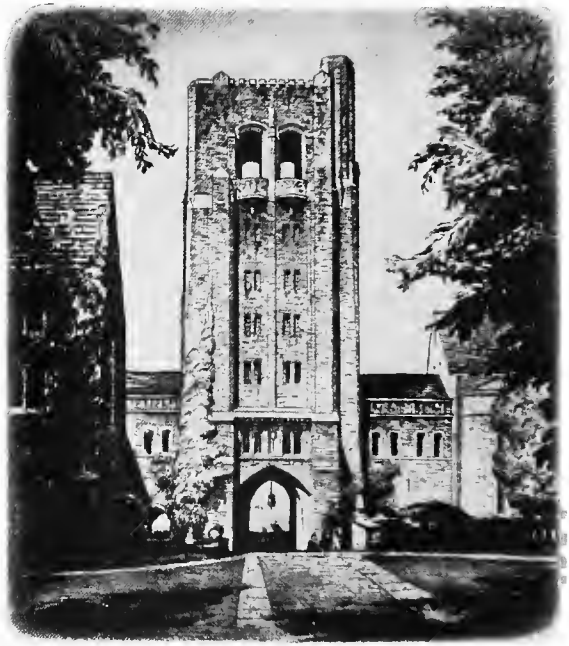

A

TREATISE ON THE DOCTRINE

OF

ULTRA VIRES.

A

TREATISE ON THE DOCTRINE

OF

ULTRA VIRES:

BEING

AN INVESTIGATION OF THE PRINCIPLES WHICH LIMIT THE CAPACITIES, POWERS, AND LIABILITIES

OF

CORPORATIONS,

AND MORE ESPECIALLY

OF

JOINT STOCK COMPANIES.

BY

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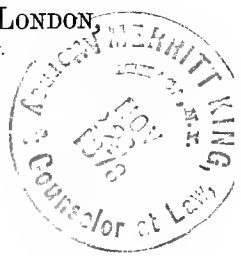

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TO

THE RIGHT HONOURABLE SIR GEORGE JESSEL,

MASTER OF THE ROLLS, A MEMBER OF THE PRIVY COUNCIL,
ETC., ETC., ETC.,

THIS WORK

IS,

BY HIS LORDSHIP'S PERMISSION,

Respectfully Dedicated

BY

THE AUTHOR.

PREFACE.

THIS treatise is, as the title-page describes it, "An Investigation of the Principles which Limit the Capacities, Powers, and Liabilities of Corporations, and more especially of Joint-Stock Companies." The doctrine of Ultra Vires is of modern growth. Its appearance as a distinct fact, and as a guiding or, rather, misleading principle in the legal system of this country, dates from about the year 1845, being first prominently mentioned in the cases in equity, of *Colman* v. *Eastern Counties Railway Company* in 1846 (*a*); and at law, of *East Anglian Railway Company* v. *Eastern Counties Railway Company* (*b*) in 1851.

At the period now mentioned the great railway companies were being projected and developed. For the making of these lines there were required larger funds than any partnership, however nume-

(*a*) 10 Beav. 1, 16 L. J. (Ch.) 73.

(*b*) 11 C. B. 775, 21 L. J. (C. P.) 23.

rous, could possess, and compulsory powers of a description utterly beyond the royal prerogative to confer by charter on any individual or association. Consequently application was made to the Supreme Legislature, by whose sanction corporations were called into being, authorised to raise the necessary capital by methods analogous to those used by Joint-Stock Companies already in existence, and enabled to acquire, by coercive means where amicable overtures were rejected, the lands, houses, easements, and other proprietory rights needful for the profitable prosecution of the undertaking.

Scarcely had these bodies been created than questions were raised as to the exact nature of the powers and other incidents so conferred upon them. Parliament had simply constituted them corporations. But corporations, according to the old Common Law notion, were civil persons differing from ordinary physical persons, mainly, if not entirely, in that they were intangible, and that, having thus a theoretical existence only, and being incapable of mental expression, they could not suffer excommunication, be attainted, or perform certain acts requiring on the part of the performer actual intention. Was this doctrine strictly correct? And

if so were the new corporations endowed with all the capacities of the old ones, and possessed of a character exactly similar?

These questions, or rather the latter, the Courts, as soon as the railway mania had to some extent subsided, were called upon to determine. The former they have left open to the present moment, inclining to answer it, though not positively answering it, in the negative.

The latter was decided in the first instance in a dispute between a few shareholders in a railway company, who objected to the grant of a subsidy to a steam-packet company in communication with their own line, and the general body, who supported such a disbursement of the corporate funds, the then Master of the Rolls holding in favour of the dissentients that this was a matter in respect to which the majority could not bind the minority, and which, if legal, could be so only when all concurred (*c*).

From disputes in which the only persons concerned were the corporations themselves and their own members, and in which the decisions might have

(*c*) *Colman* v. *Eastern Counties Railway Company*, 10 Beav. 1, 16 L. J. (Ch.) 73.

been based upon the principles of ordinary partnership, the Courts went farther, to matters which involved the rights of outsiders. First, Turner, V.-C., restrained a railway company from engaging in a trade in coal (*d*), and in doing so he distinctly stated and expressly founded his jurisdiction upon the doctrine of Ultra Vires. Then the doctrine was extended to transactions of every description where doubts could exist, or by fine-drawn reasoning be raised, as to the business peculiar to corporations or the special powers, express or implied, belonging to them. As one result, not unseldom has it been called into requisition to relieve a company from a contract of which it may have had the benefit, but which it finds convenient to repudiate (*e*).

It is thus the creature purely of judicial decision. It was originated by the Courts *proprio motu* upon grounds of public policy and commercial necessity, and to meet and provide for circumstances which called for the intervention of some strong hand, but

(*d*) *Great Northern Railway Company* v. *Eastern Counties Railway Company*, 9 Hare, 306, 21 L. J. (Ch.) 837.

(*e*) *Balfour* v. *Ernest*, 5 C. B. N. S. 601, 28 L. J. C. P. 170; *Ernest* v. *Nicholls*, 6 H. Lds. 401; *Athenæum Life Assurance Company* v. *Pooley*, 3 D. G. & J. 294, 28 L. J. (Ch.) 119.

for which the State had not directly provided. Being so originated, and, as most will probably admit, wisely originated, and in the best interests of trade and commerce, it has, however, become a species of Frankenstein. The tribunals have created; but they have confessed themselves powerless to control the operations of the principle which they have called into existence, or even to systematise its effects. In consequence the doctrine of Ultra Vires is constantly cropping up in unexpected quarters, and manifesting its effects in an unforeseen and unwelcome manner. One of its first onslaughts was upon the time-honoured maxim of the Common Law that a man cannot stultify himself (*f*)—that the lunatic, the fool, the drunkard, and the knave, who have made a contract, shall not subsequently repudiate the same by alleging that neither they nor their agents had at the time sufficient brains or authorisation to make it. This maxim the doctrine of Ultra Vires soon demolished, and corporations may set up their incapacity whenever it is inconvenient for them to carry out their engagements (*g*).

(*f*) *Beverley's Case*, 4 Rep. 123, b.

(*g*) *Balfour* v. *Ernest*, 5 C. B. (N. S.) 601, 28 L. J. (C. P.) 170; *London Dock Company* v. *Sinnott*, 8 E. & B. 347.

It next ran full tilt against the less rigid but more equitable, principles laid down by the Courts of Lincoln's Inn. "Who seeks equity must do equity," and "who comes for aid to Chancery must come with clean hands," are two of the most elementary principles of the Chancellor's jurisdiction. But the new doctrine refused to allow them to be applied to corporations, and after much wrangling it came off victorious, and corporations can now be relieved from Ultra Vires contracts, and yet keep the benefits thereof (*h*). Another rule was found to hamper the development of the doctrine, and to impose some check upon the license assumed by corporations in their dealings. "Qui facit per alium facit per se" is the basis of the law of principal and agent, and it has hitherto been deemed a very useful and common-sense rule, as sound and rational when applied to the complex transactions of trade and commerce as to the ordinary intercourse of every-day life. But the doctrine of Ultra Vires objected to its restraint, and made a desperate stand to be relieved from it. Here, however, the Common Law maintained its supremacy (*i*), though, *mirabile*

(*h*) With the exceptions and qualifications set forth, *post*, in Part IV., Chap. III.

(*i*) *Barwick* v. *English Joint Stock Bank*, L. R. 2 Ex. 259.

dictu, Equity yielded (*j*), so that there is now to be seen the strange anomaly that corporations may be liable at law under circumstances where Chancery imposes no liability, and that what the former says is palpable fraud, the latter will often pass over, or at least, admit its inability to punish.

Besides these anomalies there is the uncertainty that shrouds the application of the doctrine. It is often impossible to predicate beforehand what transactions will be held within the powers of a given corporation. It is Ultra Vires of the Great Eastern Railway Company to run steam-packets from Harwich (*k*), but not of the South Wales Railway Company to run them from Milford Haven (*l*). It is Ultra Vires of a steam-ship company to sell the whole of its vessels except two (*m*), but perfectly legal thus to dispose at one swoop of every one of them (*n*). It is Ultra Vires of railway companies to enter into partnership (*o*), but not Ultra Vires to make arrangements for dividing the whole

(*j*) *Mixer's Case*, 4 D. G. & J. 575, 586, and *post*, pp. 230–235.

(*k*) *Colman* v. *Eastern Counties Railway Company*, 10 Beav. 1.

(*l*) *South Wales Railway Company v. Redmond*, 10 C. B. (N. S.) 675.

(*m*) *Gregory* v. *Patchett*, 33 Beav. 597.

(*n*) *Wilson* v. *Miers*, 10 C. B. (N. S.) 348.

(*o*) *Charlton* v. *Newcastle and Carlisle Railway Company*, 5 Jur. (N. S.) 1097.

of the joint profits among themselves in fixed proportions (*p*). It is Ultra Vires of the town of Southampton (*q*) or Sheffield (*r*) to incur expense in order to obtain a proper supply of water for their respective inhabitants, but not so for Ashton-under-Lyne (*s*) or Wigan (*t*) to do exactly the same thing.

As a necessary result the decisions and *dicta* upon this subject are very conflicting, and some absolutely irreconcilable, while the principle itself is become, if not an excrescence upon, at least a very disturbing element in the legal system.

But it soon showed itself almost as inimical and dangerous as a friend as unquestionably it was as an enemy. From being a protector to shareholders by preventing their companies from embarking in hazardous enterprises, it has developed into their terror by putting on the list of contributories persons whose shares were surrendered or forfeited years before, but which surrender or forfeiture was

(*p*) *Hare* v. *London and North Western Railway Company*, 2 J. & H. 80.

(*q*) *Attorney-General* v. *Andrews*, 2 Mac. & G. 225.

(*r*) *Reg.* v. *Mayor, &c., of Sheffield*, L. R. 6 Q. B. 652.

(*s*) *Bateman* v. *Mayor, &c., of Ashton-under-Lyne*, 3 H. & N. 323.

(*t*) *Attorney-Gen.* v. *Mayor, &c., of Wigan*, 5 D. G. M. & G. 52.

Ultra Vires (*u*). Acquiescence and lapse of time will lay the ghost of most misdeeds, but they are unavailing when this doctrine is concerned, and Ultra Vires compromises, *bonâ fide* made, have been opened after the lapse of well nigh a quarter of a century, in order to fix with liability the parties thereto (*v*).

This work is an attempt, though perhaps nothing more, to collect and group the more important of these various decisions. Where possible, the general conclusions deducible from a series of authorities have been formulated in specific terms. The subject has been arranged under four main heads—viz., a brief introduction; then the effect of the doctrine upon what may be called the substantive law of corporations; next its influence upon their special powers which any particular corporation may possess; and, lastly, the procedure relating to Ultra Vires proceedings, and persons affected thereby. It has been endeavoured either to state the substance of or at least to refer to all the chief cases. Omissions may nevertheless be noted, as well as

(*u*) Ten years afterwards, in *Stanhope's Case*, 3 D. G. & Sm. 198.

(*v*) *Spackman* v. *Evans*, L. R. 3 H. Lds. 171.

imperfections of other kinds; but this is the first attempt that has been made to deal with the subject as a whole, and I therefore ask for the kind consideration and the lenient criticism of the profession.

I have to acknowledge with many thanks the great assistance rendered by my friend and former pupil, Mr. B. L. Mosely, LL.B., of the Middle Temple and Gray's Inn, who has compiled the index of cases, and corrected many of the proof sheets.

S. B.

The Temple,
July, 1874.

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A

TREATISE ON THE DOCTRINE

OF

ULTRA VIRES.

PART I.

INTRODUCTORY.

SECTION I.—THE LEGAL STATUS OF CORPORATIONS.

Definition and description of corporation.

A CORPORATION is a person which exists in contemplation of law only, and not physically. "It is a collection of individuals united in one body, under a special denomination, having *perpetual succession* under an artificial form, and vested by the policy of the law with the capacity of acting in several respects as an individual, particularly of taking and granting property, of contracting obligations, and of suing and being sued, of enjoying privileges and immunities in common, and of exercising a variety of political rights, more or less extensive according to the design of its institution, or the powers conferred upon it, either at the time of its creation or any subsequent period of its

existence." This is the definition given by Kyd (1 Kyd, 13), and it is a fairly accurate description of the general nature of a corporation, but sufficient stress is not laid upon that which is its real characteristic in the eye of the law, viz., its existence separate and distinct from the individual or individuals composing it.

The abstract nature of corporations.

Considered as a tangible fact, it is a fiction, a shade, a nonentity, but a reality for many legal purposes. A corporation aggregate is only *in abstracto*—it is invisible, immortal, and rests only in intendment and consideration of law. This is the description given by Coke in the *Case of Sutton's Hospital* (*a*), and though exception has sometimes been taken to it, and more especially to the statement that a corporation is immortal, probably no better definition at once brief and accurate can be given. The essential part of the notion involved in the term corporation is its abstraction, the intangibility of its existence, its being composed of a physical being, or beings, through which it manifests its capacities and powers, but from which it is totally distinct. This is the one important fact. The members of a corporation aggregate, and the one individual who is constituted a corporation sole may, from their connection with such, have rights and privileges, and be under obligations and duties over and above those affecting them in their private capacity, but

(*a*) 10 Rep. 32*b*.

they get them by reflection, as it were, from the corporation. They individually are not the corporation—cannot exercise the corporate powers, enforce the corporate rights, or be responsible for the corporate acts.

Name and seal.

It is usually laid down that a corporation must have a name, a common seal, and a perpetual identity. Other attributes and faculties may or may not belong to it, but these are essential. It must undoubtedly possess some designation by which to identify it, but there is no necessity, even at common law, that it should be described by metes and bounds, or by any particular locality (*b*).

The common seal is an unquestionable incident of every corporation, and evidence that there was a time when a borough had not a common seal has consequently been held evidence that it was not then a corporation (*c*). It has been said that it may, by common consent change its seal at any time, and consequently it may validly affix to an instrument any seal whatever, provided it purport to be the corporate seal (*d*). But considering the embarrassment and doubts that would arise from constant change in the corporate seal, and also the fact that the Legislature has by statute expressly authorised limited liability companies to alter from time to time their common seal (*e*), and that in some charters a similar power has been given, it may

(*b*) *Case of Sutton's Hospital*, 10 Rep. 29*a*.

(*c*) *Bailiffs of Ipswich* v. *Johnston*, 2 Barnard, 191.

(*d*) Sheph. Touch. 57.

(*e*) 7 & 8 Vict. c. 110, s. 25.

fairly be questioned whether such a power exists at common law.

The possession and user of a seal purporting to be a common seal by a body does not necessarily show that they are a corporation (*f*), for many bodies not only have a common seal, but also take in perpetual succession, and yet are not corporations. Thus the Commissioners in Lunacy have a common seal (8 & 9 Vict. c. 100, s. 7), so have the Inns of Court (Skinner, 684), but neither is a corporation (*g*). And of course, the assumption by a number of persons of a common seal, and the affixing of the same to a contract, cannot confer on such persons any of the qualities of a corporation, or enable them to sue collectively upon such contract (*h*).

Immortality.

Corporations enjoy to some extent the attribute of immortality. It is often said that they never die. But this expression is scarcely correct. Some corporations have been, by special Acts of Parliament, created for limited and definite periods only —the East India Company and the Bank of England were at their origin instances of this kind; so was the South Sea Company.

Moreover, the existence of a corporation may be suddenly determined in various ways, *e.g.*, by the withdrawal or cancellation of its charter, by wind-

(*f*) *Stallingers of Sunderland's Case*, cited 2 Q. B. 593.

(*g*) See many instances referred to in Merew & Steph. "Hist. of Boroughs," *passim*.

(*h*) *Cooch* v. *Goodman*, 2 Q. B. 580.

ing up under statutory provisions, or the like. The better expression is, therefore, that of continuous identity. This simply denotes that, notwithstanding the lapse of time or alterations in the constitution of a corporation, or the renewal many times repeated of all its members, or its reconstruction on a new basis, and with even different objects (*i*), the corporation itself remains the same—it does not import that it must or will continue for ever.

SECTION II.—THE ORDINARY INCIDENTS OF CORPORATIONS.

Blackstone's description considered.

The incidents of a corporation, as enumerated by Blackstone, 9th Ed., bk. i. p. 475, are:—1. To have perpetual succession. 2. To perform all legal acts—to sue and be sued, grant and receive, &c.—in its corporate name, and to do all other acts as natural persons may. 3. To purchase lands and hold them for the benefit of themselves and their successors. 4. To have a common seal. 5. To make bye-laws or private statutes for the better government of the corporation, which are binding upon themselves, unless contrary to the laws of the land, and then they are void.

Now, in reference to the above, it may be observed, in the first place, as Blackstone himself points out, that the last two powers, though they

(*i*) See *Att.-Gen.* v. *Kerr*, 2 Beav. 420; *Att.-Gen.* v. *Corporation of Leicester*, 9 Beav. 546.

may be practised by, yet are very unnecessary to, a corporation sole: and secondly, that it is but a list, and that neither complete nor systematically arranged, of the incidents which exist at common law.

Perpetual succession.

As to 1—Perpetual Succession. It would seem that this is by the common law an absolute essential of a corporation, and that the Crown cannot of its prerogative create corporations having a limited duration. The 1 Vict., c. 73, however, has by section 29, empowered the Sovereign in any *charter* of incorporation to be hereafter granted, to limit the duration thereof for any term or number of years, or for any period whatever. Reference has also been made (*j*) to statutory corporations of a similar description.

Performance of legal acts.

As to 2. The corporation as a distinct and separate entity being alone recognised in all legal matters affecting itself, it follows that the corporate property and funds alone are liable for the corporate transactions, and that no responsibility for the same can be attached to any member of the corporation merely as such. The corporation exists; it enforces its own rights and privileges—through agents, indeed, since it is invisible—and is liable on account of any proceeding authorised or ratified by it; no private individual can enforce these rights, or be brought under any obligation for the results arising from their enforcement.

But the Joint-Stock and other similar Acts have

(*j*) *Ante*, p. 4.

not only allowed corporations to be created, the members of which are responsible for the contracts, &c., of the corporation up to the amount of the shares held by them in it; but also given the members power to transfer their interest to other parties, without asking permission of the general body. This is a most important modification of the doctrines of the old common law, which in no case recognised the individual apart from the corporation, or deemed him to possess any interest in its funds or franchises, which he could at his absolute pleasure convey to another.

Blackstone adds, that corporations may "do all other acts as natural persons may." This statement is manifestly wrong if taken in its full sense. A corporation could not levy a fine, wage law, be outlawed, or perform fealty or homage, nor can it commit treason or felony, or be bound by statute or recognizance, or be summoned into the Ecclesiastical Courts, or be executor, or administrator. But it is probable that their capacity was limited, in the opinion of even the older judges, to a much greater degree than these few disabilities. A corporation always forfeited its charter for abuse of its franchises—"if the trust be broken, and the end of its institution be perverted," *per* Holt, in *Rex* v. *Mayor, &c. of London* (*k*). It is here, and in many other cases distinctly recognised, that a corporation has a definite scope and limit, outside which it may not

(*k*) 1 Show. 274, 280.

presume to act without risking its very existence. This is but the germ of the doctrine of Ultra Vires which has been so greatly developed by recent decisions.

Acquisition of lands.

As to 3. "It is not correct to say that every corporation aggregate, as such, has power to acquire lands as an incident to its incorporation; the proper mode of stating the law seems to be that, subject to the discretion of the Crown or Parliament as to the grant of a licence in mortmain, a corporation has a capacity to take and hold in perpetuity" (Grant, "Corporations," 98).

From very early times, as is well known, the Legislature, favouring the unfettered alienation of land, and seeing that this was greatly impeded by the transfer to corporations, who took in perpetuity and never died, passed numerous statutes interposing obstacles to such transfer. Of these the most important were, 7 Ed. I. st. 2, c. 1 (De viris Religiosis), and 13 Ed. I. st. 1, c. 32 (Westminster the Second), which declared that no corporation, ecclesiastical or lay, should buy or sell, or in any way take land by gift, lease, or otherwise, under pain of forfeiture of the same, with power to the next lord of the fee within one year to enter, and if he do not, then the next lord has half a year to enter, and in default of all the mesne lords, then the king can seize: and 15 Rich. II. c. 5, which extended the provision of these statutes to all alienations to the *use* of corporations. The effect of these enactments

is, that a corporation may, without licence from the Crown (*l*) acquire lands, but the mesne lords or the Crown may within the prescribed period seize them —the alienation is good as against the grantor under any circumstances, and good as regards the title of the corporation, if those who have power to enter do not choose to do so (*m*).

Alienation of corporate lands.

Trading corporations may of course alienate their lands in any way, and for any estate that may be most conducive to their own interests; but it is very doubtful if other descriptions of corporations have this power. Coke was of opinion they might (*n*), but modern authorities incline the other way (*o*). The lands given to ecclesiastical, charitable, municipal, and similar corporations, have, however, generally been given to enable them fitly to discharge the duties imposed on them. They consequently hold them under a trust; and the Court of

(*l*) The grant of such a licence is merely a waiver of the Crown's right to enter; it does not abrogate the Statutes of Mortmain with respect to the mesne lords; but as the titles of these latter have now become impossible to trace, it in reality abolishes the penalties of Mortmain. Licences are now granted in pursuance of 7 & 8 Will. 3, c. 37.

(*m*) As to the property which may be held by corporations and the restrictions upon the same, see Grant on Corporations, pp. 98—153; Stephen's Commentaries, bk. ii. pt. i. chap. xiv.; and 9 Geo. 2, c. 36.

(*n*) *Case of Sutton's Hospital*, 10 Rep. 30*b*.

(*o*) See *Rex* v. *Wharton*, 2 T. R. 204; *Mayor, &c., of Colchester* v. *Lowton*, 1 V. & B. 226; *Evan* v. *Corporation of Avon*, 29 Beav. 144.

Chancery will in all such cases interfere to prevent any disposition of the lands which would interfere with the proper performance of this trust (*p*).

Common seal.

As to 4—the need of a Common Seal. This requisite has been considerably qualified by modern legislation and judicial decision, as will be seen in Part III., Chap. III., Section 2.

Bye-laws.

As to 5—bye-laws. Corporations aggregate, being as it were semi-political, though inferior communities, require the establishment of fixed and known rules, in accordance with which their internal government shall be carried on. The law has deemed it the more advisable course to leave these rules for the most part to the discretion of the corporations, and those composing them, who may reasonably be supposed to know what is most conducive to their own interests and welfare. Consequently corporations have inherent in them the power to make all such bye-laws as are requisite for the due management of their affairs, and for determining the conditions of membership. These bye-laws must not be opposed to, or inconsistent with, the statute or common law of the realm, nor contradictory to the charter of incorporation (*q*).

(*p*) See *Att.-Gen.* v. *Mayor, &c., of Plymouth*, 9 Beav. 67; *Reg.* v. *Mayor, &c., of Liverpool*, 9 A. & E. 435; and the cases cited *post*, part ii., chaps. v. and vi.

(*q*) See *Dunston* v. *Imperial Gas Company*, 3 B. & Ad. 125; *Elwood* v. *Bullock*, 6 Q. B. 383; *Att.-Gen.* v. *Myddleton*, 3 Ves. 330; *Everett* v. *Grapes*, 3 L. T N. S. 669.

Not unseldom, especially in the case of statutory corporations, they require, for complete validity, the ratification or approval of some official board or personage (*r*).

The above may be considered as a statement of the leading facts relative to the capacities of corporations, but it is nothing more than a brief, imperfect enumeration. The most scientific method of treating their capacities and incidents, and the rights and liabilities resulting therefrom, would probably be to take them in the following order:

i. Common law incidents of every corporation —understanding by the term incident, all legal facts whatever coming within the category of right, power, privilege, capacity, immunity, duty, obligation, liability.

ii. Incidents which cannot belong to a corporation, unless it be by the instruments creating and constituting it, expressly invested with the same, or with the possibility, on the happening of certain events, of acquiring them or being subject thereto.

iii. Incidents which do or may belong to a corporation, impliedly and without any special words, being rendered necessary from a consideration of the nature and requirements of its business or undertaking.

(*r*) See for example, 3 & 4 Vict. c. 97, ss. 7—10; 8 & 9 Vict. c. 20, ss. 108—111.

Such a treatment of the subject, if thoroughly and successfully carried out, would be exhaustive; but the difficulties in the way, arising from the multiplicity and diversity of topics, are too great. Therefore, it is proposed, having in the present chapter indicated in a general manner the various incidents of corporations, in the subsequent chapters to deal with these incidents *seriatim* in a less pretentious way, in connection with the particular facts—business, financial proceedings, and the like—to which they severally relate.

SECTION III.—VARIETIES OF CORPORATIONS.

Division of corporations into sole and aggregate.

The first and primary division of corporations, and that which is the most characteristic of English law, is into sole and aggregate. The former are single persons who, for certain purposes, are considered to have a personality altogether distinct from that of ordinary citizens. There are not many examples of these. The sovereign is one, so constituted to prevent an abeyance of the Crown between the death of one holder and the accession of another. All bishops of the Church of England, all parsons and vicars, and some deans and prebendaries are corporations sole (*s*). So is the queen regnant; so, at least, for certain pur-

Corporations sole.

(*s*) As to the lands formerly vested in deans and prebendaries in their corporate capacity, see The Ecclesiastical Duties and Revenues Act, 3 & 4 Vict. c. 113.

poses, is the Chamberlain of the City of London (*t*), and it would seem the Chancellor of the University of Oxford is another instance (*u*). So the Regius professors of Law and Hebrew, and the Lady Margaret's Reader of Divinity in the University of Oxford are respectively corporations sole, having each a prebend attached to his office (*v*).

Division into ecclesiastical and lay.

The best arrangement of corporations, in order to exhibit the whole of them in their mutual relationship, is into Ecclesiastical and Lay. Ecclesiastical include all those whose members are spiritual persons only, and which exist in connection with and subordination to the Church of England. They may be thus subdivided:

1. Ecclesiastical corporations sole.

I. Ecclesiastical corporations sole, which again admit of subordinate division into—

(*a*) *regular, i.e.*, those communities of religious persons who lived under some fixed rule, had a common dormitory and refectory, and were obliged to observe the statutes of their order, as monasteries, priories, and some canonries. These have died out at the present day.

And (*b*) *secular, i.e.*, those associations who freely communicated with the general world,

(*t*) See *Howley* v. *Knight*, 18 L. J. (Q. B.) 3, 7.

(*u*) *Chase's Case*, 8 Hen. 6, fol. 18, pl. 7.

(*v*) See 13 & 14 Car. II, c. 4, s. 29, and *King* v. *Baylay*, 1 B. & Ad. 761, 770.

"in seculo," and took upon them the cure of souls, as bishops, deans, some canonries, parsons.

2. Ecclesiastical corporations aggregate.

II. Ecclesiastical corporations aggregate, in some of which all the members were and are capable, *e.g.*, dean and chapter, master and fellows of a college; while in others the head alone was capable, the remaining members being dead in law, *e.g.*, abbot and monks.

Of lay corporations, the better arrangement is into—

Lay corporations divided into—
1. Eleemosynary and

I. *Eleemosynary*, such as hospitals for the maintenance or relief of sick persons, almshouses, colleges for the promotion of learning, and all similar institutions.

2. Civil, subdivided into

And II. *Civil*, *i.e.*, established for distinctively temporal and worldly purposes. These may conveniently be divided into trading and non-trading corporations.

(*a*) Trading.

Trading corporations may again be collected into the following classes :—

(*a.*) Those created by special statute or charter, and having all their capacities determined by such statute or charter.

(*b.*) Those created by special statute, but also incorporating therewith, wholly or partially, and, to that extent, falling under the provisions of other general Acts; *e.g.*, most companies for railways, gas-works, &c.

(*c.*) Those created in accordance with the regulations of the general Acts which have been passed in recent times for the purpose of facilitating the incorporation of individuals for particular purposes. These Acts, the chief of which are enumerated *post*, pp. 24-6, contain merely general rules, it being left to the persons proposing to incorporate themselves to determine most of the powers and duties of the future corporation.

These corporations differ widely in many respects from all others, except, perhaps, groups (*c*) and (*d*) of the next division. They all have a capital, divided into stock or shares, the latter of equal values, or arranged into classes of equal values, and membership is constituted by the possession of some of such stock or shares. In consequence they are, and in this work will be, frequently styled "joint-stock" or "public companies."

(*b*) Non-trading.

Non-trading corporations cannot be subdivided in accordance with any leading principle, or upon any scientific plan; but, perhaps, the most useful grouping of them will be into—

(*a.*) Municipal and quasi-municipal corporations, including, under this head, both the various Local Government Boards and the other municipal authorities, whether they

are or are not within the 5 & 6 Will. IV., c. 76.

(*b.*) The many bodies which have been called into being and incorporated for the carrying out or the supervision of works and other matters of general or national importance, such as the commissioners for river, sewage, navigation, and the like purposes; dock or turnpike trustees; and so on.

(*c.*) Those whose aims are of a somewhat charitable nature, *i.e.*, friendly and benefit societies.

(*d.*) Anomalous associations, existing for worldly as opposed to religious or charitable purposes, but not designed for the acquisition of gain, such as the Council of Law Reporting, the Corporation of Foreign Bondholders.

Between these various and dissimilar societies there is no difference in legal consideration. Whatever be the aims of any group of men, in every case, if the group be endowed with the legal marks of a corporation, it is such, having the privileges, but also subject to the incapacities of a corporation.

Quasi corporations aggregate.

But, besides these, various other bodies exist, having some, but wanting others of the characteristics of true corporations. Such, for instance, are most of the commissioners instituted for public purposes, and which have been referred to

above. These are either made corporations to all intents, or, so far erected into corporations, that the powers given to them, the duties imposed on them, and the rights of action acquired by them, descend to their successors (*w*).

Of these quasi-corporations, aggregate churchwardens are another example (*x*). They have no common seal (*y*), and, therefore, cannot bind themselves and their successors, covenants entered into by or with churchwardens being merely personal and going to and against their executors (*z*). Like partnerships, they must all join in suing, and notice to or acquiescence by one is notice to or acquiescence by all (*a*). They may hold chattels, but not lands (*b*), and they are the proper persons to sue for injury done to the goods of the parish (*c*).

(*w*) See *Conservators of River Tone* v. *Ash*, 10 B. & C. 349; *Att.-Gen.* v. *Andrews*, 2 Mac. & Gor. 225, 2 H. & T. 431; *Hall* v. *Taylor*, E. B. & E. 107; *Hartnall* v. *Ryde Commissioners*, 4 B. & S. 361; *Mersey Docks and Harbour Board* v. *Gibbs*, L. R. 1 H. Ld. 293; see also 10 & 11 Vict. c. 16, The Commissioners Clauses Act.

(*x*) *Withnell* v. *Gartham*, 6 T. R. 396.

(*y*) *Rex* v. *Austrey*, 6 M. & Selw. 319; *Ex parte Annesley*, 2 Y. & Coll. (Eq. Ex.) 350.

(*z*) *Furnivall* v. *Coombes*, 6 Scott, N. R. 537; *Rew* v. *Pettet*, 1 A. & E. 196. Compare *Tuffnell* v. *Constable*, 7 A. & E. 798; *Robinson* v. *Lewis*, per Brian, C. J., 20 Ed. IV. fol. 2, pl. 7; and see *Martin* v. *Nutkin*, 2 P. Wms. 266.

(*a*) *Withnell* v. *Gartham*, 6 T. R. 366.

(*b*) *Att.-Gen.* v. *Ruper*, 2 P. Wms. 125; *Doe* dem. *Bailey* v. *Foster*, 3 C. B. 215, 226.

(*c*) *Evelins' Case*, W. Jones, 439. Compare *Marriott* v. *Tarpley*, 6 Sim. 279.

The churchwardens and overseers have been together constituted a quasi-corporate body for certain purposes, by 9 Geo. I. c. 7, and 59 Geo. III. c. 12 (*d*). The guardians of the poor are another instance of quasi-corporations (*e*).

There are also quasi-corporations sole. The Lord Chancellor is an example; so are the Chief Justices of the King's and Common Bench, *e.g.*, a person who has received a grant of an office from either, may plead the prescriptive right of the grantor. So a sheriff may prescribe to take a fee for a thing which is not within his office, *e.g.*, to take 20*d.* of every prisoner acquitted, that not being given for doing his office (*f*).

Many of the statutes regulating friendly societies and other analogous associations provide that the property shall be vested in the treasurer or secretary for the time being, or in a trustee, and that actions shall be brought by and against him; such person is thereby created a quasi-corporation sole (*g*).

SECTION IV.—HOW CREATED.

Created expressly or impliedly by royal prerogative.

Corporations are usually considered to owe their existence to the royal prerogative, which has

(*d*) See *R.* v. *Beestor*, 3 T. R. 592; *Gouldsworth* v. *Knights*, 11 M. & W. 342.

(*e*) 5 & 6 Will. IV. c. 69, and 5 & 6 Vict. c. 57. Compare judgment in *Jefferys* v. *Gurr*, 2 B. & Ad. 833; and in *Reg.* v. *Poor Law Commissioners*, 9 Q. B. 291.

(*f*) 2 Inst. 210; *Coste's case*, 21 Hen. VII. 16.

(*g*) *e.g.*, 18 & 19 Vict. c. 63. Compare *Cartridge* v. *Griffiths*, 1 B. & Ald. 57.

been manifested impliedly in the case of such as exist—

a. by Common Law,
b. by Prescription,
c. by Implication;

and expressly in the case of those that have been created—

d. by Charter,
e. by Act of Parliament.

a. Corporations by Common Law.

Corporations by common law.

This class comprises all those to which corporate capacities have been annexed in virtue of their political character, by the universal assent of the community from the most remote period to which their existence can be traced. Of this description are the king, all bishops, parsons, vicars, deans, archdeacons, prebendaries or canons of some cathedrals, churchwardens, and deans and chapters; and such were all chauntry priests, abbot and convent, prior and convent.

b. Corporations by Prescription.

Corporations by prescription.

These are such as have existed from time immemorial, and of which it is impossible to show the commencement by any particular charter or act of parliament, the law presuming that such charter or act of parliament once existed, but that it has been lost by such accidents as length of time may pro-

duce (*h*). This origin must of course be clearly proved, and in pleading it the corporation must aver that it has existed from time immemorial (*i*). It was formerly contended that corporations could not exist by prescription merely, but the contrary is now well established (*j*).

c. Corporations by Implication.

Corporations by implication.

These are bodies to whom rights have been given or upon whom duties have been imposed, which rights and duties cannot be enforced without considering the bodies having them as corporations. Thus where the King granted to the men of Islington to be discharged from toll, they were impliedly incorporated for this purpose (*k*). So in *Conservators of the River Tone* v. *Ash* (*l*) an Act of 10 & 11 Will. III. had constituted thirty persons therein named, and their successors, conservators of the river, &c., and had enabled them to take estates in fee simple to themselves and their successors; but it had not *totidem verbis* incorporated them. On trespass brought by the plaintiffs, the third plea was, that "the said persons so suing as conservators of the River Tone, were not a body

(*h*) 1 Kyd. 41.

(*i*) *Reg.* v. *Durham*, 10 Mod. 146.

(*j*) See 10 Rep. 27; Merew. & Steph. "Hist. of Boroughs," 2172; *Jenkins* v. *Harvey*, 2 C. M. & R. 339.

(*k*) 21 Edward IV. 69.

(*l*) 10 B. & C. 349. See also *Jefferys* v. *Gurr*, 2 B. & Ad. 841; and *ex parte Newport Marsh Trustees*, 16 Sim. 346.

politic or corporate as by the declaration was supposed." But it was held, that the above words by implication had incorporated them.

d. Corporations by Charter.

Corporations by Charter.

These are such as have been constituted by letters patent of the crown, passed under the great seal. The great majority of the corporations that arose in the Middle Ages were thus created. The granting of charters being a branch of the royal prerogative, it is usually stated that none but the sovereign can create a corporation; but several instances are on record where subjects having *jura regalia*, and even those not so privileged, have granted charters of incorporation (*m*), and it is unquestioned that the Crown may confer on a citizen, or another corporation, such a power (*n*).

e. Corporations by Act of Parliament.

Corporations by act of parliament.

The invariable mode in which corporations are now called into being, is by the direct intervention of the supreme legislature. Either a special act of parliament is passed incorporating the persons applying for the same, or individuals in a manner incorporate themselves by taking advantage of the general statutes which have been enacted for that

(*m*) See Grant, "Corporations," p. 11.

(*n*) See 39 Eliz. c. 5; *Fazakerly* v. *Wiltshire*, 1 Stra. 462; and 35 & 36 Vict. c. 24.

purpose. The more important of these latter which are now in force, are the following :—

25 & 26 Vict. c. 89, "The Companies Act, 1862," and 30 & 31 Vict. c. 131, "The Companies Act, 1867," which relate to and regulate all joint-stock companies not governed by special acts or charters.

25 & 26 Vict. c. 87, "The Industrial and Provident Societies Act, 1862" (amended by 30 & 31 Vict. c. 117, and 34 & 35 Vict. c. 80), which primarily and especially regard Friendly Societies, and other similar associations.

33 & 34 Vict. c. 61, "The Life Assurance Societies Act, 1870" (amended by 34 & 35 Vict. c. 58, and 35 & 36 Vict. c. 41), containing regulations as to life assurance companies formed after the passing of the act, and as to other matters connected therewith.

32 & 33 Vict. c.19, an Act amending the law relating to mining partnerships within the Stannaries.

8 & 9 Vict. c. 16, "The Companies Clauses Consolidation Act;" 8 & 9 Vict. c, 20, "The Railways Clauses Consolidation Act," and the other similar statutes.

25 & 26 Vict. c. 89.
30 & 31 Vict. c. 131.

The above statutes, and especially the first two—the Companies Acts of 1862 and 1867—enable persons by a very simple and speedy process to unite themselves into, and thereby create, a corporation for almost any and every purpose of life, commercial or otherwise. The constitution of such corporation, its objects and purposes, its rights and powers, and

those of its various members, will be determined by the instruments drawn up—the memorandum and articles of association—at the time of registration. The acts themselves contain but little upon these heads. The chief specific provisions found in them relate to the formalities and other circumstances connected with the foundation and the dissolution, voluntary or forced, of the corporation, and with the assembling periodically of the members. The enactments that concern the working and control of the corporation, and to the rights and liabilities of the shareholders, and other matters belonging to the internal management of the association, are but mere *generalia*, it being left to the individuals from time to time composing the association, to fix and prescribe these in a more particular manner, and in accordance with the exigencies and requirements of the undertaking in which they propose to engage.

These statutes give to the bodies coming within their purview, no arbitrary or compulsory power of dealing with the rights, pecuniary or proprietary, of others than their own members. A corporation is as powerless as an individual, and it is as illegal in the one case as the other to infringe or encroach upon existing rights. Wherever for any reason whatever, public or private, it is necessary to do so, special authorisation must be obtained from the supreme legislature. For this purpose special acts of parliament are passed, conferring on the corporations obtaining them powers to enter upon and

occupy property other than and exceeding what they would enjoy at common law, or by virtue of the Companies Acts, and immunities, more or less extensive, from liabilities that would otherwise arise from the user of such powers, very generally also providing compensation more or less adequate, and modes of obtaining the same for the parties thereby damnified. Of these acts a great number are passed every session, a few only creating new corporations, by far the larger portion investing existing corporations with additional powers, or additional facilities, for using the powers which they already possess. In consequence of the multiplicity of such statutes and of the continued repetition therein of clauses which had been, and which would be very many, re-enacted in statutes *pari materie*, a series of acts was passed in the eighth and ninth years of this reign, embodying in distinct acts the most frequent and important of such clauses, according to the undertakings to which they related, and providing that such should be incorporated in subsequent statutes of the description in question, saving so far they should be expressly varied or excepted by such statutes. Of these "Consolidation Acts," the chief are—

(1) 8 & 9 Vict. c. 16, The Companies Clauses Consolidation Act, 1845 (amended slightly by 30 & 31 Vict. cc. 126 and 127; and further, more materially by 32 & 33 Vict. c. 48, The Companies Clauses Consolidation Act, 1869).

8 & 9 Vict. c. 17, a similar Act for Scotland.

(2) 8 & 9 Vict. c. 18, The Lands Clauses Consolidation Act, 1845 (amended by 32 & 33 Vict. c. 18, The Lands Clauses Consolidation Act, 1869).

8 & 9 Vict. c. 19, a similar Act for Scotland (amended by 23 & 24 Vict. c. 106, The Lands Clauses Amendment Act, 1860).

(3) 8 & 9 Vict. c. 20, The Railways Clauses Act, 1845 (amended, or rather added to, by 26 & 27 Vict. c. 92, The Railways Clauses Act, 1863, which has consolidated certain other provisions usually inserted in the more recent Railway Acts).

8 & 9 Vict. c. 33, is a similar Act for Scotland.

(4) 10 & 11 Vict. c. 14, The Markets and Fairs Clauses Act, 1845.

(5) 10 & 11 Vict. c. 15, The Gas Works Clauses Act, 1845 (amended as below, see 7).

(6) 10 & 11 Vict. c. 16, The Commissioners Clauses Act, 1845. This act relates to the execution of undertakings of a public nature by "commissioners," and embodies many of the clauses usually inserted in such acts, but it applies only where the act creating the commissioners expressly incorporates it.

(7) 10 & 11 Vict. c. 17, The Waterworks Clauses Act, 1845 (extended and amended by The Waterworks Clauses Act, 1863; by 33 & 34 Vict. c. 70, The Gas and Waterworks Facilities Act, 1870; and by 36 & 37 Vict. c. 89, The Gas and Waterworks Facilities Act, 1870, Amendment Act, 1873).

(8) 10 & 11 Vict. c. 27, The Harbour, Docks, and Piers Clauses Act, 1847 (amended by 25 & 26 Vict. c. 69, and affected by 24 & 25 Vict. c. 45, The General Pier and Harbour Act, 1861; and 29 & 30 Vict. c. 56, The General Pier and Harbour Orders Confirmation Act, 1866).

(9) 10 & 11 Vict. c. 34, The Towns Improvement Clauses Act, 1847 (amended by 24 & 25 Vict. c. 81). Also amended, modified, and curtailed, or otherwise affected in its operation by the various acts relating to Local Government Boards and to Boards of Public Health.

(10) 10 & 11 Vict. c. 65, The Cemeteries Clauses Act, 1847.

(11) 26 & 27 Vict. c. 112, The Telegraph Act, 1863, qualified and affected in various ways by the subsequent acts, 29 & 30 Vict. c. 3; 31 & 32 Vict. c. 110; 32 & 33 Vict. c. 73; 33 & 34 Vict. c. 88. See also 35 & 36 Vict. c. 83, and 36 & 37 Vict. c. 83.

(12) 33 & 34 Vict. c. 78, The Tramways Act, 1870, slightly affected by 35 & 36 Vict. c. 43.

PART II.

THE DOCTRINE OF ULTRA VIRES AS AFFECTING THE BUSINESS AND OTHER TRANSACTIONS ENGAGED IN BY CORPORATIONS, AND THEIR RIGHTS AND LIABILITIES IN RESPECT THEREOF.

CHAPTER I.

SECTION I.—THE EXACT IMPORT OF THE DOCTRINE OF ULTRA VIRES.

In old times, as we have seen, corporations were considered to have most of the powers—the due exercise of such powers being secured by the imposition of certain formalities—and to be subject to the greater part of the obligations of ordinary citizens. But of late, from the introduction and development of the doctrine of Ultra Vires, these powers and obligations have been, especially as regards some kinds of corporations, considerably curtailed. It has been laid down that some, if not all, corporations, exist for the attainment of certain objects only, and that, if their powers are not expressly they are impliedly restricted to such only as are necessary for the due attainment of those objects, and that, consequently, they can perform

no acts, enter into no transactions, and incur no liability but such as spring out of or are otherwise incidental to the purposes for which they have been created. This doctrine may have been present in a vague form to the minds of the older judges, but it is only within the last half century that it has been laid down in clear and unqualified language. The exact purport of the doctrine may be gathered from the judgments in the following cases :—

Colman *v.* Eastern Counties Rail. Co.

In *Colman* v. *Eastern Counties Railway Company* (*o*) the defendants, for the purpose of encouraging the traffic on their railway, proposed to guarantee certain profits, and secure the capital of an intended steamboat company, who were to run steamboats from Harwich in connection with their railway. But Lord Langdale, the Master of the Rolls, held that such a transaction was not within the scope of their authority, and he accordingly restrained them from carrying it into effect. "I am clearly of opinion that the powers which are given by an Act of Parliament like that now in question extend no further than is expressly stated in the Act, or is necessarily and properly required for carrying into effect the undertaking and works which the Act has expressly sanctioned." "I must say, in the absence of legal decision, that the acquiescence of the shareholders in such transactions affords no ground whatever for the presumption of legality." And in *Salomons* v. *Laing* (*p*) his

(*o*) 10 Beav. 1. (*p*) 12 Beav. 339.

lordship said: "A railway company incorporated by Act of Parliament is bound to apply all the moneys and property of the company for the purposes directed and provided for by the Act, and for no other purposes whatever."

In *East Anglian Railways Company* v. *Eastern Counties Railway Company* (*q*), one of the earliest cases at law, per Sir J. Jervis, L.C.J.: "It is clear that the defendants have a limited authority only, and are a corporation only, for the purpose of making and maintaining the railway sanctioned by the Act; and that their funds can only be applied for the purposes directed and provided for by the statute."

In *Bagshaw* v. *Eastern Union Railway Company* (*r*), Wigram, V.-C., said: "The Legislature may have thought it right to provide that the capital raised for a specific purpose should not be applied for any other purpose. Under such a state of things, the application of capital so appropriated to any other than the specified purpose must be unlawful. No majority of the shareholders, however large, could sanction the misapplication of such portion of the capital. Indeed, in strictness even unanimity would not make such an act lawful."

Turner, L.J., expressed himself to the same effect in *Shrewsbury, &c., Railway Company* v. *London and North Western, &c., Railway Com-*

(*q*) 11 C. B. 775. (*r*) 7 Hare, 114.

pany (*s*): "The great undertakings of these [*i.e.*, railway and similar] companies could not be carried out by private enterprise, and Parliament has therefore, with a view to the public good, authorised the constitution of large bodies, acting by directors, for the purpose of carrying them out. But these bodies have no existence independent of the Acts which create them, and they are created by Parliament with special and limited powers, and for limited purposes. Whether Parliament has wisely limited their powers for the purposes of their incorporation it is not for us to consider. The fact of their being endued with such powers, and incorporated for such purposes, only shows that Parliament did not think fit to entrust them with more extended powers, or to incorporate them for other purposes."

In *South Yorkshire Railway and River Dun Company* v. *Great Northern Railway Company* (*t*) an agreement, under the seals of the two companies, that defendants might for a term of twenty-one years have free use of the plaintiffs' railway, works, engines, &c., on payment of certain tolls and under certain conditions, was held, by a majority of the Court of Exchequer, not to be ultra vires, the payments to be made being considered tolls within the meaning of 8 Vict. c. 20, s. 87 (Railway Clauses Consolidation Act, 1845).

(*s*) 22 L. J. (Ch.) 682.

(*t*) 9 Ex. 55, 84,; 22 L. J. (Ex.) 304.

In reference to the question of ultra vires, Parke, B., observed : "Corporations which are creations of law are, when the seal is properly affixed, bound just as individuals are by their own contracts, and as much as all the members of a partnership would be by a contract in which all concurred. But where a corporation is created by an Act of Parliament for particular purposes, and with special powers, then indeed another question arises. Their deed, though under the corporate seal, and that regularly affixed, does not bind them if it appears, by the express provisions of the statute creating the corporation, or by reasonable inference from its enactments, that the deed was ultra vires—that is, that the legislature means that such a deed should not be made."

Similarly Lord Cranworth, in the House of Lords, in *Eastern Counties Railway* v. *Hawkes* (*u*): "It must, therefore, be now considered as a well-settled doctrine that a company incorporated by Act of Parliament for a special purpose cannot devote any part of its funds to objects unauthorised by the terms of its incorporation, however desirable such an application may appear to be."

Corporation styled a "legal person."

It is unnecessary to add anything to the above. A corporation is commonly styled a "legal person," but the appellation "person" is applicable to it only by analogy; and the analogy fails when we see it thus clearly stated that this legal person is wanting

(*u*) 5 H. Lds. 348.

in much that belongs to a natural person—that its course of existence is marked out from its birth, that it has been called into being for certain special purposes; that it has all the powers and capacities, and only those, requisite for the due carrying out those purposes; and that all the obligations it affects to assume which do not arise from or out of the pursuit of such purposes are null and void.

Distinction between "ordinary" and "special" corporations.

It will be seen that, in the extract from the judgment in *South Yorkshire Railway and River Dun Company* v. *Great Northern Railway Company*, Parke, B., draws a distinction, and the same distinction has been made in many other cases, between ordinary corporations "which are bound just as individuals by their own contracts" and those created for particular purposes. But it may fairly be doubted whether any corporations are now, or ever have been, created save for particular purposes. Their *raison d'être* is to enable associations to accomplish certain ends, which single individuals, unaided by the law, could not accomplish; and what are these ends but "particular purposes?" Take, as a strong instance, a university or a London guild. Either can undoubtedly manage, invest, transform, and expend the corporate property in almost any way it pleases, but, if they proposed to exhaust the same on the private pleasures of existing members, or to abandon the promotion, the one of education, the other of their "art and mystery," it is very probable, if not absolutely certain, that

the Court of Chancery would restrain the same, as being Ultra Vires. It must, however, be admitted that there is a distinction between "ordinary" and "special" corporations, in that some corporations exist for the furtherance of private aims only, and can deal with their assets and privileges in any way which may seem most agreeable to the majority of the members, without hindrance from the Courts on behalf either of the public, so long as they keep within their powers, or of an individual member so long as he is not being treated fraudulently or unfairly. But the franchises and the powers of all corporations, and therefore of these, are restricted. If they attempt to exceed or to misuse them, they commit acts Ultra Vires, which, at all periods of our history, have exposed them to the risk of confiscation of their charter and privileges. The Crown, to whose prerogative they owe their existence, can require them to observe the conditions upon which their privileges have been granted. To this extent, therefore, they are "special" corporations. It is equally certain that they are "special" in the sense that, as all their capacities are contained in and spring from the instrument of incorporation, these capacities must be limited, vaguely, perhaps, but still limited (*v*), and, consequently, that any member is entitled to prevent an abuse of these capacities, or a turning of them to wrong objects.

(*v*) See the judgment of Bramwell, B., in *Payne* v. *Mayor, &c., of Breckon*, 3 H. & N. 572, 27 L. J. (Ex.) 495.

We may, however, for the sake of convenience and distinction, apply the term "ordinary" to such corporations, and style all others "special," whether, this special character arises from a trust imposed upon the corporate body or from a limitation express or implied of its rights and faculties to the accomplishment of certain defined and unmistakable purposes.

SECTION II.—VARIOUS MEANINGS THAT HAVE BEEN GIVEN TO THE TERM ULTRA VIRES.

The expression, "Ultra Vires," has been used in at least two senses, as was pointed out by Kindersley, V.-C., in the *Earl of Shrewsbury* v. *North Staffordshire Railway Co.* (*w*). "When you speak of Ultra Vires of the company, you mean one or other of two things, either that you cannot bind all the shareholders to submit to it [*i.e.*, that you cannot bind dissentient shareholders], or that it is Ultra Vires in this respect, that the legislature, for instance, having authorised you to make a railway, you cannot go and make a harbour. But, in the present case, the latter question does not arise. The question is, whether it is Ultra Vires as being beyond the power of the directors to bind all the shareholders."

Two significations of the term "ultra vires."

(*w*) 35 L. J. (Ch.) 156, 172. The report in L. R. 1 Eq. 618, does not show so clearly the distinction as drawn by the Vice-Chancellor.

This passage was quoted with approval by Blackburn, J., in *Taylor* v. *Chichester & Midhurst Railway Co.* (*x*), and explained at some length: "The legislature, in passing special Acts by which railway and other trading companies are incorporated, have in view two distinct purposes. They incorporate a body of shareholders, who seek, as a trading speculation to carry out a particular scheme for their own benefit, and they, at the same time, being satisfied that the scheme will be for the benefit of the public, confer on the body thus incorporated certain privileges, and impose on them certain restrictions for the benefit of the public. Taylor v. Chichester & Midhurst Rail. Co.

"As the shareholders are, in substance, partners in a trading corporation, the management of which is committed to the body corporate, a trust is by implication created in favour of the shareholders that the corporation will manage the corporate affairs, and apply the corporate funds for the purpose of carrying out the original speculation."

This twofold use of the term has been unfortunate, as it has contributed to obscure the reasoning upon a subject in itself sufficiently perplexing. Especially to it is due not a little of the confusion that exists as to the cases in which corporations can ratify, and as to the extent to which they can be made liable for acts done and agreements entered into by itself or its agents in an informal manner, when such acts and agreements are in other respects within their

(*x*) L. R. 2 Ex. 356, 378.

powers. The former is the true and proper meaning; viz., that a corporation has certain powers only, and that it can be bound only when acting, whether directly or by agents, within the limits of these powers; and this is the signification which will in this work be given to the term when it is employed without any qualification.

The latter meaning is a totally different affair. In fact, it has nothing to do with the powers of *corporations as such*, but simply with the powers of the *collective body of individuals* composing them. This body, be it remembered, is not the corporation, which exists apart and distinct from its members, and whose capacities were determined at its origin. Now, it is manifest, that any body of men, whether associated casually or by some stronger union, can bind *themselves* by positively participating in and agreeing to any legal transaction. Can we go a step further and say, that when this association takes the form of a corporation, the members can, by the concurrence of one and all, in a given act, which, though not absolutely Ultra Vires of the corporation, is, nevertheless, not binding on it, render such act binding, not merely on themselves, but on the corporations? This question, however, will be better discussed in connection with Ratification, *post* Part III., Chapter VI.

Third signification of "Ultra Vires."

There is yet a third meaning not unseldom given to Ultra Vires, viz., what is beyond the powers of the executive part of a corporation. This is needless

confusion, and might always be avoided by adding, as is sometimes done, "of the directors," or "agents," as the case might be.

Fourth signification of "Ultra Vires."

Sometimes the term Ultra Vires is used even in a fourth sense, as denoting what is outside the powers, not of a particular corporation, but of every corporation. Thus, bye-laws in restraint of trade are Ultra Vires in this sense (*y*). Facts will thus be Ultra Vires which are contrary to the Common Law or to the provisions expressed or implied of some statute, *e.g.*, the issuing prior to the Companies' Act of 1867 of shares to bearer (*z*).

"Constating instruments."

It may here be observed, that the expression, "constating instruments," will very generally be employed in this work, to signify the document or collection of documents which fix the constitution of any corporation. These documents are very various —charters, letters patent, statutes of the founder, acts of parliament, bye-laws, deeds of settlement, articles of association—and not unfrequently they will be very numerous and lengthy, the original muniments having been added to or modified by many subsequent proceedings, resolutions, and the like. Therefore it will be far more convenient to have one single term always denoting the same

(*y*) Though it seems that such could be legalised by special custom. See *Shaw* v. *Pope*, 2 B. & Ad. 465; *Shaw* v. *Poynter*, 2 A. & E. 312.

(*z*) See *Re General Company for Promotion of Land Credit*, L. R. 5 Ch. 363.

general fact, but varying in its exact meaning with the circumstances.

SECTION III.—THE BURTHEN OF PROOF IN QUESTIONS OF ULTRA VIRES.

There is another much more important question, or rather it may be considered but another form of the present; viz., whether a corporation—or if we admit of the above division into ordinary and special—whether a special corporation has only those powers which are expressly given to it by its constating instruments, or has all such as will conduce to the attainment of its ends, save such as are, by direct provision in its constating instruments or by necessary inference from the same, denied it?

In *Colman* v. *Eastern Counties Railway Company*, the Master of the Rolls said (*a*):—"It has been very properly admitted that railway companies have no right to enter into new trades or businesses *not pointed out by the acts*." In *East Anglian Railways Company* v. *Eastern Counties Railway Company*, the Court of Common Pleas stated:—"It is clear that the defendants have a limited authority only, and are a corporation only for the purpose of making and maintaining the railway sanctioned by the Act, and that the funds can *only be applied for the purposes directed and provided for by the statute*."

(*a*) 10 Beav. 1, 16 L. J. (Ch.) 73; cited *ante*, p. 28.

All contracts of corporatio are valid sav those prohibited by statutes of incorporation

The burthen of authority would, however, seem, from a consideration of subsequent cases, to incline the other way; *i.e*, to the following opinion, promulgated by Parke, B., and quoted *ante*, p. 31. Thus, in *Chambers* v. *Manchester & Milford Railway Company* (*b*), Crompton, J., held that a "corporation is bound by the seal being affixed to the deed, where the directors have power given them so to affix it, but that it is not bound where the legislature *has said that the thing shall not be done.*" In *Shrewsbury & Birmingham Railway Company* v. *North Western Railway Company* (*c*), Lord Cranworth, in delivering the judgment of the House of Lords, considered this to be the more correct way of enunciating the doctrine. "*Primâ facie* a corporation may contract under seal. You must show that the particular contract is one which the corporation has no power to enter into. It must be shown on the face of it to be a breach of duty—something foreign to the object for which the company was established."

So, in *Scottish North Eastern Railway Company* v. *Stewart* (*d*) Lord Wensleydale expressed himself very similarly, saying, "There can be no doubt that a corporation is fully capable of binding itself by any contrivance under its common seal in England, and without it in Scotland,

(*b*) 5 B. & S. 588, 33 L. J. (Q. B.) 268, 274; cf. *South Wales Railway Company* v. *Redmond*, 10 C. B. N. S. 675.

(*c*) 6 H. L. Ca. 113, 124.

(*d*) 3 Macq. 382, 414–6.

except when the statutes by which it is created or regulated expressly or by necessary implication prohibit such contract between the parties. *Primâ facie* all its contracts are valid, and it lies on those who impeach any contract to make out that it is avoided." Finally, in the latest case on the subject, and one where the question was very thoroughly examined, viz., that of *Taylor* v. *Chichester & Midhurst Railway Company* (*e*), Blackburn J. approved of the same, adding: "I think, therefore, we are entitled to consider the question to be, not whether the present defendants had, by virtue of the acts of incorporation, authority to make the contract, but whether they are *by those statutes forbidden* to make it."

As this view has also been taken, not only by the different members of the House of Lords and by the Court of Queen's Bench, in *Chambers* v. *Manchester & Milford Railway Company*, as above quoted, and by the Court of Exchequer in *Bateman* v. *Mayor, &c., of Ashton-under-Lyne* (*f*), but also by the Court of Common Pleas itself, in *Redmond* v. *South Wales Railway Company* (*g*), we may conclude that it is now established that this is the true mode of expressing the doctrine.

(*e*) L. R. 2 Ex. 356, 384. L. J. (Ex.) 458.
(*f*) 3 H. & N. 323, 27 (*g*) 10 C. B. N. S. 675.

CHAPTER II.

THE AFFAIRS OF CORPORATIONS AND CONDUCT OF THE SAME.

In the last Chapter reference was made to the distinction between special and ordinary corporations. The better and more practical division would probably be into trading corporations and those for any purpose whatever other than trade pure and simple. Trading corporations are, one and all, "special" corporations, and to them in particular the doctrine of Ultra Vires applies. Of other varieties of corporations some, at least, will be special, and will be subject to the principle of Ultra Vires; some may be considered as "ordinary" corporations, taking that term with the explanation already given, and will, in so far as they are ordinary, be unaffected by—save under peculiar circumstances—this principle. In this chapter it is intended to examine our subject in so far as it concerns the general conduct of the affairs of corporations, not for trading purposes.

Conduct of affairs of corporations not for trading purposes.

Membership in Corporations.

Conditions which constitute membership.

In connection with the control of the corporate affairs, the first point to be noticed is membership, and the rights and privileges which it confers. For the determination of these matters the common law lays down few rules, and recourse must, in consequence, be had to the constating instruments. Here will be found the conditions which, qualified and supplemented it may be by custom, constitute membership. These conditions vary indefinitely with the nature of the corporation, but, as to municipal bodies, they have been amended and reduced to uniformity by the provisions of 5 & 6 Will. IV. c. 76. Sometimes residence, or the occupation or ownership of property within a certain district, or the being rated to the poor, is a sufficient qualification, and the person possessing the same is thereby entitled to become, or perhaps *ipso facto* becomes, a corporator. Sometimes it is poverty, place of birth, the bearing a particular name, or the being related to the founder. Very generally, an election or some formal kind of admission is necessary. This latter essential is never found in the case of joint-stock companies, not, at least, when the incoming member obtains from one retiring shares or stock, in respect of which no pecuniary liability exists. The possession of such shares or stock confers membership without the knowledge, and even against the wishes, and to the detriment of all the other members.

Membership, as it confers privileges, so, on the other hand, very generally entails the performance of certain duties with respect to the corporation. When this is so, the corporation has power to expel members who do not observe those duties, at least when the breach tends directly or indirectly to the forfeiture of the corporate rights and franchises, and the destruction of the corporation. Corporations may also disfranchise their members who have been proved guilty of the more heinous crimes. It must, however, be questioned whether this power of disfranchisement can belong impliedly to any joint-stock companies. Persons become members of such corporations—apart, that is, from express provision to the contrary—merely by the acquisition of shares or stock, the possession of such shares or stock seldom, if ever, imposes upon the possessor the least duty towards the company, and by the transfer thereof his membership ceases. It would, consequently, seem that such corporations have no implied power to eject their members, however troublesome they may be, or however hostile their acts to the welfare and prosperity of the whole body. But such a power might unquestionably be given by express provision in the constating instruments, as is indeed, in reality, done whenever the company or its directors are authorised to forfeit shares for non-payment of calls (*a*).

Powers of corporations over their members.

(*a*) On Disfranchisement, see Grant on "Corporations," pp. 262—267.

The affairs of Corporations considered generally.

Powers of members in general meeting assembled over corporate affairs.

A corporation is an *imperium in imperio*. Its bye-laws, statutes, and customs are its legal code, establishing in a general manner the mode in which its affairs are to be conducted, and the rights and powers of the various corporators. The members in general meeting assembled constitute a forum, supreme in all that relates to internal arrangement (See *post*, Part IV., Chapters I. and II.), provided they keep within the corporate powers, and act in subordination to the immutable statutes, if any, which form its constitution (*b*). They can determine the business which shall be done and the transactions which shall be carried on or concurred in in the corporate name. They can maintain or abandon the corporate rights, enforce the corporate privileges, or allow them to pass into disuetude, improve or waste the corporate property; change the nature of that property, and divert it from one purpose to another—in a word, keep the corporation alive and active, or permit it to fall into decay; but always provided that, in so doing they are infringing no public rights or committing no breach of trust or violation of other duties.

It is seldom, however, that this can be the case. There may be "ordinary" corporations endowed with privileges without corresponding responsibilities,

(*b*) See *Mayor, &c., of Colchester* v. *Lowton*, 1 V. & B. 226.

and therefore absolutely exempt, save when misusing their franchises from the jurisdiction of every legal tribunal, whether the intervention of the Courts be sought on public or on private grounds; and therefore it would seem *à fortiori* irresponsible for, because incapable of, committing Ultra Vires acts.

Excluding these corporations, if any are to be found, and also for the present trading corporations, there remain the large numbers to which this principle does with more or less stringency apply. In the management of their affairs, the Courts do intervene whenever they are exceeding or misusing their powers, or are refusing to do acts the doing of which is imposed on them as a duty. In briefly considering these matters, the simpler way will be to proceed by taking the different classes of corporations as already enumerated.

First.—Ecclesiastical Corporations.

These have incident to them a visitor; either the founder and his heirs and assigns, or these failing, the King and his successors (*c*). The supervision of the visitor is supreme as to all matters of internal arrangement (*d*), and in so far as he acts in accordance with the rules and ordinances established and in force, he excludes the

Powers of visitor.

(*c*) *Rex* v. *St. Catherine's Hall, Cambridge*, 4 T. R. 233.

(*d*) *King* v. *Bishop of Chester*, 1 W. Bl. 22; and see *Thompson* v. *University of London*, 33 L. J. (Ch.) 625.

jurisdiction of the Courts. He may be restrained if acting beyond his powers or compelled to act if he refuses, but application must be to the Queen's Bench for a prohibition or a *mandamus* (*e*) and not to Chancery; but beyond this, in the absence of a trust, the Courts ordinarily will not interpose (*f*). It may be difficult to determine who is the visitor (*g*), and sometimes the appointment is to be gathered only from an examination of the statutes generally (*h*). But, though the jurisdiction of the visitor is under ordinary circumstances, exclusive, and his decision not examinable, either at law or in equity, yet it is different if a trust exists. In such a case the Court of Chancery exercises its authority whenever this is necessary for the due carrying out of the trust (*i*).

The doctrine of Ultra Vires comes into play in very many ways in connection with ecclesiastical corporations, but it is not possible to do more than refer to some of the points to be noticed. These matters can be fittingly discussed only in works which especially treat of ecclesiastical law. First

(*e*) *Whiston* v. *Dean & Chapter of Rochester*, 7 Hare, 532.

(*f*) *Att.-Gen.* v. *Foundling Hospital*, 2 Ves. 42.

(*g*) Compare the case cited in Note (*e*) in Chancery with *Reg.* v. *Dean & Chapter of Rochester*, 17 Q. B. 1, 20 L. J. (Q. B.) 467, which was practically the same decision at law.

(*h*) See *St. John's College, Cambridge* v. *Todington*, 1 Burr. 158; *Att.-Gen.* v. *Middleton*, 2 Ves. 329.

(*i*) See *Whiston* v. *Dean & Chapter of Rochester*, *ubi suprà*; and the cases cited in the notes following in reference to charitable trusts.

to be considered is the right of appointment to ecclesiastical benefices, prebendaries, and sees—in other words, of naming the person who shall be for the time being an ecclesiastical corporation sole, in whom this is vested, the ceremonies to be observed by the appointor and the acceptor, and the conditions to be satisfied by either party; and also the corresponding legal facts in connection with the filling up of vacancies in ecclesiastical corporations aggregate (*j*).

Secondly, the personal rights and privileges of these persons. In many cases they have ample powers of prohibiting other ministers from conducting public worship in the churches or districts to which they have been appointed.

Thirdly, their rights, powers, and liabilities in respect of the user and alienation of church property.

Fourthly, the questions relating to the jurisdiction of the many inferior ecclesiastical courts.

Secondly.—Charitable Corporations.

Powers of visitor;

What has been said as to the visitor applies equally with regard to these corporations as to those of the last class. Within the limits of the authority bestowed upon him, in the absence of a trust, his jurisdiction is supreme.

But it is otherwise when the existence of a trust

(*j*) See *Reg.* v. *President & Chapter of Exeter*, 12 A. & E. 512.

and how affected by a trust.

can be established. "Where there is a clear and distinct trust, this Court administers and enforces it as much where there is a visitor as where there is none. This is clear, both on principle and authority. The visitor has a common law office, and common law duties to perform, and does not superintend the performance of the trust, which belong to the various officers, which he may take care to see are properly kept up and appointed" (*k*).

Where this trust is established, whatever be its object, whatever be the nature of the charity—places of worship, whether of the Established Religion or not (*l*), almshouses or hospitals (*m*), colleges (*n*), grammar schools (*o*), the promulgation of religious or secular doctrines (*p*), works of public

(*k*) Per *Romilly*, M.R., *Att.-Gen.* v. *St. Cross Hospital*, 17 Beav. 435, 466; *Green* v. *Rutherford*, 1 Ves. 462; *Re Berkhampstead School*, 2 V. & B. 134.

(*l*) *Att.-Gen.* v. *Daugars*, 33 Beav. 621; *Att–Gen.* v. *Munro*, 2 D. G. & Sm. 122; *Corbyn* v. *French*, 4 Ves. 418; *Att.-Gen.* v. *Pearson*, 3 Mer. 400; *Daugars* v. *Rivaz*, 28 Beav. 233; *Att.-Gen.* v. *Pearson*, 7 Sim. 270. See *Re Scarborough Charity Petitions*, 1 Jur. 36; *Shore* v. *Wilson*, 9 Cl. & F. 355.

(*m*) *Att.-Gen.* v. *St. Cross Hospital*, 17 Beav. 435. See *Philpott* v. *St. George's Hospital*, 27 Beav. 107; *Att.-Gen.* v. *Browne's Hospital*, 17 Sim. 173, 19 L.J. (Ch.) 73.

(*n*) *Att.-Gen.* v. *Sidney Sussex College, Cambridge*, L. R. 4 Ch., 722.

(*o*) *Wilkinson* v. *Malin*, 2 C. & J. 636.

(*p*) *Att.-Gen.* v. *Baxter*, 1 Vern. 248; *Thornton* v. *Howe*, 31 Beav. 14; *Re Michel's Trusts*, 28 Beav. 39; *Straus* v. *Goldsmid*, 8 Sim. 614.

utility (*q*); or any of the very many purposes which have been decided to fall within the spirit if not the letter of 43 Eliz. c. 4 (*r*) and the like—the Court of Chancery assumes jurisdiction, and causes the trust to be duly observed and carried out.

A charity generally partakes of the nature of a trust.

It is not easy to conceive a charity that does not, to a greater or less degree, partake of the nature of a trust, and therefore to that extent come within the supervision of Chancery (*s*). It would seem, upon general principles, that the objects of the charity ought in every case to be looked upon as *cestuis que trustent*. The gift has been made or bequeathed, and the charity created for their benefit, and the persons who for the time being are the legal owners of the property belonging to the charity, are owners thereof, *sub modo*, that is, in order to apply it to the purposes directed by the original donor,—in other words, they hold it upon a trust.

Questions of Ultra Vires will depend on the construction placed upon the instruments under which the charity was primarily founded, or by which its constitution has been subsequently modified. Any going beyond or abandonment of the original scope or object of the charity will be Ultra Vires, unless

(*q*) *Johnson* v. *Swann*, 2 Madd. 457; *Trustees of the British Museum* v. *White*, 2 S. & S. 594.

(*r*) See *University of London* v. *Yarrow*, 23 Beav. 159, 26 L. J. (Ch.) 430; *Jones* v. *Williams*, Amb. 651.

(*s*) See *Hayman* v. *Governing Body of Rugby School*, W. N. 1874, p. 73.

expressly permitted by the legislature (*t*), or compelled by necessity (*u*), or excused by lapse of time and custom (*v*).

Thus, schools founded for giving instruction in classics may not be converted into establishments for teaching merely elementary English (*w*). Nor, on the other hand, can one intended for diffusion of elementary knowledge be restricted to the teaching of higher subjects only (*x*).

So, schools endowed for the benefit of a particular town or district will not be thrown open to the whole kingdom (*y*), unless under special circumstances, such as a very large increase in the income (*z*).

But a departure from the strict directions or words and language employed by the founder will be permitted, if thereby his manifest intention can be the better fulfilled (*a*). And in recent times there

(*t*) See *Att.-Gen.* v. *Margaret*, 1 Vern. 55; *Re Highgate School*, 1 Jur. 774; *Re Reading Dispensary*, 10 Sim. 118.

(*u*) See *Re Ashton's Charity*, 27 Beav. 115.

(*v*) *Att.-Gen.* v. *Hartley*, 2 J. & W. 353; *Att.-Gen.* v. *Myddleton*, 3 Ves. S. 330. See *Re Chertsey Market*, 6 Price, 261; *Att.-Gen.* v. *Gould*, 28 Beav. 485.

(*w*) *Att.-Gen.* v. *Mansfield*, 2 Russ. 501. See *Re Marlborough School*, 13 L. J. (Ch.) 3; *Re Free Grammar School of Chipping Sodbury*, 8 L. J. (Ch.) 13; *Re Rugby School*, 1 Beav. 457.

(*x*) *Att.-Gen.* v. *Jackson*, 2 Keen, 541. See *Re Manchester School*, L. R. 2 Ch. 497.

(*y*) *Berkhampstead School Case*, L. R. 1 Eq. 102.

(*z*) *Re Latymer's Charity*, L. R. 7 Eq. 353.

(*a*) *Att.-Gen.* v. *Whiteley*, 11 Ves. 241.

has been by statute, vested in the Court of Chancery, an extensive authority of dealing with, and reconstituting, endowed and grammar schools, and approving of modification in their constitution and regulations (*b*).

In considering charitable corporations, it must not be forgotten that the Charity Commissioners possess very extensive powers of supervision and control, and that their consent and authorisation have to be obtained, in respect of the doing of anything which affects the essential constitution of the charity, and especially by 16 & 17 Vict. c. 137, s. 17, prior to bringing any suit, petition, or other legal proceeding relating to the charity or its funds (*c*). Now, also, by 35 & 36 Vict. c. 24, The Charitable Trustees Incorporation Act, 1872, they are empowered to grant a certificate of registration to, and thereby to incorporate, the trustees of any charity for religious, educational, literary, scientific, or public purposes.

Powers of Charity Commissioners.

Thirdly.—Friendly Societies and other similar Associations.

Analogous as regards many of their objects to charitable corporations, are friendly, industrial, and benefit building societies. But these societies are of statutory not private origin, their constitution

Friendly societies are, as regards their objects, analogous to charities.

(*b*) See 3 & 4 Vict. c. 77; 23 & 24 Vict. c. 11; 31 & 32 Vict. cc. 32 and 118; 32 & 33 Vict. cc. 56 and 58.

(*c*) See *Braund* v. *Earl of Devon*, L. R. 3 Ch. 800.

being determined by various Acts of Parliament which have been passed in that behalf, supplemented in matters of detail and minor importance by rules drawn up by the members themselves, and in so far as necessary officially certified and approved. Of these statutes the most important are the following:—

a. In respect of Friendly Societies.

18 & 19 Vict. c. 63, which repealed many prior statutes, and amended and consolidated the others, and added various new provisions, and in a manner constitutes a code for these societies.

21 & 22 Vict. c. 101, which slightly amended the former, in conjunction with which it is to be read as the "Friendly Societies Acts of 1855 & 1858."

23 & 24 Vict. c. 58, which amended 18 & 19 Vict. c. 63, chiefly in matters relating to insolvency and winding-up and by the imposition of a penalty upon registrars omitting to make the requisite annual returns.

b. Loan Societies.

3 & 4 Vict. c. 110, regulates these bodies, and has finally been made perpetual by 26 & 27 Vict. c. 56.

c. Industrial and Provident Societies.

25 & 26 Vict. c. 87, as amended by 30 & 31

Vict. c. 117, being respectively the "Industrial and Provident Societies Acts, 1862 & 1867," are the two statutes which chiefly regulate the constitution and working of these bodies.

d. Benefit Building Societies.

6 & 7 Will. IV. c. 32 is the Act under which these associations are founded. It has been modified in unimportant matters by 12 & 13 Vict. c. 106, s. 1, 13 & 14 Vict. c. 115, 23 & 24 Vict. c. 13, 26 & 27 Vict. 65, s. 44, and 31 & 32 Vict. c. 124, s. 11.

With regard to these different societies, few remarks need be made. Their purposes and objects are determined mainly and primarily by the special Acts relating to them, which can be qualified in minor details only, by their certified rules. Thus, 18 & 19 Vict. c. 63, s. 9, defines the objects of friendly societies. Those associations only which confine themselves to the objects so defined will come within the designation; and therefore a society whose main purpose is within this section, but which adds thereto the propagation and maintenance of trades unionism, is not a friendly society (*d*).

Objects of industrial and provident societies.

Industrial and Provident Societies are those whose object is combination for labour or trade in the

(*d*) *Hornby* v. *Close*, L. R. 2 Q. B. 153. Compare *Reg.* v. *Scott*, 13 L. J. (M. C.) 473, 8 Jur. 473; *Pare* v. *Clegg*, 29 Beav. 589, 30 L. J. (Ch.) 742.

manner and to the extent permitted by the Acts ; and, consequently, combinations for any other object, however closely allied, do not come under this class (*e*).

Objects of building societies.

So with benefit building societies. Their object is "that any individual member may borrow money from the society to enable him to buy or build a house, mortgaging it to the society as security for the money borrowed, and, ultimately, making it absolutely his own, by paying off the mortgage out of his subscription" (*f*).

Consequently it is Ultra Vires of such a society to act or hold themselves out as a freehold land society (*g*). But if the rules so allow they may invest a portion of their surplus funds in the purchase of real estate, provided this be done *bonâ fide*, and in the furtherance of their main objects (*h*). Moreover, some societies combine the acquisition and dealing in land with the purposes of a building society pure and simple ; and, provided the former object be auxiliary and subordinate to the latter, it would appear that the combination is allowable (*i*).

(*e*) See judgment in *Re Midland Counties Benefit Building Society*, 33 L. J. (Ch.) 739.

(*f*) Per *Kindersley*, V.-C., in *Re Kent Benefit Building Society*, 1 Dr. & Sm. 417, 30 L. J. (Ch.) 785, 7 Jur. (N. S.) 1045.

(*g*) *Grimes* v. *Harrison*, 26 Beav. 435, 28 L. J. (Ch.) 823.

(*h*) *Mullock* v. *Jenkins*, 14 Beav. 628, 21 L. J. (Ch.) 65 ; *Grimes* v. *Harrison*, ubi suprà. Compare *Peto* v. *Hammond*, 30 Beav. 495, 31 L. J. (Ch.) 354 ; *Hughes* v. *Layton*, 4 B. & S. 820, 33 L. J. (M. C.) 89.

(*i*) See *Re Durham County*

Building societies have no power to borrow money unless their rules especially authorise it, and, therefore, without a provision in that behalf, a borrowing by them or their directors is Ultra Vires (*j*). Even rules authorising borrowing must restrict the sums so to be obtained to limited and definite amounts: unlimited powers to borrow are Ultra Vires, as contrary to the spirit of the Acts (*k*). The borrowing must, moreover, be not only for the purposes of the society, but also for the purposes pointed out in the authorising rules, those purposes being in other respects lawful (*l*), and the powers given by such rules must, in all respects, be strictly followed: thus, authority to borrow from members does not justify borrowing from other persons (*m*).

Settlement of disputes.

In respect of disputes relating to the internal affairs of these societies, provision has been made by statute, which will generally obviate any necessity for the interference of the superior courts. By 18 & 19 Vict. c. 63, s. 40, every dispute between any

Courts will not interfere in matters which

Permanent Investment Land and Building Society, Davis and Wilson's Case, L. R. 12 Eq. 316.

(*j*) *Re National Permanent Benefit Building Society, Ex parte Williamson*, L. R. 5 Ch. 309.

(*k*) *Laing* v. *Reed*, L. R. 5 Ch. 4; *Re Victoria Permanent Benefit, &c., Society, Hill's and Jones's Case*, L. R. 9 Eq. 605; *Re Professional, Commercial, and Industrial Benefit Building Society*, L. R. 6 Ch. 856.

(*l*) *Re Durham County &c. Society, Davis and Wilson's Case*, L. R. 12 Eq. 516.

(*m*) *Re Victoria Permanent Benefit, &c., Society, ubi suprà.*

are properly a subject for internal regulation.

member or members of any society established under that Act or any of the Acts thereby repealed, or any person claiming through or under a member or under the rules of such society, and the trustee, treasurer, or other officer, or the committee thereof shall be decided in manner directed by the rules of such society, and the decision so made shall be binding and conclusive on all parties, without appeal. By 21 & 22 Vict. c. 101, s. 6, this provision is extended and applied to disputes between the executors, administrators, nominees or assigns of a member, and the trustees, treasurer, or other officer or the committee of a society. Where the rules do not prescribe any other mode of settling these disputes, or of enforcing the decision of the arbitrators and the like, the county court within the district of which the usual or principal place of business of the society is situate is, upon the application of any person interested, to determine the matter (18 & 19 Vict. c. 63, ss. 41, 42, 43).

By the "Industrial and Provident Societies Act, 1867," 30 & 31 Vict. c. 117, s. 3, the provisions last mentioned, as to the county courts, and enacted specially with reference to friendly societies, are made applicable to all societies registered under that Act.

By the joint effect of 6 & 7 Will. IV. c. 32, s. 4, and 13 & 14 Vict. c. 115, s. 1, very similar provisions are made for benefit building societies.

It would seem that the jurisdiction of the Courts

is ousted as regards disputes of the kind contemplated, whenever rules have been drawn up, as is usually done, providing for an extra-judicial settlement of such disputes as by a reference to arbitration. There are two judgments of Lord Romilly to the contrary (*n*). But all the other decisions, both at law (*o*) and in equity (*p*) are uniform to the effect that not only is the adjudication in the manner provided by the statutes binding and conclusive without appeal, but also the jurisdiction of the tribunal so constituted is absolutely exclusive of, not merely concurrent with, that of any other tribunal.

But if questions of fraud or breaches of trust arise, the ordinary jurisdiction of the ordinary courts remains (*q*).

Fourthly.—Municipal Corporations.

Nature of municipal corporations.

Prior to 5 & 6 Will. IV. c. 76, municipal corporations were "ordinary" corporations—using that term in the sense and with the explanation already given it—and as such had wide, if not unrestricted

(*n*) *Smith* v. *Lloyd*, 26 Beav. 507; *Doubleday* v. *Hoskins*, L. R. 15 Eq. 344 n.

(*o*) See *Grinham* v. *Card*, 7 Ex. 833, 21 L. J. (Ex.) 321; *Wright* v. *Deley*, 4 H. & C. 209.

(*p*) See *Fleming* v. *Self*, Kay, 518, 3 D. G. M. & G. 997; *Tott* v. *Hughes*, 16 L. T. (O. S.) 260; *Thompson* v. *Planet Benefit Building Society*, L. R. 15 Eq. 333.

(*q*) *Mullock* v. *Jenkins*, 14 Beav. 628, 21 L. J. (Ch.) 65.

powers of dealing with their property and funds (*r*). That statute, however, as to municipal bodies coming within it (*s*) completely altered their nature, constituting them trustees of their corporate property for public purposes, and impressing a trust upon this property. Any diversion of the borough funds to purposes other than those prescribed by the Act will, consequently, be illegal, on the double ground of its being a breach of trust and also Ultra Vires. In *Att.-Gen.* v. *Aspinall* (*t*) an injunction was granted against the endowment of places of worship at the borough expense; though, in *Att.-Gen.* v. *Mayor, &c., of Warwick* (*u*) the defendants were allowed to defray, from time to time, the expense of repairing a certain pew in the parish church. In *Att.-Gen.* v. *Mayor, &c., of Poole* (*v*), a similar order was issued with respect to a proposal to award out of the corporate funds compensation for the emoluments of offices abolished. So the levying of rates (*w*), or the granting of leases (*x*), by the

Illegal acts.

Levying rates.

Granting leases, &c.

(*r*) *Reg.* v. *Watson*, 2 T. R. 199; *Mayor, &c., of Colchester* v. *Lowton*, 1 V. & B. 226, 244; *Holdsworth* v. *Mayor, &c., of Dartmouth*, 11 Ad. & E. 490; *Evan* v. *Corporation of Avon*, 29 Beav. 144; Com. Dig. Franchise, F. 11, 18.

(*s*) See also 1 Vict. c. 78, s. 49, enabling the Crown by charter to extend 5 & 6 Will. IV. c. 76, to other towns.

(*t*) 2 My. & Cr. 613.

(*u*) 10 Jur. 962, 15 L. J. (Q. B.) 306.

(*v*) 4 My. & Cr. 17; *Att.-Gen.* v. *Wilson*, Cr. & Ph. 1.

(*w*) *Att.-Gen.* v. *Mayor, &c., of Lichfield*, 11 Beav. 121.

(*x*) *Att.-Gen.* v. *Mayor, &c., of Yarmouth*, 21 Beav. 625.

corporation, will be restrained, if it appears that these things are about to be done from improper motives. So the immingling the municipal funds in any transaction which, from circumstances beyond the corporate control, may cause the loss of those funds, such as in the purchase of a sub-lease, the original demise of which contained covenants forfeiting the whole lease on breach of the same, will be illegal (*y*). As will be seen hereafter, applications to Parliament at the corporate expense (*z*), or the engaging in litigation, save strictly and solely in the protection of the corporate privileges or property (*a*) are Ultra Vires, and will be restrained.

Application to Parliament.

In short, as in every other case where the doctrine of Ultra Vires applies, the powers of the corporation are restricted and its funds can be spent, its property utilised, and its proceedings legitimate only in accordance with the provisions of the constating instruments, which, in the present instance, are the 5 & 6 Will. IV. c. 76, 6 & 7 Will. IV. c. 104, 1 Vict. c. 78, and the many statutes qualifying these. Section 92 of the first Act, enacts in a general manner that any surplus from the rates may be devoted to "the public benefit of the inhabitants of the borough;" but this does not include the payment of legal expenses not necessarily—although, perhaps, very justifiably — incurred on account of the corpora-

Misapplication of corporate funds.

(*y*) *Mulholland* v. *Belfast Corporation*, 9 Ir. Ch. 292.

(*z*) Part ii. Chapter vi. section 2.

(*a*) Part ii. Chapter v. section 2.

tion (*b*). The expenses of public bath and wash-houses may, by 9 & 10 Vict. c. 74, s. 4, be defrayed out of the corporate funds. Other statutes, adding to or amending the municipal powers are 13 & 14 Vict. c. 64, providing for the repair of bridges within boroughs, and 18 & 19 Vict. c. 70, amended by 29 & 30 Vict. c. 114, and 34 & 35 Vict. c. 71, relating to the establishment of museums and public libraries. Not only is the application of the municipal funds now confined to the limited and definite objects specified in the Act 5 & 6 Will. IV. c. 76, but by section 94 an absolute bar is placed upon the alienation of the municipal real estate—save for terms not exceeding thirty-one years, and upon conditions laid down by the statute—unless it be with the consent of the Commissioners of the Treasury or any three of them, which consent has to be strictly followed (*c*). It was, however, held in *Payne* v. *Mayor, &c., of Brecon* (*d*) that the covenants in a mortgage, charging the municipal estates, and which had been made without the consent of the Commissioners first obtained, were valid and enforceable against the

(*b*) *Att.-Gen.* v. *Mayor, &c., of Sheffield*, L. R. 6 Q. B. 652. See *Att.-Gen.* v. *Mayor, &c., of Wigan*, 5 D. G. M. & G. 52, 23 L. J. (Ch.) 429; *Att.-Gen.* v. *Mayor, &c., of Norwich*, 21 L. J. (Ch.) 139; *Att.-Gen.* v. *Parr*, 8 C. & F. 409, 6 Jur. 245.

