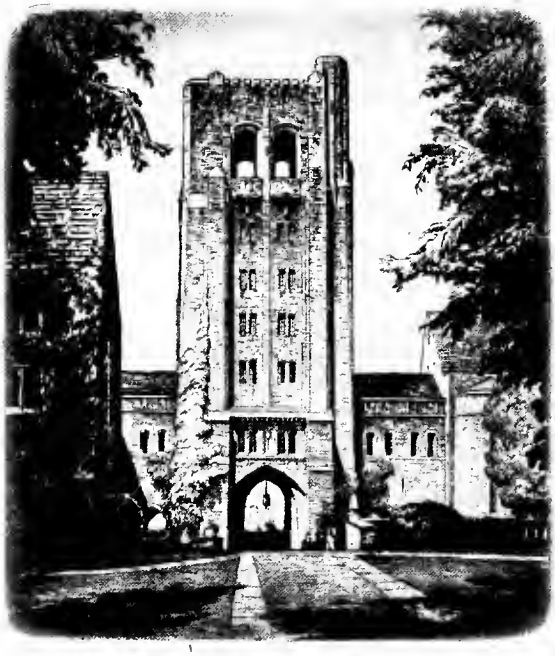

THE LAW OF

BUSINESS CORPORATIONS

INCLUDING

THEIR ORGANIZATION AND MANAGEMENT; THEIR POWERS AND OBLIGATIONS; THEIR RIGHTS AND PRIVILEGES; THEIR ASSESSMENT AND TAXATION; THEIR DISSOLUTION AND WINDING UP; RECEIVERS FOR AND JUDICIAL CONTROL OVER, AND THE LIKE,

EMBRACING

THE NEW YORK BUSINESS ACT; THE NEW YORK MANUFACTURING ACT; THE NEW YORK CONDEMNATION LAW; THE NEW YORK WEEKLY PAYMENT OF WAGES LAW; THE NEW YORK CONSOLIDATED CORPORATION ACT,

AND

THE NEW JERSEY AND WEST VIRGINIA ACTS.

BY

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NEW YORK. ALBANY, N. Y.

1890.

TO

CHARLES W. DAYTON

OF THE NEW YORK BAR

THIS WORK

IS RESPECTFULLY DEDICATED

BY THE AUTHOR.

PREFACE.

THIS volume is founded upon New York statute law,—principally the Acts known as "The Business Act" and "The Manufacturing Act." But the scope of the work far exceeds the narrow limits of those Acts. The object of the author has been to make the volume a convenient manual wherein the busy attorney may find an exhaustive collection of the cases upon the organization and management of business corporations; their powers and obligations; their rights and privileges; their assessment and taxation; their dissolution and winding up, and receivers for and judicial control thereof, and the like. The method of treatment has been to give the text of the statute in running sections, printed in large type, and underneath these sections, in sub-sections, and in the foot-notes in smaller type, every case wherein any court of this state has passed upon or construed the section in question, at the same time giving a concise statement of the point decided. An effort has also been made to cull from the various reports of the different states all cases wherein the same or a cognate point has been discussed and decided. In some instances—as in discussing the rights and liabilities of "promoters"—extensive citations of English authorities are made, for the reason that the adjudicated cases bearing upon the matter in hand are almost if not quite all English.

The new chapter added to the Code of Civil Procedure by the General Assembly of 1889-90, prescribing the proceedings for the condemnation of real property, and the proceedings for the sale of corporate real property, is included in this volume; as is also the law requiring all corporations (except

surface railroads) to pay the wages of their help weekly. In Part IV. will be found so much of the consolidated corporation laws, passed by the last General Assembly, as relate to the matters treated of in this volume. The chapters of the law here given do not go into effect until May, 1891, and there will, doubtless, be many changes, wise and otherwise, by the General Assembly of 1890-91; but it is thought best to give these chapters as they now stand because, they, with the amendments of the coming session of the General Assembly should there be any, will furnish, after May 1, 1891, the whole of the statute law for this state relating to and governing the subjects discussed in this volume.

In Part III. the corporation laws of New Jersey and West Virginia are given in full, for the benefit of those persons who find, or think, that the laws of those states furnish advantages not to be found elsewhere to persons organizing corporations.

Being convinced, with Pope, that

"Order is Heaven's first law,"

and realizing the fact that this truth appears nowhere so plainly as in the citations in the foot-notes to a legal treatise, the author has adhered to that orderly method in the citation of authorities which met with such a favorable reception in his edition of "Benjamin on Sales." This method is simply to arrange the authorities alphabetically by states, in the inverse order of decision. This method has the advantage of giving the busy lawyer the authorities of his state in one place, and the one decided latest first. The fact that this is a distinctively New York book, justifies giving a preference to the New York cases in the citations, and arranging those from the other states alphabetically thereafter, Canadian and English cases always closing the list where there are any given. To aid the searcher in determining the relative value of any particular case, as compared with others, the year in which each case was decided is given.

The text is broken up into short paragraphs and each para-

graph provided with head-lines or catch-words, designed to serve as an index to the section. This is done in the interest of the busy man who wishes to come at once to the point desired. An appendix of forms is added, and no pains have been spared to make the book a practical one, and assistful to the profession.

JAMES M. KERR.

ASTOR BUILDING,
10 WALL STREET,
NEW YORK,
September 1, 1890.

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BUSINESS CORPORATIONS.

CHAPTER I.

ANALYSIS OF BUSINESS ACT.

SEC. 1. Object.
SEC. 2. Scope of Act.
SEC. 3. Preliminary Certificate.
SEC. 4. Same—"Full Liability" and "Limited Liability" Companies.
SEC. 5. Same—Location of Business and Principal Office.
SEC. 6. Same—Change of Principal Business Office.
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SEC. 26. Same—Liability of Stockholders—Full Liability Companies.
SEC. 27. Same—Limited Liability Companies.
SEC. 28. Reorganization.
SEC. 29. Certificate of Reorganization.
SEC. 30. Reorganization of "Full Liability Companies" as "Limited Liability Companies."

Sec. 1. Object.—The object of this analysis is to give a summary of the Act of the General Assembly, known as the "Business Act," for the benefit of non-professional readers.

Sec. 2. Scope of Act.—It is important to remember the fact that the law of 1875, c. 611, applies only to corporations organized under it and the acts amendatory thereto, and that between it and the law of 1848, c. 40, known as the "Manufacturing Act," there is no conflict; on the contrary, many of the provisions of the Business Act are derived from the Manufacturing Act, and decisions under the latter are equally applicable to the provisions of the former.[1] The language of many of the sections is substantially the same in each act, and their re-enactment in the latter statute is an adoption by the Legislature of the construction previously put upon them by courts under the former act.[2]

The Business Act is of very wide application, and under it a corporation may be formed for carrying on any lawful business, except those businesses which are specifically excepted in section one of the act.[3] None of the general acts for the formation of corporations, existing at the time this act was passed, are repealed; and all corporations falling within the scope of those general acts of incorporation, as well as those formed under the Business Act, may now organize under either act. And where such companies have or may hereafter incorporate under any general act of incorporation other than the Business Act, they may thereafter organize under the latter in the manner pointed out by said act.[4]

Sec. 3. Preliminary Certificate.—The Business Act

[1] See Richards v. Crocker, 19 Abb. (N. Y.) N. C. 73 (1887); Richards v. Kinsley, 12 N. Y. St. Rep. 128, 129 (1887.)

[2] People ex rel Outwater v. Green, 56 N. Y. 466 (1874); Richards v. Crocker, 19 Abb. (N. Y.) N. C. 73 (1887.)

[3] *Post*, § 31.

[4] L. 1875, c. 611, § 32; *post*, § 105.

requires[1] the filing of a preliminary certificate, which must be signed by at least five persons, and acknowledged by each, a majority of whom must be citizens and residents of this state. This preliminary certificate should among other things:

1 State as fully as possible the exact object and nature of the business to be carried on;

2 The amount of capital stock, and the par value of the shares; and,

3 Should fix the duration of the company, which in no instance can exceed fifty years.[2]

The certificate need not, and in fact should not, state any particular day or date upon which the corporation will commence, because the full incorporation is not perfected until the certificate of incorporation is filed and recorded as required by the act, and a license issued by the Secretary of State.[3]

Sec. 4. Same—"Full Liability" and "Limited Liability" Companies.—The act providing for both "full liability companies" and "limited liability companies," the preliminary certificate must show to which class the proposed corporation will belong; and when it belongs to the class of limited liability companies the word "limited" must in all cases form the last word of the corporate name.[4]

Sec. 5. Same—Location of Business and Principal Office.—The act requires[5] that the preliminary certifi-

[1] L. 1875, c. 611, § 3; *post*, § 33.

[2] Where the term of the corporate existence is fixed for a less period than fifty years, it may be extended by making, filing, and recording the certificate required by section twenty-nine of the Business Act in the offices of secretary of state, and clerk of the county, where the principal business office of the corporation is situated. The extended term, however, together with the original term, must not exceed the prescribed limit of fifty years. See *post*, § 73.

[3] L. 1875, c. 611, § 7; *post*, § 45.

[4] L. 1875, c. 611, § 35; *post*, § 120, 121, 122.

[5] L. 1875, c. 611, § 3, subds. 2 and 5; *post*, § 41.

cate shall set forth not only the object for which the company is formed, but also the "locality of its business," and subdivision five of the same section, requires such certificate to set forth the "location of the principal business office." This would seem to indicate that the preliminary certificate should state both the point at which the business is carried on, and the point at which the principal business office is located.[1] Thus, where a corporation is formed for the purpose of manufacturing caskets, or other articles, in Monroe county, and has its business office in New York City, the preliminary certificate will be required by subdivision two, to set out the fact that the industry is to be carried on in Monroe county, and by subdivision five, to state that the principal business office is to be located in New York City.

Sec. 6. Same—Change of Principal Business Office.—Any corporation may change its principal business office at any time by filing and recording, in the offices of the secretary of state, and of the clerk of the county in which the principal business office is located, the certificate provided for in section thirty-one of the business act.[2]

Sec. 7. Corporate Name.—Care should be exercised in the selection of a corporate name, because no corporation can be formed under the provisions of this act, with a name the same as or closely resembling that of a corporation already existing in the state.[3] A list of the companies formed under this act is

[1] L. 1875, c. 611, § 3, subd. 5.
[2] *Post*, § 106.
[3] L. 1857, c. 611, § 4; *post*, § 42.

required to be published in the Session Laws of each year.[1]

Sec. 8. Capital Stock.—The capital stock of any company organized under this act, cannot in any instance exceed the sum of five millions, and must be divided into shares, the par value of which must be from ten to one hundred dollars.[2]

In the case of limited liability companies, the entire amount of the capital stock is required to be paid in within one year from the 15th of June, 1889 ;[3] but no such provision is found in relation to the time when the capital stock of full liability companies shall be paid in.

Stock can be issued only for money paid, labor performed, or property received for corporate use.[4]

Sec. 9. Same—Increase of Stock.—Under section eleven of the Business Act,[5] at the time of filing its preliminary certificate the corporation can fix its capital stock at any amount, not exceeding five million dollars ; but it is thought that in case of an increase of stock after the corporation is formed, under section fifteen of the same act, the whole capital stock, when increased, cannot exceed two million dollars.[6]

Sec. 10. Same—Statement of Increase.—In the case of an increase of the capital stock of a corporation, a statement of such increase is required to be filed in the offices of the secretary of state, and of the clerk of the county in which the principal business office of the company is situated, within ten days after such action is taken[7].

[1] *Post*, § 47.
[2] L. 1875, c. 611, § 11; *post*, § 51.
[3] L. 1889, c. 519, § 1.
[4] *Post*, § 54.
[5] As amended by L. 1883, c. 2, § 1: *post*, § 51.
[6] *Post*, § 55.
[7] L. 1875, c. 611, § 15; as amended by L. 1884, c. 397, §§ 1, 2 & 3; *post*, §§ 56, 57, & 58.

Sec. 11. Same—Diminution.—Since the passage of the act of May 15, 1878, section fifteen of the original act no longer applies to proceedings to reduce the capital stock of incorporated companies; and proceedings for such reduction must be taken under chapter 264 of the laws of 1878.[1]

Sec. 12. Certificates of Stock—Certificates of stock are required to be signed by the president and treasurer, and sealed with the corporate seal, and may be transferred at the pleasure of the holder, either in person, or by attorney, except in those cases where the holder of the certificate is indebted to the corporation, in which case there can be no transfer without the board of directors shall consent thereto.[2]

Sec. 13. Powers and Privileges.—The Business Act confers upon all corporations formed under it the general powers specified in section two of that act[3] and also authorizes them,

1. To issue bonds to the value of one half of the corporate property.[4]

2. To change the place of the general business office of the company.[5]

3. To increase or reduce their capital stock,[6] and

4. To extend the period of their corporate existence.[7]

But the place of business of the company cannot be changed, or the duration of the corporate existence

[1] *Post*, §§ 55, 55*a*–55*k*.
[2] *Post*, § 52.
[3] *Post*, § 32.
[4] *Post*, § 53.
[5] *Post*, § 106.
[6] *Post*, § 55.
[7] *Post*, § 73.

extended, unless upon the vote of two-thirds of all the stockholders.

Sec. 14. Book for Subscriptions.—Upon the issuing by the secretary of state of a license, empowering those making a certificate as commissioners to open books for subscription to the capital stock to the proposed company, such persons shall proceed to open books for subscriptions.[1] These books should be ruled in columns for the names of the subscribers, dates of their subscriptions, the number of shares taken by each, their respective place of residence, and the payment of the ten per cent. of the par value of the stock subscribed for by the stockholders.

Sec. 15. Meeting of Subscribers—Adoption of By-Laws.—Where the commissioners empowered to open books for subscription have received subscriptions of fully one-half of the capital stock, together with the payment of the ten per cent. in cash provided for, they are required to call a meeting of the subscribers, for the purpose of adopting by-laws for the government of such corporation and electing directors thereof.[2] The by-laws thus adopted must fix the number of directors, not less than five nor more than thirteen, and otherwise make all provisions for the general government of the corporation in accordance with the requirements of section six of the original act.[3] These by-laws may be amended from time to time, but no change in them can take effect until after a copy of the by-laws, as amended, is filed, as provided for in section seven.[4]

Sec. 16. Directors—Election of.—The first board of

[1] *Post*, § 43.
[2] *Post*, §§ 43, 44.
[3] *Post*, § 44.
[4] *Post*, § 45.

directors is to be elected at the subscribers' meeting ;[1] all subsequent boards are to be elected by the stockholders at the annual meeting.[2] The votes for such purpose shall be either in person or by proxy ; it is thought, however, that at the subscribers' meeting the subscribers to the capital stock cannot vote by proxy, but must vote in person.

To be eligible to the office of director, the person voted for must, at the time of his election, and throughout the term of his office, be the owner of at least five shares of the capital stock in the company.[3]

Sec. 17. Same—Cumulative Voting.—At the annual election each stockholder is entitled to as many votes as shall equal the number of his shares multiplied by the number of directors to be elected, and may distribute these votes among those to be voted for, as he may see fit.[4] This enables any subscriber to cast all his votes for one director, if he so desires.

By thus cumulating their votes, minority stockholders may secure one or more directors in the board, even where the majority of the directors elected are adverse to them.

At such annual election executors, administrators, and guardians, may vote stock held by them as such, and stockholders may vote stock which they have pledged.[5]

Should there be a failure to elect directors at an annual meeting, those in office shall hold over until their successors are chosen, and an election may be

[1] See *post*, § 48.
[2] *Post*, § 70.
[3] *Post*, § 48.
[4] *Post*, § 70.
[5] *Post*, § 68.

had at any time within three months, for the purpose of choosing such successors.[1]

Sec. 18. Same—Duty of Directors.—It is the duty of the directors of a corporation to cause corporate account books to be kept which, together with the stock books, shall be open to the inspection of the stockholders at all reasonable times.[2] It is their further duty to look after the interest and property of and manage the business of the corporation.

Sec. 19. Same—Resignation of Directors.—It is thought that the directors may resign simultaneously and terminate their connection with the company, in a case where the company is insolvent and there is imminent danger of its assets being fastened by one or two persons in such a manner as to prevent an equitable distribution among all the creditors.[3]

Sec. 20. Verified Record, Certificate of Incorporation.—Within ten days after the subscribers' meeting, heretofore spoken of, the commissioners named in the license issued by the state, shall file a verified record of their proceedings sworn to by a majority of the commissioners, containing a copy of the subscription list, the by-laws adopted and the names of the directors chosen, with the secretary of state, whereupon the secretary of state is required to issue a certificate of incorporation which must be recorded in the office of secretary of state, and filed and recorded in the office of the clerk of the county in which the principal business office of the corporation is situated.[4]

Sec. 21. Organization Tax.—At the time of filing the commissioners' report, the corporation is re-

[1] *Post*, § 70.
[2] *Post*, §§ 59, 60.
[3] See *post*, § 48*l*.
[4] *Post*, § 45.

quired to pay to the state treasurer a tax for organization of one-eighth of one per cent. upon the amount of capital stock such corporation is authorized to have.[1]

Sec. 22. License Revoked.—Where a corporation fails to fully organize, as provided by the act, within one year after the issuing of the license to commissioners to open books, it is deemed to be revoked, and all proceedings thereunder are then void.[2]

Sec. 23. Annual Report.—Every corporation is required to make and file annually a report which must be signed by the president and a majority of the directors, and be verified by the oath of the president or secretary. In this report shall be stated:

1. The amount of capital of the corporation;
2. The proportion actually paid in;
3. The names of its then stockholders;
4. In general terms, the amount and nature of the existing assets and liabilities; and
5. The dividends, if any, declared since the last report.

This report must be filed in the office of the secretary of state within twenty days from the first day of January in each year.[3] However, where a corporation does business without the United States, its annual report is required to be made within twenty days after the first day of April, which report is to be made as of the first day of January.[4] And where a corporation does business without the United States it is still required to make such annual report within twenty days after the first day of January, unless it shall make and file in the office

[1] *Post*, § 45.
[2] *Post*, § 46.
[3] *Post*, § 61.
[4] *Id.*

of the secretary of state, within twenty days after the first day of January in each year, a certificate verified by the president, secretary or treasurer of the company, stating that said corporation is at the date of such certificate doing business without the United States. When it makes and files such certificate, its annual report is to be made within twenty days after the first day of April following.

No provision is made either for the filing or recording of the annual report in the office of the clerk of the county where the company has its principal business office, and there is no requirement that it shall be published.[1]

Sec. 24. Same—Failure to Make Report.—On failure of the directors to make the annual report provided for, they become jointly and severally liable for the debts of the company then existing, and for all that may be contracted before the record is made.[2]

Sec. 25. Same.—Minority Report.—Any director may guard against the liability resulting from the failure to file the annual report provided for by making and filing on his own behalf at any time within thirty days after the first of January, or the first day of April, as the case may be, a certificate under oath, setting forth the fact that he has endeavored to have such report made, and alleging neglect or refusal of the directors to make the same. This certificate should be accompanied by a verified report of the facts required to be set forth in the annual report, so far as they are within the knowledge of such

[1] *Post*, § 61. [2] *Id.* [3] *Id.*

director or are obtainable from sources of information which are open to him.[1]

Sec. 26. Liability of Stockholders — Full Liability Companies.—In full liability companies the stockholders are severally individually liable for all debts and liabilities of the company.[2] This liability of stockholders is qualified by section twenty-five of the original act,[3] which provides that no stockholder shall be personally liable.

1. For the payment of any debt not to be paid within two years from the time it is contracted,

2. Nor unless an action for its collection is brought within two years from the time it becomes due; and,

3. In cases where the party sought to be charged has ceased to be a stockholder, an action seeking to hold him liable as such, must be brought within two years from the time when he ceased to be a stockholder.

Sec. 27. Same.—Limited Liability Company. — The stockholders of limited liability companies are severally individually liable to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by the company until the whole amount of the capital stock fixed and limited by such company has been paid in, and a certificate of payment of capital stock made and recorded.[3] By the act of the General Assembly of 1889, all capital stock of limited liability companies is required to be paid in within one year from June 15, 1889.[4] Within thirty days from the payment of the last

[1] *Post*, § 120.
[2] *Post*, § 69.
[3] *Post*, § 121.
[4] L. 1889, c. 519, § 1.

installment of the capital stock, the directors are required to make and file a certificate of such payment and record the same in the office of the secretary of state, and in the office of the clerk of the county in which the principal business office of such corporation is situated.[1]

Sec. 28. Reorganization.—Any corporation except those prohibited in section one of the original act [2] heretofore or hereafter organized under the general laws of this state, may reorganize under this act. Since the amendment of 1880, existing corporations incorporated by special charter prior to June 21, 1875, can no longer be reorganized under section thirty-two of the act as it originally stood.[4]

In order to secure a reorganization, the following must be observed:

1. There must be filed, a certificate reciting the original incorporation of the company, and under what general act the same was entered.

2. The certificate must state the term of the corporate existence of such company.

3. It must contain a notice of the meeting of the stockholders, signed by a majority of the directors, and in order that it may clearly appear that this has been done. the certificate should state the number of directors of the original company.

4. The certificate should also set forth in what paper and for what length of time the notice was published.

5. The certificate should show that the paper containing the notice was, on a designated day, mailed

[1] See *post*, § 121.
[2] *Ante*, § 2; *post*, § 31.
[3] *Post*, § 107.
[4] *Id.*

to the last address of each stockholder, postage prepaid. The fact of the printing of the notice may be shown by the affidavit of the printer as to its publication, and by the affidavit of the party mailing the notice as to such mailing, which affidavits must be annexed to the certificate.

6. The certificate should also show that at the meeting of stockholders held in pursuance of such notice, one of the directors was chosen to preside.

7. Also that a suitable person was chosen as secretary.

8. The certificate should contain a statement as to the number of shares in the stock of the original company, and the number of shares of stock represented at said meeting, together with a statement of the vote upon the question of reorganization under this act, and should show that votes representing a majority of all the stock of the company were given in favor of such reorganization.

9. The certificate must set forth fully all that is required by section thirty-two of the original act.

10. The certificate, together with the by-laws, must be filed in the office of the secretary of state.[1]

Sec. 29. Certificate of Reorganization.—After the things set out in the preceding section have been done, and a certificate of the stockholders has been filed as required, the secretary of state issues to the directors of the old company a certificate of reorganization, which certificate is to be recorded in the office of the secretary of state and a copy thereof to be filed in the office of the clerk of the county in which the principal business office of the corporation is

[1] *Post*, §§ 107–111.

situated, within ten days from the issuing thereof with the secretary of state.[1]

Sec. 30. Reorganization of "Full Liability Companies" as "Limited Liability Companies."—By the supplementary act of 1885 "full liability companies" may, in a manner similar to that already set out,[2] organize as limited liability companies.[3] A certificate of the proceedings, together with a copy of the by-laws of the reorganized company, must be filed with the secretary of state and in the office of the clerk of the county in which the principal business office of the organized company is situated.

[1] See *post*, § 105 *et seq.*
[2] *Ante*, § 28.
[3] L. 1885, c. 535, § 1.
[4] *Post*, § 107.

CHAPTER II.

BUSINESS ACT.

FORMATION OF CORPORATIONS—GENERAL POWERS—NATURAL GAS COMPANIES—CERTIFICATE OF INCORPORATION—ISSUANCE OF LICENSE.

SEC. 31. Formation of Corporations—For What Purpose.
SEC. 31a. Right to Form Corporations—Method of Formation.
SEC. 31b. Same—When goes into Effect.
SEC. 31c. The Law Governing.
SEC. 31d. Same—Transfer by Married Women.
SEC. 31e. Same—Liability of Stockholder.
SEC. 31f. Fifth Avenue Transportation Co., Limited.
SEC. 32. General Powers Conferred on Corporations.
SEC. 32a. Patrons of Husbandry—Sovereigns of Industry.
SEC. 32b. Powers of Corporations.
SEC. 32c. Same—Powers Limited to Terms in Grant.
SEC. 32d. Same—Contract Ultra Vires.
SEC. 32e. Same—Plea of Ultra Vires.
SEC. 32f. Same—Foreign Corporations.
SEC. 32g. Same—Power to Divide Franchise.
SEC. 32h. Same—Power to Affix Seal of Corporation.
SEC. 32i. Same—Mode of Exercising Power.
SEC. 32j. Same—Power to Employ Women and Children.
SEC. 32k. Same—Power to Build Private Railroad.
SEC. 32l. Same—Power to Purchase Land.
SEC. 32m. Same—Power to Hold Lands in Foreign State, and Invest in Stock of Foreign Companies.
SEC. 32n. Same—Power to Sell Entire Property.
SEC. 32o. Same—Power to Sell and Convey Real Estate.
SEC. 32p. Same—Conveyance by Corporation—Who may Execute.
SEC. 32q. Same—Form of Deed.
SEC. 32r. Same—Addition of Descriptive Title.
SEC. 32s. Same—Form of Signature.
SEC. 32t. Same—Power to Lease Real Estate.
SEC. 32u. Same—Suit on Lease—Pleadings—Res Adjudicata.
SEC. 32v. Same—Power to Form Combinations—Trusts.
SEC. 32w. Same—Implied Powers.

SEC. 32x. Contracts—Implied Contracts.
SEC. 32y. Same—Contracts by Officers.
SEC. 32z. Same—Duties Regulated by Charter or By-Laws—Notice.
SEC. 32a[1]. Same—Contracts by President.
SEC. 32b[1]. Same—For Attorney's Services.
SEC. 32c[1]. Same—Contract by Treasurer.
SEC. 32d[1]. Same—Foreign Corporation—Power of Treasurer to bind Company.
SEC. 32e[1]. Same—Supplies Furnished Superintendent.
SEC. 32f[1]. Dealings of Corporation—Presumption as to Validity.
SEC. 32g[1]. Same—Execution of Promissory Notes.
SEC. 32h[1]. Same—Insolvent Corporation—Judgment Note.
SEC. 32i[1]. Same—Execution and Endorsement of Corporate Paper—Proper Method of.
SEC. 32j[1]. Same—Notes Executed by President.
SEC. 32k[1]. Same—Execution by Secretary, Treasurer, etc.
SEC. 32l[1]. Same—Execution by Agent—Personal Liability.
SEC. 32m[1]. Same—Use of the Word "As."
SEC. 32n[1]. Same—Parol Evidence.
SEC. 32o[1]. Agent of corporation.
SEC. 32p[1]. Same—Notice to Agent.
SEC. 32q[1]. Same—Agent or Officer of one Corporation also Agent or Officer of Another Corporation or Person.
SEC. 32r[1]. Same—Presumption of Communication by Agent.
SEC. 32s[1]. Same—Notice to President.
SEC. 32t[1]. Same—Notice to Directors.
SEC. 32u[1]. Same—Notice to Stockholders.
SEC. 32v[1]. Same—Ratification of Employment—Formal Meeting not Necessary.
SEC. 32w[1]. Same—Evidence of.
SEC. 32x[1]. Same—Delegation of Power.
SEC. 32y[1]. Same—Statutory Agents—Implied Prohibition.
SEC. 32z[1]. Same—Notice as to Powers.
SEC. 32a[2]. Duty of Company as to Agents.
SEC. 32b[2]. Same—Apparent Authority.
SEC. 32c[2]. Same—Private Instructions.
SEC. 32d[2]. Acts and Contracts of Officers and Agents.
SEC. 32e[2]. Same—Ratification.
SEC. 32f[2]. Same—Previous Assent.
SEC. 32g[2]. Same—Ratification by Acquiescence.
SEC. 32h[2]. Same—Estoppel.
SEC. 32i[2]. Agents - Frauds and Misrepresentations.
SEC. 33. Hot Water, Hot Air, Steam-Heating Companies.
SEC. 33a. Steam-Heating Companies—Statutes.
SEC. 34. Natural Gas Companies.
SEC. 35. Same—Power to Dig Trenches and Lay Pipes.
SEC. 36. Same—Sanction by City Authorities.
SEC. 37. Same—Surveys—Compensation.
SEC. 38. Same—Map of Route—Signing and Filing.

SEC. 39. Same—Commissioners to Assess Damages—Report.
SEC. 40. Same—Confirmation of Report—Deposit by Corporation.
SEC. 41. Certificate of Incorporation—Application for.
SEC. 41a. Infringement of Corporate Name.
SEC. 41b. Change of Corporate Name—Corporations may Apply to Supreme Court for.
SEC. 41c. Same—Petition and Notice of Application.
SEC. 41d. Same—Power of Court to Order a Change of Name.
SEC. 41e. Same—When Change of Name to Take Effect.
SEC. 41f. Same—Change not to Affect Pending Suits, Rights or Liabilities.
SEC. 41g. Same—Discretion of Court.
SEC. 41h. Capital Stock.
SEC. 41i. Shares of Stock.
SEC. 41j. Defective Organizations.
SEC. 42. License—Secretary of State to Issue.

Sec. 31. Formation of Corporations—For what purpose.—Corporations may be organized under the provisions of this act for the carrying on of any lawful business except banking, insurance, the construction and operation of railroads, or aiding in the construction thereof, and the business of savings banks, trust companies or corporations intended to derive profit from the loan or use of money, or safe deposit companies, including the renting of safes in burglar and fire-proof vaults.[1]

Sec. 31 a. Right to form Corporation—Method of Formation.—The right to form a corporation is a special privilege conferred only by the legislature. The method of the formation of a corporation and the validity of the membership contract always depends upon the act of the legislature granting the privilege to organize.[2] In those cases where the act of the legislature authorizing the formation of corporations requires the payment or deposit of a certain amount upon each share subscribed, the actual payment of the deposit is essential to

[1] L. 1875 c. 611, § 1; 3 R. S., 8th ed., p. 1978.

[2] See People v. Utica Ins. Co., 15 Johns. (N. Y.) 358, 386 (1818); Thompson v. People, 23 Wend. (N. Y.) 537, 579 (1840); State v. Bradford, 32 Vt. 35 (1859); Paul v. Virginia, 75 U. S. (8 Wall.) 181 (1868); bk. 19 L. ed. 357; Bank of Augusta v. Earle, 38 U. S. (13 Pet.) 595 (1839); bk. 10 L. ed. 311.

validity of the subscription.[1] However, the payment of the deposit being for the benefit of the company, and not for the benefit of the public or creditors of the company, there are some cases holding that it may be waived by the company.[2]

Sec. 31b. Same—When goes into effect.—Where the statute under which a corporation is organized prohibits the organization until the capital stock has all been subscribed, the intention to form such corporation goes into effect when the stock is subscribed, without any formal act of the corporation.[3]

Sec. 31c. Same—The Law Governing.—The law governing questions relating to shares of stock of a corporation, is the law of the state where it is created.[4] The transfer of stock must be made in accordance with the requirements of the law of the state of the corporation, and all legal proceedings against the stock must be had at the domicile of the cor-

[1] See Lake Ontario, A. & N. Y. R. Co. v. Mason, 16 N. Y. 451 (1857); Beach v. Smith, 28 Barb. (N. Y.) 254 (1858); Ogdensburg R. & C. R. Co. v. Frost, 21 Barb. (N. Y.) 542 (1856); Excelsior Grain Binding Co. v. Stayner, 61 How. (N. Y.) Pr. 456 (1881); Ogdensburg C. & R. R. Co. v. Wolley, 34 How. (N. Y.) Pr. 65 (1864); Highland Turnpike Co. v. McKean, 11 Johns. (N. Y.) 98 (1814); Goshen Turnpike Co. v. Hurtin, 9 Johns. (N. Y.) 218 (1812); People v. Stockton & V. R. Co., 45 Cal. 306 (1873); Wood v. Coosa & C. R. Co., 32 Ga. 273 (1861); Ryder v. Alton & S. R. Co. 13 Ill. 516 (1851); Taggart v. Western Md. R. Co., 24 Md. 588 (1866); Fisher v. Mississippi & T. R. Co., 32 Miss. 359 (1856); Boyd v. Peack B. R. Co., 90 Pa. St. 169 (1879); State Ins. Co. v. Redmond, 1 McCreary, C. C. 308 (1880.)

[2] Ogdensburg R. & C. R. Co. v. Frost, 21 Barb. (N. Y.) 542 (1856); Ogdensburg C. & R. R. v. Wolley, 34 How. (N. Y.) Pr. 65 (1864); Mitchell v. Rome R. Co., 17 Ga. 574 (1855); Illinois R. Co. v. Zimmer, 20 Ill. 656 (1858); Home S. Ins. Co. v. Sherwood, 72 Mo. 461 (1880); Piscataqua Ferry Co. v. Jones, 39 N. H. 491 (1859); Henry v. Vermillion & A. R. Co., 17 Ohio 191 (1848); Com. v. Westchester R. Co., 3 Grant's Cas. (Pa.) 200 (1855).

[3] Phœnix W. Co. v. Badge, 67 N. Y. 298 (1876); Burr v. Wilcox, 22 N. Y. 551 (1860); Lake Ont. A. & N. Y. R. Co. v. Mason, 16 N. Y. 451 (1857); Northern R. Co. v. Miller, 10 Barb. (N. Y.) 260 (1851); Spear v. Crawford, 14 Wend. (N. Y.) 20 (1835) Beckett v. Houston, 32 Ind. 398 (1869); Chester Glass Co. v. Dewey, 16 Mass. 94 (1819); Pacific R. Co. v. Hughes, 22 Mo. 291 (1855): New Hampshire C. R. Co. v. Johnson, 10 N. H. 390 (1855); Haynes v. Brown, 36 N. H. 545 (1858.)

[4] See Story's Conf. of L. (7th ed.), § 383.

poration.[1] But contracts to transfer stock are valid, if made according to the law of the domicile of the owner, or the law of the place where the contract is entered into, unless such contracts are specially prohibited by the law of the state creating the corporation.[2]

Sec. 31d. Same—Transfer by Married Woman.—It seems, however, that a transfer of stock made by a married woman is valid and effectual if made in accordance with the law of her domicile, without reference to the law governing married women's rights in the state where the corporation exists.[3]

Sec. 31e. Same—Liability of Stockholder.—The extent of the liability of a stockholder on his stock is determined by the law of the domicil of the corporation, but the law of the place where the suit was brought determines the method of enforcing that liability.[4]

Sec. 31f. Fifth Avenue Transportation Co. (Limited).—The Fifth Avenue Transportation Co. (Limited), is authorized, upon certain conditions, to run its stages for the transportation of passengers, through certain streets in the city of New York.[5]

Sec. 32. General Power Conferred on Companies.—When so organized, every such corporation shall possess the following general powers:

[1] See Richmondville Manuf. Co., v. Prall, 9 Conn. 487 (1833); Noyes v. Spaulding, 27 Vt. 420 (1853); Black v. Zacharie, 44 U. S. (3 How.) 483 (1845); bk. 11 L. ed. 690. See also Sibley v. Quinsigamond Nat. Bank, 133 Mass. 515 (1882); Dickinson v. Central Nat. Bank, 129 Mass. 279 (1880); s. c. 37 Am. Rep. 351; Scott v. Pequonnock Nat. Bank, 15 Fed. Rep. 494 (1883); Continental Nat. Bank v. Eliot Nat. Bank, 12 Rep. 35; *Compare* State v. First Nat. Bank of Jeffersonville, 89 Ind. 302 (1883).

[2] See Story on Confl. of L. (7th ed.) § 383; 2 Kent Comm., Lecture 45; 1 Chitt. on Comm. & Manuf. 556, 558, 569.

[3] Dow v. Gould & C. S. M. Co., 31 Cal. 629 (1867); Hill v. Pine River Bank, 45 N. H. 300 (1864.) See Ross v. Southwestern R. Co., 53 Ga. 514 (1874).

[4] New Haven Horse Nail Co. v. Linden Spring Co., 142 Mass. 349 (1886). See Hutchings v. New England Coal Mining Co., 86 Mass. (4 Allen) 580 (1862); Blackstone Manuf. Co. v. Blackstone, 79 Mass. (13 Gray) 488 (1859); Penobscot & K. R. Co. v. Bartlett, 78 Mass. (12 Gray) 244 (1858); s. c. 71 Am. Dec. 753; Jones v. Sisson, 72 Mass. (6 Gray) 288, (1856).

[5] L. 1889, c. 182; amending 1886, c. 536.

1. To have succession by its corporate name for the period limited in its certificate of incorporation.

2. To sue and be sued; to complain and defend in any court.

3. To make and use a common seal and alter the same at pleasure.

4. To appoint such subordinate officers and agents as the business of the corporation shall require, and its by-laws shall provide for.

5. To make by-laws for the management of its property, the regulation of its affairs, for the transfer of its stock and defining the duties of its officers, and from time to time to amend the same.

6. To purchase, hold and possess so much real and personal estate as shall be necessary for the transaction of its business, and sell and convey the same when not required for the uses of the corporation; provided, however, that all real estate acquired in satisfaction of any liability or indebtedness, unless the same be necessary and suitable for the uses and business of the corporation, shall be sold within three years after becoming the property of such corporation, but such time may be extended to a period not exceeding five years in all, by an order of the Supreme Court made in the district in which is located the principal business office of such corporation, on the verified petition of such corporation, stating the reason for such extension.[1]

Sec. 32a. Patrons of Husbandry—Sovereigns of Industry.—The act of 1878 supplementary to chapter 611 of the laws of 1875 entitled "an act to provide for the organization and regulation of certain business corporations," provides that it shall be lawful for any corporation formed under chapter six

[1] L. 1875, c. 611, § 2; 3 R. S., 8th ed., p. 1979; 1 R. S. Codes & L., p. 368, § 2.

hundred eleven Laws of one thousand eight hundred and seventy-five, by either Patrons of Husbandry or Sovereigns of Industry, or jointly by both, to fix in their by-laws or constitution the following provisions:

1. The amount of each share, which shall be not less than five dollars.

2. The number of shares that shall be held by each director, which shall not be less than one full share.[1]

3. The basis of voting at all meetings of associations for directors thereof, giving at least one vote to each member having paid for one full share.[1]

Sec. 32b. Powers of corporations.—At common law there are certain powers incident to corporations, and these, in the absence of special restraints by statute or in their charters, they are presumed to possess. These are such powers as are necessary and proper to enable the corporation to accomplish the purposes of its creation, and are deemed to be inseparable from every corporation, notwithstanding the fact they they are not expressly conferred by the charter, or act of incorporation.[2] The powers incident at common law are restricted by the nature and object of each corporate body.[3] But no powers will be implied except those which are incidental to the very existence of the corporation, or so necessary to the enjoyment of a special grant, that without the implied power the right would fail.[4]

Within the scope of their authority, corporations have all the powers of ordinary persons;[5] but the scope of their authority is always limited by the act creating them, and they can rightfully exercise only such powers as are expressly

[1] L. 1878, c. 334, § 1.

[2] Hood v. New York & N. H. R. Co., 22 Conn. 1 (1852); Rochester Ins. Co. v. Martin, 13 Minn. 59 (1868); Gaines v. Coates, 51 Miss. 35 (1875); Downing v. Mt. Washington R. Co., 40 N. H. 230 (1860); White's Bank v. Toledo Ins. Co., 12 Ohio St. 601 (1861).

[3] Buffet v. Troy & B. R. Co., 40 N. Y. 168, 176 (1869); Barry v. Merchants' Ex. Co., 1 Sandf. Ch. (N. Y.) 280 (1844); Hood v. New York & N. H. R. Co., 22 Conn. 1 (1852).

[4] Wellersburg & W. N. Plankroad Co. v. Young, 12 Md. 476 (1858); Gaines v. Coates, 51 Miss. 335 (1875); Linton v. Sharpsburg Bridge Co., 1 Grant Cas. (Pa.) 414 (1856); Tennessee & A. R. Co. v. Adams, 3 Head (Tenn.) 596 (1859).

[5] Derringer's Adm'r v. Derringer's Adm'r, 5 Houst. (Del.) 416 (1878); s. c. 1 Am. St. Rep. 150.

granted, together with such incidental powers as are necessary to carry into effect those specifically conferred;[1] and

[1] See Lute Coeulx v. Buffalo, 33 N. Y. 333 (1865); Brady v. New York, 20 N. Y. 312 (1860); Auburn & C. P. Road v. Douglass, 9 N. Y. 444 (1854); Halstead v. Mayor of New York, 3 N. Y. 430 (1850); Boyce v. City of St. Louis, 29 Barb. (N. Y.) 650 (1859); s. c. 18 How. (N. Y.) Pr. 125; Camden & A. R. Co. v. Remer, 4 Barb. (N. Y.) 130 (1848); New York Firemen Ins. Co. v. Ely, 2 Cow. (N. Y.) 678 (1824); New York Firemen Ins. Co. v. Sturges, 2 Cow. (N. Y.) 664 (1824); Utica Ins. Co. v. Scott, 19 Johns. (N. Y.) 1 (1821); People v. Utica Ins. Co., 15 Johns. (N. Y.) 358 (1818); Life & Fire Ins. Co. v. Mechanic Fire Ins. Co., 7 Wend. (N. Y.) 31 (1831); Beach v. Fulton Bank, 3 Wend. 583 (1829); North River Ins. Co. v. Lawrence, 3 Wend. (N. Y.) 482 (1830); Montgomery v. Montgomery & W. Pl. Road Co., 31 Ala. 76 (1857); Vandall v. South San Francisco Dock Co., 40 Cal. 83 (1870); Occum Co. v. Sprague Mfg. Co., 34 Conn. 541 (1868); New London v. Brainard, 22 Conn. 552 (1853); Berlin v. New Britain, 9 Conn. 180 (1832); Fuller v. Plainfield Academic School, 6 Conn. 532 (1827); Winter v. Muscogee R. Co., 11 Ga. 438 (1852); Chicago Gas Light Co. v. People's Gas Light Co., 121 Ill. 530 (1887); s. c. 2 Am. St. Rep. 124; Balsley v. St. Louis A. & T. H. R. Co., 119 Ill. 68 (1886); s. c. 59 Am. Rep. 784; Petersburg v. Metzker, 21 Ill. 205 (1859); Bowling Green & M. R. Co. v. Warren County Court, 10 Bush. (Ky.) 712 (1874); Weckler v. First National Bank, 42 Md. 581 (1875); Pennsylvania D. & M. Nav. Co. v. Dandridge, 8 Gill. & J. (Md.) 248 (1836); Davis v. Old Colony R. Co., 131 Mass. 259 (1881); First Parish v. Cole, 20 Mass. (3 Pick.) 232 (1825); Rochester Ins. Co. v. Martin, 13 Minn. 59 (1868); Mobile & O. R. Co. v. Franks, 41 Miss. 511 (1867); Abby v. Billups, 35 Miss. 618 (1858); s. c. 72 Am. Dec. 143; Matthews v. Skinker, 62 Mo. 329 (1876); Pacific R. Co. v. Seely, 45 Mo. 220 (1870); Ruggles v. Collier, 43 Mo. 353 (1869); Downing v. Mt. Washington R. Co., 40 N. H. 231 (1860); Trustees of South Newmarket Meth. Sem. v. Peaslee, 15 N. H. 330 (1844); Franklin Bank v. Commercial Bank, 36 Ohio St. 355 (1881); s. c. 38 Am. Rep. 594; White's Bank v. Toledo F. & M. Ins. Co., 12 Ohio St. 601 (1861); Straus v. Eagle Ins. Co., 5 Ohio St. 59 (1855); Overmyer v. Williams, 15 Ohio 31 (1846); Diligent Fire Co. v. Com., 75 Pa. St. 291 (1874); Com. v. Erie & N. E. R. Co., 27 Pa. St. 339 (1856); Pennsylvania R. Co. v. Canal Commissioners, 21 Pa. St. 9 (1852); Wolf v. Goddard, 9 Watts (Pa.) 550 (1840); Northeastern R. Co. v. Payne, 8 Rich (S. C.) L. 177 (1855); Elevator Co. v. Memphis & C. R. Co., 85 Tenn. 703 (1887); s. c. 4 Am. St. Rep. 798; Shawmut Bank v. Plattsburgh & M. R. Co., 31 Vt. 491 (1859); Thomas v. West Jersey R. Co., 101 U. S. (11 Otto) 71 (1879); bk. 25 L. ed. 950; Huntington v. National Sav. Bk. of D. C., 96 U. S. (6 Otto) 388 (1877); bk. 24 L. ed. 777; Runyan v. Coster, 39 U. S. (14 Pet.) 122 (1840); bk. 10 L. ed. 382; Beaty v. Knowler, 29 U. S. (4 Pet.) 152 (1830); bk. 7 L. ed. 813; Dartmouth College v. Woodward, 17 U. S. (4 Wheat.) 518 (1819); bk. 4 L. ed. 629; Russell v. Topping, 5 McLean C. C. 194 (1850).

where a corporation usurps public franchises or powers which are not conferred by the charter, *quo warranto* lies against it for such usurpation.[1] What is barely implied is thought to be as much granted as what is expressed within the measure of the powers of the corporation; but where powers are enumerated, the enumeration of the powers implies the exclusion of all those not included.[2]

A contract made by or with a corporation which is outside of the pale of its corporate authority, confers no rights, and the making of such contract does not estop the promisor from pleading that the act was *ultra vires*[3]; but if the contract be

[1] Although it has been held that an estoppel may grow, even under these circumstances, out of a long continued acquiescence in or enjoyment of the fruits of the contract. People v. Bank of Hudson, 6 Cow. (N. Y.) 217 (1826); People v. Tibbits, 4 Cow. (N. Y.) 358 (1825); People v. Utica Ins. Co., 15 Johns. (N. Y.) 358 (1818); People v. Hillsdale & C. Turnpike Co., 2 Johns. (N. Y.) 190 (1807); People v. Bristol & R. Turnp. Co., 23 Wend. (N. Y.) 223 (1840); People v. Rensselaer & S. R. Co., 15 Wend. (N. Y.) 113 (1836); People v. Trustees of Geneva College, 5 Wend. (N. Y.) 211 (1830); Hood v. New York & N. H. R. Co., 22 Conn. 502 (1853); State v. Cincinnati Gas Co., 18 Ohio St. 262 (1868); Hopple v. Brown Twp.. 13 Ohio St. 311 (1862); Goshen Twp. v. Springfield, Mt. V. & P. R. Co., 12 Ohio St. 624 (1861); State v. Hancock Co., 11 Ohio St. 183 (1860); State v. Van Horne, 7 Ohio St. 327 (1857); Ang. & A. Corp. § 256; Herman on Estoppel 510; High on Extr. Rem. 650.

[2] See Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co., 121 Ill. 530 (1887); Balsley v. St. Louis A. & T. H. R. Co., 119 Ill. 68 (1886); Franklin Bank v. Commercial Bank, 36 Ohio St. 355 (1881); Green Bay & M. R. Co. v. Union Steamboat Co., 107 U. S. (17 Otto) 98 (1882); bk. 27 L. ed. 413; Thomas v. West Jersey R. Co., 101 U. S. (11 Otto) 71 (1879); bk. 25 L. ed. 952; Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. (7 Otto) 659 (1878); bk. 24 L. ed. 1036; St. Clair Co. Turnpike Co. v. Illinois, 96 U. S. (6 Otto) 63 (1877); bk. 24 L. ed. 651; Perrine v. Chesapeake & D. Canal Co., 50 U. S. (9 How.) 184 1850); bk. 13 L. ed. 92; Bank of Augusta v. Earle, 38 U. S. (13 Pet.) 587 (1839); bk. 10 L. ed. 274; Dartmouth College v. Woodward, 17 U. S. (4 Wheat.) 636 (1819); bk. 4 L. ed. 629.

[3] Wilks v. Georgia Pac. R. Co., 79 Ala. 180 (1885); Westinghouse Machine Co. v. Wilkinson, 79 Ala. 312 (1885); Sherwood v. Alvis, 83 Ala. 115 (1887); s. c. 3 Am. St. Rep. 695; Grand Lodge of Alabama v. Waddill, 36 Ala. 313 (1860); Waddill v. Alabama & T. R. Co., 35 Ala. 323 (1859) City Council v. Montgomery & W. Plank Road Co., 31 Ala. 76 (1857) Chambers v. Faulkner, 65 Ala. 448 (1880); Smith v. Alabama Life Ins. Co., 4 Ala. 558 (1843).

within its corporate power, the other party is estopped from disputing the regular and complete organization of the corporation.[1]

Sec. 32c. Same—Powers limited to terms in grant.—Corporations are always confined to the exercise of the powers granted and all such incidental powers as are necessary to carry into effect those specially conferred,[2] and can do only such acts as its charter, considered in relation to the general law authorizes it to do,[3] and whatever rights beyond those belonging to natural persons are claimed by a corporation must be either found in its charter or must arise from contract.[4]

Sec. 32d. Same—Contract ultra vires.—A corporation can make no contracts and do no acts except such as are authorized by its charter or the general statute, and only in such manner as therein authorized.[5] A distinction, however, is to be applied between contracts made *ultra vires* which are executory and those which are executed; the latter, as a general rule, are permitted to stand;[6] and an *ultra vires* contract which has been executed will always be enforced where the corporation has received the benefit thereof.[7]

It is thought that an executory contract *ultra vires* can be

[1] Sherwood v. Alvis, 83 Ala. 115 (1887); s. c. 3 Am. St. Rep. 695; Lehman v. Warner, 61 Ala. 455 (1878).

[2] Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co., 121 Ill. 530 (1887); Balsley v. St. Louis A. & T. H. R. Co., 119 Ill. 68 (1886); Franklin Bank v. Commercial Bank, 36 Ohio St. 355 (1881).

[3] Ft. Worth Street R. Co. v. Rosedale Street R. Co., 68 Tex. 169 (1887); Gulf C. & S. F. R. Co. v. Morris, 67 Tex. 692 (1887).

[4] Shelbyville R. Co. v. Louisville C. & L. R. Co., 82 Ky. 541 (1885).

[5] Ewing v. Savings Bank & T. Co., 43 Ohio St. 31 (1885); Augusta Bk. v. Earle, 38 U. S. (13 Pet.) 519 (1839) bk. 10 L. ed. 274. See People v. Louisville & N. R. Co., 120 Ill. 48 (1887).

[6] See Parish v. Wheeler, 22 N. Y. 503 (1860); Merritt v. Millard, 4 Keyes (N. Y.) 208 (1868).

[7] Bissell v. Michigan S. & N. I. R. Co., 22 N. Y. 258 (1860); Cary v. Cleveland & T. R. Co., 29 Babr. (N. Y.) 35 (1859); Chapman v. Mad River & L. E. R. Co., 6 Ohio St. 137 (1856); Zabriskie v. Cleveland C. & C. R. Co., 64 U. S. (23 How.) 381 (1859); bk. 16 L. ed. 488.

rendered valid by the acquiescence of all the stockholders of the company.[1]

Sec. 32e. Same—Plea of ultra vires.—A plea of *ultra vires* cannot be sustained where the contract has been executed, and where the allowance of such plea will work injury to innocent third persons;[2] and such plea will not be allowed to prevail where interposed in an action for or against a corporation where justice will not be advanced but a wrong perpetrated.[3]

Sec. 32f. Same—Powers of foreign corporations.—A corporation has no extra territorial life or authority and its existence is recognized in other states and its operations permitted where they do not come in contact with the laws of such other states only on the principle of comity;[4] but a

[1] Cozart v. Georgia R. & B. Co., 54 Ga. 379 (1875); Hazlehurst v. Savanah G. & N. A. R. Co., 43 Ga. 13 (1871); Camden & A. R. Co. v. Mays Landing & E. H. C. R. Co., 48 N. J. L. (19 Vr.) 530 (1886); Thomas v. West Jersey R. Co., 101 U. S. (11 Otto) 71 (1879); bk. 25 L. ed. 950. See Sherman v. Fitch, 98 Mass. 59 (1867); Christian University v. Jordan, 29 Mo. 68 (1859); Hilliard v. Goold, 34 N. H. 230 (1856); Kelsey v. National Bk., 69 Pa. St. 426 (1871); Creswell v. Lanahan, 101 U. S. (11 Otto) 347 (1879); bk. 25 L. ed. 853.

[2] Camden & A. R. Co. v. Mays Landing & E. H. C. R. Co., 48 N. J. L. (19 Vr.) 530 (1886). See Woodruff v. Erie R. Co., 93 N. Y. 609 (1883) Kent v. Quicksilver Min. Co., 78 N. Y. 159 (1879); Whitney Arms Co. v. Barlow, 63 N. Y. 62 (1875); Bissell v. Michigan S. & N. I. R. Co., 22 N. Y. 258 (1860); Parish v. Wheeler, 22 N. Y. 494 (1860); Terry v. Eagle Lock Co., 47 Conn. 141 (1879); Bradley v. Ballard, 55 Ill. 413 (1870); Darst v. Gale, 83 Ill., 137 (1876); Baltimore & P. Steamboat Co. v. McCutcheon, 13 Pa. St. 13 (1850); Ashbury R. C. & I. Co. v. Riche, L. R. 7 H. L. 653 (1875); Spackman v. Evans, L. R. 3 H. L. 171 (1868); Evans v. Smallcombe, L. R. 3 H. L. 249 (1868).

[3] Whitney Arms Co. v. Barlow, 63 N. Y. 62 (1875); Chicago & A. R. Co. v. Derkes, 103 Ind. 520 (1885); Southern Express Co. v. Western N. C. R. Co., 99 U. S. (9 Otto) 191 (1878), bk. 25 L. ed. 319; Ohio & M. R. Co. v. McCarthy, 96 U. S. (6 Otto) 258 (1877); bk. 24 L. ed. 693; Brice, Ultra Vires, 729, note; Pierce on Railroads, 515.

[4] Jessup v. Carnegie, 80 N. Y. 441 (1880); Merrick v, Van Santvoord, 34 N. Y. 208 (1866); Bard v. Poole, 12 N. Y. 495 (1855); Mumford v. Am. L. Ins. Co., 4 N. Y. 463 (1851); Silver Lake Bk. v. North, 4 Johns. Ch. (N. Y.) 370 (1820); Stoney v. Am. L. Ins. Co., 11 Paige Ch. (N. Y.) 535 (1845); Lathrop v. Commercial Bank, 8 Dana (Ky.) 114 (1839); Lumbard v. Aldrich, 8 N. H. 31 (1835); National Trust Co. v.

corporation cannot exercise greater power elsewhere than is allowed to it by the law of the state where it is created.[1]

It is a general rule in all the states that foreign corporations may be permitted to sue and be sued in the courts of a state other than the one creating such corporation, with the conditions imposed as to costs, service of process, and the like, in the state where suit is brought.[2]

Sec. 32g. Same—Power to divide franchise.—It is thought that where by its charter a corporation assumes and is charged with certain duties it cannot as a whole escape responsibility for the proper discharge of those duties, or of any of them, by the division of its franchise.[3]

Sec. 32h. Same—Power to affix seal of corporation.—The seal of a corporation cannot be properly affixed to an

Murphey, 30 N. J. Eq. (3 Stew.) 408 (1879); Christian Union v. Yount, 101 U. S. (11 Otto) 352 (1879); bk. 25 L. ed. 888: Cowell v. Springs Co., 100 U. S. (10 Otto) 55 (1876); bk. 25 L. ed. 547; Bank of Augusta v. Earle, 38 U. S. (13 Pet.) 519 (1839); bk. 10 L. ed. 274; Bateman v. Service, L. R. 6 App. Cas. 386 (1881). See Kennebec Co. v. Augusta Ins. Co., 72 Mass. (6 Gray) 204 (1856); Williams v. Creswell, 51 Miss. 817 (1876); Bank of Cincinnati v. Hall, 35 Ohio St. 158 (1878); Newburg Petroleum Co. v. Weare, 27 Ohio St. 343 (1875); Runyan v. Coster, 39 U. S. (14 Pet.) 122 (1840); bk. 10 L. ed. 382; Howe Machine Co. v. Walker, 35 U. C. Q. B. 37 (1874).

[1] Kerr v. Dougherty, 79 N. Y. 327 (1880); Starkweather v. Bible Society, 72 Ill. 50 (1874); s. c. 22 Am. Rep. 133; Thompson v. Waters, 25 Mich. 214 (1872).

[2] Mutual Benefit L. Ins. Co. v. Davis, 12 N. Y. 569 (1855); Versse & B. Paper Works v. Willett, 14 Abb. (N. Y.) Pr. 119 (1862); Elizabethport Manuf. Co. v. Campbell, 13 Abb. (N. Y.) Pr. 86 (1861); Fisk v. Chicago, R. I. & P. R. Co., 4 Abb. (N. Y.) Pr. N. S. 378 (1868); New York Floating Derrick Co. v. New Jersey Oil Co., 3 Duer (N. Y.) 648 (1854); Bank of Commerce v. Rutland & W. R. Co., 10 How. (N. Y.) Pr. 1 (1854); Silver Lake Bank v. North, 4 Johns. Ch. (N. Y.) 370 (1820); Cunningham v. Pell, 5 Paige Ch. (N. Y.) 607 (1836); American Ins. Co. v. Owen, 81 Mass. (15 Gray) 493 (1860); British Am. Land Co. v. Ames, 47 Mass. (6 Metc.) 391 (1843); Runyan v. Coster, 39 U. S. (14 Pet.) 122 (1840); bk. 10 L. ed. 382; Bank of Augusta v. Earle, 38 U. S. (13 Pet.) 519, 588, 589 (1839); bk. 10 L. ed. 274; Society, &c., v. Wheeler, 2 Gall. C. C. 105 (1814); Berne v. Bank of England, 9 Ves. 347 (1804).

[3] Oakland R. Co. v. Oakland, Brooklyn & F. V. R. Co., 45 Cal. 365 (1873). See People v. Albany & V. R. Co., 24 N. Y. 261 (1862); State v. Hartford & N. H. R. Co., 29 Conn. 538 (1861); Com. v. Fitchburg R. Co., 78 Mass. (12 Gray) 180 (1858).

instrument without express authorization.[1] In the absence of any express authorization by the directors, the president or other agent of a corporation has no power to affix the corporate seal to an instrument.[2]

Sec. 32i. Same—Mode of exercising power.—A body corporate can act only in the manner prescribed by the law creating such a corporation;[3] but where a corporation is authorized to do an act without any manner for its performance being specially prescribed, it may do it in any ordinary and proper way.[4]

Sec. 32j. Same—Power to employ women and children.—A corporation formed under the New York act for business or manufacturing purposes, employing women under twenty-one years of age, or children under sixteen years of age, is required to post up in each room where such help is employed, a printed notice, stating the number of hours per day (which must not exceed sixty hours in any week) required of such persons and in every room where children under sixteen years of age are employed, a list of their names with their ages. No child under thirteen years of age is permitted to be employed by such company, and every child under sixteen years of age when so employed, must be recorded by name in a book kept

[1] See Hunter v. Hudson R. I. & M. Co., 20 Barb. (N. Y.) 504 (1855); Johnson v. Bush, 3 Barb. Ch. (N. Y.) 207 (1848); People v. Deyoe, 2 T. & C. (N. Y.) 142 (1873).

[2] See Hoyt v. Thompson, 5 N. Y. 320 (1851); Luse v. Isthmus Transit R. Co., 6 Oreg. 125 (1876); s. c. 25 Am. Rep. 506.

[3] Farmers' Loan & Trust Co. v. Carroll, 5 Barb. (N. Y.) 613 (1849); McSpedon v. Mayor, 7 Bosw. (N. Y.) 601 (1861); s. c. 20 How. (N. Y.) Pr. 395; Firemen Ins. Co. v. Ely, 2 Cow. (N. Y.) 678 (1824); People v. Utica Ins. Co., 15 Johns. (N. Y.) 358 (1818); Beatty v. Marine Ins. Co., 2 Johns. 109 (1807): Hoosack v. College of Physicians, of N. Y., 5 Wend. (N. Y.) 547 (1830); City Council of Montgomery v. Montgomery & W. Plank Road Co., 31 Ala. 76 (1857); Winter v. Muscogee R. Co. 11 Ga. 438 (1852); Petersburg v. Metzker, 21 Ill. 205 (1859); Downing v. Mt. Washington R. Co., 40 N. H. 230 (1860); White's Bank v. Toledo Ins. Co., 12 Ohio St. 601 (1861); Beaty v. Knowler. 29 U. S. (4 Pet.) 152 (1830); bk. 7 L. ed. 813; Dartmouth College v. Woodward, 17 U. S. (4 Wheat.) 518 (1819); bk. 4 L. ed. 629; Head v. Providence Ins. Co., 6 U. S. (2 Cr.) 127 (1804); bk. 2 L. ed. 229.

[4] See City of St. Louis v. Russell, 9 Mo. 507 (1845); Coe v. Columbus P. & I. R. Co., 10 Ohio St. 372 (1859); Clark v. Farrington, 11 Wis. 306 (1860).

by the company for that purpose, and a certificate duly verified by the child's parent or guardian (or if there be no parent or guardian then by such child) stating the age and place of birth of such child, must be kept on file by the company. For every violation of such provisions, a fine is imposed of from fifty to one hundred dollars.[1]

Sec. 32k. Power to build private railroad.—It shall be lawful for any individual company, association or private corporation to build and operate solely for the purpose of conducting the business of such individual, company, association or corporation, a railroad on or across any highway; provided that consent in writing, and under seal, of the owners of all lands on which any such railroad may be built, abutting a highway, be first obtained; and provided further, that the consent, in writing, of the supervisor of the town in which any railroad proposed to be built under this act is located be also first obtained; and provided further, that no such railroad shall be located, graded, built or operated as to interfere with or obstruct the traveled part of any highway, or interfere with or obstruct the public use of any highway, or any highway intersecting the same.[2]

Sec. 32l. Same—Power to purchase land.—By the Laws of 1882 it is provided that any corporation which shall have sold and conveyed any part of its real estate, may, notwithstanding any restriction in its charter, purchase, take and hold, from time to time, any lands adjacent to those already held by it; provided the Supreme Court shall authorize such purchase, taking and holding, upon the application of such corporation, and on being satisfied that the value of all lands proposed to be so purchased shall not exceed that of lands sold and conveyed by the said corporation within the three years next preceding such application.[3]

Sec. 32m. Same—Power to hold lands in foreign state and invest in stock of foreign companies.—By the Laws of 1883 the power to hold and convey real estate for business purposes is amended so as to read as follows: "It shall be lawful for

[1] L. 1886, c. 409, §§ 1, 2; 4 N. Y. R. S., 8th ed., p. 2620.

[2] L. 1882, c. 140, § 1; 2 N.Y. R. S., 8th ed., p. 1402.

[3] L. 1882, c. 290, § 1; 3 N.Y. R. S., 8th ed., p. 1725.

any corporation organized under the laws of this state, and transacting business in it and other states, or foreign countries, except savings banks, to acquire, hold and convey in such states or foreign countries, with the consent thereof, such real estate as shall be requisite for such corporation, in the convenient transaction of its business, and to invest its funds in the stocks, bonds or securities of other corporations owning lands situated in this state or such states, provided that loans shall not be made on any stocks upon which dividends shall not have been declared continuously for three years immediately before such loans are made; and provided, further, that such stocks shall be continuously of a market value twenty per cent. greater than the amount loaned or continued thereon."[1]

Sec. 32n. Same—Power to sell entire property.—A general power to dispose of and alienate its property is thought to be incident to every corporation not restricted in this respect by express legislation, or the purposes for which it was created, and the nature of the duties and liabilities imposed by the charter.[2] All corporations have an absolute *jus disponendi*, in the absence of restriction,[3] and may dispose of and alienate

[1] L. 1883, c. 361, § 1, amending L. 1882, c. 146, and L. 1875, c. 119; 3 N. Y. R. S., 8th ed., p. 1733.

[2] Buffett v. Troy & B. R. Co., 40 N.Y. 176 (1869); Barry v. Merchants' Ex. Co., 1 Sandf. Ch. (N.Y.) 280, 289 (1844); Hood v. New York, and N. H. R. Co. 22 Conn. 1 (1852); Commonwealth v. Smith, 92 Mass. (10 Allen) 448 (1865). See Warfield v. Marshall Co. Canning Co., 72 Iowa 666 (1887); s. c. 2 Am. St. Rep. 263; also *post*, § 124*a*. as to effect of sale of all of corporate property.

[3] Buffett v. Troy & B. R. Co., 40 N.Y. 176 (1869); DeRuyter v. St. Peter's Church, 3 N.Y. 238 (1850); Clark v. Titcomb, 42 Barb. (N.Y.) 122 (1864); Partridge v. Badger, 25 Barb. (N.Y.) 146 (1857); Beers v. Phœnix G. Co., 14 Barb. (N.Y.) 358 (1852); Central Gold Mining Co. v. Platt, 3 Daly (N.Y.) 263 (1870); Barry v. Merchants' Exchange Co., 1 Sandf. Ch. (N.Y.) 280 (1844); Miners Ditch Co. v. Zellerbach, 37 Cal. 588 (1869) s. c. 99 Am. Dec. 300; Hood v. New York and N. H. R. Co., 22 Conn. 1 (1852); Reichwald v. Commercial Hotel Co., 106 Ill. 439, 451 (1883); United States Bank v. Huth, 4 B. Mon. (Ky.) 423 (1844); Frazier v. Willcox, 4 Rob. (La.) 517 (1843); Binney's Case, 2 Bland Ch. (Md.) 142 (1829); State v. Bank of Maryland, 6 Gill & J. (Md.) 205 (1834); Pierce v. Emery, 32 N. H. 486 (1856); Burton's Appeal, 57 Pa. St. 213 (1868); Reynolds v. Commissioners of Stark Co., 5 Ohio 205 (1831); Dana v. Bank of United States, 5 Watts. & S. (Pa.) 223 (1843); White Water Valley Canal Co. v. Vallette, 62 U. S. (21 How.) 414 (1858); bk. 16, L. ed. 154.

both chattels and lands as fully and freely as an individual may.[1]

It follows as a natural conclusion that any corporation can dispose of any interest which it may have in any way it may deem expedient[2]; and unless restrained by statute or otherwise may dispose of the whole of its corporate property, both real and personal, for any corporate purpose.[3]

It is thought that a majority of the shareholders of a solvent and prosperous corporation cannot sell out the entire property of the corporation and invest their capital in other enterprises where the minority desire the prosecution of the business of the corporation[4]; and the directors, with the consent of a majority of the stockholders, as against the non-consenting stockholders, have no right to thus affect or discontinue the existence of the corporation and defeat the object of its organization[5]; because it is of the essence of the implied contract or compact of association in every corporation that the majority shall not control the corporate purposes to pervert or destroy the original purposes of the corporators[6]; and it is also well established that the funda-

[1] State v. College of California, 38 Cal. 166, 171 (1869); Miners' Ditch Co. v. Zellerbach, 37 Cal. 543 (1869); s. c. 99 Am. Dec. 300; Ardesco Oil Co. v. North American Oil & Mining Co., 66 Pa. St. 375, 382 (1870).

[2] Barry v. Merchants' Ex. Co., 1 Sandf. Ch. (N.Y.) 280 (1844); Kelly v. Trustees of Ala. & C. R. Co. 58 Ala. 489, 496 (1877); Richardson v. Sibley, 93 Mass. (11 Allen) 65 (1865); White Water Valley Canal Co. v. Vallette, 62 U. S. (21 How.) 414 (1858); bk. 16 L. ed. 154. See Clark v. Titcomb, 42 Barb. (N.Y.) 122 (1864); Central Gold Mining Co. v. Platt, 3 Daly (N.Y.) 263 (1870); United States Bank v. Huth, 4 B. Mon. (Ky.) 423 (1844).

[3] State v. College of California, 38 Cal. 166, 171 (1869); Miners Ditch Co. v. Zellerbach, 37 Cal. 543 (1869); s. c. 99 Am. Dec. 300. See Webster v. Turner, 12 Hun, (N.Y.) 264 (1877); Ardesco Oil Co. v. North American Oil & Mining Co., 66 Pa. St. 375, 382 (1870).

[4] Kean v. Johnson, 9 N. J. Eq. (1 Stock.) 401 (1853); See McCurdy v. Myers, 44 Pa. St. 535 (1863); Boston & P. R. Co. v. New York & N. E. R. Co., 13 R. I. 260 (1881); Clinch v. Financial Co., L. R. 4 Ch. App. Cas. 117 (1868).

[5] Barclay v. Quicksilver Mining Co., 9 Abb. (N.Y.) Pr. N. S. 284 (1870); Abbott v. American Hard Rubber Co., 21 How. (N.Y.) Pr. 193 (1861); s. c. 33 Barb. (N.Y.) 578; Middlesex R. Co. v. Boston & C. R. Co., 115 Mass. 347 (1874); Balliet v. Brown, 103 Pa. St. 546 (1883.) See *post* § 123.

[6] Livingston v. Lynch, 4 Johns. Ch. (N.Y.) 573 (1820).

mental articles or constitution cannot be changed or altered except by unanimous vote.[1]

A corporation may sell its property to another corporation,[2] but a sale by one corporation of all its property to another corporation to be paid for in stock of the latter, which stock is to be distributed among the stockholders of the former, or any other agreement which will have the effect to withdraw the capital of an incorporated company and turn it over to the stockholders, except in the manner provided by law, is in violation of a statute which forbids the trustees "to divide, withdraw, or in any way pay to the stockholders or any of them, any part of the capital stock of the company," and for that reason is void as to any creditor of the corporation either prior or subsequent to such sale, who had no notice of the arrangement at the time of giving the credit.[3]

Where the consideration for such sale is the assumption and payment by the corporation purchasing of mortgage debts of the corporation making the sale, to the full value of all the property conveyed, such sale will not be set aside in favor of other unsecured creditors of the corporation making the sale; neither will they have any lien on the property for which full value has been paid in good faith.[4]

Sec. 32o. Same—Power to sell and convey real estate.—The

[1] Livingston v. Lynch, 4 Johns. Ch. (N.Y.) 573 (1820). See Blatchford v. Ross, 54 Barb. (N.Y.) 42 (1869); s. c. 37 How. (N.Y.) Pr. 113; 5 Abb. (N. Y.) Pr. N. S. 437; Abbott v. American Hard Rubber Co., 33 Barb. (N.Y.) 584 (1861); s. c. 20 How. (N. Y.) Pr. 204 (1860); Troy & R. R. Co. v. Kerr, 17 Barb. (N.Y.) 606 (1854); Hartford & N. H. R. Co. v. Croswell, 5 Hill (N.Y.) 386 (1843); s. c. 40 Am. Dec. 356; Hoyt v. Quicksilver Min. Co., 17 Hun, (N.Y.) 184 (1879); Skinner v. Dayton, 19 Johns. (N.Y.) 540 (1822); Clarke v. Omaha & S. W. R. Co., 5 Neb. 346 (1877); Black v. Delaware & R. Canal Co., 22 N. J. Eq. (7 C. E. Gr.) 404 (1871); Zabriskie v. Hackensack & N. Y. R. Co., 18 N. J. Eq. (3 C. E. Gr.) 184 (1867); Com. v. Cullen, 13 Pa. St. 144 (1850); s. c. 53 Am. Dec. 458. Commented on and distinguished in Pacific R. Co. v. Hughes, 22 Mo. 291; s. c. 64 Am. Dec. 270.

[2] Warfield, v. Marshall Canning Co., 72 Iowa 666 (1887); s.c. 2 Am. St. Rep. 263.

[3] Martin v. Zellerbach, 38 Cal. 300 (1869); s. c. 99 Am. Dec. 365. See San Francisco & N. P. R. Co. v. Bee, 48 Cal. 404, (1874).

[4] Warfield, v. Marshall Canning Co., 72 Iowa 666 (1887); s. c. 2 Am. St. Rep. 263.

ownership of real estate carries with it the general power of disposition. Thus it has been held that where a corporation is authorized by its charter to purchase, hold and convey any real estate for its use, subject to the limitation that it shall not hold more than is necessary for its immediate accommodation in transacting business, or such as it may have acquired by sale or otherwise for the purpose of securing debts due it, all real estate so held may be conveyed for its use.[1] But it is held in New York that a corporation organized under the laws of that state has no power to transfer all its property, and thus terminate its existence, and taken in payment stock in foreign corporations carrying on the same business.[2]

Sec. 32p. Same—Conveyance of corporation—who may execute.—Where a general statute of this state, or the charter of the corporation, provides a particular officer or officers by whom conveyances by the corporation shall be made, or that the authority to make conveyances shall be given in a particular way, such provision must be strictly complied with.[3] But where there is no general statute governing, and no express provision in the charter or act of incorporation as to whom or by whom authority shall be given for executing conveyances by the corporation, the manager, trustees, board of directors or other body which has the management and control of the affairs of the corporation may execute such conveyance.[4] In such case it is not necessary that the board of directors or other managing body or the members thereof

[1] Leggett v. New Jersey Manuf. & Banking Co., 1 N. J. Eq. (1 Saxt.) 541 (1832); s. c. 23 Am. Dec. 728.

[2] Taylor v. Earle, 8 Hun (N. Y.) 1 (1876); Frothingham v. Barney, 6 Hun, (N. Y.) 366 (1876.)

[3] See Cape Sable Company's Case, 3 Bland Ch. (Md.) 606 (1823); Berks & D. T. P. Road v. Myers, 6 Serg. & R. (Pa.) 12 (1820); s. c. 9 Am. Dec. 402; Isham v. Bennington Iron Co., 19 Vt. 230 (1847); Wheelock v. Moulton, 15 Vt. 519 (1843); Warner v. Mower, 11 Vt. 385 (1839).

[4] Buell v. Buckingham, 16 Iowa 284 (1864); Hendee v. Pinkerton, 96 Mass. (14 Allen) 381 (1867); Gordon v. Preston, 1 Watts (Pa.) 385 (1833). See Union Turnpike Co. v. Jenkins, 1 Cai. (N. Y.) 381 (1803); Clark v. Farmers' Manuf. Co., 15 Wend. (N. Y.) 256 (1836); McDonough v. Templeman, 1 Harr. & J. (Md.) 156 (1801); s. c. 2 Am. Dec 510; Leggett v. New Jersey Banking Co., 1 N. J. Eq. (1 Saxt.) 541 (1832); s. c. 23 Am. Dec. 728; Commonwealth v. St. Mary's Church, 6 Serg. & R.

themselves sign the deeds or other conveyances of the corporation; they, as representatives of the corporation, may authorize other officers to sign and seal the same [1]; but individual members of such controlling or managing board or body cannot without previous action of the whole body make a valid conveyance.[2] Where the managing power is vested in a board of directors or other like body, authority to convey real estate of the corporation may be conferred by the vote of such board.[3] The authority to convey, thus given, of necessity includes the power to execute a suitable instrument of conveyance as well as to affix the corporate seal,[4] and it is thought that such power to convey need not be executed under seal.[5] Any number, however, less than a quorum of the members of the managing body cannot appoint an agent to execute a conveyance.[6]

Sec. 32q. Same—Form of deed.—A deed executed by an officer or person delegated for that purpose must be executed in the name and as the act and deed of the principal.[7]

(Pa.) 508 (1821); United States Bank v. Dandridge, 25 U. S. (12 Wheat.) 64, 113 (1827); bk. 6 L. ed. 552, 569.

[1] Jackson ex dem People v. Brown, 5 Wend. (N. Y.) 590 (1830); Savings Bank v. Davis, 8 Conn. 191 (1830); Bellows v. Todd, 39 Iowa 209 (1874); Burrill v. Nahant Bank, 43 Mass. (2 Metc.) 163 (1840); s. c. 35 Am. Dec. 395; Arms v. Conant, 36 Vt. 744 (1864).

[2] Gashwiler v. Willis, 33 Cal. 11 (1867); s. c. 91 Am. Dec. 607.

[3] Dispatch Line v. Bellamy Manuf. Co., 12 N. H. 205 (1841); s. c. 37 Am. Dec. 203. See Gashwiler v. Willis, 33 Cal. 11 (1867); s. c. 91 Am. Dec. 607.

[4] Burrill v. Nahant Bank, 43 Mass. (2 Metc.) 163 (1840); s. c. 35 Am. Dec. 395. See Jackson ex dem. People v. Brown, 5 Wend. (N. Y.) 590 (1830). As to the fixing of the corporate seal, see *ante*, § 32 h.

[5] Savings Bank v. Davis, 8 Conn. 191 (1830); Garrison v. Combs, 7 J. J. Marsh. (Ky.) 84 (1831); s. c. 22 Am. Dec. 120. See Decker v. Freeman, 3 Me. (3 Greenl.) 338 (1825); Burr v. McDonald, 3 Gratt. (Va.) 215 (1846).

[6] Holcomb v. New Hope Bridge Co., 9 N. J. Eq. (1 Stockt.) 457 (1853).

[7] Garrison v. Combs, 7 J. J. Marsh (Ky.) 84 (1831); s. c. 22 Am. Dec. 120; Stinchfield v. Little, 1 Me. (1 Greenl.) 231 (1821); s. c. 10 Am. Dec. 65; Abbey v. Chase, 60 Mass. (6 Cush.) 56 (1850); Brinley v. Mann, 56 Mass. (2 Cush.) 337 (1848); s. c. 48 Am. Dec. 669; Elwell v. Shaw, 16 Mass. 42 (1819); s. c. 8 Am. Dec. 126; Hale v. Woods, 10 N. H. 470 (1839); s. c. 31 Am. Dec. 176; Locke v. Alexander, 2 Hawks (N. C.) 155 (1822); s. c. 11 Am. Dec. 750; Bellas v. Hays, 5 Serg. & R. (Pa.) 427 (1819); s. c. 9 Am. Dec. 385.

Whether such is the case must be determined by a consideration of the whole instrument and not from any particular clause.[1]

The court say in the case of Magill v. Hinsdale,[2] that "deeds are to receive a construction from the whole taken together, and every deed ought to be so construed as to effect the intention of the parties *utres magis valet quam perat.*"[3]

No particular form of words is necessary for an agent to bind his principal, provided it appears from the instrument that he intended it as the act of his principal; where this intent appears the signature may be "A" as agent of "B."[4] But where the agent of a corporation appointed to execute a conveyance of its real estate conveys the land in his own name without reference to the power given him or to his principal, nothing passes by the deed[5]; in such case the conveyance is the act of the agent and not the principal, and binds the former personally.[6] But where the instrument of a conveyance states in the body thereof that the agent contracted in behalf of the corporation, he will not be personally liable.[7]

Sec. 32r. Same—Addition of descriptive title.—The deed of

[1] Hale v. Woods, 10 N. H. 470 (1839); s. c. 31 Am. Dec. 176.

[2] 6 Conn. 464 (1827); s. c. 16 Am. Dec. 70.

[3] Citing Wilks v. Back, 2 East 142 (1802).

[4] Magill v. Hinsdale, 6 Conn. 464 (1827); s. c. 16 Am. Dec. 70; Hovey v. Magill, 2 Conn. 682 (1818).

[5] Scott v. McAlpin, N. C. Term Rep. 155 (1817); s. c. 7 Am. Dec. 703.

[6] Briggs v. Partridge, 64 N. Y. 357 (1876); s. c. 21 Am. Rep. 617; Stone v. Wood, 7 Cow. (N. Y.) 453 (1827); s. c. 17 Am. Dec. 52; Townsend v. Corning, 23 Wend. (N. Y.) 435 (1840); Bogart v. DeBussy, 6 Johns. (N. Y.) 94 (1810); Carter v. Chaudron, 21 Ala. 72 (1852); Echols v. Cheney, 28 Cal. 157 (1865); Morrison v. Bowman, 29 Cal. 337 (1865); Hancock v. Yunker, 83 Ill. 208 (1876); Stinchfield v. Little, 1 Me. (1 Greenl.) 231 (1821); s. c. 10 Am. Dec. 65; Fullam v. West Brookfield, 91 Mass. (9 Allen) 1 (1864); Brinley v. Mann, 56 Mass. (2 Cush.) 337 (1848); s. c. 48 Am. Dec. 669; Elwell v. Shaw, 16 Mass. 42 (1819); s. c. 8 Am. Dec. 126; Fowler v. Shearer, 7 Mass. 14 (1810); Grubbs v. Wiley, 17 Miss. (9 S. & M.) 29 (1847); Hopkins v. Mehaffy, 11 Serg. & R. (Pa.) 126 (1824); City of Providence v. Miller, 11 R. I. 272 (1876); Webster v. Brown, 2 S. C. 428 (1871); Martin v. Flowers, 8 Leigh (Va.) 158 (1837); Lutz v. Linthicum, 38 U. S. (8 Pet.) 165 (1834); bk. 8 L. ed. 904; Combes's Case, 9 Co. 76 (1614).

[7] McDonough v. Templeman, 1 Harr. & J. (Md.) 156 (1801); s. c. 2 Am. Dec. 510.

an agent will not be sufficient, though he describes himself in the deed as acting by virtue of a power of attorney, or otherwise, for, or in behalf, or as attorney of the principal, or corporation, and then signs his individual name with his representative capacity, because these descriptive words denoting relation appended to a signature are simply to be regarded as *descriptio personæ*, and do not prevent the contract being regarded as that of the person whose signature is subscribed.[1]

Thus in Brinley v. Mann,[2] a deed signed "C. C., treasurer of New England Silk Company," and acknowledged by C. C., treasurer, etc., to be his free act and deed, is not the instrument of the corporation, although the corporation is therein described as the grantor.[3]

[1] Stone v. Wood, 7 Cow. (N. Y.) 453 (1827); s. c. 17 Am. Dec. 52; Taft v. Brewster, 9 Johns. (N. Y.) 334 (1812); Sumwalt v. Ridgely, 20 Md. 114 (1863); City of Detroit v. Jackson, 1 Doug. (Mich.) 115 (1843); Price v. Taylor, 5 H. & N. 540 (1860). See Buffalo Catholic Institute v. Bitter, 87 N. Y. 250 (1881); Kiersted v. Orange & A. R. Co., 69 N. Y. 343 (1877); s. c. 25 Am. Rep. 199; Briggs v. Partridge, 64 N. Y. 357 (1876); s. c. 21 Am. Rep. 617; Willis v. Bellamy, 52 N. Y. Super. Ct. (20 J. & S.) 373 (1885); White v. Skinner, 13 Johns. (N. Y.) 307 (1816); s. c. 7 Am. Dec. 381; Taft v. Brewster, 9 Johns. (N. Y.) 334 (1812); s. c. 6 Am. Dec. 280; Jones v. Morris, 61 Ala. 518 (1878); Fisher v. Salmon, 1 Cal. 413 (1851); s. c. 54 Am. Dec. 297; Deming v. Bullitt, 1 Blackf. (Ind.) 241 (1823); Banks v. Sharp, 6 J. J. Marsh. (Ky.) 180 (1831); Sturdivant v. Hull, 59 Me. 172 (1871); Stinchfield v. Little, 1 Me. (1 Greenl.) 231 (1821); s. c. 10 Am. Dec. 65; Tucker Manuf. Co. v. Fairbanks, 98 Mass. 101 (1867); Fullam v. West Brookfield, 91 Mass. (9 Allen) 1 (1864); Barlow v. Congregational Society, 90 Mass. (8 Allen) 460 (1864); Haverhill Ins. Co. v. Newhall, 83 Mass. (1 Allen) 130 (1861); Fiske v. Eldridge, 78 Mass. (12 Gray) 474 (1859); Sargent v. Webster, 54 Mass. (13 Metc.) 497 (1847); s. c. 46 Am. Dec. 743; Fowler v. Shearer, 7 Mass. 14 (1810); Tucker v. Bass, 5 Mass. 164 (1809); Tippets v. Walker, 4 Mass. 595 (1808); Endsley v. Strock, 50 Mo. 508 (1872); Scott v. McAlpin, N. C. Term. Rep. 155 (1817); s. c. 7 Am. Dec. 703; Locke v. Alexander, 2 Hawks (N. C.) 155 (1822); s. c. 11 Am. Dec. 750; Quigley v. De-Haas, 82 Pa. St. 267 (1876); Bellas v. Hays, 5 Serg. & R. (Pa.) 427 (1819); s. c. 9 Am. Dec. 385; Welsh v. Usher, 2 Hill (S. C.) Eq. 167 (1835); s. c. 29 Am. Dec. 63; Lutz v. Linthicum, 33 U. S. (8 Pet.) 165 (1834); bk. 8 L. ed. 904; Duvall v. Craig, 15 U. S. (2 Wheat.) 45 (1817); bk. 4 L. ed. 180.

[2] 56 Mass. (2 Cush.) 337 (1848); s. c. 48 Am. Dec. 669.

[3] Love v. Sierra Nevada L. W. & M. Co., 32 Cal. 639 (1867); Morrison v. Bowman, 29 Cal. 337 (1865); Echols v. Cheney, 28 Cal. 157 (1865); Stinchfield v. Little, 1 Me. (1 Greenl.)

Where the agent is named in the instrument as the party, and the deed is properly signed in the name of the principal, it is thought that it will be the deed of the principal and not of the agent.[1] Thus where a deed read "know all men by these presents that the West Kansas Land Company, by Solomon Houck, President, and Theodore S. Case, Secretary . . . . has granted," etc., and signed "Solomon Houck, President (Seal) Theodore S. Case, Secretary (Seal) W. K. Land Co. (Seal)," it was held to be the deed of the company.[2]

Where a manufacturing company, by vote, had authorized one Arthur W. Magill to make a deed of the real estate of the company, and he, in pursuance of the authority, executed a deed, the granting clause of which was as follows: "Arthur W. Magill, Agent for the Middletown Manufacturing Company, being empowered by vote," etc., "for and in behalf o said company," etc., "do give grant," etc., the covenant being: "I do hereby covenant for and in behalf of the said company," etc., "that said Middletown Manufacturing Company is well seized," etc., "and I do also bind the said Middletown Manufacturing Company to warrant and defend," etc., the conclusion being as follows: "In witness whereof I have hereto, for, and in behalf of Middletown Manufacturing Company, set my hand and seal, at Middletown, this 29th day of March, A.D., 1817. Arthur W. Magill (Seal), Agent for the Middletown Manufacturing Company"; the court held this to be the deed of the Company and not of Magill.[3]

Sec. 32s. Same—Form of signature.—There is considerable conflict of authority regarding the signification of the act where the signature is "for A. B. by C. D." Some of the cases holding that this form of signature strictly imports the

231 (1821); s. c. 10 Am. Dec. 65; Elwell v. Shaw, 16 Mass. 42 (1819); s. c. 8 Am. Dec. 126.

[1] Northwestern Distilling Co. v. Brant, 69 111. 658 (1873); s. c. 18 Am. Rep. 631; Butterfield v. Beall, 3 Ind. 203 (1851); Shanks v. Lancaster, 5 Gratt. (Va.) 110 (1848); s. c. 50 Am. Dec. 108.

[2] City of Kansas v. Hannibal & St. Jos. R. Co., 77 Mo. 180 (1882).

[3] Magill v. Hinsdale, 6 Conn. 464 (1827); s. c. 16 Am. Dec. 70.

signature and obligation on behalf of another; [1] while other well-considered cases hold a contrary view.[2]

It is thought, however, that the word "as" prefixed to the description would probably indicate the agency.[3]

Sec. 32t. Same—Power to lease real estate.—It is held in the case of Metropolitan Concert Co. v. Abbey,[4] that the power under the statute to sell and convey real estate does not to include the power to lease and that therefore the making of a lease by a corporation organized under the Business Act of all of its property, unless required by reason of imperative necessity, is *ultra vires*, and the lease is void, and that in such a case it rests with the corporation to show the imperative necessity.

However, it is thought that the holding of the Court of Appeals in the case of Denike v. Rosendale Lime and Cement Co.,[5] justifies the opinion that a business corporation may temporarily lease its property to a person or corporation who will continue and carry on its business. And the Supreme Court held in the case of Smith v. Bennett,[6] that under the New York statute,[7] providing that the Sea Cliff Grove & Metropolitan Camp-Ground Association may erect and maintain docks along the shore of its lands, and have the exclusive control of them, the association may lease the exclusive control of such docks to another.

Sec. 32u. Same—Suit on lease—Pleadings—Res adjudicata.—Where an action was brought by a corporation lessor against the lessee, the rent reserved by the lease which fell due dur-

[1] Means v. Swormstedt, 32 Ind. 87 (1869); s. c. 2 Am. Rep. 330; Garrison v. Combs, 7 J. J. Marsh. (Ky.) 84 (1831); s. c. 22 Am. Dec. 120; Rice v. Gove, 39 Mass. (22 Pick.) 158 (1836); Ballou v. Talbot, 16 Mass. 461 (1820); Emerson v. Providence Hat Co., 12 Mass. 237 (1815); Long v. Coburn, 11 Mass. 97 (1814); Alexander v. Sizer, L. R. 4 Ex. 102 (1869); Deslandes v. Gregory, 2 El. & El. 602 (1860).

[2] See Dewitt v. Walton, 9 N. Y. 571 (1854); Tannatt v. Rocky Mountain Bank, 1 Colo. 278 (1871); s. c. 9 Am. Rep. 156; Offutt v. Ayres, 7 Mon. (Ky.) 356 (1828); Garrison v. Combs, 7. J. J. Marsh. (Ky.) 84 (1831); s. c. 22 Am. Dec. 120.

[3] See Price v. Taylor, 5 H. & N. 540 (1860).

[4] 52 N. Y. Super. Ct. (20 J. & S.) 97,.106 (1885)

[5] 80 N. Y. 599 (1880).

[6] 1 N. Y. Sup. 108 (1888).

[7] L. 1872, c. 361, § 3.

ing the lessee's actual occupancy and the question of the invalidity of the lease was not in issue on the pleadings, judgment was given against the defendant. It was held in a subsequent action to recover rent for a period ensuing the lessee's abandoning the occupancy, in which the invalidity of the lease was raised on the pleadings that the former judgment was not *res adjudicata* on the question of the validity of the lease, since it was not in issue in the first action; and even if it had been pleaded therein it would not have been available as a defence thereto, whereas in the second action the invalidity was pleaded, and such invalidity constituted a defence.[1]

Sec. 32v. Same—Power to form combinations—Trusts.—Business corporations have no power to enter into those combinations designed to control the production and price of goods or commodities, commonly denominated "trusts."[2]

Sec. 32w. Same—Implied powers.—The implied powers of a corporation are as much beyond the control of subsequent legislation as powers expressly granted.[3]

Sec. 32x. Same—Power to contract—Implied contracts.—Like individuals, corporations may be bound by implied contracts; such contracts may be deduced by inference from corporate acts without any ratified deed or even a vote[4]; thus where a person is employed on behalf of a corporation by one who assumed to act in its behalf, and he renders services according to the agreement, with the knowledge of its officers and without notice that the contract is not recognized as valid and binding, the corporation will be held to have sanctioned

[1] Metropolitan Concert Co. v. Abbey, 52 N. Y. Super. Ct., (20 J. & S.) 97; 106 (1885).

[2] See post, §§ 112 l,et seq.

[3] People v. Manhattan Co., 9 Wend. (N. Y.) 351, 361 (1832).

[4] Peterson v. New York, 17 N. Y. 454 (1858); Ex. parte Peru Iron Co., 7 Cow. (N. Y.) 540 (1827); New York & H. R. Co. v. New York, 1 Hilt. (N. Y.) 588 (1858); Randall v. Van Vechten, 19 Johns. (N. Y.) 60 (1821); American Ins. Co. v. Oakley, 9 Paige Ch. 496 (1842); s. c. 38 Am. Dec. 561; Magill v. Kauffman, 4 Serg. & R. (Pa.) 317 (1818); United States Bank v. Dandridge, 25 U. S. (12 Wheat.) 74 (1827); bk. 6 L. ed. 566; Columbia Bank v. Patterson, 11 U. S. (7 Cr.) 299 (1813); bk. 3 L. ed. 351.

and ratified the contract and will be bound thereby.[1] And it has been said that a contract for legal services may be made by the tacit or implied consent of the trustees or board of directors, and even by managing officers of a corporation, without any previous authority so to do from the board of directors or trustees.[2]

Where an officer of a corporation employs a person to perform services for the corporation, the latter is liable on an implied assumpsit.[3]

Sec. 32y. Same—Contracts by officers.—It is thought that a person dealing with a corporation has a right to presume that the president and manager has lawful authority to transact its business.[4]

[1] See Wild v. New York & A. S. Min. Co., 59 N. Y. 644 (1874); Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank, 16 N. Y. 125 (1857); s. c. 69 Am. Dec. 678; 28 N. Y. 425; Emmet v. Reed, 8 N. Y. 312 (1853); New Hope & D. B. Co. v. Phœnix Bk., 3 N. Y. 156 (1849); Clarke National Bank v. Bank of Albion, 52 Barb. (N. Y.) 592 (1868); Mumford v. Hawkins, 5 Den. (N. Y.) 355 (1848); Lee v. Pittsburgh Coal & Mining Co., 56 How. (N. Y.) Pr. 378 (1877); American Ins. Co. v. Oakley, 9 Paige Ch. (N. Y.) 496 (1842); s. c. 38 Am. Dec. 561; Bates v. Keith Iron Co., 48 Mass. (7 Metc.) 224 (1843); Merchants' National Bk. v. State National Bk., 77 U. S. (10 Wall.) 604, 644 (1870); bk. 19 L. ed. 1008.

[2] American Ins. Co. v. Oakley, 9 Paige Ch. (N. Y.) 496 (1842); s. c. 38 Am. Dec. 561. See Holmes v. Board of Trade, 81 Mo. 142 (1883); Thompson v. School District No. 4, 71 Mo. 495 (1880); Southgate v. Atlantic & P. R. Co., 61 Mo. 89 (1875); Turner v. Chillicothe & D. M. C. R. Co., 51 Mo. 505 (1873); Western Bk. v. Gilstrap, 45 Mo. 419 (1870).

[3] See Hooker v. Eagle Bk., 30 N. Y. 86 (1864); Fister v. LaRue, 15 Barb. (N. Y.) 323 (1853); Dunn v. St. Andrews Church, 14 Johns. (N. Y.) 118 (1817); Danforth v. Schoharie Turnpike Co., 12 Johns. (N. Y.) 227 (1815); Long Island R. Co. v. Marquand, 6 Leg. Obs. 160 (1848).

[4] Lee v. Pittsburgh Coal & Mining Co., 56 How. (N. Y.) Pr. 373 (1877). See Wild v. New York & A. S. M. Co., 59 N. Y. 644 (1874); Farmers' & Mech. Bank. v. Butchers' & Drov. Bank, 16 N. Y. 125 (1857); s. c. 69 Am. Dec. 678; 28 N. Y. 425; Emmet v. Reed, 8 N. Y. 312 (1853); New Hope & Del. Bridge Co. v. Phœnix Bank, 3 N. Y. 156 (1849); Clarke Nat. Bank v. Bank of Albion, 52 Barb. (N. Y.) 592 (1868); Mumford v. Hawkins, 5 Den. (N. Y.) 355 (1848); American Ins. Co. v. Oakley, 9 Paige Ch. (N. Y.) 496 (1842); s. c. 38 Am. Dec. 561; Bates v. Keith Iron Co., 48 Mass. (7 Metc.) 224 (1843); Merchants' Bank v. State Bank, 77 U. S. (10 Wall.) 604, 644 (1870); bk. 19 L. ed. 1008.

As to the power of an officer of a corporation to bind the same by acts within the apparent scope of his au-

Yet it has been held that all persons dealing with a corporation are bound to take notice of the nature and extent of the authority possessed by its officers; and that the officers of a corporation are special and not general agents, and have no power to bind the corporation except within the limits prescribed by the charter and by-laws.[1]

The signature of an officer of a corporation to a contract made in its name, with his official designation attached, placed thereon before the contract was signed by the other parties, though written under the printed word "Witness," is evidently intended as a signature for the corporation, and will bind it.[2]

Sec. 32z. Same—Duties regulated by charter or by-laws—Notice.—Where the charter or by-laws of a corporation provide that particular agents shall exercise certain powers or do certain acts, the majority have no right to interfere with such agents in the exercise of the powers entrusted to them, and it is immaterial that the agents were appointed by the majority,

thority, see Central R. & Banking Co. v. Cheatham, 85 Ala. 292 (1888); s. c. 4 So. Rep. 828; Rio Grande Extension Co. v. Coby, 7 Colo. 299 (1884); s. c. 3 Pac. Rep. 481; St. Louis Ft. S. & W. R. Co. v. Grove, 39 Kan. 731 (1883); s. c. 18 Pac. Rep. 958; Whitaker v. Kilroy (Mich.) 38 N. W. Rep. 606 (1888); Merchants' Bank v. Detroit Knitting & Corset Works (Mich.) 36 N. W. Rep. 696 (1888); Gregory v. Lamb, 16 Neb. 205 (1884); s. c. 20 N. W. Rep. 248; Park v. Grant Locomotive Works, 40 N. J. Eq. (13 Stew.) 114 (1885); s. c. 3 Atl. Rep. 162; Bank of Attica v. Pottier & Stymus Manuf. Co., 49 Hun (N. Y.) 606 (1888); s. c. 2 N. Y. Sup. 644; Morrell v. Long Island R. Co., (N. Y. City Ct. G. T.) 1 N. Y. Sup. 65 (1888); s. c. 22 N. Y. St. Rep. 30; Walker v. Wilmington C. & A. R. Co., 26 S. C. 80 (1886); s. c. 1 S. E. Rep. 366; Gano v. Chic. & N. W. R. Co., 60 Wis. 12 (1884); s. c. 17 N. W. Rep. 15; Page v. Fall River W. & P. R. Co., 31 Fed. Rep. 257 (1887); Tompkins v. Butterfield, 25 Fed. Rep. 556 (1885); Foster v. Ohio-Colorado Reduction Mining Co., 17 Fed. Rep. 130 (1883); Whiting v. Wellington, 10 Fed. Rep. 810 (1882).

[1] Adriance v. Rome, 52 Barb. (N. Y.) 399, 411 (1868); Dabney v. Stevens, 40 How. (N. Y.) Pr. 341 (1870); s. c. 2 Sween. (N. Y.) 415; DeBost v. Albert Palmer Co., 35 Hun (N. Y.) 386, 388 (1885); L. 1875, c. 611, §§ 6, 7.

[2] Dwyer v. Rathbone, Sard & Co., (Sup. Ct. G. T.) 5 N. Y. Sup. 505 (1889); s. c. 52 Hun (N. Y.) 615.

and that the majority has power to appoint their successors.[1] And where the charter of a company requires contracts of a particular description to be signed by certain officers, or approved in a certain manner, an agent cannot bind the company by a contract of that description unless it is executed or approved in the manner prescribed by the charter or by-laws.[2]

A person dealing with an officer of a corporation whose duties are regulated by the by-laws of the corporation is said to be chargeable with notice of his authority and all the restrictions on it contained in them and in the act of incorporation.[3]

Sec. 32a[1]. Same—Contract by president.—Where plaintiff is employed by the president of a railroad company owning a franchise, but whose road is not yet built, to procure some person to build the road on terms profitable to the president, and finally an agreement is made by which the franchises of the road are to be turned over to a person who is to advance the money and build the road, taking one-half the profits for himself, the balance to be divided between the plaintiff and the president of the road, plaintiff cannot recover from the railroad company for his services in obtaining the contract.[4]

It makes no difference whether the directors of the company knew and approved the contract or not. The company

[1] Conro v. Port Henry Iron Co., 12 Barb. (N. Y.) 27 (1851); Gashwiler v. Willis, 33 Cal. 11 (1867); State v. Curtis, 9 Nev. 325 (1874); Union Mutual Fire Ins. Co. v. Keyser, 32 N. H. 313 (1855); Commonwealth v. Church of St. Mary's, 6 Serg. & R. (Pa.) 508 (1821). *Compare*, Aspinwall v. Meyer, 2 Sandf. (N. Y.) 186 (1848); s. c. 3 N. Y. 290.

[2] See Safford v. Wyckoff, 4 Hill (N. Y.) 446 (1842); Murphy v. City of Louisville, 9 Bush (Ky.) 189 (1872); Badger v. American Ins. Co., 103 Mass. 244 (1869); Salem Bk. v. Gloucester Bk., 17 Mass. 1 (1820); Henning v. United States Ins. Co., 47 Mo. 425 (1871); Head v. Providence Ins. Co., 6 U. S. (2 Cr.) 127 (1804); bk. 2 L. ed. 229; Crampton v. Varna R. Co., L. R. 7 Ch. App. 562 (1872). *Compare*, In re General Providence Ins. Co., L. R. 14 Eq. 507, 513 (1872).

[3] Dabney v. Stevens, 10 Abb. (N. Y.) Pr. N. S. 39 (1870).

[4] Van Valkenburgh v. Thomasville, T. & G. R. Co., (Sup. Ct. G. T.) 4 N. Y. Sup. 782 (1889); s. c. 52 Hun (N. Y.) 610.

was not bound by it, and could repudiate it as a diversion of profits, which it was the duty of its agents to abstain from appropriating to themselves.[1]

A statement by the president of defendant corporation, on being asked by plaintiff for $5,000 for services in the matter, "If that is your lowest figure I will see that the company will pay you," is not an agreement by the company to pay that sum.[2]

Sec. 32b[1]. Same—For attorney's service.— In an action against a corporation by an attorney to recover for legal services rendered under a contract with the president, by which plaintiff was to be paid in stock, where the president's authority to employ plaintiff is admitted, but his power to agree to pay him in stock is denied, the question as to whether the president so exceeded his authority is not properly presented for review by a motion to dismiss the complaint on the ground that there was no proof of any authority on the part of the president to make the contract, or that there was nothing to show an employment by the corporation.[3]

In this case it is said: "There is evidence to support a finding that the president of the corporation had authority to agree to pay plaintiff for legal services in stock, where it appears that, prior to the hiring of plaintiff, other attorneys hired by him, with the approval of the directors, had been paid in stock, and that plaintiff's services were performed with the knowledge of the directors.

Sec. 32c[1]. Same—Contract by treasurer — Endorsement of paper, etc.—It is said in the case of Bank of Attica v. Potter & Stymus Manuf. Co.,[4] that where the treasurer of a corporation has for a number of years, with the knowledge and the consent of his principal, signed and indorsed business paper

[1] Van Valkenburgh v. Thomasville, T. & G. R. Co., (Sup. Ct. G. T.) 4 N. Y. Sup. 782; 52 Hun (N. Y.) 610.

[2] Van Valkenburgh v. Thomasville, T. & G. R. Co., 4 N. Y. Sup. 782; s. c. 52; Hun (N. Y.) 610.

[3] Merrill v. Consumers' Coal Co., 114 N. Y. 216 (1889); s. c. 21 N. E. Rep. 155; 39 Alb. L. J. 478. See Code, § 32.

[4] 49 Hun (N. Y.) 606 (1888); s. c. 2 N. Y. Sup. 644.

in its name, such corporation is estopped to deny the treasurer's authority to indorse an accommodation note to a purchaser for value, who relied upon these transactions as evidence of his authority.

Also, that: In an action on an accommodation note indorsed to plaintiff by defendant's treasurer, evidence that at the time of the indorsement plaintiff was told that it was the defendant's regular indorsement is admissible to show plaintiff's knowledge of the agent's apparent authority to indorse.

Sec. 32d[1]. Same—Foreign corporations—Power of treasurer to bind company.—It is said in the case of New York P. & B. R. Co. v. Dixon,[1] that, in the absence of proof of the powers, functions, and duties of the treasurer of a foreign corporation he must be held to the same measure of liability as is imposed on all persons who are clothed with fiduciary relations towards property in which others are beneficially interested.

Sec. 32e[1]. Same—Supplies furnished superintendent.—A corporation is not liable for supplies furnished its superintendent without its authority, where it had previously adopted a by-law providing that "no debts shall be contracted by any officer or agent of the company, nor any obligation created imposing any liability on it, unless expressly authorized by a majority of all the members of the board of trustees present at any meeting of said board," even though the seller of the supplies had no notice of such by-law.[2]

Especially is this true when the supplies were furnished the superintendent to be used in improving land owned by himself and others, of which the corporation never became the owner, and where the trustees were in a distant country, and had no knowledge of the transaction, and no express ratification is shown, though the corporation had agreed to take the land in exchange for stock when the land was developed,

[1] 114 N. Y. 80 (1889); s. c. 5 Ry. & Corp. L. J. 599.

[2] Rathburn v. Snow, (N. Y. City C. P., G. T.) 3 N. Y. Sup. 925 (1889); s. c. 22 N. Y. St. Rep. 227; following Westerfield v. Radde, 7 Daly (N. Y.) 326 (1877).

and had furnished the superintendent funds to be used in developing it.[1]

Sec. 32f[1]. Dealings of corporation—Presumption as to validity— All acts which are within the power of a corporation are presumed to be lawful until the contrary is shown.[2]

However, acts done or authorized to be done at a meeting, of which notice was not given in the manner prescribed by its charter or by-law,[3] are void; and where no mode of giving notice is prescribed by the charter or by-laws, personal notice must be given to the stockholder.[4]

The notice of meeting must show that it is given by a person or persons having authority to give it;[5] but where such notice is given by a person having no authority to call the meeting, the want of authority may be waived by the presence and consent of all who had a right to vote at such meeting.[6]

[1] Rathburn v. Snow, (N. Y. City C. P., G. T.) 3 N. Y. Sup. 925 (1889); s. c. 22 N. Y. St. Rep. 227.

[2] See Nelson v. Eaton, 26 N. Y. 410 (1863); s. c. 16 Abb. (N. Y.) Pr. 113; De Groff v. American Linen Thread Co., 21 N. Y. 124 (1860); Belmont v. Coleman, 21 N. Y. 96 (1860); Chautauqua County Bk. v. Risley, 19 N. Y. 369 (1859); s. c. 75 Am. Dec. 347; Mutual Benefit Life Ins. Co. v. Davis, 12 N. Y. 569 (1855); Farmer's Loan & Trust Co. v. Curtis, 7 N. Y. 466 (1852); Farmers' Loan & Trust Co. v. Clowes, 3 N. Y. 470 (1850); Mechanics' Bk. Assoc. v. Spring Valley Shot & Lead Co., 25 Barb. (N. Y.) 420 (1857); Partridge v. Badger, 25 Barb. (N. Y.) 146 (1857); Ex parte Peru Iron Co., 7 Cow. (N. Y.) 540 (1827); Moss v. Oakley, 2 Hill, (N. Y.) 265 (1842); Willmarth v. Crawford, 10 Wend. (N. Y.) 341 (1833); Greene v. Dennis, 6 Conn. 293, 302 (1826); s. c. 16 Am. Dec. 58; Hagers Town Turnpike Co. v. Creeger, 5 Har. & J. (Md.) 122 (1820); s. c. 9 Am. Dec. 495; Stockbridge v. West Stockbridge, 12 Mass. 400 (1815); Dillingham v. Snow, 3 Mass. 276 (1807).

[3] Stockholders of Shelby R. Co. v. Louisville C. & L. R. Co., 12 Bush. (Ky.) 62 (1876.)

[4] Stow v. Wyse, 7 Conn. 214 (1828); s. c. 18 Am. Dec. 99. See People v. Batchelor, 22 N. Y. 128 (1860); Harding v. Vandewater, 40 Cal. 77 (1870); Wiggins v. Freewill Baptist Church, 49 Mass. (8 Metc.) 301 (1844); People's Ins. Co. v. Westcott, 80 Mass. (14 Gray) 440 (1860); State v. Ferguson, 31 N. J. L. (2 Vr.) 107 (1864); Rex v. Doncaster, 2 Burr. 738 (1759); Rex v. Liverpool, 2 Burr. 723 (1755); Rex v. Theodorick, 8 East, 543 (1807);

[5] Bethany v. Sperry, 10 Conn. 200 (1834); Johnston v. Jones, 23 N. J. Eq. (8 C. E. Gr.) 216 (1872); Stevens v. Eden Meeting-House Soc., 12 Vt. 688 (1839.)

[6] Judah v. American L. S. Ins. Co., 4 Ind. 333 (1853); Jones v. Milton & R. T. Co., 7 Ind. 547 (1856).

The dealings of a corporation which on their face, or according to their apparent import, are within its charter, will not be regarded as illegal, or unauthorized without some evidence to show that they are of such a character. In the absence of proof there is no presumption that the law has been violated. On the contrary, these artificial bodies, like natural persons, are entitled to the benefit of the rule which imputes innocence rather than wrong to the conduct of men.[1]

The Supreme Court of the United States say, in the Bank of United States v. Dandridge,[2] that the law presumes that every man in his private and official character does his duty until the contrary is proved, and that it will presume that all things are rightly done unless the circumstances of the case overturn this presumption. The Court continue: "The same presumptions are, we think, applicable to corporations. Persons acting publicly as officers of the corporation are to be presumed rightfully in office; acts done by the corporation which presuppose the existence of their power to make them legally operative, are presumptive proofs of the law. Grants and proceedings beneficial to the corporation, are presumed to be accepted; and slight acts on their part which can be reasonably accounted for are admitted as presumptions of the fact. If the officers of the corporation openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful and the delegated authority will be presumed. . . . In short, we think that the acts of artificial persons afford the same presumptions as the acts of natural persons. Each afford pre-

[1] Cheever v. Gilbert Elevated R. Co., 43 N. Y. Super. Ct. (11 J. & S.) 478 (1878). See De Groff v. American Linen Thread Co., 21 N. Y. 124 (1860); Chautauqua County Bank v. Risley, 19 N. Y. 369 (1859); s. c. 75 Am. Dec. 347; Farmers' Loan & Trust Co. v. Clowes, 3 N. Y. 470 (1850); Budlong v. Van Nostrand, 24 Barb. (N. Y.) 25 (1857); New York Firemen Ins. Co. v. Sturges, 2 Cow. (N. Y.) 664 (1824); Bank of United States v. Dandridge, 25 U. S. (12 Wheat.) 64 (1827); bk. 6 L. ed. 553.

[2] 25 U. S. (12 Wheat.) 64 (1827); bk. 6 L. ed. 553.

sumptions from acts done of what must have preceded them, as matters of right or matters of duty."

Sec. 32g[1]. Same—Execution of promissory notes.—Where corporations are not prohibited by law from so doing, they may, without express power in their charter for that purpose, make negotiable promissory notes where such notes are given for any of the legitimate purposes for which the company was incorporated.[1]

Sec. 32h[1]. Same—Insolvent corporation—Judgment note.—It is said by the Appellate Court of Illinois, in the case of Adams v. Crosswood Printing Co.,[2] that the president and treasurer of a corporation have no implied power to confess judgment against the corporation, and they cannot lawfully exercise such power unless it has been given them in express terms by the board of directors; but it is said in the case of Burch, Receiver v. West,[3] that the insolvency of a corporation does not prevent the giving of valid judgment notes, nor does it of itself invalidate a judgment by confession. In that case the directors of a corporation for pecuniary profit, organized under the laws of Illinois, had power to ratify the giving of judgment notes after said notes were made and delivered to the payees by the executive officers, where they were given for full consideration which passed to the corporation. The Court say that the directors of such a corporation may authorize the executive officers to make judgment notes with warrant of attorney to confess judgment before the maturity of the notes.

[1] See Moss v. Averill, 10 N. Y. 457 (1853); Conro v. Port Henry Iron Co., 12 Barb. (N. Y.) 27 (1851); Mott v. Hicks, 1 Cow. (N. Y.) 513 (1823); s. c. 13 Am. Dec. 550; McCullough v. Moss, 5 Den. (N. Y.) 567 (1846); Moss v. Rossie Lead Min. Co., 5 Hill, (N. Y.) 137 (1843); Kelley v. Mayor of Brooklyn, 4 Hill (N. Y.) 263 (1843); Safford v. Wyckoff, 4 Hill (N. Y.) 442 (1842); Moss v. Oakley, 2 Hill (N. Y.) 265 (1842); Attorney-General v. Life & Fire Ins. Co., 9 Paige Ch. (N. Y.) 470 (1842); Barker v. Mechanic's Ins. Co., 3 Wend. (N. Y.) 94 (1829); Oxford Iron Co. v. Spradley, 46 Ala. 98 (1871); Ward v. Johnson, 95 Ill. 238 (1880); Cattron v. First Universalist Society, 46 Iowa, 108 (1877); Monument Nat. Bank v. Globe Works, 101 Mass. 57 (1869); Narragansett Bank v. Atlantic Silk Co., 44 Mass. (3 Metc.) 282 (1841); Richmond F. & P. R. Co. v. Snead, 19 Gratt. (Va.) 354 (1869); s. c. 100 Am. Dec. 670.

[2] 5 Ry. & Corp. L. J. 18 (1888).

[3] 4 Ry. & Corp. L. J. 541 (1888).

Sec. 32i[1]. Same—Execution and indorsement of corporate paper—Proper method of.—Where an individual executes a negotiable instrument, affixing thereto his individual name and adding a word or words indicating his official position or representative capacity in a corporation, the obligation becomes his personal obligation, because the addition of his official character to the signature operates merely to identify the person, and not to limit or qualify the liability.[1]

The Supreme Court of Maine in the case of Simpson v. Garland,[2] held that under the Maine statute, the rule is that where a deed or other instrument is executed by an agent or attorney with authority therefor, and it appears by the deed that it was the intention of the parties to bind the principal or constituent, that it should be his deed and not the deed of the agent, or attorney, it must be regarded as the

[1] See Schmittler v. Simon, 101 N. Y. 554 (1886); s. c. 54 Am. Rep. 737; s. c. 5 N. E. Rep. 452; Pumpelly v. Phelps, 40 N. Y. 59 (1869); s. c. 100 Am. Dec. 468; Hills v. Bannister, 8 Cow. (N. Y.) 31 (1827); Mott v. Hicks, 1 Cow. (N. Y.) 533 (1823); s. c. 13 Am. Dec. 550; Haight v. Naylor, 5 Daly (N. Y.) 219 (1874); Taft v. Brewster, 9 Johns. (N. Y.) 334 (1812); s. c. 6 Am. Dec. 280; Gould v. Ray, 13 Wend. (N. Y.) 634 (1835); Pinney v. Johnson, 8 Wend. (N. Y.) 500 (1832); Barker v. Mechanics Fire Ins. Co., 3 Wend. (N. Y.) 94 (1829); s. c. 20 Am. Dec. 664; Tannatt v. Rocky Mountain Nat. Bk., 1 Colo. 278 (1871); Hypes v. Griffin, 89 Ill. 134 (1878); s. c. 31 Am. Rep. 71; Powers v. Briggs, 79 Ill. 493 (1875); s. c. 22 Am. Rep. 175; Burlingame v. Brewster, 79 Ill. 515 (1875); s. c. 22 Am. Dec. 177; Cornthwaite v. First Nat. Bk., 57 Ind. 268 (1877); Means v. Swormstedt, 32 Ind. 87 (1869); s. c. 2 Am. Rep. 330; Heffner v. Brownell, 70 Iowa, 591 (1887); s. c. 31 N. W. Rep. 947; Bishop v. Rowe, 71 Me. 263 (1880); Sturdivant v. Hull, 59 Me. 172 (1871); s. c. 8 Am. Rep. 409; Davis v. England, 141 Mass. 587 (1886); Carpenter v. Farnsworth, 106 Mass. 561 (1871); s. c. 8 Am. Rep. 360; Forster v. Fuller, 6 Mass. 58 (1809); s. c. 4 Am. Dec. 87; Thacher v. Dinsmore, 5 Mass. 299 (1809); s. c. 4 Am. Dec. 61; Tilden v. Barnard, 43 Mich. 376 (1880); s. c. 38 Am. Dec. 197; Rittenhouse v. Ammerman, 64 Mo. 197 (1876); s. c. 27 Am. Rep. 215; Toledo Agricultural Works v. Heisser, 51 Mo. 128 (1872); Robinson v. Kanawha Valley Bank, 44 Ohio St. 441 (1886); s. c. 8 N. E. Rep. 583; Collins v. Buckeye St. Ins. Co., 17 Ohio St. 215 (1867); Titus v. Kyle, 10 Ohio St. 445 (1859); Guthrie v. Imbrie, 12 Oreg. 182 (1885); s. c. 6 Pac. Rep. 664; Tassey v. Church, 4 Watts. & S. (Pa.) 346 (1842); Childs v. Monins, 2 B. & B. 459 (1821); s. c. 6 Eng. C. L. 228; 5 Moore, 282.

[2] 72 Me. 40 (1881); s. c. 39 Am. Rep. 297.

deed of the principal or constituent, though signed by the agent or attorney in his own name[1].

The same court have held that a note by which "the subscribers for Carmel Cheese Manufacturing Company, promise to pay," and signed by the directors of the company without official description, is the obligation of the company and not the individual obligation of the directors.[2]

In Castle v. Belfast Foundry Co.,[3] a note signed "Belfast Foundry Company, N. W. Castle, President" was held to bind the company. In Draper v. Massachusetts Steam Heating Company,[4] a note signed "Massachusetts Steam Heating Company, L. S. Fuller, Treasurer," was held to be the signature of the Massachusetts Steam Heating Company and not of Fuller.[5]

It was held in Russell v. Folsom[6] that the endorsee of a promissory note payable to the order of a corporation, and endorsed Charles B. Folsom, Treasurer, by one who held that office in the corporation, and who was authorized to perform the financial business thereof could maintain a suit thereon[7].

In McIntyre v. Preston,[8] a note payable to a corporation was transferred by its authorized officer endorsing the same in his own name, to which he added his official designation, and this was held sufficient to pass the note.[9]

[1] See Nobleboro v. Clark, 68 Me. 87 (1878); s. c. 28 Am. Rep. 22.

[2] See Purinton v. Insurance Co., 72 Me. 22 (1881).

[3] 72 Me. 167 (1881).

[4] 87 Mass., (5 Allen) 338 (1862).

[5] To same effect, Atkins v. Brown, 59 Me. 90 (1871); Slawson v. Loring, 87 Mass., (5 Allen) 340 (1862); Abbott v. Shawmut Ins. Co., 85 Mass. (3 Allen) 215 (1861).

[6] 72 Me. 436 (1881).

[7] See Dunn v. Weston, 71 Me. 275 (1880); s. c. 36 Am. Rep. 310; Castle v. Belfast Foundry Co., 72 Me. 167 (1881); Chase v. Hathorn, 61 Me. 505 (1873); Farrar v. Gilman, 19 Me. 441 (1841); Folger v. Chase, 35 Mass. (18 Pick.) 63 (1836); Nicholas v. Oliver, 36 N. H. 219 (1858).

[8] 5 Gilm. (10 Ill.) 48 (1848).

[9] See Anderson v. Pierce, 36 Ark. 293 (1880); s. c. 38 Am. Rep. 39; Hypes v. Griffin, 89 Ill. 134 (1878); s. c. 31 Am. Rep. 71; School Town of Monticello v. Kendall, 72 Ind. 91 (1880); s. c. 37 Am. Rep. 139; Tilden v. Barnard, 43 Mich. 376 (1880); s. c. 38 Am. Rep. 197; Hardy v. Pilcher, 57 Miss. 18 (1879); s. c. 34 Am. Rep. 432; Bryson v. Lucas, 84 N. C. 680 (1881); s. c. 37 Am. Rep. 634.

Sec. 32j[1]. Same—Notes executed by president.—In Martin v. Niagara Falls Paper Co.,[1] it is said that the act of the president of a corporation in making a corporation note is neither *malum in se* nor *malum prohibitum*.

A promissory note signed "Independence Mfg. Co., B. I. Brownell, Pres.," purporting to bind both signers, and having nothing on its face to indicate that the last signer was president of the corporation, or had signed the note for it, or on its behalf, binds the last signer personally; and the letters "Pres." must be regarded simply as descriptive of the person to whose signature they are appended.[2]

It is said in Davis v. England,[3] that a promissory note signed by "W. H. E., Pres. & Treas. C. I. F. Co.," is the note of W. H. E. and not of the C. I. F. Co., and that it is erroneous to admit oral testimony to show that at the time the note was given, and afterward, it was understood and agreed by the maker and payee, that the note was the note of the C. I. F. Co.

Where a promissory note is clearly expressed in the words "we promise to pay," etc., and signed "Ind. Mfg. Co., B. I. B. Pres., D. B. S. Sec'y.," parol evidence is not admissible to prove that the company was the only real promisor, and that the payee knew of the fact when taking the note[4]; but in Latham v. Houston Flour Mills Co.,[5] the court held a promissory note providing, that "we promise to pay," etc., and signed "Houston Flour Mills Co., D. P. Shepherd, President," is a separate obligation of the corporation, and not the joint promise of it and the individual who signed as president.

In Guthrie v. Imbrie,[6] the note was as follows:

"$500. Portland, Oregon, July 8, 1875.

"For value received we promise to pay to David Guthrie

[1] 44 Hun, (N. Y.) 140 (1887).

[2] Heffner v. Brownell, 70 Iowa 591 (1887); s. c. 31 N. W. Rep. 947.

[3] 141 Mass. 587 (1886).

[4] Heffner v. Brownell, 70 Iowa 591 (1888); s. c. 39 N. W. Rep. 460.

[5] 68 Tex. 127 (1887); s. c. 3 S. W. Rep. 462.

[6] 12 Oreg. 182 (1885); s. c. 6 Pac. Rep. 664.

or order, ninety days after date, five hundred dollars in U. S. gold coin, without interest.

(Seal) Signed,

JAMES IMBRIE, Prest.
J. J. IMBRIE, Sec. G. M. Co."

The Court say that "the words 'Prest.' and 'Sec. G. M. Co.,' attached to the signatures, are merely *descriptio personarum*. They do not disclose the name of any principal, and in fact are too indefinite, without the aid of extraneous proof to designate any corporation. When a person merely adds to the signature of his name the words 'Sec.,' 'Agent,' 'Trustees' without disclosing the principal, he is personally bound. This is undoubtedly the ordinary rule, and supported by much authority." [1]

Sec. 32k[1]. Same—Execution by secretary, treasurer, etc.—In Means v. Swomstedt,[2] the secretary of an incorporated company gave a promissory note under the seal of the company, using the words "we promise to pay," etc., and signed his own name with "Sec'y" affixed, and the Court held that he was personally liable thereon. In Carpenter v. Farnsworth,[3] a bank check with the words "Ætna Mills" printed on the margin, was given in payment for a debt due from the Mills, and signed "I. D. Farnsworth, Treasurer," and it was held to be the check of the Mills and not the personal check of F. But a note drawn "I promise to pay," and signed by A. B. and C. as trustees of a society, is the personal note of the signers.[4]

[1] Citing Chamberlain v. Pacific Wool G. Co., 54 Cal. 106 (1880); Tannatt v. Rocky Mountain Nat. Bank, 1 Colo. 279 (1871); Trustees of Cahokia v. Rautenberg, 88 Ill. 220 (1878); Burlingame v. Brewster, 79 Ill. 515 (1875); s. c. 22 Am. Rep. 177; Hays v. Crutcher, 54 Ind. 261 (1876); Sturdivant v. Hull, 59 Me. 172 (1871); s. c. 8 Am. Rep. 409; Towne v. Rice, 122 Mass. 67, 75 (1877); Tucker Manuf. Co. v. Fairbanks, 98 Mass. 102 (1867); Bank v. Cook, 38 Ohio St. 442, 444 (1882); Scott v. Baker, 3 W. Va. 290 (1869).

[2] 32 Ind. 87 (1869); s. c. 2 Am. Rep. 330.

[3] 106 Mass. 561 (1871); s. c. 8 Am. Rep. 360.

[4] Burlingame v. Brewster, 79 Ill. 515 (1875); s. c. 22 Am. Rep. 177.

In Titus v. Kyle,[1] where the makers describe themselves in the body of the note as directors of a certain turnpike road, and the note read "one year after date we, or either of us, as directors," etc., "promise to pay," to which each signed his individual name, it was held that he was individually liable, and that in the absence of an averment of fraud or mistake, the makers could not be permitted to show an intention on their part not to bind themselves individually.

In an action to charge a corporation as indorser of notes indorsed in its name by "L. Hirsch, Manager," a judgment against the corporation is unauthorized, in the absence of evidence of Hirsch's authority, or that the notes related to the corporation's business, or that the corporation ever received any value for or benefit from the indorsement.[2]

Sec. 3211. Same—Execution by agent — Personal liability. —The president and manager of a corporation can appoint an agent to execute bills or notes of the corporation in payment of its debts.[3]

The law as to notes and bills executed by persons acting as agents of other persons, is not uniform, but as a rule where one acting as agent uses words that import a personal agreement on his part, and signs his own name, it is held to be an individual obligation, although he describe himself as agent, and the like; the added words being regarded simply as a description of his person.[4]

[1] 10 Ohio St. 445 (1859).

[2] Middlesex County v. Hirsch Bros'. Veneer Manuf. Co., (N. Y. City Ct. G. T.) 4 N. Y. Sup. 385 (1889).

[3] Olcott v. Tioga R. Co., 27 N. Y. 546, 557 (1863); s. c. 84 Am. Dec. 298; Curtis v. Leavitt, 15 N. Y. 9, 66, 67 (1857).

[4] Schmittler v. Simon, 101 N. Y. 554 (1886); s. c. 54 Am. Rep. 737; 5 N. E. Rep. 452; American Ins. Co. v. Stratton, 59 Iowa, 696 (1882); s. c. 13 N. W. Rep. 763; Davis v. England, 141 Mass. 587 (1886); s. c. 6 N. E. Rep. 731 n; Tilden v. Barnard, 43 Mich. 376 (1880); s. c. 68 Am. Rep. 512; 5 N. W. Rep. 420; Robinson v. Kanawha Valley Bank, 44 Ohio St. 441 (1886); s. c. 8 N. E. Rep. 583. See Mott v. Hicks, 1 Cow. (N. Y.) 533 (1823); s. c. 13 Am. Dec. 550; Haight v. Naylor, 5 Daly (N. Y.) 219 (1874); Barker v. Mechanics' Fire Ins. Co., 3 Wend. (N. Y.) 94 (1829); s. c. 20 Am. Dec. 664; Tannatt v. Rocky Mountain Nat. Bank 1 Colo. 278 (1871); Toledo Agricultural Works v. Heisser, 51 Mo. 128 (1872); Lockwood v. Coley, 22 Fed. Rep. 192 (1884) note.

The supreme judicial court of Maine, in Bishop v. Rowe,[1] held where a note payable to order of "C. B. M., Agent," and was indorsed "C. B. M., Agent Guaranty Agricultural Works" that it was the individual indorsement of C. B. M.; but in Lockwood v. Coley,[2] which was an action on a note signed "J. A. D. Coley, Agent," it was held that the original payee may maintain an action against the principal, who was known and recognized as such in the execution of the note, and who authorized the agent to sign notes in that way in the course of the principal's business.[3]

In Collins v. Buckeye,[4] the note read "I promise to pay," etc., and was signed "Edw'd K. Collins, Agent." The defence was set up that the party had notice of the agency of the maker, and that the latter was not liable individually upon the note; but the court held that parol evidence was inadmissible for that purpose, and that Collins was personally liable.

The drawee of a bill of exchange, drawn by the "Kanawha and Ohio Coal Co.," was described in the bill as "John A. Robinson, Agt.," and it was accepted by him as "John A. Robinson, Agent K. & O. C. Co." The Court held that an acceptance so made was the personal obligation of John A. Robinson, and that in a suit upon the acceptance by an indorsee against him parol evidence was not admissible, in the absence of fraud, accident or mistake, to show that the defendant so accepted the bill intending to bind the drawer as his principal, and that this fact was known to the plaintiff at the time it became the owner and holder of it.[5]

Sec. 32m[1]. **Same—Use of the word "as."**—It seems that if the word "as" be prefixed to the word of description it will change the liability.[6] However, in Burlingame v. Brewster,[7] the defendants signed "as trustees of" a society, and were held personally liable.

[1] 71 Me. 263 (1880).

[2] 22 Fed. Rep. 192 (1884).

[3] Following Merchants' Bank of Macon v. Central Bank of Georgia, 1 Ga. 418, 429 (1846).

[4] 7 Ohio St. 215 (1867); s. c. 93 Am. Dec. 612.

[5] Robinson v. Kanawha Valley Bank, 44 Ohio St. 441 (1886); s. c. 8 N. E. Rep. 583.

[6] Price v. Taylor, 5 Hurl. & N. 540 (1860).

[7] 79 Ill. 515, (1878); s. c. 22 Am. Dec. 177.

Sec. 32n[1]. Same—Parol evidence.—Parol evidence is inadmissible to show that a written instrument was made on behalf of another,[1] unless there be something on the face of the instrument to indicate it.[2]

Where a note was drawn "with the president and directors" of a company, and was signed by them with the official title after each name, it was held that parol evidence was admissible to show that the note was given and received as the note of the company.[3]

Sec. 32o[1]. Agent of corporation.—All incorporated companies of necessity conduct their business by and through agents,[4] and all acts within the powers of the corporation may be performed by agents of its selection.[5] Thus, unless prohibited by the charter, a corporation may confer authority upon an agent to draw and execute bills of exchange on behalf of the company, and no action in writing on the part of the board of trustees or directors is necessary to vest such authority in the agent.[6]

[1] Davis v. England, 141 Mass. 587 (1886); s. c. 6 N. E. Rep. 731 n.; Rowell v. Oleson, 32 Minn. 288 (1884); s. c. 20 N. W. Rep. 227.

[2] See Bean v. Pioneer Mining Co., 66 Cal. 451 (1885); s. c. 56 Am. Rep. 106; 6 Pac. Rep. 86; Rowell v. Oleson, 32 Minn. 288 (1884); s. c. 20 N. W. Rep. 227. *Compare*, Nutt v. Humphrey, 32 Kan. 100 (1884); s. c. 3 Pac. Rep. 787; Brewster v. Baxter, 2 Wash. Tr. 135 (1882); s. c. 3 Pac. Rep. 844.

[3] Haile v. Peirce, 32 Md. 327 (1869); s. c. 3 Am. Rep. 139.

As to whether parol evidence can be introduced to show in what capacity an agent signed a note where the note purports on its face to be the note of the party signing, see Bean v. Pioneer Min. Co., 66 Cal. 451 (1885); s. c. 36 Am. Rep. 106; 6 Pac. Rep. 86; Wing v. Glick, 56 Iowa 473 (1881); s. c. 41 Am. Rep. 118; 9 N. W. Rep. 384; Rendell v. Harriman, 75 Me. 497 (1883); s. c. 6 Am. Rep. 421; Haile v. Peirce, 32 Md. 327 (1869); s. c. 3 Am. Rep. 139.

[4] Lee v. Pittsburgh Coal & Min. Co., 56 How. (N. Y.) Pr. 373 (1877).

[5] Olcott v. Tioga R. Co., 27 N. Y. 546, 557 (1863); s. c. 84 Am. Dec. 298; Barnes v. Ontario Bank, 19 N. Y. 158 (1859.)

[6] American Ins. Co. v. Oakley, 9 Paige Ch. (N. Y.) 496 (1842); s. c. 38 Am. Dec. 561; Preston v. Missouri & P. L. Co., 58 Mo. 541 (1871). See Dunn v. St. Andrews Church, 14 Johns. (N. Y.) 118 (1817); Davenport v. Peoria M. & F. Ins. Co., 17 Iowa, 276 (1864); Fayles v. Hannibal Nat. Ins. Co., 40 Mo. 380 (1872); Buckley v. Briggs, 30 Mo. 452 (1860); Southern Hotel Co. v. Newman, 30 Mo. 118 (1860); Christian University v. Jordan, 29 Mo. 68 (1859); Magill v. Kauffman, 4 Serg. & R. (Pa.) 317 (1818); s. c. 8 Am. Dec. 713.

But a corporation, like a natural person, is bound only by the acts and contracts of agents when such acts are done and contracts made in the course of their employment and within the scope of their authority.[1]

Sec. 32p[1]. Same—Notice to agent.—Notice given to an agent or an officer of a corporation within the scope of his agency, and respecting a matter in which he is authorized to represent the corporation, is notice to the principal where it is the duty of the agent to act upon such information or to communicate it to his principal.[2]

It has been said that there is more reason for enforcing this rule against corporations than against individual principals, because of the fact that the only way of communicating actual notice to a corporation is through its agents.[3] But the agent or officer must have notice in his representative character, or the corporation will not be bound.[4] And the agent must have authority, and it must be his duty, to act upon the subject of the notice, or the notice given to him

[1] DeBost v. Albert Palmer Co., 35 Hun, (N. Y.) 386, 388 (1885).

[2] Fulton Bank v. New York & S. Canal Co., 4 Paige Ch. (N. Y.) 127 (1833); Dock v. Elizabethtown S. Manuf. Co., 34 N. J. L. (5 Vr.) 317 (1870). See New Hope & D. B. Co. v. Phoenix Bank, 3 N. Y. 156 (1849); Cumberland Coal Co. v. Sherman, 30 Barb. (N. Y.) 553, 560 (1859); Conro v. Port Henry Iron Co., 12 Barb. (N. Y.) 27 (1851); McEwen v. Montgomery Ins. Co., 5 Hill (N. Y.) 101 (1843); North River Bank v. Aymar, 3 Hill (N. Y.) 262 (1842); United States Bank v. Davis, 2 Hill (N. Y.) 451 (1842); Jackson v. Sharp, 9 Johns. (N. Y.) 163 (1812); s. c. 6 Am. Dec. 267; Branch Bank v. Steele, 10 Ala. 915 (1846); Smith v. Water Commissioners, 38 Conn. 208 (1871); New Milford Nat. Bank v. New Milford, 36 Conn. 93 (1869); Lawrence v. Tucker, 7 Me. (7 Greenl.) 195 (1831); National Security Bank v. Cushman, 121 Mass. 490 (1877); Washington Bank v. Lewis, 33 Mass. (22 Pick.) 24 (1839); Trenton Banking Co. v. Woodruff, 2 N. J. Eq. (1 H. W. Gr.) 117 (1838); Danville Bridge Co. v. Pomroy, 15 Pa. St. 151 (1850); Bank of Pittsburgh v. Whitehead, 10 Watts & S. (Pa.) 397 (1840); s. c. 36 Am. Dec. 186; Boggs v. Lancaster Bank, 7 Watts. & S. (Pa.) 331 (1844); Tagg v. Tennessee Nat. Bank, 9 Heisk. (Tenn.) 479 (1872); Ex parte Larking, L. R. 4 Ch. Div. 566 (1876); Wing v. Harvey, 5 DeG. M. & G. 265 (1854); s. c. 27 Eng. L. & Eq. 140.

[3] See Factors & T. Ins. Co. v. Marine Dry Dock & S. Co., 31 La. An. 149 (1879.)

[4] See Mechanics' Bank v. Schaumburg, 38 Mo. 228 (1866); Congar v. Chicago & N. R. Co., 24 Wis. 157 (1869); s. c. 1 Am. Rep. 164.

will not be binding upon the corporation.[1] Mere private information or knowledge which comes to an agent or officer of a corporation at a time when he is not engaged in the business of the company, or casually and by rumor or other channels open alike to all, or as to matters upon which such agent or officer is not required to act, such knowledge is not notice to and will not bind the corporation if not communicated by such officer or agent to the proper authority.[2] And knowledge acquired by a party before becoming an agent of a corporation will not be notice to the corporation after the inception of the agency.[3]

Sec. 32q[1]. Same—Agent or officer of one corporation also agent or officer of another corporation or person.—Where a person is an agent or officer of one corporation and also an agent or officer of another corporation or person, and there are mutual dealings between the principals through the intervention of such officer or agent, whether or not knowledge on the part of such person acting as the mutual officer or agent of two corporations will be notice to the principal depends upon circumstances.[4] It is a general rule that the mere fact that two corporations have the same attorney, or the same directors, does not render each chargeable with notice of whatever is known or done in the other.[5]

Sec. 32r[1]. Same—Presumption of communication by agent.—In those cases where the information obtained was so recent, or

[1] Bank of Virginia v. Craig, 6 Leigh (Va.) 399 (1835). See Congar v. Chicago & N. R. Co., 24 Wis. 157 (1869); s. c. 1 Am. Rep. 164.

[2] Miller v. Illinois Cent. R. Co., 24 Barb. (N. Y.) 314 (1857); United States Ins. Co. v. Shriver, 3 Md. Ch. 381 (1851); Winchester v. Baltimore & S. R. Co., 4 Md. 231 (1853); Mechanics' Bank v. Schaumburg, 38 Mo. 228 (1866); Bank of Virginia v. Craig, 6 Leigh (Va.) 399 (1835).

[3] Houseman v. Girard Association, 81 Pa. St. 256 (1876). See Bridgport Bank v. New York & N. H. R. Co., 30 Conn. 231 (1861); Union Bank v. Campbell, 4 Humph. (Tenn.) 394 (1843.)

[4] See In re Marseilles E. R. Co., L. R. 7 Ch. App. Cas. 161 (1871); In re Contract Corporation, L. R. 8 Eq. 14 (1869); Gale v. Le 9 Q. B. 730 (1846.)

[5] See In re Marseilles E. R. Co., L. R. 7 Ch. App. Cas. 161 (1871); In re European Bank, L. R., 5 Ch. App. Cas. 357 (1870); Banco De Sima v. Anglo-Peruvian Bank, L. R. 8 Ch. Div. 160, 175 (1878.)

from its nature so positive, direct, and strong, that it must be regarded as certainly remaining present in the mind or memory of the officer or agent, it may be presumed to have been communicated.[1]

Sec. 32s[1]. Same—Notice to president.—Notice to a person acting both as the president and general agent of the corporation, addressed to him in his official character, as to any matter within his supervision, is notice to the corporation[2]; and any knowledge or information acquired by such person in the course of his official duty relating to the business of the corporation under his control, will be notice to the corporation.[3] Thus express notice to the president of a bank sufficient to put him upon inquiry, that stock is held in trust for another, is notice to the bank to that effect[4]; and notice to the president of a mining company relative to the acts of one who assumes to act for it without authority, is notice to the corporation in those cases where the president has general control over its affairs.[5] However, the mere casual private knowledge of the president of a corporation upon a matter in respect to which he is not called upon to act, is not notice to the corporation.[6]

[1] Atlantic State Bank v. Savery, 82 N. Y. 291, 307 (1880); Westfield Bank v. Cornen, 37 N. Y. 320 (1867); Miller v. Illinois Cent. R. Co., 24 Barb. (N. Y.) 312 (1857); Seneca County Bank v. Neass, 5 Den. (N. Y.) 329, 337 (1848); National Bank v. Norton, 1 Hill (N. Y.) 572 (1841); Farmers' & C. Bank v. Payne, 25 Conn. 444 (1857); Brown v. Bankers & B. Tel. Co., 30 Md. 39 (1868); General Ins. Co. v. United States Ins. Co., 10 Md. 517 (1857); Winchester v. Baltimore & S. R. Co., 4 Md. 231 (1853); United States Ins. Co. v. Shriver, 3 Md. Ch. 381 (1851); Canada G. W. R. Co. v. Wheeler, 20 Mich. 419 (1870).

[2] Smith v. Board of Water Commissioners, 38 Conn. 208 (1871).

[3] Van Leuvan v. First Nat. Bank, 6 Lans. (N. Y.) 373 (1871); Mechanics' Bank v. Schaumburg, 38 Mo. 228 (1866). See Central Bank v. Levin, 6 Mo. App. 543 (1880).

[4] Porter v. Bank of Rutland, 19 Vt. 410 (1847). See Bank of Pittsburg v. Whitehead, 10 Watts. (Pa.) 397 (1840); s. c. 36 Am. Dec. 186. *Compare* Bank of Virginia v. Craig, 6 Leigh (Va.) 399 (1835).

[5] Union Mining Co. v. Rocky Mountain Nat. Bank, 2 Colo. 248, 565 (1873).

[6] Miller v. Illinois Cent. R. Co., 24 Barb. (N. Y.) 312 (1857); Mechanics Bank v. Schaumburg, 38 Mo. 228 (1866). See Factors & T. Ins. Co. v. Marine Dry Dock & S. Co., 31 La. An. 149 (1879); Green v. Merchants Ins. Co., 27 Mass. (10 Pick.) 402 (1830).

Sec. 32t[1]. Same—Notice to directors.—Information given to a board of directors as a body, regarding any matter upon which the corporation is required to act, is notice to the corporation [1]; and a change in the board of directors made after notice has been given, does not affect such notice.[2]

While in some cases it is held that "as a general rule whatever the directors know regarding matters affecting its interest the corporation knows"; [3] yet there are cases which hold that where the directors are not officers, in a proper sense, and have no individual power to control or participate in the management of its concerns, individual notice to them will not be notice to the corporation.[4]

And there are some cases which hold that the individual director, while not clothed with any special agency in a particular transaction, yet he should be regarded as in some measure an organ of communication between the board and third persons, with respct to matters upon which the board has power to act, and that where notice is given to him officially, "for the purpose of being communicated to the board," with respect to any such matter, the corporation should be charged with notice, whether it is actually communicated to the board or not.[5]

And another class of cases holds that where a director having such knowledge acts as a member of the board upon the matter affected by the information, the corporation will be bound, whether such knowledge is acquired privately or in the course of the business of the corporation.[6]

[1] Ex parte Holmes, 5 Cow. (N. Y.) 426 (1826); Fulton Bank v. New York & S. Canal Co., 4 Paige Ch. (N. Y.) 127 (1833); Bank of Pittsburg v. Whitehead, 10 Watts (Pa.) 397 (1840); s. c. 36 Am. Dec. 186; Ex parte Agra Bank, L. R. 3 Ch. App. 555 (1868).

[2] See Mechanics' Bank of Alexandria v. Seton, 26 U. S. (1 Pet.) 299 (1828); bk. 7 L. ed. 152.

[3] Toll Bridge Co. v. Betsworth, 30 Conn. 380 (1862.)

[4] Louisiana State Bank v. Senecal, 13 La. 525 (1839). See First Nat. Bank of Hightstown v. Christopher, 40 N. J. L. (11 Vr.) 435 (1878); s. c. 8 Cent. L. J. 181.

[5] See Boyd v. Chesapeake & O. Canal Co., 17 Md. 195 (1860); General Ins. Co. v. United States Ins. Co., 10 Md. 527 (1857); United States Ins. Co. v. Shriver, 3 Md. Ch. 381 (1851.)

[6] See North River Bank v. Aymar, 3 Hill (N. Y.) 262 (1842); Bank of United States v. Davis, 2 Hill (N. Y.) 451 (1842); National Security Bank v. Cushman, 121 Mass. 490 (1877);

But mere private knowledge on the part of one or more of the directors of the corporation, not communicated to the board, concerning any business in which the corporation is interested, where the directors have no official duty to perform in regard to the matter concerning which they possess knowledge, and where they do not take any part in the transaction on behalf of the corporation, the corporation will not be affected by the facts within the knowledge of such directors.[1]

Sec. 32u[1]. Same—Notice to stockholders.—A notice given to one or more stockholders of a corporation respecting any corporate business is not notice to the corporation, because such stockholder is in no sense an agent of the corporation.[2]

Sec. 32 v[1]. Same—Ratification of employment—Formal meeting not necessary.—It is thought that it is not necessary, in order to charge a corporation for services rendered, that the directors at a formal meeting should have either formally

Clerk's Savings Bank v. Thomas, 2 Mo. App. 367 (1878); Union Bank v. Campbell, 4 Humph. (Tenn.) 394 (1843). *Compare* Terrell v. Branch Bank of Mobile, 12 Ala. 502 (1847); Custer v. Tompkins County Bank, 9 Pa. St. 27 (1848).

[1] See Atlantic Bank v. Savery, 18 Hun (N. Y.) 36 (1879); s. c. 82 N. Y. 291; Westfield Bank v. Cornen, 37 N. Y. 320 (1867); National Bank v. Norton, 1 Hill (N. Y.) 572 (1841); Fulton Bank v. New York & S. Canal Co., 4 Paige Ch. (N. Y.) 127 (1833); Lucas v. Bank of Darien, 2 Stew. (Ala.) 280 (1830); Farrel Foundry v. Dart, 26 Conn. 376 (1857); Farmers' & C. Bank v. Payne, 25 Conn. 444 (1857); Mercier v. Canonge, 8 La. An. 37 (1853); Fairfield Sav. Bank v. Chase, 72 Me. 226 (1881); s. c. 39 Am. Rep. 319; 11 Rep. 809; General Ins. Co. v. United Ins. Co., 10 Md. 517 (1857); Winchester v. Baltimore & S. R. Co., 4 Md. 231 (1853); United States Ins. Co. v. Shriver, 3 Md. Ch. 381 (1851); Sawyer v. Pawners Bank, 88 Mass. (6 Allen) 207 (1863); First Nat. Bank of Hightstown v. Christopher, 40 N. J. L. (11 Vr.) 435 (1878); s. c. 8 Rep. 403; 8 Cent. L. J. 181; Jones v. Planters' Bank, 9 Heisk. (Tenn.) 455 (1872); Peruvian R. Co. v. Thames & M. M. Ins. Co., L. R. 2 Ch. 617 (1867); In re Carew's Estate Act, 31 Beav. 39 (1862); Powles v. Page, 3 C. B. 16 (1846); Ex parte Burbridge, 1 Deac. 131 (1835); Ex parte Watkins, 2 Mont. & A. 349 (1836); s. c. 4 Deac. & Chit. 87.

[2] Fairfield Turnpike Co. v. Thorp, 13 Conn. 182 (1839); Housatonic Bank v. Martin, 42 Mass. (1 Metc.) 294 (1840); Pittsburgh Bank v. Whitehead, 10 Watts (Pa.) 397, 402 (1840); s. c. 36 Am. Dec. 186; Union Canal Co. v. Loyd, 4 Watts & S. (Pa.) 393 (1842).

authorized or ratified the employment,[1] because, for many purposes, the officers and agents of the corporation may employ persons to perform services for it, and such employment being within the scope of the agent's or officer's duty, binds the corporation, and where an officer employs an agent to perform services for the corporation, and such services are performed with the knowledge of the directors, and they received the benefit of such services without objection, the corporation is liable upon an implied assumpsit.[2]

Sec. 32w[1]. Same—Evidence of.—Evidence that a report of the liabilities of defendant corporation, showing an amount due plaintiffs' assignor for a salary, had been before a stockholders' meeting, and was not objected to, is sufficient evidence of ratification of the services to go to the jury.[3]

Sec. 32x[1]. Same—Delegation of Power.—Although the charter of a corporation declares that its powers shall be exercised by a board of directors consisting of a specified number, yet the board may delegate its authority to agents or a quorum composed of less than the majority of the number.[4] But the transfer of the powers of one corporation to another without legislative authority are against public policy and the courts will do nothing which will promote the transfer.[5]

Sec. 32y[1]. Same—Statutory agents—Implied prohibition.—When a statute covers the whole subject and prescribes the persons who may bind a corporate body, and the manner in which they may bind it, resort to other instrumentalities is by implication prohibited.[6] But it is a general rule that the president and directors of a company, when legally chosen,

[1] Scott v. Middletown U. & W. G. Co., 86 N. Y. 200, 206 (1881); Conover v. Mutual Ins. Co., of Albany, 1 N. Y. 290, 292 (1848).

[2] Hooker v. Eagle Bank, 30 N. Y. 83, 86 (1864); s. c. 86 Am. Dec. 351.

[3] Copeland v. Johnson Manuf. Co., (Sup. Ct. G. T.) 3 N. Y. Sup. 42 (1888); s. c. 19 N. Y. St. Rep. 212.

[4] Hoyt v. Thompson, 19 N. Y. 207 (1859).

[5] Chicago Gas-Light Co. v. People's Gas-Light Co., 121 Ill. 530 (1887); s. c. 2 Am. St. Rep. 124. See Hays v. Ottawa O. & F. R. V. R. Co., 61 Ill. 422 (1871); Thomas v. West Jersey R. Co., 101 U. S. 83 (1879); bk. 25 L. ed. 950.

[6] Landers v. Frank Street Methodist Church, 97 N. Y. 119 (1884).

are the proper parties to execute acts ordered to be done by the president, directors and company.[1]

Sec. 32z[1]. Same—Notice as to powers.—Corporations being artificial creatures, existing by virtue of law and organized for powers defined in their charters, he who deals therewith is chargeable with notice of the purpose for which it was formed, and when he deals with agents or officers of a corporation he is bound to know their powers and the extent of their authority.[2]

Sec. 32a[2]. Same—Duty of company as to agents.—Incorporated companies whose business is necessarily conducted by agents should be required at their peril to see to it, that the officers and agents whom they employ, not only know what their powers and duties are, but that they do not habitually and as a part of their system of business transcend those powers.[3]

Sec. 32b[2]. Same—Apparent authority.—A corporation is bound by the acts of one whom it clothes with apparent authority to act for it, and allows to act for it with third persons.[4]

Sec. 32c[2]. Same—Private instructions.—One dealing in good faith with a corporation cannot be affected by private instructions to or limitations upon the agent.

Sec. 32d[2]. Acts and contracts of officers and agents.—A corporation is bound by the express or implied contracts of its agents or officers made in the ordinary discharge of their official duties, although not authorized or executed under its corporate seal.[6] Thus, where the president and vice-president

[1] Union Turnpike Co. v. Jenkins, 1 Cai. (N. Y.) 381 (1803).

[2] Alexander v. Cauldwell, 83 N. Y. 480 (1881); DeBost v. Albert Palmer Co., 35 Hun (N. Y.) 386, 388 (1885).

[3] Conover v. Ins. Co., 1 N. Y. 290, 292 (1848).

[4] East River National Bk. v. Gove, 57 N. Y. 597 (1874).

[5] Insurance Co. v. McCain, 96 U. S. (6 Otto) 84 (1877); bk. 24 L. ed. 653; Merchants' Bk. v. State Bk., 77 U. S. (10 Wall.) 604, 650 (1870); bk. 19, L. ed. 1008. See Story on Agency, sec. 127; Field on Corp., secs. 192, 209.

[6] Cheever v. Gilbert Elevated R. Co., 43 N. Y. Super. Ct. (11 J. & S.) 478, 486 (1878). See President & Directors of the Bank of the Metropolis v. Guttschlick, 39 U. S. (14 Pet.) 19 (1840); bk. 10 L. ed. 335; Fleckner v. President & Directors of the Bank of United States, 21 U. S. (8 Wheat.) 338 (1823); bk. 5, L. ed. 631; Bank of Columbia v. Patterson's Ad'mr., 11 U. S. (7 Cr.) 299 (1813); bk. 3 L. ed. 351.

of a corporation instruct a person to deal with the superintendent, and the corporation receives the benefit of an oral agreement made by him for the corporation, it cannot deny his authority to act.[1] But it is said by the New York City Court in the care of Middlesex County Bank v. Hirsch Bros. Veneer Manfg. Co.,[2] that in an action to charge a corporation as indorser of notes indorsed in its name by "L. HIRSCH, Manager," a judgment against the corporation is unauthorized, in the absence of evidence of Hirsch's authority, or that the notes related to the corporation's business, or that it ever received any value for or benefit from the indorsement.

Sec. 32e[2]. Same — Ratification. — A corporation like an individual may ratify the acts of its agents done in excess of their authority, and such ratification may in many cases be inferred from the informal acquiescence in or the approval of his acts.[3] But a subsequent ratification will not be inferred in the absence of proof of notice of the unauthorized acts of the agents.[4]

An averment in pleading that an agent of a corporation acted by due authority is sustained by proof of subsequent ratification.[5]

Sec. 32f[2]. Same—Previous assent.—A previous assent is as effective as a subsequent ratification, and a ratification of all stockholders of the unauthorized act of the president or the agent of the company, will make it valid.[6] Letters to an incorporation may be properly relied upon by the plaintiff, as ratification of an agent's acts.[7]

Sec. 32g[2]. Same—Ratification by acquiescence.—The ratification by a corporation of an unauthorized act of an agent,

[1] Morrell v. Long Island R. Co., (N. Y. City Ct. G. T.) 1 N. Y. Sup. 65 (1888).

[2] 4 N. Y. Sup. 385 (1889).

[3] Hoyt v. Thompson, 19 N. Y. 207 (1859).

[4] Dabney v. Stevens, 10 Abb. (N. Y.) Pr. N. S. 39 (1870).

[5] Hoyt v. Thompson, 19 N. Y. 207 (1859).

[6] Martin v. Niagara Falls Paper Manuf. Co., 44 Hun (N. Y.) 130, 140 (1887). See Sheldon Hat B. Co. v. Eickemeyer Hat B. M. Co., 90 N. Y. 607 (1882); Kent v. Quicksilver Mining Co., 78 N. Y. 159 (1879).

[7] Scott v. Middletown, U. & W. G. R. Co., 86 N. Y. 200, 208 (1881). See Wild v. New York & Austin Mining Co., 59 N. Y. 644 (1874).

which is within the scope of its corporate powers, may be inferred from acquiescence merely.[1] If the directors of a company, either through inattention or otherwise, suffer its subordinate officers to pursue a particular line of conduct for a considerable period without objection they are as much bound to those who deal with the officers in good faith and in ignorance of their want of authority as if the requisite power had been directly conferred.[2]

Sec. 32h[2]. Same—Estoppel.—Where a corporation has enjoyed the fruits of the act of an agent, ratification will be presumed, and it will not be permitted to deny the authority of such agent.[3] Thus it has been said that where a corporation receives material services appropriate or incident to its business, engaged upon its credit and for its use by one of its officers, without authority, and appropriates it for the purpose for which it was designed, this is an adoption and ratification of the act of the agent or officer.[4]

It is the general doctrine that where an officer employs an agent to perform a service for the corporation and it is performed with the knowledge of the directors and they receive the benefit of such service without objection the corporation is liable.[5]

[1] Hoyt v. Thompson, 19 N. Y. 206, 215 (1859). See New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30, 63 (1865); Olcott v. Tioga R. Co., 27 N. Y. 546 (1863); s. c. 84 Am. Dec. 298; Caldwell v. National M. V. Bank, 64 Barb. (N. Y.) 342 (1869).

[2] Beers v. Phœnix Glass Co., 14 Barb. 358 N. Y. (1852); Caldwell v. Nat. M. B. Bk., 64 Barb. N. Y. 342 (1869.)

[3] Lee v. Pittsburgh C. & M. Co., 56 How. (N. Y.) Pr. 373 (1877); aff'd 75 N. Y. 601. See Lander's Case, 97 N. Y. 119 (1884); and The Alexander Case, 83 N. Y. 480 (1881); Castle v. Lewis, 78 N. Y. 131, 134, 135 (1871); Parish v. Wheeler, 22 N. Y. 494, 508, 509 (1860); Bissell v. Michigan S. & N. I. R. Co., 22 N. Y. 258 (1860).

[4] Scott v. Middletown U. V. & W. G. R. Co., 86 N. Y. 200, 206 (1881.)

[5] Hooker v. Eagle Bank of Rochester, 30 N. Y. 83, 86 (1864); s. c. 86 Am. Dec. 351. See Peterson v. Mayor &c., of N. Y., 17 N. Y. 449 (1858); Long Island R. Co. v. Marquand, 6 N. Y. Leg. Obs. 160 (1848); Fister v. La Rue, 15 Barb. (N. Y.) 323 (1853); Ex parte Peru Iron Co., 7 Cow. (N. Y.) 540 (1827); Dunn v. Rector of St. Andrews, 14 Johns. (N. Y.) 118 (1817); Danforth v. Schoharie Turnpike Co., 12 Johns (N. Y.) 227 (1815); American Ins. Co. v. Oakley, 9 Paige Ch. (N. Y.) 496 (1842); s. c. 38 Am. Dec. 561; Commercial Bank of Buffalo v. Kortright, 22 Wend. (N. Y.) 348 (1839); Kortright v. Buffalo Commercial Bank, 20 Wend. (N. Y.) 91 (1838.)

On the same principle one who has had the benefit of an act done by a corporation without authority, cannot be permitted to avail himself of the defence of want of authority, express or implied, by the terms of the charter.[1]

Sec. 32i[2]. Agents—Frauds and misrepresentations.—To sustain an action for fraud founded upon representations made by a director of a corporation in the form of published statements and reports, as to its financial condition, it must be made to appear that he believed or, had reason to believe, at the time he made them, that the representations were false or that he had actual knowledge of the truth, and the plaintiff relied upon them to his injury. Knowledge of all of the affairs of the company cannot be imputed to a director for the purpose of charging him with fraud.[2]

The active managers of a corporation are the agents of the company and not of the directors as individuals, and have no power to bind the latter by their statements, consequently the mere fact of being a director and stockholder is not *per se* sufficient to hold the party liable for the frauds and misrepresentations of such active managers. Some knowledge and participation in the act claimed to be fraudulent must be brought home to the person charged. It is only where a director lends his name and influence to promote a fraud upon the community, or is guilty of some violation of law through mismanagement, that he is personally liable.[3]

[1] Cheever v. Gilbert Elevated R. Co., 42 N. Y. Super. Ct. (11 J. & S.) 478 (1878). See Parish v. Wheeler, 22 N. Y. 494 (1860); Bissell v. Mich. S. & N. I. R. Co., 22 N. Y. 258, 359 (1860); Mott v. United States T. Co., 19 Barb. (N. Y.) 568 (1855); Steam Nav. Co. v. Weed, 17 Barb. (N. Y.) 378 (1853); Sacketts Harbor Bank v. President, etc., of Lewis County Bank, 11 Barb. (N. Y.) 213 (1851); Potter v. Bank of Ithica, 5 Hill (N. Y.) 490, 491 (1843); Pringle v. Phillips, 5 Sandf. (N. Y.) 170 (1851); Shutesbury v. Oxford, 16 Mass. 102 (1819); Baltimore & P. S. Co. v. McCutcheon, 13 Pa. St. 13 (1850).

[2] Wakeman v. Dalley, 51 N. Y. 27 (1872); s. c. 10 Am. Rep. 551; criticising and questioning Bennett v. Judson, 21 N. Y. 238 (1860). See Marsh v. Falker, 40 N. Y. 566 (1869); Jackson v. King, 4 Cow. (N. Y.) 207, 220 (1825); s. c. 15 Am. Dec. 354; Starr v. Peck, 1 Hill (N. Y.) 270 (1841); Fleming v. Slocum, 18 Johns. (N. Y.) 403 (1820); s. c. 9 Am. Dec. 224.

[3] Arthur v. Griswold, 55 N. Y. 400 (1874.)

Sec. 33. Hot water, hot air, and steam-heating companies.—The municipal authorities of the cities, towns and villages of the state of New York, are hereby authorized and empowered to carry out the provisions of this act.[1]

Any corporation or association formed or organized under the act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February seventeenth, eighteen hundred and forty-eight, or under any of the amendments to said act, or under the "Act to provide for the organization and regulation of certain business corporations," passed June twenty-first, eighteen hundred and seventy-five, shall have full power to manufacture, furnish and sell such quantities of hot water, hot air, or steam, as may be required in the city, town or village where the same shall be located; and such corporation shall have power to lay pipes or conductors for conducting hot water, hot air, or steam through the streets, avenues, lanes, alleys, squares and highways in such city, village or town, with the consent of the municipal authorities of said city, town or village, and under such reasonable regulations and conditions as they may prescribe; and whenever any such permission shall be granted, it shall only be upon the condition that reasonable compensation shall be paid therefor, and upon a further condition that a satisfactory bond shall be given to secure the city, town or village against all damages in the use of said pipes. The amount of the compensation, and the manner of its payment, and the amount of

[1] L. 1879, c. 317, § 1.

the bond, shall be first fixed and determined by said municipal authorities before any pipes, as provided for by this act, shall be laid in any city, town or village of this state, and that all such permissions heretofore given by any of said municipal authorities, where the above terms have been complied with, are hereby confirmed.[1]

Sec. 33a. Steam-heating companies—Statutes.—See L. 1880, c. 263, as amended by Laws of 1883, chapter 237, "An act for the protection of corporations organized for the generating and distributing of steam for heating and other purposes."

By the Laws of 1885, chapter 549, steam-heating companies are required, upon certain terms and conditions, to supply steam for heating upon the application of owners or occupiers of buildings which are situated "within 100 feet in street-main laid down" by such company.

Sec. 34. Natural Gas Companies.—The general assembly of 1889 passed an act "to provide for the organization and regulation of natural gas companies, being 'an act supplementary to chapter 611 of the Laws of 1875'," This statute provides that: It shall be lawful for any corporation organized under chapter six hundred and eleven of the Laws of one thousand eight hundred and seventy-five, and acts amendatory thereto, for the purpose of boring, drilling, or mining for natural gas, and conveying and distributing the same in pipes, and vending said gas to the consumers thereof, to purchase, lease, secure and convey such real estate, and such only, as may be necessary for the convenient transaction of their business; and to effectually carry on the operations of such corporation.[2]

Sec. 35. Same—Power to dig trenches and lay pipes.—

[1] L. 1879, c. 317, § 2.

[2] L. 1889, c. 422, § 1.

Such corporation is authorized to dig and trench for, and lay their pipes along or under any of the public roads or highways, or through or under any of the waters within the limits of this state: provided the same shall not be so done as to incommode the public use of said highways, or interrupt the navigation of said waters. Provided, however, that no pipe-line for the purpose aforesaid shall be constructed along, across, or upon any public highway, without the consent of the commissioners of highways of the town in which such highway is located, upon such terms as may be agreed upon with such commissioners, or upon the order of the general term of the supreme court of the department in which such highways are situated, made upon petition, and notice to the commissioners of highways of such town, according to the practice, or order of the court, or an order to show cause; and in such manner, and upon such terms as shall be ordered by the court.[1]

Sec. 36. Same—Sanction by city authorities.—No pipe-line shall be constructed into or through any incorporated city or village in this state, unless the same be sanctioned by a majority of the common council of such city, or trustees of such village, by resolution adopted at a regular meeting of such common council, or board of trustees, which resolution shall prescribe the terms upon which consent is granted. Nothing in this or the preceding section shall be construed or held to confer any other right than the relinquishment of the public rights, and the consent of the people to the construction of such pipe-line, and shall not affect any private right.[2]

[1] L. 1889 c. 422, § 2.

[2] L. 1889, c. 422, § 3.

Sec. 37. Same—Surveys—Compensation.—When any corporation formed as aforesaid has fully completed its organization, the said corporation, its agents or employees shall be authorized to enter upon any lands for the purpose of making surveys, and to agree with the owner of the property as to the amount of compensation to be paid such owner for the right of laying and maintaining pipes for conveying natural gas on or beneath the surface of said lands.[1]

Sec. 38. Same—Map of route—Signing and filing.—Before entering on or using any lands, for the purpose of conveying natural gas as aforesaid, the said corporation shall cause a survey and map to be made, of the proposed route of said pipe-line, by, and on which the lands of each owner and occupant through which the same may run shall be designated, which map shall be signed by the president of said corporation and its secretary, and be filed in the office of the county clerk of the county in which the lands are situated; and the said corporation, by any of its officers, agents and servants, may enter upon any lands, for the purpose of making such survey and map.[2]

Sec. 39. Same—Commissioners to assess damages—Report.— In all cases where the said corporation shall be unable to agree with the person owning, or having an interest in any lands, for the right to lay gas-pipes through the same, the supreme court, at any special term thereof, held in the judicial district in which lands are situated, shall, on application of the said corporation, after ten days' written notice, personally served within this state, or if such persons shall be incapacitated from receiving per-

[1] L. 1889 c. 422, § 4.

[2] L. 1889, c. 422, § 5.

sonal notice, then by service in such manner as the court shall direct, appoint three disinterested citizens of the county in which such lands are situated, who shall be freeholders, as commissioners, to determine the damage sustained by each of said persons, by reason of the use of his or her lands, for the purpose above recited. Such commissioners shall take the oath required by the constitution of public officers, and shall personally examine each parcel of land proposed to be used, and shall estimate and report to said court at any term thereof held in said judicial district, on ten days' notice, served as aforesaid, on the parties in interest, the several sums which they shall decide to be just compensation to such owners, or personally interested, for the use of such property as aforesaid. Such commissioners may examine witnesses upon hearing before them, and shall have power to administer oaths to such witnesses, and all the evidence they shall take shall accompany their report to the court. On the presentation of such report the said court may confirm or amend, or appoint new commissioners, who shall proceed in like manner as the first commissioners, and whose reports, subject to amendment as aforesaid, shall be final, and shall be confirmed by said court. Said commissioners shall receive from the said corporation the sum of three dollars per day each, for the time employed by them in the performance of their duties, together with the amount which they shall certify, on their oaths, as correct, in their said report, for incidental expenses connected with their work, including the preparation of said report.[1]

[1] L. 1889, c. 422, § 6.

Sec. 40. Same—Confirmation of report—Deposit by corporation.—Whenever any report of such commissioners shall have been confirmed by the said supreme court, the said corporation may deposit, as the court directs, or pay to the said owner of persons as court directs the sum mentioned in said report, in full compensation for the right or easement so required, and thereupon the said corporation shall be seized of said easement and discharged from all claim by reason of such appropriation and use.[1]

Sec. 41. Certificate of Incorporation.—Whenever five or more persons, a majority of whom shall be citizens and residents of this state, shall propose to form a corporation under the provisions of this act, they shall make a certificate to that effect, which certificate shall be signed by each of such persons and duly acknowledged by them before some officer authorized to take acknowledgments under the laws of this state. Such certificate shall set forth :

1. The name of the proposed corporation.
2. The object for which it is to be formed, including the nature and locality of its business.
3. The amount and description of the capital stock.
4. The number of shares of which such capital stock shall consist.
5. The location of the principal business office.
6. The duration of the corporation, which, however, shall not exceed fifty years.[2]

Sec. 41a. Infringement of corporate name.—The "United States Commercial Agency & Collecting Company," a name sought to be used by petitioner, a corporation engaged in the

[1] L. 1889, c. 422, § 7.
[2] L. 1875, c. 611, § 2; 3 N. Y. R. S., 8th ed., p. 1979. See *post* note to § 47.

same business as respondent, the "United States Mercantile Reporting Company," is an infringement of respondent's name.[1]

Plaintiff transacted business in New York city for more than fifty years under the name of the "Farmers' Loan & Trust Company." Defendant, organized under the laws of Kansas in 1885, under the name of the "Farmers' Loan & Trust Company of Kansas," established an office in New York city, and advertised, omitting from its name the words "of Kansas." The court held, that a preliminary injunction should issue restraining defendant from using its name on advertising matter without the words "of Kansas."[2]

Sec. 41b. Change of corporate name—Application to supreme court for.—Any incorporation, incorporated company, society or association organized under the laws of this state, excepting banks, banking associations, trust companies, life, health, accident, marine and fire insurance companies, may apply at any special term of the supreme court sitting in the county in which shall be situated its chief business office, for an order to authorize it to assume another corporate name.[3]

Sec. 41c. Same—Petition and notice of application.—Such application shall be by petition, which shall set forth the grounds of the application, and shall be verified by the chief officer of the corporation. Notice of such application shall be published for six weeks in the state paper and in a newspaper of every county in which such corporation shall have a business office, or, if it have no business office, of the county in which its principal corporate property is situated, such newspaper to be one of those designated to publish the session laws; and it must appear to the satisfaction of the court that such notice has been so published, and that the application is made in pursuance of a resolution of the directors, trustees or other managers of the corporation applying.[4]

[1] In re United States Mercantile Reporting & Collecting Ass'n, (Sup. Ct. G. T.) 4 N. Y. Sup. 916 (1887.)

[2] Farmers' Loan & Trust Co. v. Farmers' Loan & Trust Co. of Kansas, 21 Abb. N. C. 104 (1888); s. c. 1 N. Y. Sup. 44.

[3] L. 1870, c. 322, § 1, as amended by L. 1876, c. 280.

[4] Id. § 2,

Sec. 41d. Same—Power of court to order a change of name.—If the court to which such application is made shall be satisfied, by such petition so verified, or by other evidence, that there is no reasonable objection to such corporation changing its name, it may make an order authorizing it to assume the proposed new corporate name. A copy of said order shall be filed in the office of the secretary of state, and with the county clerk of every county in which said corporation has a business office, or, if it have no business office, of the county in which its principal corporate property is situated, and be published at least once in each week for four weeks in some newspaper in every county where such corporation has a business office, or if it have no business office in the county in which its principal corporate property is situated, such newspaper to be designated by the court.[1]

Sec. 41e. Same—When change of name to take effect.—When the requirements of this act shall have been complied with, the corporation applying for a change of name may, from and after the day specified in the order of the court, be known by and use the new corporate name designated in the order of the court.[2]

Sec. 41f. Same—Change not to affect pending suits, rights or liabilities.—No suit or legal proceeding commenced by or in behalf of or against any corporation shall abate by reason of a change of its corporate name, made as herein authorized. Such change of the corporate name of the said corporation or company shall in no way affect the rights or liabilities of said corporation or company. All obligations of said corporation or company may be enforced against said corporation or company in the changed name, and all actions and proceedings commenced and pending against said corporation or company at the time said corporate name is changed shall be continued in the name in which said action or proceedings were commenced, or the court may, on the application of either party, allow the action or proceeding to be continued in the corporate name to which said corporation or company has been changed.[3]

[1] L. 1870, c. 322. § 3. [2] Id., § 4. [3] Id., § 5.

Sec. 41g. Same—Discretion of court.—Under Laws N. Y. 1870, c. 322, authorizing the court to change the name of a corporation when there appears to be no reasonable objection thereto, the power to make such change is entirely discretionary with the court.[1]

Sec. 41h. Capital stock.—The term "capital stock" of a corporation has been said to consist of the aggregate of the shares into which the capital is divided upon the incorporation,[2] and of its property, real and personal.[3] That is, all the funds upon which it transacts its business, which would be liable to its creditors, and in case of insolvency pass to a receiver.[4] Other courts hold that the term "capital stock" in an act of incorporation, means the amount of money contributed, or shares subscribed by the stockholders as members of the company, and does not refer to the property thereof.[5]

Sec. 41i. Same—Shares of stock.—A share of stock may be defined as "a right which its owner has in the management, profits, and assets of the corporation." [6]

Sec. 41j. Defective organizations.—It is thought that where the papers filed by which a corporation is sought to be created, are colorable but so defective that in a proceeding on

[1] In re United States Mercantile Reporting Co., 115 N. Y. 176 (1889); s. c. 21 N. E. 1034.

[2] Cook on Stockholders, § 199.

[3] New Haven v. City Bank, 31 Conn. 106 (1862); State Bank v. Brackenridge, 7 Blackf. (Ind.) 395 (1845.)

[4] See International Life Assurance Society v. Commissioner of Taxes, 28 Barb. (N. Y.) 318 (1858); s. c. 17 How. (N. Y.) Pr. 206.

[5] St. Louis I. M. & S. R. Co. v. Bigelow, 30 Ark. 693 (1875). See State v. Morristown Fire Association, 23 N. J. L. (3 Zab.) 195 (1851).

[6] Plimpton v. Bigelow, 93 N. Y. 592, 599 (1883). See Jermain v. Lake Shore & M. S. R. Co., 91 N. Y. 485, 492 (1883); Kent v. Quicksilver Mining Co., 78 N. Y. 159 (1879); Burrall v. Bushwick R. Co., 75 N. Y. 211, 216 (1878); People v. Commissioners, 40 Barb. (N. Y.) 353 (1863); Field v. Pierce, 102 Mass. 253, 261 (1869); Bent v. Hart, 73 Mo. 641; s. c. 10 Mo. App. 143 (1881); Bradley v. Bauder, 36 Ohio St. 28, 35 (1880); s. c. 38 Am. Rep. 547; Jones v. Davis, 35 Ohio St. 474, 477 (1880); Brightwell v. Mallory, 10 Yerg. (Tenn.) 196 (1836); Harrison v. Vines, 46 Tex. 15, 21 (1876); Barksdale v. Finney, 14 Gratt. (Va.) 338, 357 (1858); Van Allen v. Assessors, 70 U. S. (3 Wall.) 573, 585 (1865); bk. 18 L. ed. 229.

the part of the state against it the corporation would for that reason be dissolved; yet by acts of user under such an organization it becomes an organization *de facto*, and no advantage can be taken of such defect in its constitution, collaterally, by any person.[1]

Sec. 42. License—Secretary of State to Issue.—Such certificate shall be filed in the office of the Secretary of State, and the Secretary of State shall thereupon issue a license to the persons making such certificate, empowering them as commissioners to open books for subscriptions to the capital stock of such corporation at such times and places as they may determine; but no license shall be issued in the case of a proposed corporation, having the same name as an existing corporation in this state, or a name so nearly resembling that of an existing corporation as to be calculated to deceive.[2]

[1] See Buck v. Barker, 5 N. Y. St. Rep. 826, 828 (1887); Buffalo & A. R. Co. v. Cary, 26 N. Y. 75, 77 (1862); Aspinwall v. Sacchi, 57 N. Y. 331, 338, (1874); Meriden Tool Co. v. Morgan, 1 Abb. (N. Y.) N. C. 125 note (1875).

[2] L. 1875, c. 611, § 4; 3 N. Y. R. S., 8th ed., p. 1979. See Chemical National Bank v. Colwell, 14 N. Y. St. Rep. 682, 685 (1888).

CHAPTER III.

BUSINESS ACT (CONTINUED).

OPENING SUBSCRIPTION-BOOKS—BY-LAWS—CERTIFICATE OF INCORPORATION—FAILURE TO ORGANIZE.

SEC. 43. Commissioners to Open Subscription Books—First Meeting of Subscribers.
SEC. 43a. Subscriptions to Stock.
SEC. 43b. Same—Subscription in Memorandum Book.
SEC. 43c. Same—Agreement to Subscribe.
SEC. 43d. Same—When Subscription Void.
SEC. 43e. Same—Failure to Pay Ten Per Cent.
SEC. 43f. Same—Payment by Check.
SEC. 43g. Same—Who may take Subscriptions.
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SEC. 43i. Same—Irregularity and Informality.
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SEC. 43q. Same—Frauds in Subscription for Stock—Signing Fictitious Name.
SEC. 43r. Same—Effect on Subscription.
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SEC. 43t. Same—When Binding.
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SEC. 44e. Same—Construction.
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SEC. 44j. Same—Invalid By-Laws—Injunction to Restrain Enforcement.
SEC. 44k. Same—By-Law Regulating Signing of Notes—Lack of Secretary's Signature.
SEC. 44l. Same—Void in Part.
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SEC. 44o. Same—By-Law Restricting Right to Use.
SEC. 44p. Same—Repeal of By-Law.
SEC. 44q. Same—Notice of By-Laws—When Presumed.
SEC. 44r. Same—Failure to Provide by By-Laws for Annual Election.
SEC. 44s. Same—Salary of Officers—Directors.
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SEC. 45. Commissioners' Report—Certificate of Incorporation.
SEC. 45a. Organization Tax.
SEC. 45b. Incorporation and Powers.
SEC. 46. Failure to Organize—Revocation of License.
SEC. 46a. Failure to Organize—Recovery of Money Advanced.
SEC. 46b. Forfeiture and Surrender of Charter.

Sec. 43. Commissioners to open Subscription Books—First meeting of subscribers.—Said commissioners shall proceed to open books for subscriptions to the capital stock of such corporation, and no such subscription shall be received unless at the time of making it the person so subscribing shall pay to said commissioners ten per cent. of the par value of the stock subscribed for in cash. When one-half of the capital stock has been subscribed, said commissioners shall call a meeting of the subscribers for the purpose of adopting by-laws for such corporation and electing directors thereof. Notice of such meeting shall be given to every subscriber by depositing in the post-office, properly addressed to his last

known place of residence, and postage prepaid, at least five days before the time fixed, a written or printed notice, stating the time, place and object of such meeting.[1]

Sec. 43a. Subscriptions to stock.—It is thought that it was not intended by the statute to prescribe a fixed mode of making a subscription, and that any contract of subscription which is good at common law, is still valid under the statute.[2]

All contracts of subscription must be in writing.[3] But a simple writing of the name to the articles of incorporation, with a statement of the number of shares subscribed for written opposite the name, is a sufficient writing and constitutes a binding subscription for the stock, and takes effect upon the filing of the certificate, as required by the statute.[4]

A subscription upon a sheet of paper, instead of in the book which the statute provided for, has been held to be valid and binding.[5] But it seems that where duplicate sets of

[1] L. 1875, c. 611, § 5; 3 N. Y. R. S., 8th, ed., p. 1979.

[2] See Buffalo & J. R. Co. v. Gifford, 87 N. Y. 294 (1882).

[3] Bouwer v. Appleby, 1 Sandf. (N. Y.) 170 (1847); Vreeland v. New Jersey Stone Co., 29 N. J. Eq. (2 Stew.) 188 (1878); Fanning v. Hibernia Ins. Co., 37 Ohio, St. 339 (1881); Pittsburgh & S. R. Co. v. Gazzam, 32 Pa. St. 340 (1858); Galveston Hotel Co. v. Bolton, 46 Tex. 633 (1877); Fothergill's Case, L. R., 8 Ch. App. 270 (1873); Thames Tunnell Co. v. Sheldon, 6 B. & C. 341 (1827). See Phœnix Warehousing Co. v. Badger, 67 N. Y. 294 (1876), and must be such as to constitute a valid and complete contract on both sides. Duchess & C. R. Co. v. Mabbett, 58 N. Y. 397 (1874); Belfast & M. L. R. Co. v. Moore, 60 Me. 561 (1871); Bucher v. Dillsburg & M. R. Co., 76 Pa. St. 306 (1874); See Lake Ontario Shore R. Co. v. Curtiss, 80 N. Y. 219 (1880).

[4] Phœnix Warehousing Co. v. Badger, 67 N. Y. 294 (1876); Dayton v. Borst, 31 N. Y. 435 (1865). See Lake Ontario A. & N. Y. R. Co. v. Mason, 16 N. Y. 451 n. (1857); Buffalo & N. Y. City R. Co. v. Dudley, 14 N. Y. 336 (1856).

[5] Hamilton & D. P. R. Co. v. Rice. 7 Barb. (N. Y.) 157 (1849); Iowa & M. R. Co. v. Perkins, 28 Iowa, 281 (1869)); Mexican Gulf R. Co. v. Viavant, 6 Rob. (La.) 305 (1843); Ashtabula & N. L. R. Co. v. Smith, 15 Ohio St. 328 (1864). See Clark v. Continental Improvement Co., 57 Ind. 135 (1877); Brownless v. Ohio J. & J. R. Co., 18 Ind. 68 (1862); Boston B. & G. R. Co. v. Wellington, 113 Mass. 79 (1873); St. Charles Manuf. Co. v. Britton, 2 Mo. App. 290 (1878); Clements v. Todd, 1 Ex. 268 (1847); *Compare* Bucher v. Dillsburgh & M. R. Co., 76 Pa. St. 306 (1874); Hawley v. Upton, 102 U. S. (12 Otto) 314 (1880); bk. 26 L. ed. 179.

articles are used for the purpose of obtaining subscriptions, and only one set is properly filed in the office of the secretary of state, the subscribers to the paper not so filed, do not become members of the corporation, and are not liable on their subscriptions.[1]

Sec. 43b. Same—Subscription in memorandum book.—It has been held that a subscription in a memorandum book is sufficient and binds the subscriber without such subscription being transferred to the corporate records, or accepted by the corporation.[2] But it is said by the United States circuit court in the case of McClelland v. Whiteley,[3] that a person cannot be held liable as a stockholder of a company, until his name has been signed by himself, or his authorized agent, in the book of the company kept for that purpose; and that writing one's name in a private memorandum book of a party soliciting subscriptions to the stock of the company, is not of itself authority to such person to sign a subscription for stock.

Sec. 43c. Same—Agreement to subscribe.—A mere agreement between persons to subscribe and pay for a certain amount of stock in a corporation is a valid contract, and enforceable by the corporation when it comes into being.[4]

[1] Erie & N. Y. City R. Co. v. Owen, 32 Barb. (N. Y.) 616 (1860).

[2] Buffalo & J. R. Co. v. Gifford, 87 N. Y. 294 (1882); Brownlee v. Ohio J. & J. R. Co., 18 Ind. 68 (1862.)

[3] 11 Biss. C. C. 444 (1883); s. c. 15 Fed. Rep. 322.

[4] Buffalo & J. R. Co. v. Gifford, 87 N. Y. 294 (1882); Dayton v. Borst, 31 N. Y. 435 (1865); Rensselaer & W. Plank Road Co. v. Barton, 16 N. Y. 457 (1857); Lake Ontario A. & N. Y. R. Co. v. Mason, 16 N. Y. 451 (1857); Eastern Plank Road Co. v. Vaughan, 14 N. Y. 546 (1856); Buffalo & N. Y. City R. Co. v. Dudley, 14 N. Y. 336 (1856); Hutchins v. Smith, 46 Barb. (N. Y.) 235 (1865); Union Turnpike Co. v. Jenkins, 1 Cai. (N. Y.) 381 (1803); Stanton v. Wilson, 2 Hill (N. Y.) 153 (1841); Harlem Canal Co. v. Seixas, 2 Hall (N. Y.) 504 (1829); Reformed Protestant Dutch Church v. Brown, 17 How. (N. Y.) Pr. 287 (1859); Buffalo & J. R. Co. v. Clark, 22 Hun (N. Y.) 359 (1880); Dutchess Cotton Manuf. Co. v. Davis, 14 Johns. (N. Y.) 238 (1817); s. c. 7 Am. Dec. 459; Highland Turnpike Co. v. McKean, 11 Johns. (N. Y.) 98 (1814); s. c. 6 Am. Dec. 324; Goshen & M. T. R. Co. v. Hurtin, 9 Johns. (N. Y.) 217 (1812); s. c. 6 Am. Dec. 273; Palmer v. Lawrence, 3 Sandf. (N. Y.) 161 (1849); Sagory v. Dubois, 3 Sandf. Ch. (N. Y.) 466 (1846); Valk v. Crandall, 1 Sandf. Ch. (N. Y.) 179 (1843); Spear

Sec. 43d. Same—When subscription void.—A subscription to the capital stock of a company is void if the object of incorporation, as expressed in the agreement, is illegal,[1] and all subscriptions which are made after the full amount of stock provided for in the act of incorporation has been subscribed for and taken are generally void.[2]

Sec. 43e. Same—Failure to pay ten per cent.—A subscription unaccompanied by the required ten per cent. of the par value in cash is void,[3] and a subscription taken in violation of the provision of the statute[4] cannot be enforced by the corporation.[5]

v. Crawford, 14 Wend. (N. Y.) 20 (1835); s. c. 28 Am. Dec. 513; Selma & T. R. Co. v. Tipton, 5 Ala. 787 (1843); s. c. 39 Am. Dec. 344; Beene v. Cawhaba & M. R. Co., 3 Ala. 660 (1842); Chater v. SanFrancisco Sugar Ref. Co., 19 Cal. 219 (1861); Hartford & N. H. R. Co. v. Kennedy, 12 Conn. 499 (1838); Kirksey v. Florida & G. Pl. R. Co., 7 Fla. 23 (1857); Stone v. Gt. Western Oil Co., 41 Ill. 85 (1866); Griswold v. Peoria University, 26 Ill. 41 (1861); Cross v. Pinckneyville Mill Co., 17 Ill. 54 (1855); Klein v. Alton, & S. R. Co., 13 Ill. 514 (1851); Banet v. Alton & S. R. Co., 13 Ill. 504 (1851); Drover v. Evans, 59 Ind. 454 (1877); Heaston v. Cincinnati & Ft. W. R. Co., 16 Ind. 275 (1861); s. c. 79 Am. Dec. 430; Nulton v. Clayton, 54 Iowa, 425 (1880); s. c. 37 Am. Rep. 213; Twin Creek & C. T. P. Co. v. Lancaster, 79 Ky. 552 (1881); Gill v. Kentucky & C. G. & S. Min. Co., 7 Bush (Ky.) 635 (1870); Cucullu v. Union Ins. Co., 2 Rob. (La.) 573 (1842); Penobscot R. Co. v. Dumer, 40 Me. 172 (1855); Athol Music Hall Co. v. Carey, 116 Mass. 471 (1875); People's Ferry Co. v. Balch, 74 Mass. (8 Gray) 303 (1857); Proprietors of the City Hotel of Worcester v. Dickinson, 72 Mass. (6 Gray) 586 (1856); Worcester Turnpike Corporation v. Willard, 5 Mass. 80 (1809); s. c. 4 Am. Dec. 39; Peninsular R. Co. v. Duncan, 28 Mich. 130 (1873); Ashuelot B. & S. Co. v. Hoit, 56 N. H. 548 (1876); Tar River Nav. Co. v. Neal, 3 Hawks (N. C.) 520 (1825); Weiss v. Mauch Chunk Iron Co., 58 Pa. St. 295 (1868); Edinboro Academy v. Robinson, 37 Pa. St. 210 (1860); s. c. 78 Am. Dec. 421; Rhey v. Ebensburg & S. P. R. Co., 27 Pa. St. 261 (1856); Robinson v. Edinboro Academy, 3 Grant Cas. (Pa.) 107 (1861); Thigpen v. Mississippi Cent. R. Co., 32 Miss. 347 (1856); Essex Bridge Co. v. Tuttle, 2 Vt. 393 (1830); Sanger v. Upton, 91 U. S. 56 (1875); bk. 23 L. ed. 220; Kidwelly Canal Co. v. Raby, 2 Price 93 (1816); West Cornwall R. Co. v. Mowatt, 15 Q. B. 521 (1850).

[1] Taylor's Law of Private Corporations, § 95.

[2] Lathrop v. Kneeland, 46 Barb. (N. Y.) 432 (1866); Machley's Case, L. R. 1 Ch. Div. 247 (1875.)

[3] Perry v. Hoadley, 19 Abb. (N. Y.) N. C. 76 (1887.)

[4] Supra, § 43.

[5] Excelsior Binder Co. v. Stayner, 25 Hun (N. Y.) 91 (1881); s. c. 61 How. (N. Y.) Pr. 456; 12 N. Y. Wk. Dig. 536; affirmed s. c. 58 How. (N. Y.) Pr. 273.

The subscription and the payment of the ten per cent. must both concur to satisfy the requirements of the statute.[1]

But the failure to pay the necessary percentage at the time of subscription furnishes the subscriber with no defence, on the principle that no man will be permitted to take advantage of his own wrong;[2] but this doctrine is questioned in Excelsior Grain Binder Co. v. Stayner.[3]

Sec. 43f. Same—Payment by check.—It is thought that the delivery of a check for the amount required to be paid in cash is not a payment "in cash" within the meaning of the statute.[4] A different view, however, seems to have been taken in the case of Thorp v. Woodhull;[5] but as this authority is subordinate to that pronouncing the judgment in the case of Durant v. Abendroth,[6] this doctrine cannot now be regarded as the law in this state.[7]

However it is thought that a subscription is not invalid because a short interval of time occurs between the actual signing of the subscription-book and the payment of the money.[8]

Sec. 43g. Same—Who may take subscriptions.—It has been said that a subscription to any one, except the commissioners provided for in section forty-three above is not binding.[9] It is thought, however, that subscriptions taken other than by said commissioners are valid and binding where attacked by

[1] Perry v. Hoadley, 19 Abb. (N. Y.) N. C. 76 (1887.)

[2] See Vicksburgh S. & T. R. Co. v. McKean, 12 La. An. 638; Henry v. Vermillion & A. R. Co., 17 Ohio, 187 (1848).

[3] 25 Hun, (N. Y.) 91 (1881); See Stephens v. Fox, 83 N. Y. 313, 316, 317 (1881).

[4] See Durant v. Abendroth, 69 N. Y. 148 (1877); s. c. 25 Am. Rep. 158.

[5] 1 Sandf. Ch. (N. Y.) 411 (1844).

[6] 69 N. Y. 148 (1877); s. c. 25 Am. Rep. 158.

[7] Excelsior Grain Binder Co. v. Stayner, 25 Hun, (N. Y.) 91 (1881); s. c. 61 How. (N. Y.) Pr. 456; 12 N. Y. Wk. Dig. 536; aff'g s. c. 58 How. (N. Y.) Pr. 273.

[8] Excelsior Grain Binder Co. v. Stayner, 25 Hun (N. Y.) 91 (1881); s. c. 61 How. (N. Y.) Pr. 456; 12 N. Y. Wk. Dig. 536; aff'g s. c. 58 How. (N. Y.) Pr. 273.

[9] Troy & B. R. Co. v. Tibbits, 18 Barb. (N. Y.) 297 (1854). See also Field v. Cooks, 16 La. An. 153 (1861); Parker v. Northern Cent. M. R. Co., 33 Mich. 23 (1875); Unity Ins. Co. v. Cram, 43 N. H. 636.

the corporation after reorganization.[1] But where subscriptions are taken by a person who has no authority from the corporation to take subscriptions they are not enforceable against the corporation.[2]

Sec. 43h. Same—Who may subscribe.—Any person competent to enter into ordinary contracts may make a valid subscription for stock in an incorporated company. Thus

1. An agent may make a valid subscription,[3] but where the agent making the subscription has no authority, it will be inoperative to bind the person sought to be charged, in the absence of any qualifying circumstances;[4] however, if such subscription be adopted and ratified, it will be valid and binding; but where the agent subscribing makes the sub-

[1] See Buffalo & J. R. Co. v. Gifford, 87 N. Y. 294 (1882). See also Buffalo & N. Y. City R. Co. v. Dudley, 14 N. Y. 336 (1856); Stuart v. Valley R. Co., 32 Gratt. (Va.) 146 (1879); Webster v. Upton, 91 U. S. (1 Otto) 65 (1875); bk. 23 L. ed. 384; Upton v. Tribilcock, 91 U. S. (1 Otto) 45 (1875); bk. 23 L. ed. 203.

[2] Troy & B. R. Co. v. Warren, 18 Barb. (N. Y.) 310 (1854); Essex Turnpike Corporation v. Collins, 8 Mass. 292 (1811); Carlisle v. Saginaw Val. & St. L. R. Co., 27 Mich. 315 (1873); Shurtz v. Schoolcraft & T. R. R. Co., 9 Mich. 269 (1861); Grangers' Market Co. v. Vinson, 6 Oreg. 174 (1876); Northeastern R. Co. v. Rodrigues, 10 Roch. (S. C.) L. 278 (1857); Howard's Case, L. R. 1 Ch. App. 561 (1866).

[3] Burr v. Wilcox, 22 N. Y. 551 (1860). See Drover v. Evans, 59 Ind. 454 (1877); Musgrave v. Morrison, 54 Md. 161 (1880); Grangers' Market Co. v. Vinson, 6 Oreg. 172 (1876); State v. Lehre, 7 Rich. (S. C.) L. 234 (1854); Hawley v. Upton, 102 U. S. (12 Otto) 314 (1880); bk. 26 L. ed. 179; Davidson v. Grange, 4 Grant's Ch. (U. C.) 377 (1854).

[4] Ticonic W. P. & M. Co. v. Lang, 63 Me. 480 (1874); Chapman's Case, L. R. 3 Eq. 361 (1867); Hennessey's Case, 3 DeG. & S. 191 (1850); Pim's Case, 3 DeG. & S. 11 (1849); Ex parte Hall, 1 McN. & G. 307 (1849).

[5] See Danbury & N. R. Co. v. Wilson, 22 Conn. 435 (1853); Thompson v. Reno Sav. Bank, (Dak.) 10 Am. & Eng. Corp. Cas. 203; Jones v. Milton & R. T. Co., 7 Ind. 547 (1856); Fry v. Lexington & B. S. R. Co., 2 Met. (Ky.) 314 (1859); Musgrave v. Morrison, 54 Md. 161 (1880); Mississippi & T. R. Co. v. Harris, 36 Miss. 17 (1858); Griswold v. Seligman, 72 Mo. 110 (1880); s. c. 4 Am. & Eng. R. R. Cas. 371; McHose v. Wheeler, 45 Pa. St. 32 (1863); McCully v. Pittsburg & C. R. Co., 32 Pa. St. 25 (1858); Philadelphia W. & B. R. Co. v. Cowell, 28 Pa. St. 329 (1857); Diman v. Providence W. & B. R. Co., 5 R. I. 130 (1858); Haslett v. Wotherspoon, 1 Strobh. (S. C.) Eq. 209 (1847); Hume v. Commercial Bank, 9 Lea. (Tenn.) 728 (1882); Moses v. Ocoee Bank, 1 Lea (Tenn.) 398 (1878); Rutland & B. R. Co. v. Lincoln, 29 Vt. 206 (1857); McClelland v. Whiteley, 11 Biss. C. C. 444

scription without authority, he will himself be liable thereon.[1]

2. Directors or other officers of the corporation may subscribe for shares of its capital stock.[2]

3. A married woman may subscribe,[3] and her separate estate alone will be liable for such subscription;[4] but where stock is entered on the company's books by authority of a director in the name of his wife, he afterwards voting and representing the stock, and it does not appear that she authorized or subsequently ratified his acts, or received any dividends from or claimed any interest in the stock, it is error to charge her separate estate with the debts of the company to the amount of the stock standing in her name.[5] The court say: "It may be that the husband and company would both be estopped from disputing Mrs. Pomeroy's ownership of the stock placed in her name under the circumstances above stated, but until she does some acts signifying her acceptance of the same, she is not to be regarded as the owner of the stock, and subject to the liabilities thence arising in favor of creditors.[6]"

This is not in conflict with the general doctrine that where the name of an individual appears on the stock-book of a corporation as a stockholder, the *prima facie* presumption is

(1883); Putnam v. City of New Albany, 4 Biss. C. C. 365 (1869); Sanger v. Upton, 91 U. S. (1 Otto) 56 (1875); bk. 23 L. ed. 220; In re Wincham S. B. & S. Co., L. R. 9 Ch. Div. 529 (1878); Fox v. Clifton, 6 Bing. 776 (1830).

[1] Union Hotel Co. v. Herse, 79 N. Y. 454 (1880); s. c. 35 Am. Rep. 536; Burr v. Wilcox, 22 N. Y. 551 (1860); Troy & B. R. Co. v. Warren, 18 Barb. (N. Y.) 310 (1854); Salem Milldam Corporation v. Ropes, 26 Mass. (9 Pick.) 187 (1829); State v. Smith, 48 Vt. 266 (1876); Cox's Case, 4 DeG. J. & S. 53 (1863).

[2] Sims v. Street R. Co., 37 Ohio St. 556 (1882); s. c. 4 Am. & Eng. R. R. Cas. 132.

[3] In re Reciprocity Bank, 22 N. Y. 9 (1860); Pugh & Sharman's Case, L. R. 13 Eq. 566 (1872); s. c. 41 L. J. Ch. 580; Butler v. Cumpston, L. R. 7 Eq. 16 (1868); Mrs. Matthewman's Case, L. R. 3 Eq. 781 (1866); Luard's Case, 1 DeG. F. & J. 533 (1860).

[4] Mrs. Matthewman's Case, L. R. 3 Eq. 781 (1866); Ness v. Angas, 3 Ex. 805 (1849); Biggart v. City of Glasgow Bank, 6 Rettie 607 (1879).

[5] Longdale Iron Co. v. Pomeroy Co., 34 Fed. Rep. 448 (1888); s. c. 4 Ry. & Corp. L. J. 83.

[6] Distinguishing Turnbull v. Payson, 95 U. S. (5 Otto) 418 (1877); bk. 24 L. ed. 437.

that he is the owner of the stock, in a case where there is nothing to rebut that presumption; and, in an action against him as a stockholder, the burden of proving that he is not a stockholder, or of rebutting that presumption, is cast upon the defendant.[1]

4. A municipal corporation is competent to subscribe for stock.[2]

5, A partner acting within the scope of the partnership business may subscribe for stock in a private corporation and bind the firm thereby.[3] Where the act is not within the scope of the partnership business, the firm will not be liable; but the party signing will be liable personally. Whether or not the subscription is within the scope of the partnership business, is a question for the jury.[4]

6. A corporation cannot subscribe for its own stock.[5]

[1] Hoagland v. Bell, 36 Barb. (N. Y.) 57 (1861); Hamilton & D. Plank Road v. Rice, 7 Barb. (N. Y.) 162 (1849); Mudgett v. Hoyrell, 33 Cal. 25 (1867); Merrill v. Walker, 24 Me. 237 (1844); Coffin v. Collins, 17 Me. 440 (1840); Rockville & W. Turnpike Road v. Van Ness, 2 Cr. C. C. 451 (1824).

[2] Commissioners of Walker v. Devereaux, 4 Paige Ch. (N. Y.) 229 (1833); Sharpless v. Mayor, 21 Pa. St. 147 (1853); s. c. 59 Am. Dec. 759.

[3] Union Hotel Co. v. Hersee, 79 N. Y. 454 (1880); s. c. 35 Am. Rep. 536; Ogdensburgh R. & C. R. Co. v. Frost, 21 Barb. (N. Y.) 541 (1856); Maltby v. Northwestern Va. R. Co., 16 Md. 422 (1860.)

[4] Union Hotel Co. v. Hersee, 79 N. Y. 454 (1880); s. c. 35 Am. Rep. 536.

[5] Nassau Bank v. Jones, 95 N. Y. 115 (1884); s. c. 47 Am. Rep. 14; Talmage v. Pell, 7 N. Y. 328 (1852); Central R. & B. Co. v. Smith, 76 Ala. 572 (1884); s. c. 52 Am. Rep. 353; Wheeler v. San Francisco & A. R. Co., 31 Cal. 46 (1866); s. c. 89 Am. Dec. 147; Mechanics' Bank v. Meriden Agency, 24 Conn. 159 (1855); New Orleans Steamship Co. v. Dry Dock Co., 28 La. An. 173 (1876); Franklin Co. v. Lewiston Sav. Bank, 68 Me. 43 (1877); s. c. 28 Am. Rep. 9; Elysville Co. v. Okisko Co., 1 Md. Ch. 392 (1849); s. c. aff'd 5 Md. 152; Downing v. Mt. Washington R. Co., 40 N. H. 230 (1860); First Nat. Bank of Charlotte v. National Exchange Bank of Baltimore, 92 U. S. (2 Otto) 122 (1875); bk. 23 L. ed. 679; Pearce v. Madison & I. R. Co., 62 U. S. (21 How.) 441 (1858); bk. 16 L. ed. 184; Sumner v. Marcy, 3 Woodb. & M. C. C. 105 (1847); Royal Bank of India's Case, L. R. 4 Ch. App. 252 (1869); Joint Stock Co. v. Brown, L. R. 8 Eq. 381 (1869); Maunsell v. Midland Gt. W. R. Co., 1 Hem. & M. 130 (1863); Preston v. Grand Collier Dock Co., 11 Sim. 327 (1840), and an infant's subscription to the capital stock of a corporation is void unless ratified after coming of age; Baker's Case, L. R. 7 Ch. App. 115 (1871); Ebbett's Case, L. R. 5 Ch.

7 An infant may subscribe; but where an infant has subscribed for stock, the corporation may repudiate his subscription after accepting it, in the absence of an equitable, estoppel on learning of the disability.[1] If the infant wishes to repudiate the subscription he must do so within a reasonable time after coming of age.[2] Where one subscribes in the name of an infant, he is personally liable on such subscription.[3]

Sec. 43i. Same—Irregularity and informality.—In general a contract by subscription to the capital stock of a corporation may be made in any way in which other simple contracts may be lawfully made,[4] and mere irregularities of form or informalities in the manner of subscription are not, as a rule, sufficient to release a subscriber;[5] such as the use of subscription papers instead of a book.[6] However, there are instances in

App. 302 (1870); Lumsden's Case, L. R. 4 Ch. App. 31 (1868); Mitchell's Case, L. R. 9 Eq. 363 (1870); Wilson's Case, L. R. 8 Eq. 240 (1869); Hart's Case, L. R. 6 Eq. 512 (1868); Maguire's Case, 3 DeG. & S. 31 (1849); Reaveley's Case, 1 DeG. & S. 550 (1848).

[1] Symon's Case, L. R. 5 Ch. App. 298 (1870); Castello's Case, L. R. 8 Eq. 504 (1869). See Parson's Case, L. R. 8 Eq. 656 (1869).

[2] See Beardsley v. Hotchkiss, 96 N. Y. 201 (1884); Mitchell's Case, L. R. 9 Eq. 363 (1870); Curtis' Case, L. R. 6 Eq. 455 (1868); Dublin & W. R. Co. v. Black, 8 Exch. 181 (1852); s. c. 7 Eng. Railway & Canal Cases, 434; Cork & B. R. Co. v. Cazenove, 10 Q. B. 935 (1847).

[3] Roman v. Fry, 5 J. J. Marsh. (Ky.) 634 (1831); Castleman v. Holmes, 4 J. J. Marsh. (Ky.) 1 (1830); Symon's Case, L. R. 5 Ch. App. 298 (1870); Capper's Case, L. R. 3 Ch. 458 (1868); Richardson's Case, L. R. 19 Eq. 588 (1875); Pugh & Sharman's Case, L. R. 13 Eq. 566 (1872); s. c. 41 L. J. Ch. 580; Castello's Case, L. R. 8 Eq. 504 (1869); Reid's Case, 24 Beav. 318 (1857); Reaveley's Case, 1 DeG. & S. 550 (1848); Clements v. Bowes, 1 Drew 684 (1853); Ex parte Reaveley, 1 Hall & T. W. 118 (1849).

[4] See Penobscot & K. R. Co. v. Bartlett, 78 Mass. (12 Gray) 244 (1858); s. c. 71 Am. Dec. 753.

[5] Cayuga Lake R. Co. v. Kyle, 64 N. Y. 185 (1876); Fry v. Lexington & B. S. R. Co., 2 Met. (Ky.) 314 (1859); Mexican Gulf R. Co. v. Viavant, 6 Rob. (La.) 305 (1843); Boston B. & G. R. Co. v. Wellington, 113 Mass. 79 (1873); Oaks v. Turquand, L. R. 2 H. L. 325 (1867).

[6] Hamilton & Deansville P. R. Co. v. Rice, 7 Barb. (N. Y.) 157 (1849); St. Charles Manuf. Co. v. Britton, 2 Mo. App. 290 (1878); Ashtabula & N. L. R. Co. v. Smith, 15 Ohio St. 328 (1864); Clark v. Continental Improvement Co., 57 Ind. 135 (1877); Brownlee v. Ohio I. & I. R. Co., 18 Ind. 68 (1862).

which informalities are held to be sufficient to destroy the validity of the undertaking, and to release the subscriber from his obligation thereunder; such as a subscription to an incomplete copy of the association,[1] or to articles which are materially altered without the consent of all the subscribers, after their subscriptions are taken, and before the complete organization of the company; in such case they are not binding upon the non-consenting subscribers.[2] And where the subscription is to a paper in which the names of the directors were left blank, it will not be enforceable against a subscriber after the blank has been filed without his consent or concurrence.[3]

Sec. 43j. Same—Statutory regulation.—It has been said that where the statute regulates the manner of forming the contract of subscription, non-conformity with the statutory regulations will not necessarily vitiate the subscription,[4] if there is a substantial compliance, in good faith, with the provisions of the charter, or with the act of incorporation regulating the manner of subscribing.[5]

[1] Dutchess & Col. Co. R. Co. v. Mabbett, 58 N. Y. 397 (1874); Bucher v. Dillsburg & M. R. Co., 76 Pa. St. 307 (1874).

[2] Burrows v. Smith, 10 N. Y. 550 (1853); Eakright v. Logansport & N. J. R. Co., 13 Ind. 404 (1859); Tilsonburg, etc., R. Co. v. Goodrich, 8 Ont. Q. B. Div. 565 (1885). But see Reed v. Richmond St. R. Co., 50 Ind. 342 (1875); Kansas City Hotel Co. v. Hunt, 57 Mo. 126 (1874).

[3] Dutchess & Col. Co. R. Co. v. Mabbett, 58 N. Y. 397 (1874); Consols Ins. Co. v. Newall, 3 Fost. & F. 130 (1862). See Clark v. Continental Improvement Co., 57 Ind. 135 (1877); Sewell v. Eastern R. Co., 63 Mass. (9 Cush.) 5 (1851); Carlisle v. Saginaw Val. & St. L. R. Co., 27 Mich. 315 (1873); Parker v. Northern C. M. R. Co., 33 Mich. 23 (1875); St. Paul, S. & T. F. R. Co. v. Robbins, 23 Minn. 439 (1877). *Compare*, Trasher v. Pike Co. R. Co., 25 Ill. 393 (1861).

[4] Peninsular R. Co. v. Duncan, 28 Mich. 130 (1873); Gunn's Case, L. R. 3 Ch. Div. 40 (1861); Wolverhampton N. W. Co. v. Hawksford, 11 C. B. N. S. 456 (1861); London & B. R. Co. v. Fairclough, 2 Man. & G. 674 (1841); London G. T. R. Co. v. Freeman, 2 Man. & G. 606 (1841); Birmingham B. & T. J. R. Co. v. Locke, 1 Q. B. 256 (1841).

[5] Buffalo & Jamestown R. Co. v. Gifford, 87 N. Y. 294 (1882); People v. Stockton & V. R. Co., 45 Cal. 306 (1873); s. c. 13 Am. Rep. 176; Harris v. McGregor, 29 Cal. 124 (1865); Brownlee v. Ohio I. & I. R. Co., 18 Ind. 68 (1862); Ashtabula & N. L. R. Co. v. Smith, 15 Ohio St. 328 (1864). See Hamilton & D. P. R. Co. v. Rice, 7 Barb. (N. Y.) 157 (1849); Woodruff v. McDonald, 33 Ark. 97 (1878); Mexican Gulf R. Co.

Sec. 43k. Same—Implied promise to pay.—A subscription to the capital stock of a corporation implies a promise to pay the amount subscribed, and an express promise in terms to pay is not necessary.[1] In such a case the subscriber assumes to pay for the stock in the mode prescribed by[2] and according to the conditions of the charter.[3]

v. Viavant, 6 Rob. (La.) 305 (1843); Stuart v. Valley R. Co., 32 Gratt. (Va.) 146 (1879).

[1] Rensselaer & W. Plankroad Co. v. Barton, 16 N. Y. 457 note (1854); Van Cott v. Van Brunt, 2 Abb. (N. Y.) N. C. 283 (1877); Chouteau v. Dean, 7 Mo. App. 210 (1880); Shickle v. Watts, 94 Mo. 410 (1888); s. c. 13 West Rep. 631; 7 S. W. Rep. Dayton v. Borst, 31 N. Y. 435 (1865); Lake Ontario, Auburn & N. Y. R. Co. v. Mason, 16 N. Y. 451 (1857); Small v. Herkimer Manuf. Co., 2 N. Y. 330 (1849); Northern R. R. Co. v. Miller, 10 Barb. (N. Y.) 260, 268 (1851); Beene v. Cahawba & M. R. Co., 3 Ala. 660 (1842); Mitchell v. Beckman, 64 Cal. 117 (1883); Miller v. Wildcat G. R. Co., 52 Ind. 51 (1875). *See* Reed v. Richmond Street R. Co., 50 Ind. 342 (1875); Nulton v. Clayton, 54 Iowa 425 (1880); s. c. 37 Am. Rep. 213; Waukon & M. R. Co. v. Dwyer, 49 Iowa 121 (1878); Mt. Sterling C. Co. v. Little, 14 Bush. (Ky.) 429 (1879); Gill v. Kentucky & C. G. & S. M. Co., 7 Bush. (Ky.) 635 (1870); Fry v. Lexington & B. S. R Co., 2 Met. (Ky.) 314 (1859); Dexter & M. P. R. Co. v. Millerd, 3 Mich. 91 (1854); Chase v. E. T., Va. & Ga. R. Co., 5 Lea. (Tenn.) 415 (1880); Merrimac M. Co. v. Levy, 54 Pa. St. 227 (1867); Hawley v. Upton, 102 U. S. (12 Otto) 314; bk. 26 L. ed. 179 (1880); Upton v. Tribilcock, 91 U. S. (1 Otto) 45; bk. 23 L. ed. 203 (1875); Webster v. Upton, 91 U. S. (1 Otto) 65; bk. 23 L. ed. 384 (1875). See Seymour v. Sturgess, 26 N. Y. 134 (1862); Townsend v. Goewey, 19 Wend. (N. Y.) 424 (1838); s. c. 32 Am. Dec. 514; Russell v. Bristol, 49 Conn. 251 (1881); Oddfellows Hall Co. v. Glazier, 5 Harv. (Del.) 172 (1848); Proprietors of City Hall v. Dickinson, 72 Mass. (6 Gray) 586 (1856); Essex T. Co. v. Collins, 8 Mass. 292 (1811); New Hampshire C. R. Co. v. Johnson, 30 N. H. (1855); s. c. 64 Am. Dec. 300; Stokes v. Lebanon & S. T. Co., 6 Humph. (Tenn.) 241 (1845). See also Belfast & M. L. R. Co. v. Cotterell, 66 Me. 185 (1876); Belfast & M. L. R. Co. v. Moore, 60 Me. 561 (1872); Buckfield Br. R. Co. v. Irish, 39 Me. 44 (1854); Kennebec & P. R. Co. v. Kendall, 31 Me. 470 (1850); Katama Land Co. v. Jeregann, 126, Mass. 156 (1879); Mechanics' F. & M. Co. v. Hall, 121 Mass. 272 (1876); Boston B. & G. R. Co. v. Wellington, 113 Mass. 79 (1873); Atlantic Cotton Mills v. Abbott, 63 Mass. (9 Cush.) 423 (1852); Andover & M. Turnpike Corporation v. Gould, 6 Mass. 40 (1809); s. c. 4 Am. Dec. 80; Connecticut & P. R. R. Co. v. Bailey, 24 Vt. 465 (1852); s. c. 58 Am. Dec. 181.

[2] See Fry. v. Lexington & B. S. R. Co., 2 Met. (Ky.) 314 (1859).

[3] Rensselaer & W. Plankroad Co. v. Barton, 16 N. Y. 457 note (1854). See Ogdensburgh, R. & C. R. Co. v. Frost, 21 Barb. (N. Y.) 541 (1856); Danbury & N. R. Co. v. Wilson, 22 Conn. 435 (1853); Macon &, A. R.

It has been said that where a man contracts to take shares of the stock of an incorporated company he must pay for them "in meal or malt;" that is, he must either pay in money or money's worth; and if he pays in one or the other that will be satisfaction in the absence of conflicting statutory regulations.[1]

Sec. 431. Same—Conditional subscription.—A subscription, before incorporation, to the capital stock of a company, in New York and some other states, is void where a condition is attached, and cannot be enforced either by the corporation or by the subscriber;[2] but it is thought that a conditional subscription made after incorporation is valid and will be upheld.[3]

Co. v. Vason, 57 Ga. 314 (1876); Peoria & O. R. Co. v. Elting, 17 Ill. 429 (1856); Buckfield B. R. Co. v. Irish, 39 Me. 44 (1854); Proprietors of City Hotel v. Dickinson, 72 Mass. (6 Gray) 586 (1856); White Mts. R. Co. v. Eastman, 34 N. H. 147 (1856).

[1] Drumond's Case, L. R. 4 Ch. App. 772 (1869). See Lorillard v. Clyde, 86 N. Y. 384 (1881); Van Cott v. Van Brunt, 82 N. Y. 535 (1880); Fletcher v. McGill, 110 Ind. 395 (1887); s. c. 8 West. Rep. 525; 10 N. E. Rep. 651; Coffin v. Ransdell, 110 Ind. 417 (1887); s. c. 11 N. E. Rep. 20; 9 West. Rep. 33; State v. Bailey, 16 Ind. 46 (1861); Cincinnati T. & C. R. Co. v. Clarkson, 7 Ind. 595 (1856); Crawford v. Rohrer, 59 Md. 599 (1882); Liebke v. Knapp, 79 Mo. 22 (1883); s. c. 49 Am. Rep. 212; Pittsburgh & C. R. Co. v. Stewart, 41 Pa. St. 54 (1861); Philadelphia & W. C. R. Co. v. Hickman, 28 Pa. St. 318 (1857); Carr v. LeFevre, 27 Pa. St. 413 (1856); Foster v. Seymour, 23 Blatchf. C. C. 107 (1885); s. c. 23 Fed. Rep. 65; 6 Am. & Eng. Corp. Cas. 533; Foreman v. Bigelow, 4 Cliff. C. C. 508 (1878); Phelan v. Hazard, 5 Dill. C. C. 45 (1878); Spargo's Case, L. R. 8 Ch. App. 407 (1873); Pell's Case, L. R. 5 Ch. App. 11 (1869); Re Baglan Hall Colliery Co., L. R. 5 Ch. App. 346 (1870); Re Cape Breton Co., 50 L. R. N. S. 390 ( ).

[2] Troy & B. R. Co. v. Tibbits, 18 Barb. (N. Y.) 297 (1854). See also Chamberlain v. Painesville & H. R. Co., 15 Ohio St. 225 (1864); Boyd v. Peach Bottom R. Co., 90 Pa. St. 169 (1879); Caley v. Philadelphia & C. C. R. Co., 80 Pa. St. 363 (1876).

[3] See Union Hotel Co. v. Hersee, 79 N. Y. 454 (1880); s. c. 35 Am. Rep. 536; Burrows v. Smith, 10 N. Y. 550 (1853): Morris Canal & Banking Co. v. Nathan, 2 Hall (N. Y.) 239 (1829); New Albany & S. R. Co. v. McCormick, 10 Ind. 499 (1858); McMillan v. Maysville & L. R. Co., 15 B. Mon. (Ky.) 218 (1854); s. c. 61 Am. Dec. 181; Ashtabula & N. L. R. Co. v. Smith, 15 Ohio St. 328 (1864). Except it be in those cases where from any reason the condition is contrary to public policy. See Lake Ontario Shore R. Co. v. Curtiss, 80 N. Y. 219 (1880); Fort Edward & Fort Miller Plankroad Co. v. Payne, 15 N. Y. 583 (1857); Macedon & Bristol Plankroad Co. v. Snediker,

While there are some conditional subscriptions to stock which have been held to be invalid, it is thought that any condition which can be legally performed or complied with by the corporation will be upheld.[1]

Sec. 43m. Same—Condition precedent.— It is thought that in all subscriptions to the capital stock of a corporation it is an implied condition precedent that the capital fixed by the charter shall be fully subscribed before liability on the subscription attaches.[2]

Sec. 43n. Same—Condition subsequent.—Subscriptions to the capital stock of a corporation, on a condition subsequent, contain a contract by and between the corporation and the subscriber and are upheld by the courts.[3]

18 Barb. (N. Y.) 317 (1854); Butternuts & Oxford Turnpike Co. v. North, 1 Hill (N. Y.) 518 (1841); Dix v. Shaver, 14 Hun, (N. Y.) 392 (1878) (dictum).

[1] See Penobscot & K. R. Co. v. Dunn, 39 Me. 587 (1855). Thus, subscriptions may be legally conditioned as to the time, manner, or means of payment. Van Allen v. Illinois Cent. R. Co., 7 Bosw. (N. Y.) 515 (1861); Highland Turnpike Co. v. McKean, 11 Johns. (N. Y.) 98 (1814); s. c. 6 Am. Dec. 324; Smith v. Tallassee B. P. R. Co., 30 Ala. 650 (1857); People v. Chambers, 42 Cal. 201 (1871); Mitchell v. Rome R. R. Co., 17 Ga. 574 (1855); Swatara R. Co. v. Brune, 6 Gill (Md.) 41 (1847); Milwaukee & N. J. R. Co. v. Field, 12 Wis. 340 (1860).

[2] See Bray v. Farwell, 81 N. Y. 607 (1880); Allman v. Havana R. & E. R. Co., 88 Ill. 521 (1878); Peoria & R. I. R. Co. v. Preston, 35 Iowa 121 (1872); Stoneham Branch R. Co. v. Gould, 68 Mass. (2 Gray) 278 (1854). See also Santa Cruz R. Co. v. Schwartz, 53 Cal. 106 (1878); New York, H. & N. R. Co. v. Hunt, 39 Conn. 75 (1872); Hoagland v. Cincinnati & F. W. R. Co., 18 Ind. 452 (1862); Topeka B. Co. v. Cummings, 3 Kan. 55 (1864); Shurtz v. Schoolcraft & T. R. R. Co., 9 Mich. 269 (1861); Hughes v. Antietam Manuf. Co., 34 Md. 332 (1871); Cabot & W. S. B. Co. v. Chapin, 60 Mass. (6 Cush.) 50 (1850); Salem Mill Dam Co. v. Ropes, 23 Mass. (6 Pick.) 23 (1827); s. c. 26 Mass. (9 Pick.) 187; Swartwout v. Michigan Air Line R. Co., 24 Mich. 390 (1872); Selma, M. & M. R. Co. v. Anderson, 51 Miss. 829 (1876); Livesey v. Omaha Hotel Co., 5 Neb. 50 (1876); Hale v. Sanborn, 16 Neb. 1 (1884); Fox v. Clifton, 6 Bing. 776 (1830); Wontner v. Shairp, 4 C. B. 404, 440 (1847); Norwich Nav. Co. v. Theobald, 1 Moody & M. 151 (1828); Pitchford v. Davis 5 M. & W. 2 (1839).

[3] Swartout v. Michigan Air Line R. Co., 24 Mich. 389 (1872); Chamberlain v. Painesville & H. R. Co., 15 Ohio St. 225 (1864). See Lane v. Brainerd, 30 Conn. 565 (1862); Henderson & N. R. Co. v. Leavell, 16 B. Mon. (Ky.) 358 (1855.)

Sec. 43o. Same—Conditions in charter.—Where the charter of a corporation requires certain acts to be performed before the shareholders shall become liable upon their subscription, the performance of such acts is a condition precedent to the liability of the shareholders upon their stock subscriptions.[1]

Sec. 43p. Same—Parol agreements.—It has been said that a defendant who is sued on a subscription absolute may show that he agreed, orally, to subscribe conditionally, and placed his name on blank paper, and that subsequently an officer of the corporation, without his knowledge, transferred his name to the subscription paper;[2] but the better opinion is that parol evidence of contemporaneous negotiations stipulating terms or agreements is not admissible to change a subscription contract absolute on its face, on the principle forbidding the introduction of parol evidence to explain, contradict, or vary a written instrument.[3]

[1] Carlisle v. Cahawaba & M. R. Co., 4 Ala. 76 (1842). See White Mts. R. Co. v. Eastman, 34 N. H. 134.

[2] See Brewers Fire Ins. Co. v. Burger, 10 Hun, (N. Y.) 56 (1877); Tonica & P. R. Co. v. Stein, 21 Ill. 96 (1859); Bucher v. Dillsburgh & M. R. Co., 76 Pa. St. 306 (1874).

[3] See, as bearing upon this point, Kelsey v. Northern Light Oil Co., 45 N. Y. 505 (1871); Phœnix Warehousing Co. v. Badger, 6 Hun, (N. Y.) 293 (1875); aff'd 67 N. Y. 294; Smith v. Tallassee Branch of C. P. R. Co., 30 Ala. 650 (1857); Mississippi & R. R. O. R. Co. v. Cross, 20 Ark. 443 (1859); Ridgefield & N. Y. R. Co. v. Brush, 43 Conn. 86 (1875); Litchfield Bank v. Church, 29 Conn. 137 (1860); Mann v. Cook, 20 Conn. 178 (1849); Union Ins. Co. v. Frear S. Manuf. Co. 97 Ill. 537 (1881); Melvin v. Lamar Ins. Co., 80 Ill. 446 (1875); s. c. 22 Am. Rep. 199; Corwith v. Culver, 69 Ill. 502 (1873); Cleveland Iron Co. v. Ennon, (Ill.) (1886); 12 Am. & Eng. Corp. Cas. 88; Miller v. Wildcat Gravel Road Co., 52 Ind. 51 (1875); s. c. 57 Ind. 241; Cincinnati U. & F. W. R. Co. v. Pearce, 28 Ind. 502 (1867); Brownlee v. O. I. & Ill. R. Co., 18 Ind. 68 (1862); Eakright v. Logansport & N. I. R. Co., 13 Ind. 404 (1859); Carlisle v. Evansville I. & C. S. L. R. Co., 13 Ind. 447 (1859); Evansville I. & C. S. L. R. Co. v. Posey, 12 Ind. 363 (1859); Keller v. Johnson, 11 Ind. 337 (1858); s. c. 71 Am. Dec. 355; New Albany & S. R. Co. v. Fields, 10 Ind. 187 (1858); New Albany & S. R. Co. v. Slaughter, 10 Ind. 218 (1858); Clem v. New Castle & D. R. Co., 9 Ind. 488 (1857); s. c. 68 Am. Dec. 653; Goff v. Hawkeye & W. M. Co., 62 Iowa, 691 (1883); Gelpcke v. Blake, 15 Iowa, 387 (1863); s. c. 83 Am. Dec. 418; Wight v. Shelby R. Co., 16 B. Mon. (Ky.) 4 (1855); s. c. 63 Am. Dec. 522; Peychand v. Hood, 23 La. An. 732 (1871); Saffold v. Barnes, 39 Miss. 399 (1860); Ellison v. Mobile & O. R. Co., 36 Miss. 572 (1858); Thigpen v. Mississippi Cent. R. Co.,

Sec. 43q. Same—Frauds in subscription for stock—Signing a fictitious name.—Under the New York Penal Code,[1] it is a misdemeanor for a person to sign the name of a fictitious person to a subscription for stock, or the name of a genuine person to such subscription, knowing that such person does not intend in good faith to comply with the terms thereof.

Sec. 43r. Same—Effect on subscription.—A contract of subscription to the capital stock of a corporation procured through fraud cannot be enforced against the subscriber.[2] Such a subscription, however, is valid until disaffirmed;[3] but the party to secure relief, must act promptly in disaffirming the contract after the knowledge of the fraud is brought home to him.[4]

32 Miss. 347 (1856); Chouteau Ins. Co. v. Floyd, 74 Mo. 286 (1881); Gill v. Balis, 72 Mo. 424 (1880); La Grange & M. P. R. Co. v. Mays, 29 Mo. 64 (1859); Piscataqua Ferry Co. v. Jones, 39 N. H. 491 (1859); White Mts. R. Co. v. Eastman, 34 N. H. 124 (1856); Braddock v. Philadelphia M. & M. R. Co., 45 N. J. L. (16 Vr.) 363 (1883); Wetherbee v. Baker, 35 N. J. Eq. (8 Stew.) 501 (1882); North Carolina R. Co. v. Leach, 4 Jones' (N. C.) L. 340 (1857); Henry v. Vermillion & A. R. Co., 17 Ohio 187 (1848); Noble v. Callender, 20 Ohio St. 199 (1870); Bates v. Lewis, 3 Ohio St. 459 (1854); Miller v. Hanover Junction & S. R. Co., 87 Pa. St. 95 (1878); s. c. 30 Am. Rep. 349; Custar v. Titusville Gas & Water Co., 63 Pa. St. 381 (1869; Robinson v. Pittsburgh & C. R. Co., 32 Pa. St. 334 (1858); s. c. 72 Am. Dec. 792; Graff v. Pittsburgh & S. R. Co., 31 Pa. St. 489 (1858); Crossman v. Penrose Ferry B. Co., 26 Pa. St. 69 (1856); Kishacoquillas & C. T. P. R. Co. v. McConaby, 16 Serg. & R. (Pa.) 140 (1827); East Ten. & Va. R. Co. v. Gammon, 5 Sneed, (Tenn.) 567 (1858); Stewards of M. E. Church v. Town, 49 Vt. 29 (1876); Connecticut & P. Rivers R. Co. v. Bailey, 24 Vt. 465 (1852); s. c. 58 Am. Dec. 181; Blodgett v. Morrill, 20 Vt. 509 (1848); Downie v. White, 12 Wis. 176 (1860); s. c. 78 Am. Dec. 731; Upton v. Tribilcock, 91 U. S. (1 Otto.) 45 (1875); bk. 23 L. ed. 203; Minor v. Mechanics' Bank of Alexandria, 26 U. S. (1 Pet.) 46 (1828); bk. 7 L. ed. 47; Payson v. Withers, 5 Biss. C. C. 269 (1873); Davidson's Case, 3 DeG. & S. 21 (1849); Bridger's Case, L. R. 9 Eq. 74 (1869); Mangles v. Grand Collier Dock Co., 10 Sim. 519 (1840). *Compare*, Rives v. Montgomery, S. P. R. Co., 30 Ala. 92 (1857); Mahan v. Wood, 44 Cal. 462 (1872).

