BANKERS AND BORROWERS

BY

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WITH AN INTRODUCTION BY

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PREFACE TO THE SECOND EDITION

In presenting a second Edition of this work, care has been taken to make the alterations and additions necessitated by recent legislation. The section dealing with Local Authorities has been partly rewritten, thus enabling the Tables of Subsidiary General Acts to be dispensed with, and I have again to express my thanks to Mr. J. R. Johnson, City Treasurer of Birmingham, for his kind help in this connection.

The opportunity has also been taken to incorporate information which it is hoped will be of use to Scottish bankers: and I have to express my appreciation for assistance kindly rendered by Mr. Allan M'Neil, S.S.C., Lecturer on Banking in Edinburgh University and joint author of Wallace and M'Neil's "Banking Law."

J. B.

February, 1924.

INTRODUCTION

By ERNEST SYKES

Secretary of the Institute of Bankers

Before deciding whether he will accede to a request for a loan or overdraft a banker has to make numerous inquiries. He must ask himself or his Head Office whether he has money which it is convenient to lend; he must ascertain whether the customer is likely to be able to repay the advance at maturity; he must examine the nature of the security offered; he should satisfy himself that the advance is required for legitimate purposes.

But beyond all these questions there is another which, in the case of a numerous and rapidly growing class of borrowers, obtrudes itself upon his attention. That question is, has the borrower power to borrow, and if so is the contemplated advance within such powers? This is the question which Mr. Brunton sets himself to answer in the following pages. It is a very technical aspect of the business of lending money, but its importance can hardly be exaggerated. The question does not often arise when the would-be borrower is an individual, except maybe when he is known to be borrowing in a fiduciary capacity. The banker however is constantly faced with applications for advances from bodies corporate or unincorporate, usually the creations of statutory enactments or whose powers are subject to statutory control, in regard to which it is essential that he shall first satisfy himself that the proposed borrowing is within the powers possessed by the

applicant. Such bodies as joint stock companies, municipal and other local government authorities, and building societies, have very definite restrictions over their powers to borrow and to every lender the law attributes an exact knowledge of the extent of these powers. If the borrowing is outside of these powers, *ultra vires* in legal phraseology, the lender is in an unhappy position. If for instance a municipal authority borrows money for a purpose for which it has no power to borrow, or without the consent of the appropriate central authority, any ratepayer may take steps which will result in the repayment of the loan being forbidden. If again a joint stock company should borrow beyond or outside of the company's powers, and should go into liquidation, the lender cannot recover from the liquidator. It is true that in either case the lender may possibly by a roundabout legal fiction be able to acquire the rights of the creditors of the company or municipal authority in so far as the proceeds of the loan have been applied in satisfaction of the debts legally due to such creditors, but this right is unreliable and unsatisfactory.

The only satisfactory safeguard is to obtain full assurance of the powers of the borrower before making the loan, and this is what Mr. Brunton's book sets out to teach the reader. It is a practical explanation of the limitations placed by statute or by the common law on the borrowing powers of a very wide class of borrowers. Mr. Brunton's experience as a bank inspector has brought him into familiar contact with most of the problems which he discusses. The subject is complex and is not adequately treated in any single volume which is known to me ; this book should therefore find ready admittance to the select library of reference works which the practical banker likes to have at his elbow.

ERNEST SYKES.

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There are numerous classes of Associations known to the law, but by far the greater number consists of trading Companies which derive their charter from the Companies Acts, 1862–1917. The Companies (Consolidation) Act of 1908 was a consolidating measure, and the provisions of that Act, interpreted and supplemented by the many important decisions of the Courts on the measure and also on the Companies Acts, 1862–1907, furnish us with an admirable system for regulating the constitution, management, and winding up of Companies. While Companies registered under the Acts, owing to their number and importance, will naturally occupy first place in this work, it is proposed to deal, in due course, with such combinations as are met with in the ordinary course of business.

COMPANIES REGISTERED UNDER THE COMPANIES ACTS, 1862–1917.

Prohibition of Large Partnerships.—Partnerships of more than ten members for the purpose of carrying on the business of banking, and of more than twenty for carrying on any other business, with the object of gain, are prohibited (Sect. 1) [1] unless registered under the Act, or formed in pursuance of some other Act or of letters patent.

Any Company or Association formed in violation of this Section is an illegal Association, and cannot be wound up under the Act of 1908, at the instance either of the Association, of a creditor, or of a shareholder; the Association cannot sue, nor conversely can a member or outsider sue the Associa-

[1] Except where otherwise stated the Sections cited refer to the Act of 1908.

tion, for, the Association having no legal existence, it cannot contract.

"Mutual Assurance Associations" have been held to be "Associations for gain" within the Section (*re* Padstow Association (1882), 20 Ch. D. 137); while land Companies of more than twenty members have been held not to be illegal, the object being merely the acquiring and dividing of land between the members, and not the carrying on of any business, e.g. trafficking in land (Wigfield *v.* Potter (1881), 45 L.T. 612).

Memorandum of Association.—It is of prime importance to appreciate the distinction between the Memorandum and the Articles of Association, inasmuch as this distinction has a material bearing on the subject of borrowing.

The Memorandum must be drawn in accordance with the provisions of the Act (Sects. 3, 4, 5). It must be signed by the persons who wish to form the Company, and it announces to the public, when registered—

(*a*) The name of the Company;

(*b*) In what part of the United Kingdom the registered office will be;

(*c*) The objects of the Company;

(*d*) That the liability of members is limited;

(*e*) The capital of the Company, and how it is to be divided.