(*c*) See *Arnold* v. *Mayor, &c., of Gravesend*, 2 K. & J. 574, 25 L. J. (Ch.) 776.

(*d*) 3 H. & N. 572, 27 L. J. (Ex.) 495; *Pallister* v. *Mayor, &c., of Gravesend*, 9 C. B. 774.

corporation, and that although the money had not been borrowed for any of the purposes set forth in section 92.

Fifthly.—Other Public Bodies.

Courts will not interfere if public body keep within its authority.

It is the same with the many corporate and quasi-corporate bodies and associations, constituted for the carrying out of public works or the supervision of matters of public necessity. If they keep within their authority the Courts will not interfere, even though they may not be proceeding in such a way as to meet with thorough approval (*e*).

Misapplication of corporate funds.

But if they exceed or abuse their powers, or are acting with mala fides, or are devoting the funds at their disposal to wrong purposes, the Court of Chancery will put a stop to the same. This occurs most frequently in respect of the application of rates or tolls raised by such bodies. These, as will be seen (*f*), cannot be applied to the support of application to Parliament for further powers, nor in the payment of legal expenses not incurred strictly in the discharge of the actual and unavoidable duties of their office. So, where different classes of rates

(*e*) *Tinkler* v. *Wandsworth District Board of Health*, 2 D. G. & J. 261; *Austin* v. *Lambeth Vestry*, 27 L. J. (Ch.) 388. See *Weardale District Highway Board* v. *Bainbridge*, L. R. 1 Q. B. 396; *Bruton Turnpike Trustees* v. *Wincanton Highway Board*, L. R. 5 Q. B. 437.

(*f*) Post, Part ii. Chap. vi. section 2.

are levied, and there is a deficiency in one class, money cannot be taken from any other class to supply this deficiency (*g*).

And generally, as with all other corporations, their powers, duties, and liabilities will be determined directly or impliedly by the statutes and other instruments appointing them. The jurisdiction (*h*), the rights (*i*), and the responsibilities (*j*), thereby vested in or imposed upon them, will belong to them, but no others. For the due and careful carrying out of their authorities they must provide: and in default of this—if anything be done, directed, or concurred in negligently by them, or through negligence omitted to be so done or directed—they will be answerable in damages for the injury resulting (*k*), even though they have no funds

(*g*) *Att.-Gen.* v. *Daniel*, 9 L. J. (Ch.) 394; *Rex* v. *Dursley*, 5 Ad. & E. 10. Compare *Att.-Gen.* v. *Church*, 2 H. & M. 697; *Harrison* v. *Stickney*, 2 H. Lds. 108. See also the cases cited in the last note, and *Local Board of Health of Chatham, Extra*, v. *Rochester Pavement, &c., Commissioners*, L. R. 1 Q. B. 24.

(*h*) *Barber* v. *Nottingham, &c., Canal Company*, 15 C. B. N. S. 726, 33 L. J. (C. P.) 193. Compare *Kennet and Avon Navigation Company* v. *Witherington*, 18 Q. B. 531, 21 L. J. (Q. B.) 419.

(*i*) See *Vivian* v. *Mersey Dock and Harbour Board*, L. R. 5 C. P. 19.

(*j*) See *Bayley* v. *Wolverhampton Waterworks Company*, 30 L. J. (Ex.) 57, and cases in following notes; and compare *Reg.* v. *Woods and Forests*, 19 L. J. (Q. B.) 497.

(*k*) *Mersey Dock and Harbour Trustees* v. *Gibbs*, L. R. 1 H. Lds. 93, 35 L. J. (Ex) 225; *Romney Marsh* v. *Corporation of the Trinity House*, L. R. 5 Ex. 204; *Ohrby* v. *Ryde Commissioners*, 5 B. & S.

to pay such damages (*l*) ; and even though they are purely a public body, and deriving personally no profit or advantage whatever from their position (*m*).

A few general remarks are all that can be added here by way of conclusion to the statement contained in this chapter. First, the doctrine of Ultra Vires applies to "special" corporations only. Secondly, the rights and privileges, the powers and duties of such corporations are given to them, or imposed upon them, solely and entirely, by their constating instruments, either expressly or by implication therefrom. Thirdly, apart from the fact as will be seen hereafter (Part IV. Chapter I.), that the Courts refuse to adjudicate in matters of purely internal administration, the Legislature has by statute provided for the determination by an extra-judicial tribunal of disputes arising in connection with the affairs of certain corporations. Fourthly, if there are any "ordinary" corporations possessed like physical individuals of full power over their rights and property, and in respect of their dealings therewith exempt from the control of the Courts, yet, whenever a trust has been created, the Court of Chancery will compel

General remarks.

743, 33 L. J. (Q. B.) 296; *Coe* v. *Wise*, 5 B. & S. 440, 33 L. J. (Q. B.) 281 ; *Clothier* v. *Webster*, 12 C. B. N. S. 790, 31 L. J. (C. P.) 216. Compare *Holliday* v. *St. Leonards, Shoreditch*, 11 C. B. N. S. 192, 8 Jur. (N. S.) 79.

(*l*) *Bush* v. *Martin*, 2 H. & C. 311, 33 L. J. (Ex.) 17 ; and see the cases cited in the last note.

(*m*) See the cases cited in the last two notes, especially *Mersey Dock and Harbour Trustees* v. *Gibbs*.

the due observance and carrying out of such trust. Fifthly, if there are any such "ordinary" corporations, at least, municipal corporations are not so since 5 & 6 Will. IV. c. 76; nor are any of the boards of commissioners and other such authorities which are constituted for public purposes; nor apparently are any charitable corporations—if they do not exist for particular and special purposes it would appear that they all import a trust.

CHAPTER III.

THE BUSINESS WHICH TRADING CORPORATIONS MAY TRANSACT.

Corporations can engage on certain transactions only.

It follows from the general statement already given of the purport and effect of the doctrine of Ultra Vires, that corporations can legally become concerned in certain transactions only. The purposes—commercial or otherwise—for the carrying on of which corporations are brought into being are defined by their constating instruments, and special circumstances and equities apart, they cannot bind the corporate property by engaging in matters alien to these purposes. To determine such purposes the language of these instruments must be carefully considered, for in construing documents, it is the exact wording, and not the possible intentions of their framers, that the Courts have to follow. Herein lies the vast distinction between statute and judiciary interpretation. In estimating the effect of the judgment in any particular case, it is not the mere expressions employed that give it weight, but the *ratio decidendi*—the rule to be deduced from the decision taking into account surrounding facts. From a statute, however, no

particular facts have to be eliminated. It constitutes a code, and enunciates principles for the determination of every point that comes within its scope. Its authors must be credited with the possession of all necessary foresight and discrimination, and with an average knowledge of the due value to be given to the legal language they employ. If their labours point to the creation of a corporation, all the capacities and attributes of the same when in being, will, as already seen, depend upon the *ipsissima verba* of which they have made use, and the meaning attached to them by the Courts, and not upon the powers they had intended to give it, or their interpretation of their own language. From this difference between originators' intention and subsequent legal construction, have undoubtedly arisen many of the cases relating to Ultra Vires, while the wonderful diversity of construction, attached by various judicial luminaries to the same wording, has contributed not a little to render still more obscure a subject in itself sufficiently perplexing.

It must then be carefully borne in mind, that questions of Ultra Vires relating to the express powers of corporations will have to be decided upon a consideration of the exact language used in the constating instruments, while such as concern their implied powers will be determined by the *ratio decidendi* to be gathered from an examination of numerous conflicting decisions and dicta.

Moreover, it would seem, as has already been pointed out, that the doctrine of Ultra Vires will be applied more strictly to trading than to non-trading corporations, though perhaps there is no real ground for drawing such a distinction; but in every case there is a limit to the acts, the doing of which will render the funds of the corporation liable for the consequences resulting therefrom. What are these acts? What is the business which may be undertaken by a corporation will be determined in each particular instance by a reference to, and an examination of, the powers actually given to a corporation read in connection with the business or other purposes for which it has been instituted. That it may carry on such primary business is a truism — the difficulty is in determining what other secondary matters, incidental to such primary business and necessary for the commodious and profitable carrying on of the same, are within the scope of its constitution.

SECTION I.—THE BUSINESS OF TRADING CORPORATIONS.

Subject to these remarks, the following general rules relating to the business of trading corporations will probably be found accurate :—

I. A corporation may transact all such matters as, being ancillary to its primary business,

are transacted by ordinary individuals under similar circumstances.

What transactions may be entered into by corporations.

This rule is but an enunciation in words of the fact that corporations must have, and have impliedly, the authority given them to make arrangements for the due and proper conduct of their undertakings. Thus railway companies may put up refreshment rooms (*a*), guardians of the poor may enter into contracts for the erection of water-closets at the workhouses under their supervision (*b*), and the like. So all corporations, trading or non-trading, may engage and discharge, without the formality of a deed, their ordinary servants and workmen.

II. A corporation may employ the corporate property, when it would otherwise be lying idle and profitless, for such purposes as are not alien to its primary business.

Were it not for this principle, a corporation would be unable to utilise its waste lands, or to invest its unemployed capital, or even to place it at deposit account. But the principle extends to circumstances different from and more important than these. A corporation takes or acquires, either from

(*a*) *Flanagan* v. *Great Western Railway Company*, L. R. 7 Eq. 116.

(*b*) *Clarke* v. *Cuckfield Union*, 21 L. J. (Q. B.) 349, 1 Bail. C. C. 81.

necessity or by miscalculating the extent of its future business, or by the result of subsequent occurrences it finds itself in possession of, more extensive premises, or a larger stock than it can itself profitably employ—what is it to do with the excess ?

Forrest v. *Manchester Railway Company* (c) is a case in point. The defendants had authority to keep steam vessels for the purposes of a ferry, and it was decided that they could use these vessels when otherwise unemployed for excursion trips. The Master of the Rolls took the ground that it was not for the benefit of the company that its property or capital should remain idle ; that the steamboats having been purchased really for the purposes of the ferry, and not of the excursions, the company were justified in utilising them in the way they had done. Forrest v. Manchester Rail. Co.

III. A corporation may temporarily let off or transfer to third parties such part of its estates or assets as it is unable, from special circumstances, to make an immediate advantageous use of.

We have just seen that the corporation may itself utilise its surplus stock, when lying idle, in ways and modes not perhaps exactly and literally within

(c) 30 Beav. 40.

the purview of its charter. It may do more—it may assign or lease for a time this surplus to third parties. The limits of the principle, and the extent to which it reaches, are vague and not to be marked with any degree of precision; but the principle itself as a principle is established beyond dispute.

Simpson v. Westminster Hotel Co.

It is the ratio of the decision in *Simpson* v. *Westminster Palace Hotel Company, Limited* (*d*). The defendant company was established for the purpose of building an hotel, "the carrying on the usual business of an hotel and tavern therein, and the doing all such things as are incidental or otherwise conducive to the attainment of the above objects." The company built an enormous hotel, containing 317 rooms. Before it was opened, the directors, with the assent of a majority of the shareholders, agreed to let a portion of it, containing 169 rooms, unfurnished, to the India Board for offices, at the rent of £6000 a year for the term of three years, with an option to the Board to extend it to five years. The directors also agreed to make alterations for that purpose, which it was estimated would cost about £2000, and cause a further expense in restoring the rooms to a state fit for hotel purposes.

It was established that this agreement was not entered into with a view to the permanent employment of part of the premises for purposes not authorised by the constitution of the company, but

(*d*) 2 D. G. F. & J. 141, 29 L. J. (Ch.) 561; affirmed 8 H. Lds. C. 712.

was adopted as an interim measure, because the directors believed that the whole of so large a building could not safely and advantageously be opened as an hotel at first, and because they had not capital to open the whole at once. It was held by Knight-Bruce, L. J., affirming the decision of Page Wood, V.-C., that the agreement was not Ultra Vires, and that the Court ought not to interfere to restrain its being carried into effect.

Horsey's Claim.

And in the very similar case of *Horsey's Claim, re London and Colonial Company* (*e*), where the company had taken on lease a house too large for their own needs, and had let off the portion which they did not require, Page Wood, V.-C., said the point was: "Did they [*i.e.*, the company] take this house for a speculation in order to let it again, or for their own purposes? That is the real question, and it can be answered only in one way. I do not therefore think the taking of this house was Ultra Vires." He consequently admitted the landlord to claim as a creditor in the winding up of the company.

Statutory provision is often made for the sale by corporations of the superfluous lands acquired by them under their compulsory powers, and being in excess of what is needed for their undertaking (*f*), and in such cases the right of pre-emption is generally reserved to the original owner (*g*).

(*e*) L. R. 5 Eq. 561; 37 L. J. (Ch.) 393.

(*f*) See 8 & 9 Vict. c. 18, s. 128.

(*g*) See *London and South-Western Railway Company* v.

IV. A corporation may carry on a part only of its business.

Partial abandonment of the objects of a corporation.

It sometimes happens after a corporation has been created, that certain branches of its undertaking turn out as profitless as the others are remunerative. Under such circumstances, if the different branches can be separated, the corporation may give up the former, and devote all its attention to the latter. It is no abandonment of the objects of a company if, when established, to accomplish three or four it abandons one, and carries on the others, provided such abandonment does not alter the fundamental principle of the company. *The Norwegian Titanic Iron Company, Limited* (*h*), was formed for the purchase of certain collieries in England, and iron mines in Norway, in order to bring over the iron ore from Norway and smelt it in England. After a time it was deemed advisable to sell the collieries and to retain the mines. One of the shareholders thereupon presented a petition to wind up the company, on the ground that it had failed to realize its objects; but the Master of the Rolls considered that the company were justified in abandoning the collieries, and he therefore dismissed the petition with costs.

Norwegian Titanic Iron Co.

Blackmore, L. R. 4 H. Lds. 610; *Highgate Archway Company* v. *Jeakes*, L. R. 12 Eq. 9; and the many similar decisions.

(*h*) 35 Beav. 223. Compare *Bank of Switzerland* v. *Bank of Turkey*, 5 L. T. N. S. 549.

V. A corporation may, in the furtherance of its aims, enter into contracts and perform and concur in acts alien to its own undertaking and *dehors* its express powers, provided such contracts and acts are not directly forbidden, are essential to its existence, and could not have been foreseen and provided for at its inception.

The principle is circumscribed within narrow limits, and it holds only when applied with great care, and to unexpected and material circumstances.

In *Wilson* v. *Furness Railway Company* (*i*) the defendants were decreed specifically to perform an engagement entered into by them to construct a wharf and carriage road, upon certain terms, for the benefit of third parties. The Act incorporating the defendant company subjected them to the necessity of obtaining approval of the Admiralty to certain works to be done by them. In consideration of certain landowners obtaining from the Admiralty a waiver of this obligation, they agreed to make the wharf and road mentioned, but omitted to do so; and upon a bill being filed, demurred on the ground of Ultra Vires, the said agreement being in no way expressly authorised by their Act; but the demurrer was overruled. Wilson *v.* Furness Rail. Co.

(*i*) L. R. 9 Eq. 28.

VI. A corporation may, in carrying on its business, enter into all the usual arrangements with its customers and other parties, that private persons enter into in the ordinary course of managing a property or conducting a trade or other undertaking.

The business of a corporation can be conducted only in the manner in which other individuals are accustomed to look after and conduct their own, and what is customary with the latter will generally be legal and allowable with the former. Thus a banking company may allow a customer to overdraw his account, and the Court will neither restrain this at the suit of a shareholder, nor subsequently on losses thereby occurring hold the directors, who are guiltless of fraud, liable for the same, even though the defaulting customer be himself a director (*j*).

Company may deal liberally with its customers.

A company in transacting its legitimate business, may deal liberally with its customers and waive the benefit of stipulations introduced for its own benefit when the enforcement of the same would in the end be detrimental to itself, and to the profitable carrying on of its business. Thus, where the directors of an insurance company had offered to pay losses caused by a gunpowder explosion, although their policies contained an express exception of such

(*j*) *Turquand* v. *Marshall*, L. R. 4 Ch. 376, 38 L. J. (Ch.) 639.

losses, and they at the same time did not admit any legal liability to do so, on a bill by a shareholder to restrain the payments, it appearing on the evidence that it was usual and advantageous for companies to make such payments, although not strictly bound to do so, Page Wood, V.-C., held, that this was a mode of carrying on the business with which the Court could not interfere; and the bill was dismissed with costs. "This is not a case of applying funds to purposes wholly foreign to the objects of the company, but it is an expenditure designed to secure to the company the largest possible amount of profits in its own proper business" (*k*).

VII. Corporations endued with special powers, will have, in addition, an implied authority to do such acts as may be necessary for the full and complete utilisation of such special powers.

Corporations are generally liable on their torts just as private individuals.

Corporations, as will be seen hereafter, are, as regards most varieties of torts, on a very similar footing to that of ordinary citizens, acts which are wrongful in the case of the latter being equally so if done by the former. But many corporations have given to them compulsory powers for entering upon land and the like. Proceedings carried on by them in pursuance of such powers are legal, and persons

(*k*) *Taunton* v. *Royal Insurance Company*, 2 H. & M. 135.

aggrieved thereby will be ousted of their common law remedy, and, if the statutes conferring the powers have not indicated a method of redress, will be without remedy at all (*l*). Over and above the powers so expressly bestowed, corporations have, under some circumstances, impliedly the privilege to carry on other works, and to engage in other matters detrimental to their neighbours, without exposing themselves to legal proceedings for the same. The principle unquestionably exists, but how far it extends and what the wrongs are which it legalises cannot be predicated with any degree of certainty. The recent decision in *Hammersmith and City Railway Company* v. *Brand* (*m*), well illustrates both the principle itself and the difficulties incidental to its application. Property of the original plaintiff (Brand), lying near to, but none of which was actually taken by the Railway Company, was seriously affected by the traffic on the railway after it was opened, and a jury summoned to assess this damage, awarded "for vibration from the use of the railway after construction £272." A special case was then prepared, which stated, *inter alia*, that "It did not appear [*i.e.* at the award] that any structural injury was caused to the house or outbuildings by the construction of the

Hammersmith & City Rail. Co. *v.* Brand.

(*l*) See *Penny* v. *South-Eastern Railway Company*, 7 E. & B. 660, 26 L. J. (Q. B.) 225.

(*m*) L. R. 4 H. Lds. 171; *City of Glasgow Union Railway Company* v. *Hunter*, L. R. 2 Sc. & D. 78.

railway; but it did appear, and it was admitted for the purposes of this case, that, by reason of the working of the railway after it had been opened for traffic, the house and buildings were and would be subjected to vibration, noise, and smoke from passing trains, and were and always would be affected and depreciated and lessened in value thereby:" and the question asked was, "whether the plaintiff was entitled to have compensation for the injury so caused?" The Court of Queen's Bench decided in the negative against the plaintiff's claim; this was reversed by a majority of the Exchequer Chamber; but finally a majority of the House of Lords concurred in and maintained the original decision. They held that neither the Lands Clauses Consolidation Act nor the Railways Clauses Consolidation Act contains any provisions under which a person, whose land has not been taken for the purposes of a railway, can recover statutory compensation from the railway company in respect of damage or annoyance arising from vibration occasioned (without negligence) by the passing of trains, after the railway is brought into use, even though the value of the property has been actually depreciated thereby; and further, that the common law right of action is under such circumstances taken away. Lord Chelmsford observed, "We do not expect to find words in an Act of Parliament expressly authorizing an individual or a company to commit a nuisance, or to do damage to a neigh-

bour. The 86th section [*i.e.*, of 8 & 9 Vict. c. 20] gives power to the company to use and employ locomotive engines, and if such locomotives cannot possibly be used without occasioning vibration and consequent injury to neighbouring houses, upon this principle of law that '*Cuicumque aliquis quid concedit, concedere videtur et id sine quo res ipsa esse non potuit,*' it must be taken that power is given to cause that vibration without liability to an action. The right given to use the locomotive would otherwise be nugatory, as each time a train passed upon the line and shook the houses in t h neighbourhood, actions must be brought by their owners, which would soon put a stop to the use of the railway."

Attorney-General *v.* Cambridge Consumers' Gas Co.

Another case, coming under this principle, is that of the *Att.-Gen.* v. *Cambridge Consumers' Gas Company* (*n*). A local Act of Parliament passed in 1788, vested the property of all the streets of Cambridge in Commissioners, and empowered the Commissioners from time to time to cause the pavements to be taken up and the streets to be paved, relaid or altered, and to cause the streets to be lighted, and to contract with any persons for lighting the streets, and gave to the persons to be appointed by them for these purposes full power to do the same. The Commissioners authorized a gas company to take up the streets. Upon motion for an injunction to restrain the company, it was held, that although

(*n*) L. R. 6 Eq. 282.

for the purpose of lighting the streets in the only methods originally known it was not necessary to break up the streets, the Act enabled the Commissioners to adopt every improved method of lighting, and consequently to break up, and authorize other persons to break up, the streets for the purpose of lighting them with gas.

SECTION II.—THE EXTENSION AND DEVELOPMENT OF THE BUSINESS OF CORPORATIONS.

Corporations cannot render corporate assets liable for transactions not coming within the scope of their constitution.

Trading corporations can enter into no business, and corporations generally can engage in no transactions, so as to render the corporate assets liable for the results thereof, other than those coming within the scope of their constitution. This is, indeed, but a restatement of the doctrine of Ultra Vires, but it is or has been not unseldom forgotten or misunderstood, and attempts have from time to time been made to break through it, or counteract its operations. Such attempts, whether made openly or covertly, will always, on the application of parties affected thereby, be restrained by the Court; and even if not restrained—if by the indolence or fraud of the parties concerned in them they are persisted in—yet they will not, save under special circumstances (see *post*, Part IV., Chapter III.), entail upon the corporation itself any responsibility for the consequences.

I. A corporation can neither engage in any undertakings nor render its property liable by being engaged in any undertakings other than those for which it has been expressly created.

Attorney-General *v.* Great Northern Rail. Co.

This is well shown by the decision in *Att.-Gen.* v. *Great Northern Railway Company* (*o*), where upon an information at the suit of the Attorney-General as representing the public, Kindersley, V.-C., restrained the defendants from carrying on, without special authorisation in their Act, a trade in coal. He observed: "Is such an act an illegal act? Now here again it appears to me that the case is hardly arguable on this point. . . . Although the Act of Parliament which constitutes and incorporates the company, contains no prohibition in express terms against engaging in any other business except that of making and maintaining and using the railway, there is implied in every such Act of Parliament a prohibition or (looking at it as a contract) a contract against ever engaging in any other business than that of a railway company."

Natusch *v.* Irving.

Another and much earlier case equally well-known, is that of *Natusch* v. *Irving* (*p*). The plaintiff was one of the original subscribers to a company formed for granting fire and life assur-

(*o*) 6 Jur. N. S. 1006. Compare *National Manure Company* v. *Donald*, 4 H. & N. 8, 28 L. J. (Ex.) 185.

(*p*) Gow on "Partn." App. 398.

ances; shortly after its incorporation, the Act of 6 Geo. I. c. 18, was repealed, which had prohibited companies from engaging in marine insurance, and the company then proposed to grant marine insurance and issued advertisements to that effect. To this the plaintiff objected, and he was told he might have his subscription back, and a policy which he had effected in the company cancelled and the premium returned. These offers he refused, and after some further negotiations, filed his bill against the company to restrain the issue of policies of marine insurance. Lord Eldon granted the injunction, being fully of opinion that the plaintiff was entitled thereto.

Not only may corporations be restrained beforehand from entering into engagements of this nature, but also such engagements when entered into are not obligatory upon or enforceable against the corporation; and securities given and contracts made in consideration of them are invalid. *Balfour* v. *Ernest* (*q*) is the leading authority upon this point. The directors of a joint-stock insurance company, registered under 7 & 8 Vict. c. 110, who were authorised by the deed of settlement, to draw bills on account of the company only when they were so drawn for the purposes of the company, drew a bill on behalf of the company in payment of a claim

Balfour *v.* Ernest.

(*q*) 5 C. B. (N. S.) 601, 28 L. J. (C. P.) 170. Compare *Ridley* v. *Plymouth and Stonehouse Grinding and Baking Company*, 2 Ex. 711, 17 L. J. (Ex.) 252.

due to the plaintiff on a policy effected by him with another company, the business of which was attempted to be assigned to the first-mentioned company by a deed of amalgamation of the two companies. The amalgamation failed, and the deed of amalgamation was illegal and void, but the bill was given to and received by the plaintiff upon the supposition that such deed was valid. The issuing of the said bill was no part of the ordinary business of the first-mentioned company. It was held, that the plaintiff could not recover against such company on the bill, as the directors had no authority to draw it, and the plaintiff (being taken to have had knowledge of the contents of the deed of settlement) must be considered to have had notice of the want of such authority.

This was a case at common law, but the decision is the same in chancery, at least until the corporation is held—if it ever can be held—bound by acquiescence. Thus, in *Re the Phœnix Life Assurance Company, Burges and Stock's Case* (*r*), the company had been established for granting assurances upon lives, and, at an extraordinary general meeting, it was resolved to extend the business to marine insurance. A supplemental deed, professing to confirm this extension of business, was executed by several of the shareholders; and in the annual return to the Joint Stock Company's

Burges and Stock's Case.

(*r*) 2 J. & H. 441, 31 L. J. (Ch). 749; *Natusch* v. *Irving*, Gow on Partn. App. 398.

Registry Office, the extension was notified. The reports of the directors several times alluded to the extension, and on one occasion such a report accompanied the dividend warrant. The business, as extended, was carried on for a year and a half, when the company was ordered to be wound up. The Vice-Chancellor, *Page Wood*, decided that these circumstances were not sufficient to bind the general body of shareholders by acquiescence to the extension which could be effected only by a new deed, executed by all. He said: "I need not refer to the cases that show that you cannot bind a single dissentient shareholder to any purpose which is not the original purpose of the company; and that if there was a single dissentient shareholder, it would be quite sufficient for the official manager appearing for all the shareholders to say that no such claim could be supported against the company."

II. As corporations may not engage in business other than that for which they have been created, so also, if they acquire lands, easements, or other rights to be devoted to certain specified purposes, they cannot employ such in or towards the furtherance of other purposes.

Lands and rights acquired for special purposes.

Not unseldom corporations obtain, compulsorily or otherwise, rights more or less limited, either of property or of the user of property, in order to enable

them the better to compass their aims. In course of time, from change of circumstances, the corporation becomes desirous of employing such rights in a manner different from that originally contemplated. It would appear that it cannot do so—that even though it acquires the absolute property in land, yet, if it acquired such land for certain purposes, its user thereof is restricted to those purposes. On this point, *Bostock* v. *North Staffordshire Railway Company* (*s*) is a leading case, and the judgments delivered in it merit very careful attention. By various acts a company—represented at the time of the suit by the defendants—had been incorporated for making an inland navigation, and had compulsorily acquired certain lands in fee simple, "to and for the use of the navigation, but to be for no other use or purpose whatsoever." The acts reserved to the grantor of the lands purchased, his heirs, &c., the minerals, the right of fishing, and the right to use pleasure boats over the whole canal and reservoir. A special case having been stated by the Court of Chancery for the opinion of Queen's Bench, the questions in which were, first, whether the defendants could lawfully let out boats for hire on the reservoir? and secondly, whether they could lawfully use the reservoir for any other purpose than for supplying

Bostock *v.* North Staffordshire Rail. Co.

(*s*) 4 E. & B. 798; 24 L. J. (Q. B.) 225. Compare *National Guaranteed Manure Company* v. *Donald*, 4 H. & N. 8, 28 L. J. (Ex.) 185; and *Badger* v. *South Yorkshire Railway Company*, 1 E. & E. 347, 28 L. J. (Q. B.) 118.

the canal with water? It was held by Lord Campbell, C. J., that, under the statutes, there was not a prohibition against the defendants using the reservoir for any other purpose than that of feeding the canal, but that all uses of it, whereby the grantor of the land, his heirs, &c., were prejudiced, were unlawful. Coleridge and Wightman, JJ., decided that the defendants could not lawfully let out boats for hire upon the reservoir, or use it for any other purposes of profit but those contemplated by the statutes, since the land was vested in them for the use of the navigation only [*i.e.*, any other use would be Ultra Vires in the strict sense]; and also because such use of the reservoir would derogate from the rights of adjacent landholders; and, lastly, because it involved a disposition of the corporate funds to a purpose foreign to the object of the incorporation [*i.e.*, be Ultra Vires in the secondary sense; but this point was immaterial, since plaintiff was not a shareholder]. Erle, J., said that "the company took the fee with all usual incidents, and also the superadded duty both of using it for the purpose of navigation, and of not using it for any other purpose inconsistent with or tending to defeat that purpose; and that so long as the company perform this superadded duty, they may exercise all rights of ownership consistent with such performance, and so may use pleasure boats thereon which do not impede the performance of that duty."

It will be seen that a majority of the Court decided that the letting boats for hire was *quâ* the plaintiff—she being the representative of the grantor—unlawful (*t*); but that upon the question of Ultra Vires the judges were equally divided.

Where land had been sold to a railway company, one of the sections of whose Act provided that the whole of the land so sold should be "appropriated to and used solely for the purposes of the said railway and the buildings connected therewith," and the company erected on this land a building, which was used as a custom-house, for the examination of the luggage of persons coming from the continent, of whom a portion only went on by the railway. Turner, V.-C., considered this to be no infringement of the above provision (*u*). The building was used principally and primarily for a "purpose connected with the railway," and the Vice-Chancellor thought that the employment of it for other purposes not radically different from or inconsistent with this one, constituted no breach of the statute.

(*t*) Accordingly, *Stuart*, V.-C., granted a perpetual injunction to restrain such letting, 25 L. J. (Ch.) 325.

(*u*) *Warden, &c., of Dover Harbour* v. *South-Eastern Railway Company*, 9 Ha. 489. Compare *Astley* v. *Manchester, Sheffield and Lincolnshire Railway Company*, 2 D. G. & J. 463, and *East & West India Docks, &c., Railway* v. *Dawes*, 11 Ha. 363.

III. Corporations may transact, in addition to their main undertaking, all such subordinate and connected matters as are, if not essential, at least very convenient to the due prosecution of the former.

Though corporations may not undertake new business foreign to their primary work, yet, under many circumstances, they are in a manner necessitated to engage in business which is not within the mere letter of their constitution. Thus, railway companies will be permitted to erect refreshment rooms (*v*), or bookstalls (*w*), and to adopt other similar measures for both providing for the comfort of their customers and adding to their own receipts.

How far corporations may engage in matters not primarily contemplated by their founders.

IV. Corporations may so far develop and extend their operations, as to engage in matters not primarily contemplated by their founders, provided these matters come fairly within their scope, and provided also that in so developing and extending their undertaking, they employ direct and not indirect means.

Corporations may extend their sphere of business; but there are limits beyond which they cannot go.

(*v*) See *Rigby* v. *Great Western Railway Company*, 4 R. C. 175, 491; *Flanagan* v. *Great Western Railway Company*, L. R. 7 Eq. 116.

(*w*) *Holmes* v. *Eastern Counties Railway Company*, 3 K. & J. 375.

These limits are vague and obscure, and the above statement is only an attempt to indicate them roughly. The Master of the Rolls, in *Gregory* v. *Patchett* (*x*), in reference to this subject, thus observed: "The difficulty in this case is, to define the limits of deviation which will justify the interference of this Court. It is very easy to point out many cases in which the right to interfere is unquestionable, as if the directors of a railway company should embark the funds of the company in carrying on a brewery or a steamboat company, or speculate in the purchase or sale of stock; or where, as in *Beman* v. *Rufford* (*xx*), the directors proposed to transfer the whole business to another company." In a subsequent case his lordship referred at greater length to the same question (*y*). "As an illustration of the manner by which a railway company might legitimately embark in projects apparently inconsistent with its means and objects, it was suggested that coals might be necessary for the purpose of the railway, and that thereupon the company might work a coal mine for that purpose, if, by so doing, it could obtain coals cheaper than by the purchase of them, and that by so doing, it would be fair and proper and not really inconsistent with the objects of the company; and that if it did work a colliery for this purpose, it would be foolish to prevent the

(*x*) 33 Beav. 595, 606.
(*xx*) 1 Sim. N. S. 550.
(*y*) *Lyde* v. *Eastern Bengal Railway Company*, 36 Beav. 10, 16.

company from obtaining a profit by the sale of such coals as were raised and not required for the company. The answer to this argument appears to me to depend upon the facts of each particular case. If, in truth, the real object of the colliery was to supply the railway with cheaper coals, it would be proper to allow the accidental additional profit of selling coals to others; but if the principal object of the colliery was to undertake the business of raising and selling coals, then it would be a perversion of the funds of the company, and a scheme which ought not to be permitted, however profitable it might appear to be. The prohibition or permission to carry on this trade would depend on the conclusions which the Court drew from the evidence. The same observations apply here; if the use of the boat is really to assist the traffic on the existing railway, it is lawful and proper; but if the object be to extend the traffic to places beyond the railway, which the railway is never intended to reach, then it is illegal and beyond the powers of the company."

Company may employ all the usual means for the promotion of its legitimate business;

These expressions of Lord Romilly are so lucid and explicit as to need nothing additional by way of explanation. Whatever be a company's legitimate business, the company may foster it by all the usual means; but it may not go beyond this; it may not, under the pretence of fostering, entangle itself in proceedings with which it has no legitimate concern.

but such means must be direct.

In the next place the Courts have, however, determined that such means shall be direct, not indirect; *i.e.*, that a company shall not enter into engagements, as the rendering assistance to other undertakings, from which it anticipates a benefit to itself, not immediately, but mediately, by reaction, as it were, from the success of the operations thus encouraged—all such proceedings inevitably tending to breaches of duty on part of the directors, to abandonment of its peculiar objects on part of the corporation. Such is the rule of law, but great difficulties arise in its application.

In *Colman* v. *Eastern Railway Company* (*z*), the defendants were, at suit of a shareholder, restrained from guaranteeing the dividends of a steam-packet company, to be started, in connection with their line, from Harwich, and from which they expected great profit would result to the railway.

The limitation involved in this decision applies, however, only where the transaction to be assisted or engaged in is in reality and fact something beyond the corporation's primary undertaking. Consequently, where a company, whose railway terminated at Milford Haven, entered into a contract with the defendant for steam vessels to run between that place and Ireland, it was held that the contract was not Ultra Vires, and that the

South Wales Rail. Co. *v.* Redmond.

(*z*) 10 Beav. 1, 16 L. J. (Ch.) 73; *Cohen* v. *Wilkinson*, 12 Beav. 134, 1 Mac. & G. 486, 18 L. J. (Ch.) 378, 411. Compare *Logan* v. *Courtown*, 13 Beav. 22.

defendant, having provided an unseaworthy vessel, was liable in damages. Erle, C. J., thus distinguished this from the last case: "So far from a contract by this company to facilitate the forwarding of passengers and goods to Ireland being illegal, I rather gather that the legislature contemplated and intended that a railway terminating at Milford Haven should forward traffic to and from Ireland, and therefore this contract would be entirely within the scope and object of the companies in corporation and extension" (*a*).

It is not Ultra Vires of a railway company to contract to carry beyond their own line. In *Wilby* v. *West Cornwall Railway Company* (*aa*), this point was raised for the defendants, though not pressed; but Watson, B., said that such a contract was not Ultra Vires, whether the extra distance were by sea or land; and the legality of such contracts has since been expressly decided (*b*).

V. A corporation may extend its undertaking so as to include within its operations business not perhaps contemplated by its originators, but become essential to its existence,

(*a*) *South Wales Railway Company* v. *Redmond*, 10 C.B. (N. S.) 675.

(*aa*) 2 H. & N. 703.

(*b*) See *Blake* v. *Great Western Railway Company*, 7 H. & N. 987, 31 L. J. (Ex.) 346; *Coxon* v. *Great Western Railway Company*, 5 H. & N. 274, 29 L. J. (Ex.) 165; *Le Conteur* v. *London and South Western Railway Company*, L. R. 1 Q. B. 54.

and growing out of its primary and special business.

This rule seems to be established, but it certainly conflicts with many other of the principles of Ultra Vires, and must be applied with great care, and under particular circumstances only. The memorandum of association of the *British and Foreign Cork Company* stated that the objects for which the company was established were "the purchasing and selling of cork, and also the cutting of cork by the improved machinery for which letters patent were granted to R. B. C." It was determined not to be Ultra Vires for the company to purchase the patent (*c*).

Re British and Foreign Cork Company.

This decision was acquiesced in, but it will probably be considered to have somewhat restricted the doctrine. There is certainly a broad distinction between dealing in cork and cutting cork and purchasing the patent of a cork-cutting machine.

Corporation may deal in the shares of other corporations.

VI. A corporation may deal in the shares of other corporations, without express power so to do, provided the nature of its business be such as to render such transactions conducive to its prosperity.

Till quite recently it was doubted whether one

(*c*) *Re British & Foreign Cork Company, Leifchild's Case*, L. R. 1 Eq. 231. Compare *Gleadow* v. *Hull Glass Company*, 19 L. J. (Ch.) 44.

company could be a shareholder in another; indeed, the weight of authority was in the negative. In *Great Western Railway Company* v. *Metropolitan Railway Company* (*d*), the facts were: The Great Western Railway had been authorised, by Act of Parliament, to hold 17,500 shares in the Metropolitan Railway, and had placed these in the hands of nominees; and it was provided that, on an extension of the Metropolitan Railway, additional shares should be offered to the original shareholders. An extension was made and new shares issued. The Great Western Railway Company claimed its proportion of these. Page Wood, V.-C., decided that the Great Western Railway was not authorised to take, &c., nor claim these; but, on appeal, it was held that they might take, though perhaps not hold, such shares; and therefore a demurrer to their bill was overruled, reserving the benefit for the hearing.

Great Western Rail. Co. *v.* Metropolitan Rail. Co.

In subsequent cases the possibility of corporations possessing such a power impliedly and without express provision has been fully admitted. It was so admitted by Lord Cairns, L. J., in *Re Barned's Bank, ex parte the Contract Corporation* (*e*), and also most unreservedly by Selwyn, L. J., in *Re Asiatic Banking Corporation, Royal Bank of India's Case* (*f*). "As to the capacity of a trading

(*d*) 32 L.J. (Ch.) 382, 9 Jur. (N. S.) 562.]

(*e*) L. R. 3 Ch. 105.

(*f*) L. R. 4 Ch. 252, 257. Compare *Re Asiatic Banking Company*, L. R. 7 Eq. 91.

corporation to accept shares in another trading corporation, it is sufficient for me to say that I entirely agree with the judgment of Lord Cairns, in the case of *Barned's Banking Company*, viz., that there is not, either by the common or statute law, anything to prohibit one trading corporation from taking or accepting shares in another trading corporation. There may of course be circumstances which prohibit or render it improper for a company so to do, having regard to its own constitution, as defined by its memorandum and articles."

Joint Stock Co. v. Brown.

The last sentence contains a qualification—important, indeed, but arising from the general doctrines. Accordingly, in *Joint Stock Company* v. *Brown* (*g*), a case six months later, before James, V.-C., where the directors of a company established for, *inter alia*, "the making advances and procuring loans on, and the investing in, securities," had taken 3000 £10 shares in another company (banking), it was held that the *directors had no power* to take these shares, and that the payment of the deposit (£30,000) was a breach of trust on their part, for which they were to be personally liable. This was the *ratio decidendi;* but the Vice-Chancellor, following Page-Wood, V.-C., before whom the case had also been, considered that the transaction was not an "investment in securities," and consequently was Ultra Vires of the company as constituted by its articles.

(*g*) L. R. 8 Eq. 381.

When a company purchases shares, they are very generally transferred into the name of a trustee for itself. In such case the trustee is, under the Companies' Acts, the person immediately liable in respect of the shares so standing in his name. The trustee of a private individual is under the same liability, as well appears by *Chapman and Barker's Case* (*h*). Here a shareholder in a company borrowed money of it, and transferred some shares to a nominee of the company as a security for the loan; and he was placed on the list of contributories without prejudice to any right which he might have to be indemnified by the company. Mortgagees will also similarly be responsible for the payments due on account of the mortgaged shares (*i*). But the trustee is entitled to be recouped by his *cestui que trust* for any payments which he may have to make on account of the same (*j*); and in the event of a winding up he can prove for all his liabilities,

Shares purchased by a company are generally transferred into the name of a trustee for itself. His rights and liabilities.

Mortgagees of shares.

(*h*) L. R. 3 Eq. 361.

(*i*) *Price & Brown's Case*, 3 Dr. & Sm. 146; *Royal Bank of India's Case*, L. R. 4 Ch. 252. Compare *Re Patent Paper Manufacturing Company, Addison's Case*, L. R. 5 Ch. 294, where shares had been issued to Addison as a security for a loan to the company, and on repayment they were transferred to a trustee for the company, but the company having no power to buy its own shares, Addison was eight years later placed on the list. With this case the decision in *Re South Eastern Railway Company's Claim*, L. R. 14 Eq., is scarcely reconcilable. See, as to the non-liability of equitable mortgagees of shares, *Sichell's Case*, L. R. 3 Ch. 119.

(*j*) *Hoare's Case*, 2 J. & H. 229; *Cruse* v. *Paine*, L. R. 4 Ch. 441.

present and future, arising from the said shares, without regard to his indebtedness to the company on other grounds (*k*).

Corporations cannot deal in their own shares.

VII. Corporations cannot, whatever the nature of their business, without an express and very clear power in that behalf, deal in their own shares.

There is a great difference between dealing in the shares of other companies and in its own. The former is ordinary business attended only with the usual risks of ordinary transactions, but the latter tends inevitably to breaches of their duty on the part of the directors, and to fraud and rigging the market on the part of the corporation itself. Consequently, a corporation, to possess such a power, must have it conferred by the plainest and most explicit language in its constating instruments.

Zulueta's Claim.

This limitation was settled by the decision in *Zulueta's Claim, Re London, Hamburgh and Continental Exchange Bank* (*l*). The Memorandum of Association fills half a page in enumerating the various objects of the company, viz., "the making of purchases, investments, sales, or *any other dealings, in any of the above-named* articles or securities;" but in the list are not contained its own shares. Lord

(*k*) *Re National Financial Company, ex parte Oriental Commercial Bank*, L. R. 3 Ch. 791.

(*l*) L. R. 5 Ch. 444.

Justice Giffard accordingly decided that the purchase of these was not within the ordinary scope of the company or could be brought within it by any reasonable construction. "I am clearly of opinion that this transaction is Ultra Vires; and if it is Ultra Vires, it is not a mere voidable transaction, but it is wholly and totally void; it is a transaction which no general meeting could confirm, because it was altogether beyond the power of the company in every sense."

Whether a company having power to deal in its own shares may, without express authority to that effect, hold them in the names of trustees is uncertain. In one case the trustee was held liable, several years after he had parted with the shares, apparently on the ground that he had by accepting the shares held himself out as a shareholder (*m*). In a later case, a dissatisfied shareholder transferred his shares, in accordance with an agreement to that effect, to a nominee of the company, and the Master of the Rolls considered the transaction valid, chiefly on account of the wide powers of contracting and action given to the directors (*n*).

(*m*) *Re Marylebone Banking Company, ex parte Davidson*, 3 D. G. & Sm. 21.

(*n*) *Re National Provincial Marine Insurance Company, Singer's case*, W. N. 1869, p. 206.

Corporations cannot purchase the whole concern of another corporation.

VIII. A corporation may not without express authority in that behalf contained in its constating instruments purchase, or by other means acquire, the whole concern of another corporation.

It might fairly have been thought that such an arrangement would be valid, if only upon the ground that it is the simplest and shortest means of enabling the purchaser to acquire a business or to amplify its own. But from the dicta in *Ernest* v. *Nicholls* (*o*) the reverse would seem to be the case. Here the sale by the directors of a joint stock company registered under 7 & 8 Vict. c. 110, of the whole of its trade, business, goodwill, stock, &c., was, from special circumstances, deemed to be invalid; but in reference "to a special contract to do the very unusual thing of purchasing by one company the trade of another," Lord Wensleydale said: "Such a contract clearly does not bind, unless it is authorised by the deed, and it is made strictly in accordance to its provisions." Similarly, per Cranworth, L.C. "the transaction in question was a purchase by the one company of the good-will and the whole concern of the other. That would, ordinarily speaking, be a

(*o*) 6 H. Lds. 401. Compare *Balfour* v. *Ernest*, 5 C. B. (N. S.) 601, 28 L. J. C. P. 170; and Part III., chapter VIII. on "Amalgamation of Corporations." See also *Anglo-Australian Life & Fire Assurance Company* v. *British Provident Insurance Company*, 3 Giff. 521; 8 Jur. (N.S.) 628, where the defendants were bound by acquiescence.

transaction in which no company would be justified in engaging, because it cannot be said to be within the ordinary scope of one company to purchase the goodwill of another."

If one company cannot purchase the business, goodwill, &c., of another, it is evident that practically this latter cannot sell, apart from any consideration whether theoretically it has or has not the ability to do so.

IX. Though the sale or purchase of a corporation's business or goodwill is invalid, the sale or purchase of the whole of a corporation's goods and chattels is not so.

Sale or purchase of the whole of a corporation's assets is valid.

This was expressly so decided in *Wilson* v. *Miers* (*p*). This was an action against the directors of a joint-stock company for an alleged breach of warranty arising thus: The defendants employed the plaintiffs to find a purchaser for the *whole* of the company's vessels. They (the plaintiffs) accordingly negotiated a sale with one C.; the negotiation, however, went off upon an objection raised by C.'s solicitors, that the directors had no power to sell the whole of the vessels; and, thereupon, the plaintiffs brought their action for their commission, £3000, against the directors, averring

(*p*) 10 C. B. (N. S.) 348; 1 Eq. 318; *Gregory* v. *Patchett*, 33 Beav. 597. Compare *Featherstonhaugh* v. *Lee Moor, &c., Company*, L. R.

an implied warranty on the part of the latter that they had power to sell, although, in fact, they had not. A verdict was entered for the plaintiffs for the full amount claimed, but the Court of Common Pleas set it aside. Erle, C.J., said: "I am of opinion that the plaintiffs fail because as to the contract between the company and C., I think it was a contract binding on the company, being made under the general authority given to the directors to sell their ships. The authority extended to sell some ships, and if some, there is no rule of law limiting it to less than twelve [the whole], or to a part only. The directors have the duty to protect the general interests of the shareholders according to their judgment. If the ships could only be navigated at a loss, they may let, cease to navigate, or lay them up, or, if it would be more profitable, sell."

CHAPTER IV.

THE FINANCIAL AFFAIRS OF CORPORATIONS.

THE first two sections of this chapter have reference more especially to joint-stock companies and other similar corporations which possess a capital or money fund distinct from their lands, goods, and other assets. The remainder of the chapter will probably be found to apply, with proper qualifications, to all corporations.

SECTION I.—CAPITAL AND PROFITS.

I. Corporations having the power to raise a definite capital may begin their business before that capital or any portion thereof is obtained.

Commencing business before the capital is subscribed.

An extra-judicial opinion has been expressed to the effect that before a company is complete so as to be able to commence operations, at least a large portion of its capital must be subscribed. In *Howbeach Coal Company* v. *Teague* (*a*), the actual point

Howbeach Coal Company *v.* Teague.

(*a*) 5 H. & N. 150, 29 L. J. (Ex.) 137. Compare the opinion of Bramwell, B., in *Ornamental Pyrographic Company* v. *Brown*, 2 H. & C. 63, 32 L. J. (Ex.) 193.

decided was that the call sued upon was illegal, the directors making it, not having been properly appointed; but in reference to a second point raised, viz., whether calls could have been made before the whole capital was subscribed, Martin, B., observed: "If a company is to be formed, of which there are to be 240 shares, it cannot be competent for the directors, after only sixty or seventy, not one-third the number of shares have been taken, to insist on the persons who hold this limited number of shares to pay calls." But it is submitted that this is not good law. No statute has fixed a minimum of capital to be subscribed for as a condition precedent to the existence of the company (*b*), nor has any case decided that such is a requirement at Common Law or in Equity. It will generally be found that shareholders have entered into such a contract as precludes them from raising this question (*c*), and the decision in *Ornamental Pyrographic Company.* v. *Brown* (*d*) is also against the above dictum—indeed, Martin, B., abandoned it—it being here held that a

(*b*) In the Act (now repealed) 7 & 8 Vict. c. 113, there was a clause, sect. 5, to this effect — in reference to which see, *Re London & Eastern Banking Corporation, ex parte Longworth's Executors*, 29 L. J. (Ch.) 55.

(*c*) Compare *Norwich & Lowestoft Navigation* v. *Theobald*, M. and M. 151, and *Galvanised Iron Company* v. *Westoby*, 21 L. J. (Ex.) 302, with *Waterford Railway Company* v. *Dalbiac*, 20 L. J. (Ex.) 227, and *London and Continental Assurance Society* v. *Redgrave*, 4 C. B. N. S. 524.

(*d*) *Ubi supra.*

company, whose Memorandum of Association had been duly signed, might, under Section 2, Table B. of 19 & 20 Vict. c. 47, make calls on the shareholders, although all the capital had not been taken up. Pollock, C.B., said :—" If you take shares in a company not guarding against the liability to be called on to pay the calls, you are liable to pay them, unless expressly exempted. The question then arises, Does the Act of Parliament create any exemption ? I can find none. On the contrary, under Table B., the governing body is entitled to make calls the moment the company is established ; and the reason of that is, the subscribers for shares become liable to pay any call upon the shares subscribed for among themselves."

Company commencing operations without adequate capital is evidence of fraud, *semble*.

In *Re Imperial Steam & Household Coal Company* (*e*), Malins, V.-C., considered it fraud for a company to commence its business with only one-fifteenth of its nominal capital subscribed.

Unless, however, either the constituting instruments name the amount of capital to be first obtained (*f*), or intending shareholders protect themselves before taking shares, they cannot repudiate them afterwards on the ground that the capital has not been subscribed (*g*). It seems clear that a company

(*e*) 37 L. J. (Ch.) 517.

(*f*) See *Pierce* v. *Jersey Waterworks Company*, L. R. 5 Ex. 209 ; *North Staffordshire Steel, &c., Company* v. *Ward*, L. B. 3 Ex. 172.

(*g*) *Great Cambrian Mining Company, ex parte Hawkins*, 2 K. & J. 253 ; 25 L. J. (Ch.) 221.

may begin operations immediately after its incorporation, with or without capital, although proceedings so begun without commensurate funds may be strong evidence of fraud on the part either of the company itself or its governing members.

There is a well-known series of cases where persons successfully resisted the attempt to fix them with liability as being members of proposed partnerships or inchoate companies (*h*). But in the first place these and similar cases were decided in accordance with principles of law relating to partnership, and not that relating to corporations. A partnership has no existence apart from those composing it, and the rights and liabilities of each member are determined by the contract which, upon his entry into the partnership, he makes with those already in it, and if any attempt be made to commence or to carry on business in any manner whatever different from that by such contract stipulated for, the member thereby affected is entitled to withdraw. The rights and liabilities of members of corporations as such, are, on the other hand, determined by a reference solely to the documents constituting the company, and do not depend upon contracts entered into between the different members thereof. And, secondly, even in the case of corporations, intending shareholders may protect themselves by taking

(*h*) See *Dickenson* v. *Valpy*, 10 B. & C. 128; *Fox* v. *Clifton*, 6 Bing. 776, 9 Bing. 115; *Re Dover & Deal Railway Company, ex parte Beardshaw*, 1 Drew. 226.

proper precautions; by obtaining, for instance, such provisions to be placed in the constating instruments of the company as forbid it commencing business or making calls before a given part, or, if thought fit, the whole of the capital has been subscribed.

Corporations may fix the time when their operations shall begin.

II. Corporations may provide by their constating instruments that their business shall not be commenced till the whole or a defined portion of their capital is subscribed.

In *Pierce* v. *Jersey Water Works Company* (*i*), a clause in the Articles of Association provided that "*when and so soon as* 3000 *shares* in the company shall have been subscribed for and allotted, the members of the company for the time being shall be and shall continue associated for the objects of the company, and the regulations for the management thereof shall be in force and binding on such members;" and the memorandum of association stated the objects of the company to be *inter alia*, "the doing of all such acts as the *directors are authorised to do by the accompanying Articles of Association* of the company." Before 3000 shares were subscribed for the directors appointed the

(*i*) L. R. 5 Ex. 209; *North Staffordshire Steel & Iron Company* v. *Ward*, L. R. 3 Ex. 172.

plaintiff engineer to the company. In an action against the company for the plaintiff's salary, it was held that until 3000 shares were subscribed for, the directors had no power to make any contract for carrying on the business of the company ; and that, therefore, the plaintiff could not maintain the action.

Powers of corporations to vary their capital.

III. Corporations have not impliedly the power to vary their capital when the amount thereof has been fixed in their constating instruments, *semble*. (But such powers have been given by statute to certain corporations, *see post*, pp. 108-9.)

Whether public companies and similar corporations have impliedly the power to vary the amount of their capital as originally fixed, has not yet been positively decided, but the weight of authority is in the negative.

Smith *v.* Goldsworthy.

In *Smith* v. *Goldsworthy* (*j*) the facts were as follows :—The deed of settlement of a company incorporated by special Act declared (clause 29) that it should be lawful for "a special general meeting to amend, alter, or annul, either wholly or in part, any or all of the existing provisions of the deed, and to make any new or other regulations in

(*j*) 4 Q. B. 430 ; 12 L. J. Q. B. 192.

lieu thereof; and such new regulations, &c.," after certain confirmation should "be binding and conclusive upon the shareholders." The deed provided that the capital should be £2,000,000 divided into 20,000 shares of £100. By resolutions passed and confirmed at meetings duly convened and holden, it was resolved that the capital should be reduced to £1,000,000 in £50 shares. The Court of Queen's Bench held that such reduction was Ultra Vires of the company. Denman, C.J., said: "The amount of shares is properly part of the constitution of the company, and does not strictly depend upon any clause, regulation, or provision of the deed. The alteration of shares seems therefore not to come within the meaning of the 29th clause. . . . . The defendant further argues that the effect of the resolutions reducing the shares was to dissolve the company. We do not think any such effect followed, but rather that they were simply void and inoperative. We think the shares always were in point of law £100 shares." Supposing this to be a decision merely that the amount of the separate shares cannot subsequently be lowered, it necessarily follows that neither can the capital (when this is divided into shares) be lowered.

A strong opinion has also been expressed by the present Lord Chief Baron that no corporations have, apart from express arrangement, such a power. "If such a proceeding were permitted, the shareholders' liability would be limited, not as was intended by

the amount of their shares, but by the amount of the already paid-up portion of their shares" (*jj*).

With regard to "companies" which are merely large partnerships, *e.g.*, one of the old joint-stock companies, it is manifest that these, like other partnerships, may vary their capital or shares with or without provision for so doing in their deed of settlement; but where these register under 25 & 26 Vict. c. 89, they become liable to all the disabilities imposed by that Act, one of which is an implied prohibition against reducing the capital (*k*).

Sections 9 to 20 of 30 & 31 Vict. c. 131, enable companies limited by shares by special resolution, if authorised so to do by its regulations as originally formed or as altered by special resolution, to reduce its capital, certain conditions for the protection of creditors and others having to be satisfied.

Increase of Capital.

The increase of capital is a somewhat different matter, tending to diminish and not to add to the risks of individual shareholders. It would nevertheless work such a radical change in the scope of a corporation, and in the extent of its operation, as well as in the position of any one shareholder relatively to the whole body, that it can under ordinary circumstances be scarcely considered as other than

(*jj*) L. R. 3 Ex. 42, where the Lord Chief Baron is apparently referring, not so much to a registered company, as to all companies possessing a capital divided into shares.

(*k*) *Droitwich Patent Salt Company* v. *Curzon*, L. R. 3 Ex. 35.

Ultra Vires. However, the 12th section of 25 & 26 Vict. c. 89, provides that certain companies may so far modify their Memorandum of Association as to increase their capital.

IV. Corporations may borrow without express authority in that behalf, provided the nature of their undertakings or concerns be such as to render borrowing, if not actually indispensable, at least very useful, for the proper conduct of the same.

Circumstances under which corporations may borrow.

Between increasing capital and raising money are many important differences. The capital of a company must be considered one of the constituent facts of a company—change it and the company is *pro tanto* changed; but a corporation, like a private individual, cannot avoid occasionally running into debt, and however great its debts it nevertheless remains the corporation it originally was. The power of incurring debts for goods and for carrying on a business, does not however necessarily involve that of raising money to pay them. The latter may be turned to a wrong account far more easily than the former, and consequently although in all ordinary partnerships any member will bind the firm by obtaining articles necessary to the firm upon the credit of the firm, yet it by no means follows that the firm

would be liable for an advance of money obtained under the same circumstances (*l*).

Liability of a partnership upon loans contracted for it.

Whether, in fact, a partnership is liable upon loans obtained for it, will have to be determined in each case by a consideration of the mode of carrying on, and the customs observed in the particular business engaged in, and by the same principles will be decided the liabilities of at least those joint-stock companies which are not, and probably also of such as actually are, incorporated. "It is said that a mining company which, as was decided in *Dickinson* v. *Valpy*, is not necessarily formed with power to pledge the credit of individual members by the drawing of bills—is also not formed with power to bind each other by dealing on credit: but these are two very different propositions. Whether the directors have such a power, must depend on the general nature of the concern; it is a matter for the jury to decide upon unless the party gives evidence to show that their authority was expressly limited; and if it had been left to the jury in this case, I think they would not have had much difficulty in saying that it is in the general nature of mining concerns to deal on credit for the purpose of carrying on their business." This was the opinion of Lord Abinger in

(*l*) Compare *Dickinson* v. *Valpy*, 10 B. & C. 139, and *Brown* v. *Byers*, 16 M. & W. with *Rothwell* v. *Humphreys*, 1 Esp. 406, and *Forster* v. *Mackreth*, L. R. 2 Ex. 163.

Tredwen v. *Bourne* (*m*), and it has been recognised and followed in subsequent cases.

Liability of a corporation upon loans.

In the *Australian Auxiliary Steamship Company* v. *Mounsey* (*n*), mortgages of the company's ships executed by the directors, who by the Articles of Association could "exercise and do all such powers, discretions, acts, deeds, and things, as the company might exercise and do," were held valid, Page-Wood, V.-C., observing, "the act complained of is this: the company being in want of a sum of money for the purposes of their business, application is made to the bankers, who, being already creditors of the company, require security for the advance. The question is, might not the bankers stipulate that they should have a mortgage on the assets, and might not the company consent to that stipulation? It was first argued, that the company could not do it, because the majority had no power to bind the minority, the case being argued as if it were one of ordinary partnership; but the case of a joint-stock company differs from that of an ordinary partnership, inasmuch as it is a corporate body, and it is clear that, with regard to everything which is within the powers of the company, the majority have full power to deal with the assets of the company in order to carry on their affairs and to bind

(*m*) 6 M. & W. 465, and see *Hawken* v. *Bourne*, 8 M. & W. 703.

(*n*) 4 K. & J. 733, 27 L. J. (Ch.) 730; *Bryon* v. *Metropolitan Saloon Omnibus Company*, 3 D. G. & J. 123, 27 L. J. (Ch.) 685.

the minority. The next question is, can the acts complained of be considered a legitimate exercise of the powers of the company, they being shipowners and not dealers in ships? I cannot see why it should not be within their ordinary province to raise money by mortgage of their ships, either for the purpose of buying new ships or paying creditors."

Gibbs' v. West's case.

To the same effect is the decision of Malins, V.-C., upon *Gibbs and West's case, re International Life Assurance Company* (*o*). The deed of settlement of the International Assurance Company, contained no express power of borrowing, but authorised the directors to do and execute all acts, deeds, and things necessary, or deemed by them proper or expedient, for carrying on the concerns and business of the company, and to do, enforce, perform, and execute all acts and things in relation to the company, and to bind the company, as if the same were done by the express assent of the whole body of members thereof. It was decided, that the directors had acted within their powers in borrowing money from the bankers to meet pressing demands upon the company, and charging the proceeds of a call already made, but not immediately payable, with the repayment of the loan; and that two of the directors who had become sureties for the company,

(*o*) L. R. 10 Eq. 312. Compare *Ex parte Birmingham Banking Company, re Patent File Company*, L. R. 6 Ch. 83.

and had repaid the loan, were entitled to the benefit of the charge on the call. The Vice-Chancellor in the course of a careful judgment observed—"Now it has been very strongly urged in this case, that the company having no power to borrow, the borrowing was Ultra Vires and improper, and that therefore no debt was created. I should say—as indeed I have already said on many occasions—that in the ordinary course of transactions of a mercantile concern, whether it be an insurance office or anything else, where the possession of money is essential for the purpose of carrying on the business, if the company finds itself in temporary difficulties for want of money, I cannot consider it beyond the powers of the directors to obtain money from their bankers or others who will temporarily lend it to them, for the purpose of preventing that which would be disastrous to all—namely, the stoppage of the company; that is to say, I cannot consider it beyond their powers to prevent that disaster by means of loans to a moderate extent, such as would not be unreasonable, having regard to the nature and extent of the business in which the company is engaged, for the purpose of carrying on the business of the company." This judgment contains perhaps the clearest authoritative exposition of the circumstances under which an implied power to borrow will be held to exist. To it we need add only that certain kinds of business seem necessarily to require, that companies transacting them should

have a power to raise money not merely to meet their daily outgoings, but for the actual carrying on of their business; such, for instance, is banking (*p*).

But if the business of the company be of such a kind that it is not necessary or usual in the conduct of it to borrow money, then it cannot do so without an express authority in that behalf. "This company is what is called a benefit building society. Until the recent decision of the Court, in *Laing* v. *Reed* (*q*), it was doubted whether, even if you put a limited borrowing power among the rules of a society of this sort, that particular rule would be legal. But, what we have here is a limited benefit building society without any power to borrow, and the rules and very nature of that society show that it would be contrary to its constitution to borrow money so as to bind the company, or to make the individual members of the company, as members, liable for borrowing money; because the whole constitution of the society is that the members are to make certain monthly payments, and in consideration of these monthly payments and the fines provided by the rules, they are to receive certain loans.

Laing v. Reed.

"After the rules had been certified and published, and the nature of the company had been

(*p*) *Bank of Australasia* v. *Breillat*, 6 Moore, P. C. 152, 12 Jur. 192. Compare *Royal British Bank* v. *Turquand*, 6 E. & B. 327, 25 L. J. (Q. B.) 317; and *Forbes* v. *Marshall*, 11 Ex. 166, 24 L. J. (Ex.) 305.

(*q*) L. R. 5 Ch. 4.

fixed, a prospectus was issued, and by that prospectus the directors chose to say 'that they have made arrangements to borrow sums to be advanced to such members as desire to receive an advance before their turn for it regularly arrives, such members of course paying interest on the sum lent until their turn arrives.' If we look at the nature of the company, that can only amount to this: that the directors have chosen to pledge their personal liability. It is not a statement that the company were liable, or that any person who was a member of the company was at all bound, or was personally made liable in respect of any debt of the company.

"This being so, let us see on what ground this winding-up order was made. It was made upon the petition of a creditor, and in order to support that petition, the petitioner must have made out that he was a creditor either legal or equitable—either character would be sufficient. I have already said, that this benefit building society could not incur a debt by borrowing money upon loan. Indeed, the contrary has hardly been argued. It could not do so any more than a mining company, or any other of the companies which have not authority or power to bind their members by borrowing money" (*r*).

(*r*) *Per* Giffard, L. J., in *Re National Permanent Benefit Building Society, ex parte Williamson*, L. R. 5 Ch. 309, 312, 313.

Mode of borrowing.

V. Corporations having the power to borrow may exercise such power like ordinary individuals, and give securities upon their assets for the sums so borrowed.

Supposing that a company has power to raise money that is to carry on its business in any other manner than by cash payments *pari passu* with its purchases, the next question is as to the mode in which it may exercise this power. In the first place, it may be laid down as a general rule, that companies whose business necessitates the periodical purchases of articles, either for their own use or for purposes of trade, may, as and when convenient, open running accounts and obtain such articles on credit; in other words, that they may incur debts. Some companies, however, are differently placed—either their business only involves others in liabilities to themselves and not *vice versâ*, or the legislature has expressly directed that all their operations shall be conducted on cash principles, or by custom this is so. Such, for instance, are building societies,-whether benefit building societies strictly so called (*s*), or freehold or other land societies (*t*). Such companies as may ordinarily incur debts may,

(*s*) *Re Kent Benefit Building Society*, 1 Dr. & Sm. 417; *Re National Permanent Benefit Building Society. Ex parte Williamson*, L. R. 5 Ch. 309.

(*t*) *Grimes* v. *Harrison*, 26 Beav. 435; *Durham County, &c., Society, Davis and Wilson's Cases*, L. R. 12 Eq. 516.

it would seem, under the like circumstances overdraw their banking account (*u*).

Mortgages and Charges upon a Company's Property.

They have also an implied power to give existing creditors securities, whether by the execution of bills of sale duly registered (*uu*), or by way of the mortgage legal (*v*) or equitable (*w*) of the corporate property ; or by the issue of debentures (*x*) charged upon the same. In the construction of these mortgages and debentures, careful attention must be paid, both to the language of the charging instrument itself and to the powers belonging expressly or impliedly to the company itself and to the governing portion thereof (*y*). The expression, "the undertaking," whether alone or in connection with other words, has been repeatedly the subject of judicial decision. In one case the terms employed were "all the lands, tenements, and estates of the company, and all their undertaking" (*z*) ; in another, "our undertaking and property and receipts and revenues" (*a*) ; in a

Mortgages, &c., upon corporate property.

Meaning of the word "undertaking."

(*u*) *Re Patent File Co., ex parte Birmingham Banking Co.*, L. R. 6 Ch. 83. See also *Re Cefn Cilicen Mining Co.*, L. R. 7 Eq. 88.

(*uu*) *Shears* v. *Jacob*, L. R. 1 C. P. 513 ; *Deffell* v. *White*, L. R. 2 C. P. 144.

(*v*) *Australian Aux. Clipper Co.* v. *Mounsey*, 4 K. & J. 733, 27 L. J. (Ch.) 729.

(*w*) *Re Patent File Co., ex parte Birmingham Banking Co.*, *ubi suprà*.

(*x*) *Re Inns of Court Hotel Co.*, L. R. 6 Eq. 82.

(*y*) See the cases referred to in the next four notes.

(*z*) *King* v. *Marshall*, 33 Beav. 565 ; 34 L. J. (Ch.) 163.

(*a*) *Re Marine Mansions Co.*, L. R. 4 Eq. 601.

third, "the undertaking and all the real and personal estate" (*b*); in a fourth, "the general undertaking as defined by the Act, and all the tolls and sums arising from or out of the general undertaking" (*c*); and in neither case did the security constitute a charge upon the capital of the company. We may perhaps conclude that the "undertaking" means ordinarily nothing more than the profits arising from the business of the company, and that a mortgage of the "undertaking," without more, creates a charge upon such profits only, and not upon the capital or plant of the company; and that, consequently, when the undertaking ceases to be a going concern, such mortgages and debentures cease to give their holders any priority over other creditors. In each of the cases just cited, it will be noticed that the charge extended to other assets than the "undertaking," and that the holders thereby acquired rights varying with the circumstances over the company's property.

Re Panama, &c., Royal Mail Company.

The "undertaking" will not, however, always have such a restricted interpretation. A steamship company having power to issue mortgages, bonds, or debentures, issued mortgage debentures, charging

(*b*) *Re New Clydach Sheet & Bar Iron Co.*, L. R. 6 Eq. 514.

(*c*) *Gardner* v. *London, Chatham, & Dover Railway Co.*, L. R. 2 Ch. 201. This was a mortgage given under 8 & 9 Vict. c. 16. Compare *Furness* v. *Caterham Railway Company*, 27 Beav. 358, and *Fountaine* v. *Carmarthen Railway Company*, L. R. 5 Eq. 316.

"the undertaking, and all sums of money arising therefrom," with the repayment at a specified time of the money borrowed with interest in the meantime. Before the debentures became due, the company was wound up, and the ships and other property of the company were sold. It was here held that the debenture holders acquired a charge upon all the property of the company, past and future, by the term "undertaking," and that they were entitled to be paid out of the property of the company in priority to the general creditors. Giffard, L.J., thus interpreted the effect of these debentures: "I have no hesitation in saying that, in this particular case, and having regard to the state of this particular company, the word 'undertaking' had reference to all the property of the company, not only which existed at the date of the debenture, but which might afterwards become the property of the company. And I take the object and meaning of the debenture to be this, that the word 'undertaking' necessarily infers that the company will go on, and that the debenture holder could not interfere until either the interest which was due was unpaid, or until the period had arrived for the payment of his principal, and that principal was unpaid. I think the meaning and object of the security was this, that the company might go on during that interval; and, furthermore, that during the interval the debenture holder would not be entitled to any account of mesne profits, or of any dealing with the

property of the company in the ordinary course of carrying on their business" (*d*).

Mortgages of calls when valid.

No matter how extensive the authority given to a company or vested in its officers to raise money and to create securities for the same, future calls cannot be mortgaged (*e*) without an express power for such purpose, and probably not even then (*f*). But calls already made, although the time for payment has not yet come, may be validly assigned as security for existing debts when the company possesses an express power to mortgage calls (*g*); and it would seem, even without such a power, provided only that it has a general authority to borrow (*h*), or, if owing to emergencies, it becomes absolutely necessary for the continuance of the business to raise money upon almost any terms (*i*). So also, where a bank refused to renew the notes of a company given for advances properly made, save upon the agreement that a call should at once be made, and the proceeds assigned to the bank as security for these advances, it was

(*d*) *Re Panama, &c., Royal Mail Company*, L. R. 5 Ch. 318, 322.

(*e*) *Re British Provident Life & Fire Assurance Company, ex parte Stanley*, 33 L. J. (Ch.) 535; *King* v. *Marshall*, 33 Beav. 565, 34 L. J. (Ch.) 163; *Re Sankey Brook Coal Company* (No. 2), L. R. 10 Eq. 381.

(*f*) See *per* Knight Bruce, L.J., in *Ex parte Stanley, ubi supra*.

(*g*) *Re Humber Ironworks Company*, 16 W. R. 474, 667; *Re Sankey Brook Coal Company* (No. 1), L. R. 9 Eq. 721.

(*h*) *Pickering* v. *Ilfracombe Railway Company*, L. R. 3 C. P. 235.

(*i*) *Re International Life Assurance Company, Gibbs and West's Case*, L. R. 10 Eq. 312.

held, upon the agreement being carried out, that the mortgage, being of the proceeds of a call already determined, was distinguishable from an attempt to pledge future calls, and was therefore valid (*j*).

Nature and effect of debentures.

What is the exact nature and effect of debentures, and what are their various incidents, has not yet been fully determined. They resemble ordinary mortgages in that they constitute charges more or less extensive over the assets, or some particular portion thereof, of the company issuing them, and in so far as this charge extends, they entitle their holders to a priority over other creditors. But they differ from them in not amounting to an assignment —in being merely a charge, and, consequently, in not investing the chargee with the legal title, or with any of the ordinary rights of ownership over the property charged. Whatever other rights debenture holders may be endowed with, they have no means —save so far as Chancery may aid them—of preventing the owner of the property from using or removing the property charged, or otherwise dealing with it as he pleases, and this power of interfering with the owner is the true test as to whether the relationship of mortgagor and mortgagee does or does not exist (*k*).

(*j*) *Re Sankey Brook Coal Company*, L. R. 9 Eq. 721.

(*k*) *Holroyd* v. *Marshall*, 10 H. L. C. 191. As to the negotiability of these instruments, see *post*, section 4.

Profits.

Mode of declaring and paying profits.

VI. Profits can be declared only out of moneys actually earned, but it is not necessary that all outstanding liabilities should be first cleared off, and they must be paid in money.

The term "profits" is ambiguous. It may denote either the net earnings, deducting merely the interest on money borrowed, or what, if anything, remains after paying off loans as well as the interest thereof. Where money has been raised in virtue of express powers in that behalf, *Corry* v. *Londonderry and Enniskillen Railway Company* (*l*) has settled that profits will have the former and wider meaning. The Master of the Rolls in that case was of opinion "that all the debts of the company are first payable, other than those which, for want of a better expression, may be called funded debts; for instance, if the defendants have raised money by mortgage, under the powers contained in their Act, for the purpose of completing their line, this does not constitute such a debt as can be paid off out of the profits, before the profits are divided. But, on the other hand, any debts which have been incurred, and which are due from the directors or the company, either for steam-engines, for rails, for completing

(*l*) 29 Beav. 263.

stations, or the like, which ought to have been and would have been paid at the time, had the defendants possessed the necessary funds for that purpose—those are so many deductions from the profits, which, in my opinion, are not ascertained till the whole of them are paid." His Lordship accordingly decided that the holders of preference shares created in pursuance of the company's statutory powers were not entitled to be paid off out of the surplus profits remaining after the interest on such preference shares had been met. The case, however, would be different with respect to ordinary loans to a company while transacting its usual everyday business—*e.g.*, advances by its bankers. These loans are simply debts which have to be defrayed before profits or dividends can be declared.

Provision for payment of interest out of the capital before company has commenced business.

A company not unseldom inserts in its constating instruments a clause allowing interest to be paid, sometimes to preference, sometimes even to ordinary shareholders, out of capital, before it has commenced business, or, it may be, afterwards, during times of adversity, when its losses counterbalance its gains. Whether such a provision is legal and valid may fairly be questioned—the manifest tendency of it is to waste, and in the result to destroy, the capital of the company in carrying out objects *aliunde* those for the prosecution of which it was created. But, certainly, without it shareholders can receive interest only out of the net earnings. The leading case is *Macdougall* v. *Jersey Imperial Hotel Com-*

Dividends can be paid only out of net earnings.

pany Limited (*m*), where, in overruling a demurrer to a bill, which stated that at an ordinary general meeting it had been determined that interest should be paid to the shareholders, although as yet no profits had been realised, and which prayed an injunction to restrain the same, Page-Wood, V.-C., said: "On grounds of public policy, and on every principle, not only of honesty as regards the public generally but of the interests of this company itself, I feel bound to prevent this proceeding."

In *Bloxam* v. *Metropolitan Railway Company* (*n*), Page-Wood, V.-C., decided, and, on appeal, the Lord Chancellor Chelmsford inclined to the same opinion, that it was Ultra Vires of the defendants to declare a dividend upon their ordinary stock, out of a sum of money received from the contractors, as penalty and interest in respect of unfinished lines.

Hoole *v.* Great Western Rail. Co.

A still stronger decision in point is that of *Hoole* v. *Great Western Railway Company* (*o*). The revenue of the Great Western Railway Company during a particular half-year had been sufficient to pay a dividend, after providing for all charges pro-

(*m*) 2 H. & M. 528; followed in *Salisbury* v. *Metropolitan Railway Company*, 38 L. J. (Ch.) 249, where, however, the 196th section of the defendants' Act expressly provided that "it shall not be lawful for the company, out of any money by this Act, or by any other Act relating to the company, authorised to be raised by calls in respect of shares, or by the exercise of any power of borrowing, to pay interest or dividend to any shareholder," &c.

(*n*) L. R. 3 Ch. 337.

(*o*) *Ibid.* 262.

perly payable out of the revenue; but, owing to the refusal of creditors of the company to give time, the revenue was absorbed in payment of sums properly chargeable to capital. In these circumstances the company in general meeting sanctioned a plan for offering to each shareholder, at par, preference shares to an amount equal to the dividend which would have been payable to him if the revenue had not been diverted for capital purposes. These shares were saleable, but only at a considerable discount. A shareholder filed his bill on behalf of himself and the section of shareholders to which he belonged, to restrain the issue of shares for the above purpose, to have those already issued cancelled, and to restrain the payments of dividends on them. On an application by a shareholder, an injunction was granted to restrain this issue, on the ground that the scheme was Ultra Vires. Assuming that the shares could lawfully be issued at a discount (an issue under this scheme being in reality an issue at a discount), and assuming that, owing to the diversion of the revenue to capital purposes, they could lawfully be treated as assets for payment of a dividend, Page-Wood, V.-C. first, and the Lords Justices affirming his decision, held, that each shareholder who was not willing to accept an allotment of them in specie, had a right to insist that the proceeds of the whole should be applied rateably in payment of a dividend to all the shareholders.

From this case we may deduce the following con-

clusions—first, that it is Ultra Vires of a company to expend its profits in any manner whatever other than in paying dividends to those entitled thereto; and, secondly, that any one shareholder may refuse to receive the profits coming to him in any shape, preference shares, &c., other than that of hard cash.

Profits must be paid in money.

Declaration of dividend.

Whether a dividend can or cannot be declared is a matter of internal arrangement for the determination of the general body of members. The Court of Chancery, in the absence of fraud, will generally refuse to interfere in such a matter, whether to direct or to restrain against the declaration of a dividend, even though its interference be sought on the ground that a contemplated dividend has been calculated on a wrong principle (*p*).

Net earnings must be fully divided.

It seems also that the whole of the profits must be periodically divided; that is, that the company has not impliedly any option in the matter, and cannot create, for instance, even a contingency fund wherewith to meet future unforeseen losses (*q*).

Mills *v.* Northern Railway of Buenos Ayres Co.

On the other hand, *Mills* v. *Northern Railway of Buenos Ayres Company* (*r*) shows that where a company have paid for things properly chargeable to capital out of revenue, they are justified in recouping the revenue account at a subsequent time out of capital; and may, if necessary, raise fresh capital under their borrowing powers for that purpose.

(*p*) See *Vool* v. *Great Western Railway Company*, 20 L. T. (N. S.) 74.

(*q*) *Per* Giffard, L.J., L. R. 4 Ch. 494, 495.

(*r*) L. R. 5 Ch. 621, 630.

In this case Lord Hatherley, L.C., said: "No doubt many great frauds have been practised by companies, both upon themselves and sometimes, unfortunately, upon the public, by carrying to capital account things that ought to go to revenue account, and thereby leaving an imaginary profit, which is no profit at all. But the bill avers nothing of this kind distinctly and definitely, and the affidavit does not go beyond it. The affidavit verifies a quantity of reports, out of which I am to pick the items as I best may, and to ascertain whether they should or should not have been charged to capital or revenue account. If I saw anything grossly extravagant or fraudulent in them, such as the working expenses of the year, or the wages of the men carried to capital account, in order to make things look pleasant, as it is called, I should have to pause, and consider how it might be proper for this Court to deal with transactions of that kind . . . . . Therefore, the whole of the averment, as I read it here, is really this, that the directors have said in their report that they are going to carry back to revenue what they have borrowed from it, for the purpose of capital; and when they have carried that back to revenue, then they are going to make a dividend. I do not see anything Ultra Vires in what is either there alleged or suggested."

Improper declaration of dividends.

Where dividends have been declared under a delusive and fraudulent balance-sheet, those who have received and those who declared the same may

be compelled, upon the winding-up of the company, to refund the same. To accomplish this purpose proceedings may be had against the parties liable, either by bill or by application to the summary jurisdiction vested in the Court by sections 101 and 165 of the Companies Act of 1862 (*s*).

Court will not interfere in matters of internal arrangement.

But though the Court will, as abundantly appears from the foregoing authorities, restrain the wrongful declaration or payment of dividends, it will not interfere in matters of internal arrangement—it will not, for instance, lay down, as a rule, that there must be actually cash in hand or at the bankers to the full amount of the dividend declared, or be astute in searching out minute errors in calculation in an account honestly made out and openly declared (*t*).

SECTION II.—SHARES.

Division of capital into shares.

The capital of a company is usually divided into portions styled shares. Such shares may be of one description only, being of one and the same amount, and conferring on all holders thereof the same rights, privileges, and liabilities; or they may be of various classes, and with various denominations, the possessors

(*s*) *Re Mercantile Trading Company, Stringer's Case*, L. R. 4 Ch. 475, and cases there cited. *Re County Marine Insurance Company, Rance's Case*, L. R. 6 Ch. 104.

(*t*) *Per* Selwyn, L.J., L. R. 4 Ch. 492, 493; *Yool* v. *Great Western Railway Company*, 20 L. T. (N. S.) 74. See *post*, Part IV. Chap. I.

of shares of one class having rights and being under liabilities differing widely from those belonging to the shares of other classes. The number and respective amounts are usually fixed by the Acts of Parliament and the other instruments creating a company; and when this is so, the characteristics of such shares become essential facts of the corporation, and cannot be changed by the action of any or all of the members thereof. But if and in so far as such matters have not been determined upon, it is competent for the corporation, either in general meeting or by its directors, to determine upon them, and from time to time to vary them. *Smith* v. *Goldsworthy* (*u*) is sometimes cited, as showing that once the value of the shares fixed, no change therein can ever afterwards be made. But this case seems rather to be an authority to the effect that the amount of capital cannot be reduced, not that the shares cannot be varied if the capital remain unaltered, since, in the subsequent case of *Ambergate Railway Company* v. *Mitchell* (*v*), it was decided that, under certain circumstances, this might be done. The Act incorporating the Ambergate Railway Company provided that, for the *purpose of voting*, £25 of the capital should represent a share, and that no one should vote in respect of any less proportion. After the formation of the company the shares were altered to £20 each, and the

Varying the nature of shares.

Ambergate Rail. Co. *v.* Mitchell.

(*u*) 4 Q. B. 430, 12 L. J. (Q. B.) 192.

(*v*) 4 Ex. 540, 19 L. J. (Ex.) 89.

directors made a call on such; and it was held that the calls were not illegal by reason of the shares having been altered. The judgment is not very clearly reported; but it evidently lays down that where the constating instruments fix the amount of the shares, not *for all purposes*, but only for some particular purpose, then it is competent for the company to fix the amount.

Sub-dividing shares.

The majority of companies, however—at least of trading companies—are within the Companies Acts of 1862 and 1867; and it seems that such companies can in no respect vary the nature of their shares, save by sub-dividing them. Even this can be done only by virtue of the express enactment contained in the 21st section of 30 & 31 Vict. c. 131, which enables any company, limited by shares, by a special resolution, so far to modify the conditions contained in its memorandum of association, if authorised so to do by its regulations as originally framed, or as altered by special resolution, as to subdivide its existing shares or any of them.

Re Financial Corporation, Feiling's and Rimington's case.

Previously to this enactment such a sub-division was, as to these companies, illegal, even though done in pursuance of an express authority contained in the constating instruments. The Memorandum of Association of the *Financial Corporation* provided that the capital should consist of shares of £100 each, and the articles (clause 7) gave the board power, "by a resolution passed by a majority, consisting of not less than two-thirds of the whole

number of directors, to reduce the nominal value of the shares, or any of them, by dividing the same into a larger number of shares of any nominal value authorised by law." This power the directors exercised by converting each £100 share into five £20 shares; but it was decided that such conversion was unauthorised and void (*w*). Lord Cairns, Lord-Justice, said: "I am clearly of opinion that, under these sections [*i.e.*, 8, 12, 22, 25, and 28, of 25 & 26 Vict. c. 89], the amount of shares into which the capital is divided must be stated in the memorandum; that these shares must be identified by numbers; that no transfer of less than one share can be made; that no departure from the memorandum by way of lowering the value of or subdividing the shares, can be admitted; and that no person can become a member or corporator, except through the ownership of at least one share, which share is to be of at least the amount named in the memorandum. The provisions in the sections to which I have referred for the consolidation and increase in the nominal value of the shares, and for the notice to the registrar of such consolidation and increase, seem to me to make more emphatic the prohibition against any change lowering the nominal value of the shares."

But a person may, by his acquiescence in such a

(*w*) *Re Financial Corporation, Feiling's and Rimington's case*, L. R. 2 Ch. 714, 732. See *New Zealand Banking Corporation, Sewell's case*, L. R. 3 Ch. 131.

division, be estopped from afterwards denying the legality of the same (*x*); and if the original shares which have been thus sub-divided can be traced and identified, the holders of them will still remain liable, and may be placed on the list of contributories (*y*).

Preference Shares.

Power to issue preference shares.

Very frequently a company issues shares, having a dividend payable in priority to that upon the ordinary shares. To do this the power must have been given in the constating instruments (*z*). The holders of such shares are entitled to be paid arrears of dividend out of future profits, but without interest on the arrears (*a*), unless there should be express statutory provisions to the contrary (*b*). When such power exists it must be employed solely and expressly for its special purpose, viz., the obtaining

(*x*) *Hull Flax, &c., Company* v. *Wellesley*, 30 L. J. (Ex.) 5; *Re Financial Corporation, King's case*, L. R. 2 Ch. 714.

(*y*) *Feiling's & Rimington's case, ubi suprà; Sewell's case, ubi suprà.*

(*z*) *Re National Patent Steam Fuel Company, ex parte Worth*, 4 Drew. 529; 28 L. J. (Ch.) 589; *Hutton* v. *Scarborough Cliff Hotel Company*, 2 Dr. & Sm. 521.

(*a*) *Henry* v. *Great Northern Railway Company*, 4 K. & J. 1; 27 L. J. (Ch.) 1; *Corry* v. *Londonderry & Enniskillen Railway Company*, 29 Beav. 263, 30 L. J. (Ch.) 290; *Coates* v. *Nottingham Waterworks Company*, 30 Beav. 86. As to the rights of holders of different kinds of preference shares, see *Matthews* v. *Great Northern Railway Company*, 28 L. J. (Ch.) 375; *Coey* v. *Belfast and Down Railway Company*, Ir. Rep. 2 C. L. 112.

(*b*) See 26 & 27 Vict. c. 118, s. 14, amended by 32 & 33 Vict. c. 48.

capital. In *Hoole* v. *Great Western Railway Company* (*c*), where the defendants had power to raise additional capital by the issue of shares, and to allot to them a preferential dividend, it being enacted that dividends should not be paid out of any monies received for the shares, and that no share should be issued until one-fifth of the amount had been paid, they were restrained from paying dividends in preference shares. Hoole v. Great Western Rail. Co.

With regard to shares of various descriptions, the Companies Act, 1867, 30 & 31 Vict. c. 131, provides, by section 24, that any company under the Companies Act, 1862, may, if authorised by its regulations as originally framed, or as altered by special resolution, make arrangements on the issue of shares for a difference between the holders of such shares in the amount of calls to be paid, and in the time of payment of such calls. But whether this enactment will justify the issue of preference shares, unless powers in that behalf had been given to a company at its inception, must be considered doubtful.

The same statute, by section 27, allows companies, under certain conditions, with respect to any share which is fully paid up, or with respect to stock, to issue, under their common seal, a warrant, stating that the bearer of the warrant is entitled to the shares or stock therein specified. This power is apparently not possessed by companies not coming Share warrants to bearer.

(*c*) L. R. 3 Ch. 262. See *ante*, p. 125, where the facts are stated.

within the provision of the Companies Acts, 1862 and 1867 (*cc*).