[1] Sec. 590.

[2] See New Orleans O. & G. W. R. Co. v. Williams, 16 La. An. 315 (1861); Hester v. Memphis & C. R. Co., 32 Miss. 378 (1856); Upton v. Tribilcock, 91 U. S. (1 Otto.) 45 (1875); bk. 23 L. ed. 203; Burnes v. Pennell, 2 H. L. Cas. 497 (1849); Atkinson v. Pocock, 12 Jur. 60 (1848); Reese River S. M. v. Smith Co. L. R. 4 H. L. 64 (1869).

[3] Upton v. Englehart, 3 Dill. C. C. 496 (1874).

[4] Dynes v. Shaffer, 19 Ind. 165

Where a party seeks to rescind a contract of subscription for fraud, he must show that he was not misled by his own negligence or he cannot obtain relief;[1] but one who is a party to the fraudulent contract cannot be discharged from liability because of such fraud.[2]

Sec. 43s. Same—False and fraudulent representations.—Where subscriptions are procured through false and fraudulent representations of the agents or officers of the company they are void.[3]

The general rule that parol representations are inadmissible to vary the terms of a written agreement of subscription,[4] is not applicable to those representations which amount to fraud on the part of the company, were made at the time of subscribing, and were the inducements by means of which the subscription was obtained.[5] In such cases, however, parol

(1862); Hughes v. Antietam Manuf. Co., 34 Md. 316 (1870); Cunningham v. Edgefield & Ky. R. Co., 2 Head, (Tenn.) 23 (1858); Upton v. Tribilcock, 91 U. S. (Otto.) 45 (1875); bk. 23 L. ed. 203; Upton v. Hansbrough, 3 Biss. C. C. 417 (1873). See Kishacoquillas & Center Turnpike Co. v. McConaby, 16 Serg. & R. (Pa.) 140 (1827); Re Hop. & Malt Exchange & W. Co., L. R. 1 Eq. 483 (1866).

[1] Upton v. Englehart, 3 Dill. C. C. 496 (1874); Oaks v. Turquand, L. R. 2 H. L. 325 (1867).

[2] See Perkins v. Savage, 15 Wend. (N. Y.) 412 (1836); Litchfield Bank v. Church, 29 Conn. 137 (1860); Mann v. Cooke, 20 Conn. 178 (1850); Southern Plank Road Co. v. Hixon, 5 Ind. 166 (1854); Graff v. Pittsburgh & S. R. Co., 31 Pa. St. 489 (1858).

[3] See Montgomery S. R. Co. v. Matthews, 77 Ala. 357 (1884); s. c. 54 Am. Rep. 60; Anderson v. Newcastle & R. R. Co., 12 Ind. 376 (1859); s. c. 74 Am. Dec. 218; Vreeland v. New Jersey Stone Co., 29 N. J. Eq. (2 Stew.) 188 (1878); Ex parte Linger, 5 Irish Chan. Rep. N. S. 174; National Exchange Co. v. Drew, (1855); 32 Eng. L. & Eq. 1; Directors of Central R. Co. v. Kisch, L. R. 2 H. L. App. Cas. 99 (1867); Henderson v. Lacon, L. R. 5 Eq. Cas. 249 (1868); Western Bank of Scotland v. Addie, L. R. 1 Sc. App. Cas. 145 (1867).

[4] See Smith v. Plank Road Co., 30 Ala. 650 (1857); Mississippi, O. & R. R. Co. v. Cross, 20 Ark. 343 (1859); Goodrich v. Reynolds, 31 Ill. 490 (1863); s. c. 83 Am. Dec. 490; Connecticut & P. R. R. Co. v. Bailey, 24 Vt. 465 (1852); s. c. 58 Am. Dec. 181; Ogilvie v. Knox Ins. Co., 63 U. S. (22 How.) 380; bk. 16, L. ed. 349 (1859).

[5] Rives v. Montgomery S. Plank Road Co., 30 Ala. 92 (1857); Martin v. Pensacola & G. R. Co., 8 Fla. 370 (1859); s. c. 73 Am Dec. 713; Miller v. Wildcat Gravel Road Co., 57 Ind. 241 (1877); Davis v. Dumont, 37 Iowa, 47 (1873); Kennebec & P. R. Co. v. Waters, 34 Me. 369 (1852);

evidence is not introduced for the purpose of varying or contradicting the contract, but to show that no contract was properly formed.[1]

A misrepresentation amounting to a false or fraudulent representation is any statement made by the authorized agents of a corporation in regard to the past or present status of the enterprise or material matters connected therewith, whereby subscriptions are obtained; such as that a certain amount of stock has been subscribed for;[2] that the directors have subscribed for stock;[3] that the corporation owns certain property;[4] that the property is unincumbered,[5] or that the corporation is solvent and prosperous.[6]

But it is said that a false and even fraudulent representation, made to a subscriber at the time of subscription as to the legal effect of his contract of subscription, will not vitiate the subscription,[7] because a subscriber is bound to know the legal effect of his subscription.[8]

Water Valley Manuf. Co. v. Seaman, 53 Miss. 655 (1876); Ellison v. Mobile & O. R. Co., 36 Miss. 572 (1858); Piscataqua Ferry Co. v. Jones, 39 N. H. 491 (1859); Vreeland v. New Jersey Stone Co., 29 N. J. Eq. (2 Stew.) 188 (1878); Custar v. Titusville Gas & Water Co,, 63 Pa. St. 381 (1869); East Tennessee V. R. Co. v. Gammon, 5 Sneed (Tenn.) 567 (1858); Blodgett v. Morrill, 20 Vt. 509 (1848); Crump v. United States Mining Co., 7 Gratt. (Va.) 352 (1851); s. c. 56 Am. Dec. 116.

[1] New York Exchange Co. v. De Wolf, 31 N. Y. 273 (1865); Jewett v. Valley R. Co., 34 Ohio St. 601 (1878).

[2] Ross v. Estate's Investment Co., L. R. 3 Ch. App. 682 (1868); Henderson v. Lacon, L. R. 5 Eq. Cas. 249 (1868); that certain individuals are directors. Blake's Case, 34 Beav. 639 (1865); Hallows v. Fernie, L. R. 3 Ch. App. 467 (1868); Munster's Case, 14 W. R. 957 (1866).

[3] Henderson v. Lacon, L. R. 5 Eq. Cas. 249 (1868).

[4] See Reese River Silver Mining Co. v. Smith, L. R. 4 H. L. 64 (1869); Waldo v. Chicago St. P. & F. D. S. R. Co., 14 Wis. 575 (1861); Denton v. Macneil, L. R. 2 Eq. Cas. 252 (1866).

[5] Water Valley Manuf. Co. v. Seaman, 53 Miss. 655 (1876); McClellan v. Scott, 24 Wis. 81 (1869).

[6] See Melendy v. Keen, 89 Ill. 395 (1878); Bell's Case, 22 Beav. 35 (1856); Western Bank of Scotland v. Addie, L. R. 1 s. c. App. Cas. 145 (1867).

[7] See Thornburgh v. Newcastle, & D. R. Co. 14 Ind. 499 (1860); New Albany & S. R. Co. v. Fields, 10 Ind. 187 (1858); Clem v. Newcastle & D. R. Co., 9 Ind. 488 (1857); s. c. 68 Am. Dec. (633); Ellison v. Mobile & O. R. Co., 36 Miss. 572, 588 (1858).

[8] Parker v. Thomas, 19 Ind. 213 (1862); s. c. 81 Am. Dec. (385); Wight v. Shelby R. Co., 16 B. Mon. (Ky.) 4 (1855); s. c. 63 Am. Dec. (522); Selma, M. & M. R. Co. v.

Thus it has been said that a misrepresentation as to the extent of the liability on the stock subscribed,[1] or as to ability to permit stock to be returned,[2] are representations as to the law, and will not affect the subscription.

Sec. 43t. Same—When binding.—To make a false or fraudulent representation binding upon the corporation such representation must be made by one who is authorized in the premises ;[3] and where the powers of the agent of a corporation are purely statutory, and have nothing to do with the taking of subscriptions, his misrepresentations will not bind the corporation. This is on the principle that the subscriber is bound to know that the commissioners are the only persons having statutory power to take subscriptions, and that such commissioners have no power to make representations which will bind the corporation.[4] Thus it has been held that representations made by the president of a corporation are not binding upon it where he had no authority to take subscriptions.[5]

And misrepresentations made by the officers of a corporation at a public meeting called for the purpose of procuring subscriptions do not bind the corporation.

Anderson, 51 Miss. 829, 833 (1876); Ellison v. Mobile & O. R. Co. 36 Miss. 572 (1858); Smith v. Reese River R. Co., L. R. 2 Eq. Cas. 264 (1866). See Vicksburg S. & T. R. Co. v. McKean, 12 La. An. 638 (1857); Bailey v. Hannibal & St. J. R. Co., 84 U. S. (17 Wall.) 96 (1872); bk. 21 L. ed. 611.

[1] Upton v. Tribilcock, 91 U. S. (1 Otto) 45 (1875); bk. 23 L. ed. 203; Upton v. Englehart, 3 Dill. C. C. 496 (1874); Accidental Ins. Co. v. Davis, 15 L. T. 182 (1866).

[2] North Eastern R. Co. v. Rodrigues, 10 Rich. S. C. L. 278 (1857), and the like, Clem v. Newcastle & D. R. Co., 9 Ind. 488 (1857); s. c. 68 Am. Dec. 653.

[3] See Cunningham v. Edgeville & K. R. Co., 2 Head. (Tenn.) 23 (1858).

[4] See Syracuse P. & O. R. Co. v. Gere, 4 Hun, (N. Y.) 392 (1875); Wight v. Shelby R. Co., 16 B. Mon. (Ky.) 4 (1855); s. c. 63 Am. Dec. 522; Rutz v. Esler & R. Manuf. Co., 3 Ill. App. 83 (1878); North Carolina R. Co. v. Leach, 4 Jones (N. C.) L. 340 (1857); Nippenose Manuf. Co. v. Stadon, 68 Pa. St. 256 (1871); Bavington v. Pittsburgh & S. R. Co., 34 Pa. St. 358 (1859).

[5] See Rives v. Montgomery South Plank Road Co., 30 Ala. 92 (1857); Crump v. United States Mining Co., 7 Gratt. (Va.) 353 (1851); s. c. 56 Am. Dec. 116.

[6] Buffalo & N. Y. City R. Co. v. Dudley, 14 N. Y. 336 (1856); Smith v. Tallassee Branch of C. P. R. Co., 30 Ala. 650 (1857); First National Bank v. Hurford, 29 Iowa, 579 (1870); Vicksburg S. & T. R. v. McKean, 12 La. An. 638 (1857).

Sec. 43u. Same—How misrepresentations arise.—Misrepresentations may arise from the prospectus issued by the authority of the directors or stockholders of a corporation where it contains false statements which are relied upon, and the subscription is made by reason thereof.[1] Misrepresentation may also arise from the report made by the corporate officers to the stockholders, where false, and is relied upon by one who contemplates subscribing for stock.[2]

Sec. 43v. Same—Fraudulent agreements.—Agreements between prospective subscribers to the proposed stock of a corporation, which are fraudulent in their nature, cannot be enforced. Thus an agreement that the subscription shall merely be nominal for the purpose of inducing others to subscribe;[3] or that the subscription shall merely be a pledge of stock, by the corporation to the subscriber;[4] or that the subscriber shall not be liable for the par value of his stock;[5] or

Compare, Atlanta & W. P. R. Co. v. Hodnett, 36 Ga. 669 (1867); McClellan v. Scott, 24 Wis. 81 (1869).

[1] See Blake's Case, 34 Beav. 639 (1865); Ross v. Estates Investment Co., L. R. 3 Ch. App. 682 (1868); Oakes v. Turquand, L. R. 2 H. L. App. Cas. 325 (1867); Henderson v. Lacon, L. R. 5 Eq. Cas. 249 (1868); Reese River Silver Mining Co. v. Smith, L. R. 4 H. L. 64 (1869).

[2] New Brunswick & C. R. Co. v. Conybeare, 9 H. L. Cas. 711 (1862); Western Bank of Scotlond v. Addie, L. R. 1 Sc. App. Cas. 145 (1867).

[3] Phœnix Warehousing Co. v. Badger, 6 Hun, (N. Y.) 293 (1876); s. c. aff'd 67 N. Y. 294; Mann v. Cooke, 20 Conn. 178 (1850); Galena & S. W. R. Co. v. Ennor, 116 Ill. 55 (1886); s. c. 12 Am. & Eng. Corp. Cas. 88; Peychaud v. Hood, 23 La. An. 732 (1871); Wetherbee v. Baker, 35 N. J. Eq. (8 Stew.) 501 (1882); Robinson v. Pittsburgh & C. R. Co., 32 Pa. St. 334 (1858); s. c. 72 Am. Dec. 792; Graff v. Pittsburgh & S. R. Co., 31 Pa. St. 489 (1858); Centre & K. Turnpike Co. v. McConaby, 16 Serg. & R. (Pa.) 140 (1827); Connecticut & P. R. R. Co. v. Bailey, 24 Vt. 465 (1852); Downie v. White, 12 Wis. 176 (1860); s. c. 78 Am. Dec. 731; Davidson's Case, 3 DeG. & S. 21 (1849). See Litchfield Bank v. Church, 29 Conn. 137 (1860); New Albany & S. R. Co. v. Slaughter, 10 Ind. 218 (1858); Chouteau Ins. Co. v. Floyd, 74 Mo. 286 (1881); Bates v. Lewis, 3 Ohio St. 459 (1854); Blodgett v. Morrill, 20 Vt. 509 (1848); Minor v. Mechanics' Bank, 26 U. S. (1 Pet.) 46 (1828); bk. 7 L. ed. 47; Preston v. Grand Collier Dock Co., 11 Sim. 327 (1840); s. c. 2 Eng. R. & Canal Cas. 335; Mangles v. Grand Collier Dock Co., 10 Sim. 519 (1840); s. c. 2 Eng. R. & Canal Cas. 360; Bridger's Case, L. R. 9 Eq. 74 (1869).

[4] Melvin v. Lamar Ins. Co., 80 Ill. 446 (1875); s. c. 22 Am. Rep. 199; White Mountains R. Co. v. Eastman, 34 N. H. 134 (1856).

[5] Union Mut. Life Ins. Co. v.

that the subscriber shall be released;[1] or that the stock may be surrendered,[2] are invalid.

An agreement entered into between prospective subscribers to the capital stock of a corporation, that they alone shall take the stock in the company when organized, is a contract which cannot be enforced.[3] But it is thought that a mere colorable subscription by a person of influence and standing in the community, shown to another to induce him to subscribe, does not avoid the latter's subscription, unless he was thereby influenced to subscribe.[4]

In the case of Tuckerman v. Brown,[5] it was held, that a corporation cannot make a valid agreement with one who delivers to them securities to form a part of their original capital, and going to make up the amount of such capital required by law, that they will subsequently surrender the same, for a less security which will not meet the requirements of the law; because such an agreement is a fraud upon the law, and the surrender and cancelling of such a security in pursuance of the agreement, does not release from liability the one who gave it to the corporation.

Frear Stone Manuf. Co., 97 Ill. 397 (1881); Custar v. Titusville Gas & Water Co., 63 Pa. St. 381 (1869); Upton v. Tribilcock, 91 U. S. (1 Otto) 45 (1875); bk. 23 L. ed. 203.

[1] Gill v. Balis, 72 Mo. 424 (1880).

[2] Melvin v. Lamar Ins. Co., 80 Ill. 446 (1875); s. c. 22 Am. Rep. 199; White Mountains R. Co. v. Eastman, 34 N. H. 124 (1856).

[3] Lake Ontario Shore R. Co. v. Curtiss, 80 N. Y. 219 (1880); Poughkeepsie & S. P. Pl. Road Co. v. Griffin, 24 N. Y. 150 (1861); California Sugar Manuf. Co. v. Schafer, 57 Cal. 396 (1881); Stowe v. Flagg, 72 Ill. 397 (1874); Chase v. Sycamore & C. R. Co., 38 Ill. 215 (1865); Mt. Sterling Coalroad Co. v. Little, 14 Bush (Ky.) 429 (1879); Goff v. Winchester College, 6 Bush (Ky.) 443 (1869); Perkins v. Union B. H. & E. Mach. Co., 94 Mass. (12 Allen) 273 (1866); Sewall v. Eastern R. Co., 63 Mass. (9 Cush.) 5 (1851); Carlisle v. Saginaw Valley & St. L. R. Co., 27 Mich. 315 (1873); Dayton, W. V. & X. Turnpike Co. v. Coy, 13 Ohio St. 84 (1861); Strasburg R. Co. v. Echternacht, 21 Pa. St. 220 (1853); s. c. 60 Am. Dec. 49; Pittsburgh & S. R. Co. v. Gazzam, 32 Pa. St. 340 (1858); Charlotte & S. C. R. Co. v. Blakely, 3 Strobh. (S. C.) L. 245 (1848); Wallingford Manuf. Co. v. Fox, 12 Vt. 304 (1840).

[4] Walker v. Mobile & O. R. Co., 34 Miss. 245 (1857); Pickering v. Templeton, 2 Mo. App. 424 (1878); State v. Jefferson Turnpike Co., 3 Humph. (Tenn.) 305 (1842); Downie v. White, 12 Wis. 176 (1860); s. c. 78 Am. Dec. 731.

[5] 11 Abb. (N. Y.) Pr. 389 (1860); s. c. 23 How. (N. Y.) Pr. 109.

Sec. 43w. Same—Substitution of stockholders.—It is thought that the substitution of one subscriber to the capital stock of a corporation for another subscriber therefor, can only be accomplished by the erasure of the name of the original subscriber, with the consent of the commissioners, and the substitution of another name therefor;[1] otherwise the corporation is not bound to recognize the new party, or to issue a certificate of stock to him.[2]

Sec. 43x. Same—Withdrawal of subscription.—It has been said that a subscription to the capital stock of a corporation may be withdrawn at any time before the filing of the articles of incorporation,[3] but the better opinion is thought to be that in those cases where a subscription is made with full knowledge of the purpose and scope of the undertaking, and has been acted upon either by the corporation or by other subscribers, that it is irrevocable.[4]

Sec. 43y. Payment of subscription—Action to recover.[5]—Assumpsit lies against a stockholder for unpaid instalments of subscription to the capital stock;[6] and this is true, notwithstanding the fact that the corporation has power

[1] Selma & T. R. Co. v. Tipton, 5 Ala. 787 (1843); s. c. 39 Am. Dec. 344; Ryder v. Alton & S. R. Co., 13 Ill. 516 (1851). See Hawley v. Upton, 102 U. S. (12 Otto) 314 (1880); bk. 26 L. ed. 179.

[2] See Hawkins v. Mansfield G. Min. Co., 52 Cal. 513 (1877); Morrison v. Gold Mountain G. M. Co., 52 Cal. 306 (1877); Coleman v. Spencer, 5 Blackf. (Ind.) 197 (1839). *Compare*, Chater v. San Francisco S. F. Co., 19 Cal. 219 (1861); Baltimore City P. R. Co. v. Sewell, 35 Md. 238 (1871); State v. Crescent City G. L. Co., 24 La. An. 318 (1872); Hunt v. Gunn, 13 C. B. N. S. 226 (1862); Tempest v. Kilner, 3 C. B. 249 (1846).

[3] Gaff v. Flesher, 33 Ohio St. 107 (1877); Garrett v. Dillsburg & M. R. Co., 78 Pa. St. 465 (1875); Holt v. Winfield Bank, 25 Fed. Rep. 812 (1885); Cook v. Chittenden Bank, 25 Fed. Rep. 544 (1885). See Rose v. San Antonio & M. G. R. Co., 31 Tex. 49 (1868); Tilsonburg R. Co. v. Goodrich, 8 Ont. Q. B. Div. 565 (1885).

[4] See Hutchins v. Smith, 46 Barb. (N. Y.) 235 (1865); New Albany & S. R. Co. v. McCormick, 10 Ind. 499 (1858); s. c. 71 Am. Dec. 337; Hughes v. Antietam M. Co., 34 Md. 316 (1870); Gulf C. & S. F. R. Co. v. Neely, 64 Tex. 344 (1885); Kidwelly Canal Co. v. Raby, 2 Price 93 (1816).

[5] See *post*, § 51g.

[6] The Dutchess Cotton Manufactory v. Davis, 14 Johns. (N. Y.) 238 (1817); Buffalo & N. Y. City R. Co. v. Dudley, 14 N. Y. 336 (1856); Rensselaer & W. Plankroad Co. v. Wetsel, 21 Barb. (N. Y.) 56 (1855);

to forfeit for non-payment, the remedies being simp., cumulative.[1] However, a contrary rule prevails in Massachusetts, where it is held that assumpsit does not lie on an implied promise where the company has the power to forfeit the stock.[2]

It is said in Anvil Mining Co. v. Sherman,[3] that where the defendant subscribes to the capital stock of a proposed corporation and agrees to pay therefor a specified amount in cash on each share on or before a given day, "and the balance on each share at such time and in such instalments as the same shall be called for by said corporation;" and such subscription is made under a statute providing that "no such corporation shall transact business with any other than its members until at least one-half of its capital stock has been duly subscribed, and at least twenty per cent. thereof actually paid in," that no action can be maintained by the corporation against such subscriber to recover an assessment subsequent to the preliminary one of the amount agreed to be paid, without alleging that the above statutory requirement has been complied with.[4]

The case of Sayler v. Simpson[5] was an action to recover

Union Turnpike Co. v. Jenkins, 1 Cai. (N. Y.) 381 (1803); Goshen Turnpike Co. v. Hurtin, 9 Johns. (N. Y.) 217 (1812); Troy Turnpike & R. Co. v. McChesney, 21 Wend. (N. Y.) 296 (1839); Bavington v. Pittsburgh & S. R. Co., 34 Pa. St. 358 (1859).

[1] Rensselaer & W. Plankroad Co. v. Barton, 16 N. Y. 457 (1854) n; Troy & B. R. Co. v. Kerr, 17 Barb. (N. Y.) 581 (1854); Union Turnpike Co. v. Jenkins, 1 Cai. (N. Y.) 381 (1803); s. c. 1 Cai. Cas. (N. Y.) 86; Goshen Turnpike Co. v. Hurtin, 9 Johns. (N. Y.) 217 (1812); Gilmore v. Pope, 5 Mass. 491 (1809); Worcester Turnpike Co. v. Willard, 5 Mass. 80 (1809).

[2] Katama Land Co. v. Jernegan, 126 Mass. 155 (1879); Mechanics' F. & M. Co. v. Hall, 121 Mass. 272 (1876); Franklin Glass Co. v. White, 14 Mass. 286 (1817); New Bedford & B. Turnpike Co. v. Adams, 8 Mass. 138 (1811); Andover & Medford Turnpike Co. v. Gould, 6 Mass. 40 (1809).

[3] 5 Ry. & Corp. L. J. (Wis.) 603 (1889).

[4] See Schenectady & S. Plank R. Co. v. Thatcher, 11 N. Y. 102 (1854); New Haven & D. Ry. Co. v. Chapman, 38 Conn. 65 (1871); Boston, B. & G. R. Co. v. Wellington, 113 Mass. 79 (1873); Hanover I. & S. R. Co. v. Haldeman, 82 Pa. St. 36 (1876).

[5] 4 Ry. & Corp. L. J. (Cincinnati, Ohio, Superior Ct. G. T.) 195 (1888).

unpaid subscriptions for stock, and it was alleged that the corporation was organized by a firm already insolvent, for the purpose of escaping liability as partners, and defrauding new creditors of the corporation, and that such corporation acted under the control and management of such partners—the other members of the board of directors being each given a share of stock merely to complete the organization—fraudulently buys from such partners the assets of the firm, assuming its debts and agreeing to take said assets in satisfaction of subscriptions to its capital stock, the corporation is a party to the fraud, and it is not necessary for creditors to make or allege a tender of the property so transferred to the corporation, and they can maintain an action to set aside the satisfaction of the subscription and recover thereon.[1] Such an action is maintained not in the right of the corporation but in the right of the creditors intended to be defrauded, and for that reason the cause of action does not arise and the statute of limitations does not begin to run until the creditors have knowledge of the fraudulent action complained of.[2] In such an action all the circumstances of the fraud may be set out, although some of the allegations might also afford a ground for an action for deceit; and all the subscribers to the capital stock may be made parties to the suit.[3]

Sec. 43z. Same—Insolvent corporation—Right of creditors to enforce.—The insolvency of a corporation does not extinguish

[1] See Cragie v. Hadley, 99 N. Y. 131 (1885); Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co., 16 Md. 456 (1860); Greenwell v. Nash, 13 Nev. 286 (1878); Clark v. Hubbard, 8 Ohio 382 (1838); Robinson v Robinson, 17 Ohio St. 480 (1867); Trimble v. Doty, 16 Ohio St. 118 (1865); Bomberger v. Turner, Administrator, 13 Ohio St. 263 (1862); Emrie v. Gilbert & Co., Wright, (Ohio) 764 (1834); Ferguson v. Hillman, 55 Wis. 181 (1882); Fisher v. Shelver, 53 Wis. 498 (1881); Blennerhassett v. Sherman, 105 U. S. (5 Otto) 100 (1881); bk. 26 L. ed. 1080; Callan v. Statham, 64 U. S. (23 How.) 477 (1859); bk. 16 L. ed. 532; Hudgins v. Kemp, 61 U. S. (20 How.) 45 (1857); bk. 15 L. ed. 856; Clements v. Moore, 73 U. S. (6 Wall.) 299 (1867); bk. 18 L. ed. 786; Stewart v. Ackley, 8 Am. L. Reg. N. S. 442 (1867); s. c. 52 Barb. (N. Y.) 283. Davis Wheel Co. v. Davis Wagon Co., 20 Fed. Rep. 699 (1884).

[2] See Scovill v. Thayer, 105 U. S. (5 Otto) 143 (1881); bk. 26 L. ed. 968.

[3] Sayler v. Simpson, (Superior Court of Cincinatti G. T.) 4 Ry. & Corp. L. J. 195 (1888).

its legal existence or in any way fix the lien by creditors upon the specific property in hand; the legal existence of a corporation can be cut short only through a forfeiture of its franchises at the suit of the state granting them, or a surrender of the same by and between the shareholders;[1] and such insolvency of the corporation will not furnish a sufficient ground for restraining the enforcement of subscriptions to its stock.[2] That portion of the capital stock of a corporation, which remains unpaid as well as that which has been actually paid, is a trust fund pledged for the debts of the corporation, and equity will enforce it by seeing that it is collected and applied;[3] and where the directors or trustees of a corporation fail to make a call when the unpaid subscriptions are needed to pay the debts of the corporation, a court of equity will, at the suit of a creditor, compel them to do so;[4] but the ordinary method is to apply for the appointment of a receiver to settle up the affairs of the corporation.[5]

It has been said that creditors of a corporation, in order to enforce their right to have the nominal value of the capital stock actually paid in, have the subsidiary right to compel the directors to make calls, or the creditors may themselves

[1] See Nimmons v. Tappan, 2 Sween. (N. Y.) 652 (1870); Coburn v. Boston Papier Maché Manuf. Co., 76 Mass. (10 Gray) 243 (1857); Boston Glass Manufactory v. Langdon, 41 Mass. (24 Pick.) 53 (1841); s. c. 35 Am. Dec. 292; Moseby v. Burrow, 52 Tex. 396 (1880).

[2] Protection Ins. Co. v. Ward, 28 Conn. 409 (1859); Dill v. Wabash Valley R. Co., 21 Ill. 91 (1859).

[3] Lane v. Nickerson, 99 Ill. 284 (1881); Executors of Gilmore v. Bank of Cincinnati, 8 Ohio 71 (1837); Marr v. Bank of West Tennessee, 4 Coldw. (Tenn.) 471, 477 (1867); Adler v. Milwaukee Patent Brick Manuf. Co., 13 Wis. 57 (1860). See Reid v. Eatonton Manuf. Co., 40 Ga. 103 (1869); Hightower v. Thornton, 8 Ga. 486 (1850); Union National Bank of Chicago v. Douglass, 1 McC. C. C. 91 (1877); Sanger v. Upton, 91 U. S. (1 Otto) 56, 60 (1875); bk. 23 L. ed. 220.

[4] Allen v. Montgomery R. Co., 11 Ala. 437 (1847); Ward v. Griswoldville Manuf. Co., 16 Conn. 601 (1844); Dalton & M. R. Co. v. McDaniel, 56 Ga. 191 (1876); Germantown Passenger R. Co. v. Fitler, 60 Pa. St. 124 (1869); s. c. 100 Am. Dec. 546; Adler v. Milwaukee Patent Brick Co.. 13 Wis. 57 (1860); Ogilvie v. Knox Ins. Co., 67 U. S. (2 Black) 539 (1862); bk. 17 L. ed. 349; s. c. 63 U. S. (22 How.) 380 (1859); bk. 16 L. ed. 349.

[5] See Ogilvie v. Knox Ins. Co., 67 U. S. (2 Black) 539 (1862); bk. 17 L. ed. 349; s. c. 63 U. S. (22 How.) 380 (1859); bk. 16 L. ed. 349. As to the appointment of receivers, see *post*, § 138 et seq.

bring a bill in equity against the delinquent shareholders.[1] However, a bill cannot be sustained by the creditor against a shareholder to recover the amount of his unpaid subscription, until after the creditor has exhausted his remedies against the corporation and its property.[2] No action lies at law by a creditor against a shareholder for unpaid subscriptions.[3]

In a suit to enforce unpaid subscriptions to stock it is proper for the creditor to join all the shareholders as defendants; if the latter are too numerous to be joined or some of them are unknown to the plaintiff beyond the jurisdiction of the court, or insolvent, the bill should contain allegations to this effect;[4] and the corporation itself must also be joined as a party defendant.[5] It seems, however, that notwithstanding the general rule that all solvent stockholders of an insolvent corporation must be joined as defendants in such a suit, yet where they are so numerous that this is impracticable, one may be sued for all the others.[6]

Sec. 43a[1]. Same—Liability of members—Unpaid subscriptions.—In an action by an alleged corporation for the balance due on subscriptions to stock, plaintiff demurred to a plea of *nul tiel* corporation on the ground that defendants were estopped from denying plaintiff's incorporation by having paid all of their subscription except the amount sued for, which was

[1] See Allen v. Montgomery R. Co., 11 Ala. 437, 449 (1847); Jones v. Jarman, 34 Ark. 323 (1879); Hightower v. Thornton, 8 Ga. 486 (1850); s. c. 52 Am. Dec. 412; Gaff v. Flesher, 33 Ohio St. 107 (1877); In Matter of Glenn Iron Works, 16 Phila. (Pa.) 563 ( ); Haslett v. Wotherspoon, 1 Strobh. (S. C.) Eq. 209 (1847).

[2] Sturges v. Vanderbilt, 73 N. Y. 384 (1878); Blake v. Hinkle, 10 Yerg. (Tenn.) 218 (1836); Hatch v. Dana, 101 U. S. (11 Otto) 205 (1879); bk. 25 L. ed. 885; Terry v. Anderson, 95 U. S. (5 Otto) 628 (1877); bk. 24 L. ed. 365; Marsh v. Burroughs, 1 Woods C. C. 463 (1871.)

[3] Patterson v. Lynde, 106 U. S. (6 Otto) 519 (1882); bk. 27 L. ed. 265.

[4] Vick v. Lane, 56 Miss. 681 (1879); Wetherbee v. Baker, 35 N. J. Eq. (8 Stew.) 501 (1882); Bronson v. Wilmington Ins. Co., 85 N. C. 411 (1881); Adler v. Milwaukee Patent Brick Co., 13 Wis. 57 (1860); Holmes v. Sherwood, 3 McC. C. C. 405 (1881). *Compare*, Erickson v. Nesmith, 46 N. H. 371 (1866); Hadley v. Russell, 40 N. H. 109 (1860).

[5] Vick v. Lane, 56 Miss. 681 (1879); Weatherbee v. Baker, 35 N. J. Eq. (8 Stew.) 501 (1882); Holmes v. Sherwood, 3 McC. C. C. 405 (1881).

[6] Bronson v. Wilmington Ins. Co., 85 N. C. 411 (1881).

alleged to have been regularly called in by plaintiff, and demand made on defendants. The circumstances of the assessments were not shown, and it did not appear that they were made under color of corporate organization or capacity. The court held that, as from the facts shown it did not appear that the payments were not made as preliminary to corporate organization, the facts were not sufficient to create an estoppel.[1]

Inasmuch as the liability of a shareholder to pay for stock does not arise out of the relation as such, but depends on his contract, express or implied, or on statute, in the absence of either contract or statute, one to whom shares have been issued as a gratuity does not, by accepting them, commit any wrong upon creditors, or make himself liable to pay the nominal face of the shares as upon a subscription or contract.[2] Thus where stock, with forty per cent. credited thereon, which, in fact, had not been paid, was issued as a gratuity, to shareholders who had been required to pay calls on their original subscriptions in excess of what was expected and represented as necessary at the commencement of the enterprise, it was held, that a creditor could not compel one of such shareholders to account for the unpaid forty per cent. on the stock, as though he had been a subscriber therefor.[3]

The undertaking of subscribers to the capital stock of a corporation to pay trustees or directors thereafter elected, the amount of their subscriptions, will authorize the bringing of an action to recover such amounts in the name of the trustees.[4] Where the promise is to pay to the trustees of an incorporated company, or their successors, a suit to enforce the payment of the subscription may be brought in the name of the trustees, although others may have succeeded them ;[5] but an undertaking to the trustees of a corporation should generally be enforced in the name of the corporation.[6]

[1] Schloss v. Montgomery Trade Co., (Ala.) 6 So. Rep. 360 (1889).

[2] Christensen v. Eno, 106 N. Y. 97 (1887); s. c. 12 N. E. Rep. 648.

[3] Christensen v. Eno, 106 N. Y. 97 (1887); s. c. 12 N. E. Rep. 648.

[4] Cross v. Jackson, 5 Hill (N. Y.) 478 (1843).

[5] Davis v. Garr, 6 N. Y. 124, 134 (1851); s. c. 55 Am. Dec. 387.

[6] Barnes v. Perine, 9 Barb. (N. Y.) 207 (1850); Townsend v. Goewey, 19

Sec. 43b[1]. Same—Agreements exempting from liability.—It is a general rule that a corporation has no right to make a special agreement with a subscriber exempting him from liability on his subscription; such an agreement being a fraud both on the stockholders and on the creditors.[1] Thus, where a secret agreement was entered into between the directors of a railroad company and a subscriber, that he might, within a specified time, reduce the number of his shares subscribed for, the subscription being made to appear *bona fide* for the purpose of inducing others to subscribe, it was held in an action by the corporation to recover such subscription that the full amount can be recovered, the stipulation to reduce the amount being a fraud on other subscribers.[2]

But it is said in the recent case of Hill v. Silvey[3] that: "An arrangement made in good faith among the stockholders of a corporation whose subscription to its capital stock has never been made public, entered into before the corporation has incurred debts, whereby, instead of issuing stock to the amount of the original subscriptions, each subscriber is given full paid-up stock to the amount that he has actually paid on his subscription, is valid as against creditors, and they cannot enforce the original subscriptions, except as to the deficiency

Wend. (N. Y.) 424 (1838); s. c. 32 Am. Dec. 514.

[1] Upton v. Tribilcock, 91 U. S. (10 Otto) 45 (1875); bk. 23 L. ed. 203. See Litchfield Bank v. Church, 29 Conn. 137 (1860); Mann v. Cooke, 20 Conn. 178 (1850); Goodrich v. Reynolds, 31 Ill. 490 (1863); Johnson v. Crawfordsville F. K. & F. W. R. R., 11 Ind. 280 (1858); Pittsburgh & C. R. Co. v. Stewart, 41 Pa. St. 54 (1861); Pittsburgh & C. R. Co. v. Graham, 36 Pa. St. 77 (1859); New York Exchange Co. v. De Wolf, 5 Bosw. (N. Y.) 593 (1859); Smith v. Plankroad Co., 30 Ala. 650, 667 (1857); Mississipi O. & R. R. Co. v. Cross, 20 Ark. 443 (1859); Martin v. Pensacola & Ga. R. Co., 8 Fla. 370 (1859); Thornburgh v. Newcastle & D. R. Co., 14 Ind. 499 (1860); Hardy v. Merriweather, 14 Ind. 203 (1860); Wight v. Shelby R. Co., 16 B. Mon. (Ky.) 4 (1855); Kennebec & P. R. Co. v. Waters, 34 Me. 369 (1852); Scarlett v. Academy of Music, 46 Md. 132 (1876); Walker v. Mobile & O. R. Co., 34 Miss. 245 (1857); La Grange & M. Plankroad v. Mays, 29 Mo. 64 (1859); Piscataqua Ferry Co. v. Jones, 39 N. H. 491 (1859); Miller v. Hanover Junction & S. R., 87 Pa. St. 95 (1878); Coil v. Pittsburg College, 40 Pa. St. 439 (1861); Cunningham v. Edgefield & K. R. Co. 2 Head. (Tenn.) 23 (1858); Blodgett v. Morrill, 20 Vt. 509 (1848).

[2] White Mountain R. Co. v. Eastman, 34 N. H. 124 (1856).

[3] 39 Alb. L. J. (Ga.) 316 (1889).

between the amount of paid-up stock so issued and the minimum allowed by the charter for the transaction of business."

Sec. 43c[1], Same—Statutory liability of officer.—The statutory liability of the officers of a corporation under section twenty-one of the original act [1] arises when they represent in their re-report that the capital has been paid in in cash; and the fact that the representation is made in good faith will not affect their liability.[2]

Sec. 44. By-Laws—What they must Provide.—The by-laws of every corporation created under the provision of this act shall be deemed and taken to be its law, and shall provide:

1. The number of directors of the corporation.
2. The term of office of such directors, which shall not exceed one year.
3. The manner of filling vacancies among directors and officers.
4. The time and place of the annual meeting.
5. The manner of calling and holding special meetings of the stockholders.
6. The number of stockholders who shall attend, either in person or by proxy, at every meeting, in order to constitute a quorum.
7. The officers of the corporation, the manner of their election by and among the directors, and their powers and duties. But such officers shall always include a president, a secretary and a treasurer.
8. The manner of electing or appointing inspectors of election.
9. The manner of amending the by-laws.[3]

Sec. 44a. By-Laws—Definition of.—A by-law, as applied to a

[1] Post sec. 65.

[2] Van Ingen v. Whitman, 62 N. Y. 518, 519 (1875); See Torbett v. Eaton, 49 Hun, (N. Y.) 209 (1888); s. c. 1 N. Y. Sup. 614. Aff'd on appeal 113 N. Y. 623; 20 N. E. Rep. 876.

[3] L. 1875, c. 611, § 6; 3 N. Y. R. S., 8th ed., p. 1980.

corporation, is a rule or law of such corporation for its government.[1] It is an act of legislation, and the form, solemnities, and sanction required by the charter for its passage, must be observed.[2] It has been said that the term "by-laws" has a peculiar and limited meaning, and is used to designate the orders and regulations which a corporation, as one of its legal incidents, has power to make, and which is usually exercised to regulate its own actions and concerns, and the rights and duties of its members among themselves;[3] for it is one of the offices of a by-law to regulate the conduct and define the duties of the members towards the corporation and between themselves.[4] Such a by-law, although made by a particular body, is still a law, and applicable whenever the circumstances arise for which it was intended to provide.[5]

Sec. 44b. Same — Power to make and enforce.—The power to make and enforce by-laws is incidental to the very existence of a corporation.[6] By-laws of a corporation, adopted in uniformity with the provisions of its charter, are equally as binding upon all members of a corporation as any public law made by the state.[7]

The right to make by-laws is seldom left to implication,

[1] Drake v. Hudson River R. Co., 7 Barb. (N. Y.) 508 (1849); Anderson's L. Dict. 143; I. Bouv. L. Dict. (15th ed.) 273.

[2] Drake v. Hudson River R. Co., 7 Barb. (N. Y.) 508, 539 (1849). See Compton v. Van Volkenburgh & N. J. R. Co., 34 N. J. L. (5 Vr.) 135 (1870).

[3] Com'rs v. Turner, 55 Mass. (1 Cush.) 493, 496 (1848). See Flint v. Pierce, 99 Mass. 68, 70 (1868).

[4] Flint v. Pierce, 99 Mass. 68, 70 (1868).

[5] Gosling v. Veley, 7 Q. B. 451 (1847); s. c. 19 L. J. N. S. (Q. B.) 135. See Hopkins v. Mayor, 4 Mees. & W. 640 (1839).

[6] Drake v. Hudson River R. Co., 7 Barb. (N. Y.) 508 (1849); Martin v. Nashville Building Assoc., 2 Coldw. (Tenn.) 418 (1865); Norris v. Staps, Hob. 211 (1618–25); City of London v. Vanacker, 1 Ld. Raym. 496 (1700.) See Commonwealth v. Turner, 55 Mass. (1 Cush.) 493 (1848); Horn v. People, 26 Mich. 222 (1872); Cahill v. Kalamazoo Mut. Ins. Co., 2 Doug. (Mich.) 124 (1845); s. c. 43 Am. Dec. 457; Leggett v. New Jersey Manuf. & Banking Co., 1 N. J. Eq. (1 Saxt.) 541 (1832); s. c. 23 Am. Dec. 728; Philadelphia & R. R. Co. v. Ervin, 89 Pa. St. 76 (1879); St. Luke's Church v. Mathews, 4 Desaus. (S. C.) 578 (1815); s. c. 6 Am. Dec. 619; Williamson v. Davidson, 43 Tex. 35 (1875).

[7] Cummings v. Webster, 43 Me. 192 (1857). See Kent v. Quicksilver Min. Co., 78 N. Y. 179 (1879); Weatherly v. Medical & Surg. Soc., 76 Ala.

but is usually conferred by the express terms of the charter. Such conferred power contains a negative to the effect that the corporation shall not make any by-law in any other cases, nor for any other purposes than those specified.[1] In the absence of any law or custom to the contrary, the power to make by-laws resides in the members of the corporation at large;[2] the body at large may delegate the power to make by-laws to a select body, as the board of directors,[3] which generally represents the whole community, and a majority of that body will constitute a quorum for the purpose of making such by-laws;[4] but the board of directors have no authority or power to make by-laws without such special authority.[5]

Where the charter of a corporation prescribes a particular form or method of proceeding for the adoption of by-laws, it must be strictly observed;[6] but where no particular method is prescribed by the charter, they may be adopted by the acts and uniform proceedings of the corporation as well as by an express vote or adoption manifested in writing.[7]

Sec. 44c. Same—Mode of adoption of by-laws.—The mode of the passage and adoption of by-laws is usually prescribed in the charter, and where so prescribed must be strictly pursued;[8] however, where the charter is silent as to the mode in which a corporation may adopt its by-laws, its acts and con-

567 (1884); Samuels v. Central O. C. & P. P. Exp. Co., McCahon (Kan.) 214 (1868); Anacosta Tribe v. Murbach, 13 Md. 91 (1858); Flint v. Pierce, 99 Mass. 68 (1868).

[1] New Orleans v. Philippi, 9 La. An. 44 (1854); Child v. Hudson's Bay Co., 2 P. Wms. 207 (1723).

[2] Morton Gravel Road Co. v. Wysong, 51 Ind. 4 (1875); Salem Bank v. Gloucester Bank, 17 Mass. 29 (1820); Bank of Holly Springs v. Pinson, 58 Miss. 421 (1880); State v. Curtis, 9 Nev. 325 (1874;) Martin v. Nashville Building Association, 2 Coldw. (Tenn.) 418 (1865). See Union Bank of Maryland v. Ridgely, 1 Har. & G. (Md.) 324 (1827).

[3] Rex v. Head, 4 Burr. 2521 (1770).

[4] Ex parte Wallcocks, 7 Cow. (N. Y.) 402 (1827); s. c. 17 Am. Dec. 525; Cahill v. Kalamazoo Ins. Co., 2 Doug. (Mich.) 124 (1845).

[5] Carroll v. Mullamphy Savings Bank, 8 Mo. App. 249 (1881).

[6] Dunston v. Imperial Gas Light Co., 3 Barn. & Ad. 125 (1832).

[7] Fairfield Turnpike Co. v. Thorp, 13 Conn. 173 (1839); Langsdale v. Bonton, 12 Ind. 467 (1859); Dunston v. Imperial Gas Light Co., 3 Barn. & Ad. 125 (1832).

[8] Langsdale v. Bonton, 12 Ind. 467 (1859); Dunston v. Imperial Gas L. Co., 3 Barn. & Ad. 125 (1832.)

duct and the acts and conduct of its officers may amount to an adoption.[1]

Sec. 44d. Same—Extent, force and effect of by-laws.—A corporate body cannot make a by-law which will enlarge or abridge the rights and powers of the corporation;[2] or affect the rights or interests of third parties.[3] Any by-law which disturbs a vested right of any shareholder is unauthorized and void.[4] And where neither the charter of the corporation nor any general statute imposes upon the individual members a liability to pay the debts of the corporation, such liability cannot be created by a by-law;[5] but it is established by the weight of authority that a corporation may pass a by-law creating a lien on the stock of the shareholder for debts due from such shareholder to the corporation.[6] However, there are authorities which hold that such a by-law will not affect subsequent purchasers for value without notice.[7]

[1] See Fairfield Turnpike Co. v. Thorp, 13 Conn. 173 (1839); Langsdale v. Bonton, 12 Ind. 467 (1859); Union Bank v. Ridgely, 1 Harr. & G. (Md.) 324 (1827); Taylor v. Griswold, 14 N. J. L. (2 J. S. Gr.) 222 (1834).

[2] See Kent v. Quicksilver Min. Co., 78 N. Y. 179 (1879); Brewster v. Hartley, 37 Cal. 15 (1869); Great Falls Ins. Co. v. Harvey, 45 N. H. 292 (1864); Chicago City R. Co. v. Allerton, 85 U. S. (18 Wall.) 233 (1873); bk. 21 L. ed. 902.

[3] Mechanics' & F. Bank v. Smith, 19 Johns. (N. Y.) 115 (1821); Manhattan Co. v. Lydig, 4 Johns. (N. Y.) 377 (1809).

[4] People v. Crockett, 9 Cal. 112 (1858); Gray v. Portland Bank, 3 Mass. 364 (1807); People v. Fire Department of Detroit, 31 Mich. 458 (1875).

[5] See Reid v. Eatonton Manuf. Co., 40 Ga. 98 (1869); Trustees of Free Schools v. Flint, 54 Mass. (13 Metc.) 539 (1847); Kennebec & P. R. Co. v. Kendall, 31 Me. 470 (1850).

[6] Planters' & M. Ins. Co. v. Selma Sav. Bank, 63 Ala. 585 (1879); People v. Crockett, 9 Cal. 112 (1858); Farmers' & M. Bank v. Wasson, 48 Iowa 336 (1878); Bank of Holly Springs v. Pinson, 58 Miss. 421 (1880); Spurlock v. Pacific R. Co., 61 Mo. 319 (1875); Mechanics' Bank v. Merchants' Bank, 45 Mo. 513 (1870); Young v. Vough, 23 N. J. Eq. (8 C. E. Gr.) 325 (1873); Lockwood v. Mechanics' Nat. Bank, 9 R. I. 308 (1869); Knight v. Old Nat. Bank, 3 Cliff. C. C. 429 (1871); Pendergast v. Bank of Stockton, 2 Sawy. C. C. 108 (1871).

[7] Driscoll v. West Bradley & C. Manuf. Co., 59 N. Y. 96 (1874); Conklin v. Second Nat. Bank, 45 N. Y. 655 (1871); Anglo-Californian Bank v. Grangers' Bank, 63 Cal. 359 (1883); Pitot v. Johnson, 33 La. An. 1286 (1881); Carroll v. Savings Bank, 8 Mo. App. 249 (1881); Merchants' Bank v. Shouse, 102 Pa. St. 488 (1883); Bullard v. National Eagle

A by-law declaring that the ordinary business of the corporation may be transacted by a quorum of five directors is a valid regulation, although the whole number consists of twenty-three.[1]

Sec. 44e. Same—Construction.—In considering by-laws they will be construed reasonably, if possible, without scrutinizing their terms for the purpose of making them void, or holding them invalid if every particular reason for their existence does not appear.[2] Where it is not claimed that the by-law is unreasonable, against law or contrary to public policy, the courts must construe and give effect to it in the same manner and upon the same principles that they would construe and give effect to an agreement in writing made and entered into by and between private individuals.[3]

Sec. 44f. Same—Validity.—The validity of the by-laws of a corporation is purely a question of law to be determined by the court.[4] Thus it has been held that a reasonable by-law of a corporation regulating the manner of holding meetings, and the election of officers is valid;[5] so also is a by-law authorizing the members of a corporation to vote at all elections by proxy.[6] However, there are cases holding that a stockholder is not entitled to vote by proxy except where authorized to so vote by legislative sanction.[7] A reasonable by-law regulating

Bank, 85 U. S. (18 Wall.) 589 (1873); bk. 21 L. ed. 923; First Nat. Bank v. Lanier, 78 U. S. (11 Wall.) 369 (1870); bk. 20 L. ed. 172.

[1] Hoyt v. Thompson, 19 N. Y. 207 (1859).

[2] Hibernia Fire Engine Co. v. Harrison, 93 Pa. St. 264 (1880); Poulters Co. v. Phillips, 6 Bing. (N. C.) 314 (1840).

[3] State v. Conklin, 34 Wis. 30 (1874); In re Dunkerson, 4 Biss. C. C. 227 (1868).

[4] State v. Overton, 24 N. J. L. (4 Zab.) 435 (1854); s. c. 61 Am. Dec. 671. See Compton v. New Jersey R. Co., 34 N. J. L. (5 Vr.) 134 (1870); following State v. Overton, 24 N. J. L. (4 Zab.) 440 (1854); s. c. 61 Am. Dec. 671; Morris & E. R. Co. v. Ayres, 29 N. J. L. (5 Dutch.) 392 (1862).

[5] In re Long Island R. Co., 19 Wend. (N. Y.) 37 (1837); Taylor v. Griswold, 14 N. J. L. (2 J. S. Green) 222 (1834); Kearney v. Andrews, 10 N. J. Eq. (2 Stockt.) 70 (1854).

[6] State v. Tudor, 5 Day (Conn.) 329 (1812); s. c. 5 Am. Dec. 162; People v. Crossley, 69 Ill. 195 (1873).

[7] See People v. Twaddell, 18 Hun (N. Y.) 427 (1879); Philips v. Wickham, 1 Paige Ch. (N. Y.) 590 (1829); Taylor v. Griswold, 14 N. J. L. (2 J. S. Gr.) 222 (1834).

the transfer of stock;[1] a by-law requiring officers and agents who have charge of the corporate funds to give a bond for the faithful performance of their duties, and the like,[3] are valid.[2]

It has been said that a by-law void as against strangers, or non-assenting members of the corporation, may be good as a contract as against the assenting members.[4]

Sec. 44g. Same—By-law regulating membership.—Defendant was a member of a corporation created under the Laws of New York,[5] membership in which was restricted to the members of certain "local assemblies" of the "Knights of Labor" under the jurisdiction of "District Assembly 49." Section 3 of the statute referred to provided for the termination of membership in the corporation by death, voluntary withdrawal, and expulsion. Under this statute it was held that a by-law which declares that the removal of a local assembly from the jurisdiction of District Assembly 49 shall be equivalent to a voluntary withdrawal of all membership in the corporation is in conflict with the statute, and the removal for insubordination, in which defendant took no part, from the jurisdiction of District Assembly 49, of the local assembly of which defendant was a member, will not deprive him of his membership on that ground.[6]

Sec. 44h. Same—By-law controlling acts of members.—Article 3, §§ 1, 2, of the by-laws of the Musical Mutual Protective Union, which provides that it shall be the duty of

[1] Farmers' & M. Bank v. Wasson, 48 Iowa 339 (1878); Chouteau Springs Co. v. Harris, 20 Mo. 383 (1855). A by-law which unreasonably interferes with the exercise of the right to transfer is void; Quiner v. Marblehead Ins. Co., 10 Mass. 476 (1813); Moore v. Bank of Commerce, 62 Mo. 377 (1873).

[2] Savings Bank v. Hunt, 72 Mo. 597 (1880).

[3] See People v. Board of Fire Underwriters, 54 How. (N. Y.) Pr. 240 (1875); Goddard v. Merchants' Exchange, 9 Mo. App. 290 (1881); s. c. aff'd 78 Mo. 609.

[4] See Slee v. Bloom, 19 Johns. (N. Y.) 456 (1821); s. c. 10 Am. Dec. 273; Cooper v. Frederick, 9 Ala. 738 (1846); Amesbury v. Bowditch Ins. Co., 88 Mass. (6 Gray) 596 (1856); Davis v. Proprietors of Meeting House, 49 Mass. (8 Metc.) 321 (1844).

[5] L. 1875, c. 267.

[6] New York Protective Ass'n v. McGrath, (N. Y. Sup. Ct.) 5 N. Y. Sup. 8 (1889); s. c. 23 N. Y. St. Rep. 209.

every member to refuse to perform in any orchestra in which are any persons not members in good standing, and that it shall be deemed a breach of good faith between members to employ a suspended or non-member, or to assist in a public performance given wholly or in part by amateurs, and article 9, § 2, which imposes a penalty for the violation of the foregoing sections, are void, because they are arbitrary and contrary to the provisions of its charter,[1] which declares that its objects are the cultivation of music and the promotion of good feeling among the members of the profession, and the relief of such of their members as should be unfortunate.[2]

Sec. 44i. Same—By-law as to assessments—When void.—A by-law requiring the members of a corporation to pay assessments which are not necessary for any lawful or authorized purpose of the company, being in excess of the powers of the directors, is void.[3] After the enterprise of the corporation has been abandoned, there being no further use for the capital of such corporation, except for winding up the company's business, no further call can be made upon the stockholders.[4]

Sec. 44j. Same—Invalid by-law—Injunction to restrain enforcement.—In Thomas v. Mutual Protective Union,[5] the plaintiff, a member of a musical union whose void by-laws prohibited any member from employing a non-member or playing in an orchestra with a person not a member, engaged a person not eligible to membership to play in an orchestra which he was conducting. The union instituted proceedings against plaintiff to enforce its by-laws. These proceedings threatened to disperse the orchestra which had been gotten together by the tact, skill, and industry of the plaintiff; two of its members actually leaving. The court held, that as irreparable injury was threatened, an injunction should be granted to

[1] See L. 1864, c. 168.

[2] Thomas v. Musical Mutual Protective Union, 49 Hun, (N. Y.) 171 (1888); s. c. 2 N. Y. Sup. 195. See *Infra*. sec. 44*o*.

[3] See Hibernia Fire Engine Co. v. Commonwealth, 93 Pa. St. 264 (1880); London Tobacco Pipe Makers' Co. v. Woodroffe, 7 B. & C. 838 (1828).

[4] McCully v. Pittsburgh & C. R. Co., 32 Pa. St. 32 (1858).

[5] 49 Hun, (N. Y.) 171 (1888): s. c. 2 N. Y. Sup. 195.

restrain the union from further proceedings to enforce its by-laws.

Sec. 44k. Same—By-law regulating signing of notes—Lack of secretary's signature.—It was held in Martin v. Niagara Falls Paper Co.,[1] that "where the by-laws of a corporation providing that the notes of the company should be signed by the secretary, and there was no provision in the by-laws that the lack of the secretary's signature should render the instrument void, the signature of the secretary was not essential to the validity of the notes signed by the president in the name of the company."

Sec. 44l. Same—Void in part.—It has been held that where a by-law consists of several distinct and independent parts, and one or more of these parts are void, the rest are equally as valid as though the void clauses had been omitted.[2]

Sec. 44m. Same—Unreasonable by-law void.—All by-laws must be reasonable and not oppressive or vexatious.[3] All unequal, oppressive and vexatious by-laws, and those manifestly detrimental to the corporation, are void.[4] Whether or not a by-law is reasonable is a question solely for the court to determine.[5]

Sec. 44n. Same—By-law inconsistent with general law.—To be valid a by-law must be consistent alike with the constitution and statute laws of the state creating it, or of the state wherein it seeks to exercise its powers,[6] and with the general

[1] 44 Hun (N. Y.) 131, 141 (1887); s. c. 8 N. Y. St. Rep. 266, 274.

[2] Shelton v. Mayor of Mobile, 30 Ala. 540 (1857).

[3] Carter v. Father Matthew Soc., 3 Daly (N. Y.) 20 (1869); Moore v. Bank of Commerce, 52 Mo. 377 (1873); State v. Merchants' Exchange, 2 Mo. App. 96 (1878); Com. v. Gill, 3 Whart. (Pa.) 228 (1837); St. Luke's Church v. Matthews, 4 Desaus. (S. C.) 578 (1815); s. c. 6 Am. Dec. 619.

[4] Cartan v. Father Matthew Soc., 3 Daly (N. Y.) 20 (1869); Palmetto Lodge v. Hubbell, 2 Strobh. (S. C.) 457 (1848); s. c. 49 Am. Dec. 604.

[5] Vedder v. Fellows, 20 N. Y. 126 (1859); Intendent of Marion v. Chandler, 6 Ala. 899 (1844); Com. v. Worcester, 20 Mass. (3 Pick.) 473 (1826); State v. Overton, 24 N. J. L. (4 Zab.) 435 (1854); Paxton v. Sweet, 13 N. J. L. (1 J. S. Gr.) 196 (1832); Reg. v. Fisher, 4 Best & S. 575 (1862); Reg. v. Saddlers Co., 10 H. L. Cas. 404 (1863).

[6] Wood v. Brooklyn, 14 Barb. (N. Y.) 425 (1852); Vance v. Little Rock, 30 Ark. 435 (1875); Livingston v.

principles of the common law, or policy of the state,[1] and not repugnant to the charter of the corporation, or in excess of the powers as to by-laws granted to such corporation.[2] Thus any by-law impairing the obligation of contracts or taking private property for public use without just compensation, and the like, is wholly void.[3] And many by-laws have been adjudged void, as in restraint of trade.[4]

Sec. 44o. Same—By-law restricting right to sue.—While it is true that the parties cannot by their agreement deprive the

Albany, 41 Ga. 22 (1870); Mayor, etc., v. Hussey, 21 Ga. 80 (1857); Haywood v. Mayor, &c., 12 Ga. 404 (1853); Illinois Cent. R. Co. v. Bloomington, 76 Ill. 447 (1875); Indianapolis v. Gas Co., 66 Ind. 396 (1879); Burlington v. Keller, 18 Iowa 65 (1864); Walker v. New Orleans, 31 La. An. 828 (1879); New Orleans v. Savings Bank, 31 La. An. 637 (1879); Cullinan v. New Orleans, 28 La. An. 102 (1876); Shreveport v. Levy, 26 La. An. 671 (1874); s. c. 21 Am. Rep. 553 (1874); State v. Caldwell, 3 La. An. 435 (1848); Kennebec & P. R. Co. v. Kendall, 31 Me. 470 (1850); Judson v. Reardon, 16 Minn. 435 (1871); State v. Hardy, 7 Neb. 377 (1878); Wilkesbarre Hospital v. Luzerne, 84 Pa. St. 59 (1877); Butchers' Benf. Assoc., 35 Pa. St. 151 (1860); Pesterfield & Mayor, etc., v. Vickers, 3 Coldw. (Tenn.) 205 (1866); Mayor v. Beasly, 1 Humph. (Tenn.) 232 (1839); Robinson v. Mayor of Franklin, 1 Humph. (Tenn.) 156 (1839); s. c. 34 Am. Dec. 628; United States v. Hart, 1 Pet. C. C. 390 (1817).

[1] Philips v. Wickham, 1 Paige Ch. (N. Y.) 590 (1829); People v. Detroit Fire Department, 31 Mich. 466 (1875); Carr v. St. Louis, 9 Mo. 191 (1845); Kearney v. Andrews, 10 N. J. Eq. (2 Stockt.) 70 (1854); State v. Curtis, 9 Nev. 325 (1874).

[2] Seneca Co. Bank v. Lamb, 26 Barb. (N. Y.) 595 (1858); People v. Kip, 4 Cow. (N. Y.) 382 (1822); Auburn Academy v. Strong, Hopk. Ch. (N. Y.) 278 (1824); Philips v. Wickham, 1 Paige Ch. (N. Y.) 590 (1829); Sayre v. Louisville, U. B. Ass'n, 1 Duv. (Ky.) 143 (1863) Jay Bridge Co. v. Woodman, 31 Me. 573 (1850); Kennebec & P. R. Co. v. Kendall, 31 Me. 470 (1850); Davis v. Meeting House, 49 Mass. (8 Metc.) 321 (1844); People ex rel. Pulford, v. Detroit Fire Department, 31 Mich. 458 (1875); Carr v. St. Louis, 9 Mo. 191 (1845); Taylor v. Griswold, 14 N. J. L. (2 J. S. Gr.) 223 (1834); State v. Curtis, 9 Nev. 325 (1874); Butchers Association, 35 Pa. St. 151 (1860); Case of Philadelphia Savings Bank, 1 Whart. (Pa.) 461 (1836); St. Luke's Church v. Mathews, 4 Desaus. (S. C.) 578 (1815); s. c. 6 Am. Dec. 619; State v. Conklin, 34 Wis. 21 (1874); First Nat. Bank v. Lanier, 78 U. S. (11 Wall.) 369 (1870); bk. 20 L. ed. 172; United States v. Hart, 1 Pet. C. C. 390 (1817).

[3] Stuyvesant v. New York, 7 Cow. (N. Y.) 588 (1827).

[4] Dunham v. Rochester, 5 Cow. (N. Y.) 462 (1826); Outwater v. Berry, 6 N. J. Eq. (2 Halst.) 64 (1846); Clark v. LeCren, 9 B. & C. 52 (1829); King v. Coopers Co., 7 T. R. 543 (1798).

courts of their jurisdiction,[1] or prevent a person having a claim due upon contracts from pursuing the usual remedies provided by law;[2] yet there are cases in which it has been held that by-laws providing for redressing grievances and deciding controversies, are valid, and that a corporation may compel the members to resort to the prescribed methods of procedure before invoking the powers of the court.[3] But if the statute by-laws make no provision for a tribunal to decide, the question arising between the corporation and its members, and a member is injured by the failure of the corporation to fulfill its contract or perform its duty, he may maintain an action at law against it.[4]

Sec. 44p. Same—Repeal of by-law.—It has been said that the same body which has power to make has also power to repeal by-laws.[5] But it is also true that although the power is reserved to a corporation by its charter to alter, amend, or repeal its by-laws, it cannot repeal a by-law so as to injure rights which have been given and become vested by virtue of such by-law.[6]

Sec. 44q. Same—Notice of by-laws—When presumed.—Members of a corporation are presumed to have notice of its by-laws without direct proof of that fact.[7] Therefore all by-laws not in themselves illegal or requiring the performance

[1] Home Insurance Co. v. Morse, 87 U. S. (20 Wall.) 445 (1874); bk. 22 L. ed. 365; Scott v. Avery, 5 H. L. Cas. 811 (1856).

[2] See Spears v. Ward, 48 Ind. 541 (1874); Manson v. Grand Lodge, 30 Minn. 509 (1883).

[3] Lafond v. Deems, 81 N. Y. 508 (1880); White v. Brownell, 2 Daly (N. Y.) 329 (1868); Poultney v. Bachman, 31 Hun (N. Y.) 49 (1883); Baner v. Sampson Lodge, Knights Pythias, 102 Ind. 262 (1885); s. c. 13 Am. & Eng. Corp. Cas. 613; Harrington v. Workingmen's Benevolent Assoc., 70 Ga. 340 (1883); s. c. 27 Alb. L. J. 438. See Supreme Council v. Garrigus, 104 Ind. 133 (1885); Osceola Tribe v. Schmidt, 57 Md. 98 (1881); Anacosta Tribe v. Murbach, 13 Md. 91 (1858); s. c. 71 Am. Dec. 625; Dolan v. Court Good Samaritan, 128 Mass. 437 (1880); Foram v. Howard Ben. Assoc. 4 Pa. St. 519 (1846); Black & White Smith Soc. v. Vandyke, 2 Whart. (Pa.) 309 (1836); s. c. 30 Am. Dec. 263.

[4] See Dolan v. Court Good Samaritan, 128 Mass. 437 (1880).

[5] Rex v. Ashwell, 12 East 22 (1810).

[6] Kent v. Quicksilver Min. Co., 78 N. Y. 159 (1879); s. c. 12 Hun, (N. Y.) 53.

[7] Buffalo v. Webster, 10 Wend. (N. Y.) 99 (1833); Inhabitants of Palmyra v. Morton, 25 Mo. 93 (1857).

of acts contrary to law, are presumed to be known to the members of the corporation, and must for that reason be deemed binding upon persons who become members of such organization.[1]

A person dealing with a corporation is not required to take notice of its by-laws; nor can secret instructions limit the authority of an agent of a corporation as against a third party who deals with the agents in good faith within the scope of his apparent powers.[2]

Sec. 44r. Same—Failure to provide by-laws for annual election.—In 1885 the New York legislature passed an act "to protect stockholders of corporations from the wrong doing of directors in certain cases."[3] This act, however, only refers to wrongs which grow out of the neglect of the directors of corporations to adopt a by-law providing for the annual election required by this act, and the adoption of such a by-law being a pre-requisite to organization, the act of 1885 does not seem to be of any special importance to companies organized under the Business Act.

Sec. 44s. Same—Salary of Officers—Directors.—In the absence of any express provision or resolution in the constitution or by-laws of a corporation a director is not entitled to any compensation for his official services,[4] and in case of a director to entitle him to such compensation the by-law or resolution providing for the same must have been passed before his services as such director were rendered,[4] because a subsequent

[1] Coles v. Iowa State Mut. Ins. Co., 18 Iowa, 425 (1865); Simeral v. Dubuque Ins. Co., 18 Iowa, 319 (1865); Presbyterian Mut. Assurance Fund v. Allen, 106 Ind. 593 (1886); Bauer v. Sansom Lodge, Knights of Pythias, 102 Ind. 262 (1885); s. c. 13 Am. & Eng. Corp. Cas. 618; Mitchell v. Lycoming Mut. Ins. Co., 51 Pa. St. 402 (1865).

[2] See, Merchants' Bk. v. State Bk., 77 U. S. (10 Wall.) 650 (1870); bk. 19 L. ed. 1020; Minor v. Mechanics' Bk.. 26 U. S. (1 Pet.) 70 (1828); bk. 7 L. ed. 57.

[3] L. 1885, c. 489.

[4] See Barril v. Calendar Insulating & Water Proofing Co., 57 Hun, (N. Y.) 257 (1888); s. c. 2 N. Y. Sup. 758; s. c. 19 N. Y. St. Rep. 877; Gill v. New York Cab Co., 48 Hun, (N. Y.) 524 (1888); s. c. 1 N. Y. Sup. 202; Illinois Linen Co. v. Hough, 91 Ill. 63 (1878); American Central R. Co. v. Miles, 52 Ill. 174 (1869); Maux Ferry & Gravel Road Co. v. Branegan, 40 Ind. 361 (1872).

[5] See Lafayette, B. & M. R. Co. v. Cheeney, 87 Ill. 446 (1877); s. c. 68 Ill. 570 (1873). *Compare*, Barstow v. City R. Co., 42 Cal. 465 (1871).

vote to pay a director for his official services is without consideration, and therefore void.[1]

A director cannot recover on a *quantum meruit* for his services as director in the absence of a provision in the constitution or by-laws of a corporation allowing him compensation;[2] and it is well settled that directors cannot make themselves an allowance for their services.[3]

Sec. 44t. Same—Salary of president.—The president of a corporation is not entitled, in the absence of agreement, to any compensation for his services performed in the discharge of his duties.[4] In Gill v. New York Cab Co.,[5] the plaintiff who was a director of defendant, and as vice-president received a salary, sued for services rendered to defendant outside his duties as vice-president or director, the court held, that he could not recover in the absence of any understanding or agreement to pay him for such extra services.[6]

In the case of Reed v. Hayt,[7] it is said that where the president of a corporation has served as such for many years without salary, and advanced to the company considerable sums of money, which it still owes him, the directors have the right to compensate him for said services and advances, by issuing to him, in satisfaction thereof, in good faith, all the shares of stock remaining in the treasury. A president of a corporation, to whom stock had been issued for services and advances, sold his stock, including the shares so issued, to

[1] Loan Association v. Stonemetz, 29 Pa. St. 534 (1858); Carr v. Chartiers Coal Co., 25 Pa. St. 337 (1855).

[2] Citizens' National Bank v. Elliott, 55 Iowa 104 (1880). See Illinois Linen Co. v. Hough, 91 Ill. 63 (1878); American Central R. Co. v. Miles, 52 Ill. 174 (1869); Maux Ferry & Gravel Road Co. v. Branegan, 40 Ind. 361 (1872).

[3] See Butts v. Wood, 37 N. Y. 317 (1867); Blatchford v. Ross, 54 Barb. (N. Y.) 42 (1869); Maux Ferry & Gravel Road Co. v. Branegan, 40 Ind. 361 (1872); Gardner v. Butler, 30 N. J. Eq. (3 Stew.) 702, 721 (1879).

[4] Barril v. Calendar Insulating & Water Proofing Co., 57 Hun, (N.Y.) 257 (1888); s. c. 2 N. Y. Sup. 758; 19 N. Y. St. Rep. 877.

[5] 48 Hun, (N. Y.) 524 (1888); s. c. 1 N. Y. Sup. 202.

[6] See Levisee v. Shreveport City R. Co., 27 La. An. 641 (1875); Pew v. Gloucester National Bank, 130 Mass. 391 (1881).

[7] 109 N. Y. 659 (1888); s. c. 4 Ry. & Corp. L. J. 135; 17 N. Y. St. Rep. 137.

defendant, who refused to pay the purchase money on the ground of defect of title, because only three of the five directors (of whom the president was one) were present at the meeting which ordered the issuing of said stock. Neither the company, as then constituted, nor after the resignation of said president and the election of defendant as his successor, nor any stockholder, made any objection to said issue; and defendant, with full knowledge of the facts, used the other stock purchased of plaintiff, the former president, took an extension of time for the performance of the contract of sale, and neither as president or stockholder made any attempt to annul or avoid the acts of said board and the court held that the facts amounted to a ratification thereof by the company, and that defendant, by his conduct, was estopped from denying plaintiff's title to said stock.

Where the president or a director of a corporation renders services outsides of the scope of his regular duties a number of decisions hold that he may recover the fair worth of such services, in the absence of any resolution providing for his compensation.[1]

Sec. 44u. Same—Salary of agents and servants.—It is thought that the agents and servants of a corporation, other than the presidents, directors, and the treasurer may recover the value of their regular and extraordinary services rendered for the corporation on a *quantum meruit*.[2]

Sec. 45. Commissioners' Report—Certificate of incorporation.—Within ten days after the said subscribers' meeting, said commissioners shall file, in the office of the secretary of state, a verified record of

[1] Jackson v. New York Central R. R. Co., 2 T. & C. (N. Y.) 653 (1874); Cheeney v. Lafayette, etc., R. Co., 68 Ill. 570 (1873); Rockford, R. I. & St. L. R. R. Co. v. Sage, 65 Ill. 328 (1872); Citizens' Nat. Bk. v. Elliott, 55 Ia. 104 (1880); Missouri River R. R. Co. v. Richards, 8 Kan. 101 (1871); Santa Clara M'g Ass'n v. Meredith, 49 Md. 389 (1878); s. c. 33 Am. Rep. 264; Rogers v. Hastings & D. R. Co., 22 Minn. 25 (1875); Shackelford v. New Orleans J. & G. N. R. Co., 37 Miss. 202 (1859); Gardner v. Butler, 30 N. J. Eq. (3 Stew.) 702, 721 (1879).

[2] See Bee v. San Francisco & H. B. R. Co., 46 Cal. (248 (1873).

the proceedings thereof, containing a copy of the subscription list, a copy of the by-laws adopted, and the names of the directors chosen. Thereupon the secretary of state shall issue to said directors a certificate, setting forth that said corporation is fully organized in accordance with this act. Such certificate shall include a copy of the original certificate provided for in section three of this act,[1] the date and place of the subscribers' meeting, the names of the directors elected, and a statement that all the provisions of this act have been duly observed in the organization of such corporation. A copy of such certificate shall within ten days after the issuing thereof by the secretary of state, be filed in the office of the clerk of the county in which the principal business office of such corporation is situated. Such certificate shall be recorded at length in a book to be kept in the office of the secretary of state to be known as the record of incorporations, and also, in a similar book in the office of the county clerk aforesaid. Such certificate, or a copy thereof duly certified by the secretary of state or his deputy, shall be presumptive evidence of the incorporation of the corporation named therein, in all courts and proceedings in this state. The secretary of state shall receive for the filing and issuing of all the necessary documents in and about the organization of a corporation under this act, the sum of ten dollars ; and for each certified copy of certificate of incorporation, the sum of three dollars, which sum shall be paid into the treasury of the state ; and county clerks shall receive the fees now allowed by law. Upon every amendment of the by-laws of any such corporation, a copy of the amended by-law shall be filed

[1] See *ante* § 33.

in the office of the secretary of state and of such county clerk, and shall not take effect until so filed; and a copy thereof, certified by the secretary of state or his deputy, shall be received as presumptive evidence of such amended by-law in all courts and proceedings.[1]

Sec. 45a. Organization tax.—It is provided by Laws of 1886 as amended by Laws of 1887 that every corporation, joint-stock company or association incorporated by or under any general or special law of this state, having capital stock divided into shares, shall pay to the state treasurer, for the use of the state, a tax of one-eighth of one per centum upon the amount of the capital stock, which said corporation, joint-stock company or association is authorized to have, and a like tax upon any subsequent increase thereof.

The said tax shall be due and payable upon the incorporation of said corporation, joint-stock company or association, or upon the increase of the capital thereof; and no such corporation, joint-stock company or association shall have or exercise any corporate powers until the said tax shall have been paid. And the secretary of state and any county clerk shall not file any certificate of incorporation or articles of association or certify or give any certificate to any such corporation, joint-stock company or association, until he is satisfied that the said tax has been paid to the state treasurer; and no such company incorporated by any special act of the legislature shall go into operation or exercise any corporate powers or privileges until said tax has been paid as aforesaid. But this act shall not apply to literary, scientific, medical and religious corporations, or corporations organized under the banking laws of this state or under chapter one hundred and twenty-two of the laws of eighteen hundred and fifty-one, entitled: "An act for incorporation of building, mutual loan and accumulating fund associations," and the acts amendatory thereof.[2]

Sec. 45b. Incorporation and powers.—Where a corporation

[1] L. 1875, c. 611, § 7; 3 N. Y. R. S., 8th ed., p. 1980.

[2] L. 1886, c. 143, § 1, as amended by L. 1887, 248, § 17.

takes all proper steps towards its organization, as required by statute, it is fully incorporated, although the probate judge, though requested to, has not issued the certificate of incorporation required by statute,[1] providing that the judge shall certify, "on the completion of their organization," that they are organized under the law, and are authorized to do business.[2]

Sec. 46. Failure to organize—Revocation of License.—Unless such corporation shall be fully organized as provided in the last preceding section within one year after the issuing of the license to commissioners to open books, such license shall be deemed to be revoked, and all proceedings thereunder shall be void.[3]

Sec. 46a. Failure to organize—Recovery of money advanced.—On the failure of a company to organize, one who has advanced money in good faith to the promoters of such a company as a deposit or assessment upon shares subscribed for and to be subsequently issued, may recover back the money so advanced,[4] and he is not required to submit to the deduction of any part thereof to be applied toward the payment of the expenses incurred by the promoters' attempting to affect the incorporation.[5]

Sec. 46b. Forfeiture and surrender of charter.—The forfeiture of a charter for nonuser, misuser and the like, is fully discussed in a subsequent part of this work.[6]

The acts of a corporation may constitute a surrender of its charter rights, and it thereafter have no existence.[7]

[1] Ala. Code, 1807.

[2] Sparks v. Woodstock Iron & Steel Co., 87, Ala. 294 (1889); s. c. 6 So. Rep. 195.

[3] L. 1875, c. 611, § 7; 3 N. Y., R. S., 8th ed., p. 1980.

[4] Nockels v. Crosby, 3 B. & C. 814 (1825); Kempson v. Saunders, 4 Bing. 5 (1826); Ward v. Londesborough, 12 C. B. 252 (1852); Ashpitel v. Sercombe, 5 Ex. 147 (1850); Chaplin v. Clarke, 4 Ex. 403 (1849). *Compare*, Vollans v. Fletcher, 1 Ex. 20 (1847); Grand Trunk, &c., R. Co. v. Brodie, 9 Hare 823 (1852); Williams v. Salmond, 2 Kay & J. 463 (1856). See also Williams v. Page, 24 Beav. 654 (1857); Green v. Barrett, 1 Sim. 45 (1826); Colt v. Woollaston, 2 P. Wms. 154 (1723).

[5] Nockels v. Crosby, 3 B. & C. 814 (1825). *Compare*, Williams v. Salmond, 2 Kay & J. 463 (1856).

[6] See *post*, § 162 m.

[7] Webster v. Turner, 12 Hun (N. Y.) 264 (1877).

CHAPTER IV.

BUSINESS ACT (CONTINUED).

NAME OF CORPORATION—OFFICERS AND DIRECTORS—CAPITAL STOCK—SUBSCRIPTIONS—CERTIFICATE AND TRANSFER.

SEC. 47. Table of names of Corporations—Publication in Session Laws.
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SEC. 52e[1]. Same—Subsequent Obligations—Liability of Transferee.
SEC. 52f[1]. Same—Insolvent Purchaser—Liability of Transferor.
SEC. 52g[1]. Same—Injunction to Prevent Selling or Voting Stock.

Sec. 47. Table of names of Corporations—Publication in Session Laws. — The Secretary of State shall publish, as an appendix to the session laws of each year, a statement of all the corporations organized under this act during the preceding year, containing in each case the name of the corporation, its principal business, the location of its principal business office, the amount of capital stock, the date of the filing of the preliminary certificate and of the granting of the final certificate of incorporation by the secretary of state; and any change of location or capital of any such corporation made during the preceding year.[1]

Sec. 47a. Selecting name—Method of.—It is recommended that the table of names of corporations in the annual Session Laws be consulted before adopting a name for the company it is proposed to organize, to the end that parties may avoid selecting substantially the same name as one that has been previously adopted by an already existing company; for should such a name be selected, no license can be issued to a proposed company having the same name as an already existing corporation in this state, or one so near resembling it as to be calculated to deceive.[2]

Sec. 48. Directors and officers.—Number and election of.—The business of every corporation created hereunder shall be managed by a board of directors (the members of which at their election and throughout their term of office shall be stockholders in such corporation to at least the extent of five shares, and shall hold their offices until their successors are chosen) and by such officers, to be elected by and from among said directors, as the by-laws shall prescribe. The number of directors shall not be less than five nor more than thirteen, and the existing number thereof may be changed to not less than

[1] L. 1875, c. 611, § 9; 3 N. Y. R. S., 8th ed., p. 1980.

[2] See *ante*, § 42.

five nor more than thirteen, by a vote of a majority in interest of the owners of the stock issued by said corporation, present in person, or by attorney duly authorized, at a meeting of the stockholders of such corporation called pursuant to such a notice, specifying the purpose of such meeting and given to each stockholder, as is prescribed in section five of this act[1]; and a statement of the change of the number of directors so made, signed and verified by the president or a vice-president of the corporation and by the secretary of the meeting at which the change was made, shall be filed in the office of the secretary of state, and a copy thereof in the office of the clerk of the county in which the principal business office of the company is situated, within ten days after such meeting. A majority of the whole number of directors shall be necessary to constitute a quorum. The secretary shall record all the votes of the corporation and the minutes of its transactions in a book to be kept for that purpose. The treasurer shall give bonds in such sums and with such sureties as are required by the by-laws for the faithful discharge of his duties.[2]

Sec. 48a. Officers of corporation—Duties and liabilities.—Directors and other officers of corporations occupy positions of trust and must act in the utmost good faith. They will not be allowed to deal with the corporate funds and property for their private gain. They have no right to deal with themselves and the corporation at the same time, and they must account for the profits made by the use of the corporate assets and moneys made by a breach of trust.[3]

[1] See *ante*, § 43.

[2] L. 1875, c. 611, § 10, as amended, L. 1881, c. 422, 3 N. Y., R. S., 8th ed., 1890.

[3] Clubb v. Davidson (Mo.), 4 Ry. & Corp. L. J. 161 (1888); Ward v. Davidson, 89 Mo. 458 (1886); s. c. 1 S. W. Rep. 846.

Sec. 48b. Same—Election and acceptance.—In an action by stockholders against the officers of the corporation, to oust the latter from office, the plaintiffs claimed that the capital stock had been illegally increased. It appeared that defendants were the legal officers prior to a meeting of stockholders in 1885, and had managed the affairs of the corporation since its creation. At the meeting in 1885 defendants received votes representing, not only a majority of the capital stock after the increase, but also a majority of the original issue. The court held that the officers were legally elected.[1] Where a person is shown to have been elected as trustee or other officer of a corporation, his acceptance of such office will be presumed in the absence of evidence to the contrary.[2]

Sec. 48c. Same—Failure to elect.—An intentional neglect on the part of the officers of a corporation to notify and hold the annual election for directors and other officers as required by statute, is such a violation of the provisions of the charter of the company as will authorize the court to appoint a receiver and to decree a dissolution of the corporation[3]; but such failure does not of itself work a dissolution of the corporation, for on the failure to elect the trustees and other officers hold over.[4]

Sec. 48d. Same—Holding over.—Where the president or other officers of the corporation are properly elected, they may, without any special provisions in the charter to that effect, hold over until their successors are elected; and especially is this so where the charter expressly provides that the officers elected by the stockholders "shall continue in office for that year and until others are chosen."[5] Where the term of a

[1] Byers v. Rollins, (Colo.) 21 Pac. Rep. 894 (1889).

[2] Nimmons v. Tappan, 2 Sween. (N. Y.) 652 (1870).

[3] Ward v. Sea Ins. Co., 7 Paige Ch. (N. Y.) 294 (1838).

[4] See Deming v. Puleston, 35 N. Y. Super. Ct. (3 J. & S.) 309, 312 (1873); Reformed Dutch Church v. Brandow, 52 Barb. (N. Y.) 236 (1868). Cahill v. Kalamazoo Mut. Ins. Co., 2 Doug. (Mich.) 124 (1845); Lehigh Bridge Co. v. Lehigh Coal & Nav. Co., 4 Rawle (Pa.) 9 (1833); s. c. 26 Am. Dec. 111; Hardon v. Newton, 14 Blatchf. C. C. 379 (1878); Morley v. Thayer, 3 Fed. Rep. 748 (1880).

[5] Olcott v. Tioga R. Co., 27 N. Y. 546, 557 (1863); People ex rel. Faile v. Ferris, 16 Hun, (N. Y.) 224 (1878). See also authorities above cited.

director or trustee has expired, and no new trustee has been elected and the old trustee acts as trustee, he becomes a trustee *de facto* of the corporation and is liable as such.[1]

Sec. 48e. Same—Acts of officers—Presumption of authority.—It is thought that the performance by the officers of a corporation of an act which the corporation had power to perform is the act of the corporation, and not the mere act of the officers of such corporation ;[2] and it will always be presumed that the acts which the officers of a corporation continually and usually perform in its behalf, are authorized by its directors.[3] If the officers of a corporation jointly exercise a power which presupposes a delegated authority from the members, and their corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed.[4]

Sec. 48f. Same—Actions against officers.—Independently of statute, a court of equity in New York has no jurisdiction, at the suit of the people, to compel the officers of a private business corporation to refund property of the corporation illegally disposed of.[5]

Code of Civil Procedure of New York in the chapter regulating "Actions Relating to Corporations "[6] provides that an action may be maintained against the trustees of a corporation to compel them to pay over to the corporation the value of

[1] Deming v. Puleston, 55 N. Y. 655 (1873). See Jones v. Barlow, 62 N. Y. 202, 211, 212 (1875); Reed v. Keese, 60 N. Y. 616 (1875); Shaler v. Hall Quarry Co. v. Bliss, 27 N. Y. 297 (1863); Boughton v. Otis, 21 N. Y. 261 (1860); Sanborn v. Lefferts, 16 Abb (N. Y.) Pr. N. S. 42 (1874.)

[2] Cheever v. Gilbert Elevated Road Co., 43 N. Y. Super. Ct. (11 J. & S.) 478, 486 (1878). See Life & Fire Ins. Co. v. Mechanic Fire Ins. Co. of N. Y., 7 Wend. (N. Y.) 31 (1831); Herzo v. San Francisco, 33 Cal. 134 (1867).

[3] Elwell v. Dodge, 33 Barb. (N. Y.) 340 (1861).

[4] See Olcott v. Tioga R. Co., 27 N. Y. 559 (1863); s. c. 84 Am. Dec. 298; Hoyt v. Thompson, 19 N. Y. 208, 219 (1859); Lee v. Pittsburgh Coal & M. Co., 56 How. (N. Y.) Pr. 373 (1877); aff'd 75 N. Y. 601; Melledge v. Boston Iron Co., 59 Mass. (5 Cush.) 175 (1849); s. c. 51 Am. Dec. 29; Bank of United States v. Dandridge, 25 U. S. (12 Wheat.) 64 (1827); bk. 6 L. ed. 552.

[5] People v. Ballard, 3 N. Y. Sup. 845 (1889).

[6] N. Y. Code Civ. Proc., art. 2, tit. 2, c. 15, § 1784.

property disposed of by them in violation of their duties. By section 1782 the action may be brought by the attorney-general in behalf of the people, or by a creditor, trustee or other officer of the corporation. Section 1808 provides that, when the attorney-general has good reason to believe that an action can be maintained by the people, he must bring it, etc. Chapter 16, tit. 1, art. 6, § 1986, "Actions in behalf of the People," provides that when an action is brought by the attorney general, on the relation of a person interested, the plaintiff must allege, and the title of the action show, that the action is brought on relation. By section 1972, upon the "Commencement of an Action to Recover Public Property," the title to the property vests in the state. These provisions recognize the distinction between actions to protect public rights and those to protect private rights; and, as the state has no interest in the property of private business corporations, an action to compel the trustees of a non-resident corporation to pay over to it the value of property situated in another state, which they have, as alleged, unlawfully transferred, cannot be maintained by the people.[1]

The fact that the action was brought on the relation of a trustee is insufficient, where neither the complaint nor the title of the action shows that it was so brought.[2]

Where the trustees issued stock in payment for property, which was worth much more than the par value of the stock, to one who had sold it for several times its par value; the trustees not being in any way interested in the transaction, except to authorize the issue. They also, in good faith, conveyed all of the property of the corporation to another corporation, which transfer was authorized and ratified, by a large majority of the stockholders. The court held that, if the state could maintain the action, no case was shown for the interference of the court.[3]

Sec. 48g. Same.—Misfeasance of officer and action of stock-

[1] People v. Ballard, 3 N. Y. Sup. 845 (1889).

[2] People v. Ballard, 3 N. Y. Sup. 845 (1889).

[3] People v. Ballard, 3 N. Y. Sup. 845 (1889).

holder.—A stockholder cannot sue an officer for injury to corporation property, caused by his misfeasance in office, unless the corporation refuses to sue, and in that case the corporation must be made a party defendant. The New York Code of Civil Procedure,[1] providing that the court may determine the controversy, as between the parties, where it can do so without prejudice to the rights of others, or by saving their rights, does not apply. Nor does section,[2] allowing a creditor, trustee, director, manager, or other officer of a corporation, having general superientndence of its concerns, to bring an action against the officers to set aside an alienation of corporation property made by them contrary to law, or foreign to the business of the corporation, apply to a stockholder.[3]

That the action is in tort against an officer who acted on his own responsibility in alienating corporation property, and signed the instrument individually, and not as trustee, does not alter the rule, as whatever damage plaintiff sustained was caused by defendant acting officially, and if he was not acting officially, his act was nugatory.[4]

Sec. 48h. Same—Default of officers.—Action by stockholder.—Plaintiff wrote to one W., as president of a corporation in which he was stockholder, requesting that action should be taken against two of the directors for misconduct and neglect of duty. W. wrote that he had resigned the presidency two years before. There was no evidence that he ever had resigned, and there had been no meeting of the corporation since his election. The two directors were most active in the management of the company. The court held that these facts were sufficient to entitle plaintiff to sue as a stockholder in his own name.[5]

A suit for relief for the misappropriation of the funds of a corporation is properly brought by the stockholders, without any demand on the directors to bring such suit, where the complaint alleges that the corporation is under the control of

[1] N. Y. Code Civ. Pro., § 452.
[2] N. Y. Code Civ. Pro., § 1782.
[3] Stromeyer v. Combes, N. Y. City C. P. S. T.) 2 N. Y. Sup. 232 (1888).
[4] Stromeyer v. Combes, (N. Y. City C. P. S. T.) 3 N. Y. Sup. 232 (1888).
[5] Averill v. Barber, 53 Hun, (N. Y.) 636 (1889); s. c. 6 N. Y. Sup. 255.

the defaulting directors, and that such demand would be useless.[1]

An averment that the plaintiffs were owners of the stock of the corporation before suit brought, and ever since 1881, sufficiently alleges ownership of the stock.[2]

Such suit may be brought by any one or any number of stockholders.[3]

The directors who are charged with having connived at such defaults are proper parties defendant in such action.[4]

Sec. 48i. Same—Directors—Duties and liabilities and Authority.—It is the duty of directors and trustees of a corporation to manage the affairs of the corporation to the best of their ability in the interest of the stockholders and creditors of the same, and if they wilfully abuse their trust or misapply the funds of the company by which a loss is sustained they are personally liable as trustees to make good such loss ; and they are also liable if they suffer the corporate funds to be lost or wasted by gross negligence or inattention to the duties of their trust.[5]

The duties of a director or trustee of a corporation are those of an agent or trustee of a stockholder, and such directors or trustees are subject to the obligations and disabilities incident to such rules.[6]

[1] Moyle v. Landers, (Cal.) 21 Pac. Rep. 1133 (1889).

[2] Moyle v. Landers, (Cal.) 21 Pac. Rep. 1133 (1889).

[3] Moyle v. Landers, (Cal.) 21 Pac. Rep. 1133 (1889).

[4] Moyle v. Landers, (Cal.) 21 Pac. Rep. 1133 (1889).

[5] See Brinckerhoff v. Bostwick, 88 N. Y. 52 (1882); Butts v. Wood, 38 Barb. (N. Y.) 181 (1862); s. c. 37 N. Y. 317; St. Mary's Bank v. St. John, 25 Ala. N. S. 566 (1854); Ver-Planck v. Mercantile Ins. Co., 1 Edw. Ch. (N. Y.) 84 (1831); Robinson v. Smith, 3 Paige Ch. (N. Y.) 222 (1832); Board of Com. of Tippecanoe County v. Reynolds, 44 Ind. 509 (1873); s. c. 15 Am. Rep. 251; Wilkinson v. Dodd, 40 N. J. Eq. (13 Stew.) 142 (1885); Ackerman v. Halsey, 37 N. J. Eq. (11 Stew.) 362 (1883); Citizens Building, L. & S. Assoc. v. Coriell, 34 N. J. Eq. (8 Stew.) 383 (1881); Citizens Loan Assoc. v. Lyon, 29 N. J. Eq. (2 Stew.) 110 (1878); Taylor v. Miami Exporting Co., 5 Ohio 162 (1831); Springs Appeal, 71 Pa. St. 23 (1872); s. c. 10 Am. Rep. 692; Lewis v. St. Albans I. & S. Wks., 50 Vt. 481 (1878); Mut. Building Fund v. Bosseiux, 3 Fed. Rep. 817, 835 (1880).

[6] Robinson v. Smith, 3 Paige Ch. (N. Y.) 222 (1832); Movius v. Lee, 30 Fed. Rep. 298, 307 (1887). See Butts v. Wood, 37 N. Y. 319 (1867); Bach v. Pacific M. S. Co., 12 Abb. (N. Y.) Pr. N. S. 377 (1872); Cumber-

The directors of a corporation cannot, even with the consent of the stockholders, discontinue the corporate business and distribute the capital stock among its stockholders, in the absence of any express legislative act conferring such power;[1] neither have they a power to transfer the entire property of the corporation except its real estate, and invest the purchasers with the whole business of the corporation, as against non-consenting stockholders.[2]

Sec. 48j. Same—Compensation—Auditing bill.—A director who receives a salary as vice-president cannot, in the absence of a special agreement, recover compensation for services outside his duties as director and vice-president.[3]

Where an officer whose duties do not require any special knowledge, ability, or attention presides at a meeting of the trustees in which a resolution voting him a salary is passed, though he testifies that he did not vote, and it is not recorded that he did, no dissent appearing, the resolution is invalid.[4]

The only testimony that the services were of any value being that of the officer himself, he cannot be held to be entitled to the salary on the *quantum meruit*.[5]

In Butts v. Wood,[6] it is held that where a member of a board of directors of a plank road company, being also the secretary of the board, presents to the board a bill for extra compensation as secretary, he is disqualified to act as director upon the

land C. & I. Co. v. Sherman, 30 Barb. (N. Y.) 571 (1859); Verplanck v. Mercantile Ins. Co., 1 Edw. Ch. (N. Y.) 84 (1831); Percy v. Millaudon, 3 La. 568 (1832); State v. Willis, 78 Me. 70 (1885); Hodges v. New Eng. Screw Co., 1 R. I. 312 (1850); s. c. 3 R. I. 9 (1853); York & N. M. R. Co. v. Hudson, 16 Beav. 485 (1853); Aberdeen R. Co. v. Blaikie, 1 McQ. H. L. Cas. 461 (1851); Benson v. Heathorn, 1 Y. & C. 326 (1842).

[1] Abbott v. American Hard Rubber Co., 33 Barb. (N. Y.) 584, 592 (1861); s. c. 20 How. (N. Y.) Pr. 204; Ward v. Sea Ins. Co., 7 Paige Ch. (N. Y.) 294 (1838).

[2] Abbot v. American Hard Rubber Co., 33 Barb. (N. Y.) 584, 592 (1861); s. c. 20 How. (N. Y.) Pr. 204; Ward v. Sea Ins. Co., 7 Paige Ch. (N. Y.) 294 (1838).

[3] Gill v. New York Cab Co., 48 Hun, (N. Y.) 524 (1888); s. c. 1 N. Y. Sup. 202.

[4] Ashley v. Kinnan, 18 N. Y. St. Rep. 791; (1888); s. c. 2 N. Y. Sup. 574.

[5] Ashley v. Kinnan, 2 N. Y. Sup. 574; (1888); s. c. 18 N. Y. St. Rep. 791.

[6] 37 N. Y. 317 (1867).

audit of such bill. It is a general principle that where an interested director must be included to constitute a quorum of the board, the board thus constituted is not qualified to act upon the bill of the interested director so as to bind the corporation.[1] And where such board acting under such circumstances audits such bill, any stockholder may sue for himself, and any other stockholder who makes himself a party to prevent a payment of said bills by the treasurer of the company.[2]

Sec. 48k. Tenure of directors—"Or" construed to mean "and".—Where the by-laws provide that the directors shall "serve for the term of one year, or until such time as their successors shall be elected," the word "or" must be read as "and," for the intention evidently is, that the trustees shall serve for one year, and thereafter until their successors shall be elected.[3]

Sec. 481. Resignation of directors.—It has been said that the directors of a corporation, when they find the corporation is insolvent; that its affairs are growing worse every day, and the danger is imminent that the remaining property will be wasted, leaving the bulk of its creditors unpaid, may lawfully resign for the purpose of securing a fair and equal distribution of the corporate property among its creditors, and such resignation becomes effective to vacate the respective offices without any affirmative act of the corporation.[4] This seems to be the only way in which a fair and equal distribution of the corporate property can be secured, The court say that under the provisions of the new code, creditors whose debts happen to be due may take all the property; and that "even in cases where the application is made by the directors, for voluntary dissolution,[5] any creditor who recovers a judgment without the assent of the corpora-

[1] Butts v. Wood, 37 N. Y. 317 (1867).

[2] Butts v. Wood, 37 N. Y. 317 (1867).

[3] Chemical Nat. Bank v. Colwell, 14 N. Y. St. Rep. 682 (1888).

Smith v. Danzig, 64 How. (N. Y.) Pr. 320 (1883); citing Chandler v. Hoag, 63 N. Y. 624 (1875); Van Amburgh v. Baker, 81 N. Y. 46 (1880); Sprague v. Dunton, 14 Hun, (N. Y.) 492 (1878).

[4] Under N. Y. Code Civ. Proc., § 2419.

tion,[1] will take the property because this court has held that in such a proceeding a temporary receiver cannot be appointed,[2] and that the only receivership authorized by law was by final judgment, which must be in less than three months after the commencement of the proceedings.[3]

Sec. 48m. Same—Care required of directors.—The directors or trustees of a corporation, as we have seen above, stand in a relation similar to that of trustees of the shareholders. Particularly is this true in reference to the management by directors or trustees of the property and general affairs of the corporation;[4] they are obliged to take the same care and diligence in the management of the affairs of the corporation as factors and agents, and are answerable not only for any fraud and gross negligence, but also to all faults that are contrary to the care required of them.[5] It has been said that a trustee or director "must use the same care, skill, diligence, and prudence in the management of the trust and his dealings with the trust property which a man of ordinary care and skill and prudence would in his own transactions, and with his own property, under like circumstances; and the trustee is answerable for all losses, deficiencies, and injuries which are occasioned by his affirmative or negative violation of this duty."[6] In all cases the question to be determined is whether the directors have omitted that care which men of common prudence take in the management of their own concerns.[7] There are some authorities, it is true, which hold that trustees are liable only for *crassa negligentia*, which literally means gross negligence, but that phrase has been defined to mean

[1] N. Y. Code Civ. Proc., § 2430.

[2] Ex parte French Manuf. Co., 12 Hun, (N. Y.) 488 (1878); see case of Open Board of Brokers, per Lawrence, J., N. Y. Special Term, Apr. 1882.

[3] N. Y. Code Civ. Proc., §§ 2423, 2429.

[4] Scott v. Depeyster, 1 Edw. Ch. (N. Y.) 513 (1832); Board of Com. of Tippecanoe County v. Lafayette, M. & B. R. Co., 50 Ind. 98 (1875).

[5] Scott v. Depeyster, 1 Edw. Ch. (N. Y.) 513 (1832); Bank of Mut. Redemption v. Hill, 56 Me. 388 (1868).

[6] See Scott v. Depeyster, 1 Edw. Ch. 513 (1832); Litchfield v. White, 3 Sandf. (N. Y.) 545 (1850); Charitable Corporation v. Sutton, 2 Atk. 405 (1742).

[7] See Hun v. Cary, 82 N. Y. 72 (1880); s. c. 59 How. (N. Y.) Pr. 443 (1880)

simply the absence of ordinary care and diligence adequate to the particular case.[1]

Sec. 48n. Same—Degrees of negligence.—There is a still recognized and accepted distinction between the degrees of negligence of which a trustee or director may be guilty; a distinction which is said to be "often found of but little practical importance, when dealt with by a jury on the trial of a cause, but one which the courts are bound to regard in the determination and application of the rules of law."[2]

Sec. 48o. Same—Liability for acts of officers.—The directors or trustees of a corporation in the appointment of a secretary and other subordinate officers do not become sureties for their fidelity and good behavior, provided they exercise good care and caution in their selection, but if they select persons to fill subordinate situations who are known to them to be unworthy of trust, or notoriously of bad character, and a loss ensues through the fraud or embezzlement of such subordinate officers, the directors or trustees will be personally liable.[3] The directors or trustees of a corporation are bound to use ordinary care and diligence in the control and management of the officers of the corporation, and are only answerable for such diligence.[4]

Sec. 48p. Same—Liability for loss.—The directors or trustees of a corporation will be personally liable as such for all losses sustained because of the willful abuse of their trust or misapplication of the funds of the company by them. They are also liable if they suffer the corporate funds to be wasted or lost through their gross negligence or inattention to the duties of their trust;[5] but the director or trustee of a corpo-

[1] Hun v. Cary, 82 N. Y. 72 (1880.)

[2] See Scott v. Depeyster, 1 Edw. Ch. (N. Y.) 513 (1832); French v. Buffalo, N. Y. & E. R. Co., 4 Keyes (N. Y.) 114 (1868); s. c. 2 Abb. App. Dec. 201.

[3] Scott v. Depeyster, 1 Edw. (N. Y.) Ch. 513 (1832). See Gardiner v. Pollard, 10 Bosw. (N. Y.) 692 (1863.)

[4] Scott v. Depeyster, 1 Edw. (N. Y.) Ch. 513 (1832). See Charlestown Boot & Shoe Co. v. Dunsmore, 60 N. H. 86 (1880); March v. Eastern R. Co., 43 N. H. 516 (1862).

[5] Robinson v. Smith, 3 Paige Ch. (N. Y.) 222 (1832). See Brinckerhoff v. Bostwick, 88 N. Y. 52 (1882); Butts v. Wood, 38 Barb. (N. Y.) 181

ration cannot, in the absence of any fraudulent conduct, embezzlement, or misappropriation of funds or realization of profit not in common to all the stockholders, be made to account to the stockholders for losses arising from mismanagement, merely, or be made liable for mistake of judgment or want of skill or knowledge,[1] and a director or trustee cannot be required to make good a loss occasioned by the fraud or misconduct of a co-director or co-trustee, in which he had no part, and which was perpetrated without his knowledge or connivance.[2]

The directors or trustees of a corporation are personally liable to parties injured by their fraudulent breach of trust.[3]

Sec. 48q. Same—Breach of trust or neglect of duty—Remedy.—Where the trustees or directors of a corporation have become liable because of their wrongful dealings with the corporate property, or wrongful exercise of corporate franchises, and the like, suits should be instituted in the name of the corporation, and where the corporation either actually or virtually refuses to institute or proceed with such a suit, it may be brought or maintained by a stockholder or stockhold-

(1862); s. c. 37 N. Y. 317; Board of Com. of Tippecanoe County v. Reynolds, 44 Ind. 509 (1873); s. c. 15 Am. Rep. 251; Scott v. Depeyster, 1 Edw. Ch. (N. Y.) 513 (1832); Verplanck v. Mercantile Ins. Co., 1 Edw. Ch. (N. Y.) 84 (1831); Franklin Fire Ins. Co. v. Jenkins, 3 Wend. (N. Y.) 130 (1829); St. Mary's Bank v. St. John, 25 Ala. (N. S.) 566 (1854); Wilkinson v. Dodd, 40 N. J. Eq. (13 Stew.) 142 (1885); Ackerman v. Halsey, 37 N. J. Eq. (10 Stew.) 362 (1883); Citizens' Bldg. Loan & S. Assoc. v. Coriell, 34 N. J. Eq. (7 Stew.) 383 (1881); Citizens' Loan Assoc. v. Lyon, 29 N. J. Eq. (2 Stew.) 110 (1878); Taylor v. Miami Exporting Co., 5 Ohio 167 (1831); Spering's Appeal, 71 Pa. St. 23 (1872); s. c. 10 Am. Rep. 692; Lewis v. St. Albans I. & S. Wks., 50 Vt. 481 (1878); Mutual Bldg. Fund v. Bosseiux, 3 Fed. Rep. 835 (1880).

[1] Spering's Appeal, 71 Pa. St. 11 (1872); s. c. 10 Am. Rep. 684. See Witters v. Sowles, 31 Fed. Rep. 2 (1887); Tippecanoe County v. Reynolds, 44 Ind. 517 (1873) s. c. 15 Am. Rep. 251.

[2] See Robinson v. Smith, 3 Paige Ch. (N. Y.) 222 (1832); State v. Willis, 78 Me. 70 (1885); Ackerman v. Halsey, 37 N. J. Eq. (10 Stew.) 356 (1883); s. c. 38 N. J. Eq. (11 Stew.) 501; Hodges v. New England Screw Co., 1 R. I. 312 (1850); s. c. 3 R. I. 9; Movius v. Lee, 30 Fed. Rep. 307 (1887).

[3] Smith v. Rathbun, 66 Barb. (N. Y.) 405 (1873); Robinson v. Smith, 3 Paige Ch. (N. Y.) 222 (1832).

ers;[1] but in order that a suit may be maintained by a stockholder or stockholders, it must be made to appear that the board of directors, or other managing body, has actually refused to bring suit itself or to permit an action to be brought in the name of the company.[2]

Sec. 48r. Same—Liability for false and deceptive statements—Misrepresentation, etc.—The directors or trustees of a corporation are liable for false and deceptive statements, misrepresentations as to solvency, and the like.[3]

It has been said that "when a fraud is committed in the name and under the cover of a corporation by persons having the right to speak for it, for their personal gain and benefit, they are bound personally for their wrongful acts. Their tongues uttered the false words and their purses must pay the damages."[4] The directors or trustees of a corporation are sup-

[1] See Robinson v. Smith, 3 Paige Ch. (N. Y.) 222 (1832); Brewer v. Boston Theatre, 104 Mass. 399 (1870); Peabody v. Flint, 83 Mass. (6 Allen) 52 (1863); Slattery v. St. Louis & N. O. Transp. Co., 91 Mo. 217 (1886); Detroit v. Dean, 106 U. S. (16 Otto) 537 (1882); bk. 27 L. ed. 300; Hawes v. Oakland, 104 U. S. (14 Otto) 450 (1881); bk. 26 L. ed. 827; Pond v. Vermont Valley R. Co., 12 Blatch. C. C. 280 (1874).

[2] See Young v. Drake, 8 Hun, (N. Y.) 61 (1876); Rogers v. Lafayette Agricultural Works, 52 Ind. 296 (1875); March v. Eastern R. Co., 40 N. H. 548 (1860); Hodges v. New England Screw Co., 1 R. I. 312 (1850); Memphis G. Gas Co. v. Williamson, 9 Heisk. (Tenn.) 314 (1872); Jackson v. Ludeling, 88 U. S. (21 Wall.) 616 (1874); bk. 22 L. ed. 492; Davenport v. Dows, 85 U. S. (18 Wall.) 626 (1873); bk. 21 L. ed. 938; Memphis v. Dean, 75 U. S. (8 Wall.) 64 (1868); bk. 19 L. ed. 326; Heath v. Erie R. Co., 8 Blatchf. C. C. 347 (1871); Forbes v. Memphis, E. P. & P. R. Co., 2 Woods C. C. 323 (1872); Mason v. Harris, L. R. 11 Ch. Div. 97 (1879); Menier v. Hopper's Tell. Works, L. R. 9 Ch. App. 350 (1874); Duckett v. Gover, L. R. 6 Ch. Div. 82 (1877); MacDougall v. Gardiner, L. R. 1 Ch. Div. 13 (1875); Atwood v. Merryweather, L. R. 5 Eq. 464 n, (1867); Benson v. Heathorn, 1 Younge & C. 326 (1842).

[3] See Craigie v. Hadley, 99 N. Y. 131 (1885); s. c. 52 Am. Rep. 9; Anonymous, 67 N. Y. 598 (1876); Chaffee v. Fort, 2 Lans. (N. Y.) 81 (1869); Oakland Bank v. Wilcox, 60 Cal. 126 (1882); Delano v. Case, 121 Ill. 247 (1887); s. c. 2 Am. St. Rep. 81; 17 Ill. App. 531.

[4] Vreeland v. New Jersey Stone Co., 29 N. J. Eq. (2 Stew.) 188, 195 (1878); Bartholomew v. Bentley, 15 Ohio 659 (1846); s. c. 45 Am. Dec. 596; Seale v. Baker, 70 Tex. 283 (1888); s. c. 8 Am. St. Rep. 592; Bank of Montreal v. Thayer, 2 McCreary C. C. 1 (1881).

posed to know and be familiar with all the facts relative to its conditions and property, and their statements regarding these matters naturally affect public confidence, consequently, if they fraudulently unite in and attempt to deceive the public and by false statement of facts to give credit and currency to its stock, they will be liable to those who have been injured by relying upon their representations;[1] thus where they knowingly issue or sanction the circulation of a prospectus containing false statements as to material facts, the tendency of which false statements is to deceive the public into purchasing the corporate stock, they will be liable in damages to any one who relied upon such false statements, to his injury.[2] Where the design is to defraud the public generally, any one who has suffered injury by means of such false statements may maintain an action in damages.[3]

The directors will be liable for misrepresentations in a prospectus where they make a material and definite statement of a fact which is false, intending that other persons shall rely upon it, and they do rely upon it and are thereby damaged,— 1. If it is false to the knowledge of the person making it; 2. If it is untrue in fact, and not believed to be true by the person making it; 3. If it is untrue in fact, and is made recklessly, for instance, without any knowledge on the subject, and without taking the trouble to ascertain if it is true or false; 4. If it is untrue in fact, but believed to be true, but without any reasonable grounds for such belief.[4]

[1] See Morgan v. Skiddy, 62 N. Y. 319, 326 (1875); Westervelt v. Demarest, 46 N. J. L. (17 Vr.) 37 (1884); s. c. 50 Am. Rep. 400.

[2] Morgan v. Skiddy, 62 N. Y. 319, 326 (1875); Paddock v. Fletcher, 42 Vt. 389 (1869); Peek v. Derry, L. R. 37 Ch. Div. 541 (1887); s. c. 21 Am. & Eng. Corp. Cas. 243. See Smith v. Chadwick, L. R. 9 App. Cas. 187 (1884); s. c. 5 Am. & Eng. Corp. Cas. 23, Edgington v. Fitzmaurice, L. R. 29 Ch. Div. 459 (1885); s. c. 10 Am. & Eng. Corp. Cas. 78; Petrie v. Guelph Lumber Co., 11 Supreme Court of Canada Rep. 451 (1886); s. c. 15 Am. & Eng. Corp. Cas. 487.

[3] Eaton v. Avery, 83 N. Y. 31 (1880); s. c. 38 Am. Rep. 389; Com. v. Harley, 48 Mass. (7 Metc.) 462 (1844); Bartholomew v. Bentley, 15 Ohio, 659 (1846); s. c. 45 Am. Dec. 596; Bank of Montreal v. Thayer, 2 McC. C. C. 1 (1881); *Compare*, Schwenk v. Naylor, 102 N. Y. 683 (1886).

[4] Peck v. Derry, L. R. 37 Ch. Div. 541, 585 (1887); s. c. 21 Am. & Eng. Corp. Cas. 243.

Sec. 48s. Same — Liability to stockholders—Parties.— The directors or trustees of a corporation are liable to the stockholders and creditors of such corporation for a fraudulent breach of trust, and in a suit instituted against them on account of such fraud it is not necessary to make all the directors parties ;[1] because the party injured may recover from any one of them for the whole loss ;[2] and it is therefore not necessary to make all parties who may more or less have joined in the act complained of, but the directors and trustees guilty of the frauds and illegal acts injuriously affecting the rights of the plaintiff should be made parties.[3]

The directors of an incorporated company will not be liable as between themselves and a stockholder, for a loss occurring from error on their part where they are otherwise without fault.[4] The court hold in Scott v. Depeyster[5] that any one taking upon himself an office of trust or confidence for the public or another, does not contract for anything more than a diligent attention to its concerns, and a faithful discharge of the duties which it imposes, he is not supposed to have attained infallibility; and, therefore, does not stipulate that he is free from error.

Sec. 48t. Same—Liability to creditors.—Where it appears in a suit brought by creditors of a corporation to enforce the personal liability of the directors under the statute, that at the time the corporation suspended its business, some of the defendants were personally liable for its debts, on account of which they have been since obliged to make advances, they cannot be compelled to pay the whole amount of their liability without reference to such advances; but are entitled to have those advances considered as payments made by them on

[1] Cunningham v. Pell, 5 Paige Ch. (N. Y.) 607 (1836). See Scott v. Depeyster, 1 Edw. Ch. (N. Y.) 513 (1832.)

[2] Miller v. Fenton, 11 Paige Ch. (N. Y.) 20 (1844) ; Cunningham v. Pell, 5 Paige Ch. (N. Y.) 607 (1836); Attorney-General v. Wilson, 4 Jur. 1174 (1840).

[3] Fisher v. World Mutual Ins. Co., 47 How. (N. Y.) Pr. 457, 607 (1873); s. c. 15 Abb. (N. Y.) Pr. N. S. 371; Cunningham v. Pell, 5 Paige Ch. (N. Y.) 607 (1836).

[4] Scott v. Depeyster, 1 Edw. Ch. (N. Y.) 513 (1832).

[5] Edw. Ch. (N. Y.) 513 (1832).

account of their individual liability, and to have them credited thereon as against the creditors of the company since its dissolution.[1]

The personal liability of directors is at an end when they have paid or been charged with debts to an amount equal to their liability, for they can be compelled to pay the amount of their liability but once; and whether they pay that amount voluntarily, in discharge of the debts of the corporation, or whether they are obliged to pay it before suit brought by the corporation, or any of its creditors, after having paid it, they may set up such payment as a defence against any further liability.[2]

Sec. 48u. Same — Unauthorized business.—If a corporate company engage in unauthorized and illegal transactions, a stockholder who has knowledge of the same and acquiesces therein by participating in the results, will not be allowed to charge the directors personally if there be a loss through such transaction.[3]

Sec. 48v. Same—Relation of directors to corporation.—The relation existing between directors and trustees of a corporation is that of trustee and *cestui que trust*;[4] but it is thought that the relation of the trustees of a religious corporation is not that of a director to a business corporation, or of a private trustee to his *cestui que trust*.[5]

Directors of a corporation are to be looked upon as the bailees of the corporate property; and as such they must answer for ordinary neglect; and "ordinary neglect" is understood to be the omission of that care which every man of common prudence takes of his own concerns.[6]

Sec. 48w. Same—Delegation of authority.—The managers of a

[1] Tallmadge v. Fishkill Iron Co., 4 Barb. (N. Y.) 382 (1848).

[2] Tallmadge v. Fishkill Iron Co., 4 Barb. (N. Y.) 382 (1848).

[3] Scott v. Depeyster, 1 Edw. Ch. (N. Y.) 513 (1832).

[4] Butts v. Wood, 37 N. Y. 317 (1867). See Verplanck v. Mercantile Ins. Co., 1 Edw. Ch. (N. Y.) 84 (1831); European & N. A. R. Co. v. Poor, 59 Me. 278 (1871.)

[5] Robertson v. Bullions, 11 N. Y. 243 (1854).

[6] Scott v. Depeyster, 1 Edw. Ch. (N. Y.) 513 (1832).

corporation may clothe a committee, in the intervals between the sitting of the board, with all their own authority to conduct the ordinary business of the corporation,[1] but it does not follow that the committee can delegate that power to one of their number.[2]

Sec. 48x. Same—As trustee in dissolution.—The statute declaring that the directors and managers of any corporation shall, upon its dissolution, be the trustees of the creditors and stockholders, expressly limits their liability to the extent of the property and effects that shall come into their hands.[3]

Sec. 48y. Same—Breach of trust—Assignment of corporate property.—In Conro v. Gray,[4] the president of a corporation, who was also the principal stockholder, assigned the personal and a portion of the real estate of the corporation to different assignees in trust to pay his individual debts. The court held, that he was guilty of a breach of trust and of a fraud upon the creditors of the company, and that the assignees, by accepting the assignment, might be deemed parties to his breach of trust. A director or trustee of a corporation which is insolvent cannot apply the property of the company to the payment of a debt due from the company to him to the exclusion of other creditors.[5]

In those cases where the directors or trustees of a corporation are guilty of a breach of trust, are negligent or fail to perform their duty, an action should be instituted in the name of the corporation, and should the proper officers of such corporation fail or refuse to institute and maintain such an action it may be maintained by the stockholder or stockholders,[6] but it should be made distinctly to appear that the

[1] Hoyt v. Thompson, 19 N. Y. 216, 217 (1859).

[2] Olcott v. Tioga R. Co., 27 N. Y. 546, 558 (1863); s. c. 84 Am. Dec. 298. See *ante*, § 32 note.

[3] Hoffman v. Van Nostrand, 48 Barb. (N. Y.) 174 (1864); s. c. 28 How. (N. Y.) Pr. 115.

[4] 4 How. (N. Y.) Pr. 165 (1849).

[5] Adams v. Crosswood Printing Co., (Ill. App.) 5 Ry. & Corp. L. J. 18 (1888).

[6] Robinson v. Smith, 3 Paige Ch. (N. Y.) 222 (1832). See Brewer v. Boston Theatre, 104 Mass. 399 (1870); Peabody v. Flint, 88 Mass. (6 Allen) 52 (1863); Slattery v. St. Louis & N. O. Transp. Co., 91 Mo. 217 (1886); Detroit v. Dean, 106 U. S. (16 Otto) 537 (1882); bk. 27 L. ed. 300; Hawes

board of directors or other managing body has actually refused to bring or to permit an action in its own name.[1]

Sec. 48z. Same—Criminal liability.—The acts, proceedings or omissions rendering directors of a corporation, formed under the New York Act, liable and the punishment and penalty therefor will be fully treated hereafter in this work.[2]

Sec. 49. Same—Number of Directors in Corporations for Opera, etc.—It shall be lawful for any corporation heretofore formed under chapter six hundred and eleven, laws of eighteen hundred and seventy-five, for the purpose of establishing a national opera and of promoting a higher musical education in the United States, to have any number of directors, not less than five, and the existing number thereof may be increased by a vote of a majority in interest of the owners of the stock issued by said corporation, present in person, or by attorney duly authorized, at a meeting of the stockholders of such corporation, held pursuant to a notice specifying the purpose of such meeting and given to each stockholder, as is prescribed in said act, and a statement of the change of the number of directors so made shall be signed, verified and filed as provided for in said act. Corpo-

v. Oakland, 104 U. S. (14 Otto) 450 (1881); bk. 26 L. ed. 827; Pond v. Vermont Valley R. Co., 12 Blatchf. C. C. 280 (1874).

[1] Young v. Drake, 8 Hun, (N. Y.) 61 (1876); Rogers v. Lafayette Agricultural Works, 52 Ind. 296 (1875); March v. Eastern R. Co., 40 N. H. 548 (1860); Hodges v. New England Screw Co., 1 R. I. 312 (1850); Memphis G. Gas Co. v. Williamson, 9 Heisk. (Tenn.) 314 (1872); Jackson v. Ludeling, 88 U. S. (21 Wall.) 616 (1874); bk. 22 L. ed. 492; Davenport v. Dows, 85 U. S. (18 Wall.) 626 (1873); bk. 21 L. ed. 938; Memphis v. Dean, 75 U. S. (8 Wall.) 64 (1868); bk. 19 L. ed. 326; Heath v. Erie R. Co., 8 Blatchf. C. C. 347 (1871); Forbes v. Memphis, E. P. & P. R. Co., 2 Woods C. C. 323 (1872); Mason v. Harris, L. R. 11 Ch. Div. 97 (1879); Menier v. Hooper's Tel. Works, L. R. 9 Ch. App. 350 (1874); Duckett v. Gover, L. R. 6 Ch. Div. 82 (1877); McDougall v. Gardiner, L. R. 1 Ch. Div. 13 (1875); Atwood v. Merryweather, L. R. 5 Eq. 464 n. (1867); Benson v. Heathorn, 1 Younge & C. 326 (1842).

[2] See *post*, §§ 200–215.

rations hereafter formed under said act, for the aforesaid purpose, may have any number of directors, not less than five, as the by-laws may provide.[1]

Sec. 50. Same—Quorum.—The number of directors necessary to constitute a quorum, in a corporation organized for such a purpose as aforesaid, shall be fixed by the by-laws.[2]

Sec. 51. Capital stock—Subscriptions to—When and how payable.—The capital stock of every corporation formed under this act shall be divided into shares of not less than ten dollars, nor more than one hundred dollars each; and shall in no case exceed five million dollars. All subscriptions therefor shall be made payable to the corporation in such instalments and at such time or times as shall be fixed by the by-laws or by the directors acting under the by-laws; and if default be made in any payment an action may be maintained in the name of the corporation to recover any instalment which shall remain due and unpaid for the period of thirty days after the time so fixed for the payment thereof; and no stockholder shall be entitled to vote at any election or at any meeting of the stockholders on whose share or shares any instalments or arrearages may have been due and unpaid for the period of thirty days immediately preceding such election or meeting. The corporation may, by by-laws, prescribe other penalties for a failure to pay the instalments that from time to time become due, not exceeding forfeiture of the stock, and the amount paid thereon, but no such forfeiture shall be declared against any stockholder before demand shall have been made for

[1] L. 1886, c. 586, § 1.

[2] L. 1886, c. 586, § 2.

the amount due thereon, either in person or by a written or printed notice duly mailed to such stockholder at his last known place of residence, at least thirty days prior to the time when such forfeiture is to take effect; and provided, further, that upon such forfeiture the shares of stock held by such delinquent stockholder or subscriber shall be sold at public auction, at the office of said corporation, after ten days' notice thereof shall be conspicuously posted up in said office, and the proceeds of such sale, over and above the amount due on said shares, and after deducting the expenses of such sale, if any, shall be paid to the delinquent stockholder or subscriber.

Sec. 51a. Payment of capital stock—Misconduct of directors.—The criminal liability of a director of a stock corporation, formed under this act, who concurs in any vote or act of the directors of such corporation, or any of them, by which it is intended to discount or receive any note or other evidence of debt, in payment of any instalment of capital stock actually collected and required to be paid, or with intent to provide the means of making such payment; or to apply any portion of the funds of such corporation, except surplus profits, directly or indirectly to the purchaser of shares of its annual stock; or receive in exchange for the shares, notes, bonds, or other evidences of debts of such corporation shares of the capital stock, or notes, bonds, or other evidences of debt issued by any other stock corporation will be hereafter treated in this work.[2]

Sec. 51b. Same—Time of.—The time of the payment of the capital stock of the corporations organized under this act has been extended from time to time.[3] The last act provides that the capital stock of any corporation organized since May 1, 1884, as a limited liability company, under the Business Act,

[1] L. 1875, c. 611, § 11 as amended by L. 1883, c. 102, and L. 1886 c. 579; 3 R. S., 8th. ed., p. 1981.

[2] See *post*, § 206, subds. 3, 5, 7.

[3] See L. 1886, c. 579; L. 1888, c. 447; L. 1889, c. 519.

may be paid in within one year from and after June 15, 1889, and that the capital stock may be reduced by proceedings authorized by law to be taken within such time.

Sec. 51c. Same—Liability to creditors.—The act of 1889 provides that "nothing in this act contained shall be construed in any wise to relieve any such corporation or directors or stockholders thereof from liability to creditors for debts contracted before the passage of this act, by reason of failure to pay in its capital, or any part thereof, within the time prescribed for the making of such payments by the said act, or to make and file any certificate of such payment.[1]

Sec. 51d. Same—Payment in cash.—In the absence of statutory provisions stock need not necessarily be paid for in money;[2] but may be made in good bank checks;[3] in promissory notes, or notes and mortgages;[4] in labor or materials;[5] or in anything else which represents money or money's worth.[6]

Sec. 51e. Same—Under the Business Corporation Act.—The ten per cent of the par value of the stock subscribed, must be paid in cash.[7]

Where the statute authorizing the formation of a corpora-

[1] L. 1889, c. 519, § 2.

[2] Cincinnati I. & C. R. Co. v. Clarkson, 7 Ind. 595 (1856); Pittsburgh & C. R. Co. v. Stewart, 41 Pa. St. 54 (1861); Fothergill's Case, L. R. 8 Ch. App. 270 (1873); Adamson's Case, L. R. 18 Eq. 670 (1874). *Compare* Neuse River Nav. Co. v. Comm'rs of Newbern, 7 Jones (N. C.) L. 275 (1859).

[3] Crocker v. Crane, 21 Wend. (N. Y.) 211 (1839); s. c. 34 Am. Dec. 228; People v. Stockton & V. R. Co., 45 Cal. 306 (1873); s. c. 13 Am. Rep. 178; Comins v. Coe, 117 Mass. 45 (1875).

[4] Ogdensburgh C. & R. R. Co. v. Wooley, 3 Abb. Ct. App. 398 (1864); Stoddard v. Shetucket Foundry Co., 34 Conn. 542 (1868); Goodrich v. Reynolds, 31 Ill. 490 (1863); s. c. 83 Am. Dec. 240; McRae v. Russell, 12 Ired. (N. C.) L. 224 (1851); Straus v. Eagle Ins. Co., 5 Ohio St. 59 (1855); Andrews v. Hart. 17 Wis. 297 (1863).

[5] American Silk Works v. Salomon, 4 Hun, (N. Y.) 135 (1875); s. c. 6 T. & C. (N. Y.) 352; Ohio I. & I. R. Co. v. Cramer, 23 Ind. 490 (1864); Edwards v. Bringier Sugar E. Co., 27 La. An. 118 (1875); Pellatt's Case, L. R. 2 Ch. App. 527 (1867); Simpson's Case, L. R. 9 Eq. 91 (1869). See Simpson's Case, L. R. 4 Ch. App. 184.

[6] East New York & J. R. Co. v. Lighthall, 36 How. (N. Y.) Pr. 481 (1868); s. c. 6 Robt. (N. Y.) 407.

[7] See *ante*, § 43 *et seq.*

tion requires its capital stock to be paid in in money, a payment of the full value in any other property, will not suffice to save the corporation from a judgment of dissolution.[1] But under a statute authorizing a corporation to receive subscriptions to stock payable "in such a manner as the board of directors should direct," the directors have power to receive payment in promissory notes.[2]

Sec. 51f. Same—Payment in cash—Construction of representation.—A statement that certain capital has been paid in, is to be regarded as a representation that it has been paid in cash, and if, in fact, some of the stock has been issued for the exchange of property, the record is false.[3]

Sec. 51g. Same—Action to enforce.—An express agreement to pay is not necessary because the corporation may enforce the personal liability of its members to contribute the amount of capital which they have impliedly agreed to contribute.[4]

[1] People v. Tory House Co., 44 Barb. (N. Y.) 625 (1865).

[2] Magee v. Badger, 30 Barb. (N. Y.) 246 (1859).

[3] Pier v. Hanmore, 86 N. Y. 95 (1881). See Bonnell v. Griswold, 89 N. Y. 122, 125 (1882); Buffalo & P. R. Co. v. Hatch, 20 N. Y. 157 (1859).

[4] See Rensselaer & Wash. P. Road Co. v. Barton, 16 N. Y. 457 n. (1854); Lake Ontario A. & N. Y. R. Co. v. Mason, 16 N. Y. 451 (1857); Buffalo & N. Y. City R. Co. v. Dudley, 14 N. Y. 336 (1856); Troy & Bos. R. Co. v. Tibbits, 18 Barb. (N. Y.) 297 (1854); Northern R. Co. v. Miller, 10 Barb. (N. Y.) 260 (1851); Mann v. Currie, 2 Barb. (N. Y.) 294 (1848); Hartford & N. H. R. Co. v. Croswell, 5 Hill (N. Y.) 383 (1843); Dutchess Cotton Manuf. v. Davis, 14 Johns. (N. Y.) 239 (1817); s. c. 7 Am. Dec. 459; Goshen & M. Turnpike Co. v. Hurtin, 9 Johns. (N. Y.) 217 (1812); s. c. 6 Am. Dec. 273; Spear v. Crawford, 14 Wend. (N. Y.) 20, 23 (1835); s. c. 28 Am. Dec. 513; Beene v. Cahawba & M. R. Co., 3 Ala. 660 (1842); Hartford & N. H. R. Co. v. Kennedy, 12 Conn. 514, 516, 523, 524 (1838); Kirksey v. Florida & G. Plankroad Co., 7 Fla. 23 (1857), s. c. 68 Am. Dec. 426; Spangler v. Indiana & I. C. R. Co., 21 Ill. 276 (1859); Peoria & O. R. Co. v. Elting, 17 Ill. 429 (1856); Klein v. Alton & S. R. Co., 13 Ill. 515 (1851); Nulton v. Clayton, 54 Iowa, 425 (1880); s. c. 37 Am. Rep. 213; Waukon & M. R. Co. v. Dwyer, 49 Iowa, 121 (1878); Instone v. Frankfort Bridge Co., 2 Bibb (Ky.) 576 (1812); s. c. 6 Am. Dec. 638; Hughes v. Antietam Manuf. Co., 34 Md. 326 (1870); Carson v. Arctic Mining Co., 5 Mich. 288 (1858); Dexter & M. Plankroad Co. v. Millerd, 3 Mich. 91 (1854); Grosse Isle Hotel Co. v. l'Ansons Exrs., 42 N. J. L. (13 Vr.) 10 (1880); Cheraw & C. R. Co. v. White, 14 S. C. 50 (1880); Essex Bridge Co. v. Tuttle, 2 Vt. 393 (1830); Upton v. Tribilcock, 91 U. S. (1 Otto) 45

Sec. 51h. Same—The tender of a certificate.—The tender of a certificate is not necessary to the maintenance of an action to enforce the payment of a subscription,[1] because the issuing of a certificate of shares is not necessary to constitute a subscriber, or a transferee of shares, a stockholder.[2]

In the recent case of Paducah and M. R. Co. v. Parks,[3] it is said that an action may be maintained on a subscription to stock without a previous tender of certificates, although the contract of subscription provides that "certificates of stock issue to the said subscribers, as to other other subscribers in said company, upon payment of their subscriptions."

Sec. 51i. Same—Provisions of articles of subscription.—It is thought, however, that where the articles of subscription provide that upon payment being made, certificates of stock shall be delivered to the subscriber, no action can be maintained to recover the total installments without a tender of the certificates of stock.[4]

(1875); bk. 23 L. ed. 203; Marzetti v. Williams, 1 Barn. & Ad. 415 (1830); s. c. 20 Eng. C. L. 412. *Compare*, Seymour v. Sturgess, 26 N. Y. 134 (1862); Fort Edward & F. M. Plank Road Co. v. Payne, 17 Barb. (N. Y.) 573 (1854); Union Turnpike Co. v. Jenkins, 1 Cai. (N. Y.) 381 (1803); Troy Turnpike & R. Co. v. McChesney, 21 Wend. (N. Y.) 296 (1839). See *Ante*, § 43 y.

[1] See South Ga. & F. R. Co. v. Ayres, 56 Ga. 234 (1876); Fulgam v. Macon & B. R. Co., 44 Ga. 597 (1872); Heaston v. Cincinnati & F. W. R. Co., 16 Ind. 275 (1861); s. c. 79 Am. Dec. 430; Vawter v. Ohio & M. R. Co., 14 Ind. 174 (1860); Slipher v. Earhart, 83 Ind. 173 (1882); New Albany & S. R. Co. v. McCormick, 10 Ind. 499 (1858); s. c. 71 Am. Dec. 331; Smith v. Gower, 2 Duv. (Ky.) 17 (1865); Paducah & M. R. Co. v. Parks, 86 Tenn. 554 (1888); s. c. 8 S. W. Rep. 842.

Wheeler v. Millar, 90 N. Y. 353 (1882); Rutter v. Kilpatrick, 63 N. Y. 604 (1876); Burr v. Wilcox, 22 N. Y. 551 (1860); Johnson v. Albany & S. R. Co., 40 How. (N. Y.) Pr. 193; Thorp v. Woodhull, 1 Sandf. Ch. (N. Y.) 411 (1844); Mitchell v. Beckman, 64 Cal. 117 (1883); South Ga. & F. R. Co. v. Ayres, 56 Ga. 234 (1876); Fulgam v. Macon, & B. R. Co., 44 Ga. 597 (1872); Slipher v. Earhart, 83 Ind. 173 (1882); Becket v. Houston, 32 Ind. 393 (1869); Chaffin v. Cummings, 37 Me. 83 (1853); Boston & Alb. R. Co. v. Pearson, 128 Mass. 445 (1880); Chester Glass Co. v. Dewey, 16 Mass. 94 (1819); s. c. 8 Am. Dec. 128; Minneapolis Harvester Works v. Libby, 24 Minn. 327 (1877); Schaeffer v. Missouri Home Ins. Co., 46 Mo. 248 (1870); Haynes v. Brown, 36 N. H. 545, 563 (1858).

[3] 86 Tenn. 554 (1888); s. c. 8 S. W. Rep. 842.

[4] Hedge v. Gibson, 58 Iowa, 656,

Sec. 51j. Same — Action by receiver to enforce.—Action by a receiver to enforce the payment of capital stock subscribed is hereafter treated.[1]

Sec. 51k. Same — Allegations and proof.—In an action to enforce the payment of a subscription, or of stocks, it must be alleged in the complaint and proven on the trial both that the defendant is a shareholder, and that all conditions precedent to his liability have been performed.[2] This fact may be shown either by the company's books,[3] or by evidence of admissions of the defendant, or of acts estopping him to deny his membership.[4]

Sec. 51l. Same — Exhaustion of liability.—After the shareholder has contributed the amount of capital stock agreed upon at the creation of the company, his liability thereon is exhausted, unless a further liability is provided by the express terms of the charter.[5]

Sec. 51m. Same—Forfeiture of stock.—An action may be brought to recover the amount of the capital stock subscribed, although the charter expressly provides that the corporation may enforce payment by forfeiture and sale of the shares.[6] The

658 (1882); Courtright v. Deeds, 37 Iowa, 507 (1873); Cooper v. McKeet, 49 Iowa, 286 (1878).

[1] See *post*, § 141.

[2] Fry v. Lexington & B. S. R. Co., 2 Met. (Ky.) 314, 324 (1859).

[3] Washer v. Allensville, C. S. & V. Turnpike Co., 81 Ind. 78 (1881). See Hoagland v. Bell, 36 Barb. (N. Y.) 57 (1861); Hamilton & D. Plankroad Co. v. Rice, 7 Barb. (N. Y.) 162 (1849); Mudgett v. Horrell, 33 Cal. 25 (1867); Wood v. Coosa & C. R. R. Co., 32 Ga. 273 (1861); Merrill v. Walker, 24 Me. 237 (1844); Hammond v. Strauss, 53 Md. 116 (1879), Pittsburgh, W. & K. R. Co. v. Applegate, 21 W. Va. 172 (1882); Turnbull v. Payson, 95 U. S. (5 Otto) 421 (1877); bk. 24 L. ed. 437; Rockville & W. Turnpike Co. v. Van Ness, 2 Cr. C. C. 449, 451 (1824).

[4] Morawetz Priv. Corp., § 158.

[5] See Lewey's Island R. Co. v. Bolton. 48 Me. 451 (1860); s. c. 77 Am. Dec. 236; Kennebec & P. R. Co. v. Kendall, 31 Me. 470 (1850); Great Falls & C. R. Co. v. Copp, 38 N. H. 124 (1859); State v. Morristown Fire Assoc., 23 N. J. L. (3 Zab.) 195 (1851); Atlantic Dedaine Co. v. Mason, 5 R. I. 463 (1858).

[6] See Dayton v. Borst, 31 N. Y. 435 (1865); Troy & R. R. Co. v. Kerr, 17 Barb. (N. Y.) 581 (1854); Mann v. Currie, 2 Barb. (N. Y.) 294 (1848); Troy Turnpike R. Co. v. McChesney, 21 Wend. (N. Y.) 296 (1839); Selma & T. R. Co. v. Tipton, 5 Ala. 787 (1843); s. c. 39 Am. Dec. 344; Carlisle v. Cahawba & M. R. Co., 4 Ala. 70 (1842); Kirksey v. Florida & Ga. Plank Road Co., 7 Fla. 23 (1857); s. c. 68 Am. Dec. 426; Buckfield Branch R. Road Co.

reason for this is the fact that the penalty of forfeiture is simply a cumulative remedy and affords no objection to an action at law,[1] and the corporation may elect to proceed *in personam*.[2]

Sec. 51n. Sale of stock—Fraud of agent—Parties to action.—In Newberry v. Garand,[3] an action to recover damages for fraud and deceit on a sale of stock to the plaintiff by the defendant through one H., as his agent, and to enforce the plaintiff's lien as the vendor upon the land vacated by her in payment for such stock, it appeared that H. acted only as the agent of the defendant; that the stock purchased by the plaintiff was in fact purchased of the defendant, and that the land conveyed by the plaintiff was received by H. for the defendant, and subsequently, and before suit brought, was conveyed to the latter. The court held that H. was not a necessary party.

Sec. 52. Certificates of Stock—Execution and Transfer.—The directors of such corporation shall prepare certificates of stock, and shall deliver them, signed by the president and treasurer, and sealed

v. Irish, 39 Me. 44 (1854); Boston B. & G. R. Co. v. Wellington, 113 Mass. 79 (1873); City Hotel v. Dickinson, 72 Mass. (6 Gray) 586 (1856); Salem Mill-Dam Co. v. Ropes, 23 Mass. (6 Pick.) 23 (1827); Taunton & S. B. Turnpike Co. v. Whiting, 10 Mass. 327 (1813); s. c. 6 Am. Dec. 124; Andover & M. Turnpike Co. v. Gould, 6 Mass. 40 (1809); s. c. 4 Am. Dec. 80; Worcester Turnpike Co. v. Willard, 5 Mass. 80 (1809); s. c. 4 Am. Dec. 39; Delaware & S. Canal Co. v. Sansom, 1 Binn. (Pa.) 70 (1803); Stokes v. Lebanon & S. Turnpike Co., 6 Humph. (Tenn.) 241 (1845); Connecticut & P. R. R. Co. v. Bailey, 24 Vt. 465 (1852); s. c. 58 Am. Dec. 181; Rockville & W. Turnpike Road v. Maxwell, 2 Cr. C. C. 451 (1824); Inglis v. Gt. Northern R. Co., 1 Macq. H. L. Cas. 112 (1852); s. c. 16 Jur. 895.

[1] Northern R. Co. v. Miller, 10 Barb. (N. Y.) 260 (1851); Southern Bay Dam Co. v. Gray, 30 Me. 547 (1849).

[2] Eastern Plank Road Co. v. Vaughan, 20 Barb. (N. Y.) 158 (1855); Spear v. Crawford, 14 Wend. (N. Y.) 20 (1835); s. c. 28 Am. Dec. 513; Mann v. Cooke, 20 Conn. 178 (1850); Raymond v. Caton, 24 Ill. 123 (1860); Instone v. Frankfort Bridge Co., 2 Bibb (Ky.) 577 (1812); s. c. 5 Am. Dec. 638; City Hotel v. Dickinson, 72 Mass. (6 Gray) 586 (1856); Birmingham B. & T. R. Co. v. Locke, 1 Q. B. 256 (1841); *Compare* Giles v. Hutt, 3 Ex. 18 (1848).

[3] 31 Barb. (N. Y.) 121 (1860).

with the seal of the corporation, to each person entitled to receive the same, according to the number of shares held, which certificates of stock shall be transferable at the pleasure of the holder, in person or by attorney duly authorized, subject, however, to all payments due or to become due thereon; and the assignee to whom the same has been so transferred, shall be a member of said corporation, and have and enjoy all the immunities, privileges and franchises, and be subject to all the liabilities, conditions and penalties incident thereto, in the same manner as the original holder would have been; but no certificate shall be transferred so long as the holder thereof is indebted to such corporation, unless the board of directors shall consent thereto.[1]

Sec. 52a. Fraudulently issuing stock.—The New York Penal Code provides for the punishment of officers or directors, servants or agents of a corporation for fraudulently issuing stock.[2]

Sec. 52b. Same—Over-issue of stock—Suit for damages—Evidence.—An action against the officers of an incorporated company for selling to the plaintiffs certificates of stock representing the stock which had been fraudulently over-issued by them, to entitle the plaintiff to recover, he must prove to the satisfaction of the jury that the certificates purchased by him did not represent genuine stock.[3] But where the plaintiff in such an action proves that the whole amount of stock which the company were authorized to issue, had been issued previously to the issuing of his certificate, the burden of proof is upon the defendants to show definitely that the certificates sold to the plaintiff represented genuine stock.[4]

[1] L. 1875, c. 611, § 12; 3 N. Y. R. S., 8th. ed., p. 1981.

[2] See post, §§ 170, 171, 174.

[3] Bruff v. Mali, 36 N. Y. 200 (1867).

[4] Bruff v. Mali, 36 N. Y. 200 (1867).

Sec, 52c. Same—Spurious stock—Liability for.—F. & Co., stock-brokers, were requested by defendant's transfer clerk to sell a certificate for 100 shares of defendant's stock purporting to stand in the name of B. The signatures of defendant's president and treasurer were genuine, and at defendant's request the certificate had been regularly countersigned and registered by the registrar of transfers. B., however, was a fictitious person, and the certificate was signed after all of defendant's stock had been issued and was in circulation. The transfer clerk had fraudulently receipted for the certificate in B.'s name on the books of the company, and had signed B.'s name on the back of the certificate. F. & Co., after ascertaining that the stock was properly registered, inquired at defendant's general transfer office, and were informed by its authorized agent that the stock was properly indorsed and that the agent was willing to make the transfer. Thereupon F. & Co. sold the stock, and gave a guaranty in compliance with a rule of the stock exchange, which was known to defendant, that, as between members, the seller of stock must guaranty to the purchaser the correctness of the certificate, and also of the transfer. F. & Co. duly accounted to the transfer clerk for the proceeds. When the fraud of the transfer clerk was discovered, they were compelled to take back the stock from their purchaser, and refund the purchase price. The court held the defendant corporation was liable to F. & Co.'s assignee for the damages.[1]

Sec. 52d. "Common" and "preferred" stock.—In 1880 the legislature passed an act to take effect immediately providing that: 1. Every corporation organized under the laws of this state, which has heretofore issued, or may hereafter issue both preferred and common stock, forming part of the capital stock of such corporation, is hereby authorized, whenever the directors of such corporation shall by vote of two-thirds of their number declare it for the interest of the corporation so to do, and the holder of any such preferred stock may

[1] Jarvis v. Manhattan Beach Co., 53 Hun, 362 (1889); s. c. 6 N. Y. Sup. 703; 6 Railway and Corporation Law Journal, 325.

request in writing the exchange of the same for the common stock, to exchange the preferred stock of such holder for common stock, and to issue certificates of common stock therefor share for share, or upon such other valuation as may have been agreed upon in the scheme for organization of such company or the issue of such preferred stock, provided, however, that the total amount of the capital stock of such company shall not be increased thereby.[1]

Sec. 52e. Certificate of stock.—By subscribing for and paying into the corporation the amount subscribed for, a party becomes a stockholder in the corporation,[2] and is entitled to all the rights of stockholders to vote at all elections.[3] It is not necessary, in order to constitute a subscriber a shareholder and member of a corporation, that the certificate should be issued; neither is it necessary that there should be a tender of a certificate of stock in order to enable a company to recover from its shareholders.[4] And without such certificate the shareholder has the complete power to transfer his stock.[5] The relation is established by the subscription and payment, and does not depend upon the issue of a certificate, or evidence of such rights by the corporation.[6]

[1] L. 1880, c. 225, § 1.

[2] Rutter v. Kilpatrick, 63 N. Y. 604 (1876); Buffalo & N. Y. C. R. Co. v. Dudley, 14 N. Y. 336, 347 (1856); Thorp v. Woodhull, 1 Sandf. Ch. (N. Y.) 411 (1844); Spear v. Crawford, 14 Wend. (N. Y.) 25 (1835); s. c. 28 Am. Dec. 513.

[3] Beckett v. Houston, 32 Ind. 393 (1869), and to share in the income; Ellis v. Proprietors of Essex Merrimac Bridge, 19 Mass. (2 Pick.) 243 (1824).

[4] See *ante*, § 51 h. See also South Georgia & F. R. Co. v. Ayres, 56 Ga. 234 (1876); Fulgam v. Macon B. R. Co., 44 Ga. 597 (1872); Slipher v. Earhart, 83 Ind. 173 (1882); Heaston v. Cincinnati & F. W. R. Co., 16 Ind. 275 (1861); s. c. 79 Am. Dec. 430; Vawter v. O. & M. R. Co., 14 Ind. 174 (1860); New Albany & S. R. Co. v. McCormick, 10 Ind. 499 (1858); s. c. 71 Am. Dec. 337; Smith v. Gower, 2 Duv. (Ky.) 17 (1865); Paducah & M. R. Co. v. Parks, 86 Tenn. 554 (1888).

As to when certificate must be tendered see *ante*, 51 h.

[5] First National Bank v. Gifford, 47 Iowa, 575 (1877); National Bank v. Watsontown Bank, 105 U. S. (15 Otto) 217 (1881); bk. 26 L. ed. 1039. See Brigham v. Mead, 92 Mass. (10 Allen) 245 (1865).

[6] Rutter v. Kilpatrick, 63 N. Y. 604 (1876). See Buffalo & N. Y. C. R. Co. v. Dudley, 14 N. Y. 336, 347 (1856); Thorp v. Woodhull, 1 Sandf. Ch. (N. Y.) 411 (1844); Spear v. Crawford, 14 Wend. (N. Y.) 25 (1835); s. c. 28 Am. Dec. 513.

The certificate of stock is merely a muniment of title, like a title-deed; that is, is merely the written evidence of the ownership of shares.[1] Apart from the shares which it represents, a certificate of stock is utterly worthless; it has value taking itself only as evidence,[2] and as evidence taken is not in every case essential; it is merely a convenient voucher which the shareholder has a right to receive if he asks for it.[3]

Sec. 52f. Same—Where issued.—A certificate of stock is usually issued in the state in which the corporation exists, but the fact that it is issued outside of such state will not render it invalid.[4]

Sec. 52g. Same—By whom issued.—Certificates of stock executed by a part only of the officers of a corporation required to sign them are void;[5] but the directors of a corporation may properly act through their officers or agents in issuing stock.[6]

Sec. 52h. Same—Refusal to issue.—Where the subscription to the capital stock of a corporation is regularly made and the corporation refuses to issue the certificate, the subscriber may pursue either of two remedies; he may recover from the corporation in assumpsit the value of the shares at the time of demand,[7] or he may bring an action in equity to enforce specific performance.[8] However, where the full capital stock

[1] Burr v. Wilcox, 22 N. Y. 551 (1860); Hawley v. Brumagim, 33 Cal. 394 (1867); Campbell v. Morgan, 4 Ill. App. 100 (1879); People's Bank v. Kurtz, 99 Pa. St. 344 (1882); Hubbell v. Drexel, (1881); s. c. 21 Am. L. Reg. (N. S.) 452; Van Allen v. Assessors, 70 U. S. (3 Wall.) 573, 598 (1865); bk. 18 L. ed. 229.

[2] Payne v. Elliot, 54 Cal. 339 (1880).

[3] See Buffalo & N. Y. C. R. Co. v. Dudley, 14 N. Y. 336, 347 (1856); Johnson v. Albany & S. R. Co., 40 How. (N. Y.) Pr. 193 (1870); Chester Glass Co. v. Dewey, 16 Mass. 94 (1819); s. c. 8 Am. Dec. 128; National Bank v. Watsontown Bk., 105 U. S. (15 Otto) 217 (1881); bk. 26 L. ed. 1039.

[4] Courtright v. Deeds, 37 Iowa, 503, 510 (1873).

[5] Holbrook v. Farquier & A. T. Co., 3 Cr. C. C. 425 (1829).

[6] Lohman v. New York & E. R. Co., 2 Sandf. (N. Y.) 39 (1848).

[7] Wyman v. American Powder Co., 62 Mass. (8 Cush.) 168 (1851).

[8] Ferguson v. Wilson, L. R. 2 Ch. App. 77 (1866).

has been issued, specific performance of an agreement to issue more cannot be enforced.[1]

Sec. 52i. Same—Measure of damages for refusal to issue—Where stock not fully paid up.—The measure of damages on the breach of a contract by a corporation to deliver shares of its stock to a subscriber, which are subject to unpaid calls by the corporation, is,—as in the case of a sale of goods not paid for,—the difference between the market value of the stock, at the time of the demand for it, and the amount unpaid of the instalments, and interest thereon. He is also entitled to interest on such difference from the day of the demand to the time of the verdict.[2]

Sec. 52j. Same—Lost or destroyed certificates—Issuance of duplicates.—Whenever any company incorporated under the laws of this state shall have refused to issue a new certificate of stock in place of one theretofore issued by it, but which is alleged to have been lost or destroyed, the owner of such lost or destroyed certificate, or his legal representatives, may apply to the supreme court, at any special term thereof, appointed to be held in the judicial district where such owner resides, for an order requiring such corporation to show cause why it should not be required to issue a new certificate of stock in place of the one lost or destroyed. Such application shall be by petition, duly verified by the owner, in which shall be stated the name of the corporation, the number and date of the certificate, if known, or can be ascertained by the petitioner, the number of shares of stock named therein and to whom issued, and as particular a statement of the circumstances attending such loss or destruction as such petitioner shall be able to give. Upon the presentation of said petition, said court shall make an order requiring said corporation to show cause, at a time and place therein

[1] See Finley S. & L. Co. v. Kurtz, 34 Mich. 89 (1876).

[2] Van Allen v. Illinois Cent. R. Co., 7 Bosw. (N. Y.) 515 (1861); s. c. 4 Abb. App. Dec. 443; 2 Keyes (N. Y.) 673. Citing Dana v. Fiedler, 12 N. Y. 41 (1854); s. c. 62 Am. Dec. 130; Allen v. Dykers, 3 Hill (N. Y.) 593 (1842); Gray v. Portland Bank, 3 Mass. 364 (1807); s. c. 3 Am. Dec. 156.

mentioned, why it should not be required to issue a new certificate of stock in place of the one described in said petition. A copy of said petition and of said order shall be served upon the president or other head of such corporation, or on the cashier, secretary or treasurer thereof, personally, at least ten days before the time designated in said order for showing cause.[1]

Sec. 52k. Same—Summary order that duplicate certificates be issued—Giving security—Enforcing obedience to order.—At the time and place specified in said order, and on proof of due service thereof, the said court shall proceed in a summary manner, and in such mode as it may deem advisable, to inquire into the truth of the facts stated in said petition, and shall hear such proofs and allegations as may be offered by or on behalf of the petitioner, or by or in behalf of said corporation or other party, relative to the subject-matter of said inquiry, and if, upon such inquiry, said court shall be satisfied that such petitioner is the lawful owner of the number of shares of the capital stock, or any part thereof, described in said petition, and that the certificate therefor has been lost or destroyed, and cannot, after due diligence, be found, and that no sufficient cause has been shown why a new certificate should not be issued in place thereof, it shall make an order requiring said corporation or other party, within such time as shall be therein designated, to issue and deliver to such petitioner a new certificate for the number of shares of the capital stock of said corporation, which shall be specified in said order as owned by said petitioner, and the certificate for which shall have been lost or destroyed. In making such order the court shall direct that said petitioner deposit such security, or file such a bond in such form and with such sureties as to the court shall appear sufficient to indemnify any person other than the petitioner, who shall thereafter appear to be the lawful owner of such certificate stated to be lost or stolen; and the court may also direct the publication of such notice, either preceding or succeeding the making of such final order, as it shall deem proper. Any person or persons who shall thereafter claim any rights under said certificate so

[1] L. 1873, c. 151, § 1.

alleged to have been lost or destroyed, shall have recourse to such indemnity, and the said corporation shall be discharged of and from all liability to such person or persons by reason of compliance with the order aforesaid; an obedience to said order may be enforced by said court by attachments against the officer or officers of such corporation, on proof of his or their refusal to comply with the same.[1]

Sec. 52l. Same—Jurisdiction of court.—To confer upon the court jurisdiction to make an order in a proceeding instituted under chapter 151 of laws of 1873, requiring a corporation to issue and deliver certificates which have been lost or destroyed, it must be proved that the petitioner is the owner of the shares, and that such shares have been lost or destroyed, and cannot, after due diligence, be found.[2]

Sec. 52m. Same—Original issue to two trustees—When application denied.—Where it appears that the shares which the petitioner claims to own were issued to persons named therein as trustees, and that a portion of the said shares are in the possession of the petitioner unindorsed; and that the other shares were held by the persons named as trustees, who declined to give up the same because the beneficiaries refused to consent to their surrendering them to the person from whom the petitioner's title was acquired, the application should be denied.[3]

Sec. 52n. Same—Form of decree.—Where a certificate has been lost and a bill brought to obtain a new certificate and a transfer on the books, the decree must secure the corporation against loss in case the lost certificate should afterwards come into the hands of a *bona fide* purchaser,[4] because where a certificate is issued by a corporation in the place of one supposed to be lost the corporation remains liable to a *bona fide* holder of the first certificate.[5]

Sec. 52o. Same—By-law regulating.—A by-law of a corporation requiring all outstanding certificates to be surrendered

[1] L. 1873, c. 151, § 2.

[2] Matter of Biglin v. Friendship Assoc., 46 Hun, (N. Y.) 223 (1887).

[3] Matter of Biglin v. Friendship Assoc., 46 Hun, (N. Y.) 223 (1887).

[4] Galveston City Co. v. Sibley, 56 Tex. 269 (1882).

[5] Cleveland & M. R. Co. v. Robbins, 35 Ohio St. 583 (1880).

or proved to be lost before the issue of new certificates in their place, is binding upon the stockholders, their representatives and assigns.[1]

Sec. 52p. Transfer of stock and effect.—A shareholder in a corporation may transfer his shares at will by simply giving notice of the transfer to the company in the absence of any provision to the contrary.[2]

Where a person becomes a stockholder in an incorporated company by a transfer to him of the stock of an original subscriber, he adopts the contract of the assignor with the company, and becomes substituted in his place, both as regards his right and liabilities.[3]

Sec. 52q. Same—Transfer contrary to by-law or charter.—It is well settled that restrictions in the charter or by-laws of a corporation as to the transfer of stock, being for the security of the company and of third persons, are valid as between the parties.[4] In no case does the assignee acquire a greater interest than that which was possessed by his assignor at the time of the assignment.[5]

Sec. 52r. Same—Lien for debt due.—At common law no lien

[1] State v. New Orleans & C. R. Co., 30 La. An. 308 (1878).

[2] Burrall v. Bushwick R. R. Co., 75 N. Y. 219 (1878); Bank of Attica v. Manuf. & T. Bk., 20 N. Y. 510 (1859); Cole v. Ryan, 52 Barb. (N. Y.) 168 (1868); State v. Franklin Bk., 10 Ohio 91 (1840); Brightwell v. Mallory, 10 Yerg. (Tenn.) 196 (1836); Duvergier v. Fellows, 5 Bing. 248 (1828); Gilbert's Case, L. R. 5 Ch. App. 559 (1870).

[3] Mann v. Currie, 2 Barb. (N. Y.) 294 (1848).

[4] See Bank of Utica v. Smalley, 2 Cow. (N. Y.) 770 (1824); s. c. 14 Am. Dec. 526; Brisbane v. Delaware, L. & W. R. Co., 25 Hun, (N. Y.) 438 (1881); Smith v. American Coal Co., 7 Lans. (N. Y.) 317 (1873); Commercial Bank v. Kortright, 22 Wend. 348 (1839); s. c. 34 Am. Dec. 317; 20 Wend. 91; Gilbert v. Manchester Iron Co., 11 Wend. (N. Y.) 627 (1834); Farmers' Bank v. Inglehart, 6 Gill. (Md.) 50 (1847); Sargent v. Franklin Ins. Co., 25 Mass. (8 Pick.) 90 (1829); s. c. 19 Am. Dec. 346; Alvord v. Smith, 22 Mass. (5 Pick.) 232 (1827); Quiner v. Marble Head Social Ins. Co., 10 Mass. 476 (1813); Black v. Zacharie, 44 U. S. (3 How.) 483 (1845); bk. 11 L. ed. 690; Fox v. Clifton, 6 Bing. 776 (1830); s. c. 9 Bing. 115 (1832).

[5] Mechanics' Bank v. New York & N. H. R. Co., 13 N. Y. 599 (1856); McCready v. Rumsey, 6 Duer, (N. Y.) 574 (1857); Stebbins v. Phenix Fire Ins. Co., 3 Paige Ch. (N. Y.) 350 (1832).

exists in favor of a corporation upon the shares of a stockholder for a debt due him from the corporation;[1] because a different rule would subvert the wholesome doctrine against secret liens;[2] such a lien, however, may exist by virtue of a provision in the charter of a corporation,[3] or the by-laws[4] or in the articles of association.[5] Under such a provision the assignee, or whoever succeeds to the right of the shareholder, takes the stock subject to the lien of the corporation.[6]

Sec. 52s. Same.—Transfer in blank.—Where a transfer of the stock of a corporation is made in blank, it seems that the holder may fill such blank.[7]

Sec. 52t. Same—Assignment to be entered on books of company.—Where the charter provides that no transfer of stock shall be effectual, except it be entered on the books of the corporation, any transfer made without such entry will never-

[1] People v. Crockett, 9 Cal. 112 (1858); Dana v. Brown, 1 J. J. Marsh (Ky.) 304 (1829); Massachusetts Iron Co. v. Hooper, 61 Mass. (7 Cush.) 183 1851); Heart v. State Bank, 2 Dev. (N. C.) Eq. 111 (1831); Steamship Co. v. Heron, 52 Pa. St. 280 (1866).

[2] Driscoll v. West Bradley & C. Manuf. Co., 59 N. Y. 96 (1874).

[3] See Stebbins v. Phenix Fire Ins. Co., 3 Paige Ch. (N. Y.) 350 (1832); German Security Bank v. Jefferson, 10 Bush. (Ky.) 326 (1874); Brent v. Bank of Washington, 35 U. S. (10 Pet.) 596 (1836); bk. 9 L. ed. 547.

[4] Vansands v. Middlesex Bank, 26 Conn. 144 (1857); McDowell v. Bank of W. & B., 1 Harr. (Del.) 27 (1830); Mechanics' Bank v. Merchants' Bank, 45 Mo. 513 (1870); St. Louis Perpetual Ins. Co. v. Goodfellow, 9 Mo. 149 (1849); Young v. Vough, 23 N. J. Eq. (8 C. E. Gr.) 328 (1873); In re Dunkerson, 4 Bliss. C. C. 227 (1868). See Driscoll v. West Bradley & C. Manuf. Co., 59 N. Y. 96 (1874); Lockwood v. Merchant's Nat. Bk., 9 R. I. 308 (1869). *Compare* Rosenback v. Salt Springs National Bank, 53 Barb. (N. Y.) 495 (1868); Bullard v. National Bk., 85 U. S. (18 Wall.) 589 (1873); bk. 21 L. ed. 923; First National Bank v. Lanier, 78 U. S. (11 Wall.) 369 (1870); bk. 20 L. ed. 172; Evansville National Bk. v. Metropolitan National Bk., 2 Biss. C. C. 527 (1871.)

[5] Leggett v. Bank of Sing Sing, 24 N. Y. 283 (1862); Arnold v. Suffolk Bk., 27 Barb. (N. Y.) 424 (1857).

[6] Stebbins v. Phenix Fire Ins. Co., 3 Paige Ch. (N. Y.) 350 (1832); Mobile Mutual Ins. Co. v. Cullom, 49 Ala. 562 (1873). See Planters' & M. Mutual Ins Co. v. Selma Savings Bank, 63 Ala. 595 (1879); Brent v. Washington Bank, 35 U. S. (10 Pet.) 596 (1836); bk. 9 L. ed. 547.

[7] See Leavitt v. Fisher, 4 Duer, (N. Y.) 1 (1854); Commercial Bank of Buffalo v. Kortright, 22 Wend. (N. Y.) 347 (1839); s. c. 34 Am. Dec. 317; 20 Wend. (N. Y.) 91; Bridgeport Bank v. New York & N. H. R. Co., 30 Conn. 231 (1861).

theless be valid as between the parties;[1] but as to other parties title will not pass as to outside parties by an assignment of shares which is never made nor recorded on the books of the corporation.[2] In the absence of a provision in the charter or by-laws of the corporation or a statute of the state creating the same requiring a record of transfer, no such record is required to perfect a transfer of stock.[3]

There are a number of well considered cases which hold that the shares of a corporation are assignable, notwithstanding a by-law of the corporation limiting their transfer to the office of the company, or providing that a transfer shall not be valid until registered on the books of the company.[4]

[1] Bank of Utica v. Smalley, 2 Cow. (N. Y.) 770 (1824); s. c. 14 Am. Dec. 526. See Commercial Bank of Buffalo v. Kortright, 22 Wend. (N. Y.) 362 (1839); s. c. 34 Am. Dec. 317; 20 Wend. (N. Y.) 91; Gilbert v. Manchester Iron Co., 11 Wend. (N. Y.) 627 (1834); Duke v. Cahawba Navigation Co., 10 Ala. 82 (1846); s. c. 44 Am. Dec. 472; Dikinson v. Central National Bank, 129 Mass. 279 (1880); s. c. 37 Am. Rep. 351; Quiner v. Marblehead Ins. Co., 10 Mass. 476 (1813); Black v. Zacharie, 44 U. S. (3 How.) 483 (1845); bk. 11 L. ed. 690;- Continental National Bank v. Eliot National Bank, 7 Fed. Rep. 369 (1881).

[2] State v. Harris, 3 Ark. 570 (1841); s. c. 36 Am. Dec. 460; Weston v. Bear River & A. W. & M. Co., 5 Cal. 186 (1855); s. c. 63 Am. Dec. 117; Fort Madison Lumber Co. v. Batavian Bank, 71 Iowa. 270 (1887); s. c. 60 Am. Rep. 789; Lippitt v. American Wood Paper Co., 15 R. I. 141 (1885); s. c. 2 Am. St. Rep. 886

[3] Sayles v. Bates, 15 R. I. 342 (1886).

[4] Bank of Utica v. Smalley, 2 Cow. (N. Y.) 770 (1824); s. c. 14 Am. Dec. 526. See Johnson v. Underhill, 52 N. Y. 210 (1873); Isham v. Buckingham, 49 N. Y. 222 (1872); McNeil v. The Tenth Nat. Bank, 46 N. Y. 331 (1871); Orr v. Bigelow, 14 Y. Y. 560 (1856); Bank of Attica v. Manufacturers' and Traders' Bank, 20 N. Y. 511 (1859); Adderly v. Storm, 6 Hill (N. Y.) 628 (1844). See also Burral v. Bushwick R. Co., 75 N. Y. 219 (1878); Leitch v. Wells, 48 N. Y. 593 (1872); New York & N. H. R. Co. v. Schuyler, 34 N. Y. 80 (1865); Bank of Utica v. Smalley, 2 Cow. (N. Y.) 770 (1824); s. c. 14 Am. Dec. 526; Comeau v. Guild Farm Oil Co., 3 Daly, (N. Y.) 220 (1870); Mechanics' Banking Asso. v. Mariposa Co., 3 Robt. (N. Y.) 403 (1865); Commercial Bank of Buffalo v. Kortright, 22 Wend. (N. Y.) 348 (1839); s. c. 34 Am. Dec. 317; 20 Wend. 91; Gilbert v. Manchester Co., 11 Wend. (N. Y.) 627 (1834); Weston v. Bear R. A. W. & M. Co., 5 Cal. 188 (1855); Bruce v. Smith, 44 Ind. 5 (1873); Sargent v. Franklin Ins. Co., 25 Mass. (8 Pick.) 90 (1829); s. c. 19 Am. Dec. 306; Chouteau Spring Co. v. Harris, 20 Mo. 388 (1855); Mt. Holly L. & M. T. Co. v. Ferree, 17 N. J. Eq. (2 C. E. Gr.) 119 (1864); Broadway Bank v. McElrath, 13 N. J. Eq. (2 Beas.) 27

Sec. 52u. Same—Title of assignee.—The purchaser of the stock of a corporation acquires the right which the seller had and nothing more,[1] if the stock is under incumbrances it remain so.[2]

Sec. 52v. Same—Purchaser in good faith.—A person who purchases in good faith the stock of a corporation from a person in whose name such stock stands on the books, and takes a transfer in conformity to the charter or by-laws of the corporation becomes vested with a complete title to the stock, which cuts off all the right and equities of the grantor of the certificate to the stock itself.[3]

Sec. 52w. Same—By-law interfering with right of transfer.—A by-law of a corporation which unreasonably interferes with the free exercise of this right of transfer is void as being in restraint of trade,[4] but a by-law requiring a transfer to be entered upon the books of a company is valid.[5] This is on the ground that the majority of a corporation have authority to prescribe any by-law which is reasonable and calculated to

(1860); Pittsburgh & C. R. Co. v. Clarke, 29 Pa. St. 151 (1857); Hoppin v. Buffum, 9 R. I. 518 (1870); Black v. Zacharie, 44 U. S. (3 How.) 483 (1845); bk. 11 L. ed. 690; United States v. Cutts, 1 Sumn. C. C. 149 (1832).

[1] Mechanics' Bank v. New York & N. H. R. Co., 13 N. Y. 599 (1856); McCready v. Rumsey, 6 Duer, (N. Y.) 574 (1857); James v. Woodruff, 10 Paige Ch. (N. Y.) 541 (1844); Stebbins v. Phenix Ins. Co., 3 Paige Ch. (N. Y.) 350 (1832); Union Bank of Georgetown v. Laird, 15 U. S. (2 Wheat.) 390 (1817); bk. 4 L. ed. 269.

[2] See Bank of Attica v. Manufacturers' and Traders' Bank, 20 N. Y. 512 (1859); Stebbins v. Phenix Fire Ins. Co., 3 Paige Ch. (N. Y.) 350 (1832).

[3] Stebbins v. Phenix Fire Ins. Co., 3 Paige Ch. (N. Y.) 350 (1832.) See New York & N. H. R. Co. v. Schuyler, 34 N. Y. 80 (1865); Mechanic's Bank v. New York & N. H. R. Co., 13 N. Y. 599 (1856); Wilson v. Little, 2 N. Y. 447 (1849); Utica Bank v. Smalley, 2 Cow. (N. Y.) 770 (1824); s. c. 14 Am. Dec. 526; Gilbert v. Manchester Manufacturers' Iron Co., 11 Wend. (N. Y.) 627 (1834); Georgetown Union Bank v. Laird, 15 U. S. (2 Wheat.) 390 (1817); bk. 4 L. ed. 269; Bargate v. Shortridge, 5 H. L. Cas. 297 (1855); s. c. 31 Eng. L. & Eq. Rep. 58. 24 L. J. Ch. 457.

[4] See Sargent v. Franklin Ins. Co., 25 Mass. (8 Pick.) 90 (1829); s. c. 19 Am. Dec. 306; Quiner v. Marblehead Ins. Co., 10 Mass. 476 (1813); Moore v. Bank of Commerce, 52 Mo. 377 (1873).

[5] Farmers' & M. Bank v. Wasson, 48 Iowa, 339 (1878); Chouteau Spring Co. v. Harris, 20 Mo. 383 (1855.)

carry into effect the objects of the corporation in pursuance of its charter.[1]

Sec. 52x. Same—Evidence of authority to transfer.—It is a well established doctrine that corporations being trustees for the property and title of each owner of their stock, may,[2] as a matter of right and for their own protection, demand evidence of authority to transfer stock but permitting such transfer to be made.[3]

Sec. 52y. Same—Unauthorized transfer.—Where a corporation caused an unauthorized transfer of shares to be executed upon its books, it will not thereby deprive the holder of the shares of his interests and rights in and to the stock of the corporation.[4]

Sec. 52z. Same—Transfer under forged power—Estoppel.—Where a transfer of stock on the books of a corporation is obtained by means of a forged assignment, the corporation is entitled to repudiate the transfer upon discovering the fraud; and the fact that the transfer upon the books is made by the agents of the corporation does not create an estoppel upon the part of the corporation because of the fact that the corporation is under no obligations to inquire into the validity of the assignment on behalf of the assignee.[5]

[1] See People v. Sailors' Snug Harbor, 54 Barb. (N.Y.) 532 (1868); Poultney v. Beachman, 10 Abb. (N.Y.) N. C. 252 (1881); Security Loan Assoc. v. Lake, 69 Ala. 456 (1881); State v. Tudor, 5 Day, (Conn.) 329 (1812) s. c. 5 Am. Dec. 162; Harrington v. Workingmen's B. Assoc., 70 Ga. 340 (1883); German E. Congregation v. Pressler, 17 La. An. 128 (1865); Came v. Brigham, 39 Me. 35 (1854).

[2] See Brewster v. Lime, 42 Cal. 139 (1871); Fisher v. Brown, 104 Mass. 259 (1870); Magwood v. R. R. Bk., 5 S. C. 379 (1874); Duncan v. Jaudon, 82 U. S. (15 Wall.) 165 (1872); bk. 21 L. ed. 142; Lowry v. Commercial & F. Bank, Taney C. C. 310 (1848).

[3] New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30 (1865); Chew v. Bank of Baltimore, 14 Md. 299 (1859); Bayard v. Farmers' & M. Bank, 52 Pa. St. 232 (1866).

[4] See Dewing v. Perdicaries, 96 U. S. (6 Otto) 193 (1877); bk. 24 L. ed. 654. See also Chew v. Bank of Baltimore, 14 Md. 300 (1859); Keppel's Admrs. v. Petersburgh R. Co., Chase's Dec. (U. S. C. C.) 167 (1868).

[5] Brown v. Howard Fire Ins. Co., 42 Md. 384 (1875); Simm v. Anglo American Telegraph Co., L. R. 5 Q. B. Div. 188 (1879). See Nutting v. Thomason, 46 Ga. 34 (1872); Central R. & B. Co. v. Ward, 37 Ga. 515 (1868); Dewing v. Perdecaries, 99 U. S. (6 Otto) 193 (1877); bk. 24 L. ed. 654. *Compare*, Hart v. Frontino Mining Co., L. R. 5 Exch. 111 (1870);

Sec. 52a[1]. Same—Recovery of damages by corporation.—It has been held by the supreme judicial court of Massachusetts that a corporation which has been induced to issue a new certificate for shares surrendered containing a certificate introduced with a forged power of attorney to execute a transfer, may maintain an action against the person who presents such forged power of attorney to transfer stock and cause the transfer to be executed even though such person acted in good faith and without notice of the forgery.[1] The court say: "This question has never been directly decided in this Commonwealth, but the adjudged cases furnish analogies which aid us in its solution. It is familiar law that, in a sale of chattels, a warranty of title is implied, unless the circumstances are such as to give rise to a contrary presumption.[2] The possession and offer to sell a chattel is held equivalent to an affirmation that the seller has title to it. This is founded upon the reason that men naturally understand that a seller who offers a chattel for sale owns it. The same rule has been extended to the case of a sale of a promissory note. The seller impliedly warrants that the previous signatures are genuine.[3] So it has been held that, if one, honestly believing himself to be authorized, acts as agent for another, and procures money or goods upon the credit of his supposed principal, and it turns out that he is not authorized, he is liable for the value of the money or goods. Chief Justice Shaw says: 'If one falsely represents that he has an authority, by which another, relying on the representation, is misled, he is liable; and by acting as agent for another, when he is not, though he thinks he is, he tacitly and impliedly represents himself authorized without knowing the fact to be true, it is in the nature of a false warranty, and he is liable.'[4] The chief justice adds: 'But in both cases

Knights v. Wiffen, L. R. 5 Q. B. 660 (1870); In re Bahia & S. F. R. Co., L. R., 3 Q. B. 584 (1868).

[1] Boston & A. R. Co. v. Richardson, 135 Mass. 473 (1883).

[2] Shattuck v. Green, 104 Mass. 24. (1870).

[3] Cabot Bank v. Morton, 70 Mass. (4 Gray) 156 (1855); Merriam v. Wolcott, 85 Mass. (3 Allen) 258 (1861).

[4] Jefts v. York, 64 Mass. (10 Cush.) 392 (1852).

his liability is founded on the ground of deceit, and the remedy is by action of tort.' We do not understand him as intending to say that the only remedy is the technical action of deceit, and that a guilty knowledge must be proved. He used the word 'deceit' in the sense of tort. In numerous other cases, the remedy is said to be an action on the case for falsely assuming to be an agent.[1] And in the recent case of May v. Western Union Tel. Co.,[2] it was held that the proper remedy is not an action of deceit; but it is an action in the nature of a false warranty against one acting as agent, who represents that he has authority when he has not. Whether such representation is made in terms, or tacitly and impliedly, he supposing but not knowing the fact to be true, he is liable to the person misled.' We can see no good reason why an action of contract upon the implied warranty should not be maintained, in the same manner as it may be upon the implied warranty in the sale of chattels." [3]

Sec. 52b[1]. Same—Refusal to transfer—Remedy.—Where the corporation refuses to make the proper transfer to an assignee of the stock, his rights are of a purely equitable character, and his only remedy is in equity to protect his equitable interests.[4] However a decree of specific performance will not be granted in those cases where performance is impossible, as in the case where the defendant has no shares to deliver.[5]

[1] Bartlett v. Tucker, 104 Mass. 336 (1870); May v. Western Union Telegraph Co., 112 Mass. 90 (1873).

[2] 112 Mass. 90 (1873).

[3] See Baltzen v. Nicolay, 53 N. Y. 467 (1873); Randell v. Trimen, 18 C. B. 786 (1856); Richardson v. Williamson, L. R. 6 Q. B. 276 (1871).

[4] Mechanics' Bank v. Seton, 26 U. S. (1 Pet.) 299 (1828); bk. 7 L. ed. 152. See White v. Schuyler, 1 Abb. (N. Y.) Pr. N. S. 300 (1865); s. c. 31 How. (N. Y.) Pr. 38; Treasurer v. Commercial Coal Mining Co., 23 Cal. 390 (1863); Ashe v. Johnson, 2 Jones (N. C.) Eq. 155 (1855); Austin & N. C. R. Co. v. Gillaspie, 1 Jones (N. C.) Eq. 261 (1854); Parish v. Parish, 32 Beav. 207 (1863); Poole v. Middleton, 29 Beav. 646 (1861); Beckitt v. Bilbrough, 8 Hare 188 (1850); Duncuft v. Albrecht, 12 Sim. 198 (1841); Doloret v. Roths child, 1 Sim. & S. 598 (1824); Adderly v. Dixon, 1 Sim. & S. 610 (1824); Gardener v. Pullen, 2 Vern. 394 (1700). *Compare* Baldwin v. Commonwealth, 11 Bush. (Ky.) 417 (1875); Wonson v. Fenno, 129 Mass 405 (1880); Leach v. Fobes, 77 Mass. (11 Gray) 506 (1858); s. c. 71 Am. Dec. 732.

[5] Columbine v. Chichester, 2 Phila. (Pa.) 27 (1851); Ferguson v. Wilson, L. R. 2 Ch. App. 87 (1866). See, however, Poole v. Middleton, 29 Beav. 646 (1861).

It is held by the supreme court of Pennsylvania, however, that where officers of a corporation refuse to permit a transfer of stock upon their books, as required by a by-law, a party entitled to such transfer may maintain a special action on the case against them.[1]

Sec. 52c[1]. Same—Evidence of transferee's rights.—No corporation can be required to execute a transfer without having reasonable evidence of the right of the party demanding the same.[2]

Sec. 52d[1]. Same—Irregular transfer—Ratification.—Where a particular mode of transfer is provided for in the charter or general laws under which a corporation is formed, this constitutes a part of the agreement between the shareholders, and cannot be disregarded without their consent; and a transfer made without such formalities will not, as a general rule, bind the company.[3] It seems, however, that where a particular method of transfer has been adopted by custom, and the general acquiescence of the shareholders of a corporation, a transfer executed according to the customary method will be binding, notwithstanding the fact that it is not in strict accordance with the charter and by-laws.[4]

Any mode of transfer is valid and binding after it has been acted upon by the transferor and transferee and ratified by the stockholders generally.[5] But a transferee will not be

[1] Morgan v. Bank of North America, 8 Serg. & R. (Pa.) 73 (1822); s. c. 11 Am. Dec. 575.

[2] Chew v. Bank of Baltimore, 14 Md. 300 (1859); Bird v. Chicago, I. & N. R. Co., 137 Mass. 428 (1884); Loring v. Salisbury Mills, 125 Mass. 138 (1878); Bayard v. Farmers' & M. Bank, 52 Pa. St. 232 (1866); Telegraph Co. v. Davenport, 97 U. S. (7 Otto) 371 (1878); bk. 24 L. ed. 1047.

[3] See Wood v. Coosa & C. R. R. Co., 32 Ga. 273, 288 (1861); Carlisle v. Saginaw Valley & St. L. R. Co., 27 Mich. 318 (1873); Fiser v. Mississippi & T. R. Co., 32 Miss. 359 (1856); Boyd v. Peachbottom R. Co., 90 Pa. St. 169, 172 (1879); Charlotte & S. C. R. Co. v. Blakely, 3 Strobh. (S. C.) 245 (1848).

[4] See Isham v. Buckingham, 49 N. Y. 216 (1872); Chambersburgh Ins. Co. v. Smith, 11 Pa. St. 124 (1849).

[5] See Cutting v. Damerel, 88 N. Y. 410 (1882); Isham v. Buckingham, 49 N. Y. 216 (1872); Richmondville Manuf. Co. v. Prall, 9 Conn. 487 (1833); Laing v. Burley, 101 Ill. 591 (1882); Smock v. Henderson, 1 Wilson (Ind.) 241 (1872); Weber v.

bound by any regular transfer of shares without his consent.[1]

Sec. 52e[1]. Same—Subsequent obligations—Liabilities of transferee.—After a lawful agreement had been entered into by the stockholders of defendant company, by which new obligations were imposed on the stock, plaintiff purchased some of the shares, and the court held that he took these shares subject to the agreement of the stockholders, and could only demand of defendant a certificate in accordance with the agreement.[2]

Sec. 52f[1]. Same—Insolvent purchaser—Liability of transferor.—A stockholder, who, in good faith, sells and transfers his stock to one who afterwards becomes insolvent, is liable to creditors of the corporation for such portion only of the debts existing while he held the stock, and remaining due, (not in excess of the amount of stock assigned,) as will be equal to the proportion which the capital stock assigned by him bears to the entire capital stock held by solvent stockholders within the jurisdiction, liable in respect of the same debts, to be ascertained at the time judgment is rendered.[3]

In a suit by a creditor of an insolvent corporation to enforce the stockholders' statutory liability, a defendant pleaded that, prior to the insolvency, he sold, in good faith, his shares to another party, who was solvent. It appeared that the vendor caused an entry of transfer to be made by the secretary of the company, in a book then present at the company's office other than the stock-book, with the expectation that it would be entered in another book then at the residence of the secretary, but no transfer was made in the stock-book of the company, and, at the time of the accruing of the debts of the corporation and at the time of the trial, such vendor appeared, by the

Fickey, 52 Md. 501, 506 (1879); Home Stock Ins. Co. v. Sherwood, 72 Mo. 461 (1880); Chambersburgh Ins. Co. v. Smith, 11 Pa. St. 120 (1849); Walter's Case, 3 DeG. & S. 149 (1850); Bargate v. Shortridge, 5 H. L. Cas. 297 (1855).

[1] See Cartmell's Case, L. R. 9 Ch. App. 691 (1874); Capper's Case, L. R. 3 Ch. App. 458 (1868); Hennessey's Exrs. Cse, 3 DeG. & S. 191 (1850); Gustard's Case, L. R. 8 Eq. 438 (1869); Ex parte Hennessy, 2 MacN. & G. 201 (1850).

[2] Campbell v. American Zylonite Co., 3 N. Y. Sup. 822 (1888).

[3] Harpold v. Stobart, (Ohio) 21 N. E. 637 (1889.)

stock-book, to be the owner of the shares. The court held the entry of transfer was not sufficient to relieve the vendor of liability to the creditors of the corporation, notwithstanding the fact that the sale was made in good faith and for value, and that the vendor believed he had done all that was necessary to effect a transfer of the stock, the further fact that the company thereafter treated the purchaser as the owner of the stock so sold.[1]

Sec. 52g[1]. Same—Injunction to prevent selling or voting stock.—It appeared, in an action to enjoin defendants from selling or voting on certain shares of stock pledged by plaintiff, the president of the corporation, to defendant S., that the stock of the corporation, while very valuable, had no market value, as it had not been sold in the market. Including the stock pledged to S., 498 shares, plaintiff owned 968 shares out of a total of 1,000. S. had transferred the 498 shares to his son's wife, who was plaintiff's daughter, and by this means plaintiff was excluded from the management of the business. There was proof that S. and his son, who had control of the business, and who were parties defendant, had conspired to keep plaintiff out of the country, and away from her business, by sending her false telegrams, and suppressing genuine telegrams to her, by reporting that she was insane, and by abstracting papers, and the like. The court held that an injunction be granted and a receiver *pendente lite* appointed.[2]

In this case it is said that "The son's wife, who holds the 498 shares of stock in her own name, will be included in the injunction, though she was not served with summons and complaint, nor with the injunction and motion papers."

[1] Harpold v. Stobart, (Ohio) 21 N. E. 637 (1889.)

[2] Ayer v. Seymour, 5 N. Y. Sup. 650 (1889.)

CHAPTER V.

BUSINESS ACT (CONTINUED).

BORROWING MONEY—STOCK AND BONDS—INCREASE AND REDUCTION OF CAPITAL—NEW SHARES—ANNUAL REPORT—DIVIDENDS—LOANS—FALSE CERTIFICATE—INDEBTEDNESS.

SEC. 53. Borrowing Money and Issuing Bonds.
SEC. 53a. Power of Corporations to Borrow Money.
SEC. 53b. Same—Defence of Want of Power to Make—Burden of Proof.
SEC. 53c. Same—Showing Purpose.
SEC. 53d. Same—Mortgage by Corporation.
SEC. 53e. Same—Misappropriation.
SEC. 53f. Same—Burden of Proof.
SEC. 53g. Same—Fraudulent Issue of Bonds
SEC. 53h. Same—Accounting for Proceeds—Creditor cannot Compel.
SEC. 54. Stock or Bonds—For What Issued.
SEC. 54a. Action Against Directors—When Action will Lie.
SEC. 54b. Same—False and Fabricated Certificate.
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SEC. 55. Increase and Reduction of Capital Stock.
SEC. 55a. Capital Stock—How Increased or Reduced.
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SEC. 55h. Same—Reduction of Capital Stock of Limited Company.
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SEC. 55j. Same—Fictitious Value—Stock Dividends.
SEC. 55k. Same—Liability of Shareholders.
SEC. 56. Increase of Number of Shares of Stock.
SEC. 57. Proceedings to Increase Number of Shares—Vote of Stockholders.
SEC. 58. New Shares of Stock—Distribution.
SEC. 59. Corporation Account, etc., Books—Right to Inspect.

SEC. 59a. Stockholders—Right to Examine Books.
SEC. 59b. Same—Refusal to Produce for Inspection.
SEC. 59c. Books of Account of a Corporation—Mutilation or Destruction of.
SEC. 60. Book of Stockholders—Contents.
SEC. 61. Annual Report—Penalty for Neglect to File.
SEC. 61a. Failure to File Annual Report—Liability of Directors.
SEC. 61b. Same—When Liability Attaches—Successive Failures to File Report.
SEC. 61c. Same—Liability in Nature of a Penalty—Debt of Corporation.
SEC. 61d. Same—Concurrence of Majority of Directors.
SEC. 61e. Same—Preparation of Report and Placing in Hands of Secretary for Deposit.
SEC. 61f. Same—Evidence—Certificate of Secretary of State.
SEC. 61g. Same—Termination of Liability.
SEC. 61h. Same—Liability to Bona Fide Purchaser.
SEC. 61i. Same—Liability to Co-director.
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SEC. 62. Dividends.
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SEC. 66. Indebtedness not to Exceed Capital Stock—Liability.
SEC. 66a. Indebtedness—Excess of Capital Stock—Liability of Directors.
SEC. 66b. Same—Liability—Joint and not Several.

SEC. 66c. Same—Determining Amount of Liability—Debt to Director.
SEC. 66d. Same—Pleadings.
SEC. 67. Executors, etc., Not Personally Liable for Debts of Company.

Sec. 53. Borrowing Money and issuing Bonds.—It shall be lawful for all such corporations to borrow money for the legitimate purpose of such corporation, and for such purpose to issue bonds with or without coupons attached thereto, or to mortgage any real estate which it may have or possess, and bearing interest not exceeding six per centum per annum; but the amount of such bonds and such mortgages outstanding at any one time shall not exceed one-half of the value of the corporate property of such corporation. Any issue of such bonds and such mortgages beyond the amount herein specified, shall render every director voting the same, personally liable to any holder of such bonds or such mortgages, for any damage caused by such over-issue to such holder. No such mortgage or mortgages shall be issued, however, without first having obtained the written assent of its stockholders owning more than two-thirds of the stock of said corporation.[1]

Sec. 53a. Power of corporations to borrow money.[2]—It is thought that the power of an incorporated company to borrow money when it has not been directly conferred by its charter, extends to all cases where it is essential to its ordinary affairs. Such power is incidental to and is in effect included in the grant of the principal power; this power to borrow money should be limited to and for the appropriate business of the corporation.[3]

[1] L. 1875, c. 611, § 13, as amended by L. 1888, c. 394; 3 N. Y. R. S., 8th ed., 1982.

[2] See act of the legislature passed in 1873 entitled, "An act relative to certain negotiable corporate bonds and obligations." L. 1873, c 595.

[3] Beers v. Phœnix Glass Co., 14 Barb. (N. Y.) 358 (1852).

Sec. 53b. Same—Defence of want of power to make—Burden of proof.—In Farmer's Loan & Trust Co. v. Clowes,[1] where a loan made to a corporation was contested by the borrower on the ground of a want of power to make it, it was held that the burden was upon such contestant to show affirmatively that the loan was not made in the proper exercise of the powers expressly granted.

Sec. 53c. Same—Showing purpose.—Where the directors of a corporation, acting in good faith, on the reports and representations of its authorized agents, borrow money for the purposes of the corporation, it is not necessary to show that the money so borrowed was actually appropriated to the use of the corporation, in order to establish an indebtedness against it, or a personal liability of its stockholders in favor of the lender of the money, or of the sureties who pay the loan.[2]

Sec. 53d. Same—Mortgage by corporation.—The power of a corporation to execute a mortgage on its real estate is implied in the power to alienate it absolutely; and in the absence of any prohibition in its charter or in other statutes, a mortgage of the realty of a corporation to secure money for the purpose of carrying on the legitimate objects of its incorporation, will be valid;[3] but where the charter requires the assent of a certain number of stockholders to the making of a mortgage, a mortgage executed without such assent will be void,[4] and where the act of incorporation requires that a particular number of members of the board of directors or trustees be present at the making of a contract, the required

[1] 3 N. Y. 470 (1850).

[2] Roland v. Haven, 37 Fed. Rep. 394 (1888.)

[3] Barry v. Merchants' Exchange Co., 1 Sandf. Ch. (N. Y.) 280 (1844); Jackson ex dem. People v. Brown, 5 Wend. (N. Y.) 590 (1830); Aurora Agricultural & H. Soc. v. Paddock, 80 Ill. 263 (1875); Thompson v Lambert, 44 Iowa, 239 (1876); Bardstown & L. R. Co. v. Metcalfe, 4 Met. (Ky.) 199 (1862); Susquehanna Bridge & B. Co. v. General Ins. Co., 3 Md. 305 (1852); Richards v. Merrimac & C. R. R. Co., 44 N. H. 135 (1862); Leggett v. New Jersey Manuf. & Banking Co., 1 N. J. Eq. (1 Sext.) 541 (1832); s. c. 23 Am. Dec. 728; Burt v. Rattle, 31 Ohio St. 116 (1876); Watt's Appeal, 78 Pa. St. 370 (1875); Gordon v. Preston, 1 Watts (Pa.) 385 (1833.)

[4] Cape Sable Co.'s Case, 3 Bland. Ch. (Md.) 606 (1823).

number must be present at the execution of a mortgage, although a less number may perform the purely ministerial act of affixing the seal to the deed.[1]

But a corporation cannot mortgage its franchise without express legislative authority so to do.[2]

A mortgage by a corporation to secure a debt in excess of the limit allowed by its articles of incorporation is not for that reason invalid, although given to the directors and shareholders as preferred creditors.[3]

It is said by the supreme court of Wisconsin in the case of Haywood v. Lincoln Lumber Co.,[4] that the directors, officers and agents and other like trustees of the corporation cannot mortgage or convey to themselves any more than they can contract with themselves as against the corporation and its creditors, it being a well-established principle that they have no right to use such relation and that official position for their own benefit to the injury of others in equal right.[5]

A mortgage by a corporation by its attorney in fact is sufficient, if executed in the name of the corporation, under the attorney's own hand and seal; and it is no objection that

[1] Berks & Dauphin Turnpike Co. v. Myers, 6 Serg. & R. (Pa.) 12 (1820); s. c. 9 Am. Dec. 402.

[2] See Richards v. Merrimack & C. R. R. Co., 44 N. H. 135 (1862); Pullan v. Cincinnati & C. A. L. R. Co., 4 Biss. C. C. 35 (1865).

[3] Warfield v. Marshall County Canning Co., 72 Iowa, 666 (1887); s. c. 2 Am. St. Rep. 263; Garrett v. Burlington Plough Co., 70 Iowa, 697 (1886); s. c. 59 Am. Rep. 461. See Silver Lake Bk. v. North, 4 Johns. Ch. 370 (1820); Jones v. Guaranty Co., 101 U. S. 622 (1879); National Bk. v. Matthews, 98 U. S. 621 (1878).

[4] 64 Wis. 639 (1885).

[5] See Hoyle v. Plattsburgh & M. R. Co., 54 N. Y. 314 (1873); s. c. 13 Am. Rep. 595; Butts v. Wood, 38 Barb. (N. Y.) 188 (1862); Cumberland C. & I. Co. v. Sherman, 30 Barb. (N. Y.) 153 (1859); Verplanck v. Mercantile Ins. Co., 1 Edw. Ch. (N. Y.) 84 (1831); Scott v. Depeyster, 1 Edw. Ch. (N. Y.) 513 (1832); European & N. A. R. Co. v. Poor, 59 Me. 277 (1871); Cook v. Berlin W. M. Co., 43 Wis. 434 (1877); In re Taylor Orphan Asylum, 36 Wis. 552 (1875); Pickett v. School District, 25 Wis. 553 (1870); Walworth County Bank v. Farmers' Loan & Trust Co., 16 Wis. 629 (1863); Koehler v. Black River Falls Iron Co., 67 U. S. (2 Black.) 715 (1862); bk. 17 L. ed. 339; Corbett v. Woodward, 5 Sawy. C. C. 403 (1879); Great L. R. Co. v. Magnay, 25 Beav. 586 (1858); York & N. M. R. Co. v. Hudson, 22 L. J. Ch. 529 (1853); s. c. 19 Eng. L. & Eq. 365.

the seal of the corporation was not affixed thereto, when it appears that the power of attorney was under seal.[1]

Sec. 53e. Same—Misappropriation.—A corporation has authority to loan money to aid in a work auxiliary to its main business; and where money is loaned for such purpose, the lendor is not responsible for its misappropriation.[2] In the case of Brown v. Winnisimmit Co.,[3] the court said, "we know of no rule or principle by which an act creating a corporation for certain specific objects or to carry on a particular trade or business, is to be strictly construed as prohibitory of all other dealings or transactions not coming within the scope of those designated. Undoubtedly the main business of a corporation is to be confined to that class of operations which properly appertain to the general purposes for which its charter was granted, but it may also enter into contracts and engage in transactions which are incidental or accessory to its main business, or it may become necessary, expedient or profitable in the care and management of the property which it is authorized to hold under the act by which it was created."

Sec. 53f. Same—Burden of proof.—Where the secretary of an incorporated company confines himself to the business of the company, and there is no evidence that he extended it beyond its legitimate sphere, it is right to infer that money borrowed by him in the name of the company under authority given by the company was destined for the appropriate use of the company. If the money was in fact obtained for an illegal purpose or was misapplied, the onus of proving it devolves upon the corporation.[4]

Sec. 53g. Same—Fraudulent issue of bonds.—The New York Penal Code provides for the punishment of the officers, agents, or other persons in the service of any joint stock company or corporation, for the fraudulent issue of bonds.[5]

[1] First Nat. Bank v. Salem Capital Flour-Mills Co., 39 Fed. Rep. 89 (1889).

[2] See Cheever v. Gilbert Elevated R. Co., 43 N. Y. Super. Ct. (11 J. & S.) 478 (1878).

[3] 93 Mass. (11 Allen) 326, 334. (1865.)

[4] Beer v. Phœnix Glass Co., 14 Barb. (N. Y.) 358 (1852).

[5] N.Y. Pen. Code, § 591. See *post*, § 200.

Sec. 53h. Same—Accounting for proceeds—Creditor cannot compel.—A creditor cannot compel a shareholder to account for the proceeds of mortgage bonds of the company, received by him on the distribution of the same among stockholders, pursuant to a resolution of the directors, there being no liability to account for such bonds to the corporation.[1]

Sec. 54. Stock or Bonds—For what Issued.—No corporation organized under this act shall issue either stock or bonds except for money, labor done, or property actually received for the use and legitimate purposes of such corporation, at its fair value, and all fictitious increase of stock or indebtedness in any form shall be void.[2]

Sec. 54a. Action against directors—When action will lie.—An action cannot be maintained under the above section of the code against the directors of a corporation by a creditor of the company unless it appears that he, as such creditor, suffered damages because of the director's violation of that section.[3]

Sec. 54b. Same—False and fabricated certificate.—Although a certificate issued for property transferred to a corporation, is not literally true, yet it may be constructively true and permissible under the statute, if the property conveyed to the company was received for the use and legitimate purpose of the corporation at a fair value.[4]

Sec. 54c. Same—Stocks and bonds—Issued for property.—The principle is now generally accepted, both in England and America, that any property which the corporation is authorized to purchase, or which is necessary for purposes of its legitimate business, may be received in payment for its stock.[5] It is said by Lord Justice Gifford in Drummond's Case,[6] that "if a man contracts to take shares, he must pay for them, to

[1] Christensen v. Eno, 106 N. Y. 97 (1887); s. c. 12 N. E. Rep. 648.

[2] L. 1875, c. 611, § 14; 3 N. Y. R. S., 8th. ed., p. 1982.

[3] Cochran v. Smith, 54 N. Y. Super. Ct. (22 J. & S.) 121 (1886).

[4] Huntington v. Attrill, 42 Hun, (N. Y.) 459, 461 (1886).

[5] See Coffin v. Ransdall, 110 Ind. 417 (1886); s. c. 11 N. E. Rep. 20.

[6] L. R. 4 Ch. App. 772 (1869).

use a homely phrase, in meal or malt; he must either pay in money or money's worth; if he pays in one or the other that will be a satisfaction.[1]

In the recent case of Dow v. Memphis & L. R. Co.,[2] it is said that under the Arkansas Constitution of 1874, article 12, providing that "no private corporation shall issue stock or bonds except for money or property actually received, and all fictitious increase of stock or indebtedness shall be void," mortgage bondholders, who buy in the property and franchise of a corporation upon foreclosure sale under their mortgage, are not prohibited from fixing the terms upon which they will surrender those interests, and they may reorganize upon substantially the same basis, as to capital stock and bonded indebtedness, as that of the old corporation and its predecessor previous to the adoption of the constitution of 1874, although under that arrangement they receive both stock and bonds in a large amount, of which the amount of the stock alone is sufficient to cover the full value of the property, rights, and privileges of the reorganized company."

Sec. 54d. Same—Bonds as a bonus.—It has been said that where the contract between the promoters and original incorporators of the company organized under the general incorporation law of Tennessee, provided that every subscriber to the stock of the corporation should receive in addition to his stock negotiable interest bearing coupon bonds to the amount of his stock, such bonds to be secured, principal and interest

[1] See Lorillard v. Clyde, 86 N. Y. 384 (1881); Van Cott v. Van Brunt, 82 N. Y. 535 (1880); Fletcher v. McGill, 110 Ind. 395; s. c. 8 West. Rep. 525; State v. Bailey, 16 Ind. 46 (1861); s. c. 79 Am. Dec. 405; Cincinnati I. & C. R. Co. v. Clarkson, 7 Ind. 595 (1856); Crawford v. Rohrer, 59 Md. 599 (1882); Liebke v. Knapp, 79 Mo. 22 (1883); Pittsburg & C. R. Co. v. Stewart, 41 Pa. St. 54 (1861); Philadelphia & W. C. R. Co. v. Hickman, 28 Pa. St. 318 (1857); Carr v. LeFevre, 27 Pa. St. 413 (1856); Foster v. Seymour, 23 Blatchf. C. C. 107 (1885); s. c. 23 Fed. Rep. 65; 6 Am. & Eng. Corp. Cas. 533; Foreman v. Bigelow, 4 Cliff. C. C. 508 (1878); Phelan v. Hazard, 5 Dill. C. C. 45 (1878); Spargo's Case, L. R. 8 Ch. App. 407 (1873); Pell's Case, L. R. 5 Ch. App. 11 (1869); Baglan Hall Colliery Co., L. R. 5. Ch. App. 346 (1870).

[2] 124 U. S. 652 (1888); bk. 31 L. ed. 565.

by a first mortgage upon the property of the company, and the corporation after subscriptions taken, decides that such an issue of bonds is illegal and unauthorized, and for that reason refuses to issue the bonds stipulated for upon the subscription to the stock, no suit can be maintained in equity by a subscriber to enforce the contract. Such an agreement is not enforceable even *inter partes ;* and the issue of such coupon bonds is not a condition precedent, so that a breach by the corporation discharges the subscriber. The contract is invalid and unenforceable in a suit by a subscriber, and the failure of the corporation to carry out its provisions does not release one whose subscription to the stock is otherwise unconditional and irregular.[1]

Sec. 55. Increase and Reduction of Capital Stock.— The capital stock of any corporation organized under this act may be increased to an amount not to exceed in the aggregate two million dollars or reduced by a vote of a majority of the stockholders in number and representing a majority of the stock of such corporation, at any meeting thereof convened for that purpose pursuant to notice thereof specifying the object of such meeting, and served pursuant to the provisions of section five.[2] A statement of such increase or reduction shall be filed in the office of the secretary of state, and of the clerk of the county in which the principal business office of such corporation is situated, within ten days after such action. But before any corporation shall be entitled to diminish the amount of its capital stock, if the amount of its debts and liabilities shall exceed the amount of capital to which it is proposed to be reduced, such amount of debts and liabilities shall

[1] Morrow v. Nashville Iron & Steel Co., 87 Tenn. 262 (1889); s. c. 5 Ry. & Corp. L. J. 206. See Scovill v. Thayer, 105 U. S. (15 Otto) 143 (1881); bk. 26 L. ed. 968; Sawyer v. Hoag, 84 U. S. (17 Wall.) 610 (1873); bk. 21 L. ed. 730.

[2] See *ante*, § 43.

be first satisfied and reduced so as not to exceed fuch diminished amount of capital.[1]

Sec. 55a. Capital stock—How increased or reduced.—By the Laws of 1889, it is provided that the capital stock of any corporation organized since May 1, 1884, may be paid in within one year from June 15, 1889, or may be reduced by proceedings authorized by law, to be taken within such time.[2]

Sec. 55b. How increased—Amount limited.—An incorporation, incorporated company, society or association formed under the laws of this state, excepting banks, banking associations, trust companies, life, health, accident, marine and fire insurance companies, railroad and navigation and gas companies, may increase its capital stock, as provided by section twentieth of "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February seventeenth, eighteen hundred and forty-eight, provided that this act shall not apply to corporations created by special act of incorporation, the capital stock of which originally exceeded two hundred thousand dollars, and that such increase shall not exceed in the aggregate the amount of capital stock specified in the said act of incorporation, and any such corporation the capital of which shall be increased under the provisions of this act, and the stockholders thereof shall be subject to all the liabilities as regards such additional capital as is provided in the original act or charter in relation to its capital.

The officers and directors of a corporation cannot without legislative sanction increase the capital of the company or issue certificates of stock beyond its capital; an attempt to do so would give ground for repealing its charter.[3]

Sec. 55c. Diminution of capital stock — Effect of act.—Any corporation or company organized under a general or special law of this state, and now existing, or which may hereafter be organized under such general or special law, may diminish its capital stock, by complying with the provisions of this

[1] L. 1875; c. 611, § 15; 3 N. Y. R. S., 8th ed., p. 1982.

[2] L. 1889; c. 519, § 1.

[3] People ex rel. Jenkins v. Parker Vein Coal Co., 10 How. (N. Y.) Pr. 543 (1854).

act, to any amount which may be deemed sufficient and proper for the purposes of the corporation. But nothing in this act shall be so construed as to relieve any holder or owner of stock in such corporation from any personal liability existing prior to such reduction; provided, that nothing in this act contained shall be construed to in any manner interfere with or affect any law now in existence authorizing any corporation heretofore organized to reduce its capital stock.[1]

Sec. 55d. Same—Notice of meeting.—Whenever any company shall desire to call a meeting of the stockholders for the purpose of diminishing the amount of its capital stock, it shall be the duty of the trustees or directors to publish a notice signed by at least a majority of them, in a newspaper in the county in which the business of the company is carried on, or its principal office is located, if any shall be published therein, at least three successive weeks, and to deposit a written or printed copy thereof in the post office, addressed to each stockholder, at his usual place of residence, at least three weeks previous to the day fixed upon for holding such meeting, specifying the object of the meeting, the time and place when and where such meeting shall be held, and the amount to which it shall be proposed to diminish the capital; and a vote of at least two thirds of all the shares of stock shall be necessary to a diminution of the amount of its capital stock.[2]

Sec. 55e. Same—Stock how reduced.—If at the time and place specified in the notice provided for in the preceding section of this act, the stockholders shall appear in person or by proxy, in numbers representing not less than two-thirds of all the shares of stock of the corporation, they shall organize by choosing one of the trustees chairman of the meeting, and also a suitable person for secretary, and proceed to a vote of those present in person or by proxy; and if, in canvassing the votes, it shall be found that a sufficient number of votes has been given in favor of diminishing the amount of capital, a certificate of the proceeding, showing a compliance with the provisions of this act, the amount of capital actually paid in,

[1] L. 1868 c. 264, § 1, as amended by L. 1882 c. 306.

[2] L. 1868 c. 264, § 2, as amended by L. 1882 c. 306.

the whole amount of debts and liabilities of the company, and the amount to which the capital stock shall be diminished, shall be made, signed and verified by the chairman, and such certificate shall be acknowledged by the chairman and filed in the office of the clerk of the county in which the business of the company shall be carried on, and a duplicate thereof in the office of the secretary of state, with the approval of the comptroller indorsed thereon, to the effect that the reduced capital is sufficient for the proper purposes of the company, and is in excess of all debts and liabilities of the company, exclusive of debts secured by trust mortgages, and that the actual market value of the stock of the company, prior to the reduction of the capital, was less than the par value of the same, and when so filed, the capital stock of such corporation shall be reduced to the amount specified in such certificate, and the amount of capital left in the possession of the company over and above the amount to which the capital shall be so reduced, shall be returned to the stockholders *pro rata*, at such times and in such manner as the trustees or directors shall determine.[1]

The Laws of 1876,[2] authorizing "corporations organized under the laws of this state to reduce their capital stock," repealed the 15th section of the Laws of 1875, c. 611, and from and after the passage of said act of 1878 all corporations theretofore organized can only reduce their capital stock upon complying with its terms and provisions.[3]

Sec. 55f. Same—Distribution among stockholders.—The mere diminution, by proceedings under the act, of the capital stock, does not authorize the distribution among the stockholders of a sum equal to the difference between the amount originally named as the capital, and the reduced amount fixed by vote of the stockholders, although the original amount was actually paid in; it should further appear that the capital so paid in has not been impaired; or, if it has, that the corporation has actual capital in hand, available for the payment of

[1] L. 1868 c. 264, § 3, as amended by L. 1882 c. 306.

[2] 1876 c. 264.

[3] People ex rel Eden Musee American Co. v. Carr, 36 Hun (N. Y.) 488 (1885); s. c. 21 N. Y. Week. Dig. 357.

debts, exceeding the reduced amount of capital, and then the excess only should be distributed, but after the corporation reduces its capital stock, it may then have an excess of funds or property actually on hand over and above the sum it is bound to keep as capital, viz., the reduced amount of capital, and this surplus, ascertained by an examination of its affairs, it can distribute without violating the statute prohibiting the depletion of capital by payments to stockholders. Its right to make this distribution depends upon general principles and the circumstances of each particular case, and not upon any provision of the act of 1878.[1]

Sec. 55g. Same—Companies organized prior to passage of Business Act—Method of reducing stock.—It is thought that all corporations organized before the passage of the "Business Act," are entitled to reduce their stock in the manner provided by section 15 of the original act of 1875. In People ex rel. Eden Musee American Co. v. Carr,[2] the court say: "It was probably thought to be unfair to deprive corporations already organized of any privileges which they possessed by the laws under which they had been organized. But it was intended that corporations which should organize after the passage of this act, and which thus knew of its provisions, should be subject to them and them alone."

Sec. 55h. Same—Reduction of capital stock of limited company.—It was said by the vice chancellor in the case of Re Telegraph Construction Co.[3], that, where a limited company reduces its capital, a lessor is entitled to have a sum impounded to answer for future rent.

Sec. 55i. Increase of capital stock—Statutory requirements—Informalities.—An increase in the capital stock of a corporation, although not made with the formalities required by a state statute is binding upon the stockholders of the corporation, where it appears that the increase was made with the consent of the stockholders.[4] It was held in the case of Veeder v.

[1] Strong v. Brooklyn Cross-Town R. R. Co., 93 N. Y. 426.

[2] 36 Hun, (N. Y.) 488 (1885); s. c. 21 N. Y. Week. Dig. 257.

[3] L. R. 10 Eq. 384 (1870).

[4] Poole v. West Point Butter & Cheese Assoc., 30 Fed. Rep. 513 (1887).

Mudgett,[1] that a statute allowing increase to be made by stockholders in meeting assembled on a specified notice is invalid if the notice did not conform to the statute; but that the stockholders are liable nevertheless to corporate creditors on such stock.

Sec. 55j. Same — Fictitious value — Stock dividend.—It is thought that, under the Business Act, an increase in the value of the property in which the original stock is invested will not justify an issue of additional capital stock to the stockholders as a stock dividend.[2]

Sec. 55k. Same — Liability of shareholders.—Persons subscribing for shares of stock upon an increase of the capital stock of a corporation are liable thereon the same as subscribers to the original capital stock, and can be required to pay calls without regard to the amount of the new shares which have been taken.[3] Such a subscriber cannot set up as a defence in an action on his subscription the invalidity of his contract of subscription,[4] or that the increase was unauthorized and illegal.[5] But stockholders of the original capital stock are not liable for the defaults of the subscribers to the increased capital stock.[6]

Sec. 56. Increase of Number of Shares of Stock.—Any company formed under the act entitled, "An act to provide for the organization and regulation of certain business corporations," passed June 21st, eighteen hundred and seventy-five, may increase the amount

[1] 95 N. Y. 295 (1884).

[2] See Fitzpatrick v. Dispatch Publishing Co., 83 Ala. 604 (1887); s. c. 2 So. Rep. 727.

[3] See Nutter v. Lexington & W. C. R. Co., 72 Mass. (6 Gray) 85 (1856); Clarke v. Thomas, 34 Ohio St. 46 (1877). *Compare*, Read v. Memphis Gayoso Gas Co., 9 Heisk. (Tenn.) 545 (1872).

[4] Kansas City Hotel Co. v. Hunt, 57 Mo. 128 (1874).

[5] Pullman v. Upton, 96 U. S. (6 Otto) 328 (1877); bk. 24 L. ed. 818.

[6] Veeder v. Mudgett, 195 N. Y. 295 (1884); Sheldon Hat Blocking Co. v. Eickemeyer Co., 90 N. Y. 607, 612 (1882), Kent v. Quicksilver Mining Co., 78 N. Y. 159, 187 (1879); Aspinwall v. Sacchi, 57 N. Y. 331 (1874); Buffalo & A. R. Co. v. Cary, 26 N. Y. 75 (1862); Eaton v. Aspinwall, 19 N. Y. 119 (1859); In re Miller's Dale Co., L. R. 31 Ch. Div. 216 (1885).

of shares of which its capital stock consists, provided the capital stock of such company shall not thereby be increased or diminished, and provided the shares shall not be less nor more than the amounts fixed by said act.[1]

Sec. 57. Proceedings to increase Number of Shares—Vote of Stockholders.—Such increase shall be made by a vote of the stockholders in favor thereof, representing two-thirds of the capital stock, at any meeting of the stockholders called in the manner prescribed in the act hereby amended, and by executing and acknowledging an amended certificate specifying the number of shares of which the said capital stock of said company shall thereafter consist and the par value of each share, and in other respects conforming to the original certificate, which amended certificate shall be signed by the president and two-thirds of the directors of the company, and shall be filed in the office of the secretary of state, and in the clerk's office of the county where the original certificate was filed.[2]

Sec. 58. New Shares of Stock—Distribution.—Each stockholder shall be entitled to a certificate for such a number of shares of said capital stock, after the whole number has been increased as aforesaid, as shall at their par value be equal to the par value of the shares therefor held by him in such company, on surrendering the certificates for said shares so held by him to be canceled; provided that such increase shall not so divide the shares as to give the fractional part of a share to any stockholder.[3]

[1] L. 1884, c. 397, § 1.
L. 1884, c. 397, § 2.

[3] L. 1884, c. 397, § 3.

Sec. 59. Corporation Account, etc., Books—Right to Inspect.—It shall be the duty of the directors of every such corporation to cause to be kept at its principal office or place of business, correct books of account of all its business and transactions, and every stockholder in such corporation shall have the right at all reasonable times, by himself or his attorney, to examine the records and books of account of such corporation.[1]

Sec. 59a. Stockholders—Right to examine books.—Plaintiff, a stockholder in defendant company, called at its office during business hours on Saturday, and informed the president that he desired to examine its stock-book and record-book. The president stated that the books were in the safe; that one P. (who had been, and, as plaintiff supposed, still was, the secretary) had the combination; that he was out of town, and would not return until the following Monday; and that the books could not be shown to plaintiff until then. In point of fact, P. had, two months before, ceased to be secretary, and the present secretary was in the office at the time plaintiff made the demand, but it was not shown that the president actually knew that he had the combination. The court held that the evidence supported a recovery under Laws N. Y. 1848, c. 40, § 25, providing that for every neglect or refusal of a corporation to exhibit to a stockholder the book in which entries in regard to stock are kept the company shall forfeit and pay to the party injured a penalty of $50.[2]

The act does not specifically name the books to be exhibited, but refers to the entries which they must contain relating to the stockholders, the shares owned by each when they

[1] L. 1875 c. 611, § 16; 3 N. Y. R. S., 8th ed., p. 1982.

[2] Kelsey v. Pfaudler Process Fermentation Co., 51 Hun (N. Y.) 636 (1889); s. c. 3 N. Y. Sup. 723.

As to rights to inspect, see also State ex rel. Bergenthal v. Bergenthal, 72 Wis. 314 (1888); s. c. 39 N. W. Rep. 566; Huybe v. Cattle Co., 40 N. J. Eq. (13 Stew.) 392 (1885); s. c. 2 Atl. Rep. 274; 7 Atl. Rep. 521; Phœnix Iron Co. v. Commonwealth, 113 Pa. St. 563 (1886); s. c. 6 Atl. Rep. 75; Stettauer v. N. Y. & Scranton Const Co., 42 N. J. Eq. (15 Stew.) 46 (1886); s. c. 6 Atl. Rep. 303; Swift v. State, (Del.) 6 Atl. Rep. 856. (1886);

became such owners, and the amount of stock actually paid in, and it has been held that a plaintiff's demand for the stock-book and record-book sufficiently indicated his desire to see the book referred to in the act.[1]

Whether it was an unreasonable request to ask plaintiff to wait until the following Monday to see the books, was a question of fact for the jury.[2]

The court did not err in refusing to charge that the jury might infer that plaintiff consented to wait until Monday; there being no evidence of such consent further than that he went away because he was given to understand he could not see the books at that time.[3]

Plaintiff did not waive his right to recover the penalty by the fact that he called on the following Monday and examined the books.[4]

No injury to plaintiff by such neglect and refusal need be shown to entitle him to recover the penalty.[5]

Sec. 59b. Same—Refusal to produce for inspection.—On trial of an order to show cause why defendants should not be punished for contempt in failing to obey an order to produce certain books of a corporation of which they are officers, the corporation being required by law to keep such books, there is a presumption that they have been kept, and the burden is on defendants to show that the books are not in existence, or not under their control.[6]

Sec. 59c. Books of account of a corporation—Mutilation or destruction of.—It is provided by the Penal Code (§ 514 as amended 1884) that any person, who, either being an officer or in the employment of a corporation, falsifies or wilfully and corruptly erases, obliterates or destroys any accounts,

[1] Kelsey v. Pfaudler Process Fermentation Co., 51 Hun (N. Y.) 636 (1889); s. c. 3 N. Y. Sup. 723.

[2] Kelsey v. Pfaudler Process Fermentation Co., 51 Hun (N. Y.) 636 (1889); s. c. 3 N. Y. Sup. 723.

[3] Kelsey v. Pfaudler Process Fermentation Co., 51 Hun (N. Y.) 636 (1889); s. c. 3 N. Y. Sup. 723.

[4] Kelsey v. Pfaudler Process Fermentation Co., 51 Hun (N. Y.) 636 (1889); s. c. 3 N. Y. Sup. 723.

[5] Kelsey v. Pfaudler Process Fermentation Co., 51 Hun (N. Y.) 636 (1889); s. c. 3 N. Y. Sup. 723.

[6] Fenlon v. Dempsey, 50 Hun (N. Y.) 131 (1888); s. c. 2 N. Y. Sup. 763; 19 N. Y. St. Rep. 231.

books of accounts, records, or other writings belonging to or appertaining to the business of the corporation, is guilty of forgery in the third degree.[1]

Sec. 60. Book of Stockholders—Contents.—It shall be the duty of the directors of every such corporation to cause a book to be kept by the treasurer or clerk thereof, containing the names of all persons, alphabetically arranged, who are or shall within six years have been stockholders of such corporation, and showing their places of residence, the number of shares of stock held by them, respectively, and the time when they, respectively, became the owners of such shares, and the amount actually paid thereon; which book shall, during the usual business hours of the day, on every day, except Sundays and legal holidays, be open for the inspection of stockholders and creditors of the corporation, and their personal representatives, at the principal business office of such corporation; and any and every such stockholder, creditor or representative shall have a right to make extracts from such book; and no transfer of stock shall be valid for any purpose whatever, except to render the person to whom it shall be transferred liable for the debts of the corporation, according to the provisions of this act, until it shall have been entered therein as required by this section, by an entry showing from and to whom transferred. Such book shall be presumptive evidence of the facts therein stated, in favor of the plaintiff, in any suit or proceeding against such corporation, or against any one or more stockholders.

[1] See People v. Phelps, 49 How. (N. Y.) Pr. 462 (1874); Phelps v. People, 6 Hun (N. Y.) 428 (1876); Sanabria v. People, 11 N. Y. Week. Dig. 492 (1881); Penal Code, §§ 592, 602. See *post*, §§ 172, 176.

Every officer or agent of any such corporation, who shall neglect to make any proper entry in such book, or shall refuse or neglect to exhibit the same, or allow the same to be inspected, and extracts to be taken therefrom, as provided by this section, shall be deemed guilty of a misdemeanor ; and the corporation shall forfeit and pay to the party injured a penalty of fifty dollars for every such neglect or refusal and all the damages resulting therefrom. And every corporation that shall neglect to keep such book open for inspection, as aforesaid, shall forfeit to the people the sum of fifty dollars for every day it shall so neglect, to be sued for and recovered in the name of the people of the state, by the district attorney of the county in which the principal business office of such corporation is located, and the amount so recovered shall be paid to the proper authorities for the support of the poor of such county.[1]

Sec. 61. Annual Report—Penalty for Neglect to File.—Every such corporation shall annually, within twenty days after the first day of January, or in case of such corporation doing business without the United States, then within twenty days after the first day of April, make a report as of the said first day of January, which shall state the amount of capital, and the proportion actually paid in, the amount and, in general terms, the nature of its existing assets and debts, and the names of its then stockholders, and the dividends, if any, declared since the last report, which report shall be signed by the president and a majority of the directors, and shall be verified by oath of the president or secretary of such corporation, and filed in the office

[1] L. 1875, c. 611, § 17; 3 N. Y. R. S., 8th ed., p. 1982.

of the secretary of state ; and if any such corporation shall fail so to do, all the directors thereof shall be jointly and severally liable for all the debts of the corporation then existing, and for all that shall be contracted before such report shall be made. Provided, however, that any such corporation doing business without the United States, shall still be required to make such report, within twenty days after the first day of January, in each year as aforesaid, unless such corporation shall make and file in the office of the secretary of state, within twenty days after the first day of January in each year, a certificate verified by the oath of the president, secretary or treasurer of such corporation, stating that said corporation is at the date of such certificate doing business without the United States, and such certificate shall be conclusive evidence for the purpose of this section that such corporation is actually doing business without the United States, and provided that if any director shall file with the secretary of state at any time within thirty days after such first day of January, or first day of April, as the case may be, a certificate, verified by the oath of such director, stating that he has endeavored to have such report made and signed as aforesaid, but that the officers or a majority of the directors have refused or neglected to make and file such report ; and shall append to such certificate a report containing the items aforesaid, so far as they are within his knowledge or are obtainable from sources of information open to him, which report shall be verified by him as being true to the best of his knowledge, information and belief, in that case such director shall not be liable on account of such failure to make and file such report

upon making proof of such facts in any action which may be commenced against him, upon the trial thereof. Whenever, under this section, a judgment shall be recovered against a director, severally, all the directors of the corporation shall contribute a ratable share of the amount paid by such director on such judgment, and such director shall have a right of action against his co-directors, jointly or severally, to recover from them the proportion of the amount so paid on such judgment.[1]

Sec. 61a. Failure to file annual report—Liability of directors.—The directors of a company organized under this act, became personally liable for the debts of the company contracted during their term of offices as such, unless they file with the secretary of state the report above provided for.[2] A like construction has been put upon section twelve of chapter forty of the Laws of 1848 which is similar in language to this section.[3] And cases decided under the act of 1848 are applicable to this statute.[4]

Sec. 61b. Same—When liability attaches—Successive failures to file report.—A trustee in office at the time the corporation fails to make its annual report, is liable for all the existing debts of the company, and such as may thereafter be contracted until the report is filed; and such liability attaches upon each default of the company as long as the trustee remains in office; so that although there have been similar successive defaults of the company, and the first of which was more than three years before suit brought, but the last was within three years, the action is maintainable upon the last default, and the statute of limitations is not a bar.[5]

[1] L. 1875, c. 611, § 18, as amended L. 1884, c. 208; 3 N. Y. R. S., 8th ed., p. 1983.

[2] Shaler Quarry Co. v. Bliss, 27 N. Y. 297, 300 (1863); Buck v. Barker, 5 N. Y. St. Rep. 826 (1887).

[3] See Cameron v. Seaman, 69 N. Y. 402; s. c. 25 Am. Rep. 212; Jones v. Barlow, 62 N. Y. 202 (1875); Boughton v. Otis, 21 N. Y. 261 (1860).

[4] See Richards v. Crocker, 19 Abb. (N. Y) N. C. 73 (1887); Richards v. Kingsley, 12 N. Y. St. Rep. 178 (1887). See People v. Green, 56 N. Y. 466.

[5] Nimmons v. Tappan, 2 Sween. (N. Y.) 652 (1870).

A new and original liability is created on each default, and if any of the defaults are within three years, such default may be made the foundation of the action; the creditor is not bound to confine himself to the first default.[1]

Sec. 61c. Same—Liability in nature of a penalty—Debt of corporation.—The liability of the trustee for the omission of the corporation to make an annual report is in the nature of a penalty for misconduct in office and within the three years limitation of actions for penalties of forfeitures;[2] and the penalty imposed is the debt of the corporation.[3]

Sec. 61d. Same—Concurrence of majority of directors.—It seems that in the certificates or reports which this act has required, the concurrence of the directors, or a majority of them, have been made necessary.[4]

Sec. 61e. Same—Preparation of report and placing in hands of secretary for deposit.—It is thought, that the preparation of a report for filing and publication and placing it, in good faith, in the hands of the secretary for deposit in the clerk's office, and in the office of a newspaper, is at least equal in significance to a delivery of a report by a mail-agent for transmission to those places. In the one case, as in the other, the company avails itself of the usual method of performing its duty; and in the absence of anything to show the want of good faith and diligence in respect thereto on its part, a trustee should be relieved from the penalty of the statute.[5]

Sec. 61f. Same—Evidence—Certificate of secretary of state.—The certificate of the secretary of state, that a corporation has filed no annual report in his office, as required by this section, is sufficient evidence of that fact by force of Code Civil Procedure, section 921.[6]

It is said in Bank of United States v. Dandridge,[7] that in

[1] Nimmons v. Tappan, 2 Sween. (N. Y.) 652 (1870.)

[2] Nimmons v. Tappan, 2 Sween. (N. Y.) 652 (1870). See Dabney v. Stevens, 10 Abb. (N. Y.) Pr. N. S. 39 (1870).

[3] Dabney v. Stevens, 10 Abb. (N. Y.) Pr. N. S. 39 (1870).

[4] Walton v. Coe, 16 N. Y St. Rep. 866 (1888).

[5] See Butler v. Smalley, 3 How. (N. Y.) Pr. N. S. 256, 260 (1886).

[6] Buck v. Barker, 5 N. Y. St. Rep. 826 (1887).

[7] 25 U. S. (12 Wheat.) 64 (1827); bk. 6 L. ed. 553.

reason and justice there does not seem any solid ground why a corporation may not, in case of the omission of its officers to file a written report, give such proofs to support its rights as would be admissible in suits against it to support adverse rights.

Sec. 61g. Same—Termination of liability.—Any director may terminate his liability, by filing an individual report.[1]

Sec. 61h. Same—Liability to bona fide purchaser.—The right to enforce the liability of directors for failure to file the annual report exists in favor of a purchasing without notice in good faith, and for a valuable consideration, a note to the corporation from a director thereof, and such purchaser need not prove a lack of notice. A proof by the defendant of the common directorship and default of plaintiff's immediate endorser, and other defendants, do not cast on plaintiff the burden of showing want of notice. It is only where the maker of the note shows that it was obtained by him by fraud or duress, that the holder will be required to show under what circumstances and for what value he became the holder.[2]

Sec. 61i. Same—Liability to co-director.—The liability of directors for failure to file an annual report, as required by this section, does not exist for favor of a co-director, or the assignor of a co-director.[3]

Sec. 61j. Same—Abatement of action.—An action against the trustees of a corporation for the indebtedness to him, upon the ground that such trustee had signed the annual report of the corporation, which was false in its material statements, abates with death of the creditor, and cannot be revived in favor of his personal representatives.[4]

[1] Buck v. Barker, 5 N. Y. St. Rep. 826 (1887).