If the Company is to be limited by guarantee, or with unlimited liability, certain modifications of the clauses are necessary; but one clause common to all, and the most important, is the "objects" clause. The subscribers have wide discretionary powers, which will not be interfered with, provided their purpose is lawful and not in contravention of the Act. They have to decide what it is they wish the Company to do, and having decided, they endow the Company with the necessary power by stating, in the "objects" clause, the objects for which the Company may trade. The Company, when formed, cannot do anything that is not expressly or impliedly included in its "objects" clause. For example, a Company formed for the manufacture of cycles is not (in the absence of a clause expressly so authorizing) entitled to embark in gold-mining operations in North America. Such a venture is beyond the power of (*ultra vires*) the Company, and is incapable of ratification, even by a majority of the shareholders.

The "objects" clause, therefore, (*a*) affirmatively determines the objects of the Company, and gives it power to carry such objects into effect; and (*b*) limits the powers of the Company to the powers so conferred, save in so far as other powers are conferred by statute (*vide* "Palmer's Company Law").

A rigid observance of its objects is necessary for the protection of the shareholders and the creditors of the Company; and no alteration of the Memorandum, with respect to the objects, is permitted except (Sect. 9) on a special resolution, confirmed by the Court, to enable the Company:—

(*a*) To carry on its business more economically or efficiently; or

(*b*) To attain its main purpose by new or improved means; or

(*c*) To enlarge or change the local area of its operations; or

(*d*) To carry on some other business which may be conveniently combined with its own; or

(*e*) To restrict or abandon any of its objects.

The Court rarely refuses to confirm a resolution for alteration under Section 9, but it is a very expensive formality, and the Court must be satisfied that the rights of all parties interested, such as debenture-holders and creditors, are not likely to be prejudiced. No alteration in the "objects" clause, save in so far as allowed by the Court as coming within the terms of this Section, can be made, so that in any other cases the only course open to a Company which wishes to enlarge its objects is to register a new Company altogether.

The Memorandum thus defines strictly the Company's powers in dealing with the outside world; and once it is registered, anyone having business relations with the Company is deemed to have notice of the contents of the Memorandum and is bound thereby, except that he need not inquire whether all the necessary steps to make the proceedings regular, i.e. matters really of internal management, have been taken by the Company itself (Royal British Bank *v.* Turquand, 6 E. & B. 327).

Articles of Association.—In the case of a Company limited by Shares, a full set of Articles may be registered; if no Articles are registered, the Articles contained in Table "A" (*see* first Schedule to Act, 1908) are to apply to the Company, so far as the same are applicable. In many cases a short set of Articles,

altering or supplementing the provisions of Table "A," are registered. Where a Company is limited by guarantee or unlimited, a set of Articles must be registered, and Table "A" may be adopted with the necessary modifications. (Sects. 10, 11.)

The Articles are the regulations which govern the relations of the Company and its members *inter se*; they deal with the internal administration of the Company; and, subject to the conditions in the Memorandum, the Company may by special resolution alter, or add to, its Articles (Sects. 13, 69); but the Court will restrain any marked abuse of this statutory power.

The Memorandum of Association is therefore the dominant instrument; it contains the conditions under which the Company becomes incorporated; it controls the Articles of Association which, in their turn, prescribe whether the powers of the Directors are general or restricted; and it is within the compass of the two documents that a banker will ascertain its powers, should a Company desire to become a borrower. In this connexion Section 82 should be read as to filing a statement in lieu of prospectus; and Section 87 as to allotment of shares.

Both the Memorandum and Articles when registered "bind the Company and the members thereof . . . *as if they . . . had been signed and sealed by each member* and contained covenants on the part of each member . . . to observe all the provisions of the Memorandum and Articles . . ." (Sect. 14.)

It should not be forgotten that a corporation is a legal persona just as much as an individual; and that the Company is at law a different person altogether from the subscribers to the Memorandum of Association (Salomon *v.* Salomon & Co. (1897) A.C. 22).

It follows, therefore, that a man may be conducting a perfectly solvent business; but in order to obtain the advantages of limited liability, he may decide to turn the business into a Company, he and members of his family subscribing the Memorandum, the capital probably being but a fraction of the total resources on which creditors could formerly rely. This "one man" Company becomes a legal entity, capable of contracting through its agent (the former sole partner), and it may do a large business on the credit he formerly enjoyed, although no longer backed with his substantial capital.

In the case mentioned, Salomon had caused mortgage debentures to the amount of £10,000 to be issued to himself in part payment by the Company for the business; and these debentures were declared to be valid—a striking illustration of this doctrine of separate legal existence.

Borrowing Powers.—To enable a Company to borrow, the necessary power must be conferred by its constitution; and whether a Company, under the Act, has the necessary power, will depend on the objects specified in its Memorandum of Association. Almost without exception, the Memorandum contains an express power to borrow, although it is not necessary that there should be an express power if the objects are such that a power to borrow may be fairly regarded as incidental to those objects, as in the case of a trading Company (Australian Auxiliary Steam Clipper Co. *v.* Mounsey, 4 K. & J. 733). With regard to a non-trading Company, there must be something in the Memorandum or Articles to show, expressly or impliedly, a power to borrow.

If a Company, by its constitution, has no power to borrow, Section 9 provides the means of obtaining the necessary power.

There is nothing in the Act itself to limit borrowing, and it is rarely, if ever, that the Memorandum contains any limitation; this must be looked for in the Articles. Frequently the latter contain no fettering of the power. On the other hand, the amount may be limited to a figure named in the Articles, or where the provisions of Table "A" apply or have been adopted, the borrowing powers (under Clause 73 of the Table) are restricted to an amount not exceeding the issued share capital of the Company unless otherwise sanctioned by the Company in general meeting. Frequently, also, the Articles provide for the manner in which the power to borrow may be exercised—usually the Directors are so authorized.