It is almost needless to add that the rights of the preference shareholders, whether individually or in a body, cannot be modified save by the acquiescence of the individuals affected; and that the Court of Chancery will, where necessary, interfere to restrain acts of the company in derogation of their rights (*d*). But these shareholders are not creditors, not even as to dividends in arrear, and therefore in a winding up they can rank only *pari passu* with the other members (*e*).

Numbering of shares.

The Companies Clauses Act of 1845, ss. 6 & 9, and the Companies Act of 1862, s. 22, require the shares of companies, which fall under their regulations, to be numbered. This provision was held to be satisfied where, though the register did not show the numbers of the defendant's shares, it could be proved, *aliunde*, that the shares had been in fact distinguished by numbers which had been inserted in a book kept by the plaintiffs (*f*).

(*cc*) See *Re General Company for Promotion of Land Credit*, L. R. 5 Ch. 363.

(*d*) See especially *Henry* v. *Great Northern Railway Company*, 4 K. & J. 1, and 1 D. G. & J. 606.

(*e*) *Re London India Rubber Company*, L. R. 5 Eq. 519.

(*f*) *East Gloucester Railway Company* v. *Bartholomew*, L. R. 3 Ex. 15. Compare *Irish Peat Company* v. *Phillips*, 1 B. & S. 629, 30 L. J. (Q. B.) 363; *Wolverhampton Waterworks Company* v. *Hawkesford*, 29 L. J. (C. P.) 121. As to the effect of the existence of two sets of shares with the same numbers, see *London & County Insurance Company, Jones's case*, 27 L. J. (Ch.) 666.

Scrip.

"Scrip" is often issued by the projectors of companies, generally of those coming under the operation of special Acts. This consists of certificates or other documents, entitling the holder to become a proprietor in the future company. The liability imposed upon the scrip receiver will principally depend upon the engagement he has entered into with the projectors; he may negotiate the scrip, but he will nevertheless remain liable if the company be formed, until the name of the purchaser be entered upon the register (*g*).

Liability of holders of scrip issued before,

Sometimes, after the formation of a company, scrip is issued to applicants, instead of an allotment of shares. What is the exact effect of such an arrangement is not settled. It must, however, it is presumed, be determined by the terms under which such scrip is issued, as read in connection with the constating instruments of the corporation. A decision in point is that of *Re Littlehampton, &c., Steamship Company, Ormerod's Case* (*h*). The articles of association of the company provided that the directors, instead of entering allottees of shares on the register of members, might issue to them scrip certificates entitling the holders to the shares therein named, subject to the payment of the

issued after, the formation of a company.

Re Littlehampton, &c., Steamship Co. Ormerod's case.

(*g*) *Midland Great Western Railway Company* v. *Gordon*, 16 M. & W. 804, 16 L. J. (Ex.) 165. But see *Jackson* v. cases cited in next note.

(*h*) L. R. 5 Eq. 110. Compare *Eustace* v. *Dublin Trunk Connecting Railway Company*,

instalments at the times therein mentioned; that the word "shareholder" should include scripholder; that the shares for which scrip was issued should be transferable by delivery of the scrip, and the holder of the scrip should be the only person recognised as entitled to the shares, and that the scripholder on surrendering his scrip should be entitled to be entered on the register of members in respect of the shares mentioned in the scrip certificate. In November, 1863, *Ormerod* applied in writing for 100 shares. These were allotted him, and he paid a deposit of £1 per share; but his name was put on the register for ten shares only, and for the remaining ninety he received provisional scrip certificates, declaring the holder entitled to the shares therein numbered. One *Gregg* similarly applied for shares, and received a notice from the company that he might have scrip certificates for the shares allotted to him; but he did not obtain the certificates, and the directors subsequently entered his name on the register of members. The Master of the Rolls held *Ormerod* not to be, and *Gregg* to be, a contributory (*i*). Lord Romilly, M.R.,

(*i*) Compare *Ellis's case*, arising from the winding up of the same company before the M. R., 34 Beav. 256; affirmed on appeal, 2 D. G. J. & Sm. 521, 34 L. J. (Ch.) 237. See other cases of scrip certificates, *Newry and Enniskillen Railway Company* v. *Edmunds*, 17 L. J. (Ex.) 102; *Hyam's case*, *Re Mexican, &c., Company*, 1 D. G. F. & J. 75, 29 L. J. (Ch.) 243; *De Pass's case*, 4 D. G. & J. 544. As to certificates of shares, see 8 & 9 Vict. c. 16, ss. 11–13, and 25 & 26 Vict. c. 86, s. 31; and *Broadbent* v. *Varley*, 12 C. B. (N. S.) 214.

followed the principle laid down in *Ellis's Case* (*j*), that the articles of association made a clear distinction between members of the company and mere scripholders, these latter not becoming members or liable as such till shares were issued to them, and their names put on the register.

Calls.

Power to make calls generally vested in the directors.

Companies having their capital divided into shares have, as incident thereto, the power to make calls. It is purely a question of internal arrangement in whom this power is vested. It will generally be in the directors; and where it is so, a call made by those who are actually directors, and not yet removed, will be good (*k*). But if made by persons not having the power (*l*), or not acting at a board meeting when this is required, the call will be simply nugatory (*m*).

Calls—when

Calls must in all respects, both as to times and amounts, be made, whether by the company in general meeting, or the directors, in such a way as to press equally upon all (*n*); and for the furtherance of the corporate purposes, *i.e.*, for the *bonâ fide*

(*j*) *Ubi suprà.*

(*k*) *Swansea Dock Company* v. *Levien*, 20 L. J. (Ex.) 447. Compare *Southampton Dock Company* v. *Richards*, 1 Man. & Gr. 448.

(*l*) *Howbeach Coal Company* v. *League*, 5 H. & N. 151.

(*m*) *Kirk* v. *Bell*, 16 Q. B. 290. And see *post*, Part III. Chapter V.

(*n*) *Preston* v. *Grand Coll. Dock Company*, 11 Sim. 327.

purpose of obtaining capital, and not to enable any particular members (*o*) to escape or lessen their liability.

and for what purposes to be made.

Of course calls can be made only for purposes not Ultra Vires of the corporation. If it is intended to devote the proceeds to other purposes, the call imposes no liability either at law or in Chancery upon a shareholder (*p*).

The Court of Chancery will interfere to restrain the making of calls for an illegal object (*q*); or the enforcing them against a shareholder, inveigled into taking shares by the fraud of the company or its officers (*r*); but it will not interfere if the application of the proceeds be in reality a matter of internal economy, and within the scope of the company, or of a majority of its members to determine (*s*).

Paid-up shares.

Paid-up shares are not unfrequently issued by companies, but such an issue is Ultra Vires, at least to this extent, that the parties taking such shares

(*o*) See *Richmond and Painter's cases*, 4 K. & J. 305, as to calls made favouring private members; and *Gilbert's case*, L. R. 5 Ch. 559, as to directors.

(*p*) *South Eastern Railway Company* v. *Hebblewhite*, 12 A. & E. 497; *Shropshire Union Railway Company* v. *Anderson*, 3 Ex. 401; *Welland Railway Company* v. *Blake*, 6 H. & N. 410.

(*q*) *Hodgkinson* v. *National Live Stock Insurance Company*, 26 Beav. 473, 4 D. G. & J. 422.

(*r*) *Smith* v. *Reese River Company*, L. R. 4 H. L. 64.

(*s*) See *Yetts* v. *Norfolk Railway Company*, 3 D. G. & Sm. 293; and the other similar cases following *Mozley* v. *Alston;* and *post*, Part VI. Chapter I.

will, on a winding up, be contributories in respect thereof, unless they shall have given for them an equivalent in money's worth (*t*). To relieve from the payment in money, the consideration must be something given to the company after it is formed; what is given to it before its formation will not do (*u*). The 25th section of the Companies Act, 1867, imposes an additional requisite, viz., that every share shall be deemed issued, and "held subject to the payment of the whole amount thereof *in cash*, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the registrar of joint-stock companies at or before the issue of such shares." This enactment has hitherto been construed stringently, and persons have been in several instances made contributories who have given a full equivalent for their shares, but which equivalent has not been in the form of a payment in cash (*v*).

SECTION III.—ORDINARY NEGOTIABLE INSTRUMENTS.

Power of corporation to issue bills and notes.

A corporation has not, as one of the incidents of its existence, the power to accept bills, or make notes, or be one of the immediate parties to nego-

(*t*) *Drummond's case*, L. R. 4 Ch. 772; *Pell's case*, L. R. 5 Ch. 11; *Schroder's case*, L. R. 11 Eq. 131; *Dent's and Forbes's case*, L. R. 8 Ch. 768.

(*u*) *Re Baglan Hall Colliery Company*, L. R. 5 Ch. 346.

(*v*) *Cleland's case*, L. R. 14 Eq. 387; *Pritchard's case*, L. R. 8 Ch. 956. But see *Fothergill's case*, L. R. 8 Ch. 270; *Maynard's case*, L. R. 9 Ch. 60; *Coates's case*, L. R. 17 Eq. 169.

tiable instruments of other descriptions. Such a power must be given to it either expressly or impliedly. A corporation may possess it expressly either by the provisions of its own constating instruments, or by the direct enactments of the legislature (*w*).

Impliedly the power may belong to it in various ways, *e.g.*, by necessary deduction from the purview or the language of an Act of Parliament. Thus the Joint Stock Companies Act of 1844, 7 & 8 Vict. c. 110, having in section 45 laid down certain regulations as to the mode in which bills should be accepted, &c., on behalf of companies coming within this statute, it was assumed as a matter of course that such companies thereby acquired the power to issue bills and notes (*x*). The Companies Act of 1862, contains a section, 47, very similarly worded, and Malins, V.-C., thought that it, by implication, invested companies with such a power; but, upon appeal, Cairns, L.-J., overruled this opinion (*y*).

Or, again, from a consideration of the business of the company, and of the requirements of the same. But the mere fact that a corporation trades or

(*w*) *Slark* v. *Highgate Archway Company*, 5 Taunt. 792; *Murray* v. *East India Company*, 5 B. & Ald. 204.

(*x*) See *Halford* v. *Cameron's, &c., Railway Company*, 16 Q. B. 442, 20 L. J. (Q. B.) 160; *Aggs* v. *Nicholson*, 1 H. & N. 165, 25 L. J. (Ex.) 348.

(*y*) *Peruvian Railway Company* v. *Thames and Mersey Marine Insurance Company*, L. R. 2 Ch. 617.

otherwise engages in business is not sufficient to enable it to issue negotiable instruments, and consequently such a power has been denied to waterworks companies in *Broughton* v. *Manchester Waterworks Company* (*z*), to mining companies in *Dickinson* v. *Walpy* (*a*), to railway companies in *Bateman* v. *Mid Wales Railway Company* (*b*), to a cemetery company in *Steele* v. *Harmer* (*c*), to gas companies in *Bramah* v. *Roberts* (*d*), to a salt and alkali company in *Bult* v. *Morell* (*e*), to a salvage company in *Thompson* v. *Universal Salvage Company* (*f*), to a washing company in *Neal* v. *Turton* (*g*). But "corporate bodies may issue promissory notes and bills of exchange where the nature and character of their business warrants it. Here the nature and character of the business is such that the issuing negotiable instruments would be an ordinary and almost necessary incident to it" (*h*). This was said by Page-Wood, L.-J., of a company

(*z*) 3 B. & A. 1; followed in *East London Waterworks Company* v. *Bailey*, 4 Bing. 283.

(*a*) 10 B. & C. 128. Compare *Burmester* v. *Norris*, 6 Ex. 796, 21 L. J. (Ex.) 43.

(*b*) L. R. 1 C. P. 499; *Peruvian Railway Company* v. *Thames and Mersey Marine Insurance Company*, L. R. 2 Ch. 617.

(*c*) 14 M. & W. 831.

(*d*) 3 Bing. N. C. 963.

(*e*) 12 Ad. & E. 745.

(*f*) 1 Ex. 694; 18 L. J. (Ex.) 242.

(*g*) 4 Bing. 149.

(*h*) *Re General Estate Company, ex parte City Bank*, L. R. 3 Ch. 758, 761. Compare *Re Land Credit Company of Ireland, ex parte Overend, Gurney and Company*, L. R. 4 Ch. 460.

whose objects, as stated in the memorandum of association, were "to acquire by purchase, lease, or otherwise, freehold, copyhold, leasehold, and other real property, for building thereon, improving, letting, or selling, and the doing of all such other things as are incidental or conducive to the attainment of the above objects."

Or, lastly, from the very wide language used in the charter, deed of settlement, or other documents to define the purposes for which the corporation has been created. This is established by the decision on appeal in the *Peruvian Railways Company* v. *Thames and Mersey Insurance Company* (*i*). This was the case of a company formed under the Companies Act, 1862, for the purpose of purchasing a concession from a foreign government for the construction of a railway, and forming a société anonyme to make a railway. The memorandum stated that in order to attain their main object the company might do, in England or Peru, or elsewhere, whatever they thought incidental or conducive thereto. The articles gave the directors a general power to do all things, and make all contracts, which in their judgment were necessary and proper for the purpose of carrying into effect the object mentioned in the memorandum. It was decided in the Court below, that bills of exchange, accepted in manner prescribed by section 47 of the Act, were binding on the company, on the ground that every

Peruvian Rail. Co. *v.* Thames and Mersey Insurance Co.

(*i*) L. R. 2 Ch. 617.

company constituted under the Act of 1862 has power to issue bills of exchange. Cairns and Turner, L.-JJ., however, decided, first, that the Companies Act, 1862, does not confer on all companies registered under it, a power of issuing negotiable instruments; but that such a power exists only where, upon a fair construction of the memorandum and articles of association, it appears that it was intended to be conferred; and, secondly, that such a power existed in the present case, for that although it could not be inferred from the nature of the business of the company, it was conferred by the above general words in the memorandum and articles.

Bills, &c., issued by corporations need not be under seal;

It is not necessary that bills and notes issued by corporations should be under seal. Provision has, therefore, usually been made for the issue of such instruments by the directors or other officials on behalf of the corporation, and various formalities are also attached to prevent fraudulent or improvident issues. These formalities must be strictly observed or, whatever the nature of the documents in other respects, those actually making them will usually be liable thereon (*j*); and, as a rule, the corporation will also be liable to such persons as received or negotiated the instruments unaware of the informalities (*k*).

but the formalities should be strictly observed.

(*j*) *Penrose* v. *Martyr*, E. B. & E. 499, 28 L. J. (Q. B.) 28; *Scott* v. *Ebury*, L. R. 2 C. P. 255; *Dutton* v. *Marsh*, L. R. 6 Q. B. 361. Compare *Lindus* v. *Melrose*, 3 H. & N. 177, 27 L. J. (Ex.) 326.

(*k*) *Gordon* v. *Sea, Fire, and Life Assurance Company*, 1 H. & N. 599, 26 L. J. (Ex.) 202. The distinction is between a defect in *form* where the power

Abuse of authority to issue negotiable instruments.

The authority to issue negotiable instruments is, in an especial degree, liable to be turned to wrong purposes. Its exercise is, therefore, scrutinised rather carefully by the Courts, and bills or notes accepted, made, or otherwise negotiated—not merely with a defect in form—but either without power, express or implied, in that behalf, or with such power but for purposes unconnected with the objects of the company will be void, in the hands at least of those cognizant of the nature of the consideration. This is aptly shown by the well-known and leading case of *Balfour* v. *Ernest* (*l*), which has already been mentioned. Here the directors of a joint-stock insurance company were authorised by the deed of settlement to draw bills on account of the company only when they were so drawn for the purposes of the company; and the company were held not liable upon a bill drawn by them for purposes *aliunde* the ordinary and proper business of the company. Lord Campbell, C.-J., in delivering judgment for the defendants, said: "It is contended that the plaintiffs, not having had any knowledge of the want of such authority, are entitled to treat this bill as a bill taken from a partner having a general power of drawing bills, and which might be considered as drawn for partnership purposes, though, in fact, it was drawn by one partner in fraud of the others. There is, however, this dif-

Balfour *v.* Ernest.

to issue exists, and the *absence* of such power. See Part III., Chap. V., sections 1 and 2.

(*l*) 5 C. B. (N. S.) 601, 28 L. J. (C. P.) 170. The facts are stated *ante*, pp. 81, 82.

ference between that case and the present one, that there, there would be no reason for supposing that the bill was not given for partnership purposes, whereas here, the bill was taken by the plaintiffs in payment of a debt, for the discharge of which they knew it was not within the general scope of the authority of the directors of this society to draw bills, for the plaintiffs must have known that the company were constituted under a deed of settlement, to which, being registered pursuant to the statute, the plaintiffs could have had access, and the case which has been referred to by my brother Willes shows that a man must be taken to have knowledge of the contents of a deed of this kind."

Here the *rationale* of the decision was, that the plaintiff was affected with notice of the nature of the transaction, and that the bill was given for the accomplishment of an object *dehors* the purposes for which the society existed. Would the decision have been different if the plaintiff had been an innocent holder—*e.g.*, an indorsee for value? It is submitted that it would not have been different. The insurance society and *à fortiori* its directors had authority to issue bills only for certain purposes. Bills drawn or accepted for any other purposes must be held to be simply void as such—to be analogous to those of infants or married women. A corporation or its directors may be guilty of fraud, actual or constructive, and may, perhaps, be compelled by a

Court of Equity to account for the money paid as consideration for such bills; but if it—*i.e.*, the corporation—has not the powers to enter into certain contracts, it seems necessarily to follow that neither can it be rendered liable upon negotiable instruments made for the carrying out of such contracts (*m*). The innocent purchaser of such bills is in precisely the same position as is a similar purchaser of the bills of an infant.

Obtaining funds by means of bills or notes.

The commonest way in which this power is likely to be abused is in obtaining funds by means of bills or notes when a company either has no borrowing powers or has exhausted them. Whether money be raised directly by borrowing or indirectly by the issue of negotiable instruments for any purpose other than in payment of goods, the practical result is the same to the company. Nevertheless there are differences between the two operations. Therefore, if a company endued with the power to do so issues or negotiates bills or notes really and *bonâ fide* as an ordinary business transaction, such bills or notes will be valid, however nearly the transaction may resemble a pure loan. "Borrowing and lending are things perfectly well understood, and although the procuring of money by means of a bill of exchange confers the same benefit on the person who procures it as if he were to borrow the amount, yet it is impossible to consider transactions upon

(*m*) Compare *Athenæum Life Association Society* v. *Pooley*, 3 D. G. & J. 294, 28 L. J. (Ch.) 119.

bills of exchange given in this manner as borrowing and lending within the meaning of the 56th article of the company's articles of association. It has been well decided that the balance due to a bank by a company which keeps an account with it, and has had the benefit of the money, is a debt, but not a loan in the proper sense." These are the words of Sir John Stuart, in *Re Cefn Cilicen Mining Company* (*n*), where the Vice-Chancellor held that, notwithstanding a clause in the company's articles of association prohibiting the directors from borrowing beyond £500 without the consent of the shareholders, the company was liable, upon bills of exchange, drawn and accepted by the directors, indorsed by the company, and discounted by a bank, the proceeds of which had been in part applied in satisfying an overdrawn account at the bank, and the balance for the benefit of the company.

Overdrawing a banking account.

So, where a company or its directors have authority to issue negotiable instruments, this is an absolute and general authority, and it cannot be restricted in degree or amount, subsequent clauses limiting the liability of the company or its members to certain sums being repugnant and void; and consequently bills drawn or notes made under such authority, even in the hands of a holder with notice of the limitation, bind at Law and in Equity both the company and the individual shareholders to the

Restrictions on amount of bills to be issued.

(*n*) L. R. 7 Eq. 88; *Waterlow* v. *Sharp*, L. R. 8 Eq. 501.

full extent (*o*). Such a restriction differs *in toto* from the imposition of a formality. A company may well require for its protection that the powers which it confers upon its agents shall be exerciseable in certain ways only, and parties dealing with the company will frequently have to see that such formalities are duly observed (*oo*); but to say that its agents may engage in transactions up to a certain amount only, would be to lay down that every person entering into any contract with the company shall investigate the state of the company's business.

Bills and Notes under Seal.

Corporate seal affixed to negotiable instruments.

The corporate seal is not unseldom affixed to notes and bills issued by corporations (*p*); but it would seem that the seal in such case is simply inoperative, not interfering with the negotiability of the instrument if otherwise valid, and not converting into a deed a document purporting to be negotiable, but which the corporation had no power to make (*q*). The bill or note, if good at all, is good as a bill or note,

(*o*) *Gordon* v. *Sea, Fire, and Life Assurance Society*, 1 H. & N. 599, 26 L. J. (Ex.) 202; *Re State Fire Insurance Company, ex parte Meredith*, 32 L. J. (Ch.) 300. On *scire facias* against a shareholder, see *Pedell* v. *Gwynn*, 1 H. & N. 590, 26 L. J. (Ex.) 199.

(*oo*) See *post*, Part III., Chapter V., sections 1 & 2.

(*p*) See *Bateman* v. *Mid-Wales Railway Company*, L. R. 1 C. P. 499.

(*q*) See *Aggs* v. *Nicholson*, 1 H. & N. 165, 25 L. J. (Ex.) 348.

and not as a money bond or as an acknowledgment under seal of indebtedness. But besides these, which whether sealed or not are intended and admitted to be ordinary bills and notes, corporations frequently issue other documents duly sealed and occasionally bearing a deed stamp, and yet though not purporting to be bills or notes designed for circulation by indorsement or mere delivery. These form the subject of the next section.

SECTION IV.—INSTRUMENTS UNDER SEAL WHICH PURPORT TO BE NEGOTIABLE.

Some consideration has already been given to the documents known as debentures or mortgage debentures (*r*). It has been seen that they are documents which, when anything more than ordinary money bonds, confer upon the grantee or holder thereof charges or liens on the property and assets, or certain specified portions thereof, belonging to the corporation issuing them. To that extent they make an approach to mortgages pure and simple; but they differ from these latter in wanting certain of the important attributes which characterise them.

Debentures are choses in action.

Viewed in another light, debentures are choses in action, and, as such, they are *primâ facie* non-negotiable, and therefore assignable in Chancery only and taken subject to equities (*s*). But of late years many companies have issued bonds of this

(*r*) *Ante*, pp. 117-121.

(*s*) See *Athenæum Life Assurance Society* v. *Pooley*, 3 D. G. & Jo. 294, 28 L. J. (Ch.) 119.

kind, payable to "order" or "bearer" and the like, and the decisions are very conflicting as to how far such expressions render these bonds negotiable and estop the companies issuing from setting up the equities existing between them and the original assignor. The weight of authority must, however, now be considered to be in favour of the proposition that such instruments are, in equity, at least, negotiable free from the equities primarily attaching to them.

First.—The Effect of these Instruments in Chancery.

Re Blakely Ordnance Co.

The claim of the *New Zealand Banking Company, Re Blakely Ordnance Company* (*t*) arose thus: Blakely and Dent agreed, in writing, with the promoter of a proposed company, viz., the Blakely Ordnance Company, to sell their business to the company when formed, part of the purchase-money to be paid in debentures of the company, payable to bearer. The articles of association adopted this agreement, and directed it to be carried into effect. The directors accordingly gave to Blakely and Dent debentures under the seal of the company, by each of which the company

(*t*) L. R. 3 Ch. 154. Compare *Woodham* v. *Anglo-Australian Assurance Association*, 3 Giff. 288, where a deposit note, and *Re Agra and Masterman's Bank, ex parte Asiatic Banking Corporation*, L. R. 2 Ch. 391, where a letter of credit was held assignable free from the equities. See also *Re Blakely Ordnance Company, ex parte Metropolitan and Provincial Bank*, W. N. 1069, p. 148.

covenanted to pay the sum therein mentioned to "Blakely and Dent, their executors, administrators, and assigns, or to the bearer hereof." Some of these debentures were passed by delivery to the New Zealand Banking Corporation, who were *bonâ fide* holders for value. In the winding up of the Blakely Ordnance Company, the Lords Justices decided that as these debentures were conformable to the agreement between Blakely and Dent and the promoter, which had been made binding on the company, effect must be given to them in equity, according to their tenor, and that consequently the New Zealand Banking Corporation could prove on them in their own name, without being subject to any equities existing between the company and Blakely and Dent, the original grantees thereof. The ground of the decision was that the Blakely Company had contracted themselves out of their right to set up the equities. "The right to this money was assignable in equity; and though, in the absence of anything more than a mere assignment, the assignee would take subject to the equities existing between the original parties to the contract, I am of opinion that there is nothing inequitable in allowing the debtor in an obligation to contract with his creditor, that he will not avail himself of any such equities, that he will pay the amount due on the obligation to the assignee of the creditor (whether he be such assignee by instrument in writing or by mere delivery of the obligation),

A company may be stopped from setting up equities.

without regard to any such equities; and I have already said that, in my opinion, in this case the Blakely Company have so contracted. The debt to be proved is the money due on this contract, and not the amount due on an instrument purporting to be a promissory note. The laws which regulate the stamps to be affixed to promissory notes are not, in my opinion, applicable to the case, and it would, I think, be inequitable to deny the assignee of the creditor the full benefit of the contract entered into between the original contracting parties.

"In *Re Agra and Masterman's Bank, ex parte Asiatic Banking Corporation* (*u*), it was held that the rule which makes assignments of choses in action subject to the equities existing between the original parties to the contract, must yield when a contrary intention appears from the nature or terms of the contract. I adopt that decision. I think it applicable, as above explained, to the facts of this case" (*v*).

The accuracy of this decision was recognised and followed by Page-Wood and Selwyn, L.-JJ., in *Re General Estates Company, ex parte City Bank* (*w*), where the directors of the General Estate's Company had given to H. for value an instrument under the seal of the company headed "debenture," and stamped as a deed, by which the company "undertake to pay to the order of J. H., on 1st July, 1867,"

(*u*) L. R. 2 Ch. 391.
(*v*) *Per* Lord Justice Rolt, L. R. 3 Ch. 159, 160.
(*w*) L. R. 3 Ch. 758.

£1000, with interest half-yearly on presentation of the annexed interest warrants. The Lords Justices, reversing the decision of the Master of the Rolls, allowed the indorsee and transferee for value of this instrument to prove on it against the company, free from equities between H. and the company.

Ex parte Colborne and Strawbridge.

The latest case in Chancery on the subject is that of *Re Imperial Land Company of Marseilles, ex parte Colborne and Strawbridge* (*x*). Here the directors of a company, having power by its memorandum of association to borrow money and to issue transferable or other bonds, mortgages, or debentures, had, under its articles of association, large powers for issuing "debentures, bonds, obligations, or other securities, either specifically charged on any property of the company, or not so charged, in any form or manner, or for any amount," not exceeding the nominal capital of the company, and a specific power to issue and indorse negotiable instruments. The company issued, in payment to vendors of land to them, instruments described on their face as "debenture bonds," and stamped as bonds, and which expressed that the company "bind themselves and their successors to pay the bearer the principal sum of £20." The words with respect to interest were in a similar form, and there was no charge on any of the property of the company. The instruments were sold in open market. The company

(*x*) L. R. 11 Eq. 478.

came to be wound up, and it was decided, it being admitted that the company had equities against the parties to whom the instruments were originally issued—1. That the instruments were promissory notes, or, if not promissory notes, negotiable instruments, and amounted to contracts to pay anyone who might happen to be the bearer; 2. That, consequently, holders for value, without notice of the equities, were entitled to prove for the amount due, free from equities; 3. That the right to prove was not affected by the fact that holders had purchased, after the passing of resolutions to wind up the company, though without notice of their having been passed. All the prior authorities were referred to and commented upon, and Malins, V.-C., in the course of a very careful judgment, said: "I am clearly of opinion that, whether they [*i.e.*, the instruments in question] were promissory notes, or bonds, or debentures, it was within the powers conferred upon the directors, by the clauses I have read from the memorandum and articles of association, to issue them. Are they, then, promissory notes or debentures? or does it make any difference which they are in the result? My opinion is that, whichever they are, the result is the same, because they in any case make a contract by which the company have bound themselves to pay, not to any particular person, but to any person who may be the bearer, the sum appearing to be due upon their face."

Debentures to "bearer" or "order" are negotiable in Chancery.

On the other hand, there is the well-known

decision of Lord Cairns, when Lord Chancellor, in *Re The Natal Investment Company, Claim of the Financial Corporation* (*y*), to the effect that debentures payable to "C., or to his executors, administrators, or transferees, or to the holder, for the time being," were taken subject to equities. Lord Cairns, after commenting upon the form of the document, and the circumstances under which it was issued, said: "There is nothing, therefore, here in any engagement antecedent to the debenture, nothing in the surrounding circumstances of the case, and nothing in the construction of the debenture itself, to show that the *Natal Company* intended to forego or to renounce the ordinary rule, that the assignee of a chose in action must take subject to the equities between the original parties." Higgs *v.* Northern Assam Tea Co.

This construction is, however, in flat opposition to that placed by the Lords Justices Rolt, Page-Wood, and Selwyn, by the Court of Exchequer, and by Malins, V.-C., upon exactly similar instruments, they laying down, as we have already seen, that even if such instruments are not promissory notes, the companies making them have debarred themselves, either by the contract entered into by them with the first holder, or by their holding out to the world, from subsequently setting up the equities which have

(*y*) L. R. 3 Ch. 355, 366, followed in *Re Rhos Hall Iron Company, ex parte Birmingham Bank*, 17 W. R. 343, W. N. 1868, 223.

existed between them and the first holders of these instruments.

Secondly.—The Effect of these Instruments at Law.

In the Blakely Company's case, Lord Justice Rolt expressed some doubts whether the debentures there sued upon would have been valid at law. This point has since been settled, to some extent at least, by the Court of Exchequer, in *Higgs* v. *Northern Assam Tea Company, Limited* (*z*); there the plaintiff had sold an estate to the defendants, receiving in part payment debentures payable with interest to him, "his executors, administrators, and assigns." Some of these the plaintiff transferred to C. and S., and the defendants in various ways recognised C. and S. as proprietors of the same. The plaintiff became indebted to the defendants for unpaid calls upon shares held by him in the company, and by the articles of association the defendants had a primary lien on the debentures of any member of the company who might be absolutely or contingently liable to the company in any amount or any account whatever. Some of the debentures assigned to C. and S. having become due upon action brought by C. and S. in the name of the plaintiff to recover the amounts so due, it was held that "the defendants and Higgs contemplated and

Higgs *v.* Northern Assam Tea Co.

(*z*) L. R. 4 Ex. 387, 396.

intended that Higgs should assign these debentures, that he could not practically do so if subject to such equities as these now set up; that, consequently, Higgs and the defendants contemplated and intended that Higgs should assign free from those equities, and that the defendants have dealt with Messrs. C. and S. on that footing. Holding this, and guiding ourselves as best we can by the cases cited, we think the plaintiff entitled to our judgment."

This, however, must not be considered a decision to the effect that such documents are negotiable at law, but only that the parties thereto, having entered into the contracts thereby expressed, will, under certain circumstances, be bound by such contracts, into whosesoever hands the documents may come. As has been laid down in a subsequent case (*a*), "If Mackin [*i.e.*, the original payee] were suing in his own name for the benefit of an assignee, as in *Higgs* v. *Assam Tea Company;* or if the assignee were proceeding in equity in his own name, as in *Re Blakely Ordnance Company;* and the defendants set up some equitable defence, good against the original contractee, and therefore generally good against the assignee also, it would be a good answer to say that the defendants had, with a view to induce persons to become assignees of such instruments, represented that there were no such equities,

(*a*) L. R. 8 Q. B. 385.

and that the now holder was induced to take this instrument on the faith of that representation.

Crouch *v.* Credit Foncier of England.

The case, *Crouch* v. *Credit Foncier of England* (*b*), from the judgment in which the above extract is taken, is the latest decision at law, and it seems to be conclusive against the negotiability at common law of these instruments. The circumstances were as follows:—In May, 1869, the defendants, a limited company, registered under the Act of 1862, sold to M. a document under the seal of the company, and signed by two directors and the secretary. It was numbered and headed with the name of the company, and called "Debenture," and proceeded: "The company hereby promise, subject to the conditions indorsed on this debenture, to pay to the bearer £100 on the 1st of May, 1872, or upon any earlier day upon which this bond shall be entitled to be paid off according to the conditions and interest, at 8 per cent., on the 1st of November and the 1st of May in each year; and also a further sum of £10 by way of interest or bonus at the same time as the principal sum is paid off. In witness whereof, the common seal of the company has been affixed this 9th of May, 1869." By the conditions indorsed, a certain number of the bonds were to be drawn for twenty-one days before the days for the payment of the half-yearly interest, and any bond drawn was to be advertised and paid off with the interest and

(*b*) L. R. 8 Q. B. 374.

bonus due, the bond being given up and no further interest being payable. In July, 1869, the bond was stolen from M. In October, 1871, the number of the bond was drawn. At the end of 1871 the plaintiff purchased the debenture from S., who afterwards absconded. The defendants having notice of the robbery, refused to pay the debenture to the plaintiff, and he brought an action in his own name, alleging that he was lawful bearer of the debenture. At the trial it was admitted that similar documents had been treated as negotiable; it was also admitted that the plaintiff derived title from the thief, but the jury found that the plaintiff had given value for the debenture without notice. The Court of Queen's Bench were unanimous, first, that the contract contained in the conditions prevented the debenture from being a promissory note, even if it had been under hand only; secondly, that it was not competent to the defendants to attach the incident of negotiability to such instruments, contrary to the general law; and that the custom to treat them as negotiable, being of recent origin, and not the law-merchant, made no difference, as such a custom, though general, could not attach an incident to a contract contrary to the general law. And the plaintiff, therefore, could not recover.

Debentures not negotiable at Law.

It has not yet been distinctly decided, but it follows as a natural consequence, that the power to issue negotiable debentures belongs, not to all corporations, nor even to those authorised to borrow by

Power to issue negotiable debentures belongs to some corporations only.

means of debentures, but only to such as may issue ordinary bills and notes (*c*).

Thirdly.—The exact Import of Instruments of this Description.

Precise character of negotiable debentures.

It follows that the great preponderance of authority in Chancery generally and at Common Law with certain qualifications, is in favour of the opinion that when these documents are payable to the "holder," "bearer," or "transferee," the company is compellable to pay them free from the equities primarily attaching to them. But this is not sufficient to determine the exact nature of them. Corporations and private individuals may be liable to discharge to any possessor of a document the debt of which such document is good and perhaps conclusive evidence, but if the liability be based simply and solely upon the contract entered into by the maker of such document, or upon the ground that the said maker is estopped by his deed or his admission in pais, the complete negotiability of such document is by no means established—in fact it is by implication denied. Now, in considering this point, we have to bear in mind that by the strict rules of law, a corporation could bind itself by no engagement to which the corporate seal had not been duly affixed, and, consequently, the real question to be determined is, not why in each particular instance has the seal

(*c*) See *per* Lord Justice Rolt, in *Re Blakely Ordnance Company's case*, L. R. 3 Ch. 154.

been affixed, but what is the effect of language *primâ facie* importing negotiability, appearing in instruments under the seal of corporations. To this question one of three answers must be returned.

Either, firstly, the document is a deed—nothing more, and the words "to order," or "bearer," or the like, must either be struck out as inconsistent with its general tenour, or be read as Lord Cairns read them in the *Natal Investment Company's case* (*cc*): "We [*i.e.*, the corporation] undertake that we will fulfil this contract, either to yourself personally, or to your executors, or to your administrators, or to your assigns by deed, or to any person whom you may make the holder of this debenture, even without a deed; but what we undertake to fulfil, whether to you or to any other of these parties, is the contract, and nothing but the contract, which we have made with you; and if in our dealings with you there is anything that might affect that contract, the person who takes the contract by assignment must take subject to the equity between us."

Firstly, Debentures may be ordinary deeds.

This, however, it is submitted, is a very strained construction of language otherwise clear and unambiguous, and it is impossible to reconcile it with the interpretation put in later cases upon expressions almost identical.

Or, secondly, the document is negotiable as regards the corporation, but not as regards any other party. It is the acknowledgment of a debt owing—the

Secondly, Debentures may be negotiable as against the corporation only.

(*cc*) L. R. 3 Ch. 355, 361.

evidence of a contract entered into—by the corporation, having the seal affixed as a necessary formality, and binding the corporation to fulfil such contract, *modo ac forma*, that is, to pay the sum of money thereby stated to be due, to any person who may lawfully be entitled to the said document. It will therefore bear a twofold character. As between the corporation and all other parties it will be negotiable; but, like every other negotiable instrument, free from those equities *only which do not appear on the face of it*. This latter qualification is most important, but it has to a great extent been overlooked. Whatever equities or trusts are attached to an ordinary bill or note in its inception, or become attached to it in the course of its circulation, *e.g.*, by a restrictive indorsement, qualify and limit the negotiability of the instrument, which henceforth passes, subject to such equities or trusts. Apply this principle to the case in question. First, a corporation has certain powers only; secondly, those powers are those which are expressly given it by its constating instruments, or which, by implication therefrom, it must possess for the due and advantageous carrying on of its business; thirdly, it incurs no liability by engaging in transactions *aliunde* those for the prosecution of which it has been created; fourthly, persons dealing with it directly or through its agents, are bound to inform themselves by an examination of its constating documents of the purposes for which it exists, of the

powers with which it is endowed, and of the limitations, if any, placed upon the exercise, in manner or degree, of such powers. These facts are admitted, and they determine the liability *ex contractu* of every corporation. Take the *Natal Investment Company's case.* The company agreed to purchase of one A. Coqui certain land in Natal, paying him partly in cash, partly in debentures; and, in pursuance of this agreement, they gave him debentures payable to himself, "or to his executors, administrators, or transferees, or to the holder for the time being," and commencing thus: "Whereas the Natal Investment Company, Limited, hereinafter designated the company, is indebted to A. Coqui in the sum of £500, now these presents witness, that in consideration of the premises the company hereby declares that the funds, assets, and property of the company shall be subject, &c." These bonds were issued not in an absolute and unqualified manner or as binding the company to pay at all events, but "in consideration of the premises;" that is, in consideration of the due performance of the contract so entered into, the completion of which, therefore, became an equity attaching to the debentures and, being apparent on the face of them, affecting every one into whose hands they came with notice thereof. Coqui, however, wholly failed to carry out his contract, having no title to the land he had agreed to sell. Consequently the company was not indebted to him, and the bonds given to him in consideration of such

indebtedness became null and void, whether as bonds or as negotiable instruments, and whether in his hands or in those of any other party. The Natal Company had power to issue negotiable bonds in payment or otherwise in fulfilment of contracts entered into in the ordinary course of their business, but not for any other purpose ; and persons taking such bonds were simply placed in the usual position of persons dealing with the company—that is, were bound to inform themselves of the extent of the powers possessed by the company, and of the restrictions placed upon these powers. Whether, however, the word "premises" in the above bond can be read as meaning the contract made between the company and Coqui, is at least doubtful ; and, perhaps, the only conclusion to be come to is that the Natal Company's case is irreconcileable with other authorities.

Thirdly, Debentures may be fully negotiable at Law and in Equity.

Or, thirdly, the document is fully negotiable. This seems to be the only logical conclusion at which in the majority of cases we can arrive. The fact that the seal is affixed is of slight importance. It denotes that the corporation has duly executed the instrument—nothing more, not converting it into a deed, nor rendering necessary that a transfer should be under seal. It is, in a word, a negotiable instrument, pure and simple, belonging to the class of simple contracts, and attested by the corporate seal as a formality solely ; and in the two latest and most considered decisions on the subject, *Re General*

Estates Company, ex parte City Bank (*d*), and *Re Imperial Land Company of Marseilles, ex parte Colborne and Strawbridge* (*e*), instruments—in the former case styled "Debenture," and made payable "to the order of" J. C. H., and in the latter "Debenture Bond," and payable "to the bearer," both expressed to be given under the common seal, and bearing each a deed stamp—have been so held, and persons taking them by the customary parol transfer were allowed to prove in the winding up for the full amount of their claims.

Effect of the Judicature Act, 36 & 37 Vict., c. 66.

Lastly, there is the very wide provision contained in the 11th clause of the 25th section of the Supreme Court of Judicature Act, that "generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the Rules of Equity and the Rules of Common Law with reference to the same matter, the Rules of Equity shall prevail." This enactment, read in connection with the rules relating to equitable rights contained in the section immediately preceding, must, it is conceived, render most mortgage debentures, purporting to be transferable, whether by indorsement or simple delivery, to be really and fully negotiable. The decisions, and therefore the rules, in Chancery—with the solitary exception of the Natal Company's case—are uniform, that such documents are assignable, either absolutely so, like ordinary bills and notes, or, if restricted at

(*d*) L. R. 3 Ch. 758. (*e*) L. R. 11 Eq. 478.

all, subject only to the equities, that is to say, the conditions appearing on the same. These decisions and rules in future are to prevail at Law; consequently, mortgage debentures must, under ordinary circumstances, and if in the ordinary language, in future be negotiable at Law as in Equity.

Mortgage Debenture Acts.

In connection with this point, the Mortgage Debenture Acts of 1865 and 1870, 28 & 29 Vict., c. 78, and 33 & 34 Vict., c. 20, should be noticed. They authorise corporations, whether governed by the Companies' Acts or incorporated by special statutes, whose objects are the advancing of money upon real securities and other analogous purposes, to issue transferable mortgage debentures, provided their capital be not less than £100,000, in shares of not less than £50 nominal value.

CHAPTER V.

LEGAL PROCEEDINGS.

Legal proceedings by and against corporations.

CORPORATIONS may undertake, whether by instituting or defending, all such legal proceedings as may be necessary for the protection of their own rights and their own legitimate business. Such a power is simply necessary for the existence of every corporation, and is therefore an essential legal fact in its constitution. The corporation sues and is sued in its corporate name (*a*). Being a legal entity existing apart from its members, it may maintain any proceedings in any court of competent jurisdiction as well against its own members as against strangers; and all the ordinary rules of procedure and of pleading, *e.g.*, cross claims, set-off, notice, &c., will be as applicable in the one case as the other. Thus they can validly execute bonds as security for costs, although they might not ordinarily have power to make money bonds (*b*).

(*a*) *Woolf* v. *City Steam Boat Company*, 7 C. B. 103, 18 L. J. C. P. 125. See *Pilbrow* v. *Pilbrow's Atmospheric Railway Company*, 3 C. B. 730; *Fell* v. *Burchett*, 7 E. & B. 537; *Ingate* v. *Austrian Lloyd's Company*, 4 C. B. N. S. 704, 27 L. J. C. P. 323; and *Towne* v. *London, &c., Ship Company*, 5 C. B. N. S. 730.

(*b*) *Young* v. *Brompton, &c., Waterworks Company*, 1 B. & S. 675, 31 L. J. Q. B. 14.

SECTION I.—LEGAL PROCEEDINGS INSTITUTED BY OR AGAINST THE CORPORATION DIRECTLY.

In matters affecting the corporation as a whole.

Not only can a corporation sue, but it is the proper party—and indeed the only party—to bring actions in all cases where the ground of action is a matter affecting the corporation as a whole, and not some particular members or classes of members. The commonest instances where questions arise as to who are the proper and necessary parties to a suit, and to be plaintiffs and defendants respectively, are when the officials of the corporation have gone beyond their authority, or have done or omitted to do some act whereby the corporation has been prejudicially affected. The acts or omission in question will be either Ultra Vires of the corporation, or about or with reference to matters which are themselves Ultra Vires; if so, it will generally be incompetent for the corporation to attempt to take cognizance of them; or within the authority of the corporation to approbate or reprobate, to affirm or repudiate. If of the latter description, then it is for the corporation to take proceedings or not—individual shareholders cannot interfere. It cannot be too clearly or plainly laid down, that the corporation as such alone is competent to deal with what concerns it as a corporation. No matter how grievously members, whether few or many, are damnified by the transactions in question, provided such transactions concern the whole body collectively in their corporate character and are not Ultra Vires,

The corporation alone can interfere.

the members in their private capacity will be without remedy. They, the members complaining, cannot bring a suit either individually, or as a class, or in the name of some one or more, "on behalf of themselves, &c.;" unless indeed the corporation—that is to say, the majority—are acting fraudulently towards the members complaining, by refusing to institute the necessary proceedings (*c*).

This part of the subject more properly falls under Part IV., Chapter I., "On the Interference of the Courts in the Internal Affairs of Corporations;" but one or two of the leading cases may be quoted in illustration.

Mozley v. *Alston* (*d*) is a decision often cited. The bill was filed by two shareholders against the corporation and twelve other members, who were alleged to have usurped the office of directors, and to be exercising the functions thereof, as a majority of the governing body, injuriously to the interests of the company, praying that those twelve defendants might be restricted from acting as directors, and be ordered to deliver the common seal, and the property and books of the company in their possession, to six other persons who were alleged to be the only duly constituted directors. Mozley *v.* Alston.

The defendants demurred, and the Lord Chancellor, upon appeal, allowed the demurrers.

(*c*) *Atwool* v. *Merryweather*, L. R. 5 Eq. 464 *n.*; *Harbottle*, 2 Hare, 461, 16 L. J. Ch. 217.

(*d*) 2 Phill. 790; *Foss* v.

In *Exeter and Crediton Railway Company* v. *Buller* (*e*), the defendants, the late directors of the company, retained possession of the corporate seal. Thereupon some of the shareholders, alleging themselves to be a majority, filed a bill in the corporate name, but not under seal; and it was held that the suit was rightly brought.

Gray v. Lewis.

Gray v. *Lewis* (*f*) is the most recent authority. The facts, stated very concisely, were these:—The directors of Charles Lafitte and Company, Limited, were concerned in certain transactions which, if bearing the construction put upon them by some of the shareholders, and among them the plaintiff, were Ultra Vires, and which in the result entailed great loss upon the company. Gray, a shareholder, filed a bill in his individual capacity against these directors, and other parties mixed up with them, to make them recoup the company for this loss. On appeal, the bill was dismissed. Lord Justice James said: "Now in this case I am of opinion, that the only person—if you may call it a person—having a right to complain was the incorporated society called Charles Lafitte & Co. In its corporate character it was liable to be sued, and was entitled to sue; and, if the company sued in its corporate character, the defendant might allege a release or a compromise by the company in its corporate character—a defence which would not be open in a suit where a plaintiff is suing on behalf of himself and other shareholders.

(*e*) 5 Ra. Ca. 211. (*f*) L. R. 8 Ch. 1035, 1051.

I think it is of the utmost importance to maintain the rule laid down in *Mozley* v. *Alston*, and *Foss* v. *Harbottle*, to which as I understand the only exception is where the corporate body has got into the hands of directors and of the majority, which directors and majority are using their power for the purpose of doing something fraudulent against the minority, who are overwhelmed by them, as in *Atwool* v. *Merryweather*, where Page-Wood, V.-C., under those circumstances, sustained a bill by a shareholder on behalf of himself and others, and there it was after an attempt had been made to obtain a proper authority from the corporate body itself in public meeting assembled."

I. A corporation cannot interfere in, whether by instituting or assisting, legal proceedings which do not either directly or indirectly affect itself or its privileges.

Legal proceedings not affecting a corporation or its franchises.

When any measures, legal or otherwise, are taken against a corporation directly, the question is quite clear—a corporation, like every other person when attacked, may adopt in defence every and any course allowed by law, whether such course may or may not necessitate an appeal to the legal tribunals.

Proceedings against members which may indirectly affect a corporation.

But whether a corporation may take part in proceedings instituted against its members, which in the result and indirectly impeach its own status, is somewhat doubtful, although the balance of authority is decidedly in the affirmative. In the *Att.-Gen.*

v. *Mayor, &c., of Norwich* (*g*), Lord Cottenham was of opinion, though he did not actually decide, that it is no improper application of the funds of a municipal corporation to defend proceedings on *quo warranto* informations, which have for their object to destroy the corporation of which the individuals attacked are members.

In the following cases the costs were deemed properly incurred by the corporations concerned, and therefore payable out of their funds.

(1). *Reg.* v. *Town Council of Lichfield* (*h*). Here the town council had, by resolution, removed the town clerk from his office for misconduct. His claim for compensation being refused, he sued out a mandamus to assess the same, and the jury ultimately found the issues raised in his favour. An attorney was employed to oppose the mandamus, and it was determined that his costs were chargeable upon the borough fund, it not being shown that the town council had acted with *mala fides* in the removal.

(2). *Holdsworth* v. *Mayor, &c., of Dartmouth* (*i*). *Quo warrantos* were filed against the plaintiff and several of his friends, to try their right to be members of a corporation, and they were in the result ousted. These informations the plaintiff, without the direction or authority of the defendants, caused to be defended, and subsequently thereto the de-

(*g*) 2 My. & Cr. 406, 428.
(*h*) 10 Q. B. 534, 16 L. J. 605.
(*i*) 11 A. & E. 490, 4 Jur. Q. B. 333.

fendants sealed and delivered to the plaintiff bonds, to reimburse him for the costs of such defences, and for no other consideration. These bonds were adjudged to be good.

This, it will be seen, is a strong case. The plaintiff defended without the authority first obtained of the defendants—the issues were found against him—it was not shown that thereby the existence or rights of the corporation were compromised; afterwards, when the proceedings were at an end, the bonds were given, and yet they were binding on the corporation.

(3). In *Reg.* v. *Town Council of Lichfield* (*j*), the Court of Queen's Bench thought that the council of a borough may prosecute at the expense of the corporation for an assault upon the mayor in the execution of his duty.

(4). *Reg.* v. *Prest* (*k*). Here a municipal corporation had imposed a rate which they intended to enforce, but concerning which they were threatened with litigation if they persevered in their intention. They employed a solicitor, who took counsel's opinion as to the legality of the rate, and it was held that his costs were properly chargeable upon the borough funds.

(5). *Lewis* v. *Mayor, &c., of Rochester* (*l*). This case arose thus: The defendants, at a court duly

(*j*) 4 Q. B. 893, 12 L. J. Q. B. 308. See *Reg.* v. *Town Council of Stamford*, 4 Q. B. 900 (*n*), 13 L. J. Q. B. 177.

(*k*) 16 Q. B. 33, 20 L. J. Q. B. 17.

(*l*) 9 C. B. N. S. 401, 30 L. J. C. P. 169. See *Reg.* v. *Mayor, &c., of Monmouth*, L. R. 5 Q. B. 251.

held, expunged the names of several burgesses from the borough list, who thereupon obtained rules *nisi*, calling upon the mayor to show cause why he should not hold another court to revise the list. The corporation, under their common seal, retained the plaintiff, an attorney, to show cause and otherwise defend the rules. He accordingly did so, but the rules were made absolute. The plaintiff then sued the corporation for his costs, and the Court held that the costs were legally incurred, and that he was consequently entitled to recover the same against the corporation.

SECTION II.—LEGAL PROCEEDINGS NOT BY OR AGAINST THE CORPORATION DIRECTLY.

First.—Where the corporate interests are not directly endangered.

In the authorities just cited, the rights and franchises of the corporation either were directly affected, or in the result might have been compromised by the proceedings that had been instituted. But if this be not so, if individuals only are attacked as such, and in their private capacity, even though it be for exercising corporate offices, then the corporation cannot interfere. The courts consider such proceedings to concern these individuals only, who must consequently themselves bear any expenses which may be incurred by them in respect thereof. The chief decisions on this point are the following :—

(1). *Reg.* v. *Mayor, &c., of Leeds* (*m*). On the election of councillors for a borough, a question arose, which of two candidates had been duly declared to be elected. The mayor took counsel's opinion, on which he acted by rejecting the vote of one of the candidates. The council had given the mayor a general authority to take such opinion in case of need. The excluded candidate obtained a rule *nisi* for a mandamus to the mayor, aldermen, and burgesses, to receive his vote, and permit him to act as councillor; and the council resolved, by a majority, that cause should be shown against the rule. It was determined that the costs of such opposition, and of the case submitted to counsel, could not be charged on the borough fund, under stat. 5 & 6 Will. IV. c. 76, s. 92, though it was sworn that the proceedings were taken *bonâ fide*, and not for the purpose of supporting one candidate against the other at the public expense.

(2). In *Reg.* v. *Bridgwater*, and *Reg.* v. *Paramore* (*n*), expenses incurred by a corporation under similar circumstances were disallowed. The town council of Bridgwater had ordered payments from the borough fund for defraying the expenses of opposing two rules, one for a *quo warranto* against a party who had been declared duly elected a councillor, and had accepted the office, for exercising that office; the other for a criminal information against an alderman of the borough, for alleged

(*m*) 4 Q. B. 796. (*n*) 10 A. & E. 281.

misconduct at an election of councillors. On motion for a *certiorari*, made at the instance of a burgess, the Court of Queen's Bench quashed the orders which directed the payments in question, holding that the purposes for which the expenses had been incurred were clearly not public purposes.

(3). In *Reg.* v. *Town Council of Stamford* (*o*), a rule was made absolute to remove by *certiorari* into the Queen's Bench an order of a town council to defray out of the borough funds the expenses entailed upon two police officers of the borough, in the prosecution of a party for an assault committed upon them in the execution of their duty; and also the expenses of their defence to an indictment preferred against them by him for an assault upon the same occasion. The Court determined that the payment of such expenses was not justified by sect. 92 of 5 & 6 Will. IV., c. 76; and that a resolution of the watch committee which had been passed approving of such payment was not an award of expenses within sect. 82 of that statute.

(4). *Reg.* v. *Mayor, &c., of Tamworth* (*p*), is to the same effect. The Court laid down the general rule, that the costs of litigation undertaken by a corporation, if *mala fide* and from improper motives, or in respect of a matter in which the corporation

(*o*) 4 Q. B. 900 *n*, 13 L. J. Q. B. 177; *Reg.* v. *Thompson*, 5 Q. B. 477, D. & M. 497. See *Reg.* v. *Dunn*, 5 Q. B. 959.

(*p*) 17 W. R. 231, 19 L. T. N. S. 433.

is only collaterally interested, cannot be charged upon the borough fund; but, if in the *bonâ fide* assertion of the rights of the corporation, they may be charged upon the fund, although the litigation has not resulted in favour of the corporation.

(5.) *Reg.* v. *Mayor, &c., of Sheffield* (*q*). A water-works company in the borough of Sheffield were by their Act bound, on the requisition of the town council, to give a constant supply of water, and they were empowered to make regulations to be observed by the consumers subject to the approval of two justices, any person aggrieved having the right to oppose the regulations before the justices. The town council having required the company to give a constant supply, the company proposed certain regulations, which were opposed before the justices by the corporation on the ground that they imposed too onerous conditions on the consumers, and the justices modified the conditions accordingly. The town council made an order for the payment of the expenses so incurred, but the Queen's Bench quashed the order, as not being justified by sect. 92 of 5 & 6 Will. IV. c. 76, and there being no surplus rates from which the payment could be made.

Result of the authorities.

The result of the above cases would seem to be this:—*first*, that it is only the invasion, actual or contemplated, of either the franchises, the rights, or the property of a corporation, which will justify an

(*q*) L. R. 6 Q. B. 652.

expenditure of the corporate funds, not an action, a *quo warranto* information, or the like brought against individual members of even the governing body; *secondly*, that save under very exceptional circumstances, a corporation may not indemnify a member for expenses incurred by him in maintaining his rights as a member; but, *thirdly*, that the Courts construe the corporate "rights" somewhat liberally; and, therefore, if legal proceedings be necessary to protect the mayor or other member of the governing body in the discharge of his functions, or to secure the corporation against the doing of acts which may, though remotely, prejudicially affect its interests, the costs of such proceedings may be defrayed out of the corporate assets; provided, however, *fourthly*, that there be no prohibition, express or implied, against undertaking the proceedings in question; for if so, no measures, no damage, no benefit, present or prospective, will justify the same (*r*).

Secondly—Where the corporate interests are in no way concerned.

Legal proceedings which do not question the corporate rights.

II. A corporation cannot in any way interfere in legal proceedings, which do not involve or question the corporate rights or privileges.

It has just been seen that a corporation may ex-

(*r*) See *Reg.* v. *Mayor, &c., of Sheffield*, L. R. 6 Q. B. 652, and similar cases.

pend its funds in maintaining its own corporate privileges, but not those of private persons. *A fortiori*, it may not institute or aid proceedings against parties who may have injured or made attacks upon its members, and thereby damaged the pecuniary position of the corporation.

This was so decided in *Pickering* v. *Stephenson* (*s*). The directors of a foreign railway company had prosecuted a person for a libel published by him, as secretary of a committee, with respect to the council of administration of the company. It was admitted that the libel had prejudicially affected the prospects of the company, and that upon the commencement of the prosecution the prospects were improved. But Wickens, V.-C., laid down "that where a *quasi* partnership of this sort is divided into a majority and minority, who differ on a question of internal administration, and litigation results from the difference, it is contrary to the spirit of the partnership to pay the expense of the litigation out of the general fund; and that this is independent of the question whether the majority is overwhelming or a bare majority." He therefore decided that the prosecution of the proceedings in question at the company's expense was Ultra Vires, and he consequently restrained the directors from paying any further costs out of the company's funds, although he did not, under the circumstances, order them to refund the costs which they had thus already discharged.

(*s*) L. R. 14 Eq. 322.

III. A corporation may not adopt legal proceedings, which were not originated by or on behalf of itself.

Generally speaking, a corporation may ratify, and thereby become liable for, acts not initiated by itself, provided that they are not Ultra Vires. This power of ratification is in respect of legal measures, subject to the qualification that these measures must have been commenced by persons purporting to represent the corporation, and to act on its behalf. Proceedings not so originated cannot subsequently be adopted or aided by the corporation, however beneficial to it may be the continued prosecution of such proceedings. This is well shown by the decision in *Kernaghan* v. *Williams* (*t*), which arose out of the following circumstances. Three directors in the Dublin Trunk Connecting Railway Company, instituted a suit (*Williams* v. *O'Meara*) on behalf, &c., "against the company, the directors, and other persons, for the purpose of recovering for the company moneys alleged to have been misapplied." Shortly afterwards the board of directors was reconstructed, and Williams, and two of his co-plaintiffs became directors. Somewhat later, at an extraordinary general meeting, the directors were authorised to prosecute the suit of *Williams* v. *O'Meara*,

Legal proceedings not initiated by corporations.

(*t*) L. R. 6 Eq. 228. Compare *Elborough* v. *Ayres*, L. R. 10 Eq. 367.

for the benefit and at the expense and risk of the company. But upon a bill filed by a shareholder to prevent the directors so acting, the Master of the Rolls decided that this resolution was Ultra Vires, and he restrained the directors from acting upon it.

Limits of the application of this principle.

This principle of course does not in any degree qualify the liability of corporations with respect to proceedings actually, though, perhaps, not nominally, instituted or defended on their behalf by persons duly authorised by statute or otherwise to represent them, such as public officers (*u*), clerks to public boards (*v*), and the like. Nor does it modify or otherwise affect their liability to indemnify directors (*w*), persons holding shares as trustees for a company (*x*), and others who from their position in relation to the company have incurred expense on its account.

(*u*) 7 Geo. IV., c. 46, s. 14. See *Croxton's case*, 5 D. G. & Sm. 432.

(*v*) See *Hall* v. *Taylor*, E. B. & E. 107, 27 L. J. Q. B. 311.

(*w*) See *General Exchange Bank* v. *Horner*, L. R. 9 Eq. 480.

(*x*) *Re National Financial Company*, L. R. 3 Ch. 791; *James* v. *May*, L. R. 6 H. Lds. 328. See also *Re Oriental Commercial Bank*, L. R. 12 Eq. 501; and ante, pp. 95, 96.

CHAPTER VI.

APPLICATIONS TO PARLIAMENT.

Whether corporations may apply to Parliament.

It has been seen that a corporation may extend its legitimate business by every legitimate means—will applications to Parliament, and agreements with reference to the same, made at the expense of the company by its duly appointed agents, either in virtue of their own inherent authority, or in pursuance of resolutions promulgated at an extraordinary meeting, be a "legitimate means?" The answer is not clear; but, as far as can be gathered from the many conflicting decisions, it appears that such applications and agreements will be legal and binding, if made *bonâ fide* for the purpose of *developing the existing* business, and of rendering the working of the same more easy, expeditious, and economical; but that they will be Ultra Vires, if the intention be to *add to* the business, and, *per consequentiam*, to increase the liabilities of the corporation as a whole, and of individual shareholders, or if the manifest tendency of the same be in this direction.

Many of the cases under this head have arisen from proceedings by shareholders, to restrain

directors from making such application. It was at first doubted whether the Court of Chancery could thus interfere between the legislature and parties proposing to address it; but the jurisdiction of the Court was amply vindicated by Lord Cottenham in *Heathcote* v. *North Staffordshire Railway Company* (*a*), and it has since been frequently admitted, theoretically, at least (*b*).

SECTION I.—APPLICATIONS TO PARLIAMENT NOT PURPORTING OR INTENDED TO BE AT THE CORPORATE EXPENSE.

I. Both private individuals and corporations may, without hindrance from the Courts, make any applications whatever to Parliament.

In considering this question we must carefully discriminate two proceedings closely allied and very similar, but widely different in their legal import and bearings; viz., first, applications to Parliament without more, by the corporation itself, acting, of course, by its duly accredited agents, or by the mem-

(*a*) 2 Mac. & G. 100, 20 L. J. (Ch.) 82.

(*b*) See *Lancashire and Carlisle Railway Company* v. *North-Western Railway Company*, 2 K. & J. 293, 25 L. J. (Ch.) 223, where, *per* Page Wood, V.-C. "With regard to the jurisdiction of the Court, there can be no doubt whatever of its power to interfere after the decisions that have been arrived at."

bers thereof, whether the governing body or private persons, but always in their individual character; and, secondly, similar applications, coupled with a proposition to support and defray the same by pledging or charging the corporate funds and assets.

Now, as has just been seen, it has often been asserted "by judges of great eminence that the Court has power to interfere, by injunction, to prevent an application to Parliament; but they all decline to define the occasion which would justify such an interference, and even to express an opinion as to the difficulty of conceiving a case in which anyone could be so restrained. Although, in common with my predecessors, I assert the right to grant an injunction in a proper case, like them, I will not attempt to define my power, but will simply say that this is not a case in which I think I ought to interfere" (*c*).

The subject upon constitutional grounds cannot be prevented from applying to the Crown.

These are the expressions of Lord Chelmsford, and it is difficult to avoid the conclusion at which, apparently, he arrived, viz., the jurisdiction of Chancery in reference to the matters in question is more of myth than reality. It is the undoubted privilege of every person, legal as well as natural, to petition and otherwise to apply to the Crown, that is to say, the supreme legislature, in a formal and respectful manner, whensoever and for whatso-

(*c*) *Per* Lord Chelmsford, L. C. in L. R. 2 Ch. 243.

ever he pleases. This is a constitutional right, in the exercise of which no subject may be hindered even by the sovereign. How then can the Court of Chancery interfere? Moreover, another body has to be considered, Parliament. Any injunction by Chancery against an application to it would be an infringement of its privileges, and it need scarcely be observed that the issue of such an injunction would be a contempt of either the House of Lords or the House of Commons, or both, and that every person concerned in any attempt to enforce the same would also be guilty of a similar contempt, and would be liable to a committal to prison as punishment therefor. Accordingly, in the case from the judgment in which the above extract is taken, *Steele* v. *North Metropolitan Railway Company* (*d*), the Chancellor did not venture to put in motion the asserted powers of his Court. The defendant company had agreed to purchase the land of a landowner, and had a clause to that effect inserted in their bill, whereupon he withdrew his opposition to the bill. They afterwards promoted a bill to enable them to abandon the branch which affected the land in question, and to repeal that clause. Both Page-Wood, V.-C., and the Lord Chancellor, on appeal, declined to restrain the company from making the application.

Steele *v.* North Metropolitan Rail. Co.

Indeed, there is but one, and that a peculiar case,

(*d*) L. R. 2 Ch. 237.

where the Court of Chancery has interfered to prevent such an application. In the case in question, *Ward* v. *Society of Attornies* (*e*), Knight-Bruce, V.-C., granted, until the hearing, an injunction, restraining the majority of the members of a corporation from surrendering their charter, with a view to obtaining a new charter for an object different from that for which the original charter was granted. The injunction was only temporary, and the Vice-Chancellor apparently considered that the proceedings of the majority were detrimental to the corporation, and that on that ground the minority had an equity enabling them to call for the interference of Chancery. But whether the decision can be upheld or not, it has not since been followed. Chancellors and Courts have reiterated their inherent jurisdiction to restrain applications to the Crown; but they have never done so. Cases have arisen imperatively demanding Chancery to intervene if it could do so—applications made or about to be made, not merely with *mala fides*, but in direct breach of solemn engagements—but the Courts have been content to lament the want of good faith, and to comment in strong terms upon the fraud; but they have not gone further.

Ward *v.* Society of Attornies.

In *Att.-General* v. *Manchester and Leeds Railway Company* (*f*), a cause had been commenced with respect to the building of a bridge by the

(*e*) 1 Coll. 370.

(*f*) 1 Ra. Ca. 436.

defendants in a manner detrimental to the public, and, pending a motion, an agreement was come to that no change in the existing state of things should be done until the hearing of the cause. Notwithstanding this the defendants inserted, in a bill which they had before Parliament, a clause liberating them from the agreement, and enabling them to do what they had undertaken not to do; and the Lord Chancellor Cottenham, while commenting very strongly on the conduct of the defendants, declared himself unable to interfere.

In *Lancaster and Carlisle Railway Company* v. *North-Western Railway Company* (*g*), the defendants had expressly agreed, in consideration of the plaintiffs withdrawing their opposition to a bill which the defendants were promoting, to erect their terminus at a certain spot, and not to carry their line in certain directions without the consent of the plaintiffs. Afterwards they brought forward another bill in Parliament, authorising them to make their line, terminus, &c., without paying any regard to this agreement; and Page-Wood, V.-C., refused a motion on behalf of the plaintiffs for an injunction to restrain them.

Perhaps the strongest instance reported is that of

(*g*) 2 K. & J. 303, 25 L. J. (Ch.) 223. See also *Stevens* v. *South Devon Railway Company*, 13 Beav. 49; *Ware* v. *Grand Junction Waterworks Company*, 2 R. & M. 470; *Astley* v. *Manchester, Sheffield, and Lancashire Railway Company*, 2 D.G. & J. 463.

Re London, Chatham, and Dover Railway, *ex parte* Hartridge *v.* Allender.

ReLondon, Chatham, and Dover Railway Arrangement Act, ex parte Hartridge v. *Allender* (*h*). The "Arrangement" Act (30 & 31 Vict. c. ccix.) provided that no suits or other proceedings against the company, with certain exceptions, should be prosecuted during a period of ten years, without the consent of the Court of Chancery. Hartridge and Allender had been appointed by the Court the representatives of the stock and shareholders of the company, to prosecute certain inquiries. A bill was introduced into Parliament for conferring additional powers on the company, and was promoted by the directors on behalf of the company. Its provisions were approved of by the mortgagors and shareholders in general meeting; but while in the House of Commons it was very materially modified. Thereupon Hartridge and Allender, as the representatives of the stock and shareholders, applied to the Court to restrain the directors from further promoting in the name of the company the said bill, or any other bill in Parliament affecting the rights and interests of the stock and shareholders, without obtaining the previous sanction of the Court. Stuart, V.-C., having commented very strongly upon the conduct and general proceedings of the directors and certain other persons officially connected with the company, granted the injunction. On appeal, however, the Lords Justices, while agreeing with the

(*h*) L. R. 5 Ch. 671.

Vice-Chancellor that the Court "has a power to act *in personam*, and, if a proper case should be proved, to restrain any person from making an improper application to Parliament," held that this was not a fit occasion for the Court's interference, and accordingly discharged the injunction (*i*).

(*i*) What would be the result of a conflict between the Legislature and the Courts arising from the latter putting in force—if this were ever done—their asserted jurisdiction in respect of applications to the former, it is impossible to predict. Apparently no instance has yet occurred of such a conflict. It is, however, not impossible that the heedlessness or the temerity of some Court or judge, anxious to prevent some more than usually gross breach of faith may bring about such a collision. The following extract from the *Times* of May 10th, 1873, shows that such a circumstance, though unexpected and unlikely, is not outside the bounds of possibility:—

"PRIVATE BILL LEGISLATION. —A novel, if not an unprecedented, case has arisen this week before a Private Bill Committee in the House of Commons, presided over by Sir John Ramsden; Sir John Duckworth sitting as referee. An Improvement Bill relating to the township of Kingstown in Ireland was promoted by the Township Commissioners under their corporate seal, and also by individual Commissioners. Certain dissentient Commissioners and ratepayers moved in the Irish Court of Chancery for an injunction to restrain both sets of promoters from proceeding with the Bill, and from applying the rates in furtherance of that object. The Vice-Chancellor granted the injunction, but against the corporate body alone, the ground taken being that they had not complied with the provisions of the Towns Improvement (Ireland) Act, 1854, and Incorporated Acts, which provide that, in carrying out works of improvement, local authorities shall first submit them to the ratepayers for approval. Armed with this injunction, the petitioners

Conflict between Parliament and the Courts.

Whether there is any difference between applications on public and on private grounds.

It has sometimes been attempted to draw a distinction between applications to the Legislature

against the Bill applied to the Committee, before the promoters' case was opened, to stop the further progress of the Bill; but the Committee held that, as the Bill had been referred to them by the authority of the House, they were bound to consider it, and that the corporate body must proceed at their own risk of the pains and penalties awaiting them if they disobeyed the Vice-Chancellor's order. Meanwhile the case was opened, and in support of the preamble evidence was heard at some length, including that of the Earl of Longford, Col. Taylor, M.P., Mr. Pim, M.P., and the Chairman of the Board. While this evidence was being heard, the promoters appealed in Ireland against the injunction; but the Appellate Court, comprising the Lord Chancellor and Lord Justice Christian, unanimously affirmed the Vice-Chancellor's order, with costs. In the Committee two days afterwards counsel elicited from one of the witnesses in cross-examination that the Commissioners, in their corporate capacity, had retired from the promotion of the Bill, though the individual Commissioners were still ready to proceed with it, a guarantee fund having been formed for the payment of expenses should the Bill fail. On hearing this admission the Committee at once ordered the room to be cleared, and after lengthened deliberation decided that, under the circumstances, while willing to hear the case out if the remaining promoters desired them to do so, they must, in the absence before them of the responsible local authority, pronounce the preamble not proved. The petitioners, six in number, thereupon, with one assent, asked that the promoters should be made to pay their costs, because the local authority had been legally adjudged to be wrongdoers from the beginning, and the petitioners, therefore, in the words of the Costs Act, had been 'unreasonably or vexatiously' subjected to expense in defending their interests. The Committee, however, declined to order costs."

which are based on *public*, and those on *private* grounds, and to assert that though the former cannot be restrained, yet the latter may be. Bacon, V.-C., thus alludes to this distinction (*j*) : "The main stress of the argument, which Mr. Eddis has urged so ably and so fully is, that no such relief as the plaintiff asks in this case can be given to him, because it would, in fact, be restraining an application to Parliament by a public body in the discharge of a public duty, and in which public interests are concerned. I thought that the law on this subject was at least as well settled as any other law of this Court. You cannot restrain a man from going to Parliament on public grounds; you cannot usurp that authority which rests only with the Legislature; you can shut no man's mouth; but if he is going on in violation of a plain contract, which is personal to himself, with which the public interests have nothing whatever to do, you cannot, under the pretence that he is going to Parliament, refuse the relief which, if there were no question about Parliament, this Court would be bound to give."

The distinction may perhaps exist; but, if so, the only effect of it must be this, viz., the Court of Chancery would decline to interfere with appli-

(*j*) L. R. 13 Eq. 594. Compare Page-Wood, V.-C., in *Lancashire and Carlisle Railway Company* v. *North Western Railway Company*, 2 K. & J. 293, 304, 25 L. J. (Ch.) 223, 227. See also *Att.-Gen.* v. *Ely, &c., Railway Company*, L. R. 4 Ch. 194.

cations to Parliament, when based upon public grounds, for the simple reason that—apart from any question of its jurisdiction—it would not allow its powers to be turned to the detriment of the public.

II. The Courts will prevent both corporations and ordinary citizens from breaking agreements not to oppose applications to Parliament—*semble*.

Opposing bills in Parliament: *semble* the courts may restrain against breaches of agreements not to oppose.

The right to petition against and that of promoting a bill in Parliament would seem to depend upon exactly similar considerations. But it has been asserted in the most unqualified manner that the Court has jurisdiction to restrain parties, if not generally from opposing bills, at least from breaking agreements not to oppose. "This Court, therefore, if it sees a proper case connected with private property or interest, has just the same jurisdiction to restrain a party from petitioning against a bill in Parliament as if he were bringing an action at law or asserting any other right connected with the enjoyment of the property or interest which he claims." This was the opinion of the Lord Chancellor Cottenham, in *Stockton and Hartlepool Railway Company* v. *Leeds and Thirsk Railway Company* (*k*), where, however, his lordship refused the injunction prayed, holding that the alleged contract had not

(*k*) 2 Phill. 666.

finally been agreed on. But the jurisdiction in the two cases of opposition to and of promoting a bill—claimed on the same grounds and supported by the same arguments—must in each case alike stand or fall. The constitutional principles affected in the one case are equally affected in the other, and the reasoning that is bad or good when applied to the one must be pronounced equally bad or good when applied to the other. As a matter of fact, the Court has not yet restrained against the breach of a covenant not to oppose, much less the simply opposing a bill (*l*).

III. Corporations will not be restrained from merely applying to the supreme government of another nation, for the purpose of amending their powers or otherwise modifying their constitution.

Application to the government of foreign states.

Nor will the Court prevent an application to a foreign legislature. There can be no doubt of the jurisdiction of the Courts in this respect. The legal tribunals of this country are under no duties to foreign states, and may exercise their functions without regard to their wishes or intervention. Nevertheless, they do not interfere in such cases unless it can be shown that the proposed applica-

(*l*) *Parker* v. *River Dun Navigation Company*, 1 D. G. & Sm. 192; *Maunsell* v. *Midland Great Western Railway Company of Ireland*, 1 H. & M. 162.

cations amount to a fraud on the members complaining, or are to be carried on at the corporate expense. In *Bill* v. *Sierra Nevada Lake, &c., Company* (*m*), a company had been formed in California, for purposes connected with land in that country; but nearly all the shareholders were resident in England. A resolution was passed, at a meeting of English shareholders, authorising the trustees to take steps for increasing the preference shares to an extent not allowed by the existing constitution of the company. One of the shareholders objecting to the creation of these preference shares, filed a bill to restrain the company and its directors from issuing the same. It appeared that there was no intention to create the preference shares, except with the sanction of the Californian Legislature; and the Lords Justices discharged the order of the Vice-Chancellor, and decided that an injunction ought not to be granted to restrain the company from acting on the resolution, holding that the Court will not in general restrain parties from applying to the Legislature, whether of this or of a foreign country.

Bill *v.* Sierra Nevada Lake, &c., Company.

IV. Though persons will not be restrained from applying to Parliament, even in breach of agreements to the contrary, they will be compelled to observe con-

(*m*) 1 D. G. F. & J. 177. See as to the jurisdiction of the Court in analogous cases, *Bulkeley* v. *Schutz*, L. R. 3 P. C. 764; *Smith* v. *Weguelin*, L. R. 8 Eq. 198.

tracts which they may have entered into collateral to such application.

Contracts collateral to applications to a supreme legislature.

It must however be conceded that the Court of Chancery has jurisdiction, on a proper case made out, to restrain parties entering into contracts and making arrangements derogatory to their own agreements, or to the rights of third persons, preliminary and incidental to applying to Parliament.

Telford v. Metropolitan Board of Works.

Telford v. *Metropolitan Board of Works* (*n*) is a recent decision in point. It arose out of the following circumstances: After the passing of the Metropolitan Commons Act, 1866, the plaintiff, a part owner, and the other co-owners, of a manor, the waste of which became, under the above statute, a metropolitan common with the Board of Works as its local authority, sold and conveyed the manor with the knowledge of the board for a sum of £10,200, to two trustees, who afterwards sold and conveyed the same to the Board of Works. By the former conveyance, the plaintiff (being the owner of house property near the common) stipulated that if, within five years from the date of the deed the common should not be enclosed and dedicated to the public, having no part of it sold or let on building leases, he (the plaintiff) should repurchase his share of the manor, on giving the same

(*n*) L. R. 13 Eq. 574. Compare *Att.-Gen.* v. *Manchester and Leeds Railway Company*, 1 Rail. Cas. 436. See *Frewin* v. *Lewis*, 4 My. & Cr. 249.

price for it as he was then receiving. The Board of Works, with notice of this stipulation, memorialised the Enclosure Commissioners to prepare and certify a scheme of local management, and the commissioners on the suggestion of the board published a scheme, whereby it was proposed to give the board power to sell or let, on building leases, a small outlying portion of the common, for the purpose of recouping to the board their expenses of and attending the enclosure. Thereupon the plaintiff filed his bill to restrain the board from promoting the scheme, or any scheme inconsistent with the stipulation originally made with him; and Bacon, V.-C., decided that the Board of Works were bound by the stipulation in the conveyance by the plaintiff, and also that his right under the stipulation to sue in equity was not affected by the circumstance that the scheme in order to become operative must be submitted to Parliament; and he granted the injunction as prayed.

SECTION II.—APPLICATIONS AT THE CORPORATE EXPENSE.

Applications as between the corporation and its own members.

In respect of applications of the other kind, viz., those which it is proposed to support at the corporate expense, considerations of a very different kind come into play. The persons favouring and urging on such applications, are not simply exercising their constitutional right of applying to the crown, but they are doing much more—they are expending,

or proposing to expend, the funds belonging to another, the corporation, in the maintenance of their objects, and if the governing body of the corporation, they are committing, or are about to commit, a breach of the trust which is imposed upon them for the general body of members. To restrain them from doing this, from what is in fact a misappropriation of the corporate property, is nothing more than what the Court of Chancery always does when it interferes to compel a trustee to fulfil his duty. Consequently though the Court has never yet (*o*) prevented a private person or a corporation from asking the intervention of the crown or parliament, yet it never hesitates to restrain such parties from devoting to such application funds entrusted to them for other purposes, when the persons, *e.g.*, shareholders, ratepayers, and others interested in the said funds call upon Chancery to restrain the illegal dealing with such funds.

First-applications to Parliament by Trading Corporations.

It will be convenient to deal first and separately with railway and other similar commercial corporations. Here the parties immediately affected by the appropriation of the funds are the shareholders. If they consent no other parties can interfere, but if any of them, few or many, object to the contem-

(*o*) With but one exception, see *Ward* v. *Societies of Attornies*, 1 Coll. 370.

plated proceedings, they may obtain an injunction against the same. It makes no difference what may be the object of the proposed application—to modify the constitution of the corporation, to add to or supplement its powers, to enlarge the scope of its business—in every case a shareholder is entitled to say, "I became, and am, a member of a corporation, having such and such powers and engaged in carrying on such and such a business, I subscribed my money to it, because it had those powers and was engaged in that business; but I do not think it can advantageously undertake any other business, and I decline to permit its funds to be wasted in any attempt to obtain additional powers or to vary its constitution." It might have been deemed consistent with the purposes and intra vires of every corporation endowed with certain privileges and carrying on certain operations, to enter into any engagements, enabling it the better to use its privileges and to conduct its operations. But the contrary has been repeatedly decided. It must remain content with its present powers and machinery however defective they may be; or application for the increase and improvement thereof must be made in the first instance at the expense and risk of private members. Such persons may secure, by the insertion of proper clauses in the Act for which they apply, that they shall be recouped by the corporation, but such provisions will evidently be of no avail if their application is unsuccessful.

A single shareholder has a right to an injunction to restrain the Company.

V. Commercial corporations may not make applications to parliament for any purpose whatever at the corporate expense, if any members object to the same.

Such applications are Ultra Vires in the narrower and restricted meaning of the term. A corporation may with the assent of all its members defray the expense of these applications out of its general funds. Such proceedings are not Ultra Vires in the sense that a corporation may not concur in them, but only in the sense that any single member may refuse to allow them to be supported at the corporate cost.

One of the strongest cases on this point is that of *Munt* v. *Shrewsbury and Chester Railway Company* (*p*). The defendants here had been by various Acts empowered to make several railways and also to build wharfs and warehouses for the purposes of the traffic of the company on the banks of the river Dee, the conservancy of which was vested in other persons. They brought a bill into parliament to preserve and improve the navigation of the river; but they had no express power to apply any of the capital of the company for that purpose. Upon a bill filed by one shareholder, it was held, that the directors of the railway company could not legally devote any of the railway capital to payment of the

(*p*) 13 Beav. 1; *Simpson* v. *Denison*, 10 Hare, 51.

expenses of preparing, prosecuting, or promoting the bill in Parliament; and the injunction prayed for to restrain the same was granted.

Great Western Rail. Co. *v.* Rushout.

In the *Great Western Railway Company* v. *Rushout*, (*q*), the *Oxford, Worcester, and Wolverhampton Railway Company*, of which Rushout and others were directors, and in which the plaintiffs held shares, were promoting a bill in parliament, and the plaintiffs filed a bill to restrain the defendants from pledging their company's funds in support of the same. Parke, V.-C., thus expressed himself: "The design of the application to Parliament, which is the subject of this suit, is to vary the scheme of this railway company. Now, in my opinion, having regard to the cases that have been referred to, the design of the application to Parliament is a lawful design if lawfully pursued. Parliament created this company, and I think the power must rest with Parliament to vary the constitution of the company, to control it, to annihilate it, or to deal with it as in its wisdom it shall think fit. It is clearly not in dispute that the company mean to make use of the funds, and to pledge the credit, and to enter into contracts on behalf of the *Oxford, Worcester, and Wolverhampton Railway Company*, for the purpose of promoting this undertaking. Now, upon all the authorities referred to, that is an unlawful application of the funds, and an application which this Court will not permit."

(*q*) 5 D. G. & Sm. 290, 307.

He, therefore, granted an injunction to restrain the entering into such contracts, or the use of the company's funds or the pledging their credit for the purpose of promoting the bill; but he would not go farther and prevent the defendants from soliciting the bill or another like it in Parliament, or from using the company's name and seal for such purpose.

Distinction between applications which are and those which are not at the corporate expense.

It should be noticed that the Vice-Chancellor in his judgment in the above case very carefully distinguishes between a simple application to Parliament —"which is a lawful design if lawfully pursued" —and such an application defrayed out of the corporate property, which is unlawful if any one shareholder objects. On this point Page Wood, V.-C., commented in *Vance* v. *East Lancashire Railway Company* (*r*),—"Mr. Bird contended that if it was once admitted that the directors had power to come to Parliament for the Act, all powers incidental to that must be inferred. It is quite clear that this is too large an inference; for instance, one of the most necessary consequences of applying for an Act, viz., the incurring expense, is just what this Court will not permit. If they apply to Parliament for an Act, the Court will not prevent them from so doing on the ground of dissenting shareholders objecting to it; but they are not permitted to apply any portion of the funds towards any part of the expenses necessary for this new purpose. They cannot

(*r*) 3 K. & J. 50.

divert the funds to any purpose other than those sanctioned by the existing Act of the corporation."

Stevens *v.* South Devon Rail. Co.

Stevens v. *South Devon Railway Company* (*s*), is another well-known authority. Here there were two classes of shareholders. A general meeting authorised the directors to apply to Parliament for an Act which would materially alter the existing rights and interests of the two classes, *inter se*. A shareholder of one of the two classes moved for an injunction to restrain the application to Parliament, and the use of the corporate seal, and the expenditure of the corporate funds for such purposes; and the Court—though it would not restrain the application to Parliament, or the use of the corporate seal—restrained the expenditure of the funds of the company in the payment of the costs of such application.

Varying rights of existing shareholders.

VI. It is, if not actually Ultra Vires, at least improper on the part of a corporation, which is applying to Parliament, to make contracts and to enter into other transactions on the assumption that its application will be successful.

Agreement dependent upon the success of these applications.

The contracts and transactions now referred to may easily enough be made contingent on the granting the application, and consequently to involve

(*s*) 13 Beav. 49.

the corporation in no liability till the same is decided. Nevertheless the tendency of such contingent arrangements is bad, for despite all precautions the corporation may become involved in liabilities, actual and not contingent, on obtaining the contemplated increase of powers. Consequently the Court of Chancery sets itself against such proceedings, and on proper cause shown, restrains them.

Vance v. East Lancashire Rail. Co.

Vance v. *East Lancashire Railway Company* (*t*) is a case in point. This was an application by a shareholder to restrain his directors from issuing certain shares, &c. At an extraordinary general meeting the directors had been authorised, almost unanimously, to apply for a bill for an extension of their line; and in contemplation of, and conditional upon, the passing of the Act, to *issue new* £5 per cent. preference shares upon certain terms, &c. The directors, by their affidavit, stated that the subscription to these shares was entirely conditional upon the Act, that they did not intend to pay any dividend till the same was obtained, and that the £3 deposit paid upon these shares was carried to a separate account, and devoted solely to the preliminary expenses.

The Vice-Chancellor, after admitting the right of the directors to apply for the Act, held that they were not justified in the way they were issuing the shares:—"All this is done, it is true, in anticipa-

(*t*) 3 K. & J. 50. Compare *Hattersley* v. *Earl of Shelburne*, 31 L. J. (Ch.) 873.

tion of a new Act of Parliament. But I apprehend that it was a course of proceeding altogether irregular. It may not have been intended perhaps so to be; but it strikes me as being a very irregular course of proceeding on the part of the directors. They are not put forward as the servants and agents of the promoters of the proposed new line, and as authorised to receive subscriptions to that line, and to engage in inducing parties so to subscribe; that the Act to be applied for shall enact that all the shareholders in the undertaking shall be deemed to be shareholders in the old undertaking; that the shares shall form part of the original stock, and shall have a preferential dividend of £5 per cent. That, as it seems to me, would have been the regular and ordinary course of proceeding . . . . It may be difficult at this moment to show that any positive liability would be cast upon the plaintiff or any other shareholder of the company by issuing these specific shares; but that is a question which he may fairly say is not now to be mooted . . . . The broader ground which the plaintiff may take is this—'I am a shareholder in a company which has nothing to do with the C. & B. extension; you are acting as directors of my company, and you are not to put anybody in possession of documents, and tell those persons that on the faith of those documents they are to be treated as shareholders in my railway; and that if a certain Act of Parliament shall pass making them shareholders in a certain other rail-

way, then they are to have a considerable advantage over me.'"

VII. If the necessary powers be taken in the constating instruments, it will not be Ultra Vires to make these applications even at the corporate cost.

When these applications may be at the corporate expense.