[2] Chemical Nat. Bank v. Colwell, 14 N. Y. St. Rep. 682 (1888); citing First National Bank v. Green, 43 N. Y. 298 (1871); Case v. Mechanics' Banking Association, 4 N. Y. 166 (1850); Vallett v. Parker, 6 Wend. (N. Y.) 615 (1831).

[3] Chemical Nat. Bank v. Colwell 14 N. Y. St. Rep. 682 (1888); citing Briggs v. Easterly, 62 Barb. (N. Y.) 51 (1872); Bronson v. Dimock, 4 Hun (N. Y.) 614 (1875); Knox v. Baldwin, 80 N. Y. 610 (1880); McClave v. Thompson, 36 Hun (N. Y.) 365 (1885), s. c. 21 N. Y. Week. Dig. 452.

[4] Boyle v. Thurber, 19 N. Y. St. Rep. 881 (1888). See Brackett v.

Sec. 61k. Same—After appointment of receiver.—After the appointment of a receiver the directors of a corporation are under no obligation to file an annual report under the above section, and their omission to do so affords no grounds for an action against them.[1] And after the directors have, on the appointment of a receiver, failed to file an annual report for that year, their subsequent action in filing an annual report for the subsequent year will not estop them from insisting that they were under no obligation to file either the report which they omitted to file or the one which they did file.[2]

Sec. 61l. Same—Director signing is an officer.—Under the above section it is held that a director signing the annual report, as provided for, is an officer within the meaning of section twenty-one of the Business Act.[3]

Sec. 62. Dividends.—It is provided by the New York Revised Statutes that it shall not be lawful for the directors or managers of any incorporated company in this state to make dividends, excepting from the surplus profits arising from the business of such corporation ; and it shall not be lawful for the directors of any such company to divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock of such company, or to reduce the said capital stock, without the consent of the legislature ; and it shall not be lawful for the directors of such company to discount or receive any note, or other evidence of debt, in payment of any instalment actually called in and required to be paid, or any part thereof, due or to

Griswold, 103 N. Y. 425 (1886); also Blake v. Griswold, 104 N. Y. 613 (1887).

[1] Cochran v. Smith, 54 N. Y. Super. Ct. (22 J. & S.) 121 (1886).

[2] Cochran v. Smith, 54 N. Y. Super. Ct. (22 J. & S.) 121 (1886).

[3] Torbett v. Eaton, 49 Hun (N. Y.) 209 (1888); s. c. 1 N. Y. Supp. 614; aff'd on appeal, 113 N. Y. 623; 20 N. E. Rep. 876.

become due on any stock in the said company ; nor shall it be lawful for such directors to receive or discount any note, or other evidence of debt, with the intent of enabling any stockholder in such company to withdraw any part of the money paid in by him on his stock ; and in case of any violation of the provisions of this section, the directors under whose administration the same may have happened, except those who may have caused their dissent therefrom to be entered at large on the minutes of the said directors at the time, or were not present when the same did happen, shall in their individual and private capacities, jointly and severally, be liable to the said corporation, and to the creditors thereof in the event of its dissolution, to the full amount of the capital stock of the said company so divided, withdrawn, paid out or reduced, and to the full amount of the notes or other evidences of debt so taken or discounted in payment of any stock, and to the full amount of any notes or other evidences of debt so discounted with the intent aforesaid, with legal interest on said respective sums, from the time such liability accrued ; and no statute of limitations shall be a bar to any suit at law or in equity, against such directors for any sums for which they are made liable by this section : Provided, That this section shall not be construed to prevent a division and distribution of the capital stock of such company which shall remain after the payment of all its debts, upon the dissolution of such company, or the expiration of its charter.[1]

Sec. 62a. Same—Definition.—A dividend has been defined to

[1] 1 Rev. Stat. 601, § 2.

be a portion of the principal or the profits of a thing divided among its several owners.[1] But as applied to corporations engaged in business, which business is being continued and not closed up and the corporation dissolved, a dividend is a fund which the corporation sets apart from its profits to be divided among its members.[2]

The word "dividends" includes, both in its technical and ordinary sense, all distributions of corporations without regard to the manner or place of their declaration or mode of payment.[3]

It is said by the supreme judicial court of Massachusetts in the case of Williston v. Michigan S. & N. I. R. Co.,[4] that the word "dividends" *ex vi termini* imports a distribution of the funds of a corporation among its members, pursuant to a vote of the directors or managers.

Sec. 62b. Same—From what declared—Net profits.—Dividends can properly be declared only out of profits actually earned.[5] It has been held that the payment of a dividend out of the capital stock of a corporation is *ultra vires* and incapable of ratification by the stockholders.[6]

The "net profits" from which dividends are to be declared

[1] Anderson's Law Dict. 369. See Hall v. Kellogg, 12 N. Y. 325 (1855); Osgood v. Laytin, 3 Abb. App. Dec. 418 (1867); Williston v. Michigan Southern & Northern Indiana R. Co., 95 Mass. (13 Allen) 400 (1866); Attorney-General v. State Bank, 1 Dev. & B. Eq. (N. C.) L. 545 (1837); Com. v. Erie & P. R. Co., 74 Pa. St. 94; (1873); s. c. 10 Phila. (Pa.) 465, 466 Taft v. Hartford, P. & F. R. Co., 8 R. I. 310, 333 (1866); Mutnal Life Ins Co. v. Newton, 89 U. S. (22 Wall.) 38 (1874); bk. 22 L. ed. 793.

[2] Lockhart v. Van Alstyne, 31 Mich. 79 (1875); Van Dyck v. McQuade, 86 N. Y. 38, 47 (1881); Karnes v. Rochester & G. V. R. Co., 4 Abb. (N. Y.) Pr., N. S. 107 (1867).

[3] Clarkson v. Clarkson, 18 Barb. (N. Y.) 646, 657 (1855). See Osgood v. Laytin, 3 Abb. App. Dec. 418, 423 (1867); s. c. 3 Keyes (N. Y.) 521.

[4] 95 Mass. (13 Allen) 400, 404 (1866).

[5] Hughes v. Vermont Copper Mining Co., 72 N. Y. 207 (1878); Comstock v. Drohan, 71 N. Y. 9 (1877); Proude v. Whiton, 15 How. (N. Y.) Pr. 304 (1856); Elkins v. Camden & A. R. Co., 36 N. J. Eq. (9 Stew.) 233 (1882); Pittsburgh & C. R. Co. v. County of Alleghany, 63 Pa. St. 126 (1869).

[6] See Lockhart v. Van Alstyne, 31 Mich. 76 (1875); Main v. Mills, 6 Biss. C. C. 98 (1874); In re Exchange Banking Co., L. R. 21 Ch. Div. 519 (1882); Bloxam v. Metropolitan R. Co., L. R. 3 Ch. App. 337 (1867).

are the gross receipts, less the expense of carrying on the business of the corporation to earn such receipts, and when all liabilities of the corporation are paid, including interest on debt and the like, either out of the gross receipts or the net earnings of the corporate business, that which remains is the property of the shareholders to go towards dividends.[1]

Sec. 62c. Same—Declaring dividends—Discretion of directors.—The directors of a corporation are the only judges of the propriety of declaring dividends, and of the amount that shall be paid. The directors possess a discretion in such a matter which, when fairly and honestly exercised, is uncontrollable by the courts;[2] but should the directors act illegally, wantonly or oppressively, and wilfully abuse their discretion in refusing to declare a dividend where the right to one is clear, and there are funds from which it can properly be made, a court of equity will compel the directors or trustees to declare and pay such a dividend as the funds accumulated will warrant.[3]

Where the directors undertake to declare a dividend they must so declare it as to give to each stockholder his proportional

[1] See Williams v. Western Union Tel. Co., 93 N. Y. 162, 191 (1883); Van Dyck v. McQuade, 86 N. Y. 47 (1881); Belfast & M. L. R. Co. v. Belfast, 77 Me. 445 (1885); Phillips v. Eastern R. R. Co., 138 Mass. 122 (1884); Park v. Grant Locomotive Works, 40 N. J. Eq. (13 Stew.) 114, 121 (1885); Union Pacific R. Co. v. United States, 99 U. S. (9 Otto) 402 (1878); bk. 25 L. ed. 274; St. John v. Erie R. Co., 10 Blatchf. C. C. 271 (1872); s. c. 89 U. S. (22 Wall) 136; bk. 22 L. ed. 743. *Compare* Corry v. Londonderry & E. R. Co., 29 Beav. 263 (1860).

[2] Williams v. Western U. Tel. Co., 93 N. Y. 162 (1883); Luling v. Atlantic Ins. Co., 45 Barb. (N. Y.) 510 (1865); State v. Bank of La., 6 La. 745 (1834); Jackson v. Newark Plankroad Co., 31 N. J. L. (2 Vr.) 263 (1860).

[3] Jermain v. Lake Shore & M. S. R. Co., 91 N. Y. 483 (1883); Boardman v. Lake Shore & M. S. R. Co., 84 N. Y. 157 (1881); Howell v. Chicago & N. W. R. Co., 51 Barb. (N. Y.) 378 (1868); Smith v. Plattville Manuf. Co., 29 Ala. 503 (1857); Beers v. Bridgeport Spring Co., 42 Conn. 17 (1875); Pratt v. Pratt, 33 Conn. 446 (1866); Hazeltine v. Belfast & M. L. R. Co., 79 Me. 411 (1887); Belfast & M. L. R. Co. v. Belfast, 77 Me. 445 (1885); March v. Eastern R. Co., 43 N. H. 515 (1862); Park v. Grant Locomotive Works, 40 N. J. Eq. (13 Stew.) 114 (1885).

share of profits.[1] Where the directors or trustees of a corporation undertake to make unjust discriminations in declaring dividends by giving one stockholder an advantage over another, they exceed their powers, and the courts have a right to interpose to prevent it.[2] However, where some of the stock consists of preferred shares, the holders of this stock constitute a class by themselves, and are entitled to priority over holders of common shares in declaring and paying dividends.[3] The payment of dividends on preferred shares can be made only from profits actually earned, and any agreement to the contrary is against public policy, and for that reason void.[4]

Sec. 62d. Same—In what payable.—In England it is held that dividends must be payable in money,[5] and it has also been said there that the whole of the profits of the corporation must be divided periodically.[6] In this country, however, neither of these rules prevail. Here stock and script dividends are very common;[7] and unless there is some obligation, created

[1] Jones v. Terre Haute & R. R. Co., 57 N. Y. 196 (1874); Luling v. Atlantic Mut. Ins. Co., 45 Barb (N. Y.) 510 (1865); Ryder v. Alton & S. R. Co., 13 Ill. 516 (1851); Hoole v. Great Western R. Co., L. R. 3 Ch. App. 262 (1867).

[2] Jones v. Terre Haute & R. R. Co., 57 N. Y. 196 (1874); Luling v. Atlantic Mutual Ins. Co., 45 Barb. (N. Y.) 510 (1865); Hale v. Republican River Bridge Co., 8 Kan. 466 (1871); Jackson v. Newark Plank-road Co., 31 N. J. L. (2 Vr.) 277 (1865); Harrison v. Mexican R. Co., L. R. 19 Eq. 358 (1875). See Beers v. Bridgeport Spring Co., 42 Conn. 17 (1875).

[3] Belfast & M. L. R. Co. v. Belfast, 77 Me. 445 (1885), Burt v. Rattle, 31 Ohio St. 116 (1876); Emerson v. New York & N. E. R. Co., 14 R. I. 555 (1884); Gordon v. Richmond F. & P. R. R. Co., 78 Va. 501 (1884). See Taft v. Hartford P. & F. R. Co., 8 R. I. 335 (1866).

[4] Painesville & H. R. Co. v. King, 17 Ohio St. 534 (1867); Pittsburgh & C. R. Co. v. Allegheny County, 63 Pa. St. 126 (1869); Chaffee v. Rutland R. Co., 55 Vt. 110 (1882); Warren v. King, 108 U. S. 389 (1882); bk. 27 L. ed. 769.

[5] Bardwell v. Sheffield W. W. Co. L. R. 14 Eq. 517 (1872).

[6] Stringer's Case L. R. 4 Ch. App. 494 (1869).

[7] Howell v. Chicago & Northwestern R. Co., 51 Barb. (N. Y.) 378 (1868); State v. Baltimore & O. R. Co., 6 Gill. (Md.) 363 (1847); Rand v. Hubbell, 115 Mass. 461 (1874); Leland v. Hayden, 102 Mass. 542 (1869); Lord v. Brooks, 52 N. H. 72 (1872); Moss's Appeal, 83 Pa. St. 264 (1877); Wiltbank's Appeal, 64 Pa. St. 256 (1870); Earp's Appeal, 28 Pa. St. 368 (1857); Aldrich v. Howard, 8 R. I. 247 (1865).

by the charter or by contract, to the contrary it is entirely a matter of discretion with the directors whether any or what dividends shall be declared, and so long as they act in good faith, the courts will not interfere even though they may deem their judgment erroneous.[1]

Sec. 62e. Same—Right to.—All persons who are shareholders at the time dividends are declared are entitled to them, irrespective of the time at which they were earned.[2] As between the vendor and the vendee of the shares of a corporation, the vendor retains the right to all dividends declared before the sale, and the vendee to all declared thereafter, in the absence of an express contrary agreement between the parties; and this is also true whether the dividends be payable before or after the consummation of the sale.[3]

In the case of Hill v. Newichawanick Co.,[4] the court, in speaking regarding the custom respecting sales of shares of stock at the Board of Brokers in New York, said: "It is understood that sales of stock made at the Board of Brokers in this city, at any time before the day fixed for the closing of the books of transfer of the corporation or company declaring a dividend payable at a future day, carry with them the divi-

[1] Karnes v. Rochester & Gen. V. R. Co., 4 Abb. (N. Y.) Pr. N. S. 107 (1867); Luling v. Atlantic Mutual Ins. Co., 45 Barb. (N. Y.) 510 (1865); Ely v. Sprague, Clarke Ch. (N. Y.) 351 (1840); State v. Bank of Louisiana, 6 La. 745 (1834).

[2] See Boardman v. Lake Shore & M. S. R. Co., 84 N. Y. 157 (1881); Hyatt v. Allen, 56 N. Y. 553 (1874); s. c. 15 Am. Rep. 449; Hill v. Newichawanick Co., 48 How. (N. Y.) Pr. 427 (1874); aff'g 8 Hun (N. Y.) 459; 71 N. Y. 593; Brisbane v. Delaware L. & W. R. Co., 25 Hun (N. Y.) 438 (1881); s. c. 94 N. Y. 204; Manning v. Quicksilver Mining Co., 24 Hun (N. Y.) 360 (1881); Cleveland & M. R. Co. v. Robbins, 35 Ohio St. 483 (1880).

See People v. Assessors, 76 N. Y. 202 (1879); Hyatt v. Allen, 56 N. Y. 553 (1874); s. c. 15 Am. Rep. 449; Currie v. White, 45 N. Y. 822 (1871); Hopper v. Sage, 47 N. Y. Super. Ct. (15 J. & S.) 77 (1881); Lombardo v. Case, 45 Barb. (N. Y.) 95 (1865); Spear v. Hart, 3 Robt. (N. Y.) 420 (1865); Brundage v. Brundage, 1 T. & C. (N. Y.) 82 (1873); Bright v. Lord, 51 Ind. 272 (1875); s. c. 19 Am. Rep. 732; City of Ohio v. Cleveland, & T. R. Co., 6 Ohio St. 489 (1856); Black v. Homersham, L. R. 4 Ex. Div. 24 (1878); Hague v. Dandeson, 2 Ex. 741 (1848). *Compare*, Burroughs v. North Carolina R. Co., 67 N. C. 376 (1872).

[4] 48 How. (N. Y.) Pr. 427 (1874); aff. 8 Hun (N. Y.) 459, 463; 71 N. Y. 593.

dend so declared, and the price is regulated accordingly. After the books are closed the sales are understood to be ex-dividend, and the price is correspondingly affected by the fact that the seller retains and is to collect the dividends." [1]

As between the vendor and the vendee the right to receive the dividends upon the shares is not affected by the failure to register the transfer; but the purchaser will have no legal claim to such dividends as against the company unless such transfer was properly registered upon the books. [2]

Sec. 62f. Same—To whom payable.—Dividends belong to the owners of the stock at the time the dividend is actually declared. Where dividends are made to the stockholders of a corporation after the death of the testator they pass to the personal representatives of the decedent; but where the dividends are declared before, although payable after the death of the testator, they pass by the devisees.[3]

As soon as the profits on shares of the stock of the corporation are ascertained and declared, such profits cease to be the property of the company, and the owner of the shares becomes entitled to the dividend. The fact that the dividends are made payable at a future time is immaterial.[4]

Sec. 62g. Same—Right of tenant for life to receive.—The decisions of the various states are hopelessly in conflict respecting and to what extent a life-tenant is entitled to receive dividends of stock; but the correct doctrine is thought to be that dividends derived from the earnings of the company, no matter where such earnings or profits were realized, belong

[1] See Hopper v. Sage, 112 N. Y. 530, 534 (1889); Matter of Kernochan 104 N. Y. 618 (1887); Jermain v. Lake Shore & M. S. R. Co., 91 N. Y. 483, 492 (1883); Boardman v. Lake Shore & M. S. R. Co., 84 N. Y. 157 (1881).

[2] See Jermain v. Lake Shore & M. S. R. Co., 91 N. Y. 484 (1883); Manning v. Quicksilver Mining Co., 24 Hun (N. Y.) 360 (1881).

[3] See Hyatt v. Allen, 56 N. Y. 553 (1874); Brundage v. Brundage, 65 Barb. (N. Y.) 397 (1873); Clapp v. Astor, 2 Edw. Ch. (N. Y.) 379 (1834); Phelps v. Farmers & Mechanics' Bk. 26 Conn. 269 (1857); Bright v. Lord, 51 Ind. 276 (1875); In re Foot, 39 Mass. (22 Pick.) 299 (1839).

[4] Hopper v. Sage, 112 N. Y. 530 534 (1889); Matter of Kernochan, 104 N. Y. 618, 628 (1887). See Clapp v. Astor, 2 Edw. (N. Y.) Ch. 379 (1834).

to the life-tenant in those cases where the dividends were declared during the existence of his estate, even when the dividends were stock dividends.[1] It has been said that where a corporation sells part of its original franchise and property and distributes the proceeds of the same as a dividend among its stockholders, as between a life-tenant entitled "to receive all issues, dividends and proceeds accrued" from certain shares of the stock, and a remainderman, such dividends will be regarded as capital and not as income.[2]

Sec. 62h. Same—When suit may be brought for.—A stockholder cannot sue the corporation for his share of accumulated profits until a dividend has been declared, and the declaring of a dividend is a matter within the discretion of the directors, and which the courts will not control.[3]

Sec. 62i. Same—Rights of non-shareholders.—One who is not a shareholder in a corporation has no right to a decree compelling the corporation to declare and pay such dividends as may appear upon an accounting to be proper; nor will a court of equity decree an account of liens on the shares of a

[1] Simpson v. Moore, 30 Barb. (N. Y.) 637 (1859); Clarkson v. Clarkson, 18 Barb. (N. Y.) 646 (1855); Riggs v. Cragg, 26 Hun (N. Y.) 89-103 (1881); Cragg v. Riggs, 5 Redf. (N. Y.) 82 (1880); Scovel v. Roosevelt, 5 Redf. (N. Y.) 121 (1881); Estate of Woodruff, 1 Tucker (N. Y.) 58 (1865); Millen v. Guerrard, 67 Ga. 284 (1881); s. c. 44 Am. Rep. 720; Richardson v. Richardson, 75 Me. 570 (1884); s. c. 46 Am. Rep. 428; Rand v. Hubbell, 115 Mass. 461 (1874); s. c. 15 Am. Rep. 121; Pierce v. Burroughs, 58 N. H. 302 (1878); Lord v. Brooks, 52 N. H. 72 [1872); Van Doren v. Olden, 19 N. J. Eq. (4 C. E. Gr.) 176 (1868); Vinton's Appeal, 99 Pa. St. 434 (1882); s. c. 44 Am. Rep. 116; Moss' Appeal, 83 Pa. St. 264 (1877); s. c. 24 Am. Rep. 164; Wiltbanks' Appeal, 64 Pa. St. 256 (1870); s. c. 3 Am. Rep. 585; Earp's Appeal, 28 Pa. St. 368 (1857.)

[2] See Clapp v. Astor, 2 Edw. Ch. (N. Y.) 379 (1834); Estate of Woodruff, 1 Tucker (N. Y.) 58 (1865); Leland v. Hayden, 102 Mass. 550 (1869); Peirce v. Burroughs, 58 N. H. 302 (1878); Lord v. Brooks, 52 N. H. 72 (1872); Van Doren v. Olden, 19 N. J. Eq. (4 C. E. Gr.) 176 (1868); Bates v. Mackinley, 31 Beav. 280 (1862); Johnson v. Johnson, 15 Jur. 714; s. c. 5 Eng. L. & Eq. 164 (1850); Murray v. Glasse, 17 Jur. 816 (1853); Plumbe v. Neild. 6 Jur. N. S. 529 (1860); Price v. Anderson, 15 Sim. 473 (1847); Barclay v. Wainewright, 14 Ves. Jr. 66 (1807).

[3] Beveridge v. New York El. R. Co., 112 N. Y. 1 (1889); s. c. 19 N. E. Rep. 489; 20 N. Y. St. Rep. 962.

stockholder at the request of a person having no lien on such shares.[1]

Sec. 62j. Same—Dividends improperly paid—Recovery.—Where dividends have been improperly declared and paid they may be recovered back.[2] It is a settled doctrine in this country that the capital stock and property of every corporation constitutes a trust-fund for the benefit of the general creditors of the corporation, and such creditors have a lien thereon and a right to prior payment over the stockholders;[3] consequently where the capital stock of a corporation is diverted in whole or in part to the payment of dividends, the creditors of such corporation may follow it into the hands of the stockholders and recover it back; because the stockholders are affected with notice of the trust character of the capital stock, and cannot claim to occupy the status of *bona fide* holders.[4] A single judgment creditor of a corporation, on the return of an execution against it unsatisfied, may maintain an action against the stockholders and recover back whatever has been received by them as dividends out of the capital stock.[5]

Sec. 62k. Same—Provisions of penal code.—The penal code

[1] Berford v. New York Iron Mine, 55 N. Y. Super. Ct. (23 J. & S.) 516 (1888); s. c. 4 N. Y. Sup. 836; 21 N. Y. St. Rep. 439.

[2] Comstock v. Drohan, 71 N. Y. 9 (1877); Proude v. Whiton, 15 How. (N. Y.) Pr. 304 (1856).

[3] Hastings v. Drew, 76 N. Y. 9 (1879); Bartlett v. Drew, 57 N. Y. 587 (1874); Mills v. Stewart, 41 N. Y. 389 (1869); Crawford v. Rohrer, 59 Md. 599 (1882); Bunn's Appeal, 105 Pa. St. 49 (1884); Bassett v. St. Alban's Hotel Co., 47 Vt. 313 (1875); County of Morgan v. Allen, 103 U. S. (13 Otto) 498 (1880); bk. 26 L. ed. 498 Sawyer v. Hoag, 84 U. S. (17 Wall.) 610 (1873); bk. 21 L. ed. 731; Burke v. Smith, 83 U. S. (16 Wall.) 390 (1872); bk. 21 L. ed. 361; Wood v. Dummer, 3 Mason, C. C. 308 (1824).

[4] Hastings v. Drew, 76 N. Y. 9 (1879); Proude v. Whiton, 15 How. (N. Y.) Pr. 304 (1856); Clapp v. Peterson, 104 Ill. 26 (1882); Peterson v. Illinois Land & Loan Co., 6 Ill. App. 257 (1880); Lexington Life &c. Ins. Co. v. Page, 17 B. Mon. (Ky.) 412 (1856); s. c. 66 Am. Dec. 165; Heman v. Britton, 88 Mo. 549 (1885); Nat. Trust Co. v. Miller, 33 N. J. Eq. (6 Stew.) 155 (1880).

[5] Hastings v. Drew, 76 N. Y. 9 (1879); Sturges v. Vanderbilt, 73 N. Y. 384 (1878); Bartlett v. Drew, 57 N. Y. 587 (1874); McLean v. Eastman, 21 Hun, (N. Y.) 312 (1880); Brewer v. Michigan Salt Assoc., 58 Mich. 351 (1885); Williams v. Boice 38 N. J. Eq. (11 Stew.) 364 (1884.)

provides that a director of a stock corporation who concurs in any vote or act of the directors of such corporation, or any of them by which it is intended,

1. To make a dividend except from the surplus profits arising from the business of the corporation, and in the cases and manner required by law; or

2. To divide, withdraw, or in any manner pay to the stockholders, or any of them any part of the capital stock of the corporation, is guilty of a misdemeanor.[1]

Sec. 63. Dividends by Insolvent company—Directors Liable for Debts.—If the directors of any such corporation shall declare and pay any dividend when the corporation is insolvent, or any dividend the payment of which would render it insolvent, or which would diminish the amount of its capital stock, the directors voting in favor of declaring such dividend shall be jointly and severally liable for all the debts of the corporation then existing, and for all that shall be thereafter contracted while they shall respectively continue in office.[2]

Sec. 64. Loans to Stockholders Prohibited.—No loan of money shall be made by any such corporation to any stockholder therein, and if any such loan shall be made to a stockholder, the officers who shall make it, or who shall assent thereto, shall be jointly and severally liable to the extent of such loan and interest for all the debts of the corporation contracted before the repayment of the sum so loaned.[3]

Sec. 65. False Certificate or Report—Officers' Liability therefor.—If any certificate or report made, or public notice given, by the officers of any such corporation, shall be false in any material representa-

[1] N. Y. Penal Code, § 494.

[2] L. 1875, c. 611, § 19; 3 N. Y. R. S., 8th. ed., p. 1883.

[3] L. 1875, c. 611, § 20; 3 N. Y. R. S., 8th ed., p. 1983.

tion, all the officers who shall have signed the same shall be jointly and severally liable for all the debts of the corporation contracted while they are officers thereof.[1]

Sec. 65a. Who are officers—When statutory liability arises.—The directors of a corporation are officers thereof within the meaning of the above section,[2] and their statutory liability under said section arises when they represent in their report, though in good faith, that the capital had been paid in cash.[3]

Sec. 65b. False report—Liability of trustees or directors and officers.—The officers of a corporation formed under this act are liable for the payments of its debts, when they join in making the annual report, or certificate, and it proves to be false in a material respect;[4] and it is no defence to a suit to enforce such liability that the director is also a creditor of the company;[5] or that the defendant signed such report in good faith, under the advice of counsel, and believing its statement to be true.[6] In such an action, where the evidence tends to show that the plaintiff had actual knowledge, the court will not disturb a verdict which finds against him on the issue whether he was guilty of actual falsehood in signing the report.[7]

It is said in Richards v. Crocker,[8] that a director is liable for all the debts of the corporation, while he is director, without limitation as to the amount. "The liability is unlimited because designed to punish the fraudulent act of the officer for making false representations as to the pecuniary condition of the company calculated to deceive the public and induce persons to extend credit to the company, which

[1] L. 1875, c. 611, § 21; 3 N. Y. R. S., 8th ed., p. 1984.

[2] Brandt v. Godwin, (N. Y. City Ct. T. T.) 3 N. Y. Sup. 807 (1889); Torbett v. Easton, 17 N. Y. St. Rep. 117 (1888).

[3] VanIngen v. Whitman, 62 N. Y. 518, 519 (1875). See Torbett v. Eaton, 49 Hun, (N. Y.) 209 (1888); s. c. 1 N. Y. Sup. 614, aff'd on appeal 113 N. Y. 623; 20 N. E. Rep. 876.

[4] Brandt v. Godwin (N. Y. City Ct. G. T.) 3 N. Y. Sup. 807 (1889); Torbett v. Eaton, 17 N. Y. St. Rep. 117 (1888).

[5] Richard v. Crocker, 19 Abb. (N. Y.) N. C. 73 (1887).

[6] Brandt v. Godwin (N. Y. City Ct. G. T.) 3 N. Y. Sup. 807 (1889).

[7] Blake v. Griswold, 103 N. Y. 429 (1886); s. c. 9 N. E. Rep. 434.

[8] 19 Abb. (N. Y.) N. C. 73 (1887).

they might not have been induced to give if the truth had been made known;" and to such liability it will not do for the director to say in defence that he is a creditor of the corporation, for that will not excuse a fraud through which another has suffered a pecuniary loss.

Sec. 65c Same—Action to enforce liability—Revivor.—It is said by the supreme court of New York in the case of Boyle v. Thurber,[1] that an action by a creditor of a corporation to enforce the liability of a trustee of a corporation for indebtedness to him upon the ground that such trustee had signed an annual report of the corporation, which was false in its material statements, cannot be revived, on decease of plaintiff, in favor of his personal representatives, the defendant being discharged from liability by the death of the creditor.[2]

Sec. 65d. Same—False certificate—Liability of directors.—The officers of a corporation issuing false certificates are liable therefor to the assignees of such certificates when they have purchased and hold them in good faith.[3]

It is said in Nimmons v. Tappan,[4] that the pendency of an action against all the trustees to enforce their liability for falsely certifying that all the capital had been paid in, is no bar to an action against one of such trustees to enforce his individual liability for a default of the company to file its annual report.

Sec. 65e. Same—Criminal liability.—An officer, director, or agent of a company who knowingly concurs in making or publishing a written report of the affairs or pecuniary condition of the company, containing any material statement which is false, is guilty of a misdemeanor.[5]

Sec. 65f. Same—Limitation of liability of trustees.—The liability of trustees is limited to those who sign the annual report knowing it to contain a false statement.[6]

Sec. 65g. Same—Knowledge of falsity.—To render officers

[1] 50 Hun (N. Y.) 259 (1888); s. c. 2 N. Y. Sup. 789; 19 N. Y. St. Rep. 881; 5 Ry. & Corp. L. J. 10.

[2] See Blake v. Griswold, 104 N. Y. 613 (1887); Brackett v. Griswold, 103 N. Y. 425 (1886).

[3] Bruff v. Mali, 36 N. Y. 200 (1867).

[4] 2 Sween. (N. Y.) 652 (1870).

[5] See *post*, § 208.

[6] Pier v. Hanmore, 86 N. Y. 95 (1881).

liable under this section, for all the debts of the corporation, it is not necessary that they have actual knowledge that the representations are false, and are liable, although they were signed in good faith.[1]

Where creditors of a corporation certify that the stock is fully paid, and the evidence shows that the only payment of stock was made by a transfer of land at an enormous advance over the purchase price, and that the debts of the corporation at the time of making the certificate greatly exceeded the purchase price of the land, these facts are sufficient to sustain a finding by the jury that the directors knew that the certificate was false.[2]

Sec. 65h. Same—Meaning of word "false."—The effect to be given to the word "false," as it has been used in the statute,[3] was considered by the court of appeals in Van Ingen v. Whitman,[4] where it was held not to have been the intention of the legislature to require that the statements used be knowingly, fraudulently false.[5]

Sec. 65i. Same—Purpose of making.—Where the report is false in a material point, and plainly proven to have been known so to be by the officers signing it, it is not necessary to prove the purpose for which the misrepresentation was made, or that any particular fraud was intended.[6] It has been said, however, that in order to justify a recovery where the allegation is denied, it must be made to appear on the trial that the return was willfully false; that is, made intentionally with a purpose to deceive, and the scienter or guilty knowledge must be equivalent to *mala fides* in making the certificate.[7]

[1] Torbett v. Eaton, 49 Hun (N. Y.) 209 (1888); s. c. 1 N. Y. Sup. 614; 17 N. Y. St. Rep. 117, aff'd on appeal 113 N. Y. 623; s. c. 20 N. E. Rep. 876. See Huntington v. Attrill, 42 Hun (N. Y.) 459 (1886).

[2] Hatch v. Attrell, 1 N. Y. St. Rep. 497 (1886).

[3] L. 1875, c. 611, § 21; 3 N. Y. R. S., 8th ed., p. 1984, see *ante*, § 65.

[4] 62 N. Y. 513 (1875).

[5] Torbett v. Eaton, 49 Hun (N. Y.) 209 (1888); s. c. 1 N. Y. Sup. 614; aff'd on appeal 113 N. Y. 623; 20 N. E. Rep. 876.

[6] Pier v. Hanmore, 86 N. Y. 95, 104, 105 (1881). See Bonnell v. Griswold, 89 N. Y. 122, 125 (1882); Taylor v. Thompson, 66 How. (N. Y.) Pr. 102, 105 (1883).

[7] Taylor v. Thompson, 66 How. (N. Y.) Pr. 102, 106 (1883); Stebbins v. Edmunds, 78 Mass. (12 Gray) 203 (1858); Pier v. Hanmore, 86 N. Y.

Sec. 65j. Same—Pleading.—Where the creditor of a corporation seeks to charge a trustee personally with a debt upon the ground that, in pursuance of the statute[1] he signed and caused to be filed an annual report which, as the complaint alleged, was false in a material representation, it is not necessary to aver that the transaction was a fraudulent cover for a fictitious payment of the stock, or that the trustees had no actual belief in the value of the land, or no reasonable ground or basis for such belief, and that the issue of the stock for the land was done for the fraudulent purpose of evading the statute, when it is alleged the defendant knew the report to be false when he signed it.[2]

Sec. 65k. Same—Abatement of action.—The liability of a director under this section abates on the death of the original creditor of the corporation, and cannot be revived in favor of, or prosecuted by personal representatives.[3]

Sec. 66. Indebtedness not to Exceed Capital Stock—Liability.—If the indebtedness of any such corporation shall at any time exceed the amount of its capital stock the directors of such corporation creating such indebtedness shall be personally and individually liable for such excess to the creditors of such corporation.[4]

Sec. 66a. Indebtedness—Excess of capital stock—Liability of directors.—A statute[5] providing that if the indebtedness of a mining company shall at any time exceed the capital stock paid in, the directors assenting thereto shall be individually liable to the creditors for such excess, applies only to the unpaid creditors, to the making of whose debts the directors assented, and directors are not liable to creditors to whose debts they did not assent, although such debts were incurred

95 (1881); Butler v. Smalley, 101 N. Y. 71, 74 (1885).

[1] L. 1875, c. 611, § 18; 3 N. Y. R. S., 8th ed., p. 1783, see *ante*, § 61.

[2] Taylor v. Thompson, 66 How (N. Y.) Pr. 102 (1883).

[3] Boyle v. Thurber, 50 Hun (N. Y.) 259 (1888); s. c. 2 N. Y. Sup. 789; following Brackett v. Griswold, 103 N. Y. 425 (1886). See Blake v. Griswold, 104 N. Y. 613, 616, 617 (1887).

[4] L. 1875, c. 611, § 22; 3 N. Y. R. S., 8th ed., p. 1984.

[5] Code Tenn. (Mill & V.) § 1858.

to pay off former illegal indebtedness to which they had assented. In this case it was shown that while defendants were directors, and both present at a meeting, an order was made authorizing one of the directors to buy machinery in the company's name, provided that two of the directors named were to "hold the company harmless." Defendants claimed that this order did not express the true action of the board, which was in fact that said two directors should purchase the machinery upon their credit, and upon trial, if it proved satisfactory, they were to receive a royalty from the company for its use. One of the defendants made an admission in contradiction of this theory. On the other hand, there was proof, that although defendants at first objected to the purchase, upon the agreement of said two directors to provide the means to pay for the machinery, they assented. The machinery was shipped in the company's name, used and sold by it, with the knowledge of defendants. The court held that the evidence showed that defendants assented to incurring the debt for said machinery.[1]

Sec. 66b. Same—Liability—Joint and not several.—The individual liability of the directors under the statute is joint and not several, and to an action brought by the creditor to enforce the liability thereby created, all the directors who are liable must be made parties.[2]

Sec. 66c. Same—Determining amount of liability—Debt to director.—It is thought that debts owing by a corporation for advances made by one of its directors cannot be included in the debts of such corporation in order to render the directors personally liable for them, upon the ground that such debts exceed the capital stock of the corporation.[3]

Thus it has been held that in determining the amount of the liabilities of a company in order to ascertain whether or not they exceed the amount of the capital stock, a judgment

[1] See Allison v. Coal Creek & New River Coal Co., 87 Tenn. 60 (1888); s. c. 4 Ry. & Corp. L. J. 559.

[2] McClave v. Thompson, 36 Hun (N. Y.) 365 (1885); s. c. 21 N. Y. Week. Dig. 452.

[3] Robinson v. Thompson, 20 N. Y. Week. Dig. 557 (1885). See Knox v. Baldwin, 80 N. Y. 610 (1880); Easterly v. Barber, 65 N. Y. 255 (1875).

recovered against the company by one of its directors for money advanced by him to it, which judgment has been subsequently signed by him to a third person, cannot be treated as one of its liabilities.[1]

Sec. 66d. Same—Pleadings.—In an action by the creditors of a corporation against the directors thereof to hold them personally liable, because the debts of the corporation created by defendants exceed the amount of its capital stock, it is enough to state the amount of such capital, and to give the amounts of the claims which are outstanding, and it is not necessary that the debts should be due. Where an apparent claim against the corporation is not real, that fact should be set up by answer.[2]

Sec. 67. Executors, etc., not Personally Liable for Debts of Company.—No person holding stock in any such corporation, as executor, administrator, guardian or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as stockholder of such corporation; but the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly; and the estates and funds in the hands of such executor, administrator, guardian or trustee shall be liable in like manner, and to the same extent, as the testator or intestate, or the ward or person interested in such trust fund would have been, if he had been living and competent to act, and held the same stock in his own name.[3]

[1] McClave v. Thompson, 36 Hun (N. Y.) 365 (1885); s. c. 21 N. Y. Week. Dig. 452; following Easterly v. Barber, 65 N. Y. 255 (1875); Knox v. Baldwin, 80 N. Y. 610 (1880).

[2] Robinson v. Attrill, 66 How. (N. Y.) Pr. 121 (1883).

[3] L. 1875 c. 611, § 23; 3 N. Y. R. S., 8th ed., p. 1984.

CHAPTER VI.

ELECTIONS—VOTING—VOTE OF MARRIED WOMEN—FAILURE TO ELECT—INSPECTORS OF ELECTIONS—LIABILITY OF STOCKHOLDERS—EXTENSION OF CORPORATE EXISTENCE—TAXATION OF CORPORATION.

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Sec. 68. Elections—Who may Vote at.—Every such executor, administrator, guardian or trustee shall

represent the share or shares of stock in his hands at all meetings of the corporation, and may vote accordingly as a stockholder, and every person who shall pledge his stock as aforesaid, may, nevertheless, represent the same at all such meetings and may vote accordingly as a stockholder.[1]

Sec. 68a. Same—Method of voting.—At common law all votes for corporate officers were required to be given in person; and in the absence of a provision in the charter expressly or by legal implication conferring such power, a by-law giving a right to vote by proxy is repugnant to law and void.[2] The only exception to this common law doctrine was in the case of the peers of England, who, by license, obtained from the king, were allowed to make their lords of parliament their proxies to vote for them in their absence.[3] In this country it has never been questioned that in all elections in public and municipal corporations, as well as in all other elections of a public nature, every vote must be personally given;[4] but in the case of moneyed corporations, instituted for private purposes, it has been held that the right to vote by proxy may be delegated by the by-laws of the corporation where the charter is silent upon that subject. Regarding this matter, however, there is a conflict in the authorities.[5] In this country the matter is regulated almost entirely by statutes, which provide by express enactment that the stockholders of private corporations may, at all meetings thereof, vote either in person or by proxy appointed in writing.[6]

[1] L. 1875, c. 611, § 24; N. Y. R. S., 8th ed., p. 1984.

[2] Phllips v. Wickham, 1 Paige Ch. (N. Y.) 590 (1829); Taylor v. Griswold, 14 N. J. L. (2 J. S. Gr.) 223 (1834); s. c. 27 Am. Dec. 33, 37, 40.

[3] Seld. Bar. P. 1, c. 1; 1 Bl. Com. 168; Angell & Ames on Corp., § 128. See Phillips v. Wickham, 1 Paige Ch. (N. Y.) 590 (1829).

[4] Dean & Charter of Ferns, Dav. 129 ( ); Attorney-General v. Scott, 1 Ves. 413 (1750).

[5] See State v. Tudor, 5 Day (Conn.) 329 (1812); s. c. 5 Am. Dec. 162; Brown v. Com., 3 Grant Cas. (Pa.) 209 (1856).

[6] 2 N. Y. Rev. Stat. 400, § 6 (1875); Comp. Laws Ariz. 515 § 7 (1877); Rev. Stats. Colo. 119, § 5; Gen. Stats. Conn. 279, § 11 (1875); Laws of Del. 376, § 2; Const. Ill. art. 6, § 3; 1 Rev. Stat. Ind. 620, § 4 (1876); Comp. Laws Kan. 22, § 27a (1879); Rev. Stats. Me. 394, § 5 (1871); Rev. Code Md. 321, § 52 (1878); Gen.

Sec. 68b. Same—Voting by proxy.—The shareholders of a corporation, for the reasons above stated, have no implied right to vote by proxy; however, it is competent for a corporation by a by-law to authorize votes to be cast by proxy; but the right to vote by proxy is not a general right and the party who claims such right must show a special authority for that purpose.[1] The power to vote by proxy must be conferred by written evidence of the agent's right to act, and by such as will reasonably assure the inspectors that the agent is acting by the authority of the principal; however, the power of attorney need not be in any particular form, or executed in any particular manner.[2]

Where a shareholder is represented by proxy at a meeting, he is chargeable with knowledge of the facts connected with the proceedings at that meeting which came to the proxy in his representative capacity.[3]

Sec. 68c. Same—Rejection of proxies.—It has been said that a proxy is a delegation of authority for a particular purpose, this in the contemplation of the person giving. Where a proxy was given in November and December, 1886, by the governors of an infirmary for a contemplated election between

Stats. Mass. 304, § 33 (1860); 1 Comp. Laws Mich. 1148 § 2 (1871); Gen. Stats. Minn. 450, § 160; Rev. Code Miss. 530, § 2406 (1871); 1 Wagner's Stats., Mo. 289, § 1; 2 Comp. Laws Nev. 274, § 5; Gen. Stats. N. H. 280, § 21 (1867); Revn. N. J. 181, § 21 (1877); Gen. Laws New Mex. 204, § 5 (1880); 1 Rev. Stats. Ohio, § 3245; Gen. Laws Oreg. 526, § 7; Purdon's Dig. Pa. 744, § 4; Gen. Stats. R. I. 291, § 3; 1 Stats. Tenn. 1404 (1871); Gen. Stats. Vt. 635, § 43 (1862); 1 Code Va. 332, § 10 (1860); 1 Rev. Stats. W. Va. 316, § 44.

[1] Philips v. Wickham, 1 Paige Ch. (N. Y.) 590 (1829); Com. v. Bringhurst, 103 Pa. St. 137 (1883); s. c. 49 Am. Rep. 119. See People v. Twaddell, 18 Hun (N. Y.) 427 (1879); State v. Tudor, 5 Day (Conn.) 329 (1812); s. c. 5 Am. Dec. 162; People v. Crossley, 69 Ill. 195 (1873); Taylor v. Griswold, 14 N. J. L. (2 J. S. Gr.) 223 (1834); s. c. 27 Am. Dec. 33, 37, 40; Hayward Plank Road Co. v. Bryan, 6 Jones (N. C.) L. 82 (1858), Craig v. Presbyterian Church, 88 Pa. St. 42 (1879); s. c. 32 Am. Rep. 417; Brown v. Com., 3 Grant Cas. (Pa.) 209 (1856); Queen v. Government Stock Investment, L. R. 3 Q. B. Div. 442 (1878); 2 Kent Com. 295; Field on Corp., § 72.

[2] In re Cecil, 36 How. (N. Y.) Pr. 477 (1869); In re St. Lawrence Steamboat Co., 44 N. J. L. (15 Vr.) 529 (1882).

[3] Thomas v. Central City Ins. Co., 49 Ala. 577 (1873.)

E. and C. for the post of surgeon, and the particular election did not take place at that time, because of the retirement of C., the court held that the proxies so given were properly rejected at a subsequent election in April, 1887, between E. and T.

Sec. 68d. Same—Delegation of power.—It has been said that a corporation may, where not inconsistent with its charter, create a select body to whom they delegate the power of electing officers.[1] Thus it has been said that a corporation may by by-law give the president power to appoint inspectors of the corporate elections and define the nature of the tickets to be used, and the manner in which they are to be voted.[2]

Sec. 68e. Same—Married women—When to vote stock.—It shall be lawful for any married woman, being a stockholder or member of any bank, insurance company (other than mutual fire insurance companies), manufacturing company, or other institution incorporated under the laws of this state, to vote at any election for directors or trustees by proxy or otherwise, in such company of which she may be a stockholder or member.

Sec. 69. Limitation of Stockholder's Liability for Debts of Company.—No stockholder shall be personally liable for the payment of any debt contracted by any corporation formed under this act, which is not to be paid within two years from the time the debt is contracted, nor unless an action for the collection of such debt shall be brought against such corporation within two years after the debt shall become due; and no action shall be brought against any stockholder who shall cease to be a stockholder in any such corporation for any debt so

[1] Ex parte Willcocks, 7 Cow. (N. Y.) 402 (1827); Anon., 12 Mod. 225. See Rex v. Larwood, Skin. 574 (1694); Rex v. Wynn, 2 Barnard 391 (1733).

[2] Com. v. Woelper, 3 Serg. & R. (Pa.) 29 (1817).

[3] L. 1851, c. 321, § 1; 4 N. Y. R. S., 8th ed., p. 2602.

contracted, unless the same shall be commenced within two years from the time he shall have ceased to be a stockholder in such corporation.[1]

Sec. 69a. Members and stockholders—Liability of stockholders for debts.—It is said in Richards v. Beach,[2] that the above section of the New York laws exempting the stockholders of business corporations organized under that act from liability in certain cases, is identical with section 24 of the act of 1848, except that it omits the provision of the act of 1848 that the stockholders shall not be liable "until an execution issued against the company shall have been returned unsatisfied," and that an action could be maintained against the stockholders of a corporation organized under the act of 1875, though no execution had been issued against the company.

In an action by a creditor of a corporation to enforce the statutory liability of a stockholder on the ground that his subscription is unpaid, the burden of proof is on the creditor to show the fact of non-payment.[3]

In the case of McIntyre v. Strong,[4] which was an action brought against a stockholder upon default of a corporation to pay rent, it was held that a stockholder in said company was liable for the rent, payable within two years from the time of executing the lease, and delivering the premises to the company, but that the rent accruing beyond that time was not a liability that could be enforced against the individual stockholders.

Sec. 69b. Same—When creditor's remedy suspended.—The above section [5] requires that a suit must be brought against the company before the stockholders can be sued, if such suit against the company be brought, the bringing of suit against the stockholder during pendency of that suit would not inter-

[1] L. 1875, c. 611 § 25; 3 N. Y. R. S. 8th ed., p 1984.

[2] 5 N. Y. Sup. 574 (1889); s. c. 22 N. Y. St. Rep. 296.

[3] Wellington v. Continental Const. & Imp. Co., 52 Hun (N. Y.) 408 (1889); s. c. 5 N. Y. Sup. 587.

[4] 63 How. (N. Y.) Pr. 43 (1882); s. c. 48 N. Y. Super. Ct. (16 J. & S.) 127; 14 N. Y. Week. Dig. 67.

[5] *Ante*, § 59.

fere with the policy of section thirty-seven of the same act;[1] but the remedy of the purchaser upon recovering a judgment against the stockholder would be suspended until after judgment and execution against the company.[2]

Sec. 70. Annual Election of Directors—How and Where Held.—The annual election of directors shall be held at such time and place as shall be designated by the by-laws of the corporation, and public notice of such time and place shall be published, not less than ten days previous thereto, in a newspaper published in a city or town in which the principal business office of the corporation is situated, if a newspaper be published therein, and otherwise in the newspaper published nearest to said office; and the election shall be made by such of the stockholders as shall attend for that purpose, either in person or by proxy. No person shall be permitted to vote upon the proxy of a stockholder in any such corporation after the lapse of eleven months from the date thereof, unless the stockholder shall have specified therein that it is to continue in force for some longer and limited time. All elections shall be by ballot, and each stockholder shall be entitled to as many votes as shall equal the number of his shares multiplied by the number of directors to be elected, and he may distribute his votes among those to be voted for as he sees fit; and the persons receiving the greatest number of votes shall be directors, and when any vacancy shall occur among the directors, by death, resignation, or otherwise, it shall be filled for the remainder of the year in such

[1] See *post*, §. . .

[2] Walton v. Coe, 16 N. Y. St. Rep. 866 (1888); aff'g s. c. 13 N. Y. St. Rep. 416.

manner as may be provided for by the by-laws of the said corporation.[1]

Sec. 71. Same—Failure to Elect—Directors Hold Over.—In case it shall happen at any time that an election of directors shall not be made on the day designated by the by-laws of said corporation, when it ought to have been made, the corporation, for that reason, shall not be dissolved, but it shall be lawful, on any other day within three months thereafter, to hold an election for directors, upon service of notice upon the stockholders thereof respectively in the manner provided in section five of this act; and all acts of directors shall be valid and binding as against such corporation until their successors shall be elected.[2]

Sec. 71a. Same—Fault of officers.—A failure to elect where brought about by the intentional neglect on the part of the officers, is discussed in a former section of this work.[3]

Sec. 71b. Same—Holding over.—Where an officer is properly elected he may, without any special provision to that effect, hold over until his successor is elected.[4]

Sec. 72. Same—Inspectors of Election—Oath of.—Every person acting as an inspector of election in any such corporation shall, before entering upon the duties of his office, take and subscribe an oath or affirmation before some officer authorized to administer the same, that he will discharge the duties of his office with fidelity, and that he will not receive any vote but such as he believes to be legal, nor reject any which he believes to be legal; and if

[1] L. 1875, c. 611, § 26; 3 N. Y. R. S., 8th ed., p. 1984.

[2] L. 1875, c. 611, § 27; 3 N. Y. R. S., 8th ed., p. 1984.

[3] See *ante*, § 48g

[4] Olcott v. Tioga R. Co., 27 N. Y. 546, 557 (1863); s. c. 84 Am. Dec. 298; People v. Farris, 16 Hun (N. Y.) 224 (1878). See *ante*, sec. 48*f*.

any such inspector shall violate this oath or affirmation, he shall be subject to all the penalties imposed by law upon inspectors of general state elections in this state violating their duty, and shall be proceeded against in like manner and with like effect.[1]

Sec. 73. Same—Duration of Corporate Existence—Extension.—Whenever any corporation organized under this act has fixed the duration of its corporate existence for a less period than fifty years, it may, at any time, extend the term of its existence beyond the time mentioned in the original certificate of incorporation, by the consent of the stockholders owning two-thirds in amount of the capital stock of such corporation, in and by certificate to be signed by such stockholders, in person or by attorney duly authorized and acknowledged or proved, so as to enable it to be recorded, which certificate shall be filed in the office of the secretary of state, and of the clerk of the county in which the principal business office of such corporation is situated, and the said secretary of state and the county clerk, respectively, upon such filing, shall record the same in the record of corporations kept in his office, and make a memorandum of such record in the margin of the original certificate in such record book; and thereupon the time of existence of such corporation shall be extended, as designated in such certificate, for a term which, with the term originally fixed, will not exceed fifty years.[2]

Sec. 74. Taxation — Where Corporation Taxable.—Every corporation organized under this act shall be

[1] L. 1875, c. 611, § 28; 3 N. Y. R. S., 8th ed., p. 1985.

[2] L. 1875, c. 611, § 29; 3 N. Y. R. S., 8th ed., p. 1985.

taxed on all of its property, except its real estate, in the town, city or village where its principal business office is situated; and on its real estate, in the town, city or village where such real estate is situated shall be taxed therein.[1]

Sec. 74a. Organization of corporations and increase of capital —Tax on.—See *ante*, § 45*a*.

Sec. 74b. Taxation of corporations.—The taxation for state purposes of all corporations organized under the Business Act, except mining or manufacturing companies carrying on manufacturing or mining ores within the state, not including gas companies, is regulated by L. 1880, c. 542, as amended by L. 1881, c. 361; L. 1882, c. 151; L. 1885, c. 359; L. 1885, c. 501; L. 1886, c. 187; L. 1887, c. 284.[2] The only change made by the Laws of 1887 was to add to the list of corporations exempted from the provisions of the law companies formed under chapter 112 of the Laws of 1851, entitled "An Act for Incorporation of Building, Mutual, Loan and Accumulating Fund Associations."

Sec. 74c. Same—The personal estate of every incorporated company liable to assessment on its capital shall be assessed in the town or ward where the principal office or place of transacting the financial concerns of the company is located; but if such company have no principal office or place for transacting its financial concerns, then in the town or ward where the operations of such company shall be carried on.[3]

Sec. 74d.—Same—The real estate of all incorporated companies liable to taxation shall be assessed in the town or ward in which the same shall lie, in the same manner as real estate of individuals.[4]

[1] L. 1875, c. 611, § 30; 3 N. Y. R. S., 8th ed., p. 1985.

[2] See *post*, §§ 90–103.

[3] People v. Board of Assessors, 39 N. Y. 82 (1868); Oswego Starch Factory v. Dolloway, 21 N. Y. 449, 452 (1860); Mut. Life Ins. Co. v. Commissioners of Taxes, 28 Barb. (N. Y) 318, 320 (1858). See *post*, sec. 76.

[4] People ex rel., &c., v. Cassity, 46 N. Y. 46, 52 (1871); People ex rel. Citizens' Gas Light Co. of Brooklyn v. Assessors of the City of Brooklyn, 39 N. Y. 81 (1868); Oswego

The mains of a gas company under the streets of the city cannot be regarded as real estate under the statute for the purposes of taxation.[1]

Sec. 74e. Same—Water-power.—A corporation owning and renting water-power in one district, held properly assessed in another district where its treasurer's office was.[2]

Sec. 74f. Same—Foreign corporation—"Doing business within the state."—The defendant's president, secretary and treasurer had their offices in New York City, its directors held their annual meetings there, and all its dividends were paid there. While most of its business was done in Utah and Chicago, its silver bullion was all sent to New York and sold there, the proceeds deposited, and some portion loaned and other portions paid out for the company's purposes in that city. The court held that the defendant was "doing business in this state" within the meaning of the New York statute, and for that reason was liable to taxation under it; that it was not essential to such liability that the whole business of the corporation should be done within the state; that while, it might be, the having an office where meetings of its directors are held, transfer books kept, dividends declared and paid, and other business merely incidental to the regular business of the company is done, and an occasional business transaction in the state would not bring it within the act; yet, where it appeared, as in this case, that in addition a substantial part of the regular business of the company was carried on here, it was sufficient, and defendant was liable.[3]

Sec. 74g. Same—Limited to state taxation.—It has been held that chapter 542 of the Laws of 1880, applies only to state taxation, and that the exemption of corporations in section eight extends only to that portion of taxes which is imposed for state purposes, and does not embrace an exemption from

Starch Factory v. Dolloway, 21 N. Y. 449, 452 (1860); Assurance Co. v. Commissioners of Taxes, 17 How. (N. Y.) Pr. 206, 208 (1858).

[1] People ex rel. v. Board of Assessors of the City of Brooklyn, 39 N. Y. 81 (1868).

[2] People ex rel. Oswego Canal Co. v. City of Oswego, 6 T. & C. (N. Y.) 673 (1875).

[3] People v. Horn Silver Mining Co., 105 N. Y. 77 (1887).

taxation for local purpose; this statute does not repeal former laws of the statute on the subject of taxing corporations, including the act of 1880, are in *pari materia*, and must be read together.[1]

Sec. 75. Same—What companies liable to taxation. All moneyed or stock corporations deriving an income or profit from the capital or otherwise, shall be liable to taxation on their capital in the manner hereinafter prescribed.[2]

Sec. 75a.—System of taxing corporations—Change of statutes. —The system of taxing corporations has been changed in important particulars in the following years: 1830, 1853, 1857. The dates affixed to the cases cited serve as an approximate clue to the statutes involved.[3]

Sec. 75b. "Capital stock"—Definition of phrase.—The expression "capital stock" is frequently used in a sense to denote the funds possessed by the institution upon which it transacts its business in the same manner in which we speak of the capital of a merchant, which is frequently called his stock in trade or his capital stock, and it is thought that it is in this sense that it is used in the above statute.[4]

Sec. 75c. Moneyed Corporation—Definition of term.— The term "moneyed corporation" is said to mean every corporation having banking powers or having the power to make

[1] People ex rel. National Freight & Lighterage Co. v. Commissioners of Taxes & Assessments, 3 N. Y. Month. L. Bull. 4 (1880).

[2] 2 N. Y. R. S., 8th ed., 1149, § 1. See Davis' System of Taxation, 88 et seq.

[3] See In Matter of McMahon v. Palmer, 102 N. Y. 176, 186 (1886); People ex rel. v. Barker, 48 N. Y. 70, 79 (1871); People ex rel., &c., v. Cassity, 46 N. Y. 46, 52 (1871); People ex rel. v. Board of Supervisors, 16 N. Y. 424 (1857); People ex rel. v. Commissioners of Assessment, &c., 32 Barb. (N. Y.) 509 (1860); Sun Mut. Ins. Co. v. Mayor, &c., of New York, 8 Barb. (N. Y.) 450, 453 (1850); People ex rel. Lincoln v. Assessors of Town of Barton, 29 How. (N. Y.) Pr. 371 (1865); People v. Commissioners of Taxes, 20 How. (N. Y.) Pr. 182, 184 (1860); Sandford v. Supervisors of N. Y., 15 How. (N. Y.) 172 (1858). See *post*, § 80*b*.

[4] Howland v. Edmonds, 24 N. Y. 307 (1862). See Oswego Starch Factory v. Dolloway, 21 N. Y. 449 (1860); People v. Commissioners of Taxes, 23 N. Y. 192, 219 (1861).

loans upon pledges of deposits, or authorized by the law to make insurances. But this is thought not to be a general definition, and that which was not intended to the corporations embraced by the 4th title of the chapter relative to the title assessment of taxes.[1]

Sec. 75d. Capital to be assessed at actual value.—It is said in People ex rel. v. Commissioners of Taxes,[2] that the capital stock of a corporation is to be assessed at its actual par value, whether more or less than its nominal amount, deducting, however, from such actual value the assessment value of its real estate and shares owned by it in other taxable corporations, and also from its surplus or reserved fund, if any, an amount not exceeding ten per cent of its capital.[3]

Under this section it is thought that the capital stock of a company is to be taken as the amount of the personal estate of the corporation for which it is to be taxed, whether it has been impaired by laws or increased by accumulated profits.[4]

It is said in the case of the City of Utica v. Churchill,[5] that under the former system of tax laws contained in the revised statutes, whether a corporation had lost part of its capital or had added to its assets by an accumulation of profits, did not in any manner affect the amount for which it was taxable.[6]

Sec. 75e. Same—Method of ascertaining value.—The method of ascertaining the actual value of the land assessed is left to the judgment of the assessors, and they have a right to resort to any and all the tests and measures of value which are ordi-

[1] Mutual Ins. Co. of Buffalo v. Supervisors of Erie Co., 4 N. Y. 442, 444 (1851).

[2] 104 N. Y. 240, 243 (1887).

[3] Citing People ex rel. v. Coleman, 107 N. Y. 541, 543 (1887); People ex rel. 23d St. v. Commissioners of Taxes, 95 N. Y. 554 (1884); Oswego Starch Factory v. Dolloway, 21 N. Y. 449 (1860). See People ex rel., &c., v. Commissioners of Taxes, 64 How. (N. Y.) Pr. 405 (1883); People v. Commissioners of Taxes, 31 Hun (N. Y.) 32 (1883).

[4] People ex rel. v. Commissioners of Taxes, 23 N. Y. 193 (1861); citing Bank of Utica v. City of Utica, 4 Paige Ch. (N. Y.) 399 (1834).

[5] 33 N. Y. 161, 239 (1865).

[6] Citing Oswego Starch Factory v. Dolloway, 21 N. Y. 449 (1860); Farmers' Loan & Trust Co. v. City of New York, 7 Hill (N. Y.) 261 (1843); People v. Board of Supervisors of Niagara County, 4 Hill (N. Y.) 20 (1842); Bank of Utica v. City of Utica, 4 Paige Ch. (N. Y.) 399 (1834).

narily adopted for business purposes in estimating values, and when the assessors have thus exercised their judgment it is subject to no review for correction, except as prescribed by law.[1]

In making such an assessment the assessors are not limited to the market value of the stock of the corporation,[2] less the statutory exception, and where they take as the share of value the "book value" that is estimated by the assets as they appeared on the corporate books, deducting all the liabilities and other matters required by law to be deducted, their action, if it does injustice to the corporation, is subject to review in the supreme court under the act of 1880,[3] but the court of appeals has no power to interfere with the assessment.[4]

Sec. 75f. Same—Nominal amount of capital paid in.—A moneyed corporation liable to taxation on its capital is to be assessed on the whole nominal amount paid in and secured to be paid in after deducting expenditures for real estate and such of the stock as the state exempts.[5] Increase or diminution of capital stock, it has been said, will not affect the tax.[6]

Sec. 75g. Income not equal to expenditures.—Moneyed or stock corporations, deriving an income or profit from their capital are liable to taxation, although the income be not equal to the expenditures for the year preceding the assessment.[7] Any income or profits means not net profits but any income, though less than expenses.[8]

Where the exemptions allowed to a corporation exceeded the assessed value of its capital and surplus, the assessors entered upon a separate roll the amount of the national bank stock owned by it, the amount being less than the difference between the capital and exemptions. The court held that such

[1] People ex rel. v. Coleman, 107 N. Y. 541 (1887).

[2] See *post*, § 76.

[3] L. 1880, c. 269.

[4] People ex rel. v. Coleman, 107 N. Y. 541 (1887).

[5] Farmers' Loan & Trust Co. v. Mayor of N. Y., 7 Hill (N. Y.) 261 (1843).

[6] See People v. Dolan, 36 N. Y. 59, 62 (1867); Bank of Utica v. City of Utica, 4 Paige Ch. (N. Y.) 396 (1834).

[7] People ex rel. Commercial Ins. Co. v. Supervisors of N. Y., 18 Wend. (N. Y.) 605 (1836).

[8] People v. Supervisors of N. Y., 18 Wend. (N. Y.) 605 (1836).

bank stock could not be the subject of an assessment, since when included in the capital the total still fell short of the amount allowed as exempt, and such an assessment was in derogation of the federal statute.[1]

Sec. 75h. Surplus earnings and net profits.—It is said that surplus earnings or net profits which have been accumulated over and above the capital, cannot be included in the capital, and that the form in which capital is invested does not change its nature or function, neither does an investment of surplus profits or reserve funds make them anything else.[2]

A corporation which is liable to taxation upon its capital cannot be taxed for its surplus or profits remaining on hand, and undivided because such surplus is not capital stock paid in or secured to be paid in.[3]

Sec. 75i. Franchise—Property used in connection with.—Where a corporation has property which would not be of any use to the owners without the franchises pertaining, or incident thereto, they may be taxed upon such property and for the purpose of fixing its value, the uses to which it may be subjected must be considered.[4]

Sec. 75j. Assessing property without state.—The investment by a steamship company, located and taxable in this state, in vessels owned by and being built for it without the state does not exempt it from taxation upon those vessels.[5]

Sec. 75k. Non-resident corporations.—Corporations not created by the laws of this state are to be regarded as non-residents, and if they transact business here are to be taxed on all sums invested in their business the same as if they were residents.[6] To exempt personal property of a corpora-

[1] People ex rel. Hanover Fire Ins. Co. v. Coleman, 44 Hun (N. Y.) 47 (1887).

[2] People v. Sup. of Niagara Co., 4 Hill (N. Y.) 20 (1842); People v. Assessors of Brooklyn, 16 Hun, (N. Y.) 198 (1878); Bank of Utica v City of Utica, 4 Paige Ch. (N. Y.) 399 (1834); People v. Sup. of New York, 18 Wend. (N. Y.) 605 (1836).

[3] Sun Mutual Ins. Co. v. Mayor of N. Y., 8 Barb.(N. Y.) 454 (1850); Bank of Utica v. City of Utica, 4 Paige Ch. (N. Y.) 399 (1834).

[4] Smith v. Mayor, 68 N. Y. 552, 555 (1877); People ex rel. v. Barker, 48 N. Y. 70 (1871).

[5] People ex rel. Pacific Mail Steamship Co. v. Commissioner of Taxes of N. Y., 64 N. Y. 541 (1876); affirming 5 Hun (N. Y). 200.

[6] International Life Assurance Soc. v. Commissioners of Taxes, 28 Barb. (N. Y). 318 (1858).

tion from local taxation because it is outside the state, the change of location must be permanent and unequivocal.[1]

Sec. 751. Mode of assessing corporations in cities.—The legislature may provide a mode of assessing corporations in one city different from that which prevails elsewhere.[2]

Sec. 76. Same—Officers to Deliver Statements to Assessors.—The president, cashier, secretary, treasurer, or other proper officer, of every such incorporated company, shall, on or before the first day of July in each year, make and deliver to the assessors, or one of them, of the town or ward in which such company is liable to be taxed, according to the provisions of the sixth section of the second title of this chapter, a written statement specifying :

1. The real estate, if any, owned by such company, the towns or wards in which the same is situated, and the sums actually paid therefor ;

2. The capital stock actually paid in and secured to be paid in, excepting therefrom the sums paid for real estate, and the amount of such capital stock held by the state, and by any incorporated literary or charitable institution ; and,

3. The town or ward in which the principal office or place of transacting the financial business of such company, is situated ; or if there be no such principal office, the town or ward in which its operations are carried on, or in which it is liable to be taxed, under the provisions of this chapter.[3]

[1] People ex rel. Pacific Mail S. S. Co. v. Commissioner of Taxes of N. Y., 64 N. Y. 541 (1876); affirming 5 Hun (N. Y.) 200.

[2] People ex rel. Parsons Manuf. Co. v. Moors, 11 N. Y. St. Rep. 859 (1887).

[3] 2 N. Y. R. S., 8th ed., p. 1149, § 2. See People ex rel. v. Gold & Stock Tel. Co., 32 Hun (N. Y.) 491, 494 (1884); People ex rel. v. Shields, 6 Hun (N. Y.) 556, 55 (1876).

Sec. 76a. Corporate statement to assessors.—The assessors to whom the statement is to be furnished respecting real estate of corporations are those of every town in which real estate of the company is situated.[1]

Sec. 76b. Same—Omission to furnish corporate statement.—The omission of a corporation to furnish such a statement neither prevents assessors of a town from assessing corporate real estate within its limits, for the assessors have jurisdiction to act without such financial statement,[2] nor the corporation from appearing before them and asking that an erroneous payment be corrected, and if this be refused from reviewing the proceedings by certiorari.[3]

The commissioners of taxes may, in the absence of sworn testimony, ascertain the value of the capital stock of a corporation from other sources, as they do in valuing real estate.[4]

Sec. 76c. Statement and affidavit of owner as to value—Not binding on assessors.—Such a statement when made is not conclusive upon the assessors. It is the judgment of the assessors that the law requires.[5]

It is said in People ex rel. v. Barker,[6] that since the act of 1851,[7] assessors are not bound by the affidavit presented by the owner of the property taxed, upon complaint in relation to the assessment thereof. The affidavit is no longer conclusive, but is evidence to be considered by them, with other means of information in their power, and upon the whole their own judgment is to be formed as to the value of the property.[8] The corporate owners are interested,

[1] People ex rel. v. Cheetham, 20 Abb. (N. Y.) N. C. 44 (1887). See People ex rel. v. Cassity, 46 N. Y. 46, 56 (1871).

[2] People ex rel. Mutual Union Tel. Co. v. Commissioners of Taxes, 99 N. Y. 254 (1885); People ex rel. v. Cheetham, 20 Abb. (N. Y.) N. C. 44 (1887); People ex rel. M. F. Ins. Co. v. Commissioners of Taxes, 76 N. Y. 64 (1879).

[3] People ex rel. Mut. U. Tel. Co. v. Commissioners of Taxes, 99 N. Y. 254 (1885); People ex rel. v. Cheetham, 20 Abb. (N.Y.) N. C. 44 (1887).

[4] People ex rel. Pacific Mail S. S. Co. v. Commissioners of Texas, 46 How. (N. Y.) Pr. 315; s. c. 1 T. & C. 611 (1873).

[5] People ex rel. Manhattan Fire Ins. Co. v. Commissioners of Taxes, 76 N. Y. 64 (1879).

[6] 48 N. Y. 70 (1871).

[7] Laws of 1851, c. 176.

[8] See People ex rel. M. F. Ins. Co. v. Commissioners of Taxes, 76 N. Y. 64 (1878).

and there is no more reason why they should be permitted to usurp the province of the commissioners than there is in the case of any other taxpayer. It is the judgment of the assessors that the law requires.[1] These statements are intended as an aid to the commissioners in forming their judgment. They are a species of evidence required to be furnished, but the commissioners are not thereby absolved from the statutory duty of making diligent inquiry to ascertain all the real and personal property within their jurisdiction.[2]

But the valuation of the capital stock made by the secretary of a company in the statement to the assessors has been held sufficient evidence of value upon which to base the assessment, notwithstanding the company sought by certiorari to correct the assessment by deducting the amounts of debts owed by it from the sum indicated in the statement, since the value of the franchises might make up the difference.[3]

Sec. 76d. Improper assessment — Hearing.—A corporation finding itself aggrieved by an assessment is entitled to a hearing before the board of assessors as well as any natural person, and cannot be deprived of this right by failure to comply with the statutory provisions requiring the filing of a written statement.[4] If such a corporation omits to appear and demand a correction of the preliminary assessment, it can obtain no relief from over-valuation by certiorari.[5]

Sec. 76e. Power to correct errors in assessment.—Upon complaint the assessors have power to relieve a corporation conceiving itself aggrieved, upon hearing and examining complaints made by it, if injustice has been done, even if they do not have the aid of the statement required in making the original assessment and the failure to make and deliver such statement to the assessors does not deprive the corporation

[1] People ex rel. v. Barker, 48 N. Y. 70 (1871).

[2] People ex rel. v. Commissioners, &c., 76 N. Y. 64, 75 (1879).

[3] People ex rel. Buffalo Mutual Gas Light Co. v. Steele, 1 Buff. Super. Ct. (N. Y.) 345 (1873).

[4] People ex rel. v. Pitman, 9 N. Y. St. Rep. 469 (1887).

[5] People ex rel. Mutual Union Tel. Co. v. Commissioners of Taxes, 99 N. Y. 254 (1885.)

of the right to a hearing on grievance day and the correction of the roll by the assessors, if just.[1]

Sec. 77. Same—To Comptroller.—The president or other proper officer of every such company shall also deliver to the comptroller, on or before the first day of July in each year, a written statement, containing the same matters required by the foregoing section,[2] to be specified in the statement to be delivered to the assessors. The statements required by this and the preceding section of this title, shall be certified under the oath of the said president or other proper officer, to be in all respects just and true.[3]

Sec. 78. Same.—Penalty for Failure to furnish Statement.—If the statements above required, or either of them, shall not be furnished by any company to the assessors and to the comptroller, within thirty days after the time above provided, the company neglecting to furnish such statements, or either of them, shall forfeit to the people of this state, for each statement omitted to be furnished, the sum of two hundred and fifty dollars; and it shall be the duty of the comptroller to furnish the attorney-general with an account of all companies that shall neglect to render such lists, that he may prosecute for the penalties hereby imposed.[4]

Sec. 78a. Penalty for failure to make statement.—It is the duty of a company to make the statement required by sections 77 and 78 above; but the courts have no power to impose any other punishment than that prescribed by the statute, and a writ of certiorari will not be quashed on the

[1] People ex rel. v. Pitman, 9 N. Y. St. Rep. 469 (1887).

[2] See *ante*, § 76.

[3] 2 N. Y. R. S., 8th ed., 1149, § 3.

[4] 2 N. Y. R. S., 8th ed., 1150, § 4.

ground that the return shows that no such statement has been made.[1]

Sec. 78b. Same—Power of courts to impose other penalty.—In the case of People ex rel. v. Pitman,[2] on a writ of certiorari issuing upon the petition of the relator under and pursuant to the laws of 1880, c. 269, to review the assessment-roll, the court held that the penalty prescribed for the omission to present the written statement directed to be made and delivered by the incorporated company to the assessors or one of them, of the town or ward in which the company was liable to be taxed according to the provisions of the statute, being the only way, the courts had no power to impose any other.

Sec. 79.—Same—Suit for Penalty.—If any company, that shall be prosecuted for any such penalty, shall pay the costs of prosecution and furnish the statement required, the comptroller, if he shall be satisfied that the omission was not wilful, may, in his discretion, discontinue such suit.[3]

Sec. 80. Same—Companies how Assessed.—The assessors shall enter all incorporated companies from which such statements shall have been received by them, and the property of such companies, and the property of all other incorporated companies, liable to taxation in their respective towns, in their assessment-rolls, in the following manner:

1. They shall insert in the first column of their assessment-rolls the name of each incorporated company in their respective towns or wards liable to taxation on its capital or otherwise; and under its name, they shall specify the amount of its capital stock paid in, and secured to be paid in, the amount paid by such company for real estate then belonging

[1] People ex rel. West Shore R. R. Co. v. Pitman, 9 N. Y. St. Rep. 469 (1887).

[2] 9 N. Y. St. Rep. 469 (1887).

[3] 2 N. Y. R. S., 8th ed., 1150, § 5.

to such company, wherever the same may be situated, the amount of all surplus profits or reserved funds, exceeding ten per cent. of their capital, after deducting therefrom the said amount of said real estate and the amount of its stock, if any, belonging to the state and to incorporated literary and charitable institutions.

2. In the second column, they shall enter the quantity of real estate owned by such company, and situated within their town or ward; and in the third column, the actual value thereof, estimated as in other cases.

3. In the fourth column, they shall enter the amount of the capital stock of every incorporated company, paid in, and secured to be paid in, and of all surplus profits or reserved funds as aforesaid, after deducting the sums paid out for all the real estate of such company, wherever the same may be situated and then belonging to it, and the amount of stock, if any, belonging to the people of the state and to incorporate literary and charitable institutions.[1]

Sec. 80a. Extension of statute.—By section eight the provisions of the above are extended to be incorporated companies in the two preceding sections named; and the

[1] 2 N. Y. R. S., 8th ed., 1150, § 6, See People v. Commissioners of Taxes, 104 N. Y. 243 (1887); People ex rel. v. Commissioners of Taxes, 95 N. Y. 554 (1884); People ex rel. M. F. Ins. Co. v. Commissioners, 76 N. Y. 64 (1879); People ex rel. v. Barker, 48 N. Y. 70 (1871); People v. Cassity, 46 N. Y. 52 (1871); People ex rel. Gas Light Co. v. Board of Assessors, 39 N. Y. 81 (1868); Oswego Starch Factory v. Dolloway, 21 N. Y. 449 (1860); Utica Cotton Manuf. Co. v. Oneida County, 1 Barb. Ch. (N. Y.) 432, 449 (1846); Farmers' Loan & Trust Co. v. Mayor, 7 Hill, (N. Y.) 261 (1843); Bank of Utica v. City of Utica, 4 Paige Ch. (N. Y.) 339, 401 (1834); Mercantile Bank v. New York, 121 U. S. 160 (1886); bk. 30 L. ed. 895.

president, secretary, or other proper officer, may make the affidavit required by said section.[1]

Sec. 80b. Taxation of capital stock—Actual value—Exemptions.—The capital stock of every company is liable to taxation at its actual value, whether that be more or less than its nominal value, except such part of it as shall have been exempted by law, together with its surplus profits or reserved funds, exceeding ten per cent. of its capital, after deducting the assessed value of its real estate, and all shares of stock in other corporations actually owned by such company, which are taxable upon their capital stock under the laws of this state, shall be assessed at its actual value, and taxed in the same manner as the other personal and real estate of the county.[2]

[1] 2 N. Y. R. S., 8th ed., 1150, § 8.

[1] See People ex rel. Panama R. Co. v. Commissioners of Taxes, 104 N. Y. 240 (1887); People ex rel. Butchers, etc., Co. v. Asten, 100 N. Y. 597 (1885); People ex rel. Williamsburgh Gas Co. v. Assessors of Brooklyn, 76 N. Y. 203 (1879); People ex rel. Manhattan Fire Ins. Co. v. Com'rs, 76 N. Y. 64 (1879); People ex rel. Pacific Mail S. S. Co. v. Commissioners of Taxes, 64 N. Y. 541 (1876); s. c. 58 N. Y. 242; People ex rel. Otsego Bank v. Supervisors, 51 N. Y. 404 (1873); People ex rel. v. Barker, 48 N. Y. 79 (1871); People ex rel. Dunkirk R. Co. v. Cassity, 46 N. Y. 52 (1871); People ex rel. Citizens' Gas-light Co. v. Board of Assessors of Brooklyn, 39 N. Y. 82 (1868); People ex rel. Glens Falls Ins. Co. v. Ferguson, 38 N. Y. 89 (1868); People ex rel. Bank of Commonwealth v. Comm'r of Taxes, 23 N. Y. 193 (1861); Oswego Starch Factory v. Dolloway, 21 N. Y. 449, 451 (1860); In re North Shore Staten I. F. Co., 63 Barb. (N. Y.) 571 (1872); People ex rel. American L. T. Co. v. Howland, 61 Barb. (N. Y.) 273 (1871); People ex rel. Genesee Co. Bank v. Olmsted, 45 Barb. (N. Y.) 644 (1866); People ex rel. Bank of Commerce v. Commissioners of Taxes, 40 Barb. (N. Y.) 334 (1863); People ex rel. Bank of Commonwealth v. Commissioner of Taxes, 32 Barb. (N. Y.) 509 (1860); Albany & S. R. Co. v. Osborn, 12 Barb. (N. Y.) 223 (1851); Utica Manuf. Co. v. Supervisors of Oneida, 1 Barb. Ch. (N. Y.) 449 (1846); Farmers' Loan & T. Co. v. Mayor of N. Y., 7 Hill, (N. Y.) 261 (1843); Manufacturers' Bank of Troy v. Troy, 24 How. (N. Y.) Pr. 256 (1859); People ex rel. W. Gas Light Co. v. Board of Assessors, 16 Hun (N. Y.) 197 (1878); People ex rel. U. & B. R. Co. v. Shields, 6 Hun (N. Y.) 556 (1876); People ex rel. Pacific Mail S. S. Co. v. Commissioners of Taxes, 5 Hun (N. Y.) 200 (1875); People ex rel. Trowbridge v. Commissioners, 4 Hun (N. Y.) 597 (1875); s. c. 62 N. Y. 630; People ex rel Williams v. Assessors, 2 Hun (N. Y.) 588 (1874); Bank of Utica v. City of Utica, 4 Paige Ch. (N. Y.) 401 (1834); Mohawk & H. R. Co. v. Clute, 4 Paige Ch. (N. Y.) 394 (1834). See also *Ante*, § 75, and note 1, and § 75b.

Sec. 80c. Ascertaining value of capital.—In assessing the capital stock of a corporation, the assessors are to ascertain the present value thereof, and from this to deduct the assessed value of the real estate,[1] and the fact that the whole capital was originally invested in real estate does not preclude them from doing this. While the indebtedness of a corporation is a proper subject for consideration in estimating the value of the capital stock, there is no provision of law which authorizes a deduction from the value after the estimate is made.[2]

The rule of taxation as to corporations, when based upon the amount of capital paid in, is, after deducting the amount paid out for real estate from the capital, to assess the remaining capital at its actual value, leaving the real estate to be assessed like that of individuals in the town or ward where it is situated.[3]

Sec. 80d. Same—Rule for fixing value.—The market value of the capital stock of a company is only one of the elements to be considered. Though in estimating the value of the capital stock of a corporation the real estate is included at a sum greater than its appraisal, if the deduction for real estate corresponds to the assessed value for purposes of taxation, the assessment is not erroneous.[4] Assessors may resort to any or all tests that they think will be most likely to give them the actual value of the stock, i.e., either "book value" or market value. The latter is usually, though not always the best test of the value of the stock of a going concern. The supreme court alone, under c. 269 of Laws of 1880, has power to correct the judgment of commissioners of assessment, when they have taken a wrong test in valuing capital stock for assessment. If a standard of value be taken that is not, in fact, any measure of value, the case is different.[5]

[1] L. 1857, c. 456, § 3.

[2] People ex rel. Butchers, etc., Co. v. Asten, 100 N. Y. 597 (1885).

[3] People ex rel. Citizens' Gas Light Co. v. Assessors of Brooklyn, 39 N. N. 81 (1868); People ex rel. Am. Linen Thread Co. v. Assessors of Mechanicville, 6 Lans. (N. Y.) 105, (1871).

[4] People ex rel. Knickerbocker Fire Ins. Co. v. Coleman, 44 Hun 410 (1887); s. c., affirmed in 107 N. Y. 541 (1887).

[5] People ex rel. Knickerbocker Fire Ins. Co. v. Coleman, 107 N. Y. 541 (1887).

Sec. 80e. Rule as to taxation—Change of.—The Laws of 1853,[1] amending the general tax law as to corporations changed the law so that corporations were taxed on the capital and on their surplus fund exceeding ten per cent., after making the taxations specified in this section; and under that act, if the corporation had not made five per cent. on its capital it could commute for five per cent. on its net profits, excepting as to real estate.[2]

The above provisions prescribing the manner in which the assessors shall prepare the assessment-rolls does not affect the rule of taxation applicable to corporations.[3]

Sec. 80f. Deduction of indebtedness.—In estimating the value of the capital stock of a corporation, its indebtedness is to be considered,[4] but the valuation having been fixed, only the value of the real estate, and not the amount of indebtedness, is to be deducted therefrom.[5]

Sec. 80g. Stock paid in or secured to be paid in.—Corporations are taxable on the capital stock paid in or secured to be paid in, less the sums designated in the above action, irrespective of its actual value and of how it is invested.[6]

Sec. 80h. Real estate—How assessed.—The real estate of a corporation is to be assessed in the same manner as the adjacent land belonging to individuals.[7] In People ex rel. Twenty-Third St. R. Co. v. Commissioners,[8] it is said that the provisions of the act of 1857, c. 456, as to the taxation of corporations, when construed together, require that the

[1] L. 1853, c. 654, § 80.

[2] People v. Gold & Stock Tel. Co., 32 Hun (N. Y.) 491, 493 (1884).

[3] People ex rel. v. Shields, 6 Hun 556, 559 (1876). See People ex rel. Citizens' Gas Co. v. Assessors, 39 N. Y. 81 (1868); People ex rel. v. Commissioners, 23 N. Y. 192 (1861); Mohawk & H. R. R. Co. v. Clute, 4 Paige Ch. (N. Y.) 384 (1834); Thomp. Man. 138.

[4] People ex rel. Pacific Mail S. S. Co. v. Commissioners of Taxes, 46 How. (N. Y.) Pr. 315 (1873); s. c. 1 T. & C. (N. Y.) 611.

[5] People ex rel. Broadway & S. Ave. R. Co. v. Commissioners of Taxes, 1 T. & C. (N. Y.) 635 (1873).

[6] Utica Cotton Manuf. Co. v. Oneida County, 1 Barb. Ch. (N. Y.) 432 (1846). See Oswego Starch Factory v. Dolloway, 21 N. Y. 456 (1860); People v. Com'r of Taxes of New York, 40 Barb. (N. Y.) 346 (1863); People v. Niagara Co., 4 Hill (N. Y.) 20 (1842); Utica Bank v. City of Utica, 4 Paige Ch. (N. Y.) 399 (1834).

[7] Albany & S. R. Co. v. Osborn, 12 Barb. (N. Y.) 223 (1851).

[8] 95 N. Y. 554 (1884)

assessed value of the real estate be taken from the actual value of the capital stock, including surplus, and the remainder is the amount for which the corporation is to be assessed.

Sec. 80i. Surplus profits — Definition.—The word "profits" generally means the gain which is made upon any business or investment when both receipts and expenditures are taken into account.[1]

Sec. 80j. Same—Assessment of.—An accumulation of surplus profits of a gas-light company, invested in mains and upon which certificates, bearing interest had been issued to its stockholders, redeemable in money or in stock, have been held liable to taxation as the property of the company; this is because the issue of such certificates did not create an indebtedness to be deducted, since the company had the option to exchange stock for them.[2]

Where it appeared that the capital stock of a corporation was $10,000, its annual income $7,000, annual expenses $2,000 to $5,000, it was held, that an assessment upon $4,000 surplus proper.[3]

The provisions of 1 R. S. 415, § 6, as amended by L. 1857, c. 456, so far as is necessary to make them conform to the later statute, it could not have been intended by the provisions of L. 1857, c. 456, § 3, that the value of the surplus should be assessed in addition to the value of the capital stock, for the valuation placed upon the latter should include the former.[4]

Sec. 80k. Same—Certificates to stockholders for.—In People ex rel. Williamsburgh Gas Light Co. v. Assessors,[5] the relator, having an accumulation of surplus profits which it had invested in real estate and in mains, issued to its stockholders certificates, each to the effect that the stockholders named

[1] Farmers' Loan & Trust Co. v. Mayor, etc., of N. Y., 7 Hill (N. Y.) 261 (1843).

[2] People ex rel. Williamsburgh Gas Light Co. v. Assessors of Brooklyn, 76 N. Y. 202 (1879).

[3] People ex rel. Oswego Canal Co. v. City of Oswego, 6 T. & C. (N. Y.) 673 (1875).

[4] People ex rel. Twenty-third Street R. R. Co. v. Commissioners of Taxes, 95 N. Y. 554 (1884).

[5] 76 N. Y. 202 (1879).

therein had an interest in its property to an amount specified, upon which the company agreed to pay interest, reserving the right to redeem the certificate upon ten days' notice, by paying the amount of money or stock. The court held, that the issuing of the certificates did not affect the status of the accumulation as surplus profits; that, at most, they were but agreements to divide at some indefinite time; and that what ever surplus existed remained in the hands of the company and, as such, was liable to assessment and taxation.

Sec. 80l. No deduction is to be made for losses of capital.[1]—No respect is to be paid either to the accumulations or losses of capital, in the course of the business of the company, but the amount paid and secured to be paid as capital is taken as the true sum to be inserted in the assessment-roll. The word "income" means that which is received from any business or investment of capital without reference to outgoing expenditures.[2]

Sec. 80m. Commuting taxes.—The privilege of commuting is allowed only to corporations which have been in existence a full year before the assessment is made. A bank organized only three months, held liable to be taxed on the full amount of its capital, though its clear income was less than five per cent.[3]

Sec. 80n. Application for reduction.—An application was made to the assessors on behalf of a corporation to have its assessment stricken out, upon affidavit showing that its debts exceeded the value of its personal property. As it did not appear that the capital stock, uninvested in real estate did not exceed the sum assessed against it the court held, that there was no error in the refusal of the assessors to strike out the assessment.[4]

Upon an application for a reduction on personal property

[1] Farmers' Loan & Trust Co. v. Mayor, etc., of N. Y., 7 Hill 261 (1843).

[2] Farmers' Loan & Trust Co. v. Mayor, etc., of N. Y., 7 Hill 261 (1843).

[3] Park Bank v. Wood, 24 N. Y. 93 (1861).

[4] People ex rel. Utica & Black River R. Co. v. Shields, 6 Hun 556 (1876).

as being without the state, the value of the property must be distinctly shown. The amount of payments on account of it is not sufficient.[1]

Where a lot of land, held under lease for a term of years which provided that the lessor should purchase the buildings to be erected thereon or extend the lease, and the buildings thereon were assessed to the lessee, at a certain sum, and were valued together the court held, that this sum could not be taken as the amount to be deducted from the capital of the bank, since the building only and not the interest in the land was real estate of the bank. The assessed value only of the real estate of a corporation should be deducted from its capital, but not necessarily the cost of it. The deduction cannot be greater than the cost, because no more than that amount was invested, but it may be less.[2]

Sec. 80o. Same—Deduction of real estate.—It seems that to arrive at the assessed value of real estate of a corporation for deduction from the value of its capital stock, if it is not situate in the town or ward, though within the state, reference may be had to the proper assessment-rolls. If it is without the state, the price paid, in the absence of other evidence, may be taken as the assessable value.[3]

It seems that to entitle a corporation to the deduction of the value of its real estate from that of its capital the real estate must have been paid for out of its capital.[4]

Sec. 81. Same—How Taxes to be Stated and Collected.—The amount of taxes assessed on all incorporated companies liable to taxation, shall be set down by the board of supervisors, in the fifth column of the corrected assessment-roll, and shall form a

[1] People ex rel. Pacific Mail S. S. Co. v. Commissioners of Taxes, 64 N. Y. 541 (1876); affirming 5 Hun (N. Y.) 200.

[2] People ex rel. Van Nest v. Commissioners of Taxes, 80 N. Y. 573 (1880).

[3] People ex rel. Twenty-third Street R. Co. v. Commissioners of Taxes, 95 N. Y. 554 (1884).

[4] People ex rel. Van Nest v. Commissioners of Taxes, 80 N. Y. 573 (1880).

part of the moneys to be collected by the collector.[1]

Sec. 82. Same—Board of Supervisors—Return to Comptroller.—The board of Supervisors, having completed the assessment, shall transmit to the comptroller, with the aggregate valuations of the real and personal estate in their county, a statement, showing the names of the several incorporated companies liable to taxation in such county; the amount of the capital stock paid in, and secured to be paid in by each; the amount of real and personal property of each, as put down by the assessors, or by them; and the amount of taxes assessed on each. In those counties in which there is no such company, the boards of supervisors shall certify such fact to the comptroller, with their returns of the aggregate valuations of real and personal estate.[2]

Sec. 83. Same—Collector—Demand of Payment of Tax.—The collector shall demand payment of all taxes assessed on incorporated companies, from the president, or other proper officer, of such companies, and, if not paid, shall proceed in the collection and payment thereof, in the same manner as in other cases, and shall be liable to the same penalties for the non-payment of moneys collected by him. And the collector's receipt shall be evidence of the payment of such tax.[3]

Sec. 83a. Certain counties—Special provisions.—There are special provisions applicable to counties containing more than 300,000 inhabitants.[4]

[1] 2 N. Y. R. S., 8th ed., p. 1150, § 15, as amended by L. 1857, c. 456. Also People v. Barker, 48 N. Y. 70, 80 (1871); People v. Board of Assessors, 39 N. Y. 81, 84 (1868).

[2] L. 1866, c. 825; 2 N. Y. R. S., 8th ed., p. 1151, § 16.

[3] L. 1866, c. 825; 2 N. Y. R. S., 8th ed., p. 1151, § 17. See People ex rel. v. Barker, 48 N. Y. 70, 81 (1871).

[4] See L. 1885, c. 411, p. 712.

Sec. 83b. Same—Demand necessary—Commencing action not a demand.—The demand is a condition precedent to a right of action, and the bringing of such action is not a demand.[1]

It is said in the case of McLean v. Manhattan Medicine Co.,[2] that the statutes in relation to the collection of taxes assessed on incorporated companies require payment thereof to be demanded from the president or other proper officer before proceedings are taken for their collection. Such demand is a condition precedent to the maintaining of an action to recover such taxes; the action itself is not a sufficient demand.

Sec. 84. Same—How taxes Paid.—Such taxes shall be paid out of the funds of the company, and shall be rateably deducted from the dividends of those stockholders whose stock was taxed, or shall be charged upon such stock, if no dividends be afterwards declared.[3]

Sec. 85. Same—Return of Collector to Treasurer—Affidavit of Demand, etc.—If the collector shall not be able to collect any tax assessed upon an incorporated company, he shall return the same to the county treasurer, and at the same time make affidavit before the county treasurer, or some other officer authorized to administer oaths that he had demanded payment thereof from the president, or other proper officer of the company, and that such officer had refused to pay the same, or that he had not been able to make such demand, as the case may be; and that such company had no personal property from which he could levy such tax.[4]

[1] McLean, as receiver, v. Manhattan Medicine Co., 54 N. Y. Sup. Ct. 22 (J. & S.) 371 (1887); G. T. reversing s. c. 3 N. Y. St. Rep. 550 (1886).

[2] 54 N. Y. Super. Ct. (22 J. & S.) 371 (1887).

[3] L. 1866, c. 825; 2 N. Y. R. S., 8th ed., p. 1851, § 18. See People ex rel. v. Barker, 48 N. Y. 70, 81 (1871); People ex rel. Cagger v. Dolan, 36 N. Y. 59, 62 (1867).

[4] L. 1886, c. 825; 2 N. Y. R. S., 8th ed., p. 1151, § 19. See People ex rel. v. Barker, 48 N. Y. 70, 81 (1871).

Sec. 86. Same—Certificate of Treasurer to Comptroller.—The county treasurer shall thereupon certify such facts to the comptroller, who shall pass to the credit of such county treasurer the amount of all taxes so returned and certified, as in the cases of taxes on the land of non-residents.[1]

Sec. 87. Same—Comptroller to Furnish List to Attorney-General—Action in Supreme Court.—The comptroller shall furnish the attorney-general with the names of all companies and banks refusing or neglecting to pay taxes imposed on them, with the amount due from them respectively, and the attorney-general shall thereupon file a petition in the supreme court against every such company or bank, for the discovery and sequestration of its property.[2]

Sec. 88. Same—Proceedings on Filing Petition—Sequestration of Property.—The chancellor, on the filing of such bill, or on the coming in of the answer thereto, shall order such part of the property of such company to be sequestered, as he shall deem necessary for the purpose of satisfying the taxes in arrear, with the costs of prosecution; and he may also, at his discretion, enjoin such company, and the officers thereof, from any further proceedings under their act of incorporation, and may order and direct such other proceedings as he shall deem necessary, to compel the payment of such tax and costs.[3]

Sec. 88a. Receiver in foreclosure proceedings—Directions to

[1] L. 1886, c. 825; 2 N. Y. R. S., 8th ed., p. 1151, § 20. See People ex rel. v. Barker, 48 N. Y. 70, 81 (1871).

[2] L. 1857, c. 456; 2 N. Y. R. S., 8th ed., p. 1151, § 21. See People ex rel. v. Barker, 48 N. Y. 70, 81 (1871). Central Trust Company v. N. Y. City & Northern R. R. Co., 15 N. Y. St. Rep. 181 (1888).

[3] L. 1866, c. 825; 2 N. Y. R. S., 8th ed., § 22. See Central Trust Company v. N. Y. City & Northern R. R. Co., 15 N. Y. St. Rep. 181 (1888).

pay taxes.—Under this section a receiver appointed in foreclosure proceedings may be absolutely directed to pay state taxes imposed by L. 1881, c. 361, out of the earnings of the company received by him. Such a proceeding is within the authority created by this section. But receivers' certificates to pay such taxes are not authorized.[1]

Sec. 89. Same—Action in other Courts.—The attorney-general may also recover such tax, with costs, from such delinquent company, by action in any court of record in this state.[2]

Sec. 90. Annual Report to Comptroller—When to be Made—Where Dividend has not been Declared—Estimate and Appraisal of Secretary—Certificate of Appraisal and Copy of Oath.[3]—Hereafter it shall be the duty of the president or treasurer of every association, corporation or joint-stock company liable to be taxed on its corporate franchise or business, as provided in section three of this act,[4] to make report in writing to the comptroller, annually, on or before the fifteenth day of November, stating specifically the amount of capital paid in, the date, amount, and rate per centum of each and every dividend declared by their respective corporations, joint-stock companies or associations, during the year ending with the first day of said month. In all cases where any such corporation, joint-stock company or association shall fail to make or declare any dividend upon either its common or preferred stock during the year ending as aforesaid, or in case the dividend or dividends

[1] The Central Trust Company v. N. Y. City & Northern R. R. Co., 15 N. Y. St. Rep. 181 (1888).

[2] L. 1866, c. 825; 2 N. Y. R. S., 8th ed., p. 1152, § 23.

[3] The Law of 1881 relative to the subject treated in sections 90–102 amended the act of 1880, c. 542, as a whole, and the sections which here follow are the text of the act as amended.

[4] See *post*, § 92.

made or declared upon either its common or preferred stock during the year ending as aforesaid shall amount to less than six per centum upon the par value of the said common or preferred stock, the treasurer and secretary thereof, after being duly sworn or affirmed to do and perform the same with fidelity, according to the best of their knowledge and belief, shall, between the first and fifteenth days of November, in each year, in which no dividend has been made or declared as aforesaid, or in which the dividend or dividends made or declared upon either its common or preferred stock amounted to less than six per centum upon the par value of said common or preferred stock, estimate and appraise the capital stock of such company upon which no dividend has been made or declared, or upon the par value of which the dividend or dividends made or declared, amounted to less than six per centum, at its actual value in cash, not less, however, than the average price which said stock sold for during said year ; and when the same shall have been so truly estimated and appraised, they shall forthwith forward to the comptroller a certificate thereof, accompanied by a copy of their said oath or affirmation, by them signed, and attested by the magistrate or other person qualified to administer the same; provided, that if the comptroller is not satisfied with the valuation so made and returned, he is hereby authorized and empowered to make a valuation thereof and to settle an account upon the valuation so made by him for the taxes, penalties and interest due the state thereon ; and any association, corporation or joint stock company dissatisfied with the account so settled, may within ten days appeal

therefrom to a board consisting of the secretary of state, attorney-general and state treasurer, which board, on such appeal, shall affirm or correct the account so settled by the comptroller, and the decision of said board shall be final; but such appeal shall not stay proceedings unless the full amount of the taxes, penalties and interest as due on said account, as settled by the comptroller, be deposited with the state treasurer.[1]

Sec. 90a. Constitutionality of statute.—The amended act as given in the following sections to 103 has been held to be constitutional.[2]

The New York supreme court in the case of People v. New York Floating Dry Dock Co.,[3] say that chapter 542 of the Laws of 1880 "to provide for raising taxes * * * upon certain corporations, joint-stock companies and associations," is not unconstitutional as levying taxes upon certain corporations and not upon all alike, that although the state cannot lawfully impose the burdens of taxation upon a few to the exclusion of others,[4] it possesses the power of apportionment and determination of the methods and modes of taxation and that the statute is not unconstitutional because it prescribes the method of taxation in certain cases, leaving others to be taxed under other laws, even though such legislation produces an inequality of burden in different cases.[5]

Sec. 90b. Tax for state purposes only—Liability for county or municipal taxes.—It has been held that the taxes imposed upon corporations by chapter 542, Laws of 1880 are for the exclusive benefit of the state, and that the act does not interfere

[1] L. 1881, c. 361, § 1; 2 N. Y. R., S.. 8th ed., p. 1152.

[2] People v. Horn Silver Mining Co., 105 N. Y. 76 (1887); People v. Gold & Stock Tel. Co., 98 N. Y. 67 (1885); People v. Equitable Trust Co., 96 N. Y. 387 (1884); People v. Nat. Fire Ins. Co., 27 Hun (N. Y.) 188 (1882).

[3] 11 Abb. (N. Y.) N. C. 40 (1882).

[4] Stuart v. Palmer, 74 N. Y. 183 (1878); Gordon v. Cornes, 47 N. Y. 608 (1872).

[5] See Bank of Commerce v. New York City, 67 U. S. (2 Black.) 620, 630, 631 (1862); bk. 17 L. ed. 451; Cooley on Taxation, 160.

with the powers of the local authorities to impose further taxation on the same corporations for municipal and county purposes.[1]

Sec. 90c. Tax upon foreign corporations—Carrying and manufacturing within this state.—In the case of People v. Horn Silver Mining Co.[2] the defendant corporation was organized under the laws of the territory of Utah, and was engaged in mining and smelting silver in Utah and Illinois. The bullion was shipped to the city of New York in bars containing about 990 parts of pure silver in each 1,000 parts of the bullion, and delivered to the United States assay office, where it was refined to the standard of 999 parts to 1,000. Upon the delivery of the bullion at the assay office certificates for the silver deposited were delivered to the defendant and the same were sold by it in the market. The court held, that the defendant could not claim exemption from the taxes imposed upon corporations by chapter 542 of Laws of 1880 as amended by chapter 361 of Laws 1881, as a manufacturing company carrying on manufacture within this state. The court said that defendant was a foreign corporation doing business in this state within the meaning of the statute.

The New York court of appeals say in the case of People v. Equitable Trust Co.,[3] that the act of 1880 and the amendment of 1881 imposes upon foreign corporations a tax which is to be levied solely upon their business done in this state; and that so far as it imposes a tax upon corporate franchises its operation is confined to corporations created under our laws.

Sec. 90d. Taxing franchise.—The New York court of appeals say in the case of People v. Albany Ins. Co.,[4] that the act of 1880, chapter 542, as amended by Laws of 1881, chapter 361, providing for taxing the franchise of certain corporations, imposes a tax for the future enjoyment of the franchise, and the

[1] See People ex rel. v. Fire Assoc. of Phila., 92 N. Y. 311(1883); People ex rel. v. Commissioner of Taxes, 26 Hun (N. Y.) 446 (1882); People ex rel. Westchester Fire Ins. Co. v. Davenport, 25 Hun (N.Y.) 630 (1881).

[2] 38 Hun (N. Y.) 276 (1885).

[3] 96 N. Y. 387 (1884).

[4] 92 N. Y. 458 (1883).

amount of dividends declared during the year is to be regarded simply as the measure of the annual value of the franchise.

This imposition of a tax upon corporate franchise is confined to corporations created under the laws of this state.

The court of appeals say in the case of People v. Equitable trust Co.,[2] that the legislature has power to impose a tax[1] upon the business of a foreign corporation created in this state, and that such a tax being a specific one no appointment or apportionment is required.[3]

It is said by the supreme court of Tennessee in the case of Southern Nashville Street R. Co. v. Morrow,[4] that the franchise of a corporation is properly subject to taxation and may be assessed separately, but more properly along with the other property and as part of it. Where property has been omitted or undervalued by the assessor, the payment of the tax as originally assessed will not preclude a further or additional assessment. It is legitimate to tax the property of a corporation to the corporation, and also to tax the shareholders the value of the shares owned by them, and this is not obnoxious as double taxation.

Sec. 90e. Same—Assailing tax.—A party assailing the validity of an assessment must make it conclusively appear that the method by which the assessors arrived at the result complained of was incorrect, and that the assessment does not represent the fair value of the property assessed.[5]

Sec. 90f. Same—Correction of errors.—It has been said that the provisions of chapter 269, Laws of 1880, enabling the court to correct illegal assessments did not enable it, under the provisions of chapter 542 of Laws of 1880, creating exemption from taxation, to vacate an assessment made before the passage of that act under laws existing at the time of the assessment.[6]

[1] People v. Equitable Trust Co., 96 N. Y. 387 (1884).

[2] 96 N. Y. 387 (1884).

[3] See Matter of McPherson, 104 N. Y. 306 (1887).

[4] 87 Tenn. 406 (1889); s. c. 5 Ry. & Corp. L. J. 248.

[5] People ex rel. Westchester Ins. Co. v. Davenport, 91 N. Y. 574 (1883). See People v. Commissioners of Taxes, 104 N. Y. 246 (1887); People v. Commissioners, 99 N. Y. 157 (1885).

[6] People ex rel. Twenty-third Street R. Co. v. Commissioners of Taxes, 91 N. Y. 593 (1883).

Sec. 91. Same—Failure to make report—Comptroller to add ten per centum—Failure for one Year to make annual Report — Report to governor.—If the said officers of any such corporation, joint-stock company or association shall neglect or refuse to furnish the comptroller, on or before the fifteenth day of November of each and every year, with the report aforesaid, or the certificate of appraisement, and oath or affirmation, as the case may be, as required by the first section of this act,[1] or to pay the tax imposed on such corporation, company or association within fifteen days after the first of January, as provided in the fourth section[2] of this act, it shall be the duty of the comptroller of the state to add ten per centum to the tax of said corporation, company or association, for each and every year for which such report or certificate of appraisement and oath, or affirmation were not so furnished, or for which such tax shall not have been paid, which percentage shall be assessed and collected with the said tax in the usual manner of assessing and collecting such taxes, provided, that if said officers of any such corporation, joint-stock company or association shall intentionally fail to comply with the provisions of the first or fourth section of this act for one year the comptroller shall report the fact to the governor, who, if he shall be made satisfied that such failure was intentional, shall thereupon direct the attorney-general to take proceedings, in the name of the people of this state, to declare the charter or privileges of said corporation, joint-stock company or association forfeited, and at an end; and for such intentional failure duly found, the charter and privi-

[1] See *ante*, § 90.

[2] See *post*, § 93.

leges of every such corporation, company or association shall cease, end, and be determined.[1]

Sec. 92. Same—Annual tax—Amount of.—Every corporation, joint-stock company or association whatever, now or hereafter incorporated, organized or formed under, by or pursuant to law of this state, or in any other state or country, and doing business in this state, except only savings banks and institutions for savings, life insurance companies, banks and foreign insurance companies, and manufacturing or mining corporations or companies wholly engaged in carrying on manufacture or mining ores within this state, and agricultural and horticultural societies or associations, which exceptions, however, shall not include gas companies, trust companies, electric or steam heating, lighting and power companies, shall be subject to and pay a tax, as a tax upon its corporate franchise or business, into the treasury of the state annually, to be computed as follows: If the dividend or dividends made or declared by such corporation, joint-stock company or association during any year ending with the first day of November, amount to six or more than six per centum upon the par value of its capital stock, then the tax to be at the rate of one quarter-mill upon the capital stock for each one per centum of dividends so made or declared, or if no dividend be made or declared, or if the dividends made or declared do not amount to six per centum upon the par value of said capital stock, then the tax to be at the rate of one and one-half mills upon each dollar of the valuation of the said capital stock, made in accordance with the pro-

[1] L. 1881, c. 361, § 2. See 2 N. Y. R. S., 8th ed., p. 1153. See People v. Horn Silver Mining Co., 105 N. Y. 76 (1887).

visions of the first section of this act;[1] and in case any such corporation, joint-stock company or association shall have more than one kind of capital stock, as for instance common and preferred stock, and upon one of said stocks a dividend or dividends amounting to six or more than six per centum upon the par value thereof has been made or declared, and upon the other no dividend has been made or declared, or the dividend or dividends made or declared thereon amount to less than six per centum upon the par value thereof, then the tax shall be at the rate of one-quarter mill for each one per centum of dividend made or declared upon the capital stock upon the par value of which the dividend or dividends made or declared amount to six or more than six per centum, and in addition thereto tax shall be charged at the rate of one and one-half mills upon each dollar of a valuation, made also in accordance with the provisions of this act, of the capital stock upon which no dividend was made or declared, or upon the par value of which the dividend or dividends made or declared did not amount to six per centum.[2]

Sec. 92a. Exemptions from taxation.—The provisions of section ninety-two exempting manufacturing corporations within this state from the taxation therein provided, exempts not only corporations formed under the general manufacturing act of 1848, but all corporations under whatever laws incorporated, and by whatever general name, whose joint and principal business is the manufacture and sale of artificial products.[3] The exemption from taxation under this statute of real estate does not repeal the provision of the Laws of 1849,

[1] See *ante*, § 90.

[2] L. 1881, c. 361, § 3, as amended by L. 1885, c. 359; L. 1889, c. 353.

[3] Nassau Gas Light Co. v. City of Brooklyn, 89 N. Y. 409 (1882). See People v. Knickerbocker Ice Co., 99 N. Y. 181, 184 (1885); s. c. Cited in 52 Am. Rep. 110.

chapter 178 as to the payment of taxes by the agents of foreign insurance companies doing business in the city of New York; it is rather a condition or license fee than a tax, and if a tax properly so called, it is one of a special and peculiar character and not a general tax for "state purposes."[1]

Sec. 92b. Same—Gas Light Co.—It has been held that a company organized under the act of 1848, chapter 37, for the manufacture of illuminating gas, is a manufacturing corporation within the meaning of the act of 1880, and that the provision of said act exempting from other taxation corporations liable to taxation under it did not apply to gas light companies.[2]

Sec. 92c. Same—Ice company.—In the case of People v. Knickerbocker Ice Co.,[3] it is said that a company incorporated under chapter 301 of the Laws of 1855 for the purpose of "collecting, storing and preserving ice, of preparing it for sale, of transporting it to the city of New York and elsewhere, and of vending the same," is not a manufacturing corporation within the meaning of section 3 of chapter 542 of the act of 1880, as amended by chapter 361, Laws of 1881, exempting manufacturing corporations from the taxes imposed by that act.

Sec. 93. Same—When to be Paid.—It shall be the duty of the treasurer or other officer having charge of any corporation, joint-stock company or association, upon which a tax is imposed by either of the preceding sections of this act, to transmit the amount of said tax to the treasury of the state within fifteen days after the first of January in each and every year.[4]

Sec. 94. Same—Lands and Real Estate of Corporation—How Taxed—Capital Stock Exempt.—The corpo-

[1] Trustees of Exempt Firemen's Fund v. Roome, 93 N. Y. 313 (1883).

[2] Nassau Gas Light Co. v. City of Brooklyn, 89 N. Y. 409 (1882); s. c. 25 Hun (N. Y.) 567.

[3] 32 Hun (N. Y.) 475 (1884).

[4] L. of 1881, c. 361, § 4. See 2 N. Y. R. S., 8th ed., p. 1154.

ations, joint-stock companies and associations mentioned in this act as taxable shall hereafter be exempt from assessment and taxation for state purposes, except upon their real estate, and as herein provided; but they shall in all other respects be liable to assessment and taxation as heretofore.[1]

Sec. 95. Same—Basis of Tax—Capital Employed—What Report must State—When Comptroller may Fix Amount. —The amount of capital stock which shall be the basis for tax under the provisions of section three[2] of this act, in the case of every corporation, joint-stock company and association liable to taxation thereunder, shall be the amount of capital stock employed within this state. In making to the comptroller the report in writing, or certificate of estimate and appraisal of the capital stock of such corporation, joint-stock company or association provided for by the first section of this act, it shall be the duty of the president or treasurer thereof, as the case may be, to state specifically the amount of capital stock employed within the state of such corporation, joint-stock company or association. Whenever the comptroller is dissatisfied with such report or certificate of estimate and appraisal, as the case may be, of any corporation, joint-stock company or association whose capital is only partially employed within the state, he is authorized and empowered to ascertain, fix and determine the amount of capital employed within this state, and to settle an account for the taxes and penalties due the state thereon.[3]

Sec. 96. Same—Failure to make Report—Examina-

[1] L. 1881, c. 361, § 8; 2 N. Y. R. S., 8th ed., p. 1155.

[2] See *ante*, § 92.

[3] L. 1881, c. 361, § 11, as amended by L. 1882, c. 151, and by L. 1885, c. 501; 2 N. Y. R. S., 8th ed., p. 1156.

tion of Book and Fixing Tax—Penalty.—Whenever any corporation, joint-stock company or association liable to make reports or certificates of estimate and appraisal to the comptroller, under any of the provisions of this act, shall neglect or refuse to make such report or reports within the time prescribed in this act, or shall make such report or certificate as shall be unsatisfactory to the comptroller, the comptroller is authorized to examine, or cause to be examined, the books and records of any such corporation, joint-stock company or association, and to fix and determine the amount of tax and penalty due in pursuance of the provisions of this act, either from the said books and records, or from any other data in his possession which shall be satisfactory to him, and to settle an account for said tax and penalty, together with the expenses of such examination, against said corporation, joint-stock company or association.[1]

Sec. 96a. Dissatisfaction of Comptroller—Basis of Computation—Where the defendant, a foreign corporation, was organized under the laws of Utah for the purpose of carrying on the business of mining and other business incidental thereto, and mined silver bullion which it shipped to Chicago and there refined, when it was shipped to the United States assay office in New York city. While most of its business was done in Chicago and Utah, the officers had their offices in New York city and sold the bullion there and loaned out the proceeds or a portion thereof. The court held that the entire capital of the defendant was properly taken as the basis in computing the tax; that this basis of computation was not changed by the amendment or supplement to the act in 1882,[2]

[1] L. 1881, c. 361, § 12, as amended by L. 1882, c. 151, and by L. of 1885, c. 501; 2 N. Y. R. S., 8th ed., 1156.

[2] L. 1882, Ch. 151.

which authorizes the comptroller, when dissatisfied with the report of any corporation liable to taxation, only a portion of whose capital is employed in the state, to fix and determine the amount of capital stock to be taken as a basis for taxation; that such provision did not authorize a corporation to report only the amount of capital employed in the state, and require the comptroller to take the amount so furnished as the basis, but simply authorized him, where only a portion of the capital is employed in the state, and he is dissatisfied with the report to fix the amount of capital stock to be taxed; that the discretion so given to the comptroller was not taken away until by the act of 1885,[1] when the liability to taxation was limited to "the amount of capital stock employed within this state."[2]

Sec. 96b. Penalty.—A corporation failing to perform its duty in regard to furnishing proper statements as to capital employed in the state, is liable to a penalty under the statute.[3]

Sec. 97. When Comptroller May issue Subpœna—Failure to Obey—Punishment.—Whenever the comptroller shall deem it necessary or important to examine any person as a witness upon any subject or matter relating to the amount of capital stock of such corporation, or to use, examine or inspect any book, account, voucher or document in possession of any officer of such corporation, or other person, or under his control relating to such capital stock and tax, he shall have the power to issue a subpœna in proper form, commanding such person or officer to appear before him or some person designated as commissioner by him by an appointment in writing, filed in the office of such comptroller, at a time and at the place where the principal office of such cor-

[1] L. 1885, c. 501.

[2] People v. Horn Silver Mining Co., 105 N. Y. 77 (1887).

[3] See *ante*, § 96; People v. Horn Silver Mining Co., 105 N. Y. 76 (1887).

poration is situated within this state, in such subpœna specified, to be examined as a witness ; and such subpœna may contain a clause requiring such person or officer to produce on such examination all books, papers and documents in his possession, or under his control, relating to the capital stock of such corporation and the amount thereof employed within this state. Such subpœna shall be served upon the person named by showing him the original subpœna and delivering to and leaving with him at the same time a copy thereof. The comptroller or the commissioner so designated by him as aforesaid may administer oaths to such persons as he may desire to examine, so brought before him by subpœna or otherwise, and examine them on oath in relation to any matter which may in any wise be material in determining the account of the tax to be paid by any such corporation, joint-stock company or association as aforesaid. Whenever any person duly subpœnaed to appear and give evidence as aforesaid, or to produce any books and papers as hereinbefore provided, shall neglect or refuse to appear or to produce such books and papers according to the exigency of such subpœna, or shall refuse to testify before any such comptroller or the commissioner so designated by him, or to answer any proper and pertinent question, he shall be deemed in contempt, and thereupon any justice of the supreme court of the judicial district within which the principal office of such corporation within this state is situated, shall, upon the motion of the comptroller, based upon affidavit showing the commission of the offence either, first, make an order requiring the accused to show cause before him, at a time and

place specified therein, why the accused should not be punished for the alleged offence; or, second, issue a warrant of attachment directed to the sheriff of a particular county, or generally directed to the sheriff of any county where the man may be found, commanding him to bring him before said justice either forthwith or at a time and place therein specified, to answer for the alleged offence. On the return of said attachment and the production of the body of the defendant therein the said justice shall have jurisdiction in the matter, and the person charged may purge himself of the contempt in the same way, and the same proceedings shall be had, and the same penalties may be imposed, and the same punishments inflicted as in the case of a witness subpœnaed to appear and give evidence as is prescribed in title three, chapter seventeen of the Code of Civil Procedure, in proceedings to punish a contempt of court other than a criminal contempt.[1]

Sec. 98. Adjustment of Taxes and Penalties—What Covered—Proviso as to Payment.—The comptroller is hereby authorized and directed, upon application to him made by any corporation, joint-stock company or association, to make, settle, and adjust all accounts against such corporation, joint-stock company or association, for all taxes and penalties arising under the third section of this act since the twelfth day of May, eighteen hundred and eighty-two, by taking as a basis for taxation the capital employed within the state by such corporation, joint-stock company or association. Provided, however, that such corporation, joint-stock company or association

[1] L. 1882, c. 151, § 13, as amended by L. 1885, c. 501; 2 N. Y. R. S., 8th ed., p. 1156.

shall not be entitled to the benefit of a settlement upon such basis, unless it shall have secured such adjustment and paid into the treasury the full amount of the taxes so settled before the first day of August, eighteen hundred and eighty-five; nor shall this section apply to the case of any tax for which suit shall have been heretofore brought by the attorney-general, in which suit the trial has been commenced, or in which judgment shall have been entered heretofore for the people for the amount of said tax. Any corporation, joint-stock company or association whose capital has heretofore been only partially employed within this state, and which is now liable for taxes arising under the third section of this act since the twelfth day of May, eighteen hundred and eighty-two and which are still due and unpaid, may, at any time prior to the first day of August, eighteen hundred and eighty-five, pay to the state treasurer, for the use of the state, in full discharge of the same, such sum of money as shall be fixed by the comptroller as the tax due for the said period by the said corporation, joint-stock company or association, upon the basis of the capital employed within the state. Provided that this section shall not apply to the case of any tax for which suit may have heretofore been brought by the attorney-general and for which judgment shall have been entered therein, or if in such suit trial has been commenced.[1]

Sec. 99. Same—Settlement by Comptroller—Notice—Interest.— All accounts hereafter settled by the comptroller agreeably to the provisions of this act

[1] L. 1881, § 14, as amended by L. 1885, c. 501; 2 N. Y. R. S., 8th ed., p. 1157. See People v. Horn Silver Mining Co., 105 N. Y. 76 (1887); People v. The Golden Stock Tel. Co., 98 N. Y. 67 (1885).

shall bear interest from a date thirty days after the sending of notice of settlement, hereinafter provided for until full payment thereof shall be made.[1]

Sec. 100. Same—Settlement of Taxes—Notice.—It shall be the duty of the comptroller after making with any partnership, corporation, joint-stock company or association, liable to taxation under any of the provisions of this act, the settlement of such taxes, to forthwith send notice thereof, in writing, to such person, partnership, corporation, joint-stock company or association, which notice may be sent by mail to the post-office address of such corporation, joint-stock company or association.[2]

Sec. 101. Determination of Comptroller—Right to Review.—No writ of *certiorari* to review the determination and settlement of the comptroller as to the amount of capital used within the state by any corporation, joint-stock company or association, and as to the tax and penalty to be paid thereon, shall be granted, except application therefor be made within thirty days after service upon such corporation, joint-stock company or association by the comptroller of notice of said settlement. Nor shall any such writ be granted except the papers upon which the motion therefor is to be made, including notice of motion, shall have been served upon the comptroller at least eight days before such motion, nor unless the corporation, joint-stock association applying for such writ shall, before making such motion, have deposited with the state treasurer the full amount

[1] L. 1881, c. 361, § 15, as amended by L. 1885, c. 501; 2 N. Y. R. S., 8th ed., 1157.

[2] L. 1881, c. 361, § 16, as amended by L. 1885, c. 501; 2 N. Y. R. S., 8th ed., 1157. See People v. Horn Silver Mining Co., 105 N. Y. 76 (1887).

of taxes, penalties and charges so settled and adjusted by the comptroller, and filed with him an undertaking in such amount, and with such sufficient sureties as shall be approved by one of the justices of the supreme court of this state, to the effect that if said writ be vacated and the determination of the comptroller sustained, the applicant for the writ will make payment of all costs and charges which may accrue against such applicant in the prosecution of such writ, including costs on all appeals.[1]

Sec. 101a. Right to review—Writ of certiorari.—The Laws of 1880, c. 269, were intended to grant relief against certain wrongs which had been long and well known to exist, but which had been theretofore practically remediless,[2] and proceedings to remedy an illegal assessment are now uniformly taken under this statute.

This act does not apply to assessments for legal improvements but relates to town, ward, village or city assessments imposed upon the whole body of tax-payers for some general purpose of taxation.[3]

In the case of People ex rel. v. Cheatham,[4] upon an appeal from an order made at a special term quashing a writ of *certiorari* under the provisions of chapter 269 of the act of 1880 to review an assessment of the property of the relators made by the respondents, as the assessors of a town, it appeared that the order was granted upon the ground that the relators had failed to make and deliver to the assessors the written statement required by the statute on or before the first day of July. The court held that, conceding

[1] L. 1881, c. 361, § 17, as amended by L. 1885, c. 501; 2 N. Y. R. S., 8th ed., 1158.

[2] People v. Supervisors, 60 N. Y. 381 (1875); People ex rel. v. Smith, 24 Hun (N. Y.) 66, 67 (1881). See People v. Dixon, 8 Hun (N. Y.) 178 (1876); Youmans v. Simmons, 7 Hun (N. Y.) 466 (1876).

[3] People ex rel. v. Common Council of Dunkirk, 38 Hun (N. Y.) 7 (1885).

[4] 45 Hun (N. Y.) 6 (1887).

that the statement should have been furnished, the failure of the relators to do so did not deprive them of their right to review the determination of the assessors, as the statute imposed no such penalty and the courts could not add penalties to those prescribed by the legislature, and that in any event the failure to make the statement could not deprive them of their right to review the act of the assessors upon evidence concerning the statement, if made, could not have given any information.

Sec. 101b. Same—Prior application to assessors.—A party who omits to avail himself of the opportunity provided by the statute to remedy an erroneous assessment by application to the assessors, cannot, after the assessment has been confirmed by lapse of time, arrest the collection of the tax by the proceedings under this act[1]

It is thought that it is requisite to a proceeding under this act to review an assessment by *certiorari*, that the relator should make application to the assessors for the reduction and present proof in support of his application; but the objection that he did not do so will not be considered by the general term if it does not appear by the record to have been raised at the special term.[2]

Sec. 101c. Same—Time of application.—Application for the review of an assessment by *certiorari* should be made within fifteen days after the assessment-roll is completed, but the omission of the assessors to give notice as required by the statute of the completion of the roll and its delivery to the proper officer prevents the running of the fifteen days limitation.[3]

Sec. 101d. Same—Form of petition.—In the case of People ex rel. v. Coleman,[4] a writ of *certiorari* was issued to review the legality of an assessment made for the purposes of taxation upon the shares of the shareholders of the Merchants'

[1] People ex rel. Mut. Union Tel. Co. v. Commissioners of Taxes, 99 N. Y. 254 (1885).

[2] People ex rel. v. Hicks, 40 Hun (N. Y.) 598 (1886).

[3] See People ex rel. v. Haupt, 104 N. Y. 377 (1887); People ex rel. v. Hicks, 105 N. Y. 198 (1886); affirming 40 Hun (N. Y.) 598.

[4] 41 Hun (N. Y.) 307 (1886).

National Bank of the city of N. Y., who were about 800 in number. The petition was subscribed by one Edge, for himself and all the other petitioners, and it was verified by him. It was also subscribed by Zabriskie & Burrill, attorneys for the petitioners. Upon the application of the respondents an order was made quashing the writ upon the ground that it could not be issued in this manner for the benefit of petitioners who did not themselves subscribe the petition, but this was held error, because the act under which the petition was prescribed [1] did not require all the persons in whose behalf the petition was presented to subscribe and verify it. It permits all persons who may be affected in the same manner by the assessment upon the same roll to unite in the same petition, and to obtain the writ of *certiorari* for their joint, as well as several benefit, and that may be done by the representations of one petition, the truth of which may be verified by either of the petitioners. Nor does the act require in terms, nor by reasonable implication, that the petition shall be signed by each of the petitioners acting individually for himself or herself, but its provisions will be satisfied, when they are represented by attorneys acting in their behalf. When attorneys subscribe such a petition, it is not to be assumed that they have done so without the authority of the petitioners, but rather that they have obtained such authority before subscribing it in such a manner as imports an authority so to do. It devolves upon the person alleging a lack of authority to establish that fact by proof before the proceeding can be held to be irregular, or the petition be dismissed.

In the case of People ex rel. v. Pond,[2] the petition under which the writ of *certiorari* was issued averred that the full and true value of the relator's estate, as it would be assessed for the payment of a just debt from an insolvent debtor, did not exceed $40,000, and the answer to the return of the averment was merely a denial that the assessors had "assessed the real property of the relator at an over-valuation of $40,000, or that they have assessed said real property at more than its true

[1] L. 1880, c. 269, §. 1.

[2] 13 Abb. (N. Y.) N. C. 1 (1882).

and real valuation," without anywhere alleging that the real property of the relator had been assessed at its real and true value as the assessors would assess the same for the payment of the just debt due from an insolvent debtor, and the court held that this denial was insufficient.

Sec. 101e. Same—Parties to.—The supervisors of the town are not necessary parties to proceedings to review their taxation.[1]

Sec. 101f. Same—Notice of granting.—Notice of the granting of a writ of *certiorari* to review an assessment under this act is discretionary with the court.[2]

Sec. 101g. Same—Form of the writ.—The writ of *certiorari* under this act is a state writ, and must be issued under the seal of the court before which it is returnable, but if the seal be omitted the omission may be cured by amendment.[3]

Such writ is defective where it is directed to "the assessors of the town of Herkimer," instead of being addressed to the individuals who constitute the board of assessors of the town of Herkimer, by naming them individually and adding the name of their office; and on motion such a writ will be quashed.[4]

Sec. 101h. Same—When to issue.—A writ of certiorari to assessors to compel a correction of the assessment-roll will be ineffectual where such roll has passed from their possession and control to the board of supervisors before the issuing of the writ; and this will be true although the writ is directed to the board of supervisors in whose possession the latter was as well.[5]

[1] People ex rel. v. Smith, 24 Hun (N. Y.) 66 (1881).

[2] People ex rel. v. Smith, 24 Hun (N. Y.) 66, 68 (1881).

[3] People ex rel. v. Assessors of Town of Herkimer, 6 N. Y. Civ. Proc. Rep. 297 (1884).

[4] People ex rel. v. Assessors of Town of Herkimer, 6 N. Y. Civ. Proc. Rep. 297 (1884).

[5] People ex rel. Porter v. Tompkins. 40 Hun (N. Y.) 228 (1886). See People ex rel. Marsh v. Delaney, 49 N. Y. 655 (1872); People ex rel. Law v. Commissioners, 9 Hun (N. Y.) 609 (1877); People ex rel. Raplee v. Reddy, 43 Barb. (N. Y.) 539 (1865); People ex rel. Heiser v. Assessors, 16 Hun (N. Y.) 407 (1878); People ex rel. v. Dunkirk, 22 N. Y. Week. Dig. 240 (1885).

In People ex rel. Porter v. Tompkins,[1] it is held that when the inquiry is as to whether the action and determination were legal and should be set aside or confirmed, the writ may be effectual after the powers of the tribunal or officers have ceased as to the matter in question, because it is mere matter of review; when the purpose of the proceedings is to have the direction of the court for those to whom the writ is issued, to take some act by way of correction of an error, it must be within the power of such officer or tribunal to perform it or the writ cannot properly issue.

Sec. 101i. Same—To whom should be issued.—The rule of the common law which required that the writ of *certiorari* should issue to the persons or officers having the custody or control of the determination or papers sought to be reviewed, and which are required by the writ to be returned, is inapplicable to a writ issued under the act of 1880, and it is sufficient that the writ should issue to the board of assessors, although the assessment-roll had, according to the statute's requirement, been filed with the town clerk.[2]

Sec. 101j. Same—Return of writ.—The writ must be made returnable at a special term in the judicial district in which the transaction complained of is made; and if made returnable at a general term the proceedings will be dismissed on motion.[3]

It was said in the case of People ex rel. v. Smith,[4] that the writ must require a return to be made thereto at a special term to be held within not less than three days from the time of its allowance, but it is not necessary that the writ should be served before the return day.

The provisions of the act of 1880 which was passed before and remained in force after section 3132 of the Code of Civil Procedure which requires the writ of *certiorari* to be made returnable within thirty days after the service thereof, went into effect, and by the express provisions of secs. 2132 and 2147 of

[1] 40 Hun (N. Y.) 228 (1886).

[2] People ex rel. v. Pitman, 9 N. Y. St. Rep'r 469 (1887).

[3] People ex rel. Church of Holy Communion v. Assessors of Greenburgh, 6 N. Y. St. Rep. 744 (1887).

[4] 24 Hun (N. Y.) 66 (1881).

the Code of Civil Procedure the provisions of that act are in no way varied or affected by the adoption of the Code.[1]

Sec. 101k. Same—Inconclusive—Power to take evidence.—The common law rule that the return of the writ of *certiorari* is conclusive as to the facts required by the writ to be returned, is inapplicable to the return provided for under the statute of 1880, as by that statute the court is empowered and may take such evidence as may be necessary for its determination of the matter, and such evidence should form a part of the proceedings upon which the determination of the court is made.[2]

Sec. 101l. Same—Hearing on return—Proper practice.—Upon the return of the writ the hearing should be at special term,[3] but it is not usually a customary practice to quash the writ upon a hearing based upon the return. Upon such a hearing the court should make a final order in the proceedings either nullifying, confirming, or modifying the determination under review.[4] It is said in the case of People ex rel. v. Davenport,[5] that "it is essential that the party assailing the validity of an assessment should make it conclusively appear that the method by which the assessors arrived at the result complained of was incorrect, and that the assesssment does not represent the fair value of the property assessed;" and in the case of People ex rel. v. Commissioners of Taxes,[6] that it is essential to support a claim to reduce or nullify an assessment made by the proper officers that it should be made to appear affirmatively by sufficient proof that the payment is in part or in whole erroneous. If the evidence leaves the matter in doubt, it is the provisions of the assessors to determine the value and amount of property liable to taxation.

The court say in the case of People ex rel. v. Smith,[7] that "the object of the statute is a review of the proceedings by the assessors. The statute does not contemplate a mere

[1] People ex rel. v. Low, 40 Hun (N. Y.) 176 (1886).

[2] People ex rel. v. Pitman, 9 N. Y. St. Rep. 469 (1887).

[3] See People ex rel. v. Smith, 24 Hun (N. Y.) 66 (1881).

[4] People ex rel. v. Pitman, 9 N. Y. St. Rep. 469 (1887).

[5] 91 N. Y. 574, 981 (1883).

[6] 99 N. Y. 154 (1885); affirming 34 Hun (N. Y.) 506.

[7] 24 Hun (N. Y.) 66 (1881).

affirmance or refusal of the whole assessment as under the common law certiorari, but it provides for a correction, for a re-estimation and the like, as if the court were, to some extent, to exercise its own judgment upon the matter. No suit is to be granted nor any original papers to be returned. It is therefore, of little consequence what officer has the actual custody of the assessment-roll. That will remain with him. If the correction of the court is made in time for the use of the board of supervisors at its annual session, it can be acted upon,[1] if not made in time the wrong done the petitioner is to be redressed at the next."[2]

This statute greatly enlarged the power previously exercised by the court in reviewing and correcting illegal assessments by certiorari, but even by this statute the court is confined to those cases where it appears by the return of the writ or the evidence taken thereunder "that the assessment complained of is illegal, erroneous, or unequal for any of the reasons alleged in the petition." It does not authorize a review where it appears that the assessment in question was made in accordance with the statutes then in force and in performance of the duty then obligatory upon the assessors.

Sec. 101m. Same—Assessment-roll and affidavit—Failure to return.—If the assessment-roll and affidavit are not returned, the court will presume that the affidavit conformed to the statute in respect to the statement of the rule of valuation.[3]

Sec. 101n. Same—Evidence as to value—Selling price of adjoining property.—It is said that in such a proceedings it is proper to receive in evidence conveyances of other property as establishing presumptively the price for which it had been sold, and also estimates as to its value, made as a basis for procuring loans or placing insurance upon it.[4]

Sec. 101o. Same—Appeal to general term.—It is thought that provisions of section 2140 of the Code of Civil Procedure

[1] L. 1880, c. 269, § 5; 2 N. Y. R. S., 8th ed., p. 1115.

[2] L. 1881, c. 269, § 8; 2 N. Y. R. S., 8th ed., p. 1115.

[3] People ex rel. v. Pond, 13 Abb. (N. Y.) N. C. 1 (1882).

[4] See People ex rel. v. Keator, 36 Hun (N. Y.) 592 (1885); affirming 67 How. (N. Y.) Pr. 277.

do not apply upon the hearing of an appeal from the judgment of the special term based upon the return of the certiorari issued under the act of 1880 to review an assessment of the relator's real estate made for the purpose of taxation by the town assessors.[1]

In People ex rel. v. Wyatt v. Williams,[2] it is held that upon *certiorari* to review the decision of the state assessors upon appeal to the supervisors of the city, from the equalization of assessments of the county made by its board of supervisors, the material facts being the value of the real estate of the small towns and in the city, the court should not refuse the judgment because of an error in the finding of them by the special term, unless it was clearly against the preponderance of proof.[3]

Errors of the referee in the admission of evidence taken by him for the use of the court on the hearing of the case are not available upon appeal from the judgment of the special term, except in those cases where the trial judge is called upon to make rulings as to the admissibility of the evidence by objection to or by motion to strike it out; and the record should show that this was done.[4]

In no case should a demand be reviewed on account of the omission of irrelevant and immaterial evidence, unless the appellate court has stated that the decision of the trial judge was improperly influenced thereby.[5]

Sec. 101p. Same—Appeal to court of appeals.—An appeal to the court of appeals must be taken within the time prescribed for appeals from orders.[6]

An appeal to the court of appeals will not be allowed from an order to set aside an order of reference in a proceeding by certiorari under the act of 1880, to refer and correct an

[1] People ex rel. v. Keator, 17 Abb. (N. Y.) N. C. 369 (1885); affirming 67 How. (N. Y.) Pr. 277.

[2] 17 Abb. (N. Y.) N. C. 366 (1885).

[3] See People ex rel. v. Keator, 17 Abb. (N. Y.) N. C. 369 (1885); affirming 67 How. (N. Y.) Pr. 277.

[4] People ex rel. v. Keator, 17 Abb. (N. Y.) N. C. 369 (1885), affirming 67 How. (N. Y.) Pr. 277.

[5] People ex rel. v. Keator, 17 Abb. (N. Y.) N. C. 369 (1885), affirming 67 How. (N. Y.) Pr. 277.

[6] People ex rel. v. Keator, 101 N. Y. 610 (1885).

alleged, illegal, erroneous, or unequal assessment, nor from the order making such reference.[1]

On an appeal to the court of appeals to review an assessment, only questions of law may be reviewed; the determination of the court below upon the question of value is final and conclusive where that question was fairly in dispute unless it appears that elements, proper to be considered, were excluded or improper ones considered, or that some legal errors vitiated the conclusion.[2]

Sec. 102. Same—Payment of Illegal Taxes—Readjustment of Accounts.—The comptroller may at any time revise and readjust any account theretofore settled against any person, association, corporation, or joint-stock company by himself or any preceding comptroller for taxes arising under this act or the act to which it is an amendment, whenever it shall be made to appear by evidence submitted to him that the same has been illegally paid or so made as to include taxes which could not have been lawfully demanded, and shall resettle the same according to law and the facts and charge or credit, as the case may require the difference, if any, resulting from such revision and resettlement upon the current accounts of such person, association, corporation or joint-stock company.[3]

Sec. 103. Same—Action of Comptroller—Review in Superior Court.—The action of the comptroller upon any application made to him by any person or corporation for a revision and resettlement of accounts as provided in this act, may be reviewed, both upon the law and the facts upon *certiorari* by the supreme

[1] People ex rel. v. Smith, 85 N. Y. 628 (1881.)

[2] People ex rel. v. Hicks, 105 N. Y. 198 (1887); affirming 40 Hun, (N. Y.) 598; People ex rel. v. Haupt, 104 N. Y. 377 (1887).

[3] L. 1889, c. 463, § 19.

court at the instance either of the party making such application or of the attorney-general in the name and in behalf of the people of this state, and for that purpose the comptroller shall return to such *certiorari* the accounts and all the evidence submitted to him on such application, and, if the original or resettled accounts shall be found erroneous or illegal by that court, either in point of law or of fact, the said accounts shall be there corrected and restated by the said supreme court ; and from any such determination of the supreme court an appeal may be taken by either party to the court of appeals as in other cases.

Sec. 104. Same—Warrant for Collection of Taxes—When Issued—How enforced.—After the expiration of thirty days from the service by the comptroller of notice of the settlement aforesaid, if no proceedings shall have been taken to review the same, as provided by this act, or if the deposit with the state treasurer of the amount of the said settlement, together with the undertaking, as provided for by this act, shall not then have been made, it shall be lawful for the comptroller to issue his warrant or warrants under his hand and seal of office directed to the sheriff of any county in this state, commanding him to levy upon and sell the goods and chattels, lands and tenements of the said corporation, joint-stock company or association found within the said county, for the payment of the amount of said settlement, together with the interest thereon and costs of executing such warrant, and to return the said warrant to the comptroller, and pay to the state treasurer the money which shall be collected by

[1] L. 1889, c. 463, § 20.

virtue thereof, by a certain time therein to be specified, not less than sixty days from the date of such warrant. Such warrant shall be a lien upon and shall bind the personal estate of the person, partnership, corporation, joint-stock company or association against whom it shall be issued, from the time an actual levy shall be made by virtue thereof, and the sheriff to whom such warrant shall be directed shall proceed upon the same in all respects with the like effect and in the same manner as prescribed by law in respect to executions issued against property upon judgments rendered by a court of record, and shall be entitled to the same fees and costs for his services in executing the same, to be collected in the same manner.[1]

Sec. 105. Same—Evasion of Law—Duty of Attorney-General and Comptroller.—For the better enforcement of chapter five hundred and forty-two, of the laws of eighteen hundred and eighty and the acts amendatory thereof,[2] it shall be lawful for any person having knowledge of the evasion of taxation under said acts by any association, corporation or joint-stock company liable to taxation thereunder, to report such fact to the comptroller, together with such information as may be in his possession as may lead to the recovery of such taxes from said association, corporation or joint-stock company; and whenever in the opinion of the attorney-general or comptroller the interest of the state require it, either of them is hereby authorized to employ such person so reporting such evasion to assist in the collection and preparation of evidence and in the prosecution and

[1] L. 1885, c. 501, § 18; 2 N. Y. R. S., 8th ed., 1158.

[2] See *ante*, §§ 90-104.

trial of suits for such taxes; and so much of the sum collected from such delinquent association, corporation or joint-stock company, by reason of such report or such services as shall have been agreed upon by such person and the attorney-general or comptroller as a compensation therefor shall be paid to such person, provided that the sum so paid shall not exceed ten per centum of the amount so collected; and provided further that nothing whatever shall be paid to such person for such purpose unless there shall be a recovery of taxes from such delinquent association, corporation or joint-stock company by reason of such report or such services.[1]

[1] L. 1886, c. 266, § 1; 2 N. Y. R. S. 8th, ed., 1158.

CHAPTER VII.

CHANGING PLACE OF BUSINESS—REORGANIZATION—"FULL LIABILITY" AS "LIMITED LIABILITY" COMPANIES—PROCEEDINGS NECESSARY—PAYMENT OF CAPITAL STOCK—AGREEMENT OF DIRECTORS—POWERS, RIGHTS AND LIABILITIES OF NEW COMPANY—RIGHTS OF CREDITORS—BUSINESS OF NEW COMPANY—"LIMITED" IN CORPORATE NAME—INDIVIDUAL LIABILITY OF STOCKHOLDERS—DISSOLUTION.

SEC. 106. Changing principal place of business.
SEC. 107. Reorganization—Mode of proceeding under business corporation act.
SEC. 107a. Same—Payment of tax.
SEC. 107b. Same—Extension of Corporate existence.
SEC. 108. Same—What companies may reorganize.
SEC. 109. Same—Reorganization of "full liability" companies as "limited liability" companies.
SEC. 110. Same—Proceedings necessary for reorganization.
SEC. 111. Same—Payment of capital stock.
SEC. 111a. Reorganized company—Payment of capital stock.
SEC. 112. Consolidation of corporations—Agreement of directors.
SEC. 112a. Same—Effect of consolidation.
SEC. 112b. Same—Suit to restrain.
SEC. 112c. Same—Consent of state.
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SEC. 112e. Same—Rights and privileges of new corporation.
SEC. 112f. Same—Liabilities.
SEC. 112g. Same—Conveyance of patent—Validity of deed.
SEC. 112h. Same—Action pending—Abatement and revival.
SEC. 112i. Same—Illegal combination—"Trusts."
SEC. 112j. Same—Trust certificates.
SEC. 112k. Same—Sugar refinery—Object of combination.
SEC. 112l. Same—Cotton seed oil trust.
SEC. 112m. Same—Gas trust.
SEC. 112n. Same—Contracts to form a monopoly.
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SEC. 112p. Same—Agreement not to compete.
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SEC. 114. Same—When completed.
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SEC. 117a. Liability after dissolution.
SEC. 118. Same—Business of new company.
SEC. 119. Classification of corporations.
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SEC. 120a. Liability—Transfer—Recission of contract.
SEC. 120b. Same—Individual liability to stockholders.
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SEC. 122. Word "Limited"—Use in corporate name—Penalty for omission.
SEC. 123. "Limited Liability" Companies.
SEC. 123a. Extension of time for the payment of capital stock.
SEC. 123b. "Debts."
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SEC. 123d. Stockholders liability—To creditors.
SEC. 123e. Same—To servants.
SEC. 123f. Same—On lease.
SEC. 123g. Same—Fixing date of lease.
SEC. 123h. Same—Action against stockholders—Injunction to restrain.
SEC. 123i. Right to sue stockholders—Several.
SEC. 123j. Same—Liability of directors and stockholders.
SEC. 123k. Same—Complaint—Sufficiency of.
SEC. 123l. Same—When right of action accrues.
SEC. 123m. Same—Payment in full.
SEC. 123n. Same—"Limited Liability" company.
SEC. 123o. Same—Evidence goods sold.
SEC. 123p. Same—Compulsory reference.
SEC. 123q. Same—Remedies of creditor.
SEC. 123r. Annual report—Failure to file.
SEC. 123s. Same—Compulsory reference.
SEC. 124. Dissolution—Liability not impaired by.
SEC. 124a. Dissolution by Legislature.
SEC. 124b. Dissolution of co-partners.
SEC. 124c. Same—When dissolution takes place.
SEC. 124d. Same—Liability of stockholders.
SEC. 124e. Same—Creditors remedy on dissolution.
SEC. 124f. Same—Effect at common law.
SEC. 124g. Same—Effect on property.
SEC. 124h. Same—Effect on suit pending.
SEC. 125. Extension of company's business—New certificate.

Sec. 106. Changing Principal Place of Business.—Such corporation may change its principal place of

business, by the consent of the stockholders owning two-thirds in amount of the capital stock of such corporation, in and by a certificate to be signed by such stockholders in person or by attorney duly authorized and acknowledged or proved, which certificate shall be filed in the office of the secretary of state and of the clerk of the county in which the principal business office of such corporation is situated; and the secretary of state and county clerk respectively shall, upon such filing, record the same in the record of corporations kept in his office, and make a memorandum of such record in the margin of the record of the original certificate recorded in such office, and thereupon the principal business office of such corporation shall be deemed to be changed as stated in said certificate.[1]

Sec. 107.—Reorganization under Business Corporation Act—Mode of Proceedings.—Any corporation heretofore or hereafter organized under the general laws of this state, except such corporations as are particularly excepted by the first section of this act from organizing thereunder, may come under and avail itself of the privileges and provisions of this act by complying with the following provisions: The directors of such corporation shall publish a notice, signed by at least a majority of them, in a newspaper published in the county in which the principal business office thereof is situated, for at least three successive weeks, and to deposit a written or printed copy thereof in the post office, postage prepaid, addressed to each stockholder, at his last known place of residence, at least three weeks previous to

[1] L. 1875, c. 611, § 31; 3 N. Y. R. S., 8th ed., p. 1985.

the day fixed upon for holding such meeting, specifying the object of the meeting, and the time and place when and where such meeting shall be held. At the time and place specified in the notice, the stockholders shall organize by choosing one of the directors chairman of the meeting, and, also, a suitable person for secretary, and proceed to a vote of those present, in person or by proxy; and if votes representing a majority of all the stock of the company shall be given in favor of availing itself of the provisions of this act, the said officers shall make a certificate of the proceedings, showing a compliance therewith, duly acknowledged, and stating:

1. The name of the corporation.
2. The object for which it is formed, including the nature and locality of its business.
3. The amount and description of the capital stock.
4. The number of shares of which such capital stock consists.
5. The location of the principal business office.
6. The duration of the corporation, which, however, shall not exceed fifty years.
7. The names of the directors for the ensuing year.

Which certificate, with a copy of the by-laws, of such corporation shall be filed in the office of the secretary of state, whereupon the secretary of state shall issue to said directors a certificate setting forth that said corporation is fully reorganized in accordance with this act. Such certificate of the secretary of state shall include a copy of the certificate of the proceedings (not including the by-laws), held, as hereinbefore set forth, the date and place of the stockholders' meeting, the names of the directors

elected, and a statement that all the provisions of this act have been duly observed in the reorganization of such corporation. A copy of such certificate shall, within ten days from the issuing thereof by the secretary of state, be filed in the office of the clerk of the county in which the principal business office of such corporation is situated. Such certificate shall be recorded at length in a book to be kept in the office of the secretary of state. For the issuing of this certificate of reorganization the secretary of state shall receive the same fee as is provided in section seven of chapter six hundred and eleven of the laws of eighteen hundred and seventy-five.[1] From the time of such filing, such corporation shall be deemed to be a corporation organized under this act, and if originally organized or incorporated under any general law of this state, shall have and exercise all such rights and franchises as it has heretofore had and exercised, under the laws pursuant to which it was originally incorporated. But such change of proceedings shall not in any way affect, change or diminish the existing liabilities of the corporation so availing itself of the provisions of this act.[2]

Sec. 107a. Reorganization—Payment of tax.—The New York Laws 1886, c. 143, providing that before the secretary of state shall issue a certificate of incorporation to any company he must be satisfied that the tax required, of one-eighth of one per cent. of the whole capital stock authorized, has been paid, applies to purchasers of the property of another corporation at foreclosure, who seek to form a new corporation to

[1] See *ante*, § 45.

[2] L. 1875, c. 611, § 32, as amended by L. 1885, c. 540, § 1; superseding L. 1881, c. 551, § 1, and L. 1880, c. 187, § 1; 3 N. Y. R. S., 8th ed., p. 1985.

succeed the former, under the New York Laws 1874, c. 430, as amended by Laws 1876, c. 446, providing for the reorganization of such companies by the purchasers of their property, and that when reorganized they shall succeed to the rights, franchises, and privileges of the former corporation ; because, although succeeding to the rights of the former, the latter is a new corporation.[1]

The act does not, when applied to a corporation so reorganized impair the obligation of a contract, though the mortgages under which the sale was made were executed before its passage.[2]

Sec. 107b. Extension of corporate existence.—Chapter 187 of laws of 1880 amending this section applies only to existing corporations.[3] The amendatory act of 1881, c. 551 validated the proceedings taken under the act of 1875 by any company during the term of its corporate existence, for the purpose of extending its existence ; and it was competent for the legislature to enact such a law and to render valid the proceedings which would othewise be invalid.[4]

The act of 1876 c. 135, as amended by the laws of 1879, c. 253 empowering turnpike and plankroad companies to extend their charters, so far as relates to the companies within its provisions abrogated the modes prescribed by chapter 937 of the laws of 1867, and chapter 611 of the laws of 1875, for extending their charters.[5] The exemption of the counties of Kings and Orange, from the operation of the act of 1876, did not make it a local act within the meaning of the constitution, and the act of 1879, extending said act of 1876 to the county of Orange, is not a local act.[6]

[1] People ex rel. Shurz v. Cook, 110 N. Y. 443 (1888); s. c. 18 N. E. Rep. 113, 4 Ry. & Corp. L. J. 513; aff'g 47 Hun (N.Y.) 467, 637.

[2] People ex rel. Schurz v. Cook, 110 N. Y. 443 (1888); s. c. 18 N. E. Rep. 113; 4 Ry. & Corp. L. J. 513, aff'g 47 Hun (N.Y.) 467, 637.

[3] People ex rel. Clauson v. Newburgh & Shawangank Plank Road Co., 86 N. Y. 1 (1881).

[4] People ex rel. Clauson v. Newburgh & Shawangank Plank Road Co., 86 N. Y. 1 (1881).

[5] People ex rel. Clauson v. Newburgh & Shawangank Plank Road Co., 86 N. Y. 1 (1881).

[6] People ex rel. Clauson v. Newburgh & Shawangank Plank Road Co., 86 N. Y. 1 (1881).

Sec. 108. Same—When Companies may Reorganize.—The provisions of this act shall apply to and include any corporation which might, under the terms of this act, come under and avail itself of the said act hereby amended, and which shall have heretofore taken proceedings and filed papers as required by said last-mentioned act, for the purpose of coming under the same and availing itself of the provisions thereof; and when any corporation, such as is described in the first section of this act, has heretofore and during the term of its original corporate existence, taken the proceedings and filed the papers specified therein, as required by said act (chapter six hundred and eleven of the laws of eighteen hundred and seventy-five), for the purpose of coming under the same and extending its corporate existence thereunder, such proceedings shall be held valid and effectual for such purposes; and, in such case, the same rights, franchises and liabilities shall belong and attach to any such corporation as if such proceedings had been taken after the passage of this act.[1]

Sec. 109. Same—Reorganization of "Full Liability Companies," as "Limited Liability" Companies.—Any corporation now or heretofore or hereafter to be organized as a corporation doing business as and belonging to a class known as a "Full liability company," under an act entitled "An act to provide for the organization and regulation of certain business corporations," passed June twenty-one, eighteen hundred and seventy-five, may become a corporation belonging to a class known as "Limited liability companies," with all the rights, privileges and duties,

[1] L. 1880, c. 187, § 2; as amended by L. 1881, c. 551. See note to preceding section.

and subject to all the regulations and liabilities pertaining to the same, together with the privilege and right of retaining and continuing the corporate name, with the word "limited" as its last word, in such cases, and in manner and form as stated in this act.[1]

Sec. 110. Same — Proceedings Necessary for Reorganization.—Any such full liability company, which at the time of availing itself of the privileges of this act, whose debts, liabilities or other obligations at such time, shall not be greater than the amount of the capital stock of such company actually paid and unimpaired, may become a limited liability company, as stated in section one of this act,[2] by complying with the following provisions: The directors of such corporations shall publish a notice, signed by at least a majority of them, in a newspaper published in the county in which the principal business office thereof is situated, for at least three successive weeks, once each week, and to deposit a written or printed copy thereof in the post office, postage prepaid, addressed to each stockholder at his last known place of residence, at least two weeks previous to the day fixed upon for holding such meeting, specifying the object of the meeting, and the time and place when and where such meeting shall be held. At the time and place specified in the notice, the stockholders shall organize by choosing one of the directors chairman of the meeting, and also a suitable person for secretary, and proceed to a vote of those present, in person or by proxy; and if votes representing a majority of all the stock of

[1] L. 1885, c. 535, § 1; 3 N. Y. R. S., 8th ed., p. 1989.

[2] *Ante*, § 109.

the company shall be given in favor of availing itself of the provisions of this act, the said chairman and secretary, with two other directors, shall make a certificate of the proceeding, showing a compliance with this act, duly acknowledged, and stating:

1. The name of the corporation.
2. The original object for which it was formed.
3. The amount and description of the capital stock, and in how many shares the same is divided.
4. The location of the principal business office.
5. The duration of the corporation, which, however, shall not exceed fifty years.
6. The names of the directors for the ensuing year.

Which certificate, with a copy of the by-laws of such corporation shall be filed in the office of the secretary of state, and of the clerk of the county in which the principal business office of such corporation is situated. From the time of such filing such corporation shall be deemed to be a limited liability corporation, as if originally organized as such, and shall have and exercise all such rights and franchises as it has heretofore had and exercised, and any stockholder or officer thereof shall not be subject to any greater liability than if such corporation had been originally organized as a limited liability company.[1]

Sec. 111. Same—Payment of Capital Stock.—It is further provided, that in case the capital stock of any such corporation availing itself of the privileges of this act shall not be paid up in full at such time, that in that case the time for the payment of such capital stock shall begin to run from the time of such new reorganization, and the time and manner

[1] L. 1885, c. 535, § 2; 3 N. Y. R. S., 8th ed., p. 1989.

in which the same shall be paid shall be the same as if such corporation had been originally organized at such time as a limited liability company.[1]

Sec. 111a. Reorganized company—Payment of capital stock.—Chapter 519 of Laws of 1889 requires the capital stock of all corporations organized since May 1, 1884, as limited liability companies, to be paid in within one year from June 15, 1889.

Sec. 112. Consolidation of Corporation—Agreement of Directors.—Any two or more corporations heretofore or hereafter organized under any general or special law of this state, for the purpose of carrying on any kind of manufacturing business of the same or of a similar nature, are hereby authorized to consolidate such companies into a single corporation in the manner following: The respective boards of directors, or of the trustees, of any two or more of such corporations, may enter into and make an agreement, under their respective corporate seals, for the consolidation of the said corporations, prescribing the terms and conditions thereof, the mode of carrying the same into effect, the name of the new corporation, the number of the trustees thereof (not less than three nor more than thirteen), the names of the trustees who shall manage the concerns of the new company for the first year, and until others shall be elected in their places, the term of existence of such new company, not exceeding fifty years, the name of the town or towns, county or counties in which the operations of the new company are to be carried on; and if such companies proposed to be consolidated, or either of them, shall have been organized for the purpose of carrying on any part of their or its business in any place out of this state,

[1] L. 1885, c. 535, § 3, 3 N. Y. R. S., 8th ed., p. 1990.

and the said new company shall propose to carry on any part of its business out of this state, the said agreement shall so state, and it shall also state the name of the town or city and county in which the principal part of the business of said new company within the state is to be transacted; the amount of capital, the number of shares of the stock into which the same is to be divided (which capital shall not be larger in amount than the fair aggregate value of the property, franchises and rights of the several companies thus to be consolidated, but which may be increased in accordance with the provisions of the act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February seventeenth, eighteen hundred and forty-eight, and any acts amending the same), and the manner of distributing such capital among such consolidated corporations or the holders of the stock of the same, with such other particulars as they may deem necessary.[1]

Sec. 112a. Same—Effect of consolidation.—The general effect of a consolidation of two or more corporations is the formation of a new corporation and the dissolution of the corporations thus joined.[2] The mere agreement to consolidate creates a new corporation;[3] and the powers and privileges of such new corporation may be designated by reference to the char-

[1] L. 1884, c. 367, § 1; 3 N. Y. R. S., 8th ed., p. 1976.

[2] Atlanta & R. A. L. R. Co. v. State, 63 Ga. 483 (1879); Racine & M. R. Co. v. Farmer's L. & T. Co., 49 Ill. 349 (1868); McMahan v. Morrison, 16 Ind. 172 (1861); State v. Bailey, 16 Ind. 46 (1861); Atl. & G. R. Co. v. Georgia, 98 U. S. (8 Otto) 935 (1878); bk. 25 L. ed. 185; Shields v. Ohio, 95 U. S. (5 Otto) 319 (1877); bk. 24 L. ed. 357; Clearwater v. Meredith, 68 U. S. (1 Wall.) 25, 40 (1863); bk. 17 L. ed. 604, 608; Ridgeway Township v. Griswold, 1 McC. C. C. 151 (1878); State v. Chicago B. & Q. R. R. Co., 2 L. A. R. 564. See Meyer v. Johnson, 64 Ala. 653 (1879.)

[3] See Bishop v. Brainerd, 28 Conn. 289 (1859); Ohio & M. R. Co. v.

ters of the old companies.[1] It has been said that the question whether the corporation thus formed is a new corporation within the meaning of the act of the legislature of a particular state, is simply a question of statutory construction.[2] The new company thus formed takes its charter subject to existing laws,[3] and subject to the general law that any act of incorporation subsequently passed shall be liable to amendment, alteration or repeal.[4]

The distinguishing feature of a consolidation of two or more corporations has been said to be the union of the shareholders of such corporations thereby forming the company; and that this action is essentially different from the purchase

People, 123 Ill. 467 (1888); s. c. 12 West. Rep. 608; Covington & C. Bridge Co. v. Mayer, 31 Ohio St. 317 (1877); Graham v. Boston H. & E. R. Co., 118 U. S. (18 Otto) 161 (1885); bk. 30 L. ed. 196; St. Louis I. M. & S. R. Co. v. Berry, 113 U. S. 465 (1885); bk. 28 L. ed. 1055; Shields v. Ohio, 95 U. S. (5 Otto) 319 (1877); bk. 24 L. ed. 357; 2 Morawetz Priv. Corp., §§ 1000, 1001.

[1] See Maine Cent. R. Co. v. Maine, 96 U. S. (6 Otto) 499 (1877); bk. 24 L. ed. 836.

[2] Crawfordsville & S. W. T. P. Co. v. Fletcher, 104 Ind. 97 (1885); s. c. 1 West. Rep. 247; Paine v. Lake Erie & L. R. Co., 31 Ind. 283 (1861); McMahan v. Morrison, 16 Ind. 172 (1861); Central R. & Banking Co. v. Georgia, 92 U. S. (2 Otto) 665 (1875); bk. 23 L. ed. 757. See Zimmer v. State, 30 Ark. 677 (1875); Bishop v. Brainerd, 28 Conn. 289 (1859); Platt v. New York & B. R. Co., 26 Conn. 544 (1857); Atlanta & R. A. L. R. Co. v. State of Georgia, 63 Ga. 483; s. c. 1 Am. & Eng. R. R. Cas. 399 (1879); Chicago R. I. & P. R. Co. v. Moffitt, 75 Ill. 524 (1874); McMahan v. Morrison, 16 Ind. 172 (1861); State v. Bailey, 16 Ind. 46 (1861); Fee v. New Orleans G. L. R. Co., 35 La. An. 413 (1883); Thompson v. Abbott, 61 Mo. 176 (1875); Commonwealth v. Atlantic & G. W. R. Co., 53 Pa. St. 9 (1866); Baltimore & O. R. Co. v. Gallahue's Admrs., 12 Gratt. (Va.) 655 (1855); Goshorn et al. v. Supervisors, 1 W. Va. 308 (1865); Louisville & N. R. Co. v. Palmes, 109 U. S. 244 (1883); bk. 27 L. ed. 922; Maine Cent. R. Co. v. Maine, 96 U. S. (6 Otto,) 509 (1877); bk. 24 L. ed. 836; s. c. 66 Me. 488; Shields v. Ohio, 95 U. S (5 Otto) 319 (1877); bk. 24 L. ed. 357; Clearwater v. Meredith, 68 U. S. (1 Wall.) 25 (1863); bk. 17 L. ed. 604; Ridgway v. Griswold, 1 McCrary, C. C. 151 (1878).

[3] See Shields v. Ohio, 95 U. S. (5 Otto,) 319 (1877); bk. 24 L. ed. 357; Peik v. Chicago & N. W. R. Co., 94 U. S. (4 Otto,) 177 (1876); bk. 24 L. ed. 98.

[4] See Atlanta & R. A. L. R. Co. v. State, 63 Ga. 483 (1879); Powell v. North Missouri R. Co., 42 Mo. 63 (1867); Atlantic & G. R. Co. v. Georgia, 98 U. S. (8 Otto) 359 (1878); bk. 25 L. ed. 185.

by such new corporation of the property and concerns of another corporation at a foreclosure sale.[1]

Where a new corporation is formed by the union of two or more existing corporations the new corporation must pay the taxes on the property of the consolidating corporations, which is not exempt from taxation, there being no provision to the contrary in the act of consolidation.[2] Where there is an exemption from taxation on the part of one of the consolidating companies this exemption is carried to the new company in those cases where the act authorizing the consolidation declares that the new company shall have the powers and franchises of the former companies.[3]

It is said by the supreme court of Louisiana in the case of Board of Administrators of the Charity Hospital v. New Orleans, Gas-Light Co.[4] that the legal effect of the consolidation of two corporations under the provisions of Louisiana act No. 157 of 1874 is a perfect amalgamation which terminates the existence of the consolidating companies as separate autonomies, and operates the creation of a new one thus concentrated in one corporation, the members, the property and the capital stock of both. The consolidating corporation not only assumes duties and obligations similar to those of the former corporation, but it will be held on the very identical liabilities and obligations incurred by either of the other companies.

Sec. 112b. Same—Suit to restrain.—Where the directors or

[1] See Houston & T. C. R. Co. v. Shirley, 54 Tex. 125 (1880).

[2] Branch v. Charleston, 92 U. S. (2 Otto) 677 (1875); bk. 23 L. ed. 750; Southwestern R. Co. v. Georgia, 92 U. S. (2 Otto,) 676 (1875); bk. 23 L. ed. 762; Central R. & Banking Co. v. Georgia, 92 U. S. (2 Otto,) 665 (1875); bk. 23 L. ed. 757; Tomlinson v. Branch, 82 U. S. (15 Wall.) 460 (1872); bk. 21 L. ed. 189; Philadelphia & W. R. Co. v. Maryland, 51 U. S. (10 How.) 376 (1850); bk. 13 L. ed. 461.

[3] Branch v. Charleston, 92 U. S. (2 Otto,) 677 (1875); bk. 23 L. ed. 750; Southwestern R. Co. v. Georgia, 92 U. S. (2 Otto) 676 (1875); bk. 23 L. ed. 762; Central R. & Banking Co. v. Georgia, 92 U. S. 665 (1875); bk. 23 L. ed. 757; Humphrey v. Pegues, 83 U. S. (16 Wall.) 244 (1872); bk. 21 L. ed. 326; Tomlinson v. Branch, 82 U. S. (15 Wall.) 460 (1872); bk. 21 L. ed. 189; Philadelphia & W. R. Co. v. Maryland, 51 U. S. (10 How.) 376 (1850); bk. 13 L. ed. 461.

[4] 40 La. An. 382 (1888); s. c. 4 Ry. & Corp. L. J. 115.

trustees of a corporation are about to consolidate with another corporation or corporations without due authority, an injunction lies at the suit of a stockholder to restrain such action.[1] The dissenting stockholders may, instead of enjoining the consolidation, exact compensation for their interest in the consolidating company,[2] and thereby be relieved from all liability on their original subscription;[3] but to be enabled to do this they must show that they dissented from the consolidation within a reasonable time.[4]

Sec. 112c. Same—Consent of the state.—At common law corporations have no powers except such as are conferred by the act creating them, and they have no such inherent power as would authorize the forming of a partnership or the consolidation of two or more corporations into one,[5] hence it follows that a corporation cannot, without special authority of the state to do so, consolidate with another corporation

[1] Clearwater v. Meredith, 68 U. S. (1 Wall.) 25 (1863); bk. 17 L. ed. 604; Pearce v. Madison & I. R. Co., 62 U. S. (21 How.) 442 (1858); bk. 16 L. ed. 184; Mowrey v. Indianapolis &. C. R. Co., 4 Biss. C. C. 78 (1866). See Rogers v. Lafayette Agricultural Works, 52 Ind. 296 (1875); Big Mt. Improvement Company's Appeal, 54 Pa. St. 361 (1867); Stevens v. Rutland & B. R. Co., 29 Vt. 545 (1851); Mowrey v. Indianapolis & C. R. Co., 4 Biss. C. C. 85 (1866); Mayor, etc., of Knoxville v. Knoxville & O. R. Co., 22 Fed. Rep. 758 (1884); *Compare*, Terhune v. Midland R. Co., 38 N. J. Eq., (11 Stew.) 423 (1884); Biscoe v. Great Eastern R. Co., L. R. 16 Eq. 636 (1873).

[2] McVickar v. Ross, 55 Barb. (N. Y.) 247 (1869); Taylor v. Earle, 8 Hun, (N. Y.) 1 (1876); Frothingham v. Barney, 6 Hun, (N. Y.) 366 (1876); Treadwell v. Salisbury Manuf. Co., 73 Mass. (7 Gray) 393 (1856); Lauman v. Lebanon Val. R. Co., 30 Pa. St. 42 (1858); International & G. R. Co. v. Bremond, 53 Tex. 96 (1880); Erwin v. Oregon R. & Nav. Co., 27 Fed. Rep. 635 (1886.)

[3] Hartford & N. H. R. Co. v. Crosswell, 5 Hill, (N. Y.) 383 (1843); Illinois G. R. R. Co. v. Cook, 29 Ill. 237 (1862); Shelbyville & R. Turnpike Co. v. Barnes, 42 Ind. 498 (1873); McCray v. Junction R. Co., 9 Ind. 359 (1857); Fisher v. Evansville & C. R. Co., 7 Ind. 407 (1856); Clearwater v. Meredith, 68 U. S. (1 Wall.) 25 (1863); bk. 17 L. ed. 604.

[4] Martin v. Pensacola & G. R. Co., 8 Fla. 370 (1859); Marietta & C. R. Co. v. Elliott, 10 Ohio St. 57 (1859). See, also Troy & Rutland R. Co. v. Kerr, 17 Barb. (N. Y.) 581 (1854); Bish et al. v. Johnson et al., 21 Ind. 299 (1863); New Orleans J. &. G. N. R. Co. v. Harris, 27 Miss. 517 (1854).

[5] See New York & S. Canal Co. v. Fulton Bank, 7 Wend. (N. Y.) 412 (1831); Marine Bank v. Ogden, 29 Ill. 248 (1862); Whittenton Mills v. Upton, 76 Mass. (10 Gray) 582 (1858); State ex rel. Attorney-General v.

or corporations.[1] Such authority may be given by statute or general law[2], or by the original charters of the consolidating companies,[3] by statute passed prior to the consolidation[4] or by subsequent statute ratifying an unauthorized consolidation;[5] but the consent of the state must be given in some

Atchison & N. R. Co., 24 Neb. 143 (1888); s. c. 8 Am. St. Rep. 164 and note 179–202; State v. Concord R. Co., (N. H.) 13 Am. & Eng. R. R. Cas. 94 (1883); Burke v. Concord R. Co., 61 N. H. 160 (1881); s. c. 8 Am. & Eng. R. R. Cas. 552; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173 (1871); Smith v. Smith, 3 Desaus. (S. Cr.) Eq. 557 (1813); Mallory v. Hanaur Oil Works, 86 Tenn. 598 (1888); s. c. 4 Ry. Corp. L. J. 202; 20 Am. & Eng. Corp. Cas. 478; Charlton v. Newcastle & C. R. Co., 5 Jur. N. S. 1097 (1859).

[1] See Blatchford v. Ross, 5 Abb. (N. Y.) Pr. N. S. 434 (1869); s. c. 54 Barb. (N. Y.) 42; New York & S. C. Co. v. Fulton Bank, 7 Wend. (N. Y.) 412 (1831); Aspinwall v. Ohio & Miss. R. Co., 20 Ind. 492 (1863); Black v. Delaware & R. Canal Co., 24 N. J. Eq. (9 C. E. Gr.) 455 (1873); Clearwater v. Meredith, 68 U. S. (1 Wall.) 25 (1863); bk. 17 L. ed. 604; Pearce v. Madison & I. R. Co., 62 U. S. (21 How.) 442 (1858); bk. 16 L. ed. 184; Mowrey v. Indianapolis & C. R. Co., 4 Biss. C. C. 78 (1866); Clinch v. Financial Corp. L. R., 5 Eq. 450 (1868); Charlton v. Newcastle & C. R. Co., 5 Jur. N. S. 1096 (1859).

[2] See 1 Ala. Civ. Code, §§ 1541–46, 1565–69, 1583–85; Ark. Rev. Stat. (1874), § 4969; Cal. Civ. Code, § 361; Colo. Gen. Stat. (1883), § 349, p. 209; Conn. Rev. Gen. Stats. (1875), §§ 3–6, p. 307; Idaho Rev. Stats., § 2673; Ill. Rev. Stat. (1887), § 50, p. 340; Ind. Rev. Stat. (1881), art. 4, §§ 3965. 79; Iowa Rev. Code (1884), § 1275, p, 332; Kan. Comp. L. (1885), § 47, p. 778; La. Const. (1879), art. 246, also Act of Dec. 12th, 1874, and acts 1875, p. 18; Mich. Howell Stats. (1882), §§ 3343–44, 3932–33, 4043–47, 4056–60. 4100–4103, 4643–44; Minn. Rev. Stat. (1878), §§ 66–68, p. 381, also Act of March 3rd, 1881, P. L. 109; Mo. Rev. Stat. (1879), § 789; Cont. (1875), § 18, art. 411; Neb. Comp. Stat. (1885), §§ 89–91, p. 198; New Jersey Sup. to Rev. Stats. (1877–86), § 20, p. 828, §§ 71–75, p. 164; 2 Nev. Comp. L. (1873), § 3465, p. 301; Ohio Rev. Stat. of (1884), §§ 3379–92; Pa. Prud. Stats. 11th ed., § 1429–31. See also Act April 29th (1874), § 42 P. L. 106, Act of May 16th (1861), Act of March, 24th (1865), Const. art 17, § 4; S. C. Gen. Sts. (1882), §§ 1425–32; Tex. Rev. Stats. (1879), art. 627, p. 104; W. Va. Code (1887), 2nd ed., § 53, p. 521; Wis. Rev. Stats. (1878), § 1777, p. 518, § 1833, p. 536.

[3] Sparrow v. Evansville & C. R. Co., 7 Ind. 369 (1856); Nugent v. Putnam County, 86 U. S. (19 Wall., 241 (1873); bk. 22 L. ed. 83.

[4] Black v. Delaware & R. C. Co.) 24 N. J. Eq. (9 C. E. Gr.) 455 (1873); Fisher v. Evansville & C. R. Co., 7 Ind. 412 (1856).

[5] Mead v. New York H. & N. R. Co., 45 Conn. 219 (1877); Bishop v. Brainerd, 28 Conn. 289 (1859); McAuley v. Columbus C. & I. C. R. Co., 83 Ill. 352 (1876); State Treasurer v. Auditor-General, 46 Mich. 224 (1881); Black v. Delaware & R. C. Co., 24 N. J. Eq. (9 C. E. Gr.) 455 (1873). See Matter of Prospect Park Co., 67

legal form,[1] for such consolidation cannot be made from implied authority, but only by the express sanction of law.[2]

Where the consolidation of two or more corporations is authorized by statute a corporation may consolidate with any other which it may select for a union and finds willing to join it, although the latter is not mentioned in the statute;[3] but the provisions of the statute providing for the consolidation must be carefully observed with respect to the steps required to be taken to accomplish that result.[4] However, an unauthorized consolidation may be subsequently ratified by statue.[5]

Sec. 112d. Same—Consent of stockholders.—It has been frequently held that the consolidation of several corporations cannot be affected without the unanimous consent of the stockholders of each company; and that such consent cannot be inferred as an implied condition of the charter or articles of association of the various corporations;[6] and the majority

N. Y. 371 (1876); Mitchell v. Deeds, 49 Ill. 418 (1867); Hill v. Nisbet, 100 Ind. 341 (1884). *Compare*, State v. Consolidation Coal Co., 46 Md. 11 (1876).

[1] Crawfordsville & S. W. Turnpike Co. v. Fletcher, 104 Ind. 97 (1885); s. c. 1 West. Rep. 247; Shelbyville & R. Turnpike Co. v. Barnes, 42 Ind. 498 (1873); Aspinwall v. Ohio & M. R. Co., 20 Ind 492 (1863); State v. Bailey, 16 Ind. 51 (1861); Booe v. Junction R. Co., 10 Ind. 93 (1857); Clearwater v. Meredith, 68 U. S. (1 Wall.) 25 (1863); bk. 17 L. ed. 604; Pearce v. Madison & I. R. Co., 62 U. S. (21 How.) 442 (1858); bk. 16 L. ed. 184.

[2] Aspinwall v. Ohio & M. R. Co., 20 Ind. 492 (1863); Fisher v. Evansville & C. R. Co., 7 Ind. 407 (1856); Clearwater v. Meredith, 68 U. S. (1 Wall.) 25 (1863); bk. 17 L. ed. 604; Pearce v. Madison & I. R. Co., 62 U. S. (21 How.) 442 (1858); bk. 16 L. ed. 184.

[3] In re Prospect Park R. Co., 67 N. Y. 371 (1876).

[4] Tuttle v. Michigan Air Line R. Co., 35 Mich. 247 (1877); Mansfield C. & L. M. R. Co. v. Drinker, 30 Mich. 124 (1874); Peninsular R. Co. v. Tharp, 28 Mich. 506 (1874).

[5] Mead v. New York H. & N. R. Co., 45 Conn. 199 (1877); Bishop v. Brainerd, 28 Conn. 289 (1859); Mitchell v. Deeds, 49 Ill. 416 (1867).

[6] Troy & Rutland R. Co. v. Kerr, 17 Barb. (N. Y.) 581 (1854); Fulton Co. v. Mississippi & W. R. Co., 21 Ill. 338 (1859); Shelbyville & R. Turnp. Co. v. Barnes, 42 Ind. 498 (1873); Booe v. Junction R. Co., 10 Ind. 93 (1857); McCray v. Junction R. Co., 9 Ind. 359 (1857); Tuttle v. Michigan Air Line R. Co., 35 Mich. 247 (1877); New Orleans J. & G. N. R. Co. v. Harris, 27 Miss. 517 (1854); Zabriskie v. Hackensack & N. Y. R. Co., 18 N. J. Eq. (3 C. E. Gr.) 183 (1867); Indiana & E. Turnpike Road Co. v. Phillips, 2 Pen. & W. (Pa.)

of the stockholders cannot make a dissenting stockholder a member of the new company.[1]

The consent of all the stockholders must be given, even when the consolidation is sanctioned by statute, unless such action is contemplated in the original contract of subscription.[2]

Sec. 112e. Same—Rights and Privileges of new corporation— The general rule is that the new corporation created by the consolidation of two or more corporations succeeds to the privileges, rights and powers of the constituent corporations, and is subject to all the restraints and liabilities of the old ones out of which it was formed, unless the statute regulating the consolidation provides otherwise.[3]

But it has been held that in those cases where the statute authorizing a consolidation of corporations confers the rights and privileges of each upon the new company, such privileges extend only to the property had.[4]

184 (1830); Clearwater v. Meredith, 68 U. S. (1 Wall.) 25 (1863); bk. 17 L. ed. 604; Pearce v. Madison & I. R. Co., 62 U. S. (21 How.) 442 (1858); bk. 16 L. ed. 184; Mowrey v. Indianapolis & C. R. Co., 4 Biss. C. C. 83 (1866); State v. Chicago B. & Q. R. Co., 2 L. R. A. 564 (1888); Dougan's Case, L. R. 8 Ch. 540 (1873); Clinch v. Financial Corp., L. R. 4 Ch. 117 (1868); 1 Morawetz Priv. Corp., 376. *Compare* Sprague v. Illinois R. R. Co., 19 Ill. 177 (1857).

[1] Lauman v. Lebanon Val. R. Co., 30 Pa. St. 42 (1858). See bowever, Treadwell v. Salisbury Manuf. Co., 73 Mass. (7 Gray) 393 (1856); Hodges v. New England Screw Co., 1 R. I. 347 (1850) s. c. 53 Am. Dec. 624.

[2] Sparrow v. Evansville & C. R. Co., 7 Ind. 369 (1856). See also Sprague v. Illinois R. Co., 19 Ill. 174 (1857); Bish v. Johnson, 21 Ind. 299 (1863); Hanna v. Cincinnati & F. W. R. Co., 20 Ind. 30 (1863); Atchison C. & P. R. Co. v. Phillips Co., 25 Kan. 261 (1881), Nugent v. Supervisors, 86 U. S. (19 Wall.) 241 (1873); bk. 22 L. ed. 83; Cork & Youghal R. Co. v. Patterson, 18 C. B. 414 (1856); s. c. 37 Eng. L. & E. p. 398.

[3] Zimmer v. State, 30 Ark. 677 (1875); Chicago R. I. & P. R. Co. v. Moffitt, 75 Ill. 524 (1874); Crawfordsville & S. W. Turnpike Co. v. Fletcher, 104 Ind. 97 (1885); s. c. 1 West. Rep. 247; Scott v. Hnasheer, 94 Ind. 1 (1883); Paine v. Lake Erie & L. R. Co., 31 Ind. 283 (1869); Indianapolis C. & L. R. Co. v. Jones, 29 Ind. 465 (1868); Tennessee v. Whitworth, 117 U. S. 139 (1886); bk. 29 L. ed. 833; Green County v. Conness, 109 U. S. 104 (1883); bk. 27 L. ed. 872; Scotland County v. Thomas, 94 U. S. (4 Otto) 682 (1876); bk. 24 L. ed. 219; Branch v. Charleston, 92 U. S. (2 Otto) 677 (1875); bk. 23 L. ed. 750; Tomlinson v. Branch, 82 U. S. (15 Wall.) 460 (1872); bk. 21 L. ed. 189; Philadelphia & W. R. Co. v. Maryland, 51 U. S. (10 How.) 376 (1850); bk. 13 L. ed. 461.

[4] Chesapeake & O. R. Co. v. Virginia, 94 U. S. (4 Otto) 718 (1876); bk. 24 L. ed. 310.

Sec. 112f. Same—Liabilities.—Where two or more corporations consolidate forming a new corporation, such new corporation succeeds not only to all the property and franchises, but also to all the liabilities and duties of the former companies.[1] But it is said in the case of Wabash St. L. & P. R. Co. v. Ham,[2] that the new corporation thus formed upon the consolidation of two or more corporations is not subject to any lien in favor of bonds of one of the old companies, issued after the passage of the statutes authorizing the consolidation, unsecured by mortgage or lien before the consolidation, and the holders of which had not exchanged or offered to exchange them for bonds of the consolidated company before the proceedings for foreclosure.

Sec. 112g. Same—Conveyance of patent—Validity of deed.—
—Where two corporations were consolidated pursuant to the laws of the state of New York,[3] and prior to the consolidation the president and secretary of one of them were duly authorized to convey by deed to the consolidated corporation certain letters-patent, which deed of assignment was not executed until after the consolidation and the consequent dissolution of the corporation purporting to make the conveyance, the court held the deed so subsequently executed pursuant to the authority conferred upon the corporate officers during the existence of the corporation, valid and effectual to convey to the new corporation the legal title to such letters-patent.[4]

[1] People v. Louisville & N. R. Co., 120 Ill. 48 (1887); s. c. 8 West. Rep. 347; Board of Administrators of the Charity Hospital v. New Orleans Gas-Light Co., 40 La. An. 382 (1888); s. c. 4 Ry. & Corp. L. J. 115. See Angier v. East Tennessee V. & G. R. Co., 74 Ga. 634 (1885); Fee v. New Orleans Gas Co., 35 La. An. 416 (1883); Plainview v. Winona & St. P. R. Co., 36 Minn. 505 (1887); s. c. 32 N. W. Rep. 745; State v. Northern Pac. R. Co., 36 Minn. 207 (1886); s. c. 30 N. W. Rep. 663; Louisville Gas Co. v. Citizens Gas Co., 115 U. S. 697 (1885); bk. 29 L. id. 510; Atlantic & G. R. Co. v. Georgia, 98 U. S. (8 Otto) 362 (1878); bk. 25 L. ed. 185; Maine Cent. R. Co. v. Maine, 96 U. S. (6 Otto) 510 (1877); bk. 24 L. ed. 836; Shields v. Ohio, 95 U. S. (5 Otto) 323 (1877); bk. 24 L. ed. 357; Clearwater v. Meredith, 68 U. S. (1 Wall.) 25 (1863); bk. 17 L. ed. 604.

[2] 114 U. S. 587 (1885); bk. 29 L. ed. 35.

[3] L. of 1884, c. 367, §§ 5 and 6.

[4] Edison Electric Light Co. v. New Haven Electric Co., 35 Fed. Rep. 233 (1888); s. c. 4 Ry. & Corp. L. J. 4 (1888).

Sec. 112h. Same—Action pending—Abatement and revival.—In the case of Edison Electric Light Co. v. Westinghouse,[1] the United States circuit court for the district of New Jersey held that under this act a corporation by consolidating with other corporations does not thereby cause the abatement of actions which are pending at the time, and that the provisions of the New York statute are binding upon the federal as well as state courts in regard to this matter.

Sec. 112i. Same—Illegal combinations—"Trusts."—A corporation that has entered into an illegal "trust" combination is estopped from setting up the illegality of the combination in an action against the receiver of the "trust."[2]

Corporations cannot enter into a combination, similar to a partnership between individuals, massing their stock, and sharing profits and losses, without express authority by charter; and such action gives the state a right to forfeit their franchises.[3]

Sec. 112j. Same—Trust certificates.—Under a "trust deed," all the shareholders of certain corporations engaged in sugar refining surrendered all their stock to trustees, and received "trust certificates," issued to the corporations in proportion to the value of their plants. Certain partnerships took corporate form for the sole purpose of becoming members of the trust. The trustees were to receive the profits from every plant, and divide them as dividends on the certificates, among the holders. A dividend was declared and paid from profits paid in by the corporations. Though each corporation retained its directors, these had no power, and held office at the pleasure of the trustees. For the benefit of the combination, and under authority of the deed, mortgages were placed on the property of some of the corporations. The court held that this was corporate combination, as distinguished from an agreement among shareholders.[4]

[1] 34 Fed. Rep. 232 (1888); s. c. 4 Ry. & Corp. L. J. 428.

[2] Pittsburgh Carbon Co. v. McMillin, 53 Hun (N. Y.) 67 (1889); s. c. 6 N. Y. Sup. 433.

[3] People v. North River Sugar Refining Co., 3 N. Y. Sup. 401 (1889); s. c. 19 N. Y. St. Rep. 853; 5 Ry. & Corp. L. J. 56; 22 Am. & Eng. Corp. Cas. 511.

[4] People v. North River Sugar Refining Co., 3 N. Y. Sup. 401 (1889);

Sec. 112k. Same—Sugar refinery—Object of combination.—The purposes of a combination of sugar refining corporations, as stated in the trust deed, were, *inter alia*, to furnish protection against unlawful combinations of labor; to protect against inducements to lower the standard of refined sugars; to promote the interests of the parties in all lawful and suitable ways. Provision was made for bringing in every other existing refinery, and four others were brought in. While the entire operations of all the corporations were practically controlled by the trustees, they themselves had no corporate existence. The court held that the combination was unlawful, as being in restraint of trade, and tending to create a dangerous monopoly; and the corporations entering into it were liable to a forfeiture of their franchises.[1]

Sec. 112l. Same—Cotton-seed oil trust.—It is said in the case of Mallory v. Hanaur Oil Works,[2] that an agreement among a number of corporations engaged in manufacturing cotton-seed oil, to select a committee composed of representatives from each corporation, and to turn over to such committee the properties and machinery of each company, to be managed and operated by the committee for the common benefit, the profits and losses to be shared in agreed proportions, and the arrangement to last for a specified time, is a contract of partnership. A corporation created under the Tennessee incorporation act of 1875, for the manufacture of cotton-seed oil, has no implied power to enter into a partnership with other similar corporations, by which the business of all the contracting companies is to be managed by a committee; and such contract, whether made by the directors or by all the stockholders, is *ultra vires* and void, as far as unexecuted. Where, by the contract of partnership, the committee was to have possession of the properties of all the contracting companies for the

s. c. 19 N. Y. St. Rep. 853; 5 Ry. & Corp. L. J. 56; 22 Am. & Eng. Corp. Cas. 511.

[1] People v. North River Sugar Refining Co., 3 N. Y. Sup. 401 (1889); s. c. 19 N. Y. St. Rep. 853; 5 Ry. & Corp. L. J. 56; 22 Am. & Eng. Corp. Cas. 511.

[2] 86 Tenn. 598 (1888); s. c. 4 Ry. & Corp. L. J. 202; 20 Am. & Eng. Corp. Cas. 478.

space of three years, and an action of unlawful detainer was brought by one of the companies to recover its property at the end of two years, the court held that the contract was, as to the remainder of the term, unexecuted, and could be repudiated as *ultra vires*. The contract being void, it could not operate to convert the managers of the combination into tenants from year to year, and entitle them to the statutory notice to quit.

Sec. 112m. Same—Gas trust.—It was recently said by the supreme court of Illinois in the case of People ex rel. Peabody v. Chicago Gas Trust Co,[1] that a corporation formed for the purpose of manufacturing and selling gas under the general incorporation law, which provides[2] that corporations formed under it may "own . . . so much real and personal estate as shall be necessary for the transaction of their business, . . . and may have and exercise all the powers necessary and requisite to carry into effect the objects for which they may be formed," has no power to purchase and hold or sell shares of stock in other gas companies, as an incident to the purpose of its formation, even though such power is specified in its articles of incorporation.[3]

Sec. 112n. Same—Contracts to form a monopoly.—All contracts for the formation of a monopoly are void.[4] Thus it has

[1] 22 N. E. Rep. 798 (1889); s. c. 41 Alb. L. J. 68.

[2] R. S. Ill., c. 32, § 5.

[3] See Chicago Gas-Light & Coke Co. v. People's Gas-Light & Coke Co., 121 Ill. 530 (1887) s. c. 13 N. E. Rep. 169.

[4] See Arnot v. Pittston & E. Coal Co., 68 N. Y. 558 (1877); Stanton v. Allen, 5 Den. (N. Y.) 434 (1848); Hooker v. Vandewater, 4 Den. (N. Y.) 349 (1847); Norwich Gas Light Co. v. Norwich City Gas Co., 25 Conn. 19 (1856); Craft v. McConoughy, 79 Ill. 346 (1875); City of Chicago v. Rumpff, 45 Ill. 90 (1867); Maguire v. Smock, 42 Ind. 1 (1873); India Bagging Ass'n v. Kock, 14 La. An. 164 (1859); Raymond v. Leavitt, 46 Mich. 447 (1881); s. c. 9 N. W. Rep. 525; Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666 (1880); Crawford v. Wick, 18 Ohio St. 190 (1868); Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173 (1871); Oregon Steam Nav. Co. v. Winsor, 87 U. S. (20 Wall.) 64 (1873); bk. 22 L. ed. 315; Dolph v. Troy Laundry Machine Co., 28 Fed. Rep. 553 (1886); Pullman Palace Car Co. v. Texas & Pac. R. Co., 11 Fed. Rep. 625 (1882); Case of the Monopolies, 11 Coke 84b (1588); Rex v. Waddington, 1 East 143, 167 (1801); and The Mague Steamship Co. v. McGregor, 7 Ry. & Corp. L. J. 61; 6 id. 121; 4 id. 217, 238, 611.

been said that a contract entered into for the purpose of forming a combination between all the lumber manufacturers of a certain place or district, limiting the out-put of lumber and increasing the price of the same, is void and unenforceable.[1] So also is an arrangement to bring about a combination of all the firms and corporations engaged in any particular undertaking (such as the refining of sugar) in the United States, and place their affairs in the hands of a board which is to have full control of the business, the plain object of which is the removal of competition and the advancement of prices of the necessaries of life.[2] It seems that a contract whereby two rival manufacturers agree on a scale of selling prices for their goods, and one discontinues his business and becomes a partner with the other, this is not void where the articles manufactured are not articles of necessity.[3]

Sec. 112o. Same—Combination as to selling price.—In the case of Dolph v. Troy Laundry Machine Co.,[4] a contract under which two rival manufacturers agreed upon a scale of selling prices for their goods, one of them discontinuing his business, and becoming a partner with the other for a specified term, was said not to be void, as in restraint of trade; provided the goods manufactured were not articles of necessity, and the transaction did not amount to a conspiracy between the parties to control prices to create a monopoly.

Sec. 112p. Same—Agreement not to compete.—It is said in the case of Chicago Gas Light & Coke Co. v. People's Gas Light & Coke Co,[5] that specific performance will not be decreed of a contract wherein two gas companies, each of which is anthorized by its charter to make and sell illuminating gas throughout the entire city, wherein it is mutually agreed not to compete with each other in the sale of gas in certain districts of the city.

In the case of Santa Clara Valley Mill & Lumber Co. v.

[1] Santa Clara M. & .L. Co. v. Hayes, 76 Cal. 387 (1888); s. c. 18 Pac. Rep. 391.

[2] People v. Refining Co., 7 N. Y. Sup. 406 (1889).

[3] Dolph v. Troy Laundry Machine Co., 28 Fed. Rep. 553 (1886).

[4] 28 Fed. Rep. 553 (1886).

[5] 121 Ill. 530 (1887); s. c. 13 N. E. Rep. 169.

Hayes,[1] the contract or agreement was for the sole purpose of forming a combination among all the manufacturers of lumber at a certain point, increasing the price, limiting the amount, and giving control of the supply in four counties for a year, and the plaintiff, by contracts with other manufacturers, either by lease of their mills, or by purchase of their product for the year, secured control of the amount produced, among which contracts, and similar to the others, was one with the defendants whereby they agreed to sell plaintiff, during the year, a specified amount of lumber at a given price; and further to manufacture no lumber for sale in said counties during said year, except under the contract to pay plaintiff $20 per M. for any lumber sold to others in that period. The court held that this contract was void as against public policy, being in restraint of trade, and virtually creating a monopoly, and that it could not be enforced as to any part thereof.

Sec. 113. Same—Approval of Stockholders—Appraisement of Stock.—Such agreement of the directors shall not be deemed to be the agreement of the said corporations so proposing to consolidate until after it has been submitted to the stockholders of each of such corporations respectively separately, at a meeting thereof to be called upon a notice of at least thirty days, specifying the time and place of such meeting and the object thereof, to be addressed to each of the said stockholders when their place of residence is known to the secretary, and deposited in the post office; and published for at least three successive weeks in one of the newspapers published in each of the counties of this state in which either of the said corporations shall have its place of business, and has been sanctioned and approved by such stockholders by the vote of at least two-thirds in

[1] 76 Cal. 387 (1888).; s. c. 18 Pac. Rep. 391.

amount of the stockholders present at such meetings respectively, voting by ballot in regard to such agreement, either in person or by proxy, each share of such capital stock being entitled to one vote; and when such agreement of the directors has been sanctioned and approved by each of the meetings of the respective stockholders separately, after being submitted to such meetings in the manner above-mentioned, then such agreement of the directors shall be deemed to be the agreement of the said several corporations; and a sworn copy of the proceedings of such meetings made by the secretaries thereof, respectively, and attached to the said agreement, shall be evidence of the holding and of the action of such meetings in the premises. If any stockholder shall, at said meeting of the stockholders, or within twenty days thereafter, object to the said consolidation and demand payment for his stock, such stockholder or said new company, if consolidation take effect at any time thereafter, may apply at any time within sixty days after such meeting of the stockholders to the supreme court, at any special term thereof held in any county in which the said new corporation may have its place of business, upon at least eight days notice to the new company, for the appointment of three persons to appraise the value of said stock, and said court shall appoint three such appraisers and shall designate the time and place of the first meeting of such appraisers, and give such directions in regard to the proceedings on said appraisement as shall be deemed proper, and shall also direct the manner in which payment for such stock shall be made to such stockholder. The court may fill any vacancy in the board of appraisers

occurring by refusal or neglect to serve or otherwise. The appraisers shall meet at the time and place designated, and they or any two of them, after being duly sworn honestly and faithfully to discharge their duties, shall estimate and certify the value of such stock at the time of such dissent as aforesaid, and deliver one copy of their appraisal to the said new company, and another to the said stockholder if demanded ; the charges and expenses of the appraisers shall be paid by the new company. When the new corporation shall have paid the amount of the appraisal, as directed by the court, such stockholder shall cease to have any interest in the said stock and in the corporate property of the said corporation, and the said stock may be held or disposed of by the said new corporation.[1]

Sec. 114. Same—When completed.—Upon the making, sanctioning and approving of the said agreement in the preceding section mentioned in the manner therein required, and the filing of the duplicates or counterparts thereof, and of the verified copy of the proceedings of the meeting of the stockholders mentioned in the preceding section in the office of the clerk of the county in this state where the operations of such new corporation are to be carried on, and in the office of the secretery of state, then, and immediately thereafter, the said corporations agreed to be consolidated, shall be merged into the new corporation provided for in the said agreement, to be known by the corporate name therein mentioned, and the details of such agreement shall be carried into effect as provided therein.[2]

[1] L. 1884, c. 367, § 2; 3 N. Y. R. S., 8th ed., p. 1976.

[2] L. 1884, c. 367, § 3; 3 N. Y. R. S., 8th ed., p. 1977.

Sec. 115. Same—New Corporation—Powers and Liabilities.—Such new company shall possess the general powers and be subject to the general liabilities and restrictions expressed in the third title of the eighteenth chapter of the first part of the Revised Statutes, and shall be entitled to enjoy the rights, franchises and privileges possessed by each of the companies from which it has been formed, subject, however, to the liabilities, restrictions, duties and provisions expressed and contained in the act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February seventeenth, eighteen hundred and forty-eight, and the acts amending or extending the same, so far as the same may be applicable to a corporation organized for the purposes expressed in the said agreement for consolidation, and for which said new company shall have been organized.[1]

Sec. 116. Same—Rights, Privileges and Franchises.—Upon the consolidation of the said corporations and the organization of such new company as hereinbefore prescribed, all and singular the rights, privileges, franchises and interests of every kind belonging to or enjoyed by the said several corporations so consolidated, and every species of property, real, personal and mixed, and things in action thereunto belonging, mentioned in said agreement of consolidation, shall be deemed to be transferred to and vested in and may be enjoyed by such new corporation, without any other deed or transfer; and such new corporation shall hold and enjoy the same and all rights of property, privileges, franchises and

[1] L. 1884, c. 367, § 4; 3 N. Y. R. S., 8th ed., p. 1977.

interests in the same manner, and to the same extent as if the said several companies so consolidated had continued to retain the title and transact the business of such corporations, and the title to real and personal estate, and rights and privileges acquired and enjoyed by either of the said corporations shall not be deemed to revert or be impaired by such act of consolidation or anything relating thereto.[1]

Sec. 117. Same—Rights of Creditors—Obligation of old Companies—Liability of Stockholders.—The rights of creditors of any corporations that shall be so consolidated shall not in any manner be impaired by any act of consolidation, nor shall any liability or obligation for the payment of any money now due or hereafter to become due to any person or persons or any claim or demand in any manner or for any cause existing against any such corporation, or against any stockholder thereof, be in any manner released or impaired; but such new corporation is declared to succeed to such obligations and liabilities, and to be held liable to pay and discharge all such debts and liabilities of each of the corporations that shall be so consolidated, in the manner as if such new corporation had itself incurred the obligation or liability to pay such debt or damages; and the stockholders of the respective corporations so entering into such consolidation shall continue subject to all the liabilities, claims and demands existing against them as such at or before such consolidation; and no suit, action or other proceeding then pending before any court or tribunal in which any corporation that may be so consolidated is a party, or in which any such stock-

[1] L. 1884, c. 367, § 5; 3 N. Y. R. S., 8th ed., p. 1978.

holder is a party, shall be deemed to have abated or been discontinued by reason of any such consolidation; but the same may be prosecuted to final judgment in the same manner as if the said corporations had not entered into the said agreement of consolidation; or the said new corporation may be substituted as a party in the place of any corporation so consolidated as aforesaid with any other corporation or corporations, and forming such new corporation, by order of the court in which such action, suit or proceeding may be pending.[1]

Sec. 117a. Liability after dissolution.—In Savings Association v. O'Brien,[2] it is said that under a statute providing that "if any company formed under this act dissolve, leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of dissolution, without joining the company in such suit; and, if judgment be rendered and execution satisfied, the defendant or defendants may sue all who were stockholders at the time of the dissolution for the recovery of the portion of such debt for which they were liable,"—creates a personal liability on the part of the stockholder which may be enforced by a common law action in other states.

Sec. 118. Same—Business of New Company.—Any new company organized under this act shall be permitted to prosecute or carry on any kind of business authorized by charter of either of the companies which have been consolidated.[3]

Sec. 119. Classification of Corporations.—The corporations formed under this act shall be of two classes, to be known, respectively, as—[4]

[1] L. 1884, c. 367, § 6; 3 N. Y. R. S., 8th ed., p. 1978.

[2] 51 Hun (N. Y.) 45 (1889); s. c. 3 N. Y. Sup. 764.

[3] L. 1884, c. 367, § 7; 3 N. Y. R. S., 8th ed., p. 1978.

[4] L. 1875, c. 611, § 93; 3 N. Y. R. S., 8th ed., p. 1986.

1. Full liability companies.
2. Limited liability companies.

Sec. 120. "Full Liability Companies."—In "full liability companies," all the stockholders shall be severally individually liable to the creditors of the company in which they are stockholders, for all debts and liabilities of such company, and may be joined as defendants in any action against the company. No execution shall issue against any stockholder individually, until execution has been issued against the company and been returned unsatisfied; and whenever a judgment shall be recovered against a stockholder individually, all the stockholders shall contribute a proportionate share of the amount paid by such stockholder on such judgment, proportionate to the number of shares of stock owned by each of such stockholders, and such stockholders shall have a right of action against the other stockholders in such corporation jointly or severally, to recover from them, and each of them, the proper portion due by them, and each of them, of the amount so paid on such judgment.[1]

Sec. 120a. Liability—Transfer—Rescission of contract.—Where two corporations make a valid agreement by which the debt of one is assumed by the other, it is competent for said corporations, by mutual agreement, to rescind such agreement, reinstate the liability of the corporation so discharged, and place the parties *in statu quo;* and the stockholders of the debtor corporation in such case will become personally liable for their respective proportionate shares of the liabilities so created or reinstated.[2]

[1] L. 1875, c. 611, § 34; 3 N. Y. R. S., 8th ed., p. 1986. See Richards v. Coe, 19 Abb. (N. Y.) N. C. 79, 83 (1887).

[2] Borland v. Haven, 37 Fed. Rep. 394 (1888).

Sec. 120b. Same—Individual liability of stockholders.—A general statute imposing a personal liability upon stockholders for the corporate debts is imposed by way of recognizing an obligation upon contract, and not by way of penalty.[1] Such a liability of the stockholders is several, and they must be sued separately.[2]

Sec. 121. "Limited Liability Companies."—In "limited liability companies," the name of the company shall in every case have, as its last word, the word "limited," and every such corporation shall paint or affix, and shall keep painted or affixed, its name on the outside of every office or place in which the business of the company is carried on, in a conspicuous position, in letters easily legible, and shall have its full name stated in legible characters in all notices, advertisements, and other official publications of such company, and in all its bills of exchange promissory notes, checks, orders for money, bills of lading, invoices, receipts, letters, and other writings used in the transaction of the business of the corporation.[3]

Sec. 122. Word "Limited"—Use in Corporate Name—Penalty for Omission.—Every omission of the word "limited" in the use of the name of such company shall render each and every officer or director in such company personally liable for any indebtedness,

[1] Corning v. McCullough, 1 N. Y. 47 (1847); Norris v. Wrenschall, 34 Md. 492 (1871); Erickson v. Nesmith, 46 N. H. 371 (1866); Coleman v. White, 14 Wis. 700 (1862).

[2] See Paine v. Stewart, 33 Conn. 516 (1866). See also Matter of Hollister Bk. of Buffalo, 27 N. Y. 393 (1863); Boyd v. Hall, 56 Ga. 563 (1876); Pettibone v. McGraw, 6 Mich. 441 (1859); State Savings Assoc. v. Kellogg, 63 Mo. 540 (1876); New England Com. Bk. v. Newport Steam Factory, 6 R. I. 154 (1859); Planters' Bk. v. Bivingsville Cotton Manuf. Co., 10 Rich. (S. C.) L. 95 (1856).

[3] L. 1875, c. 611, § 35; 3 N. Y. R. S., 8th ed., p. 1986.

damages or liability incurred during such omission. If any limited liability company under this act does not paint or affix, and keep painted or affixed its name, in the manner above set forth, it shall be liable to a penalty of not exceeding twenty-five dollars for such omission, for every day during which such name is not so kept painted or affixed; and every director or officer of such company who shall authorize or permit such omission shall be liable to a like penalty; and if any director or officer of such company, or any person on its behalf, shall use or authorize the use of any seal purporting to be a seal of the company on which its name is not so engraved as aforesaid, or shall use or authorize the issue of any notice, advertisement or other official publication of such company, or shall sign or authorize to be signed on behalf of such company any bill of exchange, promissory note, indorsement, check, order for money or goods, invoice, bill, receipt, letter of credit or other writing of the company wherein its name is not mentioned as aforesaid, he shall be liable to a penalty of one hundred dollars. The penalties in this section provided shall be sued for in the name of the people of the state of New York by the district-attorney of the county in which the principal office of such corporation is located, and the amounts recovered shall be paid over to the proper authorities for the support of the poor of such county.[1]

Sec. 123. "Limited Liability" Companies—Individual Liability of Stockholders.—In limited liability companies, all the stockholders shall be severally individually liable to the creditors of the company in

[1] L. 1875, c. 611, § 36; 3 N. Y. R. S., 8th ed., p. 1987.

which they are stockholders, to an amount equal to the amount of stock held by them, respectively, for all debts and contracts made by such company, until the whole amount of capital stock fixed and limited by such company has been paid in, and a certificate thereof has been made and recorded as hereinafter prescribed. The term stockholder, as used herein, shall apply not only to such persons as appear by the books of the corporation or association to be such, but also to every equitable owner of stock, although the same may appear on such books in the name of another person; and also to every person who shall have advanced the instalments or purchase-money of any stock in the name of any person under twenty-one years of age, and while such person remains a minor, to the extent of such advance; and also to every guardian or other trustee who shall voluntarily invest any trust funds in such stock; and no trust funds in the hands of such guardian or trustee shall be in any way liable under the provisions of this act by reason of any such investment, nor shall the person for whose benefit any such investment may be made be responsible in respect to such stock until thirty days after the time when such persons respectively become competent and able to control and dispose of the same; but the guardian or other trustee making such investment as aforesaid shall continue responsible as a stockholder until such responsibility devolves upon the person beneficially interested therein; and in respect to stock held by a guardian or other trustee under a transfer of the same by a third person or under positive directions by a third person for such investment, the person making such transfer or giving

such directions, and his executors and administrators shall, for the purposes of this act, be deemed a stockholder; and the estate of such person, if he be deceased, shall be responsible for the debts and liabilities chargeable on such stock, according to the provisions of this act. No execution shall issue against any stockholder individually, until execution has been issued against the corporation and returned unsatisfied; and whenever a judgment shall be recovered against a stockholder individually, all the stockholders shall contribute a proportionate share of the amount paid by such stockholder on such judgment proportioned to the number of shares of stock owned by each of such stockholders, and such stockholder shall have a right of action against the other stockholders in such corporation, jointly or severally, to recover from them, and each of them, the proportion due by them and each of them of the amount so paid on such judgment. The capital stock of every such limited liability company shall be paid in, one-half thereof within one year, and the other half thereof within two years from the incorporation of said company, or such corporation shall be dissolved. The directors of every such company, within thirty days after the payment of the last instalment of the capital stock, shall make a certificate stating the amount of the capital so paid in, which certificate shall be signed and sworn to by the president and a majority of the directors; and they shall, within the said thirty days, record the same in the office of the secretary of state, and of the clerk of the county in which the principal business office of such corporation is situated.[1]

[1] L. 1875, c. 611, § 37; 3 N. Y. R. S., 8th ed., p. 1987.

Sec. 123a. Extension of time for the payment of capital stock.—The legislature provided by the Laws of 1887, chapter 561, that the time for the payment of the capital stock, or for the reduction thereof in the case of corporations formed since May 1, 1884, as limited liability companies, should be extended for one year. This time was further extended for one year by the Laws of 1888, chapter 447 ; and by the Laws of 1889, chapter 519, it was provided that the capital stock of such corporations may be paid in or reduced within one year from June 15, 1889.

Sec. 123b. "Debts."—As to what are to be considered debts within the meaning of that word, and for which stockholders are liable.[1]

Sec. 123c. Construction of "Business Act."—It has been said that this statute creates a liability which is penal, and is to be strictly construed.[2]

It is said in the case of Richards v. Brice,[3] that this section is only a re-enactment of section 10 of the act of 1848, except in regard to the issuing of the execution against the stockholder, which the former declares shall not be done until the issuing and return unsatisfied of an execution against the company.[4] The court say that "there has been a wide difference of opinion on this question among text writers and the courts of other states. Cook, Stocks, (in note 4 to section 227, p. 223, and note 3 to the same section, p. 227,) says: 'When a creditor has actually commenced a suit to enforce the statutory liability of any individual shareholder to defeat the action by paying some other corporate creditor's claim; but gives no reason therefor.' He, however, cites, in support of the proposition, Jones v. Wiltberger,[5] which was

[1] See "Thompson on Liability of Stockholders," secs. 57, 58.

[2] Merchants' Bank v. Bliss, 35 N. Y. 412 (1866); Wiles v. Suydam, 64 N. Y. 173 (1876) ; Garrison v. Howey, 17 N. Y. 458 (1858); Whitney Arms Co. v. Barlow, 68 N. Y. 34 (1876); Victory Webb Printing Co. v. Beecher, 26 Hun (N. Y.) 48 (1881).

[3] 3 N. Y. Supp. 941 (1889); s. c. 22 N. Y. St. Rep. 289.

[4] Walton v. Coe, 110 N. Y. 109, 112 (1888); s. c. 17 N. E. Rep. 676; Richards v. Brice, 16 N. Y. Code Civ. Proc. Rep. 398, 404, 417 (1889); s. c. 22 N. Y. St. Rep. 289.

[5] 42 Ga. 575 (1871).

decided by a divided court, and Thebus v. Smiley,[1] which decision is based on Thompson v. Meisser.[2] The reasoning in these two cases is opposed to the reasoning in the earlier case of City of Chicago v. Hall.[3] But the conclusion to which I arrive is fully sustained by Manville v, Roever ;[4] and I think the reasons therein given are of grater force, and more conclusive, than the reasons given for the opposite view."

Consequently cases decided under the Manufacturing Act of 1848 are equally applicable to the provisions of the Business Act of 1875.[5] The language of the several sections construed is substantially the same and their re-enactment in the latter statute is an adoption by the legislature of the construction previously put upon them by the courts under the former act.[6]

This section must be read and applied in connection with every other section of the act. All must have their due and conjoint effect. Each must be so far qualified and limited by each other as that all may have operation in harmouy, and each must be kept in subservience to the general intent of the whole enactment.[7]

Sec. 123d. Stockholders liability—To creditors.—A subscription without the payment of the ten per cent in cash being void, the subscriber does not become a stockholder, even as to creditors, and cannot be held individually liable for the debts of the company until the full amount of the capital stock has been paid in and the certificate therefor duly made and recorded.[8]

It is said in the case of McIntyre v. Strong,[9] that section 37 is to be read subject to section 25, and that consequently the liability of stockholders of limited companies for debts of the

[1] 110 Ill. 316 (1884).

[2] 108 Ill. 359 (1884).

[3] 103 Ill. 342 (1882).

[4] 11 Mo. App. 317 (1883); State Sav. Association v. Kellogg, 63 Mo. 540 (1876).

[5] Richards v. Crocker, 19 Abb. (N. Y.) N. C. 73 (1887); Richards v. Kingsley, 12 N. Y. St. Rep. 128, 129 (1887).

[6] People ex rel. Outwater v. Green, 56 N. Y. 466 (1874); Richards v. Crocker, 19 Abb. (N. Y.) N. C. 73 (1887).

[7] Ansonia, B. & C. Co. v. New Lamp-Chimney Co., 53 N. Y. 125 (1873); s. c. 13 Am. Rep. 476.

[8] Perry v. Hoadley, 19 Abb. (N. Y.) N. C. 76 (1887).

[9] 48 N. Y. Super. Ct. (16 J. & S.) 127 (1882); s. c. 63 How. (N. Y.) Pr. 43; 14 N. Y. Week. Dig. 67.

corporation, the capital not being paid in, is limited to debts "to be paid within two years from the time the debt is contracted."

Sec. 123e. Same — To servants.—The stockholders of a business corporation created under this act are not under any special liability to laborers, servants or apprentices for services performed for the corporation.[1] To an action against a stockholder by a business corporation formed under this act to enforce a personal liability because the entire capital stock was not fully paid in, it is a defence that the stockholder is also a creditor of the company to an amount exceeding the amount of stock held by him.[2]

Sec. 123f. Same—On Lease.—In the case of a lease to the corporation for a term of years, one who is a stockholder at the time of the delivery of the lease, is liable for the rent payable thereunder within two years after the time of the execution of the lease and the delivery of the premises.[3]

Sec. 123g. Same—Fixing date of lease.—The presumption as to the execution of a lease afforded by the date of the instrument, is overthrown by the certificate of acknowledgment before the subscribing witness, at a later date.[4]

Sec. 123h. Same—Action against stockholders—Injunction to restrain.—Where each stockholder of a corporation is individually liable for the whole amount of each debt contracted while they were stockholders respectively, they are not entitled to an injunction to restrain the prosecution of a suit against them, and to compel the creditors to come in and prove their debts under the decree in the final suit.[5]

Sec. 123i. Right to sue stockholder—Several.—The right of a creditor to sue one or more stockholders, is said to be several

[1] Richards v. Beach, 19 Abb. (N. Y.) N. C. 84 (1887).

[2] Richards v. Crocker, 19 Abb. (N. Y.) N. C. 73 (1887). See Mathez v. Neidig, 72 N. Y. 100 (1878); Agate v. Sands, 73 N. Y. 620 (1878); Wheeler v. Millar, 90 N. Y. 353 (1882).

[3] McIntyre v. Strong, 48 N. Y. Super. Ct. (16 J. & S.) 127 (1882); s. c. 63 How. (N. Y.) Pr. 43; 14 N. Y. Week. Dig. 67.

[4] McIntyre v. Strong, 48 N. Y. Super. Ct. (16 J. & S.) 127 (1882); s. c. 63 How. (N. Y.) Pr. 43; 14 N. Y. Week. Dig. 67.

[5] Judson v. Rossie Galena Co., 9 Paige Ch. (N. Y.) 598 (1842).

and not joint.[1] The creditors of a company, whose debts have been contracted by such company at different periods of time having no common interest in the individual liability of different stockholders cannot liquidate their claims against such stockholders in a single suit.[2]

Sec. 123j. Same — Liability of directors and stockholders — When liability accrues.—It is not necessary to obtain a judgment against the corporation and have an execution thereon issued, and returned unsatisfied as a condition precedent to the commencement of an action against the directors and stockholders.[3]

Sec. 123k. Same—Complaint—Sufficiency of.—In Walton v. Coe,[4] it is held that in an action by a simple contract creditor against a stockholder of a corporation of limited liability, on the ground that its capital stock had never been paid in full, a complaint alleging that the full amount of the debt due from the company "is now being adjusted and determined in an action therefor, brought by the said plaintiff against said corporation," in a designated court, states a good cause of action.

Sec. 123l. Same—When right of action accrues.—The right of action accrues as soon as an action against the corporation has been commenced. It seems that the right to collect the judgment should not become operative until the assets of the corporation have been exhausted by the issuance of an execution against the corporation, and its return.[5]

Sec. 123m. Same—Payment in full.—It has been said that it is no defence that the particular stockholder sued has paid his stock in full, for if other stock holders are in default he is liable.[6]

[1] Weeks v. Love, 50 N. Y. 568 (1872); aff'g s. c. 33 N. Y. Super. Ct. (1 J. & S.) 397. See Cochran v. American Opera Co., 20 Abb. (N. Y.) N. C. 114, 121 (1887).

[2] Judson v. Rossie Galena Co., 9 Paige Ch. 598 (1842).

[3] Walton v. Coe, 110 N. Y. 109 (1888); s. c. 17 N. E. Rep. 676, affirming 13 N. Y. St. Rep. 416; Young v. Brice, 3 N. Y. Sup. 123, 125 (1888); overruling Richards v. Beach, 12 N. Y. St. Rep. 136 (1887).

[4] 110 N. Y. 109 (1888); aff'g s. c. 47 Hun (N. Y.) 160.

[5] Walton v. Coe, 110 N. Y. 109 (1888); aff'g s. c. 47 Hun (N. Y.) 160.

[6] Wheeler v. Millar, 90 N. Y. 353

Payment in good faith by a stockholder of the entire amounts of his statutory liability under this section, to a creditor of the company after the action brought is a good defence to an action by another creditor of the company to enforce the stockholder's liability, although the latter action was commenced before the payment was made, because the commencement of the action creates no lien upon the stockholders of the property.[1]

A creditor of a corporation does not acquire any lien by the commencement of an action against a stockholder of the corporation to recover the amount of his liability, and the payment by the stockholder, of the full amount of his liability to a creditor of the corporation, absolutely releases him from liability, whether the payment was made before or after the commencement of the action.[2] It is thought that where a creditor brings an action not for his sole benefit, but in equity, for the benefit of all the creditors, other creditors may be enjoined from the prosecution of action already begun against single stockholders, and if the debts are in excess of the liability of all the stockholders, the fund secured will be divided ratably among the creditors without any preference to those who may have first sued at law.

Such return does not prescribe the period at which the statute of limitations begins to run against an action based on the 14th, 18th, and 21st sections of this act.[3]

Sec. 123n. Same—"Limited liability" company.—It seems that the stockholders of a limited liability company cannot be

(1882), though guilty of no dereliction of duty; Richards v. Crocker, 19 Abb. (N. Y.) N. C. 73 (1887).

[1] Richards v. Brice, 16 N. Y. Civ. Proc. Rep. 398, 404 (1889); s. c. 3 N. Y. Sup. 941 (1889), following Walton v. Coe, 110 N. Y. 109; s. c. 17 N. E. Rep. 676, and citing Mathez v. Neidig, 72 N. Y. 100 (1878); Garrison v. Howe, 17 N. Y. 458 (1858); Pfohl v. Simpson, 74 N. Y. 137 (1878); Chambers v. Lewis, 28 N. Y. 454 (1863); Weeks v. Love, 50 N. Y. 568 (1872), to same effect Manville v. Roever, 11 Mo. App. 317 (1883); State Savings Association v. Kellogg, 63 Mo. 540 (1876). See Young v. Bryce, 3 N. Y. Sup. 123, 125 (1888).

[2] Richards v. Brice, 16 N. Y. Code Civ. Proc. Rep. 398, 404 (1889); citing Mathez v. Neidig, 72 N. Y. 100 (1878); Stover v. Flack, 30 N. Y. 64 (1864).

[3] Cochran v. Smith, 54 N. Y. Super. Ct. (22 J. & S.) 121 (1886).

sued by a creditor of the company for unpaid subscriptions or on account of unpaid capital stock, until the creditor has first exhausted his remedy against the corporation by recovery of judgment and the return of an execution unsatisfied.[1] Thus in Young v. Brice,[2] decided at the New York City Court Special Term, June, 1887, it was held under this rule that where the complaint shows that the plaintiff's judgment against the corporation was recovered after the action brought by him against the stockholder, and the answer shows that prior to the recovery of the judgment, although after action brought, such stockholder had paid the full amount of liability to another judgment creditor of the corporation, who had brought an action against him, that the answer set up a good defence.

It is said in Taylor v. Attrill,[3] that an action brought against a director of a limited liability company to recover a debt due from the corporation upon the ground that the defendant had made and recorded a false certificate to the effect that the capital stock had been paid up in full is a local one and must be tried in the county where the cause of action arises.[4]

Sec. 123o. Same—Evidence—Goods sold.—It is said in Claflin v. Drake,[5] that where the plaintiff has recovered a judgment against a limited corporation for goods sold and delivered to it, and after the execution returned unsatisfied, brought suit against a stockholder to enforce the liability alleged to have been incurred by him by reason of the failure of the stockholders to pay in the amount of the capital stock, the burden of proof is on the plaintiff to establish the defendant's liability for the debts of the company.

Sec. 123p. Same—Compulsory reference.—In an action, the object of which is to charge the defendant with liability under this statute, is not of such a nature as to be the subject of a reference against the objections of the defendant.[6]

[1] Richards v. Coe, 19 Abb. (N. Y.) N. C. 79 (1887); Richards v. Beach, 19 Abb. (N. Y.) N. C. 84 (1887).

[2] 3 N. Y. Sup. 1823 (1888); s. c. 18 N. Y. St. Rep. 945. See 19 Abb. (N. Y.) N. C. 79 (1887), note.

[3] 31 Hun (N. Y.) 132 (1883).

[4] Citing Veeder v. Baker, 83 N. Y. 156 (1880).

[5] 38 Hun (N. Y.) 144 (1885).

[6] Claflin v. Drake, 38 Hun (N. Y.) 144 (1885); citing Camp v. Inger-

Sec. 123q. Same—Remedies of creditor.—It seems that a creditor of a corporation seeking to enforce his right has his option of two remedies; first, he may bring an action in equity for a general accounting, in which all stockholders and creditors shall be parties; second, he may proceed at law against any stockholder under the special right to sue conveyed by the statute, and hold such stockholder liable up to the amount of his stock-subscription.[1] But where a creditor chooses the latter remedy, the stockholder may set up as a defence that he is himself a creditor of such corporation.[2]

One or more creditors of a corporation may maintain an action in equity, on behalf of themselves and of all other creditors similarly situated who may come in and adopt it against the corporation and its stockholders, who have become personally liable for its debts, or who are owing balances of stock subscriptions, to ascertain the extent of such liabilities and realize the amount thereof, and to restrain the bringing or further prosecution of separate and individual actions at law by creditors against stockholders that the claims of all the creditors to share in the fund realized from stockholders' liabilities may be investigated, established and paid, and thus a multiplicity avoided and willful litigation established.[3] The mere fact that some creditors have realized their claims in full, in suits against stockholders, recovering the full amount of the claim, does not affect the right to maintain such action, the fund to be reached being what remains unenforced of the stockholders' liabilities.[4]

The courts in their endeavor to prevent a multiplicity of suits, have, in some instances, held that the remedy of the

soll, 86 N. Y. 433; Read v. Lozin, 31 Hun, (N. Y.) 286 (1883). See Hyatt v. Roach, 1 Abb. (N. Y.) N. C. 125 (1876).

[1] Richards v. Kinsley, 12 N. Y. St. Rep. 125 (1887); s. c. 14 N. Y. St. Rep. 701.

[2] Richards v. Kinsley, 12 N. Y. St. Rep. 125 (1887); s. c. 14 N. Y. St. Rep. 701. See Briggs v. Penniman, 8 Cow. (N. Y.) 387 (1826); Garrison v. Howe, 17 N. Y. 458; Mathez v. Neidig, 72 N. Y. 100 (1878); Wheeler v. Millar, 90 N. Y. 353 (1882).

[3] Cochran v. American Opera Co., 20 Abb. (N. Y.) N. C. 114 (1887), See Pfohl v. Simpson, 74 N. Y. 137 (1878); Erie R. Co. v. Ramsey, 45 N. Y. 637 (1871).

[4] Cochran v. American Opera Co., 20 Abb. (N. Y.) N. C. 114 (1887).

creditor to enforce unpaid subscriptions is by bill in equity in behalf of himself and others similarly situated, in which the corporation and its stockholders may be brought in as defendants, that their various rights, liabilities and equities, may be determined in that action, and this is upon the theory that no one creditor can assume that he alone is entitled to what the stockholder owes, and that it is inequitable to permit him to sue at law to appropriate it exclusively to himself.[1]

Sec. 123r. Annual report—Failure to file—Incoming directors.—So long as the default lasts, the other essentials existing, there is no distinction between directors in office at the time of default and those subsequently elected; the incoming director has power at any time to protect himself from liability by filing a report, and his failure to do so imposes a liability for debts contracted during his term.[2]

But the trustees are neither parties nor privies to a judgment against the company; and where, in consequence of a failure to make and file an annual report, they have become liable to pay the debts of the company and an action is brought against them to enforce that liability and collect a debt due from the company, proof of the recovery of such a judgment thereon is neither conclusive nor *prima facie* evidence of the debt.[3]

Sec. 123s. Same—Compulsory reference.—A compulsory reference cannot be ordered in an action to which a trustee with a debt of the corporation by reason of omission to file an annual report, although the only issue is one as to the indebtedness of the corporation on a long account.[4]

Sec. 124. Dissolution—Liability not Impaired by.—The dissolution, for any cause whatever, of any cor-

[1] Richards v. Beach, 12 N. Y. St. Rep. 136, 138 (1887); citing Harris v. First Parish, 40 Mass. (23 Pick.) 112 (1839); Ladd v. Cartwright, 7 Oreg. 329 (1879); Patterson v. Lynde, 106 U. S. (16 Otto) 519 (1882); bk. 27 L. ed. 265.

[2] Chandler v. Hoag, 63 N. Y. 624 (1875); aff. 2 Hun (N. Y.) 613; Buck v. Barker, 5 N. Y. St. Rep. 826 (1887).

[3] Miller v. White, 50 N. Y. 137 (1872); Buck v. Barker, 5 N. Y. St. Rep. 826, 828 (1887).

[4] Hyatt v. Roach, 1 Abb. (N. Y.) N. C. 125 (1876).

poration created as aforesaid, shall not take away or impair any remedy given against such corporation, its stockholders or officers, for any liabilities incurred previous to its dissolution.[1]

Sec. 124a. Dissolution by legislature.—The General Assembly by act in 1886, provided for the winding up of corporations which have been annulled and dissolved by legislative enactment.[2]

Sec. 124b. Dissolution of corporations.—A corporation may cease to do business, sell or assign its property for the payment of its debts, and yet not cease to be a corporation in fact.[3] And it has frequently been held that a corporation will not be dissolved by the sale of its franchise, or of all of the corporate property and the temporary suspension of its business, so long as it has the legal and moral capacity to increase its subscriptions, call in more capital, and resume its business;[4] neither is a corporation dissolved by settlement of its concerns and division of the surplus, nor by cessation of all corporate acts, nor by abuse of its corporate powers, or the doing of acts which constitute a forfeiture of the charter, without a judgment so declaring, rendered by a court of com-

[1] L. 1875, c. 611, § 38; 3 N. Y. R. S., 8th ed., 1688.

[2] L. 1886, c. 310.

[3] Wilde v. Jenkins, 4 Paige Ch. (N. Y.) 481 (1834); De Camp v. Alward, 52 Ind. 473 (1876).