Where (i) a Company has no borrowing power, or (ii) the power is limited by the Memorandum of Association, a very rare occurrence, a borrowing in the one case, and a borrowing in excess of the prescribed limit in the other, is *ultra vires* the Company; it is, therefore, incapable of ratification by the shareholders, and securities given are inoperative. Neither can the Company regularize an *ultra vires* borrowing by obtaining,

by the aid of Section 9, borrowing powers, or an enlargement of its existing powers (*ex parte* Watson (1888), 21 Q.B.D. 301), although the decision of the House of Lords, in Sinclair *v.* Brougham (1914), App. Case 398, has since thrown doubt on this ruling.

Where money is borrowed *ultra vires* the Directors' powers, as limited by the Articles, such borrowing is irregular and securities are inoperative, unless the Company be estopped from denying the validity of the transaction or the shareholders ratify in general meeting. Generally, however, the Articles which limit the Directors' powers of borrowing provide that such limit may be exceeded with the sanction of the Company in general meeting, and in such case the lenders, if acting *bona fide*, need not inquire whether the sanction has been given because that is a question of internal management. (Royal British Bank *v.* Turquand, 6 E. & B. 327.) In practice, however, a prudent banker generally inquires.

There is thus an important distinction between borrowings which are, in the one case, *ultra vires* the Company, and, in the other, *ultra vires* the Directors.

On a liquidation an *ultra vires* borrowing, as such, cannot be recovered from the Company or its liquidator; but there is a remedy available to the lender, under the doctrine of subrogation,[1] by which he may stand in the place of creditors, whose just claims have been met by means of the money borrowed, and recover against the Company, although he will not be subrogated to any securities which may be held by those creditors. If he intervenes before the money has been spent, he may follow the money and obtain an injunction to restrain the Company from parting with it.

The remedy is a troublesome, and, it may be, an unreliable one, inasmuch as the onus of proof that the moneys were so used is on the lender; and it is therefore a matter of ordinary prudence to examine carefully the powers of any registered company desirous of becoming a borrower.

It should be noted that a borrowing may be *ultra vires* (*a*) as being outside the objects of the Company (Sinclair *v.* Brougham); or (*b*) where the Company has no borrowing power, or has exceeded its borrowing power (*ex parte* Watson).

[1] See page 18 *post.*

Where the Directors of a Company have held out that they were authorized to borrow, and the borrowing has proved to be *ultra vires*, an action would probably lie against them for breach of warranty of authority.

Particular care is necessary in lending to a Company which has only limited borrowing powers and has a debenture issue outstanding or money borrowed from other sources. In such circumstances the Company's borrowing powers may be already exercised to the full extent.

Limited Companies as Sureties and Guarantors.—A Limited Company ought to be expressly empowered by its Memorandum to become surety or guarantor because this power is one which is not easily implied, and where the obligation is undertaken on behalf of another company in which the directors of the surety Company are interested as directors or as shareholders, legal advice should be taken as to whether the resolution to guarantee has been passed by a quorum of independent directors. If not, the guarantee would probably be held to be invalid. In modern industry there is a tendency towards combination of interests: and although the Memorandum of Association invariably includes the power to guarantee contracts amongst the Company's objects, it is desirable that the authority to become surety be conferred in precise terms.

Securities and Modes of Borrowing.—A Company with power to borrow may borrow in such manner as it thinks fit; and, incidentally thereto, it has power to give security by way of mortgage or charge of all or any of its property, real or personal, present or future, including, generally, uncalled capital. The view is held that reserve capital may also be mortgaged (*vide* "Palmer's Company Law"). A point to remember is that *overdrawing is borrowing.*

Companies frequently issue debentures or debenture stock, secured by some mortgage or charge on property of the Company, effected by trust deed or by the debentures themselves, or in both ways (see Sect. 103).

The ordinary debenture constitutes a charge on all the property of the Company, present and future, including uncalled capital, by way of floating security, the Company being free to deal with its assets in the course of its business,

until the happening of some specified event, upon which the charge becomes fixed.

Another form of debenture embodies a specific first charge on the freeholds and leaseholds, together with a floating charge on the liquid assets.

There may be occasions when debentures issued to a bank or its nominees are supplemented by a trust deed, conveying the realty and charging the other assets to trustees for the bank as security; but, as a rule, the form mentioned in the preceding paragraph is the one generally used, with, however, the incorporation of certain restrictions and limitations on the Company's power to create further charges, except with the consent of the bank.

Where simply a floating charge is executed by a Company, the powers remaining in the Company of dealing with its property are so wide that "unless otherwise agreed" the Company may create specific mortgages in priority to the floating charge (Wheatley *v.* Silkstone Co. (1885), 29 C.D. 715). Words may therefore be inserted in the debenture or instrument creating the floating charge to the effect that the Company is not to be at liberty to create any mortgage or charge in priority to or *pari passu* with the floating charge. This, for the most part, is effective where the Company afterwards creates a mortgage in favour of any person who has notice of the floating charge and qualification; but where a person obtains a legal mortgage and makes out that he was not aware of the floating charge; or that, though aware of the floating charge, he was not aware of the qualification, he may take priority (Standard Rotary Machine Co. (1906), 95 L.T. 829). The weakness of such a charge is obvious, although a measure of protection will be obtained where the lender stipulates for the custody of the deeds of the Company's property, thus rendering it difficult for the Company, without his knowledge, to create a legal mortgage which would take priority.