It is quite possible for the constitution of a corporation to be such as to enable it, at the corporate expense, to apply to Parliament for additional powers, and the like. And when this is so, the authority to make such application may be vested, either expressly or impliedly, in the directors or other the governing body. Under such circumstances, no shareholder, nor any number of shareholders less than a majority, will be competent to prevent the corporation, or its managing body, from defraying, out of the corporate funds, the costs of any application to the legislature which may be thought necessary. *Lyde* v. *The Eastern Bengal Railway Company* (*u*) establishes this proposition. The defendants were incorporated by an Act of Parliament. Subsequently to the Act, their deed of settlement was executed, whereby, amongst other very wide powers, it was proved that "the directors shall have the fullest power from time to time at their discretion, to apply to Parliament for an Act

(*u*) 36 Beav. 10.

or Acts for conferring on the company all such powers for extending the undertaking . . . . as the directors from time to time think fit." The directors introduced a bill into Parliament to enlarge the objects and purposes of the company, thereupon, the plaintiff, on behalf of himself and the other shareholders, filed a bill, and moved for an injunction to restrain the payment of the costs of this bill out of the company's funds, but the Master of the Rolls refused the motion, holding that the powers—unprecedented and, indeed, dangerous, as far as the shareholders were concerned—given to the directors fully justified them in their application.

Applications as between the corporation and third parties.

VIII. It is not Ultra Vires of corporations to make applications to the supreme legislature, and to support them at the corporate expense, if none of their members raise objections.

Hitherto these applications have been considered as between corporations and their members, and it has been seen that they are Ultra Vires in the narrower signification of the term—in other words, they may be, and very generally are, a breach of trust on the part of the corporation, considered as a partnership as against its members. But this is all—if the members acquiesce, it is not open to any one else, whether the corporation itself

or third parties, to make the objection of illegality. Such, at least, is the effect of the decision in *Bateman* v. *Mayor, &c., of Ashton-under-Lyne* (*v*). A company had been incorporated by 5 & 6 Will. IV. c. 61, to supply A. with water; and by 18 Vict. c. 70, the waterworks were transferred to defendants. The original Act fixed the share capital of the company, *and defined the area* from which the water was to be taken and to which it was to be supplied. Complaints having arisen of the defective supply, the committee of management resolved, *having obtained the sanction* of the shareholders, to apply to Parliament for power to make fresh works, so as to include a much larger area; and they entered into a contract with the plaintiff to prepare the necessary Parliamentary plans. It was held that such contract was not Ultra Vires.

Bateman *v.* Mayor, &c., of Ashton-under-Lyne.

Now, in comparing this case with those immediately preceding, it must be remembered that the latter arose in Chancery, where the question was whether a majority of shareholders could compel a dissentient to submit to a considerable variation in both the nature and the magnitude of the undertaking; the reply was, that according to the elementary principles of partnership, the majority have no such power. The question was not raised as to whether the application was Ultra Vires of the corporation. In *Bateman's case*, on the other

(*v*) 3 H. & N. 323; 27 L. J. (Ex.) 458.

hand, this was the exact point in dispute; and Martin and Channell, BB., though Bramwell, B., dissented, held the negative. Unquestionably the decision arrived at in this case satisfied the requirements of justice, but whether it is in perfect accord with the judgments delivered under other not very dissimilar circumstances may, perhaps, be open to doubt.

Bateman's case then involved the question of Ultra Vires in its true and primary meaning. Hitherto we have seen that a corporation may not, in opposition to the wishes of even one member, apply to Parliament for an extension of its capacities. Supposing, however, no member dissents, how far will such an application, together with agreements incidental to it, be Ultra Vires of the corporation—to what extent will it be liable for, and can it take advantage of such agreements? What engagements collateral to such applications, and made with reference to, and often in aid of them, will be binding?

How far collateral engagements are binding.

Of these collateral engagements, the most important are such as relate to the purchase of lands for and the payment of compensation for lands injuriously affected by railways, waterworks, and the like.

Eastern Counties Rail. Co. *v.* Hawkes.

Eastern Counties Railway Company v. *Hawkes* (*w*) is a leading and important decision in point.

(*w*) 5 H. Lds. 331, affirming the judgments of Knight-Bruce, V.-C., and St. Leonards, L.-C., 22 L. J. (Ch.) 77.

The Eastern Counties Railway Company having a bill before Parliament for enabling them to make a railway from W. to S., entered into an absolute agreement with Hawkes, a landowner on the proposed line, in consideration of his withdrawing his opposition to the bill, to purchase a house and six acres of land, which stood settled on him for life, with remainders over, for the price of £8000, and £5000 additional by way of compensation, and undertook to obtain all such powers and to do all such acts as would enable Hawkes to sell the estate. The bill was passed, containing no special powers as to Hawkes' estate, but the company, under their compulsory powers, could have taken two acres of the estate as within their line of deviation. No funds were raised under the Act, and no part of the line was commenced. The company having totally abandoned the line, sent a notice to Hawkes that they should not require his estate. Upon a bill

This case was preceded by three other similar decisions, very questionable on grounds of public policy if not on legal principles, viz., *Stanley* v. *Chester and Birkenhead Railway Company*, 3 My. & Cr. 773, 9 Sim. 264, 1 Rail. Cas. 58; *Simpson* v. *Lord Howden*, 9 Cl. & F. 61, 1 Rail. Cas. 326, 8 L. J. (Ex.) 261; and *Lord Petre* v. *Eastern Counties Railway Company*, 1 Rail. Cas. 462. Compare *Webb* v. *Direct London, &c., Railway Company*, 21 L. J. (Ch.) 337; and *Stuart* v. *London and North-Western Railway Company*, 21 L. J. (Ch.) 450; *Preston* v. *Liverpool, &c., Railway Company*, 5 H. Lds. 605. See also on the question of the legality of agreements of this description entered into by or with peers, *Earl of Lindsey* v. *Great Northern Railway Company*, 10 Hare, 664.

filed by Hawkes against the company before their compulsory powers had expired, both the Vice-Chancellor and the Lord Chancellor decided that the contract was good and binding upon the company. The latter then finally appealed to the House of Lords, who also held the contract to be neither illegal nor Ultra Vires—"it was to apply the funds of the company to purposes within the scope of its original incorporation" (*x*)—and therefore affirmed the decrees for specific performance thereof. This is a very strong case—the sum to be paid was exorbitant, none of the land referred to was taken or to be taken by the bill which passed, and the line was abandoned, so that the company received absolutely nothing for their outlay. Yet specific performance was decreed, thus showing that the House of Lords were satisfied, not only as to the clearness of plaintiff's title at law, but also that an action for damages would not give him fully compensation.

It will, however, be observed that the contract was *dependent upon the passing* of the bill. This is most material, and will probably be found to be the *ratio decidendi*. It is a condition of which particular notice was taken by the House of Lords in the very recent case of *Taylor* v. *Chichester and Midhurst Railway Company* (*y*).

Taylor *v.* Chichester and Midhurst Rail. Co.

(*x*) 5 H. Lds., 331, 349.

(*y*) L. R. 4 H. Lds. 628, 638. Compare *Preston* v. *Liverpool Railway Company*, 5 H. Lds. C. 605, 25 L. J. (Ch.) 421; *Earl of Shrewsbury* v. *North Staffordshire Railway Company*, L. R. 1 Eq. 593; *Scottish North-Eastern Railway Company* v. *Stewart*, 3 Macq. 382.

The defendants, being about to apply to Parliament for an Act to sanction a branch railway which would pass through the plaintiff's property, entered into articles of agreement with him, in the second of which they covenanted to purchase from him (he covenanting to sell) at the price of £2000 the land required, &c., and in the third to pay to him within three calendar months of the bill passing the further sum of £2000, "as and for a personal compensation to him for the annoyance, inconvenience, and disturbance, &c., which he has sustained and may or will sustain in respect of the sporting and preservation of game upon his said estate, by or in consequence of the construction of the said intended railway, and of the parliamentary and other surveys and other works connected therewith and incidental thereto." Each of the stipulations began: "In the like event," *i.e.*, "of the said bill in its present or any amended, modified, or altered form with the like object being passed into an Act in the present session of Parliament." The bill did pass, and on action brought by Sir Charles Taylor for the £2000 stipulated for in the third clause, the House of Lords held that the agreement was not Ultra Vires. In his judgment, Lord Hatherley, L.-C., after stating the position of affairs at the time the above covenants were entered into, thus proceeded:—"Now what was there in that state of circumstances, assuming the bill passed (the agreement being founded, as it is founded, wholly on

the condition of its passing), what was there on the face of this state of things to make it apparent to Sir Charles Taylor, that he, on the one hand, was incompetent to enter into such a contract, or that the directors, on the other hand, were incompetent to enter into it on behalf of the company? Dependent as it was entirely on the passing of the Act, he would have a right to contemplate it as if the Act had been passed, and the agreement had been entered into under its powers—though, in fact, the powers had to be obtained before the agreement could have any force or validity. He, accordingly, would find individuals incorporated as a company, with the ordinary powers of purchasing lands and paying compensation in respect of damage, paying it out of their funds. When I say out of their funds, I will state in a few moments what exactly constitutes the character of those funds. The company was in existence, its directors were persons capable of entering into engagements under a common seal—engagements conditioned of course, upon obtaining powers, but in a state in which they could enter into a contract subject to that condition.

"He found them in possession of an Act whereby they were authorised to make a certain line of railway; he found them about to extend that line. He must be taken to have made his engagement entirely subject to their obtaining the Act authorising them to do so. When we come to that Act we

find that they meant to raise a larger amount of capital than they before possessed. Their first Act, of course, restrained the application of their capital to the purposes authorised by that Act. It is not necessary to read the clauses to that effect: they are always inserted in every Railway Act. These clauses restrained them from applying their capital to anything but the original railway which, under its powers, they brought into existence; so they sought new powers to raise additional capital to make a new line."

Contracts to take lands in view of an Act of Parliament.

In connection with this question of the legality of contracts for the acquisition of lands which are made dependent on the passing of an Act, Lord Wensleydale, in *Scottish North-Eastern Railway Company* v. *Stewart* (*z*), laid down broadly that "no objection can, I think, be made on the Ultra Vires doctrine to a contract by a company who wish to alter one of the branches of its railroad, and are about to apply to Parliament for authority to do so, engaging to purchase land from a neighbouring proprietor if they should obtain their Act. The contract to purchase land in this case will therefore, I think, probably prove valid."

It sometimes happens that the agreement is worded, or construed to be worded, so as to be conditional on the lands referred to in it being taken. In such cases the whole agreement will be

(*z*) 3 Macq. 382, 416.

held conditional on this event, and none of its stipulations will be enforceable—not even those which provide for personal compensation, unless the lands be in some way interfered with (*a*).

IX. It is Ultra Vires of a corporation to promote applications to Parliament not made directly and *bonâ fide* by itself or its constituted agents for its own proper purposes.

Corporations assisting applications to Parliament made by others.

But although corporations may themselves apply to Parliament, and defray the expenses of such applications out of the corporate funds—that is, assuming no member objects—yet such applications must be really and *bonâ fide* their own. Bills promoted and measures of other kinds instituted by other persons or by themselves as the nominees of or for the benefit of other persons, they cannot legally concern themselves with. All such proceedings will be Ultra Vires in the wider sense, and cannot be made binding upon the corporation or chargeable upon its assets, either by resolutions antecedent or by subsequent attempted ratification.

East Anglian Rail. Co. *v.* East rn Counties Rail. Co.

East Anglian Railway Company v. *Eastern*

(*a*) *Gaye* v. *Newmarket Railway Company*, 18 Q. B. 457, 21 L. J. (Q. B.) 398; *Scottish North-Eastern Railway Company* v. *Stewart*, 3 Macq. 382; *Preston* v. *Liverpool and Manchester Railway Company*, 5 H. Lds. 605, 25 L. J. (Ch.) 421.

Counties Railway Company (*b*) is not only the first case on this point, but also the first case where the question of Ultra Vires was distinctly raised at Common Law. The defendants had agreed with the plaintiffs by a deed duly sealed, *inter alia*, to pay the costs of preparing and soliciting bills introduced by the plaintiffs, and then pending in Parliament. Two of the bills passed; the defendants refused to pay the costs; and on action brought it was decided that the agreement was Ultra Vires.

Macgregor v. Dover and Deal Rail. Co.

Six months later, *Macgregor* v. *Dover and Deal Railway Company* (*c*) was taken to the Exchequer Chamber. The action was originally brought by the managing committee of the proposed Dover and Deal Railway Company, but it was subsequently carried on by the official manager appointed under the Winding-up Acts. The plaintiff, in error, as chairman of the South-Eastern Railway Company, had covenanted with this committee, that—in consideration that they would not abandon their objects, but would proceed therewith and apply to Parliament for an Act to authorise the making of the Dover and Deal Railway, and would hand over the scheme to the South-Eastern Railway Company in the event of an Act being obtained—in the event of the application failing, the South-Eastern Railway

(*b*) 11 C. B. 775, 21 L. J. (C. P.) 23; *Hill* v. *Manchester, &c., Water Works Company*, 2 B. & Ad. 544, 5 *ib.* 866.

(*c*) 18 Q. B. 618, 22 L. J. (Q. B.) 69; *Mayor, &c., of Norwich* v. *Norfolk Railway Company*, 4 E. & B. 397.

Company would insure the company represented by the committee against any loss which might be caused to the said company by such rejection and failure, and would defray and pay all expenses that should be incurred by them in endeavouring to obtain the Act of Parliament. This covenant was also unanimously adjudged to be not binding upon Macgregor, upon the ground that if made by the South-Eastern Railway Company itself, it would have been Ultra Vires, and that this being so, both the plaintiff and defendants must be taken with full knowledge of the powers conferred on the South-Eastern Railway Company to have made a contract by which the plaintiff in error was to bind the company to do an illegal act.

These two decisions have ever since been recognised and followed; some of the *dicta* put forward have not been implicitly acquiesced in; but the principle actually involved stands unshaken. Indeed, if any meaning at all is to be attached to the expression Ultra Vires, it is difficult to conceive how it could be within the scope of one corporation to assist the efforts of another corporation to modify its constitution—as in *East Anglian Railway Company* v. *Eastern Counties Railway Company*, or *à fortiori* in the creation of such other—as was the object of the contract made by Macgregor.

Maunsell v. Midland Great Western (Ireland) Rail. Co.

In *Maunsell* v. *Midland Great Western* (*Ireland*) *Railway Company* (*d*), an agreement that a Railway

(*d*) 1 H. & M. 130.

Company should contribute towards the parliamentary deposit required for bills promoted by another company, and in *Spackman* v. *Lattimore* (*e*) a similar agreement that it should assist in repaying money subscribed by the promoters in compliance with the standing orders were each adjudged to be Ultra Vires.

Result of the authorities.

From the above cases we may gather that it is not Ultra Vires, taking the term in either of its meanings, for a commercial corporation—

(1) to apply to Parliament for further powers:

Or (2) to make the necessary contracts preliminary to the same (*f*).

These two propositions must probably be to this extent qualified, viz., that the additional powers sought must be to enable it to develop its existing business or to add to other business of an analogous nature. If the object of the application were a total change in its constitution, or the extending its operations in directions totally uncontemplated by its founders, it is probably that, if such an application were not itself Ultra Vires, at least the preliminary and incidental contracts would be so, and would require express provision in the new Act to legalise them.

Nor (3) is it Ultra Vires to make contracts conditional upon the passing of the proposed Act.

(*e*) 3 Giff. 16.

(*f*) *Bateman* v. *Mayor, &c., of Ashton-under-Lyne*, 3 H. & N. 323.

But here a further question arises—Out of what funds are these contracts to be discharged? Not out of the original capital—this would be Ultra Vires, as is admitted by the Lord Chancellor and by Lord Westbury in *Taylor* v. *Chichester and Midhurst Railway Company* (*ff*): "Their first Act of course restrained the application of their capital to the purposes authorised by that Act . . . . . so they sought new powers to raise additional capital to make a new line." Consequently the new Act must provide either that the old capital shall be liable for the contracts made with reference to the new Act, or that new capital may be raised.

But it is Ultra Vires for a corporation, in the furtherance of such a bill—

Either (4) to enter into unconditional and absolute contracts, and not dependent on the passing of the bill;

Or (5) to form agreements, disguised under the name of contracts, but which are in reality bribes to secure the countenance and support of influential personages (*g*):

Or (6) to contribute towards or otherwise to assist applications made by or on behalf of other corporations.

Lastly, (7) corporations may always, if no mem-

(*ff*) L. R. 4 H. Lds. 639.

(*g*) See per Lord Cranworth in 5 H. Lds. 622; and per Blackburn, J., L. R. 2 Ex. 377, referring to *Earl of Shrewsbury* v. *North Staffordshire Railway Company*, L. R. 1 Eq. 593.

bers object, and sometimes even against the wishes of a minority, oppose such application when made by other parties, if the consequences thereof would be detrimental to themselves.

Secondly.—Applications to Parliament by non-trading Corporations and quasi-Corporations.

In the authorities hitherto cited in this chapter, the *ratio decidendi* has been the principle of Ultra Vires, pure and simple. Corporations have or have not been restrained according as they were acting or proposing to act in excess of or within their powers. But with respect to corporations and analogous bodies existing for other than commercial purposes, a different principle comes in and qualifies the former if it does not actually become the sole ground of decision.

Applications to Parliament involving a breach of trust.

X. Corporations which possess their property under conditions, express or implied, constituting a trust in respect of such property, may not apply to Parliament in breach of the trust so imposed upon them.

This trust will be created in various ways. Charitable corporations evidently hold their property upon trust; so do municipal corporations since the statute 5 & 6 Will. IV. c. 76; so apparently do all corporations and quasi-corporations which have been called into being for the accomplishment of public purposes. However the trust be created, it appears

that each and every application to Parliament at the expense of the trust funds will amount to a breach of trust, and be restrained.

Att.-Gen. v. *Mayor, &c., of Norwich* (*h*), where the defendants were restrained from paying out of the borough fund the expenses of a bill in Parliament to enable them to improve the navigation of the river flowing through their city, Shadwell, V.-C., holding that the Acts regulating the corporation did not authorise them to apply funds in obtaining powers which were not then vested in them, and could not be vested in them except by an Act of Parliament specially passed for the purpose.

He grounded the jurisdiction of the Court on the fact that the mayor, &c., were trustees, who would have been allowed their expenses if application had been made to the Court.

Att.-Gen. *v.* Eastlake.

In *Att.-Gen.* v. *Eastlake* (*i*), which is perhaps now the leading case, and which was a precisely analogous application, Page Wood, V.-C., went very carefully into the question as whether commissioners empowered to levy rates for paving, lighting, cleansing, watching, and improving the streets of a town were trustees of the money levied by them. He decided that these purposes being beneficial, not only to the inhabitants of the town, but to all others having occasion to visit it, were within 43 Eliz. c. 4,

(*h*) 16 Sim. 225; affirmed on appeal 21 L. J. (Ch.) 141.

(*i*) 11 Hare, 205.

and that the commissioners were trustees. He therefore granted the injunction prayed, viz., to restrain them, the commissioners, from applying the funds they had raised towards soliciting an Act to increase their powers which had been diminished by the Municipal Corporation Act (5 & 6 Will. IV. c. 76).

Att.-Gen. *v.* Andrews.

To the same purport is *Att.-Gen.* v. *Andrews* (*j*). By a local Act, the commissioners thereby appointed were authorised to construct reservoirs and other works for supplying the town of S. with water, and to do all things necessary for that purpose, to levy rates, &c. The supply of water being insufficient, the commissioners were desirous of extending their works. It was held that they were not justified in applying the moneys so raised to defraying the expenses of an application to Parliament for another Act to extend their powers.

Att.-Gen. *v.* West Hartlepool Improvement Commissioners.

Almost exactly similar to the facts and decision in this case were those in the *Att.-Gen.* v. *West Hartlepool Improvement Commissioners* (*k*). This was an information at the relation of certain ratepayers to restrain the defendants from applying the rates and funds under their control in payment of the costs and expenses incurred by them in the promotion of a bill in Parliament to extend the area of their district. Their existing Act empowered them,

(*j*) 2 Mac.& G. 225, 20 L. J. (Ch.) 467, on appeal before Lords Commissioners Langdale and Rolfe, confirming the decision of Shadwell, V.-C., 19 L. J. (Ch.) 197.

(*k*) L. R. 10 Eq. 152.

inter alia, to "do all acts, matters, and things for promoting the health, comfort, and convenience of the inhabitants." James, V.-C., being of opinion that these words did not include the power of applying to Parliament, and, moreover, that the case was governed by *Att.-Gen.* v. *Andrews* and *Att.-Gen.* v. *Eastlake*, issued the injunction as prayed.

Applications may sometimes be opposed at corporate expense.

XI. Corporations of this description may oppose at the corporate expense application to Parliament by other parties, which may, in the result, be damaging to the interests of the trust under which or of the persons for whose benefit they possess their property.

Bright *v.* North.

Whether this statement is correct as a general proposition is doubtful. In *Bright* v. *North* (*l*) it was held that river conservators were authorised to apply a portion of their funds in watching, and, if necessary, opposing a bill in Parliament for a project lower down the river, which was likely to be injurious to the banks under their own superintendence. The bill in this case was filed by three landowners on behalf of themselves and all other persons subject to be assessed under the Act, constituting the conservators. Lord Cottenham observed: "You do not find on the face of the Act an authority to apply funds for that purpose, because it is inci-

(*l*) 2 Phil. 216. Compare *Att.-Gen.* v. *West Hartlepool Improvement Commissioners*, L. R. 10 Eq. 152.

dent to every trust. Every trustee would be allowed the proper expenses incurred in defending the property intrusted to his care."

This judgment taken in its full significance apparently laid down that such opposition so supported is not Ultra Vires in either the wide or the more restricted meaning. There is also one other decision to the same effect, viz., that any corporation —municipal, charitable, &c.—may resist proceedings which, if successful, will prevent the due discharge of its own duties and aims. This was in *Att.-Gen.* v. *Mayor, &c., of Wigan* (*m*), where an application for an injunction to restrain the raising of a borough rate was refused under the following circumstances: A bill had been introduced into Parliament which would very materially diminish the volume of water in the river running through Wigan, and as the river acted as a sewer for the town, such a result would have been very detrimental to the inhabitants; the corporation, therefore, opposed the bill, and obtained the insertion of clauses which provided for the restoration of the water so abstracted. To meet the expenses entailed by thus opposing the Act, the mayor and corporation proposed to levy a borough rate, and both Page-Wood, V.-C., and the Lords Justices, on appeal, held that they were justified in what they had done. *Per* Turner, L.J.:—"The

Att.-Gen. v. Mayor, &c., of Wigan.

(*m*) Kay, 268; on appeal 5 De G. M. & G. 52, 23 L. J. (Ch.) 433; *Reg.* v. *Lichfield*, 10 Q. B. 534, 16 L. J. (Q. B.) 333.

Act of Parliament has devoted the whole income of the corporate property to public and municipal purposes. It has made no express provision for the expenses which are incident to the protection of the property, and it has left the provision for those expenses to the general law . . . . . They [*i.e.*, the expenses in question] have been *bonâ fide* incurred for the benefit and protection of the corporate property, and, having been so incurred, this Court ought not to interfere by injunction in the present stage of the suit."

Whether this exception really exists—*quære.*

But it would seem from subsequent authorities, that, under many circumstances, persons interested in or liable to contribute towards corporate funds, may refuse to allow those funds to be devoted, even to opposing in Parliament projects which may be detrimental, directly or indirectly, to the corporation, and therefore to themselves (*n*). However, in most if not all of these decisions, it will be observed that the application of the funds in question has been limited expressly or impliedly to certain defined purposes.

(*n*) See *Reg.* v. *Mayor, &c., of Sheffield*, L. R. 6 Q. B. 652, and other similar decisions, *ante*, pp. 175-81.

CHAPTER VII.

LIABILITIES OF CORPORATIONS EX DELICTO.

It is now completely established that a corporation can commit most varieties of torts, and, consequently, expose itself to actions for the same. At first sight it would seem that such acts must *ex necessitate rei* be Ultra Vires, that torts and crimes cannot by any species of reasoning be brought within the objects for the attainment of which a number of individuals are incorporated. This is true enough, but it is only one-half of the case. The fallacy consists in assuming that the commission of torts and crimes is one of such objects, and in overlooking the fact that in the pursuit of its legitimate business a corporation may from inadvertence render itself guilty of a tort or crime. The whole argument has been met, and the fallacy exposed on several occasions. Thus, in *Ranger* v. *Great Western Railway Company* (*a*), Lord Cottenham said: "Strictly speaking, a corporation cannot itself be guilty of fraud. But where a corporation is formed

Corporations may be liable for wrongs.

(*a*) 5 H. Lds. 72. Compare Lord Chancellor Chelmsford in *Royal British Bank, ex parte Nicol*, 28 L. J. (Ch.) 257.

for the purpose of carrying on a trading or other speculation for profit, such as forming a railway, these objects can only be accomplished through the agency of individuals; and there can be no doubt that if the agents employed conduct themselves fraudulently, so that if they had been acting for private employers, the persons for whom they were acting would have been affected by their fraud, the same principles must prevail where the principal under whom the agent acts is a corporation."

Similarly, per Erle, C.-J., in *Green* v. *London General Omnibus Company* (*b*): "I take the whole tenor of authorities from *Yarborough* v. *The Bank of England* down to the case of *Whitfield* v. *The South Eastern Railway Company*, to show that an action for a wrong does lie against a corporation, where the thing done is within the purpose of the incorporation, and that it has been done in such a manner as to constitute what would be an actionable wrong if done by a private individual."

SECTION I.—FRAUDS.

Common Law action for fraud.

Frauds form the most important class of torts in connection with the liability of corporations, and they have given rise to many complicated and difficult questions. The requisites to support at Common Law an action for fraud are well known—first the

(*b*) 7 C. B. (N.S.) 290, 29 L. J. (C. P.) 13.

defendant, *i.e.*, the party guilty of the fraud, which is oftenest a misrepresentation, and must be as to a matter of fact, must have committed the fraud knowingly, recklessly, or with negligence (*c*). Secondly, he must have intended some other to act upon it (*d*). Thirdly, the plaintiffs must have relied upon the fraud, *dolus dans locum contractui* (*e*), though it is sufficient if there was a fraudulent representation as to any part of that which induced him to enter into the contract (*f*). Fourthly, the plaintiff must have sustained damage.

These requisites should be carefully kept in mind when examining a case of fraud at Common Law, whether it concerns a corporation or a private individual. But Chancery proceeds upon somewhat different considerations, often holding that to be constructive fraud, which would afford no ground for an action at law, and very frequently granting to a suitor some redress when he would be utterly remediless at law, as by ordering the wrong-doer to recoup the plaintiff, as far as he (the wrong-doer) has benefited by the wrong. Fraud in Chancery.

In considering the question of fraud, it will be

(*c*) *Taylor* v. *Ashton*, 11 M. & W. 415.

(*d*) *Thom* v. *Bigland*, 8 Ex. 725; but it is sufficient if a misrepresentation be made to the public generally as in a prospectus or advertisement, *Gerhard* v. *Bates*, 2 E. & B. 476.

(*e*) *Attwood* v. *Small*, 6 Cl. & F. 232.

(*f*) *Kennedy* v. *Panama Royal Mail Company*, L. R. 2 Q. B. 580.

convenient to take first frauds and misrepresentations which can be imputed to corporations, directly and immediately, and secondly, those which can be imputed to them only indirectly, and by implication.

(*a*). *Frauds which may be imputed to a corporation immediately.*

I. Corporations are liable, like other individuals, for frauds committed directly by themselves or by their direction.

Fraud committed by the corporation itself.

Not a shadow of doubt now exists either at Law or in Chancery as to a corporation's liability when the circumstances are such that the fraud can be imputed to the corporation itself. When will this be the case? The answer given by Lord Chancellor Westbury (*g*) is: "That if reports are made to the shareholders of a company by their directors, and the reports are adopted by the shareholders at one of the appointed meetings of the company, and these reports are afterwards industriously circulated, misrepresentations contained in those reports must undoubtedly be taken, after their adoption, to be representations and statements made with the authority of the company, and therefore binding upon the company." Similarly in *National Ex-*

(*g*) 9 H. Lds. 725.

change Company of Glasgow v. *Drew* (*h*), Lord St. Leonards said: "I have certainly come to this conclusion that, if representations are made by a company fraudulently, for the purpose of enhancing the value of their stock, and they induce a third person to purchase stock, these representations so made by them for that purpose do bind the company. I consider representations by the directors of a company as representations by the company; and, although they may be representations made to the company, it is their own representation." This was explained or rather re-stated in a subsequent case (*i*) by Kindersley, V.-C., thus: "It was laid down in the *National Exchange Company* v. *Drew* (I do not say that the point was actually decided, but the opinion of some of the most eminent judges of the present day was expressed), that where there is a body like this, consisting of a great number of shareholders, and the directors make a report to the body at large, in performance of their duty, then, if such report contain a representation of the affairs of the company which is false, and if that is made to a public and general meeting of the shareholders of the company, and is adopted by the company as the report of the directors to that general meeting; although there be no order to publish it, either by the directors or the body at

(*h*) 2 Macq. 103.

(*i*) *Re National Patent Steam Fuel Company, ex parte Worth*, 4 Drew. 529, 532, 28 L. J. (Ch.) 590.

large, yet, from the very nature of the case, it must be regarded as the representation of the company."

As illustrating the liability at Common Law, may be mentioned, *Denton* v. *Great Northern Railway Company* (*j*). This was an action against the defendant for fraudulently publishing in their time tables a train which had ceased to run, whereby the plaintiff, who had, relying on the tables, left London for Peterborough, with the intention of going on thence to Hull by the train, which, on arriving at Peterborough, he learnt had been discontinued, was put to expense; and it was unanimously held by the Queen's Bench that the defendants were liable for the expenses so incurred.

(*b*). *Frauds imputable to a corporation, but only mediately.*

II. Corporations are, at Common Law, liable to an action for damages, for the frauds and misrepresentations of their agents in the due course of their employment.

Common Law liability of a corporation for fraud of its agents.

These are such frauds as are committed by the agents of the corporation in the management and furtherance of its business. For these frauds it is now fully established at Common Law that the corporation is liable, provided the agents guilty of the frauds kept within the limits of their authority. In

(*j*) 5 E. & B. 860, 25 L. J. (Q. B.) 129; *Williams* v. *Swansea Harbour Trustees*, 14 C. B. (N. S.) 845.

Barwick v. *English Joint Stock Bank* (*k*), the Court of Exchequer Chamber, on a bill of exceptions, held the defendants responsible for the fraud of their manager. No objection was taken—in fact, the point was not even raised by either the counsel or the bench—to the action itself, as being against a corporation. It was assumed throughout that a corporation, like any other principal, is liable for the acts of its agents. Barwick *v.* English Joint Stock Bank.

So in *Kennedy* v. *Panama, &c., Mail Company* (*l*), which was an action brought on the ground of misrepresentation in a prospectus, issued by the directors, to recover calls paid by plaintiff, the same liability was assumed as beyond all argument. Indeed, the judgment of the Court notices it only incidentally. "These would not be legitimate consequences if there had been fraud in those acting for the company. *Doubtless, in such a case, the company must bear all the consequences of the fraud of those they employ.*" Kennedy *v.* Panama, &c., Mail Co.

III. Corporations are not liable in Chancery for the frauds of their agents—*semble*; but they cannot retain any benefit derived by them from such frauds. Liability in equity for fraud of its agents.

But the authorities and *dicta* in Chancery are very conflicting, if not absolutely irreconciliable.

(*k*) L. R. 2 Ex. 259; recognised and followed in *Swift* v. *Winterbotham, P. O.*, L. R. 8 Q. B. 244.

(*l*) L. R. 2 Q. B. 580, 589.

Conflicting decisions.

On the one side it is urged that the agents of a corporation are its agents for carrying on its operations honestly and legally, and cease to be so when they act fraudulently and illegally. On the other side it is urged, with equal justice, that no distinction can be drawn between a principal, who is merely a legal entity, and an ordinary human being; and that, as a corporation must act by agents, so, like other principals, it ought, in common fairness, to be responsible for the frauds as well as the other acts of these.

In support of the former view we have the following —(1) *North of England Joint-Stock Banking Company, ex parte Bernard* (*m*), per Parker, V.-C.: "As to the argument that Mr. Bernard was induced to take these shares by incorrect representations, that point was taken in Dodgson's case, and Knight-Bruce, V.-C., said that, whatever fraud there might be, if fraud there was, it was charged against the directors, who could not be the agents of the body of shareholders to commit a fraud. For these reasons the motion must be refused."

(2) *Re Athenæum Life Assurance Company, ex parte Sheffield* (*n*), per Page-Wood, V.-C.: "With

(*m*) 5 D. G. & Sm. 283, 21 L. J. (Ch.) 468, 470, following *Dodgson's Case*, 3 D. G. & Sm. 85, which however is not clearly reported.

(*n*) 18 John. 451, 28 L. J. (Ch.) 325. See *ex parte Richmond and Painter*, 4 K. & J. 305, two cases also growing out of the winding up of the Athenæum Company.

regard to any fraud in misrepresenting what the deed itself was, I apprehend nothing can be made of that. Of course, the representations made by the secretary could have no effect at all, if the deed were different from what it was represented to be; for, though companies have been held to be bound in some cases by the act of all the directors, acting in the due execution of their powers, it has never yet been held that an officer of a company misrepresenting the effect of a deed, it being no part of his functions to explain or expound that deed, could release a shareholder."

(3) *Duranty's Case* (*o*), per Romilly, M.R.; "The directors are not the agents of the company to commit a fraud."

(4) *Re Hull and London Life Assurance Company, ex parte Gibson* (*p*), where Lord Chelmsford, L.-C., expressed himself thus: "There is no doubt that, if a person has been drawn in by the misrepresentations of an individual member of the company, he cannot exonerate himself from liability by reason of such false representation. If he has any remedy, it is against the individual shareholder who has deceived him. With respect to misrepresentations by the company itself, or its agents, the case would be different; but there has always appeared to me to be great difficulty in establishing such a case. The company is represented by its directors, who,

(*o*) 26 Beav. 268, 274. (*p*) 2 D. G. & J. 275, 283.

for certain purposes, are its agents; but the difficulty is in saying that they are its agents for the purpose of making false representations."

(5) In *Re Royal British Bank* v. *Mixer's Case* (*q*), Lord Campbell, L.-C., said: "Clearly there was fraud, and gross fraud, on the part of the directors, and I have no doubt that he [*i.e.*, the appellant] was induced by fraud to take his shares. I think, however, that it was a fraud on the part of the directors, which cannot be imputed to the company."

The above cases, however, cannot be considered binding at the present time, at least, not to the full extent of the language employed. It would indeed have been strange if that could have continued to be deemed fraud in a Court of Law which Chancery refused to recognise as such; and if a party injured by the misrepresentations of the agents of a company, would have been compelled to apply to Law for the relief and redress which Equity denied him. Three recent decisions of the Supreme Court of Appeal have partially removed this anomaly, and have at length determined that a corporation cannot in Chancery, any more than at Common Law, shield itself from liability for the frauds of those it employs, by the absurd fiction that, not possessing real existence, mental or bodily, the mental element, intention, requisite to constitute fraud, is wanting.

(*q*) 4 D. G. & J. 575, 586.

In the first of these decisions, *New Brunswick Railway Land Company* v. *Conybeare* (*r*), Lord Cranworth said: "If the directors, or the secretary acting for them, had fraudulently represented something to him [*i.e.*, the plaintiff] which was untrue, he then adhered to the opinion which he had expressed in former cases, that the company would have been bound by that fraud."

In the *Western Bank of Scotland* v. *Addie* (*s*), Lord Chelmsford laid down that, "where a person has been drawn into a contract to purchase shares belonging to a company by fraudulent misrepresentations of the directors, and the directors, in the name of the company, seek to enforce that contract, or the person who has been deceived institutes a suit against the company to rescind the contract on the ground of fraud, the misrepresentations are imputable to the company, and the purchaser cannot be held to his contract, because a company cannot retain any benefit which they have obtained through the fraud of their agents." Western Bank of Scotland v. Addie.

In *Oakes* v. *Turquand* (*t*), the same judge quoted this last extract, and adhered to it as being a correct exposition of the liability of a corporation for the fraud of its agents. Oakes v. Turquand.

But even the above decisions do not go as far as

(*r*) 9 H. Lds. 725, 31 L. J. (Ch.) 307.

(*s*) L. R. 1 S. & D. 145, 157.

(*t*) L. R. 2 H. Lds. 325, 344.

those at law. In *Barwick* v. *The English Joint-Stock Bank*, the Exchequer Chamber held unanimously and in the most unqualified manner that an action for fraud lies against a corporation as against any private individual, whether the fraud be that of the principal directly, or of the agents employed, provided only that the latter are acting within the ordinary scope of their occupation. But in *Western Bank of Scotland* v. *Addie*, the Lord-Chancellor said: "But if the person who has been induced to purchase shares by the frauds of the directors, instead of seeking to set aside the contract, prefers to bring an action for damages for the deceit, such an action cannot be maintained against the company, but only against the directors personally." To the same effect was the decision of Lord Cranworth (*u*): "An attentive consideration of the cases has convinced me that the true principle is, that these corporate bodies, through whose agents so large a portion of the business of the country is now carried on, may be made responsible for the frauds of those agents to the extent to which the companies have profited from these frauds; but that they cannot be sued as wrong-doers, by imputing to them the misconduct of those whom they have employed. A person defrauded by directors, if the subsequent acts and dealings of the parties have been such as to leave

Whether corporations are now liable for the frauds of their agents—*quære.*

(*u*) L. R. 1 S. & D. 167. See also *Barry* v. *Crosskey*, 1 J. & H. 1; and per Lord Chelmsford in *Peek* v. *Gurney*, L. R. 6 H. Lds. 370, 390.

him no remedy but an action for the fraud, must seek his remedy against the directors personally."

Most of the cases, however, which have come before Courts of Equity have arisen from the attempts of persons who, induced by flowery prospectuses and glowing reports, have taken shares, to get themselves relieved from their responsibilities upon the statements put forth, and relied on by them turning out incorrect. In all such cases if the fraud be imputable to the corporation, and the injured party has not debarred himself by laches, relief will be granted.

Persons induced by fraud to take shares.

Conybeare v. *New Brunswick, &c., Land Company* (*v*) is a leading authority. Here the House of Lords, reversing the decision of the Lords Justices, decided that the plaintiff was not entitled to have his name removed from the list of shareholders, on the grounds, first, that there had not been any concealment, inasmuch as an Act of Parliament—the absence of which from a certain report published by the company was the concealment alleged—was recited in the Articles of Association, which he (plaintiff) must be held to have perused; and, secondly, that the misrepresentation complained of, thus stated in the bill: "The said report of July, 1858, referred to the lands of the said company in

Conybeare *v.* New Brunswick, &c., Land Co.

(*v*) 9 H. Lds. 711, 31 L. J. (Ch.) 297; *New Brunswick Railway Company* v. *Muggeridge*, 1 Dr. & Sm. 363, 30 L. J. Ch. 242; *Ross* v. *Estates Investment Company*, L. R. 3 Ch. 682.

terms calculated to convey to the mind an impression that such lands were the absolute and indefeasible property of the company"—was not a representation but an inference that was left to be drawn from the expressions used in the Report. Their lordships, however, threw no doubt on the liability of a corporation for frauds which can be imputed to itself directly. The general tenor of their judgments is well expressed in the foot-note, in the House of Lords' Reports, viz.: "If reports are made to the shareholders of a company by their directors, and the reports are adopted by the shareholders, and afterwards industriously circulated, representations contained in those reports must be taken to be representations made with the authority of the company, and, therefore, binding the company. And if those reports having been industriously circulated be clearly shown to have been the proximate and immediate cause of shares having been bought from the company, the company cannot be permitted to retain the benefit of the contract, and keep the purchase-money that has been paid. Representations made by the secretary to a person in a general conversation, without a view to any definite statement by that person that he wants to purchase shares, are not binding on the company."

Central Railway Co. of Venezuela *v.* Kisch.

Another very recent case is that of *Central Railway Company of Venezuela Limited* v. *Kisch* (*w*).

(*w*) L. R. 1 H. Lds. 99, affirming the Lords Justices,

The defendant, the original plaintiff, filed a bill to have his name removed from the list of shareholders in the railway, and to have the payments he had made on account of calls returned him. He had taken the shares on the faith of a prospectus which referred to a concession made by the Venezuelan government to the company for making a railway, and stated that the contractor had guaranteed a dividend of $2\frac{1}{2}$ per cent. on the paid-up capital, during the construction of the works, while, in fact, this guarantee was limited to £20,000, and that the contract had been entered into "at a price considerably within the available capital," when, in reality—on account of the company having paid £50,000 for the concession, which payment was not mentioned in the prospectus, and which concealment the defendant alleged as a ground of complaint—it left but a margin of £30,000 out of £500,000. On these grounds of misrepresentation and concealment, and more especially of the latter, the House of Lords granted the relief prayed.

So, in many other cases, shareholders have been relieved of their shares on the ground that they were induced to take them by misrepresentation, the false statements being on one occasion with respect to the capital subscribed or shares taken (*x*);

Kisch v. *Central Railway Company of Venezuela Limited*, 3 D. G. J. & Sm. 122.

(*x*) *Ross* v. *Estates Investment Company*, L. R. 3 Ch. 682; *Henderson* v. *Lacon*, L.

upon another, as to the nature of the business to be undertaken (*y*), or as to the value (*z*) or locality (*a*) of property already or to be thereafter acquired by the company. In a word, misleading facts of any description, material to the contract to take shares, and actually the inducement to such contract, render such contract voidable on the part of the person so induced to enter into the same, always providing that the misleading facts in question were promulgated by the company itself, or its duly authorised agents (*b*).

IV. Contracts induced by fraud being only voidable, the parties aggrieved must take the necessary steps to repudiate such contracts, within a reasonable time, and before other persons have acquired rights in respect thereof.

Repudiation of contracts induced by fraud.

It must not here be forgotten that, in determining whether a company can hold a shareholder to the contract into which by their own fraud they have

R. 5 Eq. 249; *Waterhouse* v. *Jamieson*, L. R. 2, Sc. & D. 29. Compare *Wright's Case*, L. R. 12 Eq. 331.

(*y*) *Blackburn's Case*, 3 Drew. 409.

(*z*) *Reese River Mining Company* v. *Smith*. L. R. 4 H. Lds. 64; *Denton* v. *Macneil*, L. R. 2 Eq. 352.

(*a*) *Lawrance's Case*, L. R. 2 Ch. 412; *Re Russian Vyksounsky Ironworks Company, Stewart's Case*, L. R. 1 Ch. 575.

(*b*) See *Frowd's Case*, 30 L. J. (Ch.) 322; *Burnes* v. *Pennel*, 2 H. Lds. 497.

induced him to enter, other equities have to be considered, and a totally different result will be arrived at than when we are examining whether that person will be liable to third parties, the creditors of the company, for its debts. Between the company and the person whom they have duped the subject is clear, if we put the question on the simple ground that no one can be allowed to retain that which he has acquired by fraud; but as regards third parties, such person is a *de facto* shareholder, as long as he has not, from whatever cause, taken measures to denude himself of his shares; and it has consequently been decided that, as such, as a member of the company, he is subject to the company's liabilities (*c*).

Transferee cannot set aside.

Moreover, it is only the party originally defrauded —with perhaps exceptions arising in very special cases—who can repudiate the contract. For instance, a person who buys shares from one who could have repudiated these shares as having been issued to him under circumstances of fraud, cannot, on the ground of the original fraud, have such shares cancelled (*d*).

At Common Law an action of deceit may be brought at any time against a corporation as against

(*c*) *Oakes* v. *Turquand*, L. R. 1 H. Lds. 325; *Peek* v. *Gurney*, L. R. 13 Eq. 79, L. R. 6 H. Lds. 337. Compare *Pawle's Case*, L. R. 4 Ch. 497.

(*d*) *Duranty's Case*, 26 Beav. 268; *Grisewood's Case*, 4 D. G. & J. 544; *Peek* v. *Gurney*, *ubi supra*.

a private individual, till the plaintiff's right is barred by the Statutes of Limitations; but it is different when a shareholder seeks the relief of the Court of Chancery. A contract induced by fraud is voidable, not void, and the injured party will be deemed to have acquiesced, unless he displayed ordinary precautions and care at the making of the contract, and has been prompt in appealing to the Court on discovering the fraud (*e*).

Result of the decisions.

We may thus summarise the authorities:—

I. At Law. However the fraud be committed, if it can be imputed to the corporation, whether directly or indirectly, an action for fraud may be brought against the corporation for the damage thereby caused.

II. In Chancery.

(1) If the fraud be imputable to the corporation directly, that is, if it has been done or ratified by the shareholders in general meeting, then the

(*e*) *Deposit and General Life Assurance Company* v. *Ayscough*, 6 E. & B. 761, 26 L. J. (Q. B.) 29; *Clarke* v. *Dickson*, 27 L. J. (Q. B.) 223; *Scholey* v. *Central Railway Company of Venezuela*, L. R. 9 Eq. 266, n.; *Heymann* v. *European Central Railway Company*, L. R. 7 Eq. 154. Compare the judgments in *Re Royal British Bank, Nicol's Case*, 28 L. J. (Ch.) 257; *In re Reese River Silver Mining Company, Smith's Case*, L. R. 2 Eq. 264, and L. R. 2 Ch. 604; *Central Railway Company of Venezuela* v. *Kesch*, L. R. 2 H. Lds. 99; and in *Peek* v. *Gurney*, *ubi supra*.

corporation is liable for the consequences resulting therefrom.

(2) If it be imputable only indirectly, then the corporation can neither take advantage of the fraud, nor retain against the wish of the injured party any benefits that may have accrued to it (the corporation) from such fraud. But the person aggrieved may, at his election, confirm or repudiate the transaction.

(3.) It seems that the corporation cannot, by any proceedings in Chancery, be rendered liable for damages resulting from fraud imputable to it indirectly.

If the limitation last mentioned be correct, then it follows that, in future, corporations will not be liable at Law for indirect fraud, since the Supreme Court of Judicature Act, 1873, expressly provides that where the rules of Law and Equity conflict, those of Equity are to prevail (*f*). This result—the holding corporations not liable for the frauds of their agents—will cause a considerable qualification of the Law as at present existing of principal and agent, and it will be a strange exemplification of the unexpected effects produced by sweeping legislative enactments, passed without a due consideration of the matters affected thereby.

(*f*) 36 & 37 Vict. c. 66, s. 26, subs. 11, cited *ante*, p. 165.

SECTION II.—OTHER TORTS.

Torts not requiring intention in the tort-feasor.

V. Corporations are liable, at least at law, for torts of all descriptions committed by themselves, or their duly constituted agents, and not involving intention on the part of the wrong-doer.

What has been said with regard to fraud will apply with proper qualifications to other torts. Corporations are not created—it is no part of their business—to commit torts. Nevertheless, courts of law have decided that they must be held liable for torts committed by their agents and servants acting within their authority, upon the same principles and by precisely analogous reasoning as they have been made responsible for fraud. Thus an action for trespass to the person (*g*), or the property, *e.g.*, trover (*h*), will lie against a corporation as against an individual. The agent of the corporation must of course be acting within his authority, and upon this point difficult questions arise as to the extent

Trespass.

(*g*) *Seymour* v. *Greenwood*, 7 H. & N. 355, 30 L. J. (Ex.) 327; *Limpus* v. *London General Omnibus Company*, 1 H. & C. 526, 32 L. J. (Ex.) 34; *Goff* v. *Great Northern Railway Company*, 30 L. J. (Q. B.) 148.

(*h*) *Tatton* v. *Great Western Railway Company*, 29 L. J. (Q. B.) 184; *Mears* v. *London and South-Western Railway Company*, 11 C. B. (N. S.) 850, 31 L. J. (C. P.) 220.

of the agent's authority, and more especially of his implied authority. In *Edwards* v. *London and North-Western Railway Company* (*i*), it was decided that a foreman porter in the service of a railway company, who, in the absence of the station-master, is in charge of a station, has no implied authority to give in charge a person whom he suspects to be stealing the company's property; and, consequently, that if he gives in charge on such suspicion an innocent person, the company are not liable. False imprisonment.

In *Allen* v. *London and South-Western Railway Company* (*j*), a similar decision was come to with regard to the arrest, by direction of a ticket-distributor, of an innocent person whom he had suspected wrongly of an attempt to rob the till. The jury found that the ticket-distributor acted in defence of the company's property, but the Court unanimously held, that he had no implied authority from the company to order the arrest, and that consequently the company were not liable for the same. In this case, as in the former, the Court thought that the respective officials concerned had an implied authority to take such proceedings only as were imperatively demanded for the immediate protection of the property under their charge; and that the moment any attempt to injure or steal such property was abandoned, this implication ended,

(*i*) L. R. 5 C. P. 445. (*j*) L. R. 6 Q. B. 65.

—any steps they might then direct not being called for, for such protection, would be of their own motion and at their own peril. *Lex ita scripta.*

What a corporation cannot do, its agents cannot do so as to bind it. From this it necessarily follows, that there can be no authority to an agent, implied or otherwise, to take proceedings which would be Ultra Vires of the corporation; and that the corporation cannot in any way be rendered amenable for torts committed by one of their servants in the course of such proceedings. This is well shown by the case of *Poulton* v. *London and South-Western Railway Company* (*k*). The facts were these: the plaintiff, who had taken a horse to an agricultural show by the defendants' railway, was entitled, under arrangements advertised by the defendants, to take the horse back free of charge on the production of a certificate. The plaintiff accordingly produced a certificate, and the horse was put into a box without payment or booking; and the plaintiff having taken a ticket for himself proceeded by the same train. At the end of the journey the station-master demanded payment for the horse, and the plaintiff, refusing to pay, was detained in custody by two policemen under the orders of the station-master, until it was ascertained by telegraph that all was right. An action having been brought by the plaintiff against the defendants for false imprisonment, it was held, that though a railway

Poulton *v.* London and South-Western Rail. Co.

(*k*) L. R. 2 Q. B. 534.

company has power to apprehend a person travelling on the railway without having paid his own fare, it can only detain the goods for non-payment of the carriage; that, as the defendants themselves would have had no power to detain the plaintiff, on the assumption that he had wrongfully taken the horse by the train without paying, there could be no authority implied from them to the station-master to detain the plaintiff on this assumption; and that they were, therefore, not liable for this act of the station-master.

This case decides only, that no implied authority as to detention belonged to the station-master. Of course he might have had express authority to act as he did, and though such authority would have been Ultra Vires of the company purporting to confer it, yet they would have been responsible for the results thereof. Herein consists a great distinction between tortious and contractual liability for acts Ultra Vires. It is no defence to legal proceedings in tort that the torts were Ultra Vires. If the torts have been done by the corporation, or by their direction, they are liable for the results however much in excess of their powers such torts may be.

Difference between liability for acts Ultra Vires in cases of contract and tort.

Torts involving intention in the wrong-doer.

VI. Corporations are liable for at least some varieties of torts which require, as an essential ingredient, intention on the part of the tort-feasor.

Other torts there are with respect to which the liability of a corporation may be fairly considered doubtful. Ordinarily it is sufficient to render a person responsible for a tort, whether committed by himself or his agent, if only there has been negligence, heedlessness, or rashness. Sometimes, however, the mental ingredient becomes intention, actual or constructive. Can a corporation be made amenable for those torts, which require on the part of the wrong-doer knowledge or wilfulness?

Negligence.

In *Stiles* v. *Cardiff Steam Navigation Company* (*l*), it was determined that a corporation would be liable for knowingly keeping a mischievous animal. Mr. Justice Shee asserted broadly, in reference to the scienter, that "corporations are in this respect in no different position from private owners; and if it could be shown that the mischievous propensity of the dog was known to any person, having control of the business or of the yard, or even of the dog, or whose duty it would be to inform the company of what the dog had done, it might do, but the evidence fails on that point."

Libel.

In *Whitfield* v. *South-Eastern Railway Com-*

(*l*) 1 N. R. 183; 33 L. J. (Q. B.) 310.

pany (*m*), it was held that a corporation was liable for publishing a libel contained in a telegram which passed over their wires; and *e converso*, a corporation, though intangible and without personal incidents, may sue for libel upon it (*n*).

The same principles apply to non-trading corporations,

In respect of liability for torts it makes no difference, whether the corporation is a trading one making profits out of its undertaking, or exists merely for public purposes. In the latter case, as in the former, it is equally under obligations to all persons with whom it may come into contact, and is bound so to carry on its affairs as to keep within its powers, and not to cause injury to others. Failing this, it is liable for the damage resulting (*o*).

and to public boards as to trading corporations.

Under the same circumstances the various boards of commissioners, and other similar bodies appointed to conduct and carry out public improvements, and deriving therefrom no personal advantage whatever, will, in their corporate or quasi-corporate capacity —unless expressly by statutory provision relieved —be responsible to the parties injured (*p*).

(*m*) 1 E. B. & E. 115, 27 L. J. (Q. B.) 229. See *Lawless* v. *Anglo-Egyptian Cotton and Oil Company*, L. R. 4 Q. B. 262.

(*n*) *Metropolitan Saloon Omnibus Company* v. *Hawkins*, 4 H. & N. 87, 28 L. J. (Ex.) 201.

(*o*) *Southampton and Itchin Bridge Company* v. *Southampton Local Board*, 8 E. & B. 801, 28 L. J. Q. B. 41; *Ruck* v. *Williams*, 3 H. & N. 308; *Brownlow* v. *Metropol. Board*, 16 C. B. (N. S.) 546.

(*p*) See the cases cited in

SECTION III.—CRIMES.

The liability of corporations has been extended to even some varieties of crimes. The notion of crime as usually held, requires intent on the part of the criminal, but this is not the view taken by our law. Many acts which if productive of harm to a single person are mere torts, become crimes when they result in damage to a large number of people; and all proceedings which are invasions of the rights or privileges not of some one individual specially but of the public at large, or which are detrimental to the general well-being or to the interests of the State, similarly fall under the category of crimes. In such cases the intent is notional and constructive, rather than real (*q*); it suffices if the wrong-doer has caused, whether directly by his own proceedings or indirectly by those of his agents, the wrong in question. Manifestly a corporation can commit such wrongs, can have such an intent, and by consequence at least to such extent render itself amenable to the criminal law.

Crimes where the intent is constructive.

Accordingly it has been decided, that a corporation may be indicted for misdemeanors which are in reality public torts, *e.g.*, for disobedience to an order of justices requiring them to execute works pursuant

the last note, and also the *Mersey Docks Trustees* v. *Gibbs*, L. R. 1 H. Lds. 93.

(*q*) See also upon this point *Reg.* v. *Stephens*, L. R. 1 Q. B. 702.

to a statute (*r*); for misfeasance in cutting through and obstructing a public highway (*s*); for non-repair of a highway, and the like (*t*).

Liability for crimes involving intent.

The authorities hitherto have gone only so far as to render them liable criminally for a nonfeasance or misfeasance, where the mental element is negligence. Whether this can ever be extended to felonies or misdemeanors the essence of which is malice, wilfulness, or other such determinate fact, is very doubtful (*u*). Being mere abstractions, they cannot have actually the mental element therein involved, and to raise it by implication is directly opposed to every principle of criminal law.

(*r*) *Reg.* v. *Birmingham and Gloucester Railway Company*, 3 Q. B. 223.

(*s*) *Reg.* v. *Great North of England Railway Company*, 9 Q. B. 315; *Reg.* v. *Longton Gas Company*, 2 E. & E. 651; *Reg.* v. *United Kingdom Electric Telegraph Company*, 2 B. & S. 647, n., 3 F. & F. 73.

(*t*) Compare *Reg.* v. *Mayor, &c., of Manchester*, 7 E. & B. 453, 26 L. J. (M. C.) 65; and the many authorities in the books of indictments against counties, townships, and parishes, for not repairing roads, bridges, &c.

(*u*) See the arguments in *Reg.* v. *Great North of England Railway Company*, 9 Q. B. 315; and *King of the Two Sicilies* v. *Willcox*, 1 Sim. N. S. 334, 19 L. J. (Ch.) 488.

PART III.

THE DOCTRINE OF ULTRA VIRES CONSIDERED WITH REFERENCE TO THE POWERS AND PRIVILEGES OF CORPORATIONS AND THE MANNER AND PURPOSES IN AND FOR WHICH SUCH MAY BE EMPLOYED.

CHAPTER I.

THE SPECIAL POWERS AND PRIVILEGES OF CORPORATIONS.

SECTION I.—THE USER OF SPECIAL POWERS AND PRIVILEGES.

I. Powers conferred upon corporations for the attainment of certain defined objects must be employed by them strictly and solely with reference to those objects only.

It is now established beyond question, that not only are the capacities of corporations limited in degree, but so also are the purposes and ends for which they propose to employ those capacities. Corporations are created for the accomplishment of certain ends or for the transaction of certain business, which could not be so well attained or

carried out by individual effort, and in this behalf they are endowed with various powers and privileges other than such as are possessed by private persons; but these powers and privileges are given to them in a qualified manner only, and not absolutely. "It has become a well-settled head of equity that any company authorised by the legislature to take compulsorily the land of another for a definite purpose, will, if attempting to take it for any other object, be restrained by the injunction of the Court of Chancery from so doing" (*a*). This principle is, with the qualification mentioned below, strictly enforced. Whatever be the purposes for which special powers and authorities are given, to the attainment of these purposes alone can they be devoted, no deviation therefrom being permitted, however slight and however much the corporation would thereby be benefited.

Companies having Parliamentary powers must employ them bona fide.

In *Bentinck* v. *Norfolk Estuary Company* (*b*) the defendants had power to make and maintain certain cuts and works, with authority to take and use such

Bentinck *v.* Norfolk Estuary Co.

(*a*) L. R. 1 H. Lds. 43. Compare *Crossman* v. *Bristol and South Wales Railway Company*, 1 H. & M. 531.

(*b*) 8 D. G. M. & G. 714; 26 L. J. (Ch.) 404; *Webb* v. *Manchester, &c., Railway Company*, 4 My. & C. 116; *Cother* v. *Midland Railway Company*, 2 Ph. 469; 17 L. J. (Ch.) 235; *Flower* v. *London, Brighton and South Coast Railway Company*, 34 L. J. (Ch.) 540; *Edinburgh and Glasgow Railway Company* v. *Campbell*, 9 L. T. (N. S.) H. Lds. 157. See *Eversfield* v. *Mid-Sussex Railway Company*, 3 D. G. & J. 286, 28 L. J. (Ch). 107.

of certain lands "as might be necessary or proper for them to enter for the purpose of executing these works." Within the limits of their line of deviation they proceeded to take lands for the purpose, not of forming their works, but of *digging materials for* the same. It was held by Page-Wood, V.-C., that they had no authority to do so; and this judgment on appeal was affirmed, and therefore an injunction granted by the Vice-Chancellor against them was made perpetual. It should be noticed that the Act constituting the defendants incorporated the Company's Clauses and the Lands Clauses Acts, but not the Railways Clauses Act, which does contain provisions for the entering upon lands merely for the purpose of obtaining materials.

Lord Carington v. Wycombe Rail. Co.

There have been many subsequent decisions on this subject; the latest is that of *Lord Carington* v. *Wycombe Railway Company* (c). The defendants' company gave to landowners notice to treat in respect of a close of land containing 1 acre 27 perches, part of the C. estate. The price was settled between the parties and the land conveyed to the company by a deed not in the statutory form, including the mines and all the estate of the vendors. The company used about three perches of the land for their railway; and, about two years after their purchase, they, in pursuance of a contract which, before the notice to treat, they had made

(c) L. R. 2 Eq. 825, L. R. 3 Ch. 377; *Beauchamp* v. *Great Western Railway Company*, L. R. 3 Ch. 745.

with W. Terry, to convey to him all such part of the C. estate as lay between his land and the railway, conveyed the remaining 1 acre 24 perches to him by a deed which recited that it was superfluous land. The land was situate within the limits of a borough, but was at some distance from the mass of houses forming the town. There were two cottages upon it. The Lords-Justices held, that apart from other considerations, the vendors would have been entitled to relief on the ground that the company had taken the land, not for the purposes of their Act, but in order to enable them to fulfil their contract with Terry. Lord-Justice Cairns in his judgment said:—"There is no controversy as to the facts; and it appears to me that a more distinct and more openly avowed case of the use of parliamentary powers for purposes not intended by Parliament never has been presented to the Court; and this is exactly one of those cases which was described by Lord Cranworth in *Galloway* v. *Mayor and Commonalty of London* (*d*), where his lordship said: 'The principle is this, that when persons embarking in great undertakings for the accomplishment of which those engaged in them have received authority from the legislature to take compulsorily the lands of others, making to the latter proper compensation, the persons so authorised cannot be allowed to exercise the powers conferred on them for any collateral object.' The land here,

(*d*) L. R. 1 H. Lds. 34, 43.

in my opinion, was taken, and is avowed to have been taken, for that which was an object entirely collateral, namely, to give to Mr. Terry that which he had bargained for as part of the consideration for the sale of the £20,000 stock."

Powers may not be used to benefit or injure others.

It follows naturally from what has been stated, that companies may not go beyond or aside their powers in order to benefit or to injure third parties, or even to benefit themselves.

Dodd *v.* Salisbury and Yeovil Rail. Co.

In *Dodd* v. *Salisbury and Yeovil Railway Company* (*e*), the defendants were authorised to change the inclination of a road which was within their limits of deviation, so as to carry it over their line. Afterwards they proposed to alter the course of the road according to a new plan, which rendered it necessary to pull down the plaintiff's house, which likewise stood within the limits of deviation. Notice of the intention to take the house having been served upon the plaintiff, he filed his bill to restrain the defendants, alleging that the new road was not really required for the purposes of the undertaking, but was intended only as an accommodation to a large landholder in the neighbourhood. Stuart, V.-C., granted the injunction prayed for, and on appeal the Lords-Justices declined to discharge his order, because, although they considered that the corrupt bargain had not been

(*e*) 33 L. T. 254, 311, following *Eversfield* v. *Mid-Sussex Railway Company*, 3 De G. & J. 286, 28 L. J. (Ch.) 107.

established, they were nevertheless of opinion that it was a question to be determined in a Court of Law, whether the defendants actually needed, and if so, were entitled to take for the making of their railway, property situated so far as the plaintiff's was from their line of railway.

Evidence required.

If the circumstances are at all doubtful, the corporation will be compelled to adduce clear evidence that the proceedings they are about to institute are requisite for their undertaking. It will, for instance, not be sufficient to put in a vague statement or affidavit by their engineer or other such interested party to the effect, "that the lands in question are required or will be required for the purposes of the Act, or for the railway and works authorised by the Act" (*f*).

Method of exercising compulsory powers.

In the next place, compulsory powers of the nature now treated of, must be exercised not only for the purposes intended, but also in the manner and time prescribed. An open cutting may not be substituted in place of a tunnel, nor a road with an inclination of 1 in 20, if the Act of Parliament says

(*f*) *Flower* v. *London and Brighton and South Coast Railway Company*, 2 Dr. & Sm. 330; 34 L. J. (Ch.) 540. Compare *Stockton and Darlington Railway Company* v. *Brown*, 9 H. Lds. 246. See also *South Yorkshire, &c., Company* v. *Great Northern Railway Company*, 3 D. G. M. & G. 576; 22 L. J. (Ch.) 761; and the other cases of this kind where the Court has refused to enforce agreements although not clearly shown to be Ultra Vires.

that the gradient is not to exceed 1 in 30 (*g*). A well-known decision is that of *Simpson* v. *South Staffordshire Waterworks* (*h*). Here, a waterworks company were by their special Act authorised to make and maintain reservoirs, aqueducts, &c. The works authorised, so far as they related to a particular field, which was situated within marked limits of deviation, were described as "an aqueduct constructed in tunnel or otherwise, *as shown on the original plans*," which plans indicated no surface works upon the field, but merely showed that it was intended to construct, at a depth of at least forty feet under the same, an aqueduct in tunnel. After the special Act was passed, the company served the owners of the field with a notice to treat for the purchase of it, with the view of sinking shafts, in order to obtain an additional supply of water, and also of erecting thereon permanent pumping engines for raising water from beneath its surface. Upon a bill filed by the owners of the field against the

Simpson *v.* South Staffordshire Water Works Co.

(*g*) *Att.-Gen.* v. *Mid-Kent and South-Eastern Railway Company*, L. R. 3 Ch. 100.

(*h*) 34 L. J. (Ch.) 380; *Lamb* v. *North London Railway Company*, L. R. 4 Ch. 522. With these decisions may be compared *Stamps* v. *Birmingham, &c., Railway Company*, 7 Hare, 251, 17 L. J. (Ch.) 431, where the defendants, empowered to take certain land, had first given notice to the plaintiff of their intention to make a tunnel under his land, but finding this operation too difficult, had afterwards determined to make an open cutting, and had given notice to that effect; and it was held that they were not precluded by their former notice from so doing.

company for an injunction to restrain the company from proceeding to summon a jury to assess the value of the field, and from using it for any other purpose than the construction of an aqueduct, it was held on appeal that the company were not authorised to take or use the field permanently for any other purpose than that indicated upon the deposited plans.

Att.-Gen. v. Mid-Kent Rail. Co.

Att.-Gen. v. *Mid-Kent Railway Company and South-Eastern Railway Company* (*i*), is a similar decision. A local board of health, &c., withdrew its opposition to a railway bill upon the insertion in the Act of a clause providing that no bridge carrying a road over the railway within their district should have an approach with a slope of more than 1 in 30. The making a slope of 1 in 30 required an encroachment on the land of a person who obtained an injunction to prevent such encroachment, and the company thereupon made a bridge with a slope of 1 in 20. On appeal the Lords-Justices (reversing the decision of Stuart, V.-C.), decided that the company must not have a bridge with a slope of more than 1 in 30, and that it was no answer to say that this requisition could not be complied with without stopping the railway.

(*i*) L. R. 3 Ch. 100; *Manchester, &c., Railway Company* v. *Reg.*, 3 Q. B. 528; *Clarke* v. *Manchester, &c., Railway Company*, 1 J. & H. 631; *Att.-Gen.* v. *Tewkesbury and Malvern Railway Company*, 32 L. J. (Ch.) 482; *Raphael* v. *Thames Valley Railway Company*, L. R. 2 Ch. 147.

Construction of Acts of Parliament.

In these and similar cases, although the principles of law and equity are clear, it is generally very difficult to determine what are the special powers and what the exact nature of those powers possessed by corporations. This question will have to be decided by an examination of the clauses often expressed in crabbed and obscure language of Acts of Parliament and the like, and it need scarcely be said that judges of the highest eminence not unseldom differ widely in their interpretation of such instruments. Thus where the defendants, who certainly had power to take the plaintiff's land for the purpose of building thereon a market-house, were about to take it to erect on it a covered building in addition to the market-house, the Master of the Rolls restrained them from taking it for this latter purpose, saying, "I am satisfied that upon the construction of this Act of Parliament, it does not authorise that which the company are about to do" (*j*). But on appeal the Lords-Justices dissolved the injunction, holding that the company were proceeding within their powers (*jj*). Assuming, however, that no doubt exists as to the powers, general and special, with which a corporation is endowed, and that it is both keeping within its authorisation and acting *bonâ fide*, the Court will not interfere with its operation. It will be deemed the best judge, not only of what is most conducive

(*j*) *Richards* v. *Scarborough Market Company*, 23 L. J. (Ch.) 110.

(*jj*) 23 L. J. (Ch.) 115.

to its own interest, but also of what is proper and fitting as regards third parties, and it will be left unchecked to take or not to take lands, &c. (*k*).

Time within which a company may take lands, &c.

As to the time within which works have to be carried out—in most, if not all Acts conferring compulsory powers, a time is fixed for the execution of those powers. Within such period the company may exercise their option of taking lands, &c. (*l*), but not afterwards—the time and the powers expire together. If, however, before this period has elapsed they have signified their intention to exercise their powers, they may afterwards continue and complete the works thereby entailed upon them, unless some period be stated before the expiration of which the said works are to be finished (*m*), or unless they have expressly or impliedly abandoned their intention (*n*).

(*k*) *Richards* v. *Scarborough Market Company, ubi supra; Beardmer* v. *London and North-Western Railway Company*, 1 Mac. & G. 112, 18 L. J. (Ch.) 432; *Cother* v. *Midland Railway Company, ubi supra; Stockton, &c., Railway Company* v. *Brown*, 9 H. Lds. 246. Compare *Att.-Gen.* v. *Ely, &c., Railway Company*, L. R. 4 Ch. 194; and especially *Flower* v. *London, Brighton, and South Coast Railway Company, ubi supra.*

(*l*) *Hedges* v. *Metropolitan Railway Company*, 28 Beav. 109; and see *Sadd* v. *Maldon, &c., Railway Company*, 6 Ex. 143, 20 L. J. (Ex.) 102; and *Richmond* v. *North London Railway Company*, L. R. 3 Ch. 679.

(*m*) *Sparrow* v. *Oxford, &c., Railway Company*, 9 Hare, 436.

(*n*) *Hedges* v. *Metropolitan Railway Company, ubi supra; Ystalyfera Iron Company* v. *Neath and Brecon Railway Company*, L. R. 17 Eq. 142.

Above principles are equally applicable to private individuals.

The doctrines set forth above apply to private persons as to corporations and public companies. The only difference in the application of the doctrines arises from the difference in the powers and capacities of the one and the other. A corporation is created for definite purposes, an ordinary individual may direct his attention to any objects he pleases; but the case is altered with respect to special authority given him, whether by express words or by necessary implication, for particular purposes. Thus, where the owners of cotton mills on the banks of a canal were authorised by the Act of Parliament under which the canal was made to draw water from the canal, "for the sole purpose of condensing the steam used for working any steam engines" erected in those mills, they were restrained from drawing off the water of the canal for any other purpose (*o*).

Statutory powers are not obligatory on companies.

It was at one time supposed in England, as it seems to have been thought in Scotland, that permissive powers given by an Act of Parliament to a company, were obligatory upon them. The case of *Philip* v. *Edinburgh, &c., Railway Company* (*p*) in Scotland, and that of *Reg.* v. *York and North Midland Railway Company* (*q*) in 1852, in England so decided. The latter case, however, was reversed

(*o*) *Rochdale Canal Company* v. *King*, 2 Sim. (N. S.) 78.

(*p*) On appeal, 2 Macq. 514.

(*q*) 1 E. & B. 178, 22 L. J. (Q. B.) 41; on appeal, 1 E. & B. 858, 22 L. J. (Q. B). 225.

in 1853 in the Exchequer Chamber, and the former in the House of Lords, in 1857; and there can now be no doubt that corporations will be left free to put permissive powers into action or not, as may seem to them best to advance their own interests.

Effect of general enactments.

It should also be observed that special powers vested in any body for the express purpose of carrying out some special object will not be overridden by mere general powers given in a subsequent Act, upon the maxim that "*generalia specialibus non derogant* (*r*).

II.—It seems that a wider and more liberal construction will be put upon the powers vested in bodies, such as Local Government Boards, Municipal Corporations, and Sewage Commissioners, whose duties are the accomplishment of public improvements (*sed quære*).

Construction of powers vested in public bodies.

It is not unfrequently asserted, and asserted without positive contradiction, that the strictness of the principle now in statement is, or ought to be, sometimes modified—that powers given for the public

(*r*) *London and Blackwall Railway Company* v. *Board of Works for Limehouse District*, 3 K. & J. 123, 26 L. J. (Ch.) 164; *Trustees of the Birkenhead Docks* v. *Birkenhead Dock Company*, 23 L. J. (Ch.) 459.

benefit must be interpreted liberally, and persons entrusted with the exercise of them allowed very considerable discretion. It is argued that there is a great distinction between Acts granting compulsory powers to joint-stock companies in respect of what are really private speculations, and Acts empowering and requiring corporate bodies having no private interests to promote, to carry into effect public improvements. In the latter case, in order to avoid taxing the public, there may well be permission granted to a corporation to take more land than is actually necessary for the purpose of making certain specified improvements, and by a sale of the superfluous land, rendered more valuable by the improvements themselves to raise funds for the execution of a great public work. We may admit the full force of this argument, but it only amounts to this that bodies entrusted with powers for the public benefit will, like persons having analogous powers for their own advantage, under ordinary circumstances, be deemed the proper and only judges of the best method of utilising such powers for the ends designed.

We may, perhaps, also admit that it is not "the province of a Court of Equity to interfere to compel defendants who have done something ultra vires but *bonâ fide*, with a view of accommodating the public, to do something other than they have done which would be intra vires, and, therefore, legal, but would be more inconvenient to the public or

the persons complaining than that which exists" (*s*). But to admit this would be to do little more than recognise the discretion which the Court of Chancery reserves to itself of refusing to interfere under circumstances where its interference would be productive of far more harm than good. Whether the dictum just quoted of Lord Romilly is in the way he stated it correct and good law may be doubted, but in so far as it is correct it is simply a result of the Court's discretion. Moreover, whether it be correct or not, a corporation, or other person, will not be permitted to avoid specific performance by alleging as a defence to a bill that the public would be inconvenienced by a decree being made against him (*t*). The real existence of this qualification is, however, a matter of doubt. It has not been made the *ratio* of any decision, and indeed a logical absurdity would arise by laying down that corporations and other like bodies have certain capacities and powers only, and then saying that the same powers given for the same specific purposes are to receive a construction varying with the nature of the bodies to which they are given. A railway company, a municipal corporation, and a hospital, are each authorised by Act of Parliament to pull

Discretion of the Court where the public is concerned.

(*s*) Per Romilly, M. R., in *Att.-Gen.* v. *Ely, &c., Railway Company*, L. R. 6 Eq. 106, 111.

(*t*) *Raphael* v. *Thames Valley Railway Company*, L. R. 2 Ch. 147; see *Reg.* v. *Bradford Navigation Company*, 6 B. & S. 631.

down certain houses to make room for, say, a station, a new street, an additional wing, respectively. It turns out that in each case only some of the houses are required, and each of the bodies mentioned thereupon proposes to turn the houses which it does not require to some other purpose more beneficial to itself than the returning them to their original owners. These owners, however, apply for an injunction. Will it be held that the Court will deal differently with each case, and will restrain the railway company though it will not either of the others.

Private rights must be maintained,

And if private rights come into collision with public interests it is the latter, not the former, which will have to give way. This oftenest happens in questions of sewage and other nuisances committed, necessarily it may be, by bodies existing for the express purpose of carrying out works for the general well-being. The plea of necessity, however, will be of no avail; the Court will not regard the advantage of the public and exact a sacrifice from the individual, but it will, upon the application of the latter, restrain the doing of the acts, *e.g.*, the fouling of streams, which constitute an invasion of his rights (*u*).

even though public interests be compromised.

It has been, on many occasions, most emphatically decided that private persons must be protected,

(*u*) *Att.-Gen.* v. *Mayor of Kingston*, 13 W. R. 888; *Goldsmid* v. *Tunbridge Wells Imperial Company*, L. R. 1 Eq. 165. Compare *Biddulph* v. *St. George's Vestry*, 33 L. J. (Ch.) 411.

consequently injunctions will in their favour be granted, although compliance therewith be practically impossible, without compelling the corporation to infringe an Act of Parliament, and though a sequestration to compel compliance be ineffectual and injurious to the public (*v*).

SECTION II.—THE TRANSFER BY ONE CORPORATION TO ANOTHER OF ITS SPECIAL POWERS AND PRIVILEGES.

III. Corporations may not transfer to others their own peculiar powers and privileges.

Transfer of powers.

Such a transfer, whether permanently and absolutely or only for a definite period, is, it has been repeatedly decided, in the absence of statutable powers, illegal. Thus, Turner, V.-C., in *Great Northern Railway Company* v. *Eastern Counties Railway Company* (*w*) observed, with reference to this question: "It is impossible to read the agreement between the plaintiffs and the East Anglian Railway Company, without being satisfied that it amounts to an entire delegation to the plaintiffs of all the powers conferred by Parliament upon the East Anglian Railway Company. All the stock of that company is to be taken by the plaintiffs,

(*v*) *Spokes* v. *Banbury Board of Health*, L. R. 1 Eq. 42.

(*w*) 21 L. J. (Ch.) 837; *Winch* v. *Birkenhead, &c., Railway Company*, 7 Rail. Cas. 384.

without any obligation to restore it. The plaintiffs are to manage and regulate the railways of the East Anglian Railway Company, for the purposes of the agreement; and although in form it is declared that the instrument shall not operate as a lease or agreement, it amounts, in substance, either to one or the other. It is framed in total disregard of the obligations and duties which attach to these companies, and is an attempt to carry into effect, without the intervention of Parliament, what cannot lawfully be done except by Parliament, in the exercise of its discretion, with reference to the interest of the public. . . . . I think it is the duty of this Court to withhold its interference, when called upon to act in aid of agreements of such a nature." He accordingly refused an injunction prayed for by the plaintiffs, to restrain the defendants from obstructing the engines, &c., of the former, in passing over the junction of the East Anglian Railway with the Eastern Counties Railway, near Wisbeach.

Beman *v.* Rufford.

In *Beman* v. *Rufford* (*x*), a bill was filed by certain shareholders in the Oxford, Worcester, and

(*x*) 1 Sim. (N. S.) 550, 20 L. J. (Ch.) 537; *London and South-Western Railway Company* v. *South-Eastern Railway Company*, 8 Ex. 584, 22 L. J. (Ex.) 193; *West London Railway Company* v. *London and North-Western Railway Company*, 11 C. B. 327, 22 L. J. (C. P.) 117; *London, Brighton, and South Coast Railway Company* v. *London and South-Western Railway Company*, 28 L. J. (Ch.) 521; and see also *Rhymney Railway Company* v. *Taff Vale Railway Company*, 30 L. J. (Ch.) 482.

Wolverhampton Railway Company, to restrain the directors from applying the funds of the company in carrying out an agreement entered into by the directors with the London and North-Western Railway Company, under which a narrow-gauge rail was to be laid down, and the line, when completed, to be worked by the London and North-Western Railway Company. The Court was of opinion that the agreement was invalid, for, although the directors had power under their Act of Parliament to lay down narrow-gauge rails, they had no power to allow the line to be worked by another company. Lord Cranworth, V.-C., said: "What they [*i.e.* the Oxford, Worcester, and Wolverhampton Railway Company] are to do is this:—the whole concern, without incumbrance, when completed, is to be worked by the London and North-Western Railway Company, who shall have perfect control and exercise all the rights of the Oxford, Worcester, and Wolverhampton Railway Company. Now, I need not go farther into the case than to say, in my opinion that is delegating the functions which the legislature has given them to other parties, which they have no possible right to do."

Distinction between transfer of powers and working agreements.

It is not unfrequently very difficult to determine whether a certain agreement is nothing more than a traffic arrangement, or whether it amounts to a transfer of special powers. Trading corporations, it need scarcely be repeated, may make all such *bonâ fide* business arrangements as will tend to

their own emolument, and at the same time are not contrary to public policy. They may covenant to use or not to use their powers in certain modes and under certain restrictions; but the line must be drawn somewhere, and it is drawn at the point where such covenants expressly, or by implication, amount to the abandonment or the transfer of powers. The best illustration of this part of our subject, and of the difficulties involved therein, is afforded by the series of cases reported as the *Shrewsbury and Birmingham Railway Company* v. *London and North-Western and Shropshire Union Railways and Canal Company*. These cases will be dealt with at some length in the next chapter; but in so far as they more particularly concern the present subject [*i.e.*, the user and transfer of special powers], reference may be made to the decision of the Lords-Justices (*y*). The facts involved in the particular case which came before the Lords-Justices were these: the plaintiffs, viz., the Shrewsbury Company had withdrawn their opposition to a bill brought into parliament by the London and North-Western Railway Company, to authorise a lease to them of the Shropshire Union Railway, on an agreement that the profits arising from the Shrewsbury and Shropshire lines should be divided between the plaintiffs and defendants in stated proportions. The Act passed, and the agreement was re-executed

Shrewsbury and Birmingham Rail. Co.'s cases.

(*y*) 4 D. G. M. & G. 115, 22 L. J. (Ch.) 682.

under seal. The London and North-Western Railway Company, however, did not carry out their contract. Thereupon the Shrewsbury Company filed a bill for the specific performance of the agreement, but the Vice-Chancellor dismissed the bill.

They appealed against this dismissal, and the Lords-Justices held, that the directors of the London and North-Western Railway Company were trustees for their shareholders, and that their entering into such a contract was a breach of trust as between them and the shareholders, since it created a partnership between the London and North-Western Railway Company and the Shrewsbury Company, determinable only at the option of the latter, which varied the rights of the London and North-Western Company's shareholders in the gross receipts of their business, and that the Shrewsbury Company knowingly participated in such breach of trust.

IV. Corporations may sometimes be enabled, either by authority in their constating instruments or by general statutes, to enter into contracts regulating their business, and otherwise to deal with their powers in a manner which would be absolutely Ultra Vires without such provisions.

Few words need be added to this statement.

Manifestly, the supreme power which has endowed corporations with peculiar privileges, may endow them with the further privilege of using or even misusing those privileges in any way that pleases them. This has been done with certain classes of corporations by general Acts. Thus, 26 & 27 Vict. c. 92, by sections 22 to 29, enables railway companies, with the sanction of three-fifths of their shareholders, and the approval of the Board of Trade, and now of the Railway Commission, to enter into working agreements of the kind indicated. The Railway and Canal Traffic Act, 1854, contains various compulsory clauses, *viz.*, in section 2 as to through traffic, and in sections 2 and 3 as to affording equal facilities to all parties (*z*). The jurisdiction to enforce these clauses was given to the Court of Common Pleas; and it is now, by 36 & 37 Vict. c. 48, vested in the Railway Commission. So the Railways Clauses Consolidation Act (8 & 9 Vict. c. 20, s. 87) enables railway companies to make certain contracts of this description, and 8 & 9 Vict. c. 42 (*a*), contains somewhat similar enactments with regard to canal companies, providing that they may, subject to certain conditions, lease their tolls, &c. So in many special Acts, provisions have been inserted giving similar powers. In all such cases, all the regulations and formalities imposed by

Statutory authority to alienate special powers.

(*z*) See also 31 & 32 Vict. c. 119, s. 16.

(*a*) See also 21 & 22 Vict. c. 75, s. 3, and 23 & 24 Vict. c. 41.

the statutes as to conditions precedent must be duly observed. This well appears from the case of the *Kent Coast Railway Company* v. *London, Chatham, and Dover Railway Company* (*b*). An Act had empowered one railway company to grant, and another to accept, a lease of a railway upon certain terms, provided that the power to lease should not arise till the Board of Trade had certified, &c. Heads of an agreement were subsequently entered into, and duly sanctioned by majorities of three-fifths at meetings of the two companies, but without the certificate of the Board of Trade first obtained, and were acted upon for several years, but no formal lease was ever executed. The heads of the agreement were also invalid, as providing for payment of the rent out of profits not so applicable: held, that the arrangement was not ratified by references to it in subsequent local and personal Acts of Parliament, not expressing any direct intention to confirm it, nor had it been rendered valid by acquiescence.

Kent Coast Rail. Co. *v.* L. C. & D. Rail. Co.

V. Corporations may decline to use special powers and rights conferred upon them, and may decline to complete or carry on the whole of their undertakings, *semble.*

Somewhat allied to the transfer is the abandonment of special powers and privileges. Questions of this description, like those relating to the transfer,

Abandonment of powers.

(*b*) L. R. 3 Ch. 656.

have generally arisen in connection with railway companies. These companies are incorporated for the specific purpose of constructing a line between two given termini. Their authorities are conferred upon them with distinct reference to the accomplishment of such object, and the whole of it. Persons become shareholders and subscribe to its funds, with a view to the attainment of the whole of such object, and they may justly complain of and refuse to acquiesce in any proposal to complete a portion only of the total project. Not unseldom, however, before the railway is finished, circumstances arise which may make it desirable to modify the original scheme, by abandoning a portion of the undertaking or the like. It has been determined that such proceedings are, unless provided for in the Act, Ultra Vires, and that this will be restrained at the instance of any shareholder or creditor. "The company is not like a partnership for general trading,—a partnership in which one portion of the business may be encouraged and another discouraged, or abandoned, according to the contingencies of trade, and in which there is a general authority to use the capital to the best advantage; but it is a partnership for a public purpose, for *effecting a work which it is a duty to complete*, and for which alone the capital is advanced in shares, or authorised to be raised. The obligation to complete the work appears to be co-extensive with the authority to make it. Neither this Act nor any of these Acts contains authority to

substitute a less work or part for the whole." This was the decision of Lord Langdale, M. R., in *Cohen* v. *Wilkinson* (*c*), in which case the directors of a company who had obtained powers to construct a line from Epsom to Portsmouth were restrained, on bill filed by one of the shareholders, from completing it as far as Leatherhead only.

Corporations may decline to use special powers.

But there is considerable doubt as to whether this is the law now. In the first place it is extremely difficult to point out how such a decision could be carried into effect—how such an injunction could be practically worked. The directors could not be compelled to raise the funds and to do all the other multitudinous operations necessary for completing the work. Even if they were willing, whence is the requisite capital to be obtained, supposing that already raised to have been spent?

Moreover, as already seen (*d*), corporations may, even as between themselves and their members, relinquish some of their objects, and confine their attention to the remainder. They may also put into force or not, as it pleases them, powers which

(*c*) 12 Beav. 125, 18 L. J. (Ch.) 378, 411; *Reg.* v. *Eastern Counties Railway Company*, 8 L. J. (Q. B.) 340; *Bagshaw* v. *East Union Railway Company*, 2 Mac. & G. 389, 18 L. J. (Ch.) 193; *Logan* v. *Courtown*, 20 L. J. (Ch.) 347; *Graham* v. *Birkenhead, &c., Railway Company*, 2 Mac. & G. 160, 20 L. J. (Ch.) 445, where plaintiff was debarred by his laches having remained passive eighteen months.

(*d*) *Re Norwegian Titanic Iron Company*, 35 Beav. 223, ante, p. 72.

are permissive only, and not obligatory (*e*). This being so, can it be maintained that they are—considering the question merely as one of legal principle—compellable to do works, and to carry out the entirety of an undertaking for which compulsory powers have been given them? That they cannot be so compelled by information by the Attorney-General on behalf of the public was expressly decided by Shadwell, V.-C., and by the Lord Chancellor on appeal in *Att.-Gen.* v. *Birmingham and Oxford Junction Railway Company* (*f*). The remedy, if any, the Vice-Chancellor said, was by *mandamus*, but the Exchequer Chamber has since decided that a *mandamus* will not be granted under such circumstances.

(*e*) See *ante*, pp. 262-3.
(*f*) 4 D. G. & S. 490, 3 Mac. & G. 453.

CHAPTER II.

TRAFFIC ARRANGEMENTS.

Corporation may not exceed or transfer its special powers.

A CORPORATION may carry on and extend its legitimate business by every legal means; it may consequently in the furtherance of these objects enter into all such engagements with rival companies and other competing bodies as it may deem most conducive to its own interests, provided, however, that it does not in so doing either exceed its powers, or enter into engagements which, however skilfully disguised, are only a transfer or delegation of special powers and privileges. Of these engagements the commonest, as well as the most noticeable, are the arrangements entered into by railway companies for the forwarding and division of traffic. Such arrangements, if *bonâ fide* what they purport to be, viz., conventions for more economically or expeditiously conducting their several business in circumstances where they clash are valid, and are valid only when of this description. It is, however, in many cases extremely difficult to say under which head—that of legal traffic arrangements or illegal transfers of powers—a particular agreement

is to be placed, and different courts come to contrary conclusions.

I. Arrangements giving to one company running powers over the line of another company are valid.

Running powers.