[4] Briggs v. Penniman, 8 Cow. (N. Y.) 387 (1826); s. c. 18 Am. Dec. 456, 459; Brinckerhoff v. Brown, 7 Johns. Ch. (N. Y.) 217 (1823); Dewey v. St. Albans Trust Co., 56 Vt. 476, 483 (1884); s. c. 48 Am. Rep. 803, 808. See People v. Twaddell, 18 Hun, (N. Y.) 427 (1879); Slee v. Bloom, 5 Johns. Ch. (N. Y.) 366, 379 (1821); Wilde v. Jenkins, 4 Paige Ch. (N. Y.) 481 (1834); Philips v. Wickham, 1 Paige Ch. (N. Y.) 590 (1829); Niagara Bank v. Johnson, 8 Wend. (N. Y.) 645, 652 (1832); Rollins v. Clay, 33 Me. 132 (1851); Chesapeake & O. Canal Co. v. Baltimore & O. R. Co., 4 Gill & J. (Md.) 1, 121 (1832); Knowlton v. Ackley, 62 Mass. (8 Cush.) 95 (1851); Boston Glass Manuf. v. Langdon, 41 Mass. (24 Pick.) 49, 52 (1834); Russell v. McLellan, 31 Mass. (14 Pick.) 63 (1833); Harris v. Mississippi Valley & S. I. R. Co., 51 Miss. 603 (1875); Kansas City Hotel v. Sauer, 65 Mo. 288 (1877); Hoboken Building Assoc. v. Martin, 13 N. J. Eq. (2 Beas.) 427 (1861); Com. v. Cullen, 13 Pa. St. 133 (1850); Brandon Iron Co. v. Gleason, 24 Vt. 238 (1852); Morley v. Thayer, 3 Fed. Rep. 737, 748 (1880).

petent jurisdiction;[1] nor by the mere fact of insolvency.[2] Where there has been no actual and formal surrender of the franchises of a corporation, and no judicial declaration of its dissolution, merely suspending active operations, resolving to go into litigation, and depositing money to pay debts, and the like, are not sufficient to operate as a final dissolution of a corporation.[3]

Upon the dissolution of a corporation its assets become a fund for the payment of its debts, including those to mature as well as accrued indebtedness, and all open and subsisting engagements entered into by the corporation;[4] this trust fund will include all sums remaining unpaid on shares of stock of the stockholders, as well as all assets divided among the stockholders, leaving the debts unpaid; and where the property remaining is insufficient to pay the debts, the stockholders may be held liable for the payment of such debts to the extent to which they have not paid up their shares or have received assets of the corporation.[5]

[1] Wilde v. Jenkins, 4 Paige Ch. (N. Y.) 481 (1834); Morley v. Thayer, 3 Fed. Rep. 737, 748 (1880). See Slee v. Bloom, 5 Johns. Ch. (N. Y.) 366, 379 (1821); Niagara Bank v. Johnson, 8 Wend. (N. Y.) 645, 652 (1832); Chesapeake & O. Canal Co. v. Baltimore & O. R. Co., 4 Gill & J. (Md.) 1, 121 (1832); Boston Glass Manuf. v. Langdon, 41 Mass. (24 Pick.) 49, 52 (1834).

[2] Kincaid v. Dwinelle, 59 N. Y. 548 (1875); Boston Glass Manuf. v. Langdon, 41 Mass. (24 Pick.) 49 (1834); Germantown Pass. R. Co. v. Fitler, 60 Pa. St. 124 (1869); s. c. 100 Am. Dec. 546. See National Pahquioque Bank v. Bethel Bank, 36 Conn. 325 (1870); City Ins. Co. v. Commercial Bank, 68 Ill. 350 (1873); DeCamp v. Alward, 52 Ind. 469 (1876); Folger v. Columbian Ins. Co., 99 Mass. 276 (1868); Moseby v. Burrow, 52 Tex. 396 (1880); First Nat. Bank of Bethel v. National Pahquioque Bank, 81 U. S. (14 Wall.) 383 (1871); bk. 20 L. ed. 841.

[3] See Brinckerhoff v. Brown, 7 Johns. Ch. (N. Y.) 217 (1823); Ordway v. Baltimore Cent. Nat. Bank, 47 Md. 239 (1877); State v. Bank of Maryland, 6 Gill & J. (Md.) 205 (1834); Boston G. Manuf. Co. v. Langdon, 41 Mass. (24 Pick.) 49 (1834).

[4] People v. National Trust Co., 82 N. Y. 283 (1880); Hightower v. Thornton, 8 Ga. 486 (1850); s. c. 52 Am. Dec. 412; Payne v. Bullard, 23 Miss. 88 (1851); s. c. 55 Am. Dec. 74; Ohio Life Ins. & Trust Co. v. Merchants' Ins. & Trust Co., 11 Humph. (Tenn.) 1 (1850); s. c. 53 Am. Dec. 742.

[5] Hastings v. Drew, 76 N. Y. 9 (1879); Mann v. Pentz, 3 N. Y. 415, 422 (1850); Graham v. Hoy, 38 N. Y. Super. Ct. (6 J. & S.) 506 (1875); Briggs v. Penniman, 8 Cow. (N. Y.) 387 (1826); s. c. 18 Am. Dec. 454; Bartlett v. Drew, 4 Lans. (N. Y.)

Justice Swayne says in the case of Sanger v. Upton,[1] that "the capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private copartnerships. When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied otherwise than upon their demands, until such demands are satisfied. The creditors have a lien upon it in equity. If diverted they may follow it as far as it can be traced, and subject it to the payment of their claims, except as against holders who have taken it *bona fide* for a valuable consideration and without notice. It is publicly pledged to those who deal with the corporation for their security. Unpaid stock is as much a part of this pledge and as much a part of the assets of the company, as the cash which has been paid in upon it. Creditors have the same right to look to it as to anything else, and the same right to insist upon its payment as upon payment of any other debt due to the company. As regards creditors there is no distinction between such a demand and any other asset which may form a part of the property and effects of the corporation."

It has been held that upon the dissolution of a joint-stock company it is the duty of the trustees to convert the assets into money to pay the debts and obligations, and distribute the remainder among the stockholders. They have no right to exchange the assets or any portion thereof of the

444 (1871); s. c. 60 Barb. (N. Y.) 648; 57 N. Y. 587; Henry v. Vermillion & A. R. Co., 17 Ohio 187 (1848)) Smith v. Huckabee, 53 Ala. 195 (1875); Allen v. Montgomery R. Co., 11 Ala. 437 (1847); DeMony v. Johnson, 7 Ala. 51 (1845); Bingham v. Rushing, 5 Ala. 403 (1843); Harmon v. Page, 62 Cal. 448 (1882); s. c. 10 Pac. L. J. 634; Ward v. Griswoldsville Manuf. Co., 16 Conn. 593 (1844); Hightower v. Thornton, 8 Ga. 486 (1850); Roberson v. Conrey, 5 La. An. 297 (1850); Payne v. Bullard, 23 Miss. 88 (1851); Adler v. Milwaukee Pat. Brick Co., 13 Wis. 61 (1860); Hatch v. Dana, 101 U. S. (11 Otto.) 205 (1879); bk. 25 L. ed. 885; Sanger v. Upton, 91 U. S. (1 Otto) 56 (1875); bk. 23 L. ed. 220; Curran v. Arkansas, 56 U. S. (15 How.) 304 (1853); bk 14 L. ed. 705; Haskins v. Harding, 2 Dill. C. C. 106 (1873); Wood v. Dummer, 3 Mas. C. C. 308 (1824); In re South Mountain C. M. Co., 7 Sawy. C. C. 30 (1881); 2 Story Eq. Jur., § 1252; Thomp. on Liability of Stockholders, § 11.

[1] 91 U. S. (1 Otto) 56 (1875); bk. 23 L. ed. 220

old association for the corporate stock of any corporation without the consent of all the stockholders. And the stockholder who does not consent to such exchange may recover the value of his stock so wrongfully disposed of.[1]

Sec. 124c. Same—When dissolution takes place.—The dissolution of a corporation can take place only (1) by act of the legislature, where power is reserved for that purpose, (2) by a surrender of the charter which is accepted by the state; (3) by the loss of all its members, or of an integral part, so that the concerns of corporate functions cannot be restored; and (4) the forfeiture of the charter declared by the judgment of a court of competent jurisdiction.[2] It has been said that as a general rule to constitute a dissolution of a corporation by a surrender of its franchise, or by misuser or nonuser, the surrender must be accepted by the government, or the default must be judicially declared;[3] but in the case of Slee v.

[1] Frothingham v. Barney, 6 Hun (N. Y.) 366 (1876).

[2] Bradt v. Benedict, 17 N. Y. 99 (1858); Vernon Society v. Hills. 6 Cow. (N. Y.) 23 (1826); s. c. 16 Am. Dec. 429; Barclay v. Talman, 4 Edw. Ch. (N. Y.) 123 (1842); Slee v. Bloom, 5 Johns. Ch. (N. Y.) 367 (1821); Wilde v. Jenkins, 4 Paige Ch. (N. Y.) 481 (1834); Bank of Niagara v. Johnson, 8 Wend. (N. Y.) 645 (1832); Penobscot Boom Corp. v. Lamson, 16 Me. 231 (1839); s. c. 33 Am. Dec. 660; Chesapeake & O. Canal Co. v. Baltimore & O. R. Co., 4 Gill & J. (Md.) 121 (1832); Revere v. Boston Copper Co., 32 Mass. (15 Pick.) 351 (1834); Russell v. McLellan, 31 Mass. (14 Pick.) 63 (1833); Peter v. Kendal, 6 Barn. & C. 703 (1827); 2 Kent Com. 312.

[3] Denike v. New York & R. L. & C. Co., 80 N. Y. 599 (1880); Buffalo & A. R. Co. v. Cary, 26 N. Y. 75 (1862); Belmont v. Erie R. Co., 52 Barb. (N. Y.) 637 (1869); Doyle v. Peerless Petroleum Co., 44 Barb. (N. Y.) 239 (1865); Howe v. Denel, 43 Barb. (N. Y.) 504 (1865); Bangs v. McIntosh, 23 Barb. (N. Y.) 591 (1857); People v. Dean, 6 Cow. (N. Y.) 27 (1826); Attorney-General v. Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371 (1817); Wilde v. Jenkins, 4 Paige Ch. (N. Y.) 481 (1834); Verplanck v. Mercantile Ins. Co., 1 Edw. Ch. (N. Y.) 84 (1831); s. c. 2 Paige Ch. (N. Y.) 438; Neall v. Hill, 16 Cal. 145 (1860); Baker v. Backus, 32 Ill. 79 (1863); Atchapalaya Bank v. Dawson, 13 La. 497 (1839); Attorney-General v. Tudor Ice Co., 104 Mass. 239 (1870); Russell v. McLellan 31 Mass. (14 Pick.) 63 (1833); Cady v. Centreville Knit Goods Mfg. Co., 48 Mich. 133 (1882); Attorney-General v. Bank of Michigan, Harr. Ch. (Mich.) 315 (1843); Bayless v. Orne, 1 Freem. Ch. (Miss.) 161 (1841); State v. Merchants' Ins. Co., 8 Humph. (Tenn.) 235 (1847); Strong v. McCagg, 55 Wis. 624 (1882); Trustees Dartmouth College v. Woodward, 17 U. S. (4 Wheat.) 518, 698 (1819); bk. 4 L. ed.

Bloom[1] it was held by the New York court of errors that a manufacturing corporation, organized under the Act of 1811, might be deemed dissolved so as to make the stockholders liable for debts, when it had suffered its property to be sold, and the trustees had actually relinquished their trust and had for more than a year done nothing manifesting an intention of resuming their corporate functions. The court in that case held that under the circumstances the corporation might be deemed to have surrendered its franchise and to be dissolved in fact.[2]

The dissolution of a corporation is a matter of law arising from the facts.[3] Thus the seizure of the franchise of a corporation in effect works its dissolution;[4] but the mere non-user or misuser, working a forfeiture of corporate rights, cannot be taken advantage of collaterally.[5]

At common law the only modes of dissolving corporations was by the death of its members; by act of the legislature; by a surrender of the charter accepted by the government, or by forfeiture of the franchises, which could only take effect upon a judgment of a court of competent jurisdiction, in a proceeding on behalf of the government or people.[6]

629, 674; Terrett v. Taylor, 13 U. S. (9 Cr.) 43, 51 (1815); bk. 3 L. ed. 650, 652; Gaylord v. Ft. Wayne, M. & C. R. Co., 6 Biss. C. C. 286 (1875); Peter v. Kendal, 6 Barn. & C. 703 (1827); Attorney-General v. Clarendon, 17 Ves. Jr. 491 (1810).

[1] 19 Johns. (N. Y.) 456 (1822); s. c. 10 Am. Dec. 273.

[2] See Bradt v. Benedict, 17 N. Y. 93, 99 (1858); Penniman v. Briggs, Hopk. Ch. (N. Y.) 300 (1824); s. c. 8 Cow. (N. Y.) 387. See also Denike v. New York Lime & Cement Co., 80 N. Y. 599 (1880); New York Marbled Iron Works v. Smith, 4 Duer (N. Y.) 362 (1855); Allen v. New Jersey S. R. Co., 49 How. (N. Y.) Pr. 14 (1875); Webster v. Turner, 12 Hun, (N. Y.) 264 (1877); Lake Ontario Nat. Bank v. Onondaga County Bank, 7 Hun (N. Y.) 549 (1876).

[3] John v. Farmers' & Mechanics Bank, 2 Blackf. (Ind.) 367 (1830); s. c. 20 Am. Dec. 119.

[4] State Bank v. State, 1 Blackf. (Ind.) 267 (1823); s. c. 12 Am. Dec. 234.

[5] Trustees of Vernon Soc. v. Hills, 6 Cow. (N. Y.) 23 (1826); s. c. 16 Am. Dec. 429; John v. Farmers & Mechanics' Bank, 2 Blackf. (Ind.) 367 (1830); s. c. 20 Am. Dec. 119.

[6] Barclay v. Talman, 4 Edw. Ch. (N. Y.) 123 (1842); Allen v. New Jersey S. R. Co., 49 How. (N. Y.) Pr. 17 (1875); State v. Real Estate Bank, 5 Ark. 595 (1844); s. c. 41 Am. Dec. 109; McMahan v. Morrison, 16 Ind. 172 (1861); s. c. 79 Am. Dec. 418; Penobscot Boom Corporation v.

Sec. 124d. Same—Interest of stockholder.—Upon the dissolution of a corporation, the title to the real property held by such corporation vests in the receiver of the corporation; and the property, both real and personal of the corporation, must be administered by the receiver for the benefit and interest of the stockholders.[1]

Sec. 124e. Same—Liability of stockholders.—On the dissolution of a corporation, the persons composing the company at the time are individually responsible for its debts to the extent of their respective shares;[2] but where the corporation is dissolved by time, a creditor cannot enforce his debt against the individuals composing the corporation beyond the extent fixed in the resolution passed by the trustees, at which they assented.[3] In the case of Savings Association v. O'Brien,[4] it was held that the Missouri statute[5] providing that "if any company formed under this act dissolve, leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of dissolution, without joining the company in such suit, and if judgment be rendered and execution satisfied, the defendant or defendants may sue all who were stockholders at the time of the dissolution for the recovery of the portion of such debt for which they were liable," creates a personal liability on the part of the stockholder which may be enforced by a common law action in other states.

Lamson, 16 Me. 224 (1839); s. c. 33 Am. Dec. 656; Folger v. Columbian Ins. Co., 99 Mass. 267 (1868); s. c. 96 Am. Dec. 747; Boston Glass Manuf. Co. v. Langdon, 41 Mass. (24 Pick.) 49 (1834); s. c. 35 Am. Dec. 292; Trustees of McIntire Poor School v. Zanesville Canal & M. Co., 9 Ohio, 203 (1839); s. c. 34 Am. Dec. 436. See Bradt v. Benedict, 17 N. Y. 99 (1858); Kincaid v. Dwinelle, 37 N. Y. Super. Ct. (5 J. & S.) 326 (1874); New York Marbled Iron Works v. Smith, 4 Duer (N. Y.) 362 (1855); Cary v. Schoharie Valley Mach. Co., 2 Hun, (N. Y.) 110 (1874.)

[1] Owen v. Smith, 31 Barb. (N. Y.) 646 (1860); James v. Woodruff, 10 Paige Ch. (N. Y.) 541 (1844). See Morgan Co. v. Thomas, 76 Ill. 148 (1875).

[2] Slee v. Bloom, 5 Johns. Ch. (N. Y.) 366 (1821). *Compare*, Strong v. Wheaton, 38 Barb. (N. Y.) 619 (1861).

[3] See Slee v. Bloom, 5 Johns. Ch. (N. Y.) 366 (1821); Lowry v. Inman, 2 Sween. (N. Y.) 131 (1869).

[4] 5 Ry. & Corp. L. J. 318 (1889).

[5] 1 Wag. St. Mo., c. 37, art. 1, § 22.

Sec. 124f. Same—Creditor's remedy on dissolution.—In nearly if not quite all of the states, before a creditor is entitled to proceed against a stockholder he must first exhaust his remedy against the company;[1] but where all the property of a corporation has been sold in execution under the general Insolvency Act, and the corporation has ceased to do business as such, and the trustees or directors have no power to resuscitate the company, it seems that the corporation may be deemed to be dissolved for the purposes of the remedy of creditors against the stockholders individually;[2] for where a corporation is dissolved the liability of the stockholders to the creditors becomes primary and absolute, and it is not necessary first either to sue the corporation or to aver and prove its insolvency.

It has been said that where a creditor sues a single stockholder, he may maintain an action of debt, but that where he proceeds against two or more, he may maintain a bill in equity.[3]

Sec. 124g. Same—Effect at common law.—It has been said

[1] Shellington v. Howland, 53 N. Y. 374 (1873); aff'g s. c. 67 Barb. (N. Y.) 14; Lindsley v. Simonds, 2 Abb. (N. Y.) Pr. N. S. 69 (1866); Lane v. Harris, 16 Ga. 217 (1854); Thornton v. Lane, 11 Ga. 459 (1852); Drinkwater v. Portland Marine R. Co., 18 Me. 35 (1841); Chamberlin v. Huguenot M'f'g Co., 118 Mass. 536 (1875); Priest v. Essex Hat Mfg. Co., 115 Mass. 380 (1874); Cambridge Water Works v. Somerville Dyeing & B. Co., 86 Mass. (4 Allen) 239 (1862); McClaren v. Franciscus, 43 Mo. 452 (1869); Wehrman v. Reakirt, 1 Cin. Sup. Ct. 230 (1871); New England Commercial Bank v. Newport Steam Factory, 6 R. I. 154 (1859); Blake v. Hinkle, 10 Yerg. (Tenn.) 218 (1836); Danchy v. Brown, 24 Vt. 197 (1852). See Remington v. Samana Bay Co., 140 Mass. 494 (1886); s. c. 1 New Eng. Rep. 707; Stedman v. Eveleth, 47 Mass. (6 Metc.) 114 (1843); Stone v. Wiggin, 46 Mass. (5 Metc.) 316 (1842); Marcy v. Clark, 17 Mass. 330 (1821); Leland v. Marsh, 16 Mass. 389 (1820).

[2] Penniman v. Briggs, Hopk. Ch. (N. Y.) 300 (1824); s. c. 8 Cow. (N. Y.) 387. See State Savings Association v. Kellogg, 52 Mo. 589 (1853); Dewey v. St. Albans Trust Co., 56 Vt. 482 (1884).

[3] Penniman v. Briggs, Hopk. Ch. (N. Y.) 300 (1824); s. c. 8 Cow. (N. Y.) 387; Spence v. Shapard, 57 Ala. 599 (1877). See Stover v. Flack, 30 N. Y. 64 (1864); Garrison v. Howe, 17 N. Y. 458 (1858); Diven v. Duncan, 41 Barb. (N. Y.) 520 (1863); Perkins v. Church, 31 Barb. (N. Y.) 84 (1859); Slee v. Bloom, 19 Johns. (N. Y.) 456 (1822); s. c. 10 Am. Dec. 273; Van Hook v. Whitlock, 3 Paige Ch. (N. Y.) 409 (1832); Bank of Poughkeepsie v. Ibbotson, 24 Wend. (N. Y.) 473 (1840); Simonson v. Spencer, 15 Wend. (N. Y.) 548 (1836); Matthews v. Albert, 24 Md. 527 (1866); Bullard v. Bell, 1 Mass. C. C. 243 (1817).

that the effect at common law of the dissolution of a corporation was (1) that its lands and tenements reverted to the person by whom they were granted to the corporation; (2) its goods and chattels vested in the crown; and (3) the debts due to or from it were extinguished.[1] According to the rigid doctrine of the common law on the dissolution of a corporation, all debts due to the company were totally extinguished, in so far, at least, as any right of action thereon was concerned;[2] hence on dissolution a corporation could neither sue nor be sued at common law,[3] and all pending suits by or against such corporation were abated, where the fact of dissolution was brought seasonably to the notice of the court;[4] but such is not the case in this country.[5]

[1] Hightower v. Thornton, 8 Ga. 486 (1850); State Bank v. State, 1 Blackf. (Ind.) 267 (1823); s. c. 12 Am. Dec. 234; Port Gibson v. Moore, 21 Miss. (13 Smed. & M.) 157 (1849); Commercial Bank v. Chambers, 16 Miss. (8 Smed. & M.) 9 (1847); Mississippi Bank v. Wrenn, 11 Miss. (3 Smed. & M.) 791 (1844); Renick v. West Union Bank, 13 Ohio 298 (1844); Miami Exporting Co. v. Gano, 13 Ohio 269 (1844); White v. Campbell, 5 Humph. (Tenn.) 38 (1844); Colchester v. Seaber, 3 Burr. 1866 (1766); Edmunds v. Brown, 1 Lev. 237 (1669); Rex v. Pasmore, 3 T. R. 241, 242 (1789); 1 Bl. Com. 484; 2 Kent Com. 307.

[2] See People v. O'Brien, 111 N. Y. 1 (1888); s. c. 7 Am. St. Rep. 684, and note 717; Corning v. McCullough, 1 N. Y. 47 (1847); s. c. 49 Am. Dec. 287; Bingham v. Weiderwax, 1 N. Y. 509 (1848); Freeland v. McCullough, 1 Den. (N. Y.) 414 (1845); s. c. 43 Am. Dec. 685; Morgan v. New York & A. R. Co., 10 Paige Ch. (N. Y.) 290 (1843); s. c. 40 Am. Dec. 244; Robison v. Beall, 26 Ga. 33 (1858); Thornton v. Lane, 11 Ga. 492 (1852); Hightower v. Thornton, 8 Ga. 486 (1850); s. c. 52 Am. Dec. 412; State Bank v. State 1 Blackf. (Ind.) 267 (1823); s. c. 12 Am. Dec. 234; Lexington & O. R. Co. v. Bridges, 7 B. Mon. (Ky.) 556 (1847); s. c. 46 Am. Dec. 528; Merrill v. Suffolk Bank, 31 Me. 57 (1849); s. c. 50 Am. Dec. 649; White v. Campbell, 5 Humph. (Tenn.) 38 (1844); Colchester v. Seaber, 3 Burr. 1868 arg. (1766); Edmunds v. Brown, 1 Lev. 237 (1669); Knight v. Wells, 1 Lut. 519 (1695); Attorney-General v. Gower, 9 Mod. 226 (1740); Rex v. Pasmore, 3 T. R. 199 (1789); Co. Lit. 13b. 102b.; 4 Bl. Com. 484; 2 Kent Com. 307; 4 Kyd. Corp. 516; Pollex Arg. Quo Warranto, 112.

[3] Saltmarsh v. Planters' & M. Bank, 14 Ala. 668 (1848); s. c. 17 Ala. 761 (1850); Bank of Louisiana v. Wilson, 19 La. An. 1 (1867).

[4] Paschall v. Whittsitt, 11 Ala. 472 (1847); Farmers' & Mechanics' Bank v. Little, 8 Watts. & S. (Pa.) 207 (1844); First Nat. Bank of Selma v. Colby, 88 U. S. (21 Wall.) 609 (1874); bk. 22 L. ed. 687; Greeley v. Smith, 3 Story C. C. 657 (1845). *Compare*, Kansas City Hotel Co. v. Sauer, 65 Mo. 279 (1877); Lindell v. Benton, 6 Mo. 361 (1840).

[5] See *post*, § 124i.

Sec. 124h. Same—Effect on property.—On the dissolution of a legal corporation, its personal and real property becomes assets for the payment of its debts, and distribution among its stockholders;[1] but a lease to a corporation is not terminated by its dissolution, and its covenant to pay rent does not thereupon cease to be obligatory.[2]

Sec. 124i. Same—Effect on suit pending.—It has been held that in this country an action properly commenced by a corporation is not abated by the dissolution of such corporation, but may be continued in its corporate name, without a special application to the court.[3] The doctrine of the common law and the one which prevailed in this country for a time, was that on the dissolution of a corporation of pending suits by or against it were abated by the dissolution where that fact was seasonably brought to the attention of the court.[4] It seems, however, that where a judgment is rendered for or against a corporation after its dissolution, but without that fact having been regularly brought to the court, the judgment is valid;[5] but where a suit is commenced and judgment obtained against a corporation after its dissolution, the judgment is erroneous, and will be reversed on a writ of error on application of a member of the corporation whose property has been levied on under an execution issued on the judgment.[6] There are other cases holding such a judgment not merely erroneous, but absolutely void.[7]

Sec. 125. Extension of Company's Business—New Cer-

[1] State ex rel. Brown v. Bailey, 16 Ind. 46 (1861); s. c. 79 Am. Dec. 405; Lauman v. Lebanon Valley R. Co., 30 Pa. St. 42 (1858); s. c. 72 Am. Dec. 685. See *ante*, § 124a.

[2] People v. National Trust Co., 82 N. Y. 283 (1880).

[3] New York Marbled Iron Works v. Smith, 4 Duer (N. Y.) 362 (1855).

[4] See Paschall v. Whittsitt, 11 Ala. 472 (1847); Farmers' & M. Bank v. Little, 8 Watts. & S. (Pa.) 207 (1844); First Nat. Bank of Selma v. Colby, 88 U. S. (21 Wall.) 609 (1874); bk. 22 L. ed. 687; Greeley v. Smith, 3 Story C. C. 657 (1845). See *supra*, § 124f.

[5] May v. State Bank, 2 Rob. (Va.) 56 (1843); s. c. 40 Am. Dec. 726.

[6] Rankin v. Sherwood, 33 Me. 509 (1851); Merrill v. Suffolk Bank, 31 Me. 57 (1849).

[7] See Sturges v. Vanderbilt, 73 N. Y. 384 (1878); McCulloch v. Norwood, 58 N. Y. 562 (1874); Thornton v. Marginal Freight Railway, 123 Mass. 32 (1877).

tificate.—The directors of any manufacturing corporation organized under this act, who may desire within one year from the date of the original certificate of such manufacturing corporation to extend the business of such corporation beyond that mentioned in said original certificate, providing that the proposed extension of said business shall be of the same general character of that stated in, and which might have been properly included in said original certificate, are hereby authorized to make and file an amended certificate of incorporation to conform to this act; and upon the making and filing of such amended certificate, the said corporation shall be deemed and taken to be a manufacturing corporation for all purposes stated in said amended certificate from the time of filing said original certificate.[1]

[1] L. 1875, c. 611, § 39, as amended by L. 1888, c. 513.

CHAPTER VIII.

DISSOLUTION OF CORPORATIONS—VOLUNTARY DISSOLUTION.

VOLUNTARY DISSOLUTION—DIVISION OF DIRECTORS—PETITION FOR DISSOLUTION—ORDER TO SHOW CAUSE—TEMPORARY RECEIVER—INJUNCTION—SERVICE OF ORDER—HEARING ON PETITION—ORIGINAL PAPERS—FINAL ORDER—TRANSFER OF PROPERTY—VOID WHEN.

SEC. 126. Voluntary dissolution—When directors may petition for.
SEC. 126a. Same—Jurisdiction to dissolve corporation.
SEC. 126b. Same—Statutory proceeding.
SEC. 126c. Same—Application for dissolution.
SEC. 126d. Same—Resolution of directors.
SEC. 126e. Same—Insolvency of corporation.
SEC. 126f. Same—New York doctrine.
SEC. 126g. Same—Discretion of court.
SEC. 126h. Same—Remedy of creditors.
SEC. 126i. Same—Who may be trustees—Executors.
SEC. 126j. Same—Power of trustees.
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SEC. 128. Same—Petition for dissolution—Contents of.
SEC. 128a. Same—Requisites of petition for dissolution.
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SEC. 128c. Same—Inventory—Omission of items.
SEC. 129. Same—Affidavit to be annexed.
SEC. 130. Same—Presentation of petition—Order to show cause—Temporary receiver—Notice of application for—Injunction
SEC. 130a. Same—Order to show cause—Form and contents of.
SEC. 130b. Same—Notice of order—Hearing.
SEC. 130c. Same—Injunction—Vacating order.
SEC. 130d. Same—Service of injunction—Mode of.
SEC. 130e. Same—Receiver—When appointed.
SEC. 131. Same—Order to be published.
SEC. 132. Same—Order to be served on creditors and stockholders.
SEC. 132a. Same—Service of copies of papers.
SEC. 133. Same—Hearing—Appointment of referee

SEC. 133a. Same—Failure of referee to report.
SEC. 134. Same—Original papers may be used.
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SEC. 136. Same—Final order.
SEC. 136a. Same—Appointment of receiver—When made.
SEC. 136b. Same—Sale and distribution of assets.
SEC. 136c. Same—Stockholders—Rights of majority.
SEC. 137. Same—Certain sales, etc., void.
SEC. 137a. Same—Transfer of property—Void after petition for dissolution
SEC. 137b. Same—judgments obtained by confession—Preferences.

Sec. 126. Voluntary Dissolution — When Directors may Petition for.—If a majority of the directors, trustees, or other officers, having the management of the concerns of a corporation created by or under the laws of the state, discover that the stock, effects, and other property thereof are not sufficient to pay all just demands, for which it is liable, or to afford a reasonable security to those who may deal with it; or if, for any reason, they deem it beneficial to the interests of the stockholders, that the corporation should be dissolved; they may present a petition, to the supreme court or to a superior city court of the city where the principal office of the corporation is located, praying for a final order dissolving the corporation, as prescribed in this title.[1]

Sec. 126a. Same—Jurisdiction to Dissolve Corporation.—A court of equity has not, by virtue of its general or inherent powers, the right to dissolve a corporation; such right is purely

[1] N. Y. Code Civ. Proc., § 2419. This section of the Code of Civil Procedure was amended by laws of 1884, c. 406, by adding the following clause, to wit: "In cases of Corporations affected by the provisions of this title and not having stockholders, it shall be sufficient for the members of this title to notify, name and refer to the 'members' of such corporation instead of 'the stockholders' as herein provided."

This provision of the Code does not apply to incorporated library societies, to religious corporations, or to select schools or academies incorporated by the agents of the university, or by the legislature, or to a municipal or other political corporation. N. Y. Code Civ. Proc., § 2431.

statutory.[1] Where the action is properly instituted the New York superior court has jurisdiction of an action to dissolve a corporation of that state which transacts its business and is served with the summons in the city of New York.[2] In this case the court say: "By the passage of the Code of Procedure in the year succeeding the passage of the Judicial Act, the equity jurisdiction which by that act was vested exclusively in the supreme court, was bestowed in part on the superior court, the court of common pleas, and the mayor's and recorder's courts of cities; and to such extent that each of these courts was given a general equity jurisdiction."[3]

Sec. 126b. Same—Statutory Proceeding.—Proceedings for a voluntary dissolution of a corporation are special and statutory in which the court has no power or authority to act, except as such power is conferred by the statute;[4] and the courts of general jurisdiction must conform strictly to the statute.[5] Thus where a receiver was appointed in a proceeding for the voluntary dissolution of a corporation, before the return of the order to show cause, it was held that the appointment was unauthorized, the court having no authority to appoint a receiver, except in conformity with the statute.[6] And where judgment was entered in an action by a creditor in a case not authorized by law dissolving the corporation and appointing a permanent receiver, and subsequently all the unsecured indebtedness was paid off, the court held that neither the plaintiff nor any other creditor could retain the unauthorized and really suspend judgment for the benefit of a secured indebtedness, which was neither due when the action was commenced nor mentioned in the complaint, especially when

[1] Bliven v. Peru Steel & Iron Co., 9 Abb. (N. Y.) N. C. 205 (1881).

[2] Van Pelt v. United States Metallic Spring Co., 13 Abb. (N. Y.) Pr. N. S. 325 (1872).

[3] See Bennett v. LeRoy, 5 Abb. (N. Y.) Pr. 55 (1857); Bowen v. Irish Presbyterian Congregation, 6 Bosw. (N. Y.) 245 (1860); Forest v. Forest, 6 Duer, (N. Y.) 102 (1856); aff'd 25 N. Y. 501.

[4] In re Boynton Saw and File Co., 6 N. Y. Civ. Proc. Rep., 342 (1884); Chamberlain v. Seamless Paper Vessel Co., 7 Hun, (N. Y.) 557 (1876).

[5] Chamberlain v. Seamless Paper Vessel Co., 7 Hun, (N. Y.) 557 (1876).

[6] Chamberlain v. Seamless Paper Vessel Co., 7 Hun, (N. Y.) 557 (1876).

another action has been begun by the holders of such indebtedness in which their rights could be fully protected.[1]

Sec. 126c. Same—Application for dissolution.—An application for the dissolution of a corporation must proceed from the company or its board of directors or trustees.[2] A stockholder is not entitled to a decree winding up the affairs of a corporation and appointing a receiver,[3] nor can a portion of the stockholders of a manufacturing corporation surrender the franchises of the corporation and work its dissolution;[4] and a decree for the dissolution of a corporation in an action by a stockholder or creditor who is also the president, and in a case not authorized by statute, cannot be sustained although the action is assented to by the president and by one or more of the trustees individually; because an application for a voluntary dissolution must proceed from the company, or its board of trustees.[5] And in a recent case the New York supreme court held that the order of a court of equity dissolving a corporation and appointing a receiver of its assets, made upon the application of all the stockholders and some of the creditors, will be vacated where some of the requirements of the statute respecting the voluntary dissolution of corporations have not been complied with; the corporation being engaged at the time of such order in active business, with a large amount of assets, and a full board of directors.[6]

Sec. 126d. Same—Resolution of Directors.—A corporation cannot be dissolved by a resolution of its directors or trustees to wind up its affairs; such a resolution can have no effect because the corporation can only be dissolved by a judicial sentence or by a surrender of its charter accepted by the

[1] Bliven v. Peru Steel & Iron Co., 9 Abb. (N. Y.) N. C. 205 (1881).

[2] Bliven v. Peru Steel & Iron Co., 9 Abb. (N. Y.) N. C. 205 (1881).

[3] Bliven v. Peru Steel & Iron Co., 9 Abb. (N. Y.) N. C. 205 (1881). See Denike v. New York R. Lime & Cement Co., 80 N. Y. 599 (1880); Ramsey v. Erie R. Co., 7 Abb. (N. Y.) Pr. N. S. 156, 181 (1869); How v. Deuel, 43 Barb. (N. Y.) 505 (1865); Galwey v. United States Steam S. Refining Co., 36 Barb. (N. Y.) 256 (1861); Gilman v. Green Point Sugar Co., 4 Lans. (N. Y.) 483 (1871).

[4] Denike v. New York & R. Lime & Cement Co., 80 N. Y. 599 (1880).

[5] Bliven v. Peru Steel & Iron Co., 9 Abb. (N. Y.) N. C. 205 (1881).

[6] In re Mart, 5 N. Y. Sup. 82 (1889).

state.[1] The dissolution of a corporation extinguishes all its debts, and the power of dissolving itself by its own act would be a dangerous power, and one which cannot be supposed to exist.[2]

Sec. 126e. Same—Insolvency of corporation.—The mere insolvency of a corporation does not work a dissolution of its corporate existence, neither does proceedings in insolvency nor the appointment of a receiver of its corporate property ;[3] because it is not enough to work a dissolution that causes therefor have actual existence; their existence must be judicially ascertained and declared and then enforced by judgment of the court, except in those cases where they are within the power of the legislature.[4]

Thus it has been held that the mere fact that a majority of the property and franchises of a railroad company are held in custody by a court of equity, for the purpose of enforcing satisfaction of specific claims, does not work a dissolution of the corporation; and that the corporate existence continues

[1] New York Marbled Iron Works v. Smith, 4 Duer (N. Y.) 362 (1855). See Bradt v. Benedict, 17 N. Y. 93 (1858) ; Lake Ontario Nat. Bank v. Onondaga Co. Bank, 7 Hun, (N. Y.) 549 (1876).

[2] Boston Glass Manuf. v. Langdon, 41 Mass. (24 Pick.) 49, 53 (1834).

[3] Coburn v. Papier Maché Manuf. Co., 76 Mass. (10 Gray) 243, 245 (1857). See Kincaid v. Dwinelle, 59 N. Y. 548 (1875); Lea v. American Atl. & Pac. Canal Co., 3 Abb. (N. Y.) Pr. N. S. 1 (1867); Howe v. Deuel, 43 Barb. (N. Y.) 504 (1865); Huguenot Nat. Bank v. Studwell, 6 Daly (N. Y.) 13 (1875); New York Marbled Iron Works v. Smith, 4 Duer, (N. Y.) 362 (1855); People v. Erie R. Co., 36 How. (N. Y.) Pr. 129 (1868); Hollingshead v. Woodward, 35 Hun, (N. Y.) 410 (1885); Green v. Walkill Nat. Bank, 7 Hun, (N. Y.) 63 (1876); Nimmons v. Tappan, 2 Sween. (N. Y.) 652 (1870); National Pahquioque Bank v. First Nat. Bank of Bethel, 36 Conn. 325 (1870); aff'd 81 U. S. (14 Wall.) 383; bk. 20, L. ed. 840; Holland v. Heyman, 60 Ga. 174 (1878); City Ins. Co. v. Commercial Bank, 68 Ill. 348 (1873); Bruffett v. Great Western R. Co., 25 Ill. 357 (1861); Bell v. Indianapolis, C. & L. R. Co., 53 Ind. 57 (1876); Valley Bank v. Ladies Cong. Sewing Soc. 28 Kan. 423 (1882); Folger v. Columbian Ins. Co., 99 Mass. 267, 276 (1868); Boston Glass Manuf. v. Langdon, 41 Mass. (24 Pick.) 49 (1834); Moseby v. Burrows, 52 Tex. 396 (1880); Central Nat. Bank v. Connecticut Mut. Life Ins. Co., 104 U. S. (14 Otto) 54 (1881); bk. 26 L. ed. 693.

[4] Sturges v. Vanderbilt, 73 N. Y. 384 (1878); Brooklyn Cent. R. Co. v. Brooklyn City R. Co., 32 Barb. (N. Y.) 358 (1860); State v. Noyes, 47 Me. 189 (1859); Grand Gulf R. & B. Co. v. State, 18 Miss. (10 Smed. & M.) 428 (1848).

notwithstanding the fact that dominion over the road and property has been suspended.[1]

Sec. 126f. Same—New York Doctrine.—The New York doctrine is that notwithstanding the fact that the corporation does or suffers to be done, acts which destroy the end and object of its creation and which are equivalent to a surrender of its corporate rights, yet that the mere insolvency, although total, is not sufficent evidence of such a surrender.[2]

Sec. 126g. Same—Discretion of Court.—The court is not bound to decree a dissolution of the corporation simply because a majority of the directors and stockholders request it to be done. However, it seems that where the owners of a large portion of the stock find it to their interest to withdraw their capital, it will be deemed presumptive evidence that the interest of the stockholders, generally, will be promoted by the dissolution of the corporation.[3]

It is said in In re Niagara Ins. Co.,[4] that under an act to provide for the dissolution of incorporated insurance companies in the city of New York, passed April 5, 1817, the court of chancery should exercise the same discretionary power in decreeing a dissolution as the legislature in case the latter were applied to by the directors of the company for the repeal of the charter. It is thought that the same is true of other corporations.

Sec. 126h. Same—Remedy of Creditors.—Where a proceeding is pending for the dissolution of a corporation, the remedy of any creditor is in that proceeding only, and in a district in which the same is pending.[5]

Sec. 126i. Same—Who may be Trustees—Executors.—One holding corporate stock as executor may become at least a *de facto*

[1] Heath v. Missouri, K. & Tex. R. Co., 83 Mo. 617 (1884).

[2] Bradt v. Benedict, 17 N. Y. 93 (1858). See New England Iron Co. v. Gilbert Elevated R. Co., 91 N. Y. 153, 167 (1883); Bruce v. Platt, 80 N. Y. 379–390 (1880.)

[3] In re Niagara Ins. Co., 1 Paige Ch. (N. Y.) 258 (1828).

[4] 1 Paige Ch. (N. Y.) 258 (1828).

[5] Attorney-General v. North America Life Ins. Co., 6 Abb. (N. Y.) N. C. 293 (1879).

trustee of the corporation and as such join in a petition for its dissolution.[1]

Sec. 126j. Same—Power of Trustees.—It is said in the case of People v. O'Brien [2] that under the New York Revised Statute which provides that, on the dissolution of any corporation, the directors or managers of such corporation at the time of its dissolution shall be the trustees of the creditors and stockholders with full power to settle and wind up the affairs of the corporation, such directors become vested with title to the corporate property immediately upon dissolution of the corporation.[3]

The New York statute, providing that whenever a corporation shall be dissolved by act of the legislature the attorney-general shall bring suit to wind up its affairs, not being expressly retrospective, does not apply to a corporation dissolved by legislative act seven days before its passage.[4]

Sec. 127. Same—Where Directors are Equally Divided.—If a corporation, created under a general statute of the state for the formation of corporations, has an even number of trustees or directors, who are equally divided, respecting the management of its affairs, and the entire stock of the corporation is, at that time, owned by the trustees, or directors, or is so divided that one-half thereof is owned or controlled by persons favoring the course of one-half of the trustees or directors, and one-half by persons favoring the course of the other half of them, the trustees or directors, or one or more of them, may present a petition as prescribed in the last section. But this section does not apply to a savings bank, a trust company, a safe deposit company, or a

[1] In re Santa Eulalia Silver Mining Co., 51 Hun (N. Y.) 640 (1889); s. c. 2 N. Y. Sup. 221; aff'd 4 N. Y. Sup. 474; 23 N. Y. St. Rep. 1000.

[2] 111 N. Y. 1 (1888); s. c. 18 N. E. Rep. 692; rev. 45 Hun (N. Y.) 519.

[3] L. 1886, c. 310; 4 N. Y. R. S., 8th ed., p. 2678.

[4] People v. O'Brien, 111 N. Y. 1 (1888); s. c. 18 N. E. Rep. 692; rev. 45 Hun, (N. Y.) 519.

corporation formed to rent safes in burglar and fire-proof vaults, or for the construction or operation of a railroad, or for aiding in the construction thereof, or for the carrying on the business of banking or insurance, or intended to derive a profit from the loan or use of money.[1]

Sec. 128. Same—Petition for Dissolution—Contents of.—The petition must show that the case is one of those specified in the last two sections, and must state the reasons which induced the petitioner or petitioners to desire the dissolution of the corporation. A schedule must be annexed to the petition, containing the following matters, as far as the petitioner or petitioners know, or have the means of knowing the same:

1. A full and true account of all the creditors of the corporation, and of all unsatisfied engagements, entered into by, and subsisting against, the corporation.

2. A statement of the name and place of residence of each creditor, and of each person with whom such an engagement was made, and to whom it is to be performed, if known; or, if either is not known, a statement of that fact.

3. A statement of the sum owing to each creditor, or other person specified in the last subdivision, and the nature of each debt, demand, or other engagement.

4. A statement of the true cause and consideration of the indebtedness to each creditor.

5. A full, just, and true inventory of all the prop-

[1] N. Y. Code Civ. Proc., § 2420.

erty of the corporation, and of all the books, vouchers, and securities relating thereto.

6. A statement of each incumbrance upon the property of the corporation, by judgment, mortgage, pledge, or otherwise.

7. A full, just, and true account of the capital stock of the corporation, specifying the name of each stockholder; his residence, if it is known, or if it is not known, stating the fact; the number of shares belonging to him; the amount paid in upon his shares, and the amount still due thereupon.[1]

Sec. 128a. Same—Requisites of—Petition for dissolution.—A corporation can only effect a voluntary dissolution by a petition;[2] such petition must fully comply with the statute in all particulars,[3] and state facts showing that the dissolution of the corporation will be beneficial to the interest of the stockholders.[4] It is not enough to allege that the parties differ as to the management of the affairs of the company, and that the petitioners, who own one-half of the shares of the corporate stock, are convinced that if the methods and plans of the other parties in relation to the management of a corporation be carried into effect the result will be the financial ruin of the corporation.[5]

Averments in the petition or complaint that the debt has been due for a year; that the entire debt is now due; and that payment has been demanded and refused on the ground of lack of assets, are not sufficient, as they show neither insolvency for a year nor neglect of payment for a year, for

[1] N. Y. Code Civ. Proc., 2421.

[2] In New York to the Supreme Court and proceeding according to Art. 3, tit. 4, c. 8, pt. 3, of the New York Revised Statute. See note to People v. Bruff, 9 Abb. (N. Y.) N. C. 162, 166 (1880); Lake Ontario Nat. Bank v. Onondaga County Bank, 7 Hun, (N. Y.) 549 (1876).

[3] Matter of Dubois, 15 How. (N. Y.) Pr. 7 (1857); s. c. 6 Abb. (N. Y.) Pr. 386 note.

[4] Matter of Pyrolusite Manganese Co., 29 Hun., (N. Y.) 429 (1883) s. c. 3 N. Y. Civ. Proc. Rep., 270.

[5] Matter of Pyrolusite Manganese Co., 29 Hun, (N. Y.) 429 (1883) s. c. 3 N. Y. Civ. Proc. Rep. 270.

the reason that it does not appear when the demand was made.[1]

The petition or complaint should also set out that the stock not stated to be issued to the stockholders named, is still owned by or in the possession of the corporation, or, at least, that it has not been issued. The property ought to be identified in the inventory, and to be so fully described as, if it be lands, by metes and bounds, or by references to conveyances or otherwise, that the receiver may be enabled to take possession of the property. Such an inventory, and a full statement of the books, vouchers, and securities relating to the property, will be required, in order to put it in the power of the receiver to be certain that he has received all the property, and to bring such actions, or take such other steps as may be necessary to pay the liabilities of the company.[2]

Sec. 128b. Same—Presentation of—Statutory provisions—What a compliance with.—In voluntary proceedings for the dissolution of a corporation, the statutory provision [3] that on presentation of the petition the court may make an order requiring all persons interested in the corporation to show cause why it should not be dissolved, is not complied with by an order to show cause "why the prayer of the petition should not be granted," no provision being made for service of a copy of the petition therewith. The order is in the nature of process for bringing persons interested before the court, and, unless its provisions are in strict compliance with the statute it is void.[4]

Sec. 128c. Same—Inventory—Omission of items.—Under the New York Code of Civil Procedure,[5] requiring that the petition for dissolution of a corporation must have annexed a full, just, and true inventory of all the property of the corporation, and a statement of all the books, vouchers, and securities relating to its property, the question is not whether there has been a technical and accidental omission in the inventory of some

[1] Bliven v. Peru Steel & Iron Co., 9 Abb. (N. Y.) N. C. 205 (1881).

[2] Matter of Dubois, 15 How. (N. Y.) Pr. 7 (1857); s. c. 6 Abb. (N. Y.) Pr. 386 note.

[3] N. Y. Code Civ. Proc., § 2423, *post*, § 130.

[4] People v. Seneca Lake Grape & Wine Co., 52 Hun, (N. Y.) 174 (1889); s. c. 5 N. Y. Sup. 136; 23 N. Y. St. Rep. 346.

[5] N. Y. Code Civ. Proc., § 2421; *ante*, § 128.

item of property, or of some book relating to property, but whether, if any omissions exist, they show lack of good faith on the part of the petitioners, and afford evidence of a fraudulent purpose. If they do not, the defect is not jurisdictional and may be cured by evidence at the hearing.[1]

Sec. 129. Same—Affidavit to be Annexed.—An affidavit made by each of the petitioners to the effect that the matters of fact, stated in the petition and the schedule, are just and true so far as the affiant knows, or has the means of knowing the same, must be annexed to the petition and schedule.[2]

Sec. 130. Same—Presentation of petition—Order to show Cause—Temporary Receiver—Notice of Application for—Injunction.—Where the petition is addressed to the supreme court the papers must be presented at a term of that court, held within the judicial district embracing the county wherein the principal office of the corporation is located. In a case specified in section 2420 of this act, the court may, in its discretion, entertain or dismiss the application. Where it entertains the application, or where the case is one of those specified in section 2419 of this act, the court must make an order requiring all persons interested in the corporation to show cause before it, or before a referee designated in the order, at a time and place therein specified, not less than three months after the granting of the order, why the corporation should not be dissolved. The order must be entered, and the papers must be filed, within ten days after the order is made, with the clerk of the court, or, in the supreme court, with the clerk of

[1] In re Santa Eulalia Silver Mining Co., 51 Hun, 640 (1889); s. c. 4 N. Y. Sup. 174; 23 N. Y. St. Rep. 1000; aff'g 2 N. Y. Sup. 221.

[2] N. Y. Code Civ. Proc., § 2422.

the county where the principal office of the corporation is located. If it shall be made to appear to the satisfaction of the court that the corporation is insolvent, the court may at any stage of the proceeding before final order, on motion of the petitioners on notice to the attorney-general, or on motion of the attorney-general on notice to the corporation, appoint a temporary receiver of the property of the corporation, which receiver shall have all the powers and be subject to all the duties that are defined as belonging to temporary receivers appointed in an action, in section one thousand seven hundred and eighty-eight of this act. The court may also in its discretion, at any stage in the proceeding after such appointment upon like motion and notice confer upon such temporary receiver the powers and authority, and subject him to the duties and liabilities of a permanent receiver, or as much thereof as it thinks proper, except that he shall not make any final distribution among the creditors and stockholders, before final order in the proceedings, unless he is specially directed so to do by the court. If such receiver be appointed, the court may in its discretion, on like motion and notice, with or without security, at any stage of the proceeding before final order, grant an injunction, restraining the creditors of the corporation from bringing any action against the said corporation for the recovery of a sum of money, or from taking any further proceedings in such an action theretofore commenced. Such injunction shall have the same effect and be subject to the same provisions of law as if each creditor upon whom it be served was named therein.

[1] N. Y. Code Civ. Proc., § 2423, as amended by L. 1889, c. 314.

Sec. 130a. Same—Order to show cause—Form and contents of. —An order to show cause why a corporation should not be dissolved, is in the nature of the process for bringing in the persons interested not contesting and resisting the application before the court, and the requirements of the statute as to its form and contents must be strictly complied with; and if they fail to do this then the court does not acquire jurisdiction over the proceedings, and it will have no authority to make any adjudication affecting the rights of the parties designed to be controlled by it.[1]

Thus an order requiring all persons interested to show cause "why the prayer of petitioners should not be granted," does not comply with the requirements of the statute, and proceedings founded thereon are void for lack of jurisdiction; and objection may be taken by any of the parties to the proceeding at any stage thereof.[2]

The statute does not give the court control over the corporate property until the decision is made upon the return of the order to show cause. If such consent had been given there would doubtless be, as an incident of such control, authority to restrain creditors from suing the company and to prevent any interference by creditors with the corporate assets;[3] but where the creditors of a corporation do not appear, or in any way waive their rights to be served with precisely such an order as the Code of Civil Procedure prescribes, no jurisdiction is acquired over them, and a charge of this omission can be made at any time by either party, even though the objection is not taken on their motion to vacate the order in their answer.[4]

[1] Matter of Pyrolusite Manganese Co., 29 Hun (N. Y.) 429, 431 (1883); s. c. 3 N. Y. Civ. Proc. Rep. 270. See Matter of Valentine, 72 N. Y. 184 (1878); Sharp v. Speir, 4 Hill (N. Y.) 76 (1843).

[2] Matter of Pyrolusite Manganese Co., 29 Hun (N. Y.) 429 (1883); s. c. 3 N. Y. Civ. Proc. Rep. 270.

[3] In re Open Board of Brokers, 3 Month. L. Bul. 57 (1881). See Phœnix Foundry Co. v. North River Construction Co., 33 Hun (N. Y.) 156 (1884); s. c. 6 N. Y. Civ. Proc. Rep. 106; 19 N. Y. Week. Dig. 439.

[4] Matter of Pyrolusite Manganese Co., 29 Hun (N. Y.) 429 (1883); s. c. 3 N. Y. Civ. Proc. Rep. 270. See Sharp v. Speir, 4 Hill (N. Y.) 76 (1843).

Sec. 130b. Same—Notice of order—Hearing.—The notice of the order to show cause must be published and the hearing had before a referee in the county wherein is located the principal office for the management of the affairs and business of the company.[1]

Sec. 130c. Same—Injunction—Vacating order.—In a special proceeding pending before the supréme court, for the purpose of winding up the affairs and distributing the effects of a dissolved corporation, the court has power to enjoin a suit by a creditor of a corporation against the receiver appointed in such action, because such suit will necessarily hamper the court and receiver in the performance of their duties, and greatly increase the costs and expenses of the trust.[2] But it has been held in the Matter of French Manufacturing Company [3] that upon the presentation of an application for the voluntary dissolution of a corporation under the provisions of the Revised Statutes, an injunction restraining the creditors from proceeding against the corporation to enforce their demands, cannot be granted at the same time with the order to show cause why such dissolution should not be had.[4]

Sec. 130d. Same—Service of injunction—Mode of.—The fact that the mode of service of an injunction granted in an action for the dissolution of a corporation, was insufficient, does not of itself warrant the vacating of such order.[5]

Sec. 130e. Same—Receiver—When appointed.—A receiver cannot be appointed in a proceeding for the voluntary dissolution of a corporation until the granting of a final order dissolving the corporation.[6]

[1] Matter of Dubois, 6 Abb. (N. Y.) Pr. 386 (1856) note; s. c. 15 How. (N. Y.) Pr. 7.

[2] Attorney-General v. North American Life Ins. Co., 6 Abb. (N. Y.) N. C. 293 (1879).

[3] 12 Hun (N. Y.) 488 (1878).

[4] See In re Waterbury, 8 Paige Ch. (N. Y.) 380 (1840).

[5] Phœnix Foundry Co. v. North River Construction Co., 33 Hun (N. Y.) 156 (1884); s. c. 6 N. Y. Civ. Proc. Rep. 106; 19 N. Y. Week. Dig. 439.

[6] In re Boynton, S. & F. Co., 6 N. Y. Civ. Proc. Rep. 342 (1884). See Phœnix Foundry Co. v. North River Cons. Co., 6 N. Y. Civ. Proc. Rep. 106 (1884); Matter of French Manuf. Co., 12 Hun (N. Y.) 488 (1878); Chamberlin v. Rochester Seamless Paper Vessel Co., 7 Hun (N. Y.) 557 (1876).

The receiver appointed to take charge temporarily of the effects of the corporation is not a trustee for the creditors, he is merely a custodian and manager of the property under the direction of the court during the pendency of the action.[1]

Sec. 131. Same—Order to be Published.—A copy of the order must be published, as prescribed therein, at least once in each of the three weeks immediately preceding the time fixed therein for showing cause, in the newspaper printed at Albany in which legal notices are required to be published ; and also in one or more newspapers, specified in the order, published in the city or county wherein the order is entered.[2]

Sec. 132. Same—Order to be Served on Creditors and Stockholders.—A copy of the order must also be served upon each of the persons specified in the schedule as a creditor or stockholder of the corporation, or as a person to whom an engagement of the corporation is to be performed, other than a person whose residence is stated to be unknown, or to be without the United States. The service must be made either personally, at least twenty days before the time appointed for the hearing, or by depositing a copy of the order at least forty days before the time so appointed, in the post-office, inclosed in a postpaid wrapper addressed to the person to be served, at his residence, as stated in the schedule.[3]

Sec. 132a. Same—Service of copies of papers.—The New York Statute[4] providing that a copy of all motions and all motion papers, and a copy of any other application to the court, together with a copy of the order or judgment to be

[1] Herring v. New York, L. E. & W. R. Co., 105 N. Y. 340 (1887).
[2] N. Y. Code Civ. Proc., § 2424.
[3] N. Y. Code Civ. Proc., § 2425.
[4] L. 1883, c. 378, § 8; 4 N. Y. R. S., 8th ed., p. 2676.

proposed thereon in every action for the dissolution of a corporation shall in all cases be served on the attorney-general, whether the application be *ex parte* or upon notice, and any order or judgment granted in any such action or proceeding without service of the papers on the attorney-general shall be void, applies to proceedings for voluntary dissolution.[1]

Sec. 133. Same—Hearing—Appointment of Referee.—At the time and place specified in the order, or at the time and place to which the hearing is adjourned, the court, or the referee, must hear the allegations and proofs of the parties, and determine the facts. If a referee was not designated in the order to show cause, the court may, in its discretion, appoint a referee when or after the order is returnable. The decision of the court, or the report of the referee must be in writing, and must be made and filed with all convenient speed. It must contain a statement of the effects, credits, and other property, and of the debts and other engagements of the corporation, and of all other matters pertaining to its affairs.

Sec. 133a. Same—Failure of referee to report.—The failure of a referee to whom hearing is had under the statute[3] to make in his report a statement of the effects, credits and other property, and of the debts and other engagements of the corporation, and of all other matters pertaining to its affairs, is fatal to the validity of the proceedings, and renders an order dissolving the corporation entered upon such defective report void.[4]

Where the report of the referee contained no statement of the debts of the corporation, but stated, generally, that the

[1] People v. Seneca Lake Grape & Wine Co., 52 Hun (N. Y.) 174; s. c. 5 N. Y. Sup. 136, 139 (1889); 23 N. Y. St. Rep. 346.

[2] N. Y. Code Civ. Proc., § 2426.

[3] N. Y. Code Civ. Proc., § 2426; *supra*, § 133.

[4] Matter of Boynton Saw & File Co., 34 Hun (N. Y.) 369 (1884). See Matter of Pyrolusite Manganese Co., 29 Hun (N. Y.) 429 (1883); s. c. 3 N. Y. Civ. Proc. Rep. 270.

schedules annexed to the petition were correct, the court held that this was not a compliance with what the Code demands.[1]

Sec. 134. Same—Original Papers may be Used.—The court or the referee is entitled to use, upon the hearing, the original petition, and the schedules annexed thereto ; and the clerk must transmit them accordingly, upon the written order of the judge, or of the referee. In that case, they must be returned with the decision or report.[2]

Sec. 135. Same—Application for Final Order.—Where the hearing is before a referee, a motion for a final order must be made to the court upon notice to each person who has made himself a party to the proceeding, by filing with the clerk, before the close of the hearing, a notice of his appearance, in person or by attorney, specifying a post-office within the state, where such a notice may be served. The notice may be served as prescribed in this act, for the service of a paper upon an attorney in an action. Where the hearing was before the court, a motion for a final order may be made immediately, or at such a time and upon such a notice, as the court prescribes.[3]

Sec. 136. Final Order.—Upon an application for final order, if it appears to the court, in a case specified in section 2419 of this act, that the corporation is insolvent, or in a case specified either in that section or in section 2420 of this act, that, for any reason, a dissolution of the corporation will be beneficial to the interests of the stockholders, and not

[1] Matter of Pyrolusite Manganese Co., 29 Hun (N. Y.) 429 (1883); s. c. 3 N. Y. Civ. Proc. Rep. 270.

[2] N. Y. Code Civ. Proc., § 2427.

[3] N. Y. Code Civ. Proc., § 2428.

injurious to the public interests, the court must make a final order, dissolving the corporation, and appointing one or more receivers of its property. Upon the entry of the order, the corporation is dissolved. The court may, in its discretion, appoint a director, trustee, or other officer or a stockholder of the corporation, a receiver of its property.[1]

Sec. 136a. Same—Appointment of receiver—When made.—A receiver cannot be appointed before the return of the order to show cause. The Code of Civil Procedure has made no change in this respect.[2] And where a referee has been appointed in a proceeding for the dissolution of a corporation no receiver can be appointed until after the referee has reported.[3]

The Supreme Court of New York, say in the case of In re Boynton Saw and File Co.,[4] that in proceedings instituted under the Code of Civil Procedure,[5] to procure the voluntary dissolution of a corporation, the power to appoint a receiver can only be exercised by the court upon granting the final order for the dissolution of the corporation; it has no power to appoint a temporary receiver of its property or to enjoin the bringing of suits against it prior to the entry of that order.[6]

Sec. 136b. Same—Sale and distribution of assets.—Where a corporation is dissolved because the trustees cannot agree, the court may, after payment of the liabilities and expenses of the receivership, order a sale and distribution of the remaining assets.[7]

[1] N. Y. Code Civ. Proc., § 2429.

[2] Matter of Open Board of Brokers, 3 Mon. Law Bull. 57 (1881).

[3] In re Edson Recording Alarm Gage Co., 1 Month. L. Bull. 51 (1879). See Chamberlin v. Rochester Seamless Paper Vessel Co., 7 Hun (N. Y.) 557 (1876).

[4] 34 Hun (N. Y.) 369 (1884).

[5] N. Y. Code Civ. Proc., ch. 17, tit. 11.

[6] See Matter of French Manuf. Co., 12 Hun (N. Y.) 488 (1878); Chamberlain v. Rochester Seamless Paper Vessel Co., 7 Hun (N. Y.) 557 (1876).

[7] Ex parte Woven Tape Skirt Co., 8 Hun (N. Y.) 508 (1876); 309 N. Y. Code Civ. Proc. § 2429.

Sec. 136c. Same—Stockholders—Rights of majority.—A controlling interest in a corporation, originally organized by tea dealers to foster, protect and reform certain lines of trade, and to settle differences and promote friendly intercourse between members, and to continue fifty years, was acquired by sugar dealers, who made application under Code Civil Procedure to dissolve it, on the ground that it would be "beneficial to the interests of stockholders," for the purpose of dividing the assets, which consisted largely of money received for shares. The later subscriptions were for a much greater amount than the original ones. The tea dealers required an exchange, and opposed dissolution. The court held that in the absence of a special provision, giving a majority the right to it, a dissolution is not required by the Code, because beneficial to a majority, and should be denied.[1]

Sec. 137. Same—Certain Sales, etc., void.—A sale, assignment, mortgage, conveyance, or other transfer of any property of a corporation, made after the filing of a petition as prescribed in this title, in payment of, or as security for, an existing or prior debt, or for any other consideration; or a judgment thereafter rendered against the corporation by confession, or upon the acceptance of an offer, is absolutely void, as against the receiver appointed in the special proceeding, and as against the creditors of the corporation.[2]

Sec. 137a. Same—Transfer of property—Void after petition for dissolution.—The word "transfers" as used in section two thousand four hundred and thirty of the New York Code of Civil Procedure means passing over to another of an existing right to the thing transferred, which right shall survive the transfer.[3] And under the above section,[4] all transfers made

[1] In re Importers & Grocers' Exchange, 2 N. Y. Sup. 257 (1888); s. c. 28 N. Y. St. Rep. 416.

[2] N. Y. Code Civ. Proc., § 2430.

[3] Sands v. Hill, 55 N. Y. 18, 21 (1873).

[4] *Supra*, § 137.

after the filing of the petition for dissolution of the corporation in payment of or as security for pre-existing debt, or for any consideration, is void as against the receiver who may be appointed, and as against the creditors of the corporation, irrespective of the intent with which the transfer was made. This provision applies as well to the case where a petition for a dissolution is presented by the directors, trustees or other officers of the corporation, as by the creditors.[1]

Sec. 137b. Same—Judgments obtained by confession—Preferences.—A judgment obtained by confession against a corporation after a petition has been presented for the voluntary dissolution of such corporation is not entitled to a preference either as against the real or personal estate in the hands of the receiver who has subsequently been appointed; whether such confession of the judgment was by executing a bond and warrant of attorney or the giving of a cognovit in a suit commenced against the corporation in the usual way.[2]

[1] Matter of Berry, 26 Barb. (N. Y.) 55, 59 (1857); Brouwer v. Harbeck, 1 Duer (N. Y.) 114, 128 (1852).

[2] In re Waterbury, 8 Paige Ch. (N. Y.) 380 (1840).

CHAPTER IX.

DISSOLUTION OF CORPORATIONS—RECEIVERS.

WHO MAY BE APPOINTED—INTERESTS AND RIGHTS OF—POWER AND AUTHORITY OF—COLLECTION OF UNPAID SUBSCRIPTIONS—NOTICE OF APPOINTMENT—ACCOUNTING TO RECEIVER FOR PROPERTY—SETTLEMENT OF CONTROVERSY—APPOINTMENT OF REFEREE—DUTIES AND OBLIGATIONS—OPEN AND SUBSISTING CONTRACTS—CANCELLATION AND DISCHARGE—COMMISSION ON DISBURSEMENTS—RETAINING MONEY—DISTRIBUTION OF ASSETS—SECOND AND FINAL DIVIDENDS—NOTICE OF AND MANNER OF MAKING—LIABILITY ON SUBSISTING CONTRACTS—DISPOSITION OF SURPLUS—CONTROL OF—ACCOUNTING AND PASSING OF ACCOUNTS.

SEC. 138. Receivers—Who may be appointed—bond.
SEC. 138a. Same—Appointment of.
SEC. 138b. Same—Jurisdiction to appoint.
SEC. 138c. Same—When appointed.
SEC. 138d. Same—Corporation ceased to act—Use of property by officers.
SEC. 138e. Same—Who may have appointed.
SEC. 138f. Same—Who may be appointed receivers—Officers and stockholders.
SEC. 138g. Same—Effect of appointment—Dissolution of corporation.
SEC. 138h. Same—Character of receiver.
SEC. 138i. Same—Duty of receiver—Claims upon funds.
SEC. 138j. Same—Resistance of appointment—Grounds of.
SEC. 138k. Same—Title to property.
SEC. 138l. Same—What property passes.
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SEC. 138n. Same—Filing bond *nunc pro tunc*.
SEC. 138o. Same—Torts and crimes.
SEC. 139. Same—Interests and rights of.

SEC. 139a. Same—Appointment of receiver—Jurisdiction to appoint.
SEC. 139b. Same—Vesting title.
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SEC. 139d. Same—Statutory provisions—Compliance with necessary.
SEC. 139e. Same—Filing bond.
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SEC. 139g. Same—Instructions to receiver—Application to court for.
SEC. 139h. Same—In cases of insolvency.
SEC. 140. Same—Power and authority of.
SEC. 140a. Same—Duties and powers of receivers.
SEC. 140b. Same—Authority to sue.
SEC. 140c. Same—Suit by receiver to set aside judgment by collusion—Complaint—Service.
SEC. 140d. Same—Suit upon cancelled note.
SEC. 140e. Same—Suit upon notes—Foreign attachment of debt.
SEC. 140f. Same—Examination of debtor—Warrant of—Petition for.
SEC. 140g. Same—Compromise of disputed claims.
SEC. 140h. Same—Sale of property by.
SEC. 140i. Same—Directions as to sale.
SEC. 140j. Same—Setting aside sale.
SEC. 141. Same—Collection of unpaid subscriptions.
SEC. 141a. Same—Action to recover subscription—Ten per centum.
SEC. 141b. Same—Unpaid subscription—Action to enforce payment.
SEC. 141c. Same—Forfeiture.
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SEC. 141e. Same—Restriction.
SEC. 141f. Same—Who to be proceeded against.
SEC. 141g. Same—Oppressive action—Favoritism.
SEC. 142. Same—Notice of appointment—Contents of—Publication of notice.
SEC. 143. Same—Accounting to receiver for property, &c.
SEC. 144. Same—Power to settle controversy—Appointment of referee.
SEC. 144a. Same—Compulsory reference.
SEC. 145. Same—Duties and obligations—Meeting of Creditors—Adjustment of accounts.
SEC. 145a. Same—Duty as to allowance of claims.
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SEC. 146. Same—Open and subsisting contracts—Cancellation and discharge.
SEC. 146a. Same—Subsisting contracts—Retaining assets to meet.
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SEC. 147a. Same—Commission—Allowance by court.
SEC. 147b. Same—Acting as attorney—Compensation.
SEC. 148. Same—Retaining money in hands for certain purposes.
SEC. 149. Same—Suits pending—Retaining amount involved.
SEC. 150. Same—Distribution of assets.
SEC. 150a. Same—Right to share in—How determined.
SEC. 150b. Same—Distribution how made.
SEC. 150c. Same—Right to participate—When barred.
SEC. 150d. Same—Priority—Tax claim.
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SEC. 151. Same—Second and final dividends—Notice of.
SEC. 151a. Same—Final report.
SEC. 152. Same—Manner of making.
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SEC. 153. Same—Liability on subsisting contracts.
SEC. 154. Same—Distribution of surplus.
SEC. 155. Same—Determination of suit pending—Disposition of amount retained.
SEC. 156. Same—Control—Accounting—Filling vacancy.
SEC. 156a. Same—Direction and control.
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SEC. 156c. Same—Removal—Appointment of successor.
SEC. 157. Same—Final account.
SEC. 158. Same—Notice of final account—Where published.
SEC. 159. Same—Reference on—Duty of referee.
SEC. 160. Same—Accounting of receivers—Passing accounts.
SEC. 160a. Same—Fees of.

Sec. 138. Receivers—Who may be Appointed—Bond.—Any of the directors, trustees or other officers of such corporation, or any of its stockholders, may be appointed receivers; who, before entering upon the duties of their appointment, shall give such security to the people of this state, and in such penalty, as the court shall direct, conditioned for the faithful discharge of the duties of their appointment, and for the due accounting of all moneys received by them.[1]

Sec. 138a. Same—Appointment of.—A proceeding for the appointment of a receiver of a corporation made under the provisions of the Revised Statutes, relating to proceedings against corporations in equity is a proceeding against the corporation; and if the appointment of a receiver therein is binding upon the corporation, no one else can question it.[2] The merits will not be inquired into on a motion for the appointment of a receiver;[3] but such an appointment should not be made *ex parte* and without giving the corporation an

[1] 4 N. Y. R. S., 8th ed., p. 2681, § 66.

[2] Whittlesey v. Frantz, 74 N. Y. 456 (1878).

[3] Conro v. Gray, 4 How. (N. Y.) Pr. 165 (1849).

opportunity to be heard.[1] The statute, however, does not require any service or notice on the corporation; but the court would not act discreetly were it to proceed upon the application without such notice.[2]

Sec. 138b. Same—Jurisdiction to appoint.—The court, but not a judge, may appoint a receiver.[3]

The supreme court has jurisdiction to appoint a receiver in an action brought by a stockholder to restrain corporate actions; and the receiver thus appointed becomes vested with the property and effects of the insolvent corporation, but it is questionable whether the court in such an action has power to dissolve the corporation.[4] The power of the court to appoint a receiver of a corporation after the return of an instituted execution though conferred by statute is deemed to be within the general jurisdiction of the court; and facts to establish it need not be proved.[5]

It is said in Phœnix F. & M. Co. v. North River Const. Co.,[6] that in an action by a stockholder of a foreign corporation, which is insolvent, by which a receiver has been appointed in the state under whose laws the corporation was organized, for the appointment of a receiver of its property, and in this state the supreme court has power to appoint a receiver.

A receiver may be appointed in an action brought in the second judicial district by a stockholder residing there, or a corporation having its office and place of business in the first judicial district, and this is so notwithstanding the provision of rule eighty-one of the general rules of practice that "such appointment must be made in the judicial district in which the principal place of business of such corporation is situated."[7]

[1] See Devoe v. Ithica & O. R. Co., 5 Paige Ch. (N. Y.) 521 (1835).

[2] Bangs v. McIntosh, 23 Barb. (N. Y.) 600 (1857); Devoe v. Ithica & O. R. Co., 5 Paige Ch. (N. Y.) 521 (1835).

[3] N. Y. Code Civ. Proc., §§ 1788, 1810.

[4] Osgood v. Maguire, 61 N. Y. 524 (1875).

[5] Palmer v. Clark, 4 Abb. (N. Y.) N. C. 25 (1877). See Bangs v. Duckinfield, 18 N. Y. 592 (1859).

[6] 6 N. Y. Civ. Proc. Rep. 106 (1884).

[7] Smith v. Danzig, 64 How. (N. Y.) Pr. 320 (1883).

Sec. 138c. Same—When appointed.—A receiver will be appointed:

1. Where there are no persons to take charge of the effects of the company and preserve them for the benefit of the creditors and stockholders generally;[1]

2. Where fraud is shown in the defendant, and the fund is in danger of being wasted or misapplied;[2]

3. Where necessary to prevent the removal of the property beyond the jurisdiction of the court;[3] and

4. Where the directors of a corporation do any act which works a forfeiture of the charter of the company, because it is such a violation of the law incorporating the company as to authorize a creditor or a stockholder of the corporation to institute proceedings against it, for the purpose of having a receiver appointed to close up the concerns of the company, under the provisions of the statute relative to proceedings against corporations in equity.[4]

Thus it was held in the case of Keokuk N. L. Pac. Co. v. Davidson,[5] that where the president of a packet company having failed to make a contract for his company with the government for carrying the mails, and subsequently succeeding in making such a contract in his own behalf, employing the boats of his company to the extent of its capacity so long as the said company operated boats on that route, but employing other boats when necessary, will be required to use all the facilities afforded by the company, and to account to the company for all money received for the service performed by it, but not for that received for services rendered by the other boats. The court say that the directors and officers of a corporation occupy positions of trust, and must act in the utmost good faith; that they will not be allowed

[1] Conro v. Gray, 4 How. (N. Y.) Pr. 165 (1849); Lawrence v. Greenwich Ins. Co., 1 Paige Ch. (N. Y.) 587 (1829).

[2] Burch v. Newberry, 1 Barb. (N. Y.) 648, 664 (1847); Orphan Asylum v. McCartee, Hopk. Ch. (N. Y.) 429 (1825); Conro v. Gray, 4 How. (N. Y.) Pr. 165 (1849); Boyd v. Murray, 3 Johns. Ch. (N. Y.) 48 (1817); Podmore v. Gunning, 5 Sim. 485 (1832).

[3] Conro v. Gray, 4 How. (N. Y.) Pr. 165 (1849).

[4] Ward v. Sea Ins. Co., 7 Paige Ch. (N. Y.) 294 (1838).

[5] 95 Mo. 467 (1888); s. c. 8 S. W. Rep. 545.

to deal with corporate funds and property for their private gain; that they have no right to deal with themselves and for the corporation at the same time, and that they must account for the profits made by the use of the company's assets, and for moneys made by a breach of trust.[1]

The mere insolvency of a corporation is not sufficient ground for the appointment of a receiver, at the instance of a stockholder, in the absence of an express statute.[2]

Where a corporation is not made a party its property cannot be taken from it and put into the hands of a receiver;[3] nor can a receiver be appointed before the return of the order to show cause.[4]

Sec. 138d. Same—Corporation ceased to act—Use of Property by officers.—Where a corporation ceases to act and the president and principal stockholders assume to use the property as their own, the only remedy for the creditors of the corporation is to file a complaint and ask for a receiver. [5] And where an officer of a corporation has assigned the property of the corporation to pay his individual debts, it is no answer to the appointment of a receiver in such case that the assignees by accepting the assignment become parties to the breach of trust and that they are solvent and responsible.[6]

In a suit by certain minority stockholders, where it is shown that the majority, who have neglected and refuse to pay for their stock in full, have possession and control of the affairs of the corporation, as directors and officers, and are managing the business in fraud of the rights of the minority, and so as to "freeze out" the minority, and where the directors are securing to themselves an inequitable and unlawful advantage and profit for their control of the concern,

[1] See Ward v. Davidson, 89 Mo. 445, 458 (1886); s. c. 1 S. W. Rep. 846; Wardell v. Union Pac. R. Co., 103 U. S. (13 Otto) 651 (1880); bk. 26 L. ed. 509.

[2] Merryman v. Carroll Brick Co., (Md.) 4 Ry. & Corp. L. J. 12 (1888).

[3] Groesbeeck v. Dunscomb, 41 How. (N. Y.) Pr. 302 (1871).

[4] Chamberlain v. Rochester Seamless Paper Vessel Co, 7 Hun (N. Y.) 557 (1876.)

[5] Conro v. Gray, 4 How. (N. Y.) Pr. 165 (1849).

[6] Conro v. Gray, 4 How. (N. Y.) Pr. 165 (1849).

a court of equity, especially where the corporation is practically *civiliter mortuus* and insolvent, will appoint a receiver of its property.[1]

Sec. 138e. Same—Who may have appointed.—A stockholder cannot have a receiver appointed,[2] and a mere creditor of a corporation cannot have a receiver appointed until he has a judgment and an execution returned unsatisfied.[3]

In Loder v. New York U. & O. R. Co.,[4] the plaintiff, a judgment creditor, applied for the appointment of a receiver of the defendant, a corporation, which as a defence to the motion alleged that the judgment was obtained by collusion and fraud of the president of the corporation. Upon the hearing time was given to defendant to make a motion to open the judgment on that ground, of which privilege the defendant did not avail itself; and the court held that they were authorized to infer from its failure to attempt to open a judgment that the defense was without merit.

Sec. 138f. Same—Who may be appointed receiver—Officers and stockholders.—Upon a voluntary dissolution of a corporation any of its officers or stockholders may be appointed receiver, if not otherwise disqualified.[5]

Sec. 138g. Same—Effect of appointment—Dissolution of corporation.—It has been said that a corporation is not dissolved merely by the appointment of a receiver and a sequestration of its property;[6] also that a corporation which has been enjoined from the exercise of its corporate franchise and deprived of its property, and thus, for all practical purposes, has ceased to exist, is not thereby actually dissolved; because a corporation cannot be dissolved save by the judgment of a court of competent jurisdiction. Until such judgment is rendered creditors may proceed by suit against it, unless

[1] Hall v. Astoria Veneer Mills & Lumber Co. (Ky.) 5 Ry. & Corp. L. J. 412 (1889).

[2] See Merryman v. Carroll Brick Co., (Md.) 4 Ry. & Corp. L. J. 12 (1888).

[3] People v. Erie R. Co., 36 How. (N. Y.) Pr. 129 (1868).

[4] 4 Hun, (N. Y.) 22 (1875).

[5] Matter of Eagle Iron Works, 8 Paige Ch. (N. Y.) 385 (1840).

[6] Huguenot Nat. Bank v. Studwell, 6 Daly (N. Y.) 13 (1875).

restrained by injunction, and its stockholders do not cease to be such.[1]

There are cases, however, holding that a final order or decree for the appointment of a receiver of an insolvent corporation, is a virtual dissolution of such corporation.[2]

Sec. 138h. Same—Character of receiver.—A receiver appointed under the statute is a mere common law receiver to protect the fund during the action, and he has no powers except such as are conferred by the order appointing him.[3] Where a receiver of the property and effects of the corporation is appointed and qualified, he becomes, by the express terms of the statute, a trustee not only for the creditor upon whose application he is appointed, but for all the creditors of the corporation.[4]

Sec. 138i. Same—Duty of reeeiver—Claims upon funds.—The receiver of an insolvent corporation owes a like duty to all claims upon the funds; and it is his duty, as far as possible, to see that each creditor has an equal opportunity to enforce his claims.[5]

Sec. 138j. Same—Resistance of appointment—Grounds of.—A stockholder cannot resist the appointment of a receiver on the ground that he became such by an illegal contract, or that he was induced to become such by fraud of the directors.[6]

Sec. 138k. Same—Title to property.—The receiver of an insolvent corporation, unless restricted in his power by the order for his appointment, is absolutely vested with the corporate property and effects from the time of his filing the

[1] Kincaid v. Dwinelle, 59 N. Y. 548 (1875); s. c. 37 N. Y. Super. Ct. (5 J. & S.) 326.

[2] Bank Commissioners v. Bank of Buffalo, 6 Paige Ch. (N. Y.) 497, 503 (1837). See Kincaid v. Dwinelle, 59 N. Y. 548 (1875); s. c. 37 N. Y. Super. Ct. (5 J. & S.) 326.

[3] Verplanck v. Mercantile Ins. Co., 2 Paige Ch. (N. Y.) 438 (1831).

[4] Libby v. Rosenkrans, 55 Barb. (N. Y.) 202 (1869).

[5] People v. Security Life Ins. & Annuity Co., 78 N. Y. 114 (1879); s. c. 34 Am. Rep. 522.

[6] Matter of Dubois, 15 How. (N. Y.) Pr. 7 (1857); s. c. 6 Abb. (N. Y.) Pr. 386 note.

security required by statute,[1] and is authorized to distribute the surplus among the stockholders for the payment of the debts of the company.[2] But the receiver of a corporation in proceedings for voluntary dissolution takes its assets subject to the lien of an attachment or of an execution which was issued against the corporation between the time of his appointment and the filing of his bond.[3]

Sec. 1381. Same—What property passes.—Where a receiver is appointed merely of the property, moneys, choses in action, and effects of a defendant corporation only such property and effects will pass as the defendant had some beneficial interest in at the time of the commencement of the action. If an assignment has already been executed to a receiver appointed in a prior suit, the second receiver will have a right to claim from the first only such proceeds as may not be needed to satisfy the claims of the plaintiffs in such suit;[4] because upon such appointment the rights and property of the corporation pass to the receiver in precisely the same shape and condition, and subject to the same equities, under which they were held by the corporation.[5]

Sec. 138m. Same—When property passes.—The title to property does not pass to a receiver, and he is not entitled to the possession thereof, until after he has given the requisite bond or security fixed by the order of the court making the appointment;[6] and a failure to give such bond will be ground for non-suit in an action brought by such receiver in his official

[1] In re Berry, 26 Barb. (N. Y.) 55, 59 (1857); Bank Commissioners v. Bank of Buffalo, 6 Paige Ch. (N. Y.) 497, 503 (1837).

[2] Bank Commissioners v. Bank of Buffalo, 6 Paige Ch. (N. Y.) 497, 503 (1837).

[3] Chamberlain v. Rochester Seamless Paper Vessel Co., 7 Hun (N. Y.) 557 (1876). See Kincaid v. Dwinelle, 59 N. Y. 548 (1875); Hooley v. Gieve, 7 Abb. (N. Y.) N. C. 271 (1877); affirmed without opinion, 73 N. Y. 599.

[4] Cagger v. Howard, 1 Barb. Ch. (N. Y.) 368 (1846).

[5] Receivers v. Paterson Gas Light Co., 23 N. J. L. (3 Zab.) 283 (1852).

[6] Johnson v. Martin, 1 T. & C. (N. Y.) 504 (1873); Defries v. Creed, 34 L. J. Ch. N. S. 607 (1865); Edwards v. Edwards, L. R. 2 Ch. Div. 291 (1876), reversing s. c. L. R. 1 Ch. Div. 454. See Ex parte Evans, L. R. 13 Ch. Div. 252 (1879).

capacity,[1] as well as for reversing the decree of his appointment.[2] A mere informality in the bond, however, cannot be taken advantage of in an action brought by a receiver against third parties.[3]

The obligation of a receiver to give adequate security for the faithful performance of his duties as such is regarded in New York as being founded upon the general practice of courts of equity, and it has been held to be within the power of the court to dispense with security in those cases where it is plainly unnecessary. Thus, where in proceedings by judgment creditors against their debtor, the same person is appointed in different actions, because security given in the first is ample for the protection of all interests.[4]

Sec. 138n. Same—Filing bond nunc pro tunc.—The court may direct that the bond of a receiver be filed *nunc pro tunc*, so as to complete the receiver's appointment and render his title to the property good and make him liable to account as an officer of the court for the property which comes to his hands subsequently to the time when the bond should have been filed, in those cases where it has been properly executed with sufficient sureties and approved by the parties, but, through inadvertence, was not filed with the court. And such filing may be ordered notwithstanding the fact that the matter in dispute has been submitted to referees for settlement, and the parties have consented to a decree, because such submission does not in any way alter or affect the liability of the receiver to account to the court for property entrusted to him.[5] And where a receiver has executed and filed the necessary bond and it has been approved by the court if one of the sureties of such bond afterward secures a discharge therefrom and the receiver enters into a new obligation before the time for

[1] Johnson v. Martin, 1 T. & C. (N. Y.) 504 (1873).

[2] Tomlinson v. Ward, 2 Conn. 396 (1818).

[3] Morgan v. Potter, 17 Hun (N. Y.) 403 (1879).

[4] Banks v. Potter, 21 How. (N. Y.) Pr. 469 (1861).

[5] Whiteside v. Prendergast, 2 Barb. Ch. (N. Y.) 471 (1847).

enrolling the bond has lapsed, the court may order that it be entered *nunc pro tunc*.[1]

Sec. 138o. Same—Torts and crimes.—A corporation in the hands of a receiver cannot be prosecuted for crimes and misdemeanors committed by the agents or servants of the receiver who has full possession of its property and is in charge of its affairs.[2]

Sec. 139. Same.—Interests and rights of.—Such receivers shall be vested with all the estate, real and personal, of such corporation, from the time of their having filed the security hereinbefore required, and shall be trustees of such estate for the benefit of the creditors of such corporation and of its stockholders.[3]

Sec. 139a. Same—Appointment of Receiver—Jurisdiction to appoint.—The supreme court has jurisdiction to appoint a receiver in an action brought by a stockholder to restrain corporate actions; and a receiver thus appointed becomes vested with the property and effects of the insolvent corporation, but it is doubtful whether the court in such an action has jurisdiction to dissolve the corporation.[4]

Sec. 139b. Same—Vesting title.—A decree appointing a receiver upon application for the dissolution of a corporation, vests in the latter all the property of the corporation,[5] and the receiver of an insolvent corporation, unless restricted in his powers by the order of his appointment, is absolutely vested with all the corporate property and effects, subject to the order without any assignment,[6] and is authorized to distribute the surplus thereof among the stockholders for the payment of the debts of the company.[7]

[1] Vaughan v. Vaughan, Dick. Ch. 90 (1743).

[2] State v. Wabash R. Co., 115 Ind. 466 (1888); s. c. 1 L. R. A. 179. See Bell v. Indianapolis C. & L. R. Co., 53 Ind. 57 (1876); Ohio & M. R. Co. v. Davis, 23 Ind. 553 (1864).

[3] 4 N. Y. R. S., 8th ed., p. 2681, § 67.

[4] Osgood v. Maguire, 61 N. Y. 524 (1875).

[5] Attorney-General v. Guardian Mut. Life Ins. Co., 77 N. Y. 272 (1879).

[6] Mann v. Pentz, 2 Sandf. Ch. (N. Y.) 257 (1845).

[7] Bank Commissioners v. Bank of Buffalo, 6 Paige Ch. (N. Y.) 497, 503 (1837).

The statute above set out[1] does not profess to pass on the title which creditors may acquire against the company, but is intended to prescribe the period at which the estate of the company shall be vested in the receiver, so that thereafter the debtors of the company may be bound to settle with him alone, and so that, after that time, also, he shall be enabled to take the possession.[2]

Sec. 139c. Same—When appointment takes effect.—The appointment of a receiver of an insolvent corporation takes effect from the time of granting an order for a reference to appoint a receiver; and from that moment no act can be done affecting the property of the corporation by either the corporation or its creditors,[3] for although the receiver cannot take possession of the property of the corporation or be deemed vested with the estate before he is appointed, yet when his appointment is completed the estate vested in him relates back to the time of granting the order for a reference to appoint a receiver.[4]

Sec. 139d. Same — Statutory Provisions — Compliance with necessary.—The provisions of the statute requiring the appointment of a receiver of an insolvent corporation upon the petition of a judgment creditor after execution returned unsatisfied, must be strictly pursued;[5] whether an omission of service of an order to show cause why the receiver should not be appointed by the corporation in proceedings of the attorney, general to dissolve, made by the attorneys of the corporation gives the court jurisdiction to make an order appointing a receiver is an unsettled question.[6]

Sec. 139e. Same—Filing bond.—The title of the receiver appointed in voluntary dissolution proceedings of the corporation, does not vest until the filing of his bond, and a creditor of a corporation may obtain a lien by judgment or attachment

[1] 4 N. Y. R. S., 8th ed., p. 2681, § 67; *supra*, § 139.

[2] Matter of Berry, 26 Barb. (N. Y.) 55 (1857).

[3] Matter of Berry, 26 Barb. (N. Y.) 55 (1857).

[5] Matter of Berry, 26 Barb. (N. Y.) 55 (1857).

[5] Clinch v. South Side R. Co., 1 Hun (N. Y.) 636 (1874).

[6] See Bedell v. North America Life Ins. Co., 7 Daly (N. Y.) 273 (1877).

on the assets of the corporation between the appointment and the filing of the bond, of the receiver.[1]

Sec. 139f. Same—Title to goods ordered and paid for.—Where a corporation, before going into the hands of a receiver, accepted an order, accompanied with the money, for certain goods which were manufactured and capable of identification from a list which it delivered to the purchaser, it was held that there was a completed sale, and that the receiver should deliver the goods.[2]

Sec. 139g. Same—Instructions to receiver—Application to court for.—The receiver of an insolvent corporation may at any time apply to the court for instructions in regard to any matter touching the fund placed in his custody; and specially is this so where the fund, through his error, is in danger of being unfairly distributed.[3]

Sec. 139h. Same—In cases of insolvency.—Under the New York Revised Statutes[4] an insolvent corporation is vested with all the estate, real and personal, of such corporation from the time of their having filed the security therein required, and have all the power and authority conferred upon trustees to whom the assignment of an insolvent debtor may be made under the statute.[5] Such a receiver is a trustee for the benefit of the creditors of the corporation and its stockholders.[6]

It is thought that by this statute whenever a receiver of aninsolvent corporation "shall show by his own oath, or other competent proof," that any person is indebted to the corporation, or has property of the corporation in his custody or possession, the officer to whom the application is made shall

[1] Chamberlain v. Seamless Paper Vessel Co., 7 Hun (N. Y.) 557 (1876). See Kincaid v. Dwinelle, 59 N. Y. 548 (1875).

[2] Bates v. Elmer Glass Manfg. Co., (N. J. Eq.) 15 Atl. Rep. 246 (1888); s. c. 4 Ry. & Corp. L. J. 129.

[3] People v. Security L. Ins. & Ann. Co., 79 N. Y. 267 (1879.)

[4] 4 N. Y. R. S., 8th ed., p. 2681, § 67.

[5] Matter of Berry, 26 Barb. (N. Y.) 55, 59 (1857).

[6] Jones v. Robinson, 26 Barb. (N. Y.) 311 (1857). See United States Trust Co. v. New York W. S. & B. R. Co., 101 N. Y. 478, 484 (1886); Libby v. Rosenkrans, 55 Barb. (N. Y.) 202 (1869); Haxtun v. Bishop, 3 Wend. (N. Y.) 13 (1829).

issue a warrant to bring such person before him for examination; and that under this statute it is sufficient for the receiver who applies for a warrant to swear to the facts on information and belief.[1]

Sec. 140. Same—Power and Authority of.—Such receivers shall have all the power and authority, conferred by law upon trustees to whom an assignment of the estate of insolvent debtors may be made, pursuant to the provisions of the fifth chapter of the Second Part of the Revised Statutes.

Sec. 140a. Same—Duties and powers of receivers.—The receivers of insolvent corporations are charged with the like duties and clothed with the same powers as are given to trustees and assignees of absent, absconding or insolvent debtors.[3] They are authorized to retain out of the assets sufficient to cancel and discharge all liabilities upon subsisting engagements.[4]

Sec. 140b. Same—Authority to sue.—The receiver represents both the corporation and creditors and stockholders and in his character as trustee for the latter he may disaffirm and maintain an action as receiver to set aside illegal or fraudulent transfers of the property of the corporation made by its officers or agents, or to recover its funds or securities invested or misapplied.[5]

To prove the authority of a receiver of a corporation to sue it is sufficient to produce the petition, the order appointing him receiver, and his official bond.[6]

[1] Noble v. Halliday, 1 N. Y. 330 (1848).

[2] 4 N. Y. R. S., 8th ed., p. 2681, § 68. See *post*, § 145 et seq.

[3] Osgood v. DeGroot, 36 N. Y. 348, 350 (1867); Noble v. Halliday, 1 N. Y. 332 (1848); In the Matter of Van Allen, 37 Barb. (N. Y.) 225, 228 (1861); Berry v. Brett, 6 Bosw. (N. Y.) 627, 628 (1860); Attorney-General v. Life & Fire Ins. Co., 4 Paige Ch. (N. Y.) 224 (1833); Pardo v. Osgood, 5 Robt. (N. Y.) 348, 362 (1868); Hackley v. Draper, 4 T. & C. (N. Y.) 622. (18).

[4] People v. National Trust Co., 82 N. Y. 283 (1880).

[5] Attorney-General v. Guardian Mut. Life Ins. Co., 77 N. Y. 272 (1879).

[6] Palmer v. Clark, 4 Abb. (N. Y.) N. C. 25 (1877). See Potter v. Merchant's Bk., 28 N. Y. 641 (1864).

Sec. 140c. Same—Suit by receiver to set aside judgment by collusion—Complaint—Service.—The receiver of a corporation may bring an action to set aside the judgment obtained by the defendant, where it appears that the summons and complaint in defendant's action were served upon an officer of the company who brought it to the notice of the Board of Trustees and with the assent of the Board they were delivered to the attorney who brought the action to protect the interest of the corporation, and judgment was taken by default; the evidence justifies a finding that the judgment was without consideration, and was suffered to be entered by fraud and collusion between defendant and the officers and trustees of the corporation.[1]

In a complaint in such an action it was not expressly averred that the judgment was fraudulent in fact, or that officers of the corporation colluded with the plaintiff therein; but facts were averred which, if proved, authorized the inference that the judgment was without consideration and fraudulently and collusively obtained. The court held the complaint sufficient after judgment; that if the complaint was technically defective the objection should have been taken by demurrer or otherwise before issue on the facts; also, that it was not necessary to employ the term "fraud" or "fraudulent" to characterize the transaction.[2]

In an action by a receiver of a corporation to set aside a judgment obtained by defendant for the balance of the purchase-price, where it appeared that the summons and complaint in defendant's action were served upon the officer of the company who brought it to the notice of the board of trustees, and with the assent of the board they delivered to the attorney who brought the action to protect the interest of the corporation, no action is interposed and the judgment was by default. The court held that the evidence justified a finding that the judgment was without consideration, and was suffered to be entered by fraud and collusion between defendant and officers and trustees of the corporation, also

[1] Whittlesey v. Delaney, 73 N. Y. 571 (1878).

[2] Whittlesey v. Delaney, 73 N. Y. 571 (1878).

that the court having jurisdiction of the cause of action and the parties, had authority not only to vacate the judgment but also to pass upon the merits but to definitely dispose of defendant's claim.[1]

Sec. 140d. Same—Suit upon cancelled note.—The receiver of an insolvent corporation has the right to maintain an action to compel the payment of a note which the company held for the capital stock, and which the shareholder had procured to be cancelled without payment, by an arrangement effected by him by means of his being a director of the company;[2] because a receiver so appointed may not only treat as void all acts done in fraud of creditors, but he may sue for all sums due to the insolvent corporation, and for all its property improperly disposed of in violation of the rights of other creditors or stockholders, for the purpose of paying the debts and dividing the surplus among the stockholders.[3]

It is well settled that, without the aid of any statutory provision, the unpaid subscriptions to the capital stock of a corporation constitute a fund available to creditors who are unable to make their demands from the corporate debtor, and equity will lend its aid to a receiver duly appointed to enforce the payment of such subscriptions for the benefit of the creditors.[4]

Sec. 140e. Same—Suit upon notes—Foreign attachment of debt.—Where the receiver of a domestic corporation sued upon promissory notes which were part of the assets of the corporation that came into his hands as such receiver, which

[1] Whittlesey v. Delaney, 73 N. Y. 571 (1878).

[2] See Nathan v. Whitlock, 9 Paieg Ch. (N. Y.) 152 (1841); Mann v. Pentz, 2 Sandf. (N. Y.) Ch. 257, 267 (1845).

[3] Pratt v. Eaton, 18 Hun (N. Y.) 296 (1879); Nathan v. Whitlock, 9 Paige Ch. (N. Y.) 152 (1841). See Osgood v. Laytin, 48 Barb. (N. Y.) 463 (1867); aff'g 3 Keyes, (N. Y.) 521.

[4] Mann v. Pentz, 2 Sandf. (N. Y.) Ch. 257 (1845); Haskins v. Harding, 2 Dill. C. C. 107 (1873). See Briggs v. Penniman, 8 Cow. (N. Y.) 387 (1826); s. c. 18 Am. Dec. 454; Spear v. Crawford, 14 Wend. (N. Y.) 20 (1835); s. c. 28 Am. Dec. 513; Ward v. Griswoldville Manuf. Co., 16 Conn. 593 (1844); Pettibone v. McGraw, 6 Mich. 441 (1859); Henry v. Vermillion & A. R. Co., 17 Ohio, 187 (1848); Adler v. Milwaukee P. B. Manuf. Co., 13 Wis. 57 (1860); Wood v. Dummer, 3 Mason C. C. 308 (1824).

notes were made by the resident of another state, and payable at the domicil of the corporation, the defendant pleaded in bar that after the appointment of the plaintiff as receiver the debt due upon the notes was attached in an action brought in the state where the debtor resided, by a creditor of the corporation, and the court held that the notes were property, the *situs* of which was in this state, and passed to the receiver for the benefit of all the creditors, and that the proceeding in Massachusetts did not affect his title or right to recover. The court say that a subsequent attachment by a creditor in this state would not have affected plaintiff's rights, and the rule of international comity does not give foreign creditors a better position in this respect than domestic.[1]

Sec. 140f. Same—Examination of debtor—Warrant of—Petition for.—Where an application is made to an officer by a receiver of an insolvent corporation for a warrant to bring a debtor before such officer for examination pursuant to the statute, the petition for that purpose should state the facts upon which the application is founded positively and not in the alternative.[2] If the petition states that the person so proceeded against has in his possession either individually or as administrator, etc., some property belonging to the petitioner; that such person for the estate of his intestate is indebted to the petitioner, and that he individually or as such administrator has in his hand a large amount of money belonging to the petitioner, that he has not accounted for or delivered over to him; such petition will be defective, and will not authorize the issuing of a warrant.[3]

[1] Osgood v. Maguire, 61 N. Y. 521 (1875). See Matter of Accounting of Waite, 99 N. Y. 433, 448 (1885); Williams v. Ingersoll, 89 N. Y. 508, 525 (1882); Hibernia Bank v. Lacombe, 84 N. Y. 367 (1881); Kelly v. Crapo, 45 N. Y. 86 (1871); Petersen v. Chemical Bank, 32 N. Y. 21 (1865); Matter of Bristol, 16 Abb. (N. Y.) Pr. 184 (1863); Runk v. St. John, 29 Barb. (N. Y.) 585 (1859); Olyphant v. Atwood, 4 Bosw. (N. Y.) 459 (1859); Barclay v. Quicksilver Mining Co., 6 Lans. (N. Y.) 25 (1872); Hooper v. Tuckerman, 3 Sandf. (N. Y.) 311 (1849); Hunt v. Jackson, 5 Blatchf. C. C. 349 (1866).

[2] Halliday v. Noble, 1 Barb. (N. Y.) 137 (1847).

[3] Halliday v. Noble, 1 Barb. (N. Y.) 137 (1847).

If the person against whom an application of this nature is made is indebted only as administrator, he is not a person liable to be proceeded against under the statute.[1]

Sec. 140g. Same—Compromise of disputed claims.—[2]The receiver of an insolvent corporation may, upon application to the court, be authorized to compromise disputed and doubtful claims against the company by the allowance of so much of such claims as may be deemed just and equitable; and he may also be authorized in any case where he may deem it expedient and for the interest of the creditors of the stockholders of the company to do so, to compromise with debtors of the corporation who are unable to pay in full, upon the receipt of such part of the debts due from them as he may deem reasonable and for the best interest of the creditors and stockholders of the company.[3]

But it is said that where controverted rights, or doubtful acts, are to be determined, notice should always be given to the parties interested.[4] Such notice simply gives evidence of the care and good faith of the receiver in doing what may be deemed best in the execution of the trust.[5]

Sec. 140h. Same—Sale of property by.—The primary object of a sale of the property of a corporation by a receiver being to satisfy judgments and claims against it, the judgment creditors are at liberty to bid upon and buy it. This may be done by all together or by one for the benefit of all and the fact that prior to the sale certain creditors enter into some arrangement by which they were to jointly participate in the property by which one of them would buy at sale, does not vitiate the sale or support the charge of fraud in the procurement of the order of sale, and the receiver's report of the same, nor will the charge of fraud be supported by an allegation in the complaint that the defendants combine together

[1] Halliday v. Noble, 1 Barb. (N. Y.) 137 (1847).

[2] See *post*, § 144.

[3] In re Croton Ins. Co., 3 Barb. Ch. (N. Y.) 642 (1847). See Coyne v. Weaver, 84 N. Y. 386, 392 (1881); Anon v. Gelpcke, 5 Hun, (N. Y.) 245, 251 (1875).

[4] In re Croton Ins. Co., 3 Barb. Ch. (N. Y.) 642 (1847); Anon. v. Gelpcke, 5 Hun, (N. Y.) 251 (1875).

[5] In re Croton Ins. Co., 3 Barb. Ch. (N. Y.) 642 (1847).

for the purpose of securing to themselves the property of the corporation by virtue of their judgments, induced the receiver to apply to the court by petition for instructions as to the sale of such property; that the receiver was acting in their interest, and was under their control and discretion, and that the petition and the order made upon it were prepared by one of the defendants, where there is no averment that they induced the receiver to apply for such directions, or that he did so apply in order to carry such conspiracy into effect or that the application or order had anything to do with the execution for such purpose.[1]

Sec. 140i. Same—Directions as to sale.—An order giving directions to the receiver of a corporation as to the mode of conducting a sale of the corporate property, is not objectionable because it allows the sale to be made upon fourteen days notice posted in two public places and published two weeks in a newspaper printed in the city of New York.[2] If the order directing the receiver as to the manner in which he should proceed in giving notice of and making the sale are irregular or improvident the correction should be sought by a motion before the court which made the order; an independent action cannot be maintained for that purpose even though the plaintiff was not a party to the proceeding in which the order was made.[3]

Sec. 140j. Same—Setting aside sale.—Where a receiver of a corporation fails in his duty in respect to a sale ordered, or lends himself to the creditors to the unnecessary prejudice of the stockholders, the court before which the proceedings are taken upon that being established would intervene on his

[1] As to necessary allegation in a complaint setting up fraud in the procurement of an order for the sale of corporate property and of the confirmation of the report of such sale made by the receiver; See Libby v. Rosekrans, 55 Barb (N. Y.) 202 (69)·18

[2] Libby v. Rosekrans, 55 Barb. (N. Y.) 202 (1869).

[3] Libby v. Rosekrans, 55 Barb. (N. Y.) 202, 219, 220 (1869). See McCotter v. Jay, 30 N. Y. 80 (1864); Gould v. Mortimer, 26 How. (N. Y.) Pr. 167 (1863); Brown v. Frost, 10 Paige Ch. (N. Y.) 243 (1843); American Ins. Co. v. Oakley. 9 Paige Ch. (N. Y.) 496 (1842); s. c. 38 Am. Dec. 561.

application and set them aside.[1] A stockholder may apply to the court before which proceedings for sale of the corporate property by a receiver are pending to set aside such proceeding where they are irregular.[2]

Sec. 141. Same—Collection of Unpaid Subscription.—If there shall be any sum remaining due upon any share of stock subscribed in such corporation, the receivers shall immediately proceed and recover the same, unless the person so indebted shall be wholly insolvent; and for that purpose may file their bill in the court of chancery, or may commence and prosecute an action at law, for the recovery of such sum, without the consent of any creditors of such corporation.[4]

Sec. 141a. Same—Action to recover subscription—Ten per centum.—On an action brought by the receiver of an insolvent limited corporation to recover the ten per cent. cash payment required to be made by subscribers to the stock of the corporation at the time of their subscribing therefor, it is only necessary for the plaintiff to show that money belonging to the company had passed into the possession of the defendants for its benefit, and any payment of such money to or under its authority must be alleged and proved by the defendants.[5]

Sec. 141b. Same.—Unpaid subscription—Action to enforce payment.—Under the section of the Revised Statutes above given,[6] it is the duty of the receiver to collect from the stockholders

[1] Libby v. Rosekrans, 55 Barb. (N. Y.) 202 (1869).

[2] Libby v. Rosekrans, 55 Barb. (N. Y.) 202 (1869).

[3] See *ante*, § 51j *et seq.*

[4] 4 N. Y. R. S., 8th ed., p. 2681, § 69. This section only applies to stock corporations, and not to mutual insurance companies where there are no stockholders, strictly speaking. Williams v. Lakey, 15 How. (N. Y.) Pr. 206 (1857); Hyde v. Beardsley, cited in Van Buren v. Chenango Mut. Ins. Co., 12 Barb. (N. Y.) 671 (1852).

[5] Andrews v. Moller, 37 Hun, (N. Y.) 480 (1885); citing Tugman v. National Steamship Co., 76 N. Y. 207, 210, 211 (1879); Segelken v. Meyer, 94 N. Y. 473, 484 (1884); Everett v. Lockwood, 8 Hun, (N. Y.) 356 (1876).

[6] *Supra*, § 141.

the sums remaining due upon their several shares of stock; and after paying the debts of the corporation and expenses of executing the trust to distribute the residue of the fund among the stockholders who may be entitled to the same.[1] And he may sue the subscribers for their unpaid subscriptions and the whole of stock not fully paid on their misleading promise to pay such subscriptions.[2] The action to enforce payment of stock subscribed which still remains undue is merely a cumulative remedy;[3] and in such a suit it is no answer that there are other stockholders who are more delinquent than the defendant.[4]

It seems that an order of the supreme court directing an assessment upon stockholders establishes conclusively, until modified on motion or appeal, that the debts, to the payment of which the assessments are to be applied, are debts for which the stockholders are liable. When at the dissolution and the appointment of a receiver, a part of the debts are not due, it is not essential to the validity of an assessment, directed by the court, that judgment should first have been recovered thereon against the company.[5]

A receiver of a corporation organized under the general manufacturing act is not vested with the right of action given by that act to creditors of the corporation against the stockholders thereof. The liability of the stockholder does not exist in favor of the corporation itself, or for the benefit of all its creditors, but only in favor of such creditors as are within the prescribed conditions, and is to be enforced by them in their own right and for their own especial benefit.[6]

Sec. 141c. Same.—Forfeiture.—The right of an incorporated company to enforce a forfeiture of stock, and all previous payments upon the failure of the stockholder to meet the calls of the company, will not prevent such company or the

[1] Pentz v. Hawley, 1 Barb. Ch. (N. Y.) 122, 124 (1845).

[2] Dayton v. Borst, 31 N. Y. 435 (1865), aff'd 7 Bosw. (N. Y.) 115.

[3] Mann v. Currie, 2 Barb. (N. Y.) 294 (1848).

[4] Mann v. Pentz, 2 Sandf. (N. Y.) Ch. 257 (1845).

[5] Cuykendall v. Douglas, 19 Hun, (N. Y.) 577 (1880).

[6] Farnsworth v. Wood, 91 N. Y. 308 (1883).

receiver thereof from collecting the balance due upon any share of its stock.[1]

Sec. 141d. Same.—Payment in full.—It seems that it is not necessary, where all the stockholders have paid equally upon their stock, and the funds of the corporation in the receiver's hands are sufficient to pay all debts and expenses, to compel the stockholders to pay up in full. But it is unquestionably the duty of the receiver to call upon the stockholders to pay up in full, when he has reason to believe the whole amount due from those who are able to pay will be wanted for the payment of the creditors, and the expenses of executing the trust.[2]

Sec. 141e. Same—Restriction.—A receiver prosecuting a shareholder for the unpaid balance of his stock is not restricted in recovery to the amount due the creditor of the corporation, who procured his appointment; he is the officer of the court acting for all the creditors and stockholders.[3]

Sec. 141f. Same.—Who to be proceeded against.—The person to be proceeded against for the balance due on the stock is the person in whose name the stock stands on the books of the corporation as absolute owner, though he has, in fact, transferred it. He cannot set up that he holds it as trustee for one to whom he has assigned it.[4]

It is said in McDonald v. Ross-Lewin,[5] that the receiver of a company organized under the New York statute of 1875[6] appointed in an action brought by the people to procure the dissolution of the corporation may assess the members for insisted losses and bring separate actions against each member to recover the assessment so made against him.

Sec. 141g. Same.—Oppressive action—Favoritism.—If the receiver acts oppressively in enforcing the payment due upon

[1] Mann v. Currie, 2 Barb. (N. Y.) 294 (1848).

[2] Pentz v. Hawley, 1 Barb. Ch. 122, 124 (1845).

[3] Mann v. Pentz, 2 Sandf. Ch. (N. Y.) 257 (1845).

[4] Mann v. Currie, 2 Barb. (N. Y.) 249 (1848).

[5] 29 Hun, (N. Y.) 87 (1883).

[6] L. 1875, c. 267.

stock the court will interfere, either on a cross-complaint bringing in the favored parties, or on a summary application.[1]

Sec. 142. Same—Notice of Appointment—Contents of—Publication of Notice.—The receivers, immediately on their appointment, shall give notice thereof, which shall contain the same matters required by law in notices of trustees of insolvent debtors; and in addition thereto shall require all persons holding any open or subsisting contract of such corporation, to present the same in writing and in detail to such receivers, at the time and place in such notice specified; which shall be published for three weeks in the state paper and in a newspaper printed in the county where the principal place of conducting the business of such corporation shall have been situated.[2]

Sec. 143. Same—Accounting to Receivers for Property, etc.—After the first publication of the notice of the appointment of receivers, every person having possession of any property belonging to such corporation, and every person indebted to such corporation, shall account and answer for the amount of such debt and for the value of such property to the said receivers; and all the provisions of law, in respect to trustees of insolvent debtors, the collection and preservation of the property of such debtors, the concealment and discovery thereof, and the means of enforcing such discovery, shall be applicable to the receivers so appointed, and to the property of such corporation.[3]

[1] Mann v. Pentz, 2 Sandf. Ch. (N. Y.) 257 (1845).

[2] 4 N. Y. R. S., 8th ed., p. 2682, § 70.

[3] 4 N. Y. R. S., 8th ed., p. 2682, § 72.

Sec. 144. Same—Power to Settle Controversy—Appointment of Referee.—Such receivers shall have the same power to settle any controversy that shall arise between them and any debtors and creditors of such corporation, by a reference, as is given by law to trustees of insolvent debtors; and the same proceedings for that purpose shall be had, and with the like effect; and application for the appointment of referees may be made to any officer authorized to appoint such referees on the application of trustees of insolvent debtors, who shall proceed therein in the same manner; and the referees shall proceed in like manner, and file their report with the like effect in all respects.[1]

Sec. 144a. Same—Compulsory reference.—The court has power to order a compulsory reference of any controversy between the receiver of an insolvent corporation and a debtor in respect to the debt in favor of or against an insolvent corporation; the jurisdiction of the court to make the order does not depend upon the nature of the offence.[2]

Where a receiver has commenced an action at law to recover a debt, this does not conclude him from applying for a reference.[3]

Upon filing a report of referees appointed under this section, to settle controversies between the receiver of a corporation and the debtors or creditors of such corporation, formal entry of judgment is authorized and proper.[4]

Sec. 145. Same—Duties and Obligations—Meeting of Creditors—Adjustment of Accounts.—The receivers shall be subject to all the duties and obligations by law imposed on trustees of insolvent debtors, so far as they may be applicable, except where other pro-

[1] 4 N. Y. R. S., 8th ed., p. 2682, § 73. See *ante*, §§ 140f, 140h.

[2] Matter of Crosby v. Day, 81 N. Y. 242 (1880).

[3] Id.

[4] Austin v. Rawdon, 42 N. Y. 155 (1870).

visions shall be herein made. They shall call a general meeting of the creditors of such corporation, within four months from the time of their appointment, when all accounts and demands for and against such corporation, and all its open and subsisting contracts shall be ascertained and adjusted as far as may be, and the amount of moneys in the hands of the receivers declared.[1]

Sec. 145a. Same—Duty as to allowance of claims.—It is said in Attorney-General v. Life & Fire Ins. Co.,[2] that it is the duty of receivers of corporations appointed under the statute to allow all claims against the corporation which they may be satisfied are legal and just. But no claim should be allowed by them which could not have been recovered against the corporation either in law or in equity. If the receivers disallow a claim, and referees are appointed in the manner prescribed by the statute, to determine the validity of such claim, the receivers may permit those for whose benefit the defence against the claim is made to manage the defence, or it may be made under the direction of the receiver.

Sec. 145b. Same—Duty to make final report.—It is said in Attrill v. Rockaway Beach Imp. Co.,[3] that chapter 537 of the Laws of 1880[4] providing means for compelling receivers of insolvent corporations to make and file reports, applies only to such receivers as are appointed to institute proceedings under title 4, chapter 8, part 3 of the Revised Statutes, who are by chapter 348 of the Laws of 1858[5] required to make and file quarterly reports of their proceedings. It has no application to receivers of insolvent corporations appointed in one of the additional cases defined and declared in chapter 151, Laws of 1870.

Sec. 146. Same—Open and Subsisting Contracts—Cancellation and Discharge.—If there be any open and

[1] 4 N. Y. R. S., 8th ed., § 74. See *ante*, § 140 *et seq.*

[2] 4 Paige Ch. (N. Y.) 224 (1833).

[3] 25 Hun, (N. Y.) 376 (1881).

[4] 4 N. Y. Rev. St., 8th ed., p. 2674 § 3, as amended by L. 1882, c. 331, § 1.

[5] See 4 N. Y. R. S., 8th ed., p 2672, § 42.

subsisting engagements or contracts of such corporation, which are in the nature of insurances or contingent engagements of any kind, the receivers may, with the consent of the party holding such engagement, cancel and discharge the same, by refunding to such party the premium or consideration paid thereon by such corporation, or so much thereof as shall be in the same proportion to the time which shall remain of any risk assumed by such engagement, as the whole premium bore to the whole term of such risk; and upon such amount being paid by such receivers to the person holding or being the legal owner of such engagement, it shall be deemed cancelled and discharged as against such receivers.[1]

Sec. 146a. Same—Subsisting contracts—Retaining assets to meet.—A receiver of a dissolved corporation is authorized to retain out of the assets of the company sufficient funds to cancel and discharge all liabilities upon subsisting engagements;[2] but the receiver should not, in case of insurance companies, be authorized to reissue, paying out of the assets of the company the premium therefor.[3]

Sec. 147. Same—Commissions and Disbursements.—Such receiver shall, in addition to their actual disbursements, be entitled to such commissions as the court shall allow, not exceeding the sum allowed by law to executors or administrators.[4]

Sec. 147a. Same—Commission—Allowance by court.—If the

[1] 4 N. Y. R. S., 8th ed., p. 2682, § 75. This section does not apply to life insurance; it applies only to Fire, Marine, or other insurance having a definite term to run. People v. Security Life Ins. & Annuity Co., 78 N. Y. 114 (1879); s. c. 34 Am. Rep. 522.

[2] People v. Nat. Trust Co., 82 N. Y. 283 (1880). See *post*, § 148.

[3] Matter of Groton Ins. Co., 3 Barb. Ch. (N. Y.) 642 (1847).

[4] 4 N. Y. R. S., 8th ed., p. 2683, § 76. It is said that this section, so far as relates to receivers of corporations, seems to have been repealed by operation of Laws of 1867, c. 281, § 8. See People v. Mutual Ben. Assoc., 39 Hun, (N. Y.) 49, 51 (1886).

receiver renders annual accounts in conformity with the provisions of the rule of court of chancery, he may charge his commissions on the receipts and disbursements of the provisions of the previous year, exclusive of such sums as have been received for principal and reinvested. But if he neglects to render his account annually upon the making up of his accounts afterwards he can only charge his commissions upon the gross amount of the receipts and disbursements for the whole period since the rendering of the account.[1]

Receivers are entitled to receive in addition to their actual disbursements such commissions as the court shall allow not exceeding the sum allowed by law to executors or administrators.[2]

Sec. 147b. Same—Acting as attorney—Compensation.—The commission allowed by law by an insolvent corporation are intended to be a full compensation for his personal services in the execution of his trust; consequently he is not authorized to act himself as counsel in the business of his trust, so as to entitle himself to extra counsel fees for personal services beyond the allowance provided in the fee-bill to attorneys, solicitors and the like.[3]

Sec. 148. Same—Retaining Money in Hands for Certain Purposes.—The receivers shall retain out of the moneys in their hands, a sufficient amount to pay the sums, which they are hereinbefore authorized to pay, for the purpose of cancelling and discharging an open or subsisting engagement.[4]

Sec. 149. Same—Suits Pending—Retaining Amount Involved.—If any suit be pending against the corporation or against the receivers, for any demand, the receivers may retain the proportion which would

[1] In Matter of Bank of Niagara, 6 Paige Ch. (N. Y.) 213 (1836).

[2] Van Buren v. Chenango County Mut. Ins. Co., 12 Barb. (N. Y.) 671 (1852). See also Matter of Bank of Niagara, 6 Paige Ch. (N. Y.) 213, 217 (1836).

[3] In Matter of Bank of Niagara, 6 Paige Ch. (N. Y.) 213 (1836).

[4] 4 N. Y. R. S., 8th ed., p. 2683, § 77. See *ante*, § 146a.

belong to such demand if established, and the necessary costs and proceedings, in their hands, to be applied according to the event of such suit, or to be distributed in a second or other dividend.[1]

Sec. 150. Same.—Distribution of Assets.—The receivers shall distribute the residue of the moneys in their hands, among all those who shall have exhibited their claims as creditors, and whose debts shall have been ascertained, as follows :

1. All debts entitled to a preference under the laws of the United States.

2. Judgments actually obtained against such corporation, to the extent of the value of the real estate on which they shall respectively be liens.

3. All other creditors of such corporation, in proportion to their respective demands, without giving any preference to debts due on specialties.[2]

Sec. 150a. Same—Right to share in—How determined.—Where proceedings have been instituted for the dissolution of an insolvent corporation, and the distribution of its assets among its creditors, and a receiver has been appointed therein, the right of any person claiming to be a creditor of the corporation to share in the distribution of its effects in the hands of a receiver, is to be determined upon application to the court in such action or proceedings and in the district in which the receiver was appointed.[3]

Sec. 150b. Same—Distribution—How made.—The statute provides that the assets of insolvent corporations shall be distributed in the following order:

[1] 4 N. Y. R. S., 8th ed., p. 2683, § 78.

[2] 4 N. Y. R. S., 8th ed., p. 2683, § 79. As a set-off in cases of receivers, see Matter of Van Allen, 37 Barb. (N. Y.) 225 (1861). Also Osgood v. DeGroot, 36 N. Y. 348(1867); Berry v. Brett, 6 Bosw. (N. Y.) 627 (1860) Holbrook v. Receiver, 6 Paige Ch. (N. Y.) 220 (1836); Pardo v. Osgood, 5 Robt. (N. Y.) 348 (1868).

[3] Judson v. Rossie Galena Co., 9 Paige Ch. (N. Y.) 598 (1842).

1. All debts entitled to a preference under the laws of the United States.

2. All judgments obtained against such corporation to the extent of the value of the real estate on which they shall respectively be liened.[1]

3. All other demands without preference.[2] But it is not necessary that the receiver should before making his report distribute all the moneys in his hands among the creditors.[3]

Under this statute it has been held that a judgment rendered after the appointment of a receiver, who received no real estate belonging to the corporation, belongs in the third, and not in the second, class.[4]

The court has power, upon the application of the receiver, to determine the class to which a claim properly belongs, and to enter an order accordingly.[5]

One who is employed to assist the general manager of a corporation in keeping its books, and to clean the office and ship goods, is within Laws N. Y. 1885, c. 376, providing that the receiver of a corporation created under the laws of this state shall prefer and pay from the moneys which shall first come into his hands the wages of employes, operatives, and laborers thereof.[6]

Sec. 150c. Same—Right to participate.—When barred.—Where at the time of the appointment of a receiver for an insolvent corporation a suit is pending against it the plaintiff therein may, at any time before the finding of the final decree exclud-

[1] This subdivision of this section directing the payment of judgment to the extent of the value of the real estate of the corporation under which they are liened does not apply to such judgment by confession. In Matter of Waterbury, 8 Paige Ch. (N. Y.) 380, 382 (1840).

[2] Matter of Berry, 26 Barb. (N. Y.) 55, 59 (1857).

[3] Case of Empire City Bank, 6 Abb. (N. Y.) Pr. 385 (1857). As to the rule of distribution of assets of an insolvent corporation, see Matter of Columbian Ins. Co., 3 Abb. App. Dec. (N. Y.) 239 (1866); also Shield v. Sullivan, 3 Dem. (N. Y.) 296, 299 (1885).

[4] Attorney-General v. Guardian Mut. Life Ins. Co., 5 N. Y. Supp. 84 (1888).

[5] Attorney-General v. Guardian Mut. Life Ins. Co., 5 N. Y. Supp. 84 (1888).

[6] Brown v. A. B. C. Fence Co., 5 N. Y. Supp. 95. (1889); 52 Hun (N. Y.) 151.

ing all creditors who have not presented their claims, be permitted to come in and prove his claim and participate equally in the distribution of the funds still in the hands of the receiver.[1] But it seems that where the receiver has no actual notice of the petitioner's claim before making a second dividend, and has reserved no fund applicable, specifically, to the payment thereof, it is error to require him to pay to the petitioner his portion of such dividend.[2]

Sec. 150d. Same—Priority—Tax claims.—The claim of the State for taxes is prior to that of the creditors, and is to be paid in full.[3] The assets consist practically only of the residue remaining after the discharge of all antecedent claims entitled to priority of payment under the settled rules of general law.[4]

Sec. 150e. Same—Judgment by confession.—It is thought that the statute[5] does not apply to judgments by confession, which judgments are void both as to the receivers and the creditors, and therefore cannot be valid liens upon the real estate, as to either. The meaning and intent of that provision relative to the payment of judgments, in the distribution of the assets of the corporation, is, that where there are judgments, which as against the receiver and the creditors, are valid liens upon real estate the judgment creditors to the extent of those liens shall have a preference. In other words, that the receiver may sell the real estate and pay the judgments, which are liens thereupon, out of the proceeds of such sale, or so much of the judgments as the proceeds of such real estate will pay.[6]

Sec. 151. Same—Second and Final Dividend—Notice of.—If the whole of the estate of such corporation be

[1] Smith v. Manhattan Ins. Co., 4 Hun, (N. Y.) 127 (1875). See Matter of Harmony Ins. Co., 9 Abb. (N. Y.) Pr. N. S. 347 (1870).

[2] As to participation in second and subsequent dividends, see *post*, § 152a.

[3] Matter of Columbian Ins. Co., 3 Abb. App. Dec. (N. Y.)239 (1866).

[4] Matter of Columbian Ins. Co., 3 Abb. App. Dec. (N. Y.) 239 (1866)

[5] 4 N. Y. R. S., 8th ed., p. 2183, § 79; *ante*, § 150.

[6] Matter of Waterbury, 8 Paige Ch. (N. Y.) 380, 382, 383 (1840).

not distributed on the first dividend, the receiver shall, within one year thereafter, and within sixteen months after their appointment, make a second dividend of all the moneys in their hands, among the creditors entitled thereto ; of which, and that the same will be a final dividend, three weeks' notice shall be inserted, once in each week, in the state paper, and in a newspaper printed in the county where the principal place of business of such corporation is situated.[1]

Sec. 151a. Same—Final report.—It is not necessary that the receiver should before making his report distribute all the money in his hands among the creditors.[2]

Sec. 152. Same—Manner of making.—Such second dividend shall be made in all respects in the same manner as herein prescribed in relation to the first dividend, and no other shall be made thereafter among the creditors of such corporation, except to the creditors having suits against it, or against the receivers, pending at the time of such second dividend, and except of the moneys which may be retained to pay such creditors, as herein provided; but every creditor who shall have neglected to exhibit his demand before the first dividend, and who shall deliver his account to the receivers before such second dividend, shall receive the sum he would have been entitled to on the first dividend, before any distribution be made to the other creditors.[3]

Sec. 152a. Same—Participating in second dividends.— It has been said that the true meaning of the latter clause of the foregoing section is that all creditors neglecting to present

[1] 4 N. Y. R. S., 8th ed., p. 2683, § 80.

[2] See Case of Empire City Bank, 6 Abb. (N. Y.) Pr. 385 (1857).

[3] 4 N. Y. R. S., 8th ed., p. 2683, § 81. See Harmony Fire & Marine Ins. Co., 45 N. Y. 310, 315 (1871).

their demands before the first dividend is made and who are not precluded from presenting them by the statute requiring claims to be presented within a limited period after notice, may upon presenting them before a second dividend is made, share in the distribution upon an equality with those who participated in the first dividend.[1]

Sec. 153. Same—Liability on Subsisting Contracts.—After such second dividend shall have been made, the receiver shall not be answerable to any creditor of such corporation, or to any person having claims against such corporation, by virtue of any open or subsisting engagement, unless the demands of such creditor shall have been exhibited, and the engagements upon which such claims are founded shall have been presented to the said receivers, in detail and in writing, before or at the time specified by them in their notice of a second dividend.[2]

Sec. 154. Same—Distribution of Surplus.—If after the second dividend is made there shall remain any surplus in the hands of the receivers, they shall distribute the same among the stockholders of such corporation, in proportion to the respective amounts paid in by them, severally, on their shares of stock.[3]

Sec. 155. Same — Determination of Suit Pending — Disposition of Amount Retained.—When any suit pending at the time of the second dividend, shall be terminated, they shall apply the moneys retained in their hands for that purpose, to the payment of the amount recovered, and their necessary charges and

[1] See Matter of Harmony Fire & Marine Ins. Co., 45 N. Y. 310 (1871); aff. 9 Abb. (N. Y.) Pr. N. S. 347. As to right to participate in dividends, see *ante*, § 150c.

[2] 4 N. Y. R. S., 8th ed., p. 2684, § 82.

[3] 4 N. Y. R. S., 8th ed., p. 2684, § 83.

expenses ; and if nothing shall have been recovered, they shall distribute such moneys, after deducting their expenses and costs, among the creditors and stockholders of the corporation, in the same manner as herein directed in respect to a second dividend.

Sec. 156. Same—Control—Accounting—Filling Vacancy.—The receivers shall be subject to the control of the court of chancery, and may be compelled to account at any time ; they may be removed by the court, and any vacancy created by such removal, by death or otherwise, may be supplied by the court.[2]

Sec. 156a. Same—Direction and control.—It has been said that, independent of the general jurisdiction of the court over receivers as officers of the court, a general power is given by the above section [3] to direct and control receivers of insolvent corporations in reference to the discharge of their duties.[4]

If an order directing the receiver of a corporation as to the manner in which he shall proceed in giving notice of, and making the sale of corporate property, is irregular or improvident, its correction should be sought by a motion before the court that made it. An independent action will not lie for that purpose, even though the plaintiff is not a party to the proceeding in which the order was made. Such an order cannot be questioned in a collateral action brought by the stockholder of the corporation whose property was sold.[5]

Sec. 156b. Same—Application for direction.—Where upon the application of the receiver of a corporation directions are given by the court as to the manner of making a sale of the property to the corporation in his hands, such directions cannot be assailed in the collateral action on the ground that they were in effect procured by a judgment creditor of the

[1] 4 N. Y. R. S., 8th ed., p. 2684, § 84.

[2] 4 N. Y. R. S., 8th ed., p. 2684, § 85.

[3] 4 N. Y. R. S., 8th ed., p. 2684, § 85; *supra*, § 156.

[4] Holbrook v. Receivers of American Fire Ins. Co., 6 Paige Ch. (N. Y.) 220, 226 (1836).

[5] Libby v. Rosekrans, 55 Barb. (N. Y.) 202 (1869).

corporation who then was and still is a justice of the court in which the judgment was procured.[1]

Sec. 156c. Same—Removal—Appointment of successor.—A receiver in an action against an insolvent corporation should not be removed without knowledge of the application having been given to the plaintiff in the action at whose instance he was appointed.[2]

It has been said that a receiver of an insolvent corporation appointed in the first judicial district, in an action pending therein, cannot be removed upon an application made in the third judicial district. Even when the court of one judicial district having no power under the statute[3] to remove a receiver appointed in an action pending in another judicial district, it has no power under such statute to appoint his successor. To accomplish that end the proceedings must be committed to the district in which the action is pending.[4]

Sec. 157. Same — Final Account. — Within three months after the time herein prescribed for making a second dividend, the receivers shall render a full and accurate account of all their proceedings to the court of chancery, on oath, which shall be referred to a master to examine and report thereon.[5]

Sec. 158. Same.—Notice of Final Account—Where Published.—Previous to rendering such account the receivers shall insert a notice of their intention to present the same, once in each week, for three weeks, in the state paper, and in a newspaper of the county in which notices of dividends are herein required to be inserted, specifying the time and place at which such an account will be rendered.[6]

[1] Libby v. Rosekrans, 55 Barb. (N. Y.) 202 (1869).

[2] Attrill v. Rockaway Beach Improvement Co., 25 Hun, (N. Y.) 376 (1881).

[3] L. 1880, c. 537.

[4] Attrill v. Rockaway Beach Improvement Co., 25 Hun (N. Y.) 376 (1881).

[5] 4 N. Y. R. S., 8th ed., p. 2684, § 86.

[6] 4 N. Y. R. S., 8th ed., p. 2684, § 87.

Sec. 159. Same—Reference on duty of Referee.—The master to whom such account shall be referred shall hear and examine the proofs, vouchers and documents offered for or against such account, and shall report thereon fully to the court.[1]

Sec. 160. Same—Accounting of Receivers—Passing Accounts.—Upon the coming in of such report the court shall hear the allegations of all concerned therein, and shall allow or disallow such account, and decree the same to be final and conclusive upon all the creditors of such corporation, upon all persons who have claims against it, upon any open or subsisting engagement, and upon all the stockholders of such corporation. Such receivers shall also account from time to time in the same manner, and with the like effect, for all moneys which shall come to their hands after the rendering of such account, and for all moneys which shall have been retained by them for any of the purposes hereinbefore specified, and shall pay into court all unclaimed dividends.[2]

Sec. 160a. Same—Fees of—Allowance on mortgage foreclosure.—It is said by the court of appeals in the case of the United States Trust Co. of New York v. W. S. & B. R. Co.,[3] that the act of 1883[4] in relation to receivers of corporations including the second section thereof in reference to the fees of receivers applies only to receivers of corporations appointed in proceedings in bankruptcy, and a receiver appointed in an action to foreclose a mortgage executed by the corporation is not entitled to the fees specified in said action. The allowance of commissions to such a receiver is governed by the Code of

[1] 4 N. Y. R. S., 8th ed., p. 2684, § 88.

[2] 4 N. Y. R. S., 8th ed., p. 2684, § 89

[3] 101 N. Y. 478 (1886).

[4] L, 1883, c. 378, §. 2; 2 c R. S., 8th ed. p. 2675.

Civil Procedure[1] providing for the allowance by the court or the judge where not "otherwise specially described by statute."

[1] N. Y. Code Civ. Proc. § 3320.

CHAPTER X.

DISSOLUTION OF CORPORATION—INVOLUNTARY DISSOLUTION.

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Sec. 161. Sequestration, etc.—Action by Judgment Creditor for.—Where final judgment for a sum of money has been rendered against a corporation created by or under the laws of the state, and an execution issued thereupon to the sheriff of the county, where the corporation transacts its general

business, or where its principal office is located, has been returned wholly or partly unsatisfied, the judgment creditor may maintain an action to procure a judgment, sequestrating the property of the corporation, and providing for a distribution thereof as prescribed in section 1793 of this act.[1]

Sec. 161a. Sequestration of effects—How secured—Jurisdiction.—The sequestration of the effects of a corporation and the appointment of a receiver may be obtained by summary proceedings in equity, that is, by petition on judgment and return of execution unsatisfied. But it is thought that a new action may be available for that purpose under the Code of Civil Procedure.[2]

In New York a superior court has full and complete jurisdiction of a civil action against a corporation organized and incorporated under the laws of that state, where the corporation has an office and place of business in that state, to procure a dissolution of the corporation and a distribution of its effects.[3]

But to accomplish that purpose the suit must be prosecuted for the benefit of all the creditors; for the trust is created for the benefit of all the creditors as a class, and for that reason all are entitled to participate ratably in the fund; and it is thought that one creditor cannot obtain priority by superior diligence, either by a creditor's bill or by supplementary proceedings under the statute regulating executions, and appropriate to his own use the fund in which all the creditors have a common interest.[4]

[1] N. Y. Code Civ. Proc., § 1784.

A corporation is not necessarily dissolved by proceedings under this section. Mann v. Pentz, 3 N. Y. 415 (1850); rev'g 2 Sandf. Ch. (N. Y.) 257.

[2] See Corning v. Mohawk Valley Ins. Co., 11 How. (N. Y) Pr. 191 (1855); Morgan v. New York & A. R. Co., 10 Paige Ch. 290 (1863); s. c. 40 Am.Dec. 244.

[3] See Van Pelt v. United States Shoeheel Co., 35 N. Y. Super. Ct. (3 J. & S.) 117 (1872); Morgan v. New York & A. R. Co., 10 Paige Ch. (N. Y.) 290 (1843); s. c. 40 Am. Dec. 244.

[4] See Mann v. Pentz, 3 N. Y. 415 (1850); Morgan v. New York & A. R. Co., 10 Paige Ch. 290 (N. Y.) (1843); s. c. 40 Am. Dec. 244; Umsted v. Buskirk, 17 Ohio St. 113 (1866); Coleman v. White, 14 Wis. 701

The fact that there are stockholders delinquent upon which the defendant has fully paid, which unpaid calls are more than sufficient to pay the debts of the corporation, will not warrant a limiting of the sequestration to the amount of the debt of the creditor in whose suit it is ordered, for it carries the whole assets of the corporation into the bonds of the receiver.[1] But a corporation is not dissolved by the appointment of a receiver and a sequestration of its property.[2]

The remedy of a creditor of an insolvent corporation to sequester its property under the Revised Statutes may be pursued by an action under the Code of Procedure.[3]

Sec. 161b. Same—Who may apply for.—Only creditors who have secured a judgment, and issued an execution which has been returned unsatisfied, can apply for a sequestration under the statute, of the assets of a corporation.[4]

A creditor of a corporation whose execution has been returned unsatisfied can proceed by bill as well as by petition under the article of the Revised Statutes relative to proceedings against corporations in equity to obtain a sequestration of the effects of the corporation.[5]

The remedy of a sequestration against a corporation must be based on a final judgment and the issue and return of an execution unsatisfied. Where, therefore, the judgment on which the sequestration proceedings are based is opened and the defendant is allowed to come in and defend, but the judgment is ordered to stand as security, there is no longer a final judgment and the sequestration proceedings must fall.[6]

(1862); s. c. 80 Am. Dec. 797; Adler v. Milwaukee P. B. Manufg. Co., 13 Wis. 57 (1860); Pollard v. Bailey, 87 U.S. (20 Wall.) 520 (1874); bk. 22 L. ed. 376.

[1] See Morgan v. New York & A. R. Co., 10 Paige Ch. (N. Y.) 290 (1843); s. c. 40 Am. Dec. 244; Mann v. Pentz, 2 Sandf. Ch. (N. Y.) 270 (1850);

[2] Huguenot Nat. Bk. v. Studwell, 6 Daly (N. Y.) 13 (1875); rev'd on another point, 74 N. Y. 621.

[3] N. Y. Code Civ. Proc., § 1784; *supra*, § 161. See Van Pelt v. United States Metallic Spring Co., 13 Abb. (N. Y.)Pr. N. S. 325 (1872).

[4] Bliven v. Peru Steel & Iron Co., 9 Abb. (N. Y.) N. C. 205 (1881).

[5] See N. Y. Code Civ. Proc., § 1784; *supra*, § 161; Judson v. Rossie Galena Co., 9 Paige Ch. 598 (1848); s. c. 38 Am. Dec. 569.

[6] Rodburn v. Utica, I. & E. R. R. Co., 28 Hun, (N. Y.) 369 (1882.)

But where an action is brought to remove an impediment or vacate a prior encumbrance, the code[1] has no application.[2] Before an action for this object can be maintained it is indispensable that an execution and judgment, or judgments, shall have issued.[3]

Sec. 161c. Same—Motion for sequestration.—A motion for sequestration of the property of a corporation or the appointment of a receiver, must be made in the district in which the principal place of business is situated, except that in actions by the attorney-general, when it appears that sequestration is a necessary incident if made in the district where the action is triable.[4]

Sec. 161d. Same—Jurisdiction of court to appoint receiver.—It is thought that the jurisdiction of the court to entertain the proceedings under this section does not depend upon the truth of the facts alleged in the petition; if it alleges sufficient facts and the court is called upon to decide whether they are established, its determination, whether rightful or not, does not affect its jurisdiction. If the appointment of a receiver is binding upon the corporation no one else can question it.[5]

Where an action was brought under the code[6] to sequester the property of the defendant, one Hobbs was appointed a temporary receiver by an order made May 21, 1883, and on June 11, 1883, upon the default of the company, a final decree was made appointing him a permanent receiver thereof. No notice of the proceeding was given to the attorney-general,

[1] N. Y. Code Civ. Proc., 1784; *supra*, 161.

[2] Easton National Bank v. Buffalo Chem. Works & Bushwick Chemical Works, 15 N. Y. St. Rep. 924 (1888).

[3] Easton Nat. Bk. v. Buffalo Chem. & Bushwick Chemical Works, 15 N. Y. St. Rep. 924, 926 (1888). See Adsit v. Butler, 87 N. Y. 585 (1882); Mechanics' & T. Bank of Jersey City v. Dakin, 51 N. Y. 519 (1873); Bostwick v. Scott, 40 Hun (N. Y.) 212 (1886); Lichtenberg v. Hertdfelder, 33 Hun (N. Y.) 57 (1884); Bowe v. Arnold, 31 Hun (N. Y.) 256 (1883); Gardner v. Lansing, 28 Hun (N. Y.) 413 (1882); Jones v. Green, 68 U. S. (1 Wall.) 330 (1863); bk. 17 L. ed. 553.

[4] Supreme Court Rules, No. 81, ed. 1888.

[5] Whittlesey v. Frantz, 74 N. Y. 456 (1878).

[6] N. Y. Code Civ. Proc., § 1784; *supra*, § 161.

as required by chapter 378 of the Laws of 1883, which took effect May 11, 1883. In April, 1884, due notice being given to the attorney-general an order was entered providing for Hobbs' appointment as receiver *nunc pro tunc* on the notice so served. The court held, that without deciding whether or not a jurisdictional defect could be cured by an amendatory order, that the order made in this case had the effect from its date of making valid the appointment of the receiver.[1]

Sec. 161e. Same—How appointed.—The court will not grant a sequestration or appoint a receiver of a corporation against whom an execution has been returned unsatisfied upon an *ex parte* application of the judgment creditor. But upon filing a petition, duly verified, an order to show cause at a future day, why the prayer of the petitioner should not be granted may be entered and an injunction may be allowed restraining the officers of the company from selling, assigning, transferring or encumbering the property or effects of the corporation in the meantime.[2]

Sec. 161f. Same—Unliquidated debt—Set-off.—It has been said that a receiver of an insolvent corporation appointed under the act of the 18th of January, 1836, or appointed by the court of chancery in accordance with the provisions of the Revised Statutes relative to proceeding against corporations in equity, is bound to offset a liquidated debt against an unliquidated debt due from the corporation against the same person; in the same manner as trustees of insolvent debtors are bound to offset cross-demands arising from mutual credits as well as from mutual debts. In such cases the right of set-off is not confined to liquidated debts, or such as might have been offset in a suit at law between the original parties, but it also extends to all mutual credit arising *ex contractu* of such mutual parties.[3]

Sec. 161g. Same—Action by receiver against stockholder—Discharge of receiver.—A receiver of a corporation, appointed upon the sequestration of its property on the return of an

[1] Morrison v. Menhaden Co., 37 Hun (N. Y.) 522 (1885).

[2] Devoe v. Ithaca & O. R. Co., 5 Paige Ch. (N. Y.) 521 (1835).

[3] Holbrook v. Receiver of American Fire Ins. Co., 6 Paige Ch. (N. Y.) 220, 226 (1836).

execution, cannot maintain an action against its stockholders to enforce their personal liability.[1]

And a judgment creditor who files a bill against stockholders after the return of execution, obtains no preference.[2] On payment of plaintiff's judgment against a corporation not a moneyed one, and in the absence of evidence that any other creditor has sought to avail himself of the action, the court may order it discontinued and the receiver discharged.[3]

Sec. 161h. Same—Surrender of franchise.—In order to infer a surrender of corporate franchises from insolvency, suspension of business, etc., for less than a year, the circumstances must be such as to show that the corporation has lost all power to continue or to resume its business.[4]

It is said in Bradt v. Benedict,[5] that the statute declaring a corporation, which for one whole year, has remained insolvent or suspended its ordinary business, shall be deemed to have surrendered its franchises, is cumulative, and not a limitation within the common law rule previously existing in this state.

The Code of Civil Procedure[6] does not supersede the attorney-general's power to institute proceedings to dissolve, nor the power of a general creditor, without a judgment to institute proceedings to restrain the improper exercise of certain powers, or to procure payment of his debt. Each proceeding may go on, with the rights peculiar to each, subject to the power of the court to restrain unnecessary suits.[7]

Sec. 162. Same—Action to Dissolve—Grounds for.—In either of the following cases, an action to procure

[1] Farnsworth v. Wood, 91 N. Y. 308 (1883).

[2] Tallmadge v. Fishkill Iron Co., 4 Barb. (N. Y.) 382 (1848); Morgan v. N. Y. & A. R. Co., 10 Paige Ch. 290 (1843); s. c. 40 Am. Dec. 244; 2 N. Y. Leg. Obs. 246. See Briggs v. Penniman, 8 Cow. (N. Y.) 387 (1826); s. c. 18 Am. Dec. 454; Bank of Poughkeepsie v. Ibbotson, 24 Wend. (N. Y.) 473 (1840).

[3] Angell v. Silsbury, 19 How. (N. Y.) Pr. 48 (1859).

[4] Bradt v. Benedict, 17 N. Y. 93 (1858).

[5] 17 N. Y. 93 (1858).

[6] N. Y. Code Civ. Proc., § 1784; *supra*, 161.

[7] Dambman v. Empire Mills, 12 Barb. (N. Y.) 341 (1851).

a judgment, dissolving a corporation created by or under the laws of the state, and forfeiting its rights, privileges, and franchises, may be maintained, as prescribed in the next section :

1. Where the corporation has remained insolvent for at least one year.

2. Where it has neglected or refused, for at least one year, to pay and discharge its notes or other evidences of debt.

3. Where it has suspended its ordinary and lawful business for at least one year.[1]

4. If it has banking powers, or power to make loans on pledges or deposits, or to make insurances, where it becomes insolvent or unable to pay its debts, or has violated any provision of the act, by or under which it was incorporated, or of any other act binding upon it.[2]

Sec. 162a. Same—Pleadings.—In an action to dissolve a corporation on the ground that it has remained insolvent for at least one year, and that it has suspended its ordinary and lawful business at least one year, it is immaterial whether the corporation is a manufacturing corporation or not, inasmuch as the code[3] relates to all corporations created by or under the laws of the state of New York.[4]

A complaint by a stockholder to dissolve a corporation on the ground that for a year it has been insolvent, or neglected to pay its debts, or suspended its business, and which alleges that part of the debt has been due for a year, that the whole is now due, that payment has been demanded and refused on the ground of lack of assets, is not good, because, it shows neither insolvency for a year, nor neglect of payment for a year, the time of demand not being shown ; and an allegation

[1] See *ante*, § 138d.

[2] N. Y. Code Civ. Proc., § 1785.

[3] N. Y. Code Civ. Proc., § 1785; *supra*, § 164.

[4] People v. Excelsior Gas Light Co., 8 N. Y. Civ. Proc. Rep. 390 (1886).

of "practical suspension to a great extent for a whole or greater part of a year," is also insufficient.[1]

But in a stockholder's action to dissolve a corporation, the complaint states a good cause of action for dissolution, because of insolvency and suspension of business within the statute.[2] Where it alleges that the debts of a company have remained unsatisfied for many years, and will continue to so remain, because it is not within means of payment, and the corporation has become and is insolvent and unable to pay its debts, and has remained insolvent for one year last passed; that it is indebted in large sums of money to various persons and has no means whatever of liquidating its outstanding indebtedness, and that it has had the means for more than a year last passed; and that though its property consist of oil lands, to a certain extent developed, but little, if any, oil for many years has been taken from its wells and mines, and that the supply of oil has gradually diminished until the operation of the wells has ceased, and that the principal resources of the corporation were their production of oil; and that by reason of the failure of the wells and mines to furnish oil, and the failure to operate, the company has become and is crippled in its supply, rendering it solely impossible to continue the existence of the same without loss or damage.[3]

Where in an action to dissolve a corporation on the ground that it has remained insolvent for at least one year, the complaint alleged that the defendant had been unable to meet its obligation and had failed to pay a judgment therein set forth; that it had not a dollar in the treasury and was insolvent and had been so for at least a year past, the court held that an answer alleging payment of the judgment and averring that the corporation had no liabilities to creditors by way of judgments unsatisfied, was insufficient; that the corporation may be insolvent against which no judgment have been recovered.[4]

[1] Bliven v. Peru Steel & Iron Co., 9 Abb. (N. Y.) N. C. 205 (1881).

[2] N. Y. Code Civ. Proc., § 1785; *ante*, § 162.

[3] Swords v. Northern Light Oil Co., 17 Abb. (N. Y.) N. C. 115 (1885).

[4] People v. Excelsior Gas Light Co., 8 N. Y. Civ. Proc. Rep., 390 (1886).

Sec. 162b. Same—Parties.—The corporation to be dissolved, is a necessary party to a bill in chancery to decree the dissolution of such corporation and to have its property and effects distributed among its creditors and stockholders.[1] It is thought that where it has legally assigned some of its franchises to another, such franchises can only be annulled in an action against the corporation to which they have been assigned.[2] But where an action is brought by the people to dissolve a corporation, and forfeit its rights, privileges and franchises, one to whom it has leased property to be held during the term of its corporate existence has no right to be made a party defendant under the Code of Civil Procedure,[3] in order to contest the forfeiture of its franchises.[4]

The manner in which creditors of a corporation are to make themselves parties to a suit commenced against a corporation to wind up its affairs, must be substantially the same as that in which creditors of a deceased individual make themselves parties to a suit for the settlement of all its debts and credits, by going in before the master under a decree and proving the debts.[5]

Sec. 162c. Same—Action when terminated.—The effect of the expiration of the charter of a corporation is to work its dissolution,[6] consequently an action against a corporation, either foreign or domestic, is terminated by the expiration of its charter without a judicial declaration of dissolution.[7]

Sec. 162d. Same—Effect of dissolution.—The dissolution of a corporation, either from expiry of its charter, without an action or by action and judgment of the court for that purpose, terminates all pending actions, and all subsequent proceedings thereunder are void.[8] Consequently after disso-

[1] Mickles v. Rochester City Bank, 11 Paige Ch. (N. Y.) 118 (1844); s. c. 42 Am. Dec. 103.

[2] People v. Albany & Vt. R. Co., 15 Hun (N. Y.) 126 (1878).

[3] N. Y. Code Civ. Proc., § 452.

[4] People v. Albany & Vt. R. Co., 15 Hun (N. Y.) 126 (1878).

[5] Judson v. Rossie Galena Co., 9 Paige Ch. (N. Y.) 598 (1842); s. c. 38 Am. Dec. 569.

[6] People v. Manhattan Co., 9 Wend. (N. Y.) 351, 382 (1832).

[7] Sturges v. Vanderbilt, 73 N. Y. 384 (1878), modifying 11 Hun (N. Y.) 136.

[8] Sturges v. Vanderbilt, 73 N. Y. 384 (1878), modifying 11 Hun (N. Y.)

lution, process to commence a suit cannot be served upon an officer of the company.[1]

After an order enjoining a corporation from exercising its franchises, sequestering its effects, and continuing its existence so far only as may be necessary to enable a receiver to be appointed and dissolving it for all other purposes, it can make no contract on which any claim payable out of its assets can be based ;[2] but a decree dissolving a corporation "except for certain purposes," does not so extinguish it that it cannot be revived.[3]

The creditors of a dissolved corporation have no equitable lien on its assets in the hands of a third person.[4] But it has been said that on dissolution of a corporation, the interests of stockholders become equitable rights to proportionate shares of corporate property after payment of debts, and in the adjustment each stockholder is to be charged with what he owes the corporation.[5]

The real estate belonging to a corporation does not revert to the grantor on dissolution.[6]

Sec. 162e. Same—Who may bring action.—It is well established that, in the absence of statutory provisions to that effect, an individual cannot maintain an action for the dissolution of a corporation.[7]

136; McCulloch v. Norwood, 58 N. Y. 562 (1874), modifying 36 N. Y. Super. Ct. (6 J. & S.) 180 (1873).

[1] Hetzel v. Tannehill Silver Min. Co., 4 Abb. (N. Y.) N. C. 40 (1877).

[2] Carrington v. Connecticut F. & M. Ins. Co., 1 Bosw. (N. Y.) 152 (1857).

[3] Lea v. American Atl. & Pac. Can. Co., 3 Abb. (N. Y.) Pr. N. S. 1 (1867).

[4] Tinkham v. Borst, 31 Barb. (N. Y.) 407 (1860), reversing 15 How. (N. Y.) Pr. 204 (1857).

[5] James v. Woodruff, 10 Paige Ch. (N. Y.) 541 (1844); s. c. 2 Den. (N. Y.) 574.

[6] Heath v. Barmore, 50 N. Y. 320 (1872). As to title to real estate on dissolution, see Bingham v. Weiderwax, 1 N. Y. 509 (1848); Towar v. Hale, 46 Barb. (N. Y.) 361 (1866).

[7] Denike v. New York and Rosendale Lime & Cement Co., 80 N. Y. 599 (1880); Verplanck v. Mercantile Ins. Co., 1 Edw. Ch. (N. Y.) 8. (1831) ; Wilmersdoerffer v. Lake Mahopac. Imp. Co., 18 Hun (N. Y.) 387 (1879); Slee v. Bloom, 5 Johns, Ch. (N. Y.) 366 (1821); North v. State, 107 Ind. 356 (1886) ; Briggs v. Cape Cod Ship Canal Co., 137 Mass. 71, 72 (1884); Rice v. National Bank, 126 Mass. 300, 304 (1879); Folger v.

But a creditor or a stockholder of a corporation may bring an action for the dissolution of the corporation and the winding up of its affairs.[1] The neglect or failure of the company for more than a year to pay its debts is sufficient to justify a stockholder thereof in instituting proceedings for its dissolution;[2] but the fact that the property of a corporation has been lost does not give a portion of the stockholders a standing to ask for a dissolution, whether the lease is lawful or not.[3]

It is thought that the pendency of an attachment suit in another state is no bar to an action in New York, although a judgment in another state might be.[4]

But in a stockholder's action to dissolve a corporation, the complaint states a good cause of action for dissolution, because of insolvency and suspension of business within the statute,[5] where it alleges that the debts of a company have remained unsatisfied for many years, and will continue to so remain because it is without means of payment, and the corporation has become and is insolvent and unable to pay its debts, and has remained insolvent for one year last passed; that it is indebted in large sums of money to various persons and has no means whatever of liquidating its outstanding indebtedness, and that it has not had the means for more than a year last passed; and that though its property consists of oil lands, to a certain extent but little if any oil for many years has

Columbian Ins. Co., 99 Mass. 267 (1868); s. c. 96 Am. Dec. 747; Stant v. Zulick, 48 N. J. L. (19 Vr.) 599 (1886); Strong v. McCagg, 55 Wis. 624, 628 (1882).

[1] See Kittredge v. Kellogg Bridge Co., 8 Abb. (N. Y.) N. C. 168 (1880); Masters v. Electric Life Ins. Co., 6 Daly (N. Y.) 457 (1876); Medbury v. Rochester Frere S. Co., 19 Hun. (N. Y.) 500 (1880); Mickles v. Rochester City Bank, 11 Paige Ch. (N. Y.) 118 (1844); s. c. 42 Am. Dec. 103; Ward v. Sea Ins. Co., 7 Paige Ch. (N. Y.) 294 (1838); Verplanck v. Mercantile Ins Co., 2 Paige Ch. (N. Y.) 438 (1831); Boisgerard v. New York Banking Co., 2 Sandf. Ch. (N. Y.) 23 (1844).

[2] Kittredge v. Kellogg Bridge Co., 8 Abb. (N. Y.) N. C. 169 (1880); Ward v. Sea Ins. Co., 7 Paige Ch. (N. Y.) 294 (1838).

[3] Denike v. New York R. L. & C. Co., 80 N. Y. 599 (1880).

[4] Osgood v. Maguire, 61 Barb. (N. Y.) 59 (1871); Ward v. Sea Ins. Co., 7 Paige Ch. (N. Y.) 294 (1838). See Bangs v. Duckinfield, 18 N. Y. 596 (1859); Mann v. Pentz, 3 N. Y. 421 (1850); Mumma v. Potomac Co., 33 U. S. (8 Pet.) 286 (1834); bk. 8 L. ed. 947.

been taken from its wells and mines, and that the supply of oil has gradually diminished until the operation of the wells has ceased, and that the principal resources of the corporation were their production of oil; and that by reason of the failure of the wells and mines to furnish oil and the failure to operate them the company has become and is grappled in its supply, rendering it solely impossible to continue the existence of the same without loss or damage.[1] Where in an action to dissolve a corporation on the ground that it has remained insolvent for at least one year, the complaint alleged that the defendant had been unable to meet its obligations and had failed to pay a judgment therein set forth; that it had not a dollar in the treasury and was insolvent, and had been so for at least a year past. The court held, that an answer alleging payment of the judgment and averring that the corporation had no liabilities to creditors by way of judgments instituted, was insufficient; that the corporation may be insolvent against which no judgments have been recovered.[2]

Sec. 162f. Same—Jurisdiction to dissolve.—A corporation owes its life to the sovereign power of the state under which it is created, and does not cease to exist until its dissolution is accomplished in the manner provided by law. The circumstances under which it shall forfeit or be deprived of life depend upon the sovereignity or state creating it.[3] Until dissolved by a judicial proceeding on behalf of the government that created them all corporations must be regarded by the courts, and their duties and privileges enforced and protected.[4] Cause for the forfeiture of a corporate franchise and its dissolution cannot be taken advantage of in any manner other than by a direct proceeding instituted for that purpose against the corporation by or on behalf of the government that created it.[5]

Independent of statute neither a court of law nor a court

[1] People v. Excelsior Gas Light Co., 8 N. Y. Civ. Proc. Rep. 390 (1886).

[2] Bliven v. Peru Steel & Iron Co., 9 Abb. (N. Y.) N. C. 205 (1881).

[3] Denike v. New York & R. L. & C. Co., 80 N. Y. 599 (1880).

[4] Laflin & R. Powder Co. v. Sinsheimer, 46 Md. 315 (1876).

[5] Matter of New York Elevated R. Co., 70 N. Y. 337 (1877); West v. Carolina Life Ins. Co., 31 Ark. 476 (1876); Holland v. Heyman, 60 Ga. 174 (1878); Meeker v. Chicago Cast

of equity has jurisdiction to decree a forfeiture of the charter of a corporation at the suit of an individual.[1]

The power to dissolve a corporation for cause is legal and not equitable;[2] and in the absence of a statutory provision a court of equity has no right, by virtue of its inherent powers to decree a dissolution of a corporation or to take away any, of its rights or privileges,[3] because such right and power is wholly statutory.[4]

By the common law a corporation can be deprived of its franchises only in a court of law by *scire facias* or information in the nature of a *quo warranto*;[5] but it is competent for the legislature to give.[6]

Steel Co., 84 Ill. 276 (1876); Brookville & G. Turnpike Co. v. McCarty, 8 Ind. 392 (1856); s. c. 65 Am. Dec. 768; Toledo & A. A. R. Co. v. Johnson, 49 Mich. 148 (1882); New Jersey S. R. Co. v. Long Branch Commissioners, 39 N. J. L. (10 Vr.) 35 (1876); State v. Patterson & H. Turnpike Co., 21 N. J. L. (1 Zab.) 9 (1847); Cochran v. Arnold, 58 Pa. St. 399 (1868); Moseby v. Burrow, 52 Tex. 396 (1880); State v. Butler, 15 Lea (Tenn.) 104 (1885); Crump v. United States Mining Co., 7 Gratt. (Va.) 352 (1851); Greenbrier Lumber Co. v. Ward, 30 W. Va. 43 (1887); s. c. 3 S. E. Rep. 227; Moore v. Schoppert, 22 W. Va. 282 (1883); Mackall v. Chesapeake & O. Canal Co., 94 U. S. (4 Otto) 308 (1876); bk. 24 L. ed. 161; Taylor v. Holmes, 14 Fed. Rep. 498 (1882).

[1] See *ante*, § 162e.

[2] See Attorney-General v. Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371 (1817); Verplanck v. Mercantile Ins. Co., 2 Paige Ch. (N. Y.) 438 (1831); Cady v. Centreville Knit Goods Manuf. Co., 48 Mich. 133 (1882).

[3] Ferris v. Strong, 3 Edw. Ch. (N. Y.) 127 (1837); Verplanck v. Mercantile Ins. Co., 1 Edw. Ch. (N. Y.) 85 (1831); Attorney-General v. Bank of Niagara, 1 Hopk. Ch. (N. Y.) 354 (1825); Strong v. McCagg, 55 Wis. 624 (1882).

[4] Bliven v. Peru Steel & Iron Co., 9 Abb. (N. Y.) N. C. 205 (1881). See Van Pelt v. United States Metallic Spring B. & S. H. Co., 13 Abb. (N. Y.) Pr. N. S. 331 (1872); Verplanck v. Mercantile Ins. Co., 1 Edw. Ch. (N. Y.) 85 (1831).

[5] People v. Utica Ins. Co., 15 Johns. (N. Y.) 378 (1817); s. c. 8 Am. Dec. 249; State v. Real Estate Bank, 5 Ark. 595 (1844); s. c. 41 Am. Dec. 109; Baker v. Backus, 32 Ill. 79, 110 (1863); State v. St. Paul & S. C. R. Co., 35 Minn. 222 (1886); State v. Merchants' Ins. & T. Co., 8 Humph. (Tenn.) 235 (1847); Ames v. Kansas, 111 U. S. 449 (1884); bk. 28 L. ed. 482; King v. Pasmore, 3 T. R. 190 (1779). See Doyle v. Peerless Petroleum Co., 44 Barb. (N. Y.) 239 (1865); President, etc., v. Trenton City Bridge Co., 13 N. J. Eq. (2 Beas.) 57 (1860); Attorney-General v. Stevens, 1 N. J. Eq. (1 Saxt.) 369 (1831); Attorney-General v. Tudor Ice Co., 104 Mass. 239 (1870); Strong v. McCagg, 55 Wis. 624 (1882). See also *post*, § 162f[1]. It is thought, however, that an information in the nature of a *quo warranto* is the only appropriate means of testing the right to exercise corporate franchises as well as the proper remedy for the abuse of such franchises.

[6] See Parish of Bellport v. Tooker,

Jurisdiction[1] to a court of equity over corporations, and to prescribe the form of procedure to secure the remedies given by the statute[2] for it has been held that, although the remedy at common law was by writ of *scire facias* or *quo warranto*, it is within the power of the legislature to change the remedy for reclaiming, by the state, the rights and privileges conferred upon corporations by their charters; in those cases where there has been a plain misuser or a manifest abuse of its powers and franchises.[3] The general rule is, however, that a corporation is not to be deemed dissolved until the forfeiture is judicially ascertained and adjudged.[4] It is now generally held that a proceeding upon an information in the nature of a *quo warranto* filed by the attorney-general on behalf of the state is the proper mode of trying the issue.[5]

29 Barb. (N. Y.) 256 (1859); s. c. 21 N. Y. 267; People v. Hudson Bank, 6 Cow. (N. Y.) 217 (1826); People v. Kingston & M. Turnpike Co., 23 Wend. (N. Y.) 193 (1840); Reed v. Cumberland & O. Canal Co., 65 Me. 132 (1876); Commonwealth v. Commercial Bank, 28 Pa. St. 383 (1857); State v. Bradford, 32 Vt. 50 (1859); State v. Milwaukee, L. S. & W. R. Co., 45 Wis. 579 (1878); Terrett v. Taylor, 13 U. S. (9 Cr.) 43 (1815); bk. 3 L. ed. 650.

It is a tacit condition, annexed to the creation of every private corporation, that it shall be subject to dissolution by forfeiture of its franchises for wilful misuser or nonuser in regard to matters which go to the essence of the contract between it and the state.

[1] See *post*, §§ 162g, 162p, 162z. See also People v. Manhattan Co., 9 Wend. (N. Y.) 361 (1832); State v. Real Estate Bank, 5 Ark. 595 (1844); s. c. 41 Am. Dec. 109; Terrett v. Taylor, 13 U. S. (9 Cr.) 51 (1815); bk. 3 L. ed. 650.

[2] See Verplanck v. Mercantile Ins. Co., 1 Edw. Ch. (N. Y.) 85 (1831); Van Pelt v. United States M. S. B. & Shoe-Heel Co., 35 N. Y. Super. Ct. (3 J. & S.) 116 (1872); Baker v. Backus, 32 Ill. 79, 110 (1863); Newfoundland R. Co. v. Schack, 40 N. J. Eq. (13 Stew.) 222 (1885).

[3] Ward v. Farwell, 97 Ill. 593 (1881); Travellers' Ins. Co. v. Bronse, 83 Ind. 62 (1882); Scobey v. Gibson, 17 Ind. 572 (1861); s. c. 79 Am. Dec. 490; Ward v. Hubbard, 62 Tex. 559 (1884); Tennessee v. Sneed, 96 U. S. (6 Otto) 69 (1877); bk. 24 L. ed. 610.

[4] Bradt v. Benedict, 17 N. Y. 99 (1858); Ormsby v. Vermont Copper Min. Co., 65 Barb. (N. Y.) 360 (1873); Hollingshead v. Woodward, 35 Hun (N. Y.) 410, 413 (1885); Holland v. Heyman, 60 Ga. 174 (1878); State v. Fagan, 22 La. An. 545 (1870); Laflin & R. Powder Co. v. Sinsheimer, 46 Md. 315 (1876); Minnesota Cen. R. Co. v. Melvin, 21 Minn. 344 (1875); Moseby v. Burrow, 52 Tex. 396 (1880); Dewey v. St. Albans Trust Co., 56 Vt. 476 (1884); s. c. 48 Am. Rep. 893; Bank of Bethel v. Pahquioque Bank, 81 U. S. (14 Wall.) 383 (1871); bk. 20 L. ed. 840; Taylor v. Holmes, 14 Fed. Rep. 498 (1882).

[5] Darnell v. State, 48 Ark. 321

The courts proceed with great caution in declaring the forfeiture of the franchises of a corporation, and such forfeiture will not be allowed except when there is shown a plain abuse of power, by which the corporation fails to fulfill the design and purpose of its organization.[1] It is otherwise in those cases where the corporation has been guilty of acts which by statute are made a cause of forfeiture of its franchise to be a corporation; and in such cases the court has no discretion in the matter but must declare a forfeiture.[2] The court is vested with a discretion to determine whether the corporation shall be ousted of its franchise to be a corporation in those cases where it has abused or misused its corporate powers in any particular as to which it is declared by statute that the act shall operate as a forfeiture.[3]

The New York city common pleas court has jurisdiction to dissolve and wind up an insolvent corporation, when it has an office for the transaction of business in the city of New York.[4]

Sec. 162g. Same—Grounds for dissolution—Abuse and misuser of power.—The abuse of the powers of corporations, in respect

(1886); s. c. 3 S. W. Rep. 365; State v. Leatherman, 38 Ark. 81 (1881); Heard v. Talbot, 73 Mass. (7 Gray) 120 (1856); State v. Minnesota Cent. R. Co., 36 Minn. 246 (1886); s. c. 30 N. W. Rep. 816; State v. Wood, 84 Mo. 378 (1884); National Docks R. Co. v. Central R. Co., 32 N. J. Eq. (5 Stew.) 755 (1880); Greenbrier Lumber Co. v. Ward, 30 W. Va. 43 (1887); s. c. 3 S. E. Rep. 227.

[1] People v. Williamsburg Turnpike, R. & B. Co., 47 N. Y. 586 (1872); Commonwealth v. Franklin Ins. Co., 115 Mass. 278 (1874); Harris v. Mississippi Val. & S. I. R. Co., 51 Miss. 602 (1875); Attorney-General v. Petersburg & R. R. Co., 6 Ired. (N. C.) L. 469 (1846); State v. Farmers' College, 32 Ohio St. 487 (1877); State v. Commercial Bank, 10 Ohio 535 (1841); Commonwealth v. Commercial Bank, 28 Pa. St. 383 (1857).

[2] People v. Northern R. Co., 53 Barb. (N. Y.) 123 (1869); State v. Minnesota Cen. R. Co., 36 Minn. 246 (1886); s. c. 30 N. W. Rep. 816; State v. Pennsylvania & O. Canal Co., 23 Ohio St. 121 (1872).

[3] State v. Oberlin Building Assoc., 35 Ohio St. 258 (1879); See, Hart v. Boston, H. & E. R. Co., 40 Conn. 524 (1873); Harris v. Mississippi Val. & S. I. R. Co., 51 Miss. 605 (1875); State v. Peoples Mutual Ben. Assoc., 42 Ohio St. 579 (1885); State v. Central O. Mut. Rel. Assoc., 29 Ohio St. 399 (1876); State v. Essex Bank, 8 Vt. 489 (1836).

[4] Masters v. Electric Life Ins. Co., 6 Daly (N. Y.) 455 (1876).

to the notice given of the first meeting, or by reason of other informality in the proceedings of that meeting, will be grounds for its dissolution;[1] but the defect must be taken advantage of by direct proceedings against the corporation for that purpose.[2] The dissolution of a corporation, for abuse of its powers does not take effect until after being judicially ascertained, and declared.[3]

Sec. 162h. Same—Non-compliance.—It seems that non-compliance with the act of incorporation is, *per se* a misuser forfeiting the privileges and franchises conferred; and it is not necessary to work a forfeiture that the neglect or refusal to perform the duties enjoined should proceed from a bad or corrupt motive; it is enough that the duties be neglected or designedly omitted.[4]

The duties enjoined by an act of incorporation are conditions attached to the ground of the franchise conferred; but a substantial performance is all that is required, whether they be conditions precedent or subsequent.[5] But in those cases where the conditions are implied, they are to be more favorably construed than conditions expressed.[6]

Sec. 162i. Same—Breach of trust.—It has been said that a breach of trust furnishes grounds for the dissolution of a cor-

[1] However, it is said in the case of Clancey v. Onondaga Salt Co., 62 Barb. (N. Y.) 395 (1862), that a corporation formed under a general law for a legitimate purpose, does not lose its corporate capacity by a perversion of abuse of its legitimate power.

[2] Persse & Brooks Paper Works v. Willett, 19 Abb. (N. Y.) Pr. 433 (1863); s. c. 1 Robt. (N. Y.) 147; Barclay v. Talman, 4 Edw. Ch. (N. Y.) 123 (1843); See Vernon Society v. Hills, 6 Cow. (N. Y.) 23 (1826); s. c. 16 Am. Dec. 429; Bank Commissioners v. Bank of Buffalo, 6 Paige Ch. (N. Y.) 503 (1837); Chester Glass Co. v. Dewey, 16 Mass. 94 (1819); s. c. 8 Am. Dec. 128.

[3] Ormsby v. Vermont Copper Mining Co., 65 Barb. (N. Y.) 360 (1873); reversed on another point, 56 N. Y. 623; Boston Glass Manuf. v. Langdon, 41 Mass. (24 Pick.) 49 (1834); s. c. 35 Am. Dec. 292.

[4] People ex rel. Bishop v. Kingston & Middleton Turnpike Co., 23 Wend. (N. Y.) 193 (1840).

[5] People ex rel. Bishop v. Kingston & Middleton Turnpike Co., 23 Wend. (N. Y.) 193 (1840).

[6] People ex rel. Bishop v. Kingston & Middleton Turnpike Co., 23 Wend. 193 (1840).

poration,[1] because a corporation must come up to all the substantial objects for which it was instituted.[2] A corporation is made a political body on the implied condition that it shall demean itself faithfully and honestly in the use of all its franchises; and if it depart from any one of these it is guilty of a breach of trust.[3]

Sec. 162j. Same—Change of business.—Any change in the nature and business of a corporation from one for which it was created, effectually destroys it for all the purposes for which it was formed; it is no longer the same corporation and may be dissolved.[4] And a corporation is dissolved by suffering any act destructive of the object for which it was created,[5] because the suffering of such acts is equivalent to a surrender of its rights;[6] but where a corporation is formed for the construction of a particular work, such as a railroad or a canal, the same to be completed within a definite time, the corporation is not dissolved by failure to accomplish the work within the time specified in the absence of any judgment declaring a forfeiture.[7]

Sec. 162k. Same—Death of members.—A corporation may be dissolved within the period prescribed by its charter, because of a loss of all of its members, or of an integral part, by reason of which its functions cannot be restored.[8]

[1] Barclay v. Talman, 4 Edw. Ch. (N. Y.) 123 (1843); People v. Bristol & R. Turnp. Co., 23 Wend (N. Y.) 222, 235 (1840). See Slee v. Bloom, 5 John Ch. (N. Y.) 380 (1821); People v. Bristol & Rensslaerville Turnpike Co., 23 Wend. (N. Y.) 222, 235 (1840).

[2] People v. Bristol & Rensslaerville Turnpike Co., 23 Wend. (N. Y.) 222, 235 (1840).

[3] People v. Bristol & Rensslaerville Turnpike Co., 23 Wend. (N. Y.) 222, 235 (1840); Chesapeak & Ohio Canal Co. v. Baltimore & O. R. Co., 4 Gill & J. (Md.) 1, 107, 121 (1832).

[4] Abbot v. American Hard Rubber Co., 33 Barb. (N. Y.) 578 (1861); s. c. 11 Abb. (N. Y.) Pr. 204; 20 How. (N. Y.) Pr. 199; 21 How. (N. Y.) Pr. 193.

[5] See Briggs v. Penniman, 8 Cow. (N. Y.) 387 (1826); s. c. 18 Am. Dec. 454.

[6] Slee v. Bloom, 19 Johns. (N. Y.) 456 (1822); s. c. 10 Am. Dec. 273.

[7] Trustees of McIntire Poor School v. Zanesville Canal & Manuf. Co., 9 Ohio, 203 (1839); s. c. 34 Am. Dec. 436.

[8] State v. Real Estate Bank, 5 Ark. 595 (1843); s. c. 41 Am. Dec. 109; Penobscot Boom Corp. v. Lamson, 16 Me. 224 (1839); s. c. 33 Am. Dec. 656; Trustees of McIntire Poor School v. Zanesville Canal & Manuf.

Sec. 1621. Same—Failure to elect officers.—An intentional neglect on the part of the officers of a corporation to notify and hold the annual election for directors, as required by statute, is such a violation of the provisions of the charter of the company as will authorize the court of chancery to appoint a receiver, and to decree a dissolution of the corporation.[1] But a dissolution does not arise from a mere failure to continue the succession to certain offices when these offices, in fact, are exercised by officers *de facto*.[2] Thus a corporation has been held not dissolved by an omission to elect trustees for more than two years, while the members constituting an integral part of the corporation, remained *in esse*, but the old trustees continued in office until others were elected in their stead;[3] because, in such a case, the officers already in office continue to be good officers after the year for which they were elected, and until after others are chosen in their stead.[4]

If, however, such neglect to elect officers does, in any particular case, end the power of the corporation to continue or resume operations, it is thought that this would be a ground for dissolution;[5] and an election of officers, such as trustees,

Co., 9 Ohio 203 (1839); s. c. 34 Am. Dec. 436; Chicago Life Ins. Co. v. Needles, 113 U. S. 585 (1884); bk. 28 L. ed. 1088.

[1] Ward v. Sea Ins. Co., 7 Paige Ch. (N. Y.) 294 (1838).

[2] Lehigh Bridge Co. v. Lehigh Coal & Nav. Co., 4 Rawle (Pa.) 9 (1833); s. c. 26 Am. Dec. 111.

[3] Barclay v. Talman, 4 Edw. Ch. (N. Y.) 123 (1843); Meads v. Walker, 1 Hopk. Ch. (N. Y.) 587 (1825); People v. Runkel, 9 Johns. (N. Y.) 147 (1812); Haight v. Day, 1 Johns. Ch. (N. Y.) 18 (1814); Cahill v. Kalamazoo Mut. Ins. Co., 2 Doug. (Mich.) 124 (1845); s. c. 43 Am. Dec. 457; Attorney-General v. Stevens, 1 N. J. Eq. (1 Saxt.) 369 (1831); s. c. 32 Am. Dec. 526.

[4] Barclay v. Talman, 4 Edw. Ch. (N. Y.) 123 (1843); Deming v. Pulleston, 35 N. Y. Super. Ct. (3 J. & S.) 309 (1873).

[5] See Slee v. Bloom, 19 Johns. (N. Y.) 456 (1822); s. c. 10 Am. Dec. 273; Pearce v. Olney, 20 Conn. 544 (1850); State v. Trustees of Vincennes University, 5 Ind. 77 (1854); Boston Glass Manuf. v. Langdon, 41 Mass. (24 Pick.) 49 (1834); s. c. 35 Am. Dec. 292; Russell v. McLellan, 31 Mass. (14 Pick.) 33 (1833); Cahill v. Kalamazoo Mut. Ins. Co., 2 Doug. (Mich.) 124 (1845); s. c. 43 Am. Dec. 457; Harris v. Mississippi Valley & S. I. R. Co., 51 Mass. 602 (1875); State v. Commercial Bank of Manchester, 33 Miss. 474 (1857); Commonwealth v. Cullen, 13 Pa. St. 133 (1850); s. c. 53 Am. Dec. 450; Lehigh Bridge Co. v. Lehigh Coal & Nav. Co., 4 Rawle (Pa.) 9 (1833); s. c. 26 Am. Dec. 111.

apparently, merely for the purpose of keeping a corporation in existence, is not sufficient to prevent the dissolution of such corporation, if the corporate affairs are suspended.[1]

Sec. 162m. Same—Failure to do business or file return.—Where a corporation fails to do business, for a year, this will be cause for its dissolution; and the year within which such corporation must commence business or be dissolved, begins to run when the act of corporation takes effect.[2] And where a corporation is required by the statute under which it is organized, to make periodical returns to the state, a failure to file such return as is required by the law subjects it to the penalty of having their affairs wound up, and the corporation dissolved.[3]

Sec. 162n. Same—Failure to pay debts.—The neglect or failure of a corporation, for more than a year to pay its debts is sufficient to justify proceedings for its dissolution.[4] It is doubtful whether a stockholder could proceed under the law providing for the dissolution of a corporation, when for a year it has been insolvent or neglected to pay its debts, or suspend its business;[5] but it is otherwise if payment has been demanded.[6]

Sec. 162o. Same — Insolvency — Meaning of.—Insolvency means a general inability to pay debts, and to fulfill obligations according to their undertaking;[7] that is, a general inability to answer, in the course of business, the liabilities existing and capable of being enforced; not an absolute inability to pay at some future time. It does not mean an inability from unusual and unforeseen contingencies.[8]

[1] Briggs v. Penniman, 8 Cow. (N. Y.) 387 (1826); s. c. 18 Am. Dec. 454.

[2] Johnson v. Bush, 3 Barb. Ch. (N. Y.) 207 (1848).

[3] Boisgerard v. New York Bank Co., 2 Sandf. Ch. (N. Y.) 23 (1844), affirmed 4 Ch. Sent. (N. Y.) 20.

[4] Kittredge v. Kellogg Bridge Co., 8 Abb. (N. Y.) N. C. 168, 1880.

[5] Bliven v. Peru Steel & Iron Co., 6 Abb. (N. Y.) N. C. 205 (1881).

[6] Denike v. New York & R. Lime & Cement Co., 80 N. Y. 599 (1880.)

[7] Brouwer v. Harbeck, 9 N. Y. 589 (1854). See Ferry v. Bank of Central New York, 15 How. (N. Y.) Pr. 445 (1858).

[8] Ferry v. Bank of Central New York, 15 How. (N. Y.) Pr. 445 (1858). As to the proof of insolvency see People v. Bank of Hudson, 6 Cow. (N. Y.) 217 (1826).

A corporation, like an individual, is insolvent when it is not able to pay its debts, insolvency meaning simply a general inability to answer in the course of business the liabilities existing and capable of being enforced.[1]

Corporations are not dissolved by mere insolvency, however; this is simply a ground for judicially declaring them to be dissolved.[2]

It is thought that a corporation does not commit an act of insolvency, or neglect or refuse to pay its obligations, by simply allowing its demand to remain outstanding and unpaid until payment has been specifically demanded.[3]

Sec. 162p. Same—Forfeiture of franchise.—A corporation will be dissolved by reason of forfeiture of franchise, but such forfeiture cannot take place, except in clear cases of violation of the statute or charter provisions,[4] for, in the creation of every corporation there is a tacit condition that the franchise may be forfeited for willful misuser or nonuser, in regard to matters which go to the essence of the contract between it and the state.[5]

There are four cases in which the question of forfeiture may arise, as follows:

1. Where the charter provides that on the failure of the corporation to observe certain expressed provisions or condi-

[1] Cheever v. Gilbert Elevated R. Co., 43 N. Y. Super. Ct. (11 J. & S.) 478, 486 (1878); Brouwer v. Harbeck, 9 N. Y. 594 (1854). See Robinson v. Bank of Attica, 21 N. Y. 406 (1860); People v. Excelsior Gas Light Co., 8 N. Y. Civ. Proc. Rep. 390 (1886).

[2] Nimmons v. Tappan, 2 Sween. (N. Y.) 652 (1870).

[3] Denike v. New York & Rosendale Lime & Cement Co., 80 N. Y. 599 (1880).

[4] People v. O'Brien, 111 N. Y. 1 (1888); s. c. 2 L. R. A. 255; Crawfordsville Southwestern Turnp. Co. v. Fletcher, 104 Ind. 97 (1885).

[5] Darnell v. State, 48 Ark. 321 (1886); Chicago Life Ins. Co. v. Needles, 113 U. S. 574 (1884); bk. 28 L. ed. 1084; Terrett v. Taylor, 13 U. S. (9 Cr.) 43 (1815); bk. 28 L. ed. 650. See Mobile & O. R. Co. v. State, 29 Ala. 573 (1857); Commonwealth v. Blue Hill Turnp. Co., 5 Mass. 420, 423 (1809); Commonwealth v. Commercial Bank, 28 Pa. St. 383 (1857); Eastern Archipelago Co. v. Reg., 2 El. & B. 857 (1853).

tions, the franchises granted shall be forfeited, and the corporation dissolved.[1]

2. Whether the charter simply imposes certain expressed obligations upon the corporation, without saying in so many words, that any violation thereof shall be cause of forfeiture;

3. Where there are implied conditions resting upon the corporation by virtue of the acceptance of the charter; and

4. Where the corporation has violated some general statute, or rule of the common law.

The courts proceed with great caution in declaring forfeitures and dissolving corporations, and it is not mere excess of power nor simple omission of duty, that is regarded by them as a sufficient cause for the forfeiture of the charter of a corporation and its dissolution.[2] As a general rule a forfeiture will not be declared except upon the provisions of the charter, or for a plain violation of the charter, or some misuser or nonuser of its powers, by reason of which the corporation fails to fulfil the design of its creation.[3]

Where a corporation is judicially found to be guilty of such acts or omissions as are expressly declared by its charter to be a cause for forfeiture of its franchise, the courts have no discretion but must declare a forfeiture;[4] in all other cases, however, they may, in the exercise of a sound judicial discre-

[1] State v. Real Estate Bank, 5 Ark. 595, 601 (1843); s. c. 41 Am. Dec. 109, 114. See Thompson v. People, 23 Wend. (N. Y.) 587 (1840); People ex rel. Bishop v. Kingston & M. Turnp. R. Co., 23 Wend. (N. Y.) 193 (1840); s. c. 35 Am. Dec. 551.

[2] Commissioners of Fem. Sem. v. State, 9 Gill. (Md.) 379, 404 (1850); Chesapeake & O. Canal Co. v. Baltimore & O. R. Co., 4 Gill. & J. (Md.) 1, 107 (1832); Harris v. Mississippi V. & S. I. R. Co., 51 Miss. 602 (1875); State v. Royalton & W. Turnpk. Co., 11 Vt. 431, 432 (1839).

[3] State v. Real Estate Bank, 5 Ark. 595, 602 (1843); s. c. 41 Am. Dec. 109, 114; Chicago City R. Co. v. People, 73 Ill. 541 (1874); Harris v. Mississippi Valley & S. I. R. Co., 51 Miss. 602 (1872); State v. Société Republicaine, 9 Mo. App. 114 (1881); State v. Farmers' College, 32 Ohio St. 487, 489 (1877); State v. Commercial Bank of Cincinnati, 10 Ohio 535 (1841).

[4] People v. Northern R. Co., 53 Barb. (N. Y.) 98 (1869); People v. Fishkill & B. Plank R. Co., 27 Barb. (N. Y.) 445 (1857); State v. Minnesota Cent. R. Co., 36 Minn. 246, 258 (1886); State v. Oberlin Building & Loan Assoc., 35 Ohio St. 258 (1879); State v. Pennsylvania & Ohio Canal Co., 23 Ohio St. 121 (1872).

tion, refuse a judgment of forfeiture in those cases where, in the opinion of the court, the interest of the public does not require such a judgment.[1] Where a cause for forfeiture exists, the fact of the hardship upon the corporation is no reason for not enforcing it.[2]

In those cases where there has been a substantial compliance with the conditions of the charter or the requirements of the statute, a forfeiture will not be decreed,[3] because the law exacts only a substantial compliance with its conditions and requirements, and is not rigid in enforcing forfeitures.[4] A slight deviation from the provisions of the charter will not necessarily be regarded, either as an abuse, or misuser of it, and for that reason may not be ground for forfeiting the charter and dissolving the corporation.[5]

It is thought only such acts of negligence or omission, as concern matters which are of the essence of the contract between the state and the corporation, and in which the public have an interest, will induce the courts to declare a forfeiture.[6] Thus the courts will not decree a forfeiture, because

[1] State v. Crawfordsville & S. Turnp. Co., 102 Ind. 283, 289 (1885); State v. Minnesota Cent. R. Co., 36 Minn. 246, 258 (1886); State v. People's Mut. Ben. Assoc., 42 Ohio St. 579 (1885); State v. Oberlin Building & Loan Assoc., 35 Ohio St. 258 (1879); State v. Essex Bank, 8 Vt. 489 (1836).

[2] People v. Kankakee River Improvement Co., 103 Ill. 491, 510 (1882).

[3] People v. Williamsburgh Turnp. Road Co., 47 N. Y. 586 (1872); People v. Fishkill & B. Plankroad Co., 27 Barb. (N. Y.) 445 (1857); People v. Kingston & M. Turnp. Road Co., 23 Wend. (N. Y.) 193 (1840); s. c. 35 Am. Dec. 551; Chicago City R. Co. v. Story, 73 Ill. 551 (1874); State v. Wood, 84 Mo. 378 (1884); Commercial Bank of Natchez v. State, 14 Miss. (6 Smed. & M.) 599, 623 (1846); Harris v. Mississippi Valley & S. I. R. Co., 51 Miss. 609 (1875); State v. Farmers College, 32 Ohio St. 487 (1877).

[4] Commercial Bank of Natchez v. State, 14 Miss. (6 Smed. & M.) 599, 623 (1846).

[5] Eastern Archipelago Co. v. Regina, 2 El. & B. 856, 870 (1853); s. c. 22 Eng. L. & Eq. 328, 338; 23 L. J. Q. B. 82.

[6] Thompson v. People, 23 Wend. (N. Y.) 538, 581 (1840); State v. Real Estate Bank, 5 Ark. 595, 601 (1843); s. c. 41 Am. Dec. 109, 114; State v. Minnesota Thrasher Manuf. Co., 40 Minn. 213 (1889); s. c. 41 N. Y. Rep. 1020; State v. Minnesota Cent. R. Co., 36 Minn. 246, 258 (1886); Commercial Bank of Natchez v. State, 14 Miss. (6 Smed. & M.) 599, 617 (1846); Harris v. Mississippi Valley & S. I. R. Co., 51

of the violation of the provisions of the charter, which are simply intended to affect the internal government of a corporation, because in this the general public have no interest.[1] Neither will a forfeiture be declared by the courts merely for the violation of a legal duty, by the corporation, when such violation may be redressed by ordinary process of law.[2]

There must be a willful abuse or improper neglect, and something more than mere accidental negligence, excess of power, or mistake in the mode of exercising an unquestioned power.[3] Thus, courts will not decree a forfeiture because of acts of a corporation, or its agents, when such acts are done in good faith, although there would otherwise be a cause for the forfeiture of its charter.[4] Justice Cowen says in People v. Bristol Rensselaerville Turnpike Company,[5] that to work a forfeiture, "there should be something wrong; and not only a wrong, but one arising from willful abuse or improper

Miss. 602, 605 (1875); State v. Council Bluffs & Nebraska Ferry Co., 11 Neb. 354, 356 (1881); Attorney-General v. Petersburg & R. R. Co., 6 Ired. (N. C.) L. 456, 469 (1846).

[1] Harris v. Mississippi Valley & S. I. R. Co., 51 Miss. 602, 605 (1875); Commercial Bank of Natchez v. State, 14 Miss. (6 Smed. & M.) 599, 623 (1846).

[2] State v. Real Estate Bank, 5 Ark. 595 (1843); s. c. 41 Am. Dec. 109, 118; State v. New Orleans Gas Light Co., 2 Rob. (La.) 529 (1842); Commonwealth v. Allegheny Bridge Co., 20 Pa. St. 185 (1852.)

[3] Ormsby v. Vermont Copper Mining Co., 65 Barb. (N. Y.) 360 (1873); Ward v. Sea Ins. Co., 7 Paige Ch. (N. Y.) 294 (1838); Bank Commissioners v. Bank of Buffalo, 6 Paige Ch. (N. Y.) 497 (1837); Thompson v. People, 23 Wend. (N. Y.) 537, 589 (1840); People v. Bristol & R. Turnpike Co., 23 Wend. (N. Y.) 222, 231 (1840); Paschall v. Whitsell, 11 Ala. 472 (1846); State v. Real Estate Bank, 5 Ark. 595, 601 (1843); s. c. 41 Am. Dec. 109, 114; State v. Pipher, 28 Kan. 127, 131 (1882); Board of Com. of Frederick Seminary v. State, 9 Gill (Md.) 379 (1850); Chesapeake & O. Canal Co. v. Baltimore & O. R. Co., 4 Gill & J. (Md.) 1, 107 (1832); Attorney-General v. Erie & K. R. Co., 55 Mich. 15, 22 (1884); Harris v. Mississippi Valley & S. I. R. Co., 51 Miss. 602 (1875); States v. Société Republicaine, 9 Mo. App. 114, 119 (1881); State v. Merchants Ins. & T. Co., 8 Humph. (Tenn.) 235 (1847); State v. Columbia & H. Turnpike Co., 2 Sneed (Tenn.) 254 (1854); State v. Rio Grande R. Co., 41 Tex. 217 (1874). See State v. Urbana & C. M. Ins. Co., 14 Ohio 6 (1846); Commonwealth v. Commercial Bank, 28 Pa. St. 383 (1857).

[4] State v. Consolidation Coal Co., 46 Md. 1, 14 (1876).

[5] 23 Wend. (N. Y.) 236, 237 (1840). See People v. Kingston & M. Turnpike Co., 23 Wend. (N. Y.) 206 (1840); State v. Pawtuxet Turnp. Co., 8 R. I. 188 (1865).

neglect. An inability, through misfortune, to answer the design for which the body politic was instituted, is also a cause of forfeiture. That, however, is on a distinct reason, not so directly material, and of which it is not necessary to say much. The prosecution before us goes on corporate default or corporate wrong, which must, I think, be more than accidental negligence, or a mere mistaken excess of power, or a mistake in the mode of exercising an acknowledged power. There must be an abuse of trust somewhat of such a nature as would render a trustee liable to forfeit his station, on the complaint of his *cestui que trust*, if the question stood on the relation between them. Corporations are political trustees. Have they fulfilled the purpose of their trust, or acted in good faith with a view of their fulfillment, is the question to be asked, when they are called on to forfeit their charters, either for acts of commission or omission, unless, indeed, they are so generally crippled and broken down in their affairs, as, in the judgment of a court and jury, to be incapable of prosecuting their business with safety to that community who granted the charter, and who hold the relation of *cestui que trust*."

It seems that no mere intention or purpose, on the part of a corporation, to violate its charter can constitute a cause of forfeiture;[1] but if a corporation deliberately abandons a salutary rule prescribed for the benefit of the people, and substitutes therefor another in violation of the terms of its charter, this will be a sufficient cause for decreeing a forfeiture of the charter;[2] and there are a number of well-considered cases which hold that a single act of wilful non-feasance, may be be insisted upon by the state as a ground of forfeiture.[3]

[1] Commonwealth v. Pittsburg & C. R. Co., 58 Pa. St. 26 (1868).

[2] State v. Commercial Bank of Manchester, 33 Miss. 474 (1857).

[3] People v. Hillsdale & C. Turnp. Road Co., 23 Wend. (N. Y.) 254 (1840); People v. Bristol & R. Turnp. Road Co., 23 Wend. (N. Y.) 222, 245, 252 (1840); State v. Pipher, 28 Kan. 127, 131 (1882); Commonwealth v. Massachusetts Turnpike Co., 65 Mass. (11 Cush.) 171, 177 (1853); Commercial Bank of Natchez v. State, 14 Miss. (6 Smed. & M.) 599, 623 (1846); State v. Council Bluffs & N. Ferry Co., 11 Neb. 354, 356 (1881); State v. Royalton & W. Turnp. Co., 11 Vt. 431, 432 (1839).

Sec. 162q. Same—State alonecan ask.—A corporation may be dissolved by forfeiture of its charter rights and privileges, but such forfeiture, in the absence of a special provision by statute, can only be enforced by the sovereign in a proceeding instituted in its behalf;[1] such a forfeiture cannot be taken advantage of or enforced against the corporation collaterally or incidentally, or in any other manner than by such direct proceedings by the state.[2] It is said by Justice Bige-

[1] Denike v. New York & R. Lime & C. Co. 80 N. Y. 599 (1880).

[2] Matter of New York Elevated R. Co., 70 N. Y. 327, 338 (1877); Kincaid v. Dwinelle, 59 N. Y. 548 (1875); Central Crosstown R. Co. v. Twenty-third Street R. Co., 54 How. (N. Y.) Pr. 168, 185 (1877); Ormsby v. Vermont Copper Min. Co., 65 Barb. (N. Y.) 360 (1873); Towar v. Hale, 46 Barb. (N. Y.) 361 (1866); Brooklyn Cent. R. Co. v. Brooklyn City R. Co., 32 Barb. (N. Y.) 358 (1860); Trustees of Vernon Society v. Hills, 6 Cow. (N. Y.) 23 (1826); s. c. 16 Am. Dec. 429; Mechanics Building Association v. Stevens, 5 Duer, (N. Y.) 676 (1856); Barclay v. Talman, 4 Edw. Ch. (N. Y.) 123 (1842); All Saints Church v. Lovett, 1 Hall, (N. Y.) 191 (1828); Adams v. Beach, 6 Hill (N. Y.) 271 (1844); Attorney-General v. Bk. of Niagara, Hopk. Ch. (N. Y.) 354 (1825); Matter of Reformed Presbyterian Church, How. (N. Y.) Pr. 476 (1853); Hollingshead v. Woodward, 35 Hun (N. Y.) 410 (1885); Moran v. Lydecker, 27 Hun (N. Y.) 582, 585 (1882); Silver Lake Bk. v. North, 7 Johns. Ch. (N. Y.) 370 (1820); People v. Phœnix Bank, 24 Wend. (N. Y.) 431, 432 (1840); s. c. 35 Am. Dec. 634, 635; People v. Manhattan Co., 9 Wend. (N. Y.) 351 (1832); Importing and Exporting Co. v. Locke, 50 Ala. 332 (1873); Hudgins v. State, 46 Ala. 208 (1871); Harris v. Nesbit, 24 Ala. 398 (1854); Duke v. Cahawba Nav. Co., 16 Ala. 372 (1849); Salma & T. R. Co. v. Tipton, 5 Ala. 787 (1843); s. c. 39 Am. Dec. 344; Hammett v. Little Rock & N. R. Co., 20 Ark. 204 (1859); State v. Real Estate Bank, 5 Ark. 595 (1843); s. c. 41 Am. Dec. 109; National Pahquioque Bk. v. First Nat. Bk., 36 Conn. 325 (1870); aff'd 81 U. S. (14 Wall.) 383; bk. 20 L. ed. 840; Pearce v. Olney, 20 Conn. 544 (1850); Spencer v. Champion, 9 Conn. 536, 543 (1833); Kellogg v. Union Co., 12 Conn. 7 (1837); Enfield Toll Bridge Co. v. Connecticut River Co., 7 Conn. 28, 46; (1828); City of Atlanta v. Gate City Gas Light Co., 71 Ga. 106 (1883); Union Branch R. Co. v. East Tenn. & Ga. R. Co., 14 Ga. 327 (1853); Young v. Harrison, 6 Ga. 130 (1849); Attorney-General v. Chicago & E. R. Co., 112 Ill. 520 (1884); Baker v. Backus, 32 Ill. 79 (1863); Bruffett v. Great Western R. Co., 25 Ill. 353 (1861); Wilmans v. Bank of Illinois, 6 Ill. (1 Gilm.) 667 (1884); Barren Creek Ditching Co. v. Beck, 99 Ind. 247, 249 (1884); Logan v. Vernon G. &. R. R. Co., 90 Ind. 552 (1883); State v. Woodward, 89 Ind. 110 (1883); Hartsville University v. Hamilton, 34 Ind. 506 (1870); Stoops v. Greenburg & B. Plank Road Co., 10 Ind. 47 (1857); Brookville & G. Turnpike Co. v. McCarty, 8 Ind. 392 (1856); s. c. 65 Am. Dec. 768; John v. Farmers & Mechanics'

low in Heard v. Talbot,[1] that, "to allow persons, not parties to a contract, to insist on its breach and enforce a penalty

Bk., 2 Blackf. (Ind.) 367 (1830); s. c. 20 Am. Dec. 119; State v. Pipher, 28 Kan. 127, 131 (1882); Hughes v. Bank of Somerset, 5 Litt. (Ky.) 45 (1824); State v. Fagan, 22 La. An. 545 (1870); Curien v. Santini, 16 La. An. 27, 28 (1861); State v. New Orleans Gas Light & B. Co., 2 Rob. (La.) 529, 532 (1842); Baptist Meetinghouse v. Webb, 66 Me. 398 (1877); Rollins v. Clay, 33 Me. 132 (1851); Penobscot Boom Corp. v. Lamson, 16 Me. 224 (1839); s. c. 33 Am. Dec. 656; Taggart v. Western Md. R. Co., 24 Md. 563 (1866); s. c. 89 Am. Dec. 760; Hamilton v. Annapolis & E. R. Co., 1 Md. Ch. 107 (1847); Planters' Bk. v. Bank of Alexandria, 10 Gill. & J. (Md.) 346 (1839); Regents University of Maryland v. Williams, 9 Gill & J. (Md.) 365 (1838); s. c. 31 Am. Dec. 72; State v. Bank of Maryland, 6 Gill. & J. (Md.) 206, 230 (1834); Chesapeake & O. Canal Co. v. Baltimore & O. R. Co., 4 Gill & J. (Md.) 1, 107, 122 (1832); Toledo & A. A. R. Co. v. Johnson, 49 Mich. 148 (1882); City of Detroit v. Detroit & H. Plank Road Co., 43 Mich. 140 (1880); Grand Rapids Bridge Co. v. Prange, 35 Mich. 400 (1877); s. c. 24 Am. Rep. 585; Cahill v. Kalamazoo Mut. Ins. Co., 2 Doug. (Mich.) 124 (1845); s. c. 43 Am. Dec. 457; State v. Minnesota Cent. R. Co., 36 Minn. 246, 258 (1886); Minnesota Cent. R. Co. v. Melvin, 21 Minn. 339, 344 (1875); Briggs v. Cape Cod Ship Canal Co., 137 Mass. 71, 72 (1884); Folger v. Columbian Ins. Co., 99 Mass. 267 (1868); s. c. 96 Am. Dec. 756, 757; Heard v. Talbot, 73 Mass. (7 Gray) 113, 119 (1856); Boston Glass Manufactory v. Langdon, 41 Mass. (24 Pick.) 49 (1834); s. c. 35 Am. Dec. 292; Russell v. McLellan, 31 Mass. (14 Pick.) 63 (1833); Charles River Bridge v. Warren Bridge, 24 Mass. (7 Pick.) 344, 371 (1829); Harris v. Mississippi Valley & S. I. R. Co., 51 Miss. 602 (1875), Bohannon v. Binns, 31 Miss. 355 (1856); Grand Gulf Bank v. Archer, 16 Miss. (8 Smed. & M.) 151 (1847); Bayless v. Orne, 1 Freem. Ch. (Miss.; 161 (1841); Bank of Missouri v) Snelling, 35 Mo. 190 (1864); State v. Fourth New Hampshire Turnpike. 15 N. H. 162, 166 (1844); s. c. 41 Am. Dec. 690, 692; Peirce v. Somersworth, 10 N. H. 369, 375 (1839); State v. Carr, 5 N. H. 367, 370 (1831); New Jersey Southern R. Co. v. Long Branch Comm'rs, 39 N. J. L. (10 Vr.) 28 (1876); Asheville Division v. Aston, 92 N. C. 578, 585 (1885); Receivers' Bk. of Circleville v. Renick, 15 Ohio, 322 (1846); Coil v. Pittsburgh Female College, 40 Pa. St. 439 (1861); Dyer v. Walker, 40 Pa. St. 157 (1861); Com. v. Cullen, 13 Pa. St. 133 (1850); s. c. 53 Am. Dec. 450; McConahy v. Centre & K. Turnpike Co., 1 Pen. & W. (Pa.) 426 (1830); Commonwealth v. Morris, 1 Phila. (Pa.) 411, 412 (1852); Lehigh Bridge Co. v. Lehigh Coal & Nav. Co., 4 Rawle, (Pa.) 9 (1833); s. c. 26 Am. Dec. 111; Centre & K. Turnpike Co. v. McConaby, 16 Serg. & R. (Pa.) 140, 145 (1827); Irvine v. Lumberman's Bank, 2 W. & S. (Pa.) 190, 204 (1841); State v. Bank of Charleston, 2 McMull. (S. C.) L. 439 (1843); s. c. 39 Am. Dec. 135; Bank of South Carolina v. Hammond, 1 Rich. (S. C.) L. 281, 288 (1845);

[1] 73 Mass. (7 Gray,) 113, 120 (1856.)

for its violation, would be against public policy, and lead to confusion of rights, if corporate powers and privileges could be disputed and defeated by every person who might be aggrieved by their exercise. Therefore, it has often been held that a cause of forfeiture, however great, cannot be taken advantage of or enforced against corporations collaterally or incidentally, or in any other mode than by a direct proceeding for that object in behalf of the government."[1]

Neither a court of law nor a court of equity has jurisdiction to declare a forfeiture of the charter of a corporation and decree its dissolution at the suit of an individual;[2] the state alone has the right to re-entry, and can resume its grant.[3]

Sec. 162r. Same—How ascertained.—The question whether

Directors of Maryville College v. Bartlett, 8 Baxt. (Tenn.) 231 (1874); La Grange & M. R. Co. v. Rainey, 7 Coldw. (Tenn.) 420 (1870); Williams v. Union Bk., 2 Humph. (Tenn.) 339 (1841); Bache v. Nashville Horticultural Society, 10 Lea, (Tenn.) 436 (1882); White's Creek Turnpike Co. v. Davidson County, 3 Tenn. Ch. 396 (1877); Moseby v. Burrow, 52 Tex. 396 (1880); Dewey v. St. Albans Trust Co., 56 Vt. 476 (1884); s. c. 48 Am. Rep. 803; Connecticut & P. R. Co. v. Bailey, 24 Vt. 465 (1852); s. c. 58 Am. Dec. 181; Brandon Iron Co. v. Gleason, 24 Vt. 228. 237 (1852); Pixley v. Roanoke Nav. Co., 75 Va. 320 (1881); Crump v. United States Min. Co., 7 Gratt. (Va.) 352 (1851); The Banks v. Poitiaux. 3 Rand. (Va.) 136 (1825); s. c. 15 Am. Dec. 706; Greenbrier Lumber Co. v. Ward, 30 W. Va. 43 (1887); Moore v. Schoppert, 22 W. Va. 282 (1883); Baltimore & O. R. Co. v. Supervisors of Marshall County, 3 W. Va. 319, 324 (1869); Mackall v. Chesapeake & O. Canal Co., 94 U. S. (4 Otto) 308 (1876); bk. 24 L. ed. 161; Frosts Lessee v. Frostburg Coal Co., 65 U. S. (24 How.) 278 (1860); bk. 16 L. ed. 637; Kanawha Coal Co. v. Kanawha & O. Coal Co., 7 Blatchf. C. C. 391 (1870); United States v. Williams, 5 Cr. C. C. 62 (1836); People v. Society for the Propagation of the Gospel, 1 Paine C. C. 653 (1826); Southern Pac. R. Co. v. Orton, 32 Fed. Rep. 457 (1879); Taylor v. Holmes, 14 Fed. Rep. 498 (1882); Rex. v. Amery, 2 T. R. 515 (1778.)

[1] Citing Boston Glass Mfg. Co. v. Langdon, 41 Mass. (26 Pick.) 49 (1834); s. c. 35 Am. Dec. 292; Quincy Canal v. Newcomb, 48 Mass. (7 Metc.) 276 (1843).

[2] Barclay v. Talman, 4 Edw. Ch. (N. Y.) 123 (1842); Attorney General v. Stevens, 1 N. J. Eq. (1 Saxt.) 369 (1831); s. c. 22 Am. Dec. 526; Strong v. McCagg, 55 Wis. 624 (1882). See Gilman v. Green Point Sugar Co., 61 Barb. (N. Y.) 9 (1871); Doyle v. Peerless Petroleum Co., 44 Barb. (N. Y.) 239 (1865); Verplanck v. Mercantile Ins. Co., 1 Edw. Ch. (N. Y.) 84 (1831).

[3] Barclay v. Talman, 4 Edw. Ch. (N. Y.) 123 (1842); Thompson v. People, 23 Wend. (N. Y.) 576 (1840.)

or not a corporation has been guilty of acts of omission or commission constituting grounds for a forfeiture of its charter rights is, in general, a judicial question, and cannot be determined by the legislature;[1] and this rule has been applied even where the charter provided that if the company should at any time misuse or abuse any of the privileges granted it, "the legislature might resume all and singular the rights and privileges thereof granted to such corporation."[2] In the case of Miners' Bank of Dubuque v. United States,[3] it was held that a clause in the charter authorizing the legislature to repeal it for any abuse or misuse of corporate privileges, referred the question of abuse to the legislative judgment.[4]

It is thought that the legislature may rightfully reserve the power to repeal the charter of a corporation, and in case of such reservation may exercise its right at pleasure, either with or without any reason therefor. If this be true there seems to be no valid reason why the legislature may not reserve the right to repeal the charter of the corporation upon the non-performance of some of its conditions; and in such a case the legislature have the right to determine whether or not the condition has been performed, and such a determination is not judicial in its nature. Thus, where the charter of a corporation provided that if it should fail to go into operation, or should abuse or misuse the privileges conferred under the charter, it should be within the power of the legislature

[1] Bruffett v. Great Western R. Co., 25 Ill. 353 (1861); State v. Noyes, 47 Me. 189 (1859); Regents of University v. Williams, 9 Gill & J. (Md.) 365 (1838); s. c. 31 Am. Dec. 72; Chesapeake & O. Canal Co. v. Baltimore & O. R. Co., 4 Gill & J. (Md.) 1, 22 (1832); Flint & F. P. R. Co. v. Woodhull, 25 Mich. 99 (1872); s. c. 12 Am. Rep. 233; Campbell v. Union Bank, 7 Miss. (6 How.) 661 (1842); Erie & N. E. R. Co. v. Casey, 26 Pa. St. 287 (1856); Allen v. Buchanan, 9 Phila. (Pa.) 283 (1873); Vermont & C. R. Co. v. Vermont Cent. R. Co., 34 Vt. 2, 56 (1861).

[2] Mayor of Baltimore v. Pittsburgh & C. R. Co., 1 Abb. (U. S. D. C.) 9 (1865). See, Erie & N. E. R. Co. v. Casey, 26 Pa. St. 287 (1856).

[3] 1 Morr. (Iowa) 482 (1846); s. c. 43 Am. Dec. 115; 1 G. Greene (Iowa) 553.

[4] See, also Albertson v. Landon, 42 Conn. 209 (1875); Lathrop v. Stedman, 42 Conn. 583 (1875); Carey v. Giles, 9 Ga. 253 (1851); Hindman v. Piper, 50 Mo. 292 (1872).

granting the charter to vacate, annul and make void, that the legislature might repeal the charter without judicial investigation.[1] It has been questioned, however, whether such action of the legislature is final, or whether it is subject to review by the courts. The better opinion seems to be that such action of the legislature is not conclusive, but may be inquired into and set aside for plain mistake either of law or fact.[2]

The general doctrine is that a cause for forfeiture of the charter of a corporation must be taken advantage of by the state in a proceeding instituted for that purpose, and must be judicially declared by the regular process of law.[3] It is

[1] Miners' Bank of Dubuque v. United States, 1 Morr. (Iowa) 482 (1846); s. c. 43 Am. Dec. 115; 1 G. Greene (Iowa) 553. See, Crease v. Babcock, 40 Mass. (23 Pick.) 334 (1839); s. c. 34 Am. Dec. 61; Myrick v. Brawley, 33 Minn. 377 (1885); Commonwealth v. Pittsburg & C. R. Co., 58 Pa. St. 26, 46 (1868); Erie & N. E. R. Co. v. Casey, 26 Pa. St. 287 (1856); Farnsworth v. Minnesota & P. R. Co., 92 U. S. (2 Otto) 49 (1875); bk. 23 L. ed. 530. *Compare*, Mayor of Baltimore v. Pittsburg & C. R. Co., 1 Abb. (U. S. D. C.) 9 (1865).

[2] See, Commonwealth v. Pittsburg & C. R. Co., 58 Pa. St. 26, 46 (1868); Erie & N. E. R. Co. v. Casey, 26 Pa. St. 287 (1856). *Compare*, Miners' Bank of Dubuque v. United States, 1 Morr. (Iowa) 482 (1846); s. c. 43 Am. Dec. 115; 1 G. Greene (Iowa) 553.

[3] Vernon Society v. Hills, 6 Cow. (N. Y.) 26 (1826); s. c. 16 Am. Dec. 431; Allen v. New Jersey S. R. Co., 49 How. (N. Y.) Pr. 14 (1875); Haight v. New York Elevated R. Co., 49 How. (N. Y.) Pr. 20 (1875); Slee v. Bloom, 5 Johns. Ch. (N. Y.) 366 (1821); Wilde v. Jenkins, 4 Paige Ch. (N. Y.) 481 (1834); Persse & Brooks Paper Works v. Willett, 1 Robt. (N. Y.) 147 (1863); Importing & Exporting Co. of Georgia v. Locke, 50 Ala. 334 (1873); State v. Real Estate Bank 5 Ark. 595 (1843); s. c. 41 Am. Dec. 109, 117; State v. Fagan, 22 La. An. 545 (1870); Atchafalaya Bk. v. Dawson, 13 La. 497 (1839); Penobscot Boom Corporation v. Lanson, 16 Me. 224 (1839); s. c. 33 Am. Dec. 660; Chesapeake & O. Canal Co. v. Baltimore & O. R. Co., 4 Gill & J. (Md.) 1 (1832); Polger v. Columbia Ins. Co., 99 Mass. 275 (1868); s. c. 96 Am. Dec. 747; Heard v. Talbot, 73 Mass. (7 Gray) 120 (1856); Knowlton v. Ackley, 62 Mass. (8 Cush.) 95 (1851); Boston Glass Manufactory v. Langdon, 41 Mass. (24 Pick.) 49 (1834); s. c. 35 Am. Dec. 292; Nevitt v. Bank of Port Gibson, 14 Miss. (6 Smed. & M.) 513 (1846); Hestonville M. & F. P. R. Co. v. Philadelphia, 89 Pa. St. 210 (1879); La Grange & M. R. Co. v. Raine, 7 Coldw. (Tenn.) 420 (1870); Strong v. McCagg, 55 Wis. 628 (1882); Morley v. Thayer, 3 Fed. Rep. 748 (1880). See Matter of Brooklyn W. & N. R. Co., 72 N. Y. 245 (1878); also *ante*, § 162q.

well established that such forfeiture of franchise and dissolution of the corporation can only be affected by a judicial trial and judgment, even in those cases where the charter provides that in default of fulfilling such conditions in the charter the corporation shall be dissolved;[1] and the government creating the corporation alone can institute such proceeding for the forfeiture of its franchise.[2] And the state may exact the forfeiture or waive it, as may seem best to it for the public interests.[3]

Sec. 162s. Same—Suspension or abandonemnt of business.—While it is true that a corporation which neglects the performance of any duty or obligation assumed by it for the benefit of the public may have its charter franchises forfeited, yet all corporations are not under obligation to the state to carry on the business for which they were created. Thus, ordinary business corporations may at any time put an end to their operations in whole or in part, because the franchise of acting in a corporate capacity is simply permissive and not an obligation, and a forfeiture for non-user of the franchise cannot be based upon the mere neglect of duty on the part of the corporation.[4] Consequently, the fact that an ordinary business corporation has suspended operations for a time is not sufficient to warrant a judgment of forfeiture and a decree of dissolution, because such suspension may have been

[1] See Briggs v. Penniman, 8 Cow. (N. Y.) 387 (1826); s. c. 18 Am. Dec. 454; Trustees of Vernon Society v. Hills, 6 Cow. (N. Y.) 23, 26 (1826); s. c. 16 Am. Dec. 429; People v. Runkle, 9 Johns (N. Y.) 147 (1812); Thompson v. People, 23 Wend. (N. Y.) 576 (1840); Bank of Niagara v. Johnson, 8 Wend. (N. Y.) 645 (1832); People v. Manhattan Co., 9 Wend. (N. Y.) 354 (1832); Terrett v. Taylor, 13 U. S. (9 Cr.) 43 (1815); bk. 3 L. ed. 650; Rex v. Amery, 2 T. R. 515 (1778). See post, § 162.

[2] Persse & B. Paper Works v. Willett, 19 Abb. (N. Y.) Pr. 437 (1863); Slee v. Bloom, 5 Johns Ch. (N. Y.) 366 (1821); People v. Kingston & M. Turnpike Co., 23 Wend. N. Y.) 193) (1840); Ahrens v. State Bank, 3 S. C. (N. S.) 407 (1871). See *ante*, § 162q.

[3] Slee v. Bloom, 5 Johns. Ch. (N. Y.) 366 (1821); Jersey City Gas Light Co. v. Consumers' Gas Co., 40 N. J. Eq. (13 Stew.) 432 (1885). See, post, § 162y; also, *post*, § 162x.

[4] See, People v. Bank of Hudson, 6 Cow. (N. Y.) 217, 219 (1826); People v. Bristol & R. Turnpike Co., 23 Wend. (N. Y.) 237 (1840); Chesapeake & O. Canal Co. v. Baltimore & O. R. Co., 4 Gill & J. (Md.) 107 (1832).

a prudent and necessary measure.[1] Neither will the fact that a corporation has sold or assigned its property for the payment of its debts be a cause for forfeiture of franchise and dissolution of the corporation, because it may make such sale or assignment, and yet not cease to be a corporation.[2]

The conditions of the corporation, however, may be such that it has no right to continue its business, and the state may then dissolve it and end its franchise. Thus where a corporation has remained insolvent, or has suspended its ordinary business, for a year, it is deemed to have surrendered its franchise, and will be adjudged to be dissolved, either at the suit of the attorney-general or of any creditor or stockholder.[3] It may also be dissolved where it transfers all its property, obtained by its corporate franchise, and ceases to do business.[4] This is also true where a corporation makes a general assignment of its assets for the benefit of creditors.[5]

But mere insolvency alone is not sufficient to warrant the dissolution of a corporation; it must be further shown that the corporation has lost its power to continue the business for which it was created.[6]

Sec. 162t. Same—Suspension.—The suspension of the principal business of a corporation will be a sufficient ground for an absolute forfeiture of the corporate rights and franchises where the corporation is such an one as owes to the public a duty.[7]

[1] People v. Bank of Hudson, 6 Cow. (N. Y.) 217, 219 (1826); State v. Commercial Bank of Manchester, 21 Miss. (13 Smed. & M.) 569, 578 (1850); s. c. 53 Am. Dec. 106, 108.

[2] Ward v. Sea Ins. Co., 7 Paige Ch. (N. Y.) 294 (1838); DeCamp v. Alward, 52 Ind. 473 (1876). See Wilde v. Jenkins, 4 Paige Ch. (N. Y.) 481 (1834); Dana v. United States Bank, 5 Watts & S. (Pa.) 223 (1843).

[3] Ward v. Sea Ins. Co., 7 Paige Ch. (N. Y.) 294 (1838); Folger v. Columbian Ins. Co., 99 Mass. 275 (1868); s. c. 96 Am. Dec. 747. See Mickles v. Rochester City Bank, 11 Paige Ch. (N. Y.) 118 (1844); s. c. 42 Am. Dec. 103.

[4] State v. Piper, 28 Kan. 127 (1882); State v. Commercial Bk. of Manchester, 33 Miss. 474 (1857); State v. Seneca County Bank, 5 Ohio St. 171 (1856).

[5] See post, § 162a.[1]

[6] See Bradt v. Benedict, 17 N. Y. 92 (1858); People v. Washington Bank, 6 Cow. (N. Y.) 212 (1826); State v. Bailey, 16 Ind. 46 (1861); s. c. 79 Am. Dec. 405.

[7] See Ward v. Sea Ins. Co., 7

Sec. 162u. Same—What amounts to a suspension.—Suspension of ordinary business means a substantial relinquishment of such business, as, for instance, the refusal of an insurance company to take new policies;[1] and where such a company resolved to cease taking insurance, and to cancel outstanding policies, and to liquidate all liabilities, and for more than a year had done no new business, except to fulfill stipulations in the then existing policies, the court held that it came within the provisions of the statute, notwithstanding the fact that it had held its annual election of officers.[2]

It seems that where the stockholders of a manufacturing corporation lease all of its property for two years, this will be such a suspension of its ordinary business as will warrant a decree of dissolution, notwithstanding the fact that the business is carried on as before by the lessee.[3] Such a lease may be set aside as being void.[4]

Sec. 162v. Same—Suspension of business for a year.—While it is true that the mere suspension of business for a year, is not *ipso facto* a dissolution of the corporation until it is judicially declared,[5] yet an action to dissolve a corporation may be founded on the ground that such corporation has remained insolvent for a year, and that it has suspended its ordinary and lawful business for that time; and in such an action it is immaterial whether such a corporation is a manufacturing corporation or not, inasmuch as the code[6] refers to all cor-

Paige Ch. (N. Y.) 294 (1838); Heard v. Talbot, 73 Mass. (7 Gray) 117 (1856); State v. Minnesota Cent. R. Co., 36 Minn. 259 (1886); Attorney-General v. Petersburg & R. R. Co., 6 Ired. (N. C.) L. 456 (1846). See, ante, § 162s.

[1] Matter of Jackson Marine Ins. Co., 4 Sandf. Ch. (N. Y.) 559 (1847). As a charter implies and requires that the corporation is to perform the business for which it was created, a substantial suspension of business is a violation of law. Matter of Jackson Marine Ins. Co., 4 Sandf. Ch. (N. Y.) 559 (1847).

[2] Matter of Jackson Mar. Ins. Co., 1 Sandf. Ch. (N. Y.) 559 (1847); Ward v. Sea Ins. Co., 7 Paige Ch. (N. Y.) 294 (1838).

[3] Conro v. Gray, 4 How. (N. Y.) Pr. 166 (1849).

[4] Conro v. Port Henry Iron Co., 12 Barb. (N. Y.) 27 (1851).

[5] Mickles v. Rochester City Bank, 11 Paige Ch. (N. Y.) 118 (1844).

[6] N. Y. Code Civ. Proc., § 1785; *ante*, § 162.

porations created by or under the laws of the state.[1] But to authorize the dissolution of a corporation on the ground that it has suspended business for a year, there must be more than a partial suspension; hence, an allegation in an application for a dissolution of "a partial suspension to a great extent for a whole or the greater part of a year" will be insufficient.[2]

This statute is thought to be cumulative and not a limitation upon the common law rule by which, in some cases, a dissolution may be decreed in less than a year.[3]

Sec. 162w. Same—Failure to organize.—It is said in the case of People v. Troy House Company,[4] that the true construction of the statute providing that: "If any corporation hereafter created by the legislature shall not organize and commence the transaction of its business within one year from the date of its incorporation, its corporate powers shall cease," is that the business there spoken of is such as the corporation may lawfully do under the act of incorporation; and if it has never done any business of that description, then the statute applies.

Sec. 162x. Same—Accidental negligence or mistake.—To warrant a forfeiture of the franchise of a corporation and justify its dissolution there must be something more than simply accidental negligence or excess of power, or mere mistake in the mode of exercising an acknowledged power;[5] there must be some plain neglect or abuse of power, by which the corporation fails to fulfill the design and purpose of its organization.[6]

[1] People v. Excelsior Gas Light Co., 8 N. Y. Civ. Proc. Rep., 391 (1886).

[2] Bliven v. Peru Steel & Iron Co., 9 Abb. (N. Y.) N. C. 205 (1881).

[3] Bradt v. Benedict, 17 N. Y. 93 (1858).

[4] 44 Barb. (N. Y.) 625 (1865.)

[5] Harris v. Mississippi Valley & S. I. R. Co., 51 Miss. 602 (1875); State v. Pawtuxet Turnpike Co., 8 R. I. 182 (1865); s. c. 94 Am. Dec. 123. See Attorney General v. Bank of Niagara, 1 Hopk. Ch. (N. Y.) 354 (1825); Catlin v. Eagle Bank, 6 Conn. 233 (1826); Regents of University v. Williams, 9 Gill. & J. (Md.) 365 (1838); Commonwealth v. Franklin Ins. Co., 115 Mass. 278 (1874); State v. Urbana & C. M. Ins. Co., 14 Ohio, 6 (1846).

[6] Ward v. See Ins. Co., 7 Paige Ch. (N. Y.) 294 (1838); Harris v. Mississippi Valley & S. I. R. Co., 51 Miss. 602 (1875); State v. Merchants' Ins. Co., 8 Humph. (Tenn.) 235 (1847).

Sec. 162y. Same—Excusing forfeiture.—It is thought that where a legal cause for forfeiture has arisen any mere subsequent good behavior of the corporation will not atone therefor, and that nothing but a waiver by the legislature will relieve the corporation from such forfeiture.[1]

Justice Cowen says, in the case of People v. Hillsdale C. Turnpike Road Company,[2] that "when a cause of forfeiture has once arisen, whether from non-feasance or otherwise, no case nor *dictum* can be found that it shall be legally atoned for by subsequent good behavior."

Sec. 162z. Same—Failure to perform duty.—The failure of corporations to perform their duties to the public, as well as nonuser or misuser of their principal business, are sufficient grounds for the forfeiture of the corporate rights of any corporation who owes such duty to the public.[3]

Sec. 162a[1]. Same—General assignment for benefit of creditors.—Where a corporation makes a general assignment, or an assignment of so much of its property, for the benefit of its creditors, as to render it incapable of continuing its business, this fact will be a good cause for decreeing a dissolution of the corporation and a forfeiture of its franchise,[4] however, such transfer for the benefit of creditors must be a valid and binding one.[5]

Sec. 162b[1]. Same—Implied conditions—Failure to perform.—It is thought that where a corporation does that which it is impliedly understood it shall not do, or fails to do that which it has tacitly agreed it will do, and the public are interested

[1] People v. Northern R. Co., 53 Barb. (N. Y.) 98 (1869); People v. Fishkill & B. Plank R. Co., 27 Barb. (N. Y.) 445 (1857); People v. Hillsdale & C. Turnpike Co., 23 Wend. (N. Y.) 254, 258 (1840); see *post*, § 162b[1].

[2] 23 Wend. (N. Y.) 254, 258 (1840).

[3] See, Ward v. Sea Ins. Co., 7 Paige Ch. (N. Y.) 294 (1838); Heard v. Talbot, 73 Mass. (7 Gray) 113 (1856); State v. Minnesota Cent. R. Co., 36 Minn. 259 (1886); Attorney-General v. Petersburg & R. R. Co., 6 Ired. (N. C.) L. 456 (1846).

[4] See, People v. Bank of Hudson, 6 Cow. (N. Y.) 217 (1826); State v. Real Estate Bank, 5 Ark. 595 (1843); s. c. 41 Am. Dec. 591; State v. Commercial Bank of Manchester, 21 Miss. (13 Smed. & M.) 569 (1850); s. c. 53 Am. Dec. 106.

[5] See, State v. Southern Pac. R. Co., 24 Tex. 80 (1859).

in the performance or non-performance of these obligations, and the acts or omissions are wilful, there is such a misuser or nonuser as will warrant the forfeiture of the charter franchises and the dissolution of the corporation.[1] Thus it seems that if a corporation is established for the purpose of supplying a city or village with water and acts capriciously and oppressively by furnishing some houses and lots with water and refusing to supply it to others, this will be a cause for the forfeiture of the franchise and dissolution of the corporation;[2] so also is the fact that a railroad company fails to construct the line of road named in its charter, but condemns private property and constructs a road wholly unsuited to the wants of the public, and for the benefit only of coal mines owned and operated by the principal corporators and stockholders;[3] or if a railroad company suspends its public duty of maintaining and operating its road, although it possesses and continues to exercise other franchises subordinate and secondary to its principal franchise and business.[4] But it seems that it will not be a cause for the forfeiture of the charter of a railroad company that it has ceased to run regular passenger trains over a branch road, when there is not sufficient passenger business, at any rate of toll or fare, to pay the expenses of running such trains.[5]

It has been said that a company chartered to build a turnpike or plankroad assumes toward the public the duty to keep its road in a proper state of repair for the use of the public, and that its failure to do so is a cause for the forfeiture of its franchise.[6] In such a case, however, to warrant a forfeiture the failure to repair must be such as to render the

[1] See, People v. Utica Ins. Co., 15 Johns (N. Y.) 358 (1818) s. c. 8 Am. Dec. 243; Ward v. Farwell, 97 Ill. 594 (1881); State Bank v. State, 1 Blackf. (Ind.) 267 (1823); s. c. 12 Am. Dec. 234; State v. Essex Bank, 8 Vt. 489 (1836).

[2] Lumbard v. Stearns, 58 Mass. (4 Cush.) 60 (1849).

[3] State v. Hazelton & L. R. Co., 40 Ohio St. 504 (1884).

[4] State v. Minnesota Cent. R. Co., 36 Minn. 256, 258 (1886).

[5] Commonwealth v. Fitchburg R. Co., 78 Mass. (12 Gray) 180, 188 (1858).

[6] Washington & B. Turnpike Road v. State, 19 Md. 239 (1862); People v. Plymouth Plank Road Co., 32 Mich. 248 (1875).

road dangerous, or wholly inconvenient, to travel;[1] and this condition must have been allowed to continue for an unreasonable length of time.[2]

It is thought that if a cause of forfeiture for a failure to repair has arisen, subsequent repairs or proceedings taken and performed for repairing the portion of the road out of repair will not atone for the failure to repair, nor relieve from the penalty of forfeiture of all charter privileges and franchises, and a dissolution of the corporation.[3]

Sec. 162c[1]. Same—Misuser and nonuser.—The franchise of a corporation may be forfeited and the corporation dissolved for nonuser or misuser.[4] The misuser or nonuser, to justify

[1] People v. Williamsburg Turnpike Road Co., 47 N. Y. 586, 596 (1872); People v. Jackson & M. Plank R. Co., 9 Mich. 285 (1861).