In practice, therefore, it is now usual, and more convenient, to incorporate in the debenture or the trust deed a fixed first charge on the lands and immovable property of the Company, with a floating charge on the movable assets, and owing to the doctrine of notice, applicable by reason of the public registra-

tion of charges under the Act, it is submitted that advances to these registered Companies, secured by mortgage or charge on their property or assets, should be by way of loan. A banker may be the first debenture-holder, secured by a fixed charge on the immovable property and a floating charge on the movable assets; and until the Company creates a subsequent charge (by second debentures or otherwise) which is duly registered, his position is unassailable. But as soon as the subsequent charge is registered he is deemed to have notice of another equitable interest, notwithstanding any restrictions in his debentures regarding the creation of subsequent charges; and unless the subsequent charge expressly recognizes the fluctuating nature of the banker's advance, the rule of Clayton's Case would apply, where the advance had been made on current account. The law of priorities is common to all mortgages and charges, and further advances, after registration of the second charge, would not be protected by the security, even although the banker had failed to notice the publication of the registration.

Section 212 contains an important restriction on the effectiveness of a floating charge. Where debentures, carrying a floating charge, are issued within three months of winding-up, the floating charge is invalid (except to the extent of fresh advances made in consideration of the security), unless it is proved that the Company was "solvent" immediately after the creation of the charge. The section is one of considerable importance to bankers, and particulars of certain recent decisions on the subject matter of the section are of interest.

The Court of Appeal, whose decision was affirmed by the House of Lords (Illingworth *v.* Houldsworth (1904), App. Ca. 355), has held that every charge which has the following characteristics, is a "floating charge" within the meaning of Section 212:—

1. If it is a charge on a class of assets (present or future) of a Company;
2. If that class is one which in the ordinary course of business of the Company would be changing from time to time; and
3. If it appears that by the charge it is contemplated that, until some future step is taken by or on behalf of those

interested in the charge, the Company shall carry on its business in the ordinary way as far as concerns the particular class of assets comprised in the charge. A charge may be a " floating charge " within this section, though it is only charged on part of the Company's property.

The Directors of a Company guaranteed the Company's overdraft; subsequently the Company (being then insolvent), within three months of the commencement of its winding-up, issued to these directors indemnity debentures. The debentures were held to be invalid under Section 212 on the ground that they had been issued to secure an antecedent independent transaction (Orleans Motor Co. (1911), 2 Ch. 41).

On the other hand, money paid in reliance on a resolution of the Board of Directors that a debenture for a sum of £1,000, secured by a floating charge, should be executed, was paid " at the time of the creation of the charge " within the meaning of the section, though £750 was in fact paid to the Company ten days before the execution of the debenture (Columbian Fireproofing Co. (1910), 2 Ch. 120). *Bona-fide* creditors, however, must be careful to obtain their security at the time of making the advance; very little delay will imperil it.

Where debentures were issued to a bank to secure an existing loan and a current account, and the Company went into liquidation within three months, there being then nothing due on the current account, the charge was held to be invalid as regards the loan account, although in the meantime various advances had been made and repaid on the current account (Christy *v.* Hayman (1917), 1 Ch. 283).

Where a lender had registered an agreement to give him a floating charge, and he subsequently obtained, within three months of the winding-up, a debenture containing the agreed charge, it was held that the agreement had become exhausted in the issue of the debenture, and that the debenture was invalid so far as the floating charge was concerned, because created for a past liability within three months of the winding-up (Francis *v.* Gregory Love & Co. (1916), 1 Ch. 203).

The object of the section is to prevent insolvent Companies from creating floating charges to secure past debts which do not go to swell their assets and become available for creditors. The section refers only to a floating charge; presumably, if

the debenture, or instrument securing the debenture, contains as well a fixed charge given under pressure by the lender, it would be good, and not in fraud of the bankruptcy laws.

Section 104 (3) expressly covers cases where debentures are deposited to secure advances from time to time on current account or otherwise, and provides that such debentures shall not be deemed to have been repaid by reason of the account having ceased to be in debit while the debentures remain deposited; and subsection 1 of the same section provides for the reissue of debentures, in certain circumstances, if there is nothing in the debentures or the articles to prohibit reissue, and the debentures have been kept alive. Reissued debentures must be treated as new debentures for the purpose of stamp duty, Section 104 (4).

Where the advance is made by way of current account, an interesting point arises where the validity of the debentures is challenged under Section 212. The application of the rule in Clayton's Case may be rebutted by the facts of a particular case; but it appears to be, at least, a reasonable defence to an action of the nature mentioned, that the account was continued and cheques honoured, creating fresh advances, in reliance on the debentures; and that, in the absence of specific appropriation, the bank was entitled to appropriate credits in payment of the old debt. The point is one which it would be interesting to have tested in the Courts.

An interesting point also arises regarding the definition of the word "solvent" in the section. Does it mean that (*a*) at a given date the Company was able to pay its debts as and when they became due, or (*b*) able, if the assets were realized, to pay twenty shillings in the pound? No doubt, sooner or later, the opinion of the Courts will be taken on this important point. In the Scottish Courts it was decided in the case of Teenan's Tr. *v.* Teenan, 1886, that a person is insolvent if he is unable to meet his engagements as they arise from day-to-day. It is not sufficient to show that, given time to realize his assets, he could pay twenty shillings in the £.

If property situated abroad is charged as security, it should be remembered that, to perfect the chargee's title, local laws must be complied with, otherwise the charge may be overridden by a local mortgage, lien or execution.

In this connexion it is necessary to refer to Scottish Law with respect to securities over heritable property and movable property, familiar to us as real and personal property.

In Scotland, debentures issued under the Companies Act, 1908, may be (1) "naked" debentures which are simply an acknowledgment of a debt and confer no preferential rights on the holders: (2) secured on movable, or personal, rights or property *by actual or constructive delivery on transfer to the lenders or trustees for the lenders*: (3) secured by mortgage on heritable, or real, property.