South Yorkshire and River Dun Co. *v.* Great Northern Rail. Co.

One of the earliest cases determining the validity of such arrangements is that of *South Yorkshire and River Dun Company* v. *Great Northern Railway Company*, the conflicting judgments rendered in which in Chancery and at Common Law well evidencing the diverse interpretation put upon these agreements, and the difficulties involved in a determination of their true legal nature and bearing. This suit arose thus: In 1851 and 1852 negotiations were carried on between the South Yorkshire Railway and River Dun Company and the Great Northern Railway Company chiefly with reference to the regulation of the coal traffic, and the division between the two companies of the tolls received therefrom. In the result an agreement was entered into under seal between the two companies, by which it was covenanted that the latter company should have the use of the line of the former for a term certain at stated tolls, according to the tonnage carried; and it was agreed that these tolls should be charged on the tolls and dues of the company who had the use of the line, and that upon non-payment the other company might take and impound

such tolls and dues, and deal with the same in the same way as with distress for rent. In accordance with the agreement the Great Northern Railway Company had the use of the other company's line for a time, but refused to make any payments in respect thereof. Thereupon a bill was filed (*a*) by the former company to restrain the other company of the line from dividing their funds among their shareholders, by way of dividend, until the debts alleged to be due to the other company were paid. The Court of Chancery, however, declined to interfere by way of injunction, but left the plaintiffs to proceed by action or distress as they might be advised. But though the Lords Justices declined to interfere, they inclined to the opinion—first, that a railway company cannot legally or equitably mortgage its undertaking without the authority of Parliament; and, secondly, that such, the agreement here in question, was not a contract for the use of the line, nor for an apportionment of tolls within the 87th section of the Railways Consolidation Act, 8 & 9 Vict. c. 20.

An action was then brought at law, and the Court of Exchequer Chamber affirming the judgment of the Court below, considered the contract to be not only in other respects legal, but also within the powers of the directors (*b*). "It is a contract, the

(*a*) 3 D. G. M. & G. 576, 22 L. J. (Ch.) 761.

(*b*) 9 Ex. 642, 23 L. J. (Ex.) 186.

object of which is, and by which it is provided, that the plaintiffs in error may pass their carriages laden with coals over the line of the defendants in error; and so far as its purpose and general stipulations provide for effecting this, it is clearly a contract which the two bodies are competent to enter into. But it is a condition imposed on which the validity of the contract depends, that this use of the line shall be granted on payment of tolls." And the Court came to the conclusion that the payments to be made under the contract were "tolls" within the meaning of the 87th section of the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20.

In *Great Northern Railway Company* v. *Manchester, &c., Railway Company* (c), an agreement that two companies might mutually use the railway of one of the companies on certain specified terms was held good as being consistent with a proper user of the railway and with the rights of the granting company.

Midland Rail. Co. *v.* Great Western Rail. Co.

The latest decision on this subject is that of *Midland Railway Company* v. *Great Western Railway Company* (d). The H. Railway Company,

(c) 5 D. G. & Sm. 138. Compare *Midland Railway Company* v. *Ambergate, &c., Railway Company*, 10 Hare, 359.

(d) L. R. 8 Ch. 841; see also *Llanelly Railway and Dock Company* v. *London and North-Western Railway Company*, L. R. 8 Ch. 942; *Wolverhampton and Walsall Railway Company* v. *London and North-Western Railway Company*, L. R. 16 Eq. 433. See also as to the

whose line ran into the defendant company's line at B., had a Parliamentary right to use the defendant's station at B. The plaintiffs' company had running powers over the defendants' line, and were anxious to run trains through the B. station over the H. line. The H. company applied to Parliament for power to lease their line to the plaintiffs, but through the opposition of the defendants the proposed bill was thrown out. The H. company then entered into an agreement with the plaintiffs, terminable on six months' notice, by which they agreed to allow the plaintiffs to use the H. line, and all its stations, sidings, &c., and to afford them every facility for so doing; the plaintiffs to keep the line in repair and appoint and pay their own officers, and fix the rates and fares of through traffic, paying to the H. company a proportion of the through rates and fares by way of commuted toll. It was also provided that if the H. company should desire the plaintiffs to undertake the local traffic of the H. line the plaintiffs would do so, paying the H. company a proportion of the fares. The plaintiffs under this agreement claimed the right to run their trains over

effect of acquiescence by one company in the enjoyment by another company of rights of user, *Great Northern Railway Company* v. *Lancashire and Yorkshire Railway Company*, 1 Sm. & Giff. 81; and *Shrewsbury and Birmingham Railway Company* v. *Stour Valley Railway Company*, 2 D. G. M. & G. 866. As to the import of an arbitrator's award, see *Eastern Union Railway Company* v. *Eastern Counties Railway Company*, 2 E. & B. 530, 22 L. J. (Q. B.) 371.

the defendants' junction at B., and filed their bill to establish the right, which the defendants resisted on the ground that the agreement between the plaintiffs and the H. company was Ultra Vires and illegal. The Lords Justices, reversing the decision of the Master of the Rolls, held that the agreement was not Ultra Vires or illegal, and that the plaintiffs were entitled to the relief prayed.

Result of the authorities.

We may then, perhaps, lay down broadly that *bonâ fide* traffic arrangements for the more economical working of the traffic which comes to a group of companies—usually railway companies—will be supported. But such arrangements must be in reality what in name they purport to be, simply agreements by which the business that comes within the scope of all is carried on commodiously and cheaply, and for the common benefit, and not transfers of the powers of some of such companies to the others.

No test exists, no fixed line marking off legal business regulations from illegal delegation of special powers, but here may be mentioned the case of *London, Brighton, and South Coast Railway Company* v. *London and South-Western Railway Company* (*e*) as illustrating the nature of agreements which will be considered not to come under the

London, Brighton, and South-Coast Rail. Co. *v.* London and South-Western Rail. Co.

(*e*) 4 D. G. & J. 362; 28 L. J. (Ch.) 521; *Furness Railway Company* v. *Smith*, 1 D. G. & Sm. 299; *Shrewsbury, &c., Railway Company* v. *Chester, &c., Railway Company*, 14 L. T. 217, 433.

head of traffic arrangements. The Brighton Company and the South Western Company became jointly entitled to a line of railway under an Act of Parliament made in 1847, by which this joint line was placed under the management of a joint committee. By this Act it was provided that each of the two companies might use the joint line for all purposes necessary for the traffic of the same respective company. The South-Western Company afterwards, without Parliamentary authority, entered into agreements with the Portsmouth Company, by which the South-Western Company was to have the exclusive use of the line of the Portsmouth Company, paying £18,000 a year. On bill filed by the Brighton Company to prevent this agreement being carried out, it was decided that the Act of 1847 did not create a joint tenancy, carrying with it the right of using for every kind of traffic a station appurtenant to the joint line, and that the South-Western Company had no right to use it except for what was properly traffic of that company. The Court also held that the agreements between the South-Western Company and the Portsmouth Company were Ultra Vires and illegal, and that the conveyance of passengers and goods under them did not constitute traffic which could be considered traffic of the South-Western Company within the meaning of the Act of 1847, and that therefore the Brighton Company were entitled to an injunction

restraining the South-Western Company from using the joint station for the purposes of any traffic destined for or coming from the Portsmouth Railway or any part thereof.

II. Agreements for apportioning between different companies the "tolls" receivable by the whole of them collectively may be valid.

Division of tolls.

Whether such agreements would, apart from statutory enactment, be considered good is doubtful. Contracts between companies which create in fact if not in name partnerships, are void on the double ground of being Ultra Vires and also contrary to public policy, and any arrangement for the division of tolls must, it is presumed, be objectionable upon the same grounds. With regard, however, to railway companies it is expressly provided by 8 & 9 Vict. c. 20, s. 87, that

8 & 9 Vict. c. 20, s. 87.

"It shall be lawful for the company from time to time to enter into any contract with any other company, being the owners or lessees, or in possession of any other railway, for the passage over or along the railway, by the special Act authorised to be made, of any engines, coaches, waggons, or other carriages of any other company, or which shall pass over any other line of railway, or for the passage over any other line of railway of any engines, coaches, waggons, or other carriages of the company, or which shall pass over their line of railway, upon the payment of such tolls and under such conditions and restrictions as may be mutually agreed upon; and for the

purpose aforesaid it shall be lawful for the respective parties to enter into any contract for the division or apportionment of the tolls to be taken upon their respective railways."

What will be "tolls" within the meaning of this section is by no means clear; the authorities on this point, as upon so many others, in connection with Ultra Vires being very conflicting. It would seem that any payment of money, whether a lump sum or not, in consideration of the conveyance or passage over the line of the contracting company, of goods or passengers, is a "toll," although the payment be not calculated by reference to the number of individuals or separate articles (*f*). But an agreement providing for a fixed dividend upon the capital of either of the contracting companies is not so (*g*). The best cases illustrative of this point are those arising out of the agreement, which has already been referred to and commented upon (*h*), made between the Great Northern Railway Company, the South Yorkshire Railway Company, and the River Dun Company (*i*).

(*f*) *Great Northern Railway Company* v. *South Yorkshire and River Dun Company*, 9 Ex. 55, in the Exchequer Chamber.

(*g*) *Simpson* v. *Denison*, 10 Hare, 51.

(*h*) See *ante*, pp. 278-9.

(*i*) See also *East Anglian Railway Company* v. *Eastern Counties Railway Company*, 21 L. J. (C. P.) 23.

III. Agreements providing for the division of profits arising from the whole existing traffic of a district, in proportions calculated on the past course of traffic, are not Ultra Vires or otherwise void.

Apportionment of receipts.

This proposition seems to be established, but it requires the greatest care and consideration to discriminate agreements of this class on the one hand from transfers of powers, and, on the other hand, from partnerships between the various companies concerned. In the last chapter the well-known Shrewsbury Railway Company's cases were mentioned, as exemplifying these difficulties. These arose out of the following circumstances. The London and North-Western Railway Company and the Shropshire Union Railways and Canal Company, together promoted a bill to enable the former to use a portion of the line of the latter company. This bill the Shrewsbury and Birmingham Railway Company opposed. To get rid of their opposition an agreement was entered into with the opposing company, by which the other two companies agreed to conduct their traffic in a certain specified manner, to keep certain accounts, and to pay over to the Shrewsbury Company a portion of their receipts (*j*).

Shrewsbury Rail. Co.'s cases.

This agreement gave rise to an enormous amount

(*j*) See the agreement at length, 2 Mac. & G. 331—335.

of litigation. On the opening of the Shrewsbury and Birmingham Railway in 1847, that company called upon the London and North-Western Railway Company to keep the accounts stipulated for in the agreement, and this being refused a bill was filed to compel them to do so. This bill was met by a demurrer on the part of the London and North-Western Railway Company, and the demurrer was allowed by the Vice-Chancellor of England, on the ground that the agreement had not come into operation (*k*): from this there was an appeal, and Lord Cottenham overruled the demurrer, being of opinion that the agreement had come into operation and *was valid and binding* (*l*). Thereupon a motion for the injunction prayed by the bill, *i.e.*, that the London and North-Western Railway Company should not (see the third clause of the agreement) carry traffic on certain specified portions of their lines, was made and granted by the Vice-Chancellor (*m*); this also was appealed from, and the then Chancellor, Lord Truro, dissolved the injunction upon the ground of comparative inconvenience, and without giving any opinion as to the merits of the case; holding, that the questions both as to the agreement having come into operation, and as to its legal validity, ought to be tried at law (*n*).

An action was next brought upon the agreement,

(*k*) 20 L. J. (Ch.) 90.
(*l*) 2 Mac. & G. 324, 2 Hall & T. 257, 20 L. J. (Ch.) 95.
(*m*) 20 L. J. (Ch.) 102.
(*n*) 3 Mac. & G. 70, 20 L. J. (Ch.) 103.

and the Court of Queen's Bench held, that it was not void either as being a fraud on the legislature, or as depriving the public of the benefit of competition, or as being a fraud on the shareholders (*o*).

A further motion for an injunction was then made before the Master of the Rolls, to whom the cause had been transferred; and he ultimately dismissed the bill—or rather all the bills, for three cross suits were pending—and with it the motion for the injunction (*p*). Against this dismissal there was an appeal unto the Lords Justices, who also decided against the plaintiffs, holding, that the agreement was a breach of trust on the part of the directors as between themselves and their shareholders, and that the plaintiffs had knowingly participated in such breach of trust. They also held, that the contract, being to alienate the tolls of a given portion of a railway, was contrary to the authority given by parliament, and was against public policy; and that, therefore, whether it were valid or invalid at law, the Court could not lend its assistance to enforce specific performance of the same (*q*).

The plaintiffs thereupon appealed to the House of Lords, where, finally, it was determined, that whatever were the character of the covenants in question, the time had not yet come when they were to be put into operation (*r*).

(*o*) 17 Q. B. 652, 21 L. J. (Q. B.) 89.
(*p*) 16 Beav. 411.
(*q*) 1 D. G. M. & G. 115, 22 L. J. (Ch.) 682.
(*r*) 6 H. Lds. 113, 26 L. J. (Ch.) 482.

The result of these numerous judgments is thus summed up by Page-Wood, V.-C. (*s*): "I think the positive opinions are only two—Lord Cottenham on the one hand [*i.e.*, in favour of the legality of the agreement], the V.-C. Turner on the other; and the present Master of the Rolls, whether bound by the weight of authority or otherwise, adheres to the view of Lord Cottenham and the judges at Common Law. In Equity the authorities stand in the manner I have described; there are only two authorities directly opposed, and the others, perhaps, may be taken to be neuter between those two contending views. Then we have the opinion of the Court of Queen's Bench, which consisted at the time of the present Lord Chancellor, Mr. Justice Patteson, Mr. Justice Coleridge, and Mr. Justice Wightman,—certainly a very great weight of authority is there found united in favour of the contract which there existed."

Hare *v.* London and North-Western Rail. Co.

Another equally well-known, and perhaps more important as being the more recent, authority is that of *Hare* v. *London and North-Western Railway Company* (*t*). Here two groups of railway companies, being respectively the owners of independent conterminous routes (from London to Edin-

(*s*) 2 J. & H. 113, 114; 30 L. J. (Ch.) 832.

(*t*) 2 J. & H. 80, 30 L. J. (Ch.) 817; *Hodgson* v. *Earl Powis*, 1 D. G. M. & G. 6, 21 L. J. (Ch.) 17; *Lancashire and Carlisle Railway Company* v. *North-Western Railway Company*, 2 K. & J. 293, 25 L. J. (Ch.) 223.

burgh), agreed to divide the profits of the whole traffic in certain fixed proportions, calculated on the experience of the past course of traffic. As a result of that agreement, a portion of the earnings of the London and North-Western Railway Company was handed over to the other companies; and the plaintiff, a shareholder in this company, applied—though after several years of acquiescence—for an injunction to restrain the companies from carrying out the agreement: the application was refused. The Vice-Chancellor considered not only that on principle such an arrangement was legal, there being in it nothing prejudicial to either the shareholders or the public, but also that he was concluded by the judgments of Lord Cottenham and the Court of Queen's Bench in the *Shrewsbury Case*,—"Until that judgment is overruled by a higher authority, I think I ought to adhere to it in a case which seems to be entirely parallel."

In the present case the validity of the agreement was examined as far as it concerned companies and lines existing at the moment of its making; more recently it has been decided that it is not so, if applied to others not then existing. *Midland Railway Company* v. *London and North-Western Railway Company* (*u*) is the case in point. The plain-

(*u*) L. R. 2 Eq. 524. Compare *Maunsell* v. *Midland Great Western of Ireland Railway Company*, 1 H. & M. 130; 32 L. J. (Ch.) 513, one of the questions decided in which was, that an agreement making traffic regulations applicable to future extensions was Ultra Vires.

tiffs here, by extending their old line and by adding a new branch, and thence by running powers obtained over the line of the defendants, one of the parties to the agreement, had acquired, subsequently to the date of the same, a new through route from London to Edinburgh; and the suit arose in reference to the proceeds of the traffic on such new through route. Kindersley, V.-C., after determining that the agreement did not either expressly or by implication include the plaintiffs, considered that if it had done so it would have been illegal—"it would be Ultra Vires of the board of directors of such a company to enter into a contract fixing and regulating the future traffic which might be carried upon a line of railway which the company might hereafter be empowered to construct, and the profits of such traffic, so as to give to another railway company an interest in such traffic and profits."

Agreements regulating traffic upon future lines are void.

IV. Agreements between companies which create a partnership between the parties thereto are void.

Agreements creating partnership.

It has just been seen that certain kinds of agreements for the division of the receipts obtained by different companies in fixed proportions between such companies are allowable, but it is only such agreements which can be upheld. Others which closely resemble these are illegal, as establishing a

partnership between the companies concerned, and consequently producing a transfer of the powers, and a merger *pro tanto* of each separate company in the constituted whole. Reference has already been made to these agreements, and their illegality expressly laid down in the judgments in the authorities cited in the last few pages, in illustrating the nature of legal conventions of this description.

Charlton *v.* Newcastle and Carlisle Rail. Co.

Perhaps the leading case on this point is that of *Charlton* v. *Newcastle and Carlisle Railway Company* (*v*), where the arrangement was held to constitute a partnership. The heads of the agreement here in question, made between the Newcastle and Carlisle Railway Company and the North-Eastern Railway Company, provided shortly that the two railways should be amalgamated on the principle of each company receiving a proportion of the net receipts, and out of such proportion paying their own debts, dividends on share capital, and other special charges; that the rolling-stock and works belonging to the two companies should become joint property; that the gross receipts of the two lines should be charged with the total working expenses; and so on. Page-Wood, V.-C., said: "It is plain, in this state of things, that the companies are desirous of doing that which the law will not allow them to do; or at all events to go as near to the object which they have in view as the law will allow

(*v*) 5 Jur. (N.S.) 1097.

them;" and he accordingly made an order restraining the companies from acting upon the proposed agreement. In reference to the distinction between arrangements amounting to partnership and such as merely provide for a division of the tolls—which may be good, as seen in the last few pages—the Vice-Chancellor observed: "The agreement itself is one of an extremely suspicious character on the face of it. They intend to go a step farther—and that not an unimportant one—than that agreement which has been held valid by the Court of Exchequer Chamber in the case of the *South Yorkshire and River Dun Company* v. *Great Northern Railway Company* (*w*). They go this step farther: having recited the heads of amalgamation, by which the intention of all parties is that there shall be a clear partnership between the companies so far as the law will allow; and that the total profits of the two companies shall be thrown into one fund, and then the net profits divided between the two companies, which would be clearly illegal, they say: 'What we will do is this—we will adjust the bargain for tolls which the law allows to meet the scheme as nearly as we can, and we will likewise say the tolls shall be diminished by the one company or the other, so as to make the net profits received by the other company as nearly as possible one-tenth and nine-tenths of the gross profits received by the two. We

(*w*) 9 Ex. 642.

cannot agree to have a profit-and-loss account; the law will not allow us to do it directly, but so far as we can by the mechanism of tolls, we will arrange to do it; and there shall be a sliding scale of tolls which shall be adjusted to make a profit-and-loss account.' Finding a contract in this form, and the parties being convicted of an illegal act in the first instance, I am bound to restrain them from doing anything which will amount to an illegal contract for the future."

V. Corporations may not give up to others their special powers, or the control of their undertaking.

This has been shown in the last chapter, and the cases there cited in connection with the authorities here referred to, will sufficiently indicate the present state of the law. Corporations may make all necessary arrangements for cheaply and expeditiously developing or carrying on their particular business; but it is another thing to go beyond this—to enter into contracts, for instance, by which the exclusive control or the exclusive right of working the line is handed over to other parties. All such arrangements, whatever their form, however disguised (*x*), are Ultra Vires and void.

Working agreements which amount to a delegation of powers.

(*x*) See as to this, *Simpson* v. *Denison*, 10 Hare, 51, where an agreement nominally giving running powers was held void, as in reality amounting to a delegation of powers.

The leading case is *Winch* v. *Birkenhead, &c., Railway Company* (*y*). Here heads of a proposed agreement were drawn up between the directors of two railway companies, by which one company was to allow the other company for ninety-nine years to work the lines and use the property and plant of the granting company, except certain specified lands and buildings, upon certain terms of allowance for working expenses and charges, and the maintenance of works and ways, the property and plant to be restored on the termination of the agreement, on profitable terms to the granting company; and provision was made for application to Parliament for powers, if needful. On a bill by a shareholder in the granting company, on behalf of himself and all other the shareholders in that company except the directors, against that company and the other company, the Court decided, first, that the proposed agreement was a delegation of some of the statutory powers of one of the companies to the other, which was contrary to the policy of their Acts, and could neither be granted nor accepted without further powers from Parliament; that it was a contract savouring of illegality, which at the suit of any shareholder this Court would restrain; and the Court, on motion, restrained the company from

Winch v. Birkenhead, &c., Rail. Co.

(*y*) 5 D. G. & Sm. 562; *Great Northern Railway Company* v. *Eastern Counties Railway Company*, 9 Hare, 306; *Midland Railway Company* v. *Great Western Railway Company*, L. R. 8 Ch. 841. (See also the cases, *ante*, pp. 267—270, 282.)

perfecting the agreement; secondly, that such an agreement is not distinguishable on principle from a lease, to grant which is clearly not within the statutory powers of the granting company; thirdly, that the 87th section of the Lands Clauses Consolidation Act merely gives to one company a limited power to run a portion of its traffic, only when it is necessary for the purposes of its own traffic, over the line of another railway company.

Statutory authority.

As pointed out in the last chapter by express legislative provisions, whether contained in general or special statutes, corporations may be enabled to divest themselves of their own peculiar powers or to acquire those of others. Such enactments sometimes lead to unforeseen results, by conferring upon corporations indirectly and through adventitious circumstances capacities which they would not otherwise possess.

Rogers *v.* Oxford, &c., Rail. Co.

This is well shown by the case of *Rogers* v. *Oxford, &c., Railway Company* (*z*). By an Act of 1846, a railway company was authorised to purchase the S. canal, and was bound to maintain the canal and keep it open for traffic when purchased. This Act provided that, as soon as the purchase was completed, the railway company might exercise all the rights, powers, and privileges which the canal company might before the sale have exercised in relation to the canal, under any

(*z*) 2 D. G. & J. 662. Compare *M'Donnell* v. *Midland Great Western (Ireland) Railway Company*, 3 Ir. Ch. 578.

Acts relating to the canal which might be in force at the time of the conveyance. The canal company did not, before the sale, take any steps to adopt the powers of 8 & 9 Vict. c. 42, the Act "to enable canal companies to become carriers of goods upon their canals." After the purchase the railway company proceeded, under the 8th section of the last-mentioned Act, to take a lease of the tolls of the W. canal. The clerk of the G. canal company, which was likely to be injured by the granting of the lease, took shares in the railway company, and filed a bill, on behalf of himself and the other shareholders, to prevent the acceptance of the lease, as being Ultra Vires. The Court, composed of the Lords Justices Knight-Bruce and Turner, assisted by Erle, J., held, that by the purchase of the S. canal the railway company had become a canal company so as to be entitled to avail itself of the powers given to canal companies by the 8 & 9 Vict. c. 42, and that the taking of such lease was therefore not Ultra Vires.

VI. In determining whether a given traffic arrangement be or be not valid, no attention will be paid to any so-called public interests.

Agreements affecting public interests.

It has often been considered that all such arrangements as lessen the amount of competition are illegal, on the ground, without more, that the public is

thereby put at a disadvantage. It has been said that at least railway, if not all large, companies, do not exist for their own advantage merely, but that the public has, as it were, a vested interest in their objects and privileges, to the extent of having the right to say that under all circumstances cheapness of locomotion shall be especially sought after. What reliance is to be placed on such assertions is to be gathered from the following opinion of Page-Wood, V.-C. (*a*): "I see nothing in the alleged injury to the public arising from the prevention of competition; and find no indication in the course taken by the Legislature of an intention to create competition by authorising various lines. From my own experience in Parliamentary committees, I should rather be disposed to say that the Legislature wisely inclined to avoid authorising the construction of two lines which would necessarily compete with one another. . . . . Except by fixing a maximum rate of tolls, and as far as practicable a maximum amount of profit, the Legislature has imposed no conditions in favour of the travelling public."

(*a*) 2 J. & H. 103; 30 L. J. (Ch.) 823.

CHAPTER III.

THE EXERCISE OF THE POWERS OF A CORPORATION BY THE CORPORATION ITSELF.

SECTION I.—MEETINGS OF THE MEMBERS OF A CORPORATION.

Meetings.

THOUGH a corporation is distinct from the individuals composing it, yet, being intangible, it can transact its business and manifest its wishes only by and through these individuals. Consequently meetings of the members have to be held from time to time for the various purposes connected with the corporation. At all meetings every member has a right, apart from provision express or implied to the contrary, to be present. Notice must therefore, in some way or other, be given to each person entitled to be present, and the omission of such notice to anyone, though he may have given a general dispensation of notice, and though also the omission be accidental (*a*), will invalidate the proceedings at the meeting (*b*). Though all members have primarily

Who may be present.

(*a*) *Rex* v. *Langhorn*, 4 A. & E. 538.

(*b*) *Rex* v. *Langhorn*, *ubi suprà*; *Rex* v. *Chetwynd*, 7

a right to receive notice and to attend, yet the constating instruments or custom (*c*), or the bye-laws of the corporation (*d*), may restrict the number having this right, but restrictive bye-laws which are repugnant to the constating instruments or otherwise illegal, will be invalid (*e*).

Compelling attendance.

On the other hand, a corporation may make and enforce bye-laws for compelling, by means of pecuniary penalties, the attendance of members at corporate meetings (*f*).

Persons present without notice.

But if all the persons entitled to be present at any meeting are actually present thereat, whether with or without notice, and do not object to the same on the ground of informality, the want of notice will be excused, and they will be unable afterwards to repudiate the proceedings of such meeting (*g*). Even persons not present, and who did not receive notice, may by subsequent acquiescence in the resolutions passed or other business

B. & C. 695. (See *Moore* v. *Hammond*, 6 B. & C. 456.) As to whether it is necessary to give notice of an adjourned meeting to those who attended the original one, see *Wills* v. *Murray*, 4 Ex. 843.

(*c*) See *Rex* v. *Attwood*, 4 B. & Ad. 481, N. & M. 286.

(*d*) *Rex* v. *Westwood*, 7 Bing. 1, 4 B. & C. 781; *Rex* v. *Bird*, 13 East, 367; *Rex* v. *Durham*, 1 Burr. 127.

(*e*) *Tucker* v. *Rex*, 2 Bro. P. C. 304; *Hoblyn* v. *Rex*, 2 Bro. P. C. 329.

(*f*) *Tobacco-Pipe Makers' Company* v. *Woodroffe*, 7 B. & C. 838.

(*g*) *Rex* v. *Chetwynd*, 7 B. & C. 695; *Re British Sugar Refining Company, ex parte Faris*, 3 K. & J. 408, 26 L. J. (Ch.) 369.

transacted at any meeting, be bound by the same, if *intra vires*, and be unable to object to the want of notice (*h*).

Form of notice.

The requisites of the notice so required to be given vary extremely. Generally its essential parts will be set forth by the constating instruments; with joint-stock companies this will invariably be the case, but custom, more especially with municipal and eleemosynary corporations, will sometimes determine these requisites wholly or in part. Special circumstances or arrangements apart, the notice should contain, first, the date and time, and secondly, the place of meeting, unless there be some standing rule or established custom, known to all the members, which fixes these (*i*), and even then it will be more advisable to issue a proper notice to remind forgetful members; and thirdly, the business to be considered. However, the transaction of business at a meeting foreign to the objects specified in the notice will not make the whole meeting irregular (*j*).

The length of time which notices must be issued

(*h*) *Turquand* v. *Marshall*, L. R. 4 Ch. 376; *Smallcombe* v. *Evans*, L. R. 3 H. L. 249. See also *Phosphate of Lime Company* v. *Green*, L. R. 7 C. P. 43, where the matters acquiesced were apparently Ultra Vires.

(*i*) See *Rex* v. *Hill*, 4 B. & C. 426.

(*j*) *Re British Sugar Refining Company, ubi suprà*; *Graham* v. *Van Diemen's Land Company*, 1 H. & N. 541; 26 L. J. (Ex.) 73; *Re Irrigation Company of France, Fox's case*, L. R. 6 Ch. 176.

previous to meetings is usually fixed by the constating instruments. In companies governed by 8 & 9 Vict. c. 16, it must be fourteen days (*k*), while the Companies Act, 1872, requires at least seven days (*l*).

Adjourned meetings.

Meetings may be adjourned, but nothing may be transacted at any adjourned meeting save the unfinished business of the former meeting (*m*).

Ordinary and extraordinary meetings.

Meetings are of two kinds, ordinary or general, and extraordinary or special. The former are held periodically at appointed times, and for the consideration of matters in general. The latter are called upon emergencies, and for the transaction of particular business. Extraordinary meetings being thus summoned unexpectedly, the notice relating to them ought to specify very carefully and exactly the occasion of the summons, and all the business proposed to be transacted thereat, so as to call the attention of each member in an especial manner to the circumstances (*n*). But beyond this, and the further fact that the proceedings of an extraordinary meeting are usually not final, but require confirmation at some subsequent meeting (*o*), there is little difference in the requirements of both kinds of

(*k*) Sect. 71 & sect. 138.

(*l*) 25 & 26 Vict. c. 89, sect. 52, and Table A, clauses 95–97.

(*m*) *Reg.* v. *Grimshaw*, 10 Q. B. 747.

(*n*) See *Re Bridport Old Brewery Company*, L. R. 2 Ch. 191.

(*o*) See *Dean* v. *Bennett*, L. R. 6 Ch. 489; *Clinch* v. *Financial Corporation*, L. R. 5 Eq. 450.

meetings, and the notice to be previous to either, and the formalities to be observed, will be very similar, if not actually identical.

Upon this portion of the subject other observations will be made subsequently in Part III., Chapter V., Section 4, in considering the meetings of directors.

SECTION II.—THE NECESSITY FOR SEALING.

Common Law rule.

Under the strict Common Law all the contracts of corporations must be attested by the fixing of their seal. They being invisible—and as Coke adds (10 Rep. 32), without a soul—cannot manifest their intentions by any personal act or oral discourse. They, therefore, act and speak only by their common seal. For though the particular members may express their private consent to any act by words or signing their names, yet this does not bind the corporation; it is the fixing of the seal, and that only, which unites the several assents of the individuals who compose the community, and makes one joint assent of the whole. As expressed by Rolfe, B., in *Mayor, &c., of Ludlow* v. *Charlton* (*p*), "The seal is required as authenticating the concurrence of the whole body corporate. If the Legislature in creating a body corporate invest any member of it, either expressly or impliedly, with authority to bind the whole body by his mere signature or otherwise,

(*p*) 6 M. & W. 815.

then undoubtedly the adding of a seal would be matter purely of form, and not of substance. Everyone becoming a member of such a corporation knows that he is liable to be bound in his corporate character by such an act, and persons dealing with the corporation know that by such an act the body will be bound. But in other cases the seal is the only authentic evidence of what the corporation has done or agreed to do. The resolution of a meeting, however numerously attended, is after all not the act of the whole body. Every member knows he is bound by what is done under the corporate seal, and by nothing else. It is a great mistake, therefore, to speak of the necessity of a seal as a relic of ignorant times. It is no such thing; either a seal, or some substitute for a seal which by law shall be taken as conclusively evidencing the sense of the whole body corporate, is a necessity inherent to the very nature of a corporation."

The rigid application of this rule has necessarily entailed not a little moral injustice, as in the case just cited. Two other notorious instances are *Arnold* v. *Mayor of Poole*, and *Diggle* v. *London and Blackwall Railway Company* (*q*). In the former case the plaintiff, an attorney, had been appointed by the defendants to conduct their suits and to perform other legal business for them, but his appointment not having been under the common

(*q*) 4 M. & Gr. 860, and 5 Ex. 442, respectively.

seal, it was held that he could not recover his bill of costs. In the latter case the plaintiff had, in accordance with an agreement not under seal entered into with the defendants, executed certain works and improvements upon their line. He was dismissed before the completion of the work, and on action brought it was held he could not recover for the services rendered.

Moreover, owing to the vast increase in modern times in the number of trading corporations, it has been found advisable, if not absolutely necessary, to qualify the rule, and to hold many contracts made by or with corporations valid though not under seal. These exceptions are now to be examined, but it must be premised that under no circumstances will any exception be allowed to prevail against the express directions of the Legislature. Whenever a statute makes sealing an essential condition for the validity of a contract, this formality must be observed. Thus in *Frend* v. *Dennett* (*r*) the plaintiff sued the clerk of the local board of health of the non-corporate district of Worthing for work done in pursuance of a contract entered into with them, such contract not being under seal. The 85th section of 11 & 12 Vict. c. 63, provides that all contracts above £10 shall in case of non-corporate districts be under the seal of the board, &c. Consequently

(*r*) 27 L. J. C. P. 314. Compare *Cunningham* v. *Local, &c.*, *Wolverhampton*, 26 L. J. M. C. 33.

the verdict entered for the plaintiff at Nisi Prius was set aside by the Court in banc.

This being borne in mind, the following seem to be the chief cases in which the absence of a seal will be excused.

Exceptions.

a. *Matters of trivial and every day occurrence.*

Trivial matters.

From earliest times it has been admitted that to enforce the rigid rule in the insignificant affairs of daily life would be needless, if not utterly impracticable. This appears from the judgment in *Horn* v. *Ivy* (*s*), in 21 Car. 2, and the references to the year books therein contained. "Admitting all this for the defendant, yet it was said the plea was naught. First because he justified by a command from a corporation (the Governors and Society of the Trade to the Canaries), and did not allege it to be by deed. And it was agreed that a corporation might employ one in ordinary services without a deed, as

(*s*) 1 Ventr. 47. See *Randle* v. *Deane, et al* (2 Lut. 1496) 12 Will. 3, C. B., to an action of trespass for beating the horses and servants of plaintiff, defendants justified as being the servants of the mayor, aldermen, and burgesses of B. Plaintiff demurred: "que les defs justifie come servants al un corporation, et pur ceo doient monstre un authority south le seal del corporation, 1 Sid. 441;" but the plea was overruled. "Car le difference est enter un corporation que ad un teste, et per consequence poet faire un personal command et un corporation aggregate que n'ad un teste. 16 H. 7, 26. Et vid aux pur ceo 1 Lev. 107."

to be butler, 18 Ed. 4, 8, or the like. But one could not appear in an assize as a bailiff to a corporation without deed, 12 H. 7, 27. Neither can they license one to take their trees without deed, nor send one to make a claim to land, 9 Ed. 4, 39. They cannot make themselves disseisors by their assent without deed, or command one to enter for a condition broken, 7 H. 7, 9." So in *Manby* v. *Long et al* (*t*), for taking cattle damage-feasant, defendants made conusance as bailiffs for the Corporation of Christ's Hospital, and, on demurrer, held that "the conusance was good without mentioning their precept, or that it was in writing, for their precept need not be in writing for such matters as this."

b. *Cases of utility amounting to necessity.*

From cases of every day occurrence, where it is absolutely necessary that the formality of sealing should be dispensed with, we proceed to those cases whose utility differs but little from necessity. It is now fully established that when the constitution and end of a corporation require that certain contracts should be made and work done, and such contracts have been formed by agents lawfully authorised, and work has been performed and materials supplied in pursuance of the same, under such circumstances the corporation will be liable to

(*t*) 3 Lev. 107.

an action, if not upon the special contract, at least on the common counts.

"I am disposed to think that wherever the purposes for which a corporation is created render it necessary that work should be done, or goods supplied to carry such purposes into effect, as in the case of the guardians of a poor law union, and orders are given at a board regularly constituted, and having general authority to make contracts for works or goods necessary for the purposes for which the corporation was created, and the work is done or goods supplied and accepted by the corporation, and the whole consideration for payment executed, the corporation cannot keep the goods or the benefit, and refuse to pay on the ground that though the members of the corporation who ordered the goods or the work were competent to make a contract and bind the rest, the formality of a deed or of affixing the seal was wanting, and then say no action lies, we are not competent to make a parol contract, and we avail ourselves of our disability." These are the words of Wightman, J., in *Clarke* v. *Cuckfield Union* (*u*), in which case the plaintiff, having put up water-closets at a workhouse in pursuance of an oral order given him by the guardians, was held entitled to recover for the same.

Cases of utility where the claims

In the following cases similar claims were allowed:—*Sanders* v. *Guardians of St. Neot's*

(*u*) 21 L. J. Q. B. 349.

Union (*v*), for iron gates, the order given being merely oral; *De Grave* v. *Mayor, &c., of Monmouth* (*w*), for weights and measures sent to the mayor at his request, afterwards examined in the town-hall by the full corporate body, and accepted and used by them; *Beverley* v. *Lincoln Gaslight, &c., Company* (*x*), for gas meters supplied to the defendants; *Nicholson* v. *Bradfield Union* (*y*), for coals supplied at various times by the plaintiff to the defendants for their workhouse, under an agreement between the plaintiff and the guardians, signed by the former, but not under the seal of the latter. where they have been allowed;

In the following they were disallowed:—*Paine* v. *Guardians of Strand Union* (*z*), for making a plan of one of the parishes of the union; *Lamprell* v. *Bellericay Union* (*a*), for making alterations in and additions to a workhouse, such being directed by parol, though the contract to build the workhouse was itself under seal; *Homersham* v. *Wolverhampton Waterworks Company* (*b*), also for variations made in pursuance of orders given by the defendants' engineer, while carrying out a contract duly sealed. where they have been disallowed.

(*v*) 8 Q. B. 810.

(*w*) 4 C. & P. 111.

(*x*) 6 Ad. & E. 829. Compare *London Gaslight, &c., Company* v. *Nicholls*, 2 C. & P. 365; *Mayor of Stafford* v. *Till*, 4 Bing. 75; *Church* v. *Imperial Gaslight, &c., Company*, 6 Ad. & E. 846.

(*y*) L. R. 1 Q. B. 620.

(*z*) 8 Q. B. 326; 15 L. J. M. C. 89.

(*a*) 3 Ex. 283; 18 L. J. Ex. 282.

(*b*) 6 Ex. 137; 20 L. J. Ex. 193.

It will, however, be noticed in reference to the first of these three cases that the making a plan for some particular parish was not necessary to the union generally, nor incidental to the purposes for which the guardians were incorporated; and as to the two latter, that they were claims for extra work performed while completing a contract under seal, and that if it were necessary that the primary contract should be by deed, the same reasons would require the collateral engagements to be similarly authorised.

Still, it must be admitted that the authorities are conflicting, but in the latest, as appears above, *Clarke* v. *Cuckfield Union* was followed, as being founded on justice and convenience.

Common servants and some higher agents may be appointed by parol;

We have already seen that common servants may be appointed by parol, at least by such corporations as have a head. This has of late been extended to employés of a higher grade, the principle being—not so much the urgency or the triviality, but the utility of such appointments. Thus in *Haigh* v. *North Bierly Union* (*c*), an accountant employed by the guardians to examine into and audit their accounts, was allowed to recover for his services, though the engagement, by parol only, was under somewhat unusual and special circumstances. So in *Totterdell* v. *Fareham Brick, &c., Company* (*d*), where two of the directors of a registered company had parolly

(*c*) 28 L. J. Q. B. 62.

(*d*) L. R. 1 C. P. 674; *Browning* v. *Great Mining Central Company*, 5 H. & N.

engaged the plaintiff as their foreman, he was held entitled to recover from the company for his wages.

It is true that there are two decisions by the Court of Exchequer to the contrary: *Cope* v. *Thames Haven, &c., Company* and *Smart* v. *West Ham Union* (*e*), where officers appointed by parol —in the former a *general* agent, in the latter a collector of poor's rates—could not recover for their services. But both these cases, as also *Lamprell* v. *Bellericay Union* and *Homersham* v. *Wolverhampton Waterworks Company* (*f*), were determined while Sir James Parke was the senior baron, and though the greatest respect must be paid to the immense attainments of that learned judge, yet his deep acquaintance with "black-letter law," while it greatly biassed his colleagues, was itself the chief reason why he could not bring himself to be a party to freeing modern contracts from the trammels imposed upon them by past ages. After Baron Parke had been raised to the peerage another case came before the Exchequer, *Bateman* v. *Mayor, &c., of Ashton-under-Lyne* (*g*), where a contract had been made not under seal, and work done in pursuance thereof, and in which the Court decided in favour of the plaintiff, thereby impliedly overruling their

but not the superior officials.

856, 29 L. J. Ex. 399. Compare *South of Ireland Colliery Company* v. *Waddle*, L. R. 4 C. P. 617.

(*e*) 18 L. J. Ex. 345, and 24 L. J. Ex. 201, respectively.

(*f*) *Ubi supra.*

(*g*) 3 H. & N. 323, 27 L. J. Ex. 458.

former judgments, since there was a doubt whether the contract between the plaintiff and the defendants was *not actually Ultra Vires of the latter.*

However, it would seem that this rule extends to those cases only where the urgency or utility of the appointment demands that the seal should be dispensed with. Accordingly in the latest decision—*Austin* v. *Guardians of Bethnal Green* (*h*)—it has been held that a person elected by a corporate body clerk to the master of a workhouse, but not engaged by a formal contract under seal, could not sue the corporation for wrongful dismissal.

c. *Contracts entered into by Trading Corporations.*

Trading corporations may make all ordinary contracts by parol.

The doctrine is now fully established that a trading corporation may make binding contracts in furtherance of the purposes of their incorporation without using their seal, provided such contracts do not relate to matters of a special and unusual nature. This principle, suggested in *Broughton* v. *Manchester Waterworks Company* (*i*), and recognised by the judgment in the *Copper Miners' Company* v. *Fox* (*j*),

(*h*) W. N. 1874, p. 14.

(*i*) 3 B. & Ald. 1.

(*j*) 16 Q. B. 229, per Campbell, C. J.: "If the contract had been shown to be in any way incidental or auxiliary to carrying on the business of copper miners, the contract would have been binding, though not under seal; for where a trading company is created by charter, while acting

was completely confirmed by the unanimous decision of the Court of Queen's Bench in *Henderson* v. *Australian Royal Mail Steam Navigation Company* (*k*). Here the directors of the defendant company had employed the plaintiff to bring home a ship, and to pay him certain money for the same. The agreement was not under seal, but plaintiff was held entitled to recover. As to *Mayor, &c., of Ludlow* v. *Charlton* and *Arnold v. Mayor, &c., of Poole* (*l*), Wightman, J., said that they "proceed on a principle framed at a time when there were few corporations except municipal corporations, and applicable to these corporations," evidently implying that the principle does not apply to corporations of a different description. Henderson *v.* Australian, &c., Co.

So in *Australian Royal Mail, &c., Company* v. *Marzetti* (*m*), which came before the Court of Exchequer two days after the decision in *Henderson* v. *Australian, &c., Company*, the learned barons unanimously abandoned the old rule, which they had strictly enforced in the *Mayor, &c., of Ludlow* v. *Charlton*, *Arnold* v. *Mayor, &c., of Poole*, and *Diggle* v. *London and Blackwall Railway Company*, and admitted the newer one. The defendant had entered into a contract, not under the company's seal, to supply

within the scope of the charter, it may enter into the commercial contracts usual in such a business in the usual manner."

(*k*) 5 E. & B. 409, 24 L. J. Q. B. 322.

(*l*) *Ante*, pp. 303-4.

(*m*) 11 Ex. 228, 24 L. J. Ex. 273.

their ships with ale. The ale was delivered and paid for, but turned out bad, and the company sued for recovery of what they had paid, and judgment was given for them. Per Pollock, C. B.: "It is now perfectly established by a series of authorities that a corporation may with respect to those matters for which they are expressly created, deal without seal." It has also been confirmed by the unanimous decision of the Court of Common Pleas in *South of Ireland Colliery Company* v. *Waddle* (*n*), where an action was held maintainable against an engineer who refused to complete a contract he had entered into, not under seal, with the plaintiffs, a joint-stock company, for the erection of a pumping-engine and machinery. Per Bovill, C. J.: "A company can only carry on business by agents, managers, and others, and if the contracts made by these persons are contracts which relate to objects and purposes of the company, and are not inconsistent with the rules and regulations which govern their acts, they are valid and binding upon the company, though not under seal. It has been urged that the exceptions to the general rule are still limited to matters of frequent occurrence and small importance. The authorities, however, do not sustain that argument."

South of Ireland Colliery Co. *v.* Waddle.

(*n*) L. R. 3 C. P. 463; on appeal confirmed unanimously by a very strong Court, L. R. 4 C. P. 617. This case overruled a well-known opposing authority, viz., *East London Waterworks* v. *Bailey*, 4 Bing. 283.

Henderson v. *Australian, &c., Company* has been followed in *Reuter* v. *Electric Telegraph Company* (*o*), in which Campbell, C. J., said: "No reliance can be placed upon the objection that the defendants are a corporation, and that the agreement on which they are sued is not under seal. They are a corporation for carrying on a particular business, and the services done by the plaintiff were in the direct course of the business which by their charter they were to carry on. We adhere to the decision of this Court in *Copper Miners' Company* v. *Fox* and *Henderson* v. *Australian Royal Mail Company*."

Claim of Ebbw Vale Co.

In a still later case, *Re Contract Corporation, Claim of Ebbw Vale Company* (*p*), the Master of the Rolls held that a company having power to enter into a contract for the purchase of goods was bound by such contract, although it was not under seal, although the goods were not intended for the use of the company, and although this fact was known to the person with whom the contract was entered into.

The exception does not extend to contracts beyond the ordinary business.

We may, therefore, now consider the exception that concerns trading corporations to be established beyond question, but difficulties will arise in determining whether given acts are or are not of ordinary occurrence in the business of a given corporation. But the exception does not extend to unusual or

(*o*) 6 E. & B. 341. (*p*) L. R. 8 Eq. 14.

uncommon acts. Consequently in one case a railway company were held not liable to an action on a contract not under seal for work done by a party in substituting a new line of railway for the old one (*q*); and in another case a dock company could not sue on a similar contract for cleansing and removing the filth and dirt accumulating in their docks and basins (*r*).

d. *A Corporation may always sue* (semble) *and sometimes be sued upon an informal executed contract.*

The principle involved in this exception may be thus stated :—Though no action will lie against a corporation *merely* on the ground that it has received and adopted the benefit of a contract entered into without due formalities on its own part, yet under certain exceptional circumstances it may be sued on the consideration so received, and *e contrario* it seems that it may always maintain either assumpsit or debt against a person who has received from it the benefit of such a contract.

As to liability upon informal agreements, no distinction between executed and executory contracts.

As to the first portion of this statement, it was at one time thought that though a corporation could not be sued on a contract whilst it remained *executory*, they might be so on one which had been

(*q*) *Diggle* v. *London and Blackwall Railway Company*, 5 Ex. 442, 19 L. J. Ex. 308.

(*r*) *London Dock Company* v. *Sinnott*, 8 E. & B. 347, 27 L. J. Q. B. 129.

executed (*s*), but the distinction does not now exist —under no circumstances will an action lie upon the contract itself if the contract do not fall within one of the exceptions (*t*).

But more than once an action has been held maintainable against the corporation to recover payment up to the extent of the benefit derived. Thus in *Lowe* v. *London and North-Western Railway Company* (*u*), where the defendants had actually been in possession of land belonging to the plaintiff, the Court was of opinion an action for use and occupation would lie against them.

This case was recognised and followed in *Pauling* v. *London and North-Western Railway Company* (*v*), where the defendants were held liable to the plaintiff for sleepers ordered of him by a clerk in the office of their engineer, and used upon their railway.

A person who receives a benefit from a corporation always liable.

On the other hand the liability of the person who has received from a corporation, under an informal contract, the consideration thereof, to pay for the same seems fully established in all circumstances.

(*s*) See judgment of Best, C. J., in *East London Waterworks* v. *Bailey*, 4 Bing. 283.

(*t*) See *Mayor, &c., of Ludlow* v. *Charlton*, 6 M. & W. 815; *Paine* v. *Strand Union*, 8 Q. B. 326.

(*u*) 18 Q. B. 632, 21 L. J. Q. B. 361. *Barber Surgeons of London* v. *Pelson*, 2 Lev. 252. Compare *Finlay* v. *Bristol and Exeter Railway Company*, 7 Ex. 409, 21 L. J. Ex. 117, and *Hall* v. *Mayor, &c., of Swansea*, 5 Q. B. 526.

(*v*) 8 Ex. 867, 23 L. J. Ex. 105.

In the *Fishmongers' Company* v. *Robertson* (*w*), Tindal, C. J., in delivering the judgment of the Court, said: "We agree in the general rule of law [*i.e.*, as to necessity for a seal] as above stated, and that the case now under consideration *does not fall within any of those exceptions* which are so well known as to require no enumeration; but whatever may be the consequences where the agreement is entirely *executory* on the part of the corporation, yet if the contract, instead of being executory, is executed on their part—if the persons who are parties to the contract with the corporation *have received* the benefit of the consideration moving from the corporation—in that case we think, both upon principle and upon decided authorities, the other parties are bound by the contract, and liable to be sued by the corporation. . . . Independently, however, of the reasonableness of such construction, there appears authority in law to support such a position. In the case of the *Barber Surgeons of London* v. *Pelson* (*x*)—assumpsit for forfeiture under a bye-law—where the objection was expressly taken that a promise cannot be made to a corporation aggregate without deed, the Court held that the action will lie, and that the objection had been overruled in *Mayor, &c., of London* v. *Goree* (*y*).

(*w*) 5 M. & G. 131, 192.

(*x*) 2 Lev. 252.

(*y*) 1 Vent. 298. The declaration here was in Indebitatus Assumpsit "upon the custom of London, that every one who exposes foreign goods to sale, which had been entered

Again in *Mayor, &c., of London* v. *Hunt* (*z*) assumpsit was held to be maintainable by a corporation for tolls. In *Mayor, &c., of Stafford* v. *Till* (*a*) use and occupation was held to be maintainable by a corporation aggregate, though there was no demise under seal, the tenant having occupied and paid rent; and the same point was ruled in the case of *Dean and Chapter of Rochester* v. *Pierce*" (*b*).

In *Australian Royal Mail Steam Navigation Company* v. *Marzetti* (*c*), Martin, B., approved of this doctrine, as did Byles, J., in *South of Ireland Colliery Company* v. *Waddle* (*d*), and the liability of persons so dealing with and obtaining advantages from corporations has been frequently confirmed and enforced (*e*). In *The Ecclesiastical Commissioners* v. *Merral* (*f*), this was extended by holding

Australian Royal, &c., Co. v. Marzetti.

The Ecclesiastical Commissioners v. Merral.

in the custom-house, shall pay so much for showing of them." After verdict, it was alleged in arrest of judgment, that no assumpsit lay for such a duty, for there ought to be a contract express or implied to maintain an assumpsit. But the Court held the declaration was good.

(*z*) 3 Lev. 37.

(*a*) 4 Bing. 77.

(*b*) 1 Camp. 466.

(*c*) *Ubi suprà.*

(*d*) *Ubi suprà.*

(*e*) *Mayor, &c., London* v. *Hunt*, 3 Lev. 37; *Dean, &c., Rochester* v. *Pierce*, 1 Camp. 466; *Trinity House* v. *Clerk*, 4 M. & Sel. 288; *Mayor, &c., Carmarthen* v. *Lewis*, 6 Car. & P. 608; *Mayor, &c., Stafford* v. *Till*, 4 Bing. 76; *Denton* v. *East Anglian Railway Company*, 3 C. & K. 16; *Doe d. Pennington* v. *Taniere*, 18 L. J. Q. B. 49. Compare *Marshall* v. *Corporation of Queenborough*, 1 Sim. & St. 520; *Wilmot* v. *Corporation of Coventry*, 1 Y. & C. 518.

(*f*) L. R. 4 Ex. 163; *Wood* v. *Tate*, 2 B. & P. (N. R.) 247.

that the defendant—though not liable to an action directly upon the contract, which was void, not being by deed—had received the consideration, as far as he had received it, upon the terms of the contract, and was therefore liable for non-fulfilment of the same. The defendant had entered upon and paid rent for corporate property under a demise for a term made on behalf of the corporation, but not under their seal. One of the terms was to repair, and he was held liable for not so repairing.

e. *When Corporations can be deemed to have recognised the Validity of Informal Contracts.*

Ratification.

As will be shown fully hereafter, corporations may ratify engagements of many descriptions entered into by themselves or upon their behalf. Within certain limits it would also seem that corporations by acting upon, without expressly "ratifying," a contract—not necessarily relating to a subject essential to their existence—which does not bind them for want of sealing, may so far adopt it as to render themselves liable to an action either for use and enjoyment or upon the common counts, the nature and extent of their liability being estimated by a reference to the terms of the invalid agreement. It may perhaps be considered that the corporation has thereby actually ratified the agreement in question, but it would probably be the

Where an informal contract has been adopted and acted upon.

simpler and more reasonable explanation to say that the corporation by so acting is estopped from subsequently repudiating and denying the transaction. Whatever view be taken, contracts so adopted become binding on both parties, and are enforceable by and against the corporation. When a corporation will be so estopped does not clearly appear. Filing a bill to enforce the contract is sufficient, and so is the suing at law to judgment, and probably some other facts.

This is the correlative of the last exception, but is not so extensive in its operation. The former extends to all cases where the defendant has obtained the benefit of the contract; this to some only. Both have reference to executed considerations only, though it has been thought that they apply to executory cases also. In the *Fishmongers' Company* v. *Robertson* (*g*) Tindal, C. J., laid down: "Even if the contract put in suit by the corporation had been on their part executory only, not executed, we feel little doubt but that their suing upon the contract would amount to an admission on the record by them that such contract was duly entered into on their part, so as to be obligatory on themselves, and that such admission on the record would estop them from setting up as an objection in a cross action that it was not sealed with their common seal." This

(*g*) 5 M. & G. 131, 192.

dictum has, however, been so positively dissented from in subsequent cases (*h*), that we must consider it to be overruled, and that the mere institution by a corporation of proceedings at law in respect of an informal contract does not render it binding.

Agreements not under seal do not bind the other party—*semble.*

Here the question may be noticed as to whether an agreement entered into with a corporation, not under seal, is binding upon the other contracting party. Sealing is undoubtedly required, not for the protection of the corporation, but of those with whom it is contracting. It is, therefore, fairly arguable that the seal is not an *essential part of the contract per se*, which may exist without it, but is an *essential part of the proof* of the contract when sought to be enforced against the corporation. The construction put upon the 4th section of the Statute of Frauds is exactly analogous. The written agreement satisfying that statute need be signed by the party charged therewith—that is, the *party against whom the action is brought only.* As was pointed out by Tindal, C. J., in *Laythoarp* v. *Bryant* (*i*): "It is said that unless the defendant signs there is a want of mutuality. Whose fault is that? The defendant might have required the vendor's signa-

(*h*) By Campbell, C. J., in *Copper Miners' Company of England* v. *Fox*, 16 Q. B. 229, 20 L. J. Q. B. 174, and by Kelly, C.B., in *Mayor of Kidderminster* v. *Hardwick*, L. R. 9 Ex. 13, 21.

(*i*) 2 Bing. N.C. 735; 3 Scott 238.

ture to the contract, but the object of the *statute was to secure the defendant's.*" Now apply this reasoning to our present subject. The Common Law says: "No action shall be brought upon any contract entered into with a corporation unless the agreement upon which such action shall be brought shall be under the common seal of the corporation;" but it does not say that it must be under the seal of the other party also. Consequently, following the interpretation given to the Statute of Frauds, it would result that it neither in the absence of sealing voids the contract on behalf of the corporation when plaintiffs (*j*), nor requires on the part of the defendant to bind him any additional formality than the consent required in all contracts.

It is, however, now fully established that as the corporation will not, so neither will the other side be bound by an agreement not sealed, if that agreement does not fall within one of the excepted cases. In *Mayor, &c., of Kidderminster* v. *Hardwick* (*k*), the defendant was the highest bidder at an auction for the letting of certain of the municipal tolls, and was declared by the auctioneer the purchaser thereof. He duly signed the draft contract, paid a month's rent in advance, but did not ultimately fulfil all the conditions, whereupon the plaintiffs, in pursuance of a provision to that effect, resold the tolls at a loss, and

Mayor, &c., of Kidderminster v. Hardwick.

(*j*) Compare *Smith* v. *Neale*, 2 C. B. (N. S.) 67; *North Staffordshire Railway Company* v. *Peek*, 10 H. Lds. 473.

(*k*) L. R. 9 Ex. 13.

sued him for the difference. It was determined that the contract was one which ought to have been under seal, or signed on their behalf by some one appointed under seal, and that they could not recover.

The ground taken by the Court was that there was no mutuality. Usually however, not to say invariably, mutuality means mutuality of consent, and not of obligation, and seldom, if ever, has a person been disabled at law (*l*) on the ground that he himself is under no obligation, or that the other side cannot sue him (*m*).

f. *Cases of Part Performance.*

It is well known that the Court of Chancery will under certain circumstances order specific performance of a contract when acts have been done and expense incurred under and in reference to it, although such contract is not actually valid at law from the absence of some formality, usually writing as required by the 4th and 17th sections of the Statute of Frauds. It will similarly decree specific performance against a corporation when the formality wanting is the seal (*n*).

(*l*) It is often different in Chancery; see *Flight* v. *Bolland*, 4 Russ. 298.

(*m*) See the many circumstances under which one party to a contract required to be in writing by the Statute of Frauds can sue the other party, although he himself cannot be sued, not having signed the same.

(*n*) *Earl of Lindsey* v. *Great*

In *Wilson* v. *West Hartlepool Harbour, &c., Company* (*o*), an officer of the defendants had proposed terms for the sale by the company of some of its land; the plaintiff accepted the terms unconditionally, and took possession, and with the apparent connivance of the directors, put it to various uses. On the subsequent repudiation of the contract by the company on the ground that no valid contract was ever made by the company, a decree for specific performance was made by the Master of the Rolls, and this decree was affirmed on appeal. Per Turner, L. J.: "It was, however, argued for the defendants that these acts of part performance do not alter the case. It was contended on their part that companies are not bound by acts of part performance, and that the acts which have been done in this case furnish no equity against the defendants because they are acts to the prejudice of the defendants only, and not of the plaintiff; but I cannot accede to either of these arguments. Neither of them is, in my opinion, consistent with the principle upon which this Court proceeds in cases

Wilson *v.* West Hartlepool Harbour, &c., Co.

Northern Railway Company, 22 L. J. (Ch.) 995; *Laird* v. *Birkenhead Railway Company*, John. 500, 29 L. J. (Ch.) 218; *Steevens' Hospital* v. *Dyas*, 15 Ir. Ch. 405; *London and Birmingham Railway Company*, v. *Winter*, 1 Cr. & Ph. 57; *Maxwell* v. *Dulwich College*, 7 Sim. 222.

(*o*) 2 D. G. J. & Sm. 475, 34 L. J. (Ch.) 241. See *Crampton* v. *Varna Railway Company*, L. R. 7 Ch. 562, and *Leominster Canal Company* v. *Shrewsbury, &c., Railway Company*, 3 K. & J. 654; 26 L. J. (Ch.) 754.

of part performance. The Court proceeds in such cases on the ground of fraud; and cannot hold that acts, which if done by an individual would amount to a fraud, ought not to be so considered if done by a company. . . . . Apart, therefore, from any question as to the terms of the agreement, and as to the statutory provisions with respect to contracts with companies, I can see no grounds on which a specific performance of this contract could have been refused by the Court."

What amounts to part performance.

Part performance must be something done under a contract and with reference to the contract. Acts of other kinds done by the plaintiff *proprio motu* or not in reliance upon the contract, will be no ground for the Court's interference in his favour, and he will be left to obtain redress by a Common Law action for damages. If a corporation lies by and allows a person to erect works and in other ways to go to expense upon the faith of an informal agreement made with them, or of the interpretation which he has put upon a disputed agreement, the Court of Chancery will *à fortiori*, upon the double ground of acquiescence and part performance order them to carry out their side of the agreement.

Effect of acquiescence.

Crook *v.* Corporation of Seaford.

Crook v. *Corporation of Seaford* (*p*) is a case in point. Here a municipal corporation passed a resolution in January, 1860, agreeing to let to the plaintiff the flat part of the beach opposite to the

(*p*) L. R. 6 Ch. 551.

plaintiff's field for 300 years at a nominal rent. The plaintiff claimed all the beach comprised between lines drawn in prolongation of the sides of his field, and he built a wall and terrace along the part so claimed. In 1864 the corporation gave the plaintiff notice to quit, and after much negotiation in 1869 brought an action of ejectment against the plaintiff, who thereupon filed the bill in this suit for specific performance. The Lord Chancellor, affirming the decision of Stuart, V.-C., held that though the agreement was not under seal, the corporation was bound by acquiescence, and must perform the agreement to grant a lease.

g. *Statutory Enactments.*

The Legislature has, by express provision in various general Acts, relaxed the stringency of the old rule. Thus the Companies Clauses Act, 8 & 9 Vict. c. 16, after enabling by section 95 the directors to appoint committees, enacts (section 97) that : 8 & 9 Vict. c. 16, s. 97.

"With respect to any contract which, if made between private persons, would be by law required to be in writing, and under seal, such committee or the directors may make such contract on behalf of the company in writing, and under the common seal of the company, and in the same manner may vary or discharge the same.

"With respect to any contract which, if made between private persons, would be by law required to be in writing, and signed by the parties to be charged therewith, then such committee or the directors may make such contract on behalf of the com-

pany in writing, signed by such committee, or any two of them, or any two of the directors, and in the same manner may vary or discharge the same.

"With respect to any contract which, if made between private persons would by law be valid although made by parol only, and reduced into writing, such committee or the directors may make such contract on behalf of the company by parol only, without writing, and in the same manner may vary or discharge the same.

"And all contracts made according to the provisions herein contained shall be effectual in law, and shall be binding upon the company and their successors, and all other parties thereto, their heirs, executors, or administrators, as the case may be: and on any default in the execution of any such contract, either by the company or any other party thereto, such actions or suits may be brought, either by or against the company, as might be brought had the same contracts been made between private persons only."

The Companies Act, 1867.

A provision in the same words contained in section 41 of 19 & 20 Vict. c. 47, the Joint-stock Companies Act of 1856 (*q*), was omitted from the Companies Act of 1862, but it has been inserted in the amending Act of 1867, the 30 & 31 Vict. c. 131.

23 & 24 Vict. c. 125, s. 20.

So 23 & 24 Vict. c. 125 (the Metropolis Gas Act, 1860), provides by section 20 that "every contract of the gas company entered into in accordance with this Act shall without seal be binding on them if the contract be signed by at least two of their directors, or by their secretary or other officer by the authority of at least two of their directors."

(*q*) Compare 7 & 8 Vict. c. 110, s. 44, and *British Empire, &c., Company* v. *Browne*, 12 C. B. 723; 22 L. J. C. P. 49. See also *Prince* v. *Prince*, L. R. 1 Eq. 490.

SECTION III.—OTHER FORMALITIES.

Whether any other formalities are requisite.

The employment of the common seal is indispensable, with the above exceptions, to the validity of all corporate acts. But this is the only formality that is imposed by the Common Law. What, if any, others will be requisite must be determined by a reference to the instruments creating the corporation. It is competent for either the Legislature or the individuals seeking to be incorporated to add whatever formalities may be deemed advisable to secure the due carrying out of the corporate proceedings, but these can be found only in the constating instruments of each particular corporation. Some of them—viz., those relating to the meetings of the general body of members—have been in part considered in the first section of this chapter, and they are again treated of in connection with the formalities required to be observed by corporate officials in Chapter V. of this Part.

CHAPTER IV.

THE POWERS OF DIRECTORS AND OTHER SIMILAR OFFICIALS.

SECTION I.—THE EXACT POSITION FILLED BY DIRECTORS AND OTHER SIMILAR PERSONS.

THE constitution of every corporation determines the extent to which individual members can interfere in its management. Where no special provision has been made, then each corporator has a right to be notified of meetings for the transaction of business, though it sufficed if the major part actually present concurred. The power of managing and controlling the corporate affairs has, however, usually been confined to a small portion of the whole body, the presence of all being required on very special occasions only, when acts had to be done vitally affecting the interests of the corporation; the surrender of its charter and the like.

Powers of directors defined by the constitution of the Company.

Such an arrangement is, indeed, absolutely necessary in the case of canal, railway, and other similar corporations, consisting of hundreds, or perhaps thousands of members, and accordingly the acts and

charters creating the same provide for the appointment of managers—styled directors—with powers more or less limited. These directors are the agents, and the only primary agents, of the corporation—are they general or special agents? Have they or have they not all the powers of the body which they represent? In other words, will their contracts, when not Ultra Vires of the corporation, bind the corporation as regards persons dealing with them in *bonâ fide* ignorance of the limitation (if any) placed upon their authority, or is it incumbent on such persons to ascertain the extent of their authority?

This is a most important point. It is totally distinct from, though often confounded with, the question of Ultra Vires. If we consider the responsibility of corporators as analogous to that of partners, the answer is easy and evident—directors are general agents empowered to carry on all such business as fairly falls within due scope of the company's operations. But there are strong objections to such a conclusion—the check that is present in a partnership; *i.e.*, the personal liability of each member, is almost wanting in a joint-stock company, where the directors are liable up to their shares only, which may be very few or even none. The weight of authority at present seems to be in favour of holding directors to be special agents. In *Ernest* v. *Nicholls* (*a*) Lord Wensleydale said,—"All per- Ernest *v.* Nicholls.

(*a*) 6 H. Lds. 419.

sons must take notice of the deed [*i.e.*, of settlement], and the provisions of the Act [*i.e.*, 7 & 8 Vict. c. 110]. If they do not choose to acquaint themselves with the power of the directors, it is their own fault; and if they give credit to any unauthorised persons, they must be contented to look to them only and not the company at large. The stipulations of the deed which restrict and regulate their authority are obligatory on those who deal with the company; and the directors can make no contract so as to bind the whole company of shareholders, for whose protection the rules are made, unless they are strictly complied with. The contract binds the person making it, but no one else."

Smith *v.* Hull Glass Co.

So in *Smith* v. *Hull Glass Company* (*b*), Jervis, C. J., laid down: "Joint-stock companies, it is now admitted, are not to be treated as ordinary partnerships; they are only bound by contracts made by the directors *within the scope of their authority.* The public have no right to complain. They know that the company is acting under the sanction and direction of an Act of Parliament and of a deed of set-

(*b*) 11 C. B. 897, 926—7. Compare *per* Bovill arguendo in *Hambro'* v. *Hull, &c., Insurance Company*, 3 H. & N. 789, 795. "A joint-stock company differs from a private partnership in this respect, that the directors are not persons having a general authority as partners, but having certain powers which are defined by a deed of settlement, to which the public have access." See also *Agar* v. *Athenæum Life Insurance Society*, 3 C. B. (N. S.) 725; and *Athenæum Life Assurance Society* v. *Pooley*, 3 D. G. & J. 294.

tlement; and *they have a ready access to that deed.*" Similarly, per Maule, J.: "To some extent no doubt these joint-stock companies differ from ordinary partnerships. The statute 7 & 8 Vict. c. 110, required the deed of settlement to be registered, and that defines the purposes for which the company is incorporated, and the powers of the directors; and all persons who contract with the directors must be taken to be *cognisant of the extent* of the authority conferred upon them." Again, Lord Justice Giffard expressed himself to the same effect in *Re County Life Assurance Company* (*c*). "The law as I take it to be deduced from the authorities is this: in the first place, a stranger must be supposed to have read the articles of association, but nothing more; and if he knows nothing to the contrary he is justified in assuming, that as against the company all matters of internal management have been duly arranged."

Directors are special-general agents of their corporations.

This question must probably now be considered settled. The directors of a corporation are its special agents, so far as their authority is limited by the Charter, Act of Parliament, Deed of Settlement, or Articles of Association.

Public bound to notice the regulations of the Company.

But it is only so far. To the instruments just named the public have access—they have not to the books and memoranda of private partnerships—and it is their own fault if they do not take the trouble to

(*c*) L. R. 5 Ch. 288; 39 L. J. (Ch.) 471.

consult them. But the authority of directors may be, and indeed often is, limited still further by the resolutions of the shareholders; and very generally certain formalities are required for its due exercise. Such precautions are very necessary, but to require outsiders to be under all circumstances acquainted with them would be, as Lord Justice Giffard, in the case last cited pointed out, imposing restrictions hostile to the due carrying on of the business.

Directors are special-general agents.

It has accordingly been many times decided, that though directors are in one sense special agents, yet that they have a general authority to do all such acts as are indispensable for the proper performance of the engagements of the corporation, and that the absence of some unessential formality will not vitiate the transaction as against third parties who have acted *bonâ fide* (*d*). This, however, is a subject which will be treated of in the following chapter.

The Fiduciary Position of Directors.

Directors occupy a fiduciary relationship,

Directors come within the designation of persons filling a fiduciary relationship. They are not trustees taking the term in its strict and technical meaning, *i.e.*, persons having the legal title to property the

(*d*) See especially *Smith* v. *Hull Glass Company*, 19 L. J. (C. P.) 106 & 123, 8 C. B. 668; *Thompson* v. *Wesleyan Newspaper Association*, 8 C. B. 849; 19 L. J. C. P. 305.

beneficial ownership of which belongs to others, for the property of a public company is vested in the company itself; but they are so far trustees for the company that they cannot derive, directly or indirectly, out of their position any profits or other advantage save with the knowledge and concurrence, expressly or impliedly given, of the company. They are not absolutely precluded from making contracts with the company, or being interested in contracts made between the company and third parties; but in order that any such arrangements may stand as between the company and the director concerned, there must be full and complete disclosure by the latter of the extent and nature of his interest in the matters in question (*e*).

and may not derive profit from dealings with the company,

In order that a director may retain any advantage which he may have obtained at the expense of the company, there must have been upon his part such a communication to his co-directors, or the shareholders at large, as will enable them to make a perfect and exact estimate of the profits accruing or likely to accrue to the director in question.

unless with the express consent of the company.

It has also been laid down, that greater and more careful attention to their duties, and greater and more watchful supervision over the interests of their employers, will be exacted from them than from per-

Attention to duty required from directors.

(*e*) *York and North Midland Railway Company* v. *Hudson*, 16 Beav. 485; *Bank of London* v. *Tyrrell*, 10 H. Lds. 26; 31 L. J. (Ch.) 369; *Imperial Mercantile Credit Association* v. *Coleman*, L. R. 6 H. Lds. 189.

sons placed in analogous positions. "The company have a right to the service of their directors, whom they remunerate by considerable payments; they have a right to their entire services; they have a right to the voice of every director, and to the advice of every director in giving his opinion upon matters which are brought before the board for consideration; and that the general rule that no trustee can derive any benefit from dealing with those funds of which he is a trustee, applies with still greater force to the state of things in which the interest of the trustee deprives the company of the benefit of his advice and assistance" (*f*). But this language would seem too stringent, and if not, at least it is quite certain that provided all the attendant circumstances are made known, companies and their directors may validly enter into stipulations permitting the latter to have private and personal interests in the companies' contracts.

Directors favouring particular shareholders.

Nor can directors benefit or favour any particular shareholder or class of shareholders. Every authority possessed by them, *e.g.*, to forfeit shares, "is a power and discretion in the directors, who are trustees for the benefit of all the shareholders, which is to be exercised for the benefit of all; and it is the duty of the directors to direct a forfeiture when it is for the benefit of all the shareholders, and to

(*f*) *Per* Lord Chancellor Hatherley, L. R. 6 Ch. 567.

abstain from doing so when it is not for their benefit" (*g*).

Liability of directors for fraud and negligence.

Directors are bound to display in the conduct of their company's affairs at least ordinary common sense and prudence, and they will be liable to recoup to the company losses which have occurred, not merely from their fraud and wilful malfeasance, but also from their negligence and imprudence. The Courts, however, deal liberally with them; and though Chancery exacts from them a more rigorous attention to their duties than is required at Law, and often holds them responsible for constructive fraud in circumstances where no liability would be imposed at Law, yet not even Chancery requires of them more than that they should display *bona fides*, act to the best of their judgment, and not knowingly go beyond their powers. "The best of their judgment" will be estimated by comparison with the judgment of ordinary business men. Therefore where directors did not, in accordance with a clause in that behalf contained in the articles, cause the business to be stopped in good time, they were decreed to pay the losses thereby resulting (*h*).

Directors exercising their powers for their own benefit.

Not only may not directors make actual profits out of the company's business, but also they must

(*g*) *Per* the Master of the Rolls in *Harris* v. *North Devon Railway Company*, 20 Beav. 384.

(*h*) *Western Bank of Scotland* v. *Bairds*, cited L. R. 4 Ch. 381; *Turquand* v. *Marshall*, L. R. 4 Ch. 376. Compare *Overend, Gurney, & Company* v. *Gurney*, L. R. 4 Ch. 701.

employ their powers rigidly and strictly for the furtherance of the company's objects, even though thereby they inflict loss or inconvenience upon themselves. Thus where the directors having power to receive payment of calls in advance, paid into the bank the amount remaining uncalled on their own shares, and on the same day appropriated this money in payment of their fees, for which there were at the time, as they knew, no other available assets, the Court determined that there had been no *bonâ fide* payment in anticipation of calls, and that the directors, being bound to exercise the powers given to them for the benefit of the company generally, and not with a view to their own private interests only, were not relieved from liability upon their shares (*i*).

SECTION II.—POWERS POSSESSED BY DIRECTORS AND OTHER SIMILAR PERSONS.

Express Powers of Directors.

Such then is the position of directors and other similar officials. They are at once the general and yet the special agents of the corporation—special because they have only the authority defined and pointed out by the instruments of incorporation, but

(*i*) *Re European Central Railway Company, Sykes's Case,* L. R. 13 Eq. 255. Compare *Gilbert's Case,* L. R. 5 Ch. 559.

general in so far that they have this extent of authority, and that it cannot be limited or circumscribed by the internal regulations of the corporations. Trustees too they are in some respects, though not in all, but always trustees of the authority and powers so possessed by them. These powers will be given either expressly by the constating instruments, or impliedly by the operation of law as necessary incidents of their position.

Powers expressly conferred on directors.

In reference to the former, few observations need be made. What they actually are will be gathered from the language employed, not unseldom somewhat obscure and contradictory. They cannot be contrary to statutory enactments or to public policy; and if any Acts of Parliament—for instance, the Companies Acts—contemplate, even though they do not verbally provide, that associations coming within their purview, or the members thereof, shall have certain rights, or discharge certain functions only, all provisions or bye-laws derogatory thereto will be simply void (*j*).

It must also not be forgotten, that in respect of Limited Liability Companies, the memorandum indicates primarily the purposes of the company, and consequently limits in a general though definite manner its scope and powers (*k*).

(*j*) See *per* Giffard, L. J., in *Re General Company for the Promotion of Land Credit*, L. R. 5 Ch. 363, 377; and *per* Cairns, L. J., in *Re Financial Corporation, Feiling's Case*, L. R. 2 Ch. 714, 728, 729.

(*k*) See *Re New Zealand Banking Corporation, Sewell's Case*, L. R. 3 Ch. 131.

Implied Powers of Directors.

Powers belonging to directors by implication.

The implication of powers is a much more difficult matter. The directors of public companies are the special-general agents of their companies. The executive portion of most other associations—the mayor and councilmen of municipal bodies, the trustees of friendly societies, the governors of charities, the members of local government boards, and the like—stand towards those whom they represent in a relation similar in its essential aspects though varying somewhat with the varying objects in view. To this relationship the principles of agency are with some degree of qualification applicable—what is the effect of this qualification? What is the exact extent of the authority possessed by these special-general agents?

The reply is that no universal rules, valid and binding under all circumstances, can be laid down for determining the one or the other, but that regard must be had to the nature of the business and the customary methods of transacting it, and account be taken of attendant facts.

Acts of directors which are Ultra Vires of the corporation.

One principle, however, will always hold, viz., that whatever is beyond the power of the corporation is, *à fortiori*, beyond that of the directors, and therefore in considering the legal effect of any proceeding done, entered upon, or ratified by them, we must first consider whether such proceeding could

have been done, entered upon, or ratified by the corporation itself. If not so, then evidently in accordance with the most elementary of the principles flowing from the doctrine of Ultra Vires, such proceeding will be simply void as far as the corporation is concerned.

But the converse of this is not to be affirmed. Directors will have not all but only some of the powers impliedly belonging to the corporation. They will have none which are denied them either expressly by the instruments or resolutions constituting them, or impliedly by necessary deduction therefrom.

They will have none which are not required to enable them properly and expeditiously to accomplish their duties, and to carry on economically and successfully the affairs of their constituents.

The above observations must be carefully borne in mind in connection with the remainder of this chapter. The powers of a corporation must at once limit and in part determine those of its directors. The former have been considered; consequently, in treating of the latter, reference will necessarily be often made to matters already dealt with in reference to corporations themselves, and repetition may occasionally be the result.

(*a*). *Implied Powers relating to the Corporate Business, and the General Management thereof.*

Directors have impliedly general powers of management.

On this point it is impossible to lay down anything but the vaguest generalities. The aims and objects of corporations are co-extensive with human needs and inclinations; consequently the methods of attaining those objects will be infinitely various, as must also be the powers given for the attainment of the same. Directors, being the special-general agents of their principals, will have most if not all the powers of management possessed by their principals as to binding them to third parties, except so far as the constating instruments restrain them. But the general powers of management thus belonging to directors will, of course, not authorise their engaging in any transactions foreign to the proper and ordinary business of the company; for the latter could not by directly engaging in such transactions render itself liable to persons dealing with them, so manifestly it cannot incur liability when it acts through the medium of others. Most of the cases already cited in Part II., Chapter 3, are illustrations of this (*l*). Such general powers will, however, be construed liberally, and with due consideration for the best interests of the company. This well appears from the case of *Wilson* v.

(*l*) See especially *Ernest* v. *Nicholls*, 6 H. L. 401; *Athenæum Life Insurance Society* v. *Pooley*, 3 D. G. & J. 294.

Miers (*m*), where the directors of a steam-ship company endued with the powers, *inter alia*, of "selling and letting to hire, and chartering of the vessels," and of "the general conduct and management of the business of the company," were held authorised to sell all the vessels belonging to the company, and consequently a contract entered into by them for that purpose was adjudged to be binding.

(*b*). *Implied Powers as regards the Monetary Affairs of the Corporation.*

Directors varying the capital.

It has been shown that the amount of the capital, if any, of a corporation, and its division into shares, if so divided, are usually—and if the corporation come within the Companies Acts are necessarily—fixed at the constitution of the same. But statutory provisions apart, it is competent for any corporation to invest its governing body with the authority to add to, reduce, or otherwise modify its capital or its division. This is sometimes done (*n*) : and perhaps it may be considered one of the common law incidents of the governing section of such corporations as exist at Common Law. But without such express authority, directors have no implied power

(*m*) 10 C. B. (N. S.) 348, 3 L. T. (N. S.) 780. The facts are given fully, *ante*, pp. 99, 100. Compare *Clay* v. *Rufford*, 5 D. G. & Sm. 768; *Gregory* v. *Patchett*, 33 Beav. 597.

(*n*) *Ambergate Railway Company* v. *Mitchell*, 4 Ex. 540.

to vary the capital, or to determine when or how it shall be raised.

Calls by directors.

Both the Companies Act of 1862 (*o*) and the Companies Clauses Consolidation Act (*p*) contemplate the making of calls by the directors, but neither Act distinctly confers upon them the power so to do, which therefore has to be given them, as it generally is, by an article in the constating instruments, or by resolution of the shareholders.

Cancellation of shares.

With certain exceptions, corporations have no implied power to accept a surrender of, or to cancel, shares. *A fortiori*, directors have no such implied power. The leading decisions are *Stanhope's Case* and *Munt's Case*. In the former the deed of settlement declared that in all cases not provided for, it shall be lawful for the directors to act in such manner as should appear to them best calculated to promote the interest and welfare of the company. Disputes arose between the directors, and ultimately one of them, Stanhope, retired upon the terms that his shares should be cancelled, but he was nevertheless, ten years later, held a contributory (*q*).

Stanhope's Case.

Munt's Case.

In the latter the facts were very similar, Mr. Munt having been a director, and upon differences arising at the Board, having retired in pursuance of an

(*o*) See 25 & 26 Vict. c. 89, Table A, art. 4 & 26.

(*p*) 8 & 9 Vict. c. 16, s. 27.

(*q*) 3 D. G. & Sm. 198. Compare *Wollaston's Case*, 4 D. G. & J. 437, where at most there was only an unexecuted threat to forfeit, and yet the shareholder was held not a contributory.

agreement entered into with his co-directors, that his shares should be transferred to the company. The Lords Justices, however, affirming the judgment of the Master of the Rolls, held him a contributory, and that, although the shares so surrendered by him had been subsequently retransferred by the company (*r*).

The principle here involved has subsequently been repeatedly affirmed, and enforced with considerable strictness. This is well shown by the decision in *Richmond's Case* (*s*), one of the numerous cases growing out of the winding up of the Athenæum Life Assurance Society. One of the directors proposed to his co-directors, that for the benefit of the company each of them should take a certain number of shares to be held in trust for the company; and to set the example, he signed the deed of settlement for 2000 shares. No note of the proposal was entered on the minutes, nor were the shares handed over to him. No other director followed his example; but subsequently, he being still a director, his name was returned to the stamp-office for the shares. Afterwards, having ceased to be a director, and having reason to know that the company was in failing circumstances, he procured his shares to be cancelled by the directors. Held, upon the terms of the company's deed of settlement, that this

Richmond's Case.

(*r*) 22 Beav. 55. Compare *Knight's Case*, L. R. 2 Ch. 321, where, notwithstanding informalities, the forfeiture was held perfect.

(*s*) 4 K. & J. 305.

was Ultra Vires of the directors, they having no power to cancel or diminish the capital, but only to forfeit shares for the benefit of the company; and was a fraud on the part of the shareholder, who was accordingly held to be a contributory in respect of those shares. This is, perhaps, a somewhat hard decision, but it only illustrates the care with which directors must keep within their admitted powers.

Surrender of shares.

Similarly the authority to permit the surrendering of shares must be expressly vested in directors, and will not be raised by implication from the nature of the business; and it can be applied only strictly for the purposes for which intended. Thus, where they had power to accept a surrender of shares, but the company was expressly prohibited from dealing in shares, it was determined that a deed of release and indemnity, by which the directors discharged a person who had subscribed the memorandum of association for 500 shares, from all liability in respect of 250 of these shares not allotted to him, was a dealing in shares, and therefore illegal and void (*t*). Similarly, directors cannot relieve a person from a contract to take shares, and who has not yet taken them (*u*).

On the other hand, directors will have such a

(*t*) *Re United Service Company, Hall's Case*, L. R. 5 Ch. 707.

(*u*) *Re United Ports Company, Adams's Case*, L. R. 13 Eq. 474; but compare *Snell's Case*, L. R. 5 Ch. 22; and *Thomas's Case*, L. R. 13 Eq. 437.

power, not only when it is expressly given them, but also when necessarily implicated in the language used in appointing them. Thus authority to enter into any contract, "and afterwards to release and discharge, or modify and vary, the terms of any such contract or agreement" (*v*), and "to enter into, alter, rescind, or abandon contracts in such manner as they shall think fit" (*w*), coupled with power to deal in shares, has been held sufficient to enable them to accept a surrender of shares, and otherwise to relieve from the liability in respect thereof.

Payment of shares otherwise than in cash.

But general powers of management do not enable directors to issue paid-up shares, or make contracts with shareholders for the taking up of shares or the payment of calls thereon in an unusual and anomalous manner—*e.g.*, by the shareholder supplying goods in lieu of payment (*x*).

Forfeiture of shares by directors.

The authority to forfeit shares, like that to cancel them or accept a surrender, exists—as to both corporations and their managing bodies—only when actually given (*y*). The Companies Act of 1862 itself contemplates that directors can forfeit (*z*), but does not itself positively enact that they can do so, and therefore this must be provided for by the articles

(*v*) *Cockburn's Case*, 4 D. G. & Sm. 177.

(*w*) *Thomas's Case*, L. R. 13 Eq. 437.

(*x*) *Re Richmond Hill Hotel Company, Pellatt's Case*, L. R. 2 Ch. 527. See also *ante*, pp. 138, 139, and the cases there cited.

(*y*) *Re Agriculturalists' Cattle Insurance Company, Stanhope's Case*, L. R. 1 Ch. 161.

(*z*) See 25 & 26 Vict. c. 89, Table A, cl. 17 & 19.

of association. The Companies Clauses Consolidation Act (*a*) expressly enables the directors of companies falling within it under certain circumstances, and upon certain conditions, to forfeit shares.

This power, it need scarcely be added, is like every other power, a trust to be exercised *bonâ fide* for the benefit of the whole corporation and of the general body of members, and not in the favour or to the detriment of some one or more (*b*).

Borrowing.

Borrowing is one of those powers which directors may have, either as expressly given or as implied from the nature of the business. When expressly given it may be so in so many words (*c*), or by necessary deduction from general powers of management conferred upon them (*d*). The authority may be to borrow by way of loan simply (*e*) ; or by mortgaging the funds and other property of the company, whether the existing assets only (*f*) or the future assets as well, that is to say, book debts accruing, though not yet due (*g*), but not calls hereafter to be

(*a*) 8 & 9 Vict. c. 16, ss. 29-35.

(*b*) See *Richmond's Case* and *Painter's Case*, 4 K. & J. 305 ; *Sweny* v. *Smith*, L. R. 7 Eq. 324.

(*c*) *Bryon* v. *Metropolitan Saloon Omnibus Company*, 3 D. G. & J. 123 ; *Scott* v. *Colburn*, 26 Beav. 276 ; *Stanley's Case*, 33 L. J. (Ch.) 535.

(*d*) *Australian Steam Clipper Company* v. *Mounsey*, 4 K. & J. 733 ; *Gibbs and West's Case*, 10 Eq. 312.

(*e*) See *Strand Music Hall Company*, 3 D. G. J. & Sm. 147.

(*f*) *Re Sankey Brook Coal Company*, No. 1, L. R. 9 Eq. 721; No. 2, L. R. 10 Eq. 381.

(*g*) *Bloomer* v. *Union Coal and Iron Company*, L. R. 16 Eq. 383.

made, which cannot validly be pledged (*h*); or by the issue of debentures (*i*).

(*c*). *Implied Powers of Directors as regards Legal Proceedings.*

One of the chief points in connection with the authority of the managing body of a corporation to bind it by conducting or concurring in legal proceedings on its behalf, is that of notice or admission. Notice to an agent is notice to his principal, consequently notice to one partner is notice to all those then actually belonging to the firm (*j*). The exception to this rule will be found on investigation to be apparent, not real, and to be due to the fact that under the circumstances the partner affected with the notice was not in truth the agent of the firm (*k*).

Notice in case of partnerships,

This rule holds in the case of an acting director (*l*), or of any other duly authorised agent of a company (*m*).

and of corporations.

(*h*) See *Stanley's Case* and *Re Sankey Brook Coal Company, No.* 2, *ubi suprà*.