[2] People v. Jackson & M. Plank R. Co., 9 Mich. 285 (1861).

[3] People v. Hillsdale & C. Turnpike Co., 23 Wend. (N. Y.) 254 (1840); People v. Fishkill & B. Plank R. Co., 27 Barb. (N. Y.) 445 (1857); see *ante*, § 162g.

[4] Bissell v. Michigan S. & N. I. R. Co., 22 N. Y. 268 (1860); People v. Bk. of Hudson, 6 Cow. (N. Y.) 217 (1826); People v. Washington & W. Bk., 6 Cow. (N. Y.) 211 (1826); People v. Bank of Niagara, 6 Cow. (N. Y.) 196 (1826); All Saints Church v. Lovett, 1 Hall, (N. Y.) 198 (1828); Slee v. Bloom, 5 Johns. Ch. (N. Y.) 366 (1821); Ward v. Sea Ins. Co., 7 Paige, Ch. (N. Y.) 294 (1838); People ex rel. M'Kinch v. Bristol & Rensselaerville Turnpike Co., 23 Wend. (N. Y.) 222 (1840); People v. Manhattan Co., 9 Wend. (N. Y.) 351 (1832); Paschall v. Whitsett, 11 Ala. 472 (1846); State Bank v. State, 1 Blackf. (Ind.) 267, 275 (1823); s. c. 12 Am. Dec. 234; Atchafalaya Bank v. Dawson, 13 La. 497 (1839); State v. New Orleans Gas Light Co., 2 Rob. (La.) 529, 532 (1842); Hodsdon v. Copeland, 16 Me. 314 (1839); Penobscot Boom Corp. v. Lamson, 16 Me. 224 (1839); s. c. 33 Am. Dec. 656; Day v. Stetson, 8 Me. (8 Greenl.) 372 (1832); Washington & B. Turnpike Co. v. State, 19 Md. 239 (1862); Chesapeake & O. Canal Co. v. Baltimore & O. R. Co., 4 Gill & J. (Md.) 1, 121 (1832); Heard v. Talbot, 73 Mass. (7 Gray) 113 (1856); Boston Glass Manufactory v. Langdon, 41 Mass. (24 Pick.) 49 (1834); s. c. 35 Am. Dec. 292; Charles River Bridge v. Warren Bridge, 24 Mass. (7 Pick.) 371 (1829); Commonwealth v. Union F. & M. Ins. Co., 5 Mass. 230 (1809); s. c. 4 Am. Dec. 50; State v. Minnesota Cent. R. Co., 36 Minn. 259 (1886); State v. Commercial Bank of Manchester, 21 Miss. (13 Smed. & M.) 569 (1850); s. c. 53 Am. Dec. 106; Hamtramck v. Bank of Edwardsville, 2 Mo. 169 (1829); State v. Council Bluffs & N. Ferry Co., 11 Neb. 354 (1881); Attorney-General v. Petersburg & R. R. Co., 6 Ired. (N. C.) L. 456 (1846); Trustees of McIntire Poor School v. Zanesville Canal & M. Co., 9 Ohio, 203, 289 (1839); s. c. 34 Am. Dec. 440; Lehigh Bridge Co. v. Lehigh Coal &

a forfeiture, must be in regard to matters which go to the essence of the contract between the corporation and the state and in the doing or non-doing of which the people have an interest;[1] and these acts must be wilfully done or omitted to be done.[2] But in such cases judicial proceedings must be resorted to and judgment of ouster had, to effect a dissolution, because the mere failure to perform is not *ipso facto* a dissolution.[3]

The mere nonuser of a corporation is not a surrender, and the court cannot presume a surrender from nonuser or a failure to exercise its privileges by the corporation, where the charter does not contain some express provision to justify such inference.[4] Suffering an act to be done which destroys

Nav. Co., 4 Rawle (Pa.) 9 (1832); s. c. 24 Am. Dec. 11; Commonwealth v. Commercial Bank, 28 Pa. St. 383 (1857); Dartmouth College v. Woodward, 17 U. S. (4 Wheat.) 659 (1819); bk. 4 L. ed. 664; Rex v. Saunders, 3 East 119 (1802); Eastern Archipelago Co. v. Reg., 2 El. & Bl. 856 (1853); s. c. 22 Eng. L. & Eq. 338 (1853); 23 L. J. Q. B. 82; Rex v. Grosvenor, 7 Mod. 199 (1734); Sir James Smith's Case, 4 Mod. 55, 58 (1692); s. c. 12 Mod. 17, 18; Skin. 311; 1 Show. 278, 280; Rex. v. Pasmore, 3 T. R. 246 (1779); Rex v. Amery, 2 T. R. 515 (1778); Taylors de Ipswich v. Sherring, 1 Roll. 5 (1615); Rex v. Mayor of London citing, Sir James Smith's Case 2 Kyd. on Corp. 474 (1692).

[1] State v. Tombeckbee Bank, 2 Stew. (Ala.) 30, 37 (1829); Darnell v. State, 48 Ark. 321 (1886); State Bank v. State, 1 Blackf. (Ind.) 267, 275 (1823); s. c. 12 Am. Dec. 234; State v. New Orleans Gas Light & B. Co., 2 Rob. (La.) 529, 532 (1842); Washington & B. Turnpike Co. v. State, 19 Md. 239 (1862); Chesapeake & O. Canal Co. v. Baltimore & O. R. Co., 4 Gill & J. (Md.) 1, 121 (1832); State v. Minnesota Cent. R. Co., 36 Minn. 246 (1886); State v. Commercial Bank of Manchester, 21 Miss. (13 Smed. & M.) 569 (1850); s. c. 53 Am. Dec. 106; State v. Council Bluffs & N. Ferry Co., 11 Neb. 354 (1881); State v. Farmers College, 32 Ohio St. 487, 489 (1877); Chincleclamouche Lumber Co. v. Commonwealth, 100 Pa. St. 438 (1882); Chicago Life Ins. Co. v. Needles, 113 U. S. 574 (1884); bk. 28 L. ed. 1084; Mumma v. Potomac Co., 33 U. S. (8 Pet.) 281 (1834); bk. 8 L. ed. 945; Terrett v. Taylor, 13 U. S. (9 Cr.) 43, 51 (1815); bk. 3 L. ed. 650; Eastern Archipelago Co. v. Reg., 2 El. & Bl. 856 (1853); s. c. 22 Eng. L. & Eq. 328; 23 L. J. Q. B. 82; City of London v. Vanacker, 1 Ld. Raym. 496, 498 (1700); s. c. 12 Mod. 270, 271; Rex v. Grosvenor, 7 Mod. 198, 199 (1734); Rex v. City of London, 1 Show. 274, 280 (1692); Skin. 310; 4 Mod. 52, 58; 12 Mod. 17, 18; Rex v. Pasmore, 3 T. R. 199, 246 (1779).

[2] Harris v. Mississippi Valley & S. I. R. Co., 51 Miss. 602 (1875).

[3] People v. Manhattan Co., 9 Wend. (N. Y.) 351 (1832).

[4] People v. Washington & W. Bank, 6 Cow. (N. Y.) 216 (1826);

the end and object for which a corporation was instituted, is equivalent to a surrender of its corporate rights.[1] But the dissolution of a corporation is a matter of law arising from the facts,[2] and must be judicially determined and cannot be taken advantage of collaterally.[3]

It is thought that a mere misuser or nonuser in one department of an entire franchise is a cause for the forfeiture of all the franchises and dissolution of the company.[4]

Sec. 162d[1]. Same—Surrender of charter—Inferred when.—In order to infer a surrender of corporate franchise from suspension of business under a statute which provides that a corporation which has remained insolvent or suspended its ordinary business for one whole year, shall be deemed to have surrendered its franchise, the circumstances must be such as to show that the corporation has lost all power to continue or resume its business.[5] But if a corporation suffers acts to be done which destroy the end and object for which it was instituted, this will be equivalent to a surrender of its rights, and such surrender may be inferred.[6]

Sec. 162e[1]. Same—Waiver of forfeiture.—The state may waive a forfeiture which has been incurred by the corporation either expressly or impliedly when with knowledge it passes legislation which recognizes the continued existence of the

Barclay v. Talman, 4 Edw. Ch. (N. Y.) 123 (1842); State v. Real Estate Bank, 5 Ark. 595 (1844); s. c. 41 Am. Dec. 109; Ottaquechee Woolen Co. v. Newton, 57 Vt. 467 (1885).

[1] Briggs v. Penniman, 8 Cow. (N. Y.) 387 (1826); s. c. 18 Am. Dec. 454; People v. Bank of Hudson, 6 Cow. (N. Y.) 217 (1826); Slee v. Bloom, 19 Johns. (N. Y.) 456 (1822); s. c. 10 Am. Dec. 273.

[2] John v. Farmers' & Mechanics' Bank, 2 Blackf. (Ind.) 367 (1830); s. c. 20 Am. Dec. 119.

[3] Trustees of Vernon Soc. v. Hills, 6 Cow. (N. Y.) 23 (1826); s. c. 16 Am. Dec. 429; John v. Farmers & Mechanics' Bank, 2 Blackf. (Ind.) 367 (1830); s. c. 20 Am. Dec. 119. See *post* §§ 162q, 162 [1].

[4] People v. Bristol & R. Turnpike Co., 23 Wend. (N. Y.) 232, 237 (1840); People v. Kankakee Riv. Improvement Co., 103 Ill. 491 (1882).

[5] Bradt v. Benedict. 17 N. Y. 93 (1858).

[6] Bradt v. Benedict, 17 N. Y. 93 (1858). See Briggs v. Penniman, 8 Cow. (N. Y.) 387 (1826); s. c. 18 Am. Dec. 454; Slee v. Bloom, 19 Johns. (N. Y.) 456 (1822); s. c. 10 Am. Dec. 213; Bank of Poughkeepsie v. Ibbotson, 24 Wend. (N. Y.) 473 (1840).

corporation.[1] Where a waiver by implication of a forfeiture by reason of an act of the legislature is relied upon, there must be reasonable grounds from which such waiver can be inferred.[2]

The legislature of the state, only, can waive a forfeiture;[3] it cannot be done by the governor and senate alone.[4] The action of the legislature, however, must be based upon a knowledge of the default in question in order to render such

[1] Matter of Brooklyn, W. & N. R. Co., 75 N. Y. 335, 339 (1878); Matter of New York Elevated R. Co., 70 N. Y. 327, 328 (1877); People v. Fishkill & B. Plank Road Co., 27 Barb. (N. Y.) 445 (1857); People v. Phœnix Bank, 24 Wend. (N. Y.) 431 (1840); s. c. 35 Am. Dec. 634; People v. Manhattan Co., 9 Wend. (N. Y.) 351 (1832); State v. Mississippi, O. & R. R. Co., 20 Ark. 495 (1859); State v. Real Estate Bank, 5 Ark. 595 (1843); s. c. 41 Am. Dec. 109; Kellogg v. Union Co., 12 Conn. 7, 19 (1837); Enfield Toll Bridge Co. v. Connecticut River Co., 7 Conn. 28, 45 (1828); People v. Ottawa Hydraulic Co., 115 Ill. 281 (1886); Baker v. Backus' Adm'r, 32 Ill. 79 (1863); State v. Trustees of Vincennes University, 5 Ind. 77, 81, 88, 89 (1854); In re Mechanics' Society, 31 La. An. 627, 630 (1879); Atchafalaya Bank v. Dawson, 13 La. 497, 509, 510 (1839); State v. New Orleans Gas Light & B. Co., 2 Rob. (La.) 529, 531 (1842); Basshor v. Dressel, 34 Md. 503 (1871); People v. Oakland Co. Bank, 1 Doug. (Mich.) 282, 286 (1844); Planters' Bank v. State, 15 Miss. (7 Smed. & M.) 163, 177 (1846); Commercial Bank of Natchez v. State, 14 Miss. (6 Smed. & M., 599,623 (1846); Nevitt v. Bank of Port Gibson, 14 Miss. (6 Smed. & M.) 513, 524, 557 (1846); State v. Fourth New Hampshire Turnpike Co.,, 15 N. H. 162 (1844); s. c. 41 Am. Dec. 690; State v. Godwinsville & P. R. Co., 44 N. J. L. (15 Vr.) 496, 499 (1882); Attorney-General v. Petersburg & R. R. Co., 6 Ired. (N. C.) L. 456, 470 (1846); Milford & C. Turnpike Co. v. Brush, 10 Ohio 111, 116 (1840); s. c. 36 Am. Dec. 78, 82; State v. Pawtuxet Turnpike Co., 8 R. I. 521 (1867); s. c. 94 Am. Dec. 123; State v. Bank of Charleston, 2 McMull. (S. C.) 439 (1843); s. c. 39 Am. Dec. 135; Baltimore & O. R. Co. v. Supervisors of Marshall County, 3 W. Va. 319 (1869).

[2] See People v. Fishkill & B. Plank Road Co., 27 Barb. (N. Y.) 445 (1857); People v. Waterford & S. Turnpike Co., 2 Keyes (N. Y.) 327,335 (1866); s. c. 3 Abb. App. Dec. (N.Y.) 580, 590; People v. Bristol & R. Turnpike Co., 23 Wend. (N. Y.) 222 (1840); People v. Kingston & M. Turnpike Road Co., 23 Wend. (N. Y.) 193 (1840); s. c. 35 Am. Dec. 551; Commonwealth v. Tenth Massachusetts Turnpike Corp., 65 Mass. (11 Cush.) 171, 173 (1853).

[3] People v. Phœnix Bank, 24 Wend. (N. Y.) 431, 483 (1840); s. c. 35 Am. Dec. 634.

[4] People v. Phœnix Bank, 24 Wend. (N. Y.) 431 (1840); s. c. 35 Am. Dec. 634. See Green v. Seymour, 3 Sandf. Ch. (N. Y.) 285 (1846).

subsequent acts, recognizing the existence of such corporation, a waiver.[1]

Sec. 162f.[1] Same—Proceedings to declare forfeited.—At common law the forfeiture of corporate franchises is enforced either by *scire facias* or *quo warranto*. It has been said that a *scire facias* is proper where there is a legally existing body, capable of acting, but who have been guilty of an abuse of the power intrusted to them; for, as a delinquency is imputed to them, they ought not to be condemned unheard; but that does not apply to the case of a non-existing body, and a *quo warranto* is necessary where there is a body corporate *de facto*, who take upon themselves to act as a body corporate, but from some defect in their constitution they cannot legally exercise the powers they assume to use.[2]

From this it would seem that the remedy against a corporation for the misuser or nonuser of its corporate franchise is an action at law of *scire facias*, presented at the instance and on the behalf of the government.[3] The ancient writ of *quo warranto* has fallen into disuse, and the modern information in the nature of a *quo warranto* has been substituted in its stead, not only against such bodies as assume to exercise corporate powers without any authority of law, but also against corporations having a legal existence, for the forfeiture of their franchises.[4] Whether proceedings be by *scire facias*

[1] People v. Manhattan Co., 9 Wend. (N. Y.) 351 (1832); Commonwealth v. Tenth Massachusetts Turnpike Co., 65 Mass. (11 Cush.) 171, 174 (1853).

[2] Rex v. Pasmore, 3 T. R. 199, 244 (1779). See Slee v. Bloom, 5 Johns. Ch. (N. Y.) 366 (1821); Baker v. Backus' Adm'r, 32 Ill. 79, 110 (1863); Washington & B. Turnpike Co. v. State, 19 Md. 239 (1862); Regents of University of Maryland v. Williams, 9 Gill & J. (Md.) 365 (1838); s. c. 31 Am. Dec. 72; State v. Merchants, Ins. & T. Co., 8 Humph. (Tenn.) 235 (1847).

[3] See Merrick v. Brainard, 38 Barb. (N. Y.) 595 (1860); Slee v. Bloom, 5 John. Ch. (N. Y.) 366 (1821); State v. Fourth New Hampshire Turnpike Co., 15 N. H. 162 (1844); s. c. 41 Am. Dec. 692; Attorney-General v. Stevens, 1 N. J. Eq. (1 Saxt.) 369 (1831); s. c. 22 Am. Dec. 529; Patrick v. Ruffners, 2 Rob. (Va.) 209 (1843); s. c. 40 Am. Dec. 745.

[4] People v. Bank of Hudson, 6 Cow. (N. Y.) 217 (1826); People v. Washington & W. Bank, 6 Cow. (N. Y.) 211 (1826); People v. Bank of Niagara, 6 Cow. (N. Y.) 196 (1826); Thompson v. People, 23 Wend. (N. Y.) 538 (1840); People v. Bristol & R. Turnpike Co., 23 Wend. (N. Y.

or information in the nature of a *quo warranto*, they must be at the instance and on behalf of the state through its proper officers, and cannot be prosecuted by a private individual, unless permitted by special statute.[1] In such proceedings the corporation is, of course, a necessary party;[2] and it has been said that instituting such proceedings is an acknowledgment of the legal existence of the corporation,[3] but this doctrine has been questioned, and is thought not to be sound, because it rests upon no valid reason.[4]

Sec. 162g[1]. Same—Suit by Attorney-General—Discretion of Court.—Unless required by some statute, the attorney-general need not ask leave of court to institute proceedings to declare the forfeiture of corporate franchises and dissolve the corporation;[5] neither would it seem to be necessary that the legis-

222 (1840); Darnell v. State, 48 Ark. 321 (1886); Danville & W. L. Plank Road Co. v. State, 16 Ind. 456, 457 (1861); Reed v. Cumberland & O. Canal Turnpike Corp., 65 Me. 132 (1876); State v. Paterson & H. Turnpike Co., 21 N. J. L. (1 Zab.) 9, 12 (1847).

[1] Denike v. New York & R. Lime & Cement Co., 80 N. Y. 599 (1880); Slee v. Bloom, 5 Johns Ch. (N. Y.) 366 (1821); Wilmersdoerffer v. Lake Mahopac Imp. Co., 18 Hun, (N. Y.) 387 (1879); People v. North Chicago R. Co., 88 Ill. 537 (1878); Curien v. Santini, 16 La. An. 27, 29 (1861); Chesapeake & O. Canal Co. v. Baltimore & O. R. Co., 4 Gill & J. (Md.) 1, 122 (1832); Rice v. National Bank, 126 Mass. 300 (1879); Folger v. Columbian Ins. Co., 99 Mass. 267 (1868); s. c. 69 Am. Dec. 747; Commonwealth v. Union F. & M. Ins. Co., 5 Mass. 230 (1809); s. c. 4 Am. Dec. 50; State v. Paterson & A. Turnpike Co., 21 N. J. L. (1 Zab.) 9 (1847); Western Pa. R. Co.'s Appeal, 104 Pa. St. 399 (1883); Commonwealth v. Philadelphia G. & N. R. Co., 20 Pa. St. 518 (1853); Murphy v. Farmers' Bank, 20 Pa. St. 415 (1853); Commonwealth v. Allegheny Bridge Co., 20 Pa. St. 185 (1852); Commonwealth v. Farmers' Bank, 2 Grant. Cas. (Pa.) 392 (1853); State v. Butler, 15 Lea (Tenn.) 104 (1885); State v. White's Creek Turnpike Co., 3 Tenn. Ch. 163 (1876); Gaylord v. Fort Wayne M. & C. R. Co., 6 Biss. C. C. 286 (1875); Rex v. Corporation of Carmarthen, 2 Burr. 869 (1759); s. c. 1 W. Bl. 187.

[2] People v. Rensselaer & S. R. Co., 15 Wend. (N. Y.) 113, 128 (1836); s. c. 30 Am. Dec. 33, 37; Smith v. State, 21 Ark. 294 (1860); Baker v. Backus' Adm'r, 32 Ill. 79 (1863); State v. Taylor, 25 Ohio St. 279 (1874).

[3] People v. Rensselaer & S. R. Co., 15 Wend. (N. Y.) 113, 129 (1836); s. c. 30 Am. Dec. 33, 38; State v. Commercial Bank of Manchester, 33 Miss. 474 (1857); Commercial Bank of Natchez v. State, 14 Miss. (6 Smed. & M.) 599, 614 (1846); State v. Cincinnati Gas Light & C. Co., 18 Ohio St. 262 (1868).

[4] People v. Bank of Hudson, 6 Cow. (N. Y.) 217 (1826).

[5] State v. St. Louis Perpetual Ins. Co., 8 Mo. 330 (1843); State v. Pat

lature should have authorized, either by general or special statute, the proceedings to be brought.[1]

Where it is discretionary with the attorney-general to bring a suit for the forfeiture of the franchises of a corporation, he cannot be compelled by *mandamus* to do so;[2] but if the attorney-general is required to obtain the leave of court before filing an information, the granting of leave rests in the sound discretion of the court.[3]

Sec. 162h[1].—Same—When suit to be brought.—In the absence of any statutory provision establishing proceedings for the forfeiture of the franchises of a corporation for nonuser, misuser, and the like, the suit must be filed within a reasonable time after the cause of forfeiture has arisen. In such cases the court is said to possess a sound discretion in the matter, and will not entertain the proceedings if there has been unreasonable delay after the cause of forfeiture arose.[4] It has been held, however, that lapse of time is no bar where the forfeiture has not been expressly or impliedly waived.[5]

Sec. 162i[1].—Same—Where to be brought.—The proceedings for the forfeiture of the franchises of a corporation must be brought in the county or state where the corporation was created, because the courts of any other country or state have no jurisdiction to regulate and control such corporation, and terminate its civil existence.[6]

The judgment in proceedings for the forfeiture of the

erson & H. Turnpike Co., 21 N. J. L. (1 Zab.) 9 (1847). See *post* § 163c.

[1] State v. Consolidation Coal Co., 46 Md. 1 (1876); State v. Rio Grande R. Co., 41 Tex. 217, 219 (1874); State v. Southern Pac. R. Co., 24 Tex. 80 (1859).

[2] State v. Attorney-General, 30 La. An. 954 (1878).

[3] People v. North Chicago R. Co., 88 Ill. 537 (1878); Attorney-General v. Erie & K. R. Co., 55 Mich. 15, 21 (1884).

[4] People v. Oakland County Bank, 1 Doug. (Mich.) 282, 286 (1844). See Kellogg v. Union Co., 12 Conn. 7, 19 (1837).

[5] See State v. Pawtuxet Turnpike Co., 8 R. I. 521 (1867); s. c. 94 Am. Dec. 123.

[6] Importing & Exporting Co. v. Locke, 50 Ala. 332 (1873); Carey v. Cincinnati & C. R. Co., 5 Iowa, 357, 367 (1857); Society for the Propagation of the Gospel v. Town of New Haven, 21 U. S. (8 Wheat.) 464 (1823); bk. 5 L. ed. 662; People v. Society for the Propagation of the Gospel, 1 Paine, C. C. 653, 656 (1826).

franchises of a corporation is of ouster and of seizure of the franchises into the hands of the state, that is, of its dissolution.[1] It is said, however, that if the corporation violates a special franchise, the state may obtain a judgment declaring that particular franchise forfeited, without dissolving the corporation or depriving it of the general franchise of acting in a corporate capacity.[2]

Sec. 162j[1]. Same—How forfeiture declared.—Ordinarily a forfeiture can be declared and established only by judicial proceedings directly instituted for that purpose either by *scire facias* or information in the nature of a *quo warranto*;[3] but where a franchise is granted by act of the legislature with a clause declaring its subject to forfeiture upon certain conditions of non-performance, no adjudication of a forfeiture by the courts is required, and the legislature may treat the same as forfeited.[4]

Sec. 162k[1]. Same—When dissolution takes place.—A corporation will not be dissolved by sale of its franchise; nor of all the corporate property and the settlement of all its concerns, and the division of the surplus; nor by a cessation of all corporate acts; nor by any neglect of corporate duty; nor by any abuse of corporate powers; nor by doing acts which cause a

[1] People v. Bank of Hudson, 6 Cow. (N. Y.) 217 (1826); Slee v. Bloom, 5 Johns. Ch. (N. Y.) 366, 379 (1811); People v. Rennselaer & S. R. Co., 15 Wend. (N. Y.) 113, 128 (1836); s. c. 30 Am. Dec. 33, 35; State Bank v. State, 1 Blackf. (Ind.) 267 (1823); s. c. 12 Am. Dec. 234; State v. Pennsylvania & O. Canal Co., 23 Ohio St. 121, 126 (1872).

[2] Toledo & A. A. R. Co. v. Johnson, 49 Mich. 148, 151 (1882).

[3] Sturges v. Vanderbilt, 73 N. Y. 384 (1878); In re New York Elevated R. Co., 70 N. Y. 327 (1877); Danbury & N. R. Co. v. Wilson, 22 Conn. 435 (1853); Bruffett v. Great Western R. Co. 25 Ill. 353 (1861); Aurora & C. R. Co. v. Lawrenceburgh, 56 Ind. 80 (1877); New Jersey Southern R. Co. v. Long Branch Com'rs, 39 N. J. L. (10 Vr.) 28 (1876); 2 Kent. Comm. 305.

[4] Brooklyn Steam Transit Co. v. Brooklyn, 78 N. Y. 524 (1879); Sturges v. Vanderbilt, 73 N. Y. 384 (1878); In re Brooklyn W. & N. R. Co., 72 N. Y. 245 (1878); s. c. 75 N. Y. 335; 19 Hun (N. Y.) 314; 55 How. (N. Y.) Pr. 14; Kennedy v. Strong, 14 Johns. (N. Y.) 129 (1817); Oakland R. Co. v. Oakland B. & F. V. R. Co., 45 Cal. 365 (1873); State v. Clinton & P. H. R. Co., 4 Rob. (La.) 445 (1843); LaGrange & M. R. Co. v. Rainey, 7 Coldw. (Tenn.) 420 (1870); United States v. Grundy, 7 U. S. (3 Cr.) 351 (1806); bk. 2 L. ed. 459.

forfeiture of the charter, without a judgment declaring such forfeiture. Such dissolution can take place only:

1. By an act of the legislature, where power is reserved for that purpose;

2. By a surrender, which is accepted, of the charter;

3. By a loss of all its members, or of an integral part thereof, so that the exercise of corporate functions cannot be restored; and

4. By forfeiture, which must be declared by judgment of a court.[1]

Sec. 1521[1]. Same—Judgment of forfeiture necessary.—A corporation is not *ipso facto* dissolved, either by the omission or commission of acts constituting a cause of forfeiture, and its franchises remain in full force until the charter is cancelled by an act of the legislature, or a forfeiture declared by a judgment or decree of a court of competent jurisdiction, in a direct proceeding for that purpose, instituted by the state against the corporation.[2] And the cause of forfeiture cannot be taken advantage of or enforced against a corporation col-

[1] Trustees of Vernon Society v. Hills, 6 Cow. (N. Y.) 23 (1826); s. c. 16 Am. Dec. 429; Allen v. New Jersey S. R. Co., 49 How. (N. Y.) Pr. 17 (1875); Slee v. Bloom, 5 Johns. Ch. (N. Y.) 367 (1821); Wilde v. Jenkins, 4 Paige Ch. (N. Y.) 481 (1834); Bank of Niagara v. Johnson, 8 Wend. (N. Y.) 645 (1832); Penobscot Boom Corporation v. Lamson, 16 Me. 224 (1839); s. c. 33 Am. Dec. 656; Chesapeake & O. Canal Co. v. Baltimore & O. R. Co., 4 Gill & J. (Md.) 121 (1832); Revere v. Boston Copper Co., 32 Mass (15 Pick.) 351 (1834); Russell v. McLeland 31 Mass. (14 Pick.) 63 (1833); Peter v. Kendal, 6 Barn. & Cress. 703 (1827); 2 Kent. Comm. 312; See Bradt v. Benedict, 17 N. Y. 99 (1858); New York Marbled Iron Works v. Smith, 4 Duer (N. Y.) 362 (1855); Cary v. Schoharie Valley Mach. Co., 2 Hun (N. Y.) 110 (1874); Kincaid v. Dwinelle, 37 N. Y. Super. Ct. (5 J. & S.) 326 (1874).

[2] Trustees of Vernon Society v. Hills, 6 Cow. (N. Y.) 26 (1826); s. c. 16 Am. Dec. 431; Allen v. New Jersey S. R. Co., 49 How. (N. Y.) Pr. 17 (1875); Lake Ontario Nat. Bank v. Onondaga County Bank, 7 Hun (N. Y.) 549 (1876); Slee v. Bloom, 5 Johns. Ch. (N. Y.) 366 (1821); Persse & Brooks Paper Co. v. Willett, 1 Robt. (N. Y.) 147 (1863); Importing & Exporting Co. of Ga. v. Locke, 50 Ala. 334 (1873); State v. Real Estate Bank, 5 Ark. 595 (1844); s. c. 41 Am. Dec. 117; Penobscot Boom Corp. v. Lamson, 16 Me. 224 (1839); s. c. 33 Am. Dec. 660; Hestonville M. & F. P. R. Co. v. Philadelphia, 89 Pa. St. 218 (1879); Strong v. McCagg, 55 Wis. 628 (1882). See Kincaid v. Dwinelle, 59 N. Y. 548, 552 (1875).

laterally or incidentally or in any other mode than by a direct proceeding for that purpose.[1]

Acts which are improper do not of themselves, work a dissolution of the corporation;[2] neither does ceasing to do business;[3] nor a lease and transfer of the corporate property;[4] nor nonuser[5] until after a judgment declaring the forfeiture.

The omission to elect officers, the sale of its property and effects, and its subsequent failure to transact business, do not work a dissolution; there must be a surrender of its charter to, and its acceptance by the state, or a judgment of dissolution by a court of competent jurisdiction.[6]

A corporation which has been enjoined from the exercise of its corporate franchises and deprived of its property, and has ceased to exist for all practical purposes, is not dissolved till there is a decree of court to that effect, and until this time judgment creditors may sue it, and its stockholders remain liable as such.[7]

A corporation by non-user and the suspension of its ordinary business, or by continued insolvency, or the nonpayment of its notes and other evidences of debts, for one whole year, does not become *ipso facto* dissolved, but continues to exist until its dissolution is judicially declared by a decree of the court or action of the legislature.[8]

Although a corporation is deemed to have surrendered its charter in consequence of non-user, the corporation is not actually dissolved before proceedings have been instituted either at law or in equity, to have such dissolution judicially declared, and a judgment recovered against such incorporation can be enforced; and the institution of such proceed-

[1] See *ante*, § 162q.

[2] Ormsby v. Vermont Copper Mining Co., 65 Barb. (N. Y.) 360 (1873).

[3] Cary v. Schoharie Valley Machine Co., 2 Hun, (N. Y.) 110 (1874).

[4] See Troy & R. R. Co. v. Kerr, 17 Barb. (N. Y.) 581 (1854).

[5] Nimmons v. Tappan, 2 Sween. (N. Y.) 652 (1870).

[6] Allen v. New Jersey South R. Co 49 How. (N. Y.) Pr. 14 (1875).

[7] Kincaid v. Dwinelle, 59 N. Y. 548 (1875). See Sanborn v. Lefferts, 58 N. Y. 179 (1874).

[8] Mickles v. Rochester City Bank, 11 Paige Ch. (N. Y.) 118 (1844).

ings, and a sale of the corporate property upon an execution issued on such judgment will be valid and effectual to transfer the title of such property to the purchaser.[1]

Sec. 163. Same—By whom to be brought.—An action, specified in the last section, may be maintained by the attorney-general, in the name and in behalf of the people, and whenever a creditor or stockholder of any corporation submits to the attorney-general a written statement of facts, verified by oath, showing grounds for an action under the provisions of the last section, and the attorney-general omits for sixty days after this submission, to commence an action specified in the last section, then, and not otherwise, such creditor or stockholder may apply to the proper court for leave to commence such an action, and on obtaining leave may maintain the same accordingly.[2]

Sec. 163a. Same—Who may apply.—Unless there are special enabling provisions by statute, a forfeiture of the franchises of a corporation can only be enforced by the sovereign power to which the corporation owes its life, in some proceeding instituted in behalf of the sovereign.[3] Under the New York statute an insolvent corporation may be dissolved and

[1] Mickles v. Rochester City Bank, 11 Paige, Ch. (N. Y.) 118 (1844).

[2] N. Y. Code Civ. Proc. § 1786, as amended by L. 1880 c. 301. Before the enactment of this section of the Code, the decisions were not in harmony as to whether the Revised Statutes, and the acts passed since then, relating to the subject, were to be construed as confining the right to bring an action to the attorney-general. See Bliven v. Peru Steel & Iron Works, 9 Abb. (N. Y.) N. C. 205 (1881); Kittridge v. Kellogg, 8 Abb. (N. Y.) N. C. 168 (1880); Masters v. Electric Life Ins. Co., 6 Daly (N. Y.) 455 (1876); Attorney-General v. American Life Ins. Co., 56 How. (N. Y.) Pr. 160 (1878); Attorney-General v. Atlantic Mut. Life Ins. Co., 53 How. (N. Y.) Pr. 227, 300 (1877); Attorney-General v. Continental Life Ins. Co., 53 How (N. Y.) Pr. 16 (1877); Medbury v. Rochester Frear Stone Co., 19 Hun (N. Y.) 498 (1880); Wilmersdoerffer v. Lake Mahopac Imp. Co., 18 Hun (N. Y.) 387 (1879).

[3] Denike v. New York & R. L. & C. Co., 80 N. Y. 599 (1880). See *ante*, § 162q.

its affairs wound up, at the instance of a single stockholder or creditor.[1] Such creditor or stockholder, who has an interest in closing up the affairs of the corporation, may file a bill in chancery against the corporation, to have its dissolution judicially declared, and to have its concerns closed up, and the property distributed under the direction of the court, where the corporation has remained insolvent for a year, or has suspended its ordinary business, or has neglected to pay undisputed evidences of debt for a year.[2]

Sec. 163b. Same—Creditors at Large.—It was formerly held that a creditor-at-large, of a corporation, could maintain an action to have it dissolved on the ground of insolvency, and to compel its trustees and officers to make good the losses which have been sustained by reason of their negligence and mismanagement;[3] but it is said in Dambman v. The Empire Mill,[4] that a creditor-at-large cannot apply by petition for a receiver of the estate of an insolvent corporation.

Sec. 163c. Same—Leave to Sue.—In the absence of statutory requirements the attorney-general need not ask leave of the court to institute proceedings to declare the forfeiture of corporate franchises;[5] and in an action by a stockholder for the dissolution of a corporation the leave to sue, required by the code,[6] sufficiently appears from allegations showing an application to the attorney-general, requesting him to commence an action in behalf of the people to dissolve the corporation; that more than sixty days have elasped since a statement of facts, verified on oath, was submitted to him, and that he has omitted for more than sixty days after such submission to commence the action, and that upon his refusal to proceed, the plaintiffs applied to the Supreme Court

[1] Masters v. Electric Life Ins. Co., 6 Daly (N. Y.) 455 (1876).

[2] Conro v. Gray, 4 How. (N. Y.) Pr. 166 (1849); Mickles v. Rochester City Bank, 11 Paige Ch. (N. Y.) 118 (1884).

[3] Cole v. Knickerbocker L. Ins. Co. 23 Hun (N. Y.) 255 (1880). Appeal dismissed by consent, 91 N. Y. 641; Belknap v. North America L. Ins. Co., 11 Hun (N. Y.) 282 (1877); Byrne v. New York B. & C. Co., 16 N. Y. Week Dig. 139 (1882).

[4] 12 Barb. (N. Y.) 341 (1851).

[5] State v. St. Louis Perpetual Ins. Co., 8 Mo. 330 (1843); State v. Paterson & H. T. Co., 21 N. J. L. (1 Zab.) 9, 10 (1847). See *ante*, § 162g.

[6] N. Y. Code Civ. Proc. § 1786; *ante* § 163.

special term for leave to bring the action, and that such leave was duly granted.[1]

163d. Same—Parties to action—Lessee.—In proceedings for dissolution and forfeiture of the franchises of a corporation, one to whom the corporation has leased property for the term of its existence, has a right to be made a party and a right to contest the forfeiture;[2] but it has been said that where a corporation holds a franchise which is entire in its character, such as to improve the navigation of a river, intermediate between certain designated points, and has power to lease a portion of the works, the lessee of such portion will hold subject to the risk of the forfeiture of the entire franchise, if the lessor should be guilty of default in respect to the improvement of any portion of the stream.[3]

Sec. 163e. Same—Pleadings.—An action may be maintained and a receiver appointed on a complaint which sets out that defendant is a manufacturing corporation organized under the laws of this state; that plaintiffs are two of the trustees and stockholders; that three of the defendants are the other trustees; that the corporation has been insolvent for over a year; the plaintiffs are pecuniarily responsible, while the other trustees are not; that they continue the business, though judgments had been recovered against the corporation and executions returned unsatisfied; that an action has been begun against one of the plaintiffs, to charge him personally with the debts of the corporation, and praying for a dissolution of the corporation, and for an injunction and a receiver *pendente lite*.[4]

Sec. 164. Same—Temporary Injunction.—In an action brought as prescribed in this article, the court may, upon proof of the facts authorizing the action to be maintained, grant an injunction order, restraining the corporation, and its trustees, directors, managers,

[1] Swords v. Northern Light Oil Co., 17 Abb. (N. Y.) N. C. 115 (1885).

[2] People v. Albany & V. T. R. Co., 77 N. Y. 232 (1879); reversing 15 Hun (N. Y.) 126.

[3] People v. Kankakee River Improvement Co., 103 Ill. 491 (1882).

[4] Medbury v. Rochester Frear Stone Co. 19 Hun (N. Y.) 498 (1880).

and other officers, from collecting or receiving any debt demand, and from paying out, in any way transferring or delivering to any person, any money, property, or effects of the corporation, during the pendency of the action; except by express permission of the court. Where the action is brought to procure the dissolution of the corporation, the injunction may also restrain the corporation, and its trustees, directors, managers and other officers, from exercising any of its corporate rights, privileges, or franchises, during the pendency of the action; except by express permission of the court. The provisions of title second of chapter seventh of this act, relating to the granting, vacating, or modifying of an injunction order, apply to an injunction order, granted as prescribed in this section; except that it can be granted only by the court.[1]

Sec. 164a. Injunction—Who may grant.—In an action instituted to procure the forfeiture of corporate franchises, on the dissolution of a corporation, the court, but not the judge thereof, may grant an injunction, and on final injunction appoint a receiver.[2]

Sec. 164b. Same—When granted.—An injunction may be granted to restrain an officer from doing any particular wrongful or fraudulent acts[3] affecting private rights.[4] Thus an injunction may be granted to restrain directors from issuing bonds as a device to increase the capital which they

[1] N. Y. Code Civ. Proc. § 1787.

[2] See N. Y. Code Civ. Proc. §§ 1788, 1802; *post*, §§ 165, 180.

[3] Fisk v. Chicago R. I & P. R. Co., 53 Barb. (N. Y.) 513 (1868); s. c. 4 Abb. (N. Y.) Pr. N. S. 378; 36 How. (N. Y.) Pr. 20; Howe v. Deuel, 43 Barb. (N. Y.) 504 (1865).

[4] People v. Albany & S. R. Co., 7 Abb. (N. Y.) Pr. N. S. 265 (1869); s. c. 1 Lans. (N. Y.) 308; 55 Barb. (N. Y.) 344; 38 How. (N. Y.) Pr. 228; modifying 5 Lans. (N. Y.) 25; modified 57 N. Y. 161.

have converted;[1] to restrain the transfer of stock of an insolvent mining corporation;[2] to restrain a railroad from removing its rails and abandoning its franchise;[3] to restrain specific acts of the directors,[4] and to restrain the sale of the entire corporate property.[5] But an injunction will not be granted to restrain an officer from performing the general and ordinary duties of his office,[6] nor against the directors to enjoin the general business of the corporation.[7] Thus an junction has been refused against the president of a savings bank, where there has been an improper investment of the funds, but no further misappropriation and no violation of plaintiff's rights threatened,[8] and simple forfeiture of franchise is no ground for an injunction.[9]

The court, independently of these special statutory powers, may, on the application of a stockholder charging fraud against directors or trustees, have an injunction against doing particular acts, but not one enjoining the general business of the corporation.[10] But an injunction cannot be granted restraining creditors from enforcing demands, at the same time with an order to show cause why a dissolution should not be had.[11]

Where, in such a case, the creditors of the corporation did not appear or in any way waive their right to be served with

[1] Belmont v. Erie R. Co., 52 Barb. (N. Y.) 637 (1869).

[2] Rogers v. Michigan S. & N. I. R. Co., 28 Barb. (N. Y.) 539 (1858); People v. Parker Vein Coal Co., 10 How. (N. Y.) Pr. 186 (1854); affirmed 10 How. (N. Y.) Pr. 543.

[3] People v. Albany & Vt. R. Co., 19 How. (N. Y.) Pr. 523 (1860); s. c. 11 Abb. (N. Y.) Pr. 136, affirmed 37 Barb. (N. Y.) 216; 24 N. Y. 261.

[4] Howe v. Deuel, 43 Barb. (N. Y.) 504 (1865).

[5] Abbot v. American Hard Rubber Co., 33 Barb. (N. Y.) 578 (1861); s. c. 21 How. (N. Y.) Pr. 193; affirmed 11 Abb. (N. Y.) Pr. 204; 20 How. (N. Y.) Pr. 199.

[6] People v. Albany & S. R. Co., 7 Abb. (N. Y.) Pr. N. S. 265 (1869); s. c. 1 Lans. (N. Y.) 308; 55 Barb. (N. Y.) 344; 38 How. (N. Y.) Pr. 228; modifying 5 Lans. (N. Y.) 25; 57 N. Y. 161.

[7] Howe v. Deuel, 43 Barb. (N. Y.) 504 (1865).

[8] People ex rel. v. Conklin, 5 Hun (N. Y.) 452 (1875).

[9] Haight v. New York Elevated R., 49 How. (N. Y.) Pr. 20 (1875).

[10] Howe v. Deuel, 43 Barb. (N. Y.) 504 (1865).

[11] Matter of French Manuf. Co., 12 Hun. (N. Y.) 488 (1878).

precisely such an order as the Code prescribes, no jurisdiction was acquired over them, and as this was an indispensable step in the proceeding, the omission to take it could be insisted upon at any time by either of the other parties, and that although the objection was not taken on their motion to vacate the order, or in their behalf.[1]

Sec. 164c. Same—Receiver—Appointment by special term—Continuing.—It has been said that a decision of the special term restraining a corporation from the prosecution of its business, and appointing a receiver under the New York laws of 1869,[2] is not final, and that it is for the general term and court of appeals to critically scrutinize the proceedings in every case, and to determine whether good cause exists for interference, and whether there is sufficient reason for continuing the corporation. Such determination should be based upon the answer to the question "are the assets sufficient to justify the belief that it may continue business with safety to the public;" and where it appear that such cannot be done, the court may, in the exercise of a judicial discretion, confirm the appointment and continue the receiver.[3]

Sec. 164d. Same—Powers.—It is thought that the powers of a receiver appointed under the statute for the involuntary dissolution of a corporation,[4] are not greater or other than those of receivers in ordinary creditors' suits.[5]

Where the receiver of a corporation, appointed in an action by a stockholder for a receiver thereof, on the ground that no officer remained qualified to take possession of the property of the corporation, and also in an action by a judgment creditor for sequestration of such property, was sued by certain judgment creditors, in behalf of themselves and others in like situation, who alleged that his appointment

[1] Matter of Pyrolusite M. Co., 29 Hun (N. Y.) 429 (1883); s. c. 3 N. Y. Civ. Proc. Rep. 270.

[2] L. 1869, c. 902, § 7.

[3] It seems that a clause in the order dissolving the corporation will be improper, People v. Atlantic Mut. Life Ins. Co., 74 N. Y. 177 (1878); Attorney-General v. Atlantic Mut. Life Ins. Co., 53 How. (N. Y.) Pr. 227, 300 (1869).

[4] N. Y. Code Civ. Proc., § 1787. *Supra*, § 164.

[5] Mann v. Pentz, 3 N. Y. 415 (1850).

was collusive, irregular and void, and constituted an obstruction to their execution, and asked for the appointment of a receiver of the property of the corporation, and he under instruction of the court, brought an action restraining the prosecution of the judgment creditors' action should be continued until final judgment in the action.[1]

Sec. 165. Same—Permanent and Temporary Receiver—Powers, etc., of Temporary Receiver.—In such an action, the court may also, at any stage thereof, appoint one or more receivers of the property of the corporation. A receiver so appointed before a final judgment, is a temporary receiver until final judgment is entered. A temporary receiver has power to collect and receive the debts, demands, and other property of the corporation ; to preserve the property and the proceeds of the debts and demands collected ; to sell, or otherwise dispose of, the property, as directed by the court ; to collect, receive, and preserve the proceeds thereof ; and to maintain any action or special proceeding for either of those purposes. He must qualify as prescribed by law, for the qualification of a permanent receiver. Unless additional powers are specially conferred upon him, as prescribed in the next section, a temporary receiver has only the powers specified in this section, and those which are incidental to the exercise thereof. A receiver, appointed by or pursuant to a final judgment in the action, or a temporary receiver, who is continued by the final judgment, is a permanent receiver, and has all the powers and authority conferred, and is subject to all the duties and liabilities imposed upon a receiver

[1] Smith v. Danzig, 3 N. Y. Civ. Proc. Rep. 127 (1883).

appointed upon the voluntary dissolution of a corporation.[1]

Sec. 165a. Receiver—Character of office.—A receiver is a ministerial officer of the court appointed as an indifferent person by the parties, to receive and preserve the property or fund in litigation *pendente lite*, when it does not seem to the court reasonable or equitable that either party should hold it.[2] In the voluntary or involuntary dissolution of a corporation a receiver is an indifferent person appointed by the court for the purpose of getting in the assets and managing the business of the corporation pending the winding up of its affairs. He is simply an official instrument used by the court to execute its orders. He has no title personally to the funds placed in his charge, and his possession is the possession of the court. As a receiver he represents a separate and independent legal existence, and therefore an order made in an action brought against him personally, and not as receiver, and not in terms in any way purporting to affect him in his official character, has no force or bearing upon him in the latter capacity.[3] He is not an agent or representative of any party to the action, but represents both the creditors and stockholders,[4] and may assert their rights whenever affected by the fraudulent or illegal acts of the institution.[5] This is

[1] N. Y. Code Civ. Proc., § 1788; as amended by L. 1882, c. 399.

[2] Chautauqua Co. Bank v. White, 6 Barb. (N. Y.) 589 (1849); Devendorf v. Dickinson, 21 How. (N. Y.) Pr. 275 (1861); Baker v. Adm'r of Backus, 32 Ill. 79 (1863); Waters v. Carroll, 9 Yerg. (Tenn.) 102 (1836); Booth v. Clark, 58 U. S. (17 How.) 322 (1854); bk. 15 L. ed. 164; Wyatt's Prac. Reg. 355.

[3] Eddy v. Co-operative Dress Assoc., 3 N. Y. Civ. Proc. Rep. 434 (1883).

[4] Brown v. Northrup, 15 Abb. (N. Y.) Pr. N. S. 333 (1873). Curtis v. Leavitt, 1 Abb. (N. Y.) Pr. 278 (1855); Corey v. Long, 43 How. (N. Y.) Pr. 497 (1872); s. c. 12 Abb. (N. Y.) Pr. N. S. 427; Van Rensselaer v. Emery, 9 How. (N. Y.) Pr. 135 (1854); Osborn v. Heyer, 2 Paige Ch. (N. Y.) 342 (1831); Baker v. Adm'r of Backus, 32 Ill. 79 (1863); Hooper v. Winston, 24 Ill. 353 (1860); Kaiser v. Kellar, 21 Iowa 95 (1866); Ellicott v. Warford, 4 Md. 80 (1853); Williamson v. Wilson, 1 Bland, Ch. (Md.) 418 (1826); King v. Cutts, 24 Wis. 627 (1869); Booth v. Clark, 58 U. S. (17 How.) 322 (1854); bk. 15 L. ed. 164; Meier v. Kansas Pacific R. Co., 5 Dill. C. C. 476 (1878); Davis v. Duke of Marlborough, 2 Swans. 113 (1819).

[5] Gillet v. Moody, 3 N. Y. 479

true although the receiver may have been appointed in a suit brought by a single creditor or stockholder. The receiver takes the whole estate for the benefit of all the creditors, and before the distribution of the assets an opportunity must be given to all to come in.[1]

Sec. 165b. Same—Effect of appointment.—The object of the statute is to take away the franchise of the corporation and its power of action immediately on a petition for a receiver being filed, if its prayer is finally granted. A decree therefor appointing a receiver either for a dissolved or an insolvent corporation vests him absolutely with all the property, assets and effects of the corporation, and he has full power to sell and dispose of the same and settle up the affairs and distribute the proceeds in his hands;[2] and a judgment creditor cannot take such property or any portion thereof on execution.[3] The receiver's title relates back to the time of granting the order of reference to appoint a receiver, and all transfers after that time are void.[4]

Sec. 165c. Same—Business—How transacted.—Where a receiver is appointed in an action to wind up the affairs of a running corporation or to get in and distribute the assets of an insolvent one, such receiver should act, contract, and convey, in his own name, that of the corporation being unnecessary.[5]

(1850); rev'g 5 Barb. (N. Y.) 185; Brouwer v. Hill, 1 Sandf. (N. Y.) 629 (1848). See Livingston v. Bank of New York, 5 Abb. (N. Y.) Pr. 338 (1857); s. c. 36 Barb. (N. Y.) 304; Libby v. Rosekrans, 55 Barb. (N. Y.) 202 (1869); Osgood v. Laytin, 48 Barb. (N. Y.) 463 (1867); aff'd 5 Abb. (N. Y.) Pr. N. S. 1; 3 Keyes (N. Y.) 521; 3 N. Y. Trans. App. 124; 37 How. (N. Y.) Pr. 63; Sands v. Birch, 29 How. (N. Y.) Pr. 305 (1865); s. c. 19 Abb. (N. Y.) Pr. 255; Conro v. Gray, 4 How. (N. Y.) Pr. 166 (1849); Haxtun v. Bishop, 3 Wend. (N. Y.) 13 (1829).

[1] Rinn v. Astor Fire Ins. Co., 59 N. Y. 143 (1874).

[2] Attorney-General v. Guardian Life Ins. Co., 77 N. Y. 272 (1879); Matter of Berry, 26 Barb. (N. Y.) 55 (1857); Chapman v. Douglas, 5 Daly (N. Y.) 244 (1874); Verplanck v. Mercantile Ins. Co., 2 Paige Ch. (N. Y.) 438 (1831).

[3] Chapman v. Douglass, 5 Daly (N. Y.) 44 (1874).

[4] Matter of Berry, 26 Barb. (N. Y.) 55 (1857).

[5] Hoyt v. Thompson, 5 N. Y. 320 (1851); reversing 3 Sandf. (N. Y.) 416.

Sec. 165d. Same—When appointed.—The court may, by virtue of its general powers, entertain proceedings against corporations, appoint receivers of them, and the like.[1] In an action by the attorney-general for the dissolution of a corporation, the court thereby obtains jurisdiction to appoint a receiver;[2] but a receiver should not be appointed, unless in a case of necessity to protect the stockholders or creditors from loss, or to prevent abuse of the corporate franchise; because he displaces the directors or other agents selected by the stockholders, and under the direction of the court, has the control of its property, and effects, and, when authorized so to do, the exclusive power to use its franchise.[3] And particularly is this true where insolvency is not charged, nor a dissolution asked.[4]

A receiver will not be appointed on a creditor's *ex parte* application, but an order to show cause why a temporary injunction will be granted.[5] And where plaintiffs do not show themselves entitled to have a dissolution of the corporation, a receiver will not be appointed.[6]

It has been said that a receiver for a religious corporation cannot be appointed in an action by one claiming to be a corporator against individual corporators, to which action the corporation itself is not made a party;[7] and a receiver will not be appointed at a stockholder's suit on allegations of misconduct of directors, whom it is sought to remove.[8]

Sec. 165e. Same—Duty of officers to oppose appointment.—It seems that where the officers of a company believe it to be solvent and have reasonable grounds for such belief, it is their duty to oppose an application for the appointment of a

[1] Bangs v. Duckinfield, 18 N. Y. 593 (1859). See Judson v. Rossie Galena Co., 9 Paige Ch. (N. Y.) 598 (1842); s. c. 38 Am. Dec. 569.

[2] Attorney-General v. Guardian Mut. L. Ins. Co., 77 N. Y. 272 (1879); affirming 8 N. Y. Week. Dig. 65.

[3] City of Rochester v. Bronson, 41 How. (N. Y.) Pr. 78 (1871).

[4] Belmont v. Erie R. Co., 52 Barb. (N. Y.) 637 (1869).

[5] Devoe v. Ithaca & O. R. Co., 5 Paige Ch. (N. Y.) 521 (1835); Verplank v. Mercantile Ins. Co., 2 Paige Ch. (N. Y.) 438 (1831).

[6] Denike v. New York & R. Lime & C. Co., 80 N. Y. 599 (1880).

[7] Groesbeeck v. Dunscomb, 41 How. (N. Y.) Pr. 302 (1871).

[8] Belmont v. Erie R. Co., 52 Barb. (N. Y.) 637 (1869).

receiver, and the reasonable expenses incurred should be allowed to them. It is competent for the court administering the fund, if there is just ground and probable cause for appealing from the order appointing a receiver, to allow a reasonable sum for the expenses. This, however, is not an absolute right, enforceable by action, but is entirely in the discretion of such court, and to be exercised in that proceeding.[1]

Sec. 165f. Same—Who may have appointed.—The state or a judgment creditor who has secured a judgment on which an execution has been issued and returned unsatisfied, may have a receiver appointed to take charge of the effects of the corporation; but no mere creditor who has not secured a judgment upon which an execution has been issued and returned unsatisfied, can have a receiver appointed.[2] Neither can an action be maintained under the New York Revised Statute relative to proceedings against corporations in equity by a stockholder against the corporation and its trustees to restrain the trustees from exercising any powers as trustees and for the appointment of a receiver of the property and effects of the corporation.[3]

Sec. 165g. Same—Where motion for made.—Under the statute,[4] every application for the appointment of a receiver of a corporation must be made at a special term of the supreme court held in and for the judicial district in which the principal business office of the corporation is located at the commencement of the action, or in and for a county adjoining such district; and any order appointing a receiver, otherwise made, will be void.[5]

By the laws of 1883[6] it is provided that a copy of all

[1] Barnes v. Newcomb, 89 N. Y. 108 (1882).

[2] People v. Erie R. Co., 36 How. (N. Y.) Pr. 129 (1868). See Ramsay Erie R. Co., 7 Abb. (N. Y.) Pr. N. S. 156 (1869); s. c. 38 How. (N. Y.) Pr. 193.

[3] People v. Erie R. Co., 36 How. (N. Y.) Pr. 129 (1868).

[4] L. 1883, c. 378, § 1; 4 N. Y. R. S. 8th ed. p. 2675; L. 1883, c. 378, § 9; 4 N. Y. R. S., 8th ed., p. 2676.

[5] See, United States Trust Co. v. New York W. S. & B. R. Co., 35 Hun, (N. Y.) 341 (1885).

[6] L. 1883, c. 378, § 8; 4 N. Y. R. S. 8th ed., p. 2676.

motions and of all motion papers, and a copy of any other application to the court, together with a copy of the order or judgment to be proposed thereon to the court, in every action or proceeding now pending for the dissolution of a corporation or a distribution of its assets, or which shall hereafter be commenced for such purposes, shall in all cases be served on the attorney-general in the same manner as provided by law for the service of papers on attorneys who have appeared in actions, whether the applications, but for this law, would be *ex parte* or upon notice, and any judgment granted in any action or proceeding aforesaid, without such service of such papers upon the attorney-general, shall be void, and no receiver of any such corporation shall pay to any person any money directed to be paid by any order or judgment made in any such action or proceeding until the expiration of eight days after a certified copy of such order or judgment shall have been served as aforesaid upon the attorney-general, and no order or judgment granted shall vary in any material respect from the relief specified in such copy or order, unless the attorney-general shall appear on the return day and have been heard in relation thereto.

Sec. 165h. Same—Order appointing—Depository of funds.—The statute requires that all orders appointing receivers of corporations shall designate therein one or more places of deposit wherein all funds of a corporation not needed for immediate disbursement shall be kept, and no deposits or investments of such trust funds shall be made elsewhere except upon the order of the court upon due notice given to the attorney-general.[1]

Sec. 165i. Same—Setting aside appointment.—In appointing a receiver the court exercises a general jurisdiction and not a special statutory power, and its proceedings, if erroneous, can only be corrected on appeal by a party to the proceeding.[2]

Where in an action brought to set aside the appointment of a receiver of a corporation made in an action by a stockholder to preserve its property, he was enjoined from inter-

[1] L. 1883, c. 378, § 3; 4 N. Y. R. S. 8th ed., p. 2675.

[2] Bangs v. Duckinfield, 18 N. Y. 592 (1859).

fering with the property of the corporation, except to preserve it, and the action and injunction order was against him personally, and not as receiver, the court held that he was restrained from acting in his official capacity as receiver.[1]

Sec. 165j. Same—Removal, etc., of receiver.—After a receiver has been appointed in an action to wind up the affairs of a corporation the parties thereto cannot, by stipulation, undo what has been done.[2]

Under the statute the attorney-general may, at any time he deems that the interests of the stockholders, creditors, policyholders, depositors, or other beneficiaries interested in the proper and speedy distribution of the assets of any insolvent corporation will be subserved thereby, make a motion in the supreme court at a special term thereof, in any judicial district, for an order removing the receiver of an insolvent corporation and appointing a receiver thereof in his stead, or to compel him to account, or for such other and additional order or orders as to him may seem proper to facilitate the closing up of the affairs of such receivership, and may appeal from any order made upon any motion under this section shall be to the general term of said court of the department in which such motion is made.[3]

Sec. 165k. Same—Protection of the receiver.—The court in the administration of the funds of an insolvent or disbanding corporation, which are taken into its custody, must act through the officers selected for that purpose, and it is clearly its duty, not only in justice to them, but in the protection of its own dignity, to see that such officers are duly protected against endless annoyance and interference in the discharge of their duties, and that all parties willfully embarrassing them are arrested and punished.[4]

[1] Eddy v. Co-operative Dress Assoc., 3 N. Y. Civ. Pro. Rep. 434 (1883).

[2] People v. Globe Ins. Co., 57 How. (N. Y.) Pr. 481 (1879). As to power of Special Term to vacate appointment of receiver of an insolvent life insurance company, and return its assets and allow it to resume business, see Attorney-General v. Atlantic Mut. L. Ins. Co. 56 How. (N. Y.) Pr. 391 (1878); 15 Hun (N. Y.) 84; affid'd 77 N. Y. 337.

[3] L. 1883, c. 378, § 7; 4 N. Y. R. S., 8th ed., p. 2676.

[4] Eddy v. Co-Operative Dress Assoc., 3 N. Y. Civ. Proc. Rep. 434 (1883).

Sec. 1651. Same—Duties and powers of receiver.—The receiver of a corporation is vested with all the rights of action which the company had when he was appointed. Thus he may sue for a tort committed before his appointment;[1] may repudiate an illegally executed contract of the corporation and reclaim the property;[2] may set aside illegal or fraudulent provisions and recover funds misappropriated;[3] must collect deposit notes where they are the capital of the incorporation, unless excused by the court;[4] may maintain trover for the conversion of the personal property of the corporation before his appointment;[5] may enforce the common law liability of the trustee of the corporation for misappropriation of the funds;[6] may apply for a warrant to bring up for examination a person who is indebted to the corporation or who has property belonging to it in his custody;[7] may recover unpaid subscriptions;[8] may maintain an action to recover dividends wrongfully paid; may, under the direction of the court, continue a suit commenced by the insolvent company, either in his own name or in the name of the original party;[9] and he may be authorized to compromise or submit to arbitration any and all disputed claims; and the court will give him a general power to compromise.[10] But the receiver cannot

[1] Gillet v. Fairchild, 4 Den. (N.Y.) 80 (1847); Brouwer v. Hill, 1 Sandf. (N. Y.) 629 (1848). See, Hyde v. Lynde, 4 N. Y. 387, 392 (1850); Leavitt v. Palmer, 3 N. Y. 19 (1849); s. c. 51 Am. Dec. 333; Hoyt v. Thompson, 3 Sandf. (N. Y.) 416 (1850); rev'd 5 N. Y. 320.

[2] Talmage v. Pell, 7 N. Y. 328 (1852).

[3] Attorney-General v. Guardian M. L. Ins. Co., 77 N. Y. 272 (1879).

[4] Van Buren v. Chenango Co. Mutual Ins. Co., 12 Barb. (N. Y.) 671 (1852). See, Devendorf v. Beardsley, 23 Barb. (N. Y.) 656 (1857).

[5] Gillet v. Fairchild, 4 Den. (N.Y.) 80 (1847).

[6] VanDyck v. McQuade, 57 How (N. Y.) Pr. 62 (1879).

[7] See *post*, § 1650.

[8] Van Cott v. Van Brunt, 2 Abb. (N. Y.) N. C. 283 (1877). See, Pentz v. Hawley, 1 Barb. Ch. (N. Y.) 122 (1845); Phœnix Warehousing Co. v. Badger, 6 Hun (N. Y.) 293 (1875); aff'd 67 N. Y. 294; Ruggles v. Brock, 6 Hun (N. Y.) 164 (1875); Nathan v. Whitlock, 9 Paige Ch. (N. Y.) 152 (1841); Aff'd. 3 Edw. Ch. (N. Y.) 215.

[9] Albany City Ins. Co. v. Van Vranken, 42 How. (N. Y.) Pr. 281 (1872); Talmage v. Pell, 9 Paige Ch. (N. Y.) 410 (1842).

[10] Matter of Croton Ins. Co., 3 Barb. Ch. (N. Y.) 642 (1847.

impeach the lawful acts of the corporation,[1] and he has no authority without the direction or consent of the court to invest the moneys in his hands; in the absence of directions it is his duty simply to keep and protect the trust fund, and hold it ready for distribution. Where, however, a receiver without authority from the court, but acting in entire good faith, placed the fund in the hands of brokers to be loaned on call, and charged himself with the amounts received for interest, it appearing that no part of the fund was lost, and that the parties interested therein were not injured, but were probably benefited, held, that an order charging the receiver with interest beyond the amount received was error.[2]

By the act of 1880,[3] § 42 of 3 Revised Statutes, chapter 8, title 4, is made applicable to receivers appointed under the code.[4] That section reads as follows: "Such receiver shall possess all the power and authority conferred, and be subject to all the obligations and duties imposed, in article three of this title, upon receivers appointed in case of the voluntary dissolution of a corporation. It shall be his duty to keep an account of all moneys received by him, and on the first days of January, April, July and October, in each and every year, to make and file a written statement, verified by his oath, that such statement is correct and true, showing the amount of money received by such receiver, his agents or attorneys, the amount he has a right to retain under the provisions of this title, and the items for which he claims to retain the same, and the distributive share due to each person interested therein. He shall pay such distributive shares to the person or persons entitled thereto, on demand, at any time after such statement. Such account, statement, and all the books and papers of the corporation in the hands of such receiver, shall at all reasonable times be open for the inspection of all persons having an

[1] Hyde v. Lynde, 4 N. Y. 387 (1850).

[2] Attorney-General v. North American L. Ins. Co. 89 N. Y. 94 (1882) modifying 26 Hun (N. Y.) 294.

[3] L. 1880, c. 245, the repealing act of that year.

[4] N. Y. Code Civ. Pro., § 1788; *ante*, § 165.

interest therein. And in case of neglect or refusal to comply with either of the above requirements, or any duty imposed upon him by this title, the supreme court, at either a general or special term, shall, on the application of the party aggrieved, unless such neglect or refusal shall be satisfactorily explained to the court, forthwith remove such receiver, and appoint some suitable person as receiver in his place. Such removal shall not vitiate or annul any legal proceedings had by such receiver; but such proceedings shall be continued by such successor as if no removal had been made. Such receiver shall also be liable to pay to the party interested, interest at the rate of ten per cent. per annum on all moneys due to such party and retained by him more than one day after such demand made as aforesaid.

Sec. 165m. Same—Unpaid subscriptions—Collection of.—It is the duty of a receiver to require the stockholders to pay in unpaid balances of their subscriptions to the capital stock, where in his judgment such amounts will be needed;[1] and stockholders who have paid for their stock have the right to require that the receiver collect of those who have not paid.[2]

In a receiver's action to recover unpaid subscriptions to stock, one who has acted as director is estopped from denying the existence of the corporation or the validity of his subscription.[3]

The provision authorizing the receiver to recover any sum remaining due upon any share of stock, is a cumulative remedy. And the rule is the same, whether the stock be held by an original stockholder or by an assignee.[4]

[1] Pentz v. Hawley, 1 Barb. Ch. (N. Y.) 122 (1845). See, Van Cott v. Van Brunt, 2 Abb. (N. Y.) N. C. 283 (1877).

[2] Nathan v. Whitlock, 9 Paige Ch. (N. Y.) 152 (1841); aff'd 3 Edw. Ch. (N. Y.) 215.

[3] Ruggles v. Brock, 6 Hun (N. Y.) 164 (1875); Phœnix Warehousing Co. v. Badges, 6 Hun (N. Y.) 293 (1875); aff'd 67 N. Y. 294. See N. Y. Code Civ. Proc., § 1794.

[4] Mann v. Currie, 2 Barb. (N. Y.) 294 (1848); Osgood v. Laytin, 48 Barb. (N. Y.) 463 (1867); aff'd 37 How. (N. Y.) Pr. 63; 3 Keyes (N. Y.) 521; 5 Abb. (N. Y.) Pr. N. S. 1; 3 Trans. Abb. App. Dec. (N. Y.) 124.

Sec. 165n. Same—Dividends wrongfully paid—Action to recover.—The receiver of an insolvent corporation may maintain an action to recover dividends which have been wrongfully or illegally declared and paid, and in such an action the creditors of the company may be made defendants to prevent multiplicity of suits by them for the same remedy.[1]

Sec. 165o. Same—Examination of debtor.—The receiver of a corporation may apply to the court for a warrant to bring up for examination any person who is indebted to the corporation, or who has property belonging to it in his custody;[2] and where an application is made by the receiver of an insolvent corporation to an officer for a warrant to bring a debtor before such officer for examination pursuant to statute, the petition for that purpose should state the fact upon which the application is founded positively and not in the alternative.[3] The jurisdiction of the court to entertain a proceeding of this kind does not depend upon the truth of the facts alleged in the petition; if the petition alleges sufficient facts, and the court is called upon to decide whether they are established, its determination, whether rightful or not, does not affect its jurisdiction.[4]

In the case of Noble v. Halliday,[5] under a statute providing that wherever a receiver of an insolvent corporation "shall show by his own oath or other competent proof" that any person is indebted to the corporation, or has property of the corporation in his custody or possession, the officer to whom the application is made, shall issue a warrant to bring such person before him for examination, it was held that it is sufficient for the receiver who applies for a warrant to swear to the facts on information and belief; and that under such statute a person having in his custody as administrator of the deceased, effects of the corporation, such administrator will be liable to be proceeded against, and where the sworn petition

[1] Osgood v. Laytin, 5 Abb. (N. Y.) Pr. N. S. 1 (1867); s. c. 3 Keyes (N. Y.) 521; 37 How. (N. Y.) Pr. 63; aff'd 48 Barb. (N. Y.) 463.

[2] Noble v. Halliday, 1 N. Y. 330 (1848); rev. 1 Barb. (N. Y.) 137.

[3] Halliday v. Noble, 1 Barb. (N. Y.) 137 (1847).

[4] Whittlesey v. Frantz, 74 N. Y. 456 (1878).

[5] 1 N. Y. 330 (1848).

on which the warrant was granted stated that such person had property of the corporation in his custody, either individually or as administrator, was held good.

Sec. 165p. Same—Sale of property.—A court of equity will protect the interests of the general creditors and stockholders of an insolvent corporation, if it can be done without injury to judgment creditors having liens on its property, by an immediate sale thereof, and where it appears that the quicker a sale of the property can be made the more it will bring, the property should be sold, and the fund resulting from such a sale substituted for the property itself.[1] And the supreme court has power to order a sale of the property of a corporation by the receiver thereof appointed in an action by a stockholder for a receiver on the ground that no officer remained qualified to take possession of the property of the corporation, and again appointed in an action by a judgment creditor for the sequestration of such property. Independent of any statute, a court of equity has inherent power to direct such a disposition of the fund as it shall deem wisest and best for the interests of all concerned. But under sections 1788 and 1789 the power is clear, for although it may be fairly argued that the statute does not in terms apply to the stockholder's action, it certainly does apply to the act of sequestration.[2]

But where a receiver, appointed in an action against a corporation, fraudulently obtains an order for a sale of a debt due the corporation, an equitable action at the suit of the creditor will lie, to vacate the order, and set aside the sale.[3]

Sec. 165q. Same—Compensation.—Every receiver of an insolvent corporation is entitled to receive as compensation for his services as such receiver five per centum for the first $100,000 received and paid out, and two and one-half per centum on all sums received and paid out in excess of $100,000; but no receiver shall in any case receive from

[1] Smith v. Danzig, 3 N. Y. Civ. Proc. Rep. 127 (1883).

[2] Smith v. Danzig, 3 N. Y. Civ. Proc. Rep. 127 (1883).

[3] Hackley v. Draper, 60 N. Y. 88 (1875); aff'g 2 Hun (N. Y.) 523; 4 T. & C. (N. Y.) 614.

such percentage or otherwise, for his services for any one year, a greater sum or compensation than $12,000, nor for any period less than one year more than at the rate of $12,000 per year, provided that where more than one receiver shall be appointed the compensation here provided shall be divided between such receivers.[1]

Sec. 166. Same—Additional Powers and Duties may be Conferred upon Temporary Receiver.—A temporary receiver, appointed as prescribed in section one hundred and sixty-five is, in all respects, subject to the control of the court. In addition to the powers conferred upon him, by the provisions of said section, the court may, by the order or interlocutory judgment appointing him, or by an order subsequently made in the action, or by the final judgment, confer upon him the powers and authority, and subject him to the duties and liabilities, of a permanent receiver, or so much thereof as it thinks proper; except that he shall not make any distribution among the creditors or stockholders, before final judgment, unless he is specially directed so to do by the court.[2]

[1] L. 1883 c. 378, § 2, as amended by L. 1886, c. 275; 4 N. Y. R. S., 8th ed., 2675. United States Trust Co. v. New York W. S. & B. R. Co., 101 N. Y. 478 (1886); People ex rel. Newcomb v. McCall, 94 N. Y. 587 (1884); Matter of Attorney-General v. Guardian L. Ins. Co., 93 N. Y. 631 (1883); People v. Brooklyn F. & C. I. R. Co., 89 N. Y. 75, 94 (1882); People v. McCall, 65 How. (N. Y.) Pr. 442 (1883); Moore v. Taylor, 40 Hun (N. Y.) 56, 58 (1886); People v. Mutual Ben. Assoc. 39 Hun, (N. Y.) 49, 50 (1886); Greason v. Goodwillie Wyman Co., 38 Hun (N. Y.) 138, 140 (1885); Morrison v. Menhaden Co., 37 Hun (N. Y.) 522, 523 (1885); United States Trust Co. v. New York W. S. & B. R. Co., 35 Hun (N. Y.) 341, 342 (1885); Matter of Attorney-General v. Continental L. Ins. Co., 32 Hun (N. Y.) 223 (1884); Whitney v. New York & A. R. Co., 32 Hun (N. Y.) 164, 171 (1884); Matter of Commonwealth F. Ins. Co., 32 Hun (N. Y.) 78 (1884); Matter of Security L. Ins. & Annuity Co., 31 Hun (N. Y.) 36 (1883); Matter of Fees of Clerk of City Court, 25 Hun (N. Y.) 593, 594 (1881).

[2] N. Y. Code Civ. Proc., § 1789.

Sec. 167. Same—Powers and Duties of Permanent Receivers.—Such receiver shall possess all the power and authority conferred, and be subject to all the obligations and duties imposed, in article three of this title upon receivers appointed in case of the voluntary dissolution of a corporation.[1] It shall be his duty to keep an account of all moneys received by him, and on the first days of January, April, July and October, in each and every year, to make and file a written statement, verified by his oath that such statement is correct and true, showing the amount of money received by such receiver, his agents or attorneys, the amount he has a right to retain under the provisions of this title, and the items for which he claims to retain the same, and the distributive share due each person interested therein. He shall pay such distributive share to the person or persons entitled thereto, on demand, at any time after such statement. Such account, statement, and all the books and papers of the corporation in the hands of such receiver, shall at all reasonable times be open for the inspection of all persons having an interest therein. And in case of neglect or refusal to comply with either of the above requirements, or any duty imposed upon him by this title, the supreme court, at either a general or special term, shall, on the application of the party aggrieved, unless such neglect or refusal shall be satisfactorily explained to the court, forthwith remove such receiver, and appoint some suitable person as receiver in his place. Such removal shall not vitiate or annul any legal proceedings had by such receiver; but such proceedings shall be con-

[1] See *ante*, §§ 140, 145.

tinued by such successor as if no removal had been made. Such receiver shall also be liable to pay to the party interested, interest at the rate of ten per cent. per annum on all moneys due to such party and retained by him more than one day after such demand made as aforesaid.[1]

Sec. 167a. Same—Title and Possession of.—The permanent receiver, unless his powers are restricted and controlled by order of the court, is absolutely vested with all the property and effects of the corporation, and he has full power to sell and dispose of the whole at his discretion, and to distribute the proceeds among the stockholders, after paying the debts owing by the company.[2]

Sec. 168. Same—Making Stockholders, etc., Parties.—Where the action is brought by a creditor of a corporation, and the stockholders, directors, trustees, or other officers, or any of them, are made liable by law, in any event or contingency, for the payment of his debt, the persons so made liable may be made parties defendant, by the original or by a supplemental complaint; and their liability may be declared and enforced by the judgment in the action.[3]

Sec. 168a. Same—Bringing in stockholders—Voluntary appearance—Effect of.—In the case of People v. Hydrostatic Paper Co.,[4] an action was instituted in behalf of the state by the attorney-general, to procure the dissolution of the defendant, a manufacturing corporation. After the entry of judgment, terminating its corporate existence and appointing a receiver, by virtue of a written stipulation between him and two stock-

[1] 4 N. Y. R. S., 8th. ed., p. 2672, § 42, as amended by L. 1858, c. 348, and governed by the repealing act of 1880, c. 245, which declares that the section is "applicable to a permanent receiver appointed as prescribed in § 1788 of the Code of Civil Procedure."

[2] Verplanck v. Mercantile Ins. Co. 2 Paige Ch. (N. Y.) 438 (1831). See *ante*, § 164d.

[3] N. Y. Code Civ. Proc., § 1790. See Kincaid v. Dwinelle, 59 N. Y. 548 (1875).

[4] 88 N. Y. 623 (1882).

holders, who he claimed had in their possession assets belonging to the corporation, and in accordance with the statute, the matter was sent to a referee, who reported that said stockholders had such assets in their hands, which, so far as was necessary to pay debts and expenses, and produce equality of final distribution, they had no right to retain; no exceptions were filed in the report; the receiver, instead of entering final judgment thereon, made up his account for presentation to the court, and filed a petition in this action, reporting therein the precise amount necessary to be restored by said stockholders, and praying that said stockholders be adjudged to pay. A copy of the petition, with notice of application to the court thereon, was served on said stockholders who appeared at special term, and also before a referee appointed to ascertain the facts, and litigated the correctness of the receiver's accounts and the amount of their liability, without questioning the right of the referee to determine the amount of assets they should restore. On the coming in of the report judgment was entered therein against them for the amount so ascertained, and the court held, that although such judgment was beyond the legitimate and regular purposes of the action, yet said stockholders might have been brought in by a supplemental complaint and by their voluntary appearance they rendered this unnecessary and became parties, the court had power to make a final determination of the question, and having had full opportunity to be heard, they could not now complain.

Sec. 169. Same—When Separate Action may be brought against Stockholders, etc.—Where the stockholders, directors, trustees, or other officers of a corporation, who are made liable, in any event or contingency, for the payment of a debt, are not made parties defendant as prescribed in the last section,[1] the plaintiff in the action may maintain a separate action against them, to procure a judgment, declaring, apportioning, and enforcing their liability.[2]

[1] *Supra*, § 168.

[2] N. Y. Code Civ. Proc., § 1791. See Kincaid v. Dwinelle, 59 N. Y. 548 (1875).

Sec. 170. Same—Proceedings in Action—Ascertaining Defendants' Liability.—In an action, brought as prescribed in either of the last two sections,[1] the court must, when it is necessary, cause an account to be taken of the property and of the debts of the corporation, and thereupon the defendants' liability must be apportioned accordingly ; but, if it affirmatively appears, that the corporation is insolvent, and has no property to satisfy its creditors, the court may, without taking such an account, ascer. tain and determine the amount of each defendant's liability, and enforce the same accordingly.[2]

Sec. 171. Same—Judgment—Distribution of Corporate Property.—A final judgment in an action, brought against a corporation, as prescribed in this article, either separately or in conjunction with its stockholders, directors, trustees, or other officers, must provide for a just and fair distribution of the property of the corporation, and of the proceeds thereof, among its fair and honest creditors, in the order and in the proportions prescribed by law, in case of the voluntary dissolution of a corporation.[3]

Sec. 171a. Decree of sequestration—Effect.—The provision that in an action for the sequestration of the property of a corporation, its property, after the payment of creditors, should be distributed among the stockholders instead of being returned to the corporation, seems to indicate that a final decree of sequestration works a practical dissolution of the corporation.[4]

Sec. 171b. Same—Payment of debts.—Where a dividend was properly declared, and checks to the order of stockholders

[1] *Supra*, §§ 168, 169.
[2] N. Y. Code Civ. Proc., § 1792.
[3] N. Y. Code Civ. Proc., § 1793.
[4] Eddy v. Co-operative Dress Ass., 3 N. Y. Civ. Proc. Rep. 442 (1883). See Eddy v. Co-operative Dress Ass., 3 N. Y. Civ. Proc. Rep. 434 (1883).

were ordered to be drawn on a bank where the money was, it was held, there was an equitable appropriation of the money, so that stockholders were entitled to it as against creditors;[1] and where a savings bank having money on deposit with another bank changes it to a call loan, after both banks have become insolvent, the receiver of the savings bank is estopped from questioning the acts of the bank officers, in converting the deposit into a call loan, and cannot claim preference under the statute.[2]

It has been said that a receiver of an insurance company cannot be compelled to pay a check drawn by the company in settlement of loss, before his appointment, out of the funds on which the check was drawn, although such funds were withdrawn from the bank by the receiver before the presentation of the check, the check not having been drawn on any particular fund so as to become an equitable assignment.[3] The holder of a policy in a life insurance company, which matured before the appointment of a receiver, has no right to claim payment before the general distribution, though, perhaps, in an exceptional case, the court may order it.[4]

Sec. 171c. Same—References.—The creditor who brings the action gets no preference. The final decree is for the benefit of all.[5] A general creditor by a prior judgment has no lien on unpaid stock subscriptions in preference to other judgment-creditors;[6] and a surety of a corporation has no preference.[7]

Sec. 171d. Same—Interest.—Interest should be adjusted up to the date of the assignment; and if the assets are more than

[1] LeRoy v. Globe Ins. Co., 2 Edw. Ch. (N. Y.) 657 (1836).

[2] L. 1875, c. 371, § 48. See Rosenback v. M. & B. Bank, 10 Hun (N. Y.) 148 (1877), aff'd 69 N. Y. 358.

[3] Matter of Merrill 71 N. Y. 325 (1877); rev'd 10 Hun (N. Y.) 604.

[4] People ex rel. Attor.-Gen. v. Security L. Ins. Co., 71 N. Y. 222 (1877); s. c. 11 Hun (N. Y.) 96.

[5] Morgan v. New York & Alb. R R. Co. 10 Paige Ch. (N. Y.) 290 (1843); s. c. 40 Am. Dec. 244; 2 N. Y. Leg. Obs. 246; Lowne v. American F. Ins. Co., 6 Paige Ch. (N. Y.) 482 (1837).

[6] Rankin v. Elliott, 14 How. (N. Y.) Pr. 339 (1856); aff'd 16 N. Y. 377.

[7] Matter of Croton Ins. Co. 2 Barb. Ch. (N. Y.) 360 (1847).

sufficient to pay the sum so found due, subsequent interest should be paid on all debts ratably.[1]

Sec. 171e. Same—Employees' salaries—Attorney and Counsel fees.—An order directing the receiver to pay all debts "owing to the laborers and employees" of the company "for labor and services actually done in connection with" its business, has been construed to include attorney and counsel fees in litigation connected with the road.[2]

Sec. 171f. Same—Officer's salaries—. The officers of an insolvent corporation are not entitled to have their salaries paid in full in preference to the debts of other creditors; they are only entitled to be paid their ratable proportion of the assets of the company as between them and other creditors.[3] While officers have no preference for salaries,[4] yet it is thought that they may set off salary against a debt.[5]

A corporation entered into an agreement with one L. whereby it employed him for one year as its superintendent at $10,000 per annum. Seven months thereafter a receiver of its property was appointed in a sequestration action and the receiver discharged L. A judgment of sequestration and directing a distribution of the property of the corporation was thereafter entered and a dividend declared by the receiver. L. presented to him a claim for damages sustained by reason of such discharge, which the receiver rejected. L. thereupon moved that his claim be allowed, and the receiver directed to pay him a dividend thereon. The court said that while this case could be distinguished from that of the People v. The Globe Mutual Life Insurance,[6] wherein it was held that a judgment dissolving an insolvent insurance company terminated a contract of employment of an agent made by it, the principle of that case was applicable; also held, that L. was not, at the

[1] Matter of Murray, 6 Paige Ch. (N. Y.) 204 (1836).

[2] Gurney v. Atlantic & G. W. R. R. Co., 58 N. Y. 358 (1874), rev'g 2 T. & C. (N. Y.) 446.

[3] In re Croton Ins. Co., 3 Barb. Ch. (N. Y.) 642 (1847).

[4] Bruyn v. Receiver of Middle Dist. Bk., 1 Paige Ch. (N. Y.) 584 (1829); Matter of Croton Ins. Co., 3 Barb. Ch. (N. Y.) 642 (1847).

[5] Matter of Croton Ins. Co., 3 Barb. Ch. (N. Y.) 642 (1847).

[6] 91 N. Y. 174 (1883); s. c. 16 N. Y. Week. Dig. 225, affirming 4 How. (N. Y.) Pr. 240.

time of appointing the receiver, a creditor of the corporation; that the assets of the company were subject to claims of the creditors then existing, and such claims must be first satisfied before the fund could be used for another purpose.[1]

Sec. 172. Same—Subscriptions to Stock—Recovery of.—Where the stockholders of a corporation are parties to the action, if the property of the corporation is not sufficient to discharge its debts, the interlocutory or final judgment, as the case requires, must adjudge that each stockholder pay into court the amount due and remaining unpaid, on the shares of stock held by him, or so much thereof as is necessary to satisfy the debts of the corporation.[2]

Sec. 172a. Same—Liability of stockholders.—Acceptance and holding of a certificate of stock subject to the liabilities of a stockholder.[3] But a court cannot on summary application, order stockholders to pay a receiver in a creditor's suit, moneys due on stock.[4]

A creditor who files a bill to procure a receiver should amend where necessary, by making stockholders parties, so as to collect amounts due on shares.[4] Where the stockholders subscription contained no express promise to pay, the court held, that the receiver could not proceed against part of the stockholders; the creditor who filed the original bill, should, if the assets prove not sufficient, amend and make the delinquent shareholders parties to.[5] A credit of wrongful dividend as a payment of a call on stock, is not payment. Nor is a resolution of the directors that there should be no more calls, a defence.[6]

[1] Eddy v. Co-operative Dress Ass'n 3 N. Y. Civ. Proc. Rep. 442 (1883).

[2] N. Y. Code Civ. Proc., § 1794.

[3] Van Cott v. Van Brunt, 2 Abb. (N. Y.) N. C. 283 (1877). See Wheeler v. Millar, 90 N. Y. 353 (1882), aff'g 24 Hun (N. Y.) 541.

[4] Matter of Canajoharie & Catsk. R. R. Co., 2 N .Y. Leg. Obs. 199 (1843).

[4] Mann v. Pentz, 3 N. Y. 415 (1850), rev'g 2 Sandf. Ch. (N. Y.) 257 (1845).

[5] Mann v. Pentz, 3 N. Y. 415 (1850), rev'g 2 Sandf. Ch. (N. Y.) 257 (1845).

[6] Sagory v. Dubois, 3 Sandf. Ch. (N. Y.) 466 (1846).

Sec. 172b. Same—Who are stockholders.—A stockholder is the person in whose name stock stands on the books, although he has in fact transferred it.[1]

Sec. 173. Same—Liabilities of Directors and Stockholders.—If it appears, that the property of the corporation, and the sums collected or collectable from the stockholders, upon their subscriptions, are or will be insufficient to pay the debts of the corporation, the court must ascertain the several sums, for which the directors, trustees or other officers, or the stockholders of the corporation being parties to the action, are liable; and must adjudge that the same be paid into court, to be applied, in such proportions and in such order as justice requires, to the payment of the debts of the corporation.[2]

Sec. 173a. Same—Failure to pay debts—Liability of stockholder.—It has been said that where the return of an execution at law unsatisfied is the ground of proceeding against a corporation, and the effects of the corporation are not sufficient to pay the debts, the creditor may resort to equity and recover the amount of unpaid subscriptions to the capital stock; but that in such a case each shareholder is liable only in due proportion with the others, and the bill should be filed by the creditor in behalf of all the creditors against the corporation, and all the shareholders who have not paid their subscriptions, so that an account may be taken of the debts and assets of the corporation, of the amount of capital not paid in, and the sum due from each shareholder.[3]

It is thought that where the rights of the creditors are not in question an action will not lie against a subscriber to the capital stock of a corporation to recover his subscription, or any part thereof, until he is in default after regular calls

[1] Mann v. Currie, 2 Barb. (N. Y.) 294 (1848).

[2] N. Y. Code Civ. Proc., § 1795.

[3] Mann v. Pentz, 3 N. Y. 415 (1850).

upon him pursuant to the charter.[1] Directors who by permitting the debts to exceed the statute limit, become liable to creditors, are entitled to the same deductions for advances after dissolution as before.[2]

Sec. 174. Same—Limiting effect of Article.—This article does not repeal or affect any special provision of law, prescribing that a particular kind of corporation shall cease to exist, or shall be dissolved, in a case or in a manner, not prescribed in the article; or any special provision of law, prescribing the mode of enforcing the liability of the stockholders of a particular kind of corporation.[3]

Sec. 174a. Same—Charter liabilities.—Under a charter which provides that the stockholders shall be liable until the amount of capital stock has been paid in, judgment creditors are not proper parties defendant, without showing why they were not made parties plaintiff.[4] And where the charter made stockholders jointly and severally liable for debts to the amount of their stock, and gave creditors a right to sue therefor after demand and refusal, it was held that a creditor could file his bill against stockholders known to him, seeking a discovery of the others, and for payment of his simple contract demand.[5]

Sec. 175. Same—Proceeding by the People—Action by Attorney-General—Direction by Legislature.—The attorney-general, whenever he is so directed by the legislature, must bring an action against a corporation created by or under the laws of the state, to procure

[1] Mann v. Pentz, 3 N. Y. 415 (1850).

[2] Tallmadge v. Fishkill Iron Co., 4 Barb. (N. Y.) 382 (1848).

[3] N. Y. Code Civ. Proc., § 1796. Creditors' bills may be maintained against stockholders of a corporation among whom its property has been divided. Bartlett v. Drew, 57 N. Y. 587 (1874), affirming 4 Lans. (N. Y.) 444; 60 Barb. (N. Y.) 648.

[4] Young v. New York & Liv. Steamship Co., 10 Abb. (N. Y.) Pr. 229 (1860), aff'd 15 Abb. (N. Y.) Pr. 69 (1861).

[5] Bogardus v. Rosendale Mfg. Co., 7 N. Y. 147 (1852), rev'g 4 Sandf (N. Y.) 89.

a judgment, vacating or annulling the act of incorporation, or any act renewing the corporation, or continuing its corporate existence, upon the ground that the act was procured upon a fraudulent suggestion, or the concealment of a material fact, made by or with the knowledge and consent of any of the persons incorporated.[1]

Sec. 175a. Action to forfeit charter—By whom brought.—An action may be brought in the name of the people against a corporation and its officers, on the ground of mismanagement, by them for the purpose of compelling them to account, and for their removal, and for the appointment of a receiver.[2] But where an action is brought to annul the corporation and vacate the charter for fraud and concealment in obtaining the charter,[3] or for violation of law, or forfeiture, or surrender or usurpation of franchise,[4] the action must be by the attorney-general.

Officers of a corporation who have defrauded it, cannot, by causing a suit to be begun by one of their confederates, and having another confederate appointed as receiver, prevent the attorney-general from bringing an action against them and their company, and his having a receiver appointed therein.[5]

Although a corporation has abused its power, or committed acts which are unlawful, it nevertheless continues to exist as a corporate body, until, by proper proceedings, the charter has been declared to be forfeited.[6]

Where the dissolution of a corporation has been decreed by the court the intervention by the attorney-general to enforce the priority of the tax is unnecessary.[7]

[1] N. Y. Code Civ. Proc., § 1797. See *post*, § 182.

[2] People v. Bruff, 9 Abb. (N. Y.) N. C. 153 (1880).

[3] N. Y. Code Civ. Proc., § 1797, *ante*. § 175.

[4] N. Y. Code Civ. Proc., § 1798; *post*, § 176.

[5] People v. Bruff, 9 Abb. (N. Y.) N. C. 153 (1880).

[6] Ormsby v. Vermont Copper Mining Co., 65 Barb. (N. Y.) 360 (1873).

[7] Matter of Columbian Ins. Co., 3 Abb. App. Dec. (N. Y.) 239 (1866).

Sec. 176. Same—Leave of Court to Sue—Grounds for Annulling Charter.—Upon leave being granted, as prescribed in the next section,[1] the attorney-general may bring an action against a corporation created by or under the laws of the state, to procure a judgment, vacate the charter or annul the existence of the corporation, upon the ground that it has, either,

1. Offended against any provision of an act, by or under which it was created, altered, or renewed, or an act amending the same, and applicable to the corporation ; or

2. Violated any provision of law, whereby it has forfeited its charter, or become liable to be dissolved by the abuse of its powers ; or

3. Forfeited its privileges or franchises, by a failure to exercise its powers ; or

4. Done or omitted any act, which amounts to a surrender of its corporate rights, privileges, and franchises ; or

5. Exercised a privilege of franchise, not conferred upon it by law.[2]

Sec. 176a. Application for leave to sue.—A forfeiture of the franchise of a corporation, in the absence of any special statutory provision, can only be enforced by the sovereign power to which the corporation owes its life, in some proceeding instituted in behalf of the sovereignty.[3] The application by the attorney-general,[4] for leave to bring an action must be

[1] *Post*, § 177.

[2] N. Y. Code Civ. Proc., § 1798.

[3] Denike v. New York R. L. & C. Co., 80 N. Y. 599 (1880).

[4] It is said in the case of People v. Boston H. T. & W. R. Co., 27 Hun (N. Y.) 328 (1882); s. c. 15 N. Y. Week. Dig. 228, that it is not necessary for the attorney-general to obtain leave of the court to bring an action under § 1948 of the Code of Civil Procedure against persons assuming to act as a corporation within the state without being duly incorporated.

made on a written petition, and whatever papers are referred to in such petition should be filed therewith;[1] such petition must be signed by the attorney-general, and the power so to sign cannot be delegated.[2]

The pendency of voluntary proceedings for the dissolution of a corporation on the ground of its insolvency under the New York Code Civil Procedure,[3] is no bar to a proceeding by the attorney-general in the name of the people, under Code Civil Procedure, c. 15, tit. 2, art. 3, to dissolve the corporation on the sole ground of non-user.[4]

Sec. 176b. Same—Question passed upon by the court.—It is thought that under the New York Code,[5] conferring on the attorney-general "upon leave granted" power to sue a corporation to vacate its charter it is not for the court to inquire whether the suit is a wise one, but only whether the attorney-general alleges a *prima facie* case, or a case of such gravity that it should be judicially determined.[6]

Sec. 176c. Same—Leave granted ex parte.—The attorney-general may apply *ex parte* for leave to bring an action, but the court may direct notice to the proposed defendant.[7] Where leave has been given *ex parte* the court may, on a motion to set aside, inquire into the regularity of the proceedings.[8]

Sec. 176d. Same—Notice of application.—It is thought that whether or not notice of the application for leave to sue shall be given to the corporation to be sued rests in the discretion of the court, and that a failure of the court to require any

[1] People ex rel. Gould. v. Mutual Union Tel. Co., 2 N. Y. Civ. Proc. Rep. 295 (1883).

[2] People ex rel Gould. v. Mutual Union Tel. Co., 2 (N. Y.) Civ. Proc. R. 295 (1883).

[3] N. Y. Code Civ. Proc., Chapter 17, tit. 11.

[4] People v. Seneca Lake Grape & Wine Co., 52 Hun, 174 (1889); s. c. 23 N. Y. St. Rep. 346; 5 N. Y. Supp. 136.

[5] New York Code Civ. Proc. § 1798, *ante*, § 176.

[6] In re Application of Attorney-General, 50 Hun (N. Y.) 511 (1888) s. c. 3 N. Y. Supp. 464.

[7] People ex rel Gould v. Mutual Union Tel. Co., 2 N. Y. Civ. Proc. R. (N. Y.) 295. (1883).

[8] People ex rel. Gould v. Mutual Union Tel. Co., 2 N. Y. Civ. Proc. Rep. 295 (1883).

notice to be given does not render the order subsequently made invalid.[1]

Sec. 176e. Same—Leave not properly granted—Effect.—It seems that where leave of the court to bring an action against a corporation for the forfeiture of its charter and a dissolution of its corporate existence has not been granted as required by the Code of Civil Procedure,[2] a judgment dissolving the corporation cannot be granted.[3]

Sec. 176f. Same—Review and reversal.—It is said that an order granting leave to sue will not be reviewed on appeal except where the complaint on its face shows the action is unfounded.[4] As to what effect the reversal or vacating of an order allowing such an action to be brought would have upon the action if it had already been commenced, has not been determined.[5]

It seems, however, that the general term will not reverse upon appeal an order made by the court under the provisions of the Code of Civil Procedure [6] granting leave to the attorney-general to bring an action and procure a judgment to vacate the charter or annulling the existence of a corporation for one of the reasons specified in said section of the code, unless, perhaps, in extreme cases where the complaint is on its face wholly without foundation.[7]

Sec. 176g. Same—Parties.—Where an action is brought to vacate the charter of a corporation, such as a railroad or turnpike corporation, another corporation which has become the lessee of a part of the road and franchise of the defendant corporation, is entitled, on its application, to be made a

[1] People v. Boston H. T. & W. R. Co., 27 Hun (N. Y.) 528 (1882) s. c. 15 N. Y. Week. Dig. 228.

As to when notice may be dispensed with see Howlett v. New York W. S. R. Co. 14 Abb. (N. Y.) N. C. 328 (1882)

[2] N. Y. Code Civ. Proc. §. 1789.

[3] People v. Lowe, 47 Hun (N. Y.) 577 (1888.)

[4] People v. Boston H. T. & W. R. Co., 27 Hun (N. Y.) 528 (1882); s. c. 15 N. Y. Week. Dig. 228.

[5] People v. Boston H. T. & W. R. Co., 27 Hun (N. Y.) 528 (1882) s. c. 15 N. Y. Week. Dig. 228.

[6] N. Y. Code Civ. Proc. 1798, *ante*, § 176.

[7] People v. Boston H. T. & W. R. Co., 27 Hun (N. Y.) 528 (1882) s. c. 15 N. Y. Week. Dig. 228.

defendant in such action for the purpose of protecting its interests.[1]

Sec. 176h. Same—Grounds of action—Non-compliance.—Non-compliance with the requirements of the act of incorporation as to the completion and conduct of the business is a misuser which forfeits the charter privileges; but non-compliance with such conditions must be substantially shown.[2] It seems, however, that an omission of the corporation to exercise its powers, unconnected with other acts will not work a forfeiture of its franchise;[3] neither will mere nonuser under special charter.[4]

It has been said that to warrant a judgment against a turnpike company, after the lapse of fifty years from its incorporation and the construction of its road, for failing to comply with the statute in the original construction, and for failing to keep its road in repair, the verdict must show not merely a breach of the letter of the subsequent condition, but that the original deviation was material, and resulted in injury to the public, or that the want of repair was such as to render the road dangerous or inconvenient to travellers.[5]

Sec. 176i. Same—Surrender of corporate rights.—As to the creditors, a corporation may be dissolved by a surrender of its corporate rights. Suffering an act to be done which destroys the end and object of its creation is equivalent to a surrender;[6] but the mere purchase by copartners of the charter and property of a manufacturing corporation, does not dissolve it.[7]

[1] People v. Albany & Vt. R. Co., 77 N. Y. 232 (1879); rev'g 15 Hun (N. Y.) 126.

[2] People v. Kingston & M. Turnpike Co., 23 Wend. (N. Y.) 194 (1840); s. c. 35 Am. Dec. 551.

[3] See Attorney-General v. Bank of Niagara, 1 Hopk. Ch. (N. Y.) 354 (1825).

[4] People v. Bank of Washington & W., 6 Cow. (N. Y.) 211 (1826); People v. Bank of Niagara, 6 Cow. (N. Y.) 196 (1826).

[5] People v. Williamsburgh T. R. & B. Co. 47 N. Y. 586. (1872).

[6] People v. Bank of Hudson 6 Cow. (N. Y.) 217 (1826); Briggs v. Penniman, 8 Cow. 387 (1826); s. c. 18 Am. Dec. 454, aff'g Hopk. Ch. (N. Y.) 300; Slee v. Bloom, 19 Johns. (N. Y.) 456 (1821); s. c. 10 Am. Dec. 273.

[7] Wilde v. Jenkins, 4 Paige Ch. (N. Y.) 481 (1834).

Sec. 176j. Same—Attachment against directors.—It was held by the New York Supreme Court in the case of People v. Cohocton Stone Road Co.,[1] that the only provisions of law in force authorizing an attachment against the directors of a dissolving corporation to collect the costs awarded in an action for the dissolution of said corporation is the one contained in the Code of Civil Procedure,[2] and that actions brought under section 1789 of the Code of Civil Procedure are not included within the provisions of section 1987.

Sec. 177. Same—Leave to Sue—When and how Granted.—Before granting leave, the court may, in its discretion, require such previous notice of the application, as it thinks proper, to be given to the corporation, or any officer thereof, and may hear the corporation in opposition thereto.[3]

Sec. 178. Same—Action triable by a jury.—An action, brought as prescribed in this article, is triable, of course and of right, by a jury, as if it was an action specified in section 968[4] of this act, and without procuring an order, as prescribed in section 970[5] of this act.[6]

Sec. 178a. Same—Discontinuance.—It has been held that the attorney-general, in an action by the people against a corporation, may, in his discretion, discontinue the suit.[7]

Sec. 179. Same—Form of Judgment.—Where any of the matters, specified in section 1797[8] or section 1798[9] of this act, are established in an action brought as prescribed in either of those sections, the court may render final judgment that the corporation, and each officer thereof, be perpetually enjoined from exer-

[1] 25 Hun (N. Y.) 13 (1881).
[2] N. Y. Code Civ. Proc., § 1987.
[3] N. Y. Code Civ. Proc., § 1799.
[4] N. Y. Code Civ. Proc., § 968.
[5] N. Y. Code Civ. Proc., § 970.
[6] N. Y. Code Civ. Proc., § 1800.
[7] People v. Tobacco Manufg Co., 42 How. (N. Y.) Pr. 162 (1871).
[8] N. Y. Code Civ. Proc., § 1797; *ante*, § 175.
[9] N. Y. Code Civ Proc., § 1798; *ante*, § 176.

cising any of its corporate rights, privileges, and franchises ; and that it be dissolved. The judgment must also provide for the appointment of a receiver, the taking of an account, and the distribution of the property of the corporation, among its creditors and stockholders, as where a corporation is dissolved upon its voluntary application, as prescribed in chapter seventeenth of this act.[1]

Sec. 180. Same—Injunction may be Granted.—In an action, brought as prescribed in this article, an injunction order may be granted, at any stage of the action, restraining the corporation, and any or all of its directors, trustees, and other officers, from exercising any of its corporate rights, privileges, or franchises ; or from exercising certain of its corporate rights, privileges, or franchises specified in the injunction order ; or from exercising any franchise, liberty or privilege, or transacting any business, not allowed by law. Such an injunction is deemed one of those specified in section 603[2] of this act, and all the provisions of title second of chapter seventh of this act, applicable to an injunction specified in that section, apply to an injunction granted as prescribed in this section, except that it can be granted only by the court.[3]

Sec. 181. Same—Judgment Roll—Copy of to be filed and Published.—Where final judgment is rendered against a corporation, in an action, brought as prescribed in this article, the attorney-general must cause a copy of the judgment-roll to be forthwith filed in the office of the secretary of state ; who must

[1] N. Y. Code Civ. Proc., § 1801.
[2] N. Y. Code Civ. Proc., § 603.
[3] N. Y. Code Civ. Proc., § 1802.

cause a notice, of the substance and effect of the judgment, to be published, for four weeks, in a newspaper printed at Albany, in which legal notices are required to be published, and also in a newspaper printed in the county wherein the principal place of business of the corporation was located.[1]

Sec. 182. Same—The Corporations Excepted from certain Articles of this Title.—Articles second, third and fourth of this title do not apply to an incorporated library society ; to a religious corporation ; to a select school or academy, incorporated by the regents of the university, or by an an act of the legislature ; or to a municipal or other political corporation, created by the constitution or by or under the laws of the state.[2]

Sec. 182a. Same.—Compelling trustees to execute trust.—It has been said that a court of equity has no common law power to compel trustees to execute their trusts, and may remove them if necessary. This is independent of statute, and extends to religious corporations.[3]

Sec. 182b. Same—Religious corporation—Removal of trustees.—The court has no power of removal of a trustee of a religious corporation, formed under the general statute for such bodies, other than its general statutory power as to all corporations and their officers. This is so, even if the court be held to have a further general power derived from its power over trusts and trustees.[4]

Sec. 182c. Same—Trustees of benevolent societies—Contract for legislative appropriation.—If the trustees of a benevolent corporation agree to pay one whatever amount he might procure to be appropriated by the legislature in excess of a

[1] N. Y. Code Civ. Proc., § 1803.
[2] N. Y. Code Civ. Proc., § 1804.
[3] Bowden v. McLeod, 1 Edw. Ch. (N. Y.) 588 (1833); Baptist Church v. Witherell, 3 Paige, Ch. (N. Y.) 296 (1832); Kniskern v. Lutheran Churches, &c., 1 Sandf. Ch. (N. Y.) 439 (1844).
[4] Robertson v. Bullions 11 (N. Y.) 243 (1854); aff'g 9 Barb. (N. Y.) 64.

sum specified, and if they so pay him, it is such an abuse of the powers of the corporation as to constitute a sufficient cause for its dissolution.[1]

Sec. 182d. Same — Educational corporations — Sciences and arts.— A "lyceum, incorporated for the promotion of intellectual and moral improvement," with power to have a cabinet of natural history, library, etc., and all to be devoted to literature, science and the arts, is to be excepted.[2]

Sec. 183. Same—Evidence—Officers and Agents may be Compelled to Testify.—In an action brought as prescribed in article second, third or fourth of this title, a stockholder, officer, alienee or agent of a corporation is not excused from answering a question relating to the management of the corporation, or the transfer or disposition of its property, on the ground that his answer may expose the corporation to a forfeiture of any of its corporate rights, or will tend to convict him of a criminal offence, or to subject him to a penalty or forfeiture. But his testimony shall not be used as evidence against him in a criminal action or special proceeding.[3]

Sec. 184. Same — Actions by Creditors — Injunction staying.—In such an action the court may, in its discretion, on the application of either party, at any stage of the action, before or after final judgment, and with or without security, grant an injunction order restraining the creditors of a corporation from bringingactio ns against the defendants, or any of them, for the recovery of a sum of money, or from taking any further proceedings in such actions theretofore commenced. Such an injunction has the same effect, and, except as otherwise expressly prescribed in this

[1] People v. Dispensary & Hospital Soc., 7 Lans. (N. Y.) 304 (1873).

[2] Matter of Brooklyn Lyceum, 3 Edw. Ch. (N. Y.) 392 (1840).

[3] N. Y. Code Civ. Proc., § 1805.

section, is subject to the same provisions of law, as if each creditor upon whom it is served was named therein, and was a party to the action in which it is granted.[1]

Sec. 184a. Same—Injunction staying suit.—In an action by a stockholder of a corporation for a receiver, and another by a judgment creditor for the sequestration of its property for the benefit of all concerned, an attaching creditor, although not strictly a party on the record, is nevertheless and in fact a party because he is a creditor, so that he is enjoined by a general injunction granted under the provisions of the Code.[2] When a receiver is appointed, he has the right to collect unpaid stock subcriptions, and a judgment creditor's action begun after the order of the sequestration, but before the appointment of the receiver is perfected is stayed by injunction.[3] In special proceedings to wind up a dissolved corporation, an action by a creditor against a receiver may be enjoined, and this will be done if it will hamper the receiver and increase expenses.[4]

Sec. 184b. Same—Restraining action to obtain preference.—The courts are authorized to restrain by injunction an action at law by a creditor of an insolvent corporation to obtain an undue preference. Thus where an insolvent corporation was suffering creditors of a certain class to obtain judgments to an amount greater than one half the value of its property, with the view to give such creditors a preference, and an action was brought by a creditor at large to dissolve the company and distribute its assets, the court held that the course of the trustees of the company was illegal, and that the creditors so preferring to take judgment should be enjoined from further proceeding in their actions, with the exception

[1] N. Y. Code Civ. Proc., § 1806.

[2] Smith v. Danzig, 3 N. Y. Civ. Proc. Rep. 127 (1883).

[3] Rankine v. Elliott, 16 N. Y. 377 (1857); aff'g 14 How. (N. Y.) Pr. 339.

[4] People by Attorney-General v. North America L. Ins. Co., 6 Abb. (N. Y.) N. C. 293 (1879); s. c. 77 N. Y. 297; 6 Abb. (N. Y.) N. C. 302 (1879); rev'g 15 Hun (N. Y.) 18.

of entering judgment to stand as security for their respective claims.[1]

Sec. 184c. Same—Against Stockholder.—Under a charter making each stockholder liable to every creditor whose execution is unsatisfied, for the whole debt, the court cannot, on the application of one creditor, restrain the others from proceeding aganist the corporation or stockholders.[2]

Sec. 185. Same—Creditors may be brought in.—In such an action the court may, at any stage of the action, before or after final judgment, make an order requiring all the creditors of the corporation to exhibit and prove their claims, and thereby make themselves parties to the action, in such a manner, and within such a reasonable time, not less than six months from the first publication of notice of the order, as the court directs; and that the creditors who make default in so doing shall be precluded from all benefit of the judgment and from any distribution which may be made thereunder. Notice of the order must be given by publication in such newspapers and for such a length of time as the court directs.[3]

Sec. 185a. Same—Bringing in creditors.—Where compulsory proceedings have been instituted for the dissolution of an insolvent corporation and the distribution of its assets, and a receiver has been appointed for the effects of such corporation, a creditor claiming a share therein must apply in such action or proceeding, and in the district where the receiver was appointed.[4] The manner in which creditors of a corporation

[1] Galwey v. United States Steam Sug. Ref. Co., 13 Abb. (N. Y.) Pr. 211 (1861); s. c. 21 How. (N. Y.) Pr. 313, affirming 36 Barb. (N. Y.) 256.

[2] Judson v. Rossie Galena Co., 9 Paige Ch. (N. Y.) 598 (1842); s. c. 38 Am. Dec. 569.

[3] N. Y. Code Civ. Pro., § 1807.

[4] Rinn v. Astor Fire Ins. Co., 59 N. Y. 143 (1874); Attorney-General v. North American Life Ins. Co., 6 Abb. (N. Y.) N. C. 297 (1879); see s. c. 77 N. Y. 297; 6 Abb. (N. Y.) N. C. 302.

are to make themselves parties to a suit commenced against a corporation to wind up its affairs, must be substantially the same as those in which creditors of a deceased individual make themselves parties to a suit for settlement of his debts and credits by coming in under a decree and proving their debts.[1]

In the Matter of the Harmony Fire and Marine Insurance Company,[2] an order having been granted by the Supreme Court under the Revised Statutes, in reference to proceedings against corporations in equity, requiring all the creditors of the corporation to exhibit their claims, and become parties to the suit within six months from the publication, or in default thereof to be precluded from distribution ; it was held that at the expiration of the time fixed, a creditor who had failed to present his claim was wholly excluded from any share in the assets, and this although he had delivered an account of his claim in accordance with the provisions of the statute before the second dividend.

Sec. 185b. Same—Failure to come in.—Where creditors do not come in within the time limited by the published notice they are precluded from sharing in the assets. In the case of People ex rel. Attorney-General v. Security Life Insurance and Annuity Company[3] and the Matter of Harmony Fire and Marine Insurance Company,[4] where an order had been granted by the supreme court requiring all the creditors of a corporation to exhibit their claims and become parties to the suit within six months from the first publication thereof, or in default to be precluded from sharing in the distribution, the court held that at the expiration of the time fixed a creditor who had failed to present his claim was wholly excluded from any share in the assets, notwithstanding the fact that he had delivered an account of his claim as required by statute before a second dividend.

Sec. 185c. Same—Misleading statements of receiver.—In those cases, however, where a creditor having been misled by statement of the receiver, failed to present his claim within the

[1] Judson v. Rossie Galena Co., 9 Paige Ch. (N. Y.) 598 (1842); s. c. 38 Am. Dec. 569.

[2] 45 N. Y. 310 (1871).

[3] 79 N. Y. 267 (1879).

[4] 45 N. Y. 310 (1871).

time limited, and it was consequently rejected, an order granting further time will be properly made, and the court has power to grant such an order.[1]

Sec. 186. Same—When Attorney-General must bring action.—Where the attorney-general has good reason to believe that an action can be maintained in behalf of the people of the state, as prescribed in article second, third or fourth of this title, except section 1797[2] of this act, he must bring an action accordingly, or apply to a competent court for leave to bring an action, as the case requires; if, in his opinion, the public interests require that an action should be brought. In a case where the action can be brought only by the attorney-general in behalf of the people, if a creditor, stockholder, director or trustee of the corporation applies to the attorney-general for that purpose, and furnishes the security required by law, the attorney-general must bring the action, or apply for leave to bring it, if he has good reason to believe that it can be maintained. Where such an application is made, section 1986[3] of this act applies thereto, and to the action brought in pursuance thereof.[4]

Sec. 187. Same—Injunction against Corporations in Certain Cases—Requisites of.—An injunction order suspending the general and ordinary business of a corporation, or of a joint-stock association, consisting

[1] People ex rel. Attorney-General v. Security Life Ins. & Annuity Co., 79 N. Y. 267 (1879).

[2] See *ante*, § 175.

[3] See *ante*, § 163.

[4] N. Y. Code Civ. Proc., § 1808. An action to annul a charter of a corporation must be brought by the attorney-general in the name of the people in the mode required by statute. Smith v. Metropolitan Gas Light Co., 12 How. (N. Y.) Pr. 187 (1855). As to the circumstances which make it the duty of the attorney-general to proceed under this section, see People v. Bruff, 60 How. (N. Y.) Pr. 1 (1880), and People v. Globe Life Ins. Co., 60 How. (N. Y.) Pr. 82 (1880).

of seven or more persons, or suspending from office or restraining from the performance of his duties a trustee, director or other officer thereof, can be granted only by the court, upon notice of the application therefor to the proper officer of the corporation or association, or to the trustee, director or other officer enjoined. If such an injunction order is made, otherwise than is prescribed in this section, it is void.[1]

Sec. 187a. Same—Suspension of business by injunction.—Where it is sought to suspend or restrain the business which the corporation was created to carry on, as for example, in case of a railroad company, the building of the road or leasing to contractors pending construction and as a means thereof it is within the provisions of the Code as above set out; and it applies although the injunction granted does not use the words general and ordinary business, and suspends only a part of said business, although the corporation is acting illegally with reference to the business sought to be restrained and notwithstanding the fact that it has power to carry on the business in some manner other than that sought to be restrained.[2]

It has been said that an injunction should not be granted to restrain business corporations in respect to their general management, such as the investment of their surplus funds, unless the proposed action is shown to be in violation of their powers.[3]

Also, that the fact that a railroad corporation has been alleged to be insolvent and that a receiver thereof has been appointed in an action brought against it, does not authorize the court to restrain the receiver from proceeding to construct the road as authorized by the company's charter, so long as

[1] N. Y. Code Civ. Proc., § 1809.

[2] Town of Middletown v. Rondout & O.R. Co., 12 Abb. (N.Y.) Pr. N. S. 276 (1872); s. c. 43 How. (N. Y.) Pr. 144; affirmed 43 How. (N. Y.) Pr. 481.

[3] Bach v. Pacific Mail S. S. Co., 12 Abb. (N. Y.) Pr. N. S. 373 (1872).

[4] See Thompson v. Erie R. Co., 11 Abb. (N. Y.) Pr. N. S. 188 (1871).

its corporate rights and franchises have not been adjudged to be forfeited in an action brought against it by the people.[1]

In the case of Syracuse Savings Bank v. Syracuse, Chenango and New York Railroad Company,[2] an action was brought under the statute against a railroad corporation by a judgment-creditor to sequestrate its assets, etc., a receiver was appointed, who upon motion of stockholders holding a minority of the stock, without notice to the others, was ordered to sell the property and franchises of the company. Thereafter a motion was made by stockholders, holding a majority of the stock, on notice of the receiver and those stockholders who made the former application, for an order vacating the order of sale; this motion was denied. On appeal to the General Term the order denying the motion was affirmed, but a stay of proceedings under the order of sale was granted until the further order of the court, without prejudice to vacate said order of sale. On appeal from so much of the General Term order as granted the stay, and stated that the affirmance was without prejudice, held, that the portion of the order appealed from was within the discretion of the court below, and was not reviewable here; that as it appeared that the appellants were a minority of the stockholders, and that the stock was absolutely worthless as such, and it did not appear that any creditors asked for the sale, also it appearing that efforts were being made by the majority to utilize the road, there were facts sufficient before the court, upon which it could exercise its jurisdiction.

Sec. 187b. Same—Notice of application—Illegal business.—A corporation whose general and ordinary business is illegal, is within the provision of the Civil Code[3] providing that an injunction suspending the general and ordinary business of a corporation, can be granted only on notice to the proper officer of the corporation.[4]

Where an injunction restraining the ordinary business of a

[1] Moran v. Lydecker, 27 Hun (N. Y.) 582 (1882).

[2] 88 N. Y. 110 (1882).

[3] N. Y. Code Civ. Proc., § 1809.

[4] City of New York v. Starin, 56 N. Y. Super. Ct. (24 J. & S.) 153 (1888); s. c. 2 N. Y. Supp. 346, 16 N. Y. St. Rep. 882.

corporation also restrains another from transacting the business, who in fact controlled the corporation, its corporators being men in his employ and whose injunction would suspend the business of the corporation, the injunction, if granted without notice, is void under the Code,[1] as to such person as well as the corporation.[2]

Sec. 187c. Same—Restraining removal of treasurer.—An injunction to restrain directors from removing the treasurer and considering a resolution declaring the office vacant, is void and objection is not waived by a motion to dissolve.[3]

Sec. 188. Same—Receiver—Order appointing in certain cases.—A receiver of the property of a corporation can be appointed only by the court in one of the following cases :

1. An action, brought as prescribed in article second, third or fourth of this title.

2. An action brought for the foreclosure of a mortgage upon the property, over which the receiver is appointed, where the mortgage debt, or the interest thereupon has remained unpaid, at least thirty days after it was payable, and after payment thereof was duly demanded of the proper officer of the corporation; and where either the income of the property is specifically mortgaged, or the property itself is probably insufficient to pay the mortgage debt.

3. An action brought by the attorney-general, or by a stockholder, to preserve the assets of a corporation having no officer empowered to hold the same.

4. A special proceeding by the voluntary dissolution of a corporation.

Where the receiver is appointed in an action,

[1] N. Y. Code Civ. Proc., § 1809.

[2] City of New York v. Starin, 56 N. Y. Super. Ct. (24 J. & S.) 153 (1888); s. c. 2 N. Y. Supp. 346, 16 N. Y. St. Rep. 882.

[3] Wilkie v. Rochester & S. L. R. Co., 12 Hun (N. Y.) 242 (1877).

otherwise than by or pursuant to a final judgment, notice of the application for his appointment must be given to the proper officer of the corporation.[1]

Sec. 188a. Same—Vacating order.—A receiver cannot now be appointed after execution returned unsatisfied, upon motion or petition, but such appointment must be in an action, and by the supreme court on notice.[2] Where a receiver has been appointed the order cannot be vacated by consent.[3]

Sec. 189. Same—Officer—Judicial Suspension or Removal of.—A trustee, director, or other officer of a corporation shall not be suspended or removed from office, by a court or judge, otherwise than by the final judgment of a competent court, in an action brought by the attorney-general, as prescribed in section 1781 of this act.[4]

Sec. 190. Same—Application of the last Three Sections.—The last three sections apply to an action or a special proceeding, against a corporation, or a joint-stock association created by or under the laws of this state, or a trustee, director or other officer thereof; or against a corporation or joint-stock association created by or under the laws of another state, government, or county, or a trustee, director, or other officer thereof, where the corporation or association does business within the state, or has, within the state, a business agency or fiscal agency, or an agency for the transfer of its stock.[5]

[1] N. Y. Code Civ. Proc., § 1810.

[2] Clinch v. South Side R. R. Co., 1 Hun, 636 (1874); s. c. 4 T. & C. (N. Y.) 224.

[3] People v. Globe Mut. L. Ins. Co., 60 How. (N. Y.) Pr. 82 (1880).

[4] N. Y. Code Civ. Proc., § 1811.

[5] N. Y. Code Civ. Proc., § 1812. It is said in Loder v. New York U. & O. R. Co., 4 Hun (N. Y.) 22 (1875), that where a corporation in an action brought after return of execution, under L. 1870, c. 151, alleges that a judgment was obtained by the collusion and fraud of an officer, it must move to open it within a reasonable time, or a receiver will be appointed.

Sec. 191. Same—Action against Stockholders—Misnomer, etc., not available.—Where an action, authorized by law of the state, is brought against one or more persons, as stockholders of a corporation or joint-stock association, an objection to any of the proceedings cannot be taken, by a person properly made a defendant in the action, on the ground that the plaintiff has joined with him, as a defendant in the action, a person, whose name appears on the stock books of the corporation or association, as a stockholder thereof, by the name so appearing; but who is misnamed or dead, or is not liable for any cause. In such a case, the court may, at any time before final judgment, upon motion of either party, amend the pleadings and other papers, without prejudice to the previous proceedings, by substituting the true name of the person intended, or by striking out the name of the person who is dead, or not liable, and, in the proper case, inserting the name of his representative or successor.[1]

CHAPTER XI.

ACTIONS BY AND AGAINST CORPORATIONS.

COMPLAINT—BY WHOM ACTION TO BE BROUGHT—WHEN OFFICER MAY MAINTAIN—SUIT BY STOCKHOLDER—CORPORATION NECESSARY PARTY—ACTION AGAINST OFFICERS—ALLEGATION OF INCORPORATION—VERIFICATION OF PLEADINGS—SERVICE OF PROCESS—ACTION ON CONTRACTS IN RESTRAINT OF TRADE—ACTION FOR TORTS COMMITTED AFTER EXPIRATION OF CHARTER—VOLUNTARY APPEARANCE—NAME IN WHICH SUIT TO BE BROUGHT—FRAUDULENT REPRESENTATIONS OF DIRECTORS—CONTRACTS ULTRA VIRES—STAY OF SUIT—CRIMINAL PROCEEDINGS—INDICTMENT—APPEARANCE—PROOF OF INCORPORATION—MISNOMER—WHEN WAIVED—WHEN FOREIGN CORPORATION MAY SUE—WHEN MAY BE SUED—VOLUNTARY APPEARANCE—SUIT BY NON-RESIDENT—SERVICE OF SUMMONS—SERVICE ON OFFICER OUTSIDE OF STATE OF DOMICIL.

SEC. 192. Complaint in actions by or against corporations.
SEC. 192a. Same—By whom to be brought.
SEC. 192b. Same—When officer may maintain.
SEC. 192c. Same—Suit by stockholder.
SEC. 192d. Same—Corporation necessary party.
SEC. 192e. Same—Action against officers.
SEC. 192f. Same—Action by corporation—Complaint—Allegation of incorporation.
SEC. 192g. Same—Verification of pleadings.
SEC. 192h. Same—Service of process.
SEC. 192i. Same—Contract in fraud of shareholders' rights—Action to set aside.

SEC. 192j. Same—Division of corporate funds—Action by minority.
SEC. 192k. Same—Contracts and restraints of trade—Action by assignee of corporation.
SEC. 192l. Same—Action for torts committed after expiration of charter.
SEC. 192m. Same—Alleging corporate existence.
SEC. 192n. Same—Voluntary appearance.
SEC. 192o. Same—Name in which suit to be brought.
SEC. 192p. Same—Fraudulent representation of directors—Action for—Form of complaint.
SEC. 192q. Same—Contra ultra vires.
SEC. 192r. Same—Motion to stay suit—Where brought.
SEC. 192s. Criminal Proceedings—Indictment—Appearance.
SEC. 192t. Same—Proof of incorporation.
SEC. 193. Same—When proof of corporate existence unnecessary.
SEC. 193a. Same—Evidence of incorporation.
SEC. 194. Same—Misnomer—When waived.
SEC. 195. Same—Motion against a corporation upon a note, etc.
SEC. 195a. Same—Damages for non-payment of promissory note.
SEC. 196. Same—When foreign corporation may sue.
SEC. 196a. Same—Right to sue—Security for costs.
SEC. 197. Same—When foreign corporation may be sued.
SEC. 197a. Same—Foreign Corporation—Suit against.—Voluntary appearance.
SEC. 197b. Same—Suit by non-resident.
SEC. 197c. Same—Service of summons.
SEC. 197d. Same—Service of summons by publication.
SEC. 197e. Same—Service on officer outside of state of domicile.
SEC. 197f. Same—Service of Process in United States Courts.

Sec. 192. Complaint in Actions by or Against Corporations.—In an action brought by or against a corporation, the complaint must aver that the plaintiff or the defendant, as the case may be, is a corporation; must state whether it is a domestic or foreign corporation; and, if the latter, the state, country or government, by or under whose laws it was created. But the plaintiff need not set forth, or specially refer to any act or proceeding, by or under which the corporation was created.[1]

Sec. 192a. Same—By whom to be brought.—All actions, in regard to the rights of a corporation, must, as a general rule,

[1] N. Y. Code Civ. Proc., § 1775.

be brought by the corporation itself. But if the directors or other proper officers, refuse to sue, or are guilty of the wrong complained of, a court of equity will interfere at the instance of the stockholders even without proof of a demand and refusal on the part of the corporate authorities.[1]

Sec. 192b. Same—When officer may maintain.—In the case of Recamier Manufacturing Company v. Seymour,[2] the New York City Common Pleas Court held that the president of a corporation, who is also a trustee, may authorize and maintain an action for an accounting and an injunction in the name of the corporation, without the authority of the board of trustees, or against its express direction, where a majority of the directors or trustees have wrongfully converted corporate funds, and threaten to convert others, and where the neglect of the board of trustees to sue, and its resolution to discontinue the suit already commenced, are simply acts in furtherance of the unlawful design of such majority. Justice Daly said: "The question presented for decision upon the motion to discontinue the action and dismiss the complaint is whether the president of a corporation, being a trustee, may authorize and maintain an action in the name of a corporation without the authority of the board of trustees, and against the express direction of the board. Ordinarily he may not. In the board of directors or trustees is vested the authority to undertake litigation on behalf and in the name of the corporation. But this rule has manifestly no application where a majority of the directors or trustees are engaged in the wrongful diversion of the corporate funds, or other injury to its business, and the neglect to sue, or the resolution to discontinue suit or suits already commenced to recover the moneys diverted, or to remedy the wrong and injury committed, are simply acts in furtherance of the said breaches of trust. In such a contingency any trustee not implicated in the wrong may authorize the bringing of the action which the board of trustees should have authorized. The minority

[1] Davis v. Gemmell, 70 Md. 356 (1889); s. c. 5 Ry. & Corp. L. J. 447.

[2] 5 N. Y. Supp. 648 (1889); s. c. 24 N. Y. St. Rep. 54.

of the board, and any single member of it, is not divested of his office or of its powers and duties by the unfaithfulness of his colleagues.

So it was held in the case of First Reformed Presbyterian Church v. Bowden,[1] that the majority of the trustees, by their conduct having virtually abdicated their official functions, so far as the bringing of suit was concerned, the remaining trustee might sue in the name of the corporation. It was added, however, that in a case of doubt as to which of the trustees is in the right, it would be inexpedient to permit the minority to sue in the name of the corporation. We have no difficulty of the kind in this case, it being conceded by the counsel appearing for the motion to discontinue, that if the action might be authorized by a single trustee the plaintiff was entitled to the injunction, *pendente lite*, which it applied for. Upon principle and authority, I hold that the action may be authorized and maintained by one trustee under the circumstances set forth in the complaint and affidavits, notwithstanding the objection of a majority of the board of trustees.

Sec. 192c. Same—Suit by stockholder.—Where the corporation wilfully neglects or refuses to bring suit, a stockholder may sue for himself and other stockholders, making the corporation a co-defendant.[2]

A bill in equity lies by the stockholders of a corporation in behalf of themselves and other stockholders against certain directors, and other individuals conspiring for the injury of

[1] 14 Abb. (N. Y.) N. C. 356 (1883).

[2] New York & N. H. R. Co. v. Schuyler, 17 N. Y. 596 (1858); Robinson v. Smith, 3 Paige Ch. (N. Y.) 222 (1832); s. c. 34 Am. Dec. 212; Hazard v. Durant, 11 R. I. 207 (1877); Newby v. Oregon Cent. R. Co., Deady C. C. 619 (1869). See Greaves v. Gouge, 69 N. Y. 154 (1877); Butts v. Wood, 37 N. Y. 317 (1867); s. c. 38 Barb. (N. Y.) 181 (1862); Verplanck v. Mercantile Ins. Co., 1 Edw. Ch. (N. Y.) 84 (1831); Cunningham v. Pell, 5 Paige Ch. (N. Y.) 607 (1836); Bayless v. Orne, 1 Freem. Ch. (Miss.) 161 (1840); Spering's Appeal, 71 Pa. St. 11 (1872); Hodges v. New England Screw Co., 1 R. I. 312 (1850); s. c. 53 Am. Dec. 624; Charleston Ins. & Trust Co. v. Sebring, 5 Rich. (S. C.) Eq. 342 (1853); Deaderick v. Wilson, 8 Baxt. (Tenn.) 108 (1874); Davenport v. Dows, 85 U. S. (18 Wall.) 626 (1873); bk. 21 L. ed. 96; Samuel v. Holladay, 1 Woolw. C. C. 400 (1869).

the corporation, such as leasing the corporate property on improperly low terms, and sharing in the profits with the lessees;[1] but it has been held that the stockholders of a corporation may bring an action to restrain the collection of a judgment recovered by the president of a corporation in his own name, and to have the judgment declared to be the property of the corporation, on the ground that the contract from which the judgment resulted was a contract with the corporation, and not with the president as an individual.[2]

Where a contract exceeds the powers of a corporation, a stockholder has authority to file a bill in equity upon this ground; but the more usual method is, for one or more stockholders to sue on behalf of the others.[3]

Where all the stockholders have a common interest, and are affected in the same proportionate degree, according to the quantity of stock held by each, there should be but one recovery, in which all of the same class should join, or the suit should be prosecuted by one or more of the stockholders for the benefit of himself and the other stockholders.[4] It is different, however, where there is no community of interest, or where the contract or circumstances are such that the parties occupy different positions.[5]

Where the stockholders are numerous, the suit may be maintained by one or more in behalf of all the others.[6]

[1] Robinson v. Smith, 3 Paige Ch. (N. Y.) 222 (1832); s. c. 34 Am. Dec. 212; Brewer v. Boston Theatre, 104 Mass. 397 (1870). See Allen v. Curtis, 26 Conn. 456 (1857); Hersey v. Veazie, 24 Me. 9 (1844); s. c. 41 Am. Dec. 364; Peabody v. Flint, 88 Mass. (6 Allen) 52 (1863); March v. Eastern R. Co., 40 N. H. 548, 567 (1860); s. c. 77 Am. Dec. 732; Hodges v. New England Screw Co., 1 R. I. 312 (1850); s. c. 53 Am. Dec. 626; Atwood v. Merryweather, L. R. 5 Eq. 464 (1867) note; Gregory v. Patchett, 33 Beav. 595 (1864).

[2] Davis v. Gemmell, 70 Md. 356 (1889); s. c. 5 Ry. & Corp. L. J. 447.

[3] Robinson v. Smith, 3 Paige Ch. (N. Y.) 222 (1832); s. c. 34 Am. Dec. 212. See Gray v. New York & V. S. S. Co., 3 Hun (N. Y.) 383 (1875); Mahoney v. People, 5 T. & C. (N. Y. 329 (1875.)

[4] Wells v. Jewett, 11 How. (N. Y.) Pr. 247 (1855). See Robinson v. Smith, 3 Paige Ch. (N. Y.) 222 (1832); s. c. 34 Am. Dec. 212.

[5] Luling v. Atlantic Mut. Ins. Co., 45 Barb. (N. Y.) 516 (1865); Robinson v. Smith, 3 Paige Ch. (N. Y.) 222 (1832); s. c. 34 Am. Dec. 212.

[6] Brinckerhoff v. Bostwick, 88 N. Y. 60 (1882); Robinson v. Smith, 3 Paige Ch. (N. Y.) 222 (1832); s. c.

Sec. 192d. Same—Corporation necessary party.—Where the stockholders of a corporation sue in their own names, the corporation must be made a defendant, either solely or jointly, with the directors.[1] However, a corporation is not a necessary party to a suit between its stockholders, as to the ownership of certain shares of stock.[2]

Sec. 192e. Same—Action against officers.—On the collusive neglect or refusal of managers of a corporation to proceed against the officers who have wasted or misapplied the funds of the corporation, the individual stockholders of such corporation may file a bill in equity in their own names.[3] In such cases the suit to compel the officers or agents of a company to account should be in the name of the corporation; but it has been said that a court of equity will never permit a wrong to go unredressed merely for the sake of form, and that if it appears that the directors refuse to prosecute, or if the corporation is still under the control of those who must be made the defendants in the suit, the stockholders, who are the real parties in interest, will be permitted to file a bill in their own names, making the corporation a party defendant.[4] However, where there has been a misappropriation and conversion of the corporate property, suit can only be brought by a stockholder in his own name, after application and refusal on the part of the corporation to bring an action;[5] therefore, a complaint which fails to allege that the

34 Am. Dec. 212; Jones v. Johnson, 10 Bush. (Ky.) 661 (1874). See Butts v. Wood, 37 N. Y. 317 (1867).

[1] See New York & N. H. R. Co. v. Schuyler, 7 Abb. (N. Y.) Pr. 59 (1858); Cunningham v. Pell, 5 Paige Ch. (N. Y.) 612 (1836); Robinson v. Smith, 3 Paige Ch. (N. Y.) 222 (1832); s. c. 34 Am. Dec. 212; Hazard v. Durant, 11 R. I. 207 (1877).

[2] King v. Barnes, 109 N. Y. 267 (1888); s. c. 16 N. E. Rep. 332; 4 Ry. & Corp. L. J. 351.

[3] Robinson v. Smith, 3 Paige Ch. (N. Y.) 222 (1832); s. c. 34 Am. Dec. 212; Passyunk Building Assoc. Appeal, 83 Pa. St. 444 (1877).

[4] Allen v. New Jersey S. R. Co., 49 How. (N. Y.) Pr. 15 (1875); Robinson v. Smith, 3 Paige Ch. (N. Y.) 222 (1832); s. c. 34 Am. Dec. 212. See Gardiner v. Pollard, 10 Bosw. (N. Y.) 674 (1863); Gray v. New York & V. S. S. Co., 5 T. & C. (N. Y.) 224 (1875); Charitable Corporation v. Sutton, 2 Atk. 404 (1742).

[5] Anderton v. Aronson, 3 How. (N. Y.) Pr. N. S. 218 (1886); Robinson v. Smith, 3 Paige Ch. (N. Y.) 222 (1832); s. c. 34 Am. Dec. 212;

corporation, on request, refuses to bring proper action, will be held bad on demurrer;[1] but it will be unnecessary to make or allege a demand before the commencement of an action in those cases where the circumstances are such that it would be useless;[2] thus, where it it is averred that the present board of directors openly connived at the fraud complained of, and approved the transaction sought to be impeached, this allegation will be sufficient excuse for not applying to them to bring an action.[3]

A suit cannot be maintained by the stockholders against the directors or trustees of a corporation, for their mismanagement of the concerns of the corporation.[4] It is said in the case of Kennebec & P. R. Co. v. Portland K. R. Co.,[5] that "so long as the corporation is faithful to its trust, the stockholders, as individuals, have no occasion or right to resort to, or enforce any remedies legal or equitable, to vindicate any injury to the property. When it is guilty of a breach of trust, and only then, the relationship of the stockholders, arising from that trust, gives them a right to pursue the proper remedy to vindicate their rights."

In equity, a suit brought for the purpose of compelling the officers and agents of a private corporation to account for a breach of official duty, or for misapplication of corporate

Cogswell v. Bull, 39 Cal. 320 (1870). See Greaves v. Gouge, 69 N. Y. 154 (1877); Leslie v. Lorillard, 31 Hun (N. Y.) 305 (1883); Kennebec & P. R. Co. v. Portland & K. R. Co., 54 Me. 173 (1866); Brewer v. Boston Theatre, 104 Mass. 378 (1870); Huntington v. Palmer, 104 U. S. (14 Otto) 482 (1881); bk. 26 L. ed. 833; Hawes v. Contra Costa Water Co., 104 U. S. (14 Otto) 450 (1881); bk. 26 L. ed. 827; Dannmeyer v. Coleman, 9 P. C. L. J. 281.

[1] Hawes v. Contra Costa Water Co., 104 U. S. (14 Otto) 450 (1881); bk. 26 L. ed. 827; Foss v. Harbottle, 2 Hare 461 (1843); Mozley v. Alston, 1 Phill. Ch. (Eng.) 790 (1847).

[2] Robinson v. Smith, 3 Paige Ch. (N. Y.) 222 (1832); s. c. 34 Am. Dec. 212; Rogers v. Lafayette Agricultural Works, 52 Ind. 296 (1875); Heath v. Erie R. Co., 8 Blatchf. C. C. 347 (1871).

[3] Mussina v. Goldthwaite, 34 Tex. 125 (1871); s. c. 7 Am. Rep. 281: Heath v. Erie R. Co., 8 Blatchf. C. C. 347 (1871).

[4] Allen v. Curtis, 26 Conn. 456 (1857); Faurie v. Millaudon, 3 Mart. (La.) N. S. 476 (1825); Smith v. Poor, 40 Me. 415 (1855); s. c. 63 Am. Dec. 672; Smith v. Hurd, 53 Mass. (12 Metc.) 371 (1847); s. c. 46 Am. Dec. 690.

[5] 54 Me. 181 (1866).

funds, must be brought in the name of the corporation, and cannot be brought in the name of the stockholders.[1] In such cases the jurisdiction is based upon the grounds of fraud, or trust, coupled with the fact that there is no adequate remedy at law, and the stockholders will be permitted to bring an action in their own name making the corporation a party defendant.[2]

In Dodge v. Woolsey,[3] the court says, "it is now no longer doubted, either in England or the United States, that courts of equity, in both, have a jurisdiction over corporations, at the instance of one or more of their members, to apply preventive remedies by injunction to restrain those who administer them from doing acts which would amount to a violation of the charters, or to prevent any misapplication of their capital or profits, which might result in lessening the dividends of stockholders, or the value of their shares, as either may be protected by the franchise of a corporation, if the acts intended to be done create what is in law denominated a

[1] Austin v. Daniels, 4 Den. (N. Y.) 301 (1847); Forbes v. Whitlock, 3 Edw. Ch. (N. Y.) 446 (1841); Cogswell v. Bull, 39 Cal. 320 (1870); Smith v. Poor, 40 Me. 415 (1855); s. c. 63 Am. Dec. 672; Hersey v. Veazie, 24 Me. 12 (1844); s. c. 41 Am. Dec. 364; Abbott v. Merriam, 62 Mass. (8 Cush.) 588, 590 (1851); Smith v. Hurd, 53 Mass. (12 Metc.) 371 (1847); s. c. 46 Am. Dec. 690; Bayless v. Orne, 1 Freem. Ch. (Miss.) 175 (1840); Brown v. Vandyke, 8 N. J. Eq. (4 Halst.) 795, 799, 800 (1853); s. c. 55 Am. Dec. 250; Hodges v. New England Screw Co., 1 R. I. 312 (1850); s. c. 53 Am. Dec. 626; Deaderick v. Wilson, 8 Laxt. (Tenn.) 108 (1874); Mozley v. Alston, 1 Phill. Ch. (Eng.) 790 (1847).

[2] Greaves v. Gouge, 69 N. Y. 154 (1877); Butts v. Wood, 37 N. Y. 317 (1867); s. c. 38 Barb. (N. Y.) 181 (1862); Robinson v. Smith, 3 Paige Ch. (N. Y.) 222, 233 (1832); s. c. 34 Am. Dec. 212; Colquitt v. Howard, 11 Ga. 556 (1852); Ryan v. Leavenworth A. & N. W. R. Co., 21 Kan. 365 (1879); Peabody v. Flint, 88 Mass. (6 Allen) 52 (1863); Bayless v. Orne, 1 Freem. Ch. (Miss.) 173 (1840); Wilcox v. Bickel, 11 Neb. 154 (1881); March v. Eastern R. Co., 40 N. H. 548 (1860); s. c. 77 Am. Dec. 732; Brown v. Vandyke, 8 N. J. Eq. (4 Halst.) 795, 799, 800 (1853); s. c. 55 Am. Dec. 250; Hazard v. Durant, 11 R. I. 195 (1877); Hodges v. New England Screw Co., 1 R. I. 312 (1850); s. c. 53 Am. Dec. 626; Deaderick v. Wilson, 8 Baxt. (Tenn.) 108 (1874); Dodge v. Woolsey, 59 U. S. (18 How.) 331 (1855); bk. 15 L. ed. 401; Wardell v. Union Pacific R. Co., 4 Dill. C. C. 331 (1877); Gregory v. Patchett, 33 Beav. 595 (1864); Salomons v. Laing, 12 Beav. 339 (1849).

[3] 59 U. S. (18 How.) 331 (1855); bk. 15 L. ed. 401.

breach of trust. And the jurisdiction extends to inquire into, and to enjoin, as the case may require that to be done, any proceedings by individuals, in whatever character they may profess to act, if the subject of complaint is an imputed violation of a corporate franchise, or the denial of a right growing out of it, for which there is not an adequate remedy at law." It is said in the later case of Hawes v. Contra Costa Water Company,[1] that to enable a stockholder in a corporation to sustain in a court of equity, in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist, as the foundation of the suit, some action, or threatened action, of the managing board of directors or trustees of the corporation which is beyond the authority conferred on them by their charter or other source of organization; or such a fraudulent transaction completed or contemplated by the acting managers, in connection with some other party, or among themselves, or with other shareholders, as will result in serious injury to the corporation, or to the interests of the other shareholders; or where the board of directors, or a majority of them, are acting for their own interest, in a manner destructive of the corporation itself, or of the rights of the other shareholders; or where the majority of shareholders themselves are oppressively and illegally pursuing a course, in the name of the corporation, which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity. Possibly other cases may arise in which to prevent irremediable injury, or a total failure of justice, the court would be justified in exercising its powers, but the foregoing may be regarded as an outline of the principles which govern this class of cases. But in addition to the existence of grievances which call for this kind of relief, it is equally important that before the shareholder is permitted, in his own name, to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to

[1] 104 U. S. (14 Otto) 450 (1881); bk. 26 L. ed. 827.

obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated effort, with the managing body of the corporation, to induce remedial action on their part. If time permits, or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains. And he must show a cause, if that is not done, where it could not be done, or it was not reasonable to require it. The efforts to induce such action as complainant desires on the part of the directors and of the shareholders, when that is necessary, and the cause of failure in these efforts, should be stated with particularity, and an allegation that complainant was a shareholder at the time of the transactions of which he complains, or that his shares have devolved on him since by operation of law.

Sec. 192f. Same—Action by corporation—Complaint—Allegation of incorporation.—In every action by or against a corporation, the complaint must give a description of said corporation in order that it may be identified,[1] and must state whether such corporation is a foreign or domestic corporation, and if it fails to do so the defect may be taken advantage of by demurrer.[2] Thus in Clegg v. Chicago Newspaper Union,[3] where the complaint alleged that certain defendants were foreign corporations, but did not set forth the state, county, or government by or under whose laws they were created; the court held, that a demurrer on the ground that it did not contain facts sufficient to constitute a cause of action interposed by one of such defendants should be sustained, the objection being that one could be taken by demurrer.[4]

[1] Crown Point Iron Co. v. Fitzgerald, 47 Hun (N. Y.) 638 (1888); s. c. 14 N. Y. St. Rep. 427.

[2] First Nat. Bank of Northampton v. Doying, 1 N. Y. St. Rep. 617 (1886). See Lee v. La Compagnie Universelle, 41 Hun, 641 (1886); s. c. 2 N. Y. St. Rep. 612; Clegg v. Cramer, 3 How. (N. Y.) Pr. N. S. 130 (1886); Baker v. Star Print. & Pub. Co., 3 N. Y. Month. L. Bull. 29 (1881).

[3] 8 N. Y. Civ. Proc. Rep. 401 (1885).

[4] Followed, Baker v. Star Print. & Pub. Co., 3 N. Y. Month. L. Bull. 29 (1881). Distinguished, Fox v. Erie Preserving Co., 93 N. Y. 57

Yet there are cases holding that any specific allegation of the incorporation of the company, need not be made in the complaint,[1] but that the mere bringing of an action in a name, purporting to be the name of the corporation, is sufficient averment of the corporate existence of the plaintiff,[2] because, as it is alleged, a statement of the name of the corporation and of the making of the agreement, where the action is founded upon an agreement between the defendant and the company, and of what the company did in fulfillment of the agreement, includes the idea of the legal existence of the company, and the fact of incorporation is mere evidence in support of it not essential to be particularly stated in the pleading.[3]

Sec. 192g. Same—Verification of pleadings.—The New York Code of Civil Procedure [4] provides that where the party is a domestic corporation, the pleadings must be verified "by an officer thereof," and section 431, subdivision 3, provides that service of summons on a domestic corporation may be made on "the president or other head of the corporation, the secretary or clerk, * * * the cashier, the treasurer, or a director or managing agent." The court held that the answer of a defendant domestic corporation, which is verified by one who simply affirms that he is "general manager" thereof, stating nothing in regard to his duties, is defective.[5]

Under the New York Code of Civil Procedure, section 525, subdivision 1, requiring the pleadings of domestic corporations to be verified by an officer thereof, a verification by one who stated in the affidavit that he was "the former president of the defendant;" that all the officers, including deponent, had tendered their resignations; and that "no other officers

(1883); Irving Nat. Bk. v. Corbett 10 Abb. (N. Y.) N. C. 86 (1881).

[1] Kennedy v. Cotton, 28 Barb. (N. Y.) 59 (1858).

[2] Howe Machine Co. v. Robinson, 7 Daly (N. Y.) 399 (1878); Canandaigua Academy v. McKechnie, 19 Hun, (N. Y.) 62 (1879). See Phœnix Bank v. Donnell, 40 N. Y. 410 (1869); Bank of Havana v. Magee, 20 N. Y. 358 (1859).

[3] Kennedy v. Cotton, 28 Barb. (N. Y.) 59 (1858).

[4] N. Y. Code Civ. Proc., § 525, subd. 1.

[5] Thomas F. Meton & Sons v. Isham Wagon Co., 15 N. Y. Civ. Proc. Rep. 259 (1888); s. c. 4 N. Y. Supp. 215.

have yet been elected or chosen in their places,"—is insufficient.[1]

Sec. 192h. Same—Services of process.—By the early common law a corporation was regarded as represented by its officers, and the service of process on them was held to be service on the corporation.[2] That matter is now generally regulated by statute in the various states requiring a service to be made on some particular officer of the corporation or "its general managing agent." Where the statute authorizes service to be made on the "head officer" or "managing agent" the persons on whom service may be made must hold a position in the nature of a head officer whose knowledge is regarded as that of the corporation,[3] and who has general supervision and control of the affairs of the corporation, and is required to act in the premises.[4] Thus it has been held that a service is good which is made on a president or secretary or cashier,[5] or a general director;[6] but that service on a trustee who is not an officer of the company, is insufficient,[7] and also that notice to an individual member is not notice to the corporation so as to hold it to trial;[8] and this is true although no

[1] Kelly v. Woman Pub. Co.. 15 N. Y. Civ. Proc. Rep. 259 (1888) 4 N. Y. Supp. 99.

[2] Barnett v. Chicago & Lake H. R. Co., 4 Hun (N. Y.) 114 (1875); McQueen v. Middletown Manuf. Co., 16 Johns. (N. Y.) 5 (1819); Hartford City T. Ins. Co. v. Carrugi, 41 Ga. 670 (1871); Merriweather v. Bank of Hamburg, Dud. (S. C.) 36 (1837); Glaize v. South Carolina R. Co., 1 Strobh. (S. C.) L. 73 (1846).

[3] Newby v. Colt's Pat. F. A. Co., L. R. 7 Q. B. 296 (1872).

[4] Carr v. Commercial Bank of Racine, 19 Wis. 272 (1865); Upper Mississippi Trans. Co. v. Whittaker, 16 Wis. 220 (1862). See Brewster v. Michigan Cent. R. Co., 5 How. (N. Y.) Pr. 183 (1850); Emerson v. Auburn & O. L. R. Co., 13 Hun (N. Y). 150 (1878); Weight v. Liverpool, London & Globe Ins. Co., 30 La. An. 1186 (1878).

[5] Heltzell v. Chicago & A. R. Co., 77 Mo., 315 (1883); Chamberlin v. Mammoth Mining Co., 20 Mo. 96 (1854); McMurtry v. Tuttle, 13 Neb. 232 (1882); Gilling v. Independent G. & S. M. Co., 1 Nev. 247 (1865); Willamette Falls C. M. & T. Co. v. Williams, 1 Oreg. 112 (1854); Glaize v. South Carolina R. Co., 1 Strobh. (S. C.) L. 73 (1846).

[6] Boyd v. Chesapeake & O. Canal Co., 17 Md. 195 (1860); Emerson v. McCormick H. M. Co., 51 Mich. 5 (1883).

[7] Waco Lodge v. Wheeler, 59 Tex. 554 (1883).

[8] Rand v. Proprietors Upper L. & C. Co., 3 Day (Conn.) 441 (1809).

officers have been elected for many years.[1] The New York Code of Civil Procedure,[2] provided that personal service of a summons on a domestic corporation shall be by delivering a copy to the president or other head of the corporation, its secretary or clerk, cashier or treasurer, or a director or managing agent, service on an assistant treasurer, holding none of the enumerated positions, is irregular and void.[3]

Sec. 192i. Same—Contract in fraud of shareholders' rights—Action to set aside.—In Gouraud v. Edison-Gower Bell Telephone Company of Europe,[4] the plaintiff in an action sued on behalf of himself and all other shareholders of a company to set aside an agreement entered into between the defendants and another company, on the ground that such agreement was in fraud of the shareholder's rights and sought discovery of communication relating to the subject matter of the action between the defendant company and its professional advisers. The company objected that there was no fiduciary relation between a company and its shareholders, and on that ground resisted inspection. The court held that the plaintiff was entitled to discovery by analogy to the rule that professional communications were exempted from protection in partnership actions and actions between beneficiaries and trustees when such communications had been obtained for the sake of, and paid for out of, the partnership or trust estate.

Sec. 192j. Same—Division of corporate funds—Action by minority.—Where the managers and a majority of the stockholders of a corporation divert its assets and property from their legitimate purpose for the use and benefit of one of such majority, a minority stockholder may bring suit without applying to have suit brought in the name of the corporation.[5]

[1] Bache v. Nashville Hort. Soc., 10 Lea (Tenn.) 436 (1882).

[2] N. Y. Code Civ. Proc., § 431.

[3] Winslow v. Staten Island R. T. R. Co., 51 Hun (N. Y.) 298 (1889); s. c. 2 N. Y. Supp. 682.

[4] (L. R. Ch. Div.) 5 Ry. & Corp. L. J. 234 (1888).

[5] Rothwell v. Robinson, 39 Minn. 1 (1888); s. c. 4 Ry. & Corp. L. J. 213; Jones v. Morrison, 31 Minn. 140 (1883).

Sec. 192k. Same—Contracts and restraint of trade—Action by assignee of corporation.—A contract in restraint of trade running to a corporation "its successors and agents" is assignable to, and enforceable by, a corporation which succeeds to the business and property of such obligee.[1] Thus it is held in the case of the Diamond Match Company v. Roeber,[2] that a contract made by a seller with a purchaser, that he will not at any time within ninety-nine years, directly or indirectly engage in the manufacture or sale of friction matches, excepting in the capacity of agent or employee of said purchaser, within any of the several states of the United States of America, or the territories thereof, or within the district of Columbia, excepting and reserving, however, the right to manufacture and sell friction matches in the state of Nevada and in the territory of Montana, is not void as a covenant in restraint of trade.

Sec. 192l. Same—Action for torts committed after expiration of charter.—In the case of Miller's Adm'r v. Newburg Orrel Coal Co.,[3] a private business corporation, duly chartered and organized under the laws of West Virginia, failed to wind up its business when the time fixed by its charter for its duration expired, but continued thereafter in its charter name to carry on its corporate business; and it was held that such a corporation may be sued in a court of law in its corporate name for a tort committed by it after its charter had expired. The court say: "At common law, upon the death or dissolution of a corporation its real estate reverted to the grantors or donors, and its personal property escheated to the king, while the debts due to and from it were thereby extinguished, and all actions pending for or against it at the time abated.[4] But this doctrine had its origin when corporations were either municipal or ecclesiastical, and private business and commer-

[1] See Leslie v. Lorillard, 110 N. Y. 519 (1888); s. c. 18 N. E. Rep. 363, reversing 40 Hun (N. Y.) 392.

[2] 106 N. Y. 473 (1887); s. c. 13 N. E. Rep. 419.

[3] 31 W. Va. 836 (1888); s. c. 8 S. E. Rep. 600; 39 Alb. L. J. 399.

[4] Rider v. Nelson & A. Union Factory, 7 Leigh (Va.) 164 (1836); Board of Sup. v. Livesay, 6 W. Va. 44 (1873); Mumma v. Potomac Co., 33 U. S. (8 Pet.) 281 (1834); bk. 8 L. ed. 945.

cial corporations were unknown. Upon the dissolution of these old public corporations their real estate, which was usually acquired as a donation to public or pious uses, was held to revert, upon the cessation of the use, to the donors, and their personal property to escheat to the king, for the want of owners. In these cases there were no stockholders or natural persons who were entitled, equitably or otherwise, to the assets of the deceased corporation, and as in the case of an individual dying without heirs, the personalty went to the king, but to prevent the realty from escheating to the king it was held to revert to the donor, upon the theory that the grant, being made to the corporation for a public or charitable use, was made only for its life. But this rule, so far as modern business and commercial corporations are concerned, has become practicably obsolete. Its unjust operation upon the rights of creditors and stockholders has been generally prevented by statute, and in equity the assets of such a corporation, which represent, not the donations of the prince or its pious founder, but the contributions of its stockholders, are held, independent of statute, to constitute a trust fund, into whosesoever hands they may come, for the benefit of creditors and stockholders.[1] Very soon after Rider v. Nelson & A. Union Factory,[2] was decided, and according to the suggestion of the court in that case, the General Assembly of Virginia, at its session of 1836-37, passed an act which has ever since been in force. This statute, without material change, was incorporated in the West Virginia Code of 1868, and has continued to be, and still is, in force in that state. It provides, in substance, that when a corporation shall expire or be dissolved, its property and assets shall, under the direction of the board of directors then in office, or such receiver as may be appointed by the circuit court, be subject to the payment of its liabilities, and the surplus, if any, shall be distributed among its stockholders. And suits may be brought, continued or defended; the property, real or personal, of

[1] Bacon v. Robertson, 59 U. S (18 How.) 480 (1855); bk. 15 L. ed. 499; Curran v. Arkansas, 56 U. S. (15 How.) 304 (1853); bk. 14 L. ed. 705.

[2] 7 Leigh (Va.) 154 (1836).

the corporation be conveyed or transferred, under the common seal or otherwise; and all lawful acts be done, in the corporate name, in like manner, and with like effect, as before such dissolution or expiration; but so far only as shall be necessary or proper for collecting the debts and claims due to the corporation, converting its property and assets into money, prosecuting and protecting its rights, enforcing its liabilities, and paying over and distributing its property and assets or the proceeds thereof, to those entitled thereto.[1] It is no doubt true that the legislature, in passing this statute, had special reference to winding up the affairs of defunct corporations, and disposing of their assets to those entitled thereto, by proceedings in equity, and thus to destroy the common law rule, which was regarded as unjust and inapplicable to modern private business corporations. But the terms employed in the statute do not confine its operations to equity proceedings. It provides, in general terms, that suits may be brought or defended in the corporate name with like effect as before the dissolution, so far as shall be necessary for collecting the debts and enforcing the liabilities of the corporation. This language is certainly sufficiently comprehensive to embrace any suit, whether at law or in equity, which is proper for collecting the debts due to, or enforcing the liabilities against the corporation; and this seems also necessary to give effect to the general objects and purpose of the statute. It was evidently to be for the mutual benefit of the creditors of the corporation, as well as for the stockholders and the corporation itself. If either had a cause of action, which could, according to law and its rules or practice, be enforced in a court of law, the purpose of this statute was manifestly to permit the bringing suit upon it in a court of law, for otherwise the general object of the statute could not be obtained. As such *de facto* corporation it certainly possessed no special powers, such as the powers to condemn property, and other like powers, which the law confers only upon corporations existing by legal rights. But the courts cannot reasonably ignore the existence of such a corporation,

[1] W. Va. Code, c. 53, § 59.

if it is an immutable fact; nor are the acts and dealings had by and with it necessarily legally ineffective and of no binding force.[1] The scope of the powers of the officers and agents of a corporation *de facto* must be fixed in the same manner as in case of a corporation *de jure*. Therefore if an association assumes to carry on business, or enter into contracts in a corporate capacity, under an expired charter, and those dealing with it treat it as if it were a corporation, the individual members of such association cannot be made liable, either severally or jointly, or as partners. This is equally true whether the association was in fact a corporation or not, or whether the dealing with the association in its corporate capacity was authorized by the legislature, or prohibited by law, and illegal. If an association assumes a liability, or enters into a contract as a corporation, it is clear the members of the association do not agree to be bound as individuals, either jointly or severally; nor do they agree to be bound as partners to each other, or to those dealing with the association. It is equally true that the parties dealing or contracting with them do not intend to bind them individually. To treat the individuals as parties to such transaction would therefore involve not only the nullification of the act which was actually contemplated by the parties on both sides, but the creation of a different obligation, which neither of the parties intended to make.[2] It is a general rule that a party

[1] Briggs v. Cape Cod Ship Canal Co., 137 Mass. 71 (1884); St. Louis Gas-Light Co. v. City of St. Louis, 11 Mo. App. 55 (1883); 2 Mor. Priv. Corp., §§ 1002, 1003.

[2] Blanchard v. Kaull, 44 Cal. 440 (1872); Planters' & Miners Bank v. Padgett, 69 Ga. 159, 164 (1882); First Nat. Bank. v. Almy, 117 Mass. 476 (1875); Trowbridge v. Scudder, 65 Mass. (11 Cush.) 83 (1853); Fay v. Noble, 61 Mass. (7 Cush.) 188 (1851); Merchants' & Manuf. Bank v. Stone, 38 Mich. 779 (1878). See Central City Sav. Bank v. Walker, 66 N. Y. 424 (1876); Fuller v. Rowe, 57 N. Y. 23 (1874); National Union Bank v. Landon, 45 N. Y. 410 (1871); Stafford Nat. Bank v. Palmer, 47 Conn. 443 (1880); Humphreys v. Mooney, 5 Colo. 282 (1880); Glen v. Breard, 35 La. An. 875 (1883); Vredenburgh v. Behan, 33 La. An. 627 (1881); Chaffe v. Ludeling, 27 La. An. 607 (1875); McClinch v. Sturgis, 72 Me. 288 (1881); State v. How, 1 Mich. 512 (1846); Second Nat. Bank v. Hall, 35 Ohio St. 158 (1878); Medill v. Collier, 16 Ohio St. 599 (1866); Harrod v. Hamer, 32 Wis. 162 (1873); Gartside Coal Co. v. Maxwell, 22 Fed. Rep. 197 (1884). *Compare* Garnett v.

who has contracted with an association assuming to be a corporation, and acting in a corporate capacity, cannot after having received the benefit of the contract, set up as a defence to an action brought upon it by the corporation that the latter was not a legal corporation, or had no authority to make the contract in a corporate capacity.[1] This rule does not rest upon the doctrine of estoppel, as has sometimes been said, but it is founded upon the policy of the common law prohibition against unauthorized corporate action.[2] The same rule is applicable in a suit brought against a corporation upon a contract which has been performed by the other party. A company which has entered into a contract in a corporate capacity, cannot, after the contract has been performed by the other party, set up, as a defence to an action for damages, that it was not a *de jure* corporation.[3] The same rule applies in suits upon other classes of liabilities by or against *de facto* corporations.[4]

Richardson, 35 Ark. 144 (1879); Bigelow v. Gregory, 73 Ill. 197 (1874); Coleman v. Coleman, 78 Ind. 344 (1881); Kaiser v. Lawrence Sav. Bk., 56 Iowa 104 (1881); Field v. Cooks, 16 La. An. 153 (1861); Martin v. Fewell, 79 Mo. 401, 410 (1883); Abbott v. Omaha Smelting & Ref. Co., 44 Neb. 416 (1876); Hill v. Beach, 12 N. J. Eq. (1 Beas.) 31 (1858); Hess v. Werts, 4 Serg. & R. (Pa.) 356 (1818). See Holbrook v. St. Paul Fire & Marine Ins. Co., 25 Minn. 229 (1878); Richardson v. Pitts, 71 Mo. 128 (1879); Ash v. Guie, 97 Pa. St. 493 (1881).

[1] Brouwer v. Appleby, 1 Sandf. (N. Y.) 158 (1847).

[2] Bradley v. Ballard, 55 Ill. 413 (1870); City of St. Louis v. St. Louis Gas. Co., 70 Mo. 69 (1879).

[3] Dooley v. Cheshire Glass Co., 81 Mass. (15 Gray) 494 (1860); Empire Manufacturing Co. v. Stuart, 46 Mich. 482 (1881). See Eaton v. Aspinwall, 19 N. Y. 119 (1859); Wheelock v. Kost, 77 Ill. 296 (1875); Racine & M. R. Co. v. Farmers' L. & T. Co., 49 Ill. 346 (1868); Frost v. Walker, 60 Me. 468 (1872); Hager v. Cleveland, 36 Md. 476 (1872); Walworth v. Brackett, 98 Mass. 98 (1867); Dooley v. Cheshire Glass Co., 81 Mass. (15 Gray) 494 (1860); Holyoke Bank v. Goodman Paper Co., 63 Mass. (9 Cush.) 576 (1852); Empire Manuf. Co. v. Stuart, 46 Mich. 482 (1881); Rush v. Halcyon Steamboat Co., 84 N. C. 702 (1881); McHose v. Wheeler, 45 Pa. St. 32, 41 (1863); Reynolds v. Myers, 51 Vt. 444 (1871); Stone v. Berkshire Cong. Soc., 14 Vt. 86 (1842); Aller v. Town of Cameron, 3 Dill. C. C. 198 (1874); Blackburn v. Selma, M. & M. R. Co., 2 Flipp. C. C. 525 (1879). *Compare*, Boyce v. Towsontown Station M. E. Church, 46 Md. 359 (1876). *Compare*, Central Agricultural & M. Assoc. v. Alabama Gold L. Ins. Co., 70 Ala. 120 (1881); Utley v. Union Tool Co., 77 Mass. (11 Gray) 139 (1858); Gaff v. Flesher, 33 Ohio St. 107 (1877); Keyser v. Hitz, 2 Mackey (D. C.) 473 (1883).

[4] Imboden v. Etowa & B. B. Mining Co., 70 Ga. 86 (1853); Singer

The principle, it seems, to be deduced from our statute and these authorities, is that a private business corporation, acting and carrying on its corporate business in its corporate name, after its legal existence has ended by the expiration of its charter, must be held to be a corporation *de facto;* and that as such, so long as it in fact so carries on its business, and contracts or incurs liabilities with or to third persons dealing with it as such *de facto* corporation, it may sue and be sued at law, either in actions *ex contractu* or *ex delicto*, and it cannot defeat such action by alleging that its charter had expired before the cause of action arose. Its directors and stockholders by failing to wind up its business when the charter expires, as it is their duty to do under the statute, cannot relieve the corporation from liability for acts done in its name, and during its actual existence as a *de facto* corporation. In order to relieve it from liability the corporation must have ceased to exist, both in law and in fact.[1]

Sec. 192m. Same—Alleging corporate existence.—It is said in Roberts v. National Ice Company[2] that in a complaint against a corporation, it is not necessary to aver that the defendant is a corporation, because that fact may be proved at the trial,[3] but the Code as it now stands requires that, in an action brought by or against a corporation, the complaint must aver that the plaintiff or the defendant, as the case may be, is a corporation, and whether it is a domestic or foreign corporation, etc., and the omission of these allegations is ground of demurrer.[4]

McAdam, C. J., said: "The defendant is either a corporation or nothing. It cannot be a natural person, for it has no family or given name.[5] It is not a joint-stock company, or

Manufacturing Co. v. Bennett, 28 W. Va. 16 (1886); 2 Mor. Priv. Corp. §§ 751, 755.

[1] Miller's Adm'r v. Newburg Orrel Coal Co., 31 W. Va. 836 (1888); s. c. 8 S. E. Rep. 600; 39 Alb. L. J. 399.

[2] 6 Daly (N. Y.) 426 (1876).

[3] Howe Machine Co. v. Robinson, 7 Daly (N. Y.) 399 (1878).

[4] Oesterreicher v. Sporting Times Pub. Co. 5 N. Y. Supp. 2 (1889); citing, Baker v. Printing Co., 3 N. Y. Month. L. Bul. 29 (1881); Clegg v. Newspaper Union, 8 N. Y. Civ. Proc. Rep. 401 (1885); First Nat. Bank v. Doying, 11 N. Y. Civ. Proc. Rep. 61 (1886).

[5] Frank v. Levie, 5 Rob. (N. Y.) 599 (1866).

the action ought to have been brought against its president or treasurer[1] It is not a copartnership, or the action should have been commenced against the individuals composing the firm. It is not a trade name, or the action ought to have been brought against the person using it. It is therefore a corporation, if it is to be regarded as a legal entity for any purpose."

Under the New York Code Civil Procedure,[2] providing that the complaint must show whether a party to an action is a foreign or domestic corporation, and section 3343, subdivision 18, defining a domestic corporation to be one created by the laws of the state, or located therein and created by the laws of the United States, or pursuant to the laws in force in the colony before April 19, 1775, it is sufficient if the complaint alleges that the corporation was created first under statutes of other states, and that it was also incorporated under a specified chapter of the laws of New York for a given year, as the facts are stated from which a conclusion as to whether it is a foreign or domestic corporation must follow.[3]

In an action against the "Adams Express Company" it is unnecessary to specifically aver that the defendant is a corporation. Its name imports that such is the case.[4] An allegation in the complaint that defendant is a corporation is not put in issue by a general denial.[5]

Sec. 192n. Same—Voluntary appearance.—A corporation, like a natural person, may appear voluntarily by attorney, and such appearance gives jurisdiction to the same extent as if there was actual service of process.[6] The irregularity of the appointment of a receiver in a corporation upon the petition of the attorney-general, cannot be questioned voluntarily by any other tribunal than the one by which the appointment was made.[7]

[1] Code Civ. Proc., § 1919.

[2] N. Y. Code Civ. Proc., § 1775; *ante*, § 192.

[3] American Baptist Home Mission Soc. v. Foote, 59 Hun, 307 (1889); s. c. 5 N. Y. Supp. 236.

[4] Adams Exp. Co. v. Harris, 120 Ind. 73 (1889); s.c. 21 N.E. Rep. 340.

[5] Rembert v. South Carolina R. Co. (S. C.) 9 S. E. Rep. 968 (1889).

[6] Attorney-General v. Guardian Mut. Life Ins. Co., 77 N. Y. 272 (1879).

[7] Attorney-General v. Guardian

Sec. 192o. Same—Name in which suit to be brought.—A corporation may be declared against by the name by which it is known, without alleging it to be chartered or incorporated, if the description amounts to an allegation that the defendant is a corporate body.[1] The defendant cannot object that the incorporation of the company was not proved, that it does not appear that the objection was taken at the trial and he afterwards raises the objection, where it affirmatively shows that it was admitted at the trial that the company was a corporation and that the defendant at no time intimated that it was not such.[1]

Where there was no prayer of process against a corporation by its corporate name, but only against the officers thereof, and the corporation is not described in the complaint as being a party thereto, the corporation was not before the court as a party to the suit.[3]

In a case where by the mistake of the solicitor who drew the bill, and who evidently did not intend to make the president and directors, but only the corporation, a party, the prayer of process was against the president and directors, and was held to be fatal.[4]

Sec. 192p. Same—Fraudulent representations of directors—Action for—Form of Complaint.—In the case of Harper v. Chamberlain[5] the complaint stated in substance, that the defendants, being directors or trustees of the designated company, pretended to be organized for the transaction of business on the plan of mutual insurance, under the New York statute,[6] fraudulently made false representations to the plaintiffs and others in relation to the capital and conduct of the company, with intent to induce the plaintiffs to effect insurance with

Mut. Life Ins. Co., 77 N. Y. 272 (1879).

[1] See Lighte v. Everett Fire Ins. Co., 5 Bosw. (N. Y.) 716 (1860); Roberts v. National Ice Co., 6 Daly (N. Y.) 426 (1876); Acome v. American Mining Co., 11 How. (N. Y.) Pr. 26 (1855).

[2] Kennedy v. Cotton, 28 Barb. (N. Y.) 59 (1858).

[3] Verplanck v. Mercantile Ins. Co., 2 Paige Ch. (N. Y.) 438 (1831).

[4] Verplanck v. Mercantile Ins. Co., 2 Paige Ch. (N. Y.) 438 (1831).

[5] 11 Abb. (N. Y.) Pr. 234, 240 (1860).

[6] Act of April 10, 1849.

the company, and pay to it premiums therefor; that the plaintiffs, induced by such representations, did make a contract of insurance with said company, and pay the company the sum of $150 premium therefor; and that by reason and in consequence of these facts, plaintiffs were injured, and sustained damages as alleged in the complaint. These statements were held by the court to be sufficient to maintain the action.[1]

Sec. 192q. Same—Contracts ultra vires.—Where a trading corporation, which has been in the habit of assisting persons with whom it does business, allows its general manager to transact all its business, and he indorses in the corporate name the note of one with whom the corporation is dealing, causes the note to be discounted, and pays the proceeds to the maker, he is not liable to the corporation, though it is obliged to pay the note.[2]

A defendant who has violated a contract with a corporation is not in a position to claim that the contract is *ultra vires* of such corporation after he has received the benefits of the contract.[3] Thus one who has executed a promissory note to a

[1] Citing Cross v. Sackett, 6 Abb. (N. Y.) Pr. 247 (1858); Pontifex v. Bignold, 3 Man. & Gr. 63 (1841); s. c. 42, Eng. C. L. 63.

[2] Holmes v. Willard, 5 N. Y. Supp. 610 (1889); s. c. 24 N. Y. St. Rep. 260.

[3] Diamond Match Co. v. Roeber, 106 N. Y. 473 (1887); s. c. 13 N. E. Rep. 419. See Jones v. Dana, 24 Barb. (N. Y.) 395 (1855); Imboden v. Etowah & B. B. Mining Co., 70 Ga. 86 (1883); Mitchell v. Deeds, 49 Ill. 417 (1867); Goodrich v. Reynolds, 31 Ill. 490 (1863); Vater v. Lewis, 36 Ind. 288 (1871); Meikel v. German Savings Fund. Soc., 16 Ind. 181 (1861); Blake v. Holley, 14 Ind. 383 (1860); Jones v. Cincinnati Type Foundry, 14 Ind. 90 (1860); John v. Farmers' & Mech. Bank, 2 Blackf. (Ind.) 367 (1830); Massey v. Citizens' Building & Sav. Assoc. 22 Kan. 624 (1879); Jones v. Bank of Tennessee, 8 B. Mon. (Ky.) 122 (1848); Smith v. Mississippi & A. R. Co., 14 Miss. (6 Smed. & M.) 179 (1846); Studebaker Bros. Manuf. Co. v. Montgomery, 74 Mo. 101 (1881); Stoutimore v. Clark, 70 Mo. 471 (1879); Farmers' & Drov. Bank v. Williamson, 61 Mo. 259 (1875); Smith v. County of Clark, 54 Mo. 58 (1873); Camp v. Byrne, 41 Mo. 525 (1867); Hamtramck v. Bank of Edwardsville, 2 Mo. 169 (1829); Platte Valley Bank v. Harding, 1 Neb. 461 (1870); Congregational Soc. v. Perry, 6 N. H. 164 (1833); East Tennessee Iron Manuf. Co. v. Gaskell, 2 Lea (Tenn.) 742 (1879); Commr's of Douglass County v. Bolles, 94 U. S. (4 Otto) 104 (1876); bk. 24 L. ed. 46; County of Leavenworth v. Barnes, 94 U. S. (4 Otto) 70 (1876); bk. 24 L. ed. 63. *Compare*, National Bank v. Orcutt, 48 Barb. (N. Y.) 256 (1867); Welland Canal Co. v. Hathaway, 8 Wend.

corporation, or has otherwise contracted with it by its corporate name, is, in an action to enforce the contract, estopped from denying the existence of the corporation, and from urging any defects or neglect in its organization.[1]

Sec. 192r. Same—Motion to stay suit—Where brought.—Where special proceedings are pending before the supreme court for the purpose of distributing the assets of a dissolved corporation, a motion to stay proceedings in such suit need not, of necessity, be made in the district where the action is pending.[2]

Sec. 192s. Criminal proceedings—Indictment—Appearance.—Under the laws of New York, a corporation cannot by any means be compelled to appear and submit to the jurisdiction of a court wherein an indictment against the corporation has been filed.[3]

Sec. 192t. Same—Proof of incorporation.—In a criminal prosecution where the complainant injured is a corporation, the incorporation need only be generally proved,[4] direct evidence is not required.[5]

In the recent case of State *v.* Grant[6] the Supreme Court of North Carolina held that an indictment for larceny from a corporation need not allege the fact of incorporation where the corporate name is correctly set out, and that the charter of the corporation need not be produced on the trial in order to prove its incorporation; because, this is sufficiently proved by evidence that it carries on such business. The court

(N. Y.) 480 (1832); Williams v. Bank of Michigan, 7 Wend. (N. Y.) 540 (1831); Montgomery R. Co. v. Hurst, 9 Ala. 514 (1846); Butchers & Drov. Bank v. McDonald, 130 Mass. 264 (1881); Wilcox v. Toledo & A. A. R. Co., 43 Mich. 584 (1880); White v. Campbell, 5 Humph. (Tenn.) 38 (1844).

[1] Black R. & U. R. Co. v. Clarke, 25 N. Y. 208 (1862); Ransom v. Priam Lodge, 51 Ind. 60 (1875); McBroom v. Corporation of Lebanon, 31 Ind. 268 (1869); Worcester M. I. v. Harding, 65 Mass. (11 Cush.) 285 (1853); Board of Commissioners v. Shields, 62 Mo. 247 (1876); Cochran v. Arnold, 58 Pa. St. 399 (1868).

[2] Attorney-General v. North American Life Ins. Co., 56 How. (N. Y.) Pr. 160 (1878).

[3] People v. Equitable Gas-Light Co. 5 N. Y. Supp. 19 (1888).

[4] *Ante*, § 192f.

[5] See People v. D'Argencour, 95 N. Y. 624; s. c. 2 N. Y. Cr. Rep. 267 (1884); People v. Davis, 21 Wend. N. Y. 309 (1839).

[6] 10 S. E. Rep. 554 (1889).

say: "We are clearly of the opinion that it was unnecessary to produce the charter in order to prove that the prosecutor was an incorporated company. In Reg. *v.* Langton,[1] it was held that it was not necessary to produce the certificate of incorporation of a company, but that the existence of the company was sufficiently proved by evidence that it had carried on business as such.[2]

"We are also of opinion that the fact of incorporation need not be alleged where the corporate name is correctly set out in the indictment. We are aware that there is quite a diversity of opinion upon this subject in various states, but we think the better view is that such an allegation is unnecessary. In State *v.* Bell,[3] it is said that 'the name of the owner of property stolen is not a material part of the offence charged in the indictment, and it is only required to identify the transaction, so that the defendant, by proper plea, may protect himself against another prosecution for the same offence. * * * The owner may have a name by reputation, and, if it is proved that he is as well known by that name as any other, a charge in the indictment in that name will be sufficient.'

"We see no reason why a conviction upon the present indictment would not be a bar to another in which the fact of incorporation is alleged. Here the name is correctly described, and there could be but little trouble as to the identification of the prosecutor. In Stanley *v.* Richmond & D. R. Co.,[4] it is distinctly decided that such a company may be designated by its corporate name, and that such a description is good upon demurrer. This case cites, with approval, the language of Maule, J., in Woolf *v.* The City Steamboat Co.,[5] where he says that such a description of the prosecutor is 'not at all out of the usual form. It impliedly amounts to an allegation that the defendant is a corporate body.'"

[1] L. R. 2 Q. B. Div. 296 (1876); 46 Law J. M. Cas. 136.

[2] 2 Rose Crim. Ev. 868; People v. Davis, 21 Wend. (N. Y.) 309 (1839); People v. Schwartz, 32 Cal., 160 (1867); Reed v. State, 15 Ohio, 217; and State v. Western N. C. R. Co. 95 N. C., 607 (1886).

[3] 65 N. C. 313 (1871).

[4] 89 N. C. 33 (1883).

[5] 7 Man. & Gr. 103, s. c. 62 Eng. C. L., 103 (1849).

Sec. 193. Same—When proof of Corporate existence unnecessary.—In an action, brought by or against a corporation, the plaintiff need not prove, upon the trial, the existence of the corporation, unless the answer is verified, and contains an affirmative allegation that the plaintiff, or the defendant, as the case may be, is not a corporation.[1]

Sec. 193a. Same—Evidence of Incorporation.—While a corporation is required and the New York Code of Civil Procedure[2] to give a description of itself in its complaint so that it may be identified, yet, this account of itself need not be proved unless put in issue by the pleadings;[3] but it is thought that a general denial is not sufficient for that purpose.[4]

And it is said in Waterville Manuf. Co. *v.* Bryan,[5] that by the common law a corporation suing in its corporate name was bound to prove, on the general issue being pleaded, their corporate existence; and that the statute disposing with such proof, unless *nul tiel* corporation is pleaded, only applies to corporations created by, or under, a statute of this state.

That a complaint alleges that plaintiff is a corporation organized under a law of this state, and the answer simply avers that defendant has no knowledge or information sufficient to form a belief as to the truth of the allegation, the plaintiff is not required to prove the corporate existence; such an averment is not equivalent to an "affirmative allegation," that plaintiff is not a corporation which is requisite to impose upon it the burden of proof.[6]

[1] N. Y. Code Civ. Proc. § 1776.

[2] N. Y. Code Civ. Proc., § 1775; *ante*, § 192.

[3] Park Bank v. Tilton, 15 Abb. (N. Y.) Pr. 384 (1863); Howe Machine Co. v. Robinson, 7 Daly (N. Y.) 399 (1878); Crown Point Iron Co. v. Fitzgerald, 47 Hun (N. Y.) 638 (1888); s. c. 14 N. Y. St. Rep. 427; Bengtson v. Thingvalla Steamship Co., 3 N. Y. Civ. Proc. Rep. 263 (1883).

[4] Bank of Genesee v. Patchin Bank, 13 N. Y. 313 (1855). *Compare*, Howe Machine Co. v. Robinson, 7 Daly (N. Y.) 399 (1878).

[5] 14 Barb. (N. Y.) 182 (1851).

[6] Concordia Savings & Aid Assoc. v. Read, 93 N. Y. 474 (1883). See Matter of New York L. & W. R. Co., 99 N. Y. 12 (1885).

An answer by a defendant that "he is informed and believes the plaintiff is not a corporation," does not amount to a plea "that the plaintiff is not a corporation."[1]

Where a corporation is sued its general appearance and answer in the action is an admission of its corporate existence, and it cannot afterwards insist that the plaintiff must affirmatively prove it to be such.[2]

In Roberts v. National Ice Co.,[3] where it appeared that the defendant acting under the name of the "The National Ice Co." employed the plaintiff to drive an ice-wagon, which bore the name of the company upon its sides, the court held, that this was sufficient evidence of incorporation to maintain the action.

Sec. 194. Same—Misnomer — when Waived.—In an action or special proceeding, brought by or against a corporation, the defendant is deemed to have waived any mistake in the statement of the corporate name, unless the misnomer is pleaded in the answer, or other pleading in the defendant's behalf.[4]

Sec. 195. Same—Action against a Corporation upon a Note, etc.—In an action against a foreign or domestic corporation, to recover damages for the non-payment of a promissory note, or other evidence of debt, for the absolute payment of money, upon demand, or at a particular time, an order, extending the time to answer or demur, shall not be granted, except by the court, upon notice to the plaintiff's attorney. In such an action, unless the defendant serves, with a

[1] Bengtson v. Thingvalla Steamship Co., 3 N. Y. Civ. Proc. Rep. 263 (1883); East River Bank v. Rogers, 7 Bosw. (N. Y.) 493 (1860).

[2] Derrenbacher v. Lehigh Valley R. Co., 21 Hun (N. Y.) 612 (1880).

[3] 6 Daly (N. Y.) 426 (1876).

[4] N. Y. Code Civ. Proc., § 1777. In Whittlesey v. Frantz, 74 N. Y. 456 (1878) an action against a corporation, there was a misnomer but the corporation made default and the court held that the bond was made and that it was not available in a subsequent proceeding placed on the judgment of the assignment of the receiver.

copy of his answer or demurrer, a copy of an order of a judge, directing that the issues presented by the pleadings be tried, the plaintiff may take judgment, as in case of default in pleading, at the expiration of twenty days after service of a copy of the complaint, either personally with the summons, or upon the defendant's attorney, pursuant to his demand therefor; or, if the service of the summons was otherwise than personal, at the expiration of twenty days after the service is complete.[1]

Sec. 195a. Same—Damages for non-payment of promissory note, etc.—New York Code of Civil Procedure,[2] authorizing plaintiff in an action against a corporation for damages "for the non-payment of a promissory note or other evidence of debt for the absolute payment of money upon demand or at a particular time," to take judgment after twenty days, unless an order of the judge directing the issues to be tried be served with the answer, the section being a modification of the original act which read, "in an action upon any contract, note, or other evidence of debt," has no application to an action against a corporation as indorser of a note.[3]

[1] N. Y. Code Civ. Proc., § 1778. This section is in derogation of the common law and must be strictly construed. Bradley v. Albemarle Fertilizing Co., 2 N. Y. Civ. Proc. Rep. 50 (1882).

The instruments referred to in this section are absolute and not conditional contracts. See, New York L. Ins. Co. v. Universal L. Ins. Co., 88 N. Y. 424 (1882), overruling, McKee v. Metropolitan Ins. Co., 25 Hun (N. Y.) 583 (1881); Studwell v. Charter Oak Ins. Co., 19 Hun (N. Y.) 127 (1879). An ordinary Life Insurance policy is not an instrument "for the absolute payment of money upon demand or at a particular time" within the meaning of this section. McKee v. Metropolitan Ins. Co., 25 Hun (N. Y.) 583 (1881); New York L. Ins. Co. v. Universal Ins. Co., 88 N. Y. 424 (1882); s. c. 14 N. Y. Week Dig. 149. See, Anonymous, 6 Cow. (N. Y.) 41 (1826); Tyler v. Ætna Ins. Co., 2 Wend. (N. Y.) 280 (1829).

In Bradley v. Albemarle Fertilizing Co., 2 N. Y. Civ. Proc. Rep. 50 (1882); the plaintiff united a cause of action against a corporation upon a promissory note with one for goods sold and delivered; and the court held that by so doing he waived the benefit of this section.

[2] N. Y. Code Civ. Proc., § 1778; *ante*, § 195.

[3] Storer v. Times Print. & Pub. Co., 6 N. Y. Supp. 63 (1889).

Sec. 196. Same—When Foreign Corporation may Sue.—An action may be maintained by a foreign corporation, in like manner, and subject to the same regulations, as where the action is brought by a domestic corporation, except as otherwise specially prescribed by law. But a foreign corporation cannot maintain an action, founded upon an act, or upon a liability or obligation, express or implied, arising out of, or made and entered into in consideration of, an act which the laws of the state forbid a corporation or association of individuals to do, without express authority of law. This section does not affect the validity of a meeting of the stockholders or directors of a foreign corporation, held within the state, where such a meeting is authorized by the laws of the state, country, or government by or under which the corporation is created; or of an act done at such a meeting, which is not in conflict with the same laws, or the laws of the state.[1]

Sec. 196a. Same—Right to sue—Security for costs.—It is a general rule in all the states that foreign corporations may be permitted to sue and be sued in the courts of a state other than the one creating such corporation, subject to the conditions imposed as to costs, service of process, and the like, in the state where suit is brought.[2] Where such corporations

[1] N. Y. Code Civ. Proc., § 1779.

[2] Mutual Benefit L. Ins. Co. v. Davis, 12 N. Y. 569 (1855); Persse & B. Paper Works v. Willett, 14 Abb. (N. Y.) Pr. 119 (1862); Elizabeth port Manuf. Co. v. Campbell, 13 Abb. (N. Y.) Pr. 86 (1861); Fisk v. Chicago R. I. & P. R. Co., 4 Abb. (N. Y.) Pr. N. S. 378 (1868); New York Floating Derrick Co. v. New Jersey Oil Co., 3 Duer, (N. Y.) 648 (1854); Bank of Commerce v. Rutland, & W. R. Co., 10 How. (N. Y.) Pr. 1 (1854); Silver Lake Bank v. North, 4 Johns. Ch. (N. Y.) 370 (1820); Cunningham v. Pell, 5 Paige Ch. (N. Y.) 607 (1836); American Ins. Co. v. Owen, 81 Mass. (15 Gray) 491 (1860); British Am. Land Co. v. Ames, 47 Mass. (6 Metc.) 391 (1843); Runyan v. Coster, 39 U. S. (14 Pet.) 122 (1840); bk. 10 L. ed 382; Bank of Augusta v. Earle, 38 U. S. (13 Pet.) 519, 588, 589 (1839); bk. 10 L. ed. 274, 307; Society, &c., v.

are required to give surety for the costs of the action the filing of such security is not a condition precedent of its right to sue.[1]

The omission to file such security at the commencement of the action is merely an irregularity,[2] and if their proceedings are sought to be set aside by reason thereof they will be relieved on filing security and paying costs of motion.[3]

In the case of the Direct United States Cable v. Dominion Telegraph Co.,[4] an action was brought by one foreign corporation against another foreign corporation, and certain individuals residents of this state who had been appointed arbitrators by an agreement between the two corporations to settle differences between them, the object of which action was to restrain the prosecution of the arbitration. The court held, that it had no jurisdiction.

A foreign corporation keeping an office in this state for receiving deposits and discounting notes without being expressly authorized by the laws of this state to do so cannot maintain an action for money loaned either on a note or other security taken on such loan or on the account of money lent.[5]

Sec. 197. Same—When Foreign Corporation may be sued.—An action against a foreign corporation may be maintained by a resident of the state, or by a domestic corporation, for any cause of action. An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only:

1. Where the action is brought to recover dam-

Wheeler, 2 Gall, C. C. 105 (1814); Berne v. Bank of England, 9 Ves. 347 (1804).

[1] Persse & Brooks Paper Works v. Willett, 14 Abb. (N. Y.) Pr. 119 (1862).

[2] Persse & Brooks Paper Works v. Willet, 14 Abb. (N. Y.) Pr. 119 (1862).

[3] Bank of Michigan v. Jessup, 19 Wend. (N. Y.) 10 (1837).

[4] 84 N. Y. 153 (1881), reversing 22 Hun (N. Y.) 568.

[5] New Hope Delaware Bridge Co. v. Poughkeepsie Silk Co., 25 Wend. (N. Y.) 648 (1841).

ages for the breach of a contract made within the state, or relating to property situated within the state, at the time of the making thereof.

2. Where it is brought to recover real property situated within the state, or a chattel, which is replevied within the state.

3. Where the cause of action arose within the state, except where the object of the action is to affect the title to real property situated without the state.[1]

Sec. 197a. Same—Foreign corporation—Suit against—Voluntary appearance.—A voluntary appearance of a corporation by officers in court will be valid and give jurisdiction whether the service of process upon its officers be good or not, provided the corporation is still in existence.[2] While in an action against a foreign corporation a general appearance will give the court jurisdiction over the person of the defendant, yet it does not necessarily give jurisdiction over the subject matter of the action, and if that is not within the statute [3] the complaint must be dismissed.[4] And where the defendant has voluntarily appeared he may still object to the jurisdiction of the court over the subject matter of the action.[5]

It is said in De Bemer v. Drew,[6] that where a foreign cor-

[1] N. Y. Code Civ. Proc., § 1780. Before the passage of this statute a foreign corporation could not be sued in any case in the courts of this state unless it saw fit to voluntarily appear in the action. Hann v. Barnegat & Long Beach Improvement Co., 7 N. Y. Civ. Proc. Rep. 222 (1885). See, Gibbs v. Queen Ins. Co., 63 N. Y. 114 (1875); s. c. 20 Am. Rep. 513; Whitehead v. Buffalo & L. H. R. Co., 18 How. (N. Y.) Pr. 218 (1859); Campbell v. Champlain & St. L. R. Co., 18 How. (N. Y.) Pr. 412 (1858). As to when it is unnecessary that all the stockholders should be taken as parties. See, Redmond v. Hoge, 5 T. & C. (N. Y.) 386 (1875).

[2] Murray v. Vanderbilt, 39 Barb. (N. Y.) 140 (1863).

[3] N. Y. Code Civ. Proc., § 1780, *ante*, § 197.

[4] Ervin v. Oregon R. & Nav. Co., 62 How. (N. Y.) Pr. 490 (1882).

[5] Ervin v. Oregon R. & Nav. Co., 62 How. (N. Y.) Pr. 490 (1882). See Carpenter v. Central Park N. & E. R. R. Co., 11 Abb. (N. Y.) Pr. N. S. 416 (1872); Burnett v. Chicago & L. H. R. Co., 4 Hun (N. Y.) 114 (1875); Robinson v. West, 1 Sandf. (N. Y.) 19 (1847).

[6] 39 How. (N. Y.) Pr. 466 (1870); s. c. 37 Barb. (N. Y.) 438.

poration appears by its attorney, and thus submits itself to the jurisdiction of the court, and by the result of the action of the court such corporation becomes the judgment debtor of the plaintiff in that action, this gives the court power over its property and rights of action in the state, and brings the corporation as much within the jurisdiction of the court as if it were a corporation under the laws of the state. The fact that it is a foreign corporation does not relieve it from the status of being a judgment debtor, nor from the provisions of the Code regarding "provisional remedies," which apply in general terms to all judgment debtors when an execution has been returned unsatisfied, and the judgment debtor refuses to apply his property in satisfaction of the judgment.

Sec. 197b. Same—Suit by non-resident.—A suit by a non-resident against a foreign corporation can only be maintained in one of the cases mentioned in the Code of Civil Procedure.[1] And a non-resident of the State of New York, even though he is a citizen thereof cannot maintain an action in the courts of this state against a foreign corporation, except in one of the cases specified in this section.[2]

In the absence of an allegation in the complaint that the plaintiff is a non-resident of the state, and therefore disqualified, by reason of this section, to sue, such non-residence will not be assumed in support of a demurrer on the ground of want of plaintiff's capacity to sue.[3]

A non-resident of this state cannot maintain an action in a court of this state against a foreign corporation to compel the specific performance of a contract to sell lands situate without the state.[4]

The courts of this state have jurisdiction over an action under subdivision three of section 1780 of the Code of Civil Procedure,[5] where the cause of action arose in this

[1] Code Civ. Proc., § 1780; *ante*, § 197. see Ervin v. Oregon R. & Nav. Co., 28 Hun, (N. Y.) 269 (1882).

[2] Adams v. Penn. Bk. of Pittsburgh, 35 Hun, (N. Y.) 393 (1885); s. c. 21 N. Y. Week. Dig. 154.

[3] Leslie v. Lorillard, 18 N. Y. Week. Dig. 288 (1883).

[4] Hann v. Barnegat & L. B. I. Co., 7 N. Y. Civ. Proc. Rep. 222 (1885).

[5] See *ante*, § 197.

state, although the plaintiff and defendant are foreign corporations.[1] But it is said in Brooks v. Mexican National Construction Company,[2] that the superior court has no jurisdiction over a foreign corporation in an action brought by a non-resident against such corporation, and an objection to the jurisdiction of the court may be had at any time, although it is not taken in the answer.

Sec. 197c. Same—Service of Summons.—Actions against a foreign corporation must be commenced by the service of a summons in the form prescribed by the Code as in other civil actions, and a judgment recovered thereupon will be joint and may be enforced against any property of the defendant found in the jurisdiction.[3]

Suits in person may be brought against a foreign corporation by service of a process upon its officers or agents within the jurisdiction.[4] Thus, in the case of Tuchband v. Chicago and Alton Railroad Company,[5] which was a suit against a foreign corporation, the plaintiff's affidavit alleged that defendant had property in the state, consisting of cars, office furniture, tickets, etc. One Charles Oberg was described in defendant's list of "officers and agents," as its "general agent, passenger department, 261 Broadway, New York." The windows at 261 Broadway were inscribed with signs indicating that the office is the general office for the general railroad business of defendant. The court held that it sufficiently appeared that the defendant had property in the state, and that Oberg was its "managing agent," and that a service of summons upon him, under the New York Code of Civil Procedure,[6] permitting service on a foreign

[1] Toronto Trust Co. v. Chicago B. & O. R. Co., 32 Hun (N. Y.) 190 (1884). Following Hibernia Nat. Bk. v. Lacombe, 84 N. Y. 367 (1881).

[2] 64 How. (N. Y.) Pr. 364 (1883); s. c. 50 N. Y. Super. Ct. (18 J. & S.) 281.

[3] Gibbs v. Queen Ins. Co., 63 N. Y. 114 (1875); s. c. 20 Am. Rep. 513.

[4] Gibbs v. Queen Ins. Co., 63 N. Y. 114 (1875); s. c. 20 Am. Rep. 513; Plympton v. Bigelow, 13 Abb. (N. Y.) N. C. 173, 177 (1883); s. c. 66 How. (N. Y.) Pr. 131; 93 N. Y. 592.

[5] 115 N. Y. 437 (1889); s. c. 22 N. E. Rep. 360; 7 Ry. & Corp. L. J. 49, affirming 6 Ry. & Corp. L. J. 366.

[6] N. Y. Code Civ. Proc., § 432.

corporation, having property in the state, by leaving a copy of the summons with its "managing agent in the state," was good.

Sec. 197d. Same—Service of Summons by publication.—A foreign corporation may be proceeded against in chancery by advertising under the statute, as in case of an absent defendant.[1] Where a board of directors consists of sixteen, a joint action against four of the number for an act done as directors, cannot be maintained.[2]

Sec. 197e. Same—Service on officer outside of state of domicil.—At common law no jurisdiction can be acquired over a corporation by the service of process upon its officers outside of the state which gave it existence;[3] and in many of the states a foreign corporation can only be sued by express statutory legislation authorizing such suit against foreign corporations having agents within the state conducting the business for which the corporation was organized.[4] Statutes providing for such services are valid,[5] because any service which would be sufficient, against a domestic corporation may be constitutionally made sufficient against a foreign corporation,[6] and besides a corporation which does business in a foreign state invokes the comity of the state in which it transacts its business, and thereby waives the right to object to the mode of service of process which the laws of such state authorize.[7]

[1] Franklin Fire Ins. Co. v. Jenkins, 3 Wend. (N. Y.) 130 (1829).

[2] Cunningham v. Pell, 5 Paige Ch. (N. Y.) 607 (1836).

[3] Barnett v. Chicago & L. H. R. Co., 4 Hun (N. Y.) 114 (1875); McQueen v. Middletown Manuf. Co., 16 Johns. (N. Y.) 6 (1819); Peckham v. North Parish, 33 Mass. (16 Pick.) 286 (1834).

[4] Redmond v. Enfield Manuf. Co., 13 Abb. (N. Y.) Pr. N. S. 332 (1872); Howell v. Chicago & N. W. R. Co., 51 Barb. (N. Y.) 378 (1868); Whiteheard v. Buffalo & Lake H. R. Co., 18 How. (N. Y.) Pr. 230 (1859); Camden Rolling Mill Co. v. Swede Iron Co., 32 N. J. L. (3 Vr.) 15 1866); Ohio & Miss. R. Co. v. Wheeler, 66 U. S. (1 Black.) 297 (1861); bk. 17 L. ed. 131; Augusta Bank v. Earle, 38 U. S. (13 Pet.) 519 (1839); bk. 10 L. ed. 274; Dallas v. Atlantic & Miss. R. Co., 2 McAr. D. C. 146 (1875); Lathrop v. Union Pac. R. Co., 1 McAr. D. C. 234 (1873.)

[5] Moulin v. Trenton Ins. Co., 24 N. J. L. (4 Zab.) 222, 234 (1854).

[6] Pope v. Terre Haute Car Manuf. Co., 87 N. Y. 137 (1881), aff'g 24 Hun (N. Y.) 238.

[7] Merchant's Manuf. Co. v. Grand

Where an agent or an attorney is appointed by a foreign corporation, in compliance with the requirement of a state statute, such appointment amounts to a consent to the statute, and binds the corporation; [1] and it is thought that where the company fails to appoint such an agent, in compliance with the statutory requirement, it may nevertheless be sued, and that service of process on its general agent will have the same effect to bind the company as if the statute had been complied with. [1]

The service of process, however, cannot be made on an officer who is occasionally found within another jurisdiction, and a law sanctioning such a service, is void, because the character of such person as an officer of the corporation does not accompany him to another jurisdiction than that in which he is appointed. [3]

Where the plaintiff is a resident of this state service of a summons upon the proper officer of a foreign corporation, defendant, who is here temporarily and not on the business of the corporation, will suffice, although the defendant has no corporation here and the action did not arise here, and any judgment he my procure can be enforced against any of the

Trunk R. Co., 63 How. (N. Y.) Pr. 459 (1882); Barnett v. Chicago & Lake H. R. Co., 4 Hun (N. Y. 114 (1875); Bawknight v. Liverpool & London & Globe Ins. Co., 55 Ga. 195 (1875); Hartford Ins. Co. v. Carugi, 41 Ga. 671 (1871); National Bank of Commerce v. Huntington, 129 Mass. 444 (1878); National Cond. Milk Co. Brandenburgh, 40 N. J. L. (11 Vr.) 111 (1878); Ex parte Schollenberger, 96 U. S. (6 Otto) 369 (1877); bk. 24 L. ed. 853; overruling Day v. Newark Ind. Rub. Co., 1 Blatchf. C. C. 628 (1850); Chicago & N. W. R. Co. v. Whitton, 80 U. S. (13 Wall.) 270 (1871); bk. 20 L. ed. 570; Baltimore & O. R. Co. v. Harris, 79 U. S. (12 Wall.) 65 (1870); bk. 20 L. ed. 354; Hume v. Pittsburgh, Cin. & St. L. R. Co., 8 Biss. C. C. 31 (1877); Myers v. Dorr, 13 Blatchf. C. C. 22 (1870); Pomeroy v. New York & N. H. R. R. Co., 4 Blatchf. C. C. 121 (1857); Knott v. Southern L. Ins. Co., 2 Woods C. C. 479 (1874); Newby v. Colt. Pat. E. A. Co., L. R. 7 Q. B. 293 (1872).

[1] Capen v. Pacific Mut. Ins. Co., (5 N. J. L. (1 Dutch.) 67 (1855); s c. 64 Am. Dec. 412; Carstairs v. Mechanics' & Traders' Ins. Co., 13 Fed. Rep. 823 (1882).

[2] Hagerman v. Empire State Co., 97 Pa. St. 534 (1881).

[3] McQueen v. Middletown Mfg. Co., 16 Johns. (N. Y.) 6 (1819); Middlebrooks v. Springfield Ins. Co., 14 Conn. 301 (1841); Peckham v. North Parish, 33 Mass. (16 Pick.) 286 (1834); Newell v. Great Western R. Co., 19 Mich. 345 (1869); State v. Ramsey Co., Dist. Ct. 26 Minn. 234 (1879); Latimer v. Union Pac. R. Co., 43

defendant's property found at any time within the state.[1] In Hiller v. Burlington & Missouri River Railroad Company,[2] where the plaintiff contracted with a foreign corporation to represent them and their interests, with the general office in New York City, and was required in the prosecution of his business for such company to go to Europe and to various parts of the United States, the court held that the cause of action arose in New York, and a service of summons upon a director while he was temporarily there on his own business, was good, although the defendant had no property there.

It is said in Pope v. Terre Haute, Car and Manuf'g Co.,[3] that where plaintiffs, residents of this state, have a cause of action against a foreign corporation, a service upon the president of such corporation while passing through this state is sufficient to commence the suit, although his presence within the state had no relation whatever to the corporation or to his essential duties, irrespective of the question whether or not the corporation has property within the state, or the cause of action arose here; and any judgment procured can be enforced against of the defendant's property found at any time within the state.

Sec. 197f. Same—Service of Process in United States Courts.—In the United States courts process may be served upon foreign corporations in each state of the union, in the manner provided for by the state laws; and in those states where there is a statutory provision that process may be served on any general agent in the state, the United States courts apply the rule to any such agent if found within the district.[4]

Mo. 105 (1868); Moulin v. Trenton Ins. Co., 24 N. J. L. (4 Zab.) 234 (1854). *Compare* Pope v. Terre Haute Car. Manuf'g Co., 87 N. Y. 137 (1881).

[1] Pope v. Terre Haute Car & Manuf'g Co., 87 N. Y. 137 (1881), aff'g 24 Hun, 238.

[2] 70 N. Y. 223 (1877).

[3] 87 N. Y. 137 (1881), aff'g 24 Hun (N. Y.) 238; s. c. 60 How. (N. Y.) Pr. 419.

[4] Ex parte Schollenberger, 96 U. S. (6 Otto) 376 (1877); bk. 24 L. ed. 853; overruling Day v. Newark Ind. Rub. Co., 1 Blatchf. C. C. 628 (1850); Pomeroy v. New York & N. H. R. Co., 4 Blatchf. C. C. 121 (1857); Lung Chung v. North Pac. R. Co., 19 Fed. Rep. 254 (1884). Compare St. Clair v. Cox, 106 U. S. (16 Otto) 350 (1882); bk. 27 L. ed. 222.

CHAPTER XII.

JUDICIAL SUPERVISION AND CONTROL.

MISCONDUCT OF DIRECTORS OR OFFICERS—POWER OF EQUITY OVER—COMPLAINT—DEMAND—RESPONSIBILITY OF OFFICERS—SUPERVISION OF CORPORATION—VISITORIAL POWERS BY WHOM ACTION TO BE BROUGHT—FRAUDULENT MISMANAGEMENT—ACTION BY STOCKHOLDER—ACTION BY CREDITOR—ACTION BY ATTORNEY-GENERAL—FRAUDS IN SUBSCRIPTIONS FOR STOCK—LIABILITY OF OFFICERS AND AGENTS—FRAUDS IN ORGANIZATION—FRAUDULENT MISCONDUCT OF DIRECTORS—FALSE REPORTS—REMEDY FOR FRAUDS OF DIRECTORS—PRESUMED ASSENT—INJUNCTION.

SEC. 198. Directors and officers of corporation—Misconduct of—Action for.
SEC. 198a. Same—Power of equity over.
SEC. 198b. Same—Complaint—Demand.
SEC. 198c. Same—Restraint of trustees.
SEC. 198d. Same—Responsibility of officers.
SEC. 198e. Same—Suspension of corporation.
SEC. 198f. Same—Visitorial powers.
SEC. 199. Same—By whom action to be brought.
SEC. 199a. Same—Action for fraudulent mismanagement.
SEC. 199b. Same—Parties to—The corporation is a necessary party—Action affecting its mismanagement.
SEC. 199c. Same—Stockholder's action.
SEC. 199d. Same—Action of creditor—Meaning of term.
SEC. 199e. Same—Action by attorney-general.
SEC. 200. Fraudulent management of and fraudulent insolvencies by corporations—Frauds in subscription of stock for corporation.
SEC. 201. Frauds in the issue of stock, scrip, etc.
SEC. 202. Fraudulent sale of shares—Liability of officer, agent, etc.
SEC. 203. Frauds in organization of corporation or increase of capital.

SEC. 204. Fraudulent use of names in prospectuses, etc.
SEC. 205. Same—Falsely indicating person as corporate officer.
SEC. 206. Frauds and misconduct of directors.
SEC. 207. Frauds in keeping accounts, etc.
SEC. 208. Officer of corporation publishing false reports of its condition.
SEC. 208a. Fraudulent reports concerning value of stock.
SEC. 208b. Frauds by directors—Remedy.
SEC. 209. Fraudulent insolvencies—What are.
SEC. 210. Affairs of corporations—Knowledge of directors—Presumptions as to.
SEC. 211. Presence of directors at meeting—Presumed assent to proceedings.
SEC. 212. Absence of director from meeting—Assent to proceedings—When presumed.
SEC. 213 Notice of application for injunction—Service upon director—Failure to disclose.
SEC. 214. Foreign corporations.
SEC. 215. Term "director" defined.

Sec. 198. Directors and Officers of Corporation—Misconduct of—Action for.—An action may be maintained against one or more trustees, directors, managers, or other officers of a corporation, to procure a judgment for the following purposes, or so much thereof as the case requires :

1. Compelling the defendants to account for their official conduct, in the management and disposition of the funds and property, committed to their charge.

2. Compelling them to pay to the corporation, which they represent, or to its creditors, any money, and the value of any property, which they have acquired for themselves, or transferred to others, or lost or wasted, by a violation of their duties.

3. Suspending a defendant from exercising his office, where it appears that he abused his trust.

4. Removing a defendant from his office, upon proof or conviction of misconduct, and directing a new election to be held by the body or board, duly authorized to hold the same, in order to supply the

vacancy created by the removal; or, where there is no such body or board, or where all the members thereof are removed, directing the removal to be reported to the governor, who may, with the advice and consent of the senate, fill the vacancies.

5. Setting aside an alienation of property, made by one or more trustees, directors, managers or other officers of a corporation, contrary to a provision of law, or for a purpose foreign to the lawful business and objects of the corporation, where the alienee knew the purpose of the alienation.

6. Restraining and preventing such an alienation, where it is threatened, or where there is good reason to apprehend that it will be made.[1]

Sec. 198a. Same—Power of equity over.—It has been said that a court of equity has no power to interfere with the chartered rights and franchises of a corporation at common law,[2] and it is well settled that a court of equity has no jurisdiction when the suit is by information on behalf of the state for the purpose of procuring a judgment of ouster, of inflicting punishment or enforcing forfeiture,[3] because the power to dissolve a corporation for cause is legal and not equitable.[4] Neither

[1] N. Y. Code Civ. Proc., § 1781.

[2] Attorney-General v. Bank of Chenango, Hopk. Ch. (N. Y.) 598 (1826); Attorney-General v. Bank of Niagara, Hopk. Ch. (N. Y.) 354 (1825); Hodges v. New England Screw Co., 1 R. I. 352 (1850); s. c. 53 Am. Dec. 624, 633.

[3] Attorney-General v. Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371 (1817); Jersey City Gas Co. v. Dwight, 29 N. J. Eq. (2 Stew.) 250 (1878). See Fisher v. World Mutual Life Ins. Co., 47 How. (N. Y.) Pr. 452 (1873); Attorney-General v. Tudor Ice Co., 104 Mass. 239 (1870); s. c. 6 Am. Rep. 227; Attorney-General v. Stevens, 1 N. J. Eq. (1 Saxt.) 369, 377 (1831); s. c. 22 Am. Dec. 526.

[4] Verplanck v. Mercantile Ins. Co., 1 Edw. Ch. (N. Y.) 88 (1831); s. c. 2 Paige Ch. (N. Y.) 438; Attorney-General v. Bank of Chenango, Hopk. Ch. (N. Y.) 598 (1826); Attorney-General v. Bank of Niagara, Hopk. Ch. (N. Y.) 354 (1825); Slee v. Bloom, 5 Johns. Ch. (N. Y.) 381 (1821); Attorney-General v. Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371 (1817); Mann v. Pentz, 2 Sandf. Ch. (N. Y.) 266 (1845); Cady v. Centreville Knit Goods Manuf. Co., 48 Mich. 135 (1882). See Attorney-General v. Bank of Michigan, Harr. Ch. (Mich.) 315 (1843).

does the jurisdiction of a court of equity extend to the sequestration of the property of a corporation by means of a receiver, or to the winding up of its affairs, or to the control or restraint of the usurpation of franchises by corporate bodies or by persons claiming, without right, to exercise corporate powers.[1] But it is thought that a court of equity has a common law power to compel trustees to execute their trusts, and may remove them if necessary. This is true independent of statutory provisions.[2]

It is thought that it can in no instance be the province of a court to superintend the business of a corporation with a view to measure the degree of care, industry and skill to be required of, or exercised by, the directors or other officers or agents of the corporation;[3] and that a court will not interfere to review or correct the proceedings of directors or trustees of a corporation on the ground of fraud or mismanagement, except in those cases where there is cause shown for the displacement of the officers or for a final winding up of the corporate affairs. Courts of equity have no common law jurisdiction or power over corporate bodies, for the purpose of removing their officers, restraining their operations, or winding up their concerns; but this power is given by statute in many of the states; and, in the absence of such special legislative grant, the charter privileges of corporations can only be taken by direct proceedings through the usual form of *scire facias* or proceedings in the nature of *quo warranto*,[4] regularly prosecuted in a court of law.[5]

Equity will not grant relief where there is a plain, speedy,

[1] United States Trust Co. v. New York W. S. & B. R. Co., 101 N. Y. 478 (1886); Attorney-General v. Bank of Niagara, Hopk. Ch. (N. Y.) 354 (1825); Attorney-General v. Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371 (1817).

[2] Bowden v. McLeod, 1 Edw. Ch. (N. Y.) 588 (1833); Baptist Church v. Witherell, 3 Paige Ch. (N. Y.) 296 (1832); Kniskern v. Lutheran Churches, etc., 1 Sandf. Ch. (N. Y.) 439 (1844).

[3] Hedges v. Paquett, 3 Oreg. 77 80 (1869).

[4] See *ante*, § 162f.

[5] Treadwell v. Salisbury Manuf. Co., 73 Mass. (7 Gray) 393 (1856); s. c. 66 Am. Dec. 490; Bayless v. Orne, 1 Freem. Ch. (Miss.) 173 (1841).

and adequate remedy at law.[1] It is only where the common law remedies are inadequate that chancery will acquire jurisdiction.[2]

Sec. 198b.—Same—Complaint—Demand.—A complaint will be bad if the grievances complained of are alleged to have been committed in part by the want of care and attention, and in part by the corrupt and wilful mismanagement of the defendants.[3] And it seems that in a declaration charging the directors with having squandered the funds of a moneyed institution, it should be averred of what the funds, credits, and effects of the company consisted.[4]

Where the treasurer of a corporation receives money belonging to the corporation and asserts rights thereof inconsistent to the rights of the corporation to demand the same, and makes charges in the corporate books in extinguishment of his obligation to pay over the money to the corporation, a demand is not necessary before suit brought by the corporation to recover the money.[5]

Sec. 198c. Same—Restraint of trustees.—It seems that a court of chancery will not interfere to restrain persons, claiming to be the rightful trustees of a corporation, from acting as such, upon the ground that they have not been duly elected; and that the remedy of the corporation to contest the validity of the election of such trustees is by an application to the supreme court.[6]

Where three or four trustees, the pastor and sexton of a corporation, formed under the New York Statute,[7] conspired to change the ecclesiastical connection of such corporation and divert its temporalities to another denomination, the

[1] DeWitt v. Hays, 2 Cal. 463 (1852); s. c. 56 Am. Dec. 352; Doggett v. Hart, 5 Fla. 215 (1853) s. c. 58 Am. Dec. 464; Andrews v. Sullivan, 7 Ill. (2 Gilm.) 327 (1845); s. c. 43 Am. Dec. 53; Redmond v. Dickerson, 9 N. J. Eq. (1 Stockt.) 507 (1853); s. c. 59 Am. Dec. 418.

[2] Treadwell v. Salisbury Manuf. Co., 73 Mass. (7 Gray) 393 (1856) s. c. 66 Am. Dec. 690.

[3] Cunningham v. Pell, 5 Paige Ch. (N. Y.) 607 (1836).

[4] Cunningham v. Pell, 5 Paige Ch. (N. Y.) 607 (1836).

[5] East New York & J. R. Co. v. Elmore, 5 Hun (N. Y.) 214 (1875.)

[6] Mickles v. Rochester City Bank, 11 Paige Ch. (N. Y.) 118 (1844).

[7] L. 1813, c. 60.

court held that the one loyal trustee may bring action in the name of the corporation to restrain such diversion.[1]

Sec. 198d. Same—Responsibility of officers.—Directors who wilfully abuse their trust, whereby a loss is sustained, or use funds for unauthorized purposes, as stock speculations, are liable to make good the loss, independent of statute.[2] Also for loss by gross negligence.[3] Directors are not liable for breach of fidelity by subordinates appointed by them, unless they have knowledge of bad character[4]; they are liable only for neglect of ordinary care in the selection of such subordinates and in the management of the concerns of the corporation.[5] If officers in good faith assume to exercise banking powers, though they are unwarranted, it will render them liable for losses in doing so.[6]

In a corporation's action against directors for damages arising from violations of duty, no laches short of the statute of limitation is a bar.[7]

Trustees who audit a bill in favor of one of their number, whose presence is necessary to constitute the quorum, are liable to stockholders.[8]

The executive committee of a joint stock company cannot vote themselves money in addition to the regular compensation for past extra services, nor in consideration of their retirement; and when they do so a receiver will be appointed to recover such money.[9]

Sec. 198e. Same—Suspension of Corporation.—The suspension of a corporation should not be ordered except upon clear

[1] First Reformed Pres. Church v. Bowden, 16 N. Y. Week. Dig. 387 (1883). See s. c. 10 Abb. (N. Y.) N. C. 1, and 14 Abb. (N. Y.) N. C. 356.

[2] Cunningham v. Pell, 5 Paige Ch. (N. Y.) 607 (1836); Robinson v. Smith, 3 Paige Ch. (N. Y.) 222 (1832); s. c. 24 Am. Dec. 212.

[3] Robinson v. Smith, 3 Paige Ch., (N. Y.) 222 (1832).

[4] Scott v. Depeyster, 1 Edw. Ch. (N. Y.) 513 (1832).

[5] Scott v. Depeyster, 1 Edw. Ch. (N. Y.) 513 (1832).

[6] Casserly v. Manners, 9 Hun (N. Y.) 695 (1877).

[7] Ilion Bank v. Carver, 31 Barb. (N. Y.) 230 (1857.)

[8] Butts v. Wood, 37 N. Y. 317 (1867), affirming 38 Barb. (N. Y.) 181.

[9] Blatchford v. Ross, 5 Abb. (N. Y.) Pr. N. S. 434 (1869); s. c. 54 Barb. (N. Y.) 42.

proof of misconduct;[1] and such an order should not be granted before trial and without notice, except in cases of urgent necessity.[2]

Sec. 198f. Same—Visitorial powers.—The code does not divest or impair any visitorial power over a corporation which is vested by statute in a corporate body or public officer.[3] A court of equity has no visitorial powers over corporations, except what is conferred by statute.[4] The court can only interfere with a corporation, or its officers, on some of the grounds specified in the statute.[5]

Sec. 199. Same—By whom action to be brought.—An action may be brought, as prescribed in the last section, by the attorney-general in behalf of the people of the state; or except where the action is brought for the purpose specified in subdivision third and fourth of that section, by a creditor of the corporation, or by a trustee, director, manager, or other officer of the corporation, having a general superintendence of its concerns.[6]

Sec. 199a. Same—Action for fraudulent mismanagement.—An action may be maintained to recover for fraudulent mismanagement.[7] Where there has been a waste or misapplication of the corporate funds by the officers or agents of the corporation, a suit to compel them to account for the loss should be in the name of the corporation, unless it appears that the directors of the corporation refuse to prosecute such suit, or the present directors of the company are the parties who have

[1] Ramsey v. Erie R. Co., 7 Abb. (N. Y.) Pr. N. S. 156 (1869); s. c. 38 How. (N. Y.) Pr. 193.

[2] Ramsey v. Erie R. Co., 7 Abb. (N. Y.) Pr. N. S. 156 (1869); s. c. 38 How. (N. Y.) Pr. 193.

[3] Code Civ. Proc., § 1783.

[4] Belmont v. Erie R. Co., 52 Barb. (N. Y.) 637 (1869).

[5] Ferris v. Strong, 3 Edw. Ch. (N. Y.) 127 (1837); Verplanck v. Mercantile Ins. Co., 1 Edw. Ch. (N. Y.) 84 (1831).

[6] N. Y. Code Civ. Proc. § 1782.

[7] Cazeaux v. Mali, 25 Barb. (N. Y.) 578 (1857), affirming 15 How. (N. Y.) Pr. 347, approved in Bruff v. Mali, 36 N. Y. 200 (1867); 34 How. (N. Y.) Pr. 338.

made themselves answerable for the loss.[1] An action may be maintained by a stockholder to prevent the misappropriation of the funds of a corporation.[2]

An action under section 199 by one director to compel his fellow directors to account, will not prevent an action for the same purpose for a suspension and removal of all including the plaintiff in the first action from being brought by the attorney-general.[3]

Sec. 199b. Same—Parties to the corporation is a necessary party—Action affecting its mismanagement.—The corporation must be made a party to a proceeding to set aside an election of trustees;[4] and where it is sought to remove the trustees of a corporation, they must be made parties to the action.[5]

An action against the officers of a corporation for misappropriation must be brought in the name of the corporation, unless it refuses; and, in case of refusal, a stockholder may sue for all, but the corporation must be made a defendant.[6] And in a suit by a stockholder to recover from directors his share of his damages due to the corporation by the embezzlement of its assets, the corporation must be a party.[7] In those cases, however, where no personal claim is made against the directors, they should not be made parties.[8]

Sec. 199c. Same—Stockholder's action.—A stockholder may maintain a suit in behalf of himself and others to set aside

[1] Robinson v. Smith, 3 Paige Ch. (N. Y.) 222 (1832); s. c. 24 Am. Dec. 212.

[2] Carpenter v. New York & N. H. R. Co., 5 Abb. (N. Y.) Pr. 277 (1857).

[3] Keeler v. Brooklyn Elevated R. Co., 9 Abb. (N. Y.) N. C. 166 (1880); People v. Bruff, 9 Abb. (N. Y.) N. C. 153 (1880).

[4] Matter of Pioneer Paper Co., 36 How. (N. Y.) Pr. 102 (1863).

[5] Reid v. The Evergreens, 21 How. (N. Y.) Pr. 319 (1861).

[6] Greaves v. Gouge, 69 N. Y. 154 (1877); s. c. 54 How. (N. Y.) Pr. 272, affirming 52 How. (N. Y.) Pr. 58; 49 How. (N. Y.) Pr. 79; Taylor v. Earle, 8 Hun (N. Y.) 1 (1876)) O'Brien v. O'Connell, 7 Hun (N. Y.; 228 (1876); Gray v. New York & Va. Steamship Co., 3 Hun (N. Y.) 383 (1875).

[7] Gardiner v. Pollard, 10 Bosw. (N. Y.) 674 (1863); Wells v. Jewett, 11 How. (N. Y.) 242 (1855). See Smith v. Consol. Stage Co., 18 Abb. (N. Y.) Pr. 423 (1865).

[8] Allen v. New Jersey Southern R. Co., 49 How. (N. Y.) Pr. 14 (1875).

a fraudulent proceeding of the directors;[1] but a stockholder cannot sue a portion of the directors for negligence and misconduct, whereby the assets of the corporation are wasted, without making the other stockholders parties, or suing for all.[2]

Where a stockholder brings an action in behalf of himself and all the other stockholders, against the trustee and the corporation, alleging that the trustee has converted its money and property to his own use and the corporation declines, upon application of the plaintiff, to bring an action for its recovery, and is made a defendant, it is in proper form, although no other damage is alleged as accruing to the plaintiff. The decree, if the cause goes to final judgment, will adequately protect all interested, where such an action is properly brought.[3]

A third person who combined with the directors cannot properly be made a defendant in a stockholder's action to charge the directors of a corporation for embezzlement of its assets.[4]

Sec. 199d. Same—Action of Creditor—Meaning of term.— If in any case a creditor can maintain such an action, he must state in his complaint the nature of his claims, when and how they arose, and the amount due; he should also demand payment before bringing suit.[5] A creditor cannot maintain an action against creditors on the ground that their action has caused the insolvency of the corporation;[6] and a creditor at large of a corporation cannot maintain an action to have it dissolved on the ground of insolvency, and to compel its trustees, directors, and officers to make good the losses which it has sustained by reason of their negligence and mismanagement.[7]

[1] Butts v. Wood, 38 Barb. (N. Y.) 181 (1862); s. c. affirmed 37 N. Y. 317.

[2] Smith v. Rathbun, 66 Barb. (N. Y.) 402 (1873).

[3] Carpenter v. Roberts, 56 How. (N. Y.) Pr. 216; s. c. 1 N. Y. Law Bull. 2 (1878).

[4] Gardiner v. Pollard, 10 Bosw. (N. Y.) 674 (1863).

[5] Ramsey v. Erie R. Co., 7 Abb. (N. Y.) Pr. N. S. 155 (1869); s. c. 38 How. (N. Y.) Pr. 193.

[6] Winter v. Baker, 34 How. (N. Y.) Pr. 183 (1867).

[7] Cole v. Knickerbocker Life Ins.

Where the property of a corporation has been divided among the stockholders, a judgment creditor may maintain an action against a stockholder, to reach what he received. He need not sue in behalf of all, nor make all the stockholders parties.[1]

It is thought that the term "creditor," as used in this section, means a judgment creditor, and not a creditor at large.[2]

Sec. 199e. Same—Action by attorney-general.—The attorney-general, on behalf of the people of the state, may maintain an action "against one or more trustees, directors, managers, or other officers of a corporation to procure a judgment, * * * * * * compelling the defendants to account for their official conduct in the management and disposition of the funds and property committed to their charge," and "compelling them to pay the corporation which they represent or its creditors, any money, and the value of any property which they have acquired to themselves, or transferred to others, or lost, or wasted, by a violation of their duties," and "suspending a defendant from exercising his office when it appears that he has abused his trust."[3] Officers of a corporation who have defrauded it cannot, by causing a suit to be begun by a confederate, and having another confederate appointed receiver prevent the attorney-general from bringing an action against them and the company, and having a receiver appointed.[4]

It is not a valid objection to an action that it has been brought upon the relation of somebody, because the attorney-general is authorized by this section to bring, in behalf of the people, actions to compel officers of the corporation to account for their official misconduct in the management and

Co., 23 Hun (N. Y.) 255 (1880); following, Belknap v. North American Life Ins. Co., 11 Hun (N. Y.) 282 (1877).

[1] Bartlett v Drew, 57 N. Y. 587 (1874); affirming 60 Barb. (N. Y.) 648; 4 Lans. (N. Y.) 444; Hastings v. Drew, 50 How. (N. Y.) Pr. 254 (1874).

[2] Paulsen v Van Steenbergh, 65 How. (N. Y.) Pr. 342 (1883); Cole v. Knickerbocker Life Ins. Co., 23 Hun (N. Y.) 255 (1880); Belknap v. North American Life Ins. Co., 11 Hun (N. Y.) 282 (1877).

[3] People v. Bruff, 9 Abb. (N. Y.) N. C. 153 (1880); s. c. 60 How. (N. Y.) Pr. 1.

[4] People v. Bruff, 9 Abb. (N. Y.) N. C. 153 (1880).

disposition of the funds and property committed to their charge, and also to procure a judgment suspending them from office, where it appears that they have abused their trust.[1]

Sec. 200. Fraudulent Management of and Fraudulent Insolvencies by Corporations—Frauds in Subscriptions for Stock of Corporations.—A person who signs the name of a fictitious person to any subscription for, or agreement to take stock in any corporation, existing or proposed and a person who signs, to any subscriptions or agreement the name of any person, knowing that such person does not intend in good faith to comply with the terms thereof, or under any understanding or agreement, that the terms of such subscription or agreement are not to be complied with or enforced, is guilty of a misdemeanor.[2]

Sec. 201 Frauds in the Issue of Stock, Scrip, etc.—An officer, agent or person in the service of any joint-stock company, or corporation formed or existing under the laws of this state, or of the United States, or of any state or territory thereof, or of any foreign government or country, who willfully and knowingly, with intent to defraud either,

1. Sells, pledges or issues, or causes to be sold, pledged or issued, or signs or exctutes, or causes to be signed or executed, with intent to sell, pledge, or issue, or to cause to be sold, pledges or issued, any certificate or instrument purporting to be a certificate or evidence of the ownership of any share or shares of such company or corporation, or any bond or evidence of debt, or writing purporting to be a bond or evidence of debt of such company or corporation, without being

[1] People v. Lowe, 47 Hun (N. Y.) 577 (1888).