With regard to the first-named, no comment is necessary: while debentures of the second class mentioned have their prototype in the debenture issued by an English Company and secured by a floating charge covering the assets. But there is an essential difference between English and Scots law in respect to the security which may be given for a debenture of this character. It is a distinguishing feature of Scots law that no valid security can be created in Scotland over movable property *without delivery, actual or constructive, into possession of the creditor*: an operation which, consistently with the proper carrying on of business, is impracticable, since it entails the delivery of the stock-in-trade in a man's warehouse into the possession of the debenture-holder. Therefore, joint-stock Companies with their registered offices in Scotland cannot give the floating charge known to English law, unless in the case of shipping property, shares in other Companies, and debts due to them. The title to such property and debts must be duly completed in accordance with the law of Scotland. Heritable property may, however, be rendered a satisfactory security as cover for debentures by means of an *ex facie* absolute conveyance of the property to trustees for the debenture-holders, registered as required by Scots law in the appropriate Register of Sasines: and assuming the validity of the deed in other respects, the security is an effective preference in favour of the trustees. The right of the trustees is qualified by a back-letter which is not registered. In such cases the letter is similar in its effect to deeds entered into by English Companies, securing mortgage debentures over property in England.

The registration provisions of the Companies Act, 1908, do not apply to Companies registered in Scotland; but it is

essential that the usual registration of charges given over property in Scotland should be effected by Companies registered in England or Ireland.[1] The system of land registration in Scotland requires the registration of these charges in the appropriate Register of Sasines.

Debentures to bearer are valid in Scotland; and statutory Companies may issue bonds and debenture stock under the Companies Clauses Act of 1845, which, if secured by a mortgage deed over the Company's undertaking, constitute a valid security in Scotland. The bonds contemplated by the Act are "naked" debentures, but by virtue of the mortgage deed the assignment of the Company's undertaking, etc., to the creditor in security of his debt is declared to have the full effect of an assignation duly completed and creates a security very much on the same lines as a floating charge in England, thus forming an exception to the rule above-mentioned.

In the same way debenture stock issued under the Companies Clauses Act, 1863, is a statutory preferential charge on the undertaking, enforceable in case of default by application for the appointment of a Judicial Factor.

These provisions, however, are only applicable to Statutory Companies.[2]

Apart from the rights which, consistently with Scottish law, may be conferred upon the Trustees of the Deed for the better protection of the lenders against *debenture stock* of a registered Company, a banker taking a debenture really lends against the heritable property charged as a security by the instrument creating the debenture: and it is necessary to mention, briefly, the methods under which a valid security may be created over heritable property in Scotland. This may be acquired by (1) the Bond & Disposition in Security; (2) the Bond of Credit & Disposition in Security; and (3) the Disposition *ex facie* absolute, qualified by a back-bond or back-letter. The first is the usual method where the advance is intended to be made at once by way of loan: it is not available for advances on current account. A statutory form of Bond & Disposition in Security is scheduled to the Titles to Land Consolidation Act, 1868, and registration is

[1] The Act is operative in the Irish Free State and in Northern Ireland. Registration Offices: Dublin and Belfast.

[2] See page 16 *post*.

compulsory in the appropriate Register of Sasines, priority being determined according to the date of registration. The Bond of Credit & Disposition which may be used for cash accounts, limits advances to a definite amount to be specified in the security, and is thus available for advances subsequent to the date of registration, but not in excess of the specified limit. The surplus, if the security be realized, cannot, in a question with other creditors, be retained by the Bank against any other debt of the customer to the Bank. Registration of the bond must be made in the appropriate Register of Sasines.

The Disposition *ex facie* absolute enables banks to make continuing advances on the security and conveys an *absolute* right of property. The qualifying back-bond or back-letter states the conditions on which the debtor is entitled to a reconveyance of his property and sets out the nature of the transaction. The Disposition requires a stamp duty of 10*s*., and the back-letter, mortgage duty on the amount intended to be secured. Registration of the Disposition *only* is made in the appropriate Register of Sasines. The back-bond should not be recorded.

In England, an equitable mortgage may be created by a deposit of the title deeds of real property, with, or without, a written document of charge ; but in Scotland it is not so, since it is only such movable property as has an intrinsic value that can be made the subject of pledge under Scottish law. Title deeds have no intrinsic value.

For further information on this subject, often important to English bankers, the reader is referred to Wallace and M'Neil's "Banking Law," the recognized authority on matters appertaining to Scottish banking.

Registration of Mortgages, Charges, etc.—The following mortgages or charges must be registered with the Registrar of Joint Stock Companies (Sect. 93) [1] :—

1. To secure any issue of debentures ;
2. On uncalled capital ;
3. An instrument which if made by an individual would be a bill of sale ;
4. A floating charge ;
5. A mortgage of land or book debts.

[1] These provisions do not apply to Scotland.

If not registered within twenty-one days from the date of its creation, the charge is void against the liquidator and any creditor of the Company; but any contract or obligation for repayment of the money is not prejudiced, and the debt becomes immediately payable. A mortgage or charge is "created" when the deed or agreement is executed or entered into, even though the advance is made subsequently.

The section only applies to the specified classes of mortgages and charges. Securities over stocks and shares, dock warrants or other mercantile documents of title to goods, and life policies, do not require registration. Every mortgage or charge, however, must be entered in the Company's own Register (Sect. 100).

Prior to the Act of 1900, debentures did not require public registration; nor did charges on realty before the Act of 1907, although a return of the totals of mortgages or charges previously created was called for by the latter Act.

Attention must also be given to the registration requirements of the following Acts:—Merchant Shipping Act, 1894 (Sect. 33); Stannaries Act, 1887 (Sect. 19); Middlesex and Yorkshire Registries Acts; Land Transfer Acts, 1875 and 1897.