(*i*) As to which and the assets charged thereby, see *ante*, pp. 117-121.

(*j*) *Collinson* v. *Lister*, 7 De G. M. & G. 634.

(*k*) See *Bignold* v. *Waterhouse*, 1 M. & S. 255; *Ex parte Heaton*, Buck, 386.

(*l*) See *Peruvian Railway Company* v. *Thames and Mersey Marine Insurance Company*, L. R. 2 Ch. 617; and *Worcester Corn Exchange Company*, 3 De G. M. & G. 180.

(*m*) *Re Solvency Mutual Guarantee Society, Hawthorne's Case*, 31 L. J. (Ch.) 625; *Thompson* v. *Speirs*, 13 Sim. 469.

How to be given.

The notice must be express and to the agents of the company as such. Therefore, where bankers with whom policies of insurance were deposited by the assured as security gave no notice in writing to the offices, though the secretaries of the insurance companies were casually made aware of the fact of the deposit, and the assured became bankrupt and died, it was held, on a bill being filed by the bankers to realise their security, that the policies remained in the bankrupt's order and disposition, and that his assignees were entitled to the proceeds, less the premiums paid by the bankers (*n*).

Corporations with common officials.

In accordance with this principle, corporations having common officials are not necessarily affected through these with knowledge of each other's transactions. Thus, where company A. borrowed of company B., on the security of a mortgage, money to be devoted to a purpose that was Ultra Vires of company A., and the person who negotiated the loan was a director in both companies, while the solicitor employed was the solicitor of both companies, it was nevertheless held that company B. was not affected with notice of the illegality (*o*). But, on the other hand, a mere verbal, and it would seem even casual,

(*n*) *Edwards* v. *Martin*, L. R. 1 Eq. 121.

(*o*) *Re Marseillais Extension Railway Company, ex parte Credit Foncier of England*, L. R. 7 Ch. 161; *Re European Bank*, L. R. 5 Ch. 358. Compare *Re Contract Corporation, ex parte Ebbw Vale Company*, L. R. 8 Eq. 14; *Gray* v. *Lewis*, L. R. 8 Eq. 526.

notification to the directors or other responsible agents of a corporation, provided only that it be during the actual course of business, is sufficient (*p*).

Representations and admissions.

Similarly a corporation, like an ordinary firm or individual, is bound by the representations (*q*) and the admissions (*r*) of its directors and other agents, but only while these are acting within their authority, and in due course of business (*s*). Therefore either the representation or admission must be that of the directors, or a quorum thereof as a body, or if of one director or other agent, some evidence must be given of the authority of such person to bind the company (*t*).

(*p*) *Re Worcester, ex parte Agra Bank*, L. R. 3 Ch. 555. Compare *Ex parte Boulton*, 1 D. G. & J. 163; and *North British Insurance Company* v. *Hallett*, 7 Jur. (N. S.) 1263. See also *British and American Telegraph Company* v. *Albion Bank*, L. R. 7 Ex. 119.

(*q*) *Conybeare* v. *New Brunswick Railway Company*, 9 H. L. 711; *National Exchange Company* v. *Drew*, 2 Macq. 105; *Deposit Life Assurance Company* v. *Ayscough*, 6 E. & B. 763.

(*r*) *Meux's Executor's Case*, 2 D. G. M. & G. 522; *Burnes* v. *Pennell*, 2 H. L. 497.

(*s*) *Holt's Case*, 22 Beav. 48; *Nicol's Case*, 28 L. J. (Ch.) 257, where will be found a most exhaustive judgment by the Lord Chancellor.

(*t*) *Holt's Case*, 22 Beav. 48; *Moody* v. *Brighton and South Coast Railway Company*, 31 L. J. (Q. B.) 54; *Re Tring, &c., Railway Company*, 3 D. G. & Sm. 10.

CHAPTER V.

ACTS INTRA VIRES, BUT INFORMAL.

SECTION I.—FORMALITIES TO THE OBSERVANCE OF WHICH CERTAIN PARTIES ARE UNABLE TO SEE.

Need of formalities.

For its own protection a corporation may and generally does require that the engagements into which it enters, and the acts which it does, shall be accompanied with certain formalities, just as the law requires its contracts to be under seal. Such precautions are very necessary as a security not only to the corporation as a whole, but also to the individual members thereof. Without them the former might, by the incompetence or rashness of its agents or by the fraud or sharp dealing of third parties, become engaged in improvident or unwise speculations, in which, as the inevitable consequence, the latter would also be involved. Without them, too, there would be no certain test of the participation or acquiescence of the corporation in any given transaction. It is an intangible entity—it can acquire rights or incur liability only through the

medium of agents—what are the circumstances by which to determine whether persons, pretending to act on behalf of the corporation, are really and legally so acting, and are its agents in that behalf? These circumstances are the employment of such persons by the corporation, and the use by such persons of the formalities imposed.

Various kinds of formalities.

These formalities are usually arranged under the three heads of discretionary, directory, and imperative. Discretionary formalities are, as the term imports, such as the director or other agents may adopt or omit at their option. They are intended to serve merely as evidence, and their adoption or omission does not in the least affect the validity of the act to which they relate (*a*).

Nature of directory formalities.

Directory formalities are intended to protect the corporation against its governing members, but not against its creditors. They differ from discretionary in that the directors can be compelled by the corporation to make use of them in exercising their powers, and may perhaps be liable to the company for any damage occasioned by the omission (*b*). Such acts may be improper as between the corporation and its directors, and may constitute breaches of trust on the part of the latter, but as these formalities are not imperative their presence or absence

(*a*) See *Re Royal British Bank, Nicol's Case*, 3 D. G. & J. 387, 28 L. J. (Ch.) 257.

(*b*) See per Page-Wood, V.-C., L. R. 5 Eq. 323.

does not affect the legality of transactions entered into by persons unaware of the want of them.

In treating of directory formalities we must consider them under two distinct heads :—

First, in so far as they concern parties dealing with the corporation ;

Secondly, in so far as they affect the acts, other than contracts, of the corporation or its officials.

Let us take the former of these two heads, and first as to the parties who are not bound to see to the observance of the formalities.

Now it must be borne in mind that the exact point to be determined is the effect of contracts and other engagements undertaken on behalf of a corporation by the agents thereof in accordance with the powers actually given them by the instruments of incorporation, but deficient in some formality prescribed, though not made absolutely essential, by these instruments, or in excess of the powers as subsequently limited by the private resolutions of the corporation. We have nothing to do with acts Ultra Vires, using this term in its proper meaning of outside the powers of the corporation as a whole. What the corporation cannot do, *à fortiori* its agents cannot engage in so as to bind it, and any questions as to formalities will be irrelevant. We must consider first what are the powers, express or implied, of the directors in respect of the given transaction, such transaction being admitted to be within the scope of the company's business ; and

secondly, whether those powers have been duly exercised, and if not, whether the formality omitted is essential or not. If it be, then the transaction is simply void—nothing can cure it. But if not, then the authorities establish that

I. When any transactions of a corporation ought to be, but are not, accompanied with certain formalities, such formalities being directory only and not essential, the said transactions will be binding upon the corporation as regards persons dealing with it not having notice, express or implied, of the need of the formality in question.

Effect of non-observance of directory formalities.

The leading case at Common Law is *Royal British Bank* v. *Turquand* (*c*). By the deed of settlement of a joint-stock company the directors were authorised to borrow under the common seal of the company such sums as should from time to time, by a resolution passed at a general meeting of the company, be authorised to be borrowed, not to exceed a certain sum. At a general meeting the directors were authorised to borrow such sums and at such interest and for such periods as they might deem expedient, in accordance with the provisions of the deed of settlement and the Act of Parliament.

Royal British Bank *v.* Turquand.

(*c*) 6 E. & B. 327, 25 L. J. (Q. B.) 317.

The directors having borrowed £1000 on bond under the common seal of the company, it was held that the company must repay the amount, whether the resolution was or was not a sufficient authority to the directors to borrow, for though parties dealing with joint-stock companies are bound to take notice of any limitation of the authority of the directors in the deed of settlement, yet where the directors, as in this case, have power to borrow, the lenders of the money have a right to presume that the company, which put forward their directors as authorised to borrow, have taken every step requisite to empower them to do so. The decision was based upon the short ground that apart from any question as to the validity or sufficiency of the resolution, or even as to the existence of such a resolution, the company was liable to persons dealing *bonâ fide* with the directors, not knowing that the latter were exceeding their powers.

Prince of Wales Life Assurance Company v. *Harding* (*d*) is very similar. The deed of settlement of the plaintiff company provided that "the common seal shall not be affixed to any policy except by an order signed by three directors and countersigned by the manager." The seal was affixed to a policy without the order first obtained, but in other respects in accordance with the deed of settlement. It was held that this provision was

(*d*) E. B. & E. 183, 27 L. J. (Q. B.) 297.

directory merely, and that consequently such policy was not void, the assured having been *bonâ fide* ignorant of the informality.

Re Athenæum Life Assurance Company ex parte Eagle Company (*e*) is the leading decision in Chancery. This was a claim against the Athenæum Assurance Society on account of an *agreement* by the directors to grant a policy—not one actually granted. In the course of his judgment Page-Wood, V.-C., pointed out very clearly the principle upon which these decisions depend. "There is no doubt an important distinction to be drawn, and it is drawn in the case of the *Royal British Bank* v. *Turquand*, between that which on the face of it is manifestly imperfect when tested by the requirements of the deed of settlement of the company, and that which contains nothing to indicate that those requirements have not been complied with. Thus where the deed requires certain instruments to be made under the common seal of the company, every person contracting with the company can see at once whether that requisition is complied with, and he is bound to do so; but where, as in the case I have last referred to, the conditions required by the deed consist of certain internal arrangements of the company—for instance, resolutions of meetings and the like—if the party contracting with the directors

Re Athenæum Life Assurance Co. *ex parte* Eagle Co.

(*e*) 4 K. & J. 549; 27 L. J. (Ch.) 829; *Gordon* v. *Sea*, *Fire, &c., Company*, 1 H. & N. 599, 26 L. J. (Ex.) 202.

finds the acts to be within the scope of their power under the deed, he has a right to assume that all such conditions have been complied with. In the case last supposed, he is not bound to inquire whether the resolutions have been duly passed or the like, otherwise he would be bound to go further back, and to inquire whether the meetings have been duly summoned, and so ascertain a variety of other matters, into which, if it were necessary to make such inquiry, it would be impossible for the company to carry on the business for which it is formed." He accordingly allowed the claim, grounding his decision on the fact that though the deed of settlement required (section 28) every policy, &c., to be under the hands of not less than three of the directors, and sealed with the common seal of the society, yet "in every other contract" it was sufficient if there should be "a reference to these presents, and a proviso limiting, &c.," which had actually been inserted in the instrument upon which the claim was based. The Vice-Chancellor said: "In the case before me I find in the deed of this society the 28th section, distinguishing between certain *completed* instruments which it requires to be under the common seal of the society, and other contracts which, like the former, are to be satisfied out of the funds of the society, but as to which there is no such requisition with reference to the manner in which they are to be executed. I find in the 38th section a power given to the directors

wherever the deed is silent to do everything which is necessary for carrying on the business of the company; and I then find a contract, executed by three of the directors, which is a reasonable contract and within the precise scope and object of the society—viz., a contract to issue a policy in the very form which the society was constituted for the purpose of issuing. Under these circumstances it appears to me that the contract in question is one into which the directors were authorised to enter, and which upon bill filed the society would have been decreed to perform. I therefore hold that the debt is established—if not at law—as a good equitable debt."

Re County Life Assurance Co.

A very late case to a similar effect is *Re County Life Assurance Company* (*f*), the circumstances of which were as follows: In 1863 the County Life Assurance Company was registered. In the articles of association certain persons were named as first directors, with power to add to their number until the first general meeting. P. was named as first manager, or managing director. Policies were to be executed by three directors, and the whole control of the company was to be in the hands of the directors. The directors named in the articles being dissatisfied with the constitution of the company, refused to carry on business, and passed a resolution that nothing should be done in the

Contracts made by de facto directors are binding.

(*f*) L. R. 5 Ch. 288.

affairs of the company and no meetings held; but they did not proceed farther and wind-up the company. Shortly after P. and one of the subscribers of the memorandum other than the directors took steps to carry on business: they elected new directors, issued and allotted shares, made a seal, and granted policies. Held that a policy granted by the *de facto* directors, and executed by them in a manner according with the articles, and sealed with the above-mentioned seal, was binding upon the company. Giffard, L.J., on appeal, confirming the decision of the Master of the Rolls, said: "The [original and *de jure*] directors of this company might at any moment, had they chosen to do so, have restrained these transactions and put an end to the company. In this state of things the respondent in the ordinary course of business effected a policy. They knew nothing of the internal arrangements of the company, or that any irregularity had taken place. . . . The company is bound by all that takes place in the usual course of business with anybody who deals *bonâ fide* with those who may be termed *de facto* directors, and who—so far as the stranger could possibly tell—were *de jure* directors. . . . I do not hesitate to say that the business of companies of this description could not be carried on if this order be not supported as good law."

Acts done by *de facto* directors.

What formalities are considered directory.

What formalities will be considered directory as between the company and persons contracting with

it, can be determined only by the light of existing decisions. The one general rule is, that all formalities are such which relate merely to the internal arrangements and organisation of the corporation. The difficulty consists in the application of this rule to special circumstances. It seems that the following requisites are directory merely :—

First. The holding of meetings of, and the passing of resolutions by, the individual members, prior to the exercise by the directors of their powers (*g*).

Secondly. Unusual conditions as to requiring the direction, whether verbal or in writing, of particular directors or other officers, prior to affixing the corporate seal to any document (*h*).

(*g*) See cases at law, *Royal British Bank* v. *Turquand*, 25 L. J. (Q. B.) 317; *Agar* v. *Athenæum Life Insurance Company*, 3 C. B. (N. S.) 725, 27 L. J. (C. P.) 95; and compare *North-Eastern Railway Company* v. *M'Michael*, 5 Ex. 855, 20 L. J. (Ex.) 6, and *Lowe* v. *London and North-Western Railway Company*, 18 Q. B. 632, 21 L. J. (Q. B.) 361. See cases in Chancery, *Athenæum Life Insurance Company, ex parte Eagle Insurance Company*, 4 K. & J. 547, 27 L. J. (Ch.) 829; *Fountaine* v. *Carmarthen and Cardigan Railway Company*, L. R. 5 Eq. 316; *North Hallenbeagle Mining Company, Knight's Case*, L. R. 2 Ch. 321; the judgments of the Lords Justices in *Land Credit Company of Ireland ex parte Overend, Gurney, and Company*, L. R. 4 Ch. 460; and compare *Mair* v. *Himalaya Tea Company*, L. R. 1 Eq. 411.

(*h*) *Ex parte Overend, Gurney, and Company*, L. R. 4 Ch. 460; *Prince of Wales Insurance Company* v. *Harding*, E. B. & E. 183, 27 L. J. (Q. B.) 297. Compare *Hill* v. *Manchester Waterworks Company*, 5 B. & A. 866.

Thirdly. Special regulations as to the signature or counter-signature of particular officers (*i*).

Fourthly. Preliminaries—such as the issuing of formal notices, the publishing of advertisements, and the like—prior to meetings, and regulations relating to the manner of conducting such meetings (*j*).

Fifthly. Forms to be followed in making out lists of members, or in keeping the books of the corporation (*k*).

Sixthly. Formalities laid down for the appointment of directors and other officials; *i.e.*, *de facto* directors will be presumed legally appointed, and so on (*l*).

(*i*) *Aggs* v. *Nicholson*, 1 H. & N. 165, 25 L. J. (Ex.) 348; *Deffell* v. *White*, L. R. 2 C. P. 144. Compare *Prince of Wales Insurance Company* v. *Harding ubi supra*; *Allard* v. *Bourne*, 15 C. B. (N. S.) 468; *Bargate* v. *Shortridge*, 5 H. L. 297, 24 L. J. (Ch.) 457; *Re Norwich Yarn Company, ex parte Bignold*, 22 Beav. 143, 25 L. J. (Ch.) 601; *Re Straffon's Executors*, 1 D. G. M. & G. 576, 22 L. J. (Ch.) 194. But where a cheque did not, on the face of it, purport to be drawn on behalf of the Company, the Company were not liable even to a *bonâ fide* holder for value, *Serrell* v. *Derbyshire, &c., Railway Company*, 9 C. B. 811, 19 L. J. (C. P.) 371, on appeal 10 C. B. 910.

(*j*) *Re Worcester Corn Exchange Company*, 3 D. G. M. & G. 180, 15 Jur. 960; *Clarke* v. *Imperial Gas Company*, 4 B. & A. 315; *Fountaine* v. *Carmarthen and Cardigan Railway Company*, L. R. 5 Eq. 316.

(*k*) *Daniel* v. *Royal British Bank*, 1 H. & N. 681; *Dossett* v. *Harding*, 1 C. B. (N. S.) 524, 26 L. J. (C. P.) 107; *Bain* v. *Whitehaven Railway Company*, 3 H. Lds. 1.

(*l*) *Re County Insurance Company*, L. R. 5 Ch. 288;

Formalities expressly required may not be essential to validity.

It may be added as a general proposition, that where the constating instruments provide that certain transactions shall, as regards the corporation, be valid and binding only when done or concurred in under given circumstances or regulations—whether these take the shape of formalities or not—if such circumstances or regulations are matters which the corporation alone possesses the adequate means of securing the due and stipulated occurrence or observance of, then the other party will be excused from looking after the same; and, in the absence of notice to the contrary, he will be allowed to assume that the corporation has provided for them. Thus in *Webb* v. *Commissioners of Herne Bay* (*m*), debentures were issued by a body corporate to one of their commissioners, in payment of bricks supplied by him for the purposes of the Act. The statute constituting the body, however, enacted that no person being a commissioner should enter into any contract under the Act. It was nevertheless decided that the debentures were valid in the hands of a transferee for value, unacquainted with the circumstances under which they were originally issued.

Webb *v.* Commissioners of Herne Bay.

Limitation on extent of powers.

In the same way, if powers are given to the managing body, but with a limitation as to the extent to which they may employ them, *e.g.*, a power to borrow up to a certain amount, the corpo-

Hill v. *Manchester Waterworks Company*, 5 B. & A. 866. Compare 8 & 9 Vict. c. 16, s. 99.

(*m*) L. R. 5 Q. B. 642.

ration will be liable to persons dealing *bonâ fide* with the managers, although they exceed the limit so imposed (*n*).

SECTION II. — FORMALITIES TO THE OBSERVANCE OF WHICH CERTAIN PARTIES ARE BOUND TO SEE.

Hitherto we have been considering third parties who, being unable to see to or to secure the due observance of formalities imposed by a company upon its own officials, are excused the absence of such formalities, whenever they personally have acted with *bona fides*. It is different with directors and others in a similar position. They are affected with notice of the required formality, and of the want of it when absent; and, therefore, no acts in which they participate, and which ought to be transacted in a particular manner or under particular arrangements, will, as between themselves and the company, be binding upon the latter (*o*).

Formalities affecting directors and similar officials.

Re Agriculturist Cattle Insurance Company—Bush's Case (*p*), is a decision by the Lord-Chan-

Re Agriculturist Cattle Insurance Co. Bush's Case.

(*n*) *Royal British Bank* v. *Turquand*, 6 E. & B. 327, 25 L. J. (Q. B.) 317; and other similar cases, with which, however, it is not easy to reconcile *Pierce* v. *Jersey Waterworks Company*, L. R. 5 Ex. 209.

(*o*) *Newcastle Marine Insurance Company, ex parte Brown*, 19 Beav. 97, and *ex parte Henderson*, 19 Beav. 107; *Swansea Dock Company* v. *Levien*, 20 L. J. (Ex.) 447; *British Provident Assurance Company* v. *Norton*, 3 N. R. 147, 9 Jur. (N. S.) 1308.

(*p*) L. R. 6 Ch. 246. The judgments in the different

cellor Hatherley, to some extent perhaps conflicting. A company being in difficulties, and disputes having arisen, it was determined to admit new directors. Bush, one of the existing directors, agreed to transfer his shares to an incoming director, and in pursuance of such agreement a deed of transfer was executed by both, but the transferee did not execute a deed of covenant as required by the deed of settlement. The Master of the Rolls, on the winding up of the company, held Mr. Bush to be still liable upon the shares, and placed his name on the list of contributories. "It is true that there are many cases in which the undue neglect of forms by directors has not invalidated a *bonâ fide* transfer of shares; but so far as I have observed this has always been in cases between strangers, who had not the power to compel the directors to observe the proper forms, or in cases where they were ignorant of, and had no means of ascertaining, the informality which had been committed. But the case is very different when, as here, the transfer is by a director himself, whose object is to retire from the company, and who has the power to see that everything is done according to due regularity, and still more different when the transfer is made to another person acting as director of the company; and it is something more than form when the director, who makes the

cases arising out of the winding up of this company are simply irreconcilable. See *Spackman* v. *Evans*, L. R. 3 H. Lds. 171, and per Giffard, L. J., in *Dixon's Case*, L. R. 5 Ch. 79.

transfer, does not follow the form prescribed by the Act of Parliament in that very case, and when, by reason of the omission so to do, the transferee becomes in no respect bound by the deed of settlement, the execution of which was, by the rules of the society, prescribed as a preliminary condition to his becoming a member of the company." This judgment of Lord Romilly contains a very clear statement of the law on the point. From it, as an exposition of law, the Lord-Chancellor did not dissent, but he nevertheless discharged the order of the Master of the Rolls, upon the grounds partly of lapse of time, and of the acquiescence of the shareholders in the transaction, partly, that it was the duty solely of the remaining directors to see to the execution of the deed of covenant by the transferee. Upon this latter point his Lordship observed: "It is quite true that Mr. Bush was a director when he dealt with the shares, but when he parted with his shares he was no longer a director or shareholder, and he had no control over the matter beyond having the right to file a bill. The persons who were to see that within a month the deed was executed were the directors of the company, and the duty of seeing the deed executed was thrown upon them, and not upon Mr. Bush." But the questions to be settled were, first, whether a director proposing to retire from a company, is or is not bound to see to the performance of the proper formalities, and has or has not thrown upon him the duty of doing

Effect of acquiescence when formalities are wanting.

all that he can do to secure their due observance; and, secondly, whether failing this, he ceases to be a shareholder. The Lord-Chancellor, elsewhere in his judgment, admits the existence of the duty first-mentioned—here he distinctly denies it; and he also assumes the answer to the second question to be in the affirmative.

Formalities affecting private members.

These questions usually affect only the governing portion and the officials of a corporation, but certain of them equally concern the private members. Such, for instance, are all the general regulations prescribing the formalities or conditions of the transfer or abandonment of shares (*p*); and whether these regulations be expressly laid down in the constating instruments of the company, or have become established merely by custom and uniform usage (*q*).

Whatever be the nature of these formalities, whatever be the mode in which they have been created, and rendered in a manner essential to the validity of the transactions to which they relate, provided their existence can be clearly proved and brought

(*p*) See especially *Re British Provident, &c., Company, Grady's Case*, 32 L. J. (Ch.) 327; *Re Overend, Gurney, and Company, Walker's Case*, L. R. 2 Eq. 554; *Re Contract Corporation, Head's Case*, L. R. 3 Eq. 84; *Biederman* v. *Stone*, L. R. 2 C. P. 504; *Re Merchants' Company, Hermitage's Case*, L. R. 9 Eq. 5; *Re European Central Railway Company, Holden's Case*, L. R. 8 Eq. 444. Compare also *Spackman* v. *Evans*, L. R. 3 H. Lds. 171, and the cases there cited.

(*q*) *Re Imperial Merchant Credit Association, Marino's Case*, L. R. 2 Ch. 596.

home to the knowledge of the persons engaged in such transactions, *e.g.*, private members disposing of their interests—they must be duly observed, or their absence waived by the consent, express or tacit, of the whole corporation. These formalities are generally the execution of the deed of transfer by the transferee, and the registration of the transfer (*r*); and sometimes also the obtaining the consent of the directors or other officials to the transfer; and it is the duty of the transferor to see that everything is done *modo ac forma*. If he has taken all the precautions that an ordinary man of business would take to secure this, and there has been a non-observance of some requisite through the default, carelessness (*s*), or delay (*t*) of the corporation, or its responsible officers, he will be exempted from liability; though even in such case there may be countervailing laches on his part, such as to debar him from the relief to which otherwise he would be entitled (*u*).

Persons cognisant of the want of a formality.

Lastly. It must not be forgotten that a person cognisant of, and a party to, the want of a formality will, upon the ordinary principles of equity, be

(*r*) See cases cited in the last two notes.

(*s*) See cases already cited, and also *Re Joint-Stock Discount Company, Fyfe's Case*, L. R. 4 Ch. 768; and *Hill's Case*, L. R. 4 Ch. 769 *n*.

(*t*) *Re Hercules Insurance Company, Lowe's Case*, L. R. 9 Eq. 589.

(*u*) *Re Anglo-Danubian Steam Navigation, &c., Company, Walker's Case*, L. R. 6 Eq. 30. Compare *Yelland's Case*, 5 D. G. & Sm. 395.

estopped by his admission, and be prevented availing himself of such informality (*x*).

SECTION III.—FORMALITIES RELATING TO THE TRANSACTIONS, OTHER THAN CONTRACTS, OF CORPORATIONS.

Directory formalities relating to other matters.

We have next to consider directory formalities as affecting the validity of the other proceedings of corporations. Very many of the decisions relate to the transfer or acquisition of interests—shares, stock, or other rights—in the corporate property and privileges, and of these we have just been treating.

Others have turned upon the making of calls, the forfeiture of shares, and the like. The regulations perhaps require the calling of meetings either of the corporation, or of its officials, or the giving a certain length of notice before such acts can be done. Requisites of this description will probably, in every instance, be adjudged to be directory merely, not prejudicing innocent parties, but binding those acquainted with them, although, of course, waivable at the option of all parties. Thus, where a company's deed of settlement provided that twenty-one days notice should be given to the shareholders who were in arrears of calls, and that if payment were not made within such time the directory might

Notice of calls.

(*x*) *Cromford, &c., Railway Company* v. *Lacey*, 3 Y. & J. 80.

then declare the shares forfeited; and the directors sent a notice saying that certain shares would be forfeited, if payment were not made within twenty-one days, instead of actually waiting till the expiration of this time and then forfeiting the shares, such forfeiture—the shareholder having acquiesced, and nothing more having been done—was held good (*y*). This case, however, probably depends upon the fact that both parties concurred, and that the company were bound by their subsequent acquiescence—it would seem that the length of notice specified as a condition precedent to a forfeiture is an imperative requisite (*z*).

Mistake in registration of name or address.

Again, as persons who have become members of a company thereby become responsible for its liabilities, although not actually upon the list of members, it follows that mistakes in the registration of the name (*a*) or the address (*b*) of a member, can in no degree affect the question of his membership. Nor do informalities in making out the memorials or other lists of shareholders required by statute (*c*),

(*y*) *Re Home Counties, &c., Assurance Company, Wollaston's Case*, 4 De G. & J. 437, 28 L. J. (Ch.) 721.

(*z*) See *Cockerell* v. *Van Diemen's Land Company*, 26 L. J. (C. P.) 203.

(*a*) *Yelland's Case*, 5 D. G. & Sm. 395; *Clowes* v. *Brettell*, 11 M. & W. 461.

(*b*) *Wills* v. *Murray*, 4 Ex. 843, 19 L. J. (Ex.) 209.

(*c*) *Powis* v. *Harding*, 1 C. B. (N. S.) 533, 26 L. J. (C. P.) 107, and *Henderson* v. *Royal British Bank*, 26 L. J. (Q. B.) 112; *Daniell* v. *Royal British Bank*, 1 H. & N. 685.

or in numbering the shares, or entitling the register book (*d*).

Engagement and dismissal of servants.

The directors having a general authority to employ servants and other inferior agents, may exercise such authority, both in the engagement and dismissal (*e*), without regard to any special regulations that may have been laid down (*f*); but, of course, this qualification does not apply so as to dispense with the seal in such cases as this is necessary.

Imperative formalities.

The third class of formalities, imperative, are those which are absolutely essential to the validity of certain proceedings, and whose absence cannot be excused or waived by the consent of the parties concerned. Such formalities have usually been created by the common law of the land or by statutory enactment, and not by the corporation itself. The chief example coming under this head is the use of the seal in the corporate transactions, of the necessity for which and of the limitations to this necessity we have spoken (*ff*). Between directory and imperative formalities it is difficult, if not impossible, to discriminate. Probably, with the exception

Sealing.

(*d*) *Bain* v. *Whitehaven Railway Company*, 3 H. Lds. 1.

(*e*) See *Mair* v *Himalaya Tea Company*, L. R. 1 Eq. 411.

(*f*) See *Totterdell* v. *Fareham Brick Company*, L. R. 1 C. P. 674.

(*ff*) *Ante*, Chapter III., section 2.

Whether any formalities but sealing are imperative, *quære.*

of sealing, no formalities can be considered to be under all circumstances imperative as against third parties, excepting such as appear upon the constating instruments. Of these they have fair notice, and there can be no injustice or even hardship in compelling them to see to their observance.

Questions of this kind most often arise in respect of transactions between the corporation and its members or between the members themselves, and they generally relate to the creation, transfer, or cancelling of shares. No definite rule can be laid down as to what formalities will be obligatory and what not. In *Watson* v. *Eales* (*g*), a nine days' notice, where the rules of a cost book mining company required ten days, invalidated a forfeiture.

Observance of formalities cy près.

Sometimes circumstances arise rendering it impossible to comply with the necessary formalities. In such case they must be observed *cy près*. In *Exeter and Crediton Railway Company* v. *Buller* (*h*), a dispute arose between the directors and the shareholders of the railway company, a majority of the

Exeter and Crediton Rail. Co. v. Buller.

(*g*) 23 Beav. 294, 26 L. J. (Ch.) 361; *Cockerell* v. *Van Diemen's Land Company*, 1 C. B. (N. S.) 732, 26 L. J. (C. P.) 203. Compare *Wollaston's Case*, 4 D. G. & J. 437; *Knight's Case*, L. R. 2 Ch. 321. See also *Bigg's Case*, L. R. 1 Eq. 309.

(*h*) 5 Rail. Cas. 211; 16 L. J. (Ch.) 449.

former wishing to lease the line to the Bristol and Exeter Railway, a broad-gauge company—a minority of the former and a majority of the latter wishing to lease it to the Tamar Valley Railway, a narrow gauge company. The majority of the directors got possession of the common seal, whereupon the minority, with the concurrence of the shareholders, filed a bill in the name of the company to restrain them from leasing the line to the Bristol and Exeter Railway Company, or opening it on the broad-gauge system. The defendants demurred because the bill was not under seal, but both the Vice-Chancellor bank ca... Lord Chancellor overruled the de...or received the a...ound it had been sanctioned by ...consented, and signe... the shareholders, who co...sent," which was afte... they had not the seal, whi... directors, but was never ... from the original custody o...ed as a board. R. S... ...sly for the purpose of preventi... times, with suc... ...om doing what they intended to d... directors, und...

In *Foss* v. *Harbottle* (... that effect... filed by some of the shareholders in a co... pass... ...y alleged that there had ceased to be a sufficient number of qualified directors to constitute a board, that the company had no office or secretary, and that consequently general meetings could not duly be summoned or held, and it therefore prayed *inter alia* for the appointment of a receiver. The Vice-Chancellor, however, held, that assuming the statements to be

Foss *v* Harbottle.

(*i*) 2 Hare, 461.

correct as to the impossibility of convening meetings in the way laid down in the Companies Act, it would be sufficient if some of the shareholders, having convened the others, met together and purported to act on behalf of the whole body.

Effect of neglecting imperative formalities.

Although the neglect of imperative formalities will, as a rule, invalidate the whole arrangement, yet if anything be done under the arrangement so purporting to be entered into, whether by the company or the party contracting with it, equities may and often will arise enforceable in Chancery on behalf as to what for suffering loss as against the party not. In *Watson* (*j*).

May imperative formalities become inoperative by desuetude?

It e, where the rules out some at least of even impe required ten days, invale so universally disregar s to cease to be operative. e (*k*) shares had been transferred *observance of form* of the directors of a company, bu d to certain formalities as to obtaining s circumstance t. The company's deed provided that "no a with t ent or transfer, without the approbation of the directors, *to be manifested as hereinafter mentioned*, shall have any force either at law or in equity." It was, however, shown that this latter provision had been systematically neglected, and the Vice-Chancellor accordingly settled the transferee on the list of contributories.

(*j*) See *post*, Part IV. Chap. III., on "The liability of Corporations in respect of transactions absolutely Ultra Vires."

(*k*) *Re Vale of Neath, &c., Company, Walter's Case*, 3 D G. & Sm. 149.

In *Walton's Case* (*l*) the seven days' notice required by the charter and deed of settlement of a bank previous to any proposed transfer of shares was held to have been dispensed with by universal practice.

To the same effect is the case of *Bargate* v. *Shortridge* (*m*). The deed of settlement of a banking company allowed shareholders to dispose of their shares upon obtaining "the consent of the board of directors," which was to be testified by "a certificate in writing signed by three of the directors." During the whole time that the bank carried on business a managing director received the applications for sales of shares, consented, and signed the certificate of "consent," which was afterwards signed by two other directors, but was never signed by the three assembled as a board. R. S., a shareholder, had at various times, with such consents sold his shares. The directors, under 7 Geo. IV. c. 46, made a return to that effect. The company failed, and the directors passed a resolution that there had been no valid transfer of the shares of R. S. It was held, however, that as between him and the company the consents given by the directors, although informal and irregular, were valid, and that they could not afterwards treat R. S. as a member of the company.

Bargate v. Shortridge.

(*l*) *Re Royal British Bank*, *Walton's Case*, 26 L. J. (Ch.) 545, and see the cases there cited.

(*m*) 5 H. Lds. 297; 24 L. J. (Ch.) 457.

It may very fairly be questioned whether the formalities referred to in the above cases are really imperative. Imperative formalities, if not of such a kind as by their absence to void absolutely and irremediably the transactions with respect to which they are enjoined, must mean at least this—that they cannot be waived by any agreement or acquiescence of the parties immediately concerned so as to affect the rights of third parties; that third parties unaware of the arrangement are entitled to say that the contract entered into, the forfeiture made, or the transfer permitted, without the observance of such formalities, is as regards the existing rights of such third parties simply void, and that consequently the parties liable before such transaction remain liable afterwards. In each of the three decisions just cited the dispute was between the corporation and the individual, between parties, that is, in *pari delicto*, the former attempting to take advantage of informalities in which it had been concerned and had long acquiesced. Had it been a question between creditors of the corporation and its members, then the decision must have been that the absent formality was directory only and therefore the transaction was valid, or that it being imperative the transaction was invalid—there could have been no middle course. It should also be noticed that the formalities in the three cases quoted were created by the corporation itself—had they been imposed by the supreme Legislature directly

it may be doubted whether their absence could have been excused, as such a determination would be equivalent to *pro tanto* repealing an Act of Parliament.

SECTION IV.—FORMALITIES RELATING TO THE MEETINGS OF THE MANAGING BODY.

One other class of formalities remains to be considered—viz., those relating to the meetings of the various members of a corporation. A corporation undoubtedly in the eye of the law is a legal entity, existing apart and distinct from those who compose it. Nevertheless, for most practical purposes, it must be deemed identical with its members, and it is only through and by means of them that it acts and otherwise manifests its wishes and intentions. This it does through the medium of meetings of them. Such meetings must be duly summoned by the officials, if any, appointed for such purpose, and with regard to all ceremonies. What these ceremonies are cannot be precisely stated, as they depend upon the custom, the Acts of Parliament, the charter, &c., applicable to each particular case.

Notice of meetings

No meeting, whether of the governing body or of the ordinary members of any corporation, will be legal unless all those who have a right to attend—and in the case of meetings of ordinary members this includes the whole of such members—have in

must be given to every person entitled to be present.

some way received a summons or notice (*n*). Very generally such notice has to be sent to or served upon each individual member. Whatever be the regulations in this respect they must be strictly followed. Thus, if an advertisement is to be issued, circulars will not suffice (*o*).

Though no meeting, whether of the governing body or the ordinary members of any corporation, will be perfectly legal unless all those who have a right to attend have in some way received a summons or notice, yet undoubtedly an informal meeting may, under peculiar circumstances, have a power more or less extensive, of binding the corporation in respect of third parties, and especially when it would amount to a fraud upon the latter, these having acted *bonâ fide*, not to hold the corporation liable. This proposition, however, must be advanced with much circumspection, and as it almost invariably involves other questions of informality, it has been considered in the previous sections of this chapter.

Acts done by directors but not at a board meeting.

The question whether directors can act otherwise than at a *board* meeting, which was first raised in *Glover* v. *North-Western Railway Company* (*p*), was apparently decided in the negative in *D'Arcy*

(*n*) *Smyth* v. *Darley*, 2 H. Lds. 789.

(*o*) *Re British Sugar Refining Company, ex parte Faris*, 3 K. & J. 408, 26 L. J. (Ch.) 369. Compare *Kidderminster* (*Town Council*) v. *Court*, 1 E. & E. 770, 28 L. J. (M. C.) 148.

(*p*) 5 Ex. 66; 19 L. J. (Ex.) 172, per Parke, B., *ibid.* 173.

v. *Tamar, &c., Railway Company* (*q*), where the prescribed quorum of a meeting of directors being three, the defendants were held not liable on a bond to which the secretary had affixed the seal of the company, after having obtained the written authority of two directors at a private interview, and at another private interview the verbal promise of a third, to sign the authority. But this decision has since received a somewhat strained interpretation, by which its importance is very considerably qualified: "There the action was an action of debt upon a bond under the seal of the company; the plea was *non est factum*, and under that plea it was of course competent to the company to prove the truth of the plea. They did prove it conclusively. There could be no valid bond in that case unless the seal of the company was affixed to it, and the seal appeared to be so affixed. The seal could not be lawfully affixed but by the direction of the three directors, and it was proved beyond question that the seal had been affixed when only two directors, and not three, had given any kind of authority for it. The authority of the third was obtained at a later period, and upon the plainest principles of Common Law pleading there could be only one way of dealing with the case. It is true that the judges in *D'Arcy* v. *Tamar Railway Company* did, though not necessarily for the purpose of decision, D'Arcy v. Tamar, &c., Rail. Co.

(*q*) L. R. 2 Ex. 158, 36 L. J. (Ex.) 37; 4 H. & C. 463.

say that what the law required was that there should be the combined action of at least three directors before the seal could be affixed to a bond."

Re Bonelli's Telegraph Co., Collie's claim.

This is the comment of Bacon, V.-C., in *Re Bonelli's Telegraph Company, Collie's Claim* (*r*), where the circumstances were very similar to those in *D'Arcy's Case.* The articles of association of the company provided that three directors should be a quorum, and endued them with wide powers of sale, appointment of agents, &c. The company resolved to sell their undertaking to the Postmaster-General, and in July, 1869, a letter was written, addressed to Collie, appointing him to act as agent for the directors in the matter of the sale, and agreeing that if he succeeded in obtaining from the Postmaster-General the sum of £20,000 or upwards his commission should be 25 per cent. The letter concluded by saying: "We engage to sign a legal obligation to the above effect when called upon, and to get the signatures of our brother directors." This letter was written in C.'s office, and there signed by two of the directors and handed to C., who forwarded it to a third director in the country, by whom it was returned to C. confirmed and signed by himself and a fourth director. This agreement, though not appearing to have been resolved upon or confirmed at any meeting of directors, was referred to at a subsequent meeting of shareholders and not repu-

(*r*) L. R. 12 Eq. 246, 250.

diated, but no such legal obligation as referred to in the letter was executed. The sale having been effected through C.'s agency for a sum of more than £20,000, Bacon, V.-C., determined that the agreement was not Ultra Vires, and that though informal according to the internal regulations of the company, it was binding against the company in favour of a person dealing with them, and consequently that C. was entitled to commission at the rate of 25 per cent.

If these two decisions are to be considered valid and reconcileable it must be upon the distinction taken by Sir John Stuart—viz., that *D'Arcy* v. *Tamar Railway Company* was a Common Law case decided upon Common Law pleadings, the only question being whether the seal was properly affixed. But even admitting this distinction, could Collie have successfully sued at law upon the agreement entered into in manner aforesaid? When a quorum of directors is made necessary for the transaction of a company business, what difference is there between the making of a special and a simple contract. And if none—if Collie's agreement, looked at as a simple contract, was void at law—what claim could he have in Chancery save upon a *quantum meruit?*

From *D'Arcy* v. *Tamar Railway Company* (*s*)

(*s*) *Ubi supra.* Compare *Wills* v. *Murray*, 4 Ex. 843, 19 L. J. (Ex.) 209.

we may also gather that when the constating instrument is silent as to the *place* of meeting, the law is so too. Martin, B., in his judgment, said: "Now it is not necessary that there should be any fixed place of meeting, but it is quite clear that the directors are to act together and in a meeting, whereas the authority on which the secretary acted was given by two only, acting together, and by the subsequent assent of a third. The authority, therefore, was not of such a character as enabled the secretary to affix the seal so as to bind the company."

Place of meeting.

Resolutions of majority.

At any meeting it is almost unnecessary to say that the majority will bind the minority unless the concurrence of all has been for special reasons rendered necessary.

Quorum—what number sufficient.

As to the *number* which will constitue a quorum —first, if the constating instruments fix some definite number, then at least this number must be present. In *Kirk* v. *Bell* (*t*) the deed of a banking company provided that the directors should not be fewer than five, three to be a quorum, with power to transact *ordinary* business. The number having fallen to four, these executed a deed compromising a large debt due to the firm. It was held that this not being ordinary business, and consequently requiring the concurrence of five directors, was not binding on the bank.

(*t*) 16 Q. B. 290; *Ducarry* v. *Gill*, 4 C. & P. 121; *Brown* v. *Andrew*, 13 Jur. 938; 18 L. J. (Q. B.) 153.

Card v. *Carr* (*u*) is to the same purport. Here *five* trustees of a building society had been constituted a quorum, and the plaintiff, a member, after being in arrear of payment on seven consecutive occasions, had paid arrears to *two* trustees, who received the payment in ignorance of the rules, but it was held that such receipt had not bound the society, but that the society could, on returning the payments forfeit the shares of the said member.

Nor can the managing body transfer their authority to less than a quorum of the same (*v*), unless express authority in that behalf is vested in them (*w*).

Secondly. The clauses appointing the quorum may, however, be directory only (*x*), or controlled by subsequent clauses (*y*).

Thirdly. When the constating instruments are silent, then "it is the duty of the Court to find out what was the usual number of directors who conducted the business of the company" (*z*).

(*u*) 1 C. B. (N. S.) 197; 26 L. J. (C. P.) 113. But compare *ex parte Bignold*, 22 Beav. 143, and *Allard* v. *Bourne*, 15 C. B. (N. S.) 468.

(*v*) *Re Leeds Banking Company, Howard's Case*, L. R. 1 Ch. 561, 36 L. J. (Ch.) 42.

(*w*) *Totterdell* v. *Fareham Brick Company*, L. R. 1 C. P. 674.

(*x*) *Thames Haven Dock and Railway Company* v. *Rose*, 4 M. & G. 552, 12 L. J. (C. P.) 90.

(*y*) *Smith* v. *Goldsworthy*, 4 Q. B. 430, 12 L. J. (Q. B.) 192.

(*z*) *Lyster's Case, Re Tavistock Ironworks Company*, L. R. 4 Eq. 233, 237, 36 L. J. (Ch.) 616.

Committees.

As the managing body are in effect but a committee of the whole body of members, so they may also for the sake of convenience constitute, whether for general or special purposes, committees of themselves, and transfer to such committees, but not to a stranger (*a*), the requisite powers and authority to act on behalf of the whole body. Such transfer must not amount to a delegation or abandonment, but the whole body must still retain, and under certain circumstances, *e.g.*, the dismissal of an officer, actually exercise a general control over the doings of such committee (*b*).

Mode of conducting the proceedings of the meeting.

At all meetings the proceedings must be carried on with due regard to order and regularity. If by custom or express provision, any special business takes precedence of other kinds, it must be first attended to (*c*).

If it has to be done seriatim, as for instance in electing members, a collective vote upon the whole matter will not suffice (*d*).

Minutes.

Sometimes minutes or other records of the proceedings have to be kept and signed by the chairman or other official, or such minutes or records so kept and signed, are admissible in evidence without further proof (*e*).

(*a*) *Rex* v. *Bird*, 13 East, 367; *Rex* v. *Westwood*, 4 Bligh (N. S.), 213; *Rex* v. *Attwood*, 4 B. & A. 481.

(*b*) *Osgood* v. *Nelson*, L. R. 5 H. Lds. 636.

(*c*) *Rex* v. *Parkyns*, 3 B. & Ald. 668.

(*d*) *Rex* v. *Player*, 2 B. & Ald. 707.

(*e*) See *Hughes* v. *Great Northern Railway Company*,

Ordinary and extraordinary meetings.

At most ordinary, and at all extraordinary, meetings, only certain kinds of business can be transacted, and usually, when notification has to be given beforehand of such meetings, the notice must contain a statement more or less definite of the purposes for which the meeting is called, and of the business to be deliberated upon thereat (*f*).

If certain powers are vested in a select body, a meeting of this body may be summoned by the proper authority without specifying the objects of the same, since it can be summoned only for certain limited purposes (*g*).

The whole meeting will not be rendered irregular simply because of the transaction of business foreign to that set forth in the notice paper (*h*), or foreign to that which the meeting can validly transact (*i*).

16 Jur. (H. Lds.) 495; *Sheffield, &c., Railway Company* v. *Woodcock*, 7 M. & W. 574; *Miles* v. *Bough*, 3 Q. B. 845; 12 L. J. (Q. B.) 74; *West London Railway Company* v. *Bernard*, 3 Q. B. 873; 13 L. J. Q. B. 68; *Llanharry Kematite Iron Company, Tothill's Case*, L. R. 1 Ch. 85.

(*f*) See *ante*, pp. 301—3, and generally compare with this section, Part III., Chapter III., Section 1.

(*g*) *Rex* v. *Pulsford*, 8 B. & C. 350.

(*h*) *Re British Sugar Refining Company, ex parte Faris*, 3 K. & J. 408, 26 L. J. (Ch.) 369.

(*i*) *Wills* v. *Murray*, 4 Ex. 843, 19 L. J. (Ex.) 209.

CHAPTER VI.

RATIFICATION BY CORPORATIONS.

THE principles of ratification which concern private individuals will in the main be found applicable to corporations, due regard being had to the limited capacities of the latter. It must also be remembered that the tendency of modern judicial interpretation and legislation has been to waive needless formalities, and that consequently at the present many agreements are held binding on corporate bodies, even without ratification, which a few years since would, from techincal reasons, not have been so.

Express Ratification by a Corporation itself.

Express ratification.

Ratification may be either express or implied. *Sewell's Case, Re New Zealand Banking Corporation* (*a*) furnishes an example of the former. The directors of a company whose capital was £300,000, divided into 3000 shares of £100 each,

(*a*) L. R. 3 Ch. 131.

made an unauthorized issue of 1000 additional shares beyond their capital. They afterwards called general meetings at which special resolutions were passed extending, as the company had the power by their articles of association in that way to extend, their capital to £600,000. It was held that the issue of the 1000 shares, though originally Ultra Vires of the directors and invalid, was confirmed by these resolutions.

Implied Ratification by a Corporation itself.

Implied ratification.

Ratification is, however, much oftener inferred from the proceedings and conduct of the parties, whether private individuals or corporations, than plainly and positively declared. It is not easy, perhaps correctly speaking it is not possible, for a corporation, which is invisible and unable by itself to perform any act, to ratify immediately (*b*); it can do so only indirectly, by the acquiescence of either its members as a whole or its agents to whom it has entrusted a general authority. That it can thus bind itself is now completely established, as is shown by the decision in *Phosphate of Lime Company*,

Phosphate of Lime Co. *v.* Green.

(*b*) See *Williams* v. *St. George's Harbour Company*, 2 De G. & J. 547; and compare *Edwards* v. *Kilkenny, &c., Railway Company*, 26 L. J. (C. P.) 224; in both which the company was held to have ratified a contract, by allowing judgment to go by default.

Limited, v. *Green and another* (*c*). By the articles of association of the company the directors were prohibited from purchasing their own shares. They lent the defendants £6500 to enable them to take up 400 shares which the latter had bought in the open market; and some time after, the defendants being unable to repay this loan, they compromised the matter by accepting the 400 shares £10 paid up, in lieu of the loan, which they thereupon cancelled. At a subsequent meeting of the shareholders, an account was handed round to every one present wherein the sum of £4000 was set down as the price of "shares cancelled," and the account of the defendants in the company's ledger was credited with £4000 "as per shares' forfeited account." This was acquiesced in for five years, when, on the liquidation of the company, the liquidator brought an action to obtain payment of the 400 shares. It was decided that, assuming that the compromise with the defendants by the acceptance and cancellation of the 400 shares was Ultra Vires of the directors, the subsequent conduct of the shareholders, in assenting to the transfer of the old to the new company with knowledge, or the opportunity and means of knowing, if they thought proper to inquire, that such transfer was in part founded upon such cancellation, was a ratification and acquiescence in what the directors had done; and that it sus-

(*c*) L. R. 7 C. P. 43; *Athenæum Life Assurance Society* v. *Pooley*, 3 D. G. & J. 294; 28 L. J. (Ch.) 119.

tained a plea of accord and satisfaction to an action brought in 1870 against the defendants, in the name of the old company, for the recovery of the £6500 advance.

The different judgments rendered in this case examined rather carefully the circumstances under which a corporation can be deemed to have impliedly ratified an informal transaction, and one which otherwise would not be binding upon it. From them we may gather that in the case of joint-stock companies and other similar corporations, it is not necessary or possible, in order to establish assent and acquiescence on the part of the corporation, to prove the acquiescence of each individual shareholder; but that it is enough to show circumstances which are reasonably calculated to satisfy the Court or a jury that the thing to be ratified came to the knowledge of all who chose to inquire, all having full opportunity and means of inquiry (*d*).

What will constitute ratification or acquiescence by a corporation.

Very generally questions of ratification, when the point to be determined is the immediate and direct acquiescence of the corporation itself, relate to shares, their acceptance, forfeiture, transfer, and the like. In these matters it is quite clear that directory and other trivial formalities may be neglected, and that if a company agree to an informal transfer or other dealing with shares, both parties will be bound thereby, and neither of them nor any third

Ratification in connection with shares.

(*d*) Compare Lord Chelmsford, in *Spackman* v. *Evans*, L. R. 3 H. Lds. 171, 233.

person can afterwards take advantage of the informality, assuming it not to be essential to the dealing under consideration, so as to open and set aside the transaction. But if the omitted formality be essential, so that for want of it the arrangement is a nullity, no subsequent proceedings of the whole body of members can supply the defect. As they could not have dispensed with it by express agreement at the time the arrangement was entered into, so neither can they do so in an indirect manner by *ex post facto* acquiescence. In such cases the mere passage of time is of no avail—"lapse of time clearly would not make valid that which at the beginning was invalid" (*e*).

Ratification indirectly and mediately.

Reuter *v.* Electric Telegraph Co.

Reuter v. *Electric Telegraph Company* (*f*) is a well-known case upon ratification. By the deed of settlement of the company, which had been incorporated by royal charter, it was provided that the directors should manage the business, but all contracts above a certain value were to be signed by at least three directors, or sealed with the seal of the company under the authority of a special meeting. Plaintiff sued the company on an agreement above the prescribed value. It was made by parol by the chair-

(*e*) Per Lord Cairns, L. R. 3 H. Lds. 275.

(*f*) 6 E. & B. 341; 26 L. J. (Q. B.) 46; *Smith* v. *Hull Glass Company*, 11 C. B. 897.

man, who himself entered a memorandum of it in the minute book of the company; and it was recognised in correspondence with the secretary. Plaintiff did work under it, and received payment by cheques for it, which payments were audited in the company's accounts. It was within the scope of the company's business; but it was not signed by three directors or sealed at a special meeting. It was held that the contract had been ratified by the directors, and *per consequentiam* by the company; since the deed of settlement declared that "the directors shall conduct and manage the affairs of the company, and shall exercise all the powers which may be exercised by the company at large." Ratification by directors.

In this case the ratification was by the directors. This is the commoner method, and it is but seldom that it is by the corporation directly in general meeting. With regard to the extent to which directors can ratify, in *Wilson* v. *West Hartlepool Harbour, &c., Company* (*g*), it was laid down by Turner, L. J., that whatever directors can do personally in reference to a company, they can ratify when done by others. "It is not disputed that the directors had power on behalf of the company to sell the land in question; and having this power, it must, as it seems to me, have been competent to them to ratify a contract made by the manager of the company for the sale of it." What acts can be ratified by directors.

(*g*) 2 D. G. J. & S. 475; 34 L. J. (Ch.) 241.

Browning v. Great Central Mining Co.

Browning v. *Great Central Mining Company* (*h*), was a case arising thus: The plaintiff was employed by R., one of the promoters of a company, to make surveys, reports, &c., as to a mine which he proposed to assign to the company. Afterwards, by resolution of the promoters, before registration, it was agreed that the plaintiff should be "captain" of the mine, at a salary "to commence at the completion of the company's contract with R." This contract was afterwards entered into between R. on one side and N. and F. on the other, on behalf of the company. The memorandum and articles of association were next prepared, authorising the directors to complete the contract with R., and to "elect and dismiss" the secretary, manager, and other servants; and then the company was duly registered. The contract was, however, *not* carried out. After registration, prospectuses were published by the company, in which the plaintiff was described as "manager," and reports from him in that capacity were printed. There was no other evidence of any actual "election" of the plaintiff as manager, and two of the directors were called to prove that there had never been any. The Court decided that there was evidence to go to the jury that the plaintiff had been employed by the company; and the jury having found for him, the verdict was not set aside.

(*h*) 5 H. & N. 856; 29 L. J. (Ex.) 399. Compare *Totterdell* v. *Fareham Blue Brick, &c., Company*, L. R. 1 C. P. 674.

Ratification by directors—requisites of.

It need hardly be said that ratification founded upon acquiescence by the directors must be acquiescence in *bona fides*, and with the genuine intention to benefit the company. The directors are trustees for all the members. As they may make no contract, &c., either with a view to their own exclusive advantage, or collusively to benefit others at the expense of the company; so neither may they ratify for similar purposes, nor conceal from general meetings of the corporation such facts as would probably cause such meetings to refuse their assent to engagements otherwise not binding on them (*i*).

The Effect of Ratification.

When the corporation is existing.

Engagements of every description entered into on behalf of an *existing* corporation, which are not in themselves illegal, but which do not at present bind the corporation, may be duly ratified by it whatever be the defect, whether it be the absence of some formality, or the want of authority on the part of those who have purported to act for the corporation or the like—always provided that the defect be not essential to the validity of the engagement—and such ratification will have its usual effect of generally discharging the agent from liability, *e.g.*, when he has signed a contract on behalf of a named principal.

(*i*) *Athenæum Life Insurance Society* v. *Pooley*, 3 D. G. & J. 294; 28 L. J. (Ch.) 119.

Non-existing corporation.

What will be the effect of ratification when the engagement was formed on account of a *non-existing* corporation is not altogether certain; but it has been laid down that it will not relieve those already responsible. *Scott* v. *Lord Ebury et al* (*j*), was a suit by the public officer of the Union Bank of London against the promoters, of whom Lord Ebury was one, of the R. A. & C. Railway Company, upon a cheque signed by two of them—the cheque being headed "R. A. & C. Railway Company," and expressed to be for "Parliamentary expenses: House fees," and explained by a collateral agreement that it was "to be repaid out of the calls on shares." An Act authorising the railway passed, the promoters being named therein as the first directors; and at a meeting subsequently held the directors passed a resolution that the acts of the secretary—one of them being the obtaining the above loan—should be adopted and confirmed. No shares were allotted or calls made, and the undertaking was not proceeded with. It was decided that the advance was made upon the personal responsibility of those who signed the cheque, and that the subsequent adoption of their acts by the directors did not alter their position.

Scott *v.* Lord Ebury.

The only point to be determined in this case was

(*j*) L. R. 2 C. P. 255. Compare as to the liability of persons holding themselves out as directors, *Doubleday* v. *Muskett*, 7 Bing. 110; *Burbridge* v. *Morris*, 3 H. & C. 664, 34 L. J. (Ex.) 131; *Beattie* v. *Lord Ebury*, L. R. 3 Ch. 777.

whether the money sought to be recovered, was advanced by the plaintiff to be repaid by the company after its incorporation, or by the directors personally. If the defendants were originally liable they could not have subsequently been relieved from responsibility. This had been decided a few weeks previously in the case of *Kelner* v. *Baxter* (*k*). Here an agreement for the purchase of the plaintiff's premises, &c., was come to between the plaintiff and the projectors of an hotel company, in the following form :— Kelner v. Baxter.

"*January 27th*, 1866.

"To JOHN DACIER BAXTER, &c., on behalf of the proposed Gravesend Royal Alexandra Hotel Company, Limited.

"Gentlemen,—I hereby propose to sell the extra stock now at the Assembly Rooms, Gravesend, as per schedule hereto, for the sum of £900, payable on the 25th February, 1866.

"JOHN KELNER."

At the end was written—

"To MR. JOHN KELNER,

"Sir,—We have received your offer to sell the extra stock, as above, and hereby agree to and accept the terms proposed.

"J. D. BAXTER,

"&c., &c.,

"On behalf of the Gravesend Royal
"Alexandra Hotel Company, Limited."

(*k*) L. R. 2 C. P. 174.

In pursuance of this agreement, the goods in question were handed over to the projected company and consumed by them. On 1st February, a meeting of the directors took place, who passed a resolution that the above arrangement should "be and the same is hereby ratified." On 20th February the company was registered, but it collapsed. Thereupon Kelner sued the persons who had signed the above agreement, and the Court held them liable upon the ground that as the company was not in existence when they made the contract, they alone were then liable upon it, and that it was not competent upon the company after its incorporation to ratify the contract, so as either to relieve them of liability, or to impose upon itself any liability in respect thereof.

CHAPTER VII.

THE LIABILITY OF CORPORATIONS FOR THE ENGAGEMENTS ENTERED INTO UPON THEIR BEHALF BY THEIR PROMOTERS.

It is in connection with the formation of companies that the doctrine of Ultra Vires arose, and that many most conflicting decisions have been given. The corporation is distinct from its members, and *à fortiori* from the promoters who originated it, and who may not even be amongst its members. Can these, the promoters, bind the future corporation? In other words, can one person, assuming to act on behalf of another yet unborn, so far be the "agent" of this latter as to bind him by, and to enable him to take advantage of, engagements purporting to have been made for his account?

SECTION I.—WHEN THE ENGAGEMENTS ARE ULTRA VIRES.

The liability of a corporation when fully established for the acts of its promoters will of course have to be determined primarily by an appeal to

the general principles of Ultra Vires of the promoters purporting to represent the future corporation. If these acts or agreements are Ultra Vires of the corporation as constituted, it evidently will not be liable for, nor, *e contrario*, be able to take advantage of them, not even though the directors have attempted after the creation of the corporation to ratify such prior proceedings.

Earl of Shrewsbury *v.* North Staffordshire Railway Company.

In *Earl of Shrewsbury* v. *North Staffordshire Railway Company* (*a*), the promoters of the defendant company had covenanted with a landowner, a peer of Parliament, to pay him £20,000 before taking possession of any of his land, as an inducement for him to withdraw his opposition to the bill, and for his own personal and absolute benefit, independent of the ordinary payment for land and other compensation. After the passing of the Act the directors of the company, now formed, ratified under seal this agreement; but upon a bill being filed to obtain from the company payment of the £20,000, Kindersley, V.-C., held both the original agreement and the subsequent ratification to be Ultra Vires, and therefore dismissed the bill with costs.

(*a*) L. R. 1 Eq. 593; *Caledonian, &c., Railway Company* v. *Helensburgh*, 2 Macq. 391. Compare *Leominster Canal Navigation* v. *Shrewsbury, &c., Railway Company*, 3 K. & J. 654; 26 L. J. (Ch.) 764.

SECTION II.—WHEN THE ENGAGEMENTS OF THE PROMOTERS ARE NOT ULTRA VIRES OF THE CORPORATION AS CONSTITUTED.

The attempt is seldom, perhaps never, intentionally made by persons assuming to act on behalf of a proposed corporation, to bind it to enter into transactions which are beyond the powers given it. It is manifestly a mere simple and necessary precaution to endow it with all the authorities that may be needed for the due discharge of its contemplated business, and the other contingencies. Provision for this may be made in one of two ways, either by giving it all the powers and capacities that can possibly be required for the accomplishment of the purposes in view, or by not only doing this, but also by inserting in the constating instruments clauses investing it at the moment of its creation with particular duties and liabilities.

First. When the engagements of the promoters have been embodied in the constating instruments of the corporation.

It is these instruments which primarily determine, due regard being had to the rules of Common Law and Equity, the capacity and the responsibilities of the corporation. Consequently, speaking generally, whatever powers and rights they give to the corporation it can enforce, and whatever obligations

they throw upon it can be enforced against it. No cases need be quoted—they are of everyday occurrence—to illustrate the capacity of a corporation to enforce its rights and powers; but it is much less seldom that actions are successfully brought upon the express provisions of its constating instruments, to enforce claims arising from proceedings carried on before its creation. The following are instances:—

Tilson *v.* Warwick Gas Co.

In *Tilson et al* v. *Warwick Gas Company* (*b*) the first count stated that the plaintiffs had been employed by the defendants to obtain the Act of Parliament which incorporated them; that they did obtain it, and their costs amounted to a certain sum; and that by the Act it was provided that the costs of obtaining it should be paid out of the first money subscribed. It was held that the plaintiffs might maintain an action of debt founded on the statute.

Pilbrow *v.* Pilbrow's Atmospheric, &c., Co.

Pilbrow v. *Pilbrow's Atmospheric, &c., Company* (*c*), was a strong case. The declaration was upon the deed of settlement. The first count stated that by a deed made between the plaintiff and defendants, who were described as a "company registered and incorporated after a deed of settlement

(*b*) 4 B. & C. 962; *Carden* v. *General Cemetery Company*, 5 Bing. N. C. 253; *Clowes* v. *Brettell*, 10 M. & W. 506. Compare *Midland, &c., Railway Company* v. *Gordon*, 16 M. & W. 804; 16 L. J. (Ex.) 166; and *Nixon* v. *Brownlow*, 3 H. & N. 686; 26 L. J. (Ex.) 273.

(*c*) 5 C. B. 440; 17 L. J. (C. P.) 166; 5 Ry. Ca. 89.

had been executed under 7 & 8 Vict. c. 110," the defendants agreed on the purchase of a patent to pay the plaintiff £15,000 "out of the money raised by the first instalments or calls on the shares of the company," which they had not done. The second count set out the articles of agreement, stating that the plaintiff had sold his patent to the company, and containing a covenant that the company should pay him £15,000 in cash, &c., which they had not done. It was contended by the defendants that the money was not to be paid at all events, but only out of the first instalments, and that as none had been obtained they were not liable. But the Court considered this was not the correct construction of the contract; and they, therefore, decided that the second count was good on general demurrer, although the plaintiffs in their third plea to the first count, had alleged that the deed of settlement was obtained by the fraud of plaintiffs.

Madrid Bank v. Pelly.

In the *Madrid Bank* v. *Pelly* (*d*) the articles of association of a banking company with a nominal caiptal of £1,200,000 in 60,000 shares, of which the prospectus stated that the first issue would be 30,000, empowered the directors to commence business as soon as they should think fit, notwithstanding the whole capital might not have been subscribed for, and provided that upon the first allotment of shares £10,000 should be paid to the

(*d*) L. R. 7 Eq. 442. See *ex parte Williams*, L. R. 2 Eq. 216, where a claim by promoters was disallowed.

promoters. When only 5000 shares had been subscribed for, and before the company was in a situation to commence business, the directors allotted shares, and paid £5000 to the promoters, who immediately paid to four of the directors £500 a-piece. The company having been ordered to be wound up, and the official liquidator having brought a suit in the name of the company against the directors, to which the promoters were not parties, it was decided that the directors could not be charged with the money paid to the promoters, but that each of the four directors must repay to the company the £500 received by him from the promoters.

One other case may be cited, as showing the nature of the engagements for which provision may be made in the constating instruments, and the conditions under, and the extent to which the corporation will then be liable in respect thereof. *Touche* v. *Metropolitan Railway Warehousing Company* (*e*), arose thus: The plaintiffs had incurred labour and expense in organising a scheme for certain Exhibition Rooms, and had entered into negotiations with, and sent the plans to, some of the promoters of a certain company, and offered to accept £2000 for remuneration. The company was formed, and by the articles of agreement it was recited that the plaintiffs had incurred labour and expense in organising the Exhibition Rooms, and

Touche *v.* Metropolitan Railway Warehousing Co.

(*e*) L. R. 6 Ch. 671.

that it had been arranged with one of the promoters that he should pay them £2000, when and so soon as the company should be in a position to commence business. And it was agreed that no expense should be incurred until 10,000 shares had been subscribed, and at least £2 a share paid thereon, and that if the company was not in a position to carry on the undertaking before a certain day, then neither the promoters nor the officers of the company should have any claim upon the funds of the company. It also provided that when the shares were subscribed for and paid up to the amount aforesaid, the directors should pay the above-mentioned promoter the sum of £2000. Copies of the articles of association were sent to the plaintiffs. The shares in the company were subscribed for and the deposits were paid, but the company was unable to obtain a site, and never actually commenced business. The Lord Chancellor, on the evidence, held, that the company had adopted the agreement as to the payment of £2000 to the plaintiffs through the promoter; and, as to the contract, he decided that the performance of the agreement was not contingent on the actual commencement of business by the company, and that consequently the company were liable.

The expenses incidental to the foundation of a corporation, must vary indefinitely with the objects and with the necessity of obtaining compulsory powers, concessions from foreign states, &c. There-

Preliminary expenses.

fore no rule can be laid down as to the preliminary expenses, which will be considered to come within a clause of the constating instruments, which provides for the payment out of the funds of the company "of the expenses incidental to the formation of the company;" but on this point *Terrell* v. *Hutton* (*f*) should be consulted. Of course there cannot be charged under this head sums of money which are only disguised bribes. As stated by Lord Cranworth, in *Scottish North-Eastern Railway Company* v. *Stewart* (*g*), "If that sum was agreed to be paid as a bribe to buy off opposition to the new bill, I think the agreement could not be sustained—it would have been an unwarrantable application of the funds of the company" (*h*).

Bribes.

(*f*) 4 H. Lds. 1091. As to the preliminary expenses of a solicitor, see *Re Tilleard*, 3 D. G. J. & Sm. 519; 23 L. J. (Ch.) 765.

(*g*) 3 Macq. 408; and see per *Kindersley*, V.-C., L. R. 1 Eq. 619.

Statutory liability for the proceedings of promoters.

(*h*) 7 & 8 Vict. c. 110, enabled, by section 23, persons engaged in getting up a company to enter into certain contracts, and to incur certain expenses on behalf of the intended company, the contracts to be "conditional on the completion of the company, and to take effect after the certificate of complete registration," per Alderson, B., in *Taylor* v. *Crowland Gas and Coke Company*, 10 Ex. 288 n; 23 L. J. (Ex.) 254. Upon this section several decisions have been given, in none of which were the company held liable, *e.g.*, *Hutchinson* v. *Surrey Gas Consumers' Co.*, 11 C. B. 689, 21 L. J. (C. P.) 1; *Bull* v. *Chapman*, 8 Ex. 444, 22 L. J. (Ex.) 257; *Payne* v. *N. S. W. Steam Navigation Company*, 10 Ex. 283, 24 L. J. (Ex.) 117; *Job* v. *Lamb*, 11 Ex. 539, 25 L. J. (Ex.) 87; *Gunn* v. *London and Lancashire Fire*

Secondly, when the engagements of the promoters have not been embodied in the constating instruments of the corporation.

Hitherto the subject has been comparatively clear; questions of fact and of interpretation may arise, but the law is settled. We have now to deal with a large number of contradictory decisions, many of them irreconcileable with each other, upon the question as to how far a corporation can be deemed liable for the proceedings of its promoters when no liability has been imposed upon it from the outside. The simpler way will be to consider first the cases,—

(a) *Where the corporation has in no way recognised these proceedings.*

The term "recognition" is used rather than "adoption" or "ratification," as having the wider meaning, viz., that absolutely no notice whatever has been taken of these acts, and that the powers of the corporation have not been employed to the detriment of the person contracting with the promoters. Justice would seem to require that a cor-

Insurance Company, 12 C. B. (N. S.) 694 n. The statute is now repealed, but these authorities are useful as illustrating the liability, or rather the non-liability of companies for their founders.

poration should be answerable for all the engagements entered into in good faith with its promoters, and that when its existence has been secured by the buying off of fair opposition and by compromises made with opposing interests, it should not be allowed to repudiate the arrangements thus arrived at. But on the other side it is urged that the corporation is totally distinct from the association which originated it, and that shareholders who have joined it on the faith of the facts set forth in its constating instruments have a right to say that they do not assume liabilities other than are contained in the same. Moreover persons who form agreements with promoters have their remedy in their own hands—they may easily frame their agreements so as to render the promoters personally liable (*i*). These considerations have in many—it cannot be said in all—cases prevailed, and perhaps we may lay down as an established rule on this branch of the subject that

> "Engagements entered into by or with promoters not expressly provided for in the constating instruments cannot, even though within the powers and scope of the corporation when created, be enforced by or against, unless in some manner adopted by it."

This conclusion was arrived at and thoroughly

(*i*) *Barton* v. *Hutchinson, Duke of Argyll*, 6 Q. B. 477. 2 Car. & K. 712; *Lake* v.

Agreements by promoters of companies to take lands after incorporation.

vindicated by Lord Cranworth in the well-known and leading case of the *Caledonian, &c., Railway Company* v. *Helensburgh* (*j*). "When such a body [*i.e.*, projectors, &c.] applies for an act of incorporation, what they ask of the Legislature is not an Act incorporating and giving powers to those only who are applying—not necessarily even incorporating and giving powers to any of them—but an Act incorporating all persons who may be willing to subscribe the specified sums, and so to become shareholders in the company. If the Legislature accedes to the application, the Act when passed becomes the charter of the company, prescribing its duties and declaring its rights; and all persons becoming shareholders have a right to consider that they are entitled to all the benefits held out to them by the Act, and liable to no obligation beyond those which are there indicated. . . . . The principle on which all railway Acts and Acts of a similar character proceed is to specify the sum to be raised and the shares into which the funds of the company are to be divided, to incorporate the shareholders,

(*j*) 2 Jur. N. S. 695; 2 Macq. 391; *Earl of Shrewsbury* v. *North Staffordshire Railway Company*, L. R. 1 Eq. 593. Compare judgments in *Taylor* v. *Chichester and Midhurst Railway Company*, 4 H. & C. 409, in Exch. Cham. L. R. 2 Ex. 356, and in Dom. Proc. L. R. 4 H. Lds. 628; in *Scottish North Eastern Railway Company* v. *Stewart*, 3 Macq. 382; and in *Preston* v. *Liverpool, Manchester, &c., Railway Company*, 5 H. Lds. 605, 25 L. J. (Ch.) 421.

and to prescribe the objects into which the funds are to be applied. It is inconsistent with the policy of such Acts to hold that there can be any other terms binding on those who subscribe their money beyond what appear on the face of the Act itself. Not only is such a doctrine calculated to occasion injury to the shareholders, but it may often be a fraud, or at least a surprise, upon the Legislature. The statutory powers are given on the faith of the terms apparent on the Act itself. It may well be that the additional terms, if communicated to Parliament, would have prevented the passing of the special Act at all. Special terms as to particular cases or particular persons are often made the subject of special clauses, and then neither the Legislature nor any person taking shares can complain. . . . . In holding that the company is a body different from its promoters, in substance as well as in form, I am acting on what is the mere truth, and no injustice can arise to those who have dealt with the projectors, for against them, and all under whose authority they acted, there will be a clear right of action if the company does not fulfil the engagements which they have contracted that it shall perform, and that is surely all which those who have dealt with the projectors can claim as their right. For these reasons I am of opinion that on principle there is no ground for holding that a company is bound by any engagement made by those who obtained its act of incorporation unless

A corporation is distinct from its promoters,

and therefore not liable for the acts of the latter unless expressly provided for.

those engagements are embodied in the terms of the Act itself."

In this case an agreement had been come to between the respondents and three gentlemen calling themselves "a quorum of the committee of management of the Caledonian and Dumbartonshire Railway Company," then unincorporated, whereby the respondents on one hand agreed not to oppose the railway company to obtain an Act of Parliament —at the expense of the railway company—for the formation of a quay and harbour, and to apply the dues, &c., arising from the same in defraying the expense of management and in paying interest on £3000 to be borrowed by them from the company; and the company on the other hand agreed to advance to the respondents the whole costs already incurred and to be hereafter incurred in reference to the said harbour and Act of Parliament, and to make the advance of £3000 stipulated for. The company after its incorporation having refused to perform the agreement on the ground that it was Ultra Vires, the Court of Session held this defence unsustainable. Thereupon an appeal was brought, and the House of Lords unanimously reversed the decision.

Caledonian, &c., Rail. Co. v. Helensburgh.

(b) *Cases where the corporation has either recognised or acted upon these proceedings.*

If the "recognition" has amounted to ratification and the proceedings were such as could be ratified,

then no doubt can exist that the corporation will be bound. But without actually ratifying, a corporation, like an individual, may so conduct itself in reference to a given transaction as to be afterwards estopped from denying the validity of the same. In *Williams* v. *St. George's Harbour Company* (*k*), the plaintiff had withdrawn his opposition in Parliament to a harbour and railway bill on an agreement with the promoters that the company would take his land on certain terms. After the passing of the Act he brought an action against the promoters for breach of the agreement, which was stayed on the company being made by arrangement defendants to a new action, and suffering judgment for the demand. The Lords Justices held that the company thereby adopted the agreement whether it would have been otherwise binding on them or not —which Lord Justice Turner doubted—and that it was not vitiated by one of its terms being that the company should pay the costs of the landowner's opposition to the bill.

Williams *v.* St. George's Harbour Co.

It would appear that the company did not take any of the plaintiff's land—the line merely passed close to it, and so caused consequential damage.

In the next place, suppose that a corporation,

(*k*) 2 De G. & Jo. 547 ; *Edwards* v. *Kilkenny, &c., Railway Company*, 2 C. B. (N. S.) 397 ; 26 L. J. (C. P.) 224. Compare the facts and decision in *Blackmore* v. *Yates*, L. R. 2 Ex. 225.

which has not in any other way "recognised" as binding upon themselves agreements entered into by their promoters, proceeds to employ the powers given it by its constating instruments, and obtained, it may probably be, by means of these same agreements, to the detriment of the persons who are parties to such agreements, and who upon the faith of them forebore to oppose the creation of the corporation—will they (the corporation) be deemed under such circumstances to "recognise" the agreements in question, so as to lay itself open to a suit at Law or in Equity upon them?

On this point the first case to be mentioned is that of the *Vauxhall Bridge Company* v. *Earl Spencer* (*l*). The promoters of a company for making a bridge across the Thames, in order to buy off the opposition of the Trustees of Battersea Bridge, covenanted by deed to pay them for the use of their company, if the Act of Parliament should be obtained, the sum of £5000. The Act was passed, and the obligors of the bond thereupon paid over out of the funds of the company the £5000. The company having afterwards filed a bill to have the bonds cancelled and the stock re-transferred—held by Lord Eldon that the agreement was not in itself illegal, and that therefore the bill must be dismissed. Vauxhall Bridge Co. *v.* Earl Spencer.

This decision was thus commented upon by Lord Cranworth, and distinguished from the ordinary

(*l*) Jac. 64.

case, where it is sought to render a corporation liable for the proceedings of its promoters: "In the Vauxhall Bridge case there was no attempt to make any one liable on the bond but the obligors, and the only question was as to the validity of the engagement itself. It is true that the £5000 was in fact advanced out of the funds of the company, but that arrangement did not form any part of the contract with the Battersea Bridge proprietors, who looked only to the person with whom they contracted" (*m*).

Edwards *v.* Grand Junction Rail. Co.

Edwards v. *Grand Junction Railway Company* (*n*) arose thus: The promoters of a railway company, a bill for the incorporation of which was then pending in Parliament, having designed the railway so as to cross a certain turnpike road, the trustees of the road took measures to oppose the bill. After some negotiation the promoters agreed with the trustees that the turnpike road should be carried over the railway by a bridge 50 feet wide (the present width of the road), with proper approaches, &c., and thereupon the trustees withdrew their opposition, but clauses confirmatory of this arrangement were not, on account of the expense, inserted in the bill. The bill passed, but the company commenced operations for making the bridge only 30 feet wide. Both the Vice-Chancellor and Lord Cottenham granted an injunction to restrain the company from interfering

(*m*) Per *Lord Cranworth*, 2 Macq. 415.

(*n*) 1 My. & Cr. 650; 1 Ry. Cas. 173.

with the road in any manner other than that agreed to by the promoters.

Petre v. *Eastern Counties Railway Company* (*o*) is another decision on this point, and one which has aroused a great deal of comment. Here the committee of the promoters of a certain line agreed with the plaintiff, a peer, that in consideration of his withholding his opposition to their bill the incorporated company, in the event of the railway being under the powers of their Act made to pass through his estates, should pay him previous to entering upon his lands £120,000. The company after the passing of the Act being empowered to take compulsorily plaintiff's land, served on him a notice to treat for the same. The plaintiff thereupon obtained an injunction from the Lord Chancellor to restrain the defendants from proceeding to assess the value of such land, and the Vice-Chancellor afterwards refused to dissolve such injunction. The amount of compensation seems enormous, but the company had the choice of two lines, one of which Lord Petre would not have opposed so strongly, but they chose the other, which passed close by the mansion house and intersected the private grounds.

Petre *v.* Eastern Counties Rail. Co.

In *Stanley* v. *Chester and Birkenhead Railway Company* (*p*), the projectors of the Birkenhead and Chester railway had agreed with the plaintiff to give him for 14 acres of land, and as compensa-

Stanley *v.* Chester and Birkenhead Rail. Co.

(*o*) 1 Ry. Cas. 462. (*p*) 3 My. & Cr. 773, 1 Ry. Ca. 58.

tion for injury to his estate, £20,000. Other parties had started a competing line, the Chester and Birkenhead railway, and in committee on the rival bills it was agreed that the merits of the two bills should be referred to arbitration, and that the adopted company should take the engagements with the landholder into which the rejected company had entered, and to this agreement all parties signified in writing their assent. The Chester and Birkenhead railway was adopted and their bill passed, which would require 16 acres of land in a place different from that where the 14 acres were situated. The plaintiff filed his bill against the Chester and Birkenhead company to compel them to keep the agreement entered into with him by the Birkenhead and Chester company, and to restrain them from entering upon any of his lands till after the payment of the first instalment, which was already due. To this the defendants demurred generally, and Lord Cottenham, affirming the Vice-Chancellor's decision, overruled the demurrer with costs, and without calling upon the respondent's counsel. "The case as it appears on the face of the bill is one of the grossest frauds I have ever seen attempted."

Agreements by peers not to oppose a bill in Parliament.

There is also another case which should be mentioned, and in which both Lord Cottenham and the Common Law Courts decided that an agreement for a valuable consideration by a peer to withdraw opposition to a bill then in Parliament is not fraudu-

lent, but binding on the parties. This was *Simpson et al.* v. *Lord Howden* (*q*). The projectors of a railway, when applying for an Act of Parliament, had agreed with the defendant, a peer—through whose estates the intended line would pass, and who was opposing the bill—that if he would withdraw his opposition, in case the bill then pending should pass into an Act, the plaintiffs or the company to be incorporated would pay to him £5000 as compensation for the detriment to his estates, &c. The bill passed, but the company resolved to adopt a line differing from that authorised by the Act and pointed out in the agreement, and by which the estates of the defendant were altogether avoided. The defendant having brought an action in the Queen's Bench for the £5000, and the plaintiffs having filed a bill praying that he should be ordered to deliver up the agreement, and be restrained from proceeding with his action, it was held by the Lord Chancellor that the illegality of the instrument, if any, appeared on the face of it, and was a question cognizable at law. He therefore dismissed the bill. The defendant thereupon continued his action, and the Court of Exchequer Chamber also adjudged the agreement to be valid (*r*). Simpson *v.* Lord Howden.

It has been commonly considered that in these cases the Lord Chancellor laid down that the pro-

(*q*) 9 C. & F. 61; 3 Ry. Ca. 294.

(*r*) *Howden* v. *Simpson, et al.* 10 A. & E. 793, 1 Ry. Ca. 326.

Projectors are not agents of the future corporations—*semble*—

jectors are *quodam modo* the agents of the future corporation, and that the contracts and engagements of the former bind as such—*i.e.*, as being entered into by an agent on behalf of his principal—but his language scarcely admits of such a construction. His words in *Edwards* v. *Grand Junction Railway Company* are: "But the question is, not whether there be any binding contract at law, but whether this Court will permit the company to use their powers under the Act, in direct opposition to the arrangement made with the trustees prior to the Act upon the faith of which they were permitted to obtain such powers. If the company and the projectors cannot be identified, still it is clear that the company have succeeded to, and are now in possession of, all that the projectors had before; they are entitled to all their rights and subject to all their liabilities. If any one had individually projected such a scheme, and in prosecution of it had entered into arrangements, and then had sold and assigned all his interest in it to another, there would be no legal obligation between those who had dealt with the original projector and such purchaser, but in this Court it would be otherwise. So here, as the company stand in the place of the projectors, they cannot repudiate arrangements into which such projectors had entered; they cannot exercise the powers given by Parliament to such projectors in their corporate capacity and at the same time refuse to comply with those terms upon the faith of which

but Chancery will restrain a corporation from acting contrary to agreements made by them on behalf of the corporation.

all opposition to their obtaining such powers was withheld. . . . . What right have the company to meddle with the road at all? The powers under the Act give them the right, but before that right was so conferred it had been agreed that the right should only be used in a particular manner. Can the company exercise the right without regard to such agreement? I am clearly of opinion that they can not."

Similarly in *Stanley* v. *Chester and Birkenhead Railway Company* (*s*): "Would any Court of Equity permit the company first to obtain the concurrence of the plaintiff in an agreement like this, and then to turn round and say they will disregard it altogether, and put in force the adverse powers of the Act as if no such agreement was in existence?"

And in the subsequent case of *Greenhalgh* v. *Manchester, &c., Railway Company* (*t*) Lord Cottenham explained more clearly the reasons upon which his judgments had been founded: "The right [*i.e.*, which plaintiff has against the defendants] *is not properly speaking a right of contract*, but rather arises out of the contract; *for neither in this case nor in the case of Edwards* v. *The Grand Junction Railway Company was it a matter of contract;* but the equity is this, that what has subsequently taken

(*s*) *Ubi supra.*

(*t*) 3 My. & Cr. 784, 790, where, from the delay of the plaintiff in making his application an injunction was refused.

place, and the position in which the parties stand, give the party seeking the benefit of the contract a right to the interference of this Court by virtue of an equity which induces the Court to prevent the company from exercising their legal right unless upon the terms of adopting and giving effect to the contract which has been entered into by other parties."

Whether any exception can be taken to, or any flaw found in, this reasoning—whether the assertion ever will be made in a Court of Equity that because the fiction of an artificial existence is thrown round a body of individuals its jurisdiction is ousted and its power to prevent fraud and injustice gone; that by the operation of Law a being can be created, endowed with rights, and having powers obtained for it to the detriment of other persons, and on the faith of solemn engagements purporting to be made on its behalf for the compensation of the individuals thus damnified, that this being may approbate and reprobate, may employ its rights and powers to the ruin of those who have permitted its creation, and that the Court cannot interfere—is more than doubtful.

Corporations cannot repudiate the conditions upon which they have obtained rights and powers.

Lord Cottenham perhaps expressed himself—at least the reports make him do so—in too general a manner. We must evidently except all engagements which are either Ultra Vires of the constituted company or mere bribes to secure the good will of powerful interests, neither of which can under

any circumstances be enforced against the company.

A large landowner may from various reasons, more or less whimsical and exclusive, object to a railway, a manufactory, or a colliery, invading his domain, and his opposition may be a great obstacle to the success of the scheme, but beyond the damage done to the estate directly and indirectly—including under this fair compensation for the loss of privacy—it is difficult to see to what extent injury will be caused to the person of the owner. He is not a rival carrier, manufacturer, or coalmaster, whose business will be destroyed by the institution of the proposed undertaking—he is simply a powerful opponent, a member, it may be, of the Legislature, able by his social influence and by his command of able agents and counsel, to hinder, perhaps to thwart totally, the nascent corporation. Being such he is perfectly justified in using his influence for his own emolument, but he should take care to have any bargains which he may make for his private support duly entered on the constating instruments of the corporation. If this provision be not made, there is no principle of Law or Equity by which such a bargain can be enforced. The corporation does not, simply by commencing its operations, "recognise" the agreement or inflict any damage on the party to the same—it is only when it proceeds to take his land or to usurp his business or the like, that it does really cause him tangible and

manifest injury, and that, in Lord Cottenham's words, "the position in which the parties stand give the party seeking the benefit of the contract a right to the interference of the Court of Equity." It is therefore submitted that with the qualifications pointed out above, Lord Cottenham's decisions still hold good (*u*).

Leominster Canal Navigation *v.* Shrewsbury and Hereford Rail. Co.

Leominster Canal Navigation v. *Shrewsbury and Hereford Railway Company* (*v*) is a case which at first seems to militate against them, but the actual decision there was based on the ground of informality on the part of the directors of the defendants. An arrangement had been come to between the pro-

(*u*) See *Earl Lindsey* v. *Capper*, 3 H. Lds. 293; and *Earl Lindsey* v. *Great Northern Railway Company*, 10 Hare, 665; 22 L. J. (Ch.) 995, where Wood, V.-C., approves of and follows the principle of Lord Cottenham's decision. The same learned judge also thus speaks of Lord Cottenham, 2 J. & H. 114: "When the merits of Lord Cottenham as an equity judge come to be weighed hereafter, one of his marked characteristics will be found to be the skill and boldness with which, as for example in *Wallworth* v. *Holt*, 4 My. & Cr. 619, he accomodated the practice of the Court to new commercial exigencies. Whether as regards the interests of the shareholders or of the public, Lord Cottenham was the last man to shrink from restraining with a strong hand any undue exercise of power by a company; and, therefore, when I find him taking a view favourable to the company, his opinion is entitled to even more than the weight which would always belong to it." This eulogium may be worth little in point of law, but it is evidence of the high opinion entertained of Lord Cottenham as a law-maker, and of the respect that is justly due to his decisions.