[2] N. Y. Penal Code, § 590.

first thereto duly authorized by such company or corporation, or contrary to the charter or laws under which such corporation, or company exists, or in excess of the power of such company or corporation or of the limit imposed by law or otherwise upon its powerto create or issue stock or evidence of debt, or,

2. Re-issues, sells, pledges or disposes of, or causes to be re-issued, sold, pledged or disposed of, any surrendered or cancelled certificates, or other evidence of the transfer or ownership of any such share or shares :

Is punishable by imprisonment for not less than three years nor more than seven years, or by a fine not exceeding three thousand dollars, or by both.[1]

Sec. 202. Fraudulent Sale of Shares—Liability of Officer, Agent, etc.—An officer, agent or other person employed by any company or corporation existing under the laws of this state, or of any other state or territory of the United States, or of any foreign government, who willfully and with a design to defraud, sells, pledges or issues, or causes to be sold, pledged or issued, or signs or procures to be signed with intent to sell, pledge or issue, or to be sold, pledged or issued a false, forged or fraudulent paper, writing or instrument, being or purporting to be a scrip, or certificate or other evidence of the ownership or transfer of any share or shares of the capital stock of such company or corporation, or a bond or other evidence of debt of such company or corporation, or a certificate or other evidence of the ownership or of the transfer of any such bond or other evidence of debt, is guilty of for-

[1] N. Y. Penal Code, § 591; L. 1855, c. 155, §§ 1, 2.

gery in the third degree, and upon conviction, in addition to the punishment prescribed in this title for that offence, may also be sentenced to pay a fine not exceeding three thousand dollars.[1]

Sec. 203. Frauds in Organization of Corporation or Increase of Capital.—An officer, agent or clerk of a corporation, or of persons proposing to organize a corporation, or to increase the capital stock of a corporation, who knowingly exhibits a false, forged or altered book, paper, voucher, security or other instrument of evidence to any public officer or board authorized by law to examine the organization of such corporation, or to investigate its affairs, or to allow an increase of its capital, with intent to deceive such officer or board in respect thereto, is punishable by imprisonment in a state prison not exceeding ten years and not less than three years.[2]

Sec. 204. Fraudulent Use of Names in Prospectuses, etc.—A person who without authority, subscribes the name of another to, or inserts the name of another in, and prospectus, circular or other advertisement or announcement of any corporation or joint-stock association existing or intended to be formed, with intent to permit the same to be published, and thereby to lead persons to believe that the person whose name is so subscribed is an officer, agent, member or promoter of such corporation or association, is guilty of a misdemeanor.[3]

Sec. 205. Same—Falsely Indicating Person as Corporate Officer.—The false making or forging of an instrument or writing, purporting to have been issued by or in

[1] N. Y. Penal Code, § 518.
[2] N. Y. Penal Code, § 592; see L. 1829, c. 94, § 29.
[3] N. Y. Penal Code, § 593.

behalf of a corporation or association, state or government, and bearing the pretended signature of any person, therein falsely indicated as an agent or officer of such corporation, is forgery in the same degree, as if that person were in truth such officer or agent of the corporation or association, state or government.

Sec. 206. Frauds and Misconduct of Directors.—A director of a stock corporation, who concurs in any vote or act of the directors of such corporation, or any of them, by which it is intended,

1. To make a dividend, except from the surplus profits arising from the business of the corporation, and in the case and manner allowed by law; or,

2. To divide, withdraw or in any manner pay to the stockholders, or any of them, any part of the capital stock of the corporation; or to reduce such capital stock without the consent of the legislature; or,

3. To discount or receive any note or other evidence of debt in payment of an installment of capital stock actually called in, and required to be paid, or with intent to provide the means of making such payment; or,

4. To receive or discount any note or other evidence of debt with intent to enable any stockholder to withdraw any part of the money paid in by him on his stock; or,

5. To apply any portion of the funds of such corporation, except surplus profits, directly or indirectly, to the purchase of shares of its own stock; or,

6. To receive any such shares in payment or satisfaction of a debt due to such corporation; or,

7. To receive in exchange for the shares, notes,

[1] N. Y. Penal Code, § 519. See L. 1855, c. 155.

bonds, or other evidence of debt of such corporation, shares of the capital stock or notes, bonds or other evidence of debt issued by any other stock corporation;

Is guilty of a misdemeanor.[1]

Sec. 207. Frauds in Keeping Accounts, etc.—A director, officer or agent of any corporation or joint-stock association, who knowingly receives or possesses himself of any property of such corporation or association, otherwise than in payment of a just demand, and with intent to defraud, omits to make, or to cause or direct to be made, a full and true entry thereof, in the books or accounts of such corporation or association, and a director, officer, agent or member of any corporation or joint-stock association, who, with intent to defraud, destroys, alters, mutilates, or falsifies any of the books, papers, writings or securities belonging to such corporation or association, or makes or concurs in making any false entry, or omits or concurs in omitting to make any material entry in any book of accounts, or other record or document kept by such corporation or association, is punishable by imprisonment in a state prison not exceeding ten years, and not less than three years, or by imprisonment in a county jail not exceeding one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment.[2]

Sec. 208. Officer of Corporation Publishing False Reports of its Condition.—A director, officer or agent of any corporation or joint-stock association, who knowingly concurs in making or publishing any written report, exhibit or statement of its affairs or pecuniary condition, containing any material statement which

[1] N. Y. Penal Code, § 594. See L. 1869, c. 742, § 7.

[2] N. Y. Penal Code, § 602. See L. 1829 c. 94, § 29; L. 1843, c. 218, § 6.

is false, other than such as are elsewhere, by this Code, specially made punishable, is guilty of a misdemeanor.[1]

Sec. 208a. Fraudulent reports concerning value of stock.—A certificate of stock, issued upon the organization of a corporation under the general laws of this state, is to be deemed as a representation, on the part of those issuing it, that the holder is entitled to an interest, proportionate to the whole stock, in a money capital, or in property equivalent substantially to a money capital, of the amount specified as the capital of the company. Parties who project and promulgate the scheme of a joint-stock company, cause the usual books to be opened, allow or cause the inscription of a person as owner of an interest to a definite amount and value therein, and issue certificates of stock therefor, when the capital has not been paid in fully and in good faith—and annex to the certificate a written power, authorizing the transfer at large by the party to whom the certificate is issued—who publish false statements, tending to produce the belief that the stock was at least of par value, and that the business had warranted successive dividends from profits, are liable directly in damages in an action for deceit brought by an innocent party who, on the faith of the public representations and of the statements of the certificate, has purchased from third parties, and paid for shares of the stock.[2]

Sec. 208b. Fraud by directors—Remedy.—It seems, that there is no wrong or fraud which directors of a joint-stock company, incorporated or otherwise, can commit which cannot be redressed by appropriate and adequate remedies.[3]

Sec. 209. Fraudulent Insolvencies—What are.—The Insolvency of a moneyed corporation is deemed fraudulent unless its affairs appear, upon investigation, to

[1] N. Y. Penal Code, § 603. See L. 1874, c. 440, §§ 1, 2.

[2] Cross v. Sackett, 6 Abb. (N. Y.) Pr. 247. (1858).

[3] Cross v. Sackett, 6 Abb. (N. Y.) Pr. 248. (1858).

ıave been administered fairly, legally, and with ;he same care and diligence that agents receiving ı compensation for their service are bound by law to)bserve.[1]

Sec. 210. Affairs of Corporation—Knowledge of Directors—Presumptions as to.—A director of a corporation)r joint-stock association must be deemed to have ;uch a knowledge of the affairs of the corporation or ıssociation as to enable him to determine whether ıny act, proceeding or omission of its directors, is a ;iolation of this chapter.[2]

Sec. 211. Presence of Directors at Meeting—Presumed assent to proceedings.—A director of a corpo·ation, or joint-stock association, who is present at a neeting of the directors, at which any act, proceeding)r omission of such directors is in violation of this ;hapter occurs, must be deemed to concurred therein, ınless he at the time causes or in writing requires, his lissent therefrom to be entered in the minutes of the lirectors.[3]

Sec. 212. Absence of Director from Meeting—Assent to Proceedings—When presumed.—A director of a corpo·ation, or joint-stock association although not present ıt a meeting of the directors, at which any act, pro·eeding or omission of such directors, in violation of his chapter, occurs must be deemed to have con·urred therein, if the facts constituting such violation ıppear on the records or minutes of the proceedings)f the board of directors, and he remains a director)f the same company for six months thereafter, with)ut causing, or in writing requiring, his dissent from

[1] N. Y. Penal Code, § 604.
[2] N. Y. Penal Code, § 609.
[3] N. Y. Penal Code, § 610.

such illegality to be entered in the minutes of the directory.[1]

Sec. 213. Notice of application for injunction—Service upon directors—Failure to disclose.—A director, trustee or other officer of a joint-stock association or corporation, upon whom a nottce of application for an injuction affecting the property or business of such joint-stock association or corporation is served, who omits to disclose to the other directors, officers, or managers thereof, the fact of such service, and the time and place of such application, is guilty of a misdemeanor.[2]

Sec. 214. Foreign corporations.—It is no defence to a prosecution for a violation of the provisions of this chapter, that the corporation was one created by the laws of another state, government or, country, if it carried on business, or kept an office therefor, within this state.[3]

Sec. 215. Term "Directors" defined.—The term "director," as used in this chapter, embraces any of the persons having by law the direction or management of the affairs of a corporation, by whatever name such persons are described in its charter, or are known in law.[4]

[1] N. Y. Penal Code, § 611.
[2] N. Y. Penal Code, § 612. See L. 1870, c. 151, § 1.
[3] N. Y. Penal Code, § 613.
[4] N. Y. Penal Code, § 614.

CHAPTER XIII.

PROCEEDINGS FOR THE CONDEMNATION OF REAL PROPERTY.

CONDEMNATION PROCEEDINGS—TAKING PRIVATE PROPERTY —PROCEEDINGS COMMENCED BY PETITION—CONTENTS— NOTICE — SERVICE—APPEARANCE — ANSWER — CONTENTS AND VERIFICATION — TRIAL — JUDGMENT — CONTENTS — COMMISSIONERS—CONFIRMING REPORT—OFFER OF COMPROMISE — ADDITIONAL ALLOWANCE — ENFORCING JUDGMENT—WRIT OF ASSISTANCE—CONFIRMATION OF PROCEEDINGS—APPEAL—STAY OF PROCEEDINGS—NEW APPRAISAL —CONFLICTING CLAIMS—POSSESSION OF PROPERTY—GIVING SECURITY—NOTICE OF PENDENCY OF ACTION—PRACTICE.

SEC. 216. Title of act—When acts takes effect.
SEC. 217. Terms defined.
SEC. 217a. Incorporeal hereditaments—Condemnation of.
SEC. 218. When proceedings to be taken.
SEC. 218a. Taking private property for public use—Condemnation of corporate property—Construction of statute.
SEC. 219. Proceedings to be commenced by petition—What to contain.
SEC. 219a. Jurisdiction to condemn—When right exercised—Petition.
SEC. 220. Notice to be annexed to petition—Upon whom served.
SEC. 221. Petition and notice—How served.
SEC. 222. Appearance of defendant infant, idiot, lunatic or habitual drunkard.
SEC. 223. Appearance of parties.

SEC. 223a. Same—Verification of pleadings—Appearance by attorney—Effect of.
SEC. 224. Answer—What to contain.
SEC. 224a. Same—Non-performance of condition.
SEC. 225. Petition and answer—Verification.
SEC. 226. Trial of issues.
SEC. 227. Provisions made applicable.
SEC. 228. Judgment—What to contain—Costs—When to defendant.
SEC. 228a. Same—Assent—Commissioners to assess damages—evidence.
SEC. 229. Commissioners—Oath of office—Proceedings of—Compensation.
SEC. 229a. Same—Power of commissioners—Rule for estimating damages.
SEC. 230. Report—Confirming and setting aside—Deposit when payment.
SEC. 230a. Same—Title—Setting aside award on technical grounds—Arbitrary exercise of power—Stultifying report—When court will not interfere.
SEC. 231. Offer to compromise—Amount of costs—Additional allowance.
SEC. 232. Judgment—How enforced—Delivery of possession of premises—Writ of assistance.
SEC. 233. Abandonment of proceedings.
SEC. 233a. Same—When proceedings may be abandoned—Confirmation of report.
SEC. 234. Appeal from final order—Stay.
SEC. 234a. Same—Objection to incorporation—Right to appeal.
SEC. 235. Appeal from judgment by plaintiff.
SEC. 236. New appraisal—When granted.
SEC. 236a. Same—Second report—Confirmation—Review.
SEC. 237. Conflicting claimants.
SEC. 237a. Same—Award to unknown owners—Tax title—Constitutional law.
SEC. 238. Possession of property—Giving security.
SEC. 239. Possession—When to be given immediately.
SEC. 240. Pendency of action—Notice of to be filed.
SEC. 241. Practice in cases not provided for.
SEC. 242. Repealing clauses.

Sec. 216. Title of Act—When Act takes Effect.—The last General Assembly [1] amended the Code of Civil Procedure by adding a new chapter thereto, regulating and controlling the proceedings for the condemnation of real property, and the proceedings for the sale of corporate real property.[2] This act is to

[1] L. 1890, c. 95.

[2] N. Y. Code Civ. Proc., ch. 23, tits. I. and II., §§ 3375-3397.

be known as the condemnation law,[1] and takes effect May first, one thousand eight hundred and ninety, but does not in any way affect proceedings commenced before the act became a law.[2]

Sec. 217. Terms Defined.—The term "person," when used herein, includes a corporation, joint stock association, the state and a political division thereof, as well as a natural person; the term "real property," any right, interest or easement therein or appurtenance thereto; and the term "owner," all persons having any estate, interest, or easement in the property to be taken, or any lien, charge, or incumbrance thereon. The person instituting the proceedings shall be termed the plaintiff; and the person against whom the proceeding is brought, the defendant.[3]

Sec. 217a. Incorporeal hereditaments—Condemnation of.—The right of a mill owner to use the waters of a stream as a propelling power at his mill, is an incorporeal hereditament connected with the land, and may be acquired by a water-works company.[4]

Sec. 218. When Proceedings to be Taken.—Whenever any person is authorized to acquire title to real property, for a public use by condemnation the proceeding for that purpose shall be taken in the manner prescribed in this title.[5]

Sec. 218a. Taking private property for public use—Condemnation of corporate property.—The propriety of taking private property for public use is not a judicial question, but one of political sovereignty, to be determined by the legislature, either directly or by delegating the power to public agents,

[1] N. Y. Code Civ. Proc., § 3357.
[2] N. Y. Code Civ. Proc., §§ 3384–3397.
[3] N. Y. Code Civ. Proc., § 3358.
[4] Stamford Water Co. v. Stanley, 39 Hun (N. Y.) 424 (1886).
[5] N. Y. Code Civ. Proc. § 3359.

proceeding in such a manner and form as it may prescribe.[1] Neither a private nor a municipal corporation can, under a general power to take lands for a public use, take from another corporation, having the like power, lands or property held by it for a public purpose pursuant to its charter.[2]

Sec. 218b. Same—Construction of statute.—Statutes delegating the right of eminent domain to railroad and other corporations, being in derogation of common right, are not to be extended by implication, and must be strictly complied with. Yet they are not to be construed so literally as to defeat the evident purposes of the legislature.[3]

Sec. 219. Proceedings to be Commenced by Petition—What to Contain.—The proceeding shall be instituted by the presentation of a petition by the plaintiff to the supreme court, setting forth the following facts:

1. His name, place of residence, and the business in which engaged; if a corporation or joint stock association, whether foreign or domestic, its principal place of business within the state, the names and places of residence of its principal officers, and of its directors, trustees or board of managers, as the case may be, and the object or purpose of its incorporation or association; if a political division of the state, the names and places of residence of its principal officers; and if the state, the name and place of residence of the officer acting in its behalf in the proceeding.

2. A specific description of the property to be condemned, and its location, by metes and bounds, with reasonable certainty.

3. The public use for which the property is re-

[1] People ex rel. Herrick v. Smith, 21 N. Y. 595 (1860).

[2] Matter of Rochester Water Commissioners, 66 N. Y., 413 (1876). See Prospect Park & C. I. R. Co. v. Williamson, 91 N. Y. 552 (1883).

[3] In re New York & H. R. R. Co. v. Kip, 46 N. Y., 546 (1871).

quired, and a concise statement of the facts showing the necessity of its acquisition for such use.

4. The names and places of residence of the owners of the property; if an infant, the name and place of residence of his general guardian, if he has one; if not, the name and place of residence of the person with whom he resides; if a lunatic, idiot, or habitual drunkard, the name and place of residence of his committee or trustee, if he has one; if not, the name and place of residence of the person with whom he resides. If a non-resident, having an agent or attorney residing in the state authorized to contract for the sale of the property, the name and place of residence of such agent or attorney; if the name or place of residence of any owner cannot after diligent inquiry be ascertained, it may be so stated with a specific statement of the extent of the inquiry which has been made.

5. That the plaintiff has been unable to agree with the owner of the property for its purchase, and the reason of such inability.

6. The value of the property to be condemned.

7. A statement that it is the intention of the plaintiff, in good faith, to complete the work or improvement, for which the property is to be condemned; and that all the preliminary steps required by law have been taken to entitle him to institute the proceeding.

8. A demand for relief, that it may be adjudged that the public use requires the condemnation of the real property described, and that the plaintiff is entitled to take and hold such property for the public use specified, upon making compensation therefor, and that commissioners of appraisal be appointed to

ascertain the compensation to be made to the owners for the property so taken.[1]

Sec. 219a. Jurisdiction to condemn—When right exercised—Petition.—When private property is to be taken for public purposes, facts necessary to give the court or officer jurisdiction must appear in the petition, for it is upon that alone that jurisdiction depends.[2] The supreme court has the power to entertain a proceeding on the petition of a railway, to condemn lands of the state under water.[3] It is no objection to proceedings under the act that there are other lands in the same vicinity equally well adapted for the purposes which possibly might be acquired by purchase.[4] The reasons of the inability to agree must be stated, that the court may determine their sufficiency, and also that the owner of the land may negative or disprove them, as the reasons why agreement cannot be had may be various, and a petition which fails to state the reasons for disagreement is defective.[5] The exercise of the power being in derogation of individual right, allowed only when the necessity clearly appears, and the proposed use is clearly embraced within the legitimate objects of the power.[6] A defective description cannot be remedied by reference to a description in a deed. Extreme accuracy is essential for the protection of the rights of all the parties, and a failure to comply with the statute must lead to difficulty and embarrassment.[7]

In Matter of Suburban Rapid Transit Co.,[8] it was held, that the court had power to amend a defect in the petition by proof presented upon the hearing. One petition to acquire the land of several owners is but one proceeding, and requires one appeal and one allowance of costs.[9] In order to

[1] N. Y. Code Civ. Proc. § 3360.

[2] Matter of Marsh, 71 N. Y., 315 (1877), rev'g 10 Hun (N. Y.) 49.

[3] Matter of New York Cable Co., 104 N. Y. 1, 43 (1887).

[4] In re New York & H. R. R. Co. v. Kip, 46 N. Y. 546 (1871).

[5] Matter of Marsh, 71 N. Y. 316 (1877).

[6] In re Staten Island Rapid Transit Co., 103 N. Y. 251 (1886).

[7] Matter of New York C. & H. R. R. R. Co., 70 N. Y. 191 (1877).

[8] 38 Hun (N. Y.) 553 (1886).

[9] Matter of Prospect Park & C. I. R. Co., 67 N. Y., 371 (1876), affirming 8 Hun (N. Y.) 30.

sustain proceedings by which a body corporate claims the power to exercise the right of eminent domain, it is not sufficient that it be a corporation *de facto*. It must be a corporation *de jure*.[1] If the petition does not show the facts required by statute to be stated, the objection may be disposed of before trial.[2] The owner is entitled to notice and hearing.[3]

Sec. 220. Notice to be Annexed to Petition.—Upon whom Served.—There must be annexed to the petition a notice of the time and place at which it will be presented to a special term of the supreme court, held in the judicial district where the property or some portion of it is situated, and a copy of the petition and notice must be served upon all the owners of the property at least eight days prior to its presentation.[4]

Sec. 221. Petition and Notice—How Served.—Service of the petition and notice must be made in the same manner as the service of a summons in an action in the supreme court is required to be made, and all the provisions of articles one and two of title one of chapter five of this act, which relate to the service of a summons, either personally or in any other way, and the mode of proving service, shall apply to the service of the petition, and notice. If the defendant has an agent or attorney residing in this state, authorized to contract for the sale of the real property described in the petition, service upon such agent or attorney will be sufficient service upon such defendant. In case the defendant is an infant of the

[1] Matter of New York Cable Co., 104 N. Y. 1, 43 (1887).

[2] Matter of New York W. S. & B. R. Co., 64 How. (N. Y.) Pr. 217 (1882).

[3] Stuart v. Palmer, 74 N. Y. 183 (1878).

[4] N. Y. Code Civ. Proc., § 3361. All notices and hearings that may tend to give the party to be affected any semblance of benefit must be carefully observed. People ex rel. Odle v. Kniskern, 54 N. Y., 52 (1873).

age of fourteen years or upwards, a copy of the petition and notice shall also be served upon his general guardian, if he has one; if not, upon the person with whom he resides.[1]

Sec. 222. Appearance of Defendant Infant, Idiot. Lunatic or Habitual Drunkard.—If a defendant is an infant, idiot, lunatic or habitual drunkard, it shall be the duty of his general guardian, committee or trustee, if he has one, to appear for him upon the presentation of the petition and attend to his interests; and in case he has none, or in case his general guardian, committee or trustee fails to appear for him, the court shall, upon the presentation of the petition and notice, with proof of service, without further notice, appoint a guardian *ad litem* for such defendant, whose duty it shall be to appear for him and attend to his interests in the proceeding, and, if deemed necessary to protect his rights, the court may require a general guardian, committee or trustee, or a guardian *ad litem* to give security in such sum and with such sureties as the court may approve. If a service other than personal has been made upon any defendant, and he does not appear upon the presentation of the petition, the court shall appoint some competent attorney to appear for him and attend to his interests in the proceeding.[2]

Sec. 223. Appearance of Parties.—The provisions of law and of the rules and practice of the court, relating to the appearance of parties in person or by attorney in actions in the supreme court, shall apply to the proceeding from and after the service of the petition, and all subsequent orders, notices and

[1] N. Y. Code Civ. Proc., § 3362. [2] N. Y. Code Civ. Proc., § 3363.

papers may be served upon the attorney appearing and upon a guardian *ad litem*, in the same manner and with the same effect as the service of papers in an action in the supreme court may be made.[1]

Seb. 223a. Same—Verification of pleadings—Appearance by attorney—Effect of.—A party, by putting in a general appearance and proceeding without objection, submits himself to the jurisdiction of the court, and cannot afterward raise objection to the sufficiency of the verification to the petition.[2] If the petition does not state the facts required in the petition to be stated, an objection in that regard can be raised preliminarily in effect by way of demurrer, and should be disposed of before proceeding to the merits.[3] The appearance of an attorney for the landowner, when a petition for the appointment of commissioners is brought on for hearing, gives jurisdiction, and cures an omission from the petition, such as the omission to state the residence of owners.[4]

Sec. 224. Answer—What to Contain.—Upon presentation of the petition and notice, with proof of service thereof, an owner of the property may appear and interpose an answer, which must contain a general or specific denial of each material allegation of the petition controverted by him, or of any knowledge or information thereof sufficient to form a belief, or a statement of new matter constituting a defense to the proceeding.[5]

Sec. 224a. Same—Non-performance of conditions in charter.—If by non-performance of a condition of its charter, the corporation has forfeited or lost its corporate rights and powers the fact may be averred by any one whose land or property

[1] N. Y. Code Civ. Proc., § 3364.

[2] Matter of New York L. & West. R. Co., 33 Hun (N. Y.) 148 (1884).

[3] Matter of New York W. S. & B. R. Co., 64 How. (N. Y.) Pr. 217 (1882).

[4] Matter of Rochester, Hornellsville, etc., R. Co., 19 Abb. (N. Y.) N. C., 421 (1887).

[5] N. Y. Code Civ. Proc., § 3365.

is sought to be appropriated in answer to the application.[1] It is well settled in this state, that the mere fact that the land proposed to be taken for a public use is not needed for the present and immediate purpose of the petitioning party, is not necessarily a defence to a proceeding to condemn it.[2]

Sec. 225. Petition and Answer—Verification.—A petition or answer must be verified, and the provisions of this act relating to the form and contents of the verification of pleadings in courts of record, and the persons by whom it may be made, shall apply to the verification.[3]

Sec. 226. Trial of Issues.—The court shall try any issue raised by the petition and answer at such time and place as it may direct, or it may order the same to be referred to a referee to hear and determine, and upon such trial the court or referee shall file a decision in writing, or deliver the same to the attorney for the prevailing party, within twenty days after the final submission of the proofs and allegations of the parties, and the provisions of this act relating to the form and contents of decisions upon the trial of issues of fact by the court or a referee, and to making and filing exceptions thereto, and the making and settlement of a case for the review thereof upon appeal, and to the proceedings which may be had in case such decision is not filed or delivered within the time herein required, and to the powers of the court and referee upon such trial, shall be applicable to a trial and decision under this title.

Sec. 227. Provisions made Applicable.—The provi-

[1] Matter of Brooklyn, W. & N. R. Co., 72 N. Y. 245 (1878).

[2] Matter of Staten Island Rapid Transit Co., 103 N. Y. 251 (1886).

[3] N. Y. Code Civ. Proc., 3366.

[4] N. Y. Code Civ. Proc., § 3367. A denial of the intention of a railroad company to, in good faith, construct

sions of title one of chapter eight of this act shall also apply to proceedings had under this title.[1]

Sec. 228. Judgment—What to Contain—Costs—When to Defendant—Commissioners.—Judgment shall be entered pursuant to the direction of the court or referee in the decision filed. If in favor of the defendant, the petition shall be dismissed with costs, to be taxed by the clerk at the same rates as are allowed of course to a defendant prevailing in an action in the supreme court, including the allowances for proceedings before and after notice of trial. If the decision is in favor of the plaintiff, or if no answer has been interposed and it appears from the petition that he is entitled to the relief demanded, judgment shall be entered, adjudging that the condemnation of the real property described is necessary for the public use, and that the plaintiff is entitled to take and hold the property for the public use specified, upon making compensation therefor, and the court shall thereupon appoint three disinterested and competent freeholders, residents of the county where the real property or some part of it is situated or of some adjoining county, commissioners to ascertain the compensation to be made to the owners for the property to be taken for the public use specified, and fix the time and place for the first meeting of the commissioners. If a trial has been had, at least eight days notice of such appointment must be given to all defendants who have appeared.[2]

and finish its road, made by the owner of the property sought to be taken, raises an issue for trial before commissioners can be appointed, and puts the burden of proof upon the company. Matter of Staten Island Rapid Transit R., 20 N. Y. Week. Dig. 15 (1884).

[1] N. Y. Code Civ. Proc., § 3368.

[2] N. Y. Code Civ. Proc., § 3369.

Sec. 228a. Same—Assent—Commissioners to assess damages—Evidence, etc.—Inability to procure the assent of the landholders is the only pre-requisite under the statute to the appointment of commissioners. An application for the appointment of commissioners should not be denied because other companies having coincident routes have refused their consent.[1] Where commissioners were appointed on consent of parties, and it subsequently appeared one of them was not a freeholder, it was held that, in the absence of allegations of improper conduct on his part, the court properly denied a motion, made by one of the parties who had consented to his appointment, to have the report set aside and a new commissioner appointed.[2] The appointment of a son of a commissioner a station agent by the company pending the proceedings is ground for setting aside an appraisal.[3]

Sec. 229. Commissioners.—Oath of Office—Proceedings of—Compensation—The commissioners shall take and subscribe the constitutional oath of office. Any of them may issue subpœnas and administer oaths to witnesses ; a majority of them may adjourn the proceeding before them, from time to time, in their discretion. Whenever they meet, except by appointment of the court or pursuant to adjournment, they shall cause at least eight days notice of such meeting to be given to the defendants who have appeared, or their agents or attorneys. They shall view the premises described in the petition, and hear the proofs and allegations of the parties, and reduce the testimony taken by them, if any, to writing, and after the testimony in each case is closed, they, or a majority of them, all being present, shall, without unnecessary delay, ascertain and determine the compensa-

[1] Matter of Thirty-fourth Street R. Co., 102 N. Y. 343 (1886).

[2] New York W. S. & B. R. Co., 35 Hun (N. Y.) 575 (1885).

[3] New York W. S. & B. R. Co. v. Townsend, 36 Hun (N. Y.) 630 (1880).

tion which ought justly to be made by the plaintiff to the owners of the property appraised by them; and, in fixing the amount of such compensation, they shall not make any allowance or deduction on account of any real or supposed benefits which the owners may derive from the public use, for which the property is to be taken, or the construction of any proposed improvement connected with such public use. But in case the plaintiff is a railroad corporation and such real property shall belong to any other railroad corporation, the commissioners, on fixing the amount of such compensation, shall fix the same at its fair value for railroad purposes. They shall make a report of their proceedings to the supreme court with the minutes of the testimony taken by them, if any; and they shall each be entitled to six dollars for services, for every day they are actually engaged in the performance of their duties and their necessary expenses, to be paid by the plaintiff.[1]

Sec. 229a. Same—Power of commissioners—Rule for estimating damages.—The commissioners have no power to make any awards for the loss of an established business located on the land taken, nor for machinery thereon as such, though an allowance for depreciation of its value by removal is proper.[2]

It is not error for the commissioners to receive and act upon testimony as to the value of the property for park purposes or villa sites.[3]

The corporation acquires an absolute right to the lands divested of any inchoate right of dower existing in the wife.[4] The commissioners should determine the compensa-

[1] N. Y. Code Civ. Proc., § 3370.

[2] Matter of Department of Public Parks, 53 Hun (N. Y.) 280 (1889).

[3] Matter of Department of Public Parks, 53 Hun (N. Y.) 280 (1889.)

[4] Moore v. City of New York, 8 N. Y. 110 (1853).

tion to be made to a widow who has dower or life estate in lands taken;[1] and also the compensation to be made to the mortgagee.[2]

The true inquiry is, what is the fair marketable value of the whole property; what will be the fair marketable value of the property not taken? The difference is the amount of the damages.[3] An appraisal will not be set aside as excessive unless the excess is plain and palpable on the evidence.[4] The opinions of witnesses that the railroad will frighten horses, or the necessity of deviating the line of a turnpike, or the cost of diversion, or that a bridge ought to be built, or the amount of damages a turnpike company will sustain by reason of the crossing of its road, are said to be inadmissible.[5]

In Trustees of College Point v. Dennett,[6] it was held upon an appraisal of a pond that the measure of damages was not limited to its use as a mill or ice-pond, but the owner was entitled to receive its value for any use.

The commissioners must appraise the land at its actual value; they cannot make a reservation of easements and privileges to the owner.[7]

It is competent to show, where land is taken for a specific use, as a railroad, that the land not taken is depreciated in value by the use of the land taken, and if that depreciation consists in the imposition of expense upon the owner of such lands, what that expense will be.[8]

The owner should be awarded the market price of the land already taken, and in addition thereto the depreciation in the market value of the lands remaining, as compared with their

[1] Matter of William Street, 19 Wend. (N. Y.) 678 (1839).

[2] Matter of John Street, 19 Wend. (N. Y.) 659 (1839).

[3] Matter of New York & L. W. R. Co. v. Arnot, 27 Hun (N. Y.) 151 (1882).

[4] Matter of New York L. & W. R. R. Co., 27 Hun (N. Y.) 116 (1882).

[5] Troy & B. R. Co. v. Northern Turnpike Co., 16 Barb. (N. Y.) 100 (1852).

[6] 5 T. & C. (N. Y.) (1874) 217; s. c. 2 Hun (N. Y.) 669.

[7] Hill v. Mohawk & H. R. Co., 7 N. Y. 152 (1852). But see, however, *Ex parte* Hartford C. & R. Co., 65 How. (N. Y.) Pr. 133 (1883), where it is held that a company may petition for the appraisement only of the land required for its roads.

[8] Matter of Bloomfield, etc., Gas L. Co. v. Calkins, 1 T. & C. (N. Y.) 549 (1873).

former market value.[1] It is the duty of the commissioners to hear any and all evidence which would be competent in a court of law on similar questions.[2] They are controlled by the established rules of evidence.[3]

In proceedings by a railroad corporation to acquire a right to lay its tracks in a street or highway, the fee of which is in the owner of the adjoining land, the proper compensation is first, the full value of the land taken; second, a fair and adequate compensation for all the injury the owner has sustained and will sustain by the making of the road over his land.[4] The amount of damages to be awarded to the tenant is the amount which the rental value exceed the rent reserved.[5] The order in which the commissioners shall proceed is a matter left entirely in their discretion.[6]

The party whose land is taken, and who claims damages therefor, has the right to the opening and closing argument in the proceedings.[7]

An error in the admission of evidence is not cured by the certificate of one of the commissioners that it did not affect the report.[8] Errors occurring in the report of testimony are subject to correction by such commissioners, as a proper judicial function, and within their province only:[9]

Loss of business profits and good will are not substantial grounds for damages, nor are they to be considered in estimating the injury caused by the taking of land.[10] When land

[1] Matter of New York W. S. & B. R., 29 Hun (N. Y.) 609 (1883); to the same effect, Matter of New York W. S. & B. R. Co., 35 Hun (N. Y.) 260 (1885).

[2] Rochester & Syr. R. Co. v. Budlong, 6 How. (N. Y.) Pr. 467 (1851).

[3] Troy & B. R. Co., v. Northern Turnpike Co., 16 Barb. (N. Y.) 100 (1852). To the same effect, Matter of Utica & C. R. Co., 56 Barb. (N. Y.) 456.

[4] Henderson v. New York C. R. R. Co., 78 N. Y. 423 (1879).

[5] Matter of the City of Buffalo, 1 Sheld. (N. Y.) 408 (1874).

[6] Albany Northern R. Co. v. Lansing, 16 Barb. (N. Y.) 68 (1852).

[7] Matter of New York L. & W. R. Co., 33 Hun (N. Y.) 148 (1884); affirmed without opinion 98 N. Y. 664.

[8] Matter of New York L. & W. R. Co., 29 Hun (N. Y.) 1 (1883).

[9] Matter of New York W. S. & B. R. Co., 33 Hun (N. Y.) 293 (1884).

[10] Troy & B. R. Co. v. Northern Turnpike Co., 16 Barb. (N. Y.) 100 (1852); to the same effect, Matter of New York W. S. & B. R. Co., 35 Hun (N. Y.) 633 (1885).

is taken, inconveniences from noise, smoke, etc., may be taken into consideration in estimating depreciation of balance.[1]

In estimating the damages to which a lessee of premises used for a business purpose is entitled, the commissioners should consider the injury to the property as a whole; the difference in value of the leasehold interest before and after the land is taken; but the willingness of the lessor to lease another piece of land suitable for the same purpose is not admissible.[2]

Sec. 230. Report—Confirming and Setting Aside—Deposit when Payment.—Upon filing the report of the commissioners, any party may move for its confirmation at a special term, held in the district where the property or some part of it is situated, upon notice to the other parties who have appeared, and upon such motion, the court may confirm the report, or may set it aside for irregularity, or for error of law in the proceedings before the commissioners, or upon the ground that the award is excessive or insufficient. If the report is set aside, the court may direct a rehearing before the same commissioners, or may appoint new commissioners for that purpose, and the proceedings upon such rehearing shall be conducted in the manner prescribed for the original hearing, and the same proceedings shall be had for the confirmation of the second report, as are herein prescribed for the confirmation of the first report. If the report is confirmed, the court shall enter a final order in the proceeding, directing that compensation shall be made to the owners of the property, pursuant to the determination of the commissioners,

[1] Brooklyn Park Commissioners v. Armstrong, 45 N. Y. 234 (1871).

[2] Matter of New York W. S. & B. R. Co. v. Bell, 28 Hun (N. Y.) 426 (1882).

and that upon payment of such compensation, the plaintiff shall be entitled to enter into the possession of the property condemned, and take and hold it for the public use specified in the judgment. Deposit of the money to the credit of, or payable to the order of the owner, pursuant to the direction of the court, shall be deemed a payment within the provisions of this title.[1]

Sec. 230a. Same—Title—Setting aside award on technical grounds—Arbitrary exercise of power—Stultifying report—When court will not interfere.—No title is acquired under proceedings to condemn lands for public use until the confirmation of the report of commissioners appointed to assess the damages for the taking thereof.[2] It is too late to raise objections, such as that the petition is not properly verified, or that it does not appear by the petition that the company has been unable to agree with the owner of the right of way for the purchase, etc., on motion for confirmation of the commissioner's report.[3]

The supreme court will not set aside an award for every technical error, where no injustice appears to have been done.[4] The court will not disturb an appraisal for technical errors, or unless the commissioners have clearly gone astray and disregarded legal principles.[5] Where the petitioner has fairly made out a case establishing that the premises are necessary for its use, and the company has acted in good faith and exercised a reasonable discretion, the court will not interfere.[6]

Where the commissioners awarded much less than the value of the property taken, according to the testimony of

[1] N. Y. Code Civ. Proc., § 3371.

[2] Matter of Common Council of Brooklyn, 5 Hun (N. Y.) 175 (1875).

[3] New York & Erie R. Co. v. Corey, 5 How. (N..Y.) Pr. 177 (1850).

[4] New York Cent. R. Co. v. Marvin, 11 N. Y. 276 (1854); citing Troy & Boston R. Co. v. Northern Turnpike Co., 16 Barb. (N. Y.) 100 (1852).

[5] Matter of New York L. & W. R. Co. v. Arnott, 27 Hun (N. Y.) 151 (1882); to the sam effect New York W. S. & B. R. Co., 37 Hun (N. Y.) 317 (1885).

[6] Matter of New York L. & W. R. Co., 35 Hun (N. Y.) 220 (1885).

every witness put upon the stand, it was held an arbitrary exercise of power not justified by law.[1] An order of court confirming the report of commissioners of appraisement of damages to owners for lands taken, will not give validity to proceedings void for want of jurisdiction.[2]

In case commissioners have filed their report, their power of amendment is gone, and a subsequent report has no validity.[3] The commissioners, upon application and order of court, may amend or correct their report so as to conform it to the state of facts as they exist. But they have no right at the time of such correction to hear proofs by claimants as to damages.[4] Where there has been a succession of appraisals in the same county, one report may embrace all the different parcels.[5]

The report may be set aside where it appears that the commissioners had talked privately with a person from whom they obtained information discrediting claimant's testimony, and the award to him was greatly inadequate, and that his neglect to oppose the confirmation of the report arose from neglect or misconduct of his attorney.[6] The default of an owner upon the hearing before commissioners may be excused by the supreme court on motion to confirm the report, and the report set aside and a new hearing directed.[7]

Upon the application to confirm a report, a commissioner who has signed such report will not be allowed to stultify himself by an affidavit that he signed it without reading it or hearing it read.[8] The court must act solely on the report of the commissioners, and affidavits cannot be used to impeach or contradict it. The report must show that an error has

[1] New York W. S. & B. R. Co. v. Yates, 18 N. Y. Week. Dig. 272 (1883).

[2] Matter of Widening Carlton Street 16 Hun (N. Y.) 497 (1879).

[3] People ex rel. Mann v. Mott, 60 N. Y. 649 (1875).

[4] New York & Erie R. Co. v. Corey, 5 How. (N. Y.) Pr. 177 (1850).

[5] Troy & Rutland R. Co. v. Cleveland, 6 How. (N. Y.) Pr. 238 (1851).

[6] Matter of New York C. R. Co., 5 Hun (N. Y.) 105 (1875). See Visscher v. Hudson River R. Co., 15 Barb. (N. Y.) 37 (1853).

[7] Matter of New York L. & W. R. Co., 93 N. Y., 383 (1883).

[8] Rochester & Genesee Valley R. Co. v. Beckwith, 10 How. (N. Y.) Pr. 168 (1854).

been committed, or that injustice has been done, to enable the court to reverse or set aside the proceedings.[1] Where the parties have agreed as to the principles on which the appraisal is to be conducted, the court cannot interfere.[2]

The right of the mortgagee of lands taken in condemnation proceedings to the amount of awards made to him as mortgagee, is not taken away by his taking judgment in foreclosure without any abatement on account of the awards.[3] The court will not review the judgment of the commissioners upon the facts, except in cases in which a gross inequality of values is developed, or the appraisal is made upon a wrong principle.[4]

Sec. 231. Offer to Compromise—Amount of Costs—Additional Allowance.—In all cases where the owner is a resident, and not under legal disability to convey title to real property the plaintiff before service of his petition and notice may make a written offer to purchase the property at a specified price, which must within ten days thereafter be filed in the office of the clerk of the county where the property is situated ; and which can not be given in evidence before the commissioners, or considered by them. The owner may at the time of the presentation of the petition, or at any time previously, serve notice in writing of the acceptance of plaintiff's offer, and thereupon the plaintiff may, upon filing the petition, with proof of the making of the offer and its acceptance, enter an order that, upon payment of the compensation agreed upon, he may enter into possession of the real property described in the petition, and take and hold it for the public use therein

[1] Rondout & Oswego R. Co. v. Field, 38 How. (N. Y.) Pr. 187 (1869).

[2] In re New York L. & W. R. Co., 102 N. Y. 704 (1886).

[3] Rodman v. City of Buffalo, 15 N. Y. St. Rep., 583 (1888).

[4] Matter of Mayor, etc., of New York, 99 N. Y. 569 (1885); aff'g 34 Hun (N. Y.) 441.

specified. If the offer is not accepted, and the compensation awarded by the commissioners does not exceed the amount of the offer with interest from the time it was made, no costs shall be allowed to either party. If the compensation awarded shall exceed the amount of the offer with interest from the time it was made, or if no offer was made, the court shall, in the final order, direct that the defendant recover of the plaintiff the costs of the proceeding to be taxed by the clerk at the same rate as is allowed, of course, to the defendant when he is the prevailing party in an action in the supreme court, including the allowances for proceedings before and after notice of trial and the court may also grant an additional allowance of costs, not exceeding five per-centum upon the amount awarded. The court shall also direct in the final order what sum shall be paid to the general or special guardian, or committee or trustee of an infant, idiot, lunatic or habitual drunkard, or to an attorney appointed by the court to attend to the interests of any defendant upon whom other than personal service of the petition and notice may have been made, and who has not appeared, for costs, expenses and counsel fees, and by whom or out of what fund the same shall be paid. If a trial has been had, and all the issues determined in favor of the plaintiff, costs of the trial shall not be allowed to the defendant, but the plaintiff shall recover of any defendant answering the costs of such trial caused by the interposition of the unsucessful defense, to be taxed by the clerk at the same rate as is allowed to the prevailing party for the trial of an action in the supreme court.[1]

[1] N. Y. Code Civ. Proc., § 3372. As to offer to purchase property

Sec. 232. Judgment—How Enforced—Delivery of Possession of Premises—Writ of Assistance to Issue.—Upon the entry of the final order, the same shall be attached to the judgment roll in the proceeding, and the amount directed to be paid, either as compensation to the owners, or for the costs or expenses of the proceeding, shall be docketed as a judgment against the person who is directed to pay the same, and it shall have all the force and effect of a money judgment in an action in the supreme court, and collection thereof may be enforced by execution and by the same proceedings as judgments for the recovery of money in the supreme court may be enforced under the provisions of this act. When payment of the compensation awarded, and costs of the proceeding, if any has been made as directed in the final order, and a certified copy of such order has been served upon the owner, he shall, upon demand of the plaintiff, deliver possession thereof to him, and in case possession is not delivered when demanded, the plaintiff may apply to the court without notice, unless the court shall require notice to be given, upon proof of such payment and of service of the copy order, and of the demand and non-compliance therewith, for a writ of assistance, and the court shall thereupon cause such writ to be issued, which shall be executed in the same manner as when issued in other cases for the delivery of possession of real property.[1]

Sec. 233. Abandonment of Proceeding.—Within thirty days after the entry of the final order the plaintiff may abandon the proceeding, by filing and serving a written notice of his determination to do so, by

at a specified price and acceptance of same, see N. Y. Code of Civil Procedure, §§ 736–740 both inclusive

[1] N. Y. Code Civ. Proc., § 3373.

filing fees and expenses of the commissioners, and the costs and expenses directed to be paid in such order; and thereupon payment of the amount awarded for compensation shall not be enforced, but in such case the plaintiff shall not renew proceedings to acquire title to such lands or any part thereof without a tender or deposit in court of the amount of the award and interest thereon.[1]

Sec. 233a. Same—When proceedings may be abandoned—Confirmation of report.—A public body or public officers having the right of eminent domain for public purposes may be permitted to discontinue proceedings to acquire lands at any time before any rights have become vested in the property owners.[2] The confirmation of the report of commissioners prevents the abandoning of the proceedings.[3] Until the confirmation of the commissioners appointed to assess damages, the court may allow a discontinuance of the proceedings.[4]

Sec. 234. Appeal from Final Order.—Stay.—Appeal may be taken to the general term of the supreme court from the final order, within the time provided for appeals from orders by title four of chapter twelve of this act; and all the provisions of such chapter relating to appeals to the general term from orders of the special term shall apply to such appeals. Such appeal will bring up for review all the proceedings subsequent to the judgment, but the judgment and proceedings antecedent thereto may be reviewed on such appeal, if the appellant states in his notice that the same will be brought up for review, and exceptions shall have been filed to the decision of the court or the referee, and a case or a case and excep-

[1] N. Y. Code Civ. Proc., § 3374.

[2] Matter of Washington Park, 56 N. Y. 144 (1874).

[3] Matter of Rhinebeck & Connecticut R. Co., 67 N. Y. 242 (1876).

[4] Ex parte New York Syracuse B. & N. Y. Co., 4 Hun (N. Y.) 311 (1875).

tions shall have been made, settled and allowed, as required by the provisions of this act, for the review of the trial of actions in the supreme court without a jury. The proceedings of the plaintiff shall not be stayed upon such an appeal, except by order of the court, upon notice to him, and the appeal shall not affect his possession of the property taken, and the appeal of a defendant shall not be heard except on his stipulation not to disturb such possession.[1]

Sec. 234a. Same—Objection to incorporation—Right to appeal.—The objection that a corporation seeking to condemn property under the right of eminent domain, has no legal existence, should be taken in proper time ; if not, the objection cannot be raised on appeal to the court of appeals.[2] Any person deeming himself aggrieved may appeal.[3]

An appeal lies to the court of appeals from an order of the general term, affirming an order of the special term.[4] But it will not review matters of discretion.[5] An appeal from so much of the order of the general term, reversing an award confirmed by the special term, as refused to appoint new commissioners, when the latter were named in a stipulation, is reviewable in the court of appeals.[6]

The rule which deprives a party of the right to appeal from an order or judgment under which he has taken a benefit, is not applicable to these proceedings, and the right to appeal is not affected by accepting payment for the land and giving receipt therefor.[7]

Sec. 234b. Same—Waiving right of appeal—Review.—Where

[1] N. Y. Code Civ. Proc., § 3375.

[2] Matter of Union E. R. Co. of Brooklyn, 112 N. Y. 61 (1889).

[3] New York & E. R. Co. v. Corey, 5 How. (N. Y.) Pr. 177 (1850).

[4] Rensselaer & S. R. Co v. Davis, 43 N. Y. 137 (1870).

[5] Matter of New York C. & H. R. Co., 64 N. Y. 60 (1876). See Matter of Kings Co. E. R. Co., 82 N. Y. 95, 100 (1880).

[6] Matter of New York, L. & W. R. Co., 98 N. Y. 447 (1885).

[7] Matter of New York, H. R. Co., 98 N. Y. 12 (1885). See Matter of New York W. S. & B. R. Co., 94 N. Y., 287 (1884).

the owner objects to the appointment of commissioners on the ground that the land was sought for private purposes, failure to appeal from a decision declaring that the purpose was public, and consent to the appointment of commissioners, do not amount to a waiver of rights, and such owner may afterward move to set the order aside.[1] But a small portion of the evidence upon which commissioners act in the formation of their awards can be placed before the appellate court, and there can, therefore, be no regular judicial review where the original jurisdiction is exercised in such a manner.[2]

Sec. 235. Appeal from Judgment by Plaintiff.—If a trial has been had and judgment entered in favor of the defendant, the plaintiff may appeal therefrom to the general term within the time provided for appeals from judgments by title four of chapter twelve of this act, and all the provisions of such chapter relating to appeals from judgments shall apply to such appeals; and on the hearing of the appeal the general term may affirm, reverse or modify the judgment, and in case of reversal may grant a new trial, or direct that judgment be entered in favor of the plaintiff. If the judgment is affirmed, costs shall be allowed to the respondent, but if reversed or modified, no costs of the appeal shall be allowed to either party.[3]

Sec. 236. New Appraisal when Granted.—On the hearing of the appeal from the final order the court may direct a new appraisal before the same or new commissioners, in its discretion, and the report of such commissioners shall be final and conclusive upon all parties interested. If the amount of the compensation to be paid is increased by the last report, the

[1] In re Niagara Falls & W. R. Co., 4 N. Y. Supp. 485 (1888).

[2] Matter of Staten Island R. T. Co., 47 Hun (N. Y.) 396, 397 (1888).

[3] N. Y. Code Civ. Proc., § 3376.

difference shall be a lien upon the land appraised, and shall be paid to the parties entitled to the same, or shall be deposited as the court shall direct ; and if the amount is diminished, the difference shall be refunded to the plaintiff by the party to whom the same may have been paid, and judgment therefor may be rendered by the court, on the filing of the last report, against the parties liable to pay the same.[1]

Sec. 236a. Same — Second report — Confirmation — Review.— The provision that the determination as to damages for land taken, made by commissioners of appraisal in their second report, shall be final and conclusive, precludes as well a review by a common law *certiorari* as by appeal.[2]

Such second report needs no order of confirmation.[3]

To authorize a court to review on motion a second report, there must be such an irregularity, fraud or mistake in the proceedings of the commissioners as would authorize the court, under its established practice, to set aside a judgment or verdict on a motion.[4]

Sec. 237. Conflicting Claimants.—If there are adverse and conflicting claimants to the money, or any part of it, to be paid as compensation for the property taken, the court may direct the money to be paid into the court by the plaintiff, and may determine who is entitled to the same, and direct to whom the same shall be paid, and may, in its discretion, order a reference to ascertain the facts on which such determination and direction are to be made.[5]

Sec. 237a. Same — Award to unknown owners — Tax title — Constitutional Law.—If the commissioners are unable to deter-

[1] N. Y. Code Civ. Proc., § 3377.

[2] People ex rel. Schuylerville, & U. H. R. Co. v. Betts, 55 N. Y. 600 (1874).

[3] Matter of Prospect Park & C. I. R. Co., 85 N. Y. 498 (1881).

[4] Matter of New York Elevated R. Co., 41 Hun (N. Y.) 502 (1886).

[5] N. Y. Code Civ. Proc., § 3378.

mine to whom an award should be made, it should be made to unknown owners, the title to the award being determined in subsequent proceedings between the claimants. It is error to make a nominal award because of a failure to make title.[1]

A claim to a portion of the sum awarded as compensation made by the county for unpaid taxes upon the property cannot be maintained on any ground which would be insufficient in a direct proceeding by virtue of the assessment to support a sale of the property or uphold a tax title.[2]

The provisions of this section are not in violation of the constitution. The money takes the place of land, and is subject to the same liens to which the land was before being taken.[3]

Sec. 238. Possession of Property—Giving Security.—At any stage of the proceeding the court may authorize the plaintiff, if in possession of the property sought to be condemned, to continue in possession, and may stay all actions or proceedings against him on account thereof, upon giving security, or depositing such sum of money as the court may direct to be held as security for the payment of the compensation which may be finally awarded to the owner therefor, and the costs of the proceeding, and in every such case the owner may conduct the proceeding to a conclusion, if the plaintiff delays or neglects to prosecute the same.[4]

Sec. 239. Possession—When to be given Immediately.—When an answer to the petition has been interposed, and it appears to the satisfaction of the court that the public interests will be prejudiced by delay, it may direct that the plaintiff be permitted to enter immediately upon the real property to be taken, and

[1] Matter of Department of Public Parks, 53 Hun (N. Y.) 280 (1889).

[2] Matter of N. Y. C. & H. R. R. Co., 90 N. Y. 342 (1882).

[3] Matter of N. Y. C. & H. R. R. Co., 60 N. Y. 116 (1875).

[4] N. Y. Code Civ. Proc., § 3379.

devote it temporarily to the public use specified in the petition, upon depositing with the court the sum stated in the answer as the value of the property, and which sum shall be applied, so far as it may be necessary for that purpose, to the payment of the award that may be made, and the costs and expenses of the proceeding, and the residue, if any, returned to the plaintiff, and, in case the petition should be dismissed, or no award should be made, or the proceedings should be abandoned by the plaintiff, the court shall direct that the money so deposited, so far as it may be necessary, shall be applied to the payment of any damages which the defendant may have sustained by such entry upon and use of his property, and his costs and expenses of the proceeding, such damages to be ascertained by the court, or a referee to be appointed for that purpose, and if the sum so deposited shall be insufficient to pay such damages, and all costs and expenses awarded to the defendant, judgment shall be entered against the plaintiff for the deficiency, to be enforced and collected in the same manner as a judgment in the supreme court ; and the possession of the property shall be restored to the defendant.[1]

Sec. 240. Pendency of Action—Notice of to be Filed.— Upon service of the petition, or at any time afterwards before the entry of the final order, the plaintiff may file in the clerk's office of each county where any part of the property is situated, a notice of the pendency of the proceedings, stating the names of the parties and the object of the proceeding, and containing a brief description of the property affected

[1] N. Y. Code Civ. Proc., § 3380.

thereby and from the time of filing, such notice shall be constructive notice to a purchaser, or incumbrancer of the property affected thereby, from or against a defendant with respect to whom the notice is directed to be indexed, as herein prescribed, and a person whose conveyance or incumbrance is subsequently executed or subsequently recorded, is bound by all proceedings taken in the proceeding, after the filing of the notice, to the same extent as if he was a party thereto. The county clerk must immediately record such notice when filed in the book in his office kept for the purpose of recording notices of pendency of actions, and index it to the name of each defendant specified in the direction appended at the foot of the notice, and subscribed by the plaintiff or his attorney.[1]

Sec. 241. Practice in Cases not Provided for.—In proceedings under this title, where the mode or manner of conducting all or any of the proceedings therein is not expressly provided for by law, the court before whom such proceedings may be pending, shall have the power to make all necessary order and give necessary directions to carry into effect the object and intent of this title, and of the several acts conferring authority to condemn lands for public use, and the practice in such cases shall conform, as near as may be, to the ordinary practice in such court.[2]

Sec. 242. Repealing Clause.—So much of all acts and parts of acts as prescribe a method of procedure in proceedings for the condemnation of real property for a public use is repealed, except such acts and parts of acts as prescribe a method of procedure for

[1] N. Y. Code Civ. Proc., § 3381. [2] N. Y. Code Civ. Proc., § 3382.

the condemnation of real property for public use as a highway, or as a street, avenue, or public place in an incorporated city or village, or as may prescribe methods of procedure for such condemnation for any public use for, by, on behalf, on the part or in the name of the corporation of the city of New York, known as the mayor, aldermen, and commonalty of the city of New York, or by whatever name known, or by or on the application of any board, department, commissioners or other officers acting for or on behalf or in the name of such corporation or city, or where the title to the real property so to be acquired vests in such corporation or in such city; and all proceedings for the condemnation of real property embraced within the exceptions enumerated in this section are exempted from the operation of this title.[2]

[1] N. Y. Code Civ. Proc., § 3383, thus amended by Laws 1890, c. 247. This amendment was passed April 30, 1890, and went into effect immediately.

CHAPTER XIV.

PROCEEDINGS FOR THE SALE OF CORPORATE REAL PROPERTY.

WHEN PROCEEDINGS TO BE TAKEN—HOW INSTITUTED—PETITION—CONTENT—HEARING—APPOINTMENT OF REFEREE—ORDER—OPPOSITION TO—INSOLVENT CORPORATION—NOTICE TO CREDITORS—HOW SERVED—PRACTICE.

SEC. 243. When proceedings to be taken.
SEC. 244. Proceedings to be instituted by petition—Contents of petition.
SEC. 245. Hearing of application—Notice—Appointment of referee.
SEC. 246. Order—Application for—When may be opposed.
SEC. 246a. Same—Provisional order—Jurisdiction of court.
SEC. 247. Insolvent corporation or association—Notice to creditors.
SEC. 248. Service of notice—How made.
SEC. 249. Practice in cases not provided for.

Sec. 243. When Proceedings to be Taken.—Whenever any corporation or joint-stock association is required by law to make application to the court for leave to mortgage, lease or sell its real estate, the proceeding therefore shall be had pursuant to the provisions of this title.[1]

Sec. 244. Proceedings to be Instituted by Presentation of Petition.—The proceedings shall be instituted by the presentation to the supreme court of the district or the county court of the county where the real property, or some part of it, is situated, by the corporation or association, applicant, of a petition setting forth the following facts :

[1] N. Y. Code Civ. Proc., § 3390.

1. The name of the corporation or association, and of its directors, trustees or managers, and of its principal officers, and their places of residence.

2. The business of the corporation or association, or the object or purpose of its incorporation or formation, and a reference to the statute under which it was incorporated or formed.

3. A description of the real property to be sold, mortgaged or leased, by metes and bounds, with reasonable certainty.

4. That the interests of the corporation or association will be promoted by the sale, mortgage or lease, of the real property specified, and a concise statement of the reasons therefor.

5. That such sale, mortgage or lease has been authorized, by a vote of at least two-thirds of the directors, trustees or managers of the corporation or association, at a meeting thereof, duly called and held, and a copy of the resolution granting such authority.

6. The market value of the remaining real property of the corporation or association, and the cash value of its personal assets, and the total amount of its debts and liabilities, and how secured, if at all.

7. The application proposed to be made of the moneys realized from such sale, mortgage or lease.

8. Where the consent of the shareholders, stockholders or members of the corporation or association, is required by law to be first obtained, a statement that such consent has been given, and a copy of the consent, or a certified transcript of the record of the meeting at which it was given, shall be annexed to the petition.

9. A demand for leave to mortgage, lease or sell the real estate described.

The petition shall be verified in the same manner as a verified pleading in an action in a court of record.[1]

Sec. 245. Hearing of Application—Notice—Appointment of Referee.—Upon presentation of the petition, the court may immediately proceed to hear the application, or it may, in its discretion, direct that notice of the application shall be given to any person interested therein, as a member, stockholder, officer or creditor of the corporation or association, or otherwise, in which case the application shall be heard at the time and place specified in such notice, and the court may in any case appoint a referee to take the proofs and report the same to the court, with his opinion thereon.[2]

Sec. 246. Order—Application for—When may be Opposed.—Upon the hearing of the application, if it shall appear, to the satisfaction of the court, that the interests of the corporation or association will be promoted thereby, an order may be granted authorizing it to sell, mortgage or lease the real property described in the petition, or any part thereof, for such sum, and upon such terms as the court may prescribe, and directing what disposition shall be made of the proceeds of such sale, mortgage or lease.

Any person, whose interests may be affected by the proceeding, may appear upon the hearing and

[1] N. Y. Code Civ. Proc., § 3391. As to requirements of petition on sale of real estate of religious corporations in first department, see rules of the general term of the supreme court, first district, March, 1862.

Under the act to provide for the incorporation of religious societies, the trustees of such a corporation are authorized to act in its behalf in taking the steps required for effecting a sale of its real estate, and their acts are binding upon it, although it does not appear that they had the express sanction or authority of a majority of the corporation. The Madison Avenue Baptist Church v. The Baptist Church in Oliver Street, 46 N. Y. 131 (1881); s. c. 73 N. Y. 82, on subsequent appeal.

[2] N. Y. Code Civ. Proc., § 3392.

show cause why the application should not be granted.[1]

Sec. 246a. Same—Provisional Order—Jurisdiction of Court.—A provisional order may be made, such as an order that the sale may be made for a certain price and if a proper site for a new church can be obtained.[2] The sale may be made by the trustees, or by an officer appointed by the court.[3] It seems that the jurisdiction of the court to make an order for a sale depends upon the facts before it when the order was made, and that the order cannot be sustained by proof that the facts existed which justified the order, but which did not appear to the court at the time of the application.[4]

Where it appears from the application that the sale is sought for the purpose of distributing the proceeds among the pew-holders, the court has no jurisdiction to grant the application, and its order is inoperative.[5]

Jurisdiction of the court to order sale by a religious society of its real estate, under Laws 1813, chap. 60, § 11, depends upon the facts before it at the time of making the order, and cannot be upheld by proof that facts which would have justified the order existed, but were not brought to its attention.[6]

Sec. 247. Insolvent Corporation or Association—Notice to Creditors.—If the corporation or association is insolvent, or its property and assets are insufficient to fully liquidate its debts and liabilities, the application shall not be granted, unless all the creditors of the corporation have been served with a notice of the time and place at which the application will be heard.[7]

[1] N. Y. Code Civ. Proc., § 3393.

[2] Matter of Brick Presbyterian Church, 3 Edw. Ch. (N. Y.) 155 (1838).

[3] De Ruyter v. St. Peter's Church, 3 N. Y. 240 (1849).

[4] Wheaton v. Gates, 18 N. Y. 395 (1858).

[5] Madison Avenue Baptist Church v. Baptist Church in Oliver Street, 46 N. Y. 140 (1871); citing Wheaton v. Gates, 18 N. Y. 395 (1858).

[6] Madison Avenue Baptist Church v. Baptist Church in Oliver St., 73 N. Y. 82 (1878).

[7] N. Y. Code Civ. Proc., § 3394.

Sec. 248. Service of Notices—How Made.—Service of notices, provided for in this title, may be made either personally, or, in case of absence, by leaving the same at the place of residence of the person to be served, with some person of mature age and discretion, at least eight days before the hearing of the application, or by mailing the same, duly enveloped and addressed and postage paid, at least sixteen days before such hearing.[1]

Sec. 249. Practice in Cases not Provided for.—In all applications made under this title where the mode or manner of conducting any or all of the proceedings thereon are not expressly provided for, the court before whom such application may be pending, shall have the power to make all the necessary orders and give the proper directions to carry into effect the object and intent of this title, or of any act authorizing the sale of corporate real property, and the practice in such cases shall conform, as near as may be, to the ordinary practice in such court.[2]

[1] N. Y. Code Civ. Proc., § 3395. [2] N. Y. Code Civ. Proc., § 3396.

CHAPTER XV.

WEEKLY PAYMENT OF WAGES.

WAGES—WEEKLY PAYMENT—PENALTY FOR VIOLATION—PROCEEDINGS TO ENFORCE—CONSTITUTIONALITY.

SEC. 250. Wages—Weekly payment of.
SEC. 251. Same—Penalty for violation—Defenses.
SEC. 252. Same—Proceedings to enforce penalty.
SEC. 253. Same—Constitutionality.

Sec. 250. Wages—Weekly Payment of.—The general assembly of 1889–90 passed what is known as "the weekly payment of wages bill" which went into effect the first day of July, 1890[1] and provides that "every manufacturing, mining or quarrying, lumbering, mercantile, railroad, surface, street, electric and elevated railway (except steam surface railroads,) steamboat, telegraph, telephone and municipal corporation and every incorporated express company and water company, shall pay weekly each and every employee engaged in its business the wages earned by such employee to within six days of the date of such payment; provided, however, that if at any time of payment any employee shall be absent from his regular place of labor he shall be entitled to said payment at any time thereafter upon demand."[2]

[1] L. 1890, c. 388, § 4.

[2] L. 1890, c. 388, § 1.

Sec. 251. Same—Penalty for Violation—Defenses— Any corporation violating any of the provisions of this act should be liable to a penalty not exceeding $50 and not less than $10 for each violation, to be paid to the people of the state, and which may be recovered in a civil action; provided an action of such violation is commenced within thirty days from the date thereof. The factory inspectors of this state, their assistants or deputies, may bring an action in the name of the people of the state as plaintiff against any corporation which neglects to comply with the provisions of this act for a period of two weeks, after having been notified in writing by such inspectors, assistants or deputies, that such action will be brought. On the trial of such action, such corporation shall not be allowed to set up any defence for a failure to pay weekly any employee engaged in its business the wages earned by such employee to within six days of the date of such payment, other than a valid assignment of such wages, or a valid set-off against the same, or the absence of such employee from his regular place of labor at the time of payment, or an actual tender to such employee at the time of payment of the wages so earned by him, or a breach of contract by such employee, or a denial of the employment. No assignment of future wages, payable weekly under the provisions of this act, shall be valid if made to the corporation from whom such wages are to become due, or to any person on behalf of such corporation, or if made or procured to be made to any person for the purpose of relieving such corporation from the obligation to pay weekly under the provisions of this act. Nor shall any of said corporations require any agreement from

any employee to accept wages at other periods than as provided in section one of this act as a condition of employment.[1]

Sec. 252. Same—Proceedings to Enforce Penalty.—The provisions of sections 236 and 384 of the code of civil procedure shall apply to and govern any proceedings brought to enforce the provisions of this act, and it is hereby made the duty of the Attorney-General of this state to appear in behalf of such proceedings brought hereunder by the factory inspectors of this state, their assistants or deputies.[2]

Sec. 253. Same—Constitutionality—It has been claimed that this act is unconstitutional, on the ground that it interferes with subsisting contracts and seeks to regulate private business; but this is thought not to be the case, because it deals only with corporations, and all corporations are subject to the right of the state to regulate and control them.

[1] L. 1890, c. 388, § 2.

[2] L. 1890, c. 388, § 3.

PART II.

MANUFACTURING CORPORATIONS.

CHAPTER XVI.

MANUFACTURING CORPORATIONS—PRELIMINARY.

ACTS GOVERNING—INCORPORATION—TRUSTEES—NEGLECT—DISSOLUTION—STOCK—NON-PAYMENT—POWER OF TRUSTEES—STOCK—TRANSFER—EVIDENCE OF INCORPORATION—MANUFACTURERS OF CLAY AND EARTH—MAKING BY-LAWS—APPOINTING FIREMEN—ARTICLES EXEMPT FROM—DISTRESS—PIN MANUFACTORIES—LEATHER MANUFACTORIES—MORTGAGES BY.

SEC. 254. Manufacturing corporations—Acts governing.
SEC. 255. Same—Incorporation of Companies.
SEC. 256. Same—To be bodies corporate and politic.
SEC. 257. Same—Trustees to be annually elected—Vacancy in the office of trustees, how filled—Number not to exceed nine.
SEC. 258. Same—Company not dissolved by neglect to elect.
SEC. 259. Same—Capital stock—Shares forfeited for non-payment.
SEC. 260. Same—Powers of trustees.
SEC. 261. Same—Stock deemed personal estate and how transferable—Stockholders responsible—Restriction on the funds.
SEC. 262. Same—Evidence of incorporation.
SEC. 263. Same—Manufacturers of clay or earth.
SEC. 264. Same—Making by-laws—Appointing firemen.
SEC. 265. Same—Certain articles to be exempt from distress and sale.
SEC. 266. Same—Pin manufactories and others may be established.
SEC. 267. Same—Manufactories of Morocco and other leather.
SEC. 268. Same—Power to give mortgages—Doubts having existed.
SEC. 269. Same—Act continued in force.
SEC. 270. Same—Act revived.
SEC. 271. Same—Act amended.

Sec. 254. Manufacturing Corporations—Acts govern-

ing.—It is thought that under the decisions,[1] it is probable that the courts would rule that the acts contained in this article were impliedly repealed by the general manufacturing act of 1848, contained in the next chapter; but as they have never been expressly repealed, and as they are retained in all the compilations of the statutes since 1848, they are inserted here out of the abundance of precaution.

Sec. 255. Same—Incorporation of Companies.—At any time within five years hereafter, any five or more persons who shall be desirous to form a company for the purpose of manufacturing woolen, cotton or linen goods, or for the purpose of making glass, or for the purpose of making from ore, bar-iron, anchors, mill-irons, steel, nail-rods, hoop-iron and ironmongery, sheet copper, sheet lead, shot, white lead and red lead, may make, sign and acknowledge, before a justice of the supreme court, a judge of the court of common pleas, or a mastery in chancery, and file in the office of the secretary of this state, a certificate in writing, in which shall be stated the corporate name of the said company and the objects for which the company is formed, the amount of the capital stock of the said company, the number of shares of which the said stock shall consist, the number of trustees and their names who shall manage the concerns of the said company for the first year, and the names of the town and county in which the manufacturing operations of the said company are to be carried on.[2]

[1] People ex rel. v. Brooklyn, 69 N. Y. 605 (1877); Heckmann v. Pinkney, 6 Abb. (N. Y.) N. C. 371 (1879); s. c. 81 N. Y. 211.

[2] L. 1811, c. 67, § 1; 3 N. Y. R. S., 8th ed., p. 1948. See Mead v. Keeler, 24 Barb. (N. Y.) 20 (1857); Bank of Poughkeepsie v. Ibbotson, 5 Hill (N. Y.) 461 (1843).

Sec. 256. Same—To be Bodies Corporate and Politic.—As soon as such certificate shall be filed as aforesaid, the persons who shall have signed and acknowledged the said certificate, and their successors, shall, for the term of twenty years next after the day of filing such certificate, be a body politic and corporate, in fact and in name, by the name stated in such certificate, and by that name they and their successors shall and may have succession, and shall be persons in law capable of sueing and being sued, pleading and being impleaded, answering and being answered unto, defending and being defended, in all courts and places whatsoever, in all manner of actions, suits, complaints, matters and causes whatsoever; and they and their successors may have a common seal, and the same may make, alter and change at their pleasure; and that they and their successors, by their corporate name, shall in law be capable of buying, purchasing, holding and conveying any lands, tenements, hereditaments, goods, wares and merchandise whatever, necessary to enable the said company to carry on their manufacturing operations mentioned in such certificate.[1]

Sec. 257. Same—Trustees to be Annually Elected—Vacancy in the Office of Trustees, how Filled—Number not to exceed Nine.—The stock, property and concerns of such company shall be managed and conducted by trustees, who, except those for the first year, shall be elected at such time and place as shall be directed by the by-laws of the said company, and public notice shall be given of the time and place of hold-

[1] L. 1811, c. 67, § 2; 3 N. Y. R. S., 8th ed., p. 1948. See Mead v. Keeler, 24 Barb. (N. Y.) 20 (1857); Cushman v. Shepard, 4 Barb. (N. Y.) 113 (1848).

ing such election not less than ten days previous thereto, in the newspaper printed nearest to the place where the manufacturing operations of the said company shall or are to be carried on, and the election shall be made by such of the stockholders as shall attend for that purpose, either in person or by proxy, and all elections shall be by ballot, and each stockholder shall be entitled to as many votes as he owns shares of the stock of the said company, and the persons having the greatest number of votes shall be trustees; and whenever any vacancy shall happen among the trustees by death, resignation, or removals out of the state, such vacancy shall be filled for the remainder of the year in such manner as shall be provided by the by-laws of the said company: provided always, that the number of trustees shall not exceed nine, and that they shall respectively be stockholders in such company.[1]

Sec. 258. Same—Company not Dissolved by Neglect to elect.—In case it shall at any time happen that an election of trustees be not made on the day when by the by-laws of the said company it ought to have been done, the said company for that cause shall not be dissolved, but it shall and may be lawful on any other day to hold an election for trustees, in such manner as shall be directed by the by-laws of such company.[1]

Sec. 259. Same—Capital Stock—Shares Forfeited for Non-payment.—The capital stock of such company shall not exceed one hundred thousand dollars; and

[1] L. 1811, c. 67, § 3; 3 N. Y. R. S. 8th ed., p. 1949. See Matter of Rochester Dist. Tel. Co., 40 Hun (N. Y.) 172 (1886); Clark v. Farmers' Woolen Manuf. Co. of Benton, 15 Wend. (N. Y.) 257 (1836).

[2] L. 1811, c. 67, § 4; 3 N. Y. R. S., 8th ed., p. 1949.

it shall be lawful for the trustees to call and demand from the stockholders respectively all such sums of money by them subscribed, at such time and in such proportions as they shall deem proper, under pain of forfeiting the shares of the said stockholders, and all previous payments made thereon, if such payments shall not be made within sixty days after a notice requiring such payment shall have been published in such newspaper as aforesaid.[1]

Sec. 260. Same—Powers of Trustees.—The trustees of such company for the time being shall have power to make and prescribe such by-laws, rules and regulations as they shall deem proper respecting the management and disposition of the stock, property and estate of such company, the duties of the officers, artificers and servants by them to be employed, the election of trustees, and all such matters as appertain to the concerns of the said company, to appoint such and so many officers, clerks and servants for carrying on the business of the said company, and with such wages as to them shall seem reasonable : provided, that such by-laws be not inconsistent with the Constitution and laws of this state or of the United States.[2]

Sec. 261. Same—Stock deemed Personal Estate—How Transferred—Stockholders Responsible—Restriction on the Funds.—The stock of such company shall be deemed personal estate, and be transferable in such manner as shall be prescribed by the laws of the company ; and that for all debts which shall be due and owing by the company at the time of its dissolution,

[1] L. 1811, c. 67, § 5; 3 N. Y. R. S., 8th ed., p. 1949. See Mann v. Currie, 2 Barb. (N. Y.) 294 (1848).

[2] L. 1811, c. 67, § 6; 3 N. Y. R. S. 8th ed., p. 1949.

the persons then composing such company shall be individually responsible to the extent of their respective shares of stock in the said company, and no further ; and that it shall not be lawful for such company to use their funds, or any part thereof, in any banking transaction, or in the purchase of any stock of any bank, or in the purchase of any public stock whatever, or for any other purposes than those specified in such instruments as aforesaid.[1]

Sec. 262. Same—Evidence of Incorporation.—The copy of any certificate filed in pursuance of this act, and certified to be a true copy by the secretary of this state, or his deputy, shall, together with this act, be received in all courts and places as legal evidence of the incorporation of such company.[2]

Sec. 263. Same—Manufacturers of Clay or Earth.—It shall and may be lawful for any five or more persons who shall be desirous of forming a company for the purpose of manufacturing clay or earth into ware or articles for any use whatsoever, to associate

[1] L. 1811, c. 67, § 7; 3 N. Y. R. S., 8th ed., p. 1950. See Story v. Furman, 25 N. Y. 215 (1862); Garrison v. Howe, 17 N. Y. 458 (1858); Bradt v. Benedict, 17 N. Y. 93 (1858); Rosevelt v. Brown, 11 N. Y. 148 (1854); Mead v. Keeler, 24 Barb. (N. Y.) 20 (1857); Walker v. Crain, 17 Barb. (N. Y.) 119 (1853); Harris v. Thompson, 15 Barb. (N. Y.) 62 (1853); Catskill Bank v. Gray, 14 Barb. (N. Y.) 471 (1851); Beers v. Phœnix Glass Co., 14 Barb. (N. Y.) 358 (1852); Moss v. McCullough, 7 Barb. (N. Y.) 279 (1849); Tallmadge v. Fishkill Iron Co., 4 Barb. (N. Y.) 382, 390 (1848); Cushman v. Shepard, 4 Barb. (N. Y.) 113, 118 (1848); Briggs v. Penniman, 8 Cow. (N. Y.) 387 (1826); s. c. 18 Am. Dec. 454; Bank of Poughkeepsie v. Ibbotson, 5 Hill (N. Y.) 461 (1843); s. c. 24 Wend. (N. Y.) 473; Moss v. McCullough, 5 Hill (N. Y.) 131 (1843); Moss v. Oakley, 2 Hill (N. Y.) 265 (1842); Penniman v. Briggs, Hopk. Ch. (N. Y.) 300 (1824); Slee v. Bloom, 19 Johns. (N. Y.) 456 (1822); s. c. 10 Am. Dec., 273; Brinckerhoff v. Brown, 7 Johns' Ch. (N. Y.) 217 (1823); Slee v. Bloom 5 Johns. Ch. (N. Y.) 366 (1821); Fisk v. Keeseville Woolen & Cotton Manuf. Co., 10 Paige Ch. (N. Y.) 592 (1844).

[2] L. 1811, c. 67, § 8; 3 N. Y. R. S., 8th ed., p. 1950.

together and form such company according to the directions and restrictions mentioned in the act, entitled, "An act relative to incorporations for manufacturing purposes," passed March 22d, 1811; and such company when formed, and their successors, shall be a body politic and corporate, in fact and in name, with all the privileges, capacities and liabilities in the said act mentioned and contained.[1]

Sec. 264. Same—Making By-laws—Appointing Firemen.—It shall and may be lawful for the president and directors of any company incorporated for the purpose of manufacturing cotton, woolen or linen yarns or cloths, and whose capital actually employed for such purpose shall exceed the sum of twenty-five thousand dollars, the number of persons actually employed in and about such manufactory shall not be less than fifty, to make, ordain and prescribe such by-laws and regulations within the limits of any parcel of land purchased by such company for that purpose, not exceeding twenty-five acres, as they may deem proper for the better preservation of property from fire within the limits of such parcel of land; and it shall and may be lawful for such president and directors, or a major part of them, to appoint, under the common seal of the said corporation, a sufficient number of men, willing to accept, residing within such limits, and not exceeding the number of twenty to every fire engine now provided or hereafter to be provided for the use of such establishment, to have the care, management, working and using the said engines, and the other tools and instruments now or hereafter to be provided for the

[1] L. 1815, c. 47, § 1; 3 N. Y. R. S., 8th ed., p. 1950.

extinguishing of fires, which persons so to be appointed shall be called the firemen of such establishment; and while they respectively hold the said appointment shall be exempted from serving as jurors; and the certificate of the directors, or their authorized agent, under the seal of the said company, shall be evidence of the appointment of such firemen in all cases.[1]

Sec. 265. Same—Certain Articles to be Exempt from Distress and Sale.—All articles of machinery, materials for manufacturing, or manufactured articles belonging to any such company, shall be free from seizure by execution or distress, for any debts or claims for rents or services, in whose hands soever they may be, except such execution or claim be against such company.[2]

Sec. 266. Same—Pin Manufactories and Others may be Established.—From and after the passing of this act, and during the time in which the acts above mentioned shall continue in force, it shall and may be lawful, for any five or more persons, who shall be desirous of forming a company for the purpose of manufacturing pins, or for the purpose of manufacturing beer, ale or porter, or for the purpose of extracting lead from ore, to associate together, and form a company according to the directions and under the restrictions mentioned in the act, entitled "An act relative to incorporations for manufacturing purposes"; and such company, when so formed, and their successors, shall be a body politic and corporate, in fact and in name, with all the privileges,

[1] L. 1815, c. 202, § 1, 3 N. Y. R. S., p. 1950.

[2] L. 1815, c. 202, § 2; 3 N. Y. R. S., 8th ed., p. 1951.

capacities and liabilities, in the last aforesaid act mentioned and contained.[1]

Sec. 267. Same—Manufactories of morocco and other Leather.—It shall and may be lawful for any five or more persons, who shall be desirous of forming a company for the purpose of manufacturing morocco and other leather, to associate together and form such company, according to the directions and restrictions mentioned in the act entitled, "An act relative to incorporations for manufacturing purposes," passed March 22d, 1811; and such company when formed, and their successors, shall be a body politic and corporate, in fact and in name, with all the privileges, capacities and liabilities in said act mentioned and contained: provided nevertheless, that no company or companies who shall become a body corporate under this act, shall be allowed to locate their establishment in any other counties than Greene and Delaware: and also, that the capital stock of any such company shall not exceed the sum of sixty thousand dollars: and provided further, that it shall be lawful for the legislature, at any time after two years, to dissolve any incorporations who may be formed under this act.[2]

Sec. 268. Same—Power to give Mortgages—Doubts having Existed.—Whether the trustees of manufacturing companies, incorporated under and pursuant to the act of 1811, had power to secure the payment of debts contracted by them, by mortgaging their real estate, in order to remove their doubts the General Assembly of 1822 enacted, That it shall be

[1] L. 1816, c. 58, § 2; 3 N. Y. R. S., 8th ed., p. 1951.

[2] L. 1817, c. 223, § 1; 3 N. Y. R. S., 8th ed., p. 1951.

lawful for the trustees of any such company to secure the payment of any debt contracted or to be contracted by them in the business for which they were incorporated, by mortgaging all or any part of the real estate of such company; and every mortgage of such trustees shall be as valid to all intents and purposes, as if executed by an individual owning the real estate: provided, that the written assent of the stockholders owning more than two-thirds of the stock of the company shall first be given.[1]

Sec. 269. Same—Act continued in Force.—The act entitled, "An act relative to incorporations for manufacturing purposes," and the act, entitled, "An act to amend an act relative to incorporations for manufacturing purposes," shall be and continue in force until the first day of May, in the year of our Lord one thousand eight hundred and seventeen, and no longer.[2] By act of 1818[3] it was provided that the act of 1811 was revived and continued in force for five years.[4]

Sec. 270. Same—Act Revived.—The act, entitled "An act relative to incorporations for manufacturing purposes," passed on the twenty-second day of March, in the year of our Lord one thousand eight hundred and eleven, be hereby revived and continued in full force and operation, anything contained in any other law to the contrary notwithstanding.[5]

[1] L. 1822, c. 213, § 1; 3 N. Y. R. S., 8th ed., p. 1879.

[2] L. 1816, c. 58, § 1; 3 N. Y. R. S., 8th ed., p. 1951.

[3] L. 1818, c. 67, § 1; 3 N. Y. R. S., 8th ed., p. 1952.

[4] See Vanderbilt v. Eagle Iron Works, 25 Wend. (N. Y.) 665 (1841).

[5] L. 1821, c. 14, § 1; 3 N. Y. R. S., 8th ed., p. 1952. See Vanderbilt v. Eagle Iron Works, 25 Wend. (N. Y.) 666, 667 (1841).

Sec. 271. Same—Act amended.—By the act of 1817 it is provided that it shall be lawful for any company who shall become a body corporate under the act, entitled "An act to amend the act, entitled 'An act relative to incorporations for manufacturing purposes,' passed April 14th, 1817," to locate their establishment in the county of Oneida, anything in the proviso to said act to the contrary notwithstanding.[1]

[1] L. 1819, c. 102, § 1; 3 N. Y. R. S., 8th ed., p. 1952.

CHAPTER XVII.

MANUFACTURING CORPORATIONS—FORMATION.

SCOPE OF ACT—FOR WHAT BUSINESS ORGANIZED—HOW FORMED—RIGHTS AND POWERS—NUMBER OF CORPORATORS—WHEN BECOME BODIES CORPORATE—EXTENSION OF CORPORATE EXISTENCE.

SEC. 272. Title of act.
SEC. 273. Amendments and extension of act—Construction.
SEC. 274. Scope of Act.
SEC. 274a. Same—For what business companies may be organized.
SEC. 275. Same—Corporations—How formed.
SEC. 275a. Same—Right and powers of companies.
SEC. 276. Number of corporators—Purposes.
SEC. 277. When to become bodies corporate.
SEC. 278. Extension of existence.

Sec. 272. Title of Act.—The title of what is commonly known as The Manufacturing Act, passed February seventeenth, eighteen hundred and forty-eight,[1] which was originally entitled, "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," was subsequently changed so as to read "An act to authorize the formation of corporations for manufacturing, mining, mechanical, chemical, agricultural, horticultural, medical or curative, mercantile or commercial purposes."[2]

[1] 3 N. Y. R. S., 8th ed., p. 1953, *et seq.*

[2] L. 1855, c. 425; L. 1866, c. 838; L. 1887, c. 506. See 3 N. Y. R. S., 8th ed. p. 1967.

Sec. 273. Amendment and Extension of Act—Construction.—The manufacturing act, as originally passed, has been amended and extended from time to time, and these various amendments and extensions have given rise to no little conflict of opinion, and raised no little doubt as to just what business and enterprises the act as amended covers. Certain rules have been established by the court with respect to these amendatory statutes which are as follows :

1. The amendment of a statute, by declaring that the same shall read as prescribed by the amendatory act, has the effect of merging the former statute in the amendatory act, so that the former statute has no longer any vitality as to future transactions. This merger is so complete that a repeal of the amendatory act does not revive the original statute, but both fall together.[1]

2. Where a statute has been thus amended, a later statute declaring the original act (with no reference to the amendment) to be applicable, makes it applicable in its amended, not in its original, form.[2]

3. Where an act purports thus to amend a former statute, but a construction, according to the foregoing rule number one, would render the whole provision meaningless and ineffectual, and it appears clearly, from either extrinsic or intrinsic circumstances, that it was the intention of the legislature, not to abrogate the former provision, but to add to it a new clause, effect will be given to such intention, rather than to the literal terms of the act.[3]

[1] People v. Supervisors of Montgomery Co., 67 N. Y. 109 (1876).

[2] Board of Excise v. Curley, 9 Abb. (N. Y.) N. C. 100 (1877); s. c. 69 N. Y. 608. See also Mundy v. Excise Comm'rs, 9 Abb. (N. Y.) N. C. 117 (1880).

[3] In re Rochester Water Commissioners, 66 N. Y. 413 (1876). For additional illustrations of these rules,

Sec. 274. Scope of Act.—The manufacturing act differs widely from the business act heretofore set out in the provisions regulating the object for which corporations can be formed under it. Under the latter[1] may be organized corporations for carrying on any lawful business except banking, insurance, the construction and operation of railroads, or aiding in the construction thereof, and the business of savings banks, trust companies, or corporations intended to derive profit from the loan or use of money, or safe deposit companies including the renting of safes in burglar or fire proof vaults; but a corporation cannot be organized under the general manufacturing act for any object except that expressly stated in that act or in some statute amending or extending it.

Sec. 274a. Same—For what business Companies may be organized[2]—Under the general manufacturing act, corporations may be organized for carrying on the following business and enterprizes:

Agricultural companies.[3]

Agricultural, horticultural, medical, and curative associations.[4]

Ale, manufactories of. See Breweries.

Apartment houses.[5]

Basins. See Elevators and wharves.

see also People v. Davenport, 91 N. Y. 574 (1883); Whipple v. Christian, 80 N. Y. 523 (1880), affirming 15 Hun (N. Y.) 321; Moore v. Mausert, 49 N. Y. 332 (1872), affirming 5 Lans. (N. Y.) 173; Ely v. Holton, 15 N. Y. 595 (1857); Calhoun v. Delhi & M. R. Co., 28 Hun (N. Y.) 379 (1882); People v. Lucas, 25 Hun (N. Y.) 610 (1881); Pier v. George, 17 Hun (N. Y.) 207 (1879); s. c. 20 Hun (N. Y.) 210; 86 N. Y. 613; In re Hudson City Sav. Inst., 5 Hun (N. Y.) 612 (1875).

[1] L. 1875, c. 611, § 1; *ante*, § 31.

[2] See *post*, Chapter XVIII.

[3] L. 1865, c. 234; 3 N. Y. R. S., 8th ed., p. 1965.

[4] L. 1866, c. 838, §§ 2, 3 and 4; 3 N. Y. R. S., 8th ed., pp. 1967, 1968.

[5] L. 1871, c. 535, § 1, as amended by L. 1881, c. 589; 3 N. Y. R. S., 8th ed., p. 1971.

Beer manufactories. See Breweries.

Book Manufacturing Companies.[1]

Boring for water.[2]

Bottling companies.[3] See Mineral Waters.

Brandies. See Grapes.

Breweries.[4]

Building, letting, selling and maintaining locomotive engines, cars, rolling stock, and railroad machinery, or any one or more of these purposes.[5]

Butter making.

Canal boats. See Towing and Propelling.

Cheese making.

Chemical business.

Church sheds, business of erecting buildings for.

Clay or earth, manufactures of into vessels or wares.[6]

Coal and peat companies.[7]

Concentrated or condensed milk making.

Cotton. See Cultivating.

Cultivating sugar cane, cotton, rice, tobacco, indigo, and other products of the earth, preparing and transporting and disposing of the same where not confined to county.[8] See also Grapes.

Curative associations.[9]

Dairy products making.

Depots. See Union Railway Depots.

Dock building companies.[10]

Dock building, constructing and using machines for.[11]

Dock building. See Dredging, etc.

[1] L. 1857, c. 262, as amended by L. 1882, c. 309; 3 N. Y. R. S., 8th ed., p. 1953.

[2] L. 1884, c. 386, §§ 1, 2, 3 and 4; 3 N. Y. R. S., 8th ed., p. 2054.

[3] L. 1863, c. 63, §§ 1 and 2; 3 N. Y. R. S., 8th ed., p. 1964.

[4] L. 1816, c. 58, § 2; 3 N. Y. R. S., 8th ed., p. 1951.

[5] L. 1873, c. 814; 3 N. Y. R. S., 8th ed., p. 1971.

[6] L. 1815, c. 47; 3 N. Y. R. S., 8th ed., p. 1950.

[7] L. 1865, c. 305, §§ 1 and 2; 3 N. Y. R. S., 8th ed., p. 1966.

[8] L. 1865, c. 234; 3 N. Y. R. S., 8th ed., p. 1965.

[9] L. 1866, c. 838, §§ 2, 3 and 4; 3 N. Y. R. S., 8th ed. pp. 1967, 1968.

[10] L. 1875, c. 365, §§ 1 and 2; 3 N. Y. R. S., 8th ed., p. 1972.

[11] L. 1875, c. 365; 3 N. Y. R. S., 8th ed., p. 1972.

Docks. See Elevators, Warehouses.

Dredging and filling of land.

Dredging companies.[1]

Elevators, floating and stationary, or warehouses, constructing, maintaining and using.[2]

Elevator and warehouse companies.[3]

Entertainments and amusements. See Skating Rinks, Public Halls.

Exhibitions and other lawful amusements.[4]

Fairs, purchasing lots and erecting buildings for.[5]

Fertilizers. See Fish.

Fish, catching in the waters of Suffolk County to be converted into fertilizers.[6]

Fish companies.[7]

Floats. See Towing.

Grape and wine companies.[8]

Homestead companies.[9]

Horticultural associations.[10]

Hot air companies.[11]

Hot water companies.[12]

Hot water, hot air, or steam supplying companies to be used in heating, cooking, or for motive power or other useful application in the streets, public and private buildings of any city, village or town.[13]

Ice companies.[14]

[1] L. 1875, c. 365, §§ 1 and 2; 3 N. Y. R. S., 8th ed. p. 1972.

[2] L. 1864, c. 337, as amended by L. 1868, c. 781; 3 N. Y. R. S., 8th ed., p. 1964.

[3] L. 1864, c. 337, § 3, as amended by L. 1868, c. 781; 3 N. Y. R. S., 8th ed., p. 1964; L. 1881, c. 650, § 1; 3 N. Y. R. S., 8th ed., p. 2000.

[4] L. 1864, c. 337; 3 N. Y. R. S., 8th ed., p. 1964.

[5] L. 1864, c. 337; 3 N. Y. R. S., 8th ed., p. 1964.

[6] L. 1868, c. 161, § 182.

[7] L. 1868, c. 161, §§ 1 and 2.

[8] L. 1865, c. 234, § 1; 3 N. Y. R. S., 8th ed., p. 1965.

[9] L. 1871, c. 535, § 1, as amended by L. 1881, c. 589; 3 N. Y. R. S. 8th ed. p. 1971.

[10] L. 1866, c. 838, §§ 2, 3 and 4; 3 N. Y. R. S., 8th ed., pp. 1967, 1968.

[11] L. 1879, c. 317, §§ 1 and 2; 2 N Y. R. S., 8th ed., p. 936; L. 1880, c. 263, §§ 4 and 5; 3 N. Y. R. S., 8th ed., p. 1975; L. 1885, c. 549, § 1; 3 N. Y. R. S., 8th ed., p. 1975.

[12] L. 1879, c. 317, §§ 1 and 2; 2 N. Y. R. S., 8th ed., p. 936. See L. 1880, c. 263, §§ 4 and 5; 3 N. Y. R. S., 8th ed., p. 1975. L. 1885, c. 549 § 1; 3 N. Y. R. S., 8th ed., p. 1975.

[13] L. 1880, c. 263; L. 1883, c. 237.

[14] L. 1855, c. 305, §§ 1 and 2.

Indigo. See Cultivating.

Inland wharves. See Wharves.

Lands, filling in and improving. See Real Estate; Dredging.

Laundry business, erecting building for and carrying on.

Lead manufactories.[1]

Leather. See Tanneries.

Locomotive engines.

Medical and curative associations.[2]

Meetings, purchasing and erecting building for.[3]

Mining business.[4]

Navigation and salvage companies.[5]

Newspaper and book companies.[6]

Oil companies.[7]

Peat and coal companies.[8]

Petroleum and other oils, storage, conveyance and transportation.[9]

Pin manufactories.[10]

Porter. See Breweries.

Printing, publishing, selling books, pamphlets or newspapers. See Book Companies; Newspaper Companies.

Products of the dairy. See Dairy.

Products of the earth. See Cultivating.

Railroad rolling-stock companies.[11]

Raising vessels.[12]

Rates. See Towing.

[1] L. 1816, c. 58, § 2; 2 N. Y. R. S., 8th ed., p. 1951.

[2] L. 1864, c. 838, § 234; 3 N. Y. R. S., 8th ed., pp. 1967, 1968.

[3] L. 1864, c. 337; 3 N. Y. R. S., 8th ed., p. 1964.

[4] May also conduct the business of water companies, on complying with the provisions of L. 1880, c. 85, as amended by L. 1881, c. 472. These acts establish an exception to the general rule which forbids a combination of two or more general purposes in one company.

[5] L. 1864, c. 337, §§ 1 and 2; 3 N. Y. R. S., 8th ed., p. 1964.

[6] L. 1857, c. 262, as amended by L. 1882, c. 309; 3 N. Y. R. S., 8th ed., p. 1953.

[7] L. 1875, c. 113, §§ 1 and 2; 3 N. Y. R. S., 8th ed. p. 1972.

[8] L. 1865, c. 305, § 12; 3 N. Y. R. S., 8th ed., p. 1966.

[9] L. 1875, c. 113; 3 N. Y. R. S. 8th ed., p. 1972.

[10] L. 1816, c. 58, § 2; 3 N. Y. R. S. 8th ed., p. 1951.

[11] L. 1873, c. 814, §§ 1 and 2; 3 N. Y. R. S., 8th ed., p. 1971.

[12] L. 1851, c. 14, §§ 1 and 2; 3 N. Y. R. S., 8th ed., p. 1961.

Real-estate companies.[1]

Residence. See Real Estate.

Rice. See Cultivating.

Rolling stock companies.[2]

Rolling stock. See Locomotives.

Salt companies.[3]

Salvage companies.[4]

Salvage. See Towing.

Selling. See Printing.

Skating rink, purchase of ground and erecting building thereon.[5]

Slaughtering animals.

Steam heating and supply companies.[6]

Steam supply and heating companies. See hot water.

Sugar cane. See Cultivating.

Tanneries.[7]

Tobacco. See Cultivating.

Towing, etc., constructing, owning, and using vessels and machines for hire in towing vessels, carrying freight, and passengers and in aiding and protecting and saving vessels and their cargoes wrecked or in distress.[8]

Towing and propelling vessels.[9]

Towing or propelling vessels, rafts or floats on the canals or navigable rivers of New York, by animal or steam power.[10]

[1] L. 1871, c. 535, § 1, as amended by L. 1881, c. 589; 3 N. Y. R. S. 8th ed., p. 1971.

[2] L. 1873, c. 814, §§ 1 and 2; 3 N. Y. R. S., 8th ed., p. 1971.

[3] L. 1857, c. 29, § 1; 3 N. Y. R. S., 8th ed., p. 1962.

[4] L. 1864, c. 337, §§ 1 and 2; 3 N. Y. R. S., 8th ed., p. 1964.

[5] L. 1864, c. 337, as amended by L. 1868, c. 781; 3 N. Y. R. S., 8th ed., p. 1964.

[6] L. 1879, c. 317, §§ 1 and 2; 2 N. Y. R. S., 8th ed., p. 936; L. 1880, c. 263, §§ 4 and 5; 3 N. Y. R. S., 8th ed., p. 1975; L. 1885, c. 549, § 1; 3 N. Y. R. S., 8th ed., p. 1975.

[7] L. 1817, c. 223, § 1; 3 N. Y. R. S., 8 th ed., p. 1951.

[8] L. 1864, c. 337, §§ 1 and 2; 3 N. Y. R. S., 8th ed., p. 1964.

[9] L. 1880, c. 241, § 2; 3 N. Y. R. S., 8th ed., p. 1974. See L. 1884, c. 386, §§ 1, 2, 3 and 4; 3 N. Y. R. S., 8th ed.. p. 2054; L. 1866, c. 371, §§ 2 and 3; 3 N. Y. R. S., 8th ed., p. 1967.

[10] L. 1880, c. 241, § 2; 3 N. Y. R. S., 8th ed., p. 1974.

Union railway depots.[1]

United States collecting companies.[2]

Vessels. See Raising; Towing.

Water accumulating, conducting, furnishing, storing, and supplying for agricultural, domestic, manufacturing, mining and municipal purposes, except domestic, manufacturing and municipal purposes in New York city.[3] See Hot Water; Mineral Waters; Mining.

Water for mining.[4]

Wharves, construction, constructing or operating inland wharves and basins, together with the purchase and improving of land therefor.[5] See Elevators.

Wine companies.[6]

Wines. See Grape.

Wrecking. See Towing.

Sec. 275. Same—Corporations—How Formed.—At any time hereafter, any three or more persons who may desire to form a company for the purpose of carrying on any kind of manufacturing, mining, mechanical, or chemical business, or the business of printing, publishing or selling books, pamphlets or newspapers, or advertising the same or other articles, or for the purpose of purchasing, taking, holding and possessing real estate and buildings, and selling, leasing and improving the same, or the business of making butter, cheese, concentrated or condensed milk, or any other products of the dairy, or the business of erecting buildings for church sheds or laundry purposes, and the carrying on of

[1] L. 1882, c. 273, §§ 1, 2 and 3; 3 N. Y. R. S., 8th ed., p. 213.

[2] L. 1857, c. 262, as amended by L. 1883, c. 240; 3 N. Y. R. S., 8th ed., p. 1954.

[3] L. 1880, c. 85, §§ 1–6, as amended by L. 1881, c. 472; 3 N. Y. R. S., 8th ed., pp. 1970, 1974.

[4] L. 1866, c. 371, §§ 1, 2 and 3; 3 N. Y. R. S., 8th ed., p. 1967.

[5] L. 1875, c. 365; 3 N. Y. R. S., 8th ed., p. 1972.

[6] L. 1865, c. 234, § 1; 3 N. Y. R. L., 8th ed., p. 1965.

laundry business or the business of slaughtering animals, or for the purpose of towing or propelling canal boats, vessels, rafts or floats on the canals and navigable rivers of the state of New York by animal or steam power, or for the purpose of buying, storing, selling or shipping coal, merchandise and farm produce, their operations not to be confined to the county in which their certificate shall be filed, or the supplying of hot water or hot air or steam for motive power, heating, cooking, or other useful application in the streets and public and private buildings of any city, village or town in this state, or the business of buying, breeding, grazing, pasturing, dealing in and selling cattle, sheep, hogs, horses and other live stock in the United States of America, British North America and elsewhere, may make, sign, and acknowledge before some officer competent to take the acknowledgment of deeds and file in the office of the clerk of the county in which business of the company shall be carried on, and a duplicate thereof, in the office of the secretary of state, a certificate in writing, in which shall be stated the corporate name of said company, and the objects for which the company shall be formed, the amount of the capital stock of said company, the time of its existence (not to exceed fifty years), the number of shares of which the said stock shall consist, the number of trustees and their names, who shall manage the concerns of said company for the first year, and the name of the town and county in which the operations of said company are to be carried on. No company organized under this act for the purpose of taking, purchasing, holding or possessing real estate and buildings, and selling, leas-

ing and improving the same, shall be permitted to purchase and hold real estate to the value of more than one million dollars, but this act shall not be deemed to repeal or affect in any way any act heretofore passed amendatory of or supplementary to the said act of February seventeen, eighteen hundred and forty-eight, except as herein provided.[1]

[1] L. 1848, c. 40, § 1, as amended by L. 1888, c. 313; 3 N. Y. R. S., 8th ed., p. 1955. See Loring v. United States Vulcanized Gutta Percha Belting and Packing Co., 30 Barb. (N. Y.) 645 (1859.)

The first section of the act of 1848, c. 40, has been frequently amended and extended; the last amendment is given above, the others follow.

At any time hereafter, any three or more persons who may desire to form a company for the purpose of carrying on any kind of manufacturing, mining, mechanical or chemical business, or the business of printing, publishing or selling books, pamphlets, or newspapers, or advertising the same or other articles, or for the purpose of purchasing, taking, holding and possessing real estate and buildings, and selling, leasing and improving the same, or the business of making butter, cheese, concentrated or condensed milk or any other products of the dairy, or the business of erecting buildings for church sheds or laundry purposes, and the carrying on of laundry business, or the business of slaughtering animals, or for the purpose of towing or propelling canal boats, vessels, rafts or floats on the canals or navigable rivers of the state of New York, by animal or steam power, their operations not to be confined to the county in which their certificates shall be filed, or the supplying of hot water or hot air or steam for motive power, heating, cooking or other useful applications, in the streets and public and private buildings of any city, village, or town in this state, or the business of buying, breeding, grazing, pasturing, dealing in and selling cattle, sheep, hogs, horses and other live stock in the United States of America, British North America and elsewhere, may make, sign and acknowledge before some officer competent to take the acknowledgment of deeds, and file in the office of the clerk of the county in which the business of the company shall be carried on, and a duplicate thereof in the office of the secretary of state, a certificate in writing, in which shall be stated the corporate name of said company and the objects for which the company shall be formed, the amount of the capital stock of said company, the time of its existence, (not to exceed fifty years), the number of shares of which the said stock shall consist, the number of trustees and their names, who shall manage the concerns of said company for the first year, and the name of the town and county in which the operations of said company are to be carried on. No company organized under this act for the purpose of taking, purchasing, holding or possessing real estate and buildings, and selling, leasing and improving the same,

Sec. 275a. Same—Right and powers of Companies.—A power to manufacture implies a power to sell and collect,[1] and a

shall be permitted to purchase and hold real estate to the value of more than one million dollars, but this act shall not be deemed to repeal or affect in any way any act heretofore passed amendatory of or supplementary to the said act of February seventeen, eighteen hundred and forty-eight, except as herein provided. L. 1848, c. 40, § 1, as amended by L. 1885, c. 84, § 1; 3 N. Y. R. S., 8th ed., p. 1954.

At any time hereafter, any three or more persons who may desire to form a company for the purpose of carrying on any kind of manufacturing, mining, mechanical or chemical business, or the business of printing and publishing books, pamphlets and newspapers, or the business of receiving, obtaining, collecting and accumulating items and matters of news, and selling, vending, furnishing and supplying the same, may make, sign and acknowledge before some officer competent to take the acknowledgment of deeds, and file in the office of the clerk of the county in which the business of the company shall be carried on, and a duplicate thereof in the office of the secretary of state, a certificate in writing, in which shall be stated the corporate name of the said company, and the objects for which the company shall be formed, the amount of the capital stock of the said company, the term of its existence not to exceed fifty years, the number of shares of which the said stock shall consist, the number of trustees and their names who shall manage the concerns of said company for the first year, and the names of the town and county in which the operations of the said company are to be carried on. L. 1848, c. 40, § 1, as amended by L. 1884, c. 267, § 1; 3 N. Y. R. S., 8th ed., p. 1953.

At any time hereafter any three or more persons who may desire to form a company for the purpose of carrying on any kind of manufacturing, mining, mechanical or chemical business, or the business of printing, publishing or selling books, pamphlets or newspapers, or the business of making butter, cheese, concentrated or condensed milk, or any other products of the dairy, or the business of erecting buildings for church sheds or laundry purposes, and the carrying on of laundry business, or the business of slaughtering animals, or for the purpose of towing or propelling canal boats, vessels, rafts or floats on the canals and navigable rivers of the State of New York, by animal or steam power, their operations not to be confined to the county in which their certificates shall be filed, or the supplying of hot water or hot air or steam for motive power, heating, cooking or other useful applications, in the streets and public and private buildings of any city, village or town in this statee may make, sign and acknowledge before some officer competent to takthe acknowledgment of deeds, and file in the office of the clerk of the county in which the business of the company shall be carried on, and a duplicate thereof in the office of the secretary of state, a certificate in writing in which shall be stated the corporate name of the said company and the objects for which the com-

[1] De Graff v. American Linen T. Co., 21 N. Y. 124 (1860).

party dealing with a corporation is presumed to know its powers.[1] And the same is true in regard to its agents.[2]

A corporation may be bound by its acts, although done beyond the power granted to it.[3] The authority of the officers to draw and indorse paper may be proved by showing that they had formerly done similar acts.[4]

Corporations are residents in the counties where their

pany shall be formed, the amount of the capital stock of said company, the time of its existence (not to exceed fifty years), the number of shares of which the said stock shall consist, the number of trustees and their names, who shall manage the concerns of said company for the first year, and the name of the town and county in which the operations of the said company are to be carried on. L. 1848, c. 40, § 1, as amended by L. 1882, c. 309; 3 N. Y. R. S., 8th ed., p. 1953. See Nassau Gas L. Co. v. Brooklyn, 89 N. Y. 409 (1882); Raisbeck v. Oesterricher, 4 Abb. (N. Y.) N. C. 444 (1878); Loring v. United States Vulcanized G. P. B. & P. Co., 30 Barb. (N. Y.) 645 (1859); Chesebrough Manuf. Co. v. Coleman, 44 Hun (N. Y.) 545 (1887); People v. Beach, 19 Hun (N. Y.) 259 (1879).

By the laws of 1857, c. 262, § 1, as amended by Laws of 1883, c. 240; 3 N. Y. R. S., 8th ed., p. 1954, it is provided that any three or more persons who may desire to form a company for the purpose of carrying on any kind of manufacturing, mining, mechanical or chemical business, or the business of printing and publishing books, pamphlets and newspapers, or the business of receiving, obtaining, collecting and accumulating items and matters of news, and selling, vending, furnishing and supplying the same, may make, sign and acknowledge before some officer competent to take the acknowledgment of deeds, and file in the office of the clerk of the county in which the business of the company shall be carried on, and a duplicate thereof in the office of the secretary of state, a certificate in writing, in which shall be stated the corporate name of the said company, and the objects for which the company shall be formed, the amount of the capital stock of the said company, the term of its existence, not to exceed fifty years, the number of shares of which the said stock shall consist, the number of trustees, and their names, who shall manage the concerns of said company for the first year, and the names of the town and county in which the operations of the said company are to be carried on.

[1] Akin v. Blanchard, 32 Barb. (N. Y.) 527 (1860).

[2] Adriance v. Roome, 52 Barb. (N. Y.) 399 (1868); Dabney v. Stevens, 40 How. (N. Y.) Pr. 341 (1870).

[3] Bissell v. Michigan Southern & N. J. R. Co., 22 N. Y. 258 (1860); Ellis v. Howe Machine Co., 9 Daly (N. Y.) 78 (1880).

[4] Olcott v. Tioga R. Co., 27 N. Y. 546 (1863). As to when officers cannot bind. See Alexander v. Cauldwell, 83 N. Y. 480 (1881); Westerfield v. Radde, 7 Daly (N. Y.) 326 (1877).

offices are located, and their principal business carried on,[1] and are not limited to any particular kind of obligations in borrowing money.[2] They may negotiate notes to raise money;[3] or borrow money to pay off a prior indebtedness.[4]

A corporation created for a limited period may acquire title to lands in fee,[5] but where a mode of operation is prescribed by the statute, it must be followed strictly,[6] and a power to convey is a power to mortgage.[7] The directors must act strictly within their powers.[8]

A general understanding between the original subscribers, as to the corporate purposes and objects, cannot limit the powers of the corporation, as embodied in the certificate;[9] and the rights and franchises of a corporation incorporated under a general law are as inviolable as if it was incorporated by a special charter.[10]

A contract purporting to be made by a corporation, and within its power to make, and having the corporate seal and president's signature affixed, is presumptively binding upon it.[11]

[1] Rosenbaum v. Union Pac. R. Co., 2 How. (N. Y.) Pr. N. S. 45 (1885); Conroe v. National Prot. Ins. Co., 10 How. (N. Y.) Pr. 403 (1855); Perry v. Round Lake C. M. Assoc., 22 Hun (N. Y.) 293 (1880).

[2] Curtis v. Leavitt, 15 N. Y. 9 (1857).

[3] Holbrook v. Basset, 5 Bosw. (N. Y.) 147 (1859).

[4] Jansen v. Otto Stietz N. Y. G. L. Co., 16 N. Y. St. Rep., 905 (1888); Rochester Sav. Bank v. Averell, 26 Hun (N. Y.) 643 (1882), affirmed 96 N. Y. 467.

[5] Nicoll v. New York & E. R. Co., 12 N. Y. 121 (1854).

[6] Farmers L. & T. Co. v. Carroll, 5 Barb. (N. Y.) 613 (1849).

[7] Jackson v. Brown, 5 Wend. (N. Y.) 590 (1830).

[8] Abbot v. Hard Rubber Co., 11 Abb. (N. Y.) Pr. 204 (1860); Life & F. Ins. Co. v. Mechanic F. I. Co., 7 Wend. (N. Y.) 31 (1831). As to what is a sufficient designation of business and objects of corporation. See People v. Beach, 19 Hun (N. Y.) 259 (1879).

[9] Hatch v. American Union Tel. Co., 9 Abb. (N. Y.) N. C. 223 (1881).

[10] People ex rel Sturges v. Keese, 27 Hun (N. Y.) 483 (1882).

[11] New England Iron Co. v. Gilbert Elevated R. Co., 91 N. Y. 153 (1883).

What is not a manufacturing corporation. See People v. Knickerbocker Ice Co., 19 N. Y. Week. Dig. 194 (1884).

Where a company cannot plead *ultra vires*. Rider Life Raft Co. v. Roach, 97 N. Y. 378 (1884); Woodruff v. Erie R. Co., 93 N. Y. 609 (1883); reversing 25 Hun (N. Y.) 246.

When corporations liable for malicious prosecution. Morton v. Metropolitan Life Ins. Co., 34 Hun (N. Y.) 366 (1884).

Sec. 276. Number of Corporators—Purposes.—Any nine or more persons may organize themselves into a corporation in the manner specified and required in and by the act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February seventeen, eighteen hundred and forty-eight, for the purposes of building, manufacturing, owning, furnishing, letting, selling and maintaining locomotive engines, cars, rolling stock and machinery to be used or operated upon railways, or any one or more of such purposes.[1]

By the laws of 1881[2] it is provided that any three or more persons may, and are hereby authorized, to organize and form themselves into a corporation in the manner (except as hereinafter provided) specified or required in or by the act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February seventeenth, eighteen hundred and forty-eight,or any amendment or amendments thereof, for the objects and purposes of carrying on the business and operations of owning, constructing, maintaining, using and operating warehouses, elevators, docks, wharves and basins. Every corporation so formed shall have and may exercise any and all powers and privileges necessary or proper in carrying on or connected with such business or operations, or any part or parts thereof, and all the capacities, powers, benefits and privileges mentioned in or conferred by the aforesaid act, passed February seventeenth, eighteen hundred and forty-eight,

[1] L. 1873, c. 814, § 1; 3 N. Y. R. S., 8th ed., p. 1971.

[2] L. 1881, c. 65, § 1; 3 N. Y. R. S., 8th ed., p. 2000.

or any amendment or amendments thereof; and shall be subject to all the duties and obligations imposed by, and the provisions of the said act as amended, except as herein otherwise provided.

By the laws of 1871 [1] any three or more persons may organize themselves into a corporation in the manner specified and required in and by the act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February seventeenth, eighteen hundred and forty-eight, for the purpose of purchasing, acquiring, maintaining and improving real estate for residences, homesteads and apartment houses, to be leased and conducted by the corporation so formed, and occupied by the stockholders thereof, and others, and also for the purpose of purchasing, acquiring, maintaining, improving and managing a building or buildings which shall contain a hall for public meetings and entertainments; and apportioning and distributing the same among the stockholders and members of such corporation, and also for filling in and improving lands. The corporation so formed shall be subject to all the provisions and obligations of the act aforesaid, and the acts amendatory thereof, and it shall have power to take and hold by purchase, contract or lease, and convey such real estate as shall be necessary to carry out the objects of said corporation; and it may distribute and apportion the same and the rent, income and proceeds thereof among its members and stockholders in such manner as shall be deter-

[1] L. 1871, c. 535, as amended by L. 1881, c. 589, 3 N. Y. R. S., 8th ed., p. 1971.

mined by its by-laws; and may sell and convey to purchasers thereof such real estate as said corporation may have acquired by purchase or otherwise, provided, however, that it shall not be lawful for said corporation to hold at any one time real estate, the market value of which shall exceed the sum of five hundred thousand dollars.

Sec. 277. When to become bodies Corporate.—When the certificate shall have been filed as aforesaid, the persons who shall have signed and acknowledged the same, and their successors, shall be a body politic and corporate, in fact and in name, by the name stated in such certificate; and by that name have succession, and shall be capable of sueing and being sued in any court of law or equity in this state, and they and their successors may have a common seal, and may make and alter the same at pleasure; and they shall, by their corporate name, be capable in law of purchasing, holding and conveying any real and personal estate whatever which may be necessary to enable the said company to carry on their operations named in such certificate, but shall not mortgage the same or give any lien thereon.[1]

[1] L. 1840, c. 48, § 2; 3 N. Y. R. S., 8th ed., p. 1955. This section is retained unaltered, although L. 1867, c. 248, after amending section 1 of this act, provided that "the second section of said act is hereby amended." See L. 1864, c. 517; 3 N. Y. R. S., 8th ed., p. 1965, also Strong v. Wheaton, 38 Barb. (N. Y.) 616 (1861); Dorris v. French, 4 Hun (N. Y.) 292 (1875). When power to sell and convey is not power to lease. See M. C .Co. v. Abbey, N. Y. Daily Reg. June 20, 1885. The certificate is conclusive as to the location therein designated for the purpose of taxation. Western T. Co. v. Scheu, 19 N. Y. 408 (1859). A corporation, being an artificial person, is presumed capable of making every contract a natural person could make. Feeny v. People's Fire Ins. Co., 2 Robt. (N. Y.) 599 (1862). No corporation is formed till the certificates are filed with the officers specified. Childs v. Smith, 55 Barb. (N. Y.) 45 (1869); Childs v. Smith, 38 How. (N. Y.) Pr. 328 (1869). A charter of

Sec. 278. Extension of Existence.—Whenever any company, formed under said act, shall have fixed the duration of its corporate existence for a less period than it was privileged to do by the first section of said act, it may by a vote of the stockholders representing a majority of the stock, and upon executing and acknowledging a new or amended certificate under its corporate seal, signed by the president and two thirds of its directors, or trustees, and filing the same in the county where its business shall be carried on, and in the office of the secretary of state, extend the term of its corporate existence from time to time, to a period not longer in the aggregate than it could have originally fixed the same, and shall thereupon possess all the powers and privileges, and be subject to all the liabilities mentioned in said act, during such extension of its existence.[1]

incorporation is to be construed according to its spirit and meaning as well as its letter. White v. Syracuse & U. R. Co., 14 Barb. (N. Y.) 560 (1853). The subscription of the whole amount of stock is not necessary to a legal corporate existence. Schenectady & S. P. R. Co. v. Thatcher, 11 N. Y. 102 (1854). A defendant who has contracted with a corporation as such, cannot set up a defence that it is no corporation. Palmer v. Lawrence, 3 Sandf. (N. Y.) 161 (1849). A corporation may indorse only such paper as is necessary in its business. Central Bank v. Empire S. D. Co., 26 Barb. (N. Y.) 23 (1858); Beers v. Phœnix Glass Co., 14 Barb. (N. Y.) 358 (1852). It is not necessary for a corporation to attach a seal to make its contract valid. Hoag v. Lamont, 60 N. Y. 96 (1875).

[1] L. 1857, c. 29, § 2, as amended by L. 1867, c. 12; 3 N. Y. R. S., 8th ed., 1962.

CHAPTER XVIII.

MANUFACTURING CORPORATIONS—FOR WHAT PURPOSES FORMED.

AGRICULTURAL CO'S—COAL AND PEAT CO'S—DREDGING CO'S—GRAPE CULTURE—ELEVATORS—WAREHOUSES AND DOCKS—FISH CO'S—ICE CO'S—RAISING VESSELS—MINERAL WATER CO'S—NAVIGATION AND SALVAGE CO'S—NEWS CO'S—BOOK CO'S—OIL CO'S—RAILROAD CO'S—ROLLING STOCK CO'S—REAL ESTATE CO'S—SALT CO'S—STEAM HEATING CO'S—TOWING AND PROPELLING VESSELS—WATER CO'S.

SEC. 279. What business may be organized under—Agricultural Companies.
SEC. 280. Same—Agricultural, horticultural, medical, and curative associations—What certificate shall state.
SEC. 281. Same—May hold stock in certain companies.
SEC. 282. Same—Officer in two companies.
SEC. 283. Same—Coal and peat companies.
SEC. 284. Same—Cultivating grapes and making wine.
SEC. 285. Same—Dredging, dock building, etc., companies.
SEC. 286. Same—Elevators, warehouses, docks, skating rinks, fair grounds etc.
SEC. 287. Same—Fish companies—Manufacture of fertilizers.
SEC. 288. Same—Ice companies.
SEC. 289. Same—Made subject to other laws.
SEC. 290. Same—Machines and companies for raising.
SEC. 291. Same—Not limited to county.
SEC. 292. Same—Mineral water companies.
SEC. 293. Same—Navigation and salvage companies.
SEC. 294. Same—Limits of such corporations.
SEC. 295. Same—News—Collecting and vending.
SEC. 296. Same—Book and newspaper companies.
SEC. 297. Same—Oil Companies.
SEC. 298. Same—Railroad and rolling stock companies.
SEC. 299. Same—May lay down and maintain railroad track.
SEC. 300. Same—Union railway depots.
SEC. 301. Same—Stock—Who may maintain.
SEC. 302. Same—Rules, etc.

SEC. 303. Same—Real estate companies—Tenement houses, homesteads, and public halls.
SEC. 303a. Same—Additional real estate, to what extent and how may be acquired.
SEC. 304. Same—Salt companies—When to pay in stock.
SEC. 305. Same—Steam-heating companies—How to be known.
SEC. 306. Same—Must furnish steam when required—Penalty for neglect or refusal.
SEC. 307. Same—Power of municipalities.
SEC. 308. Same—Laying pipes in streets for heating, etc.
SEC. 309. Same—Agent authorized to enter buildings and examine meter—Penalty for interfering with agent.
SEC. 310. Same—Agent may enter and cut off—Under what contingencies—Misdemeanor to open valves, etc.
SEC. 311. Same—Corporations for towing or propelling vessels.
SEC. 312. Same—Water companies.
SEC. 313. Same—Liability of company and stockholders.
SEC. 314. Same—May be conducted by—Mining companies.
SEC. 315. Same—Must file certificate of such intention.
SEC. 316. Same—May acquire title to land in same manner as railroad companies.
SEC. 317. Same—May make contracts to furnish water.
SEC. 318. Same—Corporations may be organized for boring, etc., for water.
SEC. 319. Same—Rights, privileges, etc., of such corporations.
SEC. 320. Same—Have power to lay pipes, etc., through streets—Consent of public authorities.
SEC. 321. Same—May contract with cities, etc., to furnish water—In New York city, bonds to be issued and money raised.
SEC. 322. Same—Water for mining.
SEC. 323. Same—Corporations subject to certain provisions.
SEC. 324. Same—Former incorporations may proceed hereunder.

Sec. 279. What Businesses may be Organized Under[1]—Agricultural Companies.—Any three or more persons may organize and form themselves into a corporation in the manner specified and required in and by the act entitled, "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February seventeenth, eighteen hundred and forty-eight, for the purpose of propagating, cultivating and developing the different varieties of the grape, and the manufacture of wines and brandies therefrom, and culti-

[1] For a table of the various businesses to carry on which corporations may be organized under this act, see *ante*, § 274*a*.

vating sugar cane, cotton, rice, tobacco, indigo and other products of the earth, for preparing the same for market, and for transporting and disposing of the same. Every corporation so formed shall be subject to all the provisions and obligations contained in the aforesaid act, and the several acts amendatory of the same, so far as they are or may be applicable, and shall be entitled to all the benefits and privileges conferred by said act and amendatory acts; except that such corporations shall not be confined in their operations to the counties in which their certificates shall be filed.[1]

Sec. 280. Same—Agricultural, Horticultural, Medical, and Curative Associations—What Certificate shall State. At any time hereafter, any three or more persons may form a corporation for the purpose of carrying on any kind of manufacturing, mining, mechanical, chemical, agricultural, horticultural, medical or curative business, may make, sign and acknowledge, before some officer competent to take acknowledgment of deeds, and file the same in the office of the clerk of the county in which the business of the company shall be carried on, and a duplicate in the office of the secretary of state, a certificate in writing in which shall be stated the corporate name of said company and the objects for which it shall be formed, the amount of its capital stock, the number of shares of which said stock shall consist, the term of its existence, not exceeding fifty years, the number of its trustees and the names of those who shall manage the concerns of the company for the first year, and the names of the town or city and county

[1] L. 1865, c. 234, § 1; 3 N. Y. R. S., 8th ed., p. 1965.

in which the operations of the said company shall be carried on.[1]

Sec. 281. Same—May hold Stock in Certain Companies.—It shall be lawful for any company heretofore or hereafter organized under the provisions of this act, or the act hereby amended to hold stock in the capital of any corporation engaged in the business of mining, manufacturing or transporting such materials as are required in the prosecution of the business of such company so long as they shall furnish or transport such materials for the use of such company and for two years thereafter, and no longer; and also to hold stock in the capital of any corporation which shall use or manufacture materials, mined or produced by such company; and the trustees of such company shall have the same power with respect to the purchase of such stock and issuing stock therefor as are now given by the law with respect to the purchase of mines, manufactories and other property necessary to the business of manufacturing, mining and other companies. But the capital stock of such company shall not be increased without the consent of the owners of two-thirds of the stock to be obtained as provided by sections twenty-one and twenty-two of the act hereby amended.[2]

Sec. 282. Same—Officer in two Companies.—When any such manufacturing company shall be a stockholder in any other corporation, its president or other officers shall be eligible to the office of trustee

[1] L. 1866, c. 838, § 2; 3 N. Y. R. S., 8th ed., p. 1967.

[2] L. 1866, c. 838, § 3, as amended by L. 1876, c. 358; 3 N. Y. R. S., 8th ed., p. 1967.

of such corporation, the same as if they were individually stockholders therein.[1]

Sec. 283. Same.—Coal and Peat Companies.—By the act of 1865[2] it is provided that any three or more persons may organize and form themselves into a corporation, in the like manner, for the purpose of buying and selling and transporting coal and peat of all kinds. Also, that every corporation so formed shall be subject to all the provisions, duties and obligations contained in this act, and amendments thereto, and shall be entitled to all the benefits and privileges thereby conferred, except that such corporations shall not be confined in their operations to the county in which their certificates shall be filed.

Sec. 284. Same—Cultivating Grapes and Making Wine.—Any three or more persons may organize and form themselves into a corporation in the manner specified and required in and by the act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February seventeenth, eighteen hundred and forty-eight, for the purpose of propagating, cultivating and developing the different varieties of the grape, and the manufacturing of wines and brandies therefrom, and cultivating sugar-cane, cotton, rice, tobacco, indigo and other products of the earth, for preparing the same for market, and for transporting and disposing of the same. Every corporation so formed shall be subject to all the provisions and obligations contained in the aforesaid act, and the several acts amendatory of the same, so far as they are or may be applicable, and shall be entitled to

[1] L. 1866, c. 838, § 4; 3 N. Y. R. S., 8th ed., p. 1968.

[2] L. 1865, c. 307, §§ 1 and 2; 3 N. Y. R. S., 8th ed., p. 1966.

all the benefits and privileges conferred by said act and amendatory acts; except that such corporations shall not be confined in their operations to the counties in which their certificate shall be filed.[1]

Sec. 285. Same—Dredging, Dock Building, etc., Companies.—Any three or more persons may organize and form themselves into a corporation in the manner specified and required in and by the act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February seventeenth, one thousand eight hundred and forty-eight, for the purpose of constructing and using machines for dredging and filling of land, and dock building, or for the construction and operation of inland wharves and basins, and the purchase, improvement and sale thereof. Every corporation so formed shall be subject to all the provisions, duties and obligations contained in the above-mentioned act, and shall be entitled to all the benefits and privileges thereby conferred.[2]

Sec. 286. Same—Elevators, Warehouses, Docks, Skating Rinks, Fair Grounds, etc.—The act of 1864[3] provides that any three or more persons are thereby authorized to organize themselves into a corporation in a manner provided by the said act, and with all the powers, benefits and privileges thereby conferred, and subject to all the duties, liabilities and restrictions therein imposed, for the purpose of carrying on the business of constructing, maintain-

[1] L. 1865, c. 234, § 1; 3 N. Y. R. S., 8th ed., p. 1965.

[2] L. 1875, c. 365, §§ 1 and 2; 3 N. Y. R. S., 8th ed., p. 1972. See also L. 1881, c. 650; 3 N. Y. R. S., 8th ed., p. 2000.

[3] L. 1864, c. 337, § 3, as amended by L. 1868, c. 781; 3 N. Y. R. S., 8th ed., p. 1965.

ing and using stationary and floating elevators, or warehouses, for all purposes pertaining to, or connected with trade or commerce in the several kinds of grain in the state of New York, or for the purpose of purchasing a suitable lot and erecting thereon a building, to be used as a skating rink, and for holding fairs, meetings, exhibitions and all other lawful entertainments and amusements.[1]

A later amendment provides that any three or more persons may, and are thereby authorized, to organize and form themselves into a corporation in the manner (except as hereinafter provided) specified or required in and by the act entitled "An act to authorize the formation of corporations for manufacturing, mining and chemical purposes," passed February seventeenth, eighteen hundred and forty-eight, or any amendment or amendments thereof, for the objects and purposes of carrying on the business and operations of owning, constructing, maintaining, using and operating warehouses, elevators, docks, wharves and basins. Every corporation so

[1] The Laws of 1881, c. 650; 3 N Y. R. S., 8th ed., p. 2000, provides that any three or more persons may, and are thereby authorized to, organize and form themselves into a corporation in the manner (except as hereinafter provided) specified or required in or by the act entitled "An act to organize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February seventeen, eighteen hundred and forty-eight, or any amendment or amendments thereof, for the objects and purposes of carrying on the business and operations of owning, constructing, maintaining, using and operating warehouses, elevators, docks, wharves and basins. Every corporation so formed shall have and may exercise any and all powers and privileges necessary or proper in carrying on or connected with such business or operation, or any part or parts thereof, and all the capacities, powers, benefits and privileges mentioned in or conferred by the aforesaid act, passed February seventeen, eighteen hundred and forty-eight, or any amendment or amendments thereof; and shall be subject to all the duties and obligations imposed by, and the provisions of the said act as amended, except as herein otherwise provided.

formed shall have and may exercise any and all powers and privileges necessary or proper in carrying on or connected with such business or operations, or any part or parts thereof, and all the capacities, powers, benefits and privileges mentioned in or conferred by the aforesaid act, passed February seventeenth, eighteen hundred and forty-eight, or any amendment or amendments thereof; and shall be subject to all the duties and obligations imposed by, and the provisions of the said act as amended, except as herein otherwise provided.[1]

Sec. 287. Same—Fish Companies—Manufacture of Fertilizers.—At any time hereafter, any three or more persons who may desire to form a company for the purpose of catching such fish in the salt waters of Suffolk county as are not fit for food for man, by seines or otherwise, to be used for and converted into fertilizers, may make, sign and acknowledge before some notary public, and file in the office of the clerk of Suffolk county, and a duplicate thereof in the office of Secretary of State, a certificate in writing, in which shall be stated the corporate name of the company, the objects for which the company shall be formed, the amount of capital stock of the said company, the term of its existence, not to exceed fifty years, the number of shares of which the said stock shall consist, the number of trustees and their names who shall manage the concerns of the company for the first year, and the name of the town in Suffolk county in which the operations of said company are to be carried on.[2]

The companies formed under this act shall be

[1] L. 1881, c. 650, § 1; 3 N. Y. R. S., 8th ed., p. 2000.

[2] L. 1868, c. 161, § 1.

subject to the provisions of chapter forty of the laws of eighteen hundred and forty-eight, entitled, "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," and the various amendments thereto, so far as the same may be applicable. Each stockholder shall be personally liable for the debts of said company in an amount equal to the stock held or owned by him.[1]

Sec. 288. Same—Ice Companies.—Any three or more persons may organize themselves into a corporation in the manner specified and required in and by the act entitled "An act to authorize the formation of corporations, for manufacturing, mining, mechanical or chemical purposes," passed February seventeenth, one thousand eight hundred and forty-eight, for the purpose of collecting, storing and preserving ice, of preparing it for sale, of transporting it to the city of New York or elsewhere, and of vending the same.[2]

Sec. 289. Same—Made Subject to Other Laws.—Every corporation so formed shall be subject to all the provisions, duties and obligations contained in the above-mentioned act, and shall be entitled to all the benefits and privileges thereby conferred, except that such corporations shall not be confined in their operations to the county in which their certificate shall be filed.[3]

Sec. 290. Same—Machines and Companies for Raising Vessels.—Any three or more persons may organize

[1] L. 1868, c. 161, § 2.

[2] L. 1855, c. 301, § 1; 3 N. Y. R. S., 8th ed., p. 1962.

[3] L. 1855, c. 301, § 2; 3 N. Y. R. S., 8th ed., p. 1962. See People v. Knickerbocker Ice Co., 99 N. Y. 181 (1885), s. c. 52 Am. Rep. 110, affirming 32 Hun (N. Y.) 475.

and form themselves into a corporation in the manner specified and required in and by the act entitled, "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February seventeenth, one thousand eight hundred and forty-eight, for the purpose of constructing and using machines for the raising of vessels or other heavy bodies.[1]

Sec. 291. Same—Not Limited to County.—Every corporation so formed shall be subject to all the provisions, duties and obligations contained in the above-mentioned act, and shall be entitled to all the benefits and privileges thereby conferred, except that such corporation shall not be confined in their operations to the county in which their certificate shall be filed.[2]

Sec. 292. Same—Mineral Water Companies.—Any three or more persons may organize themselves into a corporation, in the manner specified and required in and by the act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February seventeen, eighteen hundred and forty-eight, for the purpose of bottling and selling mineral water drawn from any natural mineral spring. Every corporation so formed shall be subject to all the provisions, duties and obligations contained in the above mentioned act, and shall be entitled to all the benefits and privileges thereby conferred.[3]

[1] L. 1851, c. 14, § 1; 3 N. Y. R. S. 8th ed., p. 1961.

[2] L. 1851, c. 14, § 2; 3 N. Y. R. S., 8th ed., p. 1961.

[3] L. 1863, c. 63, §§ 1 and 2; 3 N. Y. R. S., 8th ed., p. 1964. The effect of this section is to render stockholders and trustees personally liable, wherever they are so liable under the act of 1848. Wakefield v. Fargo, 90 N. Y. 213 (1882).

Sec. 293. Same—Navigation and Salvage Companies. Any three or more persons may organize and form themselves into a corporation in the manner specified and required in and by the act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February seventeenth, one thousand eight hundred and forty-eight, for the purpose of constructing, owning, and using vessels and machines to be employed for hire in towing vessels, carrying freight and passengers, and in aiding, protecting and saving vessels and their cargoes, wrecked or in distress, on any of the navigable rivers and lakes in or bordering upon the State of New York, or on the high seas, or in the various arms of the seas and rivers running into the same, with all the rights appertaining by law to private individuals performing services as salvors.[1]

Sec. 294.—Same—Limits of such Corporations.—Every corporation so formed, shall be subject to all the provisions, duties and obligations contained in the above-mentioned act, and shall be entitled to all the benefits and privileges thereby conferred, except that such corporations shall not be confined in their operations to the county in which their certificate shall be filed.[2]

Sec. 295. Same—News—Collecting and Vending.—An act of 1883[3] provides that any three or more persons who may desire to form a company for the purpose of carrying on any kind of manufacturing, mining, mechanical or chemical business, or the

[1] L. 1864, c. 337, § 1; 3 N. Y. R. S., 8th ed., p. 1964.

[2] L. 1864, c. 337, § 2; 2 N. Y. R. S., 8th ed., p. 1964.

[3] L. 1883, c. 241, § 1, amending L. 1857, c. 262, § 1; 3 N. Y. R. S., 8th ed., p. 1955.

business of printing and publishing books, pamphlets and newspapers, or the business of receiving, obtaining, collecting and accumulating items and matters of news, and selling, vending, furnishing and supplying the same, may make, sign and acknowledge before some officer competent to take the acknowledgment of deeds, and file in the office of the clerk of the county in which the business of the company shall be carried on, and a duplicate thereof in the office of the secretary of state, a certificate in writing, in which shall be formed, the amount of the capital stock of the said company, the term of its existence not to exceed fifty years, the number of shares of which the said stock shall consist, the number of trustees and their names who shall manage the concerns of said company for the first year, and the names of the town and county in which the operations of the said company are to be carried on.

Sec. 296. Same—Book and Newspaper Companies.—By chapter 262 of the Laws of 1857, the first section of the manufacturing Act of 1848 was amended by authorizing thereunder the formation of companies for printing and publishing books, pamphlets and newspapers. By chapter 309 of Laws of 1882, power was given to sell, in addition to the right to publish.[1]

Sec. 297. Same.—Oil Compnies.—Any three or more persons may organize and form themselves into a corporation in the manner specified and required in and by the act entitled "An act to authorize the formation of corporations for manufacturing, mining and mechanical or chemical purposes," passed February seventeenth, eighteen hundred and forty-

[1] See 3 N. Y. R. S., 8th ed., p. 1953.

eight, for the storage, conveyance and transportation of petroleum and other oils, so that under said act and the acts amendatory thereof, it shall be lawful to form companies for carrying on the business of storing, conveying and transporting petroleum and other oils, and of doing all things necessary and proper therefor, subject to such laws or regulations as are now or may hereafter be in force, in the several cities of this state where such business may be conducted, relating to the storage and safe-keeping of petroleum and other oils. Every corporation so formed shall be subject to all the provisions, duties and obligations contained in the above-mentioned act, and shall be entitled to all the benefits and privileges thereby conferred.[1]

Sec. 298. Same—Railroads and Rolling Stock Companies.—Any nine or more persons may organize themselves into a corporation, in the manner specified and required in and by the act entitled, "An act to authorize the formation of corporations for manufacturing, mining and chemical purposes, passed February seventeenth, eighteen hundred and forty-eight, for the purposes of building, manufacturing, owning, furnishing, letting, selling and maintaining locomotive engines, cars, rolling stock, and machinery to be used or operated upon railways, or any one or more of such purposes.[2] Every corporation so formed shall be entitled to all the benefits and privileges conferred by the before-mentioned act, and may contract and transact its business with any railway company or other person engaged in the

[1] L. 1875, c. 113, §§ 1 and 2; 3 N. Y. R. S., 8th ed., p. 1972.

[2] L. 1873, c. 814, § 1; 3 N. Y. R. S., 8th ed., p. 1971.

operation of any railway in the United States or Canada, but shall otherwise be subject to all the provisions, duties and obligations in the said act contained.

Sec. 299. Same—May Lay Down and Maintain Railroad Track.—Any individual, joint-stock association or corporation now or hereafter engaged in the manufacture of railroad cars in this state may lay down and maintain such railroad tracks not exceeding one mile in length, as shall be necessary to connect such manufacturing establishment with the tracks of any railroad now or hereafter operated in this state; provided they shall obtain the consent of the owners of one-half in value the property bounded on, and the consent also of the local authorities having the control of that portion of a street or highway upon which it is proposed to construct or operate such railroad be first obtained; or in case the consent of such property owners cannot be obtained, the general term of the supreme court, in the district in which it is proposed to be constructed, may, upon application appoint three commissioners, who shall determine, after a hearing of all parties interested, whether such railroad ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners.[2]

Sec. 300. Same—Union Railway Depots.—Any three or more persons may organize themselves into a corporation in the manner specified and required in

[1] L. 1873, c. 814, § 2; 3 N. Y. R. S., 8th ed., p. 1971.

[2] The provisions of this act shall not apply to the counties of New York and Kings. L. 1880, c. 267, §§ 1 and 2; 3 N. Y. R. S., 8th ed., p. 1839.

and by chapter forty, laws of eighteen hundred and forty-eight, entitled, "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," for the purpose of purchasing, acquiring, building upon and improve ing real estate for union railway depots to be leased and occupied by any railroad company or companies owning, leasing or operating a railroad within this state. The corporations so formed shall be subject to all the privileges and obligations of the act aforesaid and all acts amendatory thereof, or supplementary thereto, and shall have power to take and hold by purchase, contract or lease, and convey such real estate as shall be necessary to carry out the objects of said corporation.[1]

Sec. 301. Same—Stock—who may Take.—Any railroad corporation, created under and by the laws of this state or of any adjoining state, is hereby authorized to subscribe for, take and hold the stock of corporations, created under and by virtue of this act in such amounts as the directors of the said subscribing corporation may, from time to time, deem best for its interest.[2]

Sec. 302. Same—Rules, etc.—The directors of any corporation, organized under and in pursuance of this act, may, from time to time, make such just, proper and needful rules and regulations for the use of the union depot or depots owned or acquired by it as to the said directors, or a majority of them, may, from time to time, seem proper.[3]

[1] L. 1882, c. 273, § 1; 3 N. Y. R. S., 8th ed., p. 2013.

[2] L. 1882, c. 273, § 2; 3 N. Y. R. S., 8th ed., p. 2013.

[3] L. 1882, c. 273, § 3; 3 N. Y. Y. S., 8th ed., p. 2013.

Sec. 303. Same—Real estate Companies — Tenement houses, Homesteads, and—Public Halls.—Any three or more persons may organize themselves into a corporation in the manner specified and required in and by the act entitled, "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February seventeenth eighteen hundred and forty-eight, for the purpose of purchasing, acquiring, maintaining and improving real estate for residences, homesteads and apartment houses, to be leased and conducted by the corporation so formed, and occupied by the stockholders thereof, and others, and also for the purpose of purchasing, acquiring, maintaining improving and managing a building or buildings which shall contain a hall for public meetings and entertainments, and apportioning and distributing the same among the stockholders and members of such corporation, and also for filling in and improving lands. The corporation so formed shall be subject to all the provisions and obligations of the act aforesaid, and the acts amendatory thereof, and it shall have power to take and hold by purchase, contract, or lease, and convey such real estate as shall be necessary to carry out the objects of said corporation ; and it may distribute and apportion the same and the rent, income and proceeds thereof among its members and stockholders in such a manner as shall be determined by its by-laws ; and may sell and convey to purchasers thereof such real estate as said corporations may have acquired by purchase or otherwise, provided, however, that it shall not be lawful for said corporation to hold at any one time real estate, the

market value of which shall exceed the sum of five hundred thousand dollars.[1]

Sec. 303a. Same—Additional real estate, to what extent and how, may be acquired.—Any association or corporation duly organized under the laws of this state for the purpose of acquiring, maintaining and improving real estate for residences, homesteads and apartment houses in any city having over twenty-five thousand inhabitants, may hold at any one time real estate in excess of the amount now limited by law by filing with the clerk of the county where its certificate of incorporation is filed a resolution of its board of trustees, duly attested, fixing the amount desired to be held, together with a consent in writing of its members or stockholders representing two-thirds in amount of its capital stock, and the approval of a justice of the Supreme Court in said county, and thereupon it shall be lawful for such corporation to hold at any one time the amount of real estate so fixed, assented to and approved, but no such corporation or association shall hold real estate to exceed in value three millions of dollars.[2]

Sec. 304. Same—Salt Companies—when to pay in stock.—No incorporated company organized or hereafter to be organized for the manufacture of salt, under the "Act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes," passed February 17, 1848, shall be deemed dissolved or shall be dissolved, on account of the capital stock of such company not being paid in, the one half within one year, and the other half within two years from the incorporation of such company, provided that such stock shall be paid in within four years from the organization of such company.[3]

Sec. 305. Same—Steam-heating Companies—How to be

[1] L. 1871, c. 535, § 1, as amended by L. 1881, chs. 58, 232, 589; 3 N. Y. R. S., 8th ed., p. 1971.

[2] L. 1883, c. 71; 3 N. Y. R. S., 8th ed., p. 2001.

[3] L. 1857, c. 29, § 1; 3 N. Y. R. S., 8th ed., p. 1962.

konwn.—Any company heretofore organized, or which may hereafter be organized, for the purpose of supplying steam to consumers from a central station or stations through pipes laid in the public streets, shall be known as a district steam company.[1]

Sec. 306. Same—Must furnish steam when required—Penalty for neglect or refusal.—Upon the application, in writing, of the owner or occupant of any building or premises within one hundred feet of any street main laid down by any such district steam company, and payment by him of all money due from him to the company, the company shall supply steam as may be required for heating such building or premises, notwithstanding there may be rent or compensation in arrears for steam supplied, or for meter, pipe or fittings furnished to a former occupant thereof, unless such owner or occupant shall have undertaken or agreed with the former occupant to pay or to exonerate him from the payment of such arrears, and shall refuse or neglect to pay the same ; and if for the space of twenty days after such application, and the deposit (if required) of a reasonable sum to cover the cost of connection and two months' steam supply, the company shall refuse or neglect to supply steam as required, the company shall forfeit and pay to such applicant the sum of ten dollars, and the further sum of five dollars for every day thereafter during which such refusal or neglect shall continue ; provided that no such company shall be required to lay a service pipe for the purpose of supplying steam to any applicant, where the ground in which such pipe is required to be laid shall be frozen, or shall otherwise present serious obstacles to laying the

[1] L. 1885, c. 549, § 1; 3 N. Y. R. S., 8th ed., 1975.

same ; nor unless the applicant, if required, shall deposit in advance with the company a sum of money sufficient to pay for two months' steam supply and the cost of the necessary connections and of the erection of a meter and such other special apparatus as are required for use in connection with such steam supply, nor unless the applicant shall provide the space and right of way necessary for the erection, maintenance and use of such connections and apparatus, nor unless the said applicant shall first signify his assent in writing to the reasonable regulations of the company with reference to the supply of steam to consumers.[1]

Sec. 307 Same—Power of Municipalities.—The municipal authorities of the cities, towns and villages of the State of New York are hereby authorized and empowered to carry out the provisions of this act.[2]

Sec. 308. Same—Laying Pipes in Streets for Heating, etc.—Any corporation or association formed or organized under the act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February seventeenth, eighteen hundred and forty-eight, or under any of the amendments to said act, or under the "Act to provide for the organization and regulation of certain business corporations," passed June twenty-first, eighteen hundred and seventy-five, shall have full power to manufacture, furnish and sell such quantities of hot water, hot air or steam as may be required in the city, town or village where the same shall be located ; and such corpora-

[1] L. 1885, c. 549, § 2; 3 N. Y. R. R., 8th ed., 1975.

[2] L. 1877, c. 317, § 1; 2 R. S., 8th ed., p. 936.

tion shall have power to lay pipes or conductors for conducting hot water, hot air or steam through the streets, avenues, lanes, alleys, squares and highways in such city, village or town, with the consent of the municipal authorities of said city, town or village, and under such reasonable regulations and conditions as they may prescribe ; and whenever any such permission shall be granted, it shall only be upon the condition that reasonable compensation shall be paid therefor, and upon a further condition that a satisfactory bond shall be given to secure the city, town or village against all damages in the use of said pipes. The amount of the compensation, and the manner of its payment, and the amount of the bond, shall be first fixed and determined by said municipal authorities before any pipes, as provided for by this act, shall be laid in any city, town or village of this state, and that all such permissions heretofore given by any of said municipal authorities, where the above terms have been complied with, are hereby confirmed.[1]

Sec. 309. Same—Agent Authorized to enter buildings and Examing Meter—Penalty for Interfering with Agent. —Any corporation organized under the laws of this state for the purposes aforesaid may make an agreement with any of its customers by which any officer or agent of such corporation, duly authorized in writing, signed by the president or secretary of said corporation, shall be authorized at all reasonable times to enter any dwelling, store, building, room or places supplied with steam by such corporation and occupied by said customer for the purpose of

[1] L. 1879, c. 317, § 2; 3 N. Y. R. S., 8th ed., 936.

inspecting and examining the meters, devices, pipes, fittings, and appliances for supplying and regulating the supply of steam, and for ascertaining the quantity of steam consumed, or the quantity of water resulting from the condensation of steam consumed. Every such agreement so made in writing shall further provide that such officer or agent shall exhibit his written authority, if requested by the occupant of such dwelling, store, building, room or place. Any person who shall directly or indirectly prevent or hinder such officer or agent from entering such dwelling, store, building, room or place, or from making such inspection or examination, in violation of his agreement with said corporation, shall forfeit and pay to the corporation, the sum of twenty-five dollars for each offence.[1]

Sec. 310. Same—Agent may Enter and Cut Off—Under what Contingencies—Misdemeanor to open values, etc.—If any person or persons, corporation or association, supplied with steam by such corporation organized under the laws of this state for the purposes aforesaid, shall neglect or refuse to pay the rent or remuneration for such steam, or for the meter, device, pipes, fittings or appliances, let by such corporation for supplying steam, or for ascertaining the quantity of steam consumed, or the quantity of water resulting from the condensation of the steam consumed, agreed upon or due for the same, as required by his, their or its contract with such corporation, the latter may thereupon stop and prevent the steam from entering the premises of such person, persons, corporation or association so neglecting or refusing to pay such rent or remunera-

[1] L. 1880, c. 263, § 4; 3 N. Y. R. S., 8th ed., p. 1974.

tion. The said corporation may also in any of the cases enumerated in this act in which a person is liable to pay a forfeiture or is liable to fine or imprisonment, or both such fine or imprisonment, stop and prevent the steam from entering the premises of the person so liable, or, if such person be an officer or agent of any corporation or association, stop and prevent the steam from entering the premises of the corporation or association of which the person so liable is an officer or agent. In all cases in which such corporation is authorized to stop and prevent the steam from entering any premises, it may, by its officers, agents or workmen, enter into or on such premises between the hours of eight o'clock in the forenoon and six o'clock in the afternoon, and cut off, disconnect, separate, and carry away any meter, device, pipe, fitting or other property of the said corporation, and may cut off, disconnect, and separate any meter, device, pipe or fitting, whether the property of the corporation or not, from the mains or pipes of said corporation. Any person who, without the consent of such corporation, shall open or cause to be opened, any valve closed under the provisions of this section, by any corporation organized under the laws of this state for the purposes aforesaid, or reconnect or cause to be reconnected, any connection disconnected by any such corporation under such provisions, or turn on steam or cause the same to be turned on, or to re-enter any premises, when the same has been stopped and prevented from entering them by such corporation, as provided in this section, shall be deemed guilty of a misdemeanor ; and upon conviction shall be punished by fine not exceeding two hundred and fifty dollars, or

by imprisonment not exceeding six months, or by both such fine and imprisonment.[1]

Sec. 311. Same—Corporations for Towing or Propelling Vessels.—The organization of any corporation for the purpose of towing or propelling canal boats, vessels, rafts or floats on the canals and navigable rivers of the state of New York, by animal or steam power, their operations not to be confined to the county in which their certificate shall be filed, formed since the passage of chapter three hundred and seventy-four of the laws of eighteen hundred and seventy-seven, and all the acts of the trustees of any such corporation, organized in compliance with the provisions of such last-named chapter, are hereby made as legal in all respects as if the said last-named chapter had remained in full force, and every such corporation so organized is hereby declared to have existence and to have the same powers and privileges in all respects as if the said act, being chapter three hundred and seventy-four of the laws of eighteen hundred and seventy-seven, had been in full force in all respects at the time of the formation of any such corporation.[2]

Sec. 312. Same—Water Companies—Organization of.—Any three or more persons may organize and form themselves into a corporation in the manner specified and required in and by the act entitled, "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February seventeenth, eighteen hundred and forty-eight, and the amendments thereof

[1] L. 1880, c. 263; § 5, as amended by L. 1883, c. 237; 3 N. Y. R. S., 8th ed., p. 1975.

[2] L. 1880, c. 241, § 2; 3 N. Y. R. S., 8th ed., p. 1974.

and supplements thereto, for the purpose of accumulating, storing, conducting, selling, furnishing and supplying water for mining, domestic, manufacturing municipal and agricultural purposes, and may acquire, take, hold, lease and convey lands and water power suitable for those purposes.[1]

Sec. 313. Same—Liability of Company and Stockholders.—Every corporation so formed and the stockholders thereof shall be subject to all the provisions, duties and obligations contained in the above-mentioned act, and shall be entitled to all the benefits and privileges thereby conferred, except that such corporations shall not be confined in their operations to the county in which their certificate shall be filed.[2]

Sec. 314. Same—May be Conducted by Mining Companies.—It shall and may be lawful for any corporation heretofore incorporated or hereafter to be incorporated, for mining purposes, under the act mentioned in the first section of this act, to conduct the business for which the formation of corporations is authorized by said first section ; provided the intention so to do shall be or, as the case may be, shall have been specified among the objects for which such corporation is or shall be formed in its certificate of incorporation.[3]

Sec. 315. Same—Must File Certificate of such Intention.—It shall and may be lawful for any corporation heretofore incorporated for mining purposes, under chapter forty of the laws of eighteen hundred and forty-eight, entitled, " An act to authorize the for-

[1] L. 1880, c. 85, § 1; 3 N. Y. R. S., 8th ed., p. 1973.

[2] L. 1880, c. 85, § 2; 3 N. Y. R. S., 8th ed., p. 1973.

[3] L. 1880, c. 85, § 3, as amended by L. 1887, c. 486; 3 N. Y. R. S. 8th ed., p. 1973.

mation of corporations for manufacturing, mining, mechanical or chemical purposes," or under any amendment of or supplement to the said act, to conduct the business for which the formation of corporations is authorized by this act ; provided a certificate signed and acknowledged by a majority of the trustees of the said corporation shall be filed, in the office of the clerk of the county where the original certificate of incorporation was filed, and a certified copy thereof in the office of the secretary of state, stating that the said corporation intends to avail itself of the provisions of this act, and to carry on the business provided for in this act in addition to the business specified in the said original certificate of incorporation.[1]

Sec. 316. Same—May acquire Title to Land in same Manner as Railroad Companies.—Any corporation formed under this act for the purpose among other things of supplying cities with water, may acquire title to land for the purposes of their business, in the same manner specified and required in and by the act entitled, " An act to authorize the formation of railroad corporations and to regulate the same," passed April second, eighteen hundred and fifty, and the acts amendatory thereof and supplemental thereto, and such corporations may lay pipes for the purpose of conducting water for the purposes of their business under any of the navigable waters of this state provided they are so laid as not to interfere with the navigation of such waters. No corporation shall be formed under this act for the purpose of accumulating, storing, conducting, furnishing or supplying

[1] L. 1880, c. 85, § 4; 3 N. Y. R. S., 8th ed., p. 1973.

water for domestic, manufacturing or municipal purposes in the city of New York.[1]

Sec. 317. Same—May Make Contracts to furnish Water.—Such corporation so formed under this act may contract with any corporation in this state, public or private, to furnish water for any of the purposes in this act mentioned, and every corporation in this tate is hereby authorized to enter in such contracts with such corporations formed under this act.[2]

Sec. 318. Same—Corporations may be Organized for boring, etc., for Water—Any three or more persons may organize and form themselves into a corporation, in the manner specified and required in and by chapter 40 of the laws of 1848, entitled, "An act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes," and the amendments thereof, and supplements thereto, for the purpose of boring, sinking, digging for, accumulating, conducting by underground pipes, conduits and reservoirs, and furnishing water, to be used for power and fire purposes.[3]

Sec. 319. Same—Rights, Privileges, etc., of such Corporations.—Every corporation so formed and the stockholders thereof shall be subject to all the provisions, duties and obligations contained in the above-mentioned act and the amendments thereof and supplements thereto, and shall be entitled to all the rights, benefits and privileges thereby conferred.[4]

Sec. 320. Same—Have Power to Lay Pipes, etc., through Streets—Consent of Public Authorities.—Any corpora-

[1] L. 1880, c. 85, § 5, as amended by L. 1881, c. 472, § 1; 3 N. Y. R. S., 8th ed., 1974.

[2] L. 1880, c. 85, § 6, as amended by L. 1881, c. 472, § 2; 3 N. Y. N. S., 8th ed., p. 1894.

[3] L. 1884, c. 386, § 1; 3 N. Y. R. S., 8th ed., p. 2054.

[4] L. 1884, c. 386, § 2; 3 N. Y. R. S., 8th ed., p. 2054.

tion formed under this act shall have power to lay its pipes and conduits through and under the streets, avenues, and highways of any city, town, or village where it may be located, with the consent of the municipal authorities of such city, or the local authorities of such town or village, and under such reasonable regulations and conditions as they may prescribe, except in the city of New York, where pipes and conduits may be laid in the streeets and avenues by any such corporation with the consent and by the authority of the commissioners of the sinking fund of said city.[1]

Sec. 321. Same—May Contract with Cities, etc., to Furnish Water—In New York City, Bonds to be Issued and Money Raised.—Any corporation formed under this act may contract with any city, town, or village in which it may be located, to furnish water for the purposes stated in section one of this act; but any contract that may be made under the authority hereby conferred, between the city of New York and any such corporation, shall be made only by the commissioners of the sinking fund of said city, upon such terms and conditions as the said commissioners shall deem for the best interest of said city. And the comptroller of the said city of New York is hereby authorized to issue bonds of said city, in sufficient amount to raise such sums, as the said commissioners of the sinking fund shall certify to be necessary, to execute any contract, made in behalf of said city, under the authority hereby conferred, and a sum sufficient to pay said bonds, with the interest thereon, shall be included in the final estimate and raised by taxation, either in the year in which

[1] L. 1884, c. 386, § 3; 3 N. Y. R. S., 8th ed., p. 2054.

said bonds are issued, or in the following year.[1]

Sec. 322. Same—Water for Mining.—Any three or more persons may organize and form themselves into a corporation in the manner specified and required in and by the act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February seventeenth, eighteen hundred and forty-eight, for the purpose of accumulating, storing, conducting, furnishing and supplying water for mining purposes, and may acquire, take, hold, lease and convey lands and water power suitable for those purposes.[2]

Sec. 323. Same—Corporations Subject to Certain Provisions.—Every corporation so formed and the stockholders thereof shall be subject to all the provisions, duties and obligations contained in the above-mentioned act, and shall be entitled to all the benefits and privileges thereby conferred, except that such corporations shall not be confined in their operations to the county in which their certificate shall be filed.[3]

Sec. 324. Same—Former Incorporations may Proceed hereunder.—It shall and may be lawful for any corporation heretofore incorporated for mining purposes under the act mentioned in the first section, to conduct the business for which the formation of corporations is authorized by said first section, provided the intention so to do shall be specified among the objects for which such corporation is formed in its certificate of incorporation.[4]

[1] L. 1884, c. 386, § 4; 3 N. Y. R. S., 8th ed., p. 2054.

[2] L. 1866, c. 371, § 1; 3 N. Y. R. S., 8th ed., p. 1967.

[3] L. 1866, c. 371, § 2; 3 N. Y. R. S., 8th ed., p. 1967.

[4] L. 1866, c. 371, § 3; 3 N. Y. R. S., 8th ed., p. 1967.

CHAPTER XIX.

MANUFACTURING CORPORATIONS—PERFECTING ORGANIZATION, ETC.

CERTIFICATE OF INCORPORATION—FILING—PLACE OF BUSINESS—CHANGE OF—TAXATION AT—ELECTION OF TRUSTEES—NUMBER OF, INCREASE AND REDUCTION—POWER TO PURCHASE—CALL ON STOCKHOLDERS—MAKING BY-LAWS—HOLDING STOCK IN OTHER COMPANIES—CERTIFICATE OF INCORPORATION, COPY OF EVIDENCE—EXTRINSIC EVIDENCE—LIABILITY OF STOCKHOLDERS—SALT COMPANIES.

SEC. 325. Certificate of incorporation—To be filed and recorded.
SEC. 326. Same—Fee for filing and recording.
SEC. 327. Same—Amended certificate—Filing of.
SEC. 328. Places of business—Number.
SEC. 329. Same—Principal place of business.
SEC. 330. Same—Change of place of business—Filing amended certificate.
SEC. 331. Same—Certificate as to—Taxation at.
SEC. 331a. Same—Taxation at—Basis of Taxation.
SEC. 332. Trustees—Election of.
SEC. 332a. Same—Right to vote at election.
SEC. 332b. Same—By-laws respecting elections.
SEC. 332c. Same—Powers of supreme court respecting elections.
SEC. 332d. Same—Oath of inspectors of election.
SEC. 332e. Same—When to be held.
SEC. 332f. Same—Setting aside election.
SEC. 332g. Same—Character and powers of trustees.
SEC. 333. Same—Number of trustees.
SEC. 333a. Same—The board—Quorum.
SEC. 334. Same—Number of—How increased or reduced.
SEC. 334a. Same—Determining number.
SEC. 335. Same—Eligibility.
SEC. 336. Same—Power to purchase—Issuing stock for.

SEC. 336a. Same—Charging stockholder by.
SEC. 337. Same—Failure to elect—Holding over.
SEC. 338. Same—Officers—Designation and appointment of.
SEC. 338a. Same—Liability and authority of.
SEC. 339. Trustees to make calls on stockholders.
SEC. 339a. Same—Enforcing payment.
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SEC. 340a. Same—Force and effect of by-laws.
SEC. 341. Stock—Transfer of.
SEC. 342. Same—Power to hold stock in other company.
SEC. 343. Certificate of incorporation—Copy of to be evidence.
SEC. 343a. Same—Evidence of legal residence—Conclusiveness.
SEC. 343b. Same—Extrinsic evidence.
SEC. 344. Liability of stockholders.
SEC. 344a. Same—Grounds of liability, etc.
SEC. 345. Same—Exception as to salt companies.
SEC. 346. Same—Certificate of payment—Filing of.
SEC. 346a. Same—Certificate to be sworn to.

Sec. 325. Certificate of Incorporation—To be Filed and Recorded.—All certificates of incorporation hereafter incorporated under any of the laws of this state, required by law to be filed in the office of the secretary of state, or in the office of any county clerk, shall be duly recorded in the office where the same shall be filed, in books specially provided therefor, which books of record shall be properly indexed. The same fees shall be charged for the recording of such certificates as are now provided by law for the recording of deeds. And the Secretary of State, and such county clerk, shall neither file nor record any such certificate in their office, unless the fees therefor are first duly paid.

Sec. 326. Same—Fee for Filing and Recording.—The secretary of state is authorized, by chapter 156 of the Laws of 1882, to charge ten dollars for filing every certificate under the general manufacturing act of 1848; and fifteen cents per folio of one hundred

[1] L. 1881, c. 224; 3 N. Y. R. S., 8th ed., p. 1724.

words, for recording certificates, notices or other papers required by law to be recorded.[1]

Sec. 327. Same.—Amended Certificate—Filing of.—The directors of any corporation organized under any general act for the formation of companies, in whose original certificate of incorporation any informality may exist, by reason of an omission of any matter required to be therein stated, are hereby authorized to make and file an amended certificate or certificates of incorporation, to conform to the general act under which said corporation may be organized; and upon the making and filing of such amended certificate, the said corporation shall, for all purposes, be deemed and taken to be a corporation from the time of filing such original certificate.[2] But nothing in this act contained shall in any manner affect any suit or proceeding, at the time of filing such amended certificate, pending against said corporation, or impair any rights already accrued.[3]

Sec. 328. Places of Business—Number.—Any certificate hereafter filed, under the provisions of the manufacturing act, may designate one or more places where the company may carry on their business.[4]

Sec. 329. Same—Principal Place of Business.—If any company shall be formed under said act, for the purpose of carrying on any part of its business, in any place out of this state, the said certificate shall so state, and shall also state the name of the town

[1] 1 N. Y. R. S., 8th ed., p. 562.

[2] L. 1870, c. 135, § 1; 3 N. Y. R. S., 8th ed., p. 1732.

[3] L. 1870, c. 135, § 2; 3 N. Y. R. S., 8th ed., p. 1732.

[4] L. 1853, c. 333, § 1; 3 N. Y. R. S., 8th ed., p. 1961. See Chesebrough Manuf. Co. v. Coleman, 44 Hun (N. Y.) 545 (1887); Knowles v. Duffy, 40 Hun (N. Y.) 485 (1886); Thurston v. Duffy, 38 Hun (N. Y.) 328 (1885).

and county in which the principal part of the business of said company within this state is to be transacted, and said town and county shall be deemed the town place and county in which the operations and business of the company are to be carried on, and its principal place of business within the meaning of the provisions of this act.[1]

Sec. 330. Same—Change of Place of Business—Filing amended certificate.—Any company formed under the act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February seventeen, eighteen hundred and forty-eight, may change its place or places of business by a vote of the stockholders, representing two-thirds of the stock, at any meeting of the stockholders regularly called, and executing and acknowledging an amended certificate specifying the names of the towns or cities from and to which the business location of the company is to be changed, and in other respects conforming to the original certificate, which amended certificate shall be signed by the president and two-thirds of the directors of the company, and shall be filed in the office of the secretary of state, and in the office of the clerk of the county where the business operations of the company are to be carried on, and published weekly in two papers in the towns or cities from and to which the business operations have been removed, and are to be carried on, for the term of three months. But the property of said company shall be liable to

[1] L. 1857, c. 29, § 3; 3 N. Y. R. S., 8th ed., p. 1962. See Chesebrough Manuf. Co. v. Coleman, 44 Hun (N. Y.) 545 (1887).

As to sufficiency of statement under this section, see People v. Beach, 19 Hun (N. Y.) 259 (1879).

taxation in any county where such property may be, or in which its business may be done to the extent of its property in any such county.[1]

Sec. 331. Same—Certificate as to—Taxation of.—No company organized under the provisions of said act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes shall be deemed or taken to have a principal office or place for transacting its financial concerns other than that at which the operations of said company are carried on, unless within the month of May in each year the president and treasurer, or a majority of the trustees, shall make duplicate certificates stating the amount of the then capital of said company, and the portion of such capital not invested in real estate, and stating that such company then has a principal office for transacting its financial concerns in a county other than that in which the operations of said company are carried on, stating the town or city and county in which such financial office is located, and that the president and treasurer, and a majority of the trustees of said company are then actually residents of the town or city in which such financial office is then located, which duplicate certificates shall be signed and sworn to by the persons making the same and filed, the one in the clerk's office of the county where the operations of said company are carried on, and the other in the clerk's office in the county in which such financial office shall be. And in case in any year such duplicate certificates shall be made and filed as aforesaid, then during the year succeeding the first day of June

[1] L. 1864, c. 517, § 1; 3 N. Y. R. S., 8th ed., p. 1965.

next after the filing of such certificates, the personal estate of such company shall be assessed only in the town or ward named in said certificates, as that in which such financial office is located.[1]

Sec. 331a. Same—Taxation at—Basis of Taxation.—The taxation for state purposes of all corporations organized under the general manufacturing act of 1848 except manufacturing or mining companies carrying on manufacture or mining ores within this state, is now regulated by chapter 542 of the Laws of 1880, as amended by the Laws of 1881, chapter 361, Laws of 1880, as amended by the Laws of 1881, chapter 361, Laws of 1882, chapter 151, and Laws of 1885, chapters 359, 360.[2]

Returns showing the amount of capital paid in, the date, amount and rate per centum of each and every dividend paid declared by the company during the year ending November 1st, together with certain other facts, must be made by the president or treasurer, to the comptroller of the state, on or before November 15th, in each year.[3]

A corporation formed to collect, store and preserve ice, is not a manufacturing corporation and so exempt from this tax.[4]

Chapter 501, Laws 1885, amends chapter 151, Laws 1882 and fixes the amount of capital employed within the state as the basis of taxation under the act and gives to the comptroller additional powers for ascertaining all facts relative to the capital stock of the company, and for settling and enforcing unpaid taxes. The statute should be consulted for the provisions.[5]

Sec. 332. Trustees—Election of.—The stock, prop-

[1] L. 1861, c. 170, § 2; 3 N. Y. R. S., 8th ed., 1965. See Chesebrough Manuf. Co. v. Coleman, 44 Hun (N. Y.) 545 (1881).

[2] The tax law of 1880 is constitutional. People v. Horn S. M. Co., 105 N. Y. 76 (1887).

[3] The necessary information and blanks for the return can be obtained on application to the comptroller of the state of New York at Albany.

[4] People v. Knickerbocker Ice Co., 99 N. Y. 181 (1885).

[5] As to means of enforcing payment of this tax, see L. 1886, c. 266.

erty and concerns of such company shall be managed by not less than three nor more than thirteen trustees, who shall respectively be stockholders in such company and a majority of whom shall be citizens and residents of this state, who shall, except the first year, be annually elected by the stockholders, at such time and place as shall be directed by the by-laws of the company ; and public notice of the time and place of holding such election shall be published not less than ten days previous thereto in the newspaper printed nearest to the place where the operations of the said company shall be carried on ; and the election shall be made by such of the stockholders as shall attend for that purpose, either in person or by proxy. All elections shall be by ballot, and each stockholder shall be entitled to as many votes as he owns shares of stock in the said company, and the persons receiving the greatest number of votes shall be trustees ; and when any vacancy shall happen among the trustees, by death, resignation or otherwise, it shall be filled for the remainder of the year in such manner as may be provided for by the by-laws of the said company.[1]

Sec. 332a. Same—Right to vote at election.—It shall be lawful for any married woman, being a stockholder or member of any manufacturing company or other institution incorporated under the laws of this state, to vote at any election for directors or trustees, by proxy or otherwise, in such company of which she may be a stockholder or member.[2]

An executor, administrator, guardian or trustee, may vote upon the stock he holds in such capacity. And, although a

[1] L. 1848, c. 40, § 3, as amended by L. 1883, ch. 232; 3 N. Y. R. S., 8th ed., p. 1956. See Castle v. Lewis, 13 Hun (N. Y.) 298 (1878); People v North Riv. Sug. Ref. Co., 16 N. Y. Civ. Proc. Rep., 28 (1889).

[2] L. 1851, c. 321, § 6; 3 N. Y. R. S., 8th ed., p. 2602.

stockholder pledges his stock, he may still vote on it at an election.[1]

In all cases where the right of voting upon any share or shares of the stock of any incorporated company of this State, shall be questioned, it shall be the duty of the inspectors of the election to require the transfer book of said company as evidence of stock held in the said company ; and all such shares as may appear standing thereon in the name of any person or persons, shall be voted on by such person or persons, directly by themselves, or by proxy, subject to the provisions of the act of incorporation. A person claiming to vote by proxy must show a special authority for that purpose.[2]

A pledgor may vote at an election, provided the stock stands in his own name on the books of the corporation.[3]

A full discussion of the question of corporate elections and the qualification of voters will be found in a former part of this work.[4]

Sec. 332b. Same—By-laws respecting elections.—No by-law of the directors and managers of any incorporated company, regulating the election of directors or officers of such company, shall be valid, unless the same shall have been published for at least two weeks in some newspaper in the county where such election shall be held, at least thirty days before such election.

Sec. 332c. Same—Powers of Supreme Court respecting elections.—It shall be the duty of the Supreme Court, upon the application of any person or persons or body corporate, that may be aggrieved by, or may complain of, any election or any proceeding, act or matter, in or touching the same (reasonable notice having been given to the adverse party, or to those who are to be affected thereby, of such intended application),

[1] *Ante*, § 17.

[2] Philips v. Wickham, 1 Paige Ch. (N. Y.) 590 (1829). As to form of proxy, see Matter of Lighthill Mfg. Co., 47 Hun (N. Y.) 258 (1888); Matter of White v. N. Y. Agricul. Soc., 45 Hun (N. Y.) 580 (1887).

[3] Ex parte Willcocks, 7 Cow. (N. Y.) 402 (1827); Matter of Barker, 6 Wend. (N. Y.) 509 (1831).

[4] See *ante*, § 48, *et seq.*

to proceed forthwith and in a summary way, to hear the affidavits, proofs and allegations of the parties, or otherwise inquire into the matters or causes of complaint, and thereupon to establish the election so complained of, or to order a new election, or make such order and give such relief in the premises, as right and justice may appear to the said Supreme Court to require: *Provided* That the said Supreme Court may, if the case shall appear to require it, either order an issue or issues to be made up in such manner and form as the Supreme Court may direct, in order to try the respective rights of the parties who may claim the same, to the office or offices or franchise in question; or may give leave to exhibit, or direct the attorney-general to exhibit, one or more information or informations in the nature of a *quo warranto* in the premises. The court may go behind the returns.[1]

Sec. 332d. Same—Oath of inspectors of election.—The inspectors who may be appointed to conduct any election of directors or any other officer of any incorporated company of this state, must, before entering on the duties of their appointment, take or subscribe the following oath or affirmation before any person authorized to take acknowledgments: "I, A B, do solemnly swear (or affirm, as the case may be,) that I will execute the duties of an inspector for the election now to be held with strict impartiality, and according to the best of my ability."

Sec. 332e. Same—When to be held.—If at any time hereafter, the election for directors of any bank or other incorporated company of this state, shall not be duly held on the day designated and appointed by the act incorporating such bank or other incorporated company, it shall be the duty of the president and directors of such bank or other incorporated company, to notify and cause an election for directors to be held within sixty days immediately thereafter; and in all cases, no share or shares shall be voted upon, except by such person or persons who may have appeared on the transfer books of said company to have had the right to vote thereon,

[1] Strong v. Smith, 15 Hun (N. Y.) 222 (1878).

on the day when, by the act of incorporation of such company, the election ought to have been held; which said right so to vote shall be exercised by the persons so appearing as aforesaid upon the transfer books of such company, on any day when such election may be held. This statute applies to corporations organized under this act, when by-laws make no provision.[1] An election may be compelled by mandamus.[2] Informality will not invalidate election.[3]

In the absence of any regulation in the by-laws, fixing a date for the annual election, it must be held upon the recurrence in the following year of the day of the first election, if that is a legal day.[4]

Sec. 332f. Same—Setting aside election.—An election will not be set aside on account of a mere informality.[5] Where, at an election, a full board is not legally elected, the persons receiving the requisite number of votes will be elected, and the vacancies must be filled.[6] Where legal votes are rejected which, if received, would have changed the election, the election will be set aside.[7] The reception of spurious votes does not vitiate the election, unless they have changed the result.[8]

Sec. 332g. Same—Character and power of trustees.—The character of a trustee of a corporation is fiduciary, and he cannot deal directly or indirectly with himself, in respect to any matter involving such confidence.[9] A meeting of the trustees is regular only where all have notice; notices sent by mail, in accordance with custom, will be presumed to have been received, in

[1] People v. Cummings, 72 N. Y. 433 (1878); Bowen v. Lease, 5 Hill (N. Y.) 221 (1843).

[2] People v. Cummings, 72 N. Y. 433 (1878).

[3] Matter of Mohawk & H. R. R. Co., 19 Wend. (N. Y.) 135 (1838). See In re Rochester D. T. Co., 40 Hun (N. Y.) 172 (1886).

[4] Vandenburg v. Broadway U. C. R. R. Co., 29 Hun (N. Y.) 348 (1883).

[5] Matter of Mohawk & Hudson R. Co., 19 Wend. (N. Y.) 135 (1838.)

[6] Matter of Union Ins. Co., 22 Wend. (N. Y.) 591 (1840).

[7] Matter of Long Island R. R. Co., 19 Wend. (N. Y.) 37 (1837).

[8] *Ex parte* Murphy, 7 Cow. (N. Y.) 153 (1827).

[9] Harpending v. Munson, 91 N. Y. 650 (1883); Duncomb v. New York H. & N. R. Co., 84 N. Y. 190 (1881); Central Trust Co. v. New York & N. R. Co., 18 Abb. (N. Y.) N. C. 381 (1887); Williams v. Western Union Tel. Co., 9 Abb. (N. Y.) N. C. 419 (1881); People v. Bruff, 9 Abb. (N. Y.) N. C. 153 (1880).

the absence of proof to the contrary.[1] Where a corporation, to pay a debt contracted while it had three trustees, one of whom had afterwards resigned, and the vacancy had not been filled, transferred property to its creditor, held, that the transaction was legal, although done by less than three trustees.[2] An act of a board of trustees, beneficial to a trustee present, whose presence is necessary to make a quorum, is voidable at the instance of a stockholder.[3] The directors of a corporation have no power to sell the entire movable property of the corporation.[4] A company with insufficient number of trustees liable.[5] A trustee may resign, and is not liable for debts contracted after his resignation.[6] Where a corporation has permitted certain persons to act as trustees, it cannot afterward, as against third persons, question the acts of such trustees.[7]

Sec. 333. Same—Number of Trustees.—The act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical and chemical purposes," passed February seventeenth, eighteen hundred and forty-eight, is hereby amended so as to allow corporations to be hereafter organized under said act, with not less than three and not more than thirteen trustees, instead of being limited to nine in number, as provided in said act.[8]

Sec. 333a. Same—The board—Quorum.—When the corporate powers of any corporation are directed by its charter to be exercised by any particular body, or number of persons, a

[1] People *ex rel.* v. Albany Med. Coll., 26 Hun (N. Y.) 348 (1882); s. c. 89 N. Y. 635.

[2] Castle v. Lewis, 13 Hun, (N. Y.) 298 (1878).

[3] Butts v. Wood, 37 N. Y. 317 (1867).

[4] Abbott v. Hard Rubb. Co., 11 Abb. (N. Y.) Pr. 204 (1860).

[5] Martin v. Niagara F. P. M. Co., 44 Hun (N. Y.) 130 (1887).

[6] Squires v. Brown, 22 How. (N. Y.) Pr. 35 (1860).

[7] Partridge v. Badger, 25 Barb. (N. Y.) 146 (1857); Lovett v. German Ref. Ch., 12 Barb. (N. Y.) 67 (1851).

[8] L. 1860, c. 269, § 1; 3 N. Y. R. S., 8th ed., 1962. Rendered nugatory by L. 1883, c. 232; 3 N. Y. R. S., 8th ed., p. 1956.

majority of such body, or persons, if it be not otherwise provided in the charter, shall be a sufficient number to form a board for the transaction of business; and every decision of a majority of the persons duly assembled as such board, shall be valid as a corporate act. A corporation that has permitted particular individuals to act as trustees, and has held them out to the world as such trustees, cannot afterwards, as against third persons, question the acts of such trustees.[1]

Sec. 334. Same—Number of—How Increased or Reduced.—The number of trustees in any corporation, organized before, or since, the eleventh day of April, eighteen hundred and sixty, or which shall hereafter be organized under the said act, may be increased to not more than thirteen, or may be reduced to not less than three, as follows: The existing trustees of any such corporation, or a majority of them, shall make and sign a certificate, declaring how many trustees the corporation shall have in the future management of its business, and, in case the number of trustees be increased, stating the names of the new, or additional trustees, and, in case the number of trustees be reduced, stating the number to which the trustees shall be reduced; which certificate shall be acknowledged by the trustees signing the same, or proved by a subscribing witness, and shall be filed in the office of the clerk of the county where the original certificate of incorporation was filed, and a duplicate or transcript thereof, duly certified under the official seal of such clerk, filed in the office of the secretary of state; and, in the case of an increase of the number of trustees, from and after the filing of such certificate and duplicate or transcript, the trustees of such cor-

[1] Lovett v. German Reformed Church, 12 Barb. (N. Y.) 67 (1851).

poration shall be deemed increased to the number therein stated, and the persons so named in such certificate shall be trustees until a new election of trustees shall be had, according to the said act, and the by-laws or regulations of such corporation. And in the case of the reducing of the number of trustees, the number stated in such certificate as the number of trustees which shall manage the business of such corporation, shall be deemed the number of trustees of such corporation to be elected, according to said act, and the by-laws and regulations of such corporation, at the next election and thereafter, after the filing of such certificate and duplicate or transcript; and in case a vacancy or vacancies shall occur in the board of trustees of such corporation, by resignation or otherwise, after the filing of such certificate and duplicate or transcript reducing the number of trustees, before the next election of trustees after such filing, no election shall be had in the meantime to fill such vacancy or vacancies while the number of trustees remaining shall equal or exceed the number to which the trustees are reduced in such certificate.[1]

Sec. 334a. Same—Determining number.—The number and qualifications of trustees for a manufacturing corporation should be determined by the charter of the corporation;[2] but if the charter fails to do so the corporation may fix the number by by-law.[3]

Sec. 335. Same—Eligibility.—When any such man-

[1] L. 1860, c. 269, § 2, as amended by L. 1867, c. 248, § 2, and L. 1878, c. 316; 3 N. Y. R. S., 8th ed., p. 1963. See Wallace v. Walsh, 52 Hun (N. Y.) 333 (1889).

[2] People v. Northern R. Co., 42 N. Y. 217 (1870).

[3] People v. Northern R. Co., 42 (N. Y.) 217 (1870); Cammeyer v. United Gen. L. Church, 2 Sandf. Ch. (N. Y.) 186 (1844).

ufacturing company shall be a stockholder in any other corporation, its president or other officers shall be eligible to the office of trustees of such corporation, the same as if they were individually stockholders therein.[1]

Sec. 336. Same—Power to Purchase—Issuing Stock for.—The trustees of such company may purchase mines, manufactories and other property necessary for their business, and issue stock to the amount of the value thereof in payment therefor; and the stock so issued shall be declared and taken to be full stock and not liable to any further calls; neither shall the holders thereof be liable for any further payments under the provisions of the tenth section of the said act, but in all statements and reports of the company, to be published, this stock shall not be stated or reported as being issued for cash paid into the company, but shall be reported in this respect according to the fact.[2]

Sec. 336a. Same—Charging stockholder by.—To charge a holder of stock, issued upon and for the purchase of property, individually for the debts of the company, it is not enough to prove that the property has been purchased and paid for at an overvaluation through a mere mistake and error of judgment on the part of the trustees, but it must be shown that the purchase at the price agreed upon was in bad faith,

[1] L. 1866, c. 838, § 4; 3 N. Y. R. S., 8th ed., p. 1968.

[2] L. 1853, c. 333, § 2; 3 N. Y. R. S., 8th ed., p. 1961. See Whitaker v. Masterton, 106 N. Y. 277 (1887); Lake Sup. Iron Co. v. Drexel, 90 N. Y. 87 (1882); Bonnell v. Griswold, 89 N. Y. 122 (1882); Pier v. Hanmore, 86 N. Y. 95 (1881); Bonnell v. Griswold, 80 N. Y. 128 (1880); Douglass v. Ireland, 73 N. Y. 100 (1878); Boynton v. Andrews, 63 N. Y. 93 (1875); Schenck v. Andrews, 57 N. Y. 133 (1874); Arthur v. Griswold, 55 N. Y. 407 (1874); Boynton v. Hatch, 47 N. Y. 228 (1872); Schenck v. Andrews, 46 N. Y. 592 (1871); National T. W. Co. v. Gilfillan, 46 Hun (N. Y.) 248 (1887); Thurber v. Thompson, 21 Hun (N. Y.) 472 (1880); Pier v. George, 17 Hun (N. Y.) 207 (1879); Nelson v. Drake, 14 Hun (N. Y.) 468 (1878).

and to evade the statute. The transaction may be impeached for fraud, but not for error of judgment or mistaken views of the value of the property, inasmuch as good faith and the exercise of an honest judgment is all that is required.[1]

Directors who issue unauthorized certificates of stock are not liable directly to ultimate purchasers who made no contract with them, and did not act on their representations.[2]

In the absence of proof to the contrary, it will be presumed that a conveyance to the corporation is pursuant to its powers.[3] And a corporation, although created only for a term of years, may purchase and hold hands in fee.[4]

Sec. 337. Same—Failure to elect—Holding over.—In case it shall happen at any time, that an election of trustees shall not be made on the day designated by the by-laws of said company, when it ought to have been made, the company for that reason shall not be dissolved, but it shall be lawful on any other day, to hold an election for trustees, in such manner as shall be provided for by the said by-laws and all acts of trustees shall be valid and binding as against such company, until their successors shall be elected.[5]

Sec. 338. Same—Officers—Designation and appointment of.—There shall be a president of the company, who shall be designated from the number of trustees, and also such subordinate officers as the company by its by-laws may designate, who may be elected or appointed and required to give such security for the faithful performance of the duties of their office as the company by its by-laws may require.[6]

[1] Douglass v. Ireland, 73 N. Y. 100 (1878); Lake Superior Iron Co. v. Drexel, 90 N. Y. 87 (1882).

[2] Seizer v. Mali, 11 Abb. (N. Y.) Pr. 129 (1860).

[3] Farmers' Loan Company v. Critus, 7 N. Y. 466 (1852).

[4] Nicoll v. New York & Erie R. Co., 12 Barb. (N. Y.) 460 (1852).

[5] L. 1848, c. 40, § 4; 3 N. Y. R. S., 8th ed., p. 1956.

[6] L. 1848, c. 40, § 5; 3 N. Y. R. S., 8th ed., p. 1956. See Westerfield v. Radde, 7 Daly (N. Y.) 328 (1877).

Sec. 338a. Same—Liability and authority of.—An officer will be liable for false representations as to the value of stock, though published in a report of the corporation.[1]

Officers cannot plead laches, except statute of limitations, in actions against them by the corporation for a violation of duty[2]. Trustees may purchase and enforce claim against company.[3]

Where an officer, though not empowered by the by-laws of the company to do certain acts—*e. g.*, to sign notes or borrow money—has been permitted to do so, if not authorized, for a long time, it was held, that one who had lent him money for the company, and taken a check of the company signed by him, could recover against the corporation.[4]

The president has no authority, by virtue of his office merely, without reference to powers actually conferred, to borrow money for the company.[5]

An authority given an officer to collect and pay debts, does not involve the power to sell and assign securities without authority from the trustees.[6]

The directors of a corporation shall have no power to sell the entire movable property of the corporation; and such a sale made by them is void as against such stockholders as do not assent.[7]

[1] Newbery v. Garland, 31 Barb. (N. Y.) 121 (1860); Morse v. Swits, 19 How. (N. Y.) Pr. 275 (1859); Boltz v. Ridder, 19 N. Y. Week. Dig. 463 (1884); s. c. in full N. Y. Dai. Reg., August 7, (1884).

[2] Ilion Bank v. Carver, 31 Barb. (N. Y.) 230 (1857). As to the authority of the president, see Beers v. Phœnix Glass Co., 14 Barb. (N. Y.) 358 (1852); Life & Fire Ins. Co. v. Mechanic Fire Ins. Co., 7 Wend. (N. Y.) 31 (1831). See also Kraft v. Freeman Printing & Pub. Co., 87 N. Y. 628 (1881); Westerfield v. Radde, 7 Daly (N. Y.) 326 (1877); People *ex rel.* v. Keese, 27 Hun (N. Y.) 483 (1882).

[3] Butler v. Duprat, 51 N. Y. Super. Ct. (19 J. & S.) 77 (1884); Crooked L. N. Co. v. Keuka N. Co., 37 Hun (N. Y.) 9 (1885); Inglehart v. Thousand I. H. Co., 32 Hun (N. Y.) 377 (1884).

[4] Beers v. Phœnix Glass Co., 14 Barb. (N. Y.) 358 (1852).

[5] Life & Fire Ins. Co. v. Mechanic Fire Ins. Co., 7 Wend. (N. Y.) 31 (1831).

[6] Jackson v. Campbell, 5 Wend. (N. Y.) 572 (1830). See also Hoyt v. Thompson, 5 N. Y. 320 (1851); s. c. 3 Bosw. (N. Y.) 267.

[7] Abbot v. Hard Rubber Co., 11 Abb. (N. Y.) Pr. 204 (1860).

Sec. 339. Trustees to Make Calls on Stockholders.—It shall be lawful for the trustees to call in and demand from the stockholders respectively, all such sums of money by them subscribed, at such times, and in such payments or instalments as the trustees shall deem proper, under the penalty of forfeiting the shares of stock subscribed for, and all previous payments made thereon, if payment shall not be made by the stockholders within sixty days after a personal demand or notice requiring such payment shall have been published for six successive weeks in the newspaper nearest to the place where the business of the company shall be carried on as aforesaid.[1]

Sec. 339a. Same—Enforcing payment.—Directors of a corporation, who issue unauthorized certificates of stock, are not liable to ultimate purchasers of the stock, who made no contract with them, and did not act on their representations.[2] The company may bring an action for subscription.[3] But after the stock has been forfeited for non-payment, the company cannot maintain an action to recover the subscription.[4] The assignee of the original stockholder is liable for payment.[5]

Although a subscription to capital stock is not binding, until the company is formed, yet if, after it is formed, the company recognizes the subscriber as a stockholder, and he ratifies his subscription by payments thereupon, he is liable for

[1] L. 1848, c. 40, § 6; 3 N. Y. R. S., 8th ed. p. 1956. See Mann v. Currie, 2 Barb. (N. Y.) 294 (1848); Dorris v. French, 6 T. & C. (N. Y.) 583 (1875).

[2] Seizer v. Mali, 11 Abb. (N. Y.) Pr. 129 (1860).

[3] Northern R. Co. v. Miller, 10 Barb. (N. Y.) 260 (1851); Troy T. & R. Co. v. McChesney, 21 Wend. (N. Y.) 296 (1839).

[4] Small v. Herkimer Manuf. Co., 2 N. Y. 330 (1849).

[5] Mann v. Currie, 2 Barb. (N. Y.) 294 (1848).

the full amount subscribed.[1] Officers of corporations cannot extend time for payment,[2] and a receiver cannot sue.[3]

Sec. 339b. Same—Forfeiting stock.—The right to forfeit the stock for non-payment of subscriptions does not prevent the trustees, if they prefer so to do, from bringing an action for the subscription.[4] But the trustees cannot forfeit the stock and also sue for the subscription.[5]

Sec. 340. Trustees to Make By-laws.—The trustees of such company shall have power to make such prudential by-laws as they shall deem proper for the management and disposition of the stock and business affairs of such company, not inconsistent with the laws of this state, and prescribing the duties of officers, artificers, and servants that may be employed; for the appointment of all officers, and for carrying on all kinds of business within the objects and purposes of such company.[6]

Sec. 340a. Same—Force and effect of by-law.—Where a by-law fixes the number of directors to make a quorum, this has reference to the ordinary business of the corporation. And the board may delegate its powers to agents, or to a quorum of less than a majority of the board.[7] So they may ratify the unauthorized acts of their agents.[8] A formal resolution is

[1] Buffalo & J. R. Co. v. Gifford, 87 N. Y. 294 (1882), affirming 22 Hun (N. Y.) 359. See also Burr v. Wilcox, 22 N. Y. 551 (1860); Buffalo & P. R. Co. v. Hatch, 20 N. Y. 161 (1859); Strong v. Wheaton, 38 Barb. (N. Y.) 622 (1861); Meyer v. Blair, 1 How. (N. Y.) Pr. N. S., 299 (1884); Dorris v. French, 6 T. & C. (N. Y.) 581 (1875); s. c. 4 Hun (N. Y.) 292.

[2] Weeks v. Silver I. C. M. Co., 8 N. Y. St. Rep. 110 (1887).

[3] Tucker v. Gilman, 45 Hun (N. Y.) 193 (1887).

[4] Northern R. Co. v. Miller, 10 Barb. (N. Y.) 260 (1851); Troy Turnpike & R. Co. v. McChesney, 21 Wend. (N. Y.) 296 (1839).

[5] Small v. Herkimer Manuf. Co., 2 N. Y. 330 (1849).

[6] L. 1848, c. 40, § 7; 3 N. Y. R. S., 8th ed., p. 1956. Farmers & M. Bank v. Empire S. D. Co., 5 Bosw. (N. Y.) 284 (1859).

[7] Hoyt v. Thompson, 19 N. Y. 207 (1859).

[8] Hoyt v. Thompson, 19 N. Y. 207 (1859); Farmers & M. Bank v. Empire Stone Dressing Co., 5 Bosw. (N. Y.) 284 (1859).

not necessary for the appointment of an agent.[1] If an officer fails to enter his claim in the proper books he does not thereby forfeit his claim.[2] A by-law forbidding a member to work at such prices as he chooses to accept, is void.[3] Force of by-laws, and when not conclusive.[4] Acts of corporations, how proved in absence of record absence.[5]

Where by-laws of a corporation declared that five directors should be a quorum for the transaction of "ordinary business," the court held that the general business of the corporation thus indicated embraced the power of pledging or assigning assets to secure debts.[6] A by-law of a corporation enacted under the express authority of an act of legislature, and in conformity with the power conferred, has the same force as if it were enacted by the legislature.[7]

Sec. 341. Stock—Transfer of.—The stock of such company shall be deemed personal estate, and shall be transferable in such manner as shall be prescribed by the by-laws of the company; but no shares shall be transferable until all previous calls thereon shall have been fully paid in, or shall have been declared forfeited for the non-payment of calls thereon; and it shall not be lawful for such

[1] Munson v. Syracuse G. & C. R., 103 N. Y. 58 (1886); National P. Bank v. German A. W. Co., 63 N. Y. Super. Ct. (21 J. & S.) 367 (1886); Negley v. Counting R. Co., 1 N. Y. St. Rep. 298 (1886); McNaughton v. Osgood, 41 Hun (N. Y.) 109 (1886); Kelsey v. Sargent, 40 Hun (N. Y.) 150 (1886); Commercial Bank v. Kortright, 22 Wend. (N. Y.) 348 (1839).

[2] Rider v. Union India Rubber Co., 5 Bosw. (N. Y.) 85 (1859).

[3] People v. Benevolent Soc. of O. M., 3 Hun (N. Y.) 361 (1875).

[4] McDermott v. Board of Police, 5 Abb. (N. Y.) Pr. 422 (1857); Brick Church v. Mayor, etc., of N. Y., 5 Cow. (N. Y.) 538 (1826); Martin v. Niagara F. P. M. Co., 44 Hun (N. Y.) 130 (1887).

[5] Morrill v. C. T. Segar M. Co., 19 N. Y. Week. Dig. 233 (1884).

[6] Hoyt v. Thompson, 19 N. Y. 207 (1859).

[7] McDermott v. Board of Police, 5 Abb. (N. Y.) Pr. 422 (1857); Brick Church v. Mayor, etc., of N. Y., 5 Cow. (N. Y.) 538 (1826).

company to use any of their funds in the purchase of any stock in any other corporation.[1]

Sec. 341a. Same—Issue—Transfer, etc.—Stock certificates executed, but not detached, are a sufficient issue.[2] The stock certificates may be transferred in blank, and the holder may fill in his name.[3]

Transfer of the stock will be good, although not entered on the transfer books.[4] A transfer or possession of the certificate is not necessary to pass title.[5]

A corporation having cancelled the original certificates, which had been transferred on a forged power of attorney, may be compelled to issue new certificates.[6]

A party who subscribes for stock is liable for debts, although he has paid no part of his subscription.[7] But not if the subscription was previously full.[8]

A person is liable to pay if, after a call is made, he transfers his subscription, or has assigned his stock.[9]

A call for payment is sufficient notice that a sufficient amount of stock has been subscribed.[10]

A resolution authorizing a forfeiture of stock is void as against creditors.[11]

[1] L. 1848, c. 40, § 8; 3 N. Y. R. S., 8th ed., p. 1956. The last clause of this section, forbidding the purchase of stock in another corporation, has been modified by. L. 1866, ch. 838, § 3; 3 N. Y. R. S., 8th ed., p. 1967. See *post*, § 341.

[2] Holstead v. Dodge, 51 N. Y. Super. Ct. (19 J. & S.) 169 (1884).

[3] Leavit v. Fisher, 4 Duer (N. Y.) 1 (1854); Commercial Bank of Buffalo v. Kortright, 22 Wend. (N. Y.) 348 (1839).

[4] Dunn v. Star F. Ins. Co., 19 N. Y. Week. Dig. 531 (1884). See Veiller v. Brown, 18 Hun (N. Y.) 571 (1879); Stebbing v. Phœnix Fire Ins. Co., 3 Paige Ch. (N. Y.) 350 (1832).

[5] DeCaumont v. Bogert, 36 Hun (N. Y.) 382 (1885).

[6] Pollock v. National Bank, 7 N. Y. 274 (1852).

[7] Spear v. Crawford, 14 Wend. (N. Y.) 20 (1835); s. c. 28 Am. Dec. 513.

[8] Lathrop v. Kneeland, 46 Barb. (N. Y.) 432 (1866).

[9] Schenectady & S. P. R. Co. v. Thatcher, 11 N. Y. 102 (1854).

[10] Harlem C. Co. v. Seixas, 2 Hall, (N. Y.) 504 (1829).

[11] Slee v. Bloom, 19 Johns, (N.Y.) 456 (1821); s. c. 10 Am. Dec. 273.

Creditors may enforce contribution from the stockholders. if the officers neglect to do so.[1]

A purchaser of stock takes it subject to all the equities there may be against the stock.[2]

Stock cannot be transferred after dissolution.[3]

When the person signing the certificate of incorporation places opposite his name the number of shares taken by him, it is a sufficient signature.[4]

A stockholder, who is indebted to the corporation, may sell and transfer his stock, unless there is a by-law prohibiting such transfer, until his indebtedness is paid.[5] This section gives the corporation power only to direct how the transfer shall be made.[6]

Stockholders may compel the transfer of stock.[7]

The company is liable for wrongfully allowing stock to be transferred on its books,[8] or for wrongfully excluding a stockholder from his rights.[9]

Dividends belong to the person who is the owner of the stock when they are declared; but in the absence of notice, the company will be protected in paying them to the person in whose name the stock stands on its books.[10]

A share of stock represents the interests of the shareholder in the capital and net earnings of the corporation.[11]

In favor of the company, or a receiver of its property, the

[1] Briggs v. Penniman, 8 Cow. (N. Y.) 387 (1826); s. c. 18 Am. Dec. 454.

[2] Mann v. Currie, 2 Barb. (N. Y.) 294 (1848); James v. Woodruff, 2 Den. (N. Y.) 574 (1845). *Compare* Christensen v. Eno, 106 N. Y. 97 (1887); Central Trust Co. v. New York C. & N. R. Co., 18 Abb. (N. Y.) N. C. 381 (1887).

[3] James v. Woodruff, 2 Den. (N. Y.) 574 (1845).

[4] Phœnix W. Co. v. Badger, 6 Hun (N. Y.) 293 (1875).

[5] Driscoll v. W. B. & C. M. Co., 59 (N. Y.) 96. (1874)

[6] Driscoll v. West Bradley & C. M. Co., 59 N. Y. 96 (1874).

[7] Cushman v. Thayer Manuf. J. Co., 53 How. (N. Y.) Pr. 60 (1877); s. c. 76 N. Y. 365; 32 Am. Rep. 315.

[8] Brisbane v. Delaware L. & W. R. Co., 25 Hun (N. Y.) 438 (1881); s. c. 13 N. Y. Week. Dig. 184.

[9] Peckham v. Van Wagenen, 83 N. Y. 40 (1880), affirming 45 N. Y. Super. Ct. (13 J. & S.) 328.

[10] Peckham v. Van Wagenen, 83 N. Y. 40 (1880).

[11] Jermain v. Lake Shore & M. S. R. Co., 91 N. Y. 483 (1883).

stock books are not conclusive, and a person who has in good faith transferred his stock, is not liable for the unpaid subscription, and his assignee is liable therefor, where the company had notice of the transfer and paid dividends to the assignee.[1]

Sec. 342. Same—Power to Hold Stock in other Company.—It shall be lawful for any company heretofore or hereafter organized under the provisions of this act, or the act hereby amended,[2] to hold stock in the capital of any corporation engaged in the business of mining, manufacturing or transporting such materials as are required in the prosecution of the business of such company, so long as they shall furnish or transport such materials for the use of such company and for two years thereafter, and no longer; and also to hold stock in the capital of any corporation which shall use or manufacture materials, mined or produced by such company; and the trustees of such company shall have the same power with respect to the purchase of mines, manufactories and other property necessary to the business of manufacturing, mining as other companies. But the capital stock of such company shall not be increased without the consent of the owners of two-thirds of the stock to be obtained as provided by section twenty-one and twenty-two of the act hereby amended.[3]

Sec. 343. Certificate of Incorporation—Copy of to be Evidence.—The copy of any certificate of incorporation, filed in pursuance of this act, certified by the

[1] Cutting v. Damerel, 88 N. Y. 410 (1882); reversing 23 Hun (N. Y.) 339. See also Robinson v. National Bank of New Berne, 95 N. Y. 637 (1884); Billings v. Robinson, 94 N. Y. 415 (1884).

[2] L. 1848, c. 40.

[3] L. 1866, c. 838, as amended L. 1876, c. 358.

county clerk or his deputy, to be a true copy, and of the whole of such certificate, shall be received in all courts and places, as presumptive legal evidence of the facts therein stated.[1]

Sec. 343a. Same—Evidence of legal residence—Conclusiveness.—It is thought that under the provisions of the act of 1848,[2] and the acts amendatory thereof, the certificate is conclusive evidence as to the legal residence of the corporation.[3] Thus it was held in the case of Western Transportation Co. v. Scheu,[4] that the act for the incorporation of companies to navigate the lakes and rivers[5] requiring the designation in their organic certificate of the city or town and county in which the principal office for managing the affairs of such company is to be situated, the certificate is conclusive as to the location therein designated, as that of the principal office of the company.[6] The court say: "The only question then is in regard to the effect as evidence of the statement in the certificate. There are some considerations which seem to me decisive of this question. Unless the legislature intended that the certificate should be conclusive as to the location of the principal office, it is difficult to see any adequate motive for requiring the statement to be made. It is in no manner essential to the existence of a corporation that the place of its principal office should be fixed or even that it should have any such office. We can, however, see obvious reasons why it is expedient that the corporations should be deemed to have a location for certain purposes, among which is that of taxation, and that this should be definite and certain and not subject to fluctuation or doubt. . . . . To avoid dispute upon the subject, was, I apprehend, one motive for requiring the location to be fixed by the certificate. It is not important that a corporation should be taxed where it does the

[1] L. 1848, c. 40, § 9; 3 N. Y. R. S., 8th ed., p. 1957.

[2] L. 1848, c. 40, §§ 1, 9, 11.

[3] See Cheesborough Mfg. Co. v. Coleman. 44 Hun (N. Y.) 546 (1887.)

[4] 19 N. Y. 408 (1859).

[5] L. 1854, c. 232; 3 N. Y. R. S., 8th ed., p. 1854.

[6] See Cheesborough Mfg. Co. v. Coleman, 44 Hun (N. Y.) 547 (1887).

greatest amount of its business, but it is important that the place where it is liable to be taxed should be known." [1]

Sec. 343b. Same—Extrinsic evidence.—Section three hundred and forty-three does not exclude other modes of proving the fact of incorporation; and where no certificate can be found in the county clerk's office, it is competent to prove by oral testimony that a certificate was in fact filed, and to produce in evidence a sworn copy thereof. A duly authenticated copy of the duplicate filed in the office of the secretary of state, with oral proof that a like certificate was filed with the county clerk, is sufficient.[2]

Sec. 344.—Liability of Stockholders.—All the stockholders of every company incorporated under this act, shall be severally individually liable to the creditors of the company in which they are stockholders, to an amount equal to the amount of stock held by them respectively for all debts and contracts made by such company, until the whole amount of capital stock fixed and limited by such company shall have been paid in, and a certificate thereof shall have been made and recorded as prescribed in the following section; and the capital stock, so fixed and limited, shall all be paid in, one half thereof within one year, and the other half thereof within two years from the incorporation of said company, or such corporation shall be dissolved.[3]

[1] See Oswego Starch Factory v. Dolloway, 21 N. Y. 449 (1860).

[2] N. Y. Car Oil Co. v. Richmond, 6 Bosw. (N. Y.) 213 (1860).

[3] L. 1848, c. 40, § 10; 3 N. Y. R. S., 8th ed., p. 1957. See Veeder v. Mudgett, 95 N. Y. 295 (1884); Farnsworth v. Wood, 91 N. Y. 308 (1883); Wheeler v. Millar, 90 N. Y. 353 (1882); Lake Superior Iron Co. v. Drexel, 90 N. Y. 87 (1882); Handy v. Draper, 89 N. Y. 334 (1882); Cuykendall v. Corning, 88 N. Y. 129 (1882); Agate v. Sands, 73 N. Y. 620 (1878); Mathez v. Neidig, 72 N. Y. 100 (1878); Schenck v. Andrews, 57 N. Y. 133 (1874); People *ex rel.* Bolton v. Albertson, 55 N. Y. 65 (1873); Shellington v. Howland, 53 N. Y. 371 (1873); Johnson v. Underhill, 52 N. Y. 203 (1873); Weeks v. Love, 50 N. Y. 568 (1872); Chambers v. Lewis, 28 N. Y. 454, 458 (1863); Burr v. Wilcox, 22 N. Y.

Sec. 344a. Same—Grounds of liability, etc.—Shareholders are liable to the amount of their stock.[1] The stockholder is liable for interest upon an amount equal to his stock, from the commencement of a suit against him.[2] A stockholder cannot set up as a defence that the corporation was not properly organized.[3] The stockholder is not a surety or guarantor, but a principal debtor.[4] A stockholder is not liable for debts contracted before he became a stockholder.[5]

The complaint should show that the stockholder holds stock equal to the debt.[6] And the holder of stock, when sued under this section, may set up and rely upon the defence, that the stock held and owned by him was issued in payment for property, purchased by the trustees and necessary for the business, and that it was full paid stock, not liable to any further calls or payments.[7] When the ground of liability is that the stock has not beeen fully paid in, that fact must be proved by the plaintiff.[8] Persons signing the articles of asso-

551, 553 (1860); Deming v. Puleston, 33 N. Y. Super. Ct. (1 J. & S.) 231 (1871); s. c. 35 N. Y. Super. Ct. (3 J. & S.) 309; Tolles v. Wood, (note end of case) 16 Abb. (N. Y.) N. C. 42 (1885); Tracy v. Yates, 18 Barb. (N. Y.) 152 (1854); Woodruff & Beach Iron Wks. v. Chittenden, 4 Bosw. (N. Y.) 406 (1859); Tucker v. Gilman, 45 Hun (N. Y.) 193 (1887); Knowles v. Duffy, 40 Hun (N. Y.) 485 (1886); King v. Duncan, 38 Hun (N. Y.) 461 (1886); Thurston v. Duffy, 38 Hun (N. Y.) 327 (1885); Patterson v. Robinson, 36 Hun (N. Y.) 622, 627 (1885); McMaster v. Davidson, 29 Hun (N. Y.) 542 (1883); Sutherland v. Olcott, 29 Hun (N. Y.) 161 (1883); Handy v. Draper, 23 Hun (N. Y.) 256 (1880); Brown v. Smith, 13 Hun (N. Y.) 408 (1878); Phillips v. Therasson, 11 Hun (N. Y.) 141 (1877); Parrott v. Colby, 6 Hun (N. Y.) 55 (1875). For a full discussion of the liability of stockholders of corporations, see *ante*, §§ 48*s*, 48*t*, 69, 69*a*, 69*b*.

[1] Boynton v. Andrews, 63 N. Y. 93 (1875); Garrison v. Howe, 17 N. Y. 458 (1858); Woodruff & B. Iron Works v. Chittenden, 4 Bosw. (N. Y.) 406 (1859).

[2] Burr v. Wilcox, 22 N. Y. 551 (1860).

[3] Eaton v. Aspinwall, 19 N. Y. 119 (1859). *Compare* Dorris v. Sweeney, 60 N. Y. 463 (1875); Dorris v. French, 4 Hun (N. Y.) 292 (1875); s. c. 6 T. & C. (N. Y.) 581.

[4] Moss v. McCulloch, 7 Barb. (N. Y.) 279 (1849).

[5] Tracy v. Yates, 18 Barb. (N. Y.) 152 (1854).

[6] Chambers v. Lewis, 28 N. Y. 454 (1863).

[7] Lewis v. Rider, 13 Abb. (N. Y.) Pr. 1 (1861).

[8] Bruce v. Driggs, 25 How. (N. Y.) Pr. 75 (1863).

ciation are stockholders.[1] The action must be brought against a single stockholder or against all the stockholders.[2] Stockholders are not liable on a note to pay an old debt.[3]

A judgment against the corporation is not sufficient evidence of its indebtedness to charge the stockholders.[4] And it is no defence that he was induced to become a stockholder by the president's fraudulent representation that the stock was fully paid.[5]

A stockholder sued under section three hundred and forty-three may interpose an equitable offset for a debt of the company due to him.[6] But not where the demand came to his hands by assignment after the company had passed into a receiver's hands.[7] It makes no difference that the particular stockholder sued, has paid his stock in full; if other stockholders are in default, he is liable.[8] If the capital was actually paid in and the certificate filed, the county clerk's failure to record it does not prejudice the stockholders or trustees.[9]

A stockholder is not liable for debts of the corporation which were contracted before he become a stockholder.[10] A person gave her note for a certain number of shares of capital stock, said stock to pass to her on payment of her note in full, it was held that she did not become a stockholder, so as to be liable as such, until the note was paid.[11]

[1] Strong v. Wheaton, 38 Barb. (N. Y.) 616 (1861).

[2] Strong v. Wheaton, 38 Barb. (N. Y.) 616 (1861).

[3] Jagger Iron Co. v. Walker, 76 N. Y. 522 (1879); Parrot v. Colby, 6 Hun (N. Y.) 56 (1875).

[4] Miller v. White, 50 N. Y. 137 (1872), reversing 57 Barb. (N. Y.) 504; and overruling Conklin v. Furman, 57 Barb. (N. Y.) 484 (1865), and Hall v. Siegel, 7 Lans. (N. Y.) 206 (1872); Berridge v. Abernethy, 24 N. Y. Week. Dig. 513 (1886).

[5] Briggs v. Cornwell, 9 Daly (N. Y.) 436 (1881).

[6] Wheeler v. Millar, 90 N. Y. 353 (1882), affirming 24 Hun (N. Y.) 541; Agate v. Sands, 73 N. Y. 620 (1878); Mathez v. Neidig, 72 N. Y. 100 (1878); Christensen v. Colby, 43 Hun (N. Y.) 362 (1887).

[7] Briggs v. Cornwell, 9 Daly)N. Y.) 436 (1881).

[8] Wheeler v. Millar, 90 N. Y. 353 (1882).

[9] Boynton v. Hatch, 47 N. Y. 225 (1872); Sutherland v. Olcott, 29 Hun (N. Y.) 161 (1883).

[10] Tracy v. Yates, 18 Barb. (N.Y.) 152 (1854).

[11] Tracy v. Yates, 18 Barb. (N.Y.) 152 (1854).

Where J. subscribed for stock on behalf of W. and, at his request, the stock was apportioned to J. for W., and the latter paid the installments thereon, it was held that W. was a stockholder, and was personally liable from the date of the apportionment, and not merely from the date when the certificate was issued. As soon as the corporation has any property or valuable franchise, the members become stockholders in proportion to their respective interest.[1]

Where a party was defrauded into a consent to take part in organizing a new company, but before the new organization was completed he discovered the deception, and actually abandoned the enterprise before the alleged default in filing the certificate, so that, in truth, there was no such corporation, then he is not liable.[2] A stockholder is liable only to the amount of his stock.[3]

A transfer of stock may be attacked, if done *male fides*, to relieve the assignor from liability.[4]

The two years above limited count from the day the incorporation is legally completed.[5]

[1] Burr v. Wilcox, 22 N. Y. 551 (1860).

[2] Squires v. Brown, 22 How. (N. Y.) Pr. 35 (1860).

[3] Garrison v. Howe, 17 N. Y. 458 (1858); Woodruff & Beach Iron Wks. v. Chittenden, 4 Bosw. (N. Y.) 406 (1859).

[4] Cushman v. Thayer Manuf. I. Co., 7 Daly (N. Y.) 330 (1878); Veiller v. Brown, 18 Hun (N. Y.) 571 (1879). For additional rulings respecting a stockholder's liability under this section, see Veeder v. Mudgett, 95 N. Y. 295 (1884); Farnsworth v. Wood, 91 N. Y. 308 (1883); criticised in 29 Alb. L. J. 366; Handy v. Draper, 89 N. Y. 334 (1882), reversing 23 Hun (N. Y.) 256; Knox v. Baldwin, 80 N. Y. 610 (1880); Bruce v. Platt, 80 N. Y. 379 (1880); Losee v. Bullard, 79 N. Y. 404 (1880); Pfohl v. Simpson, 74 N. Y. 142 (1878); Wiles v. Suydam, 64 N. Y. 173 (1876); Sanborn v. Lefferts, 58 N. Y. 179 (1874); Shellington v. Howland, 53 N. Y. 371 (1873); Johnson v. Underhill, 52 N. Y. 203 (1873); Weeks v. Love, 50 N. Y. 569 (1872); Hollingshead v. Woodward, 27 N. Y. Week. Dig. 306 (1887); s. c. 35 Hun (N. Y.) 410; Lindsley v. Simonds, 2 Abb. (N. Y.) Pr. N. S. 69 (1866); Hardman v. Sage, 47 Hun (N. Y.) 230 (1888); Knowles v. Duffy, 40 Hun (N. Y.) 485 (1886); King v. Duncan, 38 Hun (N. Y.) 461 (1886); Thurston v. Duffy, 38 Hun (N. Y.) 327 (1885); Morey v. Ford, 32 Hun (N. Y.) 446 (1884); McMaster v. Davidson, 29 Hun (N. Y.) 542 (1883); National Bank v. Fenton, 23 Hun (N. Y.) 309 (1880); Clapp v. Wright, 21 Hun (N. Y.) 240 (1880); Birmingham Nat. Bank v. Mosser, 14 Hun (N. Y.) 605 (1878); Brown v. Smith, 13 Hun (N. Y.) 408 (1878); Parrott v. Colby, 6 Hun (N. Y.) 55 (1875).

[5] Johnson v. Bush, 3 Barb. Ch. (N. Y.) 207 (1848).

Sec. 345. Same.—Exception as to Salt Companies.— No incorporated company, organized or hereafter to be organized for the manufacture of salt, under this act, shall be deemed dissolved or shall be dissolved on account of the capital stock of such company not being paid in, half within one year, and the other half within two years from the incorporation of such company, provided that such stock shall be paid in within four years from the organization of such company.[1]

Sec. 346. Same.—Certificate of Payment—Filing of.— The president and a majority of the trustees, within thirty days after the payment of the last instalment of the capital stock, so fixed and limited by the company, shall make a certificate stating the amount 2 the capital so fixed and paid in ; which certificate[2] shall be signed and sworn to by the president and a majority of the trustees ; and they shall, within the said thirty days, record the same in the office of the county clerk of the county wherein the business of the said company is carried on.[3]

Sec. 346a. Same—Certificate to be Sworn to.—The certificate must be sworn to ; merely acknowledging it will not suffice ; but the certificate is not conclusive.[4]

[1] L. 1857, c. 29, § 1; 3 N. Y. R. S., 8th ed., p. 1962.

[2] L. 1848, c. 40, § 11; 3 N. Y. R. S., 8th ed., p. 1957. See Veeder v. Mudgett, 95 N. C. 295 (1884); Schenck v. Andrews, 57 N. Y. 133 (1874); Lindsley v. Simonds, 2 Abb. (N. Y.) Pr. N. S., 69, 73 (1866); Bolz v. Ridder, 12 Daly (N. Y.) 329 (1884); Vincent v. Sands, 42 How. (N. Y.) Pr. 231, 235 (1871); Chesebrough Manuf. Co. v. Coleman, 44 Hun (N. Y.) 545 (1887); Sutherland v. Olcott, 29 Hun (N. Y.) 161 (1883); Brown v. Smith, 13 Hun (N. Y.) 408 (1878).

[3] Brown v. Smith, 13 Hun (N. Y.) 407 (1878). See Sutherland v. Olcott, 29 Hun (N. Y.) 161 (1883).

[4] Veeder v. Mudget, 95 N. Y. 295 (1884); Bolz v. Ridder, 19 N. Y. Week. Dig. 463 (1884). Pleadings Murad v. Thomas, 66 How. (N. Y.) Pr. 100 (1883); Christensen v. Eno, 21 N. Y. Week. Dig. 202 (1885).

CHAPTER XX.

MANUFACTURING CORPORATIONS—FILING ANNUAL REPORT.

FAILURE TO MAKE REPORT—LIABILITY OF TRUSTEES—DIVIDENDS BY INSOLVENT CORPORATIONS—STOCKS TO BE PAID IN CASH—ISSUING FOR PROPERTY—FALSE CERTIFICATE OR REPORT—LIABILITY OF EXECUTORS—ELECTIONS—WHO MAY VOTE AT—LIABILITY TO SERVANTS, ETC.—INCREASE OR REDUCTION OF CAPITAL STOCK—INCREASE OF SHARES—MANNER OF CALLING MEETING OF STOCKHOLDERS—ORGANIZATION OF MEETING—INDEBTEDNESS—LIMITATION OF ACTION AGAINST TRUSTEES—STOCK BOOKS—ENTRIES.

SEC. 347. Annual report—Failure to make—Individual liability of trustees.
SEC. 347a. Same—Filing report—Liability for failure to file.
SEC. 347b. Same—Extent of trustees' liability, etc.
SEC. 347c. Same—Suit by and against stockholder.
SEC. 347d. Same—Suit for penalty—Within what time to be brought.
SEC. 348. Dividends—Payment by insolvent corporation—Liability of trustees.
SEC. 349. Stock to be paid in cash.
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SEC. 351a. Same—False report—What is—Liability for.
SEC. 352. Holders of stock—Liability of executors, etc.
SEC. 353. Elections—Who may vote at—Executors, etc.
SEC. 354. Laborers, servants, etc.—Liability of stockholders.
SEC. 354a. Same—Who are laborers.
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SEC. 360. Meeting of stockholders—Manner of calling.
SEC. 361. Same—Organization and conduct of.
SEC. 362. Indebtedness of companies—Not to exceed capital stock.
SEC. 362a. Same—Liability of trustees.
SEC. 363. Same—Action against trustees—Limitation.
SEC. 364. Stock books to be kept—Entries.
SEC. 364a. Same—Care and custody—Inspection.

Sec. 347. Annual Report—Failure to Make—Individual Liability of Trustees.—Every such company shall within twenty days from the first day of January, if a year from the time of the filing of the certificate of incorporation shall then have expired, and, if so long a time shall not have expired, then within twenty days from the first day of January in each year after the expiration of a year from the time of filing such certificate, make a report which shall be published in some newspaper published in the town, city or village, or if there be no newspaper published in said town, city or village, then in some newspaper published nearest the place where the business of the company is carried on, which shall state the amount of capital, and of the proportion actually paid in, and the amount of its existing debts, which report shall be signed by the president and a majority of the trustees, and shall be verified by the oath of the president or secretary of said company, and filed in the office of the clerk of the county where the business of the company shall be carried on, and if any of said companies shall fail so to do, all the trustees of the company shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made; but whenever under this section a judgment shall be recovered against a trustee severally, all the trustees of the

company shall contribute a ratable share of the amount paid by such trustee on such judgment, and such trustee shall have a right of action against his co-trustees, jointly or severally, to recover from them their proportion of the amount so paid on such judgment; provided that nothing in this act contained shall effect[1] any action now pending.[2]

[1] So in original.

[2] L. 1848, c. 40, § 12, as amended by L. 1875, c. 510; 3 N. Y. R. S., p. 1957; Whitaker v. Masterton, 106 N. Y. 277 (1887); Blake v. Griswold, 104 N. Y. 613 (1887); Gadsden v. Woodward, 103 N. Y. 242 (1886); Cornell v. Roach, 101 N. Y. 373 (1886); Butler v. Smalley, 101 N. Y. 71 (1886); Kirkland v. Killer, 99 N. Y. 390 (1885); Rector of Trinity Church v. Vanderbilt, 98 N. Y. 170 (1885); Stokes v. Stickney, 96 N. Y. 323 (1884); Roach v. Duckworth, 95 N. Y. 391, 395 (1884); Veeder v. Judson, 91 N. Y. 374 (1883); Bonnell v. Griswold, 80 N. Y. 128 (1880); Huguenot Nat. Bank of New Peltz v. Studwell, 74 N. Y. 621 (1878); Cameron v. Seaman, 69 N. Y. 396 (1877); People of State of N. Y. v. Tweed, 63 N. Y. 202 (1875); Whitney Arms Co. v. Barlow, 63 N. Y. 62 (1875); s. c. 20 Am. Rep. 504; Adams v. Mills, 60 N. Y. 533 (1875); Miller v. White, 50 N. Y. 137, 139 (1872); Bolen v. Crosby, 49 N. Y. 183 (1872); Merchants' Bank of N. H. v. Bliss, 35 N. Y. 412 (1866); Chambers v. Lewis, 28 N. Y. 454, 459 (1863); Shaler & Hall Quarry Co. v. Bliss, 27 N. Y. 297 (1863); Oswego Starch Factory v. Dolloway, 21 N. Y. 449 (1860); Boughton v. Otis, 21 N. Y. 262 (1860); s. c. 29 Barb. (N. Y.) 196; Halstead v. Dodge, 51 N. Y. Super. Ct. (19 J. & S.) 169 (1884); Vernon v. Palmer, 48 N. Y. Super. Ct. (16 J. &. S.) 231 (1882); Jones v. Barlow, 36 N. Y. Super. Ct. (6 J. & S.) 142 (1874); Sanborn v. Lefferts, 16 Abb. (N. Y.) Pr. N. S. 42 (1874); Zoller v. O'Keeffe, 15 Abb. (N. Y.) N. C. 483 (1885); Vincent v. Sands, 11 Abb. (N. Y.) Pr. N. S. 370 (1871); Briggs v. Easterly, 62 Barb. (N. Y.) 51 (1872); Obitt v. Hughes, 41 Barb. (N. Y.) 542 (1862); Sears v. Waters, 44 Hun (N. Y.) 101 (1887); Cincinnati Cooperage Co. v. O'Keeffe, 44 Hun (N. Y.) 64 (1887); Allen v. Clarke, 43 Hun (N. Y.) 377 (1887); Morey v. Ford, 32 Hun (N. Y.) 446 (1884); Victory Webb Printing Co. v. Beecher, 26 Hun (N. Y.) 48 (1881); First Nat. Bank of South Norwalk v. Fenton, 23 Hun (N. Y.) 309 (1880); Glens Falls Paper Co. v. White, 18 Hun (N. Y.) 214 (1879); Esmond v. Bullard, 16 Hun (N. Y.) 65 (1878); Pier v. George, 14 Hun (N. Y.) 568 (1878); s. c. 17 Hun (N. Y.) 207. Norris v. DeWolf, 12 Hun (N. Y.) 666 (1878); Bronson v. Dimock, 4 Hun (N. Y.) 614 (1875); Miller v. White, 4 Hun (N. Y.) 63 (1875); Chandler v. Hoag, 2 Hun (N. Y.) 613 (1874); Bonnell v. Wheeler, 1 Hun (N. Y.) 332, 336 (1874); Craw v. Easterly, 4 Lans. (N. Y.) 513 (1871); Nimmons v. Tappan, 2 Sween. (N. Y.) 652–659 (1870); Bonnell v. Wheeler, 3 T. & C. (N. Y.) 560 (1874); Knauer v. Globe M. S. Ins. Co., 16 N. Y. Week. Dig. 426 (1882).

Sec. 347a. Same—Filing report—Liability for failure to file.—The annual report should be made until the corporation is dissolved.[1] Simply filing the report is not sufficient; it must also be published.[2] The report must be made and subscribed by the trustees; the affixing of their names by the secretary is not sufficient.[3] A verification by the president to the best of his knowledge and belief is sufficient.[4] Reports how interpreted.[5]

It is no answer to say that at the time of incurring the liability the corporation was solvent and continued solvent for a long time.[5] But where a trustee resigns, or his term of office has expired, he is not liable for the debts of the company incurred after such termination of his office.[7]

A recovery of a judgment against the company is said not to be evidence of the debt,[8] but it has been held a judgment against the corporation for costs, has been held to be a "debt" for which the trustees are personally liable under this section;[9] and even the declaration of the president is competent evidence to prove indebtedness.[10] The record of a judgment against the company, and an execution thereon returned unsatisfied, are *prima facie* evidence that the debt recovered was a valid debt.[11]

Sec. 347b. Same.—Extent of trustees' liability, etc.—The language of this section will not be extended to cover cases not

[1] Sanborn v. Lefferts, 58 N. Y. 179 (1874).

[2] Gildersleeve v. Dixon, 6 Daly (N. Y.) 76 (1875).

[3] Bolen v. Crosby, 49 N. Y. 183 (1872).

[4] Glens Falls Paper Co. v. White, 18 Hun (N. Y.) 214 (1879).

[5] Whitney A. Co. v. Barlow, 63 N. Y. 62 (1875).

[6] Merchant's Bank of N. H. v. Bliss, 1 Robt. (N. Y.) 391 (1863).

[7] Shaler & H. Q. Co. v. Bliss, 34 Barb. (N. Y.) 309 (1861); s. c. 27 N. Y. 297; Squires v. Brown, 22 How. (N. Y.) Pr. 35 (1860).

[8] Miller v. White, 50 N. Y. 137 (1872); Craft v. Coykendall, 34 Hun (N. Y.) 285 (1884); Berridge v. Abernethy, 24 N. Y. Week. Dig. 513 (1886); Doctor v. Guggenheim, N. Y. Dai. Reg., Feb. 20, 1884.

[9] Andrews v. Murray, 9 Abb. (N. Y.) Pr. 8 (1859).

[10] Hoag v. Lamont, 60 N. Y. 96 (1875).

[11] Belmont v. Coleman, 1 Bosw. (N. Y.) 189 (1857). *Compare* Hastings v. Drew, 76 N. Y. 9 (1879); Esmond v. Bullard, 16 Hun (N. Y.) 65 (1878).

strictly within its meaning,[1] because it is a penal statute.[2] The penalty is not incurred by a failure to state the proportion paid in in cash and that paid in in property.[3]

A trustee is liable only for such debts as are contracted while he is in office;[4] those trustees only who are guilty of a neglect of duty are liable.[5]

The trustee's liability is personal, and does not survive;[6] and the trustee is not liable if judgment has been taken in favor of the corporation.[7]

To charge the trustee with individual liability, the debt must have been contracted during a default, or have existed at the time of a subsequent default.[8] Liability of trustees is joint and several and *ex delicto*.[9] Compliance as to time of filing.[10] Practice and pleading.[11] The trustees may be liable for costs.[12]

The provisions of the statute,[13] that all the trustees of the company shall be jointly and severally liable for all the debts of the company then existing and for all that shall be contracted before such report shall be made, and all those who are trustees when the company shall so fail, and whose duty

[1] Whitaker v. Masterton, 106 N. Y. 277 (1887).