Remedies of Debenture-holders and Mortgagees.—Where the mortgage is by deed, the Mortgagee has the power of sale conferred by Section 19 of the Conveyancing and Law of Property Act, 1881, on giving the notice provided for by Section 20, or such notice as is stipulated for in the deed itself; or he may appoint a Receiver, or enter into possession, but he cannot foreclose without an order of the Court. The remedies under Scottish law are very similar. An equitable Mortgagee, as a rule, applies to the Court for an order to sell.

Generally, a banker's mortgage contains a power of sale which may be exercised by the attorney named in the deed immediately on default.

Debenture-holders have the following statutory remedies:—

1. To appoint a Receiver—if the conditions of the debenture allow;
2. To commence a Debenture-holder's action to obtain payment or enforce their security by sale. The Court will then appoint a Receiver and (if necessary) a Manager

until sale. The Court will sometimes authorize the Receiver to borrow money for the purposes of the business;

3. To apply for foreclosure;

4. To present a creditor's winding-up petition.

Where the Company is not being wound up, and a Receiver is appointed under the debentures which constitute a floating charge, the preferential debts [1] must be paid forthwith, and before the claims of the debenture-holders.

A Bank's form of debenture, as a rule, contains power to appoint a Receiver (the Receiver to be deemed the Agent of the Company) with full power to take possession of the property and to sell.

PUBLIC UTILITY COMPANIES

Probably next in order of importance, having regard to the amount of capital involved, are Tramway, Gas, Water Boards and Companies, Electric Lighting, Canal, Dock and Railway Companies, and similar undertakings.

These undertakings for public services may be promoted by private individuals, under the provisions of the following Acts, which also apply to Scotland: the Tramways Act, 1870, the Light Railways Act, 1896, the Gas and Water Works Facilities Act, 1870, the Gas Regulation Act, 1920, and the Electricity Supply Acts, 1882–1922, or by private Act of Parliament obtained for the purpose. Local Authorities may likewise acquire or construct such undertakings of public utility under the provisions of the general Acts named, or by special Act of Parliament. Frequently, gas and water services are supplied by Joint Boards of Local Authorities, constituted by Provisional Order of the Ministry of Health, under Sections 279 and 280 of the Public Health Act, 1875, and these Boards may borrow in accordance with the provisions of that Act.

One cannot generalize in regard to the borrowing powers of these bodies; the guiding principles can only be indicated.

Where the promoters, either private individuals or Local

[1] See page 100 *post.*

Authorities, obtain a special Act, it is only within the compass of that Act that the Company's powers will be found. It circumscribes strictly what borrowing, if any, the Company may incur, and frequently in these special Acts the borrowing power is governed by the amount of capital issued.[1] Further, the provisions of the Companies Clauses (Consolidation) Act, 1845 [2] (conferring power to borrow on mortgage of the undertaking or on debentures), apply to every *joint stock* Company which has been incorporated by a *special* Act of Parliament since 1845 for the purpose of carrying on any undertaking, unless they are expressly varied or excepted by the Company's special Act.

A Railway Company may borrow and give security in accordance with the provisions of its Act of Incorporation or (in the absence of any provisions to the contrary) of the Companies Clauses (Consolidation) Act, 1845; and where there is power to issue mortgage debentures and bonds, the Company may also issue debenture stock under the provisions of the Companies Clauses Act, 1863, even although there is no specific authority to do so incorporated in the special Act. But Railway Companies are subject to the conditions imposed by the Railway Companies Securities Act, 1866, which enacts that a Railway Company, before issuing mortgage debentures, bonds or debenture stock, must render a return to the Registrar of Joint Stock Companies stating the Act under which it is proposed to borrow; the amount authorized to be borrowed; the amount already borrowed and outstanding; the amount remaining to be borrowed, and whether a certificate of the Justices or the assent of a General Meeting is a condition precedent to the exercise of the borrowing power.

The Railways Act, 1921, had for its object the amalgamation of the railway systems of the country, and provided for the formation of the Railway Amalgamation Tribunal. The Act endowed this body with Parliamentary powers to make Rules and Orders, and a series of Rules and Orders were subsequently issued which carried into effect the intentions of

[1] The Public Utility Companies (Capital Issues) Act, 1920, extends this limit in certain circumstances and applies to Scotland as well.

[2] See page 110 *post*.

Parliament as expressed in the principal Act. These Orders contained provisions and limitations with regard to the borrowing powers of the amalgamating Companies, and were, in effect, special Acts of Incorporation precisely similar to a special Act of Parliament. The borrowing powers conferred by these Orders, while constituting a limit for the purposes of the Order, in no sense represent finality, so far as additional schemes to be promoted by the Company are concerned, and each Company retains full liberty to apply to Parliament in the usual manner for additional powers as the necessity arises. The Railways Act, 1921, conferred certain borrowing powers on the stockholders of the respective Companies; but the provisions were of a temporary nature and comparatively unimportant.

It may be appropriately mentioned here that Companies incorporated by special Act of Parliament may adopt the provisions of the Companies Clauses Acts, 1863–9, which authorize the issue of debenture stock in the shape of a right to a perpetual annuity.

Where the promoters proceed under a general Act, the Provisional Order will contain the borrowing power and the conditions under which it may be exercised, together with provisions respecting repayment.

The statute therefore, be it general or special, or the Provisional Order, prescribes definitely the amount, if any, which may be borrowed, together with the conditions and the period of repayment; and inasmuch as the statute or order is equivalent to the Memorandum of Association of a registered Company, any borrowing in excess of the power therein is *ultra vires* the Company, and irrecoverable except under the troublesome doctrine of subrogation; and only then if the money has been used in meeting *trade* debts.