(*v*) 3 K. & J. 654; 26 L. J. (Ch.) 764; 3 Jur. N. S. 930.

moters of the Shrewsbury and Hereford Railway Company and the Leominster Canal Company, in pursuance of which an Act was obtained by the Leominster Canal Company empowering them to sell their canal, and "authorised and acquired the Shrewsbury and Hereford Railway Company, with the consent of at least three-fifths of the proprietors" in the same, to purchase the said canal. A meeting was accordingly held, in pursuance of the above Act, at which the directors were duly authorised to complete the purchase, but without referring to the agreement. The directors having failed to take any further steps towards the completion of the purchase—held that there being no agreement signed by two of the directors as required by the 97th section of the Companies Clauses Consolidation Act, specific performance could not be decreed. Page-Wood, V.-C., after referring to the *Helensburgh Case* as deciding "that that which the directors could not do after the formation of the company certainly the provisional directors could not do before for the purpose of binding the company," stated that the purchase of the canal by the Shrewsbury and Hereford Railway Company would before the passing of the Act have been Ultra Vires of this company, and that consequently there was at the time of its passing no agreement binding on this company. He then pointed out that the Act did not refer to the agreement even in its imperfect and inchoative form, and considered that it was

left to the parties after the act passed, to enter into such arrangement and agreement as they might be advised to do. He therefore determined that, the agreement being invalid from the absence of the necessary signature, there was nothing binding of which the Court could enforce specific performance.

Recent cases where agreements made with promoters have not been enforced.

The recent cases in which Lord Cottenham's decisions have been especially questioned are *Preston* v. *Liverpool, Manchester, &c., Railway Company* (*w*), and the *Scottish North-Eastern Railway Company* v. *Stewart* (*x*), both in the House of Lords, the one in 1856, the other in 1859. The facts in each were very similar—an agreement by the promoters of a company to take land at certain rates, which the company, after incorporation, refuse to carry out, and in both cases the Lords, considering the agreement to be conditional on the land being taken, which had not been done, gave judgment in favour of the company, without actually deciding whether a corporation is under any, and if any, under what circumstances, liable for the acts of its originators.

Another case may here be mentioned, one which has hitherto received but little attention. *Bedford*

(*w*) 5 H. Lds. 605, 25 L. J. (Ch.) 421. See also *Caledonian Railway Company* v. *Helensburgh*, and *Earl of Shaftesbury* v. *North Staffordshire Railway Company, ubi supra.*

(*x*) 3 Macq. 382; 5 Jur. N. S. 607.

and Cambridge Railway Company v. *Stanley* (*y*) was a bill filed by the plaintiffs and two of the promoters of the company, who were joined to obviate any objection that might have been raised as to want of parties, for specific performance of an agreement entered into by a landowner with the agent of the promoters before the formation of the company, by which he agreed that in the event of the company obtaining an Act of Parliament he would sell them such land as might be required at the rate of thirty years' purchase upon the annual rental. Page-Wood, V.-C., for certain technical reasons dismissed the bill, but he considered the contract to have been binding on the defendant and apparently on the plaintiff. His words were: "If an agreement of this description is entered into before the passing of the Act, which it would be competent to the directors of the company as soon as the Act should be passed to enter into, it is known of necessity, from the characters of Acts of Parliament governing these matters, that those powers will be included in the Act when it is passed, and if the contract be beneficial and intra vires of the directors when the Act shall be passed, there can be no conceivable reason, as it appears to me, for saying that parties are not bound by an arrangement of that kind, entered into by the promoters of an intended company for the benefit of that company, as soon as the Act is obtained."

Bedford and Cambridge Rail. Co. *v.* Stanley.

(*y*) 2 J. & H. 746, 32 L. J. (Ch.) 60.

This is strong and unqualified language. It must, however, not be understood too literally. The learned Vice-Chancellor probably intended to lay down only that a person may be bound to a corporation *in posse* by a contract which that corporation when actually *in esse* can take advantage of and enforce—a proposition to which some little exception may be taken on the ground, first, that the corporation is not a party to the said contract, and secondly, that it is only the parties to contracts who can sue or be sued upon the same. If his Honour intended to go farther, and to state that agreements entered into by persons assuming to represent a corporation not yet existing, but made conditional on the creation of such corporation, will bind the same on its coming into being, then we have an assertion which if not absolutely irreconcileable with, is at least a considerable qualification of, the decision in *Caledonian Railway Company* v. *Helensburgh.*

Recapitulation.

The results arrived at in this chapter as to the agreements and engagements purporting to be made on behalf of a corporation not yet created, may be thus re-stated :—

Agreements which are Ultra Vires.

First, if Ultra Vires they do not bind and cannot be made to bind the corporation : *Earl of Shrewsbury* v. *North Staffordshire Railway Company*, *Leominster Canal Navigation* v. *Shrewsbury, &c., Railway Company.*

Agreements not Ultra Vires and provided for;

Secondly, if not Ultra Vires and provision has been made for them in the constating instruments,

they bind the corporation and the other contracting parties reciprocally: *Pilbrow* v. *Pilbrow's Atmospheric, &c., Company, Madrid Bank* v. *Pelly*, and similar cases.

not provided for, and not recognised,

Thirdly, if not Ultra Vires, but such provision has not been made, then, if the corporation has in no manner "recognised" these agreements, it will not be bound by, nor be able to enforce them: *Preston* v. *Liverpool, Manchester, &c., Railway Company, Caledonian Railway Company* v. *Helensburgh, Scottish North-Eastern Railway Company* v. *Stewart;* though there is the strong opinion of Page-Wood, V.-C., to the contrary in *Bedford and Cambridge Railway Company* v. *Stanley.*

not provided for, but recognised.

If it has recognised them or employed its powers to the detriment of those who contracted with the promoters, it will be bound—at least in Equity, on the principle that a person cannot derogate from his own stipulations—by such agreements, according to Lord Cottenham's decisions and to Page-Wood, V.-C., in *Lindsey* v. *Great Northern Railway Company,* and in *Bedford Railway Company* v. *Stanley;* and see *Williams* v. *St. George's Harbour Company, Re Saxon Life Assurance Company, Era,* and *Anchor Cases;* but according to dicta in *Preston* v. *Liverpool, &c., Railway Company, Caledonian Railway Company* v. *Helensburgh,* and *Earl of Shrewsbury* v. *North Staffordshire Railway Company,* there is some doubt whether, even in Equity, it can under any circumstances be held to such agreements.

CHAPTER VIII.

THE AMALGAMATION OF COMPANIES.

SECTION I.—THE PRINCIPLE OF NOVATION.

Novation.

MANY of the most important questions relating to Ultra Vires have arisen on the amalgamation of corporations. For the better understanding of the doctrine as applied to this subject, it will be advisable to consider very briefly what is meant by the principle of Novatio, and what is sufficient to constitute, under ordinary circumstances, a Novatio, before proceeding to an examination of the main subject.

In Roman law.

"Novatio est prioris debiti in aliam obligationem transfusio atque translatio: hoc est cum ex præcidenti causa ita nova constituatur ut prior perimatur" (*a*). This is Ulpian's well-known definition of Novatio—"the transfer of an already existing claim into another obligation." No matter what were the nature of his prior claim, even though it were one which could not for want of a "causa" be enforced, either at law or in equity, yet it could be the subject of a novatio, that is, it was sufficient to

(*a*) Dig. 46, 2, 1 pr.

form the consideration of a new contract—"qualiscunque igitur obligatio sit quæ præcessit, novari verbis potest, dummodo sequens obligatio aut civiliter teneat aut naturaliter; uptuta si pupillus sine tutoris auctoritate promiserit."

The only conditions were, first, that neither the original claim nor the substituted agreement should be illegal; and, secondly, that there should have been the intention to work a novation—"dummodo sciamus novationem ita demum fieri, *si hoc agatur*, ut novetur obligatio—novationem fieri, *si modo id actum sit* ut novetur." This latter condition is as important as the former, and is many times repeated.

Effect of novation.

The result in every case was that the former obligation was destroyed—"licet posterior stipulatio inutilis sit, tamen prima novationis jure tollatur" (*b*). As a necessary consequence the creditor might be deprived of his remedy—the former claim was gone by the novatio, the substituted one might, as in the instance above given of the ward acting without his guardian's interposition, be merely "naturalis," *i.e.*, binding in morality only.

In French law.

The French code gives no definition of novation, but enumerates the various ways in which it was brought:—

"1. Lorsque le débiteur contracte envers son créancier une nouvelle dette qui est substituée à l'ancienne laquelle est éteinte;—

(*b*) Inst. Bk. 3, 29, 3.

"2. Lorsqu'un nouveau débiteur est substitué à l'ancien qui est déchargé par le créancier ;—

"3. Lorsque par l'effet d'un nouvel engagement un nouveau créancier est substitué à l'ancien envers lequel le débiteur se trouve déchargé" (*c*).

There must be an unequivocal intention—"La novation ne se présume point ; il faut que la volonté de l'opérer résulte clairement de l'acte" (*d*). And the novation can be between those only who are able to contract ; it is therefore evident that the substituted contract must be one enforceable at law, *i.e.*, not giving rise to a moral claim merely.

Accord and satisfaction—

The principle of novation is familiar to our own legal system. All cases of accord and satisfaction depend upon it ; but in these the application of the principle has been needlessly perplexed from the rigidity of the old common law, and from its lack of general principles. The law, as at present established, seems to be this,—

effect of.

I. To an action on a specialty contract, accord and satisfaction,—

1. If entered into before breach, is not a good plea—the discharge must be by a bond expressly purporting to discharge the obligee (*e*).

(*c*) Code Civil, Art. 1271.

(*d*) Art. 1273.

(*e*) See judgment in *Mayor, &c., of Berwick* v. *Oswald*, 1 E. & B. 295, 22 L. J. (Q. B.) 129 ; but compare the effect of an equitable plea under the C. L. Proc. Act 1854, stating a valuable consideration for such a release, and *Smith* v. *Trowsdale*, 3 E. & B. 83, 23 L. J. (Q. B.) 107, 18 Jur. 552.

2. If entered into after breach, it is a good plea when the breach gives rise to a claim for unliquidated damages; *secus*, if it produces a debt, or throws any "certain duty" on the obligee (*f*).

II. To an action on a simple contract, accord and satisfaction,—

1. If entered into before breach, is a good plea:
2. If entered into after breach, then

First,—When unliquidated damages have resulted, it is a good plea;

Secondly,—When a liquidated claim has resulted, it is not a good plea, if it be an agreement to pay a less sum of money (*g*), though it is if to do any other act, as to give a peppercorn (*h*), and the like;

Thirdly,—When the liquidated claim has resulted from a negotiable instrument, it would almost seem that it may be discharged by parol (*i*).

Of accord and satisfaction, the instance which shows most decidedly the effect of novatio, is where a negotiable instrument is taken in *satisfaction and discharge* of a cause of action arising from a simple contract or a tort. In such case the original right is gone, and the taker of the instrument has to look to the instrument alone, and the maker or acceptor of it, for payment (*j*).

(*f*) *Blake's Case*, 6 Rep. 44.

(*g*) *Cumber* v. *Wane*, Smith 1 L. C. 288.

(*h*) *Pinnel's Case*, 5 Rep. 117.

(*i*) *Foster* v. *Dawber*, 6 Ex. 839.

(*j*) *Goldshede* v. *Cottrell*, 2 M. & W. 20; *Sibree* v. *Tripp*, 15 M. & W. 23.

Other instances of novation.

Other frequently occurring examples of novation are where, on the total dissolution of a partnership, the existing liabilities and assets are, by arrangement with creditors, and by due notice to the debtors, transferred to one or more members; or where, on the partial dissolution, by the withdrawal of some member, they are in like manner transferred to those who remain and continue the business. As stated by Parke, B., in *Hart* v. *Alexander* (*k*) :— "I apprehend the law now to be settled, that if one partner goes out of the firm, and another comes in, the debts of the old firm may, by the consent of all three parties (the creditors, the old firm, and the new firm), be transferred to the new firm." All that it is now requisite to prove is the consent of all parties—of the creditors to discharge the late or old firm, of the new firm in order to charge them (*l*).

But the most important instances in connection with the subject of Ultra Vires, are those which arise upon the so-called amalgamation of corporations in determining the rights of members in, or creditors of, either of the corporations concerned in the amalgamation. These are considered in the next section of this chapter.

(*k*) 2 M. & W. 484, 7 C. & P. 746.

(*l*) See *Thompson* v. *Percival*, 3 N. & M. 167, 5 B. & A. 925; *Lyth* v. *Ault*, 7 Ex. 669, 21 L. J. (Ex.) 217.

SECTION II.—THE POWER OF CORPORATIONS TO AMALGAMATE.

I. Corporations have not impliedly the power, and they cannot even by express provision give themselves the power to amalgamate.

Legal import of "amalgamation."

The idea commonly attached by the unlearned, and even by many lawyers, to the term "amalgamation" in connection with corporations, is very simple, viz., the absorption of one corporation by another, the former being *ipso facto* destroyed, and its members relieved—both individually and collectively—from all-existing liabilities save such as have been expressly reserved to them by the deed of arrangement. How far this idea has any real basis may be gathered from the observations of Page-Wood, V.-C., in *Re Empire Assurance Corporation, ex parte Bagshaw* (*m*) :—

Re Empire Assurance Corporation *ex parte* Bagshaw.

"I think it is impossible to give to the word 'amalgamate' the force which is contended for. It is difficult to say what the word 'amalgamate' means. I confess at this moment I have not the least conception of what the full legal effect of the word is. We do not find it in any law dictionary, or expounded by any competent authority. But I

(*m*) L. R. 4 Eq. 341, 347, 36 L. J. (Ch.) 663; 15 W. R. 889; 16 L. T. N. S. 345.

am quite sure of this, that the word 'amalgamate' cannot mean that the execution of a deed shall make a man a partner in a firm in which he was not a partner before, under conditions of which he is in no ways cognizant, and which are not the same as those contained in the former deed. It is true, that, in this instance, partners engaged in a concern for insurance of a particular character, have authorised their directors to amalgamate with another company. It is possible that this authority may go thus far; it may empower the directors, without being called to account for so doing in this Court, or by any other jurisdiction, to sacrifice, or to give up (which implies something more) the whole of their business, and to transfer their assets, if they think fit, to some other company, allowing that other company to carry on the business on the best terms they can make with them. In carrying out this, the directors may possibly be authorised by the clause to say, 'you who do not like this arrangement must simply lose; we have amalgamated one company with the other' (which seems to be a process of annihilation or extinction rather than anything else), 'and we have placed all our assets in the hands of another concern.' But that does not imply, that the dissentient shareholders, besides losing all their assets, are personally bound to take their part and lot in the new concern. It is one thing to say (not 'probably' but) 'possibly you may find all the assets gone, and your shares of no

Dissentient members not bound to join a new corporation.

value;' but it is a prodigious step further to say that a dissentient shareholder, having been concerned in an insurance company, shall be obliged to become subject to all the liabilities of another company, which is not only an insurance company, but a guarantee company, and a company for the purchase of houses and various other things as well. I am here assuming that the words of this clause are large enough to embrace all the assets of one company, and mix them up with those of another.

"Here I apprehend the applicants have never consented to take shares in this company, unless they consented under the words whereby they authorised the directors to amalgamate, and to execute all necessary deeds for the purpose. Now, no doubt people are very foolish, and I dare say if express words were put into a deed, under which subscribers to company A. purported to give their directors full powers to make them subscribers to company B., C., or D., plenty of people would be found ready to execute such a deed. But I think this much may be said, that persons who execute those deeds ought to know that the word 'amalgamate' is not a word by which, having subscribed to company A., they may be compelled to become subscribers to company B. It is just possible that directors may, under this clause, be justified in transferring all the assets of a dissentient shareholder to another company; but it does not appear to me that these words go to anything like the extent of saying that

the applicants in this case shall be put on the list of a totally different concern, to being members of which concern they entirely object."

Neither directors

This judgment is clear, and to the point—articles and memoranda of association, which allow the directors *mero motu* to "amalgamate" with another company, may, and probably do, authorise them to transfer the assets of their own company to some other; but such provisions do not empower them to make their own shareholders the members of this other company.

Corporations cannot confer on themselves an express Power to Amalgamate.

nor corporations themselves can have express power to amalgamate.

The next question is,—Can a corporation itself have this power? Can the constating instruments be so worded, as to enable a majority of the members, by special resolutions or otherwise, *to transform, to commute*, so to speak, their own shares into those of another association? The answer is, that such a proceeding is absolutely Ultra Vires.

Clinch *v.* Financial Corporation.

In *Clinch* v. *Financial Corporation* (*n*), A. company had agreed to purchase the good-will and property of B. company, and such agreement was

(*n*) L. R. 4 Ch. 117, *Higg's Case* and *Martin's Case*, 2 H. & M. 657, 669; *Los's Case*, 34 L. J. (Ch.) 609; *Empire Assurance Corporation, ex parte Bagshaw*, L. R. 4 Eq. 341, 36 L. J. (Ch.) 663; *London, Bombay, and Mediterranean Bank, Drew's Case*, 36 L. J. (Ch.) 785.

confirmed at a special meeting of B. company. Clinch, one of the shareholders in B., objected, and filed his bill against the other shareholders and the directors to set aside the arrangement. Lord Cairns, L.-C., said, "The arrangement between A. and B., which has been called an amalgamation or combination, was in substance a transfer by B. to A. of the business, good-will, connection, and property of the former in consideration of 25,000 shares in the latter. It was admitted in the argument, and indeed it could not be denied, that there was no power in the special constitution of B. which could warrant an arrangement of this nature; and that if it could be supported at all, it must be supported under the provisions of section 161 of the Act of 1862" (*o*). His Lordship decided that it clearly was not authorised by this section; and he then proceeded, "It was argued, however, that a large number, and, indeed, a majority of shareholders in B. had assented to the arrangement, and had actually taken shares in A. under it, and that the plaintiff could not sustain this as a bill on behalf of himself and all other members of the corporation, without making all or some of those parties who had assented to the arrangement parties to the suit. But the contract was one between the two companies, and if the contract was Ultra Vires of B., *it is a contract which in the eye of this Court it is for*

(*o*) 25 & 26 Vict. c. 89.

the benefit of all the shareholders in B. to arrest; and in my opinion, a proper form of suit in which to accomplish this end, is a suit of one member of the company on behalf of himself and all other members, making the directors of B. and A. parties as defendants."

Bank of Hindustan v. Alison.

This case was approved of and followed in *Bank of Hindustan* v. *Alison* (*p*). Here two incorporated banking companies agreed under the powers contained in their respective articles of association, to amalgamate, the business of C. being transferred to H., and the shareholders in C. having the option of taking newly-created shares in H. at a premium. H. issued circulars informing the shareholders in C. of the arrangement. The defendant, a shareholder in C., in consequence, in 1864, applied for and obtained an allotment of 25 shares, paid a portion of the deposit and premium thereon, and by his letter of application engaged to pay the residue on a given day. Several calls were afterwards made of which defendant had notice, but he never repudiated his liability, until an action was brought against him in 1867 for non-payment of those calls. In 1868 the supposed amalgamation of the two banks was, by a decree of Giffard, V.-C., in a suit (*q*) by dissentient shareholders in C., declared to be void, on

(*p*) L. R. 6 C. P. 54; with which compare *Re Bank of Hindustan, Campbell's, Hippisley's, and Alison's Cases,* L. R. 9 Ch. 1.

(*q*) *Imperial Bank of China* v. *Bank of Hindustan, &c.,* L. R. 6 Eq. 91.

the ground that whatever the legal meaning of "amalgamation," the proposed arrangement would have imposed additional liabilities on the shareholders of C., and it therefore could not be supported under either the articles of association of the company, or under 25 & 26 Vict. c. 89, s. 161.

The Court of Common Pleas accordingly held, on action brought to recover calls, that the directors of H. had no power to issue the new shares, and that the defendant was not by any acquiescence or conduct on his part estopped from denying that he was a shareholder in H.

Clinch v. *Financial Corporation* may, perhaps, be considered an authority to the effect that the arrangement there in question was invalid only as between the corporation and its members; but it would seem that most if not all agreements of this description are Ultra Vires in the fullest sense—in the sense that they do not become good even by the acquiescence of all the shareholders in each of the companies concerned. Such apparently is the result of the decision in *Re London and Northern Insurance Corporation, Stace & Worth's Case* (*r*). By the articles of association of the London, &c., Corporation, the directors were to be elected by the shareholders, and power was given to purchase the

Re London and Northern Insurance Corporation, Stace and Worth's Case.

(*r*) L. R. 4 Ch. 682; *James* v. *Eve*, L. R. 6 H. L. 335. Compare *Re Oriental Commercial Bank, Alabaster's Case*, L. R. 7 Eq. 273; and *Re Empire Assurance Corporation, Challis's Case*, L. R. 6 Ch. 266.

business of any other company. Power was also given by any extraordinary meeting of the company to amalgamate with any other company. An agreement was made for the amalgamation of this company with another company, on the terms that the second-named company should sell their assets to the first-named company; that the directors of the amalgamated board should consist of the present five directors of the purchasing company, and of seven of the directors of the selling company. This agreement was acted upon, but was never confirmed by an extraordinary meeting of the purchasing company. Both James, V.-C., and the Lords Justices, on appeal, held, that this agreement was void, and that two of the directors of the selling company, who had been allotted shares in the purchasing company in exchange for shares in the selling company and had acted as directors of the amalgamated company, were not liable to be put on the list of contributories to the purchasing company. The ground of the decision as stated by Lord Justice Giffard was this, that the agreement "was a material alteration of the constitution of the London and Northern Corporation, being nothing less than giving to the Investment [*i.e.*, the purchasing] Company the power of appointing a majority of the board of the amalgamated company. The agreement was therefore void, and not merely voidable." As the arrangement was acted upon for ten months, and not questioned till the winding up of the corpora-

tion, when Stace and Worth objected to being placed upon the list of contributors of this company, this decision must be considered conclusive to the effect that the agreement was Ultra Vires in the widest meaning of that term.

The amalgamation of companies is then impossible save by the direct interposition of the Legislature—it is Ultra Vires not merely of the directors but of the company. How far, when all the members of a corporation have agreed to what this term implies and have profited by the arrangement, they can be permitted to repudiate the agreement and yet to retain the benefit—to reprobate and approbate at the same time—is a question which will be considered in Part IV., Chapter III.

Legal reasons why corporations cannot amalgamate.

In reality the whole of this matter lies in a very small compass. A corporation is an existence owing all its qualities, powers, and capacities to the law. The law which calls it into being has also appointed the manner in which its existence shall be determined, but which has not said that it may commit civil suicide. In whatever mode—by surrender or forfeiture of the charter, by winding up, &c., a corporation be ended—we find that the law, *i.e.*, the State, intervenes. A corporation is something distinct from its members; all these may leave it, yet it still exists; how then is it possible that any action of theirs, unrecognised by the law, can destroy that which depends for its origin and continuance on the law alone? In fact, Page-Wood, V.-C., expressed

clearly the gist of the whole matter when he said: "I should rather assume an amalgamation to be where both companies agree to abandon their regulations and articles of association and to register themselves under new articles as one body" (*s*).

II. Corporations may, in an indirect manner, accomplish nearly the same purposes as intended by a direct amalgamation.

Amalgamation can be effected by transfer of rights and liabilities followed by dissolution.

But though a corporation cannot directly put an end to its existence and merge it by any process of amalgamation in that of another, yet it may accomplish this in an indirect and circuitous manner. It may do so by transferring its property, funds, rights, and liabilities to the other contracting corporation, and then voluntarily dissolving itself, usually by winding up. Generally the arrangement is supplemented by a proviso, whereby the transferee, the purchasing company, indemnifies the selling company against the liabilities which it may be under in respect of claims, existing or prospective (*t*). This, after all, is not an amalgamation, it is not a union of one corporation with another, but is simply a transfer of assets with attendant responsibilities. It is, however, a sufficient amalgamation for all prac-

(*s*) 2 H. & M. 666.

(*t*) *Anglo-Australian Company* v. *British Provident Insurance Company*, 3 Giff. 521, 4 D. G. F. & J. 341; *Re Albert Life Assurance Company, ex parte Western Life Assurance Society*, L. R. 1 1 Eq. 164.

tical purposes, and it is therefore the process always adopted.

The *modus operandi* is well illustrated by the attempted amalgamation between the *Progress Assurance Company*, and the *United Ports Company*, which led to *Wynne's Case* (*u*). Negotiations took place between the directors of the two companies for the purpose of bringing about an amalgamation. Terms being agreed to, they were embodied in an agreement under the seals of the two companies, dated the 8th of June, 1869, whereby it was provided that the Progress Company should sell all their business and property to the United Ports Company; that the United Ports Company should pay £12,000 in cash or bills, and should issue to the paid-up shareholders in the Progress Company shares of £1 each in the United Ports Company, on which the full sum of £1 should be considered as paid up, to the same amount as their former shares, and that no further liability should attach to the holders thereof; and that they should issue to the holders of partly paid-up shares in the Progress Company, shares in the United Ports Company, on which an amount should be considered to have been paid proportionate to the amount credited on the shares

Re United Ports and General Insurance Co., Wynne's Case.

(*u*) *Re United Ports and General Insurance Company, Wynne's Case*, L. R. 8 Ch. 1002. See another case arising out of the same transaction, where the shareholder was estopped by acquiescence in the arrangement from denying its validity, *Perrett's Case*, L. R. 15 Eq. 250.

in the books of the Progress Company. It was further agreed that the purchase should be completed on the 8th June, and that from that day the United Ports Company should take upon itself all the debts, engagements, and liabilities of the Progress Company, and should at all times thereafter protect and indemnify the directors and officers of the Progress Company against the same; and that the Progress Company should be forthwith wound up voluntarily, either with or without the supervision of the Court.

This agreement was engrossed in two parts, and one part was sealed with the seal of the Progress Company and delivered to the United Ports Company, but the United Ports Company, before executing their part, added a proviso at the end of the agreement, which altered it in some material points.

The agreement as executed by the United Ports Company was accepted by the directors of the Progress Company, and entered on their minutes on the 10th June, 1869; and an extraordinary meeting of the shareholders was held on the 24th June, when it was confirmed, and a resolution was passed to wind up the company voluntarily.

In this way it is manifest that, supposing nothing to happen to disturb the arrangement, the Progress Company would have been put an end to, its assets and liabilities being transferred to, and its shareholders becoming members of, the United Ports

Company; and to that extent an amalgamation of the two companies would have resulted.

But on the 22nd June a petition was presented, and on the 26th an order was made to wind up the Progress Company compulsorily. Wynne, a director of this company, and the holder of twenty fully paid-up shares in it, had, in pursuance of the above agreement, applied for 100 shares in the United Ports Company. In November following an order was made to wind up this latter company, and in the winding up, the question arose whether or not Wynne was a contributory in respect of the 100 shares so applied for by him. The Lords Justices determined that he was not a member of the United Ports Company, on the ground that, owing to the variance in the agreement as above-mentioned, the two companies never had agreed upon the terms of the amalgamation, but they expressed no doubt whatever that if the terms had been agreed upon, the amalgamation would have been complete and binding on the shareholders in each company.

Amalgamations in this manner are matters for internal regulation.

Arrangements of this kind being in substance arrangements for winding up, or otherwise dissolving some one or more of the companies participating therein, are manifestly matters of internal government only. Consequently their validity, and the extent to which they are binding upon recalcitrant members, will be determined by the constating instruments. If there be not the express powers necessary, in order that a corporation may itself

enter into such arrangements (*v*), or if from any cause whatever the arrangement be not binding on the shareholders as a whole, then manifestly only such of them as actually accept its terms will be bound thereby (*w*). Creditors, policy-holders, and other third parties, having similar claims against the company about to be dissolved, may, of course, intervene in the ordinary manner in the winding up or other mode of dissolution; but they cannot call upon the Court of Chancery to prevent the contemplated arrangement being perfected, on the ground that it is Ultra Vires. It is indeed possible that it is Ultra Vires even as regards third parties; but this can be so only when conditions have been introduced which are contrary to express statutory enactment, or to some fixed policy of the law (*x*).

(*v*) *Smith* v. *Bank of Victoria*, 41 L. J. (P. C.) 34. See also *Re United Ports Insurance Company, Brown's and Tucker's Cases*, 41 L. J. (Ch.) 157.

(*w*) See *Re Empire Assurance Corporation, Challis's Case, Somerville's Case*, L. R. 6 Ch. 266, where Challis was held bound and Somerville not bound by an agreement for amalgamation. See also the cases in the last note and *Perrett's Case*, L. R. 15 Eq. 250, which was another case arising out of the winding up of the *United Ports Insurance Company*, and where, as in *Brown's and Tucker's Cases*, a shareholder in a limited company, which had no express power to amalgamate, was held to have agreed to become and consequently to be a shareholder in an *unlimited* company with which the former was attempting to amalgamate.

(*x*) See the judgments in *Stace and Worth's Case*, L. R. 4 Ch. 682; and in *Re Irrigation Company of France, Fox's Case*, L. R. 6 Ch. 176.

In reference to members, the power to "amalgamate," in the sense and manner now in discussion, must be expressly given in the constating instruments—it will not be raised by implication. Thus, in *Re Empire Assurance Corporation, Dougan's Case* (*y*), the articles of association of a company made it lawful for a special general meeting "to determine upon the propriety of selling, disposing (*sic*), or otherwise dealing with, the business, good-will, property, and effects of the company." The directors agreed to amalgamate with another company, and the agreement was duly submitted to and approved by meetings of the shareholders. The Lords Justices, however, held that the agreement was Ultra Vires, Mellish, L.J., observing, "there are no special words in the clause giving power to amalgamate with another company; and I cannot help thinking that if it had been intended by the clause, that a special general meeting of the company should have power absolutely to bind all the shareholders, and to hand them over to another company—that, in fact, it should have power to effect what is commonly called an amalgamation, that word would have been made use of."

The power to amalgamate must be expressly given.

Re Empire Assurance Corporation, Dougan's Case.

Where the constating instruments contain express powers to amalgamate, the provisions must be carefully observed, and the powers exist only to the extent and for the exact purposes given. Thus,

Where an express power exists its requisites must be strictly followed.

(*y*) L. R. 8 Ch. 540.

where the directors of a fire and life assurance company were authorised, with the consent of an extraordinary general meeting, to "amalgamate with the business of any other company of a like nature," Page-Wood, V.-C., held that these words did not empower the directors to compel a dissentient shareholder to become a member in a company with more extended objects (*z*).

Moreover, if an agreement of this kind be either wholly or in part Ultra Vires, then, as has already been frequently mentioned, each and any member may refuse his assent thereto, though all the others agree, which, indeed, actually happened in *Fox's Case* (*a*), where a solitary shareholder, who objected to an arrangement of the kind now in question, was held entitled to relief.

Fox's Case.

Of course to any attempted "amalgamation"—which is not Ultra Vires of the corporation as a whole—the shareholders of the companies concerned may have, by acquiescence, so become parties as to

Shareholders may be bound by acquiescence in an invalid amalgamation.

(*z*) *Re Empire Assurance Corporation, ex parte Bagshaw*, L. R. 4 Eq. 341; see the judgment cited in part, *ante*, p. 431–34. Compare *Los's Case*, 34 L. J. (Ch.) 609. It would seem from expressions of Bacon, V.-C., in his judgment in *Re United Ports, &c., Company, Brown's and Tucker's Cases*, 41 L. J. (Ch.) 157, that an order in winding-up or other decision of a Court may render valid and binding an "amalgamation" which would otherwise be void as being Ultra Vires.

(*a*) *Re Irrigation Company of France, Fox's Case*, L. R. 6 Ch. 176. See the judgments in *Clinch* v. *Financial Corporation*, L. R. 4 Ch. 117.

be afterwards estopped from denying the validity of the same, just as a novation may be worked by the tacit acquiescence of a creditor, in the substitution of another person in place of the one originally liable to him. But the circumstances must be very strong thus to bind shareholders ; the application for shares, or the attending meetings held in accordance with the provisions of the proposed "amalgamation," is not necessarily sufficient (*b*).

Distinction between "amalgamation" and purchase or sale.

It is very important to distinguish a purchase or sale from an "amalgamation." The latter term conveys the idea of something—though, perhaps, in law, it may not effect, save when the legislature has intervened and expressly bound the parties, anything—more than the former. In, however, not a few reported cases, we find the two terms confused (*c*).

Indeed it is not unseldom very difficult to determine the nature of a given transaction, one Court or Judge considering that to be an "amalgamation" which another styles a purchase. A series of judgments, illustrative not only of this particular point, but of the whole subject of novation, will be found in the various cases growing out of the winding up

(*b*) See especially *Somerville's Case*, L. R. 6 Ch. 266 ; *Wynne's Case*, L. R. 8 Ch. 1002 ; *Campbell's and Hippisley's Cases*, L. R. 9 Ch. 1 ; and *ante*, pp. 443–44.

(*c*) See *Anglo-Australian, &c., Company* v. *British Provident, &c., Insurance Company*, 3 Giff. 521, before Stuart, V.-C., and on appeal, 4 D. G. F. & J. 341 ; and the case next cited.

Re Saxon Life Assurance Co., Era and Anchor Cases.

of the *Saxon Life Assurance Society.* In 1857 the Era Assurance Society purchased the business of the Saxon Life Assurance Society, received all its assets and undertook all its liabilities. The Era paid some of the liabilities to an amount exceeding the assets received by them. They also gave a mortgage and covenant to the Anchor Insurance Company for a debt due to them from the Saxon, in substitution for a similar security held by the Anchor against the Saxon, which was given up and cancelled. The Saxon and the Era Companies were both ordered to be wound up; and in the matter of the Era, Page-Wood, V.-C., held that the security given by it to the Anchor was void, on the ground that the transfer to it of the business of the Saxon was Ultra Vires (*d*). This transfer he considered to be an "amalgamation." "Both these cases seem to me to turn in a very great measure on the question, what power the directors of the Era Company had to 'amalgamate,' that is to say, to take upon themselves the responsibilities of another company." Such power was not contained expressly in the deed of settlement, and the learned Vice-Chancellor determined that the 38th clause, whereby the directors were authorised generally where these presents are silent, or do not otherwise provide, to

(*d*) *Re Saxon Life Assurance Society, Anchor Case, Era Case,* 2 J. & H. 400; 30 L. J. (Ch.) 137; also 32 L. J. (Ch.) 206; on appeal, *ib.*, and 1 D. G. J. & Sm. 29; on rehearing before Page-Wood, V.-C., *ib.* 211, and 1 H. & M. 672.

act in the direction of the concerns of the society in such manner as at their absolute discretion they shall think most conducive to the interests of the society," could not be construed as giving such power. But on appeal Lord Justice Turner held that the transfer was a "purchase," and within the authority possessed by the directors. "It was contended that it (*i.e.*, the deed of 1867) was absolutely void as being Ultra Vires as to both of these companies. Whether it was so as to the Saxon I will say nothing: but, looking to the deed of settlement of the Era Society, I think that it was within the power of that company, with the consent of a general meeting, to enter into the agreement and to bind themselves by it. It was said that the Era had no power to take to the assets, and to subject themselves to the liabilities of the Saxon Society. But those were the terms of the agreement itself, and if they had power to purchase the business they must have the power to carry into effect the terms of the purchase."

An "amalgamation" may be a sale simply;

In all cases of this kind several distinctions have to be drawn:—

First, there may be a sale, pure and simple for a consideration more or less valuable, by S. company to P. company of all its assets and liabilities—no covenants beyond what are necessary to secure the payment of the consideration being entered into by P. company.

Here it is patent that S. has not relieved itself of its liabilities. Its position with regard

to its creditors is in no way changed; no *novatio* has been made; to them, therefore, it still remains responsible. What has been done is this—S. company has simply sold its business, nothing more, and has to discharge claims upon it out of the consideration received for such sale.

or a sale accompanied by an indemnity clause;

Secondly, There may be a similar transaction, with the addition of a covenant by P. company to indemnify S. company against all claims upon it.

Under these circumstances S. will still remain liable for its debts, &c., but can compel P. to indemnify it against the same, though should such indemnity fail in whole or in part S. must nevertheless discharge the claims of its creditors (*d d*).

In these two transactions there are merely a sale and a purchase, the contracting parties remaining as distinct after the arrangement as before. No one would pretend, not even the companies concerned, that under such circumstances the selling has become defunct—the arrangement was not intended to have this result, a dissolution, but simply to be a transfer of assets and liabilities. The selling company will, therefore, remain liable to its own creditors, unless by the acquiescence, express or tacit, of these a novation has been worked, and the P. company substituted as debtors in place of the S. company.

(*d d*) As to the legal import of such an indemnity, and the manner in which it will be effectuated, see *Re Albert Life Assurance Company, ex parte Western Life Assurance Company*, L. R. 11 Eq. 164. See also *Hemming* v. *Maddick*, L. R. 7 Ch. 395.

Thirdly, there may be, not a sale by S. company, but an "amalgamation" of itself with P. company. This means, as already seen, that S. company is dissolved, but its assets and liabilities have previously been made over to, and accepted by P. company. Its members, too, are generally assumed to be made members of P. company, and to have allotted to them, and to be compellable to receive shares in that company proportionate to the value of those which they previously held in S. company. It may, however, very fairly be questioned whether membership can be thus compulsorily transformed save by the consent of each individual concerned. On the one side it is argued that the term "amalgamate" must mean—if it means anything more than merely "sell" or "transfer" assets—the power to exchange the shares of the one company for, and to commute them into, those of some other company, and by consequence to substitute membership in the new company for membership in the old one. On the other hand, it is urged in the first place that a person by entering into a company, even though its constating instruments contain provisions for amalgamation, intends and enters into a contract to be a member of that particular company and no other; and secondly, that no one can become a member of a company save by his consent given *ad hoc*, and that no vague and general authority given beforehand, and least of all such as is to be implied from the fact that he belongs to a company whose articles contain such a power, can

or a real amalgamation as far as such can be accomplished.

suffice for this purpose. This question has not yet been judicially decided, though the dictum of Page-Wood, V.C., is in the negative (*e*). Hitherto, however, the liability of persons as members of amalgamated companies has always been determined by considering whether they have or not by their own application, acts, or *laches*, constituted themselves members of the company with which the amalgamation was proposed (*ee*).

The Principle of Novation as it affects Creditors.

What has been just said will be sufficient in respect of the rights and liabilities of shareholders. If an agreement to amalgamate be nothing more than an agreement to sell the assets and goodwill, then manifestly there is no novation of membership, and it is doubtful whether this occurs even when it is proposed to amalgamate in the proper sense, unless each shareholder assents. If he does so assent, then, unless care be taken to make his acceptance of the new shares conditional on the accomplishment of the amalgamation, it is possible that this may fall through, and yet the person concerned may be fixed with shares in the new company, while he has not got rid of those he held in his original company.

Creditors of

With respect to a creditor of the amalgamating

(*e*) See *Ex parte Bagshaw*, *ante*, pp. 431–434.

(*ee*) See *United Ports Company, Tucker's Case*, 41 L. J. (Ch.) 157, 20 W. R. 88; and *Adams' Case*, L. R. 13 Eq. 474; also *ante*, pp. 443–447, and *post*, pp. 455–456.

company the considerations are much simpler. That he must in all cases of novation consent to the arrangement would seem so thoroughly in accordance with common sense and the simplest maxims of Law as to call for no proof. Numerous cases have, however, come before the Courts where the attempt has been made against the will of the creditor to substitute a new person, firm, or corporation for his old debtor. It cannot too clearly be borne in mind that when once an obligation has been brought into being, whether by breach of a contract or by committal of a tort, it can be destroyed only by the means provided by Law, and amongst these we nowhere find that the obligee can of his own accord free himself from the liabilities in which he has involved himself. A very explicit exposition of the Law is contained in the judgment of James, V.-C., in *Re Manchester and London Life Assurance and Loan Association, ex parte Pike* (*f*) : "The policy-holder whom [the petitioner] represents effected his policy in Manchester and London, &c., Association. That association transferred their business to the W. office. It is stated that the transfer in some way or other had deprived the policy-holder of his remedy against the office that undertook to pay him the amount assured. . . . . It would be a very strong thing indeed to say that a policy-holder is to be deprived of his remedy against the persons with whom he contracted

amalgamating companies always retain their original rights.

Re Manchester and London Life Assurance and Loan Association, *ex parte* Pike.

(*f*) L. R. 9 Eq. 643.

because those persons entered into an arrangement of that kind, and only gave him that notice [*i.e.*, an alteration in the heading of the receipt]. . . . . It would be monstrous that a person having a contract of this kind should be told that he has lost his right under his original contract, and must take such remedy as he may get from some other office because he pays his premiums and takes receipts at the place where he is told to do so."

With this judgment may be compared that of Lord Chancellor Hatherley in *Re Family Endowment Society* (*g*), which is instructive as showing the amount of proof necessary to bind a creditor by acquiescence in a novation. In this case it was held that though the petitioner had to a great extent recognised the amalgamation of the company from which he had bought an annuity with another company, and had received several payments from this latter company, yet he had not so completely acquiesced in the arrangement as to have debarred himself from going against the original company on the bankruptcy of the latter. The question is one of fact, and therefore in *Re National Provident Life Assurance Company* (*h*), where the holder of a life assurance policy, having notice that the N. assurance office, with which the policy was effected, had transferred its business and assets to the A. assurance office and had ceased to carry on its business, paid the premiums on his policy to the A.

(*g*) L. R. 5 Ch. 118, 131–33. (*h*) L. R. 9 Eq. 306.

office for thirteen years, and upon the dropping of the life sent in a claim upon the policy to the A. office, it was held—that there had been a complete novation of the contract, and that the N. office was released from liability on the policy.

Novation a tripartite contract.

A novation is, so to speak, a tripartite contract. It is an arrangement to which three persons must be parties—viz., the original contractors and the new contracting party. There is necessary in addition an agreement, express or implied, by which the creditor in the existing contract gives up his rights against his debtor under that contract, and accepts instead the responsibility of the new debtor. When the agreement is expressly made little difficulty arises beyond that involved in interpreting the exact purport of the agreement which has been entered into.

When consent of creditor will be implied.

If, on the other hand, there is no such express consent, but this has to be gathered from the acts of the creditor or his concurrence in other arrangements, the question becomes far more difficult. No general principles can be extracted from the many cases that have been decided, for the facts of each and their significance vary excessively. Payment of insurance premiums to a new company may (*i*),

(*i*) *Per* Malins, V.-C., in *Re National Provincial Life Assurance Society*, L. R. 9 Eq. 306; and compare the same case before Bacon, V.-C., and the L.JJ., *Fleming's Case*, L. R. 6 Ch. 393; see also *Re Times Life Assurance, &c., Company*, L. R. 5 Ch. 381; and *Ex parte Blood*, L. R. 9 Eq. 316; and now the provision in 35 & 36 Vict. c. 41, s. 7.

but usually will not (*j*) constitute a novation, while the acceptance of a bonus is generally sufficient for that purpose (*k*). So, upon the transfer of a business, the payment by the new company of interest upon debts or deposits due to creditors of the old company will (*l*), or will not (*m*), according to the circumstances, discharge the old and charge the new debtor. The receipt of an annuity from a new company, or other new source, has never been held *per se* to work a novation (*n*).

Principles laid down in the Albert,

It should be mentioned that in the Albert Arbitration Lord Cairns was content with the minimum of evidence as to the assent of the creditor, holding in many cases that a novation had been worked where undoubtedly the Court of Chancery would not have so decided (*o*).

and European arbitrations.

Lord Westbury, however, in the European Arbitration, went to the other and more equitable

(*j*) *Re Manchester, &c., Life Assurance Association*, L. R. 9 Eq. 643, 5 Ch. 640; *Re Medical Invalid, &c., Society, Griffith's Case*, L. R. 6 Ch. 374.

(*k*) *Re Times Life Assurance Company, ubi suprà*; *Re Anchor Assurance Company*, L. R. 5 Ch. 632, *Spencer's Case*, L. R. 6 Ch. 362.

(*l*) See *Rolfe* v. *Flower*, L.R. 1 P. C. 27; and *Fleming's Case*, L. R. 6 Ch. 393.

(*m*) *Re Smith, Knight, & Co., ex parte Gibson*, L. R. 4 Ch. 662; *Re Commercial Banking Corporation of India, Jones' Claim*, 16 W. R. 958.

(*n*) *Re Family Endowment Society*, L. R. 5 Ch. 118; *Re India, &c., Assurance Company*, L. R. 7 Ch. 651.

(*o*) See especially *Kennedy's Case*, 15 Sol. J. 729; *Wernick's Case*, 15 Sol. J. 767; *Fagan's Case*, 15 Sol. J. 855; *Budden's Case*, 16 Sol. J. 462; *Allen's Case*, 16 Sol. J. 657.

extreme, placing the onus of proof where it properly lies, on the debtor, and requiring the clearest proof of novation. "To raise the new contract there must be on the part of the company power to make it; there must be on the part of the policy-holder a knowledge of the company's right so to contract with him; and there must be conduct on the part of the policy-holder, when it is an incomplete contract, or where there is no evidence in writing, that unmistakeably shows his intention to accept a new contract and to discharge the old one (*p*).

SECTION III.—STATUTORY ENACTMENTS AS TO AMALGAMATION.

The chief statutory enactments on this point are those contained in the Companies Act, 1862, and in the Life Assurance Companies Act of 1870 (*p p*).

The Companies Act, 1862, by section 161 provides :—

"That where any company is proposed to be, or is in the course of being, wound up altogether voluntarily, and the whole or a portion of its business or property is proposed to be transferred or sold to another company, the liquidators of the first-mentioned company may, with the sanction of a special resolution of the company by whom they were appointed, conferring either a general authority on the liquidators, or an authority in respect of any particular arrangement, receive in compensa-

(*p*) *Coghlan's Case*, 17 Sol. J. 127, 130. See *Blundell's Case*, 17 Sol. J. 87.

(*p p*) See also 33 & 34 Vict. c. 104, "The Joint Stock Companies Arrangement Act, 1870," as to arrangements and compromises in winding up between companies and their creditors.

tion or part compensation for such transfer or sale, shares, policies, or other like interests in such other company, for the purpose of distribution amongst the members of the company being wound up, or may enter into any other arrangement whereby the members of the company being wound up may, in lieu of receiving cash, shares, policies, or other like interests, or in addition thereto, participate in the profits of or receive any other benefit from the purchasing company; and any sale made or arrangement entered into by the liquidators in pursuance of this section, shall be binding on the members of the company being wound up; subject to this proviso, that if any member of the company being wound up, who has not voted in favour of the special resolution passed by the company of which he is a member at either of the meetings held for passing the same, expresses his dissent from any such special resolution in writing addressed to the liquidators, or one of them, and left at the registered office of the company not later than seven days after the date of the meeting at which such special resolution was passed, such dissentient member may require the liquidators to do one of the following things as the liquidators may prefer, that is to say, either to abstain from carrying such resolution into effect, or to purchase the interest held by such dissentient member at a price to be determined in manner hereinafter mentioned, such purchase-money to be paid before the company is dissolved, and to be raised by the liquidators in such manner as may be determined by special resolution; no special resolution shall be deemed invalid for the purposes of this section, by reason that it is passed antecedently to or concurrently with any resolution for winding up the company, or for appointing liquidators; but if an order be made within a year for winding up the company by or subject to the supervision of the Court, such resolution shall not be of any validity unless it is sanctioned by the Court."

Upon this section the Master of the Rolls in *Re Bank of Hindustan, &c., ex parte Los* (*q*), after

(*q*) 34 L. J. Ch. 609.

observing " the law undoubtedly is that you cannot without his consent make a person a shareholder in another company than that of which he consented to become a shareholder," decided that a member of a company which was being wound up voluntarily, and whose business was to be transferred to another company in consideration of shares in such company, could not be compelled under the powers given to the liquidators by the above to take shares in the other company, and that he did not forfeit his right to refuse to become such shareholder by failing to express his dissent from the arrangement within seven days after the holding of the meeting at which it was determined upon. Under such circumstances the shareholder forfeits all claims he may have upon the original company in respect of his shares, but he is also relieved from any further liability (*r*).

In *Clinch* v. *Financial Corporation* (*s*), Page-Wood, V.-C., considered the effect of this section to be —" that if a company be desirous of merging themselves in another company, inasmuch as a *minority of dissentient shareholders cannot be compelled to take shares in the other* company, it may be desirable that the first company shall have a power of

(*r*) Compare *ex parte Higgs*, 2 H. & M. 657, an exactly similar case arising out of the same circumstances as *ex parte Los*, heard a few days later by Page-Wood, V.-C., and in which his Honour gave a similar decision.

(*s*) L. R. 5 Eq. 450, 472.

closing its concerns and winding up its affairs, and upon so doing of selling its assets to the other company, which may be disposed to purchase those assets, paying for them in shares. Then it would be for the shareholders in the company which was being wound-up to say whether they will take shares or not. If they refuse to take shares they lose all interest in the purchase money ; they are so far bound by the resolution of their own company as to lose all right of claiming any portion of it; but the sale may still be a good sale of the one concern to the other."

In the same case, on appeal (*t*), Lord Chancellor Lord Cairns said : " I think that section 161 clearly contemplates a sale of the assets of the liquidating company for such an equivalent in value as is pointed out in that section, and does not contemplate the subjecting of the shareholders in the liquidating company, without their unanimous decision, to a fresh and original liability in the shape of a guarantee." His Lordship then went on to lay down—to this extent overruling the decision of Vice-Chancellor Page-Wood—that not even could the shares of dissentients be forfeited : " It is sufficient to say that, in my opinion, the liquidators of a company would have no right to place a shareholder of a company in this position, that he must either dissent altogether from the arrangement and be

(*t*) L. R. 4 Ch. 118, 121.

subject to have his shares taken from him at a valuation, or else come in under the arrangement, and thus be forced to subject himself to the liability of guaranteeing the sufficiency of the assets."

And Selwyn, L.J., in his judgment expressed himself similarly: "The words of the 161st section are doubtless very wide and comprehensive, but it contains no power to impose any new or additional liability upon the shareholders of the selling company, and provides only for the payment of the purchase-money of the shares of dissentient shareholders, which is directed to be paid before the company is dissolved, and to be raised by the liquidators in such manner as may be determined by special resolution."

Position of dissentient shareholder under sect. 161 of 25 & 26 Vict. c. 89.

The exact position of a dissentient shareholder under this section seems to be this. First, he may assent to the proposed arrangement, either *simpliciter* or with modifications adapted to his particular case. Secondly, he may dissent therefrom. Thirdly, if he dissent, he can require the liquidators at their option "either to abstain from carrying the resolution into effect, or to purchase his interest at a price to be determined by arbitration," *i.e.*, as provided by section 162—that is, he is not compelled to accept the liquidator's valuation (*u*). Fourthly, if he dissents and wishes his interest to be valued, he must

(*u*) The shareholder has a right of action upon non-payment of the purchase money agreed on or awarded to him, in case of arbitration, *De Rosaz* v. *Anglo-Italian Bank*, L. R. 4

give the requisite notice in that behalf within seven days, or he may dissent simply and abandon all interest in the company. Fifthly, if he dissents, and his interest is purchased by the liquidators, he nevertheless remains liable up to the amount of that interest to the creditors of the company (*v*); though if he dissents and abandons his interest, it seems that his liability thereupon ceases (*w*).

Winding-up under the Court.

Though the section speaks of a winding-up "altogether voluntarily," yet it applies to a winding-up under the Court, which can, like the official liquidator, direct a sale of the assets under section 95, and such a sale is regulated by the principles laid down in this section (*x*).

Foreign companies may avail themselves of this section (*y*). So may companies not formed under this Act, but they must first register themselves so as to bring themselves within its provisions. In *Southall* v. *British Mutual Life Assurance Society* (*z*), it was decided that an unregistered company, which

Q. B. 462. Compare *Re Anglo-Italian Bank and De Rosaz*, L. R. 2 Q. B. 452.

(*v*) *Re Imperial Land Company of Marseilles, Vining's Case*, L. R. 6 Ch. 96.

(*w*) See *Los's Case* and *Higgs's Case*, *ubi suprà*; and *Martin's Case*, 2 H. & M. 669.

(*x*) *Re Imperial Mercantile Credit Association*, L. R. 12 Eq. 504; *Re Agra and Masterman's Bank*, L. R. 12 Eq. 509, n.; *Re Albert Life Assurance Company*, L. R. 6 Ch. 381; 33 & 34 Vict. c. 104, s. 2.

(*y*) *Re Irrigation Company of France, ex parte Fox*, L. R. 6 Ch. 176.

(*z*) L. R. 11 Eq. 65. Compare *Droitwich Patent Salt Company* v. *Curzon*, L. R. 3 Ex. 35; and *Princess of Reuss* v. *Bos*, L. R. 5 Ch. 363, 5 H. Lds. 176.

has no power under its deed of settlement to sell or transfer its business to another company, may carry into effect an agreement for that purpose by registering under the Companies Act, 1862, passing a resolution for voluntarily winding-up and directing the liquidators to carry out the agreement.

Statutory enactments regulating the amalgamation of life assurance companies.

The mismanagement of life assurance companies having produced great distress and absolute ruin to many, the Legislature has recently interfered and enacted regulations with respect to the conduct of their business and the control of their affairs. The greater portion of the disasters brought about by these bodies has arisen from the amalgamation or fusion of many small associations into one large and unwieldy concern. True enough the policy-holders and other creditors of the original associations would not be bound by any such arrangements unless they agreed thereto; but their recourse to their original debtors is usually of theoretical rather than practical value. What use is it to preserve them their remedy when the assets and funds of their debtors are gone or very seriously diminished. The unfortunate shareholders, too, have to be considered. Like the creditors they need not agree to an amalgamation if they do not so choose. But this also is a merely theoretical privilege, for they are to a great extent in the hands of the managing body, and unable to protect their own interests. Consequently Parliament has decided that the amalgamation of these companies shall be to some extent under the super-

vision of the Courts. Accordingly 33 & 34 Vict. c. 61, the Life Assurance Companies Act, 1870, contains among various provisions referring to the accounts and other internal matters the following relating to amalgamation :—

Section 14. "Where it is intended to amalgamate two or more companies, or to transfer the life assurance business of one company to another, the directors of any one or more of such companies may apply to the Court, by petition, to sanction the proposed arrangement, notice of such application being published in the *Gazette*, and the Court, after hearing the directors and other persons whom it considers entitled to be heard upon the petition, may confirm the same, if it is satisfied that no sufficient objection to the arrangement has been established.

"Before any such application is made to the Court, a statement of the nature of the amalgamation or transfer, as the case may be, together with an abstract containing the material facts embodied in the agreement or deed under which such amalgamation or transfer is proposed to be effected, and copies of the actuarial or other reports upon which such agreement or deed is founded, shall be forwarded to each policy-holder of the transferred company in case of transfer, by the same being transmitted in manner provided by section one hundred and thirty-six of the Companies Clauses Consolidation Act, 1845, for the transmission to shareholders of notices not requiring to be served personally; and the agreement or deed under which such amalgamation or transfer is effected, shall be open for inspection by the policy-holders and shareholders at the office or offices of the company or companies, for a period of fifteen days after the issuing of the abstract herein provided.

"The Court shall not sanction any amalgamation or transfer in any case in which it appears to the Court, that policy-holders representing one-tenth or more of the total amount assured in any company which it is proposed to amalgamate, or in any company the business of which it is proposed to transfer, dissent from such amalgamation or transfer.

"No company shall amalgamate with another, or transfer its business to another, unless such amalgamation or transfer is confirmed by the Court in accordance with this section.

"Provided always, that this section shall not apply in any case in which the business of any company, which is sought to be amalgamated or transferred, does not comprise the business of life assurance.

Section 15. "When an amalgamation takes place between any companies, or when the business of one company is transferred to another company, the combined company or the purchasing company, as the case may be, shall within ten days from the date of the completion of the amalgamation or transfer, deposit with the Board of Trade, certified copies of statements of the assets and liabilities of the companies concerned in such amalgamation or transfer, together with a statement of the nature and terms of the amalgamation or transfer, and a certified copy of the agreement or deed under which such amalgamation or transfer is effected, and certified copies of the actuarial or other reports upon which such agreement or deed is founded; and the statement and agreement or deed of amalgamation or transfer shall be accompanied by a declaration under the hand of the chairman of each company, and the principal managing officer of each company, that to the best of their belief every payment made or to be made to any person whatsoever on account of the said amalgamation or transfer, is therein fully set forth, and that no other payments beyond those set forth have been made, or are to be made either in money, policies, bonds, valuable securities, or other property, by or with the knowledge of any parties to the said amalgamation or transfer."

Amalgamation of railway

The amalgamation of railway and other similar companies possessing compulsory powers is usually effected by means of a special Act of Parliament obtained for the particular case. There are also certain statutes containing general provisions. Thus 26 & 27 Vict. c. 92 (the Railways Clauses Act, 1863)

lays down in Part V. a series of regulations in reference to the amalgamation of railway companies, but they apply only to such companies as shall be amalgamated by a special Act thereafter passed and incorporating that part of the Act. So 33 & 34 Vict. c. 70 (the Gas and Water Facilities Act, 1870) authorises two or more companies or persons supplying gas or water in any district, or in adjoining districts, to manufacture and supply gas, or to supply water, and to enter into agreements jointly to furnish and supply, and to amalgamate their undertakings.

and gas and water companies.

PART IV.

THE RIGHTS AND LIABILITIES OF PERSONS CONCERNED IN OR OTHERWISE AFFECTED BY TRANSACTIONS WHICH ARE ULTRA VIRES, AND THE LEGAL PROCEEDINGS WHICH MAY BE TAKEN IN RESPECT THEREOF.

CHAPTER I.

THE INTERFERENCE OF THE COURTS IN THE INTERNAL AFFAIRS OF CORPORATIONS.

Power of majority of partnership.

THE majority of an ordinary partnership have, while acting *bonâ fide* and apart from express provisions, full power over the operations and property of the firm. They cannot enter into engagements foreign to the purposes for which they have combined, nor employ the joint funds in support of such; but within the scope of the partnership they can compel the concurrence of a dissentient minority. The minority must, however, be fairly consulted, and have an opportunity of expressing their objections to any proposed scheme, and these reasons the majority must duly weigh and consider. On this point there are some well-known observations by

Const v. Harris.

Lord Eldon in *Const* v. *Harris* (*a*): "I call that act the act of all which is the act of the majority, provided all are consulted, and the majority are acting *bonâ fide*, meeting not for the purpose of negativing what any one may have to offer when they are met together, but for the purpose of negativing what they may after due consideration think proper to negative. For a majority of partners to say, we do not care what one one partner may say, we being the majority will do what we please, is, I apprehend, what this Court will not allow. . . . In all partnerships, whether it is expressed in the deed or not, the partners are bound to be true and faithful to each other; they are bound to act upon the joint opinion of all, and the discretion and judgment of any one cannot be excluded. What weight is to be given to it is another question—the most prominent point on which the Court acts in appointing a receiver of a partnership concern, is the circumstance of one partner having taken upon himself the power to exclude another partner from as full a share in the management of the partnership, as he who assumes that power himself enjoys. . . . . The lessees of the seven-eighths could not, without consulting the parties interested in the one-eighth, take upon themselves merely because they were lessees of seven-eighths to do those acts which could only be done by the body, or by a majority of the body

(*a*) Turn. & R. 496, 525-7.

representing the whole of the body; and the majority of the body never represents the whole of the body, except where there has been a voice called for from the majority, and submitted to and fairly overruled by the majority." His Lordship accordingly held "that the proprietors of seven shares out of eight in a theatre, had not power to alter the manner in which it had been originally agreed that the profits should be disbursed."

Powers of majorities in the cases of corporations.

The principle here so strongly enunciated applies to corporations, though perhaps with lessened force on account of the difference in the nature and purposes of these associations.

Grissell's Case.

So Kindersley, V.-C., in his judgment in *Grissell's Case* (*b*), laid down that a company is only a large partnership modified in many important particulars by special enactment, but still in essence a partnership; and that where statutes do not expressly or impliedly vary the principles to be applied, those principles which applied to an ordinary partnership are applicable to a company. Consequently, one of the principles of the law of partnership being that none of the partners can claim any debt owing to him from the partnership estate till all the creditors have been paid in full, he held that a shareholder in a company, who was also a creditor under a contract, was not in the event of the company being wound up entitled to set off the debt due to him

(*b*) *Re Overend, Gurney & Company, Grissell's Case*, L. R. 1 Ch. 528

against the calls, nor to set off against the calls a dividend which might afterwards come to him. The judgment was affirmed upon somewhat different grounds by the Lord Chancellor. The doctrine put forth by the Vice Chancellor does not hold with regard to all corporations, but with proper qualification and within limits it applies to trading corporations, at least in so far as it concerns the business to be engaged in, the management of the same, and the authority of the majority of the members.

A corporation is, of course, theoretically distinct from its members, but both it and a partnership are after all made up of natural persons. A corporation moreover, though in the eye of the law it may have an actual and separate existence, can manifest its existence and commit torts, engage in contracts, and direct other proceedings only by and through the individuals composing it. Lastly, a corporation generally, and a commercial corporation almost invariably, consists of a great number of members, a partnership of but few; it is therefore comparatively easy to find in the former a few factious individuals ready to oppose any change or innovation, and the results of such opposition can seldom be so disastrous to them personally as it would be were they members of a small firm. Consequently for all these reasons we must be careful how we apply Lord Eldon's reasoning to public companies; observing this caution, however, we shall find it applicable in the main.

I. The majority of the members of a corporation may manage its affairs, and modify its constitution in any way they please, so long as they act with *bona fides*, and do not go beyond the powers of the corporation.

Powers of the majority.

In the first place it must be repeated, by way of caution, that what the corporation itself as a united whole cannot do, *à fortiori* a majority however great of its members cannot do; what is Ultra Vires of the constituted whole must manifestly be equally so of any and each of the constituent parts.

But within the scope of the corporate affairs, the majority not merely represent but actually are for most purposes the corporation. Contracts entered into, and arrangements made or sanctioned by them, with due regard to formalities, and being authorised by the constitution of the corporation, are valid, notwithstanding the opposition or dissent of some of the members. *Lord* v. *Governor and Company of Copper Miners* (c) is an illustrative case. The bill was filed by one shareholder on behalf of himself and the others, against the company, the members of the governing body and other parties; and it impeached several transactions of that body which had been sanctioned by majorities at general

Lord *v.* Governor and Company of Copper Miners.

(c) 2 Phill. 740.

meetings of the shareholders, and amongst which was a project to vest all the property of the company in trustees for the purpose of liquidating its affairs. The defendants demurred and the demurrer was allowed, notwithstanding some vague and general charges of fraud and misconduct on the part of the defendants, and an allegation that, by the constitution of the company, no one but the governing body could convene a general meeting. The Court held, that the specific acts complained of primarily concerned the internal administration of the company, and were not clearly such as it was incompetent to a majority of shareholders to sanction.

Stupart v. Arrowsmith.

Similarly, in *Stupart* v. *Arrowsmith* (*d*), a railway scheme having proved abortive, the majority of the subscribers, at a public meeting duly convened, approved of the accounts, and dissolved the company. A bill filed subsequently by one shareholder to set aside the arrangement and open the accounts, was dismissed with costs on the ground that—apart from the plaintiff being bound by acquiescence—the proceedings having been sanctioned and adopted by the majority of the shareholders could not afterwards be disturbed.

Non-intervention of the Courts in disputes arising in the ordinary course of business.

The broad rule is that in all matters of purely internal economy the majority are supreme, and the Courts will not interfere whether before to prevent the doing of acts, or subsequently to relieve from the consequences thereof.

(*d*) 3 Sm. & G. 176; *Kent* v. *Jackson*, 2 D. G. M. & G. 49.

The leading, and perhaps the earliest, case upon this point is *Foss* v. *Harbottle* (*e*), and the principle there laid down has not since been departed from or qualified (*f*). The bill was filed by two shareholders in a statutory corporation on behalf of themselves, &c., against the five directors (three of whom had become bankrupt), and against a proprietor who was not a director, and the solicitor, and architect of the company, charging the defendants with concerting and effecting various fraudulent and illegal transactions, whereby the property of the company was misapplied and wasted, that there had ceased to be a sufficient number of qualified directors to constitute a board; that the company had no clerk or office; that in such circumstances the proprietors had no power to take the property out of the hands of the defendants, or satisfy the liabilities, or wind up the affairs of the company. It prayed that the defendants might be decreed to make good to the company the losses and expenses occasioned by the acts complained of; and for the appointment of a receiver to take and apply the property of the company in discharge of its liabilities, and to secure the surplus. The defendants demurred and the demurrers were allowed, chiefly upon the grounds that upon the facts stated, the continued existence of a board of directors *de facto* must be intended; that

Foss *v.* Harbottle.

(*e*) 2 Hare, 461.

(*f*) See *Mozley* v. *Alston*, 1 Phill. 790; *Kent* v. *Jackson*, 2 D. G. M.& G. 49; *Inderwick* v. *Snell*, 2 Mac. & G. 216.

the possibility of convening a general meeting of proprietors capable of controlling the acts of the existing board was not excluded by the allegations of the bill; and that in such circumstances there was nothing to prevent the company from obtaining redress in its corporate character in respect of the matters complained of.

The *rationale* of this decision is simple enough, viz., that the corporation being the best judge must be held the only judge of what concerns its own interests, and that consequently so long as it is acting—that is to say the majority are acting—with *bona fides*, and a due consideration for the opinions of dissentients, no appeal lies from its domestic forum. It makes no difference what is the nature of the corporation, for public or private, for religious or secular purposes; nor what the dispute, if the question be one upon which the general body is competent to determine, and if they have determined after a fair hearing of objection, the Courts will not re-hear the case. Thus in *Neate* v. *Denman* (*g*), where the plaintiff wished to withdraw from an Inn of Court, but refused to accede to the conditions imposed by the Inn upon withdrawal, Hall, V.-C., decided that this was unquestionably an affair of internal jurisdiction, and that consequently he was unable to interfere to compel the Inn to give up or modify the conditions.

The Courts will never interfere in purely internal affairs.

Neate v. Denman.

But in several cases the principle has been some-

Cases where

(*g*) W. N. 1874, p. 65.

what misconceived, and consequently extended to matters not coming within its application. It has to do only with such transactions as are *intra vires*, but it has been applied to, and held to disqualify persons from obtaining relief in respect of proceedings done or contemplated which certainly approach to, if they are not actually, Ultra Vires.

this principle has been unduly extended.

Yetts v. *Norfolk Railway Company* (*h*) is a case in point. An incorporated railway company issued new shares in pursuance of a resolution declaring the purpose of such new issue to be the raising of a sufficient amount to pay off the existing mortgage and bond debts of the company. The holder of some of the new shares filed a bill, on behalf of himself and other holders of the shares, against the directors and the company, alleging facts to shew and charging, that they were about to apply the money paid in respect of the shares otherwise than in conformity with the resolution, and praying for a declaration that the money ought to be applied according to the terms of the resolution, and for a specific performance of the agreement thereby entered into, and for an injunction. The Court allowed demurrers of the directors and the company, holding that the case fell within the principle laid down in *Mozley* v. *Alston*.

Yetts *v.* Norfolk Rail. Co.

Edwards v. *Shrewsbury and Birmingham Railway Company* (*i*), is another case where this prin-

Edwards *v.* Shrewsbury and Birmingham Rail. Co.

(*h*) 3 D. G. & Sm. 293.

(*i*) 2 D. G. & Sm. 537; *Inderwick* v. *Snell*, 2 Mac. & G. 216; *Bailey* v. *Birkenhead, &c.*,

ciple was strictly applied. Here a shareholder in an incorporated railway company filed a bill on behalf of himself and other shareholders to restrain the directors from issuing preference shares, on the ground that they were about to be issued contrary to the company's acts, and for the purpose of constructing the original line instead of the branch (for which alone additional shares were to be created), and were intended to be distributed in a manner contrary to the directions of the Act, which authorised the creation of additional shares. The bill, filed on the 22d of September, stated that the plaintiff on the 17th of September became aware of resolutions passed on the 12th of September, under which the preference shares were to be offered to the shareholders on the 23d of September, but the bill did not otherwise show that the plaintiff had not the means of procuring a suit to be instituted in the name of the corporation. The corporation and the directors demurred to the bill, and Knight-Bruce, V.-C., decided that their demurrers could not be overruled consistently with the principles stated in, or to be extracted from *Mozley* v. *Alston* and *Exeter and Crediton Railway Company* v. *Buller*, whether the proceedings sought to be restrained were legal or not.

On the bill being amended, and stating that a

Railway Company, 12 Beav. 433. Compare *Bagshaw* v. *Eastern Union Railway Company*, 7 Hare, 114, and 2 Mac. & G. 389.

majority of the shareholders supported the views of the directors, and refused to authorise the plaintiff or any other person to institute a suit in the name of the company, the Vice-Chancellor again allowed a demurrer, considering that the case as amended was still within the influence of the above authorities.

It admits of reasonable doubt whether either of the two cases last cited fell within the rule now in consideration. The matters there complained of—viz., the employment of the proceeds of shares to improper purposes—would seem rather to come under the head of Ultra Vires, strictly so called, than of mere internal arrangement. *Foss* v. *Harbottle*, as it has been judicially stated, "does not go further than this: that if the act, though it be the act of the directors only, be one which a general meeting of the company could sanction, a bill by some of the shareholders, on behalf of themselves and others, to impeach that act cannot be sustained, because a general meeting of the company might immediately confirm and give validity to the act of which the bill complains." Accordingly in the case of *Bagshaw* v. *Eastern Union Railway Company* (*j*)— from the judgment in which this extract is taken— Wigram, V.-C., determined that the application of moneys derived from a particular issue of shares was not a pure question of internal administration.

Bagshaw v. Eastern Union Rail. Co.

(*j*) 7 Hare, 114, 2 Mac. & G. 389.

Here the defendants were authorised by several Acts of Parliament to make railways from Colchester to Ipswich, Ipswich to Bury St. Edmunds and Norwich, and from Ipswich to Harwich, and for those purposes to raise monies by shares and loans, not exceeding certain sums in the whole. The same company was also, by a distinct Act, authorised to purchase and complete the Hadleigh Junction Railway, and for that purpose, by shares or loans, to raise a sum not exceeding £100,000. A suit was instituted by the proprietor of a scrip certificate for stock, forming part of the capital raised in pursuance of the Acts authorising the company to purchase the Hadleigh Junction Railway and make the Harwich line, charging that the company was about to misapply the £100,000 raised under the Hadleigh Act in the construction of the Norwich line, and seeking to restrain such misapplication. To this suit the company and the directors demurred for want of equity, but Wigram, V.-C., overruled the demurrers. On appeal, the Lord Chancellor affirmed this decision. He said: "The question really is, whether the law will permit money advanced for one purpose to be applied contrary to the wish of the owner of that money to another, and whether the bill states such a case as brings it within that principle." And after examining the facts and authorities, he decided that "the plaintiff was in equity entitled to the interposition of the Court for the purpose of keeping the company in the applica-

tion of his money to those purposes for which it was said to be advanced."

It manifestly follows that the majority from time to time may make such modifications as they think fit in the business and other matters of the corporation (*k*).

II. The Court will interfere for the general benefit of the corporation when disputes have arisen which prevent its affairs being properly carried on.

The Court will interfere temporarily for the general protection.

This was so decided in *Featherstone* v. *Cooke* (*l*). Here the board of directors of a company divided into two parties in reference to the mode of conducting the company's business. Each endeavoured to exclude the other party from the government of the company, the result being the stoppage of the company's works, and serious consequent losses to the company. Finally, one of the directors filed a bill against the company and the directors adverse to him to restrain the latter from interfering in the management. Upon motion made, Malins, V.-C., granted a temporary injunction, and appointed a receiver and manager, excluding all the directors from any voice in the management until a general meeting of the shareholders had been called, after which he discharged the receiver, and left the management in the hands of the new governing body chosen at such meeting. As to the jurisdic-

(*k*) See *Att.-Gen.* v. *Gould*, 28 Beav. 485.
(*l*) L. R. 16 Eq. 298.

tion the Vice-Chancellor observed: "With regard to private partnerships nothing is of more frequent occurrence than the quarrels of partners. If parties quarrel, oust each other from the management, or so conduct themselves that the partnership cannot go on with advantage, it is every day's practice for the Court to interfere by injunction, and appoint a receiver if necessary. With regard to public companies I apprehend the same principle is applicable. If a state of things exists in which the governing body are so divided that they cannot act together, and there is the same kind of feeling between the members as there frequently is in the case of private partnerships, it is clearly within the rule of this Court to interfere, and it will do so."

III. The Court will interfere to protect any individual member if the proceedings of the majority constitute a fraud upon him.

The majority must act with regularity and *bona fides*. They must be duly summoned, and all usual formalities must be observed in the conduct of their meetings. The minority are, of course, also entitled to notice of any meeting, and of the matters to be there transacted. More than that—they can demand a fair hearing, and that their wishes and arguments should be listened to and duly weighed (*m*).

All members entitled to be heard.

(*m*) See the judgments of Lord Eldon in *Natusch* v.

Cases in which the Court may interfere in matters of internal economy.

À fortiori, if the conduct of the majority amounts to a fraud upon, or to undue influence with respect to, the minority, the Court will protect the interests of the latter. In *Re London Mercantile Discount Company* (*n*), after a resolution to wind up the company voluntarily, several of the shareholders presented a petition complaining of certain transactions by the directors which they alleged to be fraudulent and improper, and to have caused great loss to the company, and praying that proceedings might be directed to be taken at the risk of the company in respect of such improper transactions. Page-Wood, V.-C., in the first instance, ordered the petition to stand over, to enable the sense of the company to be taken on the question of such further litigation. The petitioners, however, did not call any meeting, asserting that their votes would be overborne by the votes of the parties implicated in transactions complained of and their friends; and thereupon the petition was dismissed (*n n*). The Vice-Chancellor observed: "The Legislature has thought that the share-

Irving, and *Const* v. *Harris*, *ubi supra*. Compare *Blisset* v. *Daniel*, 10 Hare, 493.

(*n*) L. R. 1 Eq. 277. See also *Exeter and Crediton Railway Company* v. *Buller*, 5 Rail. Co. 211, and *East Pant du Lead Mining Company* v. *Merryweather*, 2 H. & M. 254, both which were suits by members of a minority, and which were ordered to stand over till the sense of the whole body could be taken.

(*n n*) But without prejudice to the petitioners at their own risk filing a bill, which—as will be seen *post*, Chap. ii., Sect. 1—any single individual can do to prevent acts or to obtain compensation for acts which are either Ultra Vires or a fraud upon the company.

holders should meet and regulate that part of their own business as they would regulate any other part of it, by the views of the majority; and, provided the votes of the majority are given fairly and reasonably, there is no ground whatever for the interference of the Court. At the same time, no doubt, it was foreseen that there might arise cases of such decided undue influence and such a cause of overbearing authority by those whose acts were sought to be impeached, as would render it desirable that the Court should interfere, and therefore in such cases there was reserved to the Court the power of superintending a voluntary winding-up by putting in force its coercive jurisdiction where anything improper should be attempted on the part of those who might endeavour to screen their own actions by procuring a voluntary winding-up. It is only by bringing the case as near as possible to the latter alternative that the petitioners could be entitled to entertain any hope of success in the attempt to obtain the order sought. I have diligently sought to ascertain, therefore, whether in truth this minority, or apparent minority, of shareholders have been overborne by improper or corrupt influence; if such a case were proved, no doubt the Court would interfere. That is one of the very objects which the Legislature had in view when it declared that, notwithstanding a voluntary winding-up, there should be a power of interference; but I cannot find any trace of that."

The Vice-Chancellor accordingly, being of opinion that the applicants had not satisfactorily proved

their allegations, dismissed the petition. But this, as he said, simply left them in their original position. "By abstaining from interference I throw no obstacle in the way of the petitioners prosecuting any litigation they may think right at their own risk—I only throw on them the risk of such litigation."

Fraser v. *Whalley* (*o*) is another case somewhat in point. Here directors of a railway company, proposing to issue shares in pursuance of an old resolution passed for a particular purpose, were restrained from so doing at the suit of a shareholder, although it was asserted that he belonged to a small minority, and that the majority were favourable to the issue of shares proposed.

SECTION II.—HOW REDRESS MAY BE OBTAINED BY ONE OR MORE MEMBERS COMPLAINING OF THE PROCEEDINGS OF THE MAJORITY.

But though we must consider it as fully established that the Court will interfere on behalf of and protect a minority against proceedings amounting to fraud on the part of the majority, yet it is by no means clear when and how, under what precise circumstances, and by what mode of application its interference can be invoked. Perhaps, however, the following statement, as far as it goes, will be found correct and borne out by the authorities.

(*o*) 2 H. & M. 10. Compare *Hattersley* v. *Shelburne*, 31 L. J. (Ch.) 873, 10 W. R. 881; *Bluck* v. *Malalue*, 27 Beav. 398.

First.—In respect of what matters.

(a.) *When the matters in question are a fraud on the corporation.*

Ratification by majority of illegal acts.

First, the majority may confirm and condone such, provided they are not Ultra Vires, thereby relieving the guilty parties of their liability; but, in determining the majority, the votes of the guilty parties themselves must be excluded. This was done in *Atwool* v. *Merryweather* (*o o*), where the number of votes for rescinding a fraudulent contract was 324, and for upholding it 344, but of the latter 106 belonged to the persons implicated.

Secondly, the minority complaining, who by thus striking off improper votes form the acting majority and consequently are competent in respect of the matters in question to act for and represent the corporation, may then file a bill to obtain redress, either in the name of the corporation against the wrong-doers simply, or in their own behalf—*i.e.*, one or more members on behalf of themselves and all the shareholders except such as are defendants thereto, who will include both the guilty parties and the corporation itself, as a formal defendant (*p*).

Proceedings by a member on behalf, &c.,

Under some circumstances it would appear from the decision in *Gregory* v. *Patchett* (*q*) that a suit

(*o o*) L. R. 5 Eq. 464. Compare *Re London Mercantile Discount Company, ubi supra.*

(*p*) *Atwool* v. *Merryweather, ubi supra.*

(*q*) 33 Beav. 595. See *Hichens* v. *Congreve*, 4 Russ. 562.

may be instituted by one or more of the members aggrieved—on behalf of himself and all other, &c.—against the wrong-doers only. But it is submitted that such a suit would be defective, and that in every case where the question, whether of Ultra Vires or of fraud, is one which concerns the corporation itself, the corporation must be a party either as plaintiff or as defendant. A decision in the absence of the corporation—which, be it remembered, is distinct from even the whole body of its members—would be a decision affecting the rights and liabilities of an individual not before, and not heard by, the Court.

against the guilty parties only.

Corporation must be a party, *semble*.

Thirdly, a minority, and any member thereof on its behalf, may file a bill asking for leave to institute proceedings in the corporate name and at the corporate risk (*r*), and this, perhaps, was till recently the more proper method, whenever it was doubtful either whether the acts in dispute were fraudulent, or whether the persons favouring the same and not implicated therein, if held to be fraudulent, formed the majority. However, since the decision in *Atwool* v. *Merryweather*—"it would be idle to go through the circuitous course of saying that leave must be obtained to file a bill for the company"—it seems that this course is unnecessary, and that, if the bill be framed in either of the forms above indicated, all and every question arising therein and calling for decision will be decided.

Suit for leave to use the corporate name.

(*r*) See Page-Wood, V.-C., in *Atwool* v. *Merryweather*,

(b.) *What matters will be considered a fraud on the minority.*

Intervention of the Court to protect the minority.

It is often extremely difficult to discriminate fraud on a corporation from fraud upon a section only of the members thereof. What concerns, what militates against the rights of the whole body, will generally to a greater or less degree similarly concern and militate against the rights of individuals. But it is not, on the other hand, equally true that the interests of the members separately are synonymous with those of the members collectively. What prejudices one particular corporator or class of corporators may not be prejudicial—indeed, may even be beneficial—to the rest of the community. Or a certain transaction may be harmful in a proportionate degree to every member and advantageous to none, but some may desire to pass it over, while others may wish to seek redress for the same. Or, without raising any question of loss or benefit, the many may actively urge or passively acquiesce in the prosecution of certain matters which the few object, and if they have the power, decline to engage the corporation in. The exact point to be determined

ubi supra. This is not unseldom done in winding up—see *Imperial Bank of China, &c.*, L. R. 1 Ch. 339; *Bank of Gibraltar and Malta*, L. R. 1 Ch. 69; *Downes* v. *Ship*, L. R. 3 H. L. 343; and compare 25 & 26 Vict. c. 88, ss. 91, 139.

is—when will the Courts interfere on behalf of the minority thus refusing to submit to arrangements and proceedings of which they disapprove? It is, of course, assumed that the affairs in question are *intra vires*, are affairs of internal government only, and *primâ facie* within the scope of corporate authority. If Ultra Vires, the difficulty of decision is far simpler, as will be seen in the next chapter.

As far as can be gathered from cases not always reconcileable, and sometimes even conflicting, it appears that the minority will be protected under the following circumstances:

(1) Violation of rights of a member or class of members.

First. When there is a direct and unjustifiable attack upon, and violation of, the rights of some one member or class of members. Thus, at the suit of preference shareholders, companies and their directors have been repeatedly restrained from paying dividends in derogation of the contracts entered into with them (*s*). What are the exact privileges of such shareholders may not be altogether clear, and even call for judicial determination (*t*), but whatever they are it is beyond the power of the corporation to vary them.

Illegal disfranchising.

So powers of making bye-laws and of disfranchising must be employed in a proper manner. In *Adley* v. *Whitstable Company* (*u*), a member had

(*s*) *Henry* v. *Great Northern Railway Company*, 4 K. & J. 1, and 1 D. G. & J. 606; and cases cited *ante*, pp. 132–34.

(*t*) See especially *Maughan* v. *Leamington Gas Company*, 15 W. R. 333.

(*u*) 19 Ves. 304, 1 Mer. 107.

been, in pursuance of a bye-law, excluded from participation in the company's profits, but Lord Eldon, holding the exclusion to be under the circumstances not only uncalled for but unlawful, decreed that the plaintiff should upon terms be restored to his original rights.

Illegal forfeiture of shares.

And as already seen, powers to forfeit shares and the like must be put in force *bonâ fide*, and, when the circumstances require, not for the purpose of punishing or damaging a shareholder (*v*).

(2) Acts which unduly affect some members of the corporation.

Secondly. When the corporation is doing acts of such a kind or in such a way as to affect unduly and unfairly some of its members only, when these acts can be so done, and consequently if done at all ought to be so done, as to affect in a proportionate degree every member.

Unequal liability to pay calls.

This chiefly occurs in the making of calls. It has already been pointed out that this is a trust to be exercised for the general benefit. Consequently it necessarily follows that calls must be levied alike, as to time, convenience, and amount, and every other circumstance, upon every shareholder.

Preston *v.* Grand Collier Dock Co.

In *Preston* v. *Grand Collier Dock Company* (*w*),

(*v*) *Hart* v. *Clarke*, 6 D. G. M. & G. 232; *Stubbs* v. *Lister*, 1 Y. & C. C. C. 81; *Watson* v. *Eales*, 23 Beav. 294. See *Sweny* v. *Smith*, L. R. 7 Eq. 324, where it was decided that an illegal forfeiture of shares is not a wrong peculiar to the shareholder concerned, but a matter affecting the whole corporation, and to annul which such shareholder may consequently file a bill on behalf of himself and all other, &c.

(*w*) 11 Sim. 326.

nine persons had subscribed for 1000 shares each under special circumstances and to benefit the company, and afterwards they made a declaration that they held these shares on trust for the company. Subsequently the company in public meeting unanimously resolved that these shares should be transferred to the secretary, and calls were made omitting these subscribers. Shadwell, V.-C., however, on bill filed by one of the other shareholders to render these nine liable, held that the calls must be made upon them:—"This Court never would allow the directors of a company so to proceed as to require some shareholders to pay a deposit and calls, and not to require others to make similar payments. It is quite obvious to me that no fraud was intended, and that the thing really meant was a benefit to all the subscribers—namely, that the subscribers should get the Act of Parliament they wished for. But, nevertheless, as that purpose was accomplished by these nine gentlemen becoming shareholders of 1000 shares each, my opinion is that there has been an error which this Court will set right—namely, that when the directors thought proper to make the calls as they did, they stopped short of that which was their duty, and that they ought to have gone on to direct the same sums to be paid upon each of those shares as had been directed to be paid upon the other shares which were held by those who were called the registered shareholders. Therefore it is evident that, in whatever manner it is to be done,

this Court will rectify the error that has been made, and will take care that all the shareholders shall be put upon the same footing with respect to the liability to pay calls."

(3) Acts which are for the general benefit, but injurious to particular persons.

Thirdly. When the corporation, and more frequently the governing portion thereof, are employing powers vested in them for the general good to the special detriment of particular individuals.

Perhaps the best illustrations of this principle occur in connection with the transfer of shares. The directors of companies have not impliedly any discretion as to refusing to register a transfer of shares even in cases where the proposed transfer would be contrary to the interests of the shareholders (*x*). Very frequently such a discretion is expressly conferred on them by the articles of association. The discretion so given must, however, be exercised reasonably—for instance, a refusal to make any transfer at all to anybody would not be reasonable, and the Court would control such an improper exercise of the power (*y*).

Refusal to transfer shares.

Persons not

It should also here be mentioned by way of

(*x*) *Re Smith, Knight, & Company, Weston's Case*, L. R. 4 Ch. 20. But as was observed by the Lord Justice Selwyn, "No doubt, if the directors had reason to believe that the transaction was fraudulent or fictitious, they might refuse to be partakers in any such fraudulent or fictitious transaction." L. R. 4 Ch. 30. And compare *Re National and Provincial Marine Insurance Company, ex parte Parker*, L. R. 2 Ch. 685.

(*y*) *Robinson* v. *Chartered Bank*, L. R. 1 Eq. 32.

caution that however harshly or cruelly, judged by the standards of morality or the customs of society, a corporation, or a *quasi*-corporate body, or a majority of its members—acting, it may be, against the wish of a minority—are proceeding with respect to an employée or other person not a member of their body, the Courts cannot interfere on behalf of the aggrieved party upon any ground connected with the internal administration. The person so complaining must apply to the Courts upon some ground of law or equity, some right peculiar to himself which has been infringed. Moral considerations are insufficient. A corporate body had not in Coke's time, and it has not now, a soul, and therefore it may, and not unseldom does, deal with its servants and others compelled to trust to its good faith with great harshness, but the Courts can only censure such proceedings, and not interfere to prevent them. If the party damnified thereby cannot allege some fraud or legal injustice to himself personally, or some legal abuse or misuse of the corporate powers which may affect the public, the decision of the corporate tribunal will as against himself be final, and not examinable by any ulterior authority (*z*).

members of corporations cannot ask the Courts to interfere.

(*z*) *Hayman* v. *Governing Body of Rugby School*, W. N. 1874, pp. 73, 74 ; *Whiston* v. *Dean and Chapter of Rochester*, 7 Hare, 532, 17 Q. B. 1.

Secondly.—Nature of proceedings when the minority are complaining.

Assuming it established that the proceedings—whether styled fraud, undue influence, or what not—are of such a description as to entitle the parties specially aggrieved to some relief in respect thereof, the next and main question is as to the means by which the relief can be obtained.

Application to be made to the Court of Chancery.