[2] Gadsden v. Woodward, 103 N. Y. 242 (1886); Stokes v. Stickney, 96 N. Y. 323 (1884).

[3] Whitaker v. Masterton, 106 N. Y. 277 (1887).

[4] Jones v. Barlow, 62 N. Y. 202 (1875); Rorke v. Thomas, 56 N. Y. 559 (1874); Boughton v. Otis, 21 N. Y. 261 (1860); Oviatt v. Hughes, 41 Barb. (N. Y.) 542, (1862); McHarg v. Eastman, 4 Robt. (N. Y.) 635 (1865).

[5] Boughton v. Otis, 29 Barb. (N. Y.) 196 (1859); Wiles v. Suydam, 10 Hun (N. Y.) 578 (1877).

[6] Stokes v. Stickney, 96 N. Y. 323 (1884); Reynolds v. Mason, 54 How. (N. Y.) Pr. 213 (1877).

[7] Tyng v. Clarke, 9 Hun (N. Y.) 269 (1876).

[8] Boughton v. Otis, 21 N. Y. 261 (1860); Garrison v. Howe, 17 N. Y. 458 (1858); Miller v. White, 57 Barb. (N. Y.) 504 (1870); Bonnell v. Wheeler, 1 Hun (N. Y.) 332 (1874; Hall v. Siegel, 7 Lans. (N. Y.) 206 (1872); Rector of Trinity Church v. Vanderbilt, 20 N. Y. Week. Dig. 488 (1885).

[9] Geisenheimer v. Dodge, 1 How. (N. Y.) Pr. N. S. 264 (1884).

[10] Zoller v. O'Keeffe, 15 Abb. (N. Y.) N. C. 483 (1885).

[11] Gadsden v. Woodward, 38 Hun (N. Y.) 548 (1886).

[12] Andrews v. Murray, 9 Abb. (N. Y.) Pr. 8 (1859).

[13] L. 1848, c. 4, § 12, as amended by L. 1875, c. 510; 3 N. Y. R. S., 8th ed., p. 1957. See *ante*, § 346.

as managers it is to see that the report is made. A trustee who has resigned before the time when the report should have been made is not liable to the penalty for failure.[1] So a trustee who comes into office after a default has been made in publishing a report, is personally liable for such debts only as are contracted while he is in office and before a report is made and published.[2]

Three circumstances must concur in point of time, to render a trustee liable, viz.: The existence of the debt; the existence of the default in making the report; and the trusteeship. Where these concur the trustee is liable for all debts, if he was such trustee when the default occurred. If he was not a trustee at the time of the default, but became such afterwards, then his liability is limited to the debts created while he remains trustee, and while the default continues.[3]

It must be shown that the trustee accepted his office; proof of election merely is not enough.[4] Acceptance under illegal election is sufficient.[5] And where the default occurred after the expiration of his term of office, and he held over and acted as trustee till the default, he is liable.[6]

After the appointment of a receiver, it is no longer the duty of the trustees to make an annual report, although he was appointed within the twenty days after January first.[7] And it excuses the trustees from making a report that the

[1] Shaler & Hall Quarry Co. v. Bliss, 34 Barb. (N. Y.) 309 (1861); s. c. 12 Abb. (N. Y.) Pr. 470, affirming 10 Abb. (N. Y.) Pr. 211; affirmed by Court of Appeals 27 N. Y. 297.

[2] Boughton v. Otis, 21 N. Y. 261 (1860); affirming s. c. 29 Barb. (N. Y.) 196; Shaler & Hall Quarry Co. v. Brewster, 10 Abb. (N. Y.) Pr. 464 (1860).

[3] Bruce v. Platt, 80 N. Y. 376 (1880); Arthur v. Griswold, 55 N. Y. 400 (1874); Reed v. Keese, 60 N. Y. 616 (1875); Chambers v. Lewis, 28 N. Y. 454 (1863); Shaler & H. Q. Co. v. Bliss, 27 N. Y. 297 (1863); Chandler v. Hoag, 2 Hun (N. Y.) 613 (1874). See also Cornell v. Roach, 101 N. Y. 373 (1886); Kirkland v. Kille, 99 N. Y. 390 (1885).

[4] Cameron v. Seaman, 69 N. Y. 396 (1877); Osborne & C. Co. v. Croome, 14 Hun (N. Y.) 165 (1878); affirmed 77 N. Y. 629.

[5] Halstead v. Dodge, 51 N. Y. Super. C. (19 J. & S.) 169 (1884).

[6] Philadelphia & R. C. & I. Co. v. Hotchkiss, 82 N. Y. 476 (1880).

[7] Huguenot Nat. Bank v. Studwell, 74 N. Y. 621 (1878). See Bruce v. Platt, 80 N. Y. 379 (1880); Walmsley v. Palmer, 5 N. Y. St. Rep. 307 (1886).

company had not begun operations during the preceding year.[1]

The action must be brought within three years after the default.[2] But it need not be brought within three years after the debt accrued.[3] The action cannot be maintained against a trustee by the assignee of a demand, which at the time of the default belonged to the president of the company.[4]

Sec. 347c. Same—Suit by and against Stockholder.—A stockholder who is sued to enforce his individual liability, cannot defend himself on the ground of a defect in the proceedings to organize the company.[5] A stockholder may defeat an action brought to enforce his individual liability for his debts incurred before the capital stock was paid up, by showing that he has already paid, on account of the debts of the corporation, a sum equal to the amount of his stock.[6] A stockholder sued to enforce his individual liability in a case where an account and the enforcing of all such liabilities would relieve him from the whole or a part of the debt claimed, may himself institute a suit for such account, and for distribution.[7]

Sec. 347d. Same—Suit for penalty—Within what time to be brought.—A suit for penalty brought against the trustees of a manufacturing company, for neglect to file and publish the annual report was for the benefit of the party aggrieved,[8] and must be brought within three years.[9]

[1] Kirkland v. Kille, 99 N. Y. 390 (1885), reversing 16 N. Y. Week. Dig. 227 (1883).

[2] Merchants' Bank v. Bliss, 35 N. Y. 412 (1866).

[3] Duckworth v. Roach, 81 N. Y. 49 (1880), affirming 8 Daly (N. Y.) 159.

[4] Bronson v. Dimock, 4 Hun (N. Y.) 614 (1875).

[5] Eaton v. Aspinwall, 19 N. Y. 119 (1859).

[6] Garrison v. Howe, 17 N. Y. 458 (1858).

[7] Garrison v. Howe, 17 N. Y. 458 (1858).

[8] Gadsden v. Woodward, 103 N. Y. 242, 244 (1886); Knox v. Baldwin, 80 N. Y. 613 (1880); Easterly v. Barber, 65 N. Y. 252, 253 (1875); Wiles v. Suydam, 64 N. Y. 177 (1876); Merchants' Bank of N. H. v. Bliss, 35 N. Y. 412 (1866).

[9] Merchants' Bank of New Haven v. Bliss, 35 N. Y. 412 (1866). See Rector of Trinity Church v. Vanderbilt, 98 N. Y. 170, 175 (1885); Stokes v. Stickney, 96 N. Y. 324, 326 (1884); Duckworth v. Roach, 81 N. Y. 49, 51 (1880); Knox v. Baldwin, 80 N. Y. 610, 613 (1880); Losee v. Bullard, 79 N. Y. 404, 406 (1880); Wiles v. Suydam, 64 N. Y. 173, 177 (1876); Jones v. Barlow, 62 N. Y. 202, 207, 210 (1875.)

It was said in the case of Victory Webb Printing and Folding Machine Co. v. Beecher,[1] that "the twelfth section of the act was repealed and superseded by the act, chapter 510 of the laws of 1875.[2] This action was commenced subsequently to the repeal to enforce a penalty under that section.[3] The right of action, therefore, fell with the repeal,[4] and the judgment should upon that ground be affirmed, with costs."

Sec. 348. Dividends—Payment by Insolvent Corporation—Liability of Trustees.—If the trustees of any such company shall declare and pay any dividend when the company is insolvent, or any dividend, the payment of which would render it insolvent, or which would diminish the amount of its capital stock, they shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be thereafter contracted, while they shall respectively continue in office: Provided, That if any of the trustees shall object to the declaring of such dividend or to the payment of the same, and shall at any time before the time fixed for the payment thereof, file a certificate of their objection in writing with the clerk of the company and with the clerk of the county, they shall be exempt from the said liability.[5]

[1] 97 N. Y. 651 (1884).

[2] Knox v. Baldwin, 80 N. Y. 610 (1880).

[3] See Stokes v. Stickney, 96 N. Y. 323 (1884); Roach v. Duckworth, 95 N. Y. 391 (1884); Pier v. George, 86 N. Y. 613 (1881); Veeder v. Baker, 83 N. Y. 156 (1880); Bruce v. Platt, 80 N. Y. 379 (1880); Easterly v. Barber, 65 N. Y. 252 (1875); Wiles v. Suydam, 64 N. Y. 173 (1876); Whitney Arms Co. v. Barlow, 63 N. Y. 62 (1875); Jones v. Barlow, 62 N. Y. 202 (1875); Merchants' Bank of N. H. v. Bliss, 35 N. Y. 412 (1866).

[4] Sturgis v. Spofford, 45 N. Y. 446, 452 (1871); Curtis v. Leavitt, 15 N. Y. 9, 229 (1857); Butler v. Palmer, 1 Hill (N. Y.) 324, 330 (1841); Norris v. Crocker, 54 U. S. (13 How.) 429 (1851); bk 14 L. ed. 210.

[5] L. 1848, c. 40, § 13; 3 N. Y. R. S., 8th ed., p. 1958. See Veeder v. Baker, 83 N. Y. 156 (1880); Excelsior Pet. Co. v. Lacey, 63 N. Y. 422 (1875); Rorke v. Thomas, 56 N. Y.

Sec. 349. Stock to be Paid in Cash.—Nothing but money shall be considered as payment of any part of the capital stock, and no loan of money shall be made by any such company to any stockholder therein; and if any such loan shall be made to a stockholder, the officers who shall make it, or who shall assent thereto, shall be jointly and severally liable to the extent of such loan and interest, for all the debts of the company contracted before the repayment of the sum so loaned.[1]

Sec. 350. Same—Issuing Stock for Property.—The trustees of such companies may purchase mines, manufactories and other property necessary for their business, and issue stock to the amount of the value thereof in payment therefor; and the stock so issued shall be declared and taken to be full stock, and not liable to any further calls; neither shall the holders thereof be liable for any further payments under the provisions of the tenth section[2] of the said act; but in all the statements and reports of the company to be published, this stock shall not be stated or reported as being issued for cash paid in to the company, but shall be reported in this respect according to the fact.[3]

559 (1874); Merchants' Bank v. Bliss, 35 N. Y. 412 (1866); Anderson v. Speers, 21 Hun (N. Y.) 568 (1880); Excelsior Petroleum Co. v. Embury, 4 Hun (N. Y.) 648 (1875); Bonnell v. Wheeler, 1 Hun (N. Y.) 332, 336 (1874); s. c. 3 T. & C. (N. Y.) 557; Nimmons v. Tappan, 2 Sween. (N. Y.) 652 (1870); Hollingshead v. Woodward, 21 N. Y. Week. Dig. 229 (1885).

[1] L. 1848, c. 40, § 14, 3 N. Y. R. S., 8th ed., p. 1958. This section is modified by the act of 1853, *post*, § 349. See Veeder v. Mudgett, 95 N. Y. 295 (1884); Lake Superior Iron Co. v. Drexel, 90 N. Y. 87 (1882); Pier v. Hanmore, 86 N. Y. 95 (1881); Schenck v. Andrews, 57 (N. Y.) 133 (1874); Boynton v. Hatch, 47 (N. Y.) 225, 229 (1872); Schenck v. Andrews, 46 N. Y. 589, 591 (1871); Clarke v. Acosta, 9 Bosw. (N. Y.) 158, 160 (1862); Billings v. Trask, 30 Hun (N. Y.) 314 (1883).

[2] See *ante*, § 343.

[3] L. 1853, c. 333, § 2; 3 N. Y. R. S., 8th ed. p. 1961. See Whitaker v.

Sec. 351. False Certificate or report--Liability of Trustees.—If any certificate or report made, or public notice given, by the officers of any such company, in pursuance of the provisions of this act, shall be false in any material representation, all the officers who shall have signed the same, knowing it to be false, shall be jointly and severally liable for all the debts of the company contracted while they are stockholders or officers thereof.[1]

Sec. 351a. Same—False Report—What is—Liability for.—A report is not false because some items of indebtedness have been omitted.[2] Where a report is made, corresponding in all formal matters to the requirements of the statute, the trustees are not liable under the above section, although it is untrue; but in such a case those only who signed it, knowing it to be false, are liable under that section.[3]

Masterton, 106 N. Y. 277 (1887); Lake Superior Iron Co. v. Drexel, 90 N. Y. 87 (1882); Bonnell v. Griswold, 89 N. Y. 122 (1882); Pier v. Hanmore, 86 N. Y. 96 (1881); Barnes v. Brown, 80 N. Y. 527 (1880); reversing 11 Hun (N. Y.) 315; Bonnell v. Griswold, 80 N. Y. 128 (1880); Douglass v. Ireland, 73 N. Y. 100 (1878); Boynton v. Andrews, 63 N. Y. 93 (1875); Schenck v. Andrews, 57 N. Y. 133 (1874); Arthur v. Griswold, 55 N. Y. 407 (1874); Boynton v. Hatch, 47 N. Y. 228 (1872); Schenck v. Andrews, 46 N. Y. 592 (1871); Bolz v. Ridder, 12 Daly (N. Y.) 329 (1884); National T. W. Co. v. Gilfillan, 46 Hun (N. Y.) 248 (1887); Thurber v. Thompson, 21 Hun (N. Y.) 472 (1880); Glens F. P. Co. v. White, 18 Hun (N. Y.) 214 (1879); Pier v. George, 17 Hun (N. Y.) 207 (1879); Nelson v. Drake, 14 Hun (N. Y.) 468 (1878); Brown v. Smith, 13 Hun (N. Y.) 408 (1878); Excelsior G. B. Co. v. Stayner, 12 N. Y. Week. Dig. 536 (1881).

[1] L. 1848, c. 40, § 15; 3 N. Y. R. S., 8th ed., p. 1958. See Blake v. Griswold, 104 N. Y. 613 (1887); Brackett v. Griswold, 103 N. Y. 425 (1886); Pier v. Hanmore, 86 N. Y 95 (1881); Veeder v. Baker, 83 N. Y. 156 (1880); Bonnell v. Griswold, 80 N. Y. 128 (1880); s. c. 89 N. Y. 122 (1882); Arthur v. Griswold, 55 N. Y. 400, 407 (1874); Butler v. Smalley, 49 N. Y. Super. Ct. (17 J. & S.) 492 (1883); s. c. 101 N. Y. 71, 75; Vernon v. Palmer, 48 N. Y. Super. Ct. (16 J. & S.) 231 (1882); Patterson v. Robinson, 36 Hun (N. Y.) 626 (1885); Bonnell v. Wheeler, 1 Hun (N. Y.) 332, 336 (1874); Bonnell v. Griswold, 3 T. & C. (N. Y.) 560 (1874).

[2] Butler v. Smalley, 101 N. Y. 71 (1885).

[3] Pier v. Hanmore, 86 N. Y. 95 (1881); Whitaker v. Masterson, 21 N. Y. Week. Dig., 209 (1885).

The words "knowing to be false" imply a wilful misrepresentation, not merely a constructive knowledge, imputed from the presumption that the officers so giving it knew the law, and comprehended the import of the language used, when construed with reference to the language of the statute.[1] If a false representation was made by an agent of the company, the trustee must, in order to make him liable, have been privy to such false representation.[2]

An action under the above section of the statute is penal in its nature, and must be tried in the county where the false report was made and filed.[3] Such action does not survive.[4]

Sec. 352. Holder of Stock—Liability of Executors, etc.—No person holding stock in any such company, as executor, administrator, guardian or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as stockholder of such company; but the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly, and the estates and funds in the hands of such executor, administrator, guardian or trustee, shall be liable in like manner, and to the same extent as the testator or intestate, or the ward or person interested in such trust fund would have been, if he had been living and competent to act, and held the same stock in his own name.[5]

Sec. 353. Elections—Who May Vote at—Executors, etc.—Every such executor, administrator, guardian or trustee shall represent the share of stock in his

[1] Pier v. Hanmore, 86 N. Y. 95 (1881).

[2] Arthur v. Griswold, 55 N. Y. 400 (1874).

[3] Veeder v. Baker, 83 N. Y. 156 (1880).

[4] Brackett v. Griswold, 103 N. Y. 425 (1886).

[5] L. 1848, c. 40, § 16; 3 N. Y. R. S., 8th ed., p. 1958. Where one partner subscribes for stock for the benefit of both, he is not a trustee for his partner. Stover v. Flack, 41 Barb. N. Y. 162 (1862).

hands at all meetings of the company, and may vote accordingly as a stockholder; and every person who shall pledge his stock as aforesaid, may nevertheless represent the same at all such meetings, and may vote accordingly as a stockholder.[1]

Sec. 354. Laborers, Servants, etc.—Liability of Stockholders.—The stockholders of any company organized under the provisions of this act, shall be jointly and severally individually liable for all debts that may be due and owing to all their laborers, servants and apprentices, for services performed for such corporation.[2]

Sec. 354a. Same—Who are laborers.—Laborers and servants, within the meaning of the above section, are those who perform menial or manual services, and, in common parlance and according to the general understanding of men, would fall under those appellations, in enumerating the different classes of persons employed by the corporation. A secretary, agent, superintendent or bookkeeper is not a servant within that section, nor is an agent's assistant at a monthly salary, who exercises the principal's powers in the latter's absence.[3] The wages must be payable within a year, and judgment first recovered in this state against the company.[4]

[1] L. 1848, c. 40, § 17; 3 N. Y. R. S., 8th ed., p. 1958.

[2] L. 1848, c. 40, § 18; 3 N. Y. R. S., 8th ed. p. 1958. See Wakefield v. Fargo, 90 N. Y. 213 (1882); Hill v. Spencer, 61 N. Y. 274 (1874); Shellington v. Howland, 53 N. Y. 371 (1873); Harris v. Norvell, 1 Abb. (N. Y.) N. C. 127 (1876); Hill v. Conklin, 7 Daly (N. Y.) 397 (1877); Vincent v. Banford, 42 How. (N.Y.) Pr. 109, 111 (1871); Short v. Medberry, 29 Hun (N. Y.) 39 (1883); Krauser v. Ruckel, 17 Hun (N. Y.) 463 (1879); Dean v. Whiton, 16 Hun (N. Y.) 203 (1878); Dean v. De Wolf, 16 Hun (N. Y.) 186 (1878); Clark v. Myers, 11 Hun (N. Y.) 608 (1877); Meriden Britannia Co. v. Zingsen, 4 Robt. (N. Y.) 312, 319 (1867).

[3] Wakefield v. Fargo, 90 N. Y. 213 (1882); Hill v. Spencer, 61 N. Y. 274 (1874); Krauser v. Ruckel, 17 Hun (N. Y.) 463 (1878); Dean v. DeWolf, 16 Hun (N. Y.) 186 (1878); affirmed 82 N. Y. 626. *Compare* Harris v. Norvell, 1 Abb. (N. Y.) N. C. 127 (1879); People v. Remington, 45 Hun (N. Y.) 329 (1887).

[4] Dean v. Mace, 19 Hun (N. Y.) 392 (1879). Right of action assignable Oneida Bank v. Ontario Bank, 21 N. Y. 490 (1860); Ayrault v. Sackett, 17 How. (N. Y.) Pr. 463

The agent of a mining company, having charge of its mines in a foreign state, with full power to control its property and manage its financial affairs in that country, in all respects as the company itself could do, is not a servant within the meaning of the above section.[1] The secretary of a manufacturing corporation, in performing the services incident to the duties of his office, is held not to be a servant, under that section.[2]

Sec. 354b. Same—Suit by stockholder.—An action will not lie by one stockholder against a fellow-stockholder of a corporation to enforce a personal liability for debt of the company, under section three hundred and fifty-four.[3]

Where a stockholder has paid debts under said section, he cannot maintain an action against a single fellow-stockholder, to recover a proportion of the amount paid by him, but he can bring an equitable action for that purpose against all his fellow-stockholders.[4]

Sec. 355. Alteration or Repeal of Act.—The legislature may at any time alter, amend or repeal this act, or may annul or repeal any incorporation formed or created under this act; but such amendment or repeal shall not, nor shall the dissolution of any such company take away or impair any remedy given against any such corporation, its stockholders or officers, for any liability which shall have been previously incurred.[5]

Sec. 356. Capital-Stock—Increase or Diminution of.—Any corporation or company heretofore formed, either by special act or under the general law, and now existing for any manufacturing, mining, mechan-

(1858); Pilcher v. Brayton, 17 Hun (N. Y.) 429 (1860).

[1] Hill v. Spencer, 61 N. Y. 274 (1874).

[2] Goffin v. Reynolds, 37 N. Y. 640 (1868).

[3] Richardson v. Abendroth, 43 Barb. (N. Y.) 162 (1864).

[4] Clark v. Myers, 11 Hun (N. Y.) 608 (1877).

[5] L. 1848, c. 40, § 19; 3 N. Y. R. S., 8th ed., p. 1958.

ical or chemical purposes, or any company which may be formed under this act, may increase or diminish its capital stock by complying with the provisions of this act to any amount which may be deemed sufficient and proper for the purposes of the corporation, and may also extend its business to any other manufacturing, mining, mechanical or chemical business, subject to the provisions and liabilities of this act. But before any corporation shall be entitled to diminish the amount of its capital stock, if the amount of its debts and liabilities shall exceed the amount of capital to which it is proposed to be reduced, such amount of debts and liabilities shall be satisfied and reduced so as not to exceed such diminished amount of capital ; and any existing company, heretofore formed under the general law, or any special act, may come under and avail itself of the privileges and provisions of this act, by complying with the following provisions, and thereupon such company, its officers and stockholders, shall be subject to all the restrictions, duties and liabilities of this act.[1]

Sec. 357. Same—Number of Shares may be Increased. —Any company formed under the act entitled, "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February seventeenth, eighteen hundred and forty-eight, may increase the number of shares of which its capital stock consists; pro-

[1] L. 1848, c. 40, § 20; 3 N. Y. R., S., 8th ed., p. 1959. As to the regularity of proceedings taken under sections 355 to 369 see Cuykendall v. Douglas, 19 Hun (N. Y.) 577 (1880). See Veeder v. Mudgett, 95 N. Y. 295 (1884); Schenck v. Andrews, 46 N. Y. 593 (1871).

vided the capital stock of such company shall not thereby be increased or diminished.[1]

Sec. 358. Same—Increase how Made.—Such increase shall be made by a vote of the stockholders in favor thereof, representing two-thirds of the capital stock, at any meeting of the stockholders called in the manner prescribed in the act hereby amended, and by executing and acknowledging an amended certificate specifying the number of shares of which the said capital stock of said company shall thereafter consist, and the par value of each share, and in other respects conforming to the original certificate, which amended certificate shall be signed by the president and two-thirds of the directors of the company, and shall be filed in the office of the secretary of state, and in the clerk's office of the county where the original certificate was filed.[2]

Sec. 359. Same—Certificate to Stockholder.—Each stockholder shall be entitled to a certificate for such a number of shares of said capital stock after the whole number has been increased as aforesaid, as shall at their par value be equal to the par value of the shares theretofore held by him in such company, on surrendering the certificates for said shares so held by him to be cancelled; provided that such increase shall not so divide the shares as to give the fractional part of a share to any stockholder.[3]

Sec. 360. Meeting of Stockholders—Manner of Calling.—Whenever any company shall desire to call a meeting of the stockholders, for the purpose of

[1] L. 1866, c. 73, § 1; 3 N. Y. R. S., 8th ed. p. 1966.

[2] L. 1866, c. 73, § 2; 3 N. Y. R. S., 8th ed., p. 1966.

[3] L. 1866, c. 73, § 3; 3 N. Y. R. S., 8th ed., p. 1966.

availing itself of the privileges and provisions of this act, or for increasing or diminishing the amount of its capital stock, or for extending or changing its business, it shall be the duty of the trustees to publish a notice signed by at least a majority of them, in a newspaper in the county, if any shall be published therein, at least three successive weeks, and to deposit a written or printed copy thereof in the post office, addressed to each stockholder at his usual place of residence, at least three weeks previous to the day fixed upon for holding such meeting; specifying the object of the meeting, the time and place, when and where such meeting shall be held, and the amount to which it shall be proposed to increase or diminish the capital, and the business to which the company would be extended or changed, and a vote of at least two-thirds of all the shares of stock shall be necessary to an increase or diminution of the amount of its capital stock, or the extension or change of its business as aforesaid, or to enable a company to avail itself of the provisions of this act.[1]

Sec. 361. Same.—Organization and Conduct of.—If at any time and place specified in the notice provided for in the preceding section of this act, stockholders shall appear in person or by proxy, in number representing not less than two-thirds of all the shares of stock of the corporation, they shall organize by choosing one of the trustees chairman of the meeting, and also a suitable person for secretary, and proceed to a vote of those present, in person or by proxy, and if on canvassing the votes it shall appear that a

[1] L. 1848, c. 40, § 21; 3 N. Y. R. S., 8th ed., p. 1959. See Veeder v. Mudgett, 95 N. Y. 295 (1884); Cuykendall v. Douglas, 19 Hun (N. Y.) 577 (1880).

sufficient number of votes have been given in favor of increasing or diminishing the amount of the capital, or of extending or changing its business as aforesaid, or for availing itself of the privileges and provisions of this act, a certificate of the proceedings, showing a compliance with the provisions of this act, the amount of capital actually paid in, the business to which it is extended or changed, the whole amount of debts and liabilities of the company, and the amount to which the capital stock shall be increased or diminished, shall be made out, signed and verified by the affidavit of the chairman, and countersigned by the secretary, and such certificate shall be acknowledged by the chairman, and filed as required by the first section of this act, and when so filed, the capital stock of such corporation shall be increased or diminished, to the amount specified in such certificate, and the business extended or changed as aforesaid, and the company shall be entitled to the privileges and provisions, and be subject to the liabilities of this act, as the case may be.[1]

Sec. 362.—Indebtedness of Companies—Not to Exceed Capital Stock.—If the indebtedness of any such company shall at any time exceed the amount of its capital stock, the trustees of such company assenting thereto shall be personally and individually liable for such excess to the creditors of such company.[2]

Sec. 362a. Same—Liability of Trustees.—To fix a personal liability upon the trustee, it must be alleged and proved that the excess of indebtedness was equal to or exceeded the

[1] L. 1848, c. 40, § 22; 3 N. Y. R. S., 8th ed., p. 1959. See Veeder v. Mudgett, 95 N. Y. 295 (1884); Cuykendall v. Douglas, 19 Hun (N. Y.) 577 (1880).

[2] L. 1848, c. 40, § 23; 3 N. Y. R. S. 8th ed. p. 1960. See Patterson v. Robinson, 37 Hun (N. Y.) 341 (1885); s. c., 36 Hun (N. Y.) 622 (1885).

amount of plaintiff's debt,[1] and bonds not issued and unauthorized indebtedness not to be included.[2] A trustee is not liable for torts.[3]

A creditor cannot maintain a separate action in his own behalf under the above section. The action must be brought by all the creditors, or by one in behalf of himself and all the others, and each can recover only such a proportion of the excess of the debts over the amount of the capital stock, as his debt bears to the whole amount of the company's debts.[4]

Sec. 363. Same—Action against Trustees—Limitations.—No stockholder shall be personally liable for the payment of any debt contracted by any company formed under this act, which is not to be paid within one year from the time the debt is contracted, nor unless a suit for the collection of such debt shall be brought against such company within one year after the debt shall become due; and no suit shall be brought against any stockholder who shall cease to be a stockholder in any such company, for any debt so contracted, unless the same shall be commenced within two years from the time he shall have ceased to be a stockholder in such company, nor until an execution against the company shall have been returned unsatisfied in whole or in part.[5]

[1] Chambers v. Lewis, 28 N. Y. 454 (1863).

[2] McClave v. Thompson, 36 Hun (N. Y.) 365 (1885).

[3] Esmond v. Bullard, 16 Hun (N. Y.) 65 (1878).

[4] Anderson v. Speers, 21 Hun (N. Y.) 568 (880). See also Agate v. Sands, 8 Daly (N.Y.) 66, (1878); Patterson v. Robinson, 36 Hun (N. Y.) 622 (1885). As to what constitutes assent, see Patterson v. Robinson, 36 Hun (N. Y.) 622 (1885), modified 37 Hun (N. Y.) 341 (1885).

[5] L. 1848, c. 40, § 24; 3 N. Y. R. S., 8th ed., p. 1960. See Hollingshead v. Woodward, 107 N. Y. 96 (1887); Veeder v. Mudgett, 95 N. Y. 295 (1884); Wheeler v. Millar, 90 N. Y, 253 (1882); Rocky Mountain Nat. Bank v. Bliss, 89 N. Y. 338 (1882); Cuykendall v. Corning, 88 N. Y. 129 (1882); Hastings v. Drew, 76 N. Y. 9 (1879); Pfohl v. Simpson, 74 N. Y. 137 (1878); Fitch v. American Popular Life Ins. Co., 59 N. Y. 557, 568 (1875); Shellington v. Howland, 53 N. Y. 371 (1873); Fisher v. Marvin, 47 Barb. (N. Y.) 159, 161 (1866); Stover v. Flack, 41 Barb. (N. Y.) 162 171 (1862); Wildey v. Whitney, 25

Sec. 363a. Same—Proceedings.—The requirements of the above section are not sufficiently complied with, where a warrant of attachment has been issued, and the execution is issued only against the specific property attached; or where a judgment is recovered and an execution is issued and returned in another state. The right to establish the stockholder's or trustee's liability by an action, a judgment and an execution, is not affected by the fact that the corporation has passed into the hands of a receiver.[1] And the filing of a petition in bankruptcy within the year after the debt became due, is not sufficient as the commencement of an action.[2]

Sec. 364. Stock Books to be Kept—Entries.—It shall be the duty of the trustees of every such corporation or company to cause a book to be kept by the treasurer or clerk thereof, containing the names of all persons, alphabetically arranged, who are or shall, within six years, have been stockholders of such company, and showing their places of residence, the number of shares of stock held by them respectively, and the time when they respectively became the owners of such shares; and the amount of stock actually paid in; which book shall, during the usual business hours of the day, on every day except Sunday and the fourth day of July, be open for the inspection of stockholders and creditors of the company, and their personal representatives, at the office or principal place of business of such company in the county where its business operations shall be located; and any and every such stockholder,

How. (N. Y.) Pr. 75 (1863); Short v. Medberry, 29 Hun (N. Y.) 39 (1883); Mason v. New York Silk Manuf. Co., 27 Hun (N. Y.) 307 (1882); Handy v. Draper, 23 Hun (N. Y.) 256 (1880); Birmingham Nat. Bank v. Mosser, 14 Hun (N. Y.) 605 (1878); Parrott v. Colby, 6 Hun (N. Y.) 55 (1875).

[1] Rocky Mt. Nat. Bk. v. Bliss, 89 N. Y. 338 (1882); Mason v. N. Y. Silk Mf. Co., 27 Hun 307 (1882).

[2] Birmingham Nat. Bk. v. Mosser, 14 Hun 605 (1878).

creditor or representative, shall have a right to make extracts from such book; and no transfer of stock shall be valid for any purpose whatever, except to render the person to whom it shall be transferred liable for the debts of the company, according to the provisions of this act, until it shall have been entered therein as required by this section, by an entry showing to and from whom transferred. Such book shall be presumptive evidence of the facts therein stated, in favor of the plaintiff, in any suit or proceeding against such company, or against any one or more stockholders. Every officer or agent of any such company, who shall neglect to make any proper entry in such book, or shall refuse or neglect to exhibit the same, or allow the same to be inspected, and extracts to be taken therefrom, as provided by this section, shall be deemed guilty of a misdemeanor, and the company shall forfeit and pay to the party injured, a penalty of fifty dollars for every such neglect or refusal, and all the damages resulting therefrom: And every company that shall neglect to keep such book open for inspection, as aforesaid, shall forfeit to the people the sum of fifty dollars for every day it shall so neglect, to be sued for and recovered in the name of the people, by the district attorney of the county in which the business of such corporation shall be located; and when so recovered, the amount shall be paid into the treasury of such county for the use thereof.[1]

Sec. 364a. Same—Care and custody—Inspection of.—Any officer of the corporation having charge of the books, though

[1] L. 1848, c. 40, § 25; 3 N. Y. R. S., 8th ed., p. 1960. See Johnson v. Underhill, 52 N. Y. 203 (1873); Tracy v. Yates, 18 Barb. (N. Y.) 152 (1854); French v. McMillan, 43 Hun (N. Y.) 188 (1887); Kelsey v. Pfaudler P. F. Co., 41 Hun (N.Y.) 20 (1886); Herries v. Wesley, 13 Hun (N. Y.) 492 (1878).

he submit them to the inspection of a stockholder, yet if he refuses to permit him to make extracts, is liable to the penalty.[1]

The provision of the above section, that a transfer of stock shall not be valid until it is entered in the books, must be confined in its application to the objects sought to be attained, to wit, the security of creditors, and the information of other stockholders. It does not affect the validity of a transfer, as between seller and purchaser.[2]

Said section does not make the book the only, or even the best evidence, that a person sued for the company's debts is a stockholder.[3]

[1] Cotheal v. Brouwer, 5 N. Y. 562 (1851). See Tracy v. Yates, 18 Barb. 152 (1854). As to inspection of books, see Kelsey v. Pfaudler P. F. Co., 41 Hun 20 (1886); s. c. 19 Abb. (N. Y.) N.C. 127; Kennedy v. Chicago R. I. & P. R. Co., 14 Abb. (N. Y.) N. C. 326 (1884); Cotheal v. Brouwer, 5 N. Y. 566 (1851); People v. Throop, 12 Wend. (N. Y.) 183 (1834); People ex rel. Harriman v. Paton, 20 Abb. (N. Y.) N. C. 172 (1887); People ex rel. McDonald v. U. S. Mer. Rep. Co., 20 Abb. (N. Y.) N. C. 192 (1888); Kelsey v. Pfaulder P. Co., 20 N. Y. 533 (1889).

[2] Johnson v. Underhill, 52 N. Y. 203 (1873). As to refusal to register transfer, see Robinson v. Nat. Bank of New Berne, 95 N. Y. 637 (1884).

[3] Herries v. Wesley, 13 Hun, 492 (1878).

CHAPTER XXI.

MANUFACTURING CORPORATIONS—POWERS, ETC.

GENERAL POWERS—MORTGAGING PROPERTY AND FRANCHISE—MORTGAGING PROPERTY OUT OF STATE—CONSENT—ISSUING STOCK TO PAY FOR PROPERTY—HOLDING STOCK IN OTHER COMPANIES—STATEMENT OF AFFAIRS ON DEMAND—STATEMENT AT ANNUAL MEETING.

SEC. 365. General powers.
SEC. 365a. Same—Succession, etc.
SEC. 365b. Same—In what corporations to vest.
SEC. 365c. Same—Other powers.
SEC. 365d. Same—Exercise of banking powers.
SEC. 365e. Same—Liability of stockholder.
SEC. 365f. Same—Quorum.
SEC. 365g. Same—Forfeiture for non-usure.
SEC. 365h. Same—Right to repeal.
SEC. 365i. Same—Dissolution—Trustees in case of.
SEC. 365j. Same—Powers of.
SEC. 365k. Same—Property of corporations.
SEC. 366. Same—Benefits and privileges.
SEC. 367. Same—Mortgaging of real or personal estate, to secure debts—Validity of Mortgage—Assent of two-thirds of capital requisite.
SEC. 367a. Same—Assent—Requisites.
SEC. 368. Same—Mortgaging property and franchise.
SEC. 369. Same—Mortgaging property out of state—Assent to mortgage—How evinced.
SEC. 370. Same—Filing consent of stockholders *nunc pro tunc*.
SEC. 371. Same—May purchase mines, manufactories, etc., and issue stock in payment.
SEC. 371a. Same—Scope of act.

SEC. 372. Same—Holding stock in other companies.
SEC. 373. Statement of affairs of company—When to be made.
SEC. 374. Same—Statement at annual meeting of stockholders.

Sec. 365. General Powers.—Every corporation created under this act shall possess the general powers and privileges, and be subject to the liabilities and restrictions contained in title third, chapter eighteen of the first part of the Revised Statutes, and the provisions of section six, article first, title two, chapter thirteen of the first part of the Revised Statutes, shall apply to every such corporation.[1]

Sec. 365a. Same—Succession, etc.—The provisions of the Revised Statutes part one, title third, chapter thirteen, referred to in the above section, here follow. It is provided that every corporation, as such, has power:

1. To have succession, by its corporate name, for the period limited in its charter; and when no period is limited, perpetually.

2. To sue and be sued, to complain and defend, in any court of law or equity.

3. To make and use a common seal, and alter the same at pleasure.

4. To hold, purchase and convey such real and personal estate as the purposes of the corporation shall require, not exceeding the amount limited in its charter.

5. To appoint such subordinate officers and agents as the business of the corporation shall require, and to allow them a suitable compensation.

6. To make by-laws, not inconsistent with any existing law, for the management of its property, the regulation of its affairs, and for the transfer of its stock.[2]

[1] L. 1848, c. 40, § 26, as amended by L. 1861, ch. 170; 3 N. Y. R. S., 8th ed., p. 1960. See Tucker v. Gilman, 45 Hun (N. Y.) 193 (1887).

[2] 3 N. Y. R. S., 8th ed., p. 1723, § 1. See Cutting v. Damerel, 88 N. Y. 410 (1882); Driscoll v. West. B. & C. M. Co., 59 N. Y. 96 (1874); Bank of Attica v. Manuf's & T. Bank, 20 N. Y. 506 (1859); Nicoll v. New York & E. R. Co., 12 N. Y. 127 (1854); Riley v. City of Rochester, 9

Sec. 365b. Same—In what corporation to vest.—The powers enumerated in the preceding section shall vest in every corporation that shall thereafter be created, although they may not be specified in its charter, or in the act under which it shall be incorporated.[1]

Sec. 365c. Same—Other powers.—In addition to the powers enumerated in the first section of this title, and to those expressly given in its charter, or in the act under which it is or shall be incorporated, no corporation shall possess or exercise any corporate powers, except such as shall be necessary to the exercise of the powers so enumerated and given.[2]

Sec. 365d. Same—Exercise of banking powers.—No corporation created or to be created, and not expressly incorporated for banking purposes, shall, by any implication or construction, be deemed to possess the power of discounting bills, notes, or other evidences of debt, of receiving deposits, of buying gold and silver bullion or foreign coins, of buying and selling bills of exchange, or of issuing bills, notes, or

N. Y. 69 (1853); Farmers L. & T. Co. v. Curtis, 7 N. Y. 471 (1852); Hay v. Cohoes Co., 2 N. Y. 160 (1849); Bingham v. Weiderwax, 1 N. Y. 509 (1848); Bank of Havana v. Wickham, 7 Abb. (N. Y.) Pr. 139 (1857); Barton v. Port. J. & U. F. P. R. Co., 17 Barb. (N. Y.) 404 (1854); Boom v. City of Utica, 2 Barb. (N. Y.) 107 (1848); Brady v. Mayor, &c., of Brooklyn, 1 Barb. (N. Y.) 590 (1847); Chantauqua Co. Bank v. Risley, 4 Den. (N. Y.) 480 (1847); Hodges v. City of Buffalo, 2 Den. (N. Y.) 112 (1846); Moss v. Rossie L. M. Co., 5 Hill (N. Y.) 137 (1843); Thompson v. Erie R. Co., 42 How. (N. Y.) Pr. 91 (1871); Barry v. Merchants Exch. Co., 1 Sandf. Ch. (N. Y.) 280 (1844).

[1] 3 N. Y. R. S., 8th ed., p. 1723, § 2. See New York F. Ins. Co. v. Sturges, 2 Cow. (N. Y.) 664 (1824); McCullough v. Moss, 5 Den. (N. Y.) 577 (1846).

[2] 3 N. Y. R. S., 8th ed., p. 1723, § 3. See Curtis v. Leavitt, 15 N. Y. 54 (1857); Talmadge v. Pell, 7 N. Y. 328 (1852); Thompson v. Schermerhorn, 6 N. Y. 96 (1851); Halstead v. Mayor, etc., N. Y., 3 N. Y. 433 (1850); Plimpton v. Bigelow, 12 Abb. (N. Y.) N. C. 229 (1883), note; Green v. N. Y. Cent. R. Co., 12 Abb. (N. Y.) Pr. N. S. 480 (1872); Farmers L. & T. Co. v. Carroll, 5 Barb. (N. Y.) 613 (1849); Moss v. Rossie L. M. Co., 5 Hill (N. Y.) 137 (1843); McGraw v. Cornell University, 45 Hun (N. Y.) 354 (1887); Rome Sav. Bank v. Kramer, 32 Hun (N. Y.) 272 (1884); Feeny v. Peoples F. Ins. Co., 2 Robt. (N. Y.) 600 (1862); People v. Manhattan Co., 9 Wend. (N. Y.) 392 (1832).

other evidences of debt, upon loan, or for circulation as money.[1]

Lec. 365e. Same—Liability of stockholder.—When the whole capital of a corporation shall not have been paid in, and the capital paid shall be insufficient to satisfy the claims of its creditors, each stockholder shall be bound to pay on each share held by him the sum necessary to complete the amount of such share, as fixed by the charter of the company, or such proportion of that sum as shall be required to satisfy the debts of the company.[2]

Sec. 365f. Same—Quorum.—When the corporate powers of any corporation are directed by its charter to be exercised by any particular body or number of persons, a majority of such body or persons, if it be not otherwise provided in the charter shall be a sufficient number to form a quorum for the transaction of business; and every decision of a majority of the persons duly assembled as a board, shall be valid as a corporate act.[3]

Sec. 365g. Same—Forfeiture for non-usuer.—If any corporation hereafter created by the legislature shall not organize and commence the transaction of its business within one year from the date of its incorporation, its corporate powers shall cease[4].

Sec. 365h. Same—Right to repeal.—The charter of every corporation that shall hereafter be granted by the legislature,

[1] 3 N. Y. R. S., 8th ed., p. 1723, § 4. See People v. Mut. Trust Co., 96 N. Y. 13 (1884); N. Y. Life Ins. & T. Co. v. Beebe, 7 N. Y. 367 (1852); Curtis v. Leavitt, 17 Barb. (N. Y.) 316 (1853); Amer. L. Ins. & T. Co. v. Dobbin, Hill & Den. (N. Y.) 252 (1843); Auburn Sav. Bk. v. Brinkerhoff, 44 Hun (N. Y.) 145 (1887); Rome Sav. Bank v. Cramer, 32 Hun (N. Y.) 272 (1884); People v. Manhattan Co., 9 Wend. (N. Y.) 392 (1832).

[2] 3 N. Y. R. S., 8th ed., p. 1723, § 5. See Mann v. Pentz, 3 N. Y. 422 (1850); Tallmadge v. Fishkill I. Co., 4 Barb. (N. Y.) 383 (1848); Cutting v. Damerel, 23 Hun (N. Y.) 339 (1880).

[3] 3 N. Y. R. S., 8th ed., p. 1724, § 6. See People's Bank v. St. Anthony's R. C. Ch., 39 Hun (N. Y.) 498, 502 (1886); Porter v. Robinson, 30 Hun (N. Y.) 209 (1883).

[4] N. Y. R. S., 8th ed., p. 1724, § 7. See People v. Troy House Co., 44 Barb. (N. Y.) 631 (1865); People v. Bowen, 30 Barb. (N. Y.) 26 (1859); Johnson v. Bush, 3 Barb. Ch. (N. Y.) 237 (1848).

shall be subject to alteration, suspension and repeal, in the discretion of the legislature.[1]

Sec. 365i. Same—Dissolution.[2]—Trustees in case of.—Upon the dissolution of any corporation, created or to be created, and unless other persons shall be appointed by the legislature, or by some court of competent authority, the directors or managers of the affairs of such corporation at the time of its dissolution, by whatever name they may be known in law, shall be the trustees of the creditors and stockholders of the corporation dissolved, and shall have full power to settle the affairs of the corporation, collect and pay the outstanding debts, and divide among the stockholders the moneys and other property that shall remain, after the payment of debts and necessary expenses.[3]

Sec. 365j. Same—Powers of.—The persons so constituted trustees shall have authority to sue for and recover the debts and property of the dissolved corporation, by the name of the trustees of such corporation, describing it by its corporate name, and shall be jointly and severally responsible to the creditors and stockholders of such corporation to the extent of its property and effects that shall come into their hands.[4]

Sec. 365k.—Property of corporations.—The provisions of section six, article first, title two, chapter thirteen of the first part of the Revised Statutes, referred to in section three

[1] 3 N. Y. R. S., 8th ed., p. 1724, § 8. See Troy & R. R. Co. v. Kerr, 17 Barb. (N. Y.) 603 (1854); White v. Syracuse & U. R. Co., 14 Barb. (N. Y.) 559 (1853); Northern R. Co. v. Miller, 10 Barb. (N. Y.) 260 (1851); Snydam v. Moore, 8 Barb. (N. Y.) 364 (1850); Hartford & N. H. R. Co. v. Croswell, 5 Hill (N. Y.) 383 (1843); N. Y. Cab Co. v. Chambers St. R. Co., 40 Hun (N. Y.) 31 (1886); People ex rel. Sturges v. Keese, 27 Hun (N. Y.) 483 (1882).

[2] As to disolution of corporations see *ante*, §§ 126–164.

[3] 3 N. Y. R. S., 8th ed., p. 1724, § 9. See Heath v. Barmore, 50 N. Y. 302, 305 (1872); Towar v. Hale, 46 Barb. (N. Y.) 365 (1866); Hoffman v. Van Vostrand, 42 Barb. (N. Y.) 174 (1864); Owen v. Smith, 31 Barb. (N. Y.) 645 (1860); Tinkham v. Borst, 31 Barb. (N. Y.) 411 (1860); Huntley v. Beecher, 30 Barb. (N. Y.) 587 (1859); McCullough v. Moss, 5 Den. (N. Y.) 574 (1846); Kane v. Bloodgood, 7 Johns. Ch. (N. Y.) 128 (1823).

[4] 3 N. Y. R. S., 8th ed., p. 1724, § 10. See Heath v. Barmore, 501 N. Y. 305 (1872); Owen v. Smith, 31 Barb. (N. Y.) 645 (1860); Merchant's Bank v. Bliss, 1 Robt. (N. Y.) 405 (1863).

hundred and sixty-four above, are as follows: "The real estate of all incorporated companies liable to taxation, shall be assessed in the town or ward in which the same shall lie, in the same manner as the real estate of individuals. All the personal estate of every incorporated company liable to taxation on its capital shall be assessed in the town or ward where the principal office or place for transacting the financial concerns of the company shall be; or if such company have no principal office or place for transacting its financial concerns, then in the town or ward where the operations of such company shall be carried on." [1]

Sec. 366. Same—Benefits and Privileges.—Every corporation so formed shall be entitled to all the benefits and privileges conferred by the before-mentioned act, and may contract and transact its business with any railway company or other person engaged in the operation of any railway in United States or Canada, but shall otherwise be subject to all the provisions, duties and obligations in the said act contained.[2]

Sec. 367. Same—Mortgaging of Real or Personal Estate, to Secure Debts—Validity of Mortgage—Assent of Two-thirds of Capital Requisite.—Any corporation formed under the said act, passed February seventeenth, eighteen hundred and forty-eight, or of the acts amending or extending the said act, may secure the payment of any debt heretofore contracted, or which may be contracted by it, in the business for which it was incorporated, by mortgaging all or any part of the real or personal estate of such corporation; and every mortgage so made shall be as valid to all intents and purposes, as if executed by an individual owning such real or personal estate, pro-

[1] 2 N. Y. R. S., 8th ed., p. 1094, § 6.

[2] L. 1873, c. 814, § 2; 3 N. Y. R. S., 8th ed., p. 1971.

vided, that the written assent of the stockholders, owning at least two-thirds of the capital stock of such corporation, shall first be filed in the office of the clerk of the county where the mortgaged property is situated.[1]

A mortgage can be executed to pay debts only ;[2] and the receiver of a corporation may sue to set aside its mortgage where the requisite assent was not procured, or the mortgage was given for a purpose other than to pay the debts of the corporation, and the assent of the company as owner of pledged stock is not sufficient.[3]

Sec. 368. Same—Mortgaging Property and Franchise.—Any company formed under the act entitled, "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February seventeenth, eighteen hundred and forty-eight, or of the acts amending or extending said act, may secure the payment of any

[1] L. 1864, c. 517, § 2, as amended by L. 1871, c. 481; 3 N. Y. R. S., 8th ed., p. 1965. See Lord v. Yonkers Fuel Gas. Co., 99 N. Y. 547 (1885); Paulding v. Chrome Steel Co., 94 N. Y. 334 (1884); Vail v. Hamilton, 85 N. Y. 453 (1881); Denike v. New York R. L. & C. Co., 80 N. Y. 599 (1880); Coman v. Lackey, 80 N. Y. 345 (1880); Greenpoint Sugar Co. v. Whitin, 69 N. Y. 328 (1877); Carpenter v. Black Hawk Gold Mine Co., 65 N. Y. 43 (1875); Martin v. Niagara Falls Paper Manuf. Co. 44 Hun (N. Y.) 130, 133 (1887); Rochester Sav. Bank v. Averell, 26 Hun (N. Y.) 643 (1882); s. c. 96 N. Y. 467; Greenpoint Sugar Co. v. Kings Co. Manuf. Co., 7 Hun (N. Y.) 44 (1876).

[2] Carpenter v. Black H. G. Mining Co., 65 N. Y. 43 (1875).

[3] Vail v. Hamilton, 20 Hun (N. Y.) 355 (1880). See Coman v. Lakey, 80 N. Y. 345 (1880).

As to the ratification of an invalid mortgage see Lord v. Yonkers F. G. Co., 99 N. Y. 547 (1885); Rochester Sav. Bk. v. Averell, 96 N. Y. 467 (1884); Carpenter v. Black Hawk G. M. Co., 65 N. Y. 43 (1875); Central Gold M. Co. v. Platt, 3 Daly (N. Y.) 263 (1870); Martin v. Niagara Falls P. Co., 44 Hun (N. Y.) 130 (1887); Astor v. Westchester Gas Co., 33 Hun (N. Y.) 333 (1884); Graham v Atlanta Hill Co., N. Y. Da. Reg. Oct. 14, 1884; Jones v. Guaranty & Indemnity Co., 101 U. S. (11 Otto) 622 (1879); bk. 25 L. ed. 1030.

debt heretofore contracted, or which may be contracted by it, in the business for which it was incorporated, by mortgaging all or any part of the goods and chattels of such corporation, and also the franchises, privileges, rights and liberties thereof, provided that the written assent of a majority of the stockholders, owning at least two thirds of the capital stock of such corporation, shall first be filed in the office of the clerk of the county where the corporation has its principal place of business, and also in the office of the clerk of the county where such goods and chattels are situated.[1]

Sec. 369. Same—Mortgaging Property out of State—Assent to Mortgage—How Evinced.—In all cases where a corporation shall have heretofore made, or shall hereafter make a mortgage of any of its real estate situated beyond the limits of this state, and the recording officer of the county in which such real estate is situated shall have refused, or shall refuse to file or record the assent as now required by law, it is hereby declared to be and to have been a sufficient filing of the assent of the stockholders, if such assent shall have been or shall hereafter be filed in the office of the clerk of the county where the company has its principal place of business within this state.[2]

Sec. 370. Same—Filing Consent of Stockholders Nunc pro tunc.—In all cases where a corporation has heretofore executed a mortgage upon any of its real

[1] L. 1878, c. 163, § 1; 3 N. Y. R. S., 8th ed., p. 1973. See Lord v. Yonkers F. G. Co., 99 N. Y. 547 (1885); s. c. 101 N. Y. 614; Paulding v. Chrome Steel Co., 94 N. Y. 334 (1884); Graham v. Atlanta Hill Co., N. Y. Da. Reg., Oct. 14, 1884.

[2] L. 1869, c. 706, § 1; 3 N. Y. R. S., 8th ed., p. 1970.

estate, and the written consent of persons owning two-thirds or more of the capital stock of such corporation shall have been given to the mortgaging of such real estate, at or before the time of the giving of such mortgage, but from accident or mistake the said consent has not been filed in the office of the clerk of the county in which such real estate is situated, as required by law, it shall be lawful for the clerk of such county to receive and file in his office the written consent so given, accompanied by the affidavit of any officer or stockholder of such corporation showing that such consent was in fact made and signed at the time the same purports to have been made and signed, and that the signatures thereto are genuine ; and in such case, on filing such consent and affidavit, the said mortgage shall have the like validity and effect from and as of the time of the filing of such consent and affidavit as if the same had been given at that time, and had been accompanied or preceded by the filing of such consent ; provided, that nothing herein contained shall affect any action or legal proceeding now pending, or impair any intermediate right acquired by lien or otherwise in or to the property of the corporation affected by such mortgage.[1]

Sec. 371. Same—May Purchase Mines, Manufactories, etc., and Issue Stock in Payment.—The trustees of such company may purchase mines, manufactories, and other property necessary for their business, and issue stock to the amount of the value thereof in payment therefor; and the stock so issued shall be declared and taken to be full stock, and not liable

[1] L. 1875, c. 88, § 1; 3 N. Y. R. S., 8th ed., p. 1971. See Rochester Sav. Bank v. Averell, 96 N. Y. 467 (1884.)

to any further calls; neither shall the holders thereof be liable for any further payments under the provisions of the tenth section of the said act; but in all statements and reports of the company, to be published, this stock shall not be stated or reported as being issued for cash paid into the company, but shall be reported in this respect according to the fact.[1]

Sec. 371a. Same—Scope of act.—This section does not authorize any increase of the capital stock of the corporation, but only the payment of stock in property instead of in cash; and when fairly so paid for, although it be the entire capital stock, the holder is not liable to creditors under section ten[2] of the act of 1848.[3] Services may be paid for in stock.[4] But if the property is grossly overvalued, with intent to evade the statute, a creditor may treat the transaction as fraudulent, and recover against a holder of the stock. And where the entire capital stock of a corporation, amounting to $2,500,000 was issued as full paid stock in payment for certain patent rights and other property, upon the agreement of the sellers to re-deliver a certain number of shares to the corporation, to be sold and otherwise disposed of for its benefit, and the same were so re-delivered; it was held, in an action by a creditor to render a stockholder personally liable under section

[1] L. 1853, c. 333, § 2; 3 N. Y. R. S., 8th ed., p. 1961; Whitaker v. Masterton, 106 N. Y. 277 (1887); Lake Superior Iron Co. v. Drexel, 90 N. Y. 87 (1882); Pier v. Hanmore, 86 N. Y. 95 (1881); Bonnell v. Griswold, 80 N. Y. 128 (1880); s. c. 89 N. Y. 122; Douglass v. Ireland, 73 N. Y. 100 (1878); Leslie v. Knickerbocker Life Ins. Co., 63 N. Y. 93 (1875); Town of Duanesburg v. Jenkins, 57 N. Y. 177, 193 (1874); Arthur v. Griswold, 55 N. Y. 400, 407 (1874); Boynton v. Hatch, 47 N. Y. 225, 228 (1872); Schenck v. Andrews, 46 N. Y. 589, 592 (1871); National Tube Works Co. v. Gilfillan, 46 Hun (N. Y.) 248 (1887); Thurber v. Thompson, 21 Hun (N. Y.) 472 (1880); People v. Twaddell, 18 Hun (N. Y.) 427 (1879); Hill v. Nye, 17 Hun (N. Y.) 207 (1879); Nelson v. Drake, 14 Hun (N. Y.) 465, 468 (1878).

[2] See *ante*, § 343.

[3] Schenck v. Andrews, 46 N. Y. 589 (1871).

[4] Veeder v. Mudgett, 95 N. Y. 295 (1884).

ten of the act of 1848, that the question was properly submitted to the jury, as to whether the purchase and issuing of the stock were in good faith, or merely a scheme to evade the statute.[1]

Where the annual report of a company states a certain sum as the amount of capital paid in, without stating that a portion was paid for property as allowed by the above section, the import of the statement is that such a sum was paid in, in cash; and if a portion was thus paid for property, the report is false, and if willfully and knowingly made, the trustees signing it are liable under section fifteen[2] of the act of 1848.[3]

Sec. 372. Same—Holding Stock in other Companies.—It shall be lawful for any company heretofore or hereafter organized under the provisions of this act, or the act hereby amended, to hold stock in the capital of any corporation engaged in the business of mining, manufacturing or transporting such materials as are required in the prosecution of the business of such company, so long as they shall furnish or transport such materials for the use of such company, and for two years thereafter, and no longer; and also to hold stock in the capital of any corporation which shall use or manufacture materials, mined or produced by such company; and the trustees of such company shall have the same power with respect to the purchase of such stock and issuing stock therefor as are now given by the law with

[1] See Lake Superior Iron Co. v. Drexel, 90 N. Y. 87 (1882). See also Blake v. Griswold, 103 N. Y. 429 (1886); Douglass v. Ireland, 73 N. Y. 100 (1878); Boynton v. Andrews, 63 N. Y. 93 (1875); Boynton v. Hatch, 47 N. Y. 225 (1872); Thurber v. Thompson, 21 Hun (N.Y.) 472 (1880); Bolz v. Ridder, 19 Wk. Dig. 463 (1884); s. c. N. Y. Da. Reg., Aug. 7, 1884; Draper v. Beadle, 16 Wk. Dig. 475 (1883).

[2] See *ante*, § 350.

[3] See *ante*, § 350; Pier v. Hanmore, 86 N. Y. 95 (1881). See, also, Whitaker v. Masterton, 106 N. Y. 277 (1887); Bonnell v. Griswold, 68 N. Y. 294 (1877); s. c. 80 N. Y. 128; Blake v. Wheeler, 18 Hun (N. Y.) 496 (1879); Pier v. George, 17 Hun (N. Y.) 207 (1879).

respect to the purchase of mines, manufactories and other property necessary to the business of manufacturing, mining and other companies. But the capital stock of such company shall not be increased without the consent of the owners of two-thirds of the stock to be obtained as provided by sections twenty-one and twenty-two of the act hereby amended.[1]

Sec. 373.—Statement of Affairs of Company—When to be made.—Whenever any person or persons owning five per cent. of the capital stock of any company, not exceeding one hundred thousand dollars, or any person or persons owning three per cent. of the capital stock of any company exceeding one hundred thousand dollars, formed under the provisions of this act, shall present a written request to the treasurer thereof that they desire a statement of the affairs of such company, it shall be the duty of such treasurer to make a statement of the affairs of said company, under oath, embracing a particular account of all its assets and liabilities, in minute detail, and to deliver such statement to the person who presented the said written request to said treasurer, within twenty days after such presentation, and shall also at the same time and place keep on file in his office, for six months thereafter, a copy of such statement, which shall at all times during business hours be exhibited to any stockholder of said company demanding an examination thereof; such treasurer, however, shall not be required to deliver such statement in the manner aforesaid, oftener than once in any six months. If such treasurer shall

[1] L. 1866, c. 838, § 3, as amended by L. 1876, c. 358; 3 N. Y. R. S., 8th ed., p. 1967.

neglect or refuse to comply with any of the provisions of this act, he shall forfeit and pay to the person presenting said written request the sum of fifty dollars, and the further sum of ten dollars for every twenty-four hours thereafter until such statement shall be furnished, to be sued for and recovered in any court having cognizance thereof.[1]

Sec. 374. Same—Statement at Annual Meeting of Stockholders.—Should not any such written statement as is required by section one of this act be demanded, during the year preceding the annual meeting of the stockholders of any company, formed under the provisions of this act, for the election of directors or trustees, it shall be the duty of the treasurer of every such company to prepare and exhibit to the stockholders then and there assembled, a general statement of the assets and liabilities of such company.[2]

[1] Added by L. 1854, c. 201, and amended by L. 1862, c. 472, § 1; 3 N. Y. R. S., 8th ed., p. 1960.

A statement in detail of assets and liabilities is sufficient. French v. McMillan, 43 Hun (N. Y.) 188 (1887).

[2] L. 1862, c. 472, § 2; 3 N. Y. R. S., 8th ed., p. 1961. See French v. McMillan, 43 Hun (N. Y.) 189 (1887.)

PART III.

CORPORATION LAWS OF NEW JERSEY AND WEST VIRGINIA.

CHAPTER XXII.

NEW JERSEY CORPORATIONS—POWERS.

GENERAL POWERS—EXPRESSLY GIVEN—LIABILITY OF STOCKHOLDERS—REPEAL OF CHARTER—PERSONAL LIABILITY OF DIRECTORS.

SEC. 375. Powers in general.
SEC. 376. Same—Vesting of.
SEC. 377. Same—Must be expressly given.
SEC. 378. Banking powers—Not implied.
SEC. 379. Stockholders—Liability to creditors.
SEC. 380. Repeal of charter—Reservation of right.
SEC. 381. Dividends—Made from surplus or profits—Personally liable of directors for debts.
SEC. 382. Company specially chartered—Powers of.
SEC. 383. Company organized under any general law—Powers of.

Sec. 375. Powers in General.—Every corporation, as such, shall be deemed to have power:

I. To have succession, by its corporate name, for the period limited in its charter or certificate of incorporation, and when no period is limited, perpetually, except so far as the constitution otherwise provides concerning banks or money corporations;

II. To sue and be sued, complain and defend in any court of law or equity;

III. To make and use a common seal, and alter the same at pleasure;

IV. To hold, purchase and convey such real and personal estate as the purposes of the corporation shall require, not ex-

[1] The New Jersey Corporation act is taken from Revision of Statutes of 1877, p. 174-197, and the pamphlet laws for the years succeeding that date.

ceeding the amount limited in its charter, and all other real estate which shall have been *bona fide* mortgaged to the said company by way of security, or conveyed to them in satisfaction of debts previously contracted in the course of dealings, or purchased at sales upon judgment or decree which shall be obtained for such debts; and to mortgage any such real or personal estate with their franchises; the power to hold real and personal estate shall include the power to take the same by devise or bequest; provided, however, that nothing herein contained shall prohibit manufacturing or trading corporations from accommodating their customers by making payments or disbursements out of any sum of money received from such customers;

V. To appoint such subordinate officers and agents as the business of the corporation shall require, and to allow them a suitable compensation;

VI. To make by-laws not inconsistent with the constitution or laws of the United States or of this state, fixing and altering the number of its directors for the management of its property, the regulation and government of its affairs, and for the transfer of its stock, with penalties for the breach thereof not exceeding twenty dollars;

VII. To wind up and dissolve itself, or be wound up and dissolved in manner hereafter mentioned.

Sec. 376. Same—Vesting of.—The powers enumerated in the preceding section shall vest in every corporation that shall hereafter be created, although they may not be specified in its charter, or in the act or certificate under which it shall be incorporated.

Sec. 377. Same—Must be Expressly Given.—In addition to the powers enumerated in the first section of this act, and to those expressly given in its charter, or in the act or certificate under which it is or shall be incorporated, no corporation shall possess or exercise any corporate powers, except such as shall be necessary to the exercise of the powers so enumerated and given.

Sec. 378. Banking Powers—Not Implied.—No corporation created or to be created shall, by any implication or con-

struction, be deemed to possess the power of discounting bills, notes or other evidences of debt, of receiving deposits, of buying gold or silver bullion, or foreign coins, of buying and selling bills of exchange, or of issuing bills, notes or other evidences of debt, upon loan or for circulation as money, unless such corporation is or shall be expressly incorporated for banking purposes, or unless such powers are or shall be expressly given in its charter.

Sec. 389. Stockholders—Liability to Creditors.—Where the whole capital of a corporation shall not have been paid in, and the capital paid shall be insufficient to satisfy the claims of its creditors, each stockholder shall be bound to pay on each share held by him the sum necessary to complete the amount of such share, as fixed by the charter of the company, or such proportion of that sum as shall be required to satisfy the debts of the company.

Sec. 380. Repeal of Charter—Reservation of Right.—The charter of every corporation which shall hereafter be granted by or created under any of the acts of the legislature, shall be subject to alteration, suspension and repeal, in the discretion of the legislature.

Sec. 381. Dividends—Made from Surplus or Profits—Personal Liable of Directors for Debts.—It shall not be lawful for the directors of any bank, or moneyed or manufacturing corporation in this state, or corporation organized under this act to make dividends, except from the surplus or net profits arising from the business of the corporation, nor to divide, withdraw, or in any way pay to the stockholders or any of them, any part of the capital stock of the said corporation, or to reduce the said capital stock, except according to this act, without the consent of the legislature; and in case of any violation of the provisions of this section the directors under whose administration the same may happen shall, in their individual and private capacities, jointly and severally, be liable at any time within the period of six years after paying any such dividend to the said corporation, and to the creditors thereof, in the event of its dissolution or insolvency, to the full amount the dividend made or capital stock so divided, withdrawn, or

paid out, or reduced, with legal interest on the same from the time such liability accrued; provided, that any of the said directors who may have been absent when the same was done or who may have dissented from the act or resolution by which the same was done, may respectively exonerate themselves from such liability by causing their dissent to be entered at large on the minutes of the said directors, at the time the same is done, or forthwith after they shall have notice of the same, and by causing a true copy of the dissent so entered on the minutes to be published, within two weeks after the same shall have been entered on said minutes, in some public newspaper published in the county where the said corporation has its office or place of business; and if none be published in such county, then in a newspaper printed in an adjoining county, and circulating in the neighborhood of such office or place of business of said corporation; and provided also, that this section shall not be construed to prevent a division and distribution of the capital stock of the corporation, which shall remain after the payment of all its debts, upon the dissolution of the corporation or the expiration of its charter.

Sec. 382. Company Specially Chartered—Powers of.—If any act shall hereafter be passed by the legislature of this state which shall by its terms enact that any person therein named or described shall be incorporated by any name and for any purpose therein stated, such corporation shall immediately be vested with and possessed of all powers in this act specified and set forth, subject to all provisions and restrictions therein contained, unless such special act incorporating the same shall otherwise in whole or in part direct to the contrary.

Sec. 383. Company Organized under any General Law—Powers of.—Any corporation organized under any general law of the legislature now or hereafter to be passed, shall, in addition to the powers and restrictions thereon to which it may become subject or of which it shall be possessed by virtue of its organization and the act authorizing the same, be additionally possessed of all powers and be subject to all restrictions thereon in this act contained, as far as the same are consistent with the act under which it may, as aforesaid, be organized.

CHAPTER XXIII.

NEW JERSEY CORPORATIONS—FORMATION, CONSTITUTION, ALTERATION AND DISSOLUTION.

PURPOSES FOR WHICH FORMED—CERTIFICATE—FILING AMENDED CERTIFICATE—CERTIFICATE AND COPY AS EVIDENCE—HOLDING REAL ESTATE OUT OF STATE—DIRECTORS, QUALIFICATIONS AND ELECTIONS—OFFICERS, WHEN CHOSEN—VOTE BY PROXY—MEETING, HOW CALLED—INCREASE OF STOCK—COMMON AND PREFERRED STOCK—HYPOTHECATED STOCK—ASSESSMENT OF STOCK—PENALTY FOR NON-PAYMENT—INCREASE OF STOCK AND SHARES—PAYMENT OF STOCK, CERTIFICATE—REDUCTION OF STOCK—CHANGE OF NATURE OF BUSINESS—DISSOLUTION OF CORPORATION.

SEC. 384. Purposes for which corporations may be formed.
SEC. 385. The certificate of incorporation—Contents—Authentication—filing and recording.
SEC. 386. Same—Amended certificate—Filing.
SEC. 387. Same—Certificate and certified copy—Evidence.
SEC. 388. Corporate existence—Begins when certificate is filed.
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SEC. 409. Dissolution of corporation—Proceedings for.
SEC. 410. Alteration of act—Reservation by legislature.

Sec. 384. Purposes for which Corporations may be Formed.—It shall be lawful for three or more persons to associate themselves into a company to carry on any kind of manufacturing, mining, chemical, trading or agricultural business, agricultural fairs and exhibitions for the encouragement of competition in agriculture, horticulture, breed of stock and development of speed in horses, the transportation of goods, merchandise or passengers, upon land or water, inland navigation, the building of houses, vessels, wharves or docks, or other mechanical business, the reclamation and improvement of submerged lands, the improvement and sale of lands, the examination, insurance and guaranty of the title to lands; the constructing, maintaining and operating (except in a town or city in which water-works are established and owned by the corporate authorities) works for the special purpose of supplying water for extinguishing fires in mills, factories, manufacturing establishments and other buildings, the damming of rivers and streams, including the storage, transportation and sale of water, and water-power and privileges, with the right to take rivulets, raceways and lands, and erect and maintain dams, reservoirs, raceways, mills, manufactories and other erections, and lease, mortgage, sell and convey the same, or any part thereof, the making, purchasing and selling manufactured articles, and also of acquiring and disposing of rights to make and use the same, the renting buildings and steam or other power therewith, the cutting and digging peat, stone, marl, clay, or other like substance, and dealing in the same, manufactured or unmanufactured, or any wholesale or

retail mercantile business or any lawful business or purpose whatever, upon making and filing a certificate in writing of their organization, in manner hereinafter mentioned; provided, that nothing herein contained shall be construed to authorize the formation of any insurance company (except companies for the insurance or guaranty of the title to lands or any estates or interests in lands), banking company, savings bank, or other corporation intended to derive profit from the loan and use of money, nor of any railroad company, turnpike company, or any other company which shall need to possess the right of taking and condemning lands, except for the damming of rivers and streams, and for purposes appertaining thereto, as hereinbefore specified; and further provided, that this act shall not apply to any river or stream of a less width and volume of water than the Delaware river, ordinarily, at Phillipsburg, in this state, below its junction with the Lehigh, nor to any river or stream below the head of tide-water in the same.[1]

Sec. 385. The Certificate of Incorporation—Contents—Authentication—Filing and Recording.—Such certificate in writing, shall set forth,

I. The name assumed to designate such company, and to be used in its business and dealings;

II. The place or places in this state or elsewhere where the business of such company is to be conducted, and the objects for which the company shall be formed.[2]

III. The total amount of the capital stock of such company, which shall not be less than two thousand dollars the amount with which they will commence business, which shall not be less than one thousand dollars, and the number of shares into which the same is divided, and the par value of each share; provided,[3] that when any corporation is to be formed for the purpose of originating and keeping a herd-register for the entry therein of any kind of thoroughbred horses, cattle, swine, sheep or other domestic animals, the total amount of the said capital stock of such

[1] As amended by act of April 12, 1876; March 3, 1880; and February 29, 1880.

[2] See *post*, § 387.

[3] Sup. of March 18, 1884, P. L., p. 82

herd-register company, may be any sum not less than two hundred dollars, and the amount with which they shall commence business shall not be less than one hundred dollars;

IV. The names and residences of the stockholders, and the number of shares held by each;

V. The periods at which such company shall commence and terminate, not exceeding fifty years; which certificate shall be proved or acknowledged, and recorded as required of deeds of real estate, in a book to be kept for that purpose in the office of the clerk of the county where the principal office or place of business of such company in this state shall be established, and, after being so recorded, shall be filed in the office of the secretary of state; the certificate may contain any limitation upon the powers of the corporation, the directors and the stockholders, that the parties signing the same desire; provided, such limitation does not attempt to exempt the corporation, the directors or the stockholders from the performance of any duty imposed by law.

Sec 386. Same—Amended Certificate—Filing.—By the act of March 31, 1875,[1] it is provided that whenever the original certificate of incorporation filed by any association under any general act for the formation of incorporated companies, is or shall be defective by reason of the omission of any matter required by law to be therein stated, or by reason of defective proof of acknowledgment, or by reason of the same not having been filed in all the offices required by law, the corporators or directors of such association are hereby authorized to make and file an amended certificate in conformity with the law under which such corporation was or shall have been organized, and upon such filing and upon due recording of such amended certificate, if required by law, said association shall be deemed and taken to be and to have been a corporation, from the time of filing such original certificate. It is also provided that nothing therein shall affect any suit or proceeding at the time of filing such amended certificate pending against such corporation or impair any

[1] P. L. 1875, p. 45, N. J. Revis. 1877, p. 197.

rights of action accrued against the stockholders, corporators or directors.

Sec. 387. Same—Certificate and Certified Copy—Evidence.—The said certificate, or a copy thereof, duly certified by said clerk or secretary, shall be evidence in all courts and places.

Sec. 388. Corporate Existence—Begins when Certificate is Filed.—Upon making said certificate, and causing the same to be recorded and filed as aforesaid, the said persons so associating, their successors and assigns, shall be, from the time of commencement fixed in said certificate, and until the time limited therein for the termination thereof, incorporated into a company, by the name mentioned in said certificate; provided, that the legislature may at pleasure dissolve any company created by virtue of this act.

Sec. 389. All Companies Governed by this Act.—All companies that may be hereafter established within this state, under the provisions hereinabove contained, or under any law of this state, and also the officers of every such company, and the stockholders therein, may exercise the powers, and shall be governed by the provisions, and be subject to the liabilities hereinbefore and hereinafter provided.

Sec. 390. Carrying on Business out of State—Holding Real estate out of State.—Any company organized as aforesaid may carry on a part of its business out of this state, and have one or more offices and places of businesss out of this state, and may hold, purchase and convey real and personal property out of this state, the same as if such real and personal property were situated in the State of New Jersey; provided, that the certificate of the organization of such company shall state what portion of its business is to be carried on out of this state, and in what town or city, county and state, its principal office or place of business out of this state is to be situated, and also in what other state or states, territory or territories of the United States, and in what other countries it proposes to carry on operations, and shall also state the name of the town or city, and county, in which the

principal part of the business of said company within the state is to be transacted, and such town or city and county within this state shall be deemed to be the town, place and county in which the operations and business of the company are to be carried on, and its principal place of business within this state within the provisions of this act.[1]

Sec. 391. Directors shall be Shareholders—Officers—Secretary and Treasurer.—The business of every such company shall be managed and conducted by the directors thereof, who shall respectively be shareholders therein, and such other officers, agents and factors as the company shall think proper to authorize for that purpose; and every such company shall have a secretary and treasurer.

Sec. 392. Directors—When to be Chosen—Selection of President.—The directors shall not be less than three in number, and, except as hereinafter provided, they shall be chosen annually by the stockholders at such time and place as shall be provided by the by-laws of the company and shall hold their offices for one year and until others are chosen and qualified in their stead; and one of the directors shall be chosen president, either by the directors or by the stockholders, as shall be directed by the by-laws; but by so providing in its original certificate of incorporation, any company, organized under the act to which this is a supplement, may classify its directors in respect to the time for which they shall severally hold office, the several classes to be elected for different terms; provided, that no class shall be elected for a shorter period than one year or for a longer period than five years, and that the term of office of at least one class shall expire in each year, and such directors shall hold office accordingly; any such company, whose directors shall be so classified and which shall have more than one kind of stock, may, by so providing in its original certificate of incorporation, or in its by-laws, confer the right to choose the directors of any class upon the stockholders of any class or classes, to the exclusion of the others.[2]

[1] As amended by supplement May 9, 1889; P. L. c. 265.

[2] As amended by supplement May 9, 1889, P. L. c. 265.

Sec. 393. Secretary and Treasurer—When Chosen—Secretary to be Sworn—Treasurer to give Bond.—The secretary and treasurer shall also be chosen annually, either by the directors or the stockholders, as the by-laws may direct, and shall hold their offices until others are chosen and qualified in their stead; the secretary shall be sworn to the faithful discharge of his duty, and shall record all the votes of the company and directors in a book to be kept for that purpose, and perform such other duties as shall be assigned to him; and the treasurer shall give bond in such sum, and with such sureties, as shall be required by the by-laws, for the faithful discharge of his duty.

Sec. 394. Same—Other officers.—Other officers, agents and factors of the company shall be chosen in such manner, and hold their offices for such terms, as shall be directed by the by-laws.

Sec. 395. Vacancies—How Filled.—When any vacancy occurs among the directors or secretary or treasurer, by death, resignation, removal or otherwise, it shall be filled for the remainder of the year in such manner as may be provided for by the by-laws of the said company.

Sec. 396.—Vote by Proxy—Meetings—Quorum.—At all meetings of the company absent stockholders may vote by proxy, authorized in writing; and every company may determine, by its by-laws, the manner of calling and conducting all meetings, what number of shares shall entitle the stockholders to one or more votes, what number of stockholders shall attend, either in person or by proxy, or what number of shares or amount of interest shall be represented at any meeting, in order to constitute a quorum; and if the quorum shall not be so determined by the company, a majority of the stockholders in interest, represented either in person or by proxy, shall constitute a quorum.

Sec. 397. Meetings—How Called.—The first meeting of every such company shall be called by a notice, signed by a majority of the persons named in the before-mentioned certificate, and designating the time, place and purposes of the

meeting, and such notice shall, two weeks at least before the time of such meeting, be published in some newspaper of the county where the corporation may be established, or, if there be no newspaper in the county, then in a newspaper of an adjoining county, or said first meeting may be called without such notice or publication if two days' notice be personally served on all the parties named in the certificate, or if all the parties named in the certificate waive such notice and fix a time of meeting, then no notice or publication whatever shall be required of such first meeting.

Sec. 398. Certificate of Stock.—Every stockholder shall have a certificate, signed by the treasurer, certifying the number of shares owned by said stockholder in such company.

Sec. 399. Increase of Stock.—Method of.—Every such company may, at any meeting called for that purpose, increase its capital stock and the number of shares therein until it shall reach the amount named in the original certificate, and in case more capital is necessary an additional certificate shall be filed, under the hands and seals of two-thirds in interest of the stockholders, or their legal representatives, stating the amount of such additional capital required, which shall be proved or acknowledged and recorded in the manner heretofore provided for in this act; provided, that for all stock issued under such supplemental certificates such company, its directors and stockholders, shall be entitled to all the benefits and subject to all the liabilities contained in this act.

Sec. 400. Common and Preferred Stock.—Any such company shall have power to create and issue certificates of two kinds of stock, namely, general stock and preferred stock; which preferred stock shall at no time exceed two-thirds of the actual capital paid in, and may be made subject to redemption, at par, at a fixed time, to be expressed in the certificates thereof; and the holders of such preferred stock shall be entitled to receive, and the said company shall be bound to pay thereon, a fixed yearly dividend, to be expressed

in the said certificate, not exceeding eight per centum, payable quarterly, half-yearly or yearly, before any dividend shall be set apart or paid on the said general stock; and in no event shall the holder of such preferred stock be individually or personally liable for the debts or other liabilities of said company; but in case of insolvency such debts or other liabilities shall be paid in preference to such preferred stock; provided always, that except where it shall be otherwise provided in its original certificate of incorporation, no such company shall create or issue certificates for such preferred stock, except by authority given to the board of directors thereof, by a vote of at least two-thirds of the stock voted at a meeting of the general stockholders duly called for that purpose.[1]

Sec. 401. Transfer of Shares—Hypothecation—Contents of Certificate—What Transfer must Express.—The shares of stock in every corporation of this state shall be deemed personal property, and shall be transferable on the books of such company in such manner as the by-laws may provide; and whenever any transfer of shares shall be made for collateral security, and not absolutely, the same shall be so expressed in the entry of said transfer.

Sec. 402. Assessment of Stock.—The directors of every such company may, from time to time, assess upon each share of general stock such sums of money as two-thirds of the stockholders in interest shall direct, not exceeding, in the whole, the amount at which each share shall be originally limited under the third article of the eleventh section of this act; and such sums so assessed shall be paid to the treasurer at such times and by such installments as the directors shall direct, said directors having given thirty days' notice of the time and place of such payment in a newspaper circulating in the county where such corporation is established.

Sec. 403. Same—Non-payment of—Penalty.—If the owner or owners of any such share or shares shall neglect to pay any sum or sums duly assessed thereon for the space of thirty days after the time appointed for the payment thereof,

[1] As amended by supplement of May 9, 1889; P. L. c. 265.

the treasurer of the company may sell, at public auction, such number of the shares of such delinquent owner or owners as will pay all assessments then due from him or them, with interest, and all necessary incidental charges; provided, two-thirds of the stockholders in interest shall so direct.

Sec. 404. Same—Proceeding for Sale of Shares.—The treasurer shall give notice of the time and place appointed for such sale, and of the sum due on each share, by advertising the same three weeks successively, before the sale, in some newspaper circulating in the county where such company is established, and by mailing a notice to such delinquent stockholder, if he has his post-office address, and shall transfer such shares to the purchaser, who shall be entitled to a certificate therefor.

Sec. 405. Payment of Capital Stock—Filing Certificate of.—The president and directors, with the secretary and treasurer of such company, after the payment of the last instalment of the capital stock so fixed and limited by the company, shall make a certificate, stating the amount of the capital so fixed and paid in in cash; which certificate shall be signed and sworn or affirmed to by the president, secretary and treasurer, and a majority of the directors; and they shall, within thirty days after making the same, cause the same to be recorded in a book to be kept for that purpose in the office of the clerk of the county wherein the business is conducted, or where their principal place of business or office is located.

Sec. 406. Increase of Stock—Certificate of—To be Filed.—If any of the said companies shall increase their capital stock, as before provided in this act, the officers mentioned in the preceding section, after the payment of the last instalment of such additional stock, shall make a certificate of the amount so added and paid in cash, and sign and swear or affirm to the same, and cause it to be recorded in the manner provided in the preceding section.

Sec. 407. Failure or Refusal to make Certificates—Penalty.—If any of said officers shall neglect or refuse to perform the duties required of them in the two preceding sections

for thirty days after written request so to do by a creditor or stockholder of said company, they shall be jointly and severally liable for all debts of the company contracted before such certificate shall be recorded as aforesaid.

Sec. 408. Reduction of Stock—Change of Nature of Business.—Every such company, except where otherwise provided in the certificate of incorporation, may, by a vote of two-thirds in interest of the stockholders or their legal representatives, and in all cases by unanimous consent of the stockholders at any meeting called for that purpose, reduce its capital stock or change the nature of its business; and in such case the certificate of the proceedings, signed and acknowledged as aforesaid, shall, within thirty days after the passing thereof, be recorded in the said book in the clerk's office for the county wherein the business is conducted, or where their principal place of business or office is located, and published for three weeks in a newspaper circulating in said county; and in default thereof the directors of the company shall be jointly and severally liable for all debts of the company, contracted after said thirty days, and before the publication and recording of the copy of the vote as aforesaid; and the stockholders shall also be liable for any such sums as they may respectively receive of the amount so withdrawn.

Sec. 409. Dissolution of Corporation—Proceedings for.—Whenever, in the judgment of the board of directors of any corporation organized under this act, or incorporated under any law of this state, it shall be deemed advisable and most for the benefit of such corporation that the same should be dissolved before the expiration of the time limited in its certificate of incorporation or in its charter, it shall and may be lawful for such board of directors, within ten days after the adoption of a resolution to that effect by a majority of the whole board at any meeting called for that purpose, and of which meeting every director shall have received at least three days' notice, to cause written or printed notice of the adoption of such resolution to be mailed to each and every stockholder of such company residing in the United States, and also within said ten days cause a like notice to be published in one or more newspapers published and circulating in the

county wherein such corporation shall have their principal office, and be conducting their business, at least four weeks successively, once a week, next preceding the time appointed for the same, of a meeting of such stockholders to be held at the office of such company in such county, to take action upon such resolution so adopted by the board of directors, and which meeting shall be held between the hours of ten o'clock in the forenoon and three o'clock in the afternoon of the day so named, and which meeting may, on the day so appointed, by consent of a majority in interest of the stockholders present, be adjourned from time to time for not less than eight days at any one time, of which adjourned meeting notice by advertisement in such paper shall be given ; and if at any such meeting two-thirds in interest of all the stockholders shall consent that such dissolution shall take place, and signify such their consent in writing, then, and in such case, such company shall, upon filing such consent, duly attested by their secretary in the office of the secretary of state, and receiving from him a certificate that such consent has been filed, be dissolved ; and the board of directors of such company shall cause such certificate to be published four weeks successively, at least once in each week, in one or more of the newspaper published and circulating in the county in which such company has been located and conducting its business ; and at the expiration of such time the said board shall proceed to settle up and adjust the business and affairs of such company in the same manner as though the same had been dissolved by the expiration of the time mentioned in their charter or certificate of incorporation ; provided, that the secretary of state shall not issue the certificate of dissolution hereinbefore mentioned until satisfied by due proof that the requirements aforesaid have been fully complied with by such corporation.

Sec. 410. Alteration of Act—Reservation by Legislature. —The provisions contained in this act may be amended or repealed, at the pleasure of the legislature, and every company created by this act shall be bound by such amendment ; but such amendment or repeal shall not take away or impair any remedy against any such corporation or its officers for any liability which shall have been previously incurred.

CHAPTER XXIV.

NEW JERSEY CORPORATIONS—ELECTION OF OFFICERS.

TRANSFER OF STOCK ON BOOKS—TIME OF MAKING—ELECTION OF DIRECTORS—VOTING BY PROXY—EXECUTORS, TRUSTEES, ETC., MAY VOTE—NON-RESIDENT STOCKHOLDERS MAY VOTE—JUDGES OF ELECTION—COMPANY CANNOT VOTE—INVESTIGATION OF ELECTIONS—BY-LAWS REGULATING ELECTIONS—FAILURE TO HOLD ELECTION—SECRETARY MAY CALL MEETING WHEN—WHO MAY BE DIRECTORS—CEASES TO BE DIRECTOR WHEN—FILING LIST OF OFFICERS.

SEC. 411. Transfer and stock books—Open to inspection—List of stockholders—Time of making.
SEC. 412. Elections for Directors—How had—Opening and Closing of Polls.
SEC. 413. Same—Votings—Proxies—Where stock cannot be voted.
SEC. 414. Same—Executors, trustees, etc., holding stock—may vote.
SEC. 415. Same—Non-resident stockholders may vote.
SEC. 416. Same—Alphabetical list of stockholders.
SEC. 417. Same—Judges of election—Candidate for office of director cannot be.
SEC. 418. Same—Company holding its own stock cannot vote on it.
SEC. 419. Same—Complaints touching—Supreme court will summarily investigate.
SEC. 420. By-laws regulating election—When to be made—Transfer books determine who may vote.
SEC. 421. Failure to hold election—Notice of new election.
SEC. 422. Same—Secretary to call meeting on application of stockholders.
SEC. 423. Director—Must be a stockholder.
SEC. 424. Same—Ceasing to be stockholder, ceases to be director.
SEC. 425. List of officers and directors—Filing with secretary of state.

Sec. 411. Transfer and Stock Books—Open to Inspection—List of Stockholders—Time of Making.—The book of books of any incorporated company in this state in which the transfer of stock in any such company shall be registered, and the books containing the names of the stockholders in any such company, shall at all times during the usual hours of transacting business, be open to the examination of every stockholder of such company for thirty day previous to any election of directors ; and that it shall be the duty of the secretary, clerk, treasurer or other officer of each and every incorporated stock company who shall have charge of the transfer books of said company to prepare and make out, at least ten days before every election of said company, a full, true and complete list of all the stockholders of said company entitled to vote at the ensuing election, with the number of shares held by each, which list shall be made and arranged in alphabetical order, and shall at all times during the usual hours for business be open to the examination of any stockholder of such company ; and if any officer having charge of such books or list shall, upon demand by any stockholder, as aforesaid, refuse or neglect to exhibit such books or list or submit them to examination, as aforesaid, he shall for every such offence forfeit the sum of two hundred dollars, the one-half thereof to the use of the State of New Jersey, and the other moiety to him who will sue for the same, to be recovered by action of debt in any court of record, together with costs of suit ; and, further, that the book or books aforesaid shall be the only evidence who are the stockholders entitled to examine such book or books, or list, and to vote in person or by proxy at any election for directors of said company, and the persons receiving the greatest number of votes shall be directors or managers.

Sec. 412. Elections for Directors—How had—Opening and Closing of Polls.—All elections for managers or directors of every incorporated company in this state shall be held by ballot (unless otherwise expressly provided in their respective charters), and that the poll at every such election shall be opened between the hours of nine o'clock in the morning and

five o'clock in the afternoon, and shall continue open at least one hour by daylight, and shall close before nine o'clock in the evening.

Sec. 413. Same—Votings—Proxies—When Stock cannot be Voted.—Unless otherwise provided in their respective charters, certificates or by-laws, at every such election each stockholder shall be entitled to one vote for each share of the capital stock of said company held by him or her, which vote may be given in person or by proxy; but no proxy shall be voted on, allowed or received, for more than three years from its date; nor shall any share or shares of stock be voted on at any election which have been transferred on the books of the company within twenty days next preceding such election.

Sec. 414. Same—Executors, Trustees, etc., holding Stock, may Vote.—Everying person holding stock in any company as executor, administrator, guardian or trustee, shall represent the share or stock in his hands at all meetings of the company, and may vote accordingly as a stockholder; and every person who shall pledge his stock as collateral security may, nevertheless, represent the same at all such meetings, and may vote accordingly as a stockholder.

Sec. 415. Same—Non-resident Stockholders may Vote.—So much and such parts of the several acts of incorporation in this state, or any law thereof as prohibits stockholders residing out of the state from voting on stock held by them, are hereby repealed.

Sec. 416. Same—Alphabetical List of Stockholders.—The board of directors or managers of each and every incorporated company in this state issuing stock shall be required to produce at the time and place of election of such incorporated company during the whole time such election shall be open, a full, true and complete list of all the stockholders of said company entitled to vote at such election, with the number of shares held by each; which list shall be arranged in alphabetical order, and subject to the inspection of any stockholder who may be present at such election; and upon the neglect or refusal of said directors or managers to produce

said list at any election of said company, they shall be ineligible to any office at such election.

Sec. 417. Same—Judges of Election—Candidate for Office of Director cannot be.—No person who is a candidate for the office of director in any incorporated company of this state who shall act as judge, inspector or clerk, or in any other character, as the conductor of any election for directors of such company; and in case any person so acting or conducting at any election shall be elected a director, his election shall be void, and it shall not be lawful for the directors for the time being to appoint such person to the office of director of such company within twelve months next succeeding such election; provided, that this section shall not apply to the first election of directors, in any corporation.

Sec. 418. Same—Company holding its own Stock Cannot Vote on it.—If any incorporated company in this state shall purchase any of the stock of such company, or take the same in payment or satisfaction of any debt due to them, such company shall not vote, in virtue of their stock so purchased or taken, either directly or indirectly, at any election for directors of said company.

Sec. 419. Same—Complaints touching—Supreme Court will summarily Investigate.—It shall be the duty of the supreme court, upon the application of any person or persons, or a body corporate, who may be aggrieved by, or may complain of, any election or any proceeding, act or matter, in or touching the same, reasonable notice having been given to the adverse party, or to those who are to be affected thereby, of such intended application, to proceed forthwith, and in a summary way, to hear the affidavits, proofs and allegations of the parties, or otherwise inquire into the matter or causes of complaint, and thereupon establish the election so complained of, or to order a new election, or make such order and give such relief in the premises as right and justice may appear to said supreme court to require; provided, that the said supreme court may, if the case shall appear to require it, either order an issue or issues to be made up in such manner and form as the supreme court may direct,

in order to try the respective rights of the parties who may claim the same to the office or offices, or franchise in question, or may give leave to exhibit, or direct the attorney-general to exhibit, one or more information or informations in the nature of a *quo warranto* in the premises.

Sec. 420. By-laws regulating Election—When to be Made—Transfer Books Determine who may Vote.—No by-law of the directors and managers of any incorporated company regulating the election of directors or officers of such company shall be valid unless the same shall have been made thirty days previous to any election of such company, and subject to the inspection of any stockholder; and in all cases where the right of voting upon any share or shares of stock of any incorporated company of this state shall be questioned, it shall be the duty of the inspectors of the election to require the transfer book of said company as evidence of stock held in the said company, and all such shares as may appear standing thereon in the name of any person or persons, shall and may be voted on by such person or persons directly by themselves or by proxy, subject to the provisions of the act of incorporation.

Sec. 421. Failure to hold Election—Notice of new Election.—If, at any time hereafter, the election for directors of any bank or other incorporated company of this state shall not be duly held on the day designated or appointed by the act incorporating such bank or other incorporated company, or by the by-laws of any such corporation, it shall be the duty of the president and directors of such bank or other incorporated company to notify and cause an election for directors to be held thereafter as soon as conveniently may be; and in all cases no share or shares shall be voted upon except by such person or persons who may have appeared on the transfer books of said company to have had the right to vote thereon on the day when, by the act of incorporation of such company, or by said by-laws, the election ought to have been held; which said right so to vote shall be exercised by the person so appearing, as aforesaid, upon the transfer books of such company on any day when such election may be held;

no failure to elect directors at the time required by law shall work any forfeiture or dissolution of the corporation, but any justice of the supreme court may summarily order such election to be held upon the application of any stockholder, and punish the directors as for a contempt of court for any neglect or failure to obey the order of such justice in reference to such election.

Sec. 422. Same—Secretary to call Meeting on Application of Stockholders.—By an act approved March 17, 1874,[1] it is provided that if, at any time hereafter the election of directors of any incorporated company of this state, shall not be duly held on the day designated by the act incorporating such company, or on the day designated by the by-laws of such company, it shall be the duty of the secretary of such corporation, on the written request of five stockholders, and in mutual insurance on like request of five policy holders to call a meeting of the stockholders or policy holders of such company for the purpose of electing directors; said call to be made in the same manner as are required by the charter or by-laws of such company for the regular election of directors thereof.[2]

Sec. 423. Directors must be Stockholders.—It shall not be lawful for any person to be elected a director of any body corporate in this state, issuing stock, unless such person shall be at the time of his election a *bona fide* holder of some of the stock of said body corporate.

Sec. 424. Same—Ceasing to be Stockholder Ceases to be Director.—When any person, a director of any body corporate, shall cease to be a *bona fide* holder of some of the stock thereof, he shall cease thereupon to be a director thereof.

Sec. 425. List of officers and directors—filing with Secretary of State.—It shall be the duty of all corporations which may now or hereafter be authorized to transact busi-

[1] P. L. 1874, p. 37; N. J. Revis. 1877, p. 196.

Section two of this act provides that it shall not apply to corporated literary and religious societies.

ness in this state, whether organized under general or special laws, although such corporation may not be organized under the laws of this state, and they are hereby required to file, on or before the thirtieth day of June next, and annually thereafter within thirty days after the usual election of directors, managers or trustees and the officers thereof, whether such election shall have been held on the day fixed by law or not, in the department of state of this state, a complete list, duly authenticated by the signature of the president and secretary, of the names of such directors, managers, trustees and officers, with the date of the election or appointment, term of office and residence of each; and also to designate the business and the location of the principal office or place of business of the company in this state, as also in the state where organized; and for this purpose it shall be the duty of the secretary of state to furnish blanks in proper form, and to safely keep in his office all lists so filed, and issue to the company so filing his certificate thereof, and also to prepare an alphabetical index thereto, which lists and index shall be submitted to the inspection of persons interested at all proper hours; and it shall further be his duty, during the month of April next, to cause a notice of the requirements of this act to be published three times in each of the newspapers in this state authorized to publish the laws; and every such corporation which shall not, within ten days of the time herein fixed, comply with the provisions of this act, shall forfeit the sum of two hundred dollars, the one-half thereof to the use of the State of New Jersey, and the other moiety to him who shall sue for the same, to be recovered by action of debt in any court of record, together with costs of suit.[1]

[1] As amended by supplement of March 8, 1877; P. L., p. 103.

CHAPTER XXV.

NEW JERSEY CORPORATIONS—MANAGEMENT AND LIABILITIES OF DIRECTORS.

STOCKHOLDERS' MEETING—WHERE HELD—OFFICERS NEGLECT OR REFUSAL TO CALL—CALL BY STOCKHOLDERS—DIVIDENDS—WITHDRAWAL OF CAPITAL—LIABILITY OF DIRECTORS AND STOCKHOLDERS—PAYMENT OF CAPITAL TO BE IN MONEY—LOANS TO STOCKHOLDER—ISSUE OF STOCK FOR PROPERTY—FALSE CERTIFICATE—LIABILITY OF OFFICERS FOR DEBTS.

SEC. 426. Stockholders' meeting—To be held at principal office in state—Exception.
SEC. 427. Same—Officers neglecting or refusing to call—Stockholders may call.
SEC. 428. Dividends—Manufacturing corporations to declare annually.
SEC. 429. Withdrawal of capital—Directors and stockholders liable.
SEC. 430. Capital—Payment of to be in money—No loans to stockholders.
SEC. 431. Stock—Issue of for property purchased.
SEC. 432. False certificate—Liability of officers for debts.

Sec. 426. Stockholders' Meeting—Exception to be Held at Principal Office in State.—In all cases where it is not otherwise provided by law the meeting of the stockholders of all corporations of this state shall be held at the principal office or place of business of the company in this state; the directors may hold their meetings, and have an office and keep the books of the company (except the stock and transfer books) outside of this state, if the by-laws of the company so provide; provided, however, that said company shall always maintain a principal office or place of business in this state, and have an agent of the company in charge thereof, wherein shall be kept the stock and transfer books of the company for the

inspection of all who are authorized to see the same, and for the transfer of the stock; and, provided further, that the chancellor of the supreme court, or any justice thereof may, upon proper causes shown, summarily order any or all of the books of said companyto be forth with brought within this state and kept therein at such place as may be designated, for such time as such chancellor, court or judge may deem proper, and upon failure of any company to comply with such order its charter may be declared forfeited by the chancellor of said court, and it shall therefrom cease to be a corporation, and all the directors and officers of said company shall be liable to be punished as for contempt of court for disobedience to such order.

Sec. 427. Same—Officers Neglecting or Refusing to Call, Stockholders may Call.—Whenever, for want of sufficient by-laws for the purpose, or of officers duly authorized, or from the improper neglect or refusal of such officers, or from other legal impediment, a legal meeting of any kind of the stockholders of any corporation cannot be otherwise called, three or more stockholders thereof may call a meeting of the company by giving ten days' notice in a newspaper circulating in the county wherein the business is conducted, or where their principal place of business or office in this state is located; and such meeting of the company; and if there be no officers of the company present, whose duty it is to preside at meetings, the stockholders present may elect officers for the meeting; and it shall be the duty of the secretary of the company to record the proceedings of such meeting in the book of minutes of the company.

Sec. 428.—Dividends—Manufacturing Corporations to Declare Annually.—All manufacturing corporations within this state shall, on the first day of August in each and every year, unless some other specific day for that purpose be fixed in their charter or by-laws, and in that case then on the day so fixed, after reserving over and above their capital stock paid in, as a working capital for said corporation, a sum to be specified by their board of directors, and not exceeding the amount of one-half of the capital stock paid or secured to be

paid, declared a dividend of the whole of their accumulated profits exceeding the amount so reserved as a working capital, and pass the share or dividend of each stockholder of such profits to the credit of their respective stockholders, and pay the same to such stockholders on demand.

Sec. 429. Withdrawal of Capital—Directors and Stockholders liable.—If any part of the capital stock of such company shall be withdrawn and refunded to the stockholders before the payment of all the debts of the company contracted previously to the recording and publishing of a copy of a vote for that purpose, as prescribed in the thirty-third section hereof, the president and directors of the company shall be jointly and severally liable for the payment of the said last-mentioned debts; and the stockholders shall also be liable for any such sums of money as they may respectively receive of the amount so withdrawn.

Sec. 430. Capital Payment of to be in Money—No Loans to Stockholders.—Nothing but money shall be considered as payment of any part of the capital stock of any company organized under this act, except as hereinafter provided for the purchase of property; and no loan of money shall be made to a stockholder or officer therein; and if any such loan shall be made to a stockholder or officer of the company, the officers who shall make it, or who shall assent thereto, shall be jointly and severally liable, to the extent of such loan and interest, for all the debts of the company contracted before the repayment of the sums so loaned.

Sec. 431. Stock—Issue for or Property Purchased.—The directors of any company incorporated under this act may purchase mines, manufactories or other property necessary for their business, or the stock of any company or companies owning mining, manufacturing or producing materials, or other property necessary for their business, and issue stock to the amount of the value thereof in payment therefor, and the stock so issued shall be declared and be taken to be full paid stock and not liable to any further call, neither shall the holder thereof be liable for any further payments under any of the

provisions of this act; and said stock shall have legibly stamped upon the face thereof, "issued for property purchased," and in all statements and reports of the company to be published, this stock shall not be stated or reported as being issued for cash paid into the company, but shall be reported in this respect according to the fact.[1]

Sec. 432. False Certificate—Liability of Officers for Debts.—If any certificate made, or any public notice given by the officers of any company, in pursuance of the provisions of this act, shall be false in any material representation, all the officers who shall have signed the same shall be jointly and severally liable for all the debts of the company contracted while they were stockholders or officers thereof.

[1] As amended by supplementary act of May 9, 1889; P. L., c. 265.

CHAPTER XXVI.

NEW JERSEY CORPORATIONS—REMEDIES.

DIRECTORS AND TRUSTEES ON DISSOLUTION—POWERS AND LIABILITIES OF TRUSTEES—CONTINUANCE OF CORPORATION FOR SETTING UP—DIRECTORS, CONTINUED AS TRUSTEES ON DISSOLUTION—RECEIVER APPOINTED, WHEN—JURISDICTION OF CHANCELLOR—DUTY OF RECEIVERS—LIEN OF WORKMEN—VESTING OF PROPERTY IN STOCKHOLDERS—SUITS NOT ABATED ON DISSOLUTION—EXECUTION AGAINST CORPORATION—SCHEDULE OF PROPERTY—DEBTS DUE CO.—PROCEEDINGS IN INSOLVENCY OF CO.—BILL IN CHANCERY—EVIDENCE OF INSOLVENCY—POWERS OF RECEIVER—QUALIFICATIONS AND OATH—EXAMINATION OF WITNESSES—BREAKING DOORS AND MAKING SEARCH—COMPOUNDING DEBTS AND ALLOWING SET-OFFS—DISPUTED CLAIM—REMOVAL OF RECEIVER—DISTRIBUTION OF ASSETS—SUBSTITUTION OF RECEIVER—APPEAL FROM RECEIVER'S DETERMINATION—EFFECT OF APPOINTMENT OF RECEIVER—SALE OF MORTGAGED PROPERTY—SALE OF FRANCHISE—PROCESS AGAINST CORPORATION—SERVICE ON FOREIGN CORPORATIONS—SERVICE BY PUBLICATION—LIEN ON LANDS—HOW LIABILITY OF OFFICERS AND DIRECTORS ENFORCED—BILL IN CHANCERY—PAYMENT OF DEBTS BY, RECOVERY—WHEN PROPERTY OF STOCKHOLDER AND DIRECTOR TO BE SOLD.

SEC. 433. Against the corporation—Directors to be trustees on dissolution.
SEC. 434. Same—Powers and liabilities of trustees.
SEC. 435. Same—Continuance of corporate existence for settling up business.
SEC. 436. Same—Dissolution—Directors may be continued as trustees—Receiver may be appointed when.

SEC. 437. Same—Chancellor has full jurisdiction.
SEC. 438. Same—Duties of receivers.
SEC. 439. Same—Lien of workmen in case of insolvency.
SEC. 440. Same—On dissolution property vests in stockholders.
SEC. 441. Same—Dissolution—Suits do not abate on.
SEC. 442. Same—Execution against corporation—Schedule of property to be shown sheriff.
SEC. 443. Same—Execution—Satisfaction out of—Debts due the company.
SEC. 444. Same—Failure or refusal to comply with above sections—Penalty.
SEC. 445. Same—Insolvency of company—Directors to call a meeting of stockholders.
SEC. 446. Same—Insolvency—Bill in chancery for injunction and receiver.
SEC. 447. Same—Insolvency—Evidence of.
SEC. 448. Same—Receivers—Court of chancery may appoint—Powers of.
SEC. 449. Same—Receivers—Qualifications of—Form of oath.
SEC. 450. Same—Receiver—Examination of—Witnesses respecting effects of the company.
SEC. 451. Same—Receiver may break doors and make search.
SEC. 452. Same—Receiver to file inventory and accounts.
SEC. 453. Same—Receiver—Power to sue, compound debts, allow set-offs, etc.
SEC. 454. Same—Suit by receiver—Disputed claim—Trial by jury.
SEC. 455. Same—Majority of receivers may act—Removal of receivers.
SEC. 456. Same—Distribution of assets of insolvent corporation.
SEC. 457. Same—Receiver may be substituted in pending suit.
SEC. 458. Same—Receiver's determination—Appeal to the chancellor from.
SEC. 459. Same—Appointment of receiver—Corporation not to transact business after—Forfeiture of charter.
SEC. 460. Same—Mortgaged property—Sale free of liens.
SEC. 461. Same—Franchise of railroad, canal, etc., may be sold.
SEC. 462. Same—Limitation of act.
SEC. 463. Same—Process against a corporation—Method of service.
SEC. 464. Same—Service of process on foreign corporations.
SEC. 465. Same—When defendant in court.
SEC. 466. Same—Service by publication when.
SEC. 467. Same—Commencement of action—Lien on company's land.
SEC. 468. Same—Dissolution of corporation does not abate suits.
SEC. 469. Against directors and stockholders—Liabilities of officers and directors enforced by action on the case.
SEC. 470. Same—Enforcement by bill in chancery.
SEC. 471. Same—Payment of debt by officers and stockholders—Recover of company.
SEC. 472. Same—Property of director or stockholder—When to be sold for company's debts.

Sec. 433. Against the Corporation—Directors to be Trustees on Dissolution.—Upon the dissolution in any manner of any corporation already created or which may here-

after be created by or under any law of this state, the president and directors, or the managers of the affairs of the said corporation at the time of its dissolution, by whatever name they may be know in law, shall be trustees of such corporation, with full power to settle the affairs, collect the outstanding debts and divide the moneys and other property among the stockholders, after paying the debts due and owing by such corporation at the time of its dissolution, as far as such moneys and property shall enable them.

Sec. 434. Same—Powers and Liabilities of Trustees.—The persons constituted trustees, as aforesaid, shall have authority to sue for and recover the aforesaid debts and property by the name of the trustees of such corporation, describing it by its corporate name, and shall be suable by the same name, or in their own names or individual capacities, for the debts owing by such corporation at the time of its dissolution, and shall be jointly and severally responsible for such debts to the amount of the moneys and property of such corporation at the time of its dissolution, and which shall come to their hands or possession.

Sec. 435. Same—Continuance of Corporate Existence for Settling up Business.—All such corporations, whether they expire by their own limitation, or shall be annulled by the legislature, or otherwise dissolved, shall nevertheless be continued bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their concerns, to dispose of and convey their property, and to divide their capital stock, but not for the purpose of continuing the business for which such corporation may be established.

Sec. 436. Same—Dissolution—Directors may be Continued as Trustees—Receiver may be Appointed when.—When any corporation shall be dissolved in any manner whatever, the chancellor, on application of any creditor or stockholder of such corporation at any time, may either continue such directors trustees as aforesaid, or appoint one or more persons to be receivers of and for such corporation, to take charge of the estate and effects thereof, and to collect

the debts and property due and belonging to the company with power to prosecute and defend, in the name of the corporation or otherwise, all such suits as may be necessary or proper for the purposes aforesaid, and to appoint an agent or agents under them, and to do all other acts which might be done by such corporation, if in being, that may be necessary for the final settlement of the unfinished business of the corporation; and the powers of such trustees or receivers may be continued as long as the chancellor shall think necessary for the purposes aforesaid.

Sec. 437. Same—Chancellor has full Jurisdiction.—The chancellor shall have jurisdiction of said application, and of all questions arising in the proceedings thereon, and may make such orders, injunctions and decrees therein as justice and equity shall require.

Sec. 438. Same—Duties of Receivers.—The said trustees or receivers shall pay all debts due from the corporation, if the funds in their hands shall be sufficient therefor, and if not, they shall distribute the same ratably among all the creditors who shall prove their debts in the manner that shall be directed by an order or decree of the court for that purpose; and if there shall be any balance remaining after the payment of such debts and necessary expenses, they shall distribute and pay the same to and among those who shall be justly entitled thereto, as having been stockholders of the corporation, or their legal representatives.

Sec. 439. Same—Lien of Workmen in case of Insolvency.—In case of the insolvency of any corporation, the laborers then or theretofore in the employ thereof shall have a lien upon the assets thereof for the amount due to them respectively, which shall be paid prior to any other debt or debts of said company; and the word "laborers" shall be construed to include all persons doing labor or service of whatever character for or as workmen or employes, in the employ of such corporation; and the lien shall have reference to and comprise all claims for such labor or services rendered for or in behalf of such corporations before the date which the court adjudges

to be the time when the insolvency occurred which gives it jurisdiction, whether such "laborers" were in the actual employ of such corporation at that time or not.[1]

This act shall not only apply to all proceedings in insolvency hereafter begun, but as well to any now pending where the assets have not been distributed.

Sec. 440. Same—On Dissolution Property Vests in Stockholders.—On the final dissolution of any corporation created under this act, all its real and personal estate, not legally disposed of, shall be vested in the individuals who may be stockholders at the time of such dissolution, in their respective proportions, and they shall hold the same as tenants or owners in common.

Sec. 441. Same—Dissolution—Suits do not Abate on.—In any action now pending or to be commenced in any court of record of this state against any corporation now or hereafter existing, or that may be created hereafter, if said corporation become dissolved, by the expiration of its charter or otherwise, before final judgment obtained therein, the said action shall not abate by reason thereof; but the dissolution of said corporation being suggested, and the names of the trustees of said corporation being entered upon the record, the said action shall proceed to final judgment against the said trustees by the name of the corporation.[2]

Sec. 442. Execution against Corporations—Schedule of Property to be shown Sheriff.—Every agent or other person having charge of any property of a corporation, on request of any public officer having for service a writ of execution against it, shall furnish the names of the directors and secretary, or stockholders thereof, and a schedule of all its property, including debts due or to become due to such corporation, so far as he may have knowledge of the same.

Sec. 443. Same—Execution—Satisfaction out of Debts due the Company.—If any such officer holding an execution shall be unable to find other property belonging to such corporation

[1] As amended by the supplement of March 31, 1887; P. L., p. 99.

[2] See *post*, § 454.

liable to execution, he, or the judgment creditor, may elect to satisfy such execution, in whole or in part, by any debts due the same, not exceeding the amount thereof; and it shall be the duty of any agent or other person having the custody of any evidence of such debt to deliver the same to the officer, for the use of the creditor; and such delivery, with a transfer to the officer in writing, for the use of the creditor, and notice to the debtor, shall be a valid assignment thereof; and such creditor may sue for and collect the same in the name of such corporation, subject to such equitable set-offs on the part of the debtor as may be in other assignments.

Sec. 444. Same—Failure or Refusal to Comply with above Sections—Penalty.—Every such agent or other person who shall neglect or refuse to comply with the provisions of the two preceding sections, shall be himself liable to pay to the execution creditor the amount due on said execution, with costs.

Sec. 445. Same—Insolvency of Company—Directors to call a Meeting of Stockholders.—Whenever any incorporated company in this state shall become insolvent, it shall be the duty of the directors or managers thereof, within ten days thereafter, to call a public meeting of the stockholders, and to lay before them for inspection and examination all the books of accounts, by-laws and minutes of the said corporation, and to exhibit to the said meeting a full and true statement of all the estate, funds and property of the said company, and of all the debts due and owing to the said company, and by whom, and of all the debts owing by the said company, and to whom, as far as the said directors and managers can at that time make out the same, so as to exhibit to the stockholders a full, fair and true account of the situation of the affairs of the said company.

Sec. 446. Same—Insolvency—Bill in Chancery for Injunction and Receiver.—Whenever any incorporated company shall have become insolvent, or shall suspend its ordinary business for want of funds to carry on the same, it shall and may be lawful for any creditor or stockholder to apply, by petition or bill of complaint, to the chancellor, setting forth the facts and circumstances of the case, for a writ of

injunction, and the appointment of a receiver or receivers, or trustees; whereupon the chancellor, being satisfied of the sufficiency of said application, and also of the truth of the facts and allegations contained in the said petition or bill, by affidavit or otherwise, and upon giving, when so ordered, such reasonable notice, to be served or published, as the chancellor in an order to be made for that purpose shall direct, the chancellor may proceed in a summary way to hear the affidavits, proofs and allegations which may be offered by or on behalf of the parties; and if upon such inquiries into the matters or cause of complaint it shall be made to appear to the chancellor that the said company has become insolvent, and shall not be about to resume its business in a short time thereafter with safety to the public and advantage to the stockholders, it shall and may be lawful for the chancellor to issue an injunction to restrain the said company and its officers and agents from exercising any of the privileges or franchises granted by its certificate, or by the act incorporating the said company, and for collecting or receiving any debts, or from paying out, selling-assigning or transferring any of the estate, moneys, funds, lands, tenements or effects of the said company, until the court shall otherwise order.

Sec. 447. Same—Insolvency—Evidence of.—Whenever two or more of the directors or the cashier of any banking company shall admit that the said bank is insolvent or unable to pay its debts, and the said bank shall neglect or refuse to pay its debts, when demanded within the usual and proper hours of business, or whenever such banking company shall have stopped payment, by neglecting or refusing to redeem their bills, notes or other evidences of debt in specie or in the notes of some other incorporated bank, current at the time in this state at par value, for want of funds, or shall have closed its doors during banking hours, or taken any other measures with intent to prevent the creditors of the said bank from demanding payment of their just debts, or from presenting the notes or bills of the said bank for redemption as aforesaid, or shall have suspended the ordinary business of the said banking company, shall from the time thereof be deemed and

considered insolvent within the true intent and meaning of this act.

Sec. 448. Same.—Receivers—Court of Chancery may Appoint—Powers of.—It shall and may be lawful for the court of chancery, if the circumstances of the case and the ends of justice require it, at the time of ordering the said in-injunction, or at any other time afterwards during the continuance of the said injunction, to appoint a receiver or receivers, or trustee or trustees, with full power and authority to demand, sue for, collect, receive and take into their possession, all the goods and chattels;rights and credits, moneys and effects, lands and tenements, books, papers, *choses in action*, bills, notes and property of every description belonging to the said company at the time of their insolvency or suspension of business as aforesaid, and to sell, convey or assign all the said real or personal estate, and to pay into the court of chancery all the moneys and securities for money arising from such sales, or which the said receiver receivers, or trustee or trustees, shall collect or receive by virtue of the authority vested in them, to be disposed of by the said receiver or receivers, or trustee or trustees, from time to time, under the order of said court, among the creditors of the said company, first making to the receiver or receivers, or trustee or trustees, such reasonable compensation as the chancellor may deem just and proper, and also deducting the costs of the proceedings in the said court.

Sec. 449. Same—Receivers—Qualifications of—Form of Oath.—Before the said receiver or receivers, or trustee or trustees, shall be capable of acting, he or they shall comply with such terms as the chancellor in his order appointing him or them may prescribe, and he or they shall respectively take and subscribe the following oath or affirmation, before one of the masters of the court of chancery, or before the chanceller: "I,———, do swear (or affirm) that I will faithfully, honestly and impartilly execute the powers and trusts reposed in me, as receiver or trustee (as the case may be), for the creditors and stockholders of the——, and that without favor or affection," which oath or affirmation shall be filed in the office of the

clerk in chancery, within ten days after the taking thereof.

Sec. 450. Same—Receiver—Examination of Witnesses Respecting Effects of the Company.—It shall and may be lawful for the receiver or receivers, or trustee or trustees, in order to enable them to ascertain and secure the property and effects of the company for which he or they shall be appointed as aforesaid, to send for persons and papers, and to examine the said persons and the president, directors, managers, cashier and all other officers and agents of the said company, on oath or affirmation (which oath or affirmation the said receiver or receivers, or trustee or trustees, are hereby empowered to administer), respecting the affairs and transactions of the said company, and the estate, money, goods, chattels, credits, notes, bills and *choses in action*, real and personal estate and effects of every kind of the said company; and if any such person shall refuse to be sworn or affirmed, and to make answer to such questions as shall be put to him, or shall refuse to declare the whole truth touching the subject-matter of the said examination, then it shall be lawful for the chancellor, on report made to him by the said receiver or receivers, or trustee or trustees, to commit such person to prison, there to remain until he shall submit himself to be examined as aforesaid, and shall pay all the costs of such proceedings against him.

Sec. 451. Same.—Receiver may break Doors and make Search.—It shall be lawful for the said receiver or receivers, or trustee or trustees, with the assistance of a peace officer, to break open, in the day-time, the houses, shops, warehouses, doors, trunks, chests or other places of said company for which he or they shall be appointed receiver or receivers, or trustee or trustees, as aforesaid, where any of the said company's goods, chattels, *choses in action*, notes, bills, moneys, books, papers, or other writings or effects, have been usually kept or shall be, and to take possession of the same, and also to take possession of the lands and tenements belong to said corporation.

Sec. 452. Same—Receiver to file Inventory and Accounts.—It shall be the duty of the receiver or receivers, or trustee or trustees, so to be appointed as soon as they conveniently can after taking possession of the estate and effects

of the company for which he or they shall be appointed as aforesaid, to lay before the court of chancery a full and complete inventory of all the estate, property and effects of the said company, its nature and probable value, and an account of all the debts due from the said company and of the debts due to it, as near as the said receiver or receivers, or trustee or trustees, can ascertain the same at that time, and also to make a report of their proceedings to the said court every six months thereafter, until the said trust shall be completed.

Sec. 453. Same—Receiver—Power to sue, Compound Debts, allow Set-offs, etc.—The receiver or reeeivers, or trustee or trustees, so to be appointed, shall be deemed and taken to be a receiver or receivers, or trustee or trustees, for the creditors and stockholders of the company for which they shall be appointed, with full power and authority, whenever they shall deem it proper, to institute suits at law or in equity in his or their own name or names as receiver or receivers, or trustee or trustees, as aforesaid, for the recovery of any estate real or personal, debts, rights in action, damages and demands whatsoever and wheresoever existing in favor of the said company, at the time of the insolvency or suspension of business as aforesaid of the said company or accruing subsequent thereto, and with power and authority, in their discretion, to compound and settle with any debtor of the said company, or with persons having possession of their property, or in any way responsible, in law or in equity, to the said company, at the time of its insolvency or suspension of business as aforesaid, upon such terms and in such manner as the said receiver or receivers, or trustee or trustees, shall deem just and beneficial, under all the circumstances, to the persons, interested in the funds and property of the said corporation; and in case of mutual dealing between the said corporation and any other person or persons, to allow just set-offs in favor of such persons, in all cases in which it shall appear to the said receiver or receivers, or trustee or trustees, that the same ought to be allowed, according to law and equity; provided, that where a debtor shall have paid *bona fide* his debt to the said company, without notice that the said company had become

insolvent, or had suspended its business as aforesaid, he, she or they shall not be liable to pay the same to the receiver or receivers, trustee or trustees.

Sec. 454. Same—Suit by Receiver—Disputed Claim—Trial by Jury.—Any creditor who shall lay his claim before the receiver or receivers, or trustee or trustees, appointed in pursuance of this act, may, at the same time, declare his desire that a jury may decide thereon; and in like manner the said receiver or receivers, or trustee or trustees, may require that the same shall be referred to a jury; and in either case, such request shall be entered on the minutes of the said receiver or receivers, or trustee or trustees, and thereupon an issue shall be made up between the parties under the direction of one of the justices of the supreme court, and a jury empaneled, as in other cases, to try the same at the circuit court next to be holden in the county in which the said company carried on their business; the verdict of such jury shall be subject to the control of the supreme court as in suits originally instituted in the said court, and when rendered, if not set aside by the court, shall be certified by the clerk of the supreme court to the said receiver or receivers, or trustee or trustees, and such creditor or creditors shall be considered, in all respects, as having proved their debts for the amounts so ascertained to be due them.

Sec. 455. Same—Majority of Receivers may Act—Removal of Receivers.—Every matter and thing by this act required to be done by the receiver or receivers, or trustee or trustees, of any such incorporated company, shall be good and effectual, to all intents and purposes, if performed by a majority of them; and it shall and may be lawful for the court of chancery to remove any receiver or receivers, or trustee or trustees, so to be appointed, and to appoint another or others in his or their place or places, or to fill any vacancy or vacancies which may occur, as the said court may deem expedient and proper.

Sec. 456. Same—Distribution of Assets of Insolvent Corporation.—In payment of the creditors and distribution of the funds of any such company, the creditors shall be paid

proportionally to the amount of their respective debts, excepting mortgage and judgment creditors, when the judgment has not been by confession for the purpose of preferring creditors; and that the said creditors shall be entitled to such distribution on debts not due, making in such a case a lawful rebate of interest, when interest is not accruing on the same; and the surplus funds, if any, after payment of the creditors, and the costs and expenses as aforesaid, and the preferred stockholders, may be divided and paid to the general stockholders proportionally, according to their respective shares; provided, however, that the provisions of this section shall not be held or construed to in any way change, alter or affect the provisions of section sixty-three of said act.[1]

Sec. 457. Same—Receiver may be Substituted in Pending Suit.—In all suits in any court of law or equity which shall be pending in the name of any such incorporated company as aforesaid, at the time of the appointment of a receiver or receivers, or trustee or trustees, as aforesaid, it shall be lawful for the said courts, and they are hereby directed, on application to the said receiver or receivers, or trustee or trustees, to cause the said receiver or receivers, or trustee or trustees, to be substituted as plaintiff or plaintiffs, in the place and stead of the said company, or to carry on such suit in the name of the said company, for the use of the said receiver or receivers, or trustee or trustees.

Sec. 458. Same—Receivers' Determination—Appeal to the Chancellor from.—In case any such company or person or persons whatever shall think themselves or himself aggrieved by the proceedings or determination of the said receiver or receivers, or trustee or trustees, in the discharge of their duty, it shall be lawful for the party aggrieved to appeal to the chancellor, who shall, in a summary way, hear and determine the matter complained of, and make such order touching the same as shall be equitable and just; and the chancellor, in the execution of the powers and authority under this act, is hereby vested with all the jurisdiction and

[1] As amended by supplement of March 8, 1877; P. L. 1877. p. 74.

power which is lawful for the court of chancery to exercise in suits depending in that court, and may proceed according to the rules, principles and practices of that court, except when otherwise directed by this act; and all cases brought before the chancellor under this act shall be considered as depending in the court of chancery, and the orders and decisions carried into effect the same as in other causes of equity jurisdiction.

Sec. 459. Same—Appointment of Receiver—Corporation not to Transact Business after—Forfeiture of Charter.—Whenever an injunction shall have been granted against any incorporated company, as provided for in this act, and a receiver or receivers, or trustee or trustees, shall have been appointed, as further provided for, and said injunction and appointment shall have continued for four months, it shall not be lawful for the stockholders or directors of said corporation or any other person whatever to use or exercise the franchise of such corporation, or to transact any business in their name, or by color of their charter, except such as may be necessary to collect their property and assets, and to sell the same, and distribute the proceeds among the creditors and stockholders of said corporation, and that for all other purposes the chancellor may at any time, by order, in such suit or proceedings, with or without notice to any one, and without any further proceedings or judgment, declare the charter of said corporation forfeited and void.[1]

Sec. 460. Same—Mortgaged Property—Sale Free of Liens.—Where the property of an insolvent corporation, in the hands of a receiver or receivers, or trustee or trustees, appointed under the laws of this state, is incumbered with mortgages or other liens, the legality of which is brought in question, and the property is of a character materially to deteriorate in value pending the litigation, the court of chancery may order such receiver or receivers, or trustee or trustees, to sell the same clear of incumbrances, at public or private sale, for the best price that can be obtained, bringing the money into the court of chancery, there to remain subject

[1] As amended by the act of March 8, 1877; P. L., 1877, p. 74.

to the same liens and equities of all parties in interest as was the property before it was sold, and to be disposed of as the said court, by its decree, shall order and direct.

Sec. 461. Same—Franchise of Railroad, Canal, etc., may be Sold.—Whenever receivers or trustees, appointed or to be appointed by virtue of this act, for the creditors and stockholders of any company, shall have charge of any canal, railroad, turnpike or other work of a public nature, in which the value of the work is dependent upon the franchise, and in the continuance of which the public as well as the corporators and creditors of such company have an interest, it shall be lawful for such receivers or trustees to sell or lease the principal work for the construction whereof the said company were incorporated, together with all the chartered rights, privileges and franchises belonging to said company and appertaining to such principal work; and the purchaser or purchasers, lessee or lessees of such principal work, chartered rights, privileges and franchises, shall thereafter hold, use and enjoy the same during the whole of the residue of the term limited in the charter of said company, or during the term in such lease specified, in as full and ample a manner as the stockholders of such company could or might have used and enjoyed the same, subject, however, to all the restrictions, limitations and conditions contained in such charter; provided that nothing in this section contained shall be so construed as to apply to or in any wise affect any corporation authorized by law to exercise banking privileges.

Sec. 462. Same—Limitation of Act.—Nothing in this act contained relating to insolvent corporations shall apply to any incorporated literary or religious society, or any corporation not formed for the purposes of gain, or destroy or impair any right or remedy already existing against any incorporated company.

Sec. 463. Same—Process against a Corporation—Method of Service.—When any personal action shall be commenced against a corporation in any of the courts of law of this state, the first process to be made use of may be a summons, a copy whereof shall be served on the president or other head officer

of the said corporation, or left at his dwelling-house or usual place of abode, at least six entire days before its return; and in case the president or other head officer of the said corporation cannot be found in this state, to be served with process as aforesaid, and has no dwelling-house or usual place of abode within this state, then a copy of the said summons shall be served on the clerk or secretary of the said corporation, if any there be, and if no clerk or secretary, then on one of the directors of the corporation, or left at his dwelling-house or usual place of abode, six entire days before its return.

Sec. 464. Same—Service of Process on Foreign Corporations.—In all personal suits or actions hereafter brought in any court of this state against any foreign corporation or body corporate, not holding its charter under the laws of this state, process may be served upon any officer, director, agent, clerk or engineer of such corporation or body corporate, either personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of such officer, directors, agent, clerk or engineer, or by leaving a true copy of such process at the office, depot or usual place of business of such foreign corporation or body corporate, and such service shall be good and valid to all intents and purposes.

Sec. 465. Same—When Defendant in Court.—When the sheriff or other officer shall return such summons "served" or "summoned," the defendant shall be considered as appearing in court, and may be proceeded against accordingly.

Sec. 466. Same—Service by Publication when.—In case the sheriff or other officer shall return such summons "not served" or "not summoned," and an affidavit shall be made to the satisfaction of the court that process cannot be served as mentioned in the eighty-seventh section of this act,[1] then the court shall make an order directing the defendants to cause their appearance to be entered to the said action, on or before the first day of the next term of the said court, a copy of which order shall, within twenty days, be inserted in one of the public newspapers printed in this state, for at least six

[1] See *Supra*, § 463.

weeks, and a copy of the same order shall also be posted up within the time aforesaid in three public places in this state, as shall be ordered by the said court, for at least six weeks, and if the defendants shall not appear within the time limited by such order, or within such further time as the court shall appoint, then on proof made of the due publication of such order, the court being satisfied of the truth thereof, shall order the clerk to make an appearance for the defendants, and thereupon the action shall be further proceeded in as if the said defendants had caused their appearance to be entered to the said action.

Sec. 467. Same—Commencement of Action—Lien on Company's lands.—It shall not be lawful for any corporation against whom any order shall be made for publication as aforesaid, after the entry of the said order in the minutes of the court, to grant, bargain, sell, alien or convey any lands, tenements or real estate in this state (in case the said summons issued out of the supreme court), or in the county in which the said summons shall have been issued (in case the said summons issued out of one of the inferior courts of common pleas in this state), of which said corporation shall be seized or entitled to at the time of making such order, until the plaintiff in the action shall be satisfied his legal demand, or until judgment shall be entered for the defendants; and the said action shall be and remain a lien on such lands, tenements and real estate from the time of entering the said order for publication in the minutes of the court, and the said lands, tenements and real estate shall and may be sold on execution, as if no conveyance had been made by the said corporation.

Sec. 468. Same—Dissolution of Corporation does not abate Suits.—In any action now depending or to be commenced in any court of record of this state against any corporation now or heretofore existing, or that may be created hereafter, if said corporation become dissolved by the expiration of its charter or otherwise, before final judgment obtained therein, the said action shall not abate by reason

thereof; but the dissolution of said corporation being suggested, and the names of the trustees or other legal representatives of said corporation being entered upon the record, the same action shall proceed to final judgment against said trustees or other legal representatives by the name of the corporation.[1]

Sec. 469. Against Directors and Stockholders—Liabilities of Officers and Directors Enforced by Action on the Case.—When any of the officers or directors of any company, or stockholders thereof, shall be liable, by the provisions of this act, to pay the debts of such company, or any part thereof, any person to whom they shall be so liable may have an action on the case against any one or more of the said officers, directors or stockholders; and the declaration in such action shall state the claim against the company, and the ground on which the plaintiff expects to charge the defendants personally.

Sec. 470. Same—Enforcement by Bill in Chancery.—When any of the said officers, directors or stockholders are liable, as mentioned in this act, for the debts of any such company, or any part thereof, the person to whom they are so liable may, instead of the other proceedings mentioned in this act, have his remedy against the said officers, directors or stockholders by a bill in chancery.

Sec. 471. Same—Payment of Debts by Officers and Stockholders—Recover of Company.—Any officer, director or stockholder of a company who shall pay any debt of the company for which he is made liable by the provisions of this act, may recover the amount so paid in an action against the company for money paid for their use, in which action the property of the company only shall be liable to be taken, and not the property of any stockholder.

Sec. 472. Same—Property of Director or Stockholder—when to be sold for Company's Debt.—No sale or other satisfaction shall be had of the property of any director or stockholder for any debt of the corporation of which he is such director or stockholder till judgment shall have been obtained therefor against such corporation, and execution

[1] See *ante*, § 437.

thereon returned unsatisfied, but any suit brought against any such director or stockholder for such debt shall stay, after execution levied or other proceedings to acquire a lien, until such returns shall have been made.[1]

[1] See *ante*, § 377.

CHAPTER XXVII.

NEW JERSEY CORPORATIONS—MISCELLANEOUS AND SUPPLEMENTARY PROVISIONS.

SEC. 473. Application for special charters and for renewals—Notice of.

SEC. 474. Manufacturing act of 1846.

SEC. 475. Foreign corporations—Power to hold and mortgage lands in this state.

SEC. 475a. Foreign corporation may hold land.

SEC. 475b. Same—Foreign benevolent corporations may hold land.

SEC. 476. Franchise—Contracts for transfer or merging of—Must be recorded.

SEC. 477. Manufacturing company act of 1848—Repealer.

SEC. 478. Manufacturing company act of 1849—Repealer.

SEC. 479. Foreign corporations—Subject to act.

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SEC. 481. Taxation of property of corporations—Proviso.

SEC. 481a. Same—Property of manufacturing corporations—How taxed.

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SEC. 481d. Same—Annual reports by certain companies to state board of assessors.

SEC. 481e. Same—Penalties for false statement, or neglect to make statement.

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SEC. 499. Mining company—Assessment of stock—May be made by directors when.
SEC. 500. Stock issued for property purchased—Guaranteed dividends.
SEC. 501. Incorporation of company—Where incorporator is dead another may be appointed.
SEC. 502. Creation of capital stock by.
SEC. 503. Rights of corporation holding stock of other corporations.

Sec. 473. Application for Special Charters and for Renewals—Notice of.—When any person or persons shall be disposed to make application to the legislature of this state for an act of incorporation for any purpose whatever, or any company or association, already incorporated, shall be disposed to make application for a renewal of their charter, or any alteration in the law so incorporating them, or when any application shall hereafter be made for the purpose of obtaining a law authorizing the erection of a bridge over any navigable

water in this state, it shall be the duty of such person or persons so applying, or the directors or stockholders of such incorporation, or some of them, to signify his or their intention, by advertisement, to be inserted for at least six weeks, successively, in one or more of the newspapers published in the county where the objects of such associations or corporation are carried, or intended to be carried, into effect, and if no newspaper be published in such county, then in the newspaper or newspapers published nearest to the same, and specify the object of such incorporation or application, the amount of capital stock requisite to carry their objects into effect; and, in case of an application for any alteration in any charter already granted, it shall be the duty of the stockholders or directors of such incorporation to state in such notice, specifically, the alteration so to be applied for; and that due proof shall be made of such notice having been published previous to leave being given to bring in any bill to comply with such application.

Sec. 474. Manufacturing Act of 1846—Companies Formed under May come under this Act.—Any company formed under and pursuant to an act entitled "An act to authorize the establishment and to prescribe the duties of manufacturing companies," approved the twenty-fifth day of February, eighteen hundred and forty-six, and the several supplements thereto, may come under and be subject to the provisions and liabilities of this act, in the same manner as if formed under the same, if such company make a certificate, under the hands of the president and directors of the company, that said company desires to come under the said provisions and liabilities; which certificate shall be acknowledged, recorded and filed in the same manner as the certificate required by this act; and such company, on the recording and filing of said certificate as aforesaid, shall be free from the liabilities and provisions of the said act under which said company was formed; provided, that nothing in this section contained shall be held to affect any transaction, liabilities or debts of any such company heretofore done, accrued or contracted.

Sec. 475.—Foreign Corporations—Power to hold and Mortgage Lands in this State—Whereas, by the laws of this state, corporations are authorized to carry on a portion of their business out of this state, and such general provision is embraced in the laws of other states granting such powers; and whereas, doubts have arisen as to whether foreign corporations can hold, mortgage and convey lands in this state; therefore, it shall be lawful for foreign corporations to acquire, hold, mortgage, lease and convey such real estate in this state as may be necessary for the purpose of carrying on the business of such corporations in this state, or such as they may acquire by way of mortgage or otherwise in the payment of debts due to said foreign corporation; and foreign corporations having charter authority to engage in the business of acquiring, holding, mortgaging, leasing and conveying real estate, are hereby authorized to pursue the conduct of such business in this state, and to that end to acquire, hold, mortgage, lease and convey real estate in this state; and any conveyances or mortgages to or by such foreign corporations of lands in this state heretofore made, are hereby declared to be good and valid in this state, both in law and equity.[1]

Sec. 475a.—Foreign Corporations may Hold Land.—It shall be lawful for any corporation incorporated, created, registered or chartered by any foreign state, kingdom or government, to hold, mortgage, lease and convey such real estate in this state as may be necessary for the purpose of carrying on the business of such corporation in this state, or such real estate as it may acquire, by way of mortgage or otherwise, in the payment of debts due such corporation; provided, such state, kingdom or government, under whose laws such corporation was created, shall not be at the time of such purchase at war with the United States.[2]

Sec. 475b.—Same—Foreign Benevolent Corporations may Hold Land.—It shall be lawful for foreign corporations,

[1] As amended by the supplement of April 11, 1887; N. J. L. 1887, p. 157. The supplement omits the preamble, but as there is no express repealer.

[2] N. J. L. 1882, p. 137.

created and organized for charitable or benevolent purposes, to hold, mortgage, lease and convey such real estate in this state as may be devised or conveyed to them for the purposes of their creation, anything in the laws of this state to the contrary notwithstanding.[1]

Sec. 476. Contracts for Transfer or Merging of Franchise must be Recorded.—All contracts or agreements for the sale, letting, leasing, consolidating, merging, or in any manner disposing of or transferring the franchises, privileges, or any part thereof, of any company or organization incorporated by or under the laws of this state, shall be acknowledged or proved as conveyances of land in this state are authorized to be acknowledged and proved, and shall be recorded in the office of the secretary of state within two months after the execution thereof, at the proper cost of the parties thereto; and unless such contract or agreement is lodged with the secretary of state for record within thirty days from the date of the execution thereof, the same shall be of no effect until recorded; and copies of the said record, duly certified by the secretary of state, shall be received in evidence in any court of this state, and be as good, effectual and available in law as if the original contract or agreement was then and there produced; provided, nevertheless, that this act shall not be held or construed by any court, or by any officer or person whomsoever, as having rendered, or as rendering, invalid or of no effect any such contract or agreement as in said act mentioned, as between the parties to such contract or agreement, nor in favor of or for the benefit of any person or corporation having notice of the contract or agreement, although such contract or agreement has not been or may not be lodged for record or recorded according to the directions of said act; but every such contract or agreement which has not been, and which may not hereafter be, lodged for record and recorded pursuant to the directions of said act, shall, between the parties to such contract or agreement, and as to every person or corporation having notice thereof, have the same force and effect as if such contract or agree-

[1] N. J. L. 1883, p. 220.

ment had been lodged for record and recorded pursuant to the directions of said act, and such contracts or agreements may be lodged for record and recorded at any time, and from the time of lodging the same for record shall be considered as duly notified to all persons entitled to notice thereof.

Sec. 477. Manufacturing Company Act of 1846—Repealed.—"An act to authorize the establishment and to prescribe the duties of manufacturing companies," approved February twenty-fifth, eighteen hundred and forty-six, and the several supplements thereto, are hereby repealed; but no company established under the said act or any of said supplements, or any person having claims or demands against said company, shall be affected by the repeal thereof.

Sec. 478. Manufacturing Company Act of 1849—Repealer.—"An act to authorize the establishment and to prescribe the duties of companies for manufacturing and other purposes," approved March second, eighteen hundred and forty-nine, and the several supplements thereto, are hereby repealed; but no company established under the said act, or any of the said supplements, or any person having claims or demands against said company, shall be affected by the repeal thereof.

Sec. 479. Foreign Corporations Subject to Act.—Foreign corporations doing business in this state shall be subject to all the provisions of this act, so far as the same can be applied to foreign corporations.

Sec. 480. General Repealer.—All acts and parts of acts, general or special, inconsistent herewith, be and the same are hereby repealed.

Sec 481. Taxation of Property of Corporations—Proviso.—All the real and personal estate of every corporation* incorporated by any act of the legislature, or by the filing of a certificate or otherwise under any general law of this state, shall be taxed the same as the real and personal estate of an individual; provided, however, that the provisions of this section shall not apply to railway, turnpike, insurance, canal or banking corporations, or to savings banks,

as to cemeteries, church property, or purely charitable or educational associations.[1] But all corporations, whether manufacturing corporations or otherwise, organized or acting under the provisions of this act, or the act to which this is a supplement, shall hereafter be taxed upon their capital stock at its actual value and accumulated surplus.[2]

Sec. 481a. Same—Property of Manufacturing Corporation—How Taxed.—All real and personal estate of every manufacturing company or corporation shall be taxed the same as the real and personal estate of an individual.[3]

Sec. 481b. Same—Tax on Franchise.—Every telegraph, telephone, cable or electric light company, every express company, not owned by a railroad company and otherwise taxed, every gas company, palace or parlor or sleeping car company, every oil or pipe-line company, and every fire, life, marine or accident insurance company, doing business in this state, except mutual fire insurance companies which do not issue policies on the stock plan, shall pay an annual tax, for the use of the state, by way of a license for its corporate franchise, as hereinafter mentioned; provided, however, that no company or society shall be construed to be a life insurance company doing business in this state within the purview of this act which, by its act or certificate of incorporation, shall have for its object the assistance of sick, needy or disabled members, the defraying of funeral expenses of deceased members, and to provide for the wants of the widows and families of members after death.[4]

Sec. 481c. Same—Amount of Franchise Tax to be paid by Certain Corporations.—Each telegraph, telephone, cable and express company shall pay to the state a tax at the rate of two per centum upon the gross amount of its receipts so returned or ascertained: that each gas company and electric light company shall pay to the state a tax at the rate of one-

[1] As amended by act of March 7, 1878, which strikes out the word "hereafter" after incorporated. By act of March 14, 1879, corporations are taxed on capital and surplus. By act of May 11, 1886, the property of manufacturing companies is taxed the same as that of an individual.

[2] N. J. L. 1879, p. 348, § 2.

[3] N. J. L. 1886, p. 345.

[4] N. J. L. 1884, p. 232, § 1.

half of one per centum upon the gross amount of its receipts so returned or ascertained, and five per centum upon the dividends of said company in excess of four per centum so earned or declared; that each oil or pipe-line company shall pay to the state a tax at the rate of eight-tenths of one per centum upon the gross amount of its receipts so returned or ascertained; that each insurance company, other than life, shall pay to the state a tax at the rate of one per centum upon the gross amount of its premiums so returned or ascertained; that each life insurance company, incorporated under the laws of this state, shall pay to the state an annual franchise tax of one per centum upon the amount of its surplus on the thirty-first day of December next preceding the time of such payment as fixed in section five, as the same shall be ascertained by the commissioner of insurance of this state, according to the actuaries' table of mortality, and four per centum interest; that each life insurance company, not incorporated under the laws of this state, but doing business therein, shall pay to the state an annual tax of two per centum on the amount of premium collected during the year ending December thirty-first, as aforesaid, from residents of this state, except on the amount of premiums collected from industrial insurance, on which amount each company shall pay to the state an annual tax of one per centum per annum, deducting from said premiums the amount of dividends actually allowed in rebate of the same, and the amount paid during said year to residents of this state for claims under matured policies; the secretary of state, acting as the commissioner of insurance, shall ascertain and report to the state board of assessors all the facts necessary to enable the board to ascertain and fix the amount of tax to be paid by life insurance companies under this act; that each parlor, palace or sleeping car company shall pay to the state treasurer a tax at the rate of two per centum upon the gross amount of its receipts so returned or ascertained; if any oil or pipe-line company has part of its transportation line in this state and part thereof in another state or states, such company shall return a statement of its gross receipts for transportation of oil or petroleum over its

whole line, together with a statement of the whole length of its line and the length of its line in this state; such company shall pay tax to the state at the aforesaid rate upon such proportion of its said gross receipts as the length of its line in this state bears to the whole length of its line; that all other corporations incorporated under the laws of this state, and not hereinbefore provided for, shall pay a yearly license fee or tax of one-tenth of one per cent. on the amount of the capital stock of such corporations; provided, that this act shall not apply to railway, canal or banking corporations, or to savings banks, cemeteries or religious corporations, or purely charitable or educational associations or manufacturing companies, or mining companies carrying on business in this State.[1]

Sec. 481d. Same—Annual Reports by Certain Companies to State Board of Assessors.—On or before the first Tuesday of May next, and annually thereafter, it shall be the duty of the president, treasurer, or other proper officer of every corporation of the character specified in the preceding section, to make report to the state board of assessors, appointed and to be appointed under the act entitled "An act for the taxation of railroad and canal property," stating specifically the following particulars, namely: Each telegraph, telephone, cable and express company, not owned by a railroad company and otherwise taxed, shall state the gross amount of its receipts from business done in this state for the year preceding the first day of January prior to the making of such report; each electric light company shall state the gross amount of its receipts for light or power supplied within this state for the year preceding the first day of February prior to the making of such report; each gas company shall state the gross amount of its receipts for business done in this state during the same time, and the amount of dividends earned or declared for the same period; each parlor, palace or sleeping car company shall state the gross amount of its receipts for fare or tolls for transportation of passengers within this state during the same time; each oil or pipe-line company engaged in the transpor-

[1] N. J. L. 1884, p. 234, § 4.

tation of oil or crude petroleum shall state the gross amount of its receipts for the transportation of oil or petroleum through its pipes or in and by its tanks or cars in this state during the same time; each fire, marine or accident insurance company shall state the total amount of premiums received by it for insurance upon the lives of persons resident, or property located within this state, during the same time.[1]

Sec. 481e. Same—Penalties for False Statement, or Neglect to make Statement.—If any officer of any company required by this act to make a return as aforesaid, shall, in such return, make a false statement, he shall be deemed guilty of perjury; if any such company shall neglect or refuse to make such return, within the time limited as aforesaid, the state board of assessors shall ascertain and fix the amount of such receipts in such manner as may be deemed by them most practicable, and the amount fixed by them shall stand as the basis of taxation of such company under this act.[2]

Sec. 481f. Same—Proceedings of State Board of Assessors.—The state board of assessors shall certify and report to the comptroller of the state, on or before the first Monday of June in each year, a statement of the amount of gross receipts as returned by each company to, or ascertained by, the said board, and the amount of tax due thereon respectively, at the rate fixed by this act; such tax shall thereupon become due and payable, and it shall be the duty of the state treasurer to receive the same; if the taxes of any company remain unpaid on the first day of July, after the same becomes due, they shall thenceforth bear interest at the rate of one per cent. for each month until paid; the state board of assessors shall have power to require of any corporation subject to tax under this act, such information or reports touching the affairs of such company as may be necessary to carry out the provisions of this act, and may require the production of abstracts of the books of such companies, and may swear and examine witnesses in relation thereto; the comptroller shall receive as compensation for his services under

[1] N. J. L. 1884, p. 232, § 2.

[2] N. J. L. 1884, p. 233, § 3.

this act, and under the act entitled, "An act for the taxation of railroad and canal property," approved April 10th, eighteen hundred and eighty-four, the sum of five hundred dollars annually.[1]

Sec. 481g. Same—The Tax is a Debt for which an Action may be Brought.—Such tax, when determined, shall be a debt due from such company to the state, for which an action at law may be maintained after the same shall have been in arrears for the period of one month; such tax shall also be a preferred debt in case of insolvency.[2]

Sec. 481h. Same—Injunction Against Company Neglecting to Pay Tax.—In addition to other remedies for the collection of such tax, it shall be lawful for the attorney-general, either of his own motion or upon the request of the state comptroller, whenever any tax due under this act from any company shall have remained in arrears for a period of three months after the same shall have become payable, to apply to the court of chancery, by petition in the name of the state, on five days' notice to such corporation, which notice may be served in such manner as the chancellor may direct, for an injunction to restrain such corporation from the exercise of any franchise, or the transaction of any business within this state until the payment of such tax and interest thereon, and the costs of such application, to be fixed by the chancellor; the said court is hereby authorized to grant such injunction, if a proper case appear, and upon the granting and service of such injunction, it shall not be lawful for such company thereafter to exercise any franchise or transact any business in this state until such injunction be dissolved.[3]

Sec. 482. Dividends—Time of Declaring—Change of.—When a company incorporated under the laws of this state is limited by its charter to certain fixed times for declaring dividends, or for holding its annual meetings of stockholders for the election of directors, such corporation shall have power at any time to change the time or times for declaring its dividends and holding said annual meetings, upon the

[1] N. J. L. 1884, p. 235, § 5.
[2] N. J. L. 1884, p. 235, § 6.
[3] N. J. L. 1884, p. 236, § 7.

vote of two-thirds in interest of its stockholders, at any regular meeting of said stockholders.[1]

Sec. 483. Corporate Existence—Extension of.—It shall be lawful for any corporation heretofore or hereafter created under or by virtue of any law of this state, at any time before the expiration of its charter, or of the period named in its certificate of organization, to file in the office of the secretary of state a certificate under its common seal, attested by the signature of its presiding officer, declaring its desire that the period of its existence as such corporation shall be extended for any time therein mentioned, not exceeding fifty years.[2]

Sec. 483a. Same—Extension after Term in Charter has Expired.—The supplementary act of 1887, provides that any corporation that has failed, during the period for its continuance named in its charter or certificate of incorporation, to file with the secretary of state a certificate extending its corporate existence, as permitted by statute, but has continued, and still continues its organization and the transaction of business, may still file such certificate at any time within thirty days from the passage of this act, naming therein a period not exceeding fifty years.

Section two of the same act provides that upon filing such certificate the period of the existence of such corporation shall be revived and extended as declared in such certificate as fully as if said period had been named in the original charter or certificate of organization of such corporation, but nothing herein contained shall be construed to interfere with the right of the State of New Jersey, reserved by any law now or hereafter existing, to acquire the property and franchises of any such corporation, or at any time to abolish or repeal, alter or amend the charter of the same, nor shall this act be construed to continue any irrepealeable or other contract with the state contained in any charter, nor shall this act apply to any corporation against which *quo warranto* or other proceedings for dissolution are pending.[4]

[1] N. J. L. 1876, p. 74; Supp. Rev. 145.

[2] N. J. L. 1876, p. 235, § 1; Supp. to Rev. 150.

[3] N. J. L. 1887, p. 137, § 1.

[4] N. J. L. 1887, p. 137, § 2.

The supplementary act of 1889[1] provides that it shall be lawful for any corporation hitherto created under or by virtue of any law of this state, which has maintained its organization, but which may have failed to renew or extend its corporate existence, as provided by law, to do so for a period not exceeding fifty years, by filing a certificate to that effect in the department of state; provided, that such corporation shall be subject to all charges, fees and taxes now imposed by law upon like corporations.

Sec. 483b. Same—On Filing Certificate Existence is Extended.—Upon filing such certificate the period of the existence of such corporation shall be extended as therein declared as fully as if the said period had been named in the original charter or certificate of organization of such corporation.[2]

Sec. 483c. Same—Extension not to Impair the Rights of the State.—Nothing herein contained shall be construed to interfere with the right of the state, reserved by any law now or hereafter existing, to acquire the property or franchises of any such corporation, or at any time to abolish or repeal, alter or amend the charter of the same; nor shall this act be construed to continue any irrepealable or other contract with the state contained in any charter beyond the time originally fixed for its expiration; nor shall this act apply to any corporation against which *quo warranto* or other proceedings for dissolution are pending.[3]

Sec. 483d. Same—Extension of Corporate Existence does not Extend Special Exemptions from Taxation.—Nothing contained in the act to which this is a supplement shall be construed as continuing in force and operation any special provision relating to taxation, or exemption therefrom, in the charter of any corporation whose corporate existence may have been, or hereafter shall be, extended in conformity with the terms of said act; but each corporation whose corporate existence may have been, or shall be, extended as authorized thereby, shall be assessed for taxes in

[1] N. J. L. 1889, p. 367, § 1.
[2] N. J. L. 1889, p. 367, § 2.
[3] N. J. L. 1889, p. 367, § 3.

accordance with the provisions of the general law of this state relating to taxation of corporations.[1]

Sec. 484. Same—How the Corporate Existence Extended.—Upon making and filing such certificate, the period of the existence of such corporation shall be extended as declared in such certificate as fully as if the said period had been named in the original charter or certificate of organization of such corporation.[2]

Sec. 485. Same—Charters not Irrepealable.—Nothing herein contained shall be construed to interfere with the right of the State of New Jersey, reserved by any law now or hereafter existing, to acquire the property and franchises of any such corporation, or at any time to abolish or repeal, alter or amend the charter of the same, nor shall this act be construed to continue any irrepealable or other contract with the state contained in any charter beyond the time originally fixed for its expiration.[3]

Sec. 486. Directors of Water or Manufacturing Companies—Residence of—Majority must Reside within State.—It shall not be necessary for any of the directors of any water or manufacturing company heretofore or which may be hereafter organized under the act to which this is a further supplement, or any other act, general or special, or in pursuance of any special charter, to reside in any specified township or city in this state, although it may be so required by any such special act or special charter, neither shall it be necessary to limit the number of directors of any such company so organized or which may be so organized under any of such acts or under any such special charter, to the number named therein or in any of them; provided, that the directors of any such company shall not be less than three in number; and provided, that a majority of the directors of any such company shall be residents of this state.[4]

It is enacted by the supplementary act of 1881[5] that it shall

[1] N. J. L. 1882, p. 76, § 1.
[2] N. J. L. 1876, p. 235, § 2; Supp. to Rev. 150.
[3] N. J. L. 1876, p. 235, § 3; Supp. to Rev., p. 150.
[4] N. J. L. 1878, p. 212.
[5] N. J. L. 1881, p. 122, § 1.

not be necessary for more than one of the directors of any cotton, woollen, chemical or other manufacturing company organized under any law of this state, to be an actual inhabitant and resident of this state; provided, that every such company having only one of its directors an actual inhabitant and resident of this state shall, in addition to the matters required by the first section of this act, entitled "A supplement to act entitled 'An act concerning corporations,'" approved April seventh, one thousand eight hundred and seventy-five, which supplement was approved March eighth, one thousand eight hundred and seventy-seven, also at the same time and manner as therein provided, designate and file in the office of the secretary of state of this state the name and place of abode of such resident director.

Sec. 487. Shares—Change of Par Value of.—Any company organized under the provisions of said act, may change the par value of the shares of its capital stock by filing in the office of the secretary of state the assent, in writing, of stockholders representing two-thirds in value of the capital stock for the time being, and also a certificate, under the hands and seals of said stockholders, or their legal representatives, stating the par value to which it is proposed to change said shares which said certificate shall be proved or acknowledged and recorded in the manner provided in said act for the original certificate of organization, and the certificate of the secretary of state that such assent and certificate have been filed in his office shall be taken and accepted as evidence of such change of par value in any court of this state; provided, however, such assent and certificate shall be filed as aforesaid within thirty days after the execution of the same by said stockholders.[1]

Sec. 488. Same—Increase of Number of by Subdividing.—Any company or association organized under the act to which this is a supplement, or otherwise, may increase the number of its shares of stock by subdividing the amount of each share, including therein as well the par value thereof as

[1] N. J. L. 1878, p. 157.

also any assessments actually paid in thereon, into shares of such equal par value as it may agree on, by filing in the office of the secretary of state, the assent in writing of stockholders representing two-thirds in value of the capital stock for the time being, and also a certificate under the hands and seals of said stockholders or their legal representatives, stating the par value at which it is proposed to fix said shares, which certificate shall be proved or acknowledged and recorded, as required of deeds of real estate, in the office of the clerk of the county where the principal office or place of business of such company in this state shall be established, and after being so recorded shall be filed in the office of the secretary of state, and the certificate of the secretary of state that such assent and certificate have been filed in his office, shall be taken and accepted as evidence of such subdivision of shares and alteration of their par value in any court of this state; provided, however, that such assent and certificate shall be filed as aforesaid within thirty days after the execution of the same by said stockholders; and provided further, that in no case shall the capital stock of any such company filing such certificate and assent be increased thereby beyond the amount limited in its charter or certificate of organization, except in the manner now provided by the act to which this is a supplement.[1]

Sec. 489. Capital Stock—Increase of by paying Bonds.—In all cases where the bonds of any corporation created by or organized under any act of the legislature of this state have been heretofore issued, and which bonds are due or about to become due, or may be paid by such corporation at its option, it shall be lawful for the board of directors of such corporation to increase its capital stock in order to provide means for the payment of such bonds, and for that purpose to issue and sell the shares of such increase of capital stock for cash only, and in such manner as they deem best, at a price not below the par value of such shares; but no greater number of shares shall be issued or sold than shall be sufficient to raise an amount sufficient for the payment of the principal

[1] N. J. L. 1879, p. 88.

sums secured by the said bonds and the interest accrued thereon; and certificates of stock shall be issued to the purchasers of such additional shares, upon payment in cash of the purchase price thereof; and the holders of the said shares of the increased capital stock hereby authorized shall possess and exercise the same rights and privileges in all respects as are possessed and exercised by the holders of the other shares of the capital stock of said corporation (other than the preferred stock thereof): and the proceeds of the sale of the shares representing such increase of said capital stock shall be applied to the payment of such outstanding bonds as aforesaid, and to no other purpose whatever.[1]

If the capital stock of any corporation shall be increased, as is authorized by the preceding section of this act, it shall be the duty of its president and secretary, within thirty days thereafter, to make a certificate, under their respective oaths or affirmations, setting forth what bonds of such corporation have been paid by the proceeds of increased capital stock and the number of shares of the increased capital stock thereof that have been issued for that purpose, and to cause such certificate to be filed and recorded in the office of the secretary of state of this state.[2]

Sec. 489a. Same—Any Company except Railroad and Canal Companies may increase Capital Stock.—It shall be lawful for any corporation of this state, whether organized under a special act of incorporation or under general laws, excepting always railroad and canal corporations, to increase its capital stock to such an amount as may be determined by its board of directors; provided, that such corporation shall, previous to the issuing of any share of stock representing such increase of its capital, file in the office of the secretary of state for this state a certificate, signed by its president and under its corporate seal, attested by its secretary, setting forth the amount of the proposed increase of capital and the number of shares of stock into which the same is to be divided, and also the assent, in writing, of stockholders owning at least

[1] N. J. L. 1882, p. 39, § 1.

[2] N. J. L. 1882, p. 39, § 2.

two-thirds in value of the existing capital stock to said proposed increase of capital.[1]

Sec. 490. Corporation in hands of Receiver—May Mortgage Property when.—Any corporation which now is, or hereafter shall be, in the hands of receivers, or of a receiver by virtue of proceedings in the court of chancery, may, whenever such corporation shall be re-organizing or arranging its property and debts to resume the management and control of its property and business, with the consent of the court of chancery, mortgage its property and franchises for such amount as may be necessary, at a rate of interest not exceeding the rate of interest secured by any pre-existing mortgage of real estate made by such corporation.[2]

Sec. 490a. Same—What Companies may come under this Act.—Any company formed under and pursuant to "An act to authorize the establishment and to prescribe the duties of companies for manufacturing and other purposes," approved the second day of March, one thousand eight hundred and forty-nine, and the several supplements thereto, may come under and be subject to the provisions and liabilities of the act to which this is a supplement, in the same manner as if formed under the same, if such company make a certificate, under the hands of the president and directors of the company, that said company desires to come under the said provisions and liabilities, which certificate shall be acknowledged, recorded and filed in the same manner as the certificate required by this act; and such company, on the recording and filing of said certificate as aforesaid, shall be free from the liabilities and provisions of the said act under which said company was formed; provided, that nothing in this supplement contained shall be held to affect any transactions, liabilities or debts of any such company heretofore done, accrued or contracted.[3]

Sec. 491. Co-operative Companies—Formation of—Capital.—For the purpose of co-operation in carrying on any manufacturing or co-operative trade authorized by the tenth

[1] N. J. L. 1889, p. 155.
[2] N. J. L. 1878, p. 29.
[3] N. J. L. 1879, p. 348, § 1.

section [1] of the act to which this is a supplement, seven or more persons may associate themselves with a capital of not less than one thousand nor more than fifty thousand dollars.[2]

Sec. 492. Principal Office—Removal of.—It shall be lawful for any corporation existing under and by virtue of the laws of this state, whether created by special charter or otherwise, to locate its principal office at such place in this state as may be for the best interests of its business, irrespective of the location of the principal office named in the charter or articles of organization of the corporation; provided, that such corporation cause to be made and filed a certificate, in writing, in manner hereinafter mentioned: such certificate shall set forth, first, the name of such corporation and the city or town in which it is located by charter, or in which its principal office had previously been located, and, second, the place, town or city in which it proposes to locate the principal office for its business and dealings in the place and stead of that referred to in last preceding paragraph, and which said certificate shall be signed by the board of directors, or a majority of said board, and filed in the office of the secretary of state, and to which certificate shall be affixed the official seal of said board and the affidavit of the secretary or acting secretary of such corporation that the said certificate is made by the authority of the board of directors or managers of such corporation, as expressed by a two-thirds vote of the members present at a regular or special meeting of said board called for that purpose; provided, such removal is not outside of this state.[3]

Sec. 493. Insolvent Company—Forfeiture of Charter.—The charter of no corporation shall be forfeited and void, notwithstanding the injunction and appointment mentioned in section eighty-three[4] of the act to which this is a supplement shall have continued for four months; provided, said corporation shall have been heretofore managed and doing business under and order of the court of chancery.[5]

[1] *Ante*, § 384.
[2] N. J. L. 1880, p. 326.
[3] N. J. L. 1880, p. 49.
[4] *Ante*, § 459.
[5] N. J. L. 1877, p. 75, § 3.

Sec. 494. Same—May issue Bonds.—In any case where any company organized under any general or special act of the legislature of this state for manufacturing purposes has heretofore become, or is, or may become insolvent, it shall be lawful for the directors of the said company, in the name of the company, the consent of two-thirds of the stockholders in interest, or their legal representatives, having been first obtained, to issue bonds or additional stock, or both, in full or part payment or settlement of any or all claims against such company, with the consent of the claimants, and subject to the approval of the chancellor in case a receiver has been appointed; in any case where there has been no election for directors after the insolvency became known to the stockholders, or after a receiver has been appointed, it shall be necessary to obtain the assent of two-thirds of the stockholders to the issue of such bonds or stock, and in all cases where stock is issued the total amount thereof shall not exceed the amount of the claims against the company for which stock is taken, and the amount so issued, together with the capital stock already authorized, although the same may not have been fully issued, shall be taken and considered to be the limit of the capital stock of the company; and a statement shall be filed with the secretary of state showing the whole amount of capital stock so authorized and issued; if bonds are issued, they may be made convertible into stock, at the option of the holders, if the directors deem it for the best interest of the company, and in that case the amount of such bonds must be included in the statement filed with the secretary of state, showing the amount of capital stock authorized; and any stock issued under the provisions of this act may be issued in whole or in part as preferred stock, bearing interest not exceeding six per centum per annum, with or without further participation in the earnings of the company: if a receiver has been appointed, it shall be lawful for the chancellor to discharge or relieve him from further service on being shown that the directors have made provision for all of the claims against the company, according to this act or otherwise, excepting only such claims as were

previously secured by mortgage, and to permit said company by its directors and officers, to resume and conduct its business and exercise all the franchises existing at the time of the insolvency.[1]

Sec. 495. Certificate of Stock Lost—New Certificate Issued.—Every corporation of this state shall have the power to issue a new certificate or certificates of stock in the place of any certificate or certificates theretofore issued by it, but which, it is alleged, have been lost or destroyed; and the directors authorizing such issue of a new certificate or certificates may, in their discretion, require the owner of such lost or destroyed certificate, or his legal representatives, to give the corporation a bond, in such sum as they may direct, as surety against any claim that may be made against such corporation; but said directors may direct such issue of a new certificate or certificates without requiring any bond as security, when, in their judgment, it is proper for the corporation so to do; when application is to be made under section two of this act,[2] the corporation shall require a bond to be given equal to the market value of the stock lost or destroyed.[3]

Sec. 496. Same—Discharge of Corporation from Liability for Issuing New Certificates.—When any corporation shall have issued a new certificate or certificates, as authorized in section one of this act,[4] to the owner of lost or destroyed certificates representing stock exceeding the par value of twenty thousand dollars, such corporation may apply to the chancellor, or any justice of the supreme court, for an order requiring all persons in interest to show cause, at the time and place to be named therein, why the corporation should not be discharged of and from all liability, to any and all persons, by reason of the issuing of such new certificate or certificates of stock as aforesaid, and why all persons claiming any title to or interest in the old certificate or certificates, so lost or destroyed as aforesaid, should not be barred from all right of action thereunder; that upon the presentation of such application, said chancellor, or any justice of the supreme court to whom the same shall be presented, shall make an order directing all

[1] N. J. L. 1882, p. 167.
[2] *Post*, § 496.
[3] N. J. L. 1882, p. 205, § 1.
[4] *Ante*, § 495.

persons in interest to show cause as aforesaid ; the application shall be by petition, duly verified by one of the officers of the corporation, and shall state the name of the corporation, the number and date of the certificates, if known, the number of shares of stock named therein, to whom issued, the name of the owner thereof at the time the same was lost or destroyed and of the present owner, as far as known ; the chancellor or justice of the supreme court, in making the order to show cause, shall direct that service of said order be made either within or without the state, upon the person named in the petition as the owner of the stock so lost or destroyed, and shall also direct a copy of said order to be served upon all others in interest, by publication thereof in one or more newspapers in this state, or elsewhere, and said order shall require said alleged owner and all other persons in interest to appear and show cause, as required by said order ; and such publication shall be once a week for not less than two weeks, or more than four weeks ; the order to show cause shall be returnable not more than six weeks from the time of the presentation thereof to such chancellor or justice, and shall require all persons claiming any interest in said stock to appear on the return day of said order, and show cause as aforesaid ; and on the return day of said order, and upon proof of the service and publication as aforesaid, said chancellor or said justice shall proceed in a summary manner, and in such mode as he may deem advisable, to inquire into the truth of the facts stated in the petition, and shall hear such proof and allegations as may be offered by or in behalf of the petitioner relative to the subject-matter of said application ; and if, upon such inquiry, the said chancellor or justice shall be satisfied that the person to whom the new certificate of stock was issued by such corporation was the lawful owner at the time of said loss or destruction of said certificates of the capital stock of said corporation, for which said new certificate was issued by said corporation, and that the new certificate is for the number of shares so lost or destroyed as aforesaid, and that the old certificate or certificates cannot, after due diligence, be found, and if no person shall appear on such return day claiming to be the owner of or

interested in, the old certificate so lost or destroyed, other than the person to whom the new certificate or certificates were so issued as aforesaid, then said chancellor or justice may, in their discretion, make an order adjudicating that the holder of the new certificate or certificates was the owner of the old certificates so lost or destroyed, and decreeing that said old certificates shall be of no further validity or effect whatsoever and shall be absolutely void, and that no person shall thereafter have or maintain any right of action thereunder in any way thereafter, providing in such order for the protection of the rights of infants or persons under legal disabilities (if any such appear by the testimony to exist), and such order so made shall be filed in the office of the secretary of state ; and upon such filing such order shall be notice to all persons, and all persons shall be bound thereby, but any *bona fide* holder of the stock represented by such lost or destroyed certificate or certificates may, at any time within sixty days after the date of such filing in the office of the secretary of state, apply to have said order vacated, and thereupon such proceedings shall be had by said chancellor or justice for a rehearing as they shall direct ; such order shall not affect the rights of any *bona fide* holder of stock who has acquired the same after its loss by the rightful owner thereof and prior to the expiration of sixty days from the date of the filing of such order as aforesaid in the office of the secretary of state.[1]

Sec. 497. Same—Proceedings to Compel Issuance of new Certificate—Order to show Cause.—Whenever any corporation incorporated under the laws of this state shall have refused to issue a new certificate of stock in the place of one theretofore issued by it, but which, it is alleged, has been lost or destroyed, the owner of such lost or destroyed certificate, or his legal representatives, may apply to the chancellor or any justice of the supreme court for an order requiring such corporation to show cause why it should not be required to issue a new certificate of stock in the place of the one so lost or destroyed ; such application shall be by petition, duly verified by the owner, or his legal representatives, in which

[1] N. J. L. 1882, p. 205, § 2.

shall be stated the name of corporation, the number and date of the certificate, if known, the number of shares of stock named therein, and to whom issued, and as particular a statement of the circumstances attending such loss or destruction as such petitioner shall be able to give; upon presentation of such petition the said chancellor or justice shall make an order requiring the said corporation to show cause, at a time and place therein mentioned, why it should not be required to issue a new certificate of stock in the place of the one described in the said petition; a copy of the said petition and of the said order shall be served upon the president or other head of such corporation, or upon the cashier or secretary or treasurer thereof, personally, at least ten days before the time designated in said order for showing cause.[1]

Sec. 498. Same—Proceedings on Return of Order.—At the time and place specified in said order (provided for in section three),[2] and upon proof of the due service thereof, the said chancellor or justice shall proceed in a summary manner, and in such mode as he may deem advisable, to inquire into the truth of the facts stated in the said petition, and shall hear such proofs and allegations as may be offered by or in behalf of the petitioner, or by or in behalf of the said corporation, relative to the subject-matter of such inquiry; and if, upon such inquiry, the chancellor or justice shall be satisfied that such petitioner is the lawful owner of the number of shares of the capital stock, or any part thereof, described in the said petition, and that the certificate therefor has been lost or destroyed, and cannot, after due diligence, be found, and no sufficient cause has been assigned why a new certificate should not be issued in place thereof, said chancellor or justice shall make an order requiring the said corporation, within such time as shall be therein designated, to issue and deliver to such petitioner a new certificate for the number of shares of the capital stock of the said corporation which shall be specified in such order as owned by such petitioner, and the certificate for which shall have been lost or destroyed; in making such order the said chancellor or jus-

[1] N. J. L. 1882, p. 207, § 3. [2] *Supra*, § 497.

tice shall direct that the said petitioner deposit such security, or file such bond, in such form and with such sureties as to the chancellor or justice shall appear sufficient to indemnify any person, other than the petitioner, who shall thereafter appear to be the lawful owner of such certificate stated to be lost or stolen, and to indemnify the said corporation against all loss or damage which it shall sustain by reason of claims made against it by other persons upon account of such lost, stolen or destroyed certificate; and the chancellor or justice may also direct the publication of such notice, either preceding or succeeding the making of such final order, as he shall deem proper; any person or persons who shall thereafter claim any rights under such certificate, so alleged to have been lost or destroyed, shall have recourse to the said indemnity, and the said corporation shall be discharged of and from all liability to such person or persons, by reason of compliance of the order aforesaid; obedience to such order may be enforced by said chancellor or justice by attachment against the officer or officers of such corporation, upon proof of his or their refusal to comply with the same.[1]

Sec. 499. Mining Company — Assessment of Stock — May be made by Directors when.—Whenever the certificate provided for in section ten[2] of the act to which this is a supplement shall contain a provision (which is hereby authorized to be inserted therein in reference to any company conducting mining operations as a part of its business, that may be formed under the act to which this is a supplement), that the board of directors shall have full power to levy assessments on general stockholders until the stock of such stockholders shall be fully paid up; that then and in every such case no action of the stockholders of such company shall be necessary in order to impose, levy and collect such assessments.[3]

Sec. 500. Stock issued for Property Purchased—Guaranteed Dividends.—Any stock issued for property purchased under section fifty-five, of the act to which this[4]

[1] N. J. L. 1882, p. 208, § 4.
[2] See *ante*, § 431.
[3] N. J. L. 1882, p. 25
[4] See *ante*, § 385.

is a supplement may, by a vote of the board of directors, whenever the certificate of incorporation shall authorize the exercise of such a power, contain a provision guaranteeing a minimum yearly dividend payable yearly, half-yearly or quarter-yearly, but only out of the actual profits of the business of the company; provided, that such provision shall not contain a guarantee of any larger dividend than is authorized to be paid on preferred stock of such company; such guaranteed dividend to be paid before any dividend paid on the general stock of said company not containing any such provision; the holder of such guaranteed stock shall be entitled to participate equally with the other holders of general stock in the profits arising out of the business of the company, and receive full dividends whenever the annual dividend or the sum of dividends in any year, upon the entire capital stock of said company, shall exceed the dividend named in such guarantee; the holders of such guaranteed stock shall have all the rights of holders of the general stock of such company, including the right to vote and receive dividends thereon, and such guaranteed stock may be converted into an equal amount of the preferred stock of the company issuing the same, carrying no larger dividend; and the directors of any company, for the purpose of retiring the guaranteed stock of such company, may issue and exchange therefor an equal amount of its preferred stock, carrying no larger dividend than that guaranteed; provided, that the amount of preferred stock so issued shall at no time exceed two-thirds of the entire capital of the company issuing the same; and provided further, that the preferred stock of issued shall be entitled to dividends on a par with preferred stock before issued only with the assent of the holders of preferred stock then outstanding, or in case it shall have been so provided in the original certificate of incorporation, or in the certificates for preferred stock outstanding.[1]

Sec. 501. Incorporation of Company — Where Incorporator is dead, another may be appointed.—Where one or more of the incorporators of any corporation created by or

[1] N. J. L. 1889, p. 415, § 2.

under any general or special act shall have died before the corporation shall have been organized pursuant to law, the survivors or survivor may, in writing, designate other persons who may take the place and act instead of those deceased in the organization; and the organization so effected by their aid shall be as effectual in law as if the organization had been effected by all the incorporators.[1]

Sec. 502. Mutual Associations—Creation of Capital Stock by.—It is provided by the supplementary act of 1886,[2] that it shall be lawful for the members of any mutual association or corporation heretofore or hereafter incorporated or organized under or by any law of this state, to provide for and create a capital stock of such association or corporation, upon the consent, in writing, of all the members of such association or corporation, and to provide for the payment of such stock, and to fix and prescribe the rights and privileges of the stockholders therein.

Sec. 503. Rights of Corporations holding Stock of other Corporations.—It shall be lawful for any corporation of this state, or of any other state doing business in this state, and authorized by law to own and hold shares of stock and bonds of corporations of other states, to own and hold and dispose thereof in the same manner, and with all the rights, powers and privileges of individual owners of shares of the capital stock and bonds or other evidences of indebtedness of corporations of this state.[3]

By a subsequent act of the same year it is provided that it shall and may be lawful for any company heretofore or hereafter organized under the provisions of an act entitled "An act concerning corporations," approved April seventh, one thousand eight hundred and seventy-five, and the acts supplementing and amending the same, for the purposes of the improvement and sale of land, or the building, operation and maintenance of hotels and the carrying on the business of an inn-keeper, or of the transportation of goods, merchandise or passengers upon land or water, to purchase and hold stock in

[1] N. J. L. 1877, p. 137.
[2] N. J. L. 1886, p. 186, § 1.
[3] N. J. L. 1888, p. 385.

the capital of any one or more corporations formed under said acts for either of the said purposes, and issue its own stock as for property purchased therefor; provided, that said corporations shall have their principal office in, or be carrying on business, in whole or in part, in the same county; and further provided, that the said business of transportation carried on by said transportation company may be incidental or necessary to the furnishing of proper facilities of travel to and from the lands or hotel of said other company or companies to the nearest points of established railroad transportation.[1]

[1] N. J. L. 1888, p. 445, § 1.

CHAPTER XXVIII.

WEST VIRGINIA CORPORATIONS—OF CORPORATIONS GENERALLY.

GENERAL POWERS—RESTRICTIONS ON—LAYING OUT OF TOWNS—ENTERING ON LANDS—CONDEMNATION PROCEEDINGS—DISSOLUTION OF CORPORATION—ACTION AND PROCESSES AGAINST CORPORATION—ADDITIONAL POWER—USURIOUS CONTRACTS.

SEC. 504. General powers of corporations.
SEC. 505. Same—Restrictions on.
SEC. 506. Same—Cannot purchase real estate to resell.
SEC. 507. Same—Certain corporations may lay out towns.
SEC. 508. When corporations may enter upon lands.
SEC. 509. Same—How much land corporations may acquire.
SEC. 510. Condemnation of land—Proceedings to take without the owner's consent.
SEC. 511. Same—Notice of application for such appointment.
SEC. 512. Same—Company to provide wagon ways.
SEC. 513. Company not to occupy streets in a town without its assent.
SEC. 514. Dissolution of corporation—Disposition of its property.
SEC. 515. Actions and process against a corporation.
SEC. 516. Same—Service of attachments.
SEC. 517. Same—Process may be served on depot or station agent.
SEC. 518. Additional powers of corporations.
SEC. 519. Usurious contracts of a corporation.
SEC. 520. Existing corporations retain their privileges and liabilities.

Sec. 504. General Powers of Corporations.—Every corporation, as such, shall have succession by its corporate name for the time limited in its charter or by-law; and, if no time be limited, perpetually. It shall have a common seal, and may renew or alter the same at pleasure. It may sue and be sued, plead and be impleaded; contract and be contracted

with by simple contract or specialty; purchase, hold, use and grant estate, real and personal; appoint officers and agents, prescribe their powers, duties and liabilities; take bond and security from any of them, and fix and pay their compensation; and make ordinances, by-laws and regulations for the government of its council, board, officers and agents, and the management and regulation of its property and business.[1]

Sec. 505. Same—Restrictions on.—The powers mentioned in the preceding section or otherwise granted to any corporation, shall be limited by the purposes for which it is incorporated, and no corporation shall engage in transactions or business not proper for those purposes; nor shall corporate powers be exercised in violation of any law of the state.[2]

Sec. 506. Same—Cannot Purchase Real Estate to Resell.—Unless specially authorized, no corporation shall purchase real estate in order to sell the same for profit, or hold more real estate than is proper for the purposes for which it is incorporated, subscribe for or purchase the stock, bonds or securities of any joint stock company, or become surety or guarantor for the debt or default of such company.[3]

Sec. 507. Same—Certain Corporations may Lay out Towns.—Nevertheless, a mining, manufacturing, oil, salt, or internal improvement company may lay out a town not to include more than six hundred and forty acres, at or near their works, and sell lots therein; and any corporation may take real estate, stock, bonds and securities, in payment, in whole or in part, of any debt *bona fide* owing to it, or as a security therefor, or may purchase the same if deemed necessary to secure or obtain payment of any such debt, in whole or in part, and may manage, use and dispose of what has been so taken or purchased, as a natural person might do; and any corporation may compromise or purchase its own debt, and establish and manage a sinking fund for that purpose, and any manufacturing company may, with the assent of the holders of two-thirds of its stock, had by a vote at a stockholders' meeting, subscribe for or purchase the stock, bonds or secu-

[1] W. Va. Code 1887, c. 52,§ 1.
[2] W. Va. Code 1887, c. 52, § 2.
[3] W. Va. Code 1887, c. 52, § 3.

rities of any corporation formed for the purpose of manufacturing or producing any articles or materials used in the business of such joint stock company, or dealing in any articles or materials manufactured or produced by such joint stock company, or constructing a railroad, or other work of internal improvement, through or into the county in which the principal place of business of such joint stock company may be, or operating a railroad or other work of internal improvement so constructed, and may, with the like assent, become surety for or guarantee the debt of such corporation, or in any manner aid it in carrying on its business.[1]

Sec. 508. When Corporations may Enter upon Lands.—Any company incorporated for a work of internal improvement may, by its officers, servants, or agents, enter upon lands for the purpose of examining the same, and surveying and laying out such as may seem fit to any officer or agent authorized by it, provided no injury be done to the owner or possessor of the land. But no company shall, under the authority of this section, throw open fences or enclosures on any land, or construct its work through the same, or in any way injure the property or the owner or possessor, without his consent, or until the same may have been legally appropriated to the use of the company, as is provided by the laws of the state of West Virginia relating to the condemnation and appropriation of private property for the use of companies incorporated for internal improvements. But no company under this act shall invade the dwelling house of any person, or any space within sixty feet thereof, without the consent of the owner, unless it be absolutely necessary for the construction of such road by reason of its passing through a narrow gorge, defile or narrow space: Provided, that this act shall not apply to any city or incorporated town; and provided further, that any company which may have heretofore actually commenced the location of its road, may invade any space twenty feet from the dwelling house of any person, or invade a nearer space, or such house, when by the reason of the location of such road in or through a narrow gorge, defile or nar-

[1] W. Va. Code 1887, c. 52, § 4.

row space, or along or near to any stream, river or bluff, such invasion is necessary for the construction of such road.[1]

Sec. 509. Same—How much Land Corporations may Acquire.—The land acquired by any company incorporated for a work of internal improvement along its line generally shall not exceed one hundred feet in width, except in deep cuts and fillings, and then only so much more shall be acquired as may be reasonably necessary therefor; the land which it may acquire for buildings or for an abutment along its line generally shall not exceed three acres in any one parcel; and the land which it may acquire for buildings or other purposes of the company at the principal termini of its work, or at any place or places within five miles of such termini, shall not exceed fifteen acres in any one parcel; but in the case of a railroad company, an amount of land not exceeding forty acres in any one parcel may be acquired for its main depots, machine shops and other necessary purposes connected with the business of said company.[2]

Sec. 510. Condemnation of Land—Proceedings to take without the Owner's Consent.—If the president and directors of a company, incorporated for a work of internal improvement, cannot agree on the terms of purchase with those entitled to lands wanted for the purpose of the company, five disinterested freeholders shall be appointed by the circuit court of the county in which such land, or the greater part thereof, shall lie, (three of whom may act) for the purpose of ascertaining a just compensation for such land. Lands owned by one internal improvement company, but not necessary for the enjoyment of its franchise, may be taken for the purposes of another internal improvement company, in the same manner as land owned by others; but where such lands are claimed to be necessary to the enjoyment of such franchise, the court appointing such freeholders may, before proceeding further, determine upon a report of such freeholders, or otherwise, whether such necessity exists.[3]

Sec. 511. Same—Notice of Application for such Ap-

[1] W. Va. Code 1887, c. 52, § 5.
[2] W. Va. Code 1887, c. 52, § 6.
[3] W. Va. Code 1887, c. 52, § 7.

pointment.—When it is intended to apply for such appointment, notice shall be given and commissioners appointed, and the proceedings thereon shall be the like in all respects as are prescribed by chapter forty-two of this act.[1]

Sec. 512. Same—Company to Provide Wagon Ways.—For every person, through whose land the road or canal of a company passes, it shall provide wagon ways across the road or canal from one part of the said land to the other, and keep such ways in good repair.[2]

Sec. 513. Company not to Occupy Streets in a Town without its Assent.—No company shall occupy, with its works, the streets of the inhabited part of any city, town or village, until the corporate authority thereof shall have assented to such occupation, unless such assent be dispensed with by special provision of law.[3]

Sec. 514. Dissolution of Corporation—Disposition of its Property.—When any corporation shall expire, or be dissolved, or its corporate rights and privileges shall have ceased, it may wind up its affairs in the manner prescribed by section fifty-nine of chapter fifty-three of this act.[4]

Sec. 515. Actions and Process against a Corporation.—In any action brought against a corporation, if it be in the circuit court, process shall be issued as provided in chapter one hundred and twenty-four of this act; or if the action be brought before a justice, process shall be issued as provided in chapter fifty of this act.[5]

Sec. 516. Same—Service of Attachments.—Attachments may be served upon a company or corporation, as garnishee, in the manner prescribed by the preceding section, and in chapter one hundred and six of this act.[6]

Sec. 517. Same—Process may be Served on Depot or Station Agent.—Provided, that when any suit is brought against a railroad company under the two preceding sections, the agent on whom process may be served shall be construed

[1] W. Va. Code 1887, c. 52, § 8.
[2] W. Va. Code 1887, c. 52, § 9.
[3] W. Va. Code 1887, c. 52, § 10.
[4] W. Va. Code 1887, c. 52, § 17.
[5] W. Va. Code 1887, c. 52, § 18.
[6] W. Va. Code 1887, c. 52, § 19.

to include a depot or station agent in the actual employment of the company, residing in the county or township wherein the action is brought.[1]

Sec. 518. Additional Powers of Corporations.—In addition to the powers enumerated in this chapter, and those expressly or by necessary implication given by any other law every corporation shall have such powers, and such only, as are necessary or proper to the exercise of the powers so enumerated or given.[2]

Sec. 519. Usurious Contracts of a Corporation.—No corporation shall interpose the defense of usury in any suit or proceeding at law or in chancery; nor shall any bond, note, debt or contract, of a corporation be set aside, impaired, or adjudged invalid, by reason of anything contained in the laws prohibiting usury.[3]

Sec. 520. Existing Corporations Retain their Privileges and Liabilities.—Corporations now existing shall continue to exercise and enjoy their powers and privileges according to their respective charters and the laws now in force, and shall continue subject to all the liabilities to which they are now subject, except so far as such powers, privileges and liabilities, are modified or controlled by this act.[4]

[1] W. Va. Code 1887, c. 52, § 20.
[2] W. Va. Code 1887, c. 52, § 21.
[3] W. Va. Code 1887, c. 52, § 22.
[4] W. Va. Code 1887, c. 52, § 23.

CHAPTER XXIX.

WEST VIRGINIA CORPORATIONS—OF JOINT STOCK COMPANIES.

INCORPORATION—ORGANIZATION—DISSOLUTION BY SUSPENSION OF BUSINESS—LEGISLATURE MAY ALTER OR REPEAL CHARTER—CHANGE OF CORPORATE NAME—CAPITAL STOCK—SUBSCRIPTION TO—STOCKHOLDERS—STOCK PERSONAL ESTATE—SALE AND TRANSFER OF STOCK—FAILURE TO PAY SUBSCRIPTIONS—SALE OF DELINQUENT STOCK—GIVING SECURITY—CERTIFICATES OF STOCK—DIVIDENDS—MEETING OF STOCKHOLDERS—VOTING BY PROXY—ANNUAL REPORT—BOARD OF DIRECTORS, MEETING OF—OFFICERS AND AGENTS—BOOKS OF ACCOUNTS—BY-LAWS—DISSOLUTION—RECEIVER.

SEC. 521. Definition.
SEC. 522. Joint stock companies—Not to be incorporated under special charter.
SEC. 523. Former charter—To be deemed extinct when.
SEC. 524. Organization of company—Within what time must be effected.
SEC. 525. Dissolution of corporation by suspension of business.
SEC. 526. Right of legislature to alter or repeal charters.
SEC. 527. What companies are subject to this chapter.
SEC. 528. Corporate name.
SEC. 529. Same—Change of corporate name.
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SEC. 532. Same—Preferred stock.
SEC. 533. Number of stockholders.
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SEC. 537. Transfer book.
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SEC. 539. Subscription to the capital stock.
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SEC. 541. How subscriptions to be paid.
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SEC. 547. Security for unpaid installment of stock.
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SEC. 552. Same—To be surrendered on transfer of stock.
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SEC. 557. Meeting of the stockholders.
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SEC. 560. Same—Mode of voting.
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SEC. 562. Annual report of directors.
SEC. 563. Books, papers, etc.
SEC. 564. Board of directors.
SEC. 565. Same—President.
SEC. 566. Same—Meeting of the board.
SEC. 567. Same—Record of proceedings.
SEC. 568. Officers and agents.
SEC. 569. Books of account.
SEC. 570. By-laws.
SEC. 571. Dissolution—Voluntary dissolution.
SEC. 572. Same—Proceedings in equity to dissolve a corporation.
SEC. 573. Receiver.
SEC. 574. Effect of dissolution or expiration of a corporation.
SEC. 575. Examination or report required by the legislature.
SEC. 576. Quantity of land which a corporation may hold.
SEC. 577. Preservation of the peace, etc.

Sec. 521. Definitions.—The words "joint stock company" include every corporation having a joint stock or capital divided into shares owned by the stockholders respectively.[1]

[1] W. Va. Code 1887, c. 53, § 1.

When the word "by-law" is used in this chapter, it is to be understood as if immediately followed by the words "adopted by the stockholders in general meeting assembled."[1]

Sec. 522. Joint Stock Companies not to be Incorporated under Special Charter.—No corporation shall hereafter be created by special charter; and no act shall be passed granting special privileges to any joint stock company heretofore or hereafter incorporated under the provisions of chapter fifty-four of this code, or any other general law of this state, and no joint stock company shall be authorized to engage in any business other than that which is proper under its charter; except, that a mining, manufacturing, oil, salt or internal improvement company, may lay out a town not to include more than six hundred and forty acres, at or near their works, and sell lots therein; and any corporation may take real estate, stocks, bonds and securities, in payment, in whole or in part, for any debt *bona fide* owing to it, or as a security therefor, or may purchase the same if deemed necessary to secure or obtain payment of any such debt, in whole or in part, and may manage, use and dispose of, what has been so taken or purchased, as a natural person might do; and any corporation may compromise or purchase its own debt, and establish and manage a sinking fund for that purpose, and any manufacturing company may, with the assent of the holders of two-thirds of its stock, had by a vote at a stockholders' meeting, subscribe for or purchase the stock, bonds or securities, of any corporation formed for the purpose of manufacturing or producing any articles or material used in the business of such joint stock company, or dealing in any articles or material manufactured or produced by such joint stock company, or constructing a railroad or other work of internal improvement, through or into the county in which the principal place of business of such joint stock company may be, or operating a railroad or other work of internal improvement so constructed, and may, with the like assent, become surety for or guarantee the debts of such cor-

[1] W. Va. Code 1887, c. 53, § 2.

poration, or in any manner aid it in carrying on its business.[1]

Sec. 523. Former Charters—To be Deemed extinct when—All existing charters or grants of special or exclusive privileges under which organizations shall not have taken place, or which shall not have been in operation within two years from the twenty-second day of August, one thousand eight hundred and seventy-two, shall have no validity or effect whatever. Provided that nothing herein shall prevent the execution of any *bona fide* contract heretofore lawfully made in relation to any existing charter or grant in this state.[2]

All rights, powers and privileges, heretofore granted by the general assembly of Virginia, or by the legislature of this state, to any joint stock company, which are not rendered invalid and of no effect by the preceding section, are hereby preserved to it.[3]

Sec. 524. Organization of Company—Within what Time must be Effected.—Where a certificate of incorporation has been or shall hereafter be issued for a joint stock company under a general law, such company must be organized and commence its proper corporate business within one year after the date of such certificate; otherwise the certificate shall be of no effect.[4]

Sec. 525. Dissolution of Corporation by Suspension of Business.—If a joint stock company, whether organized under special charter or general law, suspend its proper corporate business at any time for two years continuously, its corporate rights and privileges shall cease.[5]

Sec. 526. Charters—Right of legislature to alter or repeal.—Where the legislature has the right to alter or repeal the charter or certificate of incorporation heretofore granted to any joint stock company, or to alter or repeal any law relating to such company, nothing contained in this chapter shall be construed to surrender or impair such right. And the

[1] W. Va. Code 1887, c. 53, § 3.
[2] W. Va. Code 1887, c. 53, § 4.
[3] W. Va. Code 1887, c. 53, § 5.
[4] W. Va. Code 1887, c. 53, § 6.
[5] W. Va. Code 1887, c. 53, § 7.

right is hereby reserved to the legislature to alter any charter or certificate of incorporation hereafter granted to a joint stock company, and to alter or repeal any law applicable to such company. But in no case shall such alteration or repeal affect the right of the creditors of the company to have its assets applied to the discharge of its liabilities, or of its stockholders to have the surplus, if any, which may remain after discharging its liabilities and the expenses of winding up its affairs, distributed among themselves in proportion to their respective interests.[1]

Sec. 527. What Companies are Subject to this Chapter.—Every joint stock company heretofore organized, and which has commenced its proper corporate business, under special charter or general law, shall remain subject to the laws now in force applicable thereto, unless it accepts the provisions of this chapter, or shall be declared subject thereto by act of the legislature.[2]

Every joint stock company which shall be hereafter organized or commence its proper corporate business, or which shall accept the provisions of this chapter, or be declared subject thereto by act of the legislature, shall, so far as it is not otherwise expressly provided, have the rights, powers and privileges, and be subject to the regulations, restrictions and liabilities specified in this and the preceding chapter.[3]

Sec. 528. Corporate Name.—No joint stock company shall adopt the same name which is being used at the time by another corporation of this state.[4]

Sec. 529. Same—Change of Corporate Name.—If the stockholders of a joint stock company desire to change the name thereof, and pass, in general meeting, a resolution to that effect, stating the name by which it is intended the corporation shall be thereafter known, and cause such resolution to be certified under its common seal and the signature of its president to the secretary of state, the secretary shall issue, under his hand and the great seal of the state, a certificate reciting the resolution and declaring that the corporation is

[1] W. Va. Code 1887, c. 53, § 8.
[2] W. Va. Code 1887, c. 53, § 9.
[3] W. Va. Code 1887, c. 53, § 10.
[4] W. Va. Code 1887, c. 53, § 11.

to be thereafter known by the new name so adopted; and such certificate shall be evidence of the change of name therein specified. Notice of every such change of name shall be published by such corporation in some newspaper of general circulation, in the county where the principal office of such corporation is, once a week for four successive weeks immediately thereafter.[1]

The seventeenth, eighteenth, nineteenth and twentieth sections [2] of chapter fifty-four of this code, shall be applicable to such certificates of change of name.[3]

Sec. 530. Effect of change of Name.—No contract, right or liability, previously existing or inchoate, or suit, motion or proceeding then pending, shall be affected by such change of name.[4]

Sec. 531. The Capital Stock.—The capital stock shall be divided into shares of such amount each as may be prescribed by the charter of incorporation; but every share shall be of the same amount.[5]

Sec. 532. Same—Preferred Stock.—The stockholders in general meeting may, by resolution or by-law, provide for or authorize the issuing of preferred stock, on such terms and conditions, and with such regulations respecting the preference to be given to such stock over the other stock in relation to future dividends, or otherwise, as they may deem proper. Provided, that the maximum capital of the corporation shall not be exceeded, and that notice be first published at least once a week for four weeks successively, in some newspaper of general circulation in the county wherein the principal office or place of business of the corporation is situated, of the intention to offer such resolution or by-law.[6]

Sec. 533. Number of Stockholders.—There shall not be less than five stockholders. If the number be at any time reduced below five and so remain for six months continuously the corporation shall be dissolved.

[1] W. Va. Code 1887, c. 53, § 12.
[2] See *post*, §§ 594, 595, 596, 597.
[3] W. Va. Code 1887, c. 53, § 13.
[4] W. Va. Code 1887, c. 53, § 14.
[5] W. Va. Code 1887, c. 53, § 15.
[6] W. Va. Code 1887, c. 53, § 16.
[7] W. Va. Code 1887, c. 53, § 17.

Sec. 534. Stock Owned by the Corporation.—If the corporation acquire shares of its own stock, it may either extinguish or sell the same. If extinguished, it shall operate to that extent as a reduction of the amount of its capital stock. No vote shall be given on any stock while owned by the corporation.[1]

Sec. 535. Who Deemed the Owner of Stock.—The person in whose name shares of stock stand on the books of the corporation shall be deemed the owner thereof, so far as the corporation is concerned.

Sec. 536. Stock Deemed Personal Estate.—The shares shall be deemed personal estate, and as such shall pass to the legal representative or transferee of the stockholder, and be subject to legal process.[3]

Sec. 537. Transfer-Book.—A transfer-book shall be kept by the corporation in which the shares shall be assigned under such regulations, if there be any, as may have been prescribed by the by-laws.[4]

Sec. 538. Transfer of Stock.—No share shall be transferred without the consent of the board of directors, until the same is fully paid up, or security given to the satisfaction of the board for the residue remaining unpaid. And where bond and security have been given to the corporation for any sum remaining unpaid upon stock, no transfer shall affect the validity of such bonds and security.[5]

Sec. 539. Subscriptions to the Capital Stock, etc.—Before a corporation is organized, shares may be disposed of as prescribed by the sixteenth section[6] of chapter fifty-four of this code, or by the charter. After it is organized, the disposal of additional shares to increase the capital stock shall be subject to the order and direction of the board of directors for the time being, so that the maximum capital be not exceeded.[7]

Sec. 540. Sale of Stock—Not to be sold at less than par

[1] W. Va. Code 1887, c. 53, § 18.
[2] W. Va. Code 1887, c. 53, § 19.
[3] W. Va. Code 1887, c. 53, § 20.
[4] W. Va. Code 1887, c. 53, § 21.
[5] W. Va. Code 1887, c. 53, § 22.
[6] See *post*, § 593.
[7] W. Va. Code 1887, c. 53, § 23.

to Increase Capital Stock.—In no case shall stock be sold or disposed of at less than par in order to increase the capital of any such corporation beyond the maximum fixed by its charter. But nothing herein contained shall be so construed as to prevent any mining corporation, subject to the provisions of this chapter, from issuing stock or bonds and negotiating the sale of the same in payment of real and personal estate for the use of such corporation, and for its other corporate purposes and business, at such price and upon such terms and conditions as may be agreed upon by the owners, directors or stockholders, of such corporation. And any subscriber to the capital stock of any such mining corporation may pay for such stock by the transfer and conveyance to such corporation of real or personal property, or both, necessary for the uses and purposes of the corporation, upon such terms as may be mutually agreed upon.[1]

Sec. 541. How Subscriptions to be Paid.—At least ten per cent. of the par value of each share shall be paid at the time of subscription, and the residue as required by the board of directors or the commissioners having control of the subscription.[2]

Sec. 542. When Stock to be Regarded as Taken.—No stock shall be regarded as taken, or the person subscribing therefor considered entitled to the same, until the first instalment is paid thereon.[3]

Sec. 543. Apportionment of Stock.—If more than the amount necessary to make up the maximum capital, or the amount of capital to be disposed of, be at any time subscribed, the subscriptions shall be reduced to the proper amount by deducting the excess from the largest subscriptions, in such manner that no subscription shall be reduced while any one remains larger.[4]

Sec. 544. Failure to Pay Subscriptions.—If any person, who has received a sum of money on a subscription to the capital stock of a corporation, fail to account for and pay

[1] W. Va. Code 1887, c. 53, § 24.
[2] W. Va. Code 1887, c. 53, § 25.
[3] W. Va. Code 1887, c. 53, § 26.
[4] W. Va. Code 1887, c. 53, § 27.

over the same as the board of directors may require, or if any stockholder fail to pay any instalment upon his shares when required by the board, the corporation may recover from him the principal sum due, with interest thereon at the rate of ten per cent. per annum, by motion on ten days' notice, or by action before any justice or court having jurisdiction.[1]

Sec. 545. When Company may sell Delinquent Stock.—Or, in the case of a stockholder failing to pay any instalment upon his shares when required by the board of directors, the said shares may, by order of the board, after four weeks' notice in a newspaper of general circulation in the county, wherein the principal office or place of business of such corporation is situated, be sold at public auction for cash, and be transferred to the purchaser by such person as the board shall appoint for the purpose. In such case there shall be paid out of the proceeds of the sale the expenses of advertising and selling, and the whole residue remaining unpaid upon said stock; and the surplus, if any, shall be paid to the delinquent stockholder.[2]

Sec. 546. When Corporations may Recover from Delinquent Stockholder.—If there be no sale for want of bidders, or if the sale do not produce enough to pay the expenses and the whole residue remaining unpaid on the said stock, the corporation may recover from such stockholder whatever may remain unpaid, with interest at the rate of ten per cent. per annum from the time it was due until payment, by action or motion as aforesaid.[3]

Sec. 547. Security for Unpaid Instalments of Stock.—A corporation, the stock of which is not fully paid up, may, by by-law, require each stockholder to give security to the satisfaction of its board of directors for the payment, at such times and in such instalments as the board may direct, of the residue remaining unpaid on his stock. In such case the security may be given by bond, with one or more sureties, or by pledge of other stocks or securities, or by deed of trust or

[1] W. Va. Code 1887, c. 53, § 28.
[2] W. Va. Code 1887, c. 53, § 29.
[3] W. Va. Code 1887, c. 53, § 30.

mortgage on real estate, or in any other manner satisfactory to the board and not prohibited by such by-law.[1]

Sec. 548. Insufficient or Doubtful Security.—When security is taken from stockholders for the unpaid residue of their stock, according to the preceding section, the board of directors shall, from time to time, examine the said securities to ascertain the sufficiency thereof. And if, in any case, they deem the security insufficient or doubtful, they shall require other security in lieu thereof; and so, from time to time thereafter, whenever they find the security insufficient or doubtful.[2]

Sec. 549. Failure to Give Satisfactory Security.—If any stockholder being thereto required, according to either of the two preceding sections, fail to give security satisfactory to the board of directors for the unpaid residue of his stock, the corporation may recover from him, by motion on ten days' notice, or by action before any justice or court having jurisdiction, the whole unpaid residue of the stock, with interest thereon at the rate of ten per cent. per annum from the time of such failure, until payment; or the board of directors at their option (having first given not less than two weeks' notice to the stockholder of their intention so to do), may declare the stock, in regard to which such failure occurred, to be forfeited to the corporation.[3]

Sec. 550. Failure to Pay Instalment.—If any stockholder, having given security as aforesaid, fail to pay the unpaid residue of his stock or any instalment thereof, when thereto required by the board of directors, the corporation may recover the amount in arrear, with interest thereon at the rate of ten per cent. per annum from the time of such failure until payment, from the person liable on such security, or any one or more of them, by motion or action as aforesaid; or by the sale or collection of the stocks or securities pledged, or enforcement of the deed of trust or mortgage, or other securities, given as aforesaid; or in the manner specified in the twenty-ninth and thirtieth sections of this chapter.[4] And

[1] W. Va. Code 1887, c. 53, § 31.
[2] W. Va. Code 1887, c. 53, § 32.
[3] W. Va. Code 1887, c. 53, § 33.
[4] *Supra*, §§ 545, 546.

if it proceed in any of the modes above mentioned, it shall not be thereby precluded from resorting to the others for the recovery of so much as may remain unpaid.[1]

Sec. 551. Certificates of Stock.—The board of directors may cause to be issued, if demanded, to any person appearing on the books of the corporation to be the owner of any shares of its stock a certificate therefor under the corporate seal, to be signed by the president and such other officer, if any, as the board may direct; which certificate shall show the amount paid on each share.[2]

Sec. 552. Same—To be Surrendered on Transfer of Stock.—A stockholder, to whom such certificate has been issued, shall not be allowed to transfer the shares therein mentioned, or any part thereof, without delivering up the said certificate to the corporation to be cancelled, unless the same be lost or destroyed, or sufficient cause be shown, to the satisfaction of the board of directors, why it cannot be produced.[3]

Sec. 553. Same—Sale, etc., of Stock with Delivery of to Purchaser.—If any person, for valuable consideration, sell, pledge or otherwise dispose of, any shares belonging to him to another, and deliver to him the certificate for such shares, with the power of attorney authorizing the transfer of the same on the books of the corporation, the title of the former shall vest in the latter so far as may be necessary to effect the sale, pledge or other disposal, of the said shares, not only as between the parties themselves, but also as against the creditors of, and subsequent purchaser from, the former, but subject, nevertheless, to the provisions contained in the nineteenth section [4] of this chapter.[5]

Sec. 554. Same—Lost Certificate.—When a person to whom a certificate has been issued, alleges it to have been lost, he shall file in the office of the corporation, first, an affidavit setting forth the time, place and circumstances of the loss, to the best of his knowledge and belief; second,

[1] W. Va. Code 1887, c. 53, § 34.
[2] W. Va. Code 1887, c. 53, § 35.
[3] W. Va. Code 1887, c. 53, § 36.
[4] See *ante*, § 535.
[5] W. Va. Code 1887, c. 53, § 37.

proof of his having advertised the same in a newspaper of general circulation, published near the principal office of the corporation, once a week for four weeks; and, third, a bond to the corporation, with one or more sufficient sureties, conditioned to indemnify the corporation and all persons against any loss in consequence of a new certificate being issued in lieu of the former. And thereupon the board of directors shall caused to be issued to him a new certificate, or duplicate of the certificate alleged to be lost.[1]

Sec. 555. Dividends on Stock.—The board may, from time to time declare dividends of so much of the net profits as they deem it prudent to divide. If any stockholder be indebted to the corporation, his dividend, or so much thereof as is necessary, may be applied to the payment of the debt, if the same be then due and payable.[2]

Sec. 556. Dividend Declared out of the Capital.—If the board declare a dividend by which the capital of the corporation shall be diminished, all the members present, who do not dissent therefrom and cause said dissent to be entered on the record of their proceedings, shall be jointly and severally liable to the creditors of the corporation for the amount the capital may have been so diminished; and may be decreed against therefor on a bill in equity filed by any creditor; and moreover, every stockholder who has received any such dividend shall be liable to the creditors for the amount of capital so received by him.[3]

Sec. 557. Meetings of the Stockholders.—An annual meeting of the stockholders of every corporation, subject to this chapter, shall be held at such time as may be prescribed by the by-laws, or, if there be no such by-law, then on the fourth Tuesday of January. A general meeting of the stockholders may be called at any time by the board of directors, or by any number of the stockholders holding together at least one-tenth of the capital. Notice of the annual or any other general meeting shall be given in such manner as the

[1] W. Va. Code 1887, c. 53, § 38.
[2] W. Va. Code 1887, c. 53, § 39.
[3] W. Va. Code 1887, c. 53, § 40.

by-laws may direct, or, if there be no such by-law, by advertising the same once a week for two weeks at least in some newspaper of general circulation published near the principal office or place of business of the company.[1]

The annual meeting and other meetings of the stockholders, within this state, shall be held at such place as may be prescribed by the by-laws, or if there be no such by-law, then at the principal office or place of business of the corporation. Notice of the place of meeting shall be given in the manner prescribed by the forty-first section[2] of this chapter.[3]

Sec. 558. Same—Quorum.—The number of stockholders or amount of stock necessary to constitute a quorum at a meeting of stockholders, and the mode of transacting business at such meetings, may be prescribed by the by-laws. If there be no such by-law the majority of the stock must be present, in person or by proxy, to constitute a meeting. But if a sufficient number do not attend at the time and place appointed, those who do attend may adjourn from time to time until a meeting is regularly constituted. Every meeting of the stockholders may adjourn from time to time till its business is completed.

Sec. 559. Same—List of Stockholders to be Hung up in Principal Office.—A list of stockholders, showing the number of shares and votes to which each is entitled, shall, for one month before every annual meeting, be hung up in the most public room at the principal office or place of business of the corporation; but the failure to do so shall not affect the validity of the proceedings of such meeting.[5]

Sec. 560. Same—Mode of Voting.—In all elections for directors or managers of incorporated companies, whether in other respects governed by this chapter or not, every stockholder shall have the right to vote in person or by proxy for the number of shares of stock owned by him for as many persons as there are directors or managers to be elected, or to cumulate said shares and give one candidate as many votes as the number of directors multiplied by the number of his

[1] W. Va. Code 1887, c. 53, § 41.
[2] See first half of § 557.
[3] W. Va. Code 1887, c. 53, § 48.
[4] W. Va. Code 1887, c. 53, § 42.
[5] W. Va. Code 1887, c. 53, § 43.

shares of stock shall equal, or to distribute them on the same principle among as many candidates as he shall think fit; and such directors or managers shall not be elected in any other manner. And on any other question to be determined at any meeting of stockholders, if a vote by stock be demanded upon such question by any stockholder, every stockholder may, in person or by proxy, give the following vote on whatever stock he may hold in the same right, that is to say, one vote for every share of stock held in such company.[1]

Sec. 561. Same—Voting—Proxies.—No officer or director of a corporation shall vote as the proxy of a stockholder thereof.[2]

Sec. 562. Annual Report of Directors.—The board of directors shall make a report to the stockholders, at the annual meeting, of the condition of the corporation. The report shall show the property and funds belonging to the corporation, and the estimated value thereof; the debts due to it, distinguishing such as are believed to be good from those considered to be doubtful or hopeless; the debts and liabilities of the corporation; the amount of capital paid in; and the estimated surplus or deficiency, as the case may be. It shall also state the amount of dividends declared, and the losses incurred, or profits accruing, during the preceding year. The board shall furnish to each stockholder requiring it, a true copy of such report, together with a list of the stockholders and their places of residence.[2]

Sec. 563. Books, Papers, etc.—The property and funds, books, correspondence and papers of the corporation, in the possession or control of any officer or agent thereof, shall, at all times, be subject to the inspection of the board, or a committee thereof appointed for the purpose, or of any committee appointed for the purpose by a general meeting of the stockholders. The minutes of the resolutions and proceedings of the board shall, for thirty days before the annual meeting of the stockholders, be open to the inspection of any stock-

[1] W. Va. Code 1887, c. 53, § 44.
[2] W. Va. Code 1887, c. 53, § 45.
[2] W. Va. Code 1887, c. 53, § 46.

holder. They shall be produced when required by the stockholders at any general meeting.[1]

Sec. 564. Board of Dircetors.—For every corporation subject to this chapter there shall be a board of directors, who shall have power to do, or cause to be done, all things that are proper to be done by the corporation. The stockholders may in general meeting, by a by-law, prescribe the number of which the board shall consist: but unless a different number be so prescribed, there shall be five directors. They may also, by a by-law, prescribe the qualifications of directors; but if it be not otherwise provided, every director must be a resident of this state and a stockholder. The directors shall be elected at the annual meeting of the stockholders, or as soon thereafter as practicable, and shall hold their office until their successors are elected and qualified. The stockholders in general meeting may remove any director and fill the vacancy; but any vacancy not caused by such removal may be filled by the board. A majority of the board shall constitute a quorum, unless it be otherwise provided in the by-laws; and if the number of the board be reduced at any time so as to interrupt the proper and efficient management of the business of the corporation, a general meeting of the stockholders may be called to elect new directors, or to take such order in the premises as they may deem proper.[2]

Sec. 565. Same—President.—As soon as may be, after their election, the board of directors shall choose one of their own body president of the corporation, who shall act as such till his successor is qualified, without ceasing, however, to be a member of the board. During the absence of the president the board may appoint a president *pro tempore*, who, for the time, shall discharge the official duties of the president.[3]

Sec. 566. Same—Meetings of the Board.—The board shall hold meetings at such time as they see fit, or the president shall require. They may, by resolution, prescribe

[1] W. Va. Code 1887, c. 53, § 47.
[2] W. Va. Code 1887, c. 53, § 49.
[3] W. Va. Code 1887, c. 53, § 50.

when and where their regular meetings shall be held, how special meetings shall be called, and what notice of their meetings shall be given.[1]

Sec. 567. Same—Record of Proceedings.—They shall keep a record of their proceedings, which shall be verified by the signature of the president or president *pro tempore*. No member of the board shall vote on a question in which he is interested otherwise than as a stockholder, except the election of a president, or be present at the board while the same is being considered; but if his retiring from the board in such case reduce the number present below a quorum, the question may nevertheless be decided by those who remain. On any question the names of those voting each way shall be entered on the record of their proceedings, if any member at the time require it.[2]

Sec. 568. Officers and Agents.—The board of directors shall appoint such officers and agents of the corporation as they may deem proper, and prescribe their duties and compensation; but there shall be no compensation for services rendered by the president or any director, unless it be allowed by the stockholders. The officers and agents so appointed shall hold their places during the pleasure of the board; and if required by the board, or the by-laws, shall give bond, payable to the corporation, in such penalties and with such conditions and security as the board may approve.[3]

Sec. 569 Books of Accounts.—The board of directors shall cause regular and correct books of account to be kept, and to be settled and balanced once at least every six months.[4]

Sec. 570. By-laws.—The board of directors, in the exercise of their powers, shall be subject to such by-laws and regulations, not inconsistent with the laws of this state, as the stockholders may pass from time to time in general meeting.[5]

Sec. 571. Dissolution—Voluntary Dissolution.—The stockholders may at any time in general meeting resolve to

[1] W. Va. Code 1887, c. 53, § 51.
[2] W. Va. Code 1887, c. 53, § 52.
[3] W. Va. Code 1887, c. 53, § 53.
[4] W. Va. Code 1887, c. 53, § 54.
[5] W. Va. Code 1887, c. 53, § 55.

discontinue the business of the corporation, the majority of the capital stock being represented and voted in favor of such discontinuance; and may divide the property and assets that may remain after paying all debts and liabilities of the corporation. Public notice of such resolution shall be immediately given by advertisement in some newspaper of general circulation, published near the principal office or place of business of the corporation, once a week for six weeks at least, before any dividend of the capital shall be made; and the said resolution shall be forthwith certified by the president under his hand and the common seal of the corporation to the secretary of state, who shall preserve the same in his office, and deliver a copy to the clerk of the house of delegates, to be printed and bound with the acts of the legislature. As soon as practicable after such resolution is passed, the stockholders shall cause ample funds and assets to be set apart, either in the hands of the trustees or otherwise, to secure the payment of all debts and liabilities of the corporation; and any creditor who supposes his claim not to be sufficiently secured thereby, whether such claim be then due or thereafter to become due, may on bill in chancery, if sufficient cause therefor be shown, obtain an injunction to prevent the distribution of the capital and a decree against any stockholder for the amount of the capital received by him; and if necessary or proper in the case, the court may appoint a receiver to take charge of and administer the property and assets of the corporation.[1]

Sec. 572. Same—Proceedings in Equity to Dissolve a Corporation.—If not less than one third in interest of the stockholders of a corporation desire to wind up its affairs, they may apply by a bill in chancery to the circuit court of the county in which the principal office or place of business of such corporation is situated, or if there be no such office or place of business in this state, to the circuit court of the county in which the other stockholders or any one or more of them reside, or are found, or in which the property of such corporation or any part of it may be, setting forth in the bill

[1] W. Va. Code 1887, c. 53, § 56.

the grounds of their application; and the court may thereupon proceed according to the principles and usages of equity to hear the matter, and if sufficient cause therefor be shown, to decree a dissolution, of the corporation, and make such orders and decrees, and award such injunctions in the cause as justice and equity may require.[1]

Sec. 573. Receiver.—When a corporation expires, or is dissolved, or before its expiration or dissolution, upon sufficient cause being shown therefor, such court as is mentioned in the preceding section may, on application of a creditor or stockholder, appoint one or more persons to be receivers to take charge of and administer its assets; and whether such receiver be appointed or not, may make such orders and decrees, and award such injunctions in the cause, as justice and equity may require. This section shall apply to corporations, heretofore or hereafter, chartered by another state, which may have done business and acquired property, or contracted debts, in this state, and any of whose creditors, or stockholders, or their personal representatives, reside herein; and the circuit court of any county wherein such creditor, stockholder, or personal representative, may reside, or where such assets or property or part thereof may be, or where the person owing such debts, or having such property in possession, may reside, shall afford such relief as is prescribed in this and the next section.[2]

Sec. 574. Effect of Dissolution or Expiration of a Corporation.—When a corporation shall expire or be dissolved, its property and assets shall, under the order and direction of the board of directors then in office, or of the receiver or receivers appointed for the purpose by such circuit court as is mentioned in the fifty-seventh section of this chapter,[3] be subject to the payment of the liabilities of the corporation, and the expenses of winding up its affairs; and the surplus, if any, then remaining, to distribution among the stockholders according to their respective interests. And suits may be brought, continued or defended, the property, real or per-

[1] W. Va. Code 1887, c. 53, § 57.

[2] W. Va. Code 1887, c. 53, § 58.

[3] See *ante*, § 572.

sonal of the corporation be conveyed or transferred under the common seal or otherwise, and all lawful acts be done in the corporate name, in like manner and with like effect as before such dissolution or expiration; but so far only as shall be necessary or proper for collecting the debts and claims due to the corporation, converting its property and assets into money, prosecuting and protecting its rights, enforcing its liabilities, and paying over and distributing its property and assets, or the proceeds thereof, to those entitled thereto.[1]

Sec. 575. Examination or Report required by the Legislature.—Every corporation subject to this chapter shall exhibit its books, papers and property, to such agents or committees as the legislature may from time to time appoint to examine the same; and when required by the legislature, shall report thereto a full, fair and detailed exhibit of its property, liabilities and condition, verified by the oath of the president, and of the secretary or principal bookkeeper.[3]

Sec. 575a. Service of Process or Notice.—Process on, or notice to, a corporation may be served as is provided in section seven of chapter one hundred and twenty-four of this code.[2]

Sec. 576. Quantity of Land which a Corporation may Hold.—No corporation subject to this chapter, whether incorporated under special charter or general law, shall hold more than one hundred acres of land; except that a company for mining iron, lead or copper ore, and manufacturing the same into metal, may hold ten thousand acres for every charcoal blast furnace, and three thousand acres for every other furnace; companies for mining and selling coal, ten thousand acres each; other mining companies, salt companies and oil companies, three thousand acres each; other manufacturing companies, one thousand acres each; and a springs company, fifteen hundred acres; nor shall any corporation, subject to this chapter, hold more than five acres in any incorporated town or city, except as provided in the fourth section of chapter fifty-two of this code, and except that societies

[1] W. Va. Code 1887, c. 53, § 59.
[2] W. Va. Code 1887, c. 53, § 60.
[3] W. Va. Code 1887, c. 53, § 61.

formed to promote agriculture or stock raising, may hold not exceeding thirty acres in any incorporated town or city. But nothing in this section contained shall be construed to prevent any company heretofore incorporated from holding such number of acres of land, in addition to the number herein prescribed, as may be authorized by its charter. But any such springs company now owning or occupying the real estate of a former springs company may take, hold and use the same, notwithstanding the quantity thereof shall exceed fifteen hundred acres.[1]

Sec. 577. Preservation of the Peace, etc.—Every incorporated springs company may adopt by-laws, rules and regulations for the preservation of the peace and good order within the boundary lines of its real estate, and for the arrest of persons violating the penal laws of the state within said lines. And the board of directors of any such corporation may, from time to time, appoint such number of police officers as may be deemed necessary to carry into effect the objects and purposes of this section; and the officer so appointed shall have all the powers within the territory for which he is appointed, in criminal cases, as a constable of a district has under the law.[2]

[1] W. Va. Code 1887, c. 53, § 62.

[2] W. Va. Code 1887, c. 53, § 63.

CHAPTER XXX.

WEST VIRGINIA CORPORATIONS—INCORPORATION OF JOINTS-TOCK COMPANIES WITHOUT SPECIAL CHARTER.

PURPOSES FOR WHICH FORMED—CAPITAL STOCK—MODE OF INCQRPORATION—PER CENT. TO BE PAID—AGREEMENT—DURATION—STOCK AND ITS VALUE—DIRECTORS—FIRST MEETING OF STOCKHOLDERS—SALE OF ADDITIONAL STOCK—CERTIFICATE OF INCORPORATION—INCREASE AND REDUCTION—MEETINGS AND PRINCIPAL OFFICE—TAXATION—SALE OF PROPERTY AND WORKS—LIABILITY OF STOCKHOLDERS FOR DEBTS.

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SEC. 600. Meetings and principal office.
SEC. 601. Power of attorney to accept service of process.
SEC. 602. Taxation of corporations.
SEC. 603. Sale of property and works of corporations other than railroad companies.
SEC. 604. Stockholders—Liability for debts of company.

Sec. 578. To what Chapters such Companies shall be Subject.—Joint-stock companies, incorporated under this chapter, shall be subject to the provisions of the fifty-second and fifty-third chapters of the code,[1] so far as the same are applicable.[2]

Sec. 579. The purposes for which they may be formed.—Such companies may be incorporated for the following purposes:

I. For manufacturing, mining or insuring.

II. For constructing and maintaining lines of magnetic telegraph, telephones, lines of piping or tubing for the transportation of oils or other fluids; and carrying on the business properly pertaining to such works and improvements.

III. For establishing hotels, and springs companies, gas works, water works, cemeteries, or building and loan associations, and transacting the business properly pertaining thereto.

IV For universities, colleges, academies, seminaries, schools, or institutes, for the purpose of teaching any branch or branches of useful information or learning, or promoting religion, morality, military science or discipline; or the diffusion of knowledge, including library companies and literary and scientific associations.

V. For agricultural and industrial societies.

VI. For benevolent associations, societies and orders, including orphan, blind and lunatic asylums and hospitals, lodges of free and accepted masons, independent order of odd fellows, improved order of red men, sons of temperance, good templars and knights of pythias, and all other associations, societies and orders of like character.

[1] See *ante*, chapters xxviii, xxix. [2] W. Va. Code 1887, c. 54, § 1.

VII. For gymnastic purposes.

VIII. For railroads and other works of internal improvement.

IX. For banks of issue and circulation, and of discount and deposit, and for savings institutions.

X. And for any other purpose or business useful to the public for which a firm or copartnership may be lawfully formed in this state.[1]

Sec. 580. Formation of Corporations for Certain Purposes Prohibited.—But this chapter shall not be construed to authorize the incorporation of any church or religious denomination, or of any company the object or one of the objects of which is to purchase lands and re-sell the same for profit.[2]

Sec. 581. Capital Stock.—The capital stock shall be divided into shares, as prescribed by the fifteenth section[3] of chapter fifty-three of the code.[4]

Sec. 582. Same—Limitation of.—The capital of a corporation formed under this chapter, except for railroad or canal purposes, shall not exceed five millions of dollars.[5]

Sec. 583. Mode of Incorporation and Duration.—Any number of persons, not less than five, desiring to become a corporation for any purpose of business designated in the second section, except for railroad purposes, shall sign an agreement to the following effect: "The undersigned agree to become a corporation by the name of (here insert the name by which it is intended the corporation shall be known) for the purpose of (here describe fully and particularly the purpose for which the corporation is to be formed, and the kind of business intended to be carried on by it), which corporation shall keep its principal office or place of business at ——, in the county of——, and is to expire on the——day of——. And for the purpose of forming the said corporation we have subscribed the sum of——dollars to the capital thereof, and have paid in on said subscription the sum of—— dollars; and desire the privilege of increasing the said capital.

[1] W. Va. Code 1887, c. 54, § 2.
[2] W. Va. Code 1887, c. 54, § 3.
[3] *Ante*, § 531.
[4] W. Va. Code 1887, c. 54, § 4.
[5] W. Va. Code 1887, c. 54, § 5.

by the sale of additional shares, from time to time, to—— dollars in all. The capital so subscribed is divided into shares of——dollars each, which are held by the undersigned respectively, as follows, that is to say: By (here insert the name of each incorporator, with his residence and the number of shares held by him). And the capital to be hereafter sold is to be divided into shares of the like amount. Given under our hands this——day of——."[1]

Sec. 584. Ten per cent. of Stock must be Paid in.—No person shall be included as a corporator in any such agreement, by reason of any stock subscribed for by him, unless he has in good faith paid to the person who may have been appointed or agreed upon to receive the same for the intended corporation, at least ten per cent. of the value of said stock.[2]

Sec. 585. Agreement must be Acknowledged.—The agreement shall be acknowledged by the several corporators before a justice, notary or judge; and such acknowledgment shall be certified by the officers before whom they are made. The affidavits of at least two of the corporators named in the agreement shall be annexed thereto, to the effect that the amount therein stated to have been paid on the capital has been in good faith paid in, for the purposes and business of the intended corporation, without any intention or understanding that the same shall be withdrawn therefrom before the expiration or dissolution of the corporation.[3]

Sec. 586. Certificate of Secretary of State.—The agreement, with the acknowledgments and affidavits aforesaid, shall be delivered to the secretary of state, who shall thereupon issue to the said corporators his certificate, under the great seal of the state, to the following effect: "I, A—— B——, secretary of the State of West Virginia, hereby certify that an agreement, duly acknowledged and accompanied by the proper affidavits, has been this day delivered to me; which agreement is in the words and figures following: (here insert.) Wherefore, the corporators named in the

[1] W. Va. Code 1887, c. 54, § 6.
[2] W. Va. Code 1887, c. 54, § 7.
[3] W. Va. Code 1887, c. 54, § 8.

said agreement, and who have signed the same, and their successors and assigns, are hereby declared to be from this date until the——day of——a corporation by the name and for the purposes set forth in the said agreement. Given under my hand and the great seal of the said state at—— this——day of——."[1]

Sec. 587. Effect of Certificate of Incorporation.— When a certificate of incorporation shall be issued by the secretary of state, pursuant to this chapter, the corporators named in the agreement recited therein, and who have signed the same, and their successors and assigns, shall, from the date of the said certificate until the time designated in the said agreement for the expiration thereof, unless sooner dissolved according to law, be a corporation by the name and for the purposes and business therein specified. And the said certificate of incorporation shall be received as evidence of the existence of the corporation as aforesaid. Any corporation organized for any one or more of the purposes mentioned in the first and tenth subdivisions of the second section of this chapter [2] may, by resolution, concurred in by a majority of all the stockholders, representing a majority of the capital stock, and entered upon its records at a meeting specially called for the purpose, of which all the stockholders shall have had notice, agree to and adopt a new agreement, so as to enlarge or diminish the objects and purposes, within the limits of said two sub-divisions of section two, for which such corporation may have been organized; or, so as to increase or diminish the number of its shares of capital stock by consolidating or subdividing the same, but so that in no case shall any fractional share or shares of unequal value be created. A copy of such resolution containing such new agreement, when acknowledged by such majority of the stockholders in the manner prescribed by the eighth section of this chapter,[3] shall be delivered to the secretary of state, who shall thereupon issue his certificate in the form prescribed in the ninth section of this chapter,[4] so far as the said form may be found applicable; and from thence such corpo-

[1] W. Va. Code 1887, c. 54, § 9.
[2] See *ante*, § 579.
[3] See *ante*, § 585.
[4] See *ante*, § 586.

ration shall be subject to such new agreement and certificate. And all the provisions of this chapter shall apply to such new certificates and to the corporations receiving the same in like manner as to original agreements and certificates of incorporation, except as herein otherwise provided.[1]

Sec. 588. Duration of Corporation. — No corporation formed under this chapter, except life insurance companies and such as are formed exclusively for the purposes mentioned in the fourth, fifth, sixth, seventh, eighth and ninth clauses of the second section,[2] shall continue for more than fifty years from the date of its certificate of incorporation. Any corporation heretofore formed under the general laws of this state and now in existence, may extend the time of its continuance beyond that limited in the agreement for its formation for such additional time, not exceeding fifty years, as it may desire, in the manner following: The stockholders of such corporation may, at a general or special meeting, adopt a resolution to extend the time of the continuance of such corporation, for such time, not exceeding fifty years, as may be decided upon by said stockholders, a majority of the stock of such company being represented by the holders thereof, in person or by proxy, and voting for such resolution; but notice of the intention to offer such resolution must have been given by advertisement, published once a week for four successive weeks, in some newspaper of general circulation printed in this state. When such resolution shall have been adopted by any corporation, the president thereof, shall, under his signature and the common seal of the company, certify the resolution to the secretary of state, and the secretary, under his hand and the great seal of this state, shall issue to the company adopting such resolution a certificate reciting the resolution and declaring the proposed extension to be authorized by law, which certificate shall be received in all courts and places as evidence of the extension of the continuance of such corporation, and of the authority for the same. The provisions of section seventeen, eighteen, nineteen and twenty of this chapter[3] shall apply to such certificate.[4]

[1] W. Va. Code 1887, c. 54, § 10.
[2] See *ante*, § 579.
[3] See *post*, §§ 594, 595, 596, 597.
[4] W. Va. Code 1887, c. 54, § 11.