In connexion with the right of subrogation it should be borne in mind that where a statutory body borrows for, and expends money on, an unauthorized object, there can be no lawful contract: and, consequently, no rights to which a lender can claim subrogation.

The debt must be a properly incurred debt. A Company may incur a debt either on income account or on capital account. The debts of a gas Company, for instance, for coal,

labour or repairs are debts properly incurred on its income account: and to borrow for the discharge of these debts does not increase the liabilities of the Company—it is actually a borrowing with one hand and a discharge of the Company's lawful liabilities with the other. But if the Company, having exercised its full borrowing powers for the purposes of the capital outlay necessary to its objects, borrow further money, say, for the purchase of additional lands, the debt is not properly incurred, and there is no right of action against the Company to which the lender can claim subrogation, although he may have his remedy against the lands.

In Rex *v.* Locke, *ex parte* Bridges and others (Court of Appeal, 1910) the Court said: "In all these cases the consent of the Local Government Board is required: and in our opinion that consent does not merely involve the consent to the loan, but an approval of the way in which the loan is to be secured, according to the Act of Parliament under which the securities are issued. This is a case, therefore, of action *by an Authority that has limited powers of which limited powers the public are assumed to have notice.*"

It is well settled that overdrawing is borrowing; it is altogether distinct from a trade debt; but there are occasions when these Companies (trading Companies, to all intents and purposes) overdraw their revenue accounts for reasons which are purely temporary and connected with their trading; and in such circumstances it is reasonable for a banker to view the matter from the business, and not from the hard-and-fast legal standpoint, although strictly speaking he should insist on the Company obtaining consent to the issue of further capital under the Public Utilities Act, 1920, page 17 *ante*.

Finally, there is another feature of the Acts governing many of these statutory undertakings which calls for notice. In many the scheme of constitution and management is very much the same; and, with the object of avoiding repetition, the legislature has adopted model clauses in the form of general Acts, which are embodied in the special Act incorporating the Company. Among such general acts are the Companies Clauses Consolidation Act, 1845, The Railway Clauses Act, 1845, The Lands Clauses Consolidation Act, 1845, The Gas

Works Clauses Act, 1847, and The Waterworks Clauses Act, 1847.

COMPANIES INCORPORATED BY ROYAL CHARTER

These Companies are, in the eyes of the law, common law corporations, and, as such, possess powers which are in marked contrast to those possessed by statutory bodies created by Act of Parliament or registered under the Companies Acts. In their corporate capacity they may, under their common seal, contract and deal with their property in the same way as a private individual, as was decided in the Sutton's Hospital case (10 Rep., 30 b.). Further, if by the charter creating the Corporation (the granting of which is one of the prerogatives vested in the Crown by the common law) the King imposes some direction which would have the effect of limiting the natural capacity of the Corporation, the disregard of such direction does not destroy the legal power of the body, although it may give the Crown the right to annul the charter.

These dicta were quoted with approval by Bowen L.J. in "Baroness Wenlock *v.* River Dee Co.," and it would therefore appear that a Corporation of this character has unlimited borrowing powers, notwithstanding any limitation imposed by the charter of incorporation; but one can hardly imagine a prudent banker accepting this view in practice except under competent advice.

Instances in which the Crown has exercised its power are provided by, amongst others, The Hudson Bay Co., 1870; The London Assurance Corporation, 1720; and The Peninsular & Oriental Steam Navigation Co., 1840; while in 1917 a charter was granted to the British Trade Corporation.

In contradistinction to the statutory or registered Company which is limited in its operations to the objects defined in the governing Act or regulations, bodies incorporated by charter are free from any such restrictions. Not only may they borrow, but so long as their object is not illegal, they may borrow for any purpose and in any manner they please; in short, they possess an unrestricted corporate capacity to contract.

In spite of the privileges attaching to them, chartered incorporations are now seldom formed. The power is sparingly exercised by the Crown ; and this reluctance, together with the incidental delay and expense, probably explains the rare use of this method of incorporation.

Under the Statute, 7 Will. 4, c. 73, a considerable number of Banks have been incorporated, with a liability attaching to the shares, and with a reserve liability in the event of a winding-up.

UNINCORPORATED COMPANIES CONSTITUTED BY CONTRACT

Prior to the passing of the first registration Act in 1844 (repealed 1862), practically the only associations with legal standing were ordinary partnerships, or corporations formed by Royal Charter or by special Act of Parliament—both expensive methods of incorporation.

The advantages of co-operation and the consequent spreading of trading risks, together with the transferability of shares, were fully recognized by commercial men ; and the practice gradually became general of forming unincorporated Companies by means of a Deed of Settlement under which specific regulations were adopted and incorporated in the Deed, and the Shareholders of the Company covenanted with the Trustee or Trustees of the Deed to observe its provisions.

These Companies were practically large partnerships, but possessing, as nearly as possible, continuous existence, together with certain distinguishing features, and with the liability of the members unlimited in respect of the debts of the Company.

By Section 264 of the Act of 1908, a Company, registered under Part VII of that Act, may by special resolution alter the form of its constitution by substituting a Memorandum and Articles for a Deed of Settlement. If it does not avail itself of this permission, the Deed of Settlement continues to govern the Company.

Therefore, in the one case the Memorandum and Articles disclose the Company's powers ; in the other, the Deed of Settlement ; and in the case of a Trading Company, provided

the Deed of Settlement contains no limitation or prohibition of the borrowing power, the power will be implied. Companies, however, governed by Deed of Settlement are now few and far between; the formation of unregistered companies for gain, where the members exceed twenty, having been prohibited since 1862.