The suit must usually, perhaps invariably, be brought in Chancery. A Court of Law recognises the corporation only, not its members as distinct from and having rights against it, nor *d fortiori* one class of members as endued with powers and privileges, or subject to duties and liabilities, not in their ordinary capacity of citizens, but by virtue of their status as corporators, against or with respect to another class or section of members. And even if a Common Law tribunal could, under peculiar circumstances, take cognisance of such rights and duties and of disputes arising therefrom, the only redress it could afford the sufferers would be a money compensation by way of damages. But what they need is, not so much recompense for wrong already inflicted, as a security against future transactions similar to the past; and for this redress the intervention of Equity must be sought.

The frame of the suit.—Plaintiffs.

Proper parties to a suit.

If only one individual be aggrieved, then that one alone will be plaintiff (*a*), and the corporation—and if deemed advisable the acting members—the defendants. The relief asked for must, of course, vary with the circumstances, but usually includes a prayer for an injunction to restrain the continuance or a repetition of the conduct complained of.

Plaintiff suing on behalf of a class.

But when the wrong is actually or potentially to a class or number of the members, then one or more of these will be the actor or actors, the proceedings being instituted by him or them on behalf of all. But how to express this common interest is scarcely yet determined. In *Edwards* v. *Shrewsbury and Birmingham Railway Company* (*aa*) the plaintiff sued "on behalf of himself and all other the shareholders in the Shrewsbury and Birmingham Railway Company, except such of the other shareholders of the said company as are respectively represented by those shareholders hereinafter named as defendants hereto;" but the Vice-Chancellor, though he did not

(*a*) Compare *Fawcett* v. *Laurie*, 1 D. G. & Sm. 192, where one shareholder was not allowed to sue on behalf, &c., to restrain directors from paying a dividend already declared, with *Sweny* v. *Smith*, *ante*, p. 487, n. (*v*); and see *Stevens* v. *South Devon Railway Company*, 9 Hare, 313.

(*aa*) 2 D. G. & Sm. 537. See *White* v. *Carmarthen, &c., Railway Company*, 1 H. & M. 786, 33 L. J. (Ch.) 93; and *Carlisle* v. *South-Eastern Railway Company*, 1 Mac. & G. 689.

decide this point, doubted whether this described with sufficient clearness and precision the persons on whose behalf the suit was brought. In *Bailey* v. *Birkenhead Railway Company* (*b*) the title was "on behalf of himself and all others the holders of shares of £31 each in the company, except such (if any) of the defendants as were holders of such shares." Some of the holders of the £31 shares had paid their calls and some had not, and the Vice-Chancellor considered the bill defective as to parties in thus suing on behalf of all such holders (it being alleged that the calls were made for an improper purpose) and in not sufficiently alleging that the holders of the other shares were represented by the defendants. In *Bagshaw* v. *Eastern Union Railway Company* (*c*), the suit was "on behalf of himself and all other the proprietors of scrip certificates for perpetual six per cent. stock, 1849, in the Eastern Union Railway Company, who should come in and seek relief under and contribute to the expenses of the suit, other than and except the eighteen defendants." It was objected that, as there might be a conflict of interests between the parties whom the plaintiff affected to represent, the suit could not be thus brought, but the Vice-Chancellor held that the bill was properly framed.

Where some

In the above cases it will be observed that though

(*b*) 12 Beav. 433. Similarly in *Yetts* v. *Norfolk Railway Company*, 3 D. G. & Sm. 293.

(*c*) 7 Hare, 114.

many persons were affected by the acts in question, they were not necessarily affected to the same degree or even in the same way, so that some of them might even have approved of the arrangements. Whenever this is so it is necessary to make the latter parties defendants, naming one or more amongst them as representatives of the others, and to use such language in specifying the plaintiffs as clearly limited them to the parties complaining (*d*). In every suit of this kind the persons upon whose behalf it is brought must be necessarily interested in obtaining the relief sought, *modo ac forma;* none having conflicting claims can be joined with them (*e*), while the defendants will include actually or by representation all the opposing interests.

of the class are differently affected.

Sometimes the wrong is by its very nature a wrong to a definite class, or to a group of shareholders bearing a particular description—for instance, when a company is doing or about to do acts in derogation of the rights of its preference shareholders. In such case, evidently one member of the class or group may represent the others, and there will be none to oppose. Thus in *Henry* v. *Great Northern Railway Company* (*f*), the suit was by the plaintiffs

(*d*) As in *Kent* v. *Jackson*, 2 D. G. M. & G. 49; and *Cramer* v. *Bird*, L. R. 6 Eq. 143. See *Williams* v. *Salmond*, 2 K. & J. 463.

(*e*) See *Jones* v. *Garcia Del Rio*, T. & R. 297, 300; *Weale* v. *West Middlesex Waterworks*, 1 J. & W. 358, 370; *Carlisle* v. *South-Eastern Railway Company*, 1 Mac. & G. 689; *Thomas* v. *Hobler*, 4 D. G. F. & J. 199; *Hallows* v. *Fernie*, L. R. 3 Ch. 467.

(*f*) 4 K. & J. 1; 1 D. G. & J. 606, and 27 L. J. (Ch.) 1;

"on behalf of themselves and all others the holders of preference stock in the Great Northern Railway Company. So in *Coates* v. *Nottingham Waterworks Company* (*g*), it was by one person "on behalf of himself and all others the holders of shares in the Nottingham Waterworks Company, created previously to the 12th May, 1854, or issued in lieu of shares so created, except the defendants."

Where the plaintiff stands alone.

Whenever the injury is of this description any member of the class may thus sue, although he stand alone in his complaint, and although some even take a contrary view, but in this latter case they must be represented among the defendants. Moreover, if the actual plaintiff on the record be himself precluded from suing, the proceedings cannot be, as it were, revived and continued by others in the same position, and desirous to continue them. "As on the one hand a plaintiff who has a right to complain of an act done to a numerous society, of which he is a member, is entitled effectually to sue on behalf of himself and all others similarly interested, though no other may wish to sue, so although there are a hundred who wish to institute a suit and are entitled to sue, still if they sue by a plaintiff only who has personally precluded himself from suing, that suit cannot proceed" (*h*).

Corry v. *Londonderry and Enniskillen Railway Company*, 29 Beav. 263.

(*g*) 30 Beav. 86.

(*h*) *Burt* v. *British Nation Life Assurance Association*, 4 D. G. & J. 158, 174, 25 L. J. (Ch.) 731. Compare *Scarth* v.

A suit cannot thus be brought for a wrong peculiar to the plaintiff.

It must be clearly borne in mind that it is only when the wrong is actually or potentially to a class that a shareholder can thus sue on behalf of himself and others, the "others" being either some particular group of members or the whole of them, according as a portion or the whole are in exactly the same position and interest as himself. It is by no means clearly established what will constitute such a community of interest. Thus with regard to persons induced by fraud to become shareholders in existing companies or subscribers to inchoative companies, it was decided in *Croskey* v. *Bank of Wales* (*i*), that a bill will not lie by one subscriber on behalf of himself and others to obtain a return of their subscriptions, while in *Macbride* v. *Lindsay* (*j*) the exact contrary was determined—it being there held that a shareholder induced by the fraudulent representations of the directors of a company to become a member could not sue, on his own behalf merely, the company and the directors for a rescission of his contract and the necessary incidental relief, but must make the others who had been similarly defrauded parties to his suit.

Chadwick, 14 Jur. 300; and see *White* v. *Carmarthen, &c., Railway Company*, 1 H. & M. 786.

(*i*) 4 Giff. 314, 9 Jur. 595.

(*j*) 9 Hare, 574. Similarly decided in *Seddon* v. *Connell*, 10 Sim. 58, and *Beeching* v. *Lloyd*, 3 Drew. 314; but these cases must be now considered overruled by *Kisch* v. *Venezuela Railway Company*, L. R. 2 H. Lds. 99; and *Smith* v. *Reese River Mining Company*, L. R. 4 H. Lds. 64. See also *Menier* v. *Hooper's Telegraph Works*, L. R. 9 Ch. 350.

The plaintiff may not pray alternative relief.

Sweny v. *Smith.*

So also a bill may not have a double aspect—it may not pray relief on behalf of all the shareholders, or failing that, on behalf of himself (*k*). But in *Sweny* v. *Smith* (*l*), an objection of this kind was overruled. The plaintiff was a shareholder in a company whose shares had been forfeited, as he contended, improperly. He filed his bill on behalf, &c., first to be relieved from the forfeiture, and secondly to set aside a contract entered into by his company for the purchase of certain patents. Lord Romilly, M.R., overruled the objection of multifariousness, mainly upon the ground that the suit was occasioned in the first instance by the forfeiture, and that till the validity of this had been determined, it could not be decided whether or not the plaintiff was entitled to raise the other question raised in the suit.

As to the Defendants.

Defendants.

Among the defendants, as has been just observed, must appear personally or by representatives all the parties concerned in objecting to the suit (*m*). Consequently we must have first the corporation itself (*n*); secondly, the governing body, or at least those of them who are implicated in the objectionable pro-

(*k*) *Thomas* v. *Hobler*, 8 Jur. N. S. 125, 4 D. G. F. J. 199.

(*l*) L. R. 7 Eq. 324.

(*m*) *i.e.*, when it is merely an internal matter. If it be a question of Ultra Vires, any one member may sue on his own behalf alone.

(*n*) See, however, *Gregory* v. *Patchett*, *ante*, p. 484; and *Daugars* v. *Rivaz*, 28 Beav. 233.

ceedings, they being excepted from the description of the plaintiffs (*o*); thirdly, representatives of other sections, if any, of the members who favour the proceedings in question (*p*); lastly, representatives of that portion of the class suing which, if any, similarly favour the said proceedings, that portion being by proper words also expressly excepted from the description of the plaintiffs (*q*).

(*o*) Because the governing body are the persons to be affected by the decree in the first instance. Compare *Winch* v. *Birkenhead, &c., Railway Company*, 5 G. D. & Sm. 562.

(*p*) (*q*) *Kent* v. *Jackson*, 2 D. G. M. & G. 49, and the cases cited, *ante*, pp. 493–6.

CHAPTER II.

PROCEEDINGS TO RESTRAIN ULTRA VIRES PROCEEDINGS.

SECTION I.—BY THE MEMBERS OF CORPORATIONS.

I. Any one member of a corporation may sue to restrain acts which are Ultra Vires.

THIS proposition is now so completely admitted, that it is needless to cite authorities in support. The only points necessary to be adverted to are, first, the amount of interest which will constitute membership; and, secondly, the frame of the suit.

First.—The Amount of Interest.

1. In the case of corporations other than joint-stock companies, any member may sue (*a*); but he must be a full and complete member for all purposes, and not simply a person having an inchoative right of membership (*b*).

(*a*) See for example *Ward* v. *Society of Attornies*, 1 Coll. 370; *Adley* v. *Whitstable Company*, 19 Ves. 304; *Rendall* v. *Crystal Palace Company*, 4 K. & J. 326.

(*b*) Compare *Whiston* v. *Dean and Chapter of Rochester*,

2. As regards joint-stock companies, any complete shareholder or stockholder may be a plaintiff, but he must actually be a member of the company, and therefore a person who has sold his shares, even though he may still remain under liabilities, cannot institute proceedings (*c*). So may many other persons having analogous interests—a shareholder who has not complied with all the requisite formalities (*d*); or the equitable owner of shares (*e*); or a scrip holder (*f*); or a policy holder (*g*). But it has been said that a trustee cannot sue, since he is not actually concerned in the company (*h*).

3. Any one who would be liable upon a dissolution to contribute to the expenses thereof, or to the liquidation of the debts of the company. Numerous individuals there are who can repudiate their membership, but who till such repudiation are to all intents and purposes members. These on a dissolution, if their names still remain upon the corporate roll, are placed on the list of contributors. Amongst such will be included

7 Hare, 532. See, however, *Spackman* v. *Lattimore*, 3 Giff. 16.

(*c*) See *Doyle* v. *Muntz*, 5 Hare, 509; *Scarth* v. *Chadwick*, 14 Jur. 300.

(*d*) *Spackman* v. *Lattimore*, 3 Giff. 16.

(*e*) *Great Western Railway Company* v. *Rushout*, 5 D. G. & Sim. 290.

(*f*) *Bagshaw* v. *Eastern Union Railway Company*, 2 Mac. & G. 389.

(*g*) *Kearns* v. *Leaf*, 1 H. & M. 681; *Aldebert* v. *Leaf*, 12 W. R. 462, 3 N. R. 455. Compare *Evans* v. *Coventry*, 5 D. G. M. & G. 911.

(*h*) *Doyle* v. *Muntz*, 5 Hare, 509.

(a) persons induced by fraud to become members (*i*);

(b) the holders of shares or stock improperly issued (*j*);

(c) the owners of shares nominally paid up, but which have not been paid up in a manner satisfying the requirements of the law (*k*);

(d) transferrors, whose transfers have been made under circumstances which enable the company, or the liquidators, to set aside and cancel such transfers (*l*);

(e) *semble* persons liable to be placed upon "B" or other supplemental lists of contributories, and all persons whose responsibility for the corporate transactions does not cease *ipso facto* with their loss of membership, but only after the lapse of a period of longer or shorter duration.

No authorities can be quoted where a person coming within the classes (d) or (e) had sued to prevent Ultra Vires proceedings, but as such proceedings tend directly to add to his liability, and as

(*i*) See *Oakes* v. *Turquand*, L. R. 2 H. Lds. 325, and similar decisions.

(*j*) See, for instance, *Worth's Case*, 4 Drew. 529, 28 L. J. (Ch.) 589; *Feiling and Rimington's Case*, L. R. 2 Ch. 714; *Sewell's Case*, L. R. 3 Ch. 131.

(*k*) See *Forbes and Judd's Case*, L. R. 5 Ch. 270; *Fothergill's Case*, L. R. 8 Ch. 270.

(*l*) See especially *Williams' Case*, L. R. 9 Eq. 225, *n.*

in neither case, and more especially in the former, has the person ceased absolutely to be a member, it is submitted that he is entitled like ordinary members to the protection of the Courts.

4. A company which is the owner of shares in another company may sue in respect of these shares (*m*).

5. The smallness of the plaintiff's interest is no objection, and it would seem that where he is suing on behalf of himself and all other shareholders, the ordinary rule as to suits for a subject matter less than £10 does not apply (*n*).

Smallness of interest no objection

Secondly.—As to the frame of the suit.

What has been said in the last chapter as to the power of one person, member of a class, to institute legal proceedings to redress an injury to that class, will apply with qualifications to injuries arising from Ultra Vires transactions, as to such as are caused by the unlawful acts of a majority. The chief differences in the two cases arise from the fact that every proceeding which is Ultra Vires gives to any corporator a right to sue to prevent its repeti-

(*m*) *Great Western Railway Company* v. *Oxford, &c., Railway Company*, 3 D. G. M. & G. 341; *Bank of Switzerland* v. *Bank of Turkey*, 5 L. T. (N. S.) 549. Compare *Great Western Railway Company* v. *Rushout*, 5 D. G. & Sm. 290.

(*n*) *Seaton* v. *Grant*, L. R. 2 Ch. 459; *McDonell* v. *Grand Canal Company*, 3 Ir. (Ch.) 578.

tion, even though every other member were arrayed against him.

This being so, the chief points to be noticed in respect of the frame of such a suit are—first, that the person suing must really and *bonâ fide* be applying for redress upon his own behalf, and, secondly, that when the acts in question compromise, directly or indirectly, public interests, the public must be represented (which matters are considered more fully in the following pages); thirdly, that the third parties, if any, concerned in the Ultra Vires proceedings must be made parties as defendants (*n a*); and fourthly, that the proceedings may be instituted by the plaintiff either on behalf of himself and all other the members of the corporation or, at his option, simply in his own name and behalf (*n b*).

II. The suit must really be that of the nominal plaintiff.

A person may sue from improper motives, but

The mere fact that the plaintiff is a member of another company, or upon other grounds is opposed to the defendant company, will not debar him from

(*n a*) *Salomons* v. *Laing*, 12 Beav. 377; *Hodgson* v. *Powis*, 1 D. G. M. & G. 6, 21 L. J. (Ch.) 17; *Hare* v. *London and North Western Railway Company*, 1 J. & H. 252. See cases in next note.

(*n b*) *Hoole* v. *Great Western Railway Company*, L. R. 3 Ch. 262, 272; *Menier* v. *Hooper's Telegraph Works*, L.R. 9 Ch. 350; and *Bird* v. *Bird's Patent, &c., Sewage Company*, L. R. 9 Ch. 358.

taking proceedings. A corporation may not engage in matters which are Ultra Vires, and any *bonâ fide* member may for any reason whatever decline to permit the corporation to do so. A person may even buy shares with the open and avowed object of instituting proceedings to restrain the company from committing unauthorised acts, and so to compel them to buy off his litigation (*o*); but the plaintiff on the record must be the person urging on the suit —he cannot be the mere nominee and tool of others in the background (*p*); and in one case Malins, V.-C., directed a bill filed under such circumstances to be taken off the file (*q*).

must really be in his own behalf.

SECTION II.—PROCEEDINGS BY OR ON BEHALF OF THE PUBLIC.

It may be laid down as a general and unqualified proposition that when Ultra Vires acts of any description prejudicially affect the interests of the public, the Attorney-General must be a party to the suit.

(*o*) *Seaton* v. *Grant*, L. R. 2 Ch. 459; *Bloxam* v. *Metropolitan Railway Company*, L. R. 3 Ch. 337. See *Orr* v. *Glasgow, &c., Railway Company*, 3 Macq. 799, and cases cited in the next note.

(*p*) *Forrest* v. *Manchester, &c., Railway Company*, 4 D. G. F. & J. 126; *Rogers* v. *Oxford, &c., Railway Company*, 2 D. G. & J. 662; *Filder* v. *London, Brighton, &c., Railway Company*, 1 H. & M. 489. Compare *Thomas* v. *Hobler*, 4 D. G. F. & J. 199.

(*q*) *Robson* v. *Dodds*, L. R. 8 Eq. 301.

Where the public are concerned the Attorney-General must be a party.

Under many circumstances the Court of Chancery has, on public grounds, jurisdiction to prevent corporations acting in various ways, or contrary to the intent for which they have been created. The public, however, must be represented in all applications relating to such matters, and this is done by the intervention of the Attorney-General. No single person, whether a member of the corporation in question (*r*) or not, is able on his own account, and of his own motion, to call upon the Court to interfere for his special protection. The wrong he complains of is not confined to himself—no right or privilege peculiar to himself is violated—the wrongs inflicted and the rights invaded affect the public, and the public consequently must be a party to the proceedings (*rr*). The occasions upon which the Court will exercise jurisdiction to restrain the doing of acts of this kind, seem to fall under the three following heads.

When a corporation is abusing powers given for public purposes;

First. When a corporation, or quasi-corporate body, has been created for the accomplishment or carrying out of public objects. In all such cases the powers possessed by the corporation have been conferred upon it, not for the advantage of itself or its individual members, but for the public weal.

(*r*) *Evan* v. *Corporation of Avon*, 29 Beav. 144.

(*rr*) *Stockport District Waterworks Company* v. *Corporation of Manchester*, 9 Jur. (N. S.) 267; *Pudsey Coal Gas Company* v. *Corporation of Bradford*, L. R. 15 Eq. 167.

Any employment of such powers, save and except for the public purposes, and those special public purposes for the advancement of which they were designed, is consequently Ultra Vires. Under this head will be included River, Harbour, Dock, Navigation, Fishery, and other similar Commissioners; Turnpike Trustees; Drainage, Sanitary, Sewage, and the like authorities; Boards of Health; Guardians of the Poor; and analogous bodies.

or is committing a breach of trust;

Secondly. When the corporation holds its funds and property, whether the whole or a portion thereof, in trust for public purposes. The basis of the jurisdiction here is rather the trust that has been impressed on the corporate assets, than the public purposes to which they are to be applied. It is on this ground, as has already been seen, that the Court of Chancery supervises many ecclesiastical and eleemosynary corporations, where usually its jurisdiction is excluded by that of the visitor. Within his own province, that is to say, in matters of internal arrangement, the decisions of the visitor, *mala fides* apart, are final (*s*); but his jurisdiction does not extend to, or at least does not oust, that of Chancery in the case of trusts. Therefore if a trust can be shown to exist, whether for secular or religious matters (*t*), and whether there be or be not a visitor,

(*s*) See *Whiston* v. *Dean and Chapter of Rochester*, 7 Hare, 532, 17 Q. B. 1; *Thompson* v. *University of London*, 33 L. J. (Ch.) 625; *Rex* v. *Bishop of Ely*, 2 T. R. 290.

(*t*) See *Daugars* v. *Rivaz*, 28 Beav. 233.

the Court will take cognisance of such trust, and will if duly called upon enforce the observance of the same, and restrain proceedings inimical thereto as being Ultra Vires.

or is acting adversely to public policy.

Thirdly. When any corporation is doing acts detrimental to the public welfare, or hostile to public policy. The right of the Attorney-General to intervene on these grounds was fully established in *Att.-Gen.* v. *Great Northern Railway Company* (*u*), where the defendants had engaged in an illegal trade in coals. It was objected that it was not competent for him to file an information, but Kindersley, V.-C., said, "On this point I entertain no doubt whatever. Wherever the interests of the public are damnified by a company established for any particular purpose by Act of Parliament, acting illegally and in contravention of the powers conferred upon it, I conceive it is the function of the Attorney-General to protect the interests of the public by an information; and that where, in the case of an injury to private interests, it would be competent for an individual to apply for an injunction to restrain a company from using its powers for purposes not warranted by the Act creating it, it is competent for the Attorney-General, in cases of injury to public interests from such a cause, to file an information for an injunction."

Att.-Gen. v. Great Northern Rail. Co.

When the

The above then being the grounds of the juris-

(*u*) 1 Dr. & Sm. 154.

diction of the Court of Chancery in this behalf, the next point is when can the Attorney-General direct proceedings on behalf of the public? He may do so whenever public interests have been damnified, or will manifestly be damnified, in the result by transactions which are now taking place. And it would seem from the judgment in *Ware* v. *Regent's Canal Company* (*v*), that he may do so whenever a corporation is going beyond its special powers, even though no definite injury has been done or is likely to be done to the public. "Where there has been an excess of the powers given by an Act of Parliament, but no injury has been occasioned to any individual, or is imminent and of irreparable consequences, I apprehend that no one but the Attorney-General, on behalf of the public, has a right to apply to this Court to check the exorbitance of the party in the exercise of the powers confided to him by the Legislature."

Att.-Gen. may interfere.

As has been said, the Attorney-General must always be a party when the matter is one affecting the public generally, and not any one person in particular; and if he refuses to be plaintiff either *ex officio*, or at the relationship of persons complaining, the parties applying to the Court must make him a defendant (*w*).

Frame of the suit.

Any person specially aggrieved by the wrongs

(*v*) 3 D. G. & J. 212, 228.
(*w*) *Lang* v. *Purves*, 8 Jur. (N. S.) 524; *Temple* v. *Flower* 41 L. J. (Ch.) 604.

or otherwise interested in or affected by the transactions in question, may *proprio motu*, and without adding the Attorney-General, sue for his own protection and to enforce his own rights (*x*). He may also, if public interests are directly or indirectly affected by the matters complained of, join the Attorney-General as plaintiff, and file a compound bill and information (*y*).

Daugars v. *Rivaz.*

The corporation itself ought always to be a party, but in *Daugars* v. *Rivaz* (*z*), where the plaintiff complained that he had been wrongfully dismissed from his post, and filed his bill for restoration thereto against the governing body only, an objection that the corporation ought to have been made a defendant was overruled, for the reason that the corporation had not for a long series of years been kept up by the appointment of the members necessary to constitute it.

Effect of acquiescence.

Finally, it should be observed that lapse of time is no bar—the public cannot, like a private individual, be bound by acquiescence in a breach of trust or other illegal act.

(*x*) See per James, V.-C., in *Wilson* v. *Furness Railway Company*, L. R. 9 Eq. 28, 34. Compare *Cook* v. *Mayor, &c., of Bath*, L. R. 6 Eq. 177, and the similar cases.

(*y*) See *Att.-Gen.* v. *Vivian*, 1 Russ. 226, 233; *Skinners' Company* v. *Irish Society*, 12 Cl. & Fin. 425; *Att.-Gen.* v. *Wilson*, 1 Cr. & Ph. 1; *Att.-Gen.* v. *Earl of Lonsdale*, L. R. 7 Eq. 377.

(*z*) 28 Beav. 233. See, also, *Gregory* v. *Patchett*, *ante*, p. 484.

SECTION III.—PROCEEDINGS BY THIRD PARTIES.

Upon this point little need be said. The whole of the law, in so far as the present subject is concerned, may be summed up in the two statements—first, that as no person can institute legal proceedings on account of illegal acts, however great their detriment to the public or to others than himself, whether to obtain damages for them or to restrain their repetition, unless he has been personally damnified, so neither can he do so if the acts are Ultra Vires of a corporation instead of a private individual. Secondly, if on the other hand a private person be wronged by such acts he may in every case sue for damages or to restrain them, and that although the matter complained of would not have been a tort if done by an ordinary citizen. In a word, torts committed by corporations stand, as regards legal proceedings by aggrieved parties in respect thereof, in exactly the same position as torts by private persons, with the single qualification arising from the doctrine of Ultra Vires that every act directed or concurred in by a corporation in excess of its powers will, if it causes harm to any third party, be a tort, and give to such party a right of action.

CHAPTER III.

LIABILITY FOR PROCEEDINGS WHICH ARE ABSOLUTELY ULTRA VIRES.

What liability is incurred by corporations.

THE question arises, what, if any, liability is incurred by a corporation or its officials in respect of Ultra Vires transactions? And under what circumstances, and in what manner, can such liability, if any ever arises, be enforced against the parties so liable? While any such transaction is merely executory, it is evident that neither the one nor the other party dealing with it can have as against each other any cause of action. Very possibly the officials may, on the ground of an implied warranty of their authority, or of the corporation's powers, incur some kind of responsibility. But as regards the corporation, it is clear that by no possible legal process can they sue or be sued, render the other party, or be themselves rendered, liable to carry out an unperformed Ultra Vires arrangement.

Suppose, however, the arrangement is not altogether in posse, that it has been to some extent acted upon, other considerations arise, and under certain circumstances it is established that some

degree of liability may attach to the corporation, and that the other party will be entitled upon equitable grounds to a certain amount of redress.

SECTION I.—LIABILITY OF A CORPORATION IN RESPECT OF ULTRA VIRES TRANSACTIONS.

I. The mere fact that a corporation has received the consideration of, or otherwise derived advantage from, a contract Ultra Vires, does not involve it in any liability upon such contract.

The liability of corporations, as of partnership, in respect of contracts and other analogous matters, is founded upon the fact, that the contract is one into which the corporation could enter, and which has actually been made by the corporation or by its constituted agents. This principle as far as concerns partnerships has been established by a long series of authorities. It can scarcely be stated in terms too general and rigid. Whatever be the nature of the partnership, each member has an implied authority to bind the firm for certain purposes only. If he goes beyond that authority—if, purporting to act on behalf of the firm, he enters into engagements alien to the objects of the firm or exceeding his powers—the firm will not be responsible for those engagements, even though they have derived advantage therefrom, unless, indeed, they

Liability of partnership on contracts beyond the scope of its dealings.

have ratified the same. This non-liability exists as strictly in Chancery as at Common Law. Thus in *Fisher* v. *Tayler* (*a*), it was laid down that the implied authority of a partner to bind his co-partners for the repayment of money borrowed for partnership purposes, in the ordinary course of partnership transactions, does not necessarily extend to raising money for the purpose of increasing the fixed capital of the firm; and, therefore, a party advancing money to one partner, knowing that it was for the latter purpose, cannot as a matter of course charge the other partners with the loan, unless the transaction took place with their express or actual authority. It applies alike to money borrowed on behalf of the firm (*b*); and to materials supplied to and work done for the firm under similar circumstances. It applies, *à fortiori*, to contracts relating to matters not within the partnership purposes.

Liability of corporations on contracts Ultra Vires.

In considering this principle with reference to corporations, we have merely to bear in mind the meaning of the doctrine of Ultra Vires. Corporations can be bound, whether by their own proceedings or those of their agents within certain

(*a*) 2 Hare, 218.

(*b*) In Chancery, see the case last cited, and *Bevan* v. *Lewis*, 1 Sim. 376; *Ex parte Apsey*, 3 Bro. C. C. 265; *Ex parte Emly*, 1 Rose, 64; *Ex parte Agace*, 2 Cox, 312; and see *Re Worcester Corn Exchange Company*, 3 D. G. M. & G. 180. At Law, see *Dickinson* v. *Valpy*, 10 B. & C. 128; *Hawtayne* v. *Bourne*, 8 M. & W. 595; *Emly* v. *Lye*, 15 East, 7; *Lloyd* v. *Freshfield*, 2 C. & P. 333.

limits only. Outside those limits they are not bound. Neither at Law nor in Equity will the other contracting party obtain any redress, in any form of suit, upon the engagement itself, from the corporation, whatever be the fraud or however unjust the refusal of such redress. Some of the harshest of these decisions have been those entered into with promoters which have already been noticed; and in several of which the corporation has owed its very existence to the agreement which it has afterwards repudiated.

In many of the cases, however, falling within this principle, there has been nothing like fraud nor even harsh treatment. The suffering party must be supposed to know the law, and therefore like one who deals with an infant, or a *feme covert*, to have entered into agreements which he was aware were simply void as against the corporation. The most recent decision is that of *Re National Permanent Benefit Building Society, ex parte Williamson* (*c*). The directors of the building society, the rules of which gave no power to borrow money, borrowed a sum of money for the purpose of advancing it to their members on the security of their shares. The lender of the money afterwards presented a petition for an order to wind up the company. Giffard, L. J., reversing the decision of the Master of the Rolls, held that the transaction was

Ex parte Williamson.

(*c*) L. R. 5 Ch. 309.

Ultra Vires, and that, as it was not shown that the building society had thereby been benefited, the petitioner had no legal or equitable debt against the society such as would support the petition, which was accordingly dismissed.

Where a corporation has received the consideration.

II. The mere fact that a corporation has received the consideration of, or has otherwise derived advantage from a contract entered into on its behalf by an agent, but Ultra Vires of that agent, does not involve it in any liability upon such contract.

This is a corollary from the last proposition, and is founded upon the same reasoning. Indeed, the non-liability of corporations on contracts made by their agents in excess of their powers, is the conclusion which directly follows from the non-liability of partnerships upon analogous contracts made by their individual members. This principle has already been indicated in examining the extent of the powers of directors, and of their liability in respect thereof (*d*). The agent of a corporation, whether he be a member of the governing body or a mere servant, is the agent for certain purposes only. However wide his powers, they cannot exceed those possessed by the corporation, and will generally be much inferior. What-

(*d*) See *ante*, pp. 355—364.

ever they are the corporation will be bound only when such agent keeps within them, just as a partnership is bound by the acts of its members separately, when these do not go beyond the implied authority given them by law, or the express authority vested in them by the partnership deed.

Where there has been to the other contracting party a total failure of consideration.

III. Sometimes, if not always, where in pursuance of Ultra Vires agreements, money has been lent or paid to a corporation, and there has been a total failure of the consideration for which the loan or payment was made, the lender or payer is held entitled to be recouped by the corporation to the extent to which it has benefited thereby.

This principle if not acknowledged and established, has been put in force in a few cases for the benefit of persons having claims of the description therein mentioned. A person enters into an arrangement with a corporation *bonâ fide*, believing that it also possesses the necessary powers for rendering the arrangement binding, but it turns out that the matter is Ultra Vires of the corporation. What, then, is the position of the party so contracting? Evidently as nothing has been done under the contract, it is not enforceable by or against the corporation, and the whole proposal falls to the ground. Suppose, however, that something has

been done—that the person so dealing has gone to expense or done acts whereby advantage has resulted to the corporation—is he not to be repaid to the extent at least of this advantage? It seems that he is not entitled as a general rule, but only so under particular circumstances.

Anglo-Australian Assurance Co. *v.* British Provident Assurance Co.

In the *Anglo-Australian Assurance Company* v. *British Provident Assurance Company* (*e*), where one Insurance Company, A., transferred all its property, effects, and liabilities to another Company, B., on the terms of A. shareholders being indemnified, on a bill by A. for specific performance of the agreement, the Court decreed such indemnity. The other company, which was ordered to be wound up, having by its official manager filed a cross bill alleging fraud and misrepresentation, and that such agreement was Ultra Vires; it was held, that the B. company having had the benefit of the agreement was not entitled to object that the agreement was Ultra Vires, and improperly entered into by the managing body, and the cross bill was dismissed (*f*). This case is obscurely reported, but power to make such purchase seems to have been contained in the deed of settlement of each company. Moreover, B. had had the benefit of the contract, and being now bankrupt, A. could not be replaced in its original position—a circumstance which ever greatly influences the decision of a Court of Equity.

(*e*) 3 Giff. 521.

(*f*) Affirmed with variation on appeal, 4 D. G. F. & G. 341, 8 Jur. N. S. 628.

Re Sea, Fire, and Life Assurance Society, ex parte Port of London, &c., Company (*g*), is another decision illustrative of the liability of corporations in respect of Ultra Vires transactions of which they have had the benefit. The directors of each company had very wide powers of management, and those of the *Sea, Fire, and Life Assurance Society*, had in addition "full power and authority to purchase and lease as may seem expedient, at such price, &c., the business of any other Fire, Life, or Marine Insurance Company;" but those of the *Port of London Company* were not thus expressly authorised. By deed duly sealed, the latter company transferred its business to the former company, which also covenanted to indemnify it against all claims. In a short time the purchasing company failed; both companies were ordered to be wound up; and the official manager of the selling company tendered a proof against the purchasing company in respect of claims which the selling company had been compelled to satisfy. It was held by the Lords Justices—who did not go into the question of the validity of the amalgamation—that the claim must be allowed, and that although one part of the deed was not forthcoming. "Where a purchaser has taken possession of, and enjoyed the subject-matter of, a contract, it is in my opinion the duty of this Court to make every reasonable presumption in favour of the validity of the contract."

Re Sea, Fire, and Life Assurance Society, *ex parte* Port of London;

before the Lords Justices;

(*g*) 5 D. G. M. & G. 465.

in the House of Lords.

On appeal to the House of Lords (*h*), the decision of the Lords Justices was reversed, and the claim disallowed upon the short ground that section 29 of 7 & 8 Vict. c. 110 invalidated every contract in which a director was concerned, unless made in accordance with certain regulations, and that in the contract out of which the claim arose one of the directors of the *Sea, Fire, &c., Society* was interested, and moreover that the statutory regulations had not been observed.

Burges and Stock's Case.

In *Burges and Stock's Case* (*i*), policy holders were allowed to prove in winding up in respect of premiums, which they had paid to a company upon insurances which that company was not authorised to undertake. A life assurance company extended its business to marine insurance. Shortly after the company was wound up, and the extension being determined to be Ultra Vires, the holders of the marine policies were not allowed to prove for the value of them. As to the premiums, however, Page-Wood, V.-C., said, "They have had no consideration for the premiums they paid. The directors it is true had no power to issue marine policies, but they had power to receive money and apply it for the benefit of the company. It is proved that they did so receive and apply these premiums, and the amount might have been recovered even at law as

(*h*) *Sub nom. Ernest* v. *Nicholls*, 6 H. Lds. 401.

(*i*) *Re Phœnix Life Assurance Company, Burges & Stock's Case*, 2 J. & H. 441.

money had and received. The proof must, therefore, be allowed for the amount of the premiums paid."

There seems to be no substantial reason whatever for not extending the principle here involved to all analogous cases. If liable in one case, why should not a corporation be always liable to refund the money or property of a person which it has obtained improperly and without consideration, or if unable to return it, to pay for the benefit obtained thereby? To say that a corporation cannot sue or be sued upon an Ultra Vires arrangement is one thing. To say that it may retain the proceeds thereof which have come into its possession without making any compensation whatever to the person from whom it has obtained them, is something very different, and savours very much of an inducement to fraud.

In *Hall* v. *Mayor, &c., of Swansea* (*j*), it was decided that the proprietor of tolls wrongfully taken and withheld from him by a corporation, could sue the corporation in assumpsit for money had and received. Lord Denman, C. J., said, "If the corporation have helped themselves to another's money, it would be absurd to say they must bind themselves under seal to return it." If absurd in one case why not so always? As Page-Wood, V.-C., pointed out in *Burges and Stock's Case* (*k*), "the directors have

Hall *v.* Mayor, &c., of Swansea.

(*j*) 5 Q. B. 526.

(*k*) *Ubi supra.* See also the same Vice-Chancellor, in L. R. 2 Eq. 755: "But it is said that the contract was with the Company, and that the money has passed into their hands. Whether this gentleman could

power to receive money and apply it for the benefit of the company." Legal and equitable principles would therefore seem to require, as certainly common justice does, that a corporation shall account for whatever advantage it may derive from an Ultra Vires agreement.

Corporations should always be liable to account—*semble.*

Other instances where an account has been ordered.

The received opinion is that, special circumstances apart, it is not so liable. In addition, however, to the decision already cited, an account has been directed in some other cases of an analogous nature. Thus, in *Athenæum Life Assurance Company* v. *Pooley* (*l*), where debentures issued in fraud of the company were held invalid in the hands of an assignee for value without notice, the Lords Justices gave the assignee permission to have an inquiry as to whether the company had derived any benefit from these debentures. So in *Wood's Claim* (*m*), and *Brown's Claim* (*n*), similar accounts were directed to be taken for the benefit of the injured party.

Invalid debentures;

occupation under a void lease.

Again, in *Ex parte Kay* (*o*), where a company took a lease from one of their directors under a void

recover against them in an action for moneys had and received, I know not."

(*l*) 3 D. G. & J. 294.

(*m*) *Re London & County Assurance Company, Wood's Claim*, 30 L. J. (Ch.) 373, 9 W. R. 366.

(*n*) 10 W. R. 662. See also per Kindersley, V.-C., in *Re National Patent Steam Fuel Company, Baker's Case*, 1 Dr. & Sm. 55; *British Provident Society* v. *Norton*, 9 Jur. N. S. 1308.

(*o*) *Burslem Paper Mills Company, ex parte Key*, 16 W. R. 1103.

agreement, and the lessor recovered possession of the premises in an action of ejectment against the company for breach of the conditions, the lessee was allowed to prove in the winding up for the use and occupation by the company of the premises.

Ex parte Williamson, which has already been referred to (*p*), is sometimes thought to be opposed to the principle now in statement. But if carefully considered it will not be found to be so. Giffard, L. J., in his judgment, says, "I do not think it necessary to go through the evidence. Suffice it to say, that there is no proof whatever that one sixpence of this money went *in payment of any debt which was recoverable against the company.* In truth all this money went for the purposes of loans to members of this company. It is not for me to say whether the Savings Bank Association that lent the money, have or have not any right either *as against the property of this company which was pledged to them*, or as against the persons to whom this money was lent. If they have any such rights they can only be asserted by filing a bill, and taking a very different proceeding from that which has been taken here." In other words the decision was, not that the company were under no liability in respect of the loan in question, but that the proper course had not been adopted for rendering them

Ex parte Williamson.

(*p*) *Ante*, p. 515. Compare 30 L. J. (Ch.) 742. *Pare* v. *Clegg*, 29 Beav. 589,

liable. In fact, the Lord Justice more than hinted that they might be liable.

Wilson's Case.

And in the latest decision, *Wilson's Case* (*q*), where a person had made a loan to a building society, which it was Ultra Vires of the society to accept, and which was secured by a deposit of deeds of the society, it was determined that on the society being wound up, the official liquidator could not without payment of the money advanced deprive the lender of his securities. Bacon, V.-C., said, "If the official liquidator had filed a bill to have the securities returned, he could not get relief except on payment of the money which he confesses was advanced. He has no equitable right other than the society has."

Ex parte Cropper.

Two cases somewhat conflicting with this principle have to be noticed. In the former, *Ex parte Cropper* (*r*), a committee was appointed by the shareholders of a defunct company to wind up its affairs. To do so they went to considerable expense in endeavouring to get the Public Acts of Parliament, which were at that time brought forward, made applicable to the company, and also in urging forward the Winding-up Act itself. Their claim for these expenses was disallowed in winding up; and it is submitted rightly so in accordance with this principle. They did not advance money to the

Comments on this decision.

(*q*) *Re Durham County, &c., Building Society, Wilson's Case*, L. R. 12 Eq. 521.

(*r*) *Re St. George Steam Packet Company, ex parte Cropper*, 1 D. G. M. & G. 147.

company, or in any other way bring themselves within the principle. They were appointed for certain purposes and with certain powers only; but they went beyond their powers, and then attempted to charge those who appointed them for the expenses thereby incurred.

In the latter, *Hill's Case*(s), money had been advanced to a benefit building society which was not empowered to borrow. It was held, in the winding up, that the depositors were not entitled to have a call made upon the members for the repayment of their deposits. But here there was something very different from persons who had lent money or supplied articles to a company, asking simply for an inquiry as to how the company had benefited thereby. In the first place there were no assets to be divided. It was purely a question whether persons who had entered into an Ultra Vires agreement, could require a call to be made upon the shareholders to recoup them. It need not be said that the doctrine of Ultra Vires means among other things that this cannot be done. And secondly, the persons upon whom it was proposed to make the call, having paid all their subscriptions, had by the rules of the society actually ceased to be members and were discharged from all further liability. Under such circumstances, even if the borrowing had been *intra vires*, the decision probably would have been the same.

Hill's Case.

Comments on this decision.

(s) *Re Victoria Permanent Benefit &c., Society, Hill's Case,* *Jones' Case*, L. R. 9 Eq. 605.

IV. Persons who have in any way advanced money to a corporation, which money has been devoted to the necessaries of the corporation, are considered in Chancery as creditors of the corporation to the extent to which the loan has been so expended.

German Mining Co.'s Case.

This is the doctrine laid down in the well-known *German Mining Company's Case* (*t*), which arose thus: A joint-stock company was formed in England for working mines in Germany, subject to the terms of a deed of settlement, which provided that the capital should be £50,000, and gave no powers to the directors to raise money except by the creation of new shares. That capital was paid up, and proved insufficient for working the mines. The wages of the miners being in arrear, and other debts being due, the managing directors obtained advances from some of the shareholders for the purpose of paying those debts and preventing the mines from being seized under the law of the country. The directors also borrowed other sums on their personal guarantee from the bankers of the company, not for payment of debts, but for carrying on the business of the company in its ordinary course, and they afterwards repaid the bankers these advances. The company was wound up under the Winding-up

(*t*) *Re German Mining Company, ex parte Chippendale*, 4 D. G. M. & G. 19; *Bank of Australasia* v. *Breillat*, 6 Moo. P. C. 152.

Acts. Upon appeal, Knight-Bruce and Turner, L.JJ., decided that although the advances made by the bankers did not constitute a debt due to them from the company, the directors having no power to borrow, the directors were entitled to be allowed the amounts repaid by them to the bankers, the directors being trustees, and in that character entitled to indemnity from their *cestuis que trustent* against expenses *bonâ fide* incurred. Turner, L. J., based his decision on the ground partly that the directors were trustees for the general body of shareholders, partly that the money had been devoted to payment of debts which could at once have been enforced, to the great detriment of the company. He said: "Applying these decisions (*u*) and these principles to the present cases, I think that the shareholders by whom these advances were made would, in common with the other shareholders, have been liable to the miners and creditors who were paid by means of the advances, and therefore that (assuming the mines to have been properly carried on, upon which I have already observed; and shall presently observe more fully, and assuming the expenditure

Principle of the decision.

(*u*) Viz., *Hawtayne* v. *Bourne*, 7 M. & W. 595, and *Hawken* v. *Bourne*, 8 M. & W. 703, in the former of which, shareholders of a mining company were held not liable for monies borrowed by the agent in order to pay the arrears of the wages due to the labourers in the mine, while in the latter they were liable for goods supplied for the necessary working of the mine on the order of the resident agent.

to have been properly incurred, which upon the footing of the mines being carried on is not disputed), the decision of the Master [allowing the proof] ought to be upheld upon that ground alone.

Ex parte Bignold.

In *Ex parte Bignold, Re Norwich Yarn Company* (*v*), the directors of a trading company had incurred a large debt on account of the company, and in due conduct of its affairs. They had no express power to borrow, and indeed clause 53 of the deed provided "that the board of directors shall cause all purchases for or on behalf of the company to be made for ready money, so far as the same may be practicable, or they may deem expedient." The subscribed capital was all exhausted, but the Master of the Rolls holding that the deed of settlement did not limit the liability of each member to the amount of his shares as named in the deed, decided that the directors were entitled to be repaid by a call upon the shareholders.

Troup's case.

Troup's Case (*w*) arose thus. The directors of a company having no borrowing powers, being pressed for money by their contractor, obtained for him on credit £2000 at a banker's upon their guarantee. The contractor afterwards agreed to abandon the plant, &c., to the company on receiving £600 and

(*v*) 22 Beav. 143.

(*w*) *Re Electric Telegraph Company of Ireland, Troup's Case*, 29 Beav. 353; *Hoare's Case*, 30 Beav. 225, where the circumstances and decision were exactly analogous; *Re Magdalena Steam Navigation Company*, John. 690.

being indemnified against the bankers' claim. Subsequently to this the secretary of the company, with the sanction of the directors, borrowed £500 in his own name for the company, which was applied in paying the bankers and a judgment debt of the company. The company had the benefit of the plant, &c., which were sold for what the company gave for them. The Master of the Rolls held that the secretary could prove in the winding up for the money, with interest, which had been so *bonâ fide* applied for the benefit of the company.

Lowndes v. Garnett, &c., Mining Co.

Lowndes v. *Garnett and Moseley Gold Mining Company of America* (*x*) is to the same effect. One of the directors of a company established under the Joint-Stock Companies Act, 1844, and having definite borrowing powers, made advances (not in accordance with the borrowing powers) to meet the necessary expenses of carrying on the concern. Subsequently the company, after being registered as a limited company under the Joint-Stock Companies Act, 1856, was voluntarily wound up. Page-Wood, V.-C., held that the director was entitled to rank as a creditor of the company, and to receive payment next after the general creditors in the event of there being any assets. In reference to the principle

(*x*) 33 L. J. (Ch.) 418, 3 N. R. 601. The report in 2 J. & H. 282, of the same case, shows that the creditor under these circumstances may upon the winding up of the company, file his bill to recover the amount of his debt, instead of merely proving in the winding up.

involved in these decisions, the Vice-Chancellor observed: "When the directors had no money in hand, and the borrowing powers were exhausted, they had a choice of two things—either to stop the business of the company at once, or to carry on the business and pay the necessary expenses themselves, making the shareholders jointly liable for those expenses. If that were not intended, it ought to be provided against by the deed of settlement, but I think that very few companies would wish their deed of settlement to provide that the concern should be stopped immediately the directors had no money in hand."

Re Cork and Youghal Rail. Co.

Lastly, this principle was applied in *Re Cork and Youghal Railway Company* (*y*), to advances made by persons to enable a railway company to complete its line. The company was in difficulties; it had spent its authorised capital and was in debt besides; and resolutions were passed for the issue of Lloyd's bonds. These were given to persons who lent the company money to pay for land, buy rolling-stock, &c., but the resolutions and the issue were both Ultra Vires, because the company had exhausted its borrowing powers. It was decided by Malins, V.-C., and on appeal, that the persons to whom the bonds had been issued were entitled to be repaid by the

(*y*) L. R. 4 Ch. 748; *Re Exmouth Docks Company*, L. R. 17 Eq. 181; *Ulster Railway Company* v. *Banbridge, &c., Railway Company*, Ir. R. 2 Eq. 190, 16 W. R. 598.

company to the extent to which their loans had been used for the company. The Lord Chancellor considered these persons to be equitable assignees of the original debtors. "It is shown, I think, that as regards some of the moneys which have been raised through the medium of Mr. Lewis some small portions were paid directly to persons who were actually creditors of the company, and so far, I apprehend, there could be little or no dispute as to the right of Mr. Lewis, or of a person claiming through him, to stand in the place of the original debtor, whose debt, being a valid debt, had been so paid." This, it will be noticed, is different from the *ratio decidendi* of the *German Mining Company Case*, where the Lords Justices went partly upon the ground that directors, being in a manner trustees for their shareholders, are entitled like other trustees to be indemnified by their *cestuis que trustent* for expenses justifiably incurred by them on behalf of the latter.

Re Worcester Corn Exchange Co.

There is, however, one decision to some extent at variance. In *Re Worcester Corn Exchange Company* (*z*), directors who had themselves advanced money, after all the company's capital had been called up, to complete the undertaking, were not entitled to be recouped by a call upon the shareholders. This case in some of its circumstances resembles, and is therefore often said to be in conflict with, *Re Nor-*

(*z*) 3 D. G. M. & G. 180.

wich Yarn Company, but it is easily distinguishable. Here the company was formed for one single definite purpose—viz., the erection of a corn exchange; the building was to cost a certain sum, fixed beforehand, but it cost more, and the directors *proprio motu* supplied the excess, although the deed of settlement expressly provided that calls should not be made upon the shareholders "beyond the amount for the time being remaining unpaid of their respective shares." In the *Norwich Yarn Company's Case* all this was different—the company was established to carry on a manufacture, its liabilities were not, and could not, be precisely determined and prescribed beforehand, and the deed did not fix a limit to the amount which the shareholders might be required to pay.

Of course if persons make loans to a corporation to be to their knowledge devoted to purposes which are Ultra Vires, they can have no possible claim upon the corporation in respect thereof (*a*).

SECTION II.—LIABILITY OF THE DIRECTORS AND OTHER OFFICIALS OF A CORPORATION IN RESPECT OF ULTRA VIRES TRANSACTIONS.

General rule as to the liability of agents.

Firstly, persons acting on behalf of others must clearly and unmistakably both act and give the parties with whom they are dealing to understand

(*a*) *Re Kent Benefit Building Society*, 1 Dr. & Sm. 417; *Ex parte Williamson*, L. R. 5 Ch. 309.

that they are acting as agents, and are unwilling to incur any personal liability. Otherwise they will be liable as principals, even though they had no such intention (*b*).

The same rule applies to the agents of a corporation, as is well shown by the decision in *Kay* v. *Johnson* (*c*). This was a suit asking for specific performance of an agreement to take a lease, and for damages caused by the refusal to do so, against the Blackburn Manufacturing, &c., Company (Limited) and the directors and the secretary of the company. An agreement was made for the lease of certain premises, containing a stipulation that the lessees should execute certain building works, and the lessors should advance £1000 on mortgage to a limited company. This agreement was executed by the directors and secretary of the company as lessees. The £1000 was duly advanced, and the lessor (the plaintiff) in correspondence treated the company as liable to perform the stipulations of the agreement, and evidence was given that the directors and secretary were trustees of the benefit of the agreement for the company, but the memorandum of agreement expressly styled the directors named in it "the lessees." It was therefore held that the directors and secretary who signed the agreement were personally liable, and a decree was made against them for specific performance of the agree-

Kay v. Johnson.

(*b*) *Paice* v. *Walker*, L. R. 5 Ex. 173.

(*c*) 2 H. & M. 118.

ment to take a lease. The Vice-Chancellor said: "On the face of the instrument the presumption which arises is that the directors are liable as principals as between them and the plaintiff, although they were also trustees for the company as between themselves."

Liability of corporate officials upon agreements Intra Vires.

Similarly with respect to every kind of agreement. If it be not Ultra Vires, and the language used is such as to make the corporate officials personally parties to the same, they will *ex necessitate* be liable thereon, apart from any question as to whether the corporation is also liable, or as to what rights of indemnity or otherwise they may have against the corporation (*d*).

Examples—negotiable instruments.

Many of the decisions on this head have been in connection with negotiable instruments. Not unseldom directors, trustees, or other agents representing a company make notes and accept bills, very probably meaning the same to be on behalf of their company, but not using suitable language nor taking other precautions necessary to exclude personal liability. Thus in *Dutton* v. *Marsh* (*e*), four directors of a joint-stock company signed their

Dutton v. Marsh.

(*d*) *Barker* v. *Allan*, 5 H. & N. 61, 29 L.J. (Ex.) 100; *Haddon* v. *Ayers*, 1 E. & E. 118. See *Hallet* v. *Dowdall*, 18 Q. B. 2, 21 L. J. (Q. B.) 98.

(*e*) L. R. 6 Q. B. 361. See the cases there cited, and especially *Lindus* v. *Melrose*, 3 H. & N. 177, 27 L. J. (Ex.) 326, and *Alexander* v. *Sizer*, L. R. 4 Ex. 102, in neither of which were the directors who signed held liable.

names to a promissory note in the following form: "We, the directors of the Isle of Man Slate Company Limited, do promise to pay J. D. £1600, with interest at six per cent. till paid, for value received." And at one corner of the note the company's seal was affixed, with "Witnessed by L. L." It was held that the directors were personally liable as makers of the note, because there was nothing in the note itself to exclude this personal liability, and the fact that the company's seal was affixed was not sufficient to show that the note was signed on behalf of the company.

Agent who has no principal.

Secondly, if an agent, or rather one acting as such, has not at the time a principal, and there is not then in existence any person who could be principal, then, as the contract would otherwise be wholly inoperative, such person will be held to have acted on his own behalf, and he cannot afterwards be relieved from liability by the intervention of some person willing to ratify such contract. In the case of corporations this question will generally arise, when it does arise, with reference to the proceedings of promoters. If promoters make, on behalf of the future corporation, an absolute contract, and not merely one which is conditional on the formation of such corporation, they will be personally liable thereon, and will not be released from liability by the subsequent adoption of such contract by the corporation when created (*f*).

(*f*) *Kelner* v. *Baxter*, L. R. 2 C. P. 174, the facts of which have been given, *ante*, pp. 395, 396.

Agent exceeding his authority,

Thirdly—where the agent of a corporation misrepresents the extent of his authority. This is, perhaps, the commonest instance where a person dealing with directors obtains redress from them personally on the ground of the contract being Ultra Vires either of themselves or of the corporation. The principle may be thus stated:

> If a director or other similar official of a corporation making a contract with a person misrepresent his own authority, whereby a contract not enforceable against the corporation is made, and the person so contracting was not aware of the limitation of authority, such person will have an action for damages against the individual guilty of the misrepresentation; and it has been decided that he will have a similar action when the misrepresentation is of the powers of the corporation, *sed quære.*

(a.) *Misrepresentation of an Official's authority.*

Of the accuracy of the first part of this rule there can be little doubt. As is well known in the case of ordinary agents and principals, if the agent misrepresents or exceeds (however innocently) his authority, and his principal refuses to ratify the act in question, the agent is liable—not, indeed,

is personally liable,

upon the contract as principal, but—to an action at suit of the injured party upon the implied warranty that he had the necessary authority (*g*).

Directors are similarly liable. Thus, in *Cherry* v. *Colonial Bank of Australasia* (*h*), two of the directors of a company informed a bank that they had appointed C. to be the manager of the company, and had authorised him to draw cheques. They had no authority to do so, but they were held liable upon cheques drawn by C., upon the implied warranty that they had the requisite authority.

Cherry *v.* Colonial Bank of Australasia,

The agent will, however, not be so liable if the person with whom he dealt knew, or had the means of knowing, that he was exceeding his powers. Such means will, in the case of the officials of corporations, and more especially of joint-stock companies, be generally in the power of the person contracting with them to obtain. They have such powers only as are expressly given them in the constating instruments, or are necessarily deducible therefrom in connection with the nature of the company's business. It is, indeed, often difficult to define the limits of the implied powers of corporate officials (*i*), and therefore on that account questions will occasionally arise.

unless the other party is aware of the defect of authority.

(*g*) *Collen* v. *Wright*, 8 E. & B. 647, 27 L. J. (Q. B.) 215; *Wilson* v. *Miers*, 10 C. B. (N. S.) 348; *Slim* v. *Croucher*, 1 D. G. F. & J. 518. See *Edmunds* v. *Bushell*, L. R. 1 Q. B. 97.

(*h*) L. R. 3 P. C. 24, 17 W. R. 1031. Compare *Eastwood* v. *Bain*, 3 H. & N. 738; 28 L. J. (Ex.) 74.

(*i*) See *Wilson* v. *Miers*, 10 C. B. (N. S.) 348.

Misrepresentation by corporate officials.

Nevertheless, very generally a misrepresentation by a director or other agent of a corporation as to his powers must be a misrepresentation of law and not of fact, and when this is so he will not thereby be involved in any liability. *Beattie* v. *Lord Ebury* (*j*) is the latest case in point. Here three directors of a railway company opened, on behalf of the company, an account with a bank, and sent a letter, signed by the three as directors, requesting the bank to honour cheques signed by two of the directors and countersigned by the secretary. The account having been largely overdrawn by means of such cheques, the bank sued the company at law, recovered judgment in 1865, and issued an *elegit*. The proceeds being insufficient to satisfy the debt, the bank filed a bill to make the directors personally liable for the deficiency. Bacon, V.-C., held that this letter rendered the directors personally responsible for the advances so made by the bank, but the Lords Justices reversed his decision on the ground that, assuming the letter to contain a representation (which they were greatly inclined to doubt) that the directors had power to overdraw the account, and such representation to be erroneous, this was not a representation of fact, which the persons making it were bound to make good, but only a mistaken representation of the law. Mellish, L.J., said: "It appears to me that there is no represen-

Beattie *v.* Lord Ebury.

(*j*) L. R. 7 Ch. 777; affirmed in the House of Lords, W. N. 1874, p. 119.

tation made respecting the authority, except that they were directors of the railway company, and therefore had such authority as the directors of a railway company had."

(b.) *Misrepresentations of the Corporate powers.*

Corporate officials misrepresenting the corporate powers.

If it is but seldom that corporate officials can in this way be held liable for exceeding their own authority, it is of course still more seldom that an action will lie against them for misrepresenting the extent of the corporation's powers, and thereby inducing a person to enter into an Ultra Vires engagement. In such case the other party has access to the constating instruments—he may therefore make himself acquainted with the exact extent and nature of the capacities of the corporation. He must also be assumed to be informed of the law of the land. Consequently, as the corporate powers are questions of law, not of fact, the misrepresentation by the directors is of a matter of law, and it therefore follows that the person aggrieved is not entitled to redress.

Ellis *v.* Colman.

Accordingly, on two occasions, the Court of Chancery has refused to grant relief under such circumstances. In the first case, *Ellis* v. *Colman* (*k*), directors had induced contractors to enter into an Ultra Vires agreement with a corporation,

(*k*) 25 Beav. 662, 27 L. J. (Ch.) 611.

and on a bill being filed against the company and the directors for specific performance, or that the latter should make good their representations, demurrers for want of equity were allowed, because "the proper relief would be by action at law, for the purpose of compelling the directors to make good the loss that the plaintiff has sustained by their representations" (*l*). The other case is *Rashdall* v. *Ford* (*m*), where directors had issued Lloyd's bonds that were Ultra Vires. The plaintiff who advanced the money filed his bill to make the directors pay the amount he had advanced with interest, but Page-Wood, V.-C., allowed a demurrer, saying, "It seems to me impossible to extend the principle of relief arising out of misrepresentation to a statement of law, which turns out to be an incorrect statement. . . . . It is impossible to say that the directors are more than agents, or that they can be held personally liable for any statements as to the legal effect of a security which they agreed to give, and which the plaintiff agreed to take."

Rashdall *v.* Ford.

Similarly at Common Law, in the case of *Macgregor* v. *Dover and Deal Railway Company* (*n*),

Macgregor *v.* Dover and Deal Rail. Co.

(*l*) *Quære*, whether the demurrers would now be allowed, since by the conjoined effect of Cairns' Act and Rolt's Act the Court must both determine every question of law and fact necessary for giving full and complete relief, and must award damages where this is the better course, in addition to or in substitution for specific performance, which was here prayed.

(*m*) L. R. 2 Eq. 750.

(*n*) 18 Q. B. 618; see *ante*, p. 215-6, where it is stated fully.

the facts of which have already been stated, the Exchequer Chamber decided that an action would not lie against the chairman of a railway company, upon a promise by him that the company should do an Ultra Vires act, at the suit of the person to whom the promise was made. The Court said: "It is a promise that an act shall be done contrary to the public law of the country, of which both parties are bound to take notice. The act is, therefore, illegal; and the promise that it shall be done is a void promise."

Richardson v. Williamson.

However, in *Richardson* v. *Williamson* (*o*), the plaintiff was held entitled to recover in such an action. Here the plaintiff had lent £70 to a benefit building society, and received a receipt signed by the defendants, as two directors of the society, certifying that the plaintiff had deposited £70 with the society for three months certain, to be repaid with interest after fourteen days' notice. The society was formed under 6 & 7 Wm. IV. c. 32, and had no power to borrow money; and the plaintiff being unable to get her money back from the society, sued the defendants. On these facts, the Court having power to draw inferences, the Court of Queen's Bench unanimously decided that the defendants were liable to the plaintiff in damages for a breach of warranty of authority, they having by signing the receipt in effect represented that they had

(*o*) L. R. 6 Q. B. 276.

authority to make a binding contract of loan on behalf of the society, and so induced the plaintiff to part with her money.

Comments on Richardson *v.* Williamson.

It is scarcely possible to reconcile this decision with *Rashdall* v. *Ford* and *Macgregor's Case*. The judgments seem to have proceeded upon the ground that the misrepresentation was as to the *extent of the directors' powers*. But even looked at in that way, it was still a misrepresentation of law rather than of fact, for the powers of the directors are limited *pro tanto* with those of the company, and those of the company being, certainly at least as to the borrowing of money and similar matters a question of law, those of the directors must be a question of the same nature. Cockburn, C. J., said: "It cannot be supposed that the plaintiff, on lending money to the society, did so with the knowledge that the society was not authorised to borrow; and it was not till she wanted her money back that she ascertained the real position of affairs, and is met by the defence that the society is not liable." But with all submission, that is exactly what the Courts both of Law and Equity do—and in the previous decisions did—suppose, viz., that every person understands the doctrine of Ultra Vires, and the restrictions and qualifications which are by consequence of it imposed upon corporations; and that a misstatement of the capacity of any particular corporation is a matter of law which a person credits or not, and acts upon or not, at his own peril.

Mellish, L.J., has thus explained this decision (*p*): "There the plaintiff lent £70 to a benefit building society, and received a receipt signed by the defendants, as two of the directors, certifying that the money had been lent, and then it turned out that in point of law they had no power to borrow money. But, then, their power to borrow money depended upon whether they had made a rule to borrow money, because a benefit building society may receive money, at any rate to a certain amount on deposit, if it has a rule enabling it so to receive money. Therefore that was taken as a representation by the directors that they had such a rule, and that the borrowing was within the rule, when, in point of fact, there was no such rule at all." But in the judgments as reported nothing turns upon the want of such a rule—indeed no reference is made to it. The decision was simply that the directors "represented that they had authority to borrow money on behalf of the society, and that the society would be bound to repay it on proper demand;" whereas there was no such authority nor any such liability; and consequently "that the plaintiff was entitled to recover from the defendants the damages she had suffered from not being able to sue the society, on showing that the defendants professed to be able to bind the society."

(*p*) L. R. 7 Ch. 801.

CHAPTER IV.

DISSOLUTION OF CORPORATIONS.

A corporation may be put an end to in the following ways :—

I. By proceedings against it on the part of the Crown, as a punishment for the misuse of its franchises.

II. By surrender of its charter, or other voluntary dissolutions.

III. By extinguishment, resulting from the death of all its members, or the total loss of one of its integral parts.

IV. By a special Act of Parliament passed in any particular case.

V. By proceedings taken in accordance with the provisions of the various Winding-up Acts.

First.—Dissolution by the direct Action of the Crown.

Revocation of charter.

The first of these causes of dissolution is distinctly an instance of the effect of the doctrine of Ultra

Vires. From earliest times it has been established that a corporation which turned its liberties to improper purposes was liable to have those liberties forfeited. Without some just reason the Crown cannot revoke a charter of incorporation, or withdraw any of the privileges contained therein. But it may do so whenever the conditions of the grant are not observed (*q*). The method of procedure is by a writ of *scire facias* against the corporation to repeal the charter, or against a body claiming to exercise corporate powers to determine the validity of such claims; and by *quo warranto*, when the intention is to inflict the minor punishment of suspending for a while the corporate franchises, and not of actually taking them away and determining the existence of the corporation.

Method of instituting proceedings.

The difference between the two proceedings has been thus stated: "A *scire facias* is proper where there is a legal existence capable of acting, but who have been guilty of an abuse of the power entrusted 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 corporate body *de facto*, who take upon themselves to act as a body corporate, but from some defect in their constitution they cannot legally use the powers they affect to use" (*r*).

(*q*) *Rex* v. *Amery*, 2 T. R. 515; *Rex* v. *Ponsonby*, 1 Ves. 1, 7.

(*r*) *Per* Ashurst, J., in *Rex* v. *Pasmore*, 3 T. R. 199, 244.

Repression of corporations in ancient times.

In former times it was a rather common occurrence for proceedings to be instituted by the Crown against corporations for misusing their franchises, or against individuals for usurping such privileges. State reasons were generally the motive cause. The municipal corporations during the Middle Ages, and till a period at least as late as the Revolution of 1688, formed one of the chief mainstays of English liberty. The sovereigns encouraged them as the centres of trade, and repressed them by every means when they attempted to make subservient to political objects the great power which the union and periodical meetings of their members gave them. Other incentives there were, too, which prompted the almost continual interference of the Crown with the corporations. Every addition to the importance and strength of them was assumed to be an encroachment upon and a diminution of the prerogative. Moreover, the fines imposed upon corporate bodies, and often upon the luckless corporators themselves, were a lucrative source of revenue. However, with the increase of individual freedom, and protection for the expression of individual opinions, the political importance of these bodies has greatly diminished; consequently, seldom if ever does the Crown now attack them for an encroachment upon its own privileges, or for any other reason of offence to itself. When the Crown does intervene, it is rather the State than the sovereign personally; the cause is detriment actual or apprehended to the public

interests. The proceedings are by the Attorney-General by way of information; and the object sought is to compel the delinquent body to do or forbear from given acts, and not its dissolution temporarily or completely.

The power of the Crown to cancel a charter for non-observance of its conditions remains in full vigour, and it may be exercised at any moment to the punishment of an offender. Consequently, where a corporation or its officials are acting contrary to the provisions of their charter, or other constating instrument, or in any other manner so as to imperil the existence of the corporation, the Court of Chancery will, upon the request of any member, restrain such acts. In *Rendall* v. *Crystal Palace Company* (*s*), the defendants had been incorporated by royal charter, one of the conditions of which was, that no person should be admitted to the building or grounds on the Lord's-day in consideration of any money payment, whether made directly or indirectly, unless the express sanction of the Legislature should have been obtained. By a private Act of Parliament subsequently passed, power was given to the directors of the company to agree with any proprietor, absolutely entitled to shares or stock in the company, for the conversion thereof into a ticket of admission into the building and grounds for such

Rendall *v.* Crystal Palace Co.

(*s*) 27 L. J. (Ch.) 397. See *Company*, 22 L. J. (Q. B.) *Queen* v. *Eastern Archipelago* 196.

proprietor or his nominee for life, or term of years, as might be determined on, provided that nothing therein contained should invalidate the charter or relieve the company from any conditions contained therein, excepting in so far as the same were thereby expressly varied. In pursuance of this Act, it was proposed to give in exchange for each share a ticket entitling the owner to a certain number of admissions, and which should be available on Sundays as well as other days. Upon a bill being filed by one of the members of the company, on behalf of himself and the rest, to restrain the proposed exchange, Page-Wood, V.-C., considered that such a proposal, if carried into effect, would be an infringement of the condition in the charter, and also that it was not authorised by the Act. He accordingly overruled the demurrer which the company and the directors had put in to the bill.

Secondly.—Voluntary Dissolution.

Dissolution against the wish of a member.

The majority of a corporation may, against the wishes of the minority, dissolve by winding up, and the more generally received opinion is that they can do so by any other process which is purely voluntary. *Ward* v. *Society of Attornies* (*t*) is often stated to be a decision to the contrary, but this is

Ward *v.* Society of Attornies.

(*t*) 1 Coll. 370; see the facts *ante*, p. 186. Compare *Crystal Palace Company*, 27 L. J. (Ch.) 397.

scarcely correct. What Knight-Bruce, V.-C., did in this case was to grant an injunction restraining a corporation to the hearing from surrendering its charter or parting with its assets, and he did this to prevent irreparable damage. His words are: "The two substantial objects of the present application are, to prevent the destruction of the corporation and to prevent that alienation of the property of the corporation which is proposed for no purpose except its destruction. If such opinion as I have at present formed were more favourable to the case of the respectable defendants than it is, I could not allow the property to be so importantly affected before the hearing of the cause. It seems to me that to do so would, in the strongest sense of the term, be an irremediable act. How could I, or any Court in the kingdom, restore these plaintiffs to their original position, if the act now sought to be restrained were done?" In this there is nothing like an assertion that the majority of the members of a corporation cannot dissolve it, either absolutely or to reconstruct it upon a new footing. All that the Vice-Chancellor meant was, that they may not act in such a manner, whether with a view to dissolution or otherwise, as to damage the common funds, at least "not before the hearing of the cause."

In connection with this question may be mentioned the case of *Bank of Switzerland* v. *Bank of Turkey* (*u*). Here the directors of a projected bank- Bank of Switzerland *v.* Bank of Turkey.

(*u*) 5 L. T. (N. S.) 549.

ing company, not being able to carry out the project to its full extent, determined upon winding up the affairs, and returning to the applicants for shares the full amounts of the deposits made by them. Deposits amounting to two-thirds of the sums deposited had accordingly been returned to the depositors, and the remainder was in course of payment, when a bill was filed by purchasers of shares who were dissatisfied with the termination of the affairs of the proposed company, to restrain the directors from further carrying out the arrangement. Page-Wood, V.-C., however, held that the course which the directors had taken was not Ultra Vires, and that they were justified in taking it, since it was morally impossible, from the events which had happened, that the project could be carried out in its entirety; and he therefore granted an injunction in terms of the bill which had been asked for.

Power of a creditor to prevent dissolution.

Next to be considered is the question whether a person not actually a member of, but interested in, a corporation, such as a creditor, can call upon the Courts to prevent such corporation dissolving by amalgamation, the surrender of its charter, or any voluntary mode whatever, other than by winding up or a similar statutory arrangement. The creditor may fairly say that he is entitled to the protection of the Court in so far as, if at all, it can render him assistance by putting a stop to proceedings, active or passive, on the part of his debtor which may interpose obstacles to the debtor's dis-

charge of his obligation. Whether this would hold as a general proposition cannot be affirmed, but at least in *Kearns* v. *Leaf* (*v*) relief of this kind was afforded. Here the plaintiff held a policy in a company, the funds of which were made liable to pay the sum insured, and certain shares of profits by way of bonus. The company having entered into an agreement to transfer its business and assets to another company contrary to the stipulations of its deed of settlement, and without making provision out of its own assets for payment of the plaintiff's policy, Page-Wood, V.-C., granted an injunction at suit of the plaintiff to prevent this agreement being carried out. He considered that the plaintiff acquired under his contract "such a species of interest in the funds [of the company] as would entitle him to interfere to save the property from being wasted, contrary to the provisions of the deed," in accordance with which the plaintiff accepted his policy. No doubt the Vice-Chancellor did not here decide any more than did Knight-Bruce, V.-C., in *Ward* v. *Society of Attornies*, that a corporation cannot put an end to its existence voluntarily and *proprio motu*, but he did decide that it could not, in doing so, be permitted to prejudice the rights of its creditors, or to derogate from the securities which

Kearns v. Leaf.

(*v*) 1 H. & M. 681. See also *Law* v. *London Indisputable Company*, 1 K. & J. 223; *Re State Fire Insurance Company*, 1 D. G. J. & Sm. 634, 34 L. J. (Ch.) 58.

it gave or held out to them as an inducement for them to contract with it.

Thirdly and Fourthly.—Dissolution by Demise of the Members, or by Act of Parliament.

The doctrine of Ultra Vires is but slightly concerned with either of these matters. A corporation perishes whether the whole of its members have died out, or the whole of those who constitute an integral and essential part (*w*), provided that there is no means for repairing the breach (*x*). It would, however, seem that in such a case the corporation, sometimes at least, is not absolutely gone, but rather in abeyance, the Crown having power by a fresh charter to revive the torpid body, and to clothe it with all the dormant rights and capacities of the original body (*y*). Whether a corporation—that is to say, whether the members—can allow the corporation to die out, may be considered doubtful, at least as to all such which may be denominated public. The franchises have been granted to these for public ends and aims, and the original intention must have

Power of members to allow a corporation to die out.

(*w*) *Rex* v. *Morris*, 4 East, 17. Compare *Kennet & Avon Navigation Company* v. *Witherington*, 18 Q. B. 531, 21 L. J. (Q. B.) 419.

(*x*) See 1 Vict. c. 78, s. 7.

(*y*) *Mayor, &c., of Colchester* v. *Brooke*, 7 Q. B. 339, 15 L. J. (Q. B.) 173. Compare *Rex* v. *Pasmore*, 3 T. R. 199; *Colchester* v. *Seaber*, 3 Burr. 1866; *Newling* v. *Francis*, 3 T. R. 189.

been that they should be used. With regard to corporate offices, it is admitted that by the Common Law a corporator can be compelled to undertake them when called upon (*z*); and by statute the same has been expressly provided with reference to Municipal Corporations (*a*). *Pari ratione* it would seem that the corporation itself must be compellable to fulfil its duties, and to discharge the purposes for which it has been created, at least whenever such purposes have a distinct and primary reference to the public welfare; and if compellable to do this it is apparently compellable to keep up, or at least to make the attempt to keep up, its members, so as not to perish of mere inanition. In the present day, however, there are other ways and means of accomplishing that, for which corporations were formerly frequently established to bring about.

Non-intervention of the Crown.

Consequently it may safely be predicated that, whether it is or not theoretically Ultra Vires of a corporation to allow its members to die out totally, or as to any integral part, the Crown at least will not intervene to prevent this. If the members themselves find the duties too onerous, or do not value their privileges sufficiently to keep them alive, neither political necessities nor public needs can now be deemed sufficiently pressing to require that

(*z*) *Rex* v. *Bower*, 2 D. & R. 842.

(*a*) 5 & 6 Will. IV. c. 76, s. 51; *Reg.* v. *Richmond*, 11 W. R. 65.

corporations should be made to discharge their functions.

Rule as to private corporations.

This applies even more strongly to private corporations—that is, to those associations that have been incorporated purely for private aims. In these the privileges and capacities that belong to the whole as distinct from its parts—*i.e.*, the individual members—belong to them for the private advantage of the latter. Consequently these may use or not use them as they think fit, and may allow them to pass into desuetude, and the corporation itself to decay.

So with regard to dissolution by Act of Parliament. Such an Act may not be applied for at the corporate expense, at least not against the opposition of any one member (*b*). But in all other respects such proceedings will be matters of internal management, within the scope of a general meeting to decide upon.

Fifthly.—Dissolution by Winding up.

This is the mode by which is ordinarily determined the existence of all corporations coming within the purview of the provisions in this behalf contained in the Companies Act, 1862. These provisions apply to all corporations registered under this Act, and also to many unregistered bodies, whether corporate or not.

(*b*) Part ii. ch. vi. s. 2.

(a.) *Winding up under the Court.*

The winding up may take place either under the supervision of the Court of Chancery or voluntarily. As to the former mode, it is provided (*c*) that:— 25 & 26 Vict. c. 89, s. 79.

A company, under this Act, may be wound up by the Court as hereinafter defined, under the following circumstances (that is to say):—

1. Whenever the company has passed a special resolution requiring the company to be wound up by the Court.
2. Whenever the company does not commence its business within a year from its incorporation, or suspends its business for the space of a whole year.
3. Whenever the members are reduced in number to less than seven.
4. Whenever the company is unable to pay its debts.
5. Whenever the Court is of opinion that it is just and equitable that the company should be wound up.

The Act empowers (section 170) the Lord Chancellor, with the advice and consent of certain of the Chancery judges, to make such regulations for winding up as may be necessary. By virtue of this authority certain rules have been made, but it has been decided that one of them (No. 26)—which provides that creditors whose debts or claims Sect. 170.

(*c*) 25 & 26 Vict. c. 89, s. 79. There follows in s. 80 a statement of the circumstances under which a company is to be deemed unable to pay its debts, and in s. 81 a definition of "The Court," as referred to in s. 79.

do not carry interest shall be entitled to interest at 4 per cent. from the date of the winding-up order—is Ultra Vires, as varying the rights of the parties and adding to the burthens of the contributories (*d*). A similar doubt with respect to Rule 25 was decided in the negative by giving to the language used in that rule a somewhat strained construction (*e*).

The clause in the above section which is most important in connection with our subject is the fifth, the "just and equitable" one. As to this, Ultra Vires transactions are no ground for granting a winding-up order. This was determined in *Spackman's Case* (*f*), where an arrangement was come to for allowing upon terms certain members to retire from a company. One of the members who objected to the arrangement—and which has since been adjudged Ultra Vires (*g*)—thereupon presented a petition to wind up the company, but the Lord Chancellor dismissed the application. So in *Re*

Ultra Vires transactions no ground for granting winding-up order;

(*d*) *Re East of England Banking Company*, L. R. 4 Ch. 14. In connection with this case may be mentioned a somewhat analogous decision, *Fitzgerald* v. *Champneys*, 2 J. & H. 31, where an Order in Council, purporting to be made under s. 3 of 2 & 3 Vict. c. 49, was held to be Ultra Vires, and consequently invalid.

(*e*) *Re Trent & Humber Company, ex parte Cambrian Steam Packet Company*, L. R. 4 Ch. 112.

(*f*) *Re Agriculturist Cattle Insurance Company, ex parte Spackman*, 1 Mac. & G. 170, 18 L. J. (Ch.) 261.

(*g*) *Spackman* v. *Evans*, L. R. 3 H. L. 171.

Factage Parisien (*h*), where the petitioner alleged that the company were acting in an Ultra Vires manner, the petition was finally dismissed, it having been first directed to stand over till a meeting of the members was called, and which, having been called, preferred to continue the undertaking.

nor irregularities in the management.

À fortiori, mere irregularities in the management of a company (*i*), or misconduct on the part of the directors (*j*), or the loss of capital (*k*)—unless it amounts to actual insolvency or the impossibility of continuing the business (*l*)—are not *per se* sufficient for compulsorily winding up, though any one or more of these facts taken in connection with other circumstances—especially such as show fraud on the part of the directors, or those who got up the company—may suffice.

Claims in respect of Ultra Vires acts are not debts.

In the last chapter has been considered the liability (if any) of corporations in respect of proceedings which are absolutely Ultra Vires. Whatever be the nature or extent of this liability, it does not amount to a "debt" within the fourth clause of the above section, so as to enable a person having such

(*h*) 34 L. J. (Ch.) 140.

(*i*) *Re Anglo-Greek Steam Navigation Company*, L. R. 2 Eq. 1.

(*j*) *Ex parte Wise*, 1 Drew. 465; *Re Anglo-Greek Steam Navigation Company*, *ubi supra*.

(*k*) *Re European Life Assurance Society*, L. R. 10 Eq. 403; *Re Spence's Patent, &c., Cement Company*, L. R. 9 Eq. 9.

(*l*) See judgments in *Re Suburban Hotel Company*, L. R. 2 Ch. 737, and *Re Joint Stock Coal Company, ex parte Green*, L. R. 8 Eq. 146.

a claim against a company to ground thereon a petition to wind up (*m*).

(b.) *Voluntary Winding up.*

The provisions for this, contained in section 129 of 25 & 26 Vict. c. 89, are as follows:—

25 & 26 Vict. c. 89, s. 129.

A company under this Act may be wound up voluntarily—

1. Whenever the period, if any, fixed for the duration of the company by the articles of association expires, or whenever the event, if any, occurs, upon the occurrence of which it is provided by the articles of association that the company is to be dissolved, and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily.
2. Whenever the company has passed a special resolution requiring the company to be wound up voluntarily.
3. Whenever the company has passed an extraordinary resolution to the effect that it has been proved to their satisfaction that the company cannot, by reason of its liabilities, continue its business, and that it is advisable to wind up the same.

Companies under the Act.

In applying the section here cited, it is not always easy to determine what companies are "under" the Act, so as to be enabled to take advantage of its provisions. The statute itself enacts that it shall apply to the following companies:

(*m*) *Re National Permanent Benefit Building Society, ex parte Williamson*, L. R. 5 Ch. 309.

(1.) Those formed and registered, or merely registered, under the Joint-Stock Companies Acts of 1856, 1857, 1858 (sections 175–178).

(2.) Companies registered under the Act (sections 79, 129, 180, 196). As to registration, see section 179.

(3). All other associations consisting of more than seven members not registered under this Act, but with the exceptions and qualifications as laid down in section 199 (*n*).

Application of the Act. 1. English companies.

As to the application of the Act, it has been decided—firstly, that all English companies duly registered are within its purview, but where the number of members is very small, the Court hesitates to make a compulsory order, and has refused to do so in two cases (*o*) ; though in a very recent case, where there were only seven shareholders and no debts, Malins, V.-C., made the order, thereby overruling the previous decision to the contrary (*p*). The Act applies alike to friendly, building, and other similar societies, whether registered or not under 25 & 26 Vict. c. 87 (*q*), to cost-book mining companies (*r*), to insurance companies (*s*), and to com-

(*n*) Cited *post*, pp. 562, 563.

(*o*) *Re Natal, &c., Company*, 1 H. & M. 639; *Re Sea & River Marine Insurance Company*, L. R. 2 Eq. 545.

(*p*) *Re Sanderson's Patents Association*, L. R. 12 Eq. 188.

(*q*) *Queen's Benefit Building Society*, L. R. 6 Ch. 815.

(*r*) See s. 180; and 32 & 33 Vict. c. 19.

(*s*) See 33 & 34 Vict. c. 61, s. 21; and 35 & 36 Vict. c. 41, s. 4.

panies other than railway companies incorporated by special Act of Parliament (*t*), and to companies which are practically defunct—*e.g.*, such as have amalgamated with others (*u*), as well as to such as are carrying on their business.

2. Foreign companies.

Secondly, as to foreign companies. Registered companies formed for carrying on business partially or even exclusively abroad are within the Act, provided they have an office or branch office here (*v*), or have, or contemplate the having, as shareholders British subjects or persons resident in England (*w*); but probably they are not so if both their objects and their shareholders are exclusively foreign (*x*).

3. Railway companies.

Thirdly, as to railway companies (*y*). These, if incorporated by special Act, are by section 199 expressly excluded from this statute. After their undertaking has been abandoned by warrant of the Board of Trade, any shareholder may, by section 31 of 13 & 14 Vict. c. 83, present a petition to wind up

(*t*) *Wey* v. *Arun Junction Canal Company*, L. R. 4 Eq. 197; *Re Bradford Navigation Company*, L. R. 10 Eq. 331, 5 Ch. 600.

(*u*) *Re Family Endowment Society*, L. R. 5 Ch. 118.

(*v*) *Re Commercial Bank of India*, L. R. 6 Eq. 517. Compare *Re Imperial Anglo-German Bank*, 26 L. T. (N. S.) 229, W. N. 1872, p. 40.

(*w*) *Re General Company for Promotion of Land Credit*, L. R. 5 Ch. 363; and *Princess of Reuss* v. *Bos*, L. R. 5 H. L. 176.

(*x*) See last note.

(*y*) In connection with the dissolution of railway companies, see The Abandonment of Railways Act, 1850, 13 & 14 Vict. c. 83; and The Railway Companies Act, 1867, 30 & 31 Vict. c. 127, ss. 31–35.

under any Winding-up Act for the time being in force, but a creditor cannot do so (*z*). But where by a special Act a railway company was amalgamated with another, and in consequence it entirely ceased to carry on any business as a railway company, and continued its existence only for the purposes of winding up its affairs, Malins, V.-C., overruled a demurrer to a bill filed by one of its creditors which alleged that the assets were being wasted, and therefore prayed that the company might be wound up under the Court (*a*). Here the Vice-Chancellor thought that section 199 of the statute has reference only to going concerns. In another case he held that the exception from the power to wind up unregistered companies given by that section applies only to companies whose principal object is the construction and working of a railway, and that where a company's principal object was the construction of docks it could be wound up by the Court, although it had power also to make a branch railway for purposes connected with the docks (*b*).

(c.) *Unregistered Companies.*

The provisions of the Act (25 & 26 Vict. c. 89) with reference to these bodies are contained in section 199, and are as follows :— 25 & 26 Vict. c. 89, s. 199.

(*z*) *Re North Kent Extension Railway Company*, L. R. 8 Eq. 356.

(*a*) *Ward* v. *Sittingbourne and Sheerness Railway Company*, W. N. 1874, p. 68.

(*b*) *Re Exmouth Docks Company*, L. R. 17 Eq. 181.

Subject as hereinafter mentioned, any partnership, association, or company, except railway companies incorporated by Act of Parliament, consisting of more than seven members and not registered under this Act, and hereinafter included under the term "unregistered company," may be wound up under this Act, and all the provisions of this Act with respect to winding up shall apply to such company, with the following exceptions and additions:—

1. An unregistered company shall, for the purpose of determining the Court having jurisdiction in the matter of the winding up, be deemed to be registered in that part of the United Kingdom where its principal place of business is situate; or if it has a principal place of business situate in more than one part of the United Kingdom, then in each part of the United Kingdom where it has a principal place of business; moreover, the principal place of business of an unregistered company, or (where it has a principal place of business situate in more than one part of the United Kingdom) such one of its principal places of business as is situate in that part of the United Kingdom in which proceedings are being instituted, shall for all the purposes of the winding up of such company be deemed to be the registered office of the company.
2. No unregistered company shall be wound up under this Act voluntarily, or subject to the supervision of the Court (*c*).
3. The circumstances under which an unregistered company may be wound up are as follows (that is to say):—

(*c*) But with regard to industrial and provident societies, 25 & 26 Vict. c. 87, s. 17, provides that, if registered under that Act, they may be wound up voluntarily or by the Court in the same manner and under the same circumstances in and under which any company may be wound up under any Act or Acts for the time being in force for winding up companies.

(*a*) Whenever the company is dissolved or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs.
(*b*) Whenever the company is unable to pay its debts (*d*).
(*c*) Whenever the Court is of opinion that it is just and equitable that the company should be wound up.

What companies within this section.

From the language of the preliminary part of this section it might have been thought to include any association whatever other than those expressly excepted, but it would seem that a club cannot be wound up by the Court (*e*). A doubt has also been raised as to whether the Court can make an order for the winding up of an unregistered mutual marine insurance society (*f*). Nor can persons who associate themselves for the purpose of forming a company, which project fails, obtain an order to wind up such projected company on the ground that they have acted for and represent such company (*g*).

(*d*) See, for the circumstances under which a company will be deemed unable to pay its debts, the fourth clause of this section.

(*e*) *St. James's Club*, 2 De G. M. & G. 383.

(*f*) See *Re London Marine Insurance Association*, L. R. 8 Eq. 176.

(*g*) *Re Imperial Anglo-German Bank*, 26 L. T. (N. S.) 229, W. N. 1872, p. 40.

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