Sec. 589. Existing Corporations may Accept this Chapter.—The stockholders of any incorporated joint-stock company now existing in this state (banks of circulation and companies incorporated for the construction of works of internal improvement excepted) may, by resolution in general meeting, accept the provisions of this and the preceding chapter of the code. And thereupon a copy of the resolution shall be filed with the secretary of state, together with a statement showing the name by which the corporation had theretofore been known, and the name, whether it be the same or a different one, by which it is intended it should be known thereafter; the business to be carried on; the place where such business is to be carried on and where the principal office is to be kept; the time when the corporation is to expire, subject to the limitation contained in the eleventh section of this chapter; the amount of the whole capital; the amount of the capital paid in; the amount to which it is intended to reserve the privilege of increasing the same, and the par value of each share; which copy and statement shall be certified by the president under his hand and the common seal of the corporation. And the secretary of state shall thereupon issue a certificate of incorporation under his hand and the great seal of the state, reciting the said resolution and statement, and declaring the said corporation to be thereafter, until the time mentioned in the said statement for the expiration thereof, a corporation by the name which it is intended it should thereafter bear, and for the purpose and business therein set forth, unless sooner dissolved according to law. Certificates of incorporation issued pursuant to this section shall be received as evidence of the existence of the corporations as therein declared; and the said corporations shall no longer be under their former charters, but shall have all the rights, privileges and powers, conferred by this and the fifty-second and fifty-third chapters of this code,[1] and shall be subject to the liabilities, restrictions and regulations, therein prescribed.[2]

Sec. 590. Stock—Par value of—Change of.—A corpora-

[1] See *ante*, chapters xxviii, xxix. [2] W. Va. Code, 1887, c. 54, § 12.

tion, at the time when it accepts the provisions of this chapter, may change the par value of its shares, as the stockholders thereof in general meeting, or the board of directors under authority given them by the stockholders, may determine; in which case the statement to be filed as aforesaid with the secretary of state shall show the proposed change, and the same shall have effect from the date of the certificate of incorporation.[1]

Sec. 591. Directors—Term of Office of the First.—When a certificate of incorporation is issued pursuant to the twelfth section,[2] the board of directors and officers then in office may continue to act in their respective capacities until the next annual meeting of the stockholders, and thereafter until their successors have been chosen and qualified, or until a general meeting, called pursuant to the forty-first section of chapter fifty-three[3] of the code, shall elect a new board or make such order in the matter as they deem right.[4]

Sec. 592. First Meeting of Stockholders.—When a certificate of incorporation is issued under the ninth section, the corporators named in the agreement recited therein, or a majority of them, shall appoint the time and place for holding a general meeting of the stockholders to elect a board of directors, make by-laws, and transact any other business which may lawfully be done by the said stockholders in general meeting. The time appointed for the meeting shall not be less than twenty-one nor more than ninety days from the date of the certificate, and at least two weeks' notice of such meeting shall be given by advertisement in the manner prescribed in the forty-first section of chapter[5] fifty three of the code.[6]

Sec. 593. Sale of Additional Stock before Organization.—After a certificate of incorporation has been issued pursuant to the ninth section, and before a board of directors have been elected or qualified, additional shares of the capital stock may be disposed of, so that the maximum capital be not exceeded in such manner, on such terms, at such times

[1] W. Va. Code 1887, c. 54, § 13.
[2] See *ante*, § 589.
[3] See *ante*, § 557.
[4] W. Va. Code 1887, c. 54, § 14.
[5] W. Va. Code 1887, c. 54, § 15.
[6] See *ante*, § 586.

and places, and under the superintendence of such persons as the corporators named in the agreement recited in such certificate, or those holding a majority of the shares, may appoint, but subject to the provision of the twenty-third and the four following sections [1] of chapter fifty-three of the code.[2]

Sec. 594. Certificate of incorporation — Recording, Publication and Official Copies of.—The secretary of state shall carefully preserve in his office the agreements, resolutions and statements, mentioned in the sixth [3] and twelfth [4] sections; and cause to be accurately recorded in a well-bound book, to be kept in his office, all certificates of incorporation and certificates of change of name, which he shall issue under this or the preceding chapter. If he omit to record any such certificate, or if any error be discovered in the record thereof, he shall forfeit, for every such neglect or default, not less than ten nor more than fifty dollars. At the beginning of every regular session of the legislature, he shall deliver to the clerk of the house of delegates accurate copies of every certificate of incorporation not before reported by him; and it shall be the duty of such clerk to cause the same to be printed and bound with the acts of the session. If the said secretary or clerk fail therein, the party so in default shall forfeit not less than one nor more than fifty dollars.[5]

Sec. 595. Same—Secretary's Fees.—The secretary may charge a fee of four dollars for every such certificate issued by him; and for recording the original, or issuing a certified copy, a fee of fifty cents or, in lieu thereof, fifteen cents for every hundred words; which fees shall be paid at the time the service is rendered by the person at whose instance it was done.[6]

Sec. 596. Same—Certified Copy of—Equivalent as Evidence to the Original.—The secretary may at any time issue a copy of such certificate, and such copy certified under his hand, and also the copy printed with the acts of the legislature, shall as evidence be equivalent to the original.[7]

[1] See *ante*, §§ 539, 540. 541, 542, 543.
[2] W. Va. Code 1887, c. 54, § 16.
[3] See *ante*, § 584.
[4] See *ante*, § 589.
[5] W. Va. Code 1887, c. 54, § 17.
[6] W. Va. Code 1889, c. 54, § 18. See W. Va. Code, c. 137, § 1.
[7] W. Va. Code, 1887, c. 54, § 19.

Sec. 597. Same—Recorded in County Clerk's Office.—The company shall cause the said certificate, within three months after it has been issued, or a copy thereof certified as aforesaid, to be delivered for record to the clerk of the county court in which the principal office or place of business of such company is kept, and the clerk of the county court shall record the same in his office. If such company fail therein, it shall be fined not exceeding one thousand dollars.[1]

Sec. 598. Increase or Reduction of the Number of Shares or the par value of the Stock.—Any corporation formed, or which may hereafter be formed, or which has accepted or may accept the provisions of this chapter, may, by resolution at any general or special meeting of the stockholders thereof, make such increase or reduction in the number of shares of its capital stock, or the par value of each share, as may be decided upon by said stockholders, a majority of the stock of such company being represented by the holders thereof, and such holders being present either in person or by proxy, and voting for such increase or reduction. Provided, that notice be given by advertisement, published four successive weeks, in some newspaper of general circulation printed in this state, of the intention to offer such resolution.[2]

Sec. 599. Same—To be Certified to the Secretary of State.—When such increase or reduction shall have been made by any such company, the president thereof shall, under his signature and the common seal of the company, certify the resolution to the secretary of state, and the secretary of state, under his hand and the great seal of this state shall issue, to the company so making such increase or reduction, a certificate reciting the resolution and declaring the proposed increase or reduction to be authorized by law, which certificate shall be received in all courts and places as evidence of the change in the number or par value of the shares of the capital stock of such company, and of the authority to increase or reduce the same.[3]

Sec. 600. Meetings and Principal Office.—The stock-

[1] W. Va. Code 1887, c. 54, § 20.
[2] W. Va. Code 1887, c. 54, § 21.
[3] W. Va. Code 1887, c. 54, § 22.

holders or directors of any corporation formed under or accepting the provisions of this chapter, may hold meetings for the transaction of the lawful business of the corporation, including the first general meeting for purposes of organization, out of this state, and may keep their principal office in any state or territory of the United States, or in the District of Columbia. But no meeting shall be held out of this state without the concurrence of persons holding a majority in value of the stock of the company, nor without reasonable notice.[1]

Sec. 601. Power of Attorney to Accept Service or Process.—Every such corporation having its principal office or place of business in this state, shall, within thirty days after organization, by power of attorney duly executed, appoint some person residing in the county in this state wherein its business is conducted, to accept service on behalf of said corporation, and upon whom service may be had of any process or notice, and to make such return for and on behalf of said corporation to the assessor of the county or district wherein its business is carried on, as is required by the forty-first section of the twenty-ninth chapter of the code. Every such corporation having its principal office or place of business outside of this state, shall within thirty days after organizing, by power of attorney duly executed, appoint some person residing in this state to accept service on behalf of said corporation, and upon whom service may be had of any process or notice, and to make return of its property in this state for taxation as aforesaid.

The said power of attorney shall be recorded in the office of the clerk of the county court of the county in which the attorney resides, and filed and recorded in the office of the secretary of state, and the admission to record of such power of attorney shall be deemed evidence of compliance with the requirements of this section.

Corporations heretofore organized may comply with said requirements at any time within three months after the passage of this act. Any corporation failing to comply with

[1] W. Va. Code 1887, c. 54, § 23.

said requirements within six months after the passage of this act shall forfeit not less than two hundred nor more than five hundred dollars, and shall, moreover, during the continuance of such failure, be deemed a non-resident of this state; and its property, real and personal, shall be liable to attachment in like manner as the property of non-resident defendants; any corporation failing so to comply within twelve months after the passage of this act shall, by reason of such failure, forfeit its charter to the state, and the provisions of section eight, chapter twenty, acts one thousand eight hundred and eighty-five, relative to notice and publication, shall apply thereto.[1]

Sec. 602. Taxation of Corporations.—He (the assessor) shall ascertain from the proper officers or agents of all incorporated companies in his district (except railroads and foreign insurance, telegraph and express companies), the actual value of the capital employed or invested by them in their trade or business (exclusive of real estate and property exempt by law from taxation), and enter the same in his personal property book. The real estate of such companies shall be assessed and entered in the land book as in other cases. The value of the capital shall be estimated by taking the aggregate value of all the personal property of the company, not exempt from taxation, wherever situated, including their money, credits and investments, whether in or out of the state, and deducting from the said money, credits and investments, and not from said aggregate, what they owe to others as principal debtors. If a company have branches, each branch shall be assessed separately in the district, where the principal office for transacting its financial concerns is located, or if there be no such office, then in the district where its operations are carried on. All property of navigation companies and other joint stock transportation companies (except railroads), whether real or personal, shall be taxed in the county and district wherein such property is situated, and all locks and dams of navigation companies shall be assessed and taxed as real estate, in the county in which said locks and

[1] W. Va. Code 1887, c. 54, § 24.

dams are situated, and it shall be the duty of the assessor of each district to assess such property as hereinbefore directed. When the capital of a company is assessed as aforesaid, the personal property thereof, which shall not be held to include the locks or dams of a navigation company, shall not be otherwise assessed, nor shall any individual shareholder or partner therein be required to list or be assessed with his share, portion or interest, in the said capital.[1]

Sec. 603. Sale of Property and Works of Corporations other than Railroad Companies.—Whenever there has been since the first day of February, one thousand eight hundred and seventy-seven, or shall hereafter be, a sale of the works and property of any corporation other than a railroad corporation, under a decree, mortgage or trust deed, and there be a conveyance to the purchaser for the same, said purchaser or purchasers shall become a corporation in the same manner and be entitled to the franchises of the old corporation in the same manner as provided for railroad corporations in such cases in section seventy-two of this chapter, and the old corporation shall be *ipso facto* dissolved. But the purchaser at said sale shall not obtain the works constructed, or property acquired, after the making of the said deed or trust or mortgage.[2]

Sec. 604. Stockholders—Liability for debts of Company.—The stockholders of all corporations and joint-stock companies, except banks and banking institutions, created by laws of this state, shall be liable for the indebtedness of such corporations to the amount of their stock subscribed and unpaid, and no more.[3]

[1] W. Va. Code 1887, c. 29, § 64.
[2] W. Va. Code 1887, c. 54, § 82.
[3] W. Va. Const., Art. XI, § 2.

CHAPTER XXXI.

WEST VIRGINIA CORPORATIONS—HOMESTEAD AND BUILDING ASSOCIATION.

PURPOSES—LIMITATIONS—RIGHTS AND POWERS—LIABILITY OF STOCKHOLDERS—BY-LAWS.

SEC. 605. For what purposes formed.
SEC. 606. Limitation as to the use of funds.
SEC. 607. Rights, powers and privileges.
SEC. 608. Liability of stockholders.
SEC. 609. By-laws and articles of government.

Sec. 605. For what Purpose formed.—Building and loan associations, formed under this chapter, may be for the purposes of raising money, as hereinafter provided, to be distributed among their members, and by such members used in buying lands or houses, or in building or repairing houses, or for paying and liquidating liens on houses and other real estate.[1]

Sec. 606. Limitation as to use of Funds.—In any case where the money of any such association shall be diverted from the purposes expressed in the preceding section, such association shall not be entitled to the privileges conferred upon it in the succeeding section.[2]

Sec. 607. Rights, Powers and Privileges.—Every building and loan association may, by its by-laws, fix an ultimate value for the shares of its stock, so that the same be not less than one hundred and thirty dollars for each share, and at any time may pay in advance to such member, as shall bid

[1] W. Va. Code 1887, c. 54, § 25. [2] W. Va. Code 1887, c. 54, § 26.

the highest premium therefor at a *bona fide* sale, the ultimate value of any shares held by him less such premium; or in default of bidders at or above a minimum premium, may award to a member the ultimate value of any shares held by him less such minimum premium; the minimum premium and the mode of making and enforcing the award to be fixed by the by-laws. Such association may also levy, assess and collect from its members, stated dues upon every share of its stock, the amount of such dues to be fixed by its by-laws, but not to exceed twenty-five cents per week upon each share, and may levy, assess and collect from members to whom the ultimate value of shares, less the premium as aforesaid, shall have been advanced or awarded, stated dues upon each of such shares, in addition to those assessed upon other shares; but not exceeding upon each share three-fourths of the amount of such other dues, which additional dues shall be fixed by the by-laws. It may also levy, assess and collect from its members fines for default in the payment of any dues, or for failure to comply with or perform any other obligation or duty to the association. The amount of the respective fines shall be fixed by the by-laws, and they shall be imposed under regulations to be made in the by-laws, but such fines shall be uniform, and where they are for default in the payment of dues, shall be in proportion to the amount of the dues for the failure to pay which they are imposed; but no member shall be fined more than once for a failure to pay interest or dues for the same default. The transaction shall not be deemed usurious, although any or all of the dues, fines and premiums shall exceed the legal rate of interest on the amount of money received by the member.[1]

Sec. 608. Liability of Stockholders.—In cases where there shall be an advance or award to a member of the ultimate value of any shares, less the premium as aforesaid, the association may take personal security, or a mortgage or deed of trust upon real or personal property, or a transfer or pledge of shares of its stock, to secure the payment of all the dues to become due from such member, and the payment of any

[1] W. Va. Code 1887, c. 54, § 27.

fine which may become due from him. Such association may acquire, hold, convey and encumber all such property, real and personal, as may be so taken as security, or may be otherwise transferred to it in the due course of its legitimate business.

Sec. 609. By-laws and Articles of Government.—Every such association shall adopt by-laws, which shall embrace all the provisions of the four preceding sections, and such further provisions for its government and the management of its business, not inconsistent with these sections, as it may deem proper.

[1] W. Va. Code 1887, c. 54, § 28. [2] W. Va. Code 1887, c. 54, § 29.

PART IV.

CONSOLIDATED CORPORATION ACT.

CHAPTER XXXII.

THE GENERAL CORPORATION LAW.

SEC. 610. Short title.
SEC. 611. Definitions.
SEC. 612. Filing and recording certificates of incorporation.
SEC. 613. Corporations of the same name prohibited.
SEC. 614. Amended certificates.
SEC. 615. When copy certificate may be filed.
SEC. 616. Certificate and other papers to be evidence.
SEC. 617. General powers.
SEC. 618. Incidental powers.
SEC. 619. When additional lands may be acquired.
SEC. 620. May hold property in other states.
SEC. 621. When foreign corporation may hold real estate.
SEC. 622. May purchase at mortgage foreclosure.
SEC. 623. Banking powers prohibited.
SEC. 624. Powers of supreme court respecting election.
SEC. 625. Stockholder or member may stay proceedings in action collusively brought.
SEC. 626. Majority to act.
SEC. 627. Corporation not dissolved for failure to elect directors.
SEC. 628. Directors to be trustees in case of dissolution.
SEC. 629. Their powers as such trustees.
SEC. 630. Forfeiture for non-user.
SEC. 631. Extension of corporate existence.
SEC. 632. Laws repealed.
SEC. 633. Saving clause.
SEC. 634. Constructions.
SEC. 635. When to take effect.

Sec. 610. Short title.—This chapter shall be known as the general corporation law.[1]

Sec. 611. Definitions.—A municipal corporation includes a county, town, school district, village and city, and any other territorial division of the state established by law with pow-

[1] L. 1890, c. 563, § 1.

ers of local goverment. A domestic corporation is a corporation incorporated by or under the laws of the state or colony of New York. Every other corporation is a foreign corporation. A stock corporation is a corporation having capital stock divided into shares. A monied corporation is a corporation having banking powers, or the power to make loans upon pledges or deposits, or authorized by law to make insurances. The term "directors," when used in any act relating to corporations, shall include trustees or other persons by whatever name known, duly appointed or designated to manage the affairs of the corporation. The term "certificate of incorporation" shall include articles of association, or any other written instrument required by law to be executed to effect the incorporation of a corporation.

Sec. 612. Filing and recording certificates of incorporation.—Every certificate of incorporation and amended certificate shall be filed in the office of the secretary of state and of the clerk of the county, where the principal place of business of the corporation is or is to be located and recorded in books, properly indexed, and especially provided therefor, except religious and cemetery corporations, whose certificates may be filed and recorded only in the office of the clerk of the county, where the corporation is located, and except monied corporations whose certificates of incorporation must be filed in accordance with the provisions of law relating thereto, and except municipal and fire department corporations. All taxes required by law to be paid before incorporation, and the fees for filing and recording such certificate must be paid before filing; and no corporation shall exercise any corporate powers or privileges until such taxes and fees have been paid.[2]

Sec. 613. Corporations of same name prohibited.—No certificate of a proposed corporation shall be filed or recorded, having the same name as an existing domestic corporation, or a name so nearly resembling it as to be calculated to deceive, but a new or reorganized corporation may have the same

[1] L. 1890, c. 563, § 2. [2] Id., § 3.

name as the corporation to whose franchises it has succeeded.[1]

Sec. 614. Amended certificates.—The directors of any corporation, in whose original certificate any matter required to be therein stated has been omitted, may make and file an amended certificate to conform to the requirements of law; and thereupon such corporation shall, for all purposes, be deemed to be a corporation, from the time of filing the original certificate, but without prejudice to any pending action or proceeding, or to any rights previously accrued.[2]

Sec. 615. When copy certificate to be filed.—If either of the duplicate certificates of incorporation shall be lost or destroyed after filing, a certified copy of the other certificate may be filed in the place of the one so lost or destroyed and as of the date of its original filing, and such certified copy shall have the same force and effect as the original certificate had when filed.[3]

Sec. 616. Certificate and other papers to be evidence.—The certificates of incorporation of any corporation duly filed shall be presumptive evidence of its incorporation, and any amended certificate or other paper duly filed relating to the incorporation of any corporation, or its existence or management, and containing facts required by law to be stated therein, shall be presumptive evidence of the existence of such facts.[4]

Sec. 617. General powers.—Every corporation as such has power, though not specified in the law under which it is incorporated:

1. To have succession for the period specified in its certificate of incorporation or by law; and perpetually when no period is so specified.

2. To have a common seal, and alter the same at pleasure,

3. To acquire by grant, gift, devise or bequest, and to dispose of such property as the purposes of the corporation shall require, not exceeding the amount limited by law.

4. To appoint such subordinate officers and agents, as its

[1] L. 1890, c. 563, § 4.
[2] Id., § 5.
[3] Id., § 6.
[4] Id., § 7.

business shall require, and to allow them a suitable compensation, and

5. To make by-laws, not inconsistent with any existing law, for the management of its property, the regulation of its affairs, and the transfer of its stock. But no by-law regulating the election of directors or officers shall be valid, unless published for at least two weeks in a newspaper in the county where the election is to be held, and at least thirty days before such election.

Subdivisions four and five of this section shall not apply to municipal corporations.[1]

Sec. 618. Incidental powers.—In addition to the powers herein enumerated, and those expressly given in the law under which it is or shall be incorporated, no corporation shall possess or exercise any corporate powers, except such as shall be necessary to the exercise of the powers so enumerated and given.[2]

Sec. 619. When additional lands may be acquired.—When any corporation shall have sold and conveyed any part of its real estate, the supreme court may authorize it to purchase and hold from time to time other lands, upon satisfactory proof that the value of the lands so purchased does not exceed the value of the lands so sold and conveyed within the three years next preceding the application.[3]

Sec. 620. May hold property in other states.—Any domestic corporation transacting business in other states or foreign countries may acquire and convey such real property therein and such personal property as shall be requisite for such corporation in the convenient transaction of its business.[4]

Sec. 621. When foreign corporation may hold real estate.—Any foreign corporation doing business in this state may acquire such real property in this state as may be necessary for its corporate purposes in the transaction of its business within the state, and convey the same by deed or otherwise in the same manner as a domestic corporation.[5]

[1] L. 1890, c. 563, § 8.
[2] Id., § 9.
[3] Id., § 10.
[4] Id., § 11.
[5] Id., § 12.

Sec. 522. When may purchase at mortgage foreclosure.—Any foreign corporation may purchase at a sale upon the foreclosure of any mortgage held by it, or upon any judgment or decree for debts due it, or upon any settlement to secure such debts, any lands lying within this state covered by or subject to such mortgage, judgment, decree or settlement, and hold the same for not exceeding five years from the date of such purchase, and convey them by deed or otherwise, in the same manner as a domestic corporation.[1]

Sec. 623. Banking powers prohibited.—No corporation which is not a monied corporation shall by any implication or construction be deemed to possess the power of discounting bills, notes or other evidences of debt, of receiving deposits, of buying gold or silver bullion, or foreign coins, or buying or selling bills of exchange, or of issuing bills, notes or other evidences of debt for circulation as money.[2]

Sec. 624. Powers of supreme court respecting elections.—The supreme court shall upon the application of any person or corporation aggrieved by, or complaining of any election of any corporation, or any proceeding, act or matter touching the same, upon notice thereof to the adverse party, or to those to be affected thereby, forthwith and in a summary way, hear the affidavits, proofs and allegations of the parties, or otherwise inquire into the matters or causes of complaint, and establish the election or order a new election, or make such order and give such relief as right and justice may require, and may in its discretion order issues to be made up in such a manner and form as it may direct, to try the respective rights of the parties, touching the matters complained of.[3]

Sec. 625. May stay proceedings in action collusively brought.—If an action is brought against a corporation by the procurement of its directors, or any of them, to enforce any claim or obligation declared void by law, or to which the corporation has a valid defense, and such action is in the interest or for the benefit of any director, and the corporation has, by their connivance, made default in such action, or con-

[1] L. 1890, c. 563, § 13.
[2] Id., § 14.
[3] Id., § 15.

sented to the validity of such claim or obligation, any stockholder or member of the corporation may apply to the supreme court, upon affidavit, setting forth the facts, for a stay of proceedings in such action, and on proof of the facts in such further manner and upon such notice as the court may direct, it may stay such proceedings or set aside and vacate the same, or grant such other relief as may seem proper, and which will not injuriously affect an innocent party, who without notice of such wrong-doing and for a valuable consideration, has acquired rights under such proceedings.[1]

Sec. 626. Majority to act.—When the corporate powers of any corporation are to be exercised by any particular body or number of persons, a majority of such body or persons, if it be not otherwise provided by law, shall be a quorum; and every decision of a majority of such persons duly assembled as a board, shall be valid as a corporate act.[2]

Sec. 627. Corporation not dissolved by failure to elect directors.—If directors shall not be elected on the day designated in the by-laws, or by-law, the corporation shall not for that reason be dissolved, but the election may be held on any other day, when a meeting for that purpose may be called pursuant to the provisions of this chapter, and every director shall continue to hold his office and discharge its duties until his successor has been elected.[3]

Sec. 628. Directors to be trustees in case of dissolution.—Upon the dissolution of any corporation, its directors, unless other persons shall be appointed by the legislature, or by some court of competent jurisdiction, shall be the trustees of its creditors, stockholders or members, and shall have full power to settle its affairs, collect and pay outstanding debts and divide among the persons entitled thereto the moneys and other property remaining after payment of debts and necessary expenses.[4]

Sec. 629. Their powers as such trustees.—Such trustees shall have authority to sue for and recover the debts and

[1] L. 1890, c. 563, § 16.
[2] Id., § 17.
[3] Id., § 18.
[4] Id., § 19.

property of the corporation, by their name as such trustees, and shall jointly and severally, be personally liable to its creditors, stockholders, or members, to the extent of its property and effects that shall come into their hands.[1]

Sec. 630. Forfeiture for non-user.—If any corporation except a railroad, turnpike, plank-road or bridge corporation, shall not organize and commence the transaction of its business, or undertake the discharge of its corporate duties within one year from the date of its incorporation, its corporate powers shall cease.[2]

Sec. 661. Extension of corporate existence.—Any domestic corporation at any time within three years before the expiration thereof, may extend the term of its existence beyond the time specified in its original certificate of incorporation, or by law, or in any certificate of extension of corporate existence, by the consent of the stockholders owning two-thirds in amount of its capital stock, or, if not a stock corporation, by the consent of two-thirds of its members, in and by a certificate signed and acknowledged by them and filed in the offices in which the original certificates of its incorporation were filed, if at all, and, if not, then in the offices where certificates of incorporation are now required by law to be filed, and the officer with whom the same may be filed, shall there, upon record them in the books kept in their respective offices for the record of such certificates, and make a memorandum of such record in the margin of the original certificate in such book, if any, and thereupon the time of existence of such corporation shall be extended, as designated in such certificate, for a term not exceeding the term for which it was incorporated in the first instance.[3]

Sec. 632. Laws repealed.—Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is repealed. Such repeal shall not revive a law repealed by any law hereby repealed, but shall include all laws amendatory of the laws hereby repealed.[4]

[1] L. 1890, c. 563, § 20.
[2] Id., § 21.
[3] Id., § 22.
[4] Id., § 23.

Sec. 633. Saving clause.— The repeal of a law or any part of it specified in the annexed schedule shall not affect or impair any act done, or right accruing, accrued or acquired, or liability, penalty, forfeiture or punishment incurred prior to May first, eighteen hundred and ninety-one, under or by virtue of any law so repealed, but the same may be asserted, enforced, prosecuted or inflicted, as fully and to the same extent as if such law had not been repealed: and all actions and proceedings, civil or criminal, commenced under or by virtue of the laws so repealed, and pending on April thirtieth eighteen hundred and ninety-one, may be prosecuted and defended to final effect in the same manner as they might under the laws then existing, unless it shall be otherwise specially provided by law.[1]

Sec. 634. Construction.— The provisions of this chapter, so far as they are substantially the same as those of laws existing on April thirtieth, eighteen hundred and ninety-one shall be construed as a continuation of such laws, modified or amended according to the language employed in this chapter, and not as new enactments; and references in laws not repealed to provisions of laws incorporated into this chapter and repealed shall be construed as applying to the provisions so incorporated; and nothing in this act shall be construed to amend or repeal any provision of the Criminal or Penal Code.[2]

Sec. 635. When to take effect— This chapter shall take effect on May first, eighteen hundred and ninety-one.[3]

[1] L. 1890, c. 563, § 24.
[2] Id., § 25.
[3] Id., § 26.

SCHEDULE OF LAWS REPEALED.

Revised Statutes.....	Part 1, chap. 18, title 3	All except sec. 5.
Revised Statutes.....	Part 1, chap. 18, title 4	Sections 5 and 6.

Laws of	Chapter.	SECTIONS.
1796.....	43.....	10.
1811.....	67.....	4, 6, 8.
1847.....	210.....	3.
1848.....	37.....	4, 7, 9, 23.
1848.....	40.....	4, 7, 9, 26.
1848.....	265.....	The last three lines of section 3 and all of sections 4 and 6.
1848.....	259.....	4.
1848.....	319.....	4, 9.
1850.....	140.....	3, 48.
1853.....	117.....	4, 7, 9, 26.
1853.....	135.....	5, 11.
1854.....	112.....	The last two lines of section 3.
1854.....	232.....	4, 5, 7, 9, 26.
1854.....	269.....	4, 6.
1857.....	29.....	2.
1857.....	546.....	2. 4, 7, 9.
1857.....	776.....	6. 8.
1859.....	168.....	13.
1861.....	149.....	4.
1862.....	438.....	3, 4.
1866.....	697.....	5.
1867.....	937.....	1.
1867.....	960.....	4.
1867.....	971.....	9.
1867.....	974.....	3.
1869.....	917.....	All after the word "companies" in the last five lines of subdivision 2, to section 2.
1870.....	135.....	1 and 2.
1872.....	146.....	1.
1872.....	248.....	11.
1872.....	820.....	12, 16, 18.
1873.....	397.....	4, 8, 9.
1873.....	469.....	5.
1873.....	616.....	4.
1874.....	143.....	4, 7, 9, 15.
1874.....	288.....	2, 3.
1875.....	58.....	All
1875.....	267.....	5, 10.
1875.....	343.....	8.
1875.....	611.....	2, 4, 27.
1877.....	158.....	1.
1877.....	228.....	6.
1878.....	203.....	3.
1881.....	22.....	1.
1881.....	468.....	Last paragraph of section 4.
1882.....	273.....	3.
1882.....	290.....	All
1884.....	367.....	4.

Laws of	Chapter	SECTIONS.
1885.....	489.....	2.
1885.....	505.....	4.
1886.....	236.....	6, 8, 9.
1887.....	317.....	6.
1887.....	450.....	1.
1887.....	501.....	3.
1888.....	293.....	4, 7.
1888.....	306.....	All.
1888.....	391.....	5.
1888.....	462.....	2.

CHAPTER XXXIII.

THE BUSINESS CORPORATION LAW.

SEC. 636. Short title of chapter.
SEC. 637. Incorporation.
SEC. 638. Restriction upon commencement of business.
SEC. 639. Adoption of by-laws.
SEC. 640. Reorganization of existing corporations.
SEC. 641. Payment of capital stock.
SEC. 642. Liabilities of stockholders.
SEC. 643. Extension of business.
SEC. 644. Change of place of business.
SEC. 645. Taxation.
SEC. 646. Place of business; assessment.
SEC. 647. May hold stock in certain corporations.
SEC. 648. Corporations may consolidate; agreement therefor.
SEC. 649. Agreement to be submitted to stockholders; stock of those objecting appraised and paid for.
SEC. 650. Powers of consolidated corporations.
SEC. 651. Property, etc., transferred to new corporations.
SEC. 652. Rights of creditors.
SEC. 653. District steam corporations; must supply steam; penalty; deposit may be required.
SEC. 654. Agent authorized to enter buildings and examine meter; penalty for interference.
SEC. 655. When agent may enter and cut off steam.
SEC. 656. Laws repealed.
SEC. 657. Saving clause.
SEC. 658. Construction.
SEC. 659. When to take effect.

Sec. 626. Short title and limitation of chapter.—This chapter shall be known as the business corporation law, but no corporation shall be formed under it for the purpose of carrying on any business which might be carried on by a corporation formed under any other general law of the state

authorizing the formation of corporations for the purpose of carrying on such business.[1]

Sec. 637. Incorporation.—Five or more persons, a majority of whom shall be citizens and residents of this state, may become a corporation, for the purpose of carrying on any lawful business by making, signing, acknowledging and filing a certificate which shall contain:

1. The name of the proposed corporation;
2. The object for which it is to be formed, including the nature and locality of its business;
3. The amount and description of the capital stock.
4. The number of shares of which the capital stock shall consist, each of which shall not be less than five nor more than one hundred dollars;
5. The location of its principal business office;
6. Its duration, which shall not exceed fifty years;
7. The number of its directors, not less than five nor more than thirteen, who shall each be a stockholder having at least five shares of stock;
8. The names and post-office addresses of the directors for the first year;
9. The post-office addresses of the subscribers and a statement of the number of shares of stock which each agrees to take in the corporation, the aggregate of which subscriptions shall not be less than one-tenth of the capital stock, and ten per cent of which must be paid in cash to the directors named in the certificate. There shall be endorsed thereon or annexed thereto as a part thereof the affidavit of at least three of the directors, that the requisite amount of stock has been subscribed and the prescribed percentage thereof paid in cash to the directors.[2]

Sec. 386. Restriction upon commencement of business.—No such corporation shall engage in the transaction or management of the business, which it is incorporated to conduct, until one-half of its capital stock shall have been subscribed and ten per cent thereof shall have been paid in cash, nor

[1] L. 1890, c. 567, § 1. [2] Id. § 2.

until it shall have adopted by-laws for the corporation, and shall have filed in the offices where its certificates of incorporation were filed a further certificate, executed and acknowledged by the president and treasurer of the board of directors, to the effect that one-half of the capital stock of the corporation has been in good faith subscribed and ten per cent thereof actually paid in cash, and that the by-laws of the corporation have been adopted and a copy of the subscription list to the stock of the corporation and a copy of the by-laws shall be annexed to such certificate, and the same shall be verified by the oath of the president and treasurer to the effect that the statements contained in it are true.[1]

Sec. 639. Adoption of by-laws.—The by-laws of the corporation shall be adopted at a meeting of stockholders who have subscribed in the aggregate to at least one-half of the capital stock of the corporation and paid ten per cent of such subscription in cash, which meeting shall be called by the directors named in the certificate by serving, at least five days before the meeting, upon every stockholder personally, or by depositing in the post-office, a copy addressed to him at his last known place of residence, postage prepaid, a written notice stating the time, place and object of the meeting.

Such by-laws shall provide :

1. The term of the office of the directors, which shall no exceed one year;

2. The manner of filling vacancies among directors and officers;

3. The time and place of the annual meeting;

4. The manner of calling and holding special meetings of the stockholders;

5. The number of stockholders who shall attend, either in person or by proxy, in order to constitute a quorum;

6. The officers of the corporation, always including a president, a secretary and a treasurer, the manner of their election, by and among the directors, and their powers and duties;

7. The manner of electing or appointing inspectors of election;

[1] L. 1890, c. 567, § 3.

8. The manner of amending the by-laws.

No amendment of the by-laws of any such corporation shall take effect until a copy thereof, verified by the president and secretary, shall have been filed in the offices where the original certificates of incorporation were filed.[1]

Sec. 640. Reorganization of existing corporations. Any corporation heretofore organized, except such corporations as are prohibited by the first section [2] of this chapter from organizing thereunder, may reincorporate under this chapter in the following manner: The directors of the corporation shall call a meeting of the stockholders thereof by publishing a notice, stating the time, place and object of the meeting, signed by at least a majority of them, in a newspaper of the county in which its principal business office is situated, for at least three successive weeks, and by serving upon each stockholder at least three weeks before the meeting, a copy of such notice either personally or by depositing it in the post-office, postage prepaid, addressed to him at his last known post-office address. The stockholders shall meet at the time and place specified in the notice, and organize by choosing one of the directors chairman, and a suitable secretary, and shall then take a vote of those present in person or by proxy upon the proposition to reincorporate under this chapter, and if votes representing a majority of all the stock of the corporation shall be cast in favor of the proposition, the officers of the meeting shall execute and acknowledge a certificate of the proceedings, which certificate shall also contain the statements required by section two [3] of this chapter, and shall be filed, together with a copy of the by-laws of the corporation, in the offices where certificates of incorporation under this chapter are required to be filed. From the time of such filing such corporation shall be deemed to be a corporation organized under this chapter, and if originally organized or incorporated under a general law of the state, it shall have and exercise all such rights and franchises as it has heretofore had and exercised under the laws pursuant to which it was originally incorporated, and such reorganization shall not in any way affect, change or diminish the existing liabilities of the corporation.[4]

[1] L. 1890, c. 567, § 4. [2] See *Ante*, § 636. [3] See *Ante*, § 637. [4] Id., § 5.

Sec. 641. Payment of capital stock.—The capital stock of every such corporation shall be paid in, one-half thereof within one year and the other half thereof within two years from its incorporation, or the corporation shall be dissolved, and the directors, within thirty days after the payment of the last installment of the capital stock, shall make a certificate of the amount of the capital stock so paid in, which shall be signed and sworn to by a majority of the directors and filed in the offices where the certificates of incorporation are filed. The dissolution of any such corporation for any cause shall not take away or impair any remedy against it, its stockholders or officers, for any liabilities incurred previous to its dissolution.[1]

Sec. 642. Liabilities of stockholders.—Every corporation formed under this chapter may be or become a full liability corporation by inserting a statement in the certificate of incorporation, that the corporation thereby formed is intended to be a full liability corporation; and in case of an existing corporation, which is not a full liability corporation, it may become such by filing in the offices where certificates of incorporation are required to be filed, a supplemental certificate stating that thereafter the corporation intends to be a full liability corporation, which certificate shall be executed and acknowledged by the president and treasurer of the corporation or by the board of directors, and shall have annexed thereto a copy of a resolution, adopted by a two-thirds vote of the board of directors, and the written consent of persons owning at least two-thirds of the stock of the corporation, authorizing and consenting to the change of the corporation to a full liability corporation. If the corporation is formed as or becomes a full liability corporation all the stockholders of the corporation shall be severally individually liable to its creditors for all its debts and liabilities, and may be joined as defendants in any action against it. No execution shall issue against any stockholder individually until execution has been issued against the corporation and returned unsatisfied, and all the stockholders shall contribute a proportionate share,

[1] L. 1890, c. 567, § 6.

according to the number of shares of stock owned by each, of the amount paid by any stockholder on a judgment recovered against him individually for a debt of the corporation, and he may recover from the other stockholders in the corporation in a joint or several action the proper portion due by them and each of them, of the amount paid by him on any such judgment. If any corporation formed under this chapter is not or does not become a full liability corporation, the stockholders of the corporation shall be severally individually liable to its creditors to an amount equal to the amount of stock held by them respectively for all debts and contracts made by the corporation until the whole amount of its capital stock has been paid in, and until a certificate thereof has been made and filed as hereinbefore required.[1]

Sec. 643. Extension of business.—Any corporation incorporated under this article, within one year from the date of its certificate of incorporation, may extend its business beyond that mentioned in its original certificate, providing the proposed extension of business shall be of the same general character as that stated in and which might have been properly included in the original certificate, by executing and filing as required for the original certificate, an amended certificate stating the extension of business proposed and that the same has been authorized by a vote of stockholders representing one-half the capital stock, at a meeting called and held as provided in section two, and a copy of the proceedings of such meeting, verified by the affidavit of at least three of the directors present thereat, shall be filed with such amended certificate.[2]

Sec. 644. Change of place of business.—Such corporation may change its principal place of business by the consent of the stockholders owning two-thirds of the capital stock by such stockholders executing, acknowledging and filing in the manner required for the certificate of incorporation, a certificate specifying the names of the towns or cities from and to which its business location is to be changed, and signed by the president and two-thirds of the directors, which certificate

[1] L. 1890, c 567, § 7. [2] Id., § 8.

shall be published weekly in two papers in the towns or cities from and to which such business location has been removed for the period of three months, and if there are not two newspapers published in such towns or cities, then such publication shall be made in two papers published nearest to such towns or cities.[1]

Sec. 645. Taxation.—Every such corporation shall be taxed on all of its property, except real estate, in the town, city or village, where its principal business office is situated.[2]

Sec. 646. Place of business—Assessment.—No such corporation shall be deemed or taken to have a principal office or place for transacting its financial concerns, other than that at which its operations are carried on, unless within the month of May in each year, the president and treasurer, or a majority of the directors, shall execute, under oath, duplicate certificates stating the amount of the then capital of the corporation, the portion thereof not invested in real estate, that it has a principal office for transacting its financial concerns in a county other than that in which its operations are carried on, and the town or city and county in which such financial office is situated, and that the president and treasurer and a majority of the directors are then actually residents of the town or city in which such financial office is then located, and filing the same in the clerk's office of the county where the operations of the corporation are carried on, and in the clerk's office of the county in which such financial office shall be. And in case such duplicate certificates are so made and filed, then during the year succeeding the first day of June next after such filing, the personal estate of such corporation shall be assessed only in the town, city or ward named in such certificate as that in which such financial office is situated.[3]

Sec. 647. May hold stock in certain corporations.—Any such corporation may hold stock in the capital of any corporation engaged in the business of mining, manufactur-

[1] L. 1890, c. 567, § 9.
[2] Id., § 10.
[3] Id., § 11.

ing or transporting such materials as are requisite in the prosecution of the business of such corporation so long as they shall furnish or transport such materials for the use of such corporation, and for two years thereafter, and no longer; and to hold stock in the capital of any corporation which shall use or manufacture materials mined or produced by such corporation; and the directors shall have power to purchase such stock and to issue stock in payment therefor to the amount of the value thereof, but not to increase the capital stock except in the manner provided by law. When any such corporation shall be a stockholder in any other corporation, as herein provided, its president or other officers shall be eligible to the office of director of such corporation, the same as if they were individually stockholders therein.[1]

Sec. 648. Corporations may Consolidate.—Agreement therefor.—Any two or more corporations organized under the laws of this state for the purpose of carrying on any kind of business of the same or of a similar nature, which a corporation organized under this chapter might carry on, may consolidate such corporations into a single corporation, as follows: The respective boards of directors of such corporations may enter into and make an agreement, under their respective corporate seals, for the consolidation of such corporations prescribing the terms and conditions thereof, the mode of carrying the same into effect, the name of the new corporation, the number of directors who shall manage its affairs, not less than five nor more than thirteen, the names and post-office address of the directors for the first year, the term of its existence, not exceeding fifty years, the name of the town or towns, county or counties, in which its operations are to be carried on, the name of the town or city and county in this state in which its principal place of business is to be situated, the amount of its capital stock, which shall not be larger in amount than the fair aggregate value of the property, franchises and rights of such corporations, and the number of shares into which the same is to be divided, the manner of distributing, such capital stock among the holders

[1] L. 1890, c. 567, § 12.

thereof, and if such corporations, or either of them, shall have been organized for the purpose of carrying on any part of its business in any place out of this state, and such new corporation shall propose to carry on any part of its business out of this state, the agreement shall so state, with such other particulars as they may deem necessary.[1]

Sec. 649. Agreements to be submitted to stockholders—Stock of those objecting appraised and paid for.—Such agreement shall be submitted to the stockholders of each of such corporations, at a meeting thereof to be called upon notice of at least thirty days, specifying the time, place and object thereof, and addressed to each at their last known post-office address, and deposited in the post-office, postage prepaid, and published for at least three successive weeks in one of the newspapers in each of the counties of this state in which either of such corporations shall have its place of business, and if such agreement shall be approved at each of such meetings of the respective stockholders separately, by the vote by ballot of the stockholders owning at least two-thirds of the stock, the same shall be the agreement of such corporations; and a sworn copy of the proceedings of such meetings, made by the secretaries thereof, respectively, and attached thereto, shall be presumptive evidence of the holding and action of such meetings. Such agreement and verified copy of proceedings of such meetings shall be made in duplicate, one of which shall be filed in the office of the secretary of state, and the other in the office of the clerk of the county when the principal business office of the new corporation is to be situated in this state, and thereupon such corporations shall be merged into the new corporation specified in such agreements, to be known by the corporate name therein mentioned, and the provisions of such agreement shall be carried into effect as therein provided. If any stockholder, not voting in favor of such agreement to consolidate, shall at such meeting, or within twenty days thereafter, object to such consolidation and demand payment for his stock, such stockholder or such new corporation, if the consolidation takes effect at any time there-

[1] L. 1890, c. 567, § 13.

after, may at any time within sixty days after such meeting apply to the supreme court at any special term thereof held in the district in which any county is situated in which such new corporation may have its place of business, upon at least eight days, notice to the new corporation, for the appointment of three persons to appraise the value of such stock and the court shall appoint three such appraisers, and designate the time and place of their first meeting, with such directions in regard to their proceedings, as shall be deemed proper, and also direct the manner in which payment for such stock shall be made to such stockholder. The court may fill any vacancy in the board of appraisers occurring by refusal or neglect to serve or otherwise. The appraisers shall meet at the time and place designated, and they or any two of them, after being duly sworn honestly and faithfully to discharge their duties shall estimate and certify the value of such stock at the time of such dissent, and deliver one copy to such new corporation and another to such stockholder if demanded ; the charges and expenses of the appraisers shall be paid by the new corporation. When the new corporation shall have paid the amoun of such appraisal, as directed by the court, such stockholder shall cease to have any interest in such stock and in the corporate property of such corporation, and such stock may be held or disposed of by such new corporation.[1]

Sec. 650. Powers of consolidated corporations.—Such new corporation in addition to the general powers of corporations shall enjoy the rights, franchises and privileges possessed by each of the corporations so consolidated, subject to the restrictions, liabilities, duties and provisions contained in this article, so far as the same may be applicable to the purposes for which it shall have been organized and expressed in the agreement for consolidation, and may prosecute or carry on any kind of business which each of the consolidating corporations was authorized by law to conduct.[2]

Sec. 651. Property, etc., transferred to new corporations.—Upon such consolidation and organization of such new cor-

[1] L. 1890, c. 567, § 14.

[2] Id., § 15.

poration, all and singular the rights, privileges, franchises and interests of every kind belonging to or enjoyed by the corporations so consolidated, and every species of property, real, personal and mixed, and things in action thereunto belonging, mentioned in such agreement of consolidation, shall be deemed to be transferred and vested in, and may be enjoyed by, such new corporation, without any other deed or transfer; and such new corporation shall hold and enjoy the same, and all rights of property, privileges, franchises and interests in the same manner and to the same extent as if the several corporations so consolidated had continued to retain the title and transact the business of such corporations, and the title to real and personal estate and rights and privileges acquired and enjoyed by either of the corporations shall not revert or be impaired by such consolidation, or anything relating thereto.[1]

Sec. 652. Rights of creditors.—The rights of creditors of any corporation that shall so be consolidated shall not in any manner be impaired, nor any liability or obligation for the payment of any money due or to become due to any person or persons, or any claim or demand for any cause existing against any such corporation or against any stockholder thereof, be released or impaired by any such consolidation: but such new corporation shall succeed to and be held liable to pay and discharge all such debts and liabilities of each of the corporations consolidated in the same manner as if such new corporation had itself incurred the obligation or liability to pay such debt or damages; and the stockholders of the respective corporations consolidated shall continue, subject to all the liabilities, claims and demands existing against them as such, at or before the consolidation; and no action or proceeding then pending before any court or tribunal in which any corporation that may be so consolidated is a party, or in which any such stockholder is a party, shall abate or be discontinued by reason of such consolidation, but may be prosecuted to final judgment, as though no consolidation had been entered into; or such new corporation may be substituted as a party in place

[1] L. 1890, c. 567, § 16.

of any corporation so consolidated, by order of the court in which such action or proceeding may be pending.[1]

Sec. 653. District steam corporations—must supply steam penalty—deposit may be required.—Any corporation now or hereafter incorporated for the purpose of supplying steam to consumers from a central station or stations through pipes laid in the public streets, shall be known as a district steam corporation, and upon the application in writing of the owner or occupant of any building or premises, within one hundred feet of any street main laid down by any such corporation, and payment by him of all money due from him to it, such corporation shall supply steam as may be required for heating such building or premises, notwithstanding there may be rent or compensation in arrears for steam supplied, or for meter, pipe or fittings furnished to a former occupant thereof, unless such owner or occupant shall have undertaken or agreed with the former occupant to pay or to exonerate him from the payment of such arrears, and shall refuse or neglect to pay the same; and if, for the space of twenty days after such application, and the deposit, if required, of a reasonable sum to cover the cost of connection and two months' steam supply, the corporation shall refuse or neglect to supply steam as required, it shall forfeit to such applicant the sum of ten dollars and the further sum of five dollars for every day thereafter during which such refusal or neglect shall continue; but no such corporation shall be required to lay a service pipe for the purpose of supplying steam to any applicant, where the ground in which such pipe is required to be laid shall be frozen, or otherwise present serious obstacles to laying the same; nor unless the applicant, if required, shall deposit in advance with the corporation a sum of money sufficient to pay for two months' steam supply and the cost of the necessary connections and of the erection of a meter and such other special apparatus as are required for use in connection with such steam supply, nor unless the applicant shall provide the space and right of way necessary for the erection, maintenance and use of such connections and apparatus,

[1] L. 1890, c. 567, § 17.

and signify his assent in writing to the reasonable regulations of the corporation with reference to the supply of steam to consumers.[1]

Sec. 654. Agent authorized to enter buildings and examine meter—penalty for interference.—Any such corporation may make an agreement with any of its customers, by which any of its officers or agents shall be authorized at all reasonable times to enter any dwelling, store, building, room or place supplied with steam by such corporation and occupied by such customer, for the purpose of inspecting and examining the meters, devices, pipes, fittings and appliances for supplying or regulating the supply of steam, and for ascertaining the quantity of steam consumed, or the quantity of water resulting from the condensation of steam consumed. Every such agreement shall further provide that such officer or agent shall exhibit his written authority if requested by the occupant of such dwelling, store, building, room or place. Any person who shall directly or indirectly prevent or hinder such officer or agent from entering such dwelling, store, building, room or place, or from making such inspection or examination, in violation of such agreement shall forfeit to the corporation the sum of twenty-five dollars for each offense.[2]

Sec. 655. When agent may enter and cut off steam.—If any person or persons, corporation or association supplied with steam by any such corporation, shall neglect or refuse to pay the rent or remuneration for such steam, or for the meter, device, pipes, fittings or appliances, let by such corporation for supplying steam, or for ascertaining the quantity of steam consumed, or the quantity of water resulting from the condensation of the steam consumed, agreed upon or due for the same, as required by his, their or its contract with such corporation, the latter may thereupon stop and prevent the steam from entering the premises of such person, persons, corporation or association, so neglecting or refusing to pay such rent or remuneration, and may also in any case, in which a person is liable to pay a forfeiture, or to a fine or imprisonment, by reason of any act to or towards such corporation or its prop-

[1] L. 1890, c. 567, § 18. [2] Id., § 19.

erty for which such forfeiture, fine or penalty is imposed by law, stop and prevent the steam from entering the premises of the person so liable, or if such person be an officer or agent of any corporation or association, stop and prevent the steam from entering the premises of such corporation or association. In all cases in which such corporation is authorized to stop and prevent the steam from entering any premises it may, by its officers, agents, or workmen, enter into or on such premises between the hours of eight o'clock in the forenoon and six o'clock in the afternoon and cut off, disconnect, seperate and carry away any meter, device, pipe, fitting, or other property of the corporation; and may cut off, disconnect and separate any meter, device, pipe or fitting, whether the property of the corporation or not, from the mains or pipes of such corporation.[1]

Sec. 656. Laws repealed.—Of the laws enumerated in the Schedule hereto annexed, that portion specified in the last column is repealed. Such repeal shall not revive a law repealed by any law hereby repealed, but shall include all laws amendatory of the laws hereby repealed.[2]

Sec. 657. Saving Clause.—The repeal of a law or any part of it specified in the annexed schedule shall not affect nor impair any act done, or right accruing, accrued or acquired, or liability, penalty, forfeiture or punishment incurred prior to May first, eighteen hundred and ninety-one under or by virtue of any law so repealed, but the same may be asserted, enforced, prosecuted or inflicted, as fully and to the same extent, as if such law had not been repealed, and all actions and proceedings, civil or criminal, commenced under or by virtue of the laws so repealed and pending on April thirty, eighteen hundred and ninety-one, may be prosecuted and defended to final effect, in the same manner as they might under the laws then existing, unless it shall be otherwise specially provided by law.[3]

Sec. 658. Construction.—The provisions of this chapter, so far as they are substantially the same as those of laws existing

[1] L. 1890, c. 567, § 20. [2] Id., § 21. [3] Id., § 22.

on April thirty, eighteen hundred and ninety-one, shall be construed as a continuation of such laws, modified or amended according to the language employed in this chapter, and not as new enactments; and references in laws not repealed to provisions of laws incorporated into this chapter and repealed shall be construed as applying to the provisions so incorporated; and nothing in this chapter shall be construed to amend or repeal any provision of the Criminal or Penal Code.[1]

Sec. 659. When to take effect.—This chapter shall take effect on May first, eighteen hundred and ninety one.[2]

SCHEDULE OF LAWS REPEALED.

Laws of	Chapter.	SECTIONS.
1811	67	1 and 2.
1815	47	All.
1815	202	All.
1816	58	All.
1817	223	All.
1818	67	All.
1819	102	All.
1821	14	All.
1848	40	1 and 2.
1851	14	All.
1853	117	1 and 2.
1855	301	All.
1857	29	1 and 3.
1861	170	All.
1863	63	All.
1864	337	All.
1864	517	1.
1865	234	All.
1865	307	All.
1866	371	All.
1866	838	All.
1867	960	1, 2, 3, 5, 6 and 7.
1869	706	All.
1871	481	All.
1871	535	All.
1872	248	1, 2, 4, 5, 6 and 12.
1872	820	1, 2, 3, 5, 6, 7, 8, 11, 17 and 19.
1873	610	1, 2, 3, 5 and 6.
1873	814	All.
1874	143	1, 2, 12, 16, 17 and 18.
1875	88	All.
1875	113	All.
1875	365	All.
1875	611	1, 3, 6, 7, 8, 9, 30 to 39 (both inclusive).

[1] L. 1890, c. 657, § 23. [2] Id., § 24.

SCHEDULE OF LAWS REPEALED—*Continued.*

Laws of	Chapter	SECTIONS.
1878.....	334.....	All.
1880.....	85.....	All.
1880.....	241.....	All.
1880.....	263.....	All.
1881.....	351.....	All
1881.....	472.....	All
1881.....	650.....	All.
1882.....	273.....	1.
1882.....	309.....	All.
1883.....	71.....	All.
1883.....	240.....	All.
1884.....	267.....	All.
1884.....	367.....	1, 2, 3, 5, 6 and 7.
1885.....	84.....	All.
1885.....	535.....	All.
1885.....	549.....	All.
1886.....	579.....	All.
1886.....	592.....	All.
1887.....	486.....	All.
1888.....	313.....	1.
1888.....	447.....	All.
1889.....	57.....	All.
1889.....	519.....	All.

CHAPTER XXXIV.

THE STOCK CORPORATION LAW.

ARTICLE 1. General powers ; re-organization (§§ 660–666).
2. Directors and officers ; their election, duties and liabilities (§§ 667–678).
3. Stock ; stockholders, their rights and liabilities (§§ 679 to 697).
4. Miscellaneous provisions (§§ 698–701).

ARTICLE I.

GENERAL POWERS; REORGANIZATION.

SEC. 660. Short title.
SEC. 661. May borrow money and mortgage property.
SEC. 662. Purchasers at sale of corporate property and franchise may become a corporation.
SEC. 663. Contents of plan of agreement.
SEC. 664. Sale of property—possession of receiver and suits against him.
SEC. 665. Stockholder may assent to plan of readjustment.
SEC. 666. Combinations prohibited.

Sec. 660. Short title.—This chapter shall be known as the stock corporation law, but shall not apply to monied corporations.[1]

Sec. 661. May Borrow Money and Mortgage Property.—In addition to the powers conferred by the general corporation law, every stock corporation shall have power to borrow money or contract debts, when necessary for the transaction of its business, or for the exercise of its corporate rights,

[1] L. 1890, c. 564, § 1.

privileges or franchises, or for any other lawful purpose of its incorporation; and may issue and dispose of its obligations for any amount so borrowed, and may mortgage its property and franchises to secure the payment of such obligations or of any debt contracted for the purposes herein specified; and the amount of the obligations issued and outstanding at any one time secured by such mortgages, excepting mortgages given as a consideration for the purchase of real estate, and mortgages authorized by contracts made prior to the time when this act shall take effect, shall not exceed the amount of its paid-up capital stock, or an amount equal to two-thirds of the value of its corporate property at the time of issuing the obligations secured by such mortgages, in case such two-thirds value shall be more than the amount of such paid-up capital stock. No such mortgages excepting purchase-money mortgages shall be issued without the written consent, duly acknowledged, of the stockholders owning at least two-thirds of the stock of the corporation, and such consent shall be filed and recorded in the office of the clerk or register of the county where it has its principal place of business. When authorized by such consent the directors, under such regulations as they may adopt, may confer on the holder of any debt or obligation secured by such mortgage the right to convert the principal thereof, after two and not more than twelve years from the date of the mortgage, into stock of the corporation; and if the capital stock shall not be sufficient to meet the conversion when made, the stockholders shall, in the manner herein provided, authorize an increase of capital stock sufficient for that purpose.[1]

Sec. 662. Purchasers at sale of corporate property and franchise may become a corporation.—When the property and franchises of any domestic stock corporation shall be sold by virtre of any mortgage or deed of trust, duly executed by it or pursuant to the judgment or decree of a court of competent jurisdiction, or by virtue of any execution issued thereon, and the purchaser at such sale shall acquire title to the same in the manner prescribed by law, he may associate with

[1] L. 1890, c. 564, § 2.

him any number of persons, not less than the number required by law for the incorporation of such corporation, a majority of whom shall be citizens and residents of this state, and they may become a corporation, and take and possess the property and franchises thus sold, and which were at the time of sale possessed by the corporation whose property shall have been so sold, upon making, acknowledging and filing in the offices where certificates of incorporation are required by law to be filed, a certificate in which they shall describe by name and reference to the law under which it was organized, the corporation whose property and franchises they have acquired, and the court by whose authority the sale had been made, with the date of the judgment or decree authorizing or directing the same, and a brief description of the property sold, and also the following particulars:

1. The name of the new corporation intended to be formed by the filing of such certificate.

2. The maximum amount of its capital stock and the number of shares into which it is to be divided, specifying the classes thereof, whether common or preferred, and the amount of and rights pertaining to each class.

3. The number of directors, not less nor more than the number required by law for the old corporation, who shall manage the affairs of the new corporation, and the names and post-office address of the directors for the first year.

4. Any plan or agreement, which may have been entered into at or previous to the time of sale, in anticipation of the formation of the new corporation, and pursuant to which such purchase was made. Such corporation shall be vested with and be entitled to exercise and enjoy all the rights, privileges and franchises, which at the time of such sale belonged to, or were vested in the corporation last owning the property sold, or its receiver, and shall be subject to all the provisions, duties and liabilities, imposed by law on such corporations.[1]

Sec. 663. Contents of plan or agreement.—At or previous to the sale the purchasers thereat, or the persons for

[1] L. 1890, c. 564, § 3.

whom the purchase is to be made, may enter into a plan or agreement, for or in anticipation of the readjustment of the respective interests therein of the mortgage creditors and stockholders of the corporation owning such property and franchises at the time of sale, and for the representation of such interests of creditors and stockholders in the bonds or stock of the new corporation to be formed, and may therein regulate voting by the holders of the preferred and common stock at any meeting of the stockholders, and by the holders and owners of any or all of the bonds of the corporation foreclosed, or of the bonds issued or to be issued by the new corporation, and such right of voting by bondholders shall be exercised in such manner, for such period, and upon such conditions, as shall be therein described. Such plan or agreement must contain suitable provision for the bondholders voting by proxy, and must not be inconsistent with the laws of the state and shall be binding upon the corporation, until changed as therein provided, or as otherwise provided by law. The new corporation when duly organized, pursuant to such plan or agreement, and to the provisions of law, may issue its bonds and stock in conformity with the provisions of such plan or agreement, and may at any time within six months after its organization, compromise, settle or assume the payment of any debt, claim or liability of the former corporation upon such terms as may be lawfully approved by a majority of the agents or trustees intrusted with the carrying out of the plan or agreement of reorganization, and may establish preferences in respect to the payment of dividends in favor of any portion of its capital stock and may divide its stock into classes, but the capital stock of the new corporation shall not exceed in the aggregate, the maximum amount of stock mentioned in the certificate of incorporation, nor shall the bonds issued by it exceed in the aggregate the amount which a corporation is authorized by the provisions of this article to issue.[1]

Sec. 664. Sale of property—possession of receiver and suits against him—The supreme court may direct a sale

[1] L. 1890, c. 564, § 4.

of the whole of the property, rights and franchises covered by the mortgage or mortgages, or deeds of trust foreclosed at any one time and place to be named in the judgment or order, either in case of the non-payment of interest only, or of both the principal and interest, due and unpaid and secured by any such mortgage or mortgages or deeds of trust. Neither the sale nor the formation of the new corporation shall interfere with the authority or possession of any receiver of such property and franchises, but he shall remain liable to be removed or discharged at such time as the court may deem proper. No suit or proceeding shall be commenced against such receiver unless founded on wilful misconduct or fraud in his trust after the expiration of sixty days from the time of his discharge; but after the expiration of sixty days the new corporation shall be liable in any action that may be commenced against it, and founded on any act or omission of such receiver, for which he may not be sued, and to the same extent as the receiver, but for this section would be or remain liable, or to the same extent that the new corporation would be, had it done or omitted the acts complained of.[1]

Sec. 667. Stockholders may assent to plan of readjustment.—Every stockholder in any corporation, the franchises and property whereof shall have been thus sold, may assent to the plan of readjustment and reorganization of interests pursuant to which such franchises and property shall have been purchased at any time within six months after the organization of the new corporation, and by complying with the terms and conditions of such plan become entitled to his pro rata benefits therein. The commissioners, corporate authorities or proper officers of any city, town or village, who may hold stock in any corporation, the property and franchises whereof shall be liable to be sold, may assent to any plan or agreement of reorganization which lawfully provides for the formation of a new corporation, and the issue of stock therein to the proper authorities or officers of such cities, towns or villages in exchange for the stock of the old or former corporation by them respectively held at par. And such com-

[1] L. 1890, c. 564 § 5.

missioners, corporate authorities or other proper officers may assign, transfer or surrender the stock so held by them in the manner required by such plan, and accept in lieu thereof the stock issued by such new corporation in conformity therewith.[1]

Sec. 666. Combination prohibited.—No stock corporation shall combine with any other corporation for the prevention of competition.[2]

[1] L. 1890, c. 564, § 6.

[2] Id., § 7.

ARTICLE II.

DIRECTORS AND OFFICERS; THEIR ELECTION, DUTIES AND LIABILITIES.

SEC. 667. Directors.
SEC. 668. Change of number of directors.
SEC. 669. When acts of directors void.
SEC. 670. Liability of directors for dividends not made from surplus profits.
SEC. 671. Liability of directors for unauthorized debts and over issue of bonds.
SEC. 672. Liability for loans to stockholders.
SEC. 673. Transfers of stock by stockholder indebted to corporation.
SEC. 674. Officers.
SEC. 675. Oath of inspectors.
SEC. 676. Books to be kept.
SEC. 677. Annual report.
SEC. 678. False certificates, liability for.

Sec. 667. Directors.—The affairs of every stock corporation shall be managed by a board of directors, consisting of the number stated in the certificate of incorporation, a majority of whom shall be citizens of this state, and who shall be chosen annually, from the stock-holders, at the time and place fixed by the by-laws of the corporation, by a majority of the votes of the stockholders voting at such election. Vacancies therein shall be filled in the manner prescribed in the by-laws, and if a director shall cease to be a stockholder his office shall become vacant. Notice of the time and place of holding any election of directors shall be given, by publication thereof, at least once in each week for four successive weeks, immediately preceding such election, in a newspaper published in the county where such election is to held, and in such other manner as may be prescribed in the by-laws.[1]

[1] L. 1890, c. 564, § 20.

Sec. 668. How number of directors may be increased or reduced.—The number of directors of any stock corporation may be increased or reduced, but not above the maximum or below the minimum number prescribed by law, when the stockholders, owning a majority of the stock of the corporation shall so determine, at a meeting to be held at the usual place of meeting of the directors, on thirty days notice in writing to each stockholder of record. Such notice shall be served personally or by mail directed to each stockholder at his post-office address. The proceedings of such meeting shall be entered in the minutes of the corporation, and a transcript thereof verified by the president and secretary of the meeting shall be filed in the offices where the original certificates of incorporation were filed.[1]

Sec. 669. When acts of directors void.—When the directors of any corporation for the first year of its corporate existence shall hold over and continue to be directors after the first year, because of their neglect or refusal to adopt the by-laws required to enable the stockholders to hold the annual election for directors, all their acts and proceedings while so holding over, done for and in the name of the corporation, designed to charge upon it any liability or obligation for the services of any such director, or of any officer, or attorney, or counsel appointed by them, and every such liability or obligation shall be held to be fraudulent and void.[2]

Sec. 670. Liability of directors for dividends not made from surplus profits.—The capital stock of a stock corporation shall be deemed impaired when the value of its property and assets, after deducting the amount of its debts and liabilities, shall be less than the amount of its paid up capital stock. No dividends shall be declared or paid by any stock corporation, except from the surplus profits of its business, nor when its capital stock is or will be impaired thereby, and no such corporation shall divide or withdraw or in any way pay to its stockholders, or any of them, any part of its property and assets, so as to reduce the value thereof, after deducting the amount of its debts below the amount of its capital stock or

[1] L. 1890, c. 564, § 21. [2] Id., § 22.

reduce its capital stock except in the manner prescribed by law. Every vote of the board of directors of any such corporation declaring a dividend shall be taken by ayes and noes, to be entered and recorded in the minutes of the proceedings of the board, which shall be open to the inspection of every stockholder and creditor of the corporation daily during the usual hours of business. If the directors of any such corporation shall declare or pay any dividend, or permit the capital stock to be impaired, in violation of the provisions of this section, the directors voting in favor of declaring such dividend, or making any such payment which would impair its capital stock, shall jointly and severally be personally liable for all the debts of the corporation then existing, and thereafter contracted, while they shall respectively continue in office.[1]

Sec. 671. Liability of directors for unauthorized debts and over issue of bonds.—No stock corporation shall create any debt not secured by mortgage in excess of the amount of its paid up capital stock, and the directors creating or consenting to the creation of any such debt shall be personally liable therefor to the creditors of the corporation. If bonds or other obligations of the corporation, secured by mortgage, are issued in excess of the amount authorized by law, or in violation of law, the directors voting for such over issue, or unlawful issue, shall be personally liable to the holders of the bonds or other obligations illegally issued for the amount held by them, and to all persons sustaining damage by such illegal issues for any damage caused thereby.[2]

Sec. 672. Liability of directors for loans to stockholders, —No loans of moneys shall be made by any stock corporation or by any officer thereof out of its funds to any stockholder therein, nor shall any such corporation or officer discount any note or other evidence of debt, or receive the same in payment of any installment, or any part thereof, due or to become due on any stock in such corporation, or receive or discount any note, or other evidence of debt, to enable any stockholder to withdraw any part of the money paid in by him on his stock;

[1] L. 1890, c. 564, § 23. [2] Id., § 24.

and in case of the violation of any provision of this section, the officers or directors making such loan, or assenting thereto or receiving or discounting such notes or other evidences of debt, shall, jointly and severally, be personally liable to the extent of such loan and interest, for all the debts of the corporation contracted before the repayment of the sum loaned, and to the full amount of the notes or other evidences of debt so received or discounted with interest from the time such liability accrued.[1]

Sec. 673. Transfers of stock by stockholder indebted to corporation.—If a stockholder shall be indebted to the corporation, the directors may refuse to consent to a transfer of his stock until such indebtedness is paid, provided a copy of this section is written or printed upon the certificate of stock.[2]

Sec. 674. Officers.—The directors may appoint from their number a president, and from the stockholders a secretary and treasurer and may appoint such other subordinate officers, agents and employes, as the by-laws may designate, or they may direct, who shall respectively have such powers and perform such duties in the management of the property and affairs of the corporation, subject to the control of the directors, as may be prescribed by them in the by-laws or otherwise; and the directors may require any such officer, agent or employe to give security for the faithful performance of his duties, and may remove him at pleasure.[3]

Sec. 675. Inspectors and their oath.—The inspectors of election of every stock corporation shall be appointed in the manner prescribed in the by-laws, but the inspectors of the first election of directors, and of all previous meetings of the stockholders, shall be appointed by the board of directors named in the certificate of incorporation. The inspectors appointed to act at any meeting of the stockholders, shall, before entering upon the discharge of their duties, be sworn to faithfully execute the duties of inspector of such meeting with strict impartiality, and according to the best of their ability,

[1] L. 1890, c. 564, § 25.
[2] Id., § 26.
[3] Id., § 27.

and the oath so taken shall be subscribed by them and immediately filed in the office of the clerk of the county in which such election or meeting shall be held, with a certificate of the result of the vote taken thereat.[1]

Sec. 676. Books to be kept.—The directors of every stock corporation shall keep at its principal office or place of business correct books of accounts of all its business and transactions; and shall cause its treasurer or secretary to keep a book containing the names, alphabetically arranged, of all persons who are, or within six years have been, stockholders of the corporation, showing their places of residence, the number of shares of stock held by them respectively, the time when they, respectively, became the owners thereof, and the amount actually paid thereon; which books shall daily, during business hours, be opened for the inspection of stockholders and creditors of the corporation, and their personal representatives at such principal business office; and every such stockholder, creditor or representative may make extracts from such books; and no transfer of stock shall be valid as against the corporation, its stockholders and creditors for any purpose, except to render transferee liable for the debts of the corporation according to the provisions of this chapter, until it shall have been entered in such book as required by this section, by an entry showing from and to whom transferred. Such latter book shall be presumptive evidence of the facts therein so stated in favor of the plaintiff, in any action or proceeding against such corporation or any of its officers, directors or stockholders. Every corporation that shall neglect or refuse to keep or cause to be kept such books, or to keep them open for inspection as herein required, shall forfeit to the people the sum of fifty dollars for every day it shall so neglect or refuse. If any officer or agent of any such corporation shall neglect or refuse to make any proper entry in such book or books, or shall neglect or refuse to exhibit the same, or allow them to be inspected, and extracts taken therefrom, as provided in this section, the corporation and such officer and agent shall forfeit and pay to the party injured a penalty of fifty dollars for

[1] L. 1880, c. 564, § 28.

every such neglect or refusal, and all damages resulting to him therefrom.[1]

Sec. 677. Annual Report.—Every stock corporation, except railroad corporations, shall annually, within twenty days after the first day of January, or, if doing business without the United States, within twenty days after the first day of April, make a report as of the first day of January, which shall state the amount of capital stock and the proportion actually paid in, the amount and in general terms the nature of its existing assets and debts, and of its receipts and expenditures during the year, the names of its then stockholders, and the dividends, if any, declared since its last report; which report shall be signed by the president and a majority of its directors, and verified by the oath of the president and treasurer, and filed in the office of the secretary of state and in the office of the county clerk of the county where its principal business office may be located. If such report is not so made and filed, all the directors of the corporation shall jointly and severally, be personally liable for all the debts of the corporation then existing and for all contracted before such report shall be made. No director shall be liable for the failure to make and file such report if he shall file with the secretary of state, within thirty days after the first day of January, or the first day of April, as the case may be, a verified certificate, stating that he has endeavored to have such report made and filed, but that the officers or a majority of the directors have refused and neglected to make and file the same, and shall append to such certificate a report containing the items required to be stated in such annual report so far as they are within his knowledge or are obtainable from sources of information open to him, and verified by him to be true to the best of his knowledge, information and belief.[2]

Sec. 678. False certificates—Liability for.—If any certificate or report made, or public notice given, by the officers or directors of a stock corporation shall be false in any material representation the officers and directors signing the same shall, jointly and severally, be personally liable for all the debts of the corporation contracted while they are officers or directors thereof.[3]

[1] L. 1890, c. 564, § 29. [2] Id., § 30. [3] Id., § 31.

ARTICLE III.

STOCK ; STOCKHOLDERS, THEIR RIGHTS AND LIABILITIES.

SEC. 679. Stock, personal estate, corporation not to purchase.
SEC. 680. Subscriptions to stock.
SEC. 681. Must be paid for in cash, exceptions.
SEC. 682. When payment of subscriptions to be made.
SEC. 683. How stock may be increased or reduced.
SEC. 684. Notice thereof to be given.
SEC. 685. Meeting of stockholders for that purpose.
SEC. 686. Exchange of preferred for common stock.
SEC. 687. Certain transfers of stock and property prohibited.
SEC. 688. Stockholders may pay proportional share of defaulted bonds.
SEC. 689. May compel execution of duplicate of lost certificate.
SEC. 690. Proceedings in such cases.
SEC. 691. May require statement of financial condition to be rendered.
SEC. 692. May call meeting to elect directors.
SEC. 693. How stockholders may vote.
SEC. 694. When to vote at special election of directors.
SEC. 695. When transfer agent of foreign corporation to exhibit books.
SEC. 696. Liabilities of stockholders.
SEC. 697. Limitation of liabilities.

Sec. 679. Stock—Personal estate—Corporation not to purchase.—The stock of every corporation shall be deemed personal property, and shall be represented by a certificate prepared by the directors and signed by the president and treasurer and sealed with the seal of the corporation, and shall be transferable in the manner prescribed in this chapter and in the by-laws, but no share shall be transferable until all previous calls thereon shall have been fully paid in, and no corportion shall use any of its funds in the purchase of any stock of its own or any other corporation, unless the same shall have been bona fide pledged, hypothecated or transferred to it, by way of security for, or in satisfaction or part satisfaction, of a debt previously contracted in the course of its business, or shall

be purchased by it at sales upon judgments, orders or decrees which shall be obtained for such debts, or in the prosecution thereof. But any domestic corporation, transacting business in this state and also in other states, or foreign countries, may invest its funds in the stocks, bonds or securities of other corporations, owning lands in this state or such states, if dividends have been paid on such stocks continuously for three years immediately before such loans are made, or if the interest on such bonds or securities is not in default; and such stock, bonds or securities shall be continuously of a market value twenty per cent greater than the amount loaned or continued thereon.[2]

Sec. 680. Subscriptions to stock.—If the whole capital stock shall not have been subscribed at the time of filing the certificate of incorporation, the directors named in the certificate may open books of subscription to fill up the capital stock in such places, and after giving such notices as they may deem expedient, and may continue to receive subscriptions until the whole capital stock is subscribed. At the time of subscribing every subscriber shall pay to the directors ten per cent upon the amount subscribed by him in money, and no subscription shall be received or taken without such payment, except as provided in the next section.[3]

Sec. 681. Must be paid for in cash—Exceptions.—No corporation shall issue either stock or bonds except for money, labor done, or property actually received for the use and lawful purposes of such corporation, at its fair value, and all stock issued in violation of the provisions of this section shall be void.[3]

Sec. 682. When payment of subscriptions to be made— Subscriptions to the capital stock of a corporation shall be paid at such times and in such installments as the board of directors may by resolution require. If default shall be made in the payment of any installment as required by such resolution, the board may declare the stock and all previous payments thereon forfeited for the use of the corporation, after

[1] L. 1890, c. 564, § 40.
[2] Id., § 41.
[3] Id., § 42.

the expiration of sixty days from the service, on the defaulting stockholder personally, or by mail directed to him at his post-office address, of a written notice requiring him to make payment within sixty days from the service of the notice at a place specified therein, and stating that, in case of failure to do so, his stock and all previous payments thereon will be forfeited for the use of the corporation.[1]

Sec. 683. Increase or reduction of capital stock.—Any domestic corporation may increase or reduce its capital stock in the manner herein provided. If increased, the stockholders shall be subject to the same liabilities with respect to the additional capital, as are provided by law in relation to the original capital; if reduced, the amount of its debts and liabilities shall not exceed the amount of its reduced capital, and the owner of any stock shall not be relieved from any liability existing prior to such reduction.[2]

Sec. 684. Notice thereof to be given.—Every such increase or reduction must be authorized by a vote of the stockholders owning at least two-thirds of the stock of the corporation, taken at a meeting of the stockholders specially called for that purpose. Notice of the meeting, stating the time, place and object, and the amount of the increase or reduction proposed, signed by a majority of the directors, shall be published once a week, for at least three successive weeks, in a newspaper in the county where its principal business office is located, if any is published therein, and a copy of such notice shall be personally served upon or duly mailed to each stockholder or member at his post-office address at least three weeks before the meeting.[3]

Sec. 865. Meeting of stockholders for that purpose.—If, at the time and place specified in the notice, the stockholders shall appear in person or by proxy, in numbers representing at least two-thirds of all the shares of stock, they shall organize by choosing from their number a chairman and secretary, and take a vote of those present in person or by proxy, and if a sufficient number of votes shall be given in favor of

[1] L. 1890, c. 564, § 43. [2] Id., § 44. [3] Id., § 45.

such increase or reduction, a certificate of the proceedings, showing a compliance with the provisions of this chapter, the amount of capital actually paid in, the whole amount of the debts and liabilities of the corporation, and the amount of the increased or reduced capital stock, shall be made, signed, verified and acknowledged by the chairman and secretary of the meeting, and filed in the office of the clerk of the county where its principal place of business shall be located, and a duplicate thereof in the office of the secretary of state. In case of a reduction of the capital stock, except of a railroad corporation, such certificate shall have endorsed thereon the approval of the comptroller, to the effect that the reduced capital is sufficient for the proper purposes of the corporation, and is in excess of its debts and liabilities, and that the actual market value of the stock before reduction was less than its par value; and in case of the increase or reduction of the capital stock of a railroad corporation the certificate shall have indorsed thereon the approval of the board of railroad commissioners; and when the certificate herein provided for has been filed, the capital stock of such corporation shall be increased or reduced, as the case may be, to the amount specified in such certificate. The proceedings of the meeting at which such increase or reduction is voted shall be entered upon the minutes of the corporation. If the capital stock is reduced the amount of capital over and above the amount of the reduced capital shall be returned to the stockholders pro-rata at such times and in such manner as the directors shall determine.[1]

Sec. 686. When preferred may be exchanged for common stock.—Every domestic corporation having preferred and common stock may, upon the written request of the holder of any preferred stock, by a two-thirds vote of its directors, exchange the same for common stock, and issue certificates for common stock therefore share for share, or upon such other valuation as may have been agreed upon in the scheme for the organization of such corporation, or the issue

[1] L. 1890, c. 564, § 46.

of such preferred stock; but the total amount of capital stock shall not be increased thereby.[1]

Sec. 687. Certain transfers of stock and property prohibited.—No corporation which shall have refused to pay any of its notes or other obligations when due, in lawful money of the United States, nor any of its officers or directors, shall assign any of its property to any of its officers, directors or stockholders, directly or indirectly, for the payment of any debt; and no officer, director or stockholder thereof shall make any transfer or assignment of its property, or of any stock therein, to any person in contemplation of its insolvency; and every such transfer or assignment to such officer, director or other person, or in trust for them or for their benefit, shall be void.[2]

Sec. 688. Stockholders may pay proportional share of defaulted bonds.—Whenever default shall be made by any corporation in the payment of principal or interest of any of its bonds, secured by mortgage or deed of trust of its property, any stockholder may at any time during the pendency of the foreclosure of such mortgage or deed of trust and before the sale thereunder pay to the mortgagees or grantees in such mortgage or deed, for the use and benefit of the holders of such bonds, a sum equal to such proportion of the amount due and secured to be paid by such mortgage or deed, as his stock in such corporation shall bear to its whole capital stock, and on making such payment he shall to the extent thereof become and be interested in such mortgage or deed and protected thereby.[3]

Sec. 679. May compel execution of duplicate of lost certificate.—The owner of a lost or destroyed certificate of stock, if the corporation shall refuse to issue a new certificate in place thereof, may apply to the supreme court, at any special term held in the district where he resides, for an order requiring the corporation to show cause why it should not be required to issue a new certificate in place of the one lost or

[1] L. 1890, c. 564, § 47. [2] Id., § 48. [3] Id., § 49.

destroyed. The application shall be by petition, duly verified by the owner, stating the name of the corporation, the number and date of the certificate, if known, or it can be ascertained by the petitioner; the number of shares named therein, to whom issued, and as particular a statement of the circumstances attending such loss or destruction as the petitioner can give. Upon the presentation of the petition the court shall make an order requiring the corporation to show cause, at a time and place therein mentioned, why it should not issue a new certificate of stock in place of the one described in the petition. A copy of the petition and order shall be served on the president or other head of the corporation, or on the secretary or treasurer thereof, personally, at least ten days before the time for showing cause.[1]

Sec. 690. Proceedings in such cases.—Upon the return of the order, with proof of due service thereof, the court shall, in a summary manner, and in such mode as it may deem advisable, inquire into the truth of the facts stated in the petition, and hear the proofs and allegations of the parties in regard thereto, and if satisfied that the petitioner is the lawful owner of the number of shares, or any part thereof, described in the petition, and that the certificate therefor has been lost or destroyed, and cannot after due diligence be found, and that no sufficient cause has been shown why a new certificate should not be issued, it shall make an order requiring the corporation, within such time as shall be therein designated, to issue and deliver to the petitioner a new certificate for the number of shares specified in the order, upon depositing such security, or filing a bond in such form and with such sureties as to the court shall appear sufficient to indemnify any person, other than the petitioner, who shall thereafter be found to be the lawful owner of the certificate lost or destroyed; and the court may direct the publication of such notice, either before or after making such order, as it shall deem proper. Any person claiming any rights under the certificates alleged to have been lost or destroyed shall have recourse to such indemnity, and the corporation shall be

[1] L. 1890, c. 564, § 50.

discharged from all liability to such person upon compliance with such order; and obedience to the order may be enforced by attachment against the officer or officers of the corporation, on proof of his or their refusal to comply with it.[1]

Sec. 691. Stockholders may require statement of financial condition to be made.—Stockholders owning five per cent of the capital stock of any corporation not exceeding one hundred thousand dollars, or three per cent. where it exceeds one hundred thousand dollars, may make a written request to the treasurer for a statement of its affairs, under oath, embracing a particular account of all its assets and liabilities, and the treasurer shall make such statement and deliver it to the person presenting the request within twenty days thereafter, and keep on file for six months thereafter a copy of such statement, which shall at all times during business hours be exhibited to any stockholder demanding an examination thereof; but the treasurer shall not be required to deliver more than one such statement in any six successive months. For every neglect or refusal of the treasurer to comply with the provisions of this section he shall forfeit and pay to the person making such request the sum of fifty dollars, and the further sum of ten dollars for every twenty-four hours thereafter, until such statements shall be furnished.

Sec. 692. Stockholders may call meeting to elect directors; if directors fail to do so.—If the directors of any stock corporation shall not adopt a by-law providing for the annual election of directors for sixty days after the first year of the corporate existence, or if for any reason the annual election of directors shall not be held at the time appointed, any stockholder may call a meeting of the stockholders for the election of directors by publishing the notice required by section twenty[3] of this chapter, and by serving upon each stockholder either personally or by mail, directed to him at his post-office address, a copy of such notice at least fifteen days before the meeting, which shall be held at the principal

[1] L. 1890, c. 564, § 51. [2] Id. § 52. [3] *Ante*, § 667.

business office of the corporation, or if it has none at the place in this state, where its principal business has been transacted, or if access to such office or place is denied, at some other place in the city, village or town, where such office or place is or was located. At such meeting the stockholders attending shall constitute a quorum, and they may elect inspectors of election and directors, and adopt by-laws providing for future annual meetings and election of directors, if the corporation has no such by-laws, which shall have the same effect as if they had been adopted by the directors of the corporation; and transact any other business which may be transacted at the annual meeting of the stockholders. In the absence at such meeting of the books of the corporation, showing who are stockholder*, each stockholder, before voting, shall present his sworn statement, setting forth the number of shares of stock owned by him and standing in his name on the books of the corporation, and, if known to him, the whole number of shares of stock of the corporation, outstanding at the time when the election should have been held, and on filing such statement he may vote on the shares of stock appearing therein to be owned by him and standing in his name on the books of the corporation. The inspectors shall return and file such statements with a certificate of the results of the election verified by them in the office of the clerk of the county in which such election is held, and the persons so elected shall be the directors of the corporation.[1]

Sec. 693. How stockholders may vote.—At every election of directors and meeting of stockholders of any stock corporation, each stockholder who is not in default in the payment of subscriptions for his stock, shall be entitled to one vote for every share of stock held by him for thirty days immediately preceding the election or meeting. Such vote may be cast by proxy, and no person shall vote or issue a proxy to vote at any meeting of stockholders or bondholders, or both, upon any stock or bonds, which are not in his possession or under his control, or where he has ceased to retain the title thereto, notwitstanding* such

[1] L. 1890, c. 564, § 53.

* So in the original.

stock or bonds may stand in his name on the books of the corporation. No stockholder shall sell his vote, or issue a proxy to vote, upon any stock or bonds to any person for any sum of money, or anything of value. Any person offering to vote upon stock or bonds shall, if required by any inspector of election, or any stockholder present, take and subscribe the following oath: "I do solemnly swear that in voting at this election I have not, either directly, indirectly, or impliedly, received any promise or any sum of money or anything of value, to influence the giving of my vote or votes at this meeting, or as a consideration therefor; and that I have not sold, or otherwise disposed of my interest in or title to any shares or bonds in respect to which I offer to vote at this election, but that all such shares and bonds are still in my possession, or subject to my control." Any person offering to vote as agent or attorney or proxy for any other person shall, if required by any such inspector or stockholder, take and subscribe the following oath: "I do solemnly swear that the title to the stock or bonds, upon which I now offer to vote, is, to the best of my knowledge and belief, truly and in good faith, vested in the persons in whose names they now stand, and that such persons still retain control of the same, and that I have not, either directly or indirectly, or impliedly, given any promise or any sum of money, or anything of value, to induce the giving of authority to vote upon such stock or bonds to me." The inspectors may administer this oath, and all such oaths and all proxies shall be filed in the office of the corporation. No proxy shall be valid after the expiration of eleven months from its date, and the holder shall not be permitted to vote thereon after that time, unless the stockholder shall have specified therein the length of time it is to continue in force, which shall be for some limited period; and every proxy shall be revocable at the pleasure of the person executing it. The books and papers of the corporation shall be produced at any meeting of its stockholders upon the request of any stockholder, and if the right to vote upon any share of stock at any such meeting shall be challenged, the inspectors of election shall require the transfer books of the

corporation to be produced as evidence of stock held therein, and all such shares as may appear thereon in the name of any person shall be voted on by such person, or by proxy, subject to the provisions of this section.[1]

Sec. 694. Who to vote at election of directors called subsequently to time for annual election.—If the election of directors shall not be held on the day designated by law, the directors shall call a meeting for such election within sixty days immediately thereafter; and no shares shall be voted upon at such election, except by the persons or their proxies, who may have appeared on the transfer books of the corporation to have had the right to vote thereon, on the day the election should have been held.[2]

Sec. 695. Transfer agent of foreign corporation to exhibit books.—The transfer agent in this state of any foreign corporation, whether such agent shall be a corporation or a natural person, shall, at all time during the usual hours of transacting business, exhibit to any stockholder of such corporation, when required by him, the transfer book, and a list of the stockholders thereof, if in their power to do so, and for every violation of the provisions of this section, such agent, or any officer or clerk of such agent, shall, forfeit the sum of two hundred and fifty dollars, to be recovered by the person to whom such refusal was made.[3]

Sec. 696. Liabilities of stockholders.—The stockholders of every stock corporation shall, jointly and severally, be personally liable to its creditors, to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by the corporation, until the whole amount of its capital stock shall have been paid in, and a certificate thereof, signed, verified and acknowledged by the president and a majority of the directors, shall have been filed and recorded in the office of the clerk of the county, where the principal business office of the corporation is located. Such stockholders shall, jointly and severally, also be personally liable for all debts due and owing to any of its laborers, servants, or employes, other than contractors, for services per-

[1] L. 1890, c. 564, § 54.
[2] Id., § 55.
[3] Id., § 56.

formed by them for such corporation. Before such laborer, servant, or employe shall charge such stockholder for such services, he shall give him notice in writing, within thirty days after the termination of such services, that he intends to hold him liable, and shall commence an action therefor within thirty days after the return of an execution unsatisfied against the corporation, upon a judgment recovered against it for such services. No person holding stock in any corporation as collateral security, or as executor, administrator, guardian or trustee, unless he shall have voluntarily invested the trust funds in such stock, shall be personally subject to liability as a stockholder; but the person pledging such stock shall be considered the holder thereof, and shall be liable as stock holder; and the estates and funds in the hands of such executor, administrator, guardian or trustee, shall be liable in the like manner, and to the same extent as the testator or intestate, or the ward, or person interested in such trust fund would have been, if he had been living and competent to act, and held the same stock in his own name, unless it appears that such executor, administrator, guardian or trustee voluntarily invested the trust funds in such stock, in which case he shall be personally liable as a stockholder.[1]

Sec. 697. Limitation of liability.—No action shall be brought against a stockholder for any debt of the corporation, until judgment therefor has been recovered against the corporation, and an execution thereon has been returned unsatisfied in whole or in part, and the amount due on such execution shall be the amount recoverable, with costs, against the stockholder. No stockholder shall be personally liable for any debt of the corporation not payable within two years from the time it is contracted, nor unless an action for its collection shall be brought against the corporation within two years after the debt becomes due; and no action shall be brought against a stockholder after he shall have ceased to be a stockholder, for any debt of the corporation, unless brought within two years from the time he shall have ceased to be a stockholder.[2]

[1] L. 1890, c. 564, § 57.

[2] Id., § 58.

ARTICLE IV.

MISCELLANEOUS PROVISIONS.

SEC. 698. Laws repealed.
SEC. 699. Saving clause.
SEC. 700. Construction.
SEC. 701. When to take effect.

Sec. 698. Laws repealed.—Of the laws enumerated in the schedule hereto annexed that portion specified in the last column is repealed. Such repeal shall not revive a law repealed by any law hereby repealed but shall include all laws amendatory of the laws hereby repealed.[1]

Sec. 699. Saving clause.—The repeal of a law or any part of it specified in the annexed schedule shall not affect or impair any act done, or right accruing, accrued or acquired, or liability, penalty, forfeiture, or punishment incurred prior to May first, eighteen hundred and ninety-one, under or by virtue of any law so repealed, but the same may be asserted, enforced, prosecuted, or inflicted as fully and to the same extent, as if such law had not been repealed; and all actions and proceedings, civil or criminal, commenced under or by virtue of the laws so repealed and pending on April thirtieth, eighteen hundred and ninety-one, may be prosecuted and defended to final effect in the same manner as they might under the laws then existing, unless it shall be otherwise specially provided by law.[2]

Sec. 700. Construction.—The provisions of this chapter, so far as they are substantially the same as those of laws existing on April thirtieth, eighteen hundred and ninety-one, shall be construed as a continuation of such laws, modified or

[1] L. 1890, c. 564, § 70. [2] Id., § 71.

amended according to the language employed in this chapter, and not as new enactments; and references in laws not repealed to provisions of laws incorporated into this chapter and repealed, shall be construed as applying to the provisions so incorporated, and nothing in this act shall be construed to amend or repeal any provision of the Criminal or Penal Code, or to impair any right or liability which any existing corporation, its officers, directors, stockholders or creditors may have or be subject to, by virtue of any special act of the legislature creating such corporation, or creating or defining any such right or liability.[1]

Sec. 701. When to take effect.—This chapter shall take effect on May first, eighteen hundred and ninety-one.[2]

SCHEDULE OF LAWS REPEALED.

Revised Statutes.....	Part I, chapter 18, title 3	Section 5.
Revised Statutes.....	Part I, chapter 18, title 4	All except sections 5 and 6.

Laws of	Chapter.	SECTIONS.
1811.....	67.....	3, 5, 7.
1822.....	213.....	All.
1842.....	165.....	All.
1847.....	210.....	38, 39, 40, 41, 43, 44, 45, 51.
1847.....	405.....	All.
1848.....	37.....	3, 5, 6, 8, 10, 11, 12, 13, 14, 15, 16, 17, 20, 21, 22.
1848.....	40.....	3, 5, 6, 8, 10, 11, 12, 13,14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27.
1848.....	259.....	2, 5, 12, 13, 16.
1848.....	265.....	8, 10.
1850.....	140.....	4, 5, 7, 8, 9, 10, 11, 48.
1852.....	228.....	3 to 14, both inclusive.
1853.....	117.....	3, 5, 6, 8, 10 to 25, both inclusive.
1853.....	135.....	3, 4, 6, 7, 8, 9, 10, 14, 15, 16, 17.
1853.....	333.....	2.
1853.....	395.....	All of section 6 to and including the word "trustees" in line 7.
1853.....	502.....	All.
1854.....	232.....	3, 5, 6, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 27, 28.
1855.....	425.....	First and last sentences of section 5.
1857.....	546.....	3, 5, 6, 8 and 11 to 20, both inclusive.
1857.....	776.....	7.

[1] L. 1890, c. 564, § 72. [2] Id., § 73.

SCHEDULE OF LAWS REPEALED.— *Continued.*

Laws of	Chapter	SECTIONS.
1860	269	All.
1861	149	2, 5, 6, 7, 9.
1863	134	All.
1864	517	2.
1866	73	All.
1867	419	2.
1867	480	All.
1867	971	First two sentences of 5, and 6, 7, 8.
1867	974	4 to 11, both inclusive.
1868	290	All.
1870	773	All.
1872	248	3, last three sentences of 4, and 7, 8, 9, 10.
1872	146	All.
1872	611	All.
1872	820	4, 9 10, 13, 14, 15.
1873	151	All.
1873	469	All but section 5.
1873	737	7, 8.
1874	143	3, 6, 8, 10, 11, 13, 14, 17.
1874	288	4.
1874	430	All.
1875	4	All.
1875	343	9.
1875	606	10 to 15, both inclusive.
1875	611	5, 10, 11, 12, 13 to 26, both inclusive, and 28, 29.
1877	228	3, 4, 5.
1878	163	1.
1878	203	4, 5, 6, 7, 8, 9, 10, 11, 12, 39, 43, 44.
1878	264	All.
1879	393	All.
1879	395	All.
1879	413	All.
1880	155	All.
1880	182	1.
1880	225	All.
1880	510	All.
1881	468	4, 7, 8, 10, 11, 12.
1881	599	1.
1884	252	19.
1884	397	All.
1885	141	All.
1885	171	All.
1885	489	All except section 2.
1886	586	All.
1888	293	3.
1888	462	3, 4, 5.

CHAPTER XXXV.

OF THE GENERAL LAWS.

THE TRANSPORTATION CORPORATIONS LAW.

ARTICLE 1. Ferry corporations (§§ 702–707).
2. Navigation corporations (§§ 708–711).
3. Stage-coach corporations (§§ 712–714).
4. Tramway corporations (§§ 715–718).
5. Pipe-line corporations (§§ 719–733).
6. Gas and electric light corporations (§§ 734–744).
7. Water-works corporations (§§ 745–750).
8. Telegraph and telephone corporations (§§ 751–756).
9. Turnpike, plank-road and bridge corporations (§§ 757–788).
10. Miscellaneous provisions (§§ 789–792).

ARTICLE I.

FERRY CORPORATIONS.

SEC. 702. Short title of chapter.
SEC. 703. Incorporation of ferry corporations.
SEC. 704. Payment of capital stock.
SEC. 705. Powers.
SEC. 706. Effect of failure to pay in capital stock.
SEC. 707. Posting schedule of rates.

Sec. 702. Short title of chapter.—This chapter shall be known as the transportation corporations law.[1]

Sec. 703. Incorporation of ferry corporations.—Three or more persons may become a corporation for conducting and managing a ferry, by executing, acknowledging and filing a certificate, stating the name of the corporation, the places from and to which the ferry established or to be established shall run; the term not exceeding fifty years for which the corporation is to exist, the amount and number of shares of

[1] L. 1890, c. 566, § 1.

its capital stock; the number of directors thereof, not less than three nor more than fifteen, and the names of the directors for the first year.[1]

Sec. 704. Half of capital to be paid in before commencing business.—No ferry corporation shall be authorized to commence business until at least one-half its capital shall have been actually paid in, nor until affidavits of such payment, sworn to by a majority of the directors, shall have been filed, in each of the offices in which the certificate of incorporation is required to be filed.[2]

Sec. 705. Powers—In addition to the powers conferred by the general and stock corporation laws, any such corporation shall have power to take by grant from any authority entitled by the laws of this state to make such grant, or by assignment, the franchise or right to establish and maintain ferries, at the place specified in the certificate of incorporation, and to hold and exercise such franchise or right and carry on the business appertaining thereto, subject to the rights of the mayor, aldermen and commonalty of the city of New York, or any other municipal corporation, or of the owner or owners of any legally existing ferry, or the vested rights of any other corporation whatever.[3]

Sec. 706. Effect of failure to pay in capital stock.—The capital stock of every such corporation shall all be paid in one-half thereof within within one year and the other half thereof within two years from its incorporation, or such corporation shall be dissolved.[4]

Sec. 707. Must post schedule of rates—Every corporation operating any ferry in this state, or between this state and any other state, and from or to a city of five hundred thousand inhabitants or over, shall post in a conspicuous and accessible place in each of its ferry-houses, in plain view of the passengers, a schedule plainly printed in the English language, of the rates of ferriage charged thereon and authorized by law to be charged for ferriage over such ferry.[5]

[1] L. 1890, c. 566, § 2.
[2] Id., § 3.
[3] Id., § 4.
[4] Id., § 5.
[5] Id., § 6.

ARTICLE II.

NAVIGATION CORPORATION.*

SEC. 708. Formation of corporation.
SEC. 709. Navigation between additional ports.
SEC. 710. Payment of capital stock.
SEC. 711. Ferries unauthorized.

Sec. 708. Formation of corporation.—Seven or more persons may become a corporation, for the purpose of building for their own use, equipping, furnishing, fitting, purchasing, chartering, navigating or owning steam, sail or other boats, ships, vessels or other property to be used in any lawful business, trade, commerce or navigation upon the ocean, or any seas, sounds, lakes or rivers and for the carriage, transportation or storing of lading, freight, mails, property or passengers thereon by making, signing, acknowledging and filing a certificate, stating the name of the corporation, the specific objects for which it is formed, the waters to be navigated, and, in case of ocean steamers, the ports between which such vessels are intended to be navigated, the amount of its capital stock, which shall not be less than twenty thousand nor more than four million dollars, the term of its existence, not to exceed fifty years, the number of shares of which the capital stock shall consist, the number of directors thereof, not less than five nor more than thirteen, the names of the directors for the first year, and the name of the city or town and county in which its principal office is to be situated, the number of shares of stock which each subscriber of the certificate agrees to take, which must in the aggregate equal ten per cent of the capital and at least ten per cent of which must be paid in cash. Such certificate shall have attached thereto as a part thereof, the affidavit of at least three of such directors, to the effect that ten per cent of such capital stock has been in good faith subscribed and at least ten per cent of such subscription has been paid in cash. No railroad corporation shall have, own or hold any stock in any such corporation.[1]

[1] L. 1890, c. 566, § 10.

* So in original.

Sec. 709. Navigation between additional ports.—Any such corporation desiring or intending to navigate boats, ships or vessels, upon any other waters, or in case of ocean steamers between any other or additional ports than those named in its original certificate, may from time to time file a further certificate, in the same manner as is prescribed by law for the filing of the original certificate, in which shall be stated such additional waters or ports upon or between which such corporation desires to navigate vessels, and thereafter such corporation may navigate its vessels upon such waters and between such ports, with the like effect as if they had been named in the original certificate.[1]

Sec. 710. Payment of capital stock.—The capital stock of such corporation shall be paid in, at least one-half thereof within one year, and the remainder within two years from its incorporation, or the corporation shall be dissolved. Within thirty days after the payment of the last installment, a certificate stating that the whole amount of such capital stock has been paid in shall be made, signed and sworn to by the president and a majority of the directors of the corporation, and filed and recorded in the offices where the original certificates of incorporation were filed.[2]

Sec. 711. Ferries unauthorized.—This articles shall not authorize the formation of any ferry corporation to ply between the city of New York and any other point.[3]

ARTICLE III.

STAGE COACH CORPORATIONS.

SEC. 712. Incorporation.
SEC. 713. Alteration or extension of route.
SEC. 714. Powers.

Sec. 712. Incorporation.—Five, or more persons, may become a corporation for the purpose of establishing, maintaining and operating any stage or omnibus route or routes for public use in the conveyance of persons and property

[1] L. 1890, c. 566, § 11. [2] Id., § 12. [3] Id., § 13.

elsewhere than in the city of New York, or any stage route or routes already established for a like public use, by making, signing, acknowledging and filing a certificate which shall state the name of the corporation, the number of years it is to continue, the route or routes upon which it is intended to run as near as practicable, the number of the directors thereof, not less than three nor more than five, the names of the directors for the first year, the amount of its capital stock, the place of residence of each subscriber thereto, and the number of shares of stock he agrees to take in such corporation.[1]

Sec. 713. Alteration or extension of route.—The directors may, by a vote of two-thirds of their number, at any time alter or extend the route or routes designated in the certificate of incorporation, upon making, acknowledging, and filing a certificate to that effect, in the offices where the original certificates of incorporation were filed.[2]

Sec. 714. Powers.—In addition to the powers conferred by the general and stock corporation laws, every such corporation shall have power :

1. To take and convey persons and property in stages and omnibuses, and to provide and run the necessary stages and and omnibus upon their route or routes for the public use and to receive compensation therefor.

2. To erect and maintain all necessary and convenient buildings, fixtures and machinery for the use and accommodation of their passengers and business.[3]

ARTICLE IV.

TRAMWAY CORPORATIONS.

SEC. 715. Incorporation.
SEC. 716. Powers.
SEC. 717. Condemnation of real property.
SEC. 718. Crossings.

Sec. 715. Incorporation.—Thirteen or more persons may

[1] L. 1890, c. 566, § 20. [2] Id., § 21. [3] Id., § 22.

become a corporation for constructing, maintaining and operating an elevated tramway, constructed of poles, piers, wires, rods, ropes, bars or chains, for the transportation of freight in suspended buckets, cars or other resceptacles, for hire, by making, signing, acknowledging and filing a certificate stating the name of the corporation, the number of years it is to continue, the places from and to which such tramway is to be constructed, maintained and operated, its length as near as may be, the name of each county through or in which it is made or intended to be made, the amount of its capital stock and the number of shares into which it is to be divided, the number of the directors thereof, not less than three, the names and places of residence of the directors for the first year, the place of residence of each subscriber thereto and the number of shares he agrees to take in such corporation.[1]

Sec. 716. Powers.—Every such corporation, in addition to the powers conferred by the general and stock corporation laws, shall have power :

1. To cause such examination and surveys for its proposed tramway, to be made as may be necessary to the selection of the most advantageous route, and for such purpose by its officers and servants, to enter upon the lands or waters of any person, but subject to responsibility for all damages done thereto.

2. To lay out its tramway and to construct the same as hereby provided.

3. To erect and maintain all necessary and convenient buildings, stations, fixtures and machinery for the accommodation and transaction of its business.[2]

Sec. 717. May acquire land by condemnation.—In case any such corporation is unable to agree for the purchase, use or lease of any real property required for the purposes of its incorporation, it shall have the right to acquire title to the same by condemnation.[3]

Sec. 718. Crossings.—Whenever any tramway, constructed by any such corporation, shall cross a railroad, high-

[1] L. 1890, c. 566, § 30. [2] Id., § 31. [3] Id., § 32.

way, turnpike, plankroad or canal, such tramway shall be so constructed as not to interfere with the free use of such railroad, highway, turnpike, plank-road or canal for the purposes for which they were intended.[1]

ARTICLE V.

PIPE LINE CORPORATIONS.

SEC. 719. Incorporation.
SEC. 720. Location of line.
SEC. 721. Condemnation of real property.
SEC. 722. Railroad, turnpike, plankroad and highway crossings.
SEC. 723. Crossings of canals, rivers and creeks.
SEC. 724. Consent of local authorities.
SEC. 725. Construction through villages and cities.
SEC. 726. Over Indian reservations.
SEC. 727. Over state lands.
SEC. 728. Additional powers.
SEC. 729. Use of line to be public—storage—liable as common carriers—rates and charges.
SEC. 730. Receipts for property—cancellation of vouchers.
SEC. 731. Monthly statements.
SEC. 732. Fences, farm crossings and use of line not inclosed.
SEC. 733. Taxation of property.

Sec. 719. Incorporation.—Twelve or more persons may become a corporation for constructing and operating for public use, except in the city of New York, lines of pipe for conveying or transporting therein petroleum, gas, liquids or any products or property, or for maintaining and operating any line of pipe already constructed and owned by any corporation, person or persons, except in such city, for the public use, by making, signing, acknowledging and filing a certificate, stating the name of the corporation, the number of years it is to continue, the places from and to which it is to be constructed or maintained and operated, its length, as near as may be, the name of each county through or into which it is to be constructed; the amount of its capital stock, which shall not be less than fifteen hundred dollars for every mile of pipe constructed or proposed to be constructed, and the number of shares of which it shall consist; the number of directors not

[1] L. 1890, c. 566, 33.

less than seven, and the names and places of residence of the directors for the first year, and the place of residence of each subscriber and the number of shares he agrees to take in such corporation, which must in the aggregate equal ten hundred and fifty dollars for every mile of pipe constructed or proposed to be constructed, and twenty-five per cent of which must be paid in cash. Such certificate shall have indorsed thereon or appended thereto and as a part thereof, an affidavit made by at least three of the directors named therein that at least ten hundred and fifty dollars of stock for every mile of line proposed to be constructed or maintained and operated has been in good faith subscribed, and twenty-five per cent paid in money thereon, and that it is intended in good faith to construct or to maintain and operate the line of pipe mentioned in such certificate, and that such corporation was not projected or formed with the intent or for the purpose of injuring any person or corporation, nor for the purpose of selling or conveying its franchise to any person or corporation, nor for any fraudulent purpose.[1]

Sec. 720. Location of line.—Every such corporation shall before commencing the construction of its pipe line in any county, or any proceeding for the condemnation of real property, plainly and distinctly mark and designate the line adopted and located by them by a line of stakes consecutively numbered and equally distant, and not more than twenty rods from each other, so that each line can be definitely known and ascertained in all places, and make a map and survey of the route so located and staked out, and shall indicate thereon plainly the points where such route crosses each parcel of land to which they have not acquired title by agreement, and shall cause such map and survey to be certified by the president and engineer, and filed in the office of the clerk of the county into or through which the line so located and mapped passes, and shall give to the owner or occupant, if he is known or can be ascertained, of every parcel of land through which such route passes, the title to which has not been acquired by purchase, written notice of the filing of such map and survey,

[1] L. 1890, c. 566, § 40.

stating that such route passes over or across such owner's or occupant's lands, and that the route thereof is indicated thereon by such line of stakes. Any occupant or owner of such lands feeling aggrieved by the proposed location, may, within fifteen days after the service of such notice, give ten days written notice to the corporation, by service upon the president, engineer, or any director thereof, and to the owner or occupant of any lands to be affected by the alteration to be proposed by him, of the time and place of an application to be made by him to a special term of the supreme court in the judicial district in which the lands are situated for the appointment of commissioners to relocate such line. If upon the hearing the court shall consider that sufficient cause exists therefor, it shall appoint three disinterested persons commissioners to examine the route located and the proposed alteration thereof, and direct the mode of proceeding, who shall report to the court the facts relating thereto and their opinion as to the proposed alteration, and what, if any, alteration should be made in such line, and the court shall thereupon make such order as it shall deem proper in relation to such alteration, and determine the location of such line, and fix and adjust the costs fees and charges of the commissioners, and the costs and charges of the proceedings, and direct by which party the same shall be paid, and may enforce payment thereof by proceedings as for a contempt of court, for refusal to pay costs directed to be paid by an order of the court, and such order shall be final as to the location of the line upon the lands embraced therein. Such corporation shall not commence the work of constructing or laying its line of pipe, or institute proceedings for the condemnation of real property, in any county, until after the expiration of fifteen days from the service by it of the notice herein required, nor until all applications for a relocation of its line in such county if any are made, have been finally determined.[1]

Sec. 721. Condemnation of real property.—In case such corporation is unable to agree for the purchase of any

[1] L. 1890, c. 566, § 41.

real estate required for the purposes of its incorporation, and its line of pipe in the county in with such real estate is situated has been finally located, it shall have the right to acquire title thereto by condemnation, but such corporation shall not locate or construct any line of pipe through or under any building, dooryard, lawn, garden or orchard, except by the consent of the owner thereof in writing duly acknowledged, nor through any cemetery or burial ground, nor within one hundred feet of any building, except where such line is authorized by public officers to be laid across or upon any public highway, or where the same is laid across or upon any turnpike or plank road. No pipes shall be laid for the purpose of carrying petroleum, gas or other products or property through or under any of the streets in the cities of this state, unless such corporation shall first obtain the consent of a majority of the property owners on the streets which may be selected for the laying of pipes, and such pipe-line shall be located with all reasonable care and prudence so as to avoid danger from the bursting of the pipes.[1]

Sec. 722. Railroad, turnpike, plank-road and highway crossings.—Whenever any line of pipe of any such corporation shall necessarily cross any railroad, highway, turnpike or plank-road, such line of pipe shall be made to cross under such railroad, highway, turnpike or plank-road and with the least injury thereto practicable, and unless the right to cross the same shall be acquired by agreement, compensation shall be ascertained and made to the owners thereof, or to the public in case of highways, in the manner prescribed in the condemnation law, but no exclusive title or use shall be so acquired as against any railroad, turnpike or plank-road corporation, nor as against the rights of the people of this state in any public highway, but the rights acquired shall be a common use of the lands in such manner as to be of the least practical injury to such railroad, turnpike or plank-road, consistent with the use thereof by such pipe-line corporation, nor shall any such corporation take or use any lands, fixtures or erections of any railroad corporation, or have the right to

[1] L. 1890, c. 566, § 42.

acquire by condemnation the title or use, or right to run along or upon the lands of any such corporation, except for the purpose of directly crossing the same when necessary.[1]

Sec. 723. Construction across and along canals, rivers and creeks.—No pipe-line shall be constructed upon or across any of the canals of this state, except by the consent of and in the manner and upon the terms prescribed by the superintendent of public works, unless constructed upon a fixed bridge across such canal, and with the consent of the person for whose benefit such bridge is constructed and maintained, or upon such a bridge over the canal, at the crossing of a public highway, or street, with the consent of the public officers having the supervision thereof, or of the municipal authorities of any village or city within whose limits such bridge may be; nor shall the pipes of any such corporation be laid through or along the banks of any of the canals of this state, nor through or under any of its rivers or creeks, unless such pipes shall be encased so as to prevent leakage, in such manner as shall be approved by the superintendent of public works.[2]

Sec. 724. Consent of local authorities. — No pipe-line shall be constructed across, along or upon any public highway without the consent of the commissioners of highways of the town in which such highway is located, upon such terms as may be agreed upon with such commissioners. If such consent or the consent of the commissioners or municipal authorities required by the preceding section can not be obtained, application may be made to the general term of the supreme court of the department in which such highway or bridge is situated for an order permitting the corporation to construct its line across, along, or upon such highway, or across or upon such bridge. The application shall be by duly verified petition and notice which shall be served upon the commissioners of highways of the town in which the highway is situated, or the municipal authorities of the village or city where such bridge is located, according to the practice or order of the court, or an order to show cause, and the court upon the

[1] L. 1890, c. 566, § 43. [2] Id., § 44.

hearing of the application may grant an order permitting the line to be so constructed in such a manner and upon such terms as it may direct.[1]

Sec. 725. Construction through villages and cities.—No pipe-line shall be constructed into or through any incorporated village or city in this state, unless authorized by a resolution prescribing the route, manner of construction, and terms upon which granted, adopted at a regular meeting of the board of trustees of the village or the common council of the city by a two-thirds vote of such board or council, but such resolution shall not affect any private right. No pavement shall be removed in any city under the provisions of this article, unless done under the direction of the common council, nor until such corporation shall give a bond in such sum as the common council may require for the replacing of any pavements which shall have been removed. In case any pavement shall have been removed and not properly relaid, the common council may bring suit in any court of record, for the cost of relaying such pavement against any such corporation. No gas-houses shall be erected in any city under the provisions of this article, for supplying gas to the inhabitants, unless consent is first given by the corporate authorities of the city.[2]

Sec. 726. Over Indian reservations.—Such corporation may contract with the chiefs of any nation of Indians over whose lands it may be necessary to construct their pipe line for the right to construct such pipe line upon such lands, but no such contract shall vest in the corporation the fee of such lands, nor the right to occupy the same for any purpose other than for the construction, operation and maintenance of such pipe line, nor shall such contract be valid or effectual until the same has been ratified by the county court of the county in which the lands are situated.[3]

Sec. 727. Over State Lands.—The commissioners of the land office shall have power to grant to any pipe line corporation any lands belonging to the people of this state which may

[1] L. 1890, c. 566, § 45. [2] Id., § 46. [3] Id., § 47.

be required for the purposes of its incorporation on such terms as may be agreed on by them or such corporation may acquire title thereto by condemnation, and if any lands owned by any county, city or town as [is] required by such corporation for such purposes, the county, city or town officers having charge of such lands may grant them to such corporation upon such terms and for such compensation as may be agreed upon.[1]

See. 728. Additional powers.—Every corporation formed under this article shall in addition to the powers conferred by the general and stock corporation law have power:

1. To cause such examinations and surveys of its proposed line of pipe to be made as may be necessary to the selection of the most advantageous route, and for such purpose by its officers, agents or servants may enter upon the lands or waters of any person, upon, through or across which such corporation can construct its line of pipe, under the provisions of this article, subject however to liability for all actual damage which shall be done thereto.

2. To take and hold such voluntary grants of real estate and other property, as shall be made to it to aid in the construction, maintenance, operation and accommodation of its pipe line.

3. To lay out its pipe line route not exceeding twelve feet in width, but at the terminations of such line and at all receiving and discharging points at all places where machinery may properly or must necessarily be set up for the operation of such pipe line it may take such additional width, and for such length as may be necessary.

4. To take and convey through pipes any property, substance or product capable of transportation therein by any force, power or mechanical agency, and to erect and maintain all necessary and convenient buildings, stations, fixtures and machinery for the purposes of its incorporation.

5. To regulate the time and manner in which property shall be transported over its pipe lines, and the compensation to be paid therefor, but such compensation shall not exceed the

[1] L. 1890, c. 566 § 48.

sum or be above the rate of twenty-five cents per one hundred miles for the transportation of forty-two gallons of any product transported on lines of one hundred miles in length or over, which shall be reckoned and adjusted upon the quantity or number of gallons delivered by such corporation at the point to which it shall have undertaken to deliver the same.[1]

Sec. 729. Use of line to be public—Storage—liable as common carriers—Rates and charges.—The pipe lines of every such corporation shall be open for transporation to the public use, and all persons desiring to transport products through such pipe line shall have the absolute right upon equal terms to such transportation in the order of application therefor, on complying with the general requirements of such corporation, as to delivery for and payment of such transportation, but no application for such transportation shall be valid beyond or for a greater quantity of products than the applicant shall then own and have ready for delivery for transportation to such corporation, and every such corporation shall provide suitable and necessary receptacles for receiving all such products for transportation, and for storage at the place of delivery until the same can reasonably by moved by the consignee, and shall be liable as common car riers therefor from the time the same is delivered for transportation until a reasonable time after the same has been transported to the place of consignment and ready for delivery to the consignee, which time shall be fixed by general regulation by the corporation, and shall not be less than two days from and after the same shall be ready for delivery and notice thereof given to such consignee, and all rates and charges of every description, for or on account of or in any manner connected with the transportation of any products, shall be fixed by such corporation by general rules and regulations, which shall be applicable to all parties who shall transport any products through such pipe line, or deliver or contract to deliver products for transportation and shall be written or printed and exposed to public view and at all times open to public examination.[2]

[1] L. 1890, c. 566, § 49.

[2] Id., § 50.

Sec. 730. Receipts for property—Cancellation of vouchers—Delivery of property.—No receipt, certificate order of any kind shall be made, accepted or issued by any pipe line corporation for any commodity unless the commodity represented by them is actually in possession of the corporation at the time of making, issuing or acceptance thereof. Whenever any such corporation shall have parted with the possession of any commodity and received therefor any order, voucher, receipt or certificate, such order, voucher, receipt or certificate shall not be issued or used again, but shall be canceled with the word "canceled" stamped or printed legibly across the face thereof, and such canceled order, voucher, receipt or certificate shall be filed and preserved by such corporation and a record of the same kept by the secretary thereof. No petroleum or other commodity received for transportation by such corporation shall be delivered to any person without the presentation and surrender of all vouchers, receipts, orders or certificates that have been issued or accepted for the same.[1]

Sec. 731. Monthly statements.—Every pipe line corporation shall make monthly a specific statement showing the amount of all commodities received, the amount delivered during the month, and the stock on hand on the last day of each month of the year, and how much of such stock is represented by outstanding certificates, vouchers, receipts or orders, and how much in credit balances on the books of the corporation. Such statement shall be made on or before the tenth day of the succeeding month and verified by the oath of the president and secretary that it is in all respects true and correct, and shall be filed within three days thereafter in the county clerk's office in the county where the principal office of the corporation is located, and a true copy of the same posted in a conspicuous place in its principal office for at least thirty days thereafter.[2]

Sec. 732. Fences—Farm crossings and use of line not inclosed.—It shall not be necessary for any such corporation to fence the lands acquired by them for the purposes of its incorporation. But, if not enclosed by a substantial fence, the owner of the adjoining lands from whom such lands were

[1] L. 1890, c. 566, § 51.

[2] Id. § 52.

obtained, his heirs or assigns, may occupy and use such lands in any manner not injurious to the interests of the corporasion and shall not be liable therefor, or for any trespass upon any such lands except for willful or negligent injuries to the pipes, fixtures, machinery or personal property of the corporation. If the corporation shall keep such lands inclosed it shall construct and provide all suitable and necessary crossings with gates for the use and convenience of any owners of lands adjoining the portion of its lands so inclosed, and no claim shall be made by it against any owner of adjoining lands to make or contribute to the making or maintaining of any division fence between such adjoining lands and its lands, and if it shall neglect to keek* and maintain substantial fences along its lands the owners of adjoining lands may construct and maintain all farm or division fences, and all line fences crossed by such pipe line in the same manner as though it had not acquired such lands for such pipe line, and it shall be liable for all injuries to such fences caused or done by any of its officers or agents, or any persons acting in their or its behalf, or by any laborer in its or their employ or in the employ of any of its contractors.[1]

Sec. 733. Taxation of property.—The real estate and personal property belonging to any pipe line corporation in this state, shall be assessed and taxed in the several towns, villages and cities in the same manner as the real estate and personal property of railroad corporations are assessed and taxed, and such corporation may pay such taxes or commute therefor in the same manner as railroad corporations.[2]

ARTICLE VI.

GAS AND ELECTRIC LIGHT CORPORATIONS.

SEC. 734. Incorporation.
SEC. 735. Powers.
SEC. 736. Appointment of inspectors of gas meters.
SEC. 737. Deputy inspectors.
SEC. 738. Inspection of gas meters.
SEC. 739. Gas or electric light must be supplied on application.

[1] L. 1890, c. 566, § 53. [2] Id., § 54. * So in the original.

SEC. 740. Deposit of money may be required.
SEC. 741. Entry of buildings to *meters or lights.
SEC. 742. Refusal or neglect to pay rent.
SEC. 743. No rent for meters to be charged.
SEC. 644. Price of gas.

Sec. 734. Incorporation.—Three or more persons may become a corporation for manufacturing and supplying gas for lighting the streets and public and private buildings of any city, village or town, or two or more villages or towns not over five miles distant from each other, in this state, or for manufacturing and using electricity for producing light, heat or power, and in lighting streets, avenues, public parks and places and public and private buildings of cities, villages and towns within this state, by making, signing, acknowledging and filing a certificate stating the name of the corporation, its objects, the amount of its capital stock, the term of its existence not to exceed fifty years, the number of shares which the stock shall consist, the number of directors not less than three nor more than thirteen, the names and places of residence of the directors for the first year, and the name of the town and county in which the operations of the corporation are to be carried on, and thereupon the persons who shall have signed the same, their associates and successors shall be a corporation by the name stated in the certificate.[1]

Sec. 735. Powers.—Every such corporation shall have the following additional powers:

1. If incorporated for the purpose of supplying gas for light, to manufacture, sell and furnish such quantities of gas as may be required in the city, town or village where the same shall be located, or said two or more villages or towns, not over five miles distant from each other, named in its certificate of incorporation, for lighting the streets, and public or private buildings or for other purposes: and to lay conductors for conducting gas through the streets, lanes, alleys, squares and highways, in such city, villages or towns, with the consent of the municipal authorities thereof, and under such reasonable regulations as they may prescribe; and

[1] L. 1890, c. 566, § 60. * So in the original.

such municipal authorities shall have power to exempt any such corporation from taxation on their personal property for a period not exceeding three years from the organization of the corporation.

2. If incorporated for the purpose of using electricity for light, heat or power, to carry on the business of lighting by electricity or using it for heat or power in cities, towns and villages within this state, and the streets, avenues, public parks and places thereof, and public and private buildings therein; and for the purposes of such business to generate and supply electricity; and to make, sell or lease all machines, instruments, apparatus and other equipments therefor, and to lay, erect and construct suitable wires or other conductors, with the necessary poles, pipes or other fixtures in, on, over and under the streets, avenues, public parks and places of such cities, towns or villages, for conducting and distributing electricity, with the consent of the municipal authorities thereof, and in such manner and under such reasonable regulations, as they may prescribe.

3. Any two or more corporations, organized under this article or under any general or special law of the state for the purpose of carrying on any business which a corporation organized under this article might carry on, may consolidate such corporations into a single corporation by complying with the provisions of the business corporations law relating to the consolidation of business corporation.[1]

Sec. 736. Inspector of gas meters.—The governor shall nominate, and by and with the consent of the senate, appoint an inspector of gas meters, who shall reside in the city of New York, whose duty it shall be, when required, to there inspect, examine, prove and ascertain the accuracy of any and all gas meters used or intended to be used for measuring or ascertaining the quantity of illuminating gas furnished by any gas-light corporation in this state, except corporations engaged in supplying natural gas to consumers, to or for the use of any person or persons, and, when found to be or made correct, to seal, stamp or mark all such meters, and each of them, with

[1] L. 1890, c. 566, § 61.

some suitable device, which device shall be recorded in the office of the secretary of state. Such inspector shall hold his office for the term of five years and until the appointment of his successor, but may be removed by the governor for sufficient cause. He shall receive an annual salary of twenty-five hundred dollars, to be paid in the first instance out of the state treasury on the warrant of the comptroller, which shall be charged to and paid into the state treasury by the several gas-light corporations in this state, in amounts proportionate to the amount of the capital stock of such corporations respectively, to be ascertained and assessed by the comptroller, of the state. If any such corporation shall refuse or neglect to pay into the state treasury the amount or portion of such salary required of them respectively, for the space of thirty-days after written notice given it by the comptroller to make such payment then the comptroller may maintain an action in his name of office, against such delinquent corporation for its portion or amount of such salary, with interest thereon at the rate of ten per cent per annum from the time when such notice was given and the costs of the action.[1]

Sec. 737. Deputy inspectors.—The inspector of gas meters shall appoint deputy inspectors of gas meters, to reside wherever gas meters are manufactured in this state, to hold office during his pleasure, and who shall in their respective places of residence discharge the same duties as are required of the inspector and be paid by him out of his salary at the rate of two dollars per day, while actually engaged in the discharge of such duties.[2]

Sec. 738. Inspection of gas meters.—No corporation or person shall furnish or put in use any gas meter, which shall not have been inspected, proved and sealed by the inspector except during such time as the office of inspector may be vacant, or such inspector after request made, shall refuse or neglect to prove and seal the meter furnished for that purpose, and every gas-light corporation shall provide and keep in and upon their premises a suitable and proper apparatus, to be approved and sealed by the inspector of meters, for testing and

[1] L. 1890, c. 566, § 62.

[2] Id., § 63.

proving the accuracy of the gas meters furnished for use by it, and by which apparatus every meter may and shall be tested on the written request of the consumer, to whom the same shall be furnished, and in his presence if he desire it If any such meter on being so tested, shall be found defective or incorrect to the prejudice or injury of the consumer, the necessary removal inspection, correction and replacing of such meter shall be without expense to the consumer, but in all other cases he shall pay the reasonable expenses of such removal, inspection and replacing; and in case any consumer shall not be satisfied with such inspection of the meter furnished to him, and shall give to the corporation written notice to that effect, he may have such meter reinspected by the state inspector, if he require it, upon the same terms and conditions as herein provided for the original inspection thereof.[1]

Sec. 739. Gas and electric light must be supplied on application.—Upon the application, in writing, of the owner or occupant of any building or premises within one hundred feet of any main laid down by any gas-light corporation, or the wires of any electric-light corporation, and payment by him of all money due from him to the corporation, the corporation shall supply gas or electric light as may be required for lighting such building or premises, notwithstanding there be rent or compensation in arrear, for gas or electric light supplied, or for meter, wire, pipe or fittings, furnished to a former occupant thereof, unless such owner or occupant shall have undertaken or agreed with the former occupant to pay or to exonorate him from the payment of such arrears, and shall refuse or neglect to pay the same; and if for the space of ten days after such application, and the deposit of a reasonable sum as provided in the next section, if required, the corporation shall refuse or neglect to supply gas or electric light as required, such corporation shall forfeit and pay to the applicant the sum of ten dollars, and the further sum of five dollars for every day thereafter during which such refusal or neglect shall continue; provided that no such corporation shall be required to lay service pipes or wires for

[1] L. 1890, c. 566, § 64.

the purpose of supplying gas or electric light to any applicant where the ground in which such pipe or wire is required to be laid shall be frozen, or shall otherwise present serious obstacles to laying the same; nor unless the applicant, if required, shall deposit in advance with the corporation a sum of money sufficient to pay the cost of his portion of the pipe or wire required to be laid, and the expense of laying such portion.[1]

Sec. 740. Deposit of money may be required.—Every gas light and electric light corporation may require every person to which such corporation shall supply gas or electric light for lighting any building, room or premises to deposit with such corporation a reasonable sum of money according to the number and size of lights used or required, or proposed to be used for two calendar months, by such person and the quantity of gas and electric light necessary to supply the same as security for the payment of the gas and electric light rent or compensation for gas consumed, or rent of pipe or wire and fixtures, to become due to the corporation, but every corporation shall allow and pay to every such depositor legal interest on the sum deposited for the time his deposit shall remain with the corporation.[2]

Sec. 741. Buildings may be entered for the examination of meters, lights, and so forth.—Any officer or other agent of any gas light or electric light corporation, for that purpose duly appointed and authorized by the corporation, may at all reasonable times, upon exhibiting a written authority, signed by the president and secretary of the corporation, enter any dwelling, store, or building, room or place lighted with gas or electric light supplied by such corporation, for the purpose of inspecting and examining the meters, pipes, fittings, wires and works for supplying or regulating the supply of gas or electric light and of ascertaining the quantity of gas or electric light consumed or supplied, and if any person shall, at any time, directly or indirectly, prevent or hinder any such officer or agent from so entering any such premises, or from making such inspection or examination at any reasonable time,

[1] L. 1890, c. 566, § 65. [2] Id., § 66.

he shall, for every such offense, forfeit to the corporation twenty-five dollars.[1]

Sec. 742. Refusal or neglect to pay rent.—If any person supplied with gas or electric light by any such corporation shall neglect or refuse to pay the rent or remuneration due for the same or for the wires, pipes or fittings let by the corporation, for suppling or using such gas or electric light or for ascertaining the quantity consumed or used as required by his contract with the corporation, or shall refuse or neglect, after being required so to do, to make the deposit required, such corporation may prevent the gas or electric light from entering the premises of such person; and their officers, agents or workmen may enter into or upon any such premises between the hours of eight o'clock in the forenoon and six o'clock in the afternoon, and separate and carry away any meter, pipe, fittings, wires or other property of the corporation, and may disconnect any meter, pipe, fittings, wires or other works whether the property of the corporation or not, from the mains, pipes or wires of the corporation.[2]

Sec. 743. No rent for meters to be charged.—No gas-light corporation in this state, shall charge or collect rent on its gas meters, either in a direct or indirect manner, and any person, party or corporation violating this provision shall be liable to a penalty of fifty dollars for each offence, to be sued for and recovered in the corporate name of the city or village where the violation occurs, in any court having jurisdiction, and when collected to be paid into the treasuary of such city or village and to constitute a part of the contingent or general fund thereof.[3]

Sec. 744. Price of gas.—In any city in this state having or a population of eight hundred thousand or over, no corporation or person shall charge for illuminating gas a sum to exceed one dollar and twenty-five cents per thousand feet, and such gas shall have an illuminating power of not less than twenty sperm candles, of six to the pound, and burning at the rate of one hundred and twenty grains of spermaceti per hour,

[1] L. 1890, c. 556, § 67.
[2] Id., § 68.
[3] Id., § 69.

tested at a distance of not less than one mile from the place of manufacture, by a burner consuming five cubic feet of gas per hour, and shall comply with the standard of purity now or hereafter established by law; but in any district or ward of any city containing over one million inhabitants, which district or ward is separated from the main portion thereof by a stream or other natural boundary, any gas-light corporation may charge a price not to exceed one dollar and sixty cents per thousand cubic feet, but such corporation shall not charge a greater price in the city where its main works shall be situated than in such district or ward.[1]

ARTICLE VII.

WATER-WORKS CORPORATION.

SEC. 745. Incorporation.
SEC. 746. Must supply water; villages trustees may contract for same; tax therefor.
SEC. 747. Powers.
SEC. 748. Survey and map.
SEC. 749. Condemnation of real property.
SEC. 750. Corporation may contract with other towns or villages; amended certificate.

Sec. 745. Incorporation.—Seven or more persons may become a corporation for the purpose of supplying water to any of the towns or villages and the inhabitants thereof, in this state, by executing, acknowledging and filing a certificate stating the name of the corporation, the amount of its capital stock, the number of shares into which it is to be divided, the location of its principal office, the number of its directors, not less than seven, the names and places of residence of the directors for the first year, the name of the towns and villages which it is proposed to supply with water; that the permit of the authorities of such towns and villages herein required has been granted; the post-office address of each subscriber, and the number of shares he agrees to take in

[1] L, 1890, c. 566, § 70.

such corporation, the aggregate of which shall be at least one-tenth of the capital stock, and ten per cent of which shall be paid in cash to the directors. At the time of filing there shall be annexed to the certificate and as a part thereof, a permit, signed and acknowledged by a majority of the board of trustees of the village, in case an incorporated village is to be supplied with water, and in case a town, or any part thereof, not within an incorporated village, is to be so supplied, by the supervisor, justice of the peace, town clerk and highway commissioners thereof, or a majority of them, authorizing the formation of such corporation for the purpose of supplying such village or town with water, and an affidavit of at least three of the directors that the amount of capital stock herein acquired has been subscribed and paid in cash.[1]

Sec. 746. Must supply water—Village trustees may contract for same—Tax therefor.—Every such corporation shall supply the authorities or inhabitants of any town or village, where they have organized, with pure and wholesome water, at reasonable rates and cost to all consumers who may use the same, and the board of trustees of any incorporated village of this state shall have the power to contract for the term of one year or more with any such corporation for the delivery by it to the village of water, through hudrants* or otherwise, for the extinguishment of fires and for sanitary and other public purposes; and the amount of such contract agreed to be paid shall be annually raised as a part of the expenses of such village and shall be levied, assessed and collected in the same manner as other expenses of the village are raised, and when collected shall be kept separate from other funds of the village, and be paid over to such corporation by such trustees according to the terms and conditions of any such contract; and any such contract entered into by the board of trustees of any village shall be valid and binding upon such village, but no such contract shall be made for a longer period than five years, nor for a sum exceeding in the aggregate two and one-half mills for every dollar of the taxable property of such

[1] L. 1890, c. 556, § 80.

* So in original.

village per annum, unless a resolution authorizing the same has been submitted to a vote of the electors of the village, in the manner provided by the village law, and approved by a majority of the voters entitled to vote, and voting on such question at any annual election or at a special election duly called; and any board of trustees, when so authorized, may make such contract for a term not exceeding thirty years, and the amount of such contract shall be paid in semi-annual installments.[1]

Sec. 747. Powers.—Every such corporation shall have the following additional powers:

1. To lay and maintain their pipes and hydrants for delivering and distributing water in any street, highway or public place of any town or village in which it has obtained the permit required by section eighty[2] of this article.

2. To lay their water pipes in any streets or avenues or public places of an adjoining town or village, to the town or village where such permit has been obtained.

3. To cause such examinations and surveys for its proposed waterworks to be made as may be necessary to determine the proper location thereof, and for such purpose by its officers, agents or servants, to enter upon any lands or waters in the town or village where organized, or in any adjoining town or village for the purpose of making such examinations or surveys, subject to liability for all damages done.[3]

Sec. 748. Survey and map.—Before entering upon, taking or using any land, for the purposes of its incorporation such corporation shall cause a survey and map to be made of the lands intended to be taken or entered upon, by and on which the land of each owner or occupant shall be designated, which map shall be signed by the president and secretary, and filed in office of the county clerk of the county in which such lands are situated.[4]

Sec. 749. Condemnation of real property.—Any corporation organized under this article, shall have the right to acquire real estate, or any interest therein, necessary for the

[1] L. 1890, c. 566, § 81.
[2] *Ante*, § 745.
[3] Id., § 83.
[4] Id., § 82.

purposes of its incorporation, and the right to lay, relay, repair and maintain conduits and waterpipes with connections and fixtures, in, through or over the lands of others; the right to intercept and divert the flow of waters from the lands of riparian owners, and from persons owning or interested in any waters, and the right to prevent the flow or drainage of noxious or impure matters from the lands of others into its reservoirs or sources of supply. If any such corporation, which has made a contract with any town or village to supply it with pure and wholesome water as authorized by section two of this article, shall be unable to agree upon the terms of purchase of any such property or rights, it may acquire the same by condemnation. But no such corporation shall have power to take or use water from any of the canals of this state or any canal reservoirs as feeders or any streams which have been taken by the state for the purpose of supplying the canals with water.[1]

Sec. 750. Corporation may contract with other towns or villages—Amended certificate.—When any such corporation has entered into a contract with the authorities of any town or village not mentioned in its certificate of incorporation, but situated in the same county as the towns or villages mentioned therein, or an adjoining county, to supply it with pure and wholesome water, it may file an amended certificate, stating the name of such other town or village to be so supplied with water, and it may thereupon supply any such town or village, with water in the same manner and with the same rights and subject to the same requirements as if it had been named in original certificate of incorporation.[2]

ARTICLE VIII.

TELEGRAPH AND TELEPHONE CORPORATIONS.

SEC. 751. Incorporation.
752. Extension of lines.
753. Construction of lines.
754. Transmission of despatches.
755. Consolidation of corporations.
756. Special policemen.

[1] L. 1890, c. 566, § 84. [2] Id., § 85.

Sec. 751. Incorporation.—Seven or more persons may become a corporation for the purpose of constructing, owning, using and maintaining a line or lines of electric telegraph or telephone, wholly within or partly beyond the limits of this state, or for the purpose of owning any interest in any such line or lines, or any grants therefor by executing, acknowledging and filing a certificate, stating the name of the corporation; its general route and the points to be connected; its capital stock; the number of shares into which it is to be divided; the term of its existence; the number of its directors not less than seven; the names and residence of the directors, for the first year, and the post-office address of the subscribers and the number of shares which each agrees to take in such corporation.[1]

Sec. 752. Extension of line.—Any such corporation may construct, own, use and maintain any line of electric telegraph or telephone, not described in its original certificate of incorporation, whether wholly within or wholly or partly beyond the limits of this state, and may join with any other corporation in constructing, leasing, owning, using and maintaining such line, or hold or own any interest therein, or become lessees thereof, upon filing in the same manner as the original certificate is required to be filed an amended certificate, executed and acknowledged by at least two-thirds of the directors of such corporation, describing the general route of such line or lines, and designating the extreme points connected thereby, and upon procuring the written consent of the persons owning at least two-thirds of the capital stock of such corporation, and such amended certificate shall not be filed until there is indorsed thereon or annexed thereto an affidavit made by at least three of the directors of the corporation that such consent has been obtained, which affidavit shall be filed with and be a part of such certificate.[2]

Sec. 753. Construction of lines.—Such corporation may erect, construct and maintain the necessary fixtures for its lines upon, over or under any of the public roads, streets and highways; and through, across or under any of the waters

[1] L. 1890, c. 566, § 100.

[2] Id., § 101.

within the limits of this state, and upon, through or over any other land, subject to the right of the owners thereof to full compensation for the same. If any such corporation can not agree with such owner or owners upon the compensation to be paid therefor, such compensation shall be ascertained in the manner provided in the condemnation law.[1]

Sec. 754. Transmission of despatches.—Every such corporation shall receive despatches from and for other telegraph or telephone lines or corporations, and from and for any individual, and on payment of the usual charges by individuals for transmitting despatches as established by the rules and regulations of such corporation, transmit the same with impartiality and good faith and in the order in which they are received, and if it neglects or refuses so to do, it shall pay one hundred dollars for every such refusal or neglect to the person or persons sending or desiring to send any such despatch and entitled to have the same so transmitted, but arrangements may be made with the proprietors or publishers of newspapers for the transmission for publication of intelligence of general and public interest out of its regular order.[2]

Sec. 755. Consolidation of corporations.—Any corporation organized under this article may lease, sell or convey its property, rights, privileges and franchises, or any interest therein, or any part thereof, to any telegraph or telephone corporation, organized under or created by the laws of this or any other state, and may acquire by purchase, lease or conveyance the property, rights, privileges and franchises, or any interest therein or part thereof, of any such corporation, and may make payments therefor in its own stock, money or property, or receive payment therefor in the stock, money or property of the corporation to which the same may be so sold, leased or conveyed, but no such lease, sale, purchase or conveyance shall be valid until it shall have been ratified and approved by a three-fifths vote of its board of directors or trustees, and by the vote or written consent of stockholders owning at

[1] L. 1890, c. 566, § 102. See *Ante*, §§ 216-243. [2] Id., § 103.

least three-fifths of the capital stock given at a meeting of all the stockholders duly called for that purpose.[1]

Sec. 756. Special policemen.—The police department or board of police of any city may, in addition to the police force now authorized by law, appoint a number of persons, not exceeding two hundred, who may be designated by any corporation operating a system of signaling by telegraph to a central office for police assistance to act as special patrolmen in connection with such telegraphic system. And the person so appointed shall, in and about such service, have all the powers possessed by the members of the regular force, except as may be limited by and subject to the supervision and control of the police department or board of police of such city. No person shall be appointed such special policeman who does not possess the qualifications required by such police department or board of police for such special service; and persons so appointed shall be subject, in case of emergency, to do duty as part of the regular police force of the city. The police department or board of police shall have power to revoke any such appointment at any time, and every person appointed shall wear a badge and uniform, to be furnished by such corporation and approved by the police department or board of police, such uniform shall be designated at the time of the first appointment and shall be the permanent uniform to be worn by such special police, and the pay of such special patrolmen and all expenses connected with their service shall be wholly paid by such corporation, and no expense or liability shall at any time be incurred or paid by the police department or board of police of any city, for or by reason of the services of such persons so appointed.[2]

[1] L. 1890, c. 566, § 104.

[2] Id., § 105.

ARTICLE IX.

TURNPIKE, PLANK-ROAD AND BRIDGE CORPORATIONS.

SEC. 757. Incorporation.
SEC. 758. Restriction upon location of road.
SEC. 759. Agreement for use of highway.
SEC. 760. Application to board of supervisors.
SEC. 761. Commissioners to lay out road.
SEC. 762. Possession of and title to real estate.
SEC. 763. Use of turnpike road by plank-road.
SEC. 764. Width and construction of road.
SEC. 765. Construction of bridges.
SEC. 766. Certificate of completion of road or bridge.
SEC. 767. Toll-gates and rates of toll, and exemptions.
SEC. 768. Toll gatherers.
SEC. 769. Penalty for running a gate.
SEC. 770. Location of gates and change thereof.
SEC. 771. Inspectors, their powers and duties.
SEC. 772. Change of route, extensions and branches.
SEC. 773. Milestones, guide-posts and hoist-gates.
SEC. 774. Location of office of corporation.
SEC. 775. Consolidation of corporations, sale of franchise.
SEC. 776. Surrender of road.
SEC. 777. Taxation and exemption.
SEC. 778. Hauling logs and timber.
SEC. 779. Encroachment of fences.
SEC. 780. Penalty for fast driving over bridges.
SEC. 781. Acts of directors prohibited.
SEC. 782. Actions for penalties.
SEC. 783. Proof of incorporation.
SEC. 784. When stockholders to be directors.
SEC. 785. Dissolution of corporation, road to be a highway.
SEC. 786. Town must pay for lands not originally a highway.
SEC. 787. Highway labor upon line of plank-road or turnpike.
SEC. 788. Extension of corporate existence.

Sec. 757. Incorporation.—Five or more persons may become a corporation for the purpose of constructing, maintaining and owning a turnpike, plank-road or a bridge, or causeway across any stream or channel of water, or adjoining bay, swamp, marsh, or water to form in connection with such bridge or causeway a continuous roadway across the same, by signing, acknowledging and filing a certificate containing the name of the corporation, its duration, not exceeding fifty

years, the amount and number of shares of its capital stock, the number of its directors, and their names and post-office address for the first year, the termini of the proposed road, its length, and each town, city or village into or through which it is to pass, or of a bridge, the location and plan thereof, and the post-office address of each subscriber, and the number of shares of stock which he agrees to take, the aggregate of which subscriptions shall not be less then five hundred dollars for every mile of road, or if a bridge corporation not less than one-fourth of the amount of the capital stock, and five per cent of which must be actually paid in cash. There shall be indorsed on and annexed to the certificate and made a part thereof the affidavit of at least three of the directors named therein, that the required amount of capital stock has been subscribed and the prescribed percentage paid in cash.[1]

Sec. 758. Restrictions upon location of road.—No such road shall be laid out through any orchard of the growth of four years or more to the injury or destruction of fruit trees, or through any garden cultivated for four years or more before the laying out of the road, or through any dwelling-house or building connected therewith, or any yards or inclosures necessary for its use or enjoyment without the consent of the owner thereof, nor shall any such corporation bridge any stream in any manner that will prevent or endanger the passage of any raft of twenty-five feet in width or where the same is navigable by vessels or steamboats.[2]

Sec. 759. Agreements for use of highways.—The supervisor and commissioner of highways, or a majority, if there be more than one of any town, may agree in writing with any such corporation for the use of any part of a public highway therein required for the construction of any such road, and the compensation to be paid by the corporation for taking and using such highway for such purpose on first obtaining consent of at least two-thirds of all the owners of land bounded on or along such highway, which agreement shall be filed and recorded in the town clerk's office of the

[1] L. 1890, c. 566, § 120. [2] Id., § 121.

town. If such agreement can not be made the corporation may acquire the right to take such highway for such purpose by condemnation. The compensation therefor shall be paid to the commissioners of highways, to be expended by them in improving the highways of the town.[1]

Sec. 760. Application to board of supervisrs.— If the lands necessary for the construction of the road or bridge of any such corporation in any county have not been procured by gift or purchase, and the right to take and use any part of any highway therein required by such corporation shall not have been procured by agreement with the supervisor and commissioners of highways of the town in which such highway is situated, the corporation may make application to the board of supervisors of each county in which such bridge or road, or any part thereof, is to be located, for authority to build, lay out and construct the same, and take the necessary real estate for such purpose. Notice of the application shall be published in at least one public newspaper in each county for six successive weeks, specifying the time and place where it will be made, the location, length and breadth of any such bridge, and the length and route of any such proposed road, its character, and each town, city and village in or through which it is to be constructed. The application may be made at any annual or special meeting of the board, and if the corporation desires a special meeting therefor any three members of the board may fix a time when the same shall be held, and notice thereof shall be served upon each of the other supervisors by delivering the same to him personally or leaving it at his place of residence at least twenty days before the minutes, and the expenses of the special meeting and of notifying the members of the board thereof shall be paid by the corporation. All persons interested therein or owning real estate in any of the towns through which it is proposed to construct the road may appear and be heard upon the hearing of the application. The board may take testimony in respect thereto, or authorize it to be taken by a committee of the board and may adjourn the hearing from

[1] L. 1890, c. 566, § 122.

time to time. After hearing the application the board may by an order entered in its meetings, authorize the corporation to construct such bridge or road and to take the real estate necessary for that purpose, and a copy of the order certified by the clerk of the board shall be recorded by the corporation in the office of the clerk of the county in which such bridge or road or any part thereof is to be located before any act shall be done under it.[1]

Sec. 761. Commissioners to lay out road.—If the application for the construction of any such road is granted, the board shall appoint three disinterested persons, not owners of real estate in any town, through which the road is to be constructed or in any adjoining town, commissioners to lay out the road. They shall take the constitutional oath of office, and without unnecessary delay lay out the route of such road in such manner as in their opinion will best promote the public interests; they shall hear all persons interests who shall apply to be heard and may take testimony in relation thereto, and shall cause an accurate survey and description of the road andthe necessary buildings and gates, signed and acknowledged by them to be recorded in the clerk's office of the county. If the road is situated in more than one county, such survey and description shall be separate as to that portion in each county and filed in the office of the cleark of the county in* which it relates. The corporation shall pay each commissioner three dollars for every day spent by him in the performance of his duties and his necessary expenses.[2]

Sec. 762. Possession of and title to real estate —The route so laid out and surveyed by the commissioners shall be the route of the road, and the corporation may enter upon, take and hold for the purposes of its incorporation, the lands described in such survey as necessary for the construction of its road, and requisite building sand gates. If for any cause the owner of any of such lands shall be incapable of selling the same or his name or residence can not with reasonable diligence be ascertained or the corporation is unable to agree

[1] L. 1890, c. 556, § 123. [2] Id., § 124.

with the owner for the purchase thereof it may acquire title thereto by condemnation.[1]

Sec. 763. Use of turnpike road by plank-road.—No plank-road shall be made on the roadway of any turnpike corporation without its consent, except for the purpose of crossing the same. Any plank-road corporation may contract with any connecting turnpike corporation for the purchase of its roadway or a part thereof, or of its stock, on such terms as may be mutually agreed upon, and such stock, if purchased, shall be held by the plank-road corporation for the benefit of its stockholders in proportion to the amount of stock held by each, and a transfer of stock in the plank-road corporation shall carry with it its proportional amount of the turnpike stock, and entitle the holder thereof to his share of the dividends derived ther from. After the purchase of the whole of the stock of any such turnpike corporation by such plank-road corporation the directors of the plank-road corporation shall be the directors of the turnpike corporation, and shall manage its affairs and render an account of the same annually to the stockholders of the plank-road corporation. If the plank-road corporation is dissolved, its stockholders at the time of dissolution shall be the stockholders of the turnpike corporation in proportion to the amount of stock held by each, and the stock of the turnpike corporation shall thereafter be deemed to be divided into shares equal in number to the shares of stock of the late plank-road corporation, and scrip therefor shall be issued accordingly to each of the last stockholders of the plank-road corporation, and the officers of the turnpike corporation shall be the same in number as provided for in its charter or certificate of incorporation, and shall be chosen by such former stockholders of the plank-road corporation or their assigns. A corporation owning a turnpike road on or adjoining which a plank-road shall have been constructed may abandon that portion of its road on or adjoining the route of which a plank-road is actually constructed and used.[2]

Sec. 764. Width and construction of road.—Every such plank-road shall be so constructed as to make, secure and

[1] L. 1890, c. 566, § 125. [2] Id., § 126.

maintain a smooth and permanent road, the track of which shall be made of timber, plank or other hard material forming a hard and even surface, and every such turnpike road shall be bedded with stone, gravel, or such other material as may be ound on the line thereof, and faced with broken stone or gravel, forming a hard and even surface with good and sufficient ditches on each side wherever practicable, and all such roads shall be laid out at least four rods wide and the arch or bed at least eighteen feet wide, and shall be so constructed as to permit carriages and other vehicles conveniently to pass each other, and to pass on and off such road where intersected with other roads. Any corporation which shall have once laid its road with plank may relay the same, or any part thereof with broken stone, gravel, shells or other hard materials, forming, a good and substantial road. Any plank-road or turnpike corporation may lay iron rails on its road suitable for the use of wagons and vehicles drawn by horses or animals over its road; but no other motive power shall be used thereon.[1]

Sec. 765. Construction of bridges; obstruction of rafts prohibited.—Every bridge constructed by any such corporation shall be built with a good and substantial railing or siding at least four and one-half feet high, and over any stream navigable by rafts the corporation shall keep the channel of the stream above and below the bridge free and clear from all deposits, formed or occasioned by the erection of the bridge, which shall in any wise obstruct the navigation thereof, and shall be liable to all persons unreasonably or unnecessarily delayed or hindered in passing the same for all damages sustained thereby. No such bridge shall be constructed over or across any river or water-course where the tide ebbs and flows or any water used for a harbor, or any lake, river or water navigable by sail vessels or steamboats, nor within the limits prescribed by law, within which a bridge shall not be erected and maintained in proximity to another bridge.[2]

Sec. 766. Certificate of completion of road or bridge—When any such corporation shall have completed its bridge or road or any five consecutive miles thereof, it may apply to

[1] L. 1890, c. 566, § 127. [2] Id., § 128.

the commissioners of highways of each town in which the completed road or bridge is situated to inspect the same, and if a majority of the commissioners are satisfied that the road or bridge is made and completed as required by law and in a manner safe and convenient for the public use, they shall make a certificate to that effect, which shall be filed in the office of the county clerk. Each commissioner shall be paid by the corporation two dollars per day for his services and necessary expenses.[1]

Sec. 767. Gates, rates of toll and exemption.—Upon filing such certificate such corporation may erect a toll-gate at such bridge or one or more toll-gates upon the road so inspected, and may demand and receive the following rates of toll, a printed list of which shall be conspicuously posted at or over each gate: if a bridge corporation, such sum as shall be from time to time prescribed by the board of supervisors of the county or counties in which the bridge is located. If a turnpike or plank-road, for every vehicle drawn by one animal, one cent per mile, and one cent per mile for each additional animal; for every vehicle used chiefly for carrying passengers, three cents per mile, and one cent per mile for each additional animal; for every horse rode, led or driven, three-quarters of a cent per mile; for every score of sheep or swine, one and one-half cents per mile, and for every score of neat cattle, two cents per mile. When diverging roads strike any plank-road or turn-pike at or near any toll-gate, the board of supervisors of the county may direct that the toll charge shall commence from the point of such divergence, and only for the distance traveled on such turnpike or plank-road, but fractions of cents may be made units of cents in favor of the plank-road or turnpike corporation. The corporation may from time to time commute, but not for a longer period than one year at any one time, with any person whose place of abode shall adjoin or be near to the road for the toll payable at the nearest gate on each side thereof, and the commutation may be renewed from year to year. No tolls shall be charged or collected at any gate, from any person going to or from

[1] L. 1890, c. 566, § 129.

public worship, a funeral, school, town meeting or election, at which he is a voter to cast his vote, a military parade which he is required by law to attend, any court which he shall be required to attend as a juror or witness, and when going to or from his legally required work upon any public highway, persons living within one mile of the gate by the most usually travelled road when not engaged in the transportation of other persons or property, and troops in the actual service of this state or of the United States.[1]

Sec. 768. Toll-gatherers.—Every such corporation may appoint toll gatherers to collect toll at each gate, who may detain and prevent from passing through the gate, any person riding, leading or driving animals or vehicles, subject to the payment of toll, until the toll is paid, but if he shall unreasonably hinder or delay any traveler or passenger liable to the payment of toll, or shall demand or receive from any person more toll than he is authorized by law to collect, he shall forfeit to such person the sum of five dollars for every offense, and the corporation employing him shall be liable for the payment thereof, and for any damages sustained by any person for acts done or omitted to be done by him in his capacity of toll gatherer, if, on recovery of judgment against the toll gatherer therefor, execution thereon shall be returned nulla bona.[2]

Sec. 769. Penalty for running a gate.—Any person who, with intent to avoid the payment of toll, shall pass any gate, without paying the toll required by law, or shall, with his team, carriage or horse, turn out of a turnpike or plank-road and pass any gate thereon on grounds adjacent thereto, shall forfeit for each offense the sum of ten dollars to the corporation injured.[3]

Sec. 770. Location of gates and change thereof.—No such corporation shall erect any toll gate, house or other building within ten rods of the front of any dwelling house, barn or other out house, without the written consent of the owner, and the county judge of the county in which the same

[1] L. 1890, c. 566, § 130. [2] Id., § 131. [3] Id., § 132.

is located shall, on application, order any building so erected to be removed, and if a majority of the commissioners of highways of any town, in which a toll-gate shall be located, or in an adjoining town, shall deem the location of any gate unjust to the public interests by reason of the proximity of diverging roads or otherwise, they may, on fifteen days' written notice to the president or secretary of the corporation, apply to the county court of the county in which the gate is located, for an order to alter or change its location. On hearing such application, and viewing the premises, if deemed necessary, the court may make such order in the matter as may be just and proper. Either party may, within fifteen days thereafter, appeal to the general term of the supreme court from such order, on giving such security as the county judge, making the order, may prescribe. Upon such appeal the supreme court, on motion of either party and on due notice, shall appoint three disinterested persons who are not residents of any town through or into which such road shall run, or to or from which it is the principal thoroughfare, or any adjoining town, as referees to hear, try and determine the appeal. Such referees shall view the premises and the location of the gate, and hear the parties in the same manner as on the trial of an issue of fact by a referee in a civil action in the supreme court, and report their decision thereon and the reasons therefor, and the evidence taken thereon to the supreme court, and such court shall review the report and render judgment thereon as justice and equity shall require, which shall be final and conclusive. The referees shall be entitled to the same fees as referees in civil actions in the supreme court, to be paid in the first instance by the party in whose favor their report or decision shall be, and the supreme court shall award judgment therefor, with such costs and expenses as it may deem reasonable, to the successful party on the appeal, which judgment shall be entered with the order affirming or reversing the order appealed from, and may be enforced by execution as a judgment of a court of record. If the order of the county court is not appealed from, it may be enforced, as the court may direct, and the court

may allow such costs as may be deemed just and equitable.[1]

Sec. 771. Inspectors—their powers and duties.—The commissioners of highways of the several towns and the trustees or other officers in the incorporated cities and villages of the state, who perform the duties of commissioners of highways in such cities and villages, shall be inspectors of plank-roads and turnpikes, in their respective towns, cities and villages. They shall personally inspect the whole of such turnpike or plank-road as lies in their respective towns, villages or cities, at least once in each month, and upon written complaint to them, or any of them, that any part of such road is out of repair they shall, without delay, view and examine the part complained of, and if it shall be found to be out of repair, or in condition not to be conveniently used by the public, they shall give written notice to the toll gatherer or person attending the gate nearest the place out of repair or in bad condition, to cause the same to be put in good condition within forty-eight hours from the service of the notice, and in default thereof they shall order the toll-gates upon such road to be immediately thrown open until the road shall be fully repaired to the satisfaction of the inspector. The fees of the inspectors for such service shall be two dollars for each day actually employed, to be paid by the corporation or person whose road is so inspected, if they order the gates to be thrown open, but otherwise to be charged, audited and paid in the same manner as other fees of commissioners of highways. Any party aggrieved by the order of the inspectors may appeal therefrom to the county court of the county in which that part of the order is situated within twenty days after service of the order by serving a notice of appeal upon one of the inspectors, and filing a copy thereof in the county clerk's office, and the appeal may be brought on for hearing upon a notice of not less than five days, and the county court shall always be open to hear the same, and upon hearing the proofs and allegations of the parties the court may affirm, reverse or modify the order. If the order requires the gates to be thrown open, they shall remain open during the pendency of the appeal. Any

[1] L. 1890, c. 566, § 133.

inspector who shall neglect to perform his duty as such inspector shall forfeit the sum of twenty-five dollars for each offence. Every keeper of a gate ordered to be thrown open not immediately obeying such order, or not keeping such gate open until a certificate permitting it to be closed shall be granted, or hindering or delaying any person in passing, or taking any tolls from any person passing such gate during the time it ought to be open, shall forfeit to the party aggrieved the sum of ten dollars for each offence, and the corporation owning the road, who shall refuse or neglect to obey the requirements of any such notice or order, shall forfeit to the people of the state the sum of two hundred dollars for each offence.

Sec. 775. Change of route, extensions and branches.—Any such corporation may, with the written consent of the owners of two-thirds of its capital stock and of a majority of the commissioners of highways of the town or towns in which any change or extension is proposed to be made construct branches to its main line or extend the same, or change the route of its road or any part thereof, and acquire the right of way, for the same in the same manner as for the original or main line, and may, by any of its officers, agents or servants, enter upon lands for the purpose of making any examination, survey or map, doing no unnecessary damage; but before entering upon, taking or using such lands, the corporation shall make a survey and map thereof, designating thereon the lands of each owner or occupant intended to be taken or used, which shall be signed and acknowledged by the engineer making the same and the president of the corporation and filed in the office of the clerk of the county in which the land is situated.[2]

Sec. 773. Mile-stones, guide-posts and hoist-gates.—A mile-stone or post shall be erected and maintained by every such corporation on each mile of its road, on which shall be fairly and legibly marked or inscribed the distance of such stone or post from the place of commencement of the road, and when the road shall commence at the end of any

[1]L. 1890, c. 566, § 134. [2]Id., § 135.

other road having mile-stones or post on which the distance from any city or town is marked, a continuation of that distance shall in like manner be inscribed. A guide-post shall also be erected at the intersection of every public road leading into or from every turnpike or plank-road, on which shall be inscribed the name of the place to which such intersecting road leads in the direction to which the name on the guide-post shall point. No plank-road or turnpike corporation shall erect or put up any hoist-gate on its road. Any person who shall willfully break, cut down, deface or injure any mile-stone, post or gate on such road, or dig up, or injure any part of the road, or any thing belonging thereto, shall forfeit to the corporation twenty five dollars for every offence, in addition to the damages resulting from the act.[1]

Sec. 774. Location of office of corporation.—Within two weeks after the formation of any such corporation its directors shall designate some place within a county in which its road or bridge, or some part thereof shall be constructed as its office, and shall give public notice thereof by publishing the same once in each week for three successive weeks in a public newspaper in the county, and shall file a copy of the notice in the office of the county clerk of every county in which any part of the road or bridge is, or is to be constructed, and if the location of such office shall be changed, like notice of the change shall be published and filed, in which shall be specified the time of making the change, before it shall take effect. Every notice, summons or other paper required by law to be served on the corporation may be served by leaving the same at such office with any person having charge thereof, at any time between nine o'clock in the forenoon, and five o'clock in the afternoon of any day except Sunday or legal holiday.[2]

Sec. 775. Consolidation of corporation and sale of franchise.—Any two or more of such corporations may consolidate into one corporation on such terms as the persons owning two thirds of the stock of each corporation may agree upon, and may change the name of the road on filing in the office

[1] L. 1890 c. 566, § 136.

[2] Id., § 137,

where the original certificates of incorporation were filed, a certificate containing the names of the roads so consolidated, and the name by which such road shall thereafter be known. Any plank-road or turnpike corporation may, with the consent of the owners of sixty per cent of its stock, sell, and convey the whole or any part of its rights, property and franchises to any other domestic plank-road or turnpike corporation, and such sale and conveyance shall vest the rights, property and franchises thereby transferred in the corporation to which they are conveyed for the term of its corporate existence.[1]

Sec. 776. Surrender of road.—The directors of any plank-road or turnpike corporation may abandon the whole or any part of its road at either or both ends thereof, upon obtaining the written consent of the stockholders, owning two-thirds of the stock of the corporation, which surrender shall be by a declaration in writing to that effect, attested by the seal of the corporation and acknowledged by the president and secretary. Such declaration and consent shall be filed and recorded in the clerk's office of the county in which any part of the road abandoned shall be situated, and the road so abandoned shall cease to be the road or property of the corporation, and shall revert and belong to the several towns, cities and villages through which it was constructed, and the corporation shall no longer be liable to maintain it or to be assessed thereon, or permitted to collect tolls for traveling over the same, but without impairing its right to take toll on the remaining part of its road at the rate prescribed by law.[2]

Sec. 777. Taxation and exemption.—So much of any bridge or toll-house of any bridge corporation as may be within any town, city or village, shall be liable to taxation therein as real estate. Toll-houses and other fixtures and all property belonging to any plank-road or turnpike corporation shall be exempt from assessment and taxation for any purpose until the surplus annual receipts of tolls on its road over necessary repairs and a suitable reserve fund for repairs or relaying of plank, shall exceed seven per cent per annum on the first cost

[1] L. 1890, c. 566, § 138 [2] Id., § 139.

of the road. If the assessors of any town, village or city and the corporation disagree concerning any exemption claim, the corporation may appeal to the county judge of the county in which such assessment is proposed to be made, who shall, after due notice to both parties, examine the books and vouchers of the corporation, and take such further proof as he shall deem proper, and decide whether such corporation is liable to taxation under this section, and his decision shall be final.[1]

Sec. 778. Hauling Logs and Timber.—Any person who shall draw or haul or cause to be drawn or hauled, any logs, timber or other material upon the bed of any plank or turnpike road, unless the same shall be entirely elevated above the surface of the road on wheels or runners, and the road-bed shall be injured thereby, or who shall do or cause to be done any act by which the road-bed, or any ditch, sluice, culvert or drain appertaining to any turnpike or plank-road shall be injured or obstructed, or shall divert or cause to be diverted, any stream of water so as to injure or endanger any part of such road, shall forfeit to the corporation the sum of five dollars for every offense in addition to the damages resulting from the wrongful act.[2]

Sec. 779. Encroachment of Fences.—Whenever the president or secretary of any turnpike or plank-road corporation shall notify any inspector of such roads in the county where situated that any person is erecting or has erected any fence or other structure upon any part of the premises lawfully set apart for any such turnpike or plank-road, the inspector shall examine into the facts and order the fence or other structure to be removed if it shall appear to be upon any part of any such road, and any person neglecting or refusing to remove the same within twenty days or such further time not exceeding three months, as may be fixed by the inspector, shall forfeit to the corporation the sum of five dollars for every day, during which the fence or other structure shall remain upon such road, but no such order shall require the removal of any fence, previously erected, between the first day of December and the first day of April.[3]

[1] L. 1890, c. 566, § 140. [2] Id., § 141. [3] Id., § 142.

Sec. 780. Penalty for fast driving over bridges.—Any plank-road, turnpike or bridge corporation may put up and maintain at conspicuous places at each end of any bridge, owned or maintained by it, the length of whose span is not less than twenty-five feet, a notice with the following words in large characters: "One dollar fine for riding or driving over this bridge faster than a walk." Whoever shall ride or drive faster than a walk over any bridge, upon which such notice shall have been placed, and shall then be, shall forfeit to the corporation the sum of one dollar for every such offense.[1]

Sec. 781. Acts of directors prohibited.—No director of, any such corporation shall be concerned, directly or indirectly in any contract for making or working any road belonging to it during the time he shall be a director. No contractor for the making of such road, or any part thereof, shall make a new contract for the performance of his work, or any part of it, other than by hiring hands, teams, carriages or utensils to be superintended and paid by himself, unless such new contract and its terms be laid before the board of directors and be approved by them.[2]

Sec. 782. Actions for penalties.—No action to recover any penalty against any turnpike or plank-road corporation, shall be commenced or maintained against it, or any of its officers or agents, unless commenced within thirty days after the penalty was incurred.[3]

Sec. 783. Proof of incorporation.—In any action brought by or against any domestic turnpike or plank-road corporation, which shall have been in actual operation, and in possession of a road upon which it has taken toll for five consecutive years, next preceding the commencement of the action, parol proof of such corporate existence and use shall be sufficient to establish the incorporation of the corporation, for all the purposes of the action, unless the opposing party shall set up a claim in his complaint or answer duly verified of title in

[1] L. 1890, c. 566, § 143. [2] Id., § 144. [3] Id., § 145.

himself to the road, or some part thereof stating the nature of his title and right to the immediate possession and use thereof.[1]

Sec. 784. When stockholders to be directors.—When the whole number of stockholders in any turnpike or plank-road corporation shall not exceed the number of directors specified in the certificate of incorporation, each stockholder shall be a director of such corporation and the stockholders shall constitute the board of directors, whatever may be their number, and a majority thereof shall be a quorum for the transaction of business.[2]

Sec. 785. Dissolution of corporation.—Every turnpike, plank-road or bridge corporation may be dissolved by the legislature when, by the income arising from tolls, it shall have been compensated for all moneys expended in purchasing, making, repiaring and taking care of its road, and have received in addition thereto an average annual interest at the rate of ten per cent, and on such dissolution all the rights and property of the corporation shall vest in the people of the state. Any such corporation, which shall not within two years from the filing of its certificate of incorporation, have commenced the construction of its road or bridge and actually expended thereon ten per cent of its capital, or which shall not within five years from such filing have completed its road or bridge, or, in case such bridge is destroyed, shall not rebuild the same within five years, or which, for a period of five consecutive years shall have neglected or omitted to exercise its corporate functions shall be deemed dissolved. Where the corporation has neglected or omitted for five years to exercise its corporate functions, and its road-bed or right of way shall have been used as a public highway for that period, or where any such corporation shall have become dissolved, or where the road or any part of it of a turnpike or plank-road corporation, or the bridge of any bridge corporation, shall have been discontinued, such road-bed or right of way, and such discontinued road or bridge, and the road or bridge of any such dissolved corporation, shall thereafter be a public highway, with the same effect as if laid out by the

[1] L. 1890, c. 566, § 146. [2] Id., § 147.

commissioners of highways of the town, and be subject to the laws relating to highways and the erection, reparing and preservation of bridges thereon.[1]

Sec. 786. Town must pay for lands not originally a highway.—When the corporate existence of any plank-road or turnpike corporation shall have ceased by limitation of time, or where any judgment of ouster or dissolution, or restraining the exercise of its franchises has been rendered in any action against it, such portion of the line of its road as was built over lands which were originally purchased by it and not previously a public highway shall not be used as a public highway, nor be taken possession or control of by the town in which the same may be, or by any of the authorities thereof, or be claimed or worked or used as a public highway until the town shall pay over to the treasurer, receiver or other legal representatives of the corporation, or its assigns, the principal sum of the amounts paid by it for such lands, as shown by the deeds of conveyance thereof to it, and every such judgment shall provide accordingly. Such payments shall be made within three months after the expiration of the corporate existence of the corporation, or if any such judgment has been or shall be rendered within three months after service of written notice of the entry thereof on the supervisor of the town, and the person receiving such payment shall execute a proper discharge therefor and a conveyance to the town of all the title and interest which the corporation had in such lands at the expiration of its corporate existence.[2]

Sec. 787. Highway labor upon line of plank-road or turnpike.—Every person liable for highway labor living or owning property on the line of any plank-road or turnpike may, on written application to the commissioners of highways of the town, on any day previous to making out the highway warrant by the commissioners, be assessed for the highway labor upon his property upon the line of such road, in the discretion of the commissioners to be worked out upon the line of

[1] L. 1890, c. 566, § 148.

[2] Id., § 149.

such road as a separate road district, and the commissioners shall make a separate list of the persons and property so assessed, as for a separate road district, and deliver the same to one of the directors of the corporation owning such road, who shall cause such highway labor to be worked out on such road in the same manner that overseés* of highways are required to do, and such directors shall possess the powers and have the authority to compel the performance of such highway labor or the payment of the tax therefor as such oversees* now have by law, and shall make like returns to the commissioner of highways, and any person so assessed may commute for the highway labor assessed upon him or his property by paying the sum now fixed by law as the commutation for such highway labor.

Sec. 788. Extension of corporate existence.—No turnpike, plank-road or bridge corporation shall extend its corporate existence, pursuant to the provisions of the general corporation law, without the written consent of the persons owning at least two-thirds of its capital stock, nor without the consent of the board of supervisors of each county in which any part of its road or bridge is situated, which consent shall be given by a resolution of the board adopted at any regular or special meeting, and a copy of such resolution, certified by the clerk of the board, or verified by the affidavit of some member thereof, together with such consent of the stockholders, and a statement verified by the affidavit of the president and treasurer of the corporation, showing the actual capital expended upon the construction of the road, exclusive of repairs, the name of each town or ward through or into which the road passes, and, if any part of the road shall have been abandoned, the actual cost of the remaining part, exclusive of repairs, shall be filed with the certificate of the continuance of the corporate existence. No further abandonment of any road belonging to a corporation whose corporate existence has been so extended shall be made, except with the consent of a majority of the board of supervisors of the

[1] L. 1890, c. 566, § 150.

*So in the original.

county in which the abandoned portion of the road may lie, which consent shall be filed in the office of the clerk of the county.[1]

ARTICLE X.

MISCELLANEOUS PROVISIONS.

SEC. 789. Laws repealed.
SEC. 790. Saving clause.
SEC. 791. Construction.
SEC. 792. When to take effect.

Sec. 789. Laws repealed.—Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is repealed. Such repeal shall not revive a law repealed by any law hereby repealed, but shall include all laws amendatory of the laws hereby repealed.[2]

Sec. 790. Saving clause.—The repeal of a law or any part of it specified in the annexed schedule shall not affect or impair any act done, or right accruing, accrued or acquired, or liability, penalty, forfeiture or punishment incurred prior to May first, eighteen hundred and ninety-one, under or by virtue of any law so repealed, but the same may be asserted, enforced, prosecuted or inflicted, as fully and to the same extent, as if such law had not been repealed; and all actions and proceedings civil or criminal, commenced under or by virtue of the laws so repealed and pending on April thirtieth, eighteen hundred and ninety-one, may be prosecuted and defended to final effect, in the same manner as they might under the laws then existing, unless it shall be otherwise specially provided by law.[3]

Sec. 791. Construction.—The provisions of this chapter, so far as they are substantially the same as those of laws existing on April thirtieth, eighteen hundred and ninety-one, shall be construed as a continuation of such laws, modified or

[1] L. 1890, c. 566, § 151. [2] Id., § 160. [3] Id., § 161.

amended according to the language employed in this chapter, and not as new enactments; and references in laws not repealed to provisions of laws incorporated into this chapter and repealed shall be construed as applying to the provisions so incorporated, and nothing in this chapter shall be construed to amend or repeal any provision of the Criminal or Penal Code.[1]

Sec. 792. When to take effect.—This chapter shall take effect on May first, eighteen hundred and ninety-one.[2]

SCHEDULE OF LAWS REPEALED.

Revised Statutes, Part 1.	Chapter 18, Title 1.	All.
Laws of	Chapter	SECTIONS.
1836	284	All.
1838	262	All.
1847	210	All.
1847	287	All.
1847	398	All.
1848	37	All.
1848	45	All.
1848	265	All.
1848	259	All.
1848	360	All.
1849	250	All.
1849	362	All.
1850	71	All, except the
1851	107	All. [first section.
1851	487	All.
1851	98	All.
1852	228	All.
1852	372	All.
1853	124	All.
1853	135	All.
1853	245	All.
1853	471	All.
1853	626	All.
1854	3	All.
1854	87	All.
1854	232	All.
1855	300	All.
1855	485	All.
1855	546	All.
1855	559	All.
1857	83	All.
1857	202	All.
1857	643	All.
1858	10	All.

[1] L. 1890, c. 566, § 162.

[2] Id., § 163.

SCHEDULE OF LAWS REPEALED.

Laws of	Chapter	SECTIONS.
1859	209	All.
1859	311	All.
1860	116	All.
1861	215	All.
1861	238	All.
1862	205	All.
1862	248	All.
1862	425	All.
1865	691	All.
1865	780	All.
1866	780	All.
1867	419	All.
1867	974	All.
1868	253	All.
1869	234	All.
1870	443	All.
1870	568	All.
1871	95	All.
1872	128	All.
1872	283	All.
1872	374	All.
1872	779	All.
1872	780	All.
1873	440	All.
1873	473	All.
1875	4	All.
1875	120	All.
1875	319	All.
1875	445	All.
1876	135	All.
1876	373	All.
1876	415	All.
1876	435	All.
1877	164	All.
1878	203	All.
1878	394	All.
1879	214	All.
1879	253	All.
1879	377	All.
1879	441	All.
1879	512	All.
1880	90	All.
1880	484	All.
1881	77	All.
1881	117	All.
1881	213	All.
1881	311	All,
1881	313	All.
1881	337	All.
1881	464	All.
1881	674	All.
1882	289	All.
1883	216	All.

SCHEDULE OF LAWS REPEALED.

Laws of	Chapter	SECTIONS.
1883	323	All.
1883	409	All.
1883	482	All.
1883	483	All.
1883	497	All.
1884	386	All.
1885	153	All.
1885	141	All.
1885	422	All.
1885	423	All.
1886	248	All.
1886	321	All.
1886	322	All.
1887	570	All.
1888	462	All.
1889	369	All.

PART V.

FORMS.

FORMS.

No. 1.

PRELIMINARY CERTIFICATE, OR APPLICATION FOR A LICENSE.

(*Ante*, § 41.)

STATE OF NEW YORK,
(City and) County of } ss:

We, the undersigned, A B, C D, E F, all of the city of and State of , and G H and K L, of the city of and State of , a majority of whom are citizens and residents of this State, being desirous of forming a company in the class of (*limited or full*) liability, in accordance with the provisions of an act of the Legislature of the State of New York, entitled "An Act to provide for the Organization and Regulation of certain Business Corporations," passed June 21st, 1875, hereby certify,

THAT the name of the proposed corporation shall be (*here give name in full, with the addition of the word "Limited," if it be in that class.*)

THAT the object for which it is to be formed, is (*here state the exact nature of the business to be carried on*) and the manufactory (*or place of business*) thereof, is to be at in the County of and State of

THAT the amount of the capital stock of said corporation shall be dollars. (*If not all cash, state here what proportion is to be represented by money and what by property, describing it.*)

THAT the number of shares of which said capital shall consist, is , of the par value of dollars each. (*Not less than* $10, *nor more than* $100 *each.*)

THAT the location of the principal business office of said Corporation is to be in the of and of State of New York.

THAT the duration of said Corporation is to be for the term of years [*not exceeding fifty.*]

A B. E F.
C D. G H.
K L.

STATE OF NEW YORK, }
(City and) County of } *ss:*

On this day of A. D. 189 , before me personally came and appeared A B, C D, E F, G H and K L, to me personally known and known to me to be the persons described in and who executed the foregoing instrument, and who severally acknowledged to me that they executed the same for the purposes therein set forth.

In witness whereof, I have hereunto set my hand and affixed my official seal, in the city of this day of A. D. 189 .

C. L. F,
NOTARY PUBLIC,
(*Or Com'r of Deeds*)

[L. S.]

No. 2.

LICENSE.

(*Ante*, § 42.)

STATE OF NEW YORK, }
Office of the Secretary of State, } *ss:*

WHEREAS, an application for the formation of a corpora-

tion in the class of liability, under the corporate name pursuant to the provisions of Chapter 611, Laws of 1875, entitled "An act to provide for the organization and regulation of certain business corporations," was filed in this office on the day of A. D. 189 .

I do therefore, in conformity with the requirements of said act, hereby license and appoint and empower the following named persons (being the persons named in and making said preliminary certificate) to wit:

as commissioners to open books for subscriptions to the capital stock of such corporation, as provided in and by the said act.

Witness my hand and the seal of office of the Secretary of State, at the city of Albany, this day of 189 .

[L. S.] *Secretary of State.*

No. 3.

BY-LAWS.[1]

(*Ante*, § 44.)

Article 1. Directors.

Sec. 1. Number and Election of Directors.—The number of directors of the [*Insert full name of company*] company shall be [*not less than five nor more than thirteen*], who shall be stockholders of the company to the extent of at least five shares each, and shall be annually elected at the annual meeting of the stockholders on the [*insert day*] and serve for the term

[1] This form of by-laws, taken from a set in use, is offered merely as a general form; others may of course be adopted to meet the requirements of particular companies. For a form of by-laws under Manufacturing Act, see *post* No. 19, p. 932.

of one year, and until such time as their successors are chosen.

Sec. 2. Method of Election.—At the stockholders' annual meeting the election of each director shall be made by ballot by such of the stockholders as shall attend for that purpose, either in person or by proxy. Each stockholder shall be entitled to as many votes as he owns shares of stock in said company, and the persons receiving the greatest number of votes shall be directors for the ensuing year.

Sec. 3. Vacancy—Removal.—Any vacancy in the board of directors or among the officers of the company, caused by death, resignation or otherwise, shall be filled by the remaining directors for the balance of the year, and until the next annual election. Any one or more of the directors may be removed, at any time, by a vote of two-thirds in amount of all the stockholders in person or by proxy, at any special meeting called for that purpose, due notice thereof having been properly given.

Sec. 4. Organization of Board.—The board of directors, immediately after organizing, shall elect a president, a treasurer and a secretary. They shall hold their offices for the term of one year, and until such time as their successors are chosen, unless removed for cause by a vote of the majority of the board.

Sec. 5. Salaries of Directors.—No director, as such, shall receive any salary for his services; but this is not to be construed to preclude any director from holding any other office in the company and receiving compensation therefor, or performing any special service for which compensation may be allowed, provided that no director shall be chosen to any office for which compensation is allowed, or such compensation be fixed, except by a two-thirds vote of the directors not including his own vote. The board of directors shall fix the compensation of the agents and employees.

Sec. 6. Regular Meetings of Board.—The board of directors shall hold regular monthly meetings at the office of the company on the [*insert time, as first Monday of every month,*] except when such day shall be a legal holiday, and in that case the meeting shall be held on the following day.

Sec. 7. Special Meetings of Board.—Special meetings of directors may be called at any time by the president, by oral notice to, or by notice in writing duly served on, each director. All committees shall be appointed by a vote of the board.

Sec. 8. When President or Director shall not be Present.—Neither the president nor any director or directors shall be present at or take any part in any meeting at which matters relating to his or their individual interest are voted upon.[1]

Sec. 9. Declaring Dividends.—Dividends of net profits on hand shall be declared and paid as often and at such times as the directors may decide, subject to the restrictions contained in sections 19 of the act under which this corporation is formed.

Sec. 10. Corporate Seal.—The board shall provide a seal with suitable device, and containing thereon the corporate name of the company, which shall be in charge of the secretary, and shall be affixed by him only on certificates of stock, unless otherwise instructed to affix the same by order of the board of directors. The president may affix the corporate seal to any instrument upon being duly authorized by the board of directors.

Article 2. Meetings of Stockholders.

Sec. 1. Annual Meeting.—There shall be an annual meeting of stockholders on the [*insert day*] in each and every year, at the general office of the company in the city of .

Sec. 2. Special Meetings.—Special meetings of stockholders may be called by the board of directors, and also upon the request in writing of such number of stockholders as may collectively own one-third of the capital stock of the company, upon ten days' notice duly published in a newspaper published in the city of , in like manner as for the regular annual meeting.

Sec. 3. Quorum.—At all stockholders' meetings a majority of the whole capital stock of the company issued, shall be required to constitute a quorum for the transaction of business.

[1] Such presence vitiates the proceedings. See Anderson v. Aronson & N. Y. Concert Co., 3 How. (N. Y.) Pr. N. S. 216 (1886); Hudson River Brewing Co. v. White, 5 N. Y. Month. L. Bull. 18 (1883).

Article 3. Capital Stock.

Sec. 1. [1] **Subscription to Stock—Payment of.**—Subscriptions to the capital stock (in addition to the ten per cent. paid at time of subscription) to the amount of one-half of the capital stock of the company, must be paid into the treasury within one year from the date of the issuing of the license to commissioners, to wit, from [*insert date*], and the remaining one-half of such subscriptions to capital stock must be paid in within one year thereafter, as provided in section 37 of said general act, ch. 611, Laws of 1875, and to be paid at such intervals of time as shall be fixed by the board of directors.

Sec. 2. Same—Failure to pay Installment.—Any failure to pay any instalments when required to be paid by the board of directors, shall work a forfeiture of the delinquent shares, pursuant to the provisions of section eleven of said general act.

Sec. 3. Certificates of Stock—Numbering and Registering.—Certificates of stock shall be numbered and registered in the order they are issued, and shall be signed by the president and countersigned by the treasurer, and the seal of the company shall be affixed thereto. All certificates shall be bound in a book, and shall be issued in consecutive order therefrom; and in the margin thereof shall be entered the name of the person owning the shares therein represented, with the number of shares, and the date thereof. Each certificate shall be receipted for in the certificate book. All certificates exchanged or returned to the company shall be canceled by the secretary, and such canceled certificate pasted in its original place in the certificate book, and no new certificate shall be issued until the old certificate has been thus canceled and returned to its original place in said book.

Sec. 4. Transfer of Stock.—Transfers of shares shall only be made upon the books of the company by the holder in person, or by power of attorney duly executed and acknowledged and filed with the secretary of the company, and on the surrender of the certificate or certificates of such shares.

[1] If the corporation is full liability this section and the one following will be omitted.

Sec. 5. Increase of Capital—Purchase of Stocks.—Whenever the capital stock of the company is increased, each *bona fide* owner of stock of the company shall be entitled to purchase an amount of stock in proportion to the number of shares of stock he holds in the company at the time of such increase, at the par value of the same.

Article 4. Officers.

Sec. 1. Duties of the President—Salary.—It shall be the duty of the president to preside at all the meetings of the board of directors; to sign all certificates of stock of the company; to countersign all checks drawn by the treasurer; to sign and execute all contracts in the name of the company and affix the seal of the company thereto, when instructed so to do by the board; he shall at each stated meeting present a report of the state of the business of the company; he shall appoint and discharge all employees, subject to the approval of the board of directors; he shall have general charge of, and supervision over, all the business of the company and over all its employees; and he shall do and perform all acts incident to the office of president of such company. In the absence of the president, the board may appoint a president *pro tem.* from its number. The salary of the president shall be after 189 , at the rate of dollars per annum.

Sec. 2. Duties of the Treasurer—Bond—Salary.—It shall be the duty of the treasurer to have the care and custody of all funds of the company which may come into his hands, and to deposit the same as treasurer in such bank or banks as the directors may elect; he shall sign all checks, drafts, notes and orders for the payment of money, which shall be countersigned by the president, and he shall pay out and dispose of the same under the direction of the president; he shall render a statement of his cash account at each regular meeting of the board; he shall at all reasonable times exhibit his books and accounts to any director or stockholder of the company, upon application at the office of the company, during business hours; he shall countersign all certificates of stock signed by

the president; he shall give such bonds for the faithful performance of his duties, to the amount of thousand dollars, with two or more sufficient sureties, to the amount of thousand dollars each, as shall be satisfactory to the board of directors. The salary of the treasurer shall be after , 189 , at the rate of dollars per annum.

Sec. 3. Duties of the Secretary—Salary.—The secretary shall keep the minutes of the board of directors, in a proper book provided for that purpose, and also the minutes of the meetings of stockholders; he shall attend to the giving and serving of all notices of the company, and shall affix the seal of the company to all certificates of stock, when signed by the president and countersigned by the treasurer; he shall have charge of the certificate book, transfer book and stock ledger, and such other books and papers as the board may direct, all of which shall at all reasonable times be open to the examination of any director or stockholder, upon application at the office of the company, during business hours; he shall attend to such correspondence as may be assigned to him, and he shall, in general, under the direction of the president, perform all the duties incident to the office of secretary of such company; he shall also act as secretary to all the standing committees of the board. The salary of the secretary shall be after , 189 , at the rate of dollars per annum.

Article 5. Order of Business.

The following shall be the regular order of business at all meetings of the board of directors:

1. Reading and approving the minutes of the previous meeting.
2. Report of the president.
3. Report of the secretary.
4. Report of the treasurer.
5. Reports of standing committees.
6. Reports of special committees.
7. Unfinished business.
8. New business.

ARTICLE 6. INSPECTORS OF ELECTION.

Sec. 1. Election—Elegibility.—The election of directors shall be conducted by three inspectors, who shall be stockholders, and shall annually be elected with the directors. And neither of the inspectors shall be an officer or a director of the company. The inspectors of the first annual election shall be appointed by the board one month previous to such election.

ARTICLE 7. AMENDMENTS TO BY-LAWS.

Sec. 2. When and how made.—These by-laws may be altered, amended or added to, by the affirmative vote of the stockholders representing at least two-thirds of the capital stock issued, at any annual meeting, or at a special meeting, called for that purpose.

No. 3.

Commissioners' Report—Verified Record of Proceedings.

(*Ante*, § 45.)

STATE OF NEW YORK.
(City and) County of } *ss:*

We, the undersigned, duly appointed and empowered by the Secretary of State of the State of New York, by Licence bearing date of the day of A. D. 189 , Commissioners to open books for subscriptions to the capital stock of a (*full or, limited*) liability company, to be known under the corporated name of (*give name in full, with the addition of the word "Limited," if it be in that class*), hereby report in conformity therewith:

That on the day of A. D. 189 , at the office of (*or other place, naming it particularly*), No. Street,

in the of , we opened books for subscriptions to the capital stock of such company.

That annexed hereto, is a true copy of the list of subscriptions to the said capital stock, which list is marked "EXHIBIT A," and is hereby made a part of this record.

That at the time of making such subscription, each subscriber paid to us in cash ten per cent of the par value of each and every share subscribed for by him.

That on the day of A. D. 189 , it appearing that at least one-half of the capital stock of the said (*give name in full*), had been duly subscribed in accordance with the requirements of section five[1] of the aforesaid act, we called a meeting of the subscribers for the purpose of adopting By-Laws for said corporation, and of electing Directors therefor.

That such meeting was called by depositing a notice in the post-office, addressed to each and every subscriber at his last known place of residence, and with the proper postage thereon prepaid, at least five days previous to the time appointed for said meeting, as appears by the copy of said notice, and the accompanying affidavit hereunto annexed, marked "EXHIBIT B," and which is hereby made a part of this record.

That at the time and place named in said notice, to wit: on the day of A. D. 189, at No. street, in the of , at o'clock in the noon subscribers to the number of , and representing, in person or by proxy, of the capital stock, appeared, and organized by choosing Mr. and Mr. (*who should be Commissioners*), Chairman and Secretary, respectively.

That on motion, it was

Resolved, "That the following are hereby adopted as the By-Laws of this Corporation:"

of "The (*give name in full as before; proceed as directed by* § 6 *of the act.*)

That the meeting then proceeded to the election of

[1] See Ante, § 43.

(*state number, as required by By-Laws*) Directors to manage the affairs of the company for the first year.

THAT the Chair appointed Mr. , Mr. , and Mr. , inspectors of such election.

THAT upon a canvas by such Inspectors, it was found that votes, representing shares of the capital stock, had been cast, of which

A. B., of New York, received——votes.
C. D., " " " —— "
E. F., " " " —— "
G. H., of Newark, N. J. " —— "
K. L., of Baltimore, Md. " —— "

being a majority of all the votes cast; whereupon they were declared duly elected, as appeares by the Certificate of the Inspectors hereunto annexed, marked "EXHIBIT C," and which is hereby made part of this record.

That, there being no further business, the meeting then adjourned. C. D., *Secretary.*

And we, the Commissioners aforesaid, being severally duly sworn, depose and say, and each for himself deposes and says, that the foregoing is a true and correct record of the proceedings had under the aforesaid License, and of all of them, from the time of the receipt thereof.

Severally subscribed and sworn to before me, this day of A. D. 189 . [L. S.]
C. L. F., *Notary Public.*

A. B.
C. D.
E. F.
G. H.
K. L.

"EXHIBIT A."

LIST OF SUBSCRIBERS

to the capital stock of "The [*name in full, add word "Limited" when such the case.*]

NAMES.	RESIDENCE.	NO. OF SHARES.
S. T.....	New York City.....	20.
L. C.	Rochester, N. Y.....	10.
	etc., etc.	

"EXHIBIT B."

NOTICE.

A meeting of the subscribers to the capital stock of [*insert corporate name in full*] will be held at No. street, in the city of , on the day of , 189 , at o'clock in the noon, for the adoption of By-Laws for said corporation, and the election of Directors to manage the concerns of the company for the first year.

Dated New York, A. D. 189

A. B.,
C. D.,
E. F.,
G. H.
K. L.,
Commissioners.

STATE OF NEW YORK, } ss.:
County of , }

[*Insert name of person who mailed notice*], being duly sworn, doth depose and say, that on the day of A. D. 189 , he deposited in the post-office in the city of , printed [*or* written] copies of the above notice, each notice having been first securely inclosed in an envelope, and said envelopes having been respectively addressed to each subscriber at his last known place of residence, and the proper postage on each of said envelopes having been prepaid and properly stamped.

[*Signature of deponent.*]

Sworn to before me this day of , A. D. 189 . } ss.:

[L. S.] [C. L. F., *Notary Public.*]

EXHIBIT C.

(See *Ante*, § 76.)

STATE OF NEW YORK, } *ss:*
(City and) County of , }

We, P. R., L. N. and T. F., the Inspectors for the first annual election of (*give name in full, as before*), being severally duly sworn, do depose and say, and each for himself deposes and says: That, at such election held at , in the of on the day of A. D. 189 , the following named stockholders were elected Directors to manage the affairs of the said company for the first year of its existence, each Director having received the number of votes set opposite to his name, to wit:

A. B. received votes.
etc., etc., etc.

Sworn to before me, this day of A. D. 189 . } P. R.,
L. N.,
C. L. F., T. F.,
Notary Public. *Inspectors.*

No. 4.

PROOF OF EXECUTION OF A DEED OR BOND BY AN INCORPORATION.

(See *Ante*, § 53, *et seq.*)

COUNTY, *ss.:*

On the sixth day of , 189 , A. B., to me known, came before me, who being by me sworn, did say, that he resides in the city of Hudson, and is President of the [*insert name*] Company in the city of [*insert name*]; that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and was hereto affixed by the order of the board of directors (or trustees) of said company, and that he signed and executed the same by virtue of a like order of said board of directors (or trustees).

L. L. F., *Commissioner of Deeds.*

No. 5.

ANNUAL REPORT

(*Ante*, § 61.)

for the year ending December 31, 189 , of [*insert corporate name in full, adding word "Limited" if in that class*], a corporation organized pursuant to Chapter 611, Laws of 1875.

STATE OF NEW YORK,
County of } *ss.*

TO THE SECRETARY OF STATE:

In compliance with the requirements of Section 18 of Chapter 611, Laws of 1875, as amended by Section 1, of Chapter 208, Laws of 1884, we, A. B., C. D., E. F. & G. H. being a majority of the directors of a corporation, known as [*insert name as above*], A. B. being President thereof, do hereby certify and declare:

That the amount of the capital of said corporation is dollars:

That the proportion of the capital actually paid in is per cent:

That the debts at present existing against said corporation are dollars, and are as follows: [*specify each debt, amount, and when due.*]

That the nature of the existing assets of the corporation is [*specifying different kinds*].

That the names of the stockholders at the date hereof are [*naming each stockholder.*]

That since the last annual report, which was made on the 2nd day of January, 189 , the following dividends have declared [*specifying each.*].

Dated, *January* 2, 189 .

A. B., *President.*
C. D.,
E. F.,
G. H., } *Majority of Directors.*

STATE OF NEW YORK, County of , } ss.

On this day of January, 189 , personally appeared before me A. B., above named, to me known to be the president of [*insert name of corporation, with word* "Limited" *if such the case,*] and to me known to be one of the individuals described in, and who executed, the foregoing certificate, and being by me sworn did say that the foregoing names signed to the foregoing certificate, comprise a majority of the directors of said corporation, and that they severally signed the same, and that the statement in said certificate is in all respects correct and true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

A. B., *Prest.*

Sworn to before me this day of January, 189 . }

[L. S.] C. L. F.,
Notary Public.

No. 6.

EXTENDING CORPORATE EXISTENCE—CERTIFICATE.

(*Ante*, § 73.)

Whereas, the original certificate of incorporation of the [*insert corporate name, with the addition of the word* "Limited" *if of that class*], a corporation duly created and formed under and in pursuance of an act of the Legislature of the State of New York, entitled "An act to provide for the organization and regulation of certain business corporations," passed June 21, 1875, and of the several acts amendatory thereof or supplementary thereto, fixed the duration of said company for the term of years, commencing on the day of , 189 .

Now, therefore, we [*insert individual names*], being stock holders in the said [*insert corporate name as above*], owning at least two-thirds in amount of the capital stock of said company, to wit: [*insert number*] shares, do hereby consent that the corporate existence of said company be, and the same hereby is, extended for the term of [*here insert the additional term*] years from the expiration of the period originally fixed for the duration of its corporate existence, as mentioned in its original certificate of incorporation.

In witness whereof, we have hereunto subscribed our names, this day of , 189 .

[*Signature of stockholders.*]

STATE OF NEW YORK, }
County of , } *ss:*

On this day of , 189 , before me personally appeared [*insert names of stockholders signing said certificate*], to me known to be the individuals described in, and who signed the foregoing certificate, and severally acknowledged to me that they signed the same for the purposes therein mentioned.

In witness whereof, I have hereunto affixed my hand and seal of office, in the city of on the day and year above set forth.

[L. S.]

C. L. F.,
Notary Public.

No. 7.

POWER OF ATTORNEY FOR TRANSFER OF STOCK.

(See *Ante*, §§ 52, 52f., 52g.)

Know all men by these presents, that I, A. B., for value received, have bargained, sold and assigned, and by these presents do bargain, sell and assign unto L. M., the following described stock, to wit., (describe the kind of stock) unto me, belonging and held by certificate No. , in my

name, and hereunto annexed, and do hereby constitute and appoint N. M., the treasurer of said company, my true and lawful attorney, irrevocably, for me and in my name and stead, to assign and transfer the said stock unto the said L. M., and for that purpose to make and execute the necessary acts of assignment and transfer, and an attorney or attorneys under him for that purpose to make and substitute, and to do all other lawful acts requisite for affecting the premises, hereby ratifying and confirming the same.

In witness whereof, I have hereunto set my hand and seal in the city of , the day of , in the year of our Lord, one thousand eight hundred and ninety .

(Signed) A. B. [L. S.]

No. 8.

ACKNOWLEDGEMENT ANNEXED.

STATE OF NEW YORK, City of , County of . } ss:

On the day of 188 personally appeared before me A. B., to me known to be the person described in and who executed the within instrument, and acknowledged the execution of the same for the uses and purposes therein mentioned.

C. L. F.
Commissioner of Deeds.

No. 9.

PROXY TO VOTE.

(*Ante*, §§ 68, 68c.)

Know all men by these presents, that I, A. B., of do hereby constitute and appoint G. C., to be my lawful attorney, substitute and proxy, for me and in my name, to vote on all the stock held by me in the [*insert name*] Company, at any election for directors, as fully as I might or could do, were I personally present at such election.

In witness whereof I have hereunto set my hand and seal this day of , 189 .

In presence of

(Signed) A. B. [L. S.]

No. 10.

AFFIDAVIT ANNEXED TO PROXY.

COUNTY, *ss:*

I, A. B., of , do swear, that the shares in the capital stock of the [*insert name*], for which I have given the above power of proxy to vote, do not belong and are not hypothecated to the said G. C., and that they are not hypothecated or pledged to any other corporation, or any person or persons whatever; that such shares have not been transferred to him for the purpose of enabling him to vote thereon, and that I have not contracted to sell or transfer them upon any condition, agreement or understanding, in relation to the manner of voting at any election.

A. B.

Sworn before me this day of , 189 ,

C. L. F., *Justice, etc.*

No. 11.

REPORT TO COMPTROLLER.

(*Ante*, § 90, *et seq.*)

REPORT OF DIVIDENDS.[1]

Report of the Company, for the year ending

[1] Report to be filed in the Comptroller's office on or before November fifteenth, annually. The tax based on the report is due January fifteenth. Accounts for the same will be sent from the Comptroller's office about January first.

the first day of November A. D. 189 , made pursuant to provisions of chapter 542, Laws of 1880, and the subsequent acts amendatory thereof.

(*Give post-office address of company, street and No.*)

. . . . . 18 . .

To the Comptroller of the State of New York:

Agreeably to law, as treasurer of the above company, I make the following report, viz.:

Date of organization of the company.....
Total authorized capital of company..... $.....
Whole number of shares of stock authorized..... .....
Number of shares of stock issued..... .....
Par value of each share..... $.....
Amount paid into the treasury of the company on each share..... $.....
Amount of capital paid in..... $.....
Amount of capital upon which dividends were declared... $.....
Date of each dividend declared..... .....
Amount of each dividend declared..... $.....
Rate per cent. per annum of dividends..... .....
Capital stock employed in New York State[1]..... $.....
If not in New York State, where and how employed.....
.....
.....
.....

Treasurer.

STATE OF NEW YORK, County of . } *ss.:*

On this day of , A. D. 189—, personally appeared before me, the subscriber, a notary public in and for the county of , one , treasurer of the above-named company, who, being duly sworn according to law, did depose and say, that the foregoing report is just and true, according as the accounts stand in the books of the company, and that it includes all dividends, whether cash, stock, scrip or of any other character

[1] This line need not be filled out by those companies the capital of which is all employed in this state.

or description, declared by said company, during the year ending on the 1st day of November, A.D. 189 .

. . . . . .
Treasurer.

Sworn to and subscribed before me, the day and year aforesaid.
[L. S.]

C. L. F.,
Notary Public.[1]

REPORT OF DIVIDENDS AND APPRAISEMENT.[2]

Report and Appraisement of the Company, for the year ending the first day of November, 189

STATE OF NEW YORK, County of . } *ss.:*

On this day of , A.D. 189 , before me, the subscriber, a notary public in and for the county of , personally appeared , treasurer, and , secretary of the above-named company, who, being by me severally duly sworn, did say that the amount of capital paid in of said company is $, and that said company declared no dividend in cash, stock, scrip, or of any other character or description during the year ending the first day of November, 189 , save the dividends herein reported, and that they will with fidelity, according to the best of their knowledge and belief, estimate and appraise the capital stock of said company at its actual value in cash, not less, however, than the average price which said stock sold for during said year.

. . . . . .
Treasurer.

. . . . . .
Secretary.

[1] Notary Public should always use a seal.

[2] Report and appraisement for year in which no dividends or a dividend of less than six per cent. has been declared, as shown by the report of dividends, See *Ante*, p. 914.

Sworn to and subscribed before me, the day and year aforesaid.

[L. S.]

C. L. F.,
Notary Public

Office of the Company.

. . . . . 18 .

We, the undersigned, being the treasurer and secretary of the above-named company, do certify that, in pursuance of our aforesaid oaths, we have estimated and appraised the capital stock of said company, at its actual value in cash as follows, viz.: shares at dollars and cents per share, amounting in the whole to dollars.

In witness whereof we have hereunto set our hands the day and year aforesaid.

. . . . . .
Treasurer.

. . . . . .
Secretary.

Report of Gross Earnings.

Report of the gross earnings in the State of New York, of the Company, for the year ending June 30, 189 , made in accordance with the requirements of chapter 542, Laws of 1880, as amended.

Office of the Company.[1]

.....

.....189....

Gross earnings derived from all sources during the above period..... $.....

For tolls and transportation..... $.....

For telegraph business..... $.....

[1] Give P. O. address with street and number.

For express business..... $.....
Taxable gross receipts..... $.....

STATE OF NEW YORK, }
County of , } ss.:

On this day of A. D. 189 , personally appeared before me, a notary public in and for the county of , one treasurer of the Company, who, being duly sworn according to law, did depose and say that the foregoing report is true and correct.

.....
Treasurer.

Sworn to and subscribed before me, }
the day and year aforesaid. }

[L. S.] [C. L. F. *Notary Public.*]

No. 11.

CERTIFICATE CHANGING PRINCIPAL PLACE OF BUSINESS.

(*Ante*, § 106.)

Whereas, the original certificate of incorporation of the [*insert corporate name, with the addition of the word "Limited" if of that class*] a corporation duly created and formed under and in pursuance of an act of the Legislature of the State of New York, entitled "An act to provide for the organization and regulation of certain business corporations," passed June 21, 1875, fixed the principal business office of said corporation, at the city of , in the State of New York:

Now therefore, we [*insert individual names*], being stockholders in the said [*insert corporate name as above*], owning at least two-thirds in amount of the capital stock of such corporation, to wit: [*insert number*] shares, do hereby consent that

the principal business office of said company be, and the same hereby is, changed from the said city of , to the city of , in the State of New York.

In witness whereof, we have hereunto subscribed our names this day of , 189 .

[*Signature of stockholders.*]

STATE OF NEW YROK, } ss.:
County of , }

On this day of 189 , before me personally appeared [*imsert names of stockholders signing said certificate*], to me personally known to be the individuals described in, and who signed the foregoing certificate, and severally acknowledged to me that they signed the same for the purposes therein mentioned.

In witness whereof, I have hereunto affixed my hand and seal of office, in the city of on the day and year above set forth.

[L. S.] [C. L. F., *Notary Public.*]

No. 13.

"LIMITED LIABILITY"—CERTIFICATE OF PAYMENT IN FULL OF CAPITAL STOCK.

(*Ante*, § 123.)

We, A. B., C. D., E. F., and G. H., being directors of the [*insert corporate name,*] "Limited" and a majority thereof, and the said A. B. being president of said company, do hereby certify:

That the capital stock of said company is dollars.

That one-half thereof, to wit, dollars, was paid in before the day of 189 , and within one year from the incorporation of said company and the other half within two years from the incorporation of said company.

[*If the payment has been paid in any other way than in cash, set out here how paid.*]

That the payment of the last instalment of the said capital stock, to wit, the sum of dollars, was made within the thirty days last past, and on the day of 189

Witness our hands, this day of , 189

A. B., *Prest.*
C. D.
E. F.
G. H. } *Majority of Directors.*

STATE OF NEW YORK, County of } ss.:

On this day of 189 , before me the subscriber, come A. B., C. D., E. F., and G. H., directors of the [*insert corporate name*] "Limited" and the said A. B., president of said company, and the said C. D., E. F., and G.H., directors being duly sworn, each for himself, deposes and says, that he has read the foregoing certificate and knows the contents thereof, and that the same is in all respects correct and true.

Severally subscribed and sworn to before me, this day of , 189 .

A. B., *Prest.*
C. D.
E. F.
G. H.

[L. S.] [C. L. F., *Notary Public.*]

No. 14.

PETITION FOR CONDEMNATION OF REAL PROPERTY.

(*Ante*, § 219.)

NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Plaintiff,
against
FRANCIS X. KIMBALL, JOHN WILSON, THOMAS RUMSEY, WILIAM REDFIELD, DAVID H. STONEMAN, SAMUEL PAIGE AND CHARLES WENDELL,
Defandants.

The Supreme Court:

The New York Central and Hudson River Railroad Company, the above-named plaintiff, by this petition, respectfully shows to this court:

First.—That the said New York Central and Hudson River Railroad Company is a domestic corporation duly organized under and in pursuance of the laws of the state of New York, for the purpose of constructing, maintaining and operating a railway for public use in the conveyance of persons and property, from a point on the north side of Forty-second street, near Vanderbilt avenue, in the city and county of New York; running thence through said city to a point on the Hudson river at or near Spuyten Duyvil, and thence along or near the east shore of the Hudson river *via* Peekskill, Poughkeepsie and Hudson to or near East Albany, crossing the Hudson river at Albany; thence to Schenectady, and thence along or near the north shore of the Mohawk river to Utica; thence *via* Syracuse to Buffalo; the line of said railway running through or into the counties of Westchester, Putnam, Dutchess, Columbia, Rensselaer, Albany, etc., in the state of New York; that the said plaintiff has its principal place of business at the Grand Central depot, New York

city, and that the names and places of residence of its principal officers are: Chauncey N. Depew, president, New York city; Edwin D. Wooster, secretary, New York city: and of its directors are, Cornelius Vanderbilt, New York city; Cyrus W. Field, New York city; William Bliss, Boston, Massachusetts, and Erastus Corning, Albany, N. Y.

Second.—That the real property to be condemned is situated in the city and county of Albany and state of New York, bounded and described as follows, to wit: (*describe property*).

Third.—That the public use for which the said property is required is for tracks, switches and sidings, whereon and whereby plaintiff's cars and trains may be moved, loaded, and unloaded, stored, received and dispatched; that said property is necessary from the great increase of the business of the plaintiff, in that it will enable the plaintiff to lay out additional tracks for the loading and unloading of cars; furnish additional room for the storage of cars; to receive and deliver freight with increased convenience; save time and expense to the consignees of freight and to the plaintiff, and in every respect promote the interests and welfare of the plaintiff, as well as of those who furnish freight for transportation.

Fourth.—That the names and places of residence of the owners of said property are as follows, viz.: Francis X. Kimball, residing at No. 4 Jefferson street, in the city of Albany, N. Y., John Wilson, residing No. 1180 Broadway, in the city of Albany, N. Y.; Thomas Rumsey, residing at No. 42 Colonie street, in the city of Albany, N. Y.; William Redfield, residing at No. 64 Livingston avenue, in the city of Albany, N. Y.; David H. Stoneman, residing at 82 Van Woert street, in the city of Albany, N. Y.; Samuel Paige, residing in the city of Toledo and State of Ohio; and Charles Wendell, whose place of residence cannot, after diligent inquiry, be ascertained.

(*Where owner infant:*) That said John Wilson is an infant, and his general guardian is Joseph Wilson, who resides at No. 1180 Broadway, in the city of Albany, N. Y.; that Thomas Rumsey is an infant, but has no general guardian,

and resides with Samuel Rumsey at No. 42 Colonie street, in the city of Albany, N. Y.

(*Where owner is lunatic, idiot or habitual drunkard:*) That said William Redfield is a lunatic, and that his committee (or *trustee*), is John Redfield, who resides at No. 64 Livingston avenue, in the city of Albany, N. Y.; that said David H. Stoneman is a habitual drunkard; that he has no committee (or *trustee*), and resides with John Stoneman at No. 82 Van Woert street, in the city of Albany, N. Y.

(*Where owner non-resident, having agent or attorney:*) That said Samuel Paige is a non-resident, residing in the city of Toledo, and State of Ohio, having an agent (or *attorney*) in the State authorized to contract for the sale of the said property, whose name is John Paige, residing at No. 42 Van Woert street, in the city of Albany, N. Y.

(*Where owner unknown:*) That the owner of the said property is unknown to the plaintiff, and cannot, after diligent inquiry, be ascertained; that for the purpose of ascertaining him, inquiry was made of numerous persons residing upon and in the vicinity of the said property, and of many others who would be most likely to have knowledge as to who the owner of said property was; and that the only information plaintiff could obtain from any of such persons, in all such conversations and inquiries, is that a person, whose name could not be learned, claimed to own the said property in the year 1863, and who, in 1865, removed to San Francisco, California, and has not been seen nor heard from since.

(*Where place of residence of owner unknown:*) That the place of residence of said Charles Wendell is unknown to plaintiff, and cannot, after diligent inquiry, be ascertained; that for the purpose of ascertaining it, inquiry was made of Robert Wendell, who resides in the city of Troy, N. Y., who is said Charles Wendell's brother, and only relative residing in this State, and that said Robert Wendell, in answer to said inquiries on or about the 1st day of May last, said that he was ignorant of said Charles Wendell's residence; but that said Charles Wendell was not a resident of this State, and that his last known place of residence was at Lima,

Ohio, from whence he moved about a year ago; that a letter addressed to said Charles Wendell, at Lima Ohio, was deposited in the post-office at Albany, N. Y., and was shortly thereafter returned through the post-office, with the information that the said Charles Wendell could not be found.

Fifth.—That the plaintiff has been unable to agree with the owners of the said property for its purchase, for the reason that the said owners demand nine thousand dollars for said property, which is largely in excess of the value thereof.

Sixth.—That the value of the said real property is five thousand dollars.

Seventh.—That it is the intention of the plaintiff in good faithto complete the work or improvement for-which the said property is to be condemned, and that all the preliminary stepsrequired by law have been taken to entitle it to institute these proceedings.

Wherefore the plaintiff demands that it may be adjudged that the public use requires the condemnation of the real property herein described, and that the plaintiff be entitled to take and hold such property for the public use specified, upon making compensation therefor, and that commissioners of appraisal be appointed to ascertain the compensation to be made to the owners for the property so taken.

NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,

By CHAUNCEY M. DEPEW, *President.*

Dated, New York City, May 7, 1890.

STATE OF NEW YORK, }
City and County of New York, } *ss.:*

Chauncey M. Depew being duly sworn, says that he is the President of the New York Central and Hudson River Railroad Company, the plaintiff named, in the foregoing petition; that he knows the contents of said petition, and that the same is true to his own knowledge, except as to the matters

therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

CHAUNCEY M. DEPEW.

Subscribed and sworn to before me this day of 189 .

GEORGE C. KIMBALL,
Notary Public, New York County.

No. 15.

NOTICE OF TIME AND PLACE OF PRESENTATION.

(*Ante*, § 220.)

NEW YORK SUPREME COURT—COUNTY OF ALBANY.

NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Plaintiff,
against
FRANCIS X. KIMBALL AND OTHERS,
Defendants.

Take notice, that the petition of the New York Central and Hudson River Railroad Company, a copy of which is herewith served upon you, will be presented to the Supreme Court of the State of New York, at a Special Term thereof appointed to be held at the city hall in the city of Albany, N. Y., on the day of 189 , at the opening of the court on that day, or as soon thereafter as counsel can be heard, and a motion will then and there be made that the demand of said petition be granted,

Dated Albany, N. Y., , 189.

Yours, etc.,
HARRIS & RUDD,
Attorneys for Plaintiff.

Office and post-office address, Tweddle building, Albany, N. Y.,

To Francis X. Kimball, etc. (*naming owners of property*).

No. 16.

ANSWER CONTAINING GENERAL AND SPECIFIC DENIALS.

(*Ante*, § 224)

[*Name of Court.*]

[*Names of all the parties.*]

The defendant [*name, if less than all*], answering the petition of the plaintiff herein:

Denies [*or* denies upon information and belief] that, etc. [*stating allegation of the petition denied by him, and in like manner make denial of each allegation specifically denied.*]

Or denies each and every allegation in said petition contained.

Or denies any knowledge or information sufficient to form a belief, as to each and every allegation in the said petition contained.

Or denies any knowledge or information sufficient to form a belief, as to whether, etc. (stating the allegation, as to which such denial is made), and in like manner as to each allegation so denied.

Wherefore this defendant demands judgment against the plaintiff, dismissing the petition herein, together with costs.

R. G. S.,
Defendant's Attorney.

Office and post-office address, No. street, N. Y.

STATE OF NEW YORK, }
City and County of Albany, } *ss.:*

F. X. K., being duly sworn, says that he is one of the defendants named in the above entitled proceeding; that the foregoing answer is true to the knowledge of the deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

F. X. K.

Subscribed and sworn to before me, }
this day of, 189 }

C. L. F., *Notary Public,*
[*or Comm'r Deeds.*]

No. 17.

ANSWER SETTING UP NEW MATTER AS A DEFENCE.

(*Ante*, § 224.)

[*Name of Court.*]

[*Names of all the parties.*]

The defendant [*name if less than all*], answering the petition of plaintiff, herein alleges that, etc. [*stating facts or new matter constituting defence*].

Wherefore this defendant demands judgment against the plaintiff, dismissing petition herein, together with costs.

R. G. S.,
Defendant's attorney.

Office and post-office address, No. street, N. Y.

[Verification as in form No. 16.]

No. 18.

CERTIFICATE OF INCORPORATION OF MANUFACTURING COMPANY WHERE BUSINESS IS TO BE CARRIED ON WITHIN THE STATE.[1]

(*Ante* § 275.)

STATE OF NEW YORK, County of , } *ss.*

We [*insert names of subscribers, to be not less than three*],

[1] Duplicate copies should be prepared, each of which should be signed by the persons whose names are inserted at the commencement of the certificate in the presence of, and acknowledged before some officer competent to take the acknowledgment of deeds. When so signed and acknowledged, one duplicate should be filed and recorded with the clerk of the county in which it is stated that the operations of the company are to be carried on, and the other duplicate should be filed and recorded in the office of the secretary of State. The tax for organization must be paid before these certificates are offered for record. If it has not been, the certificates will not be received.

This is thought to be the preferable way, but in Eaton *v.* Aspinwall **(N.Y.)**

do hereby certify that we desire to form a company pursuant to the provisions of an act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February 17, 1848, and of the several acts extending and amending said act. That the corporate name of the said company is to be [*insert name of company.*]

That the objects for which the company is to be formed are [*insert objects for which company is formed*].

That the amount of the capital stock of the said company is to be [*insert amount of capital stock*].

That the term of the existence of the said company is to be [*state number of years, nor exceeding fifty years*].

That the number of shares of which the said stock is to consist is to be [*insert number*].

That the number of the trustees who shall manage the concerns of the said company shall be [*insert number of trustees not less than three, not more than thirteen*].

That the names of such trustees for the first year are [*insert names of trustees*].*

That the names of the town and county [*or towns and counties*] in which the operations of the said company are to be carried on are [*insert names of town and county, or towns and counties*].

3 Abb. Pr. 417; (1856) s. c. aff'd 19 N. Y. 121; the filing of a "certified copy" to the articles of association, in the secretary of State's office, was held to be a sufficient compliance with the requirement for filing "a duplicate." That suit was brought under the Act of April 12, 1852, which provided that seven or more persons desiring to form such a company, should "make, sign and acknowledge before some officer competent to take the acknowledgment of deeds, and file in the office of the clerk of the county in which the principal office for the management of the business of the company shall be situated, and a duplicate thereof in the office of the secretary of State, a certificate in writing," which should state the name and objects of the company, amount of capital stock and other necessary facts. It will be observed, that the language of this Ocean Steamship Company Act, so far as related to the preparing and filing of said articles of association, was identical with the said provisions of the General Manufacturing Act. The court held that the filing of a certified copy of the articles of association in the secretary of State's office was a sufficient compliance with the requirements of the act.

In witness whereof we have hereunto set our hands, this of , 189 .

[*Signatures of subscribers*].

STATE OF NEW YORK, County of , } *ss.*

On this day of , A. D. 189 , before me personally appeared [*insert names of subecribers to the certificate*], to me known to be the individuals described in and who executed the foregoing certificate, and they severally, before me, signed the said certificate, and acknowledged that they executed the same for the purposes therein mentioned.

C. L. F.,
Commissioner of Deeds.

No. 19.

CERTIFICATE OF INCORPORATION, WHERE THE BUSINESS, OR PART OF IT, IS TO BE CARRIED ON OUT OF THE STATE.[1]

[*Proceed as in the preceding form to the asterisk.**] The said company is formed for the purpose of carrying on some part of its business out of the State of New York, namely, at [*insert name of place*], and the names of the town and county in which the principal part of the business of the said company is to be transacted are [*insert names of town and county*].

No. 20.

FORMS OF BY-LAWS.[2]

(*Under Manufacturing Act.*)

(*Ante*, § 340).

ARTICLE I.

§ The number of trustees of the [*insert corporate name o*

[1] To be signed, acknowledged, filed and recorded as directed with respect to above certificate.

[2] This form of by-laws is in use by a book publishing company and may serve as a suggestion to meet other requirements.

company] shall be not less than three, nor more than five, who shall be stockholders of the Company to the extent of at least five shares each, and shall be annually elected at the annual meeting on the first Monday in May, and serve for the term term of one year; and until such time as their successors are chosen. When any vacancy shall occur in the Board of Trustees, or in any office of the Company by death or otherwise, the Trtstees shall have power to fill such vacancy for the unexpired term.

ARTICLE II.

The officers of the Company shall consist of a President, Vice President, Treasurer, Secretary and Manager of Stationery Department, who shall be elected at each annual meeting of the Company by the Board of Trustees.

ARTICLE III.

A majority of the Board of Trustees shall constitute a quorum for the transaction of business.

ARTICLE IV.

At all Stockholders meetings a majority of the whole Capital Stock of the Company issued shall be required to constitute a quorum for the transaction of business.

ARTICLE V.

The Trustees shall, if they think it necessary, hold a regular meeting on the first Monday of each month, and any Trustee shall have power to call a special meeting at any time, by giving an individual or written notice to each Trustee, of at least one day.

ARTICLE VI.

The President shall preside at all meetings of the Board of

Trustees; sign all certificates of Stock of the Company; sign all checks, notes and contracts in the name of the Company. He shall appoint and discharge all employees, subject to the approval of the Board of Trustees, He shall have general charge of and supervision over all the business of the Company, and over all the employees, and he shall do and perform all acts incident to the office of President of such Company.

ARTICLE VII.

The Vice President is authorized to perform all the duties of the President, in case of the absence, sickness or other disability of the President.

ARTICLE VIII.

The Treasurer shall have the care and custody of all the funds and books of the Company, and to deposit same as Treasurer, in such bank as the Trustees may elect; and shall sign all checks, drafts, notes and orders for the payment of money. He shall at all reasonable times exhibit his books and accounts to any Director of the Company upon application at the office of the Company, during business hours.

ARTICLE IX.

The Secretary shall keep the minutes of the Board of Trustees, in a proper book provided for that purpose, and also the minutes of the meetings of Stockholders. He shall attend to the giving and serving of all notices of the Company, and shall sign all certificates of stock, and affix the seal of the Company thereto. He shall have charge of the certificate and transfer book, and such other books as the Trustees may direct, all of which shall be open at all reasonable times, during business hours, for the examination of any Trustee upon application at the sffice of the Company.

ARTICLE X.

The Manager of the Stationery Department shall have

charge of, and general supervision of the employees, and make all purchases of stock required in said department.

ARTICLE XI.

No Trustee or other Officer of the Company shall receive a salary as such, but shall receive it only as an employee.

ARTICLE XII.

No obligation shall be entered into in the name of the Company, or any contract signed exceeding in value, without the consent previously obtained of a majority of the Board of Trustees.

ARTICLE XIII.

At each annual meeting a dividend shall be declared from the profits of the Company for the preceding year of such an amount as the Trustees in their discretion may determine.

ARTICLE XIV.

Stock shall be transferable upon the books of the Company upon presentation to the Secretary of the certificate of such stock with the written assignment thereon, duly signed by the person in whose name such stock appears upon the stock book: but no Stockholders in said Company shall sell or assign as collateral, or in any manner hypothecate the whole or any part of the stock owned by him, without the written consent of all the Trustees in said Company, unless said Stockholder shall have given to every other Stockholder six months written notice of his desire to sell or assign said stock, giving the name of the person to whom said stock is to be sold, or assigned, or hypothecated, and any other Stockholder in said Company shall within the said period of six months have the first right or option to buy and take an assignment of said stock.

ARTICLE XV.

The following shall be the regular order of business at all meetings of the Board of Trustees:

1. Reading and approving the minutes of the previous meeting.
2. Report of President.
3. Report of Treasurer.
4. Report of Secretary.
5. Unfinished Business.
6. New Business.

ARTICLE XVI.

These By-laws may be changed, amended or added to at any time by the Trustees upon written notice having been given at the second regular meeting preceding the one upon which said amendment or addition shall be acted upon.

No. 21.

CERTIFICATE OF PAYMENT OF CAPITAL STOCK.

(*Under Manufacturing Act.*)

(*Ante*, § 346.)

STATE OF NEW YORK, County of , } *ss.*

We, A. B., C. D., and E. F., trustees of the [*insert corporate name*] and a majority thereof, and the said A. B. being president of said company, do hereby certify and declare:

That the amount of capital stock of the [*insert corporate name*] was fixed at dollars, and that the whole thereof has been paid in.

[*Where the capital stock or some part thereof has been issued in*

payment for property necessary for the operation of the company, the certificate must state that fact as follows:]

That pursuant to authority of the board of trustees of said corporation, the property of said corporation consists of (*insert property, premises, goods or patent right purchased*): which were purchased of J. G. for shares of the capital stock of said corporation; and the officers of said corporation were authorized to issue full paid stock for the same.

And the whole amount of shares was issued to said J. G. for the said property, and has been issued as full paid stock and delivered to him.

Witness our hands, this day of , 189

A. B., *President.*

A. B., C. D., E. F., } *Majority of Trustees.*

STATE OF NEW YORK, County of } *ss.*

A. B., C. D., and E. F., to me known to be the individuals who are described in and who signed the foreign certificate, being each duly sworn, jointly and severally, depose and say that the said A. B. is president of the [*insert corporate name*], and the said A. B., C. D. and E. F. are trustees of said corporation, and a majority thereof, and that the foregoing certificate of payment of capital stock, made and subscribed by them, is true.

A. B., *President.*

A. B., C. D., E. F., } *Trustees.*

Sworn to before me this day of 189 .

[L. S.] C. L. F. *Notary Public.*

No 22.

ANNUAL REPORT.

(Under Manufacturing Act.)

(*Ante*, § 347.)

STATE OF NEW YORK,
County of , } ss.

We, A. B., C. D., and E. F., trustees of the [*insert corporate name*], and a majority thereof, and the said A. B. being president of said company, do hereby certify and declare

That the capital stock of said company, is [*insert amount:*] dollars.

That [*insert amount:*] dollars of said capital stock has been paid in [*insert amount:*] thereof in cash and [*insert amount:*] thereof has been paid up in full by mining property necessary for the company's business, in payment for which [*insert amount*] capital stock was issued.

That the balance, to wit: [*insert amount*] of the capital stock of said company has never been issued.

That the existing debts of said company amount, as nearly as can be ascertained, to [*insert amount*] dollars.

Witness our hands, this day of January, 18 .

A. B., *President.*

A. B.,
C. D.,
E. F., } *Majority of Trustees.*

AFFIDAVIT ANNEXED TO REPORT.

STATE OF NEW YORK,
CITY OF ROCHESTER.
County of Monroe. } ss.

On this 3d day of January, 189 , personally appeared before me A. B., above named, to me known to be the president of said corporation, and to me known to be one of the indi-

viduals described in and who executed the foregoing certificate, and being by me sworn did say that the foregoing names signed to the foregoing certificate, comprise a majority of the trustees of said corporation, and that they severally signed the same, and that the statement in said certificate is in all respects correct and true.

C. L. F *Commissioner of Deeds.*

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