LOCAL AUTHORITIES

As defined by the Public Health Act, 1875, the term "local authority" applies only to urban sanitary authorities and rural sanitary authorities now acting under the style of Urban and Rural District Councils; but, in order to deal with the subject as a whole, the term is here employed to include as well the councils of boroughs, the councils of counties, together with authorities charged with the administration of the Education and the Poor Law Acts; and other minor authorities.

All borrowing powers exercisable by Local Authorities are derived from Acts of Parliament. The power to borrow may be conferred either—

(1) by the General Law; or

(2) by Local Acts of Parliament; or

(3) by Provisional Orders issued by a Government Department and confirmed by Parliament.

In a study of these powers one is confronted with countless anomalies and complications (*vide* "Loans of Local Authorities," Biddell): and it is necessary first to consider the powers conferred by the General Law, as contained in the following statutes:—

Statute.	Maximum Borrowing.	Security.	Period of Repayment.
Municipal Corporations Act, 1882 (106, 119 (4), 120).	No limit.[1]	Land. Borough Fund. Borough Rate.	Not exceeding 30 years.
Public Health Act, 1875 (233, 234).	Two years' assessable value.[1]	District Fund and Rate.	Not exceeding 60 years.
Local Government Act, 1888 (69).	One-tenth annual rateable value.[1, 2]	County Fund and Revenues.	Not exceeding 30 years.
Local Government Act, 1894, (12).	Half annual assessable value.[3]	Poor Rate and Revenues.	Not exceeding 60 years.
Poor Law Acts, 1889 (2), 1897 (2).	One-quarter annual rateable value.[1, 2, 5]	Poor Rate.	Ditto.
Education Act, 1921 (132).	No limit.[1, 4]	County Fund in Counties; and Borough Fund in Boroughs; or separate rate in Urban Districts.	Counties not exceeding 30 years, Boroughs not exceeding 60 years.

[1] Consent of Ministry of Health must be obtained.

[2] May be increased by Provisional Order of Ministry of Health, confirmed by Parliament.

[3] Consent of Ministry of Health and County Council must be obtained.

[4] For Industrial Schools, Home Secretary's consent must be obtained.

[5] Managers of School Districts, $\frac{1}{16}$th of A.R.V. Managers of Sick Asylum Districts, $\frac{1}{10}$th of A.R.V., but may be extended by Provisional Order.

It is under the foregoing Acts that the following authorities derive their constitution and power to borrow in the discharge of their primary functions:—

County Councils	Local Government Act, 1888.
Borough Councils (other than Metropolitan)	Municipal Corporations Act, 1882.

Urban District Councils . .	Public Health Act, 1875.
Rural District Councils . .	Public Health Act, 1875, and Local Government Act, 1894 (borrowing provisions of former Act apply).
Parish Councils and Parish Meetings	Local Government Act, 1894.
Overseers of the Poor. . .	Poor Law Act, 1601.
Education Authorities . .	Education Act, 1921.
Boards of Guardians and Managers of Poor Law School Districts and Asylums	Poor Law Acts, 1889–1897.
Port Sanitary Authorities (other than Borough Councils); Joint Boards and Committees for purposes of Sewerage and Drainage; for supply of water	Public Health Act, 1875.

The constitution of Metropolitan Authorities is dealt with later (*post*, p. 44).

The first four Acts may be said to be the basic Acts or fabric of English Local Government, and a clear understanding of their scope is necessary.

Under the Municipal Corporations Act, 1882, borough councils are endowed with power to borrow for municipal purposes, these purposes being the provision of buildings for the accommodation of the council and its officers; for the administration of justice and for police purposes; for town halls; workmen's dwellings; bridges; and the purchase of land and corporate property; while under the provisions of the Local Government Act, 1888 (Sect. 62 (6), and Sect. 67 (1) (2)), they have certain duties with regard to financial adjustments, and emigration and colonization.

For the due administration of the Act, the council is authorized to levy a borough rate where the borough fund is insufficient for the purpose of the council's expenses.

The Public Health Act, 1875, as its title implies, deals with matters of public health and is a comprehensive measure. It confers on the Sanitary Authorities of Urban and Rural Districts

powers with regard to sewerage and drainage, water and gas supply, and the provision of hospitals, together with extensive powers in connexion with the construction of highways, pleasure-grounds, markets, etc. The Public Health Amendment Acts have since added to these powers.

Expenses under the Act are directed to be defrayed out of the district fund and general district rate.

It will, therefore, be apparent that a borough council will have with its bankers a Borough Fund Account; and where it also acts as sanitary authority, a District Fund Account; unless parliamentary powers have been obtained to amalgamate the two funds for rate and collection purposes.

The objects aimed at in the Local Government Act, 1888, appear to be the division of England and Wales into counties and county boroughs for local government, with distinct boundaries corresponding as nearly as possible to the geographical counties, and the establishment in those counties and county boroughs of a representative council with full control over the administrative business and finance of that county or county borough (*vide* Baker's "Local Government Act, 1888").

The general purposes for which a county council may borrow are the consolidation of debt; the purchase of land or building any building which the council by *any Act* is authorized to purchase or build (no specific clause therefore authorizing borrowing is necessary with county councils); permanent works and things; emigration and colonization; any purpose for which Quarter Sessions or county council is authorized to borrow, such as the provision of shire halls, sessions houses, judges' lodgings, county bridges, reformatory and industrial schools; and repaying loans. Re-borrowing for the latter purpose must be repaid within the term fixed for the original loan.

The powers conferred on county councils are therefore much wider than those possessed by other local authorities. This fact must not be overlooked, as it explains why an Act of Parliament, while authorizing county councils and other local authorities to purchase land and execute works, and empowering the latter to borrow *specifically* for the purpose, does not do the same as regards county councils.

A county rate is authorized to be levied by the council and the county fund is the channel through which the income and expenditure of the council passes.

Under the Local Government Act, 1894, the powers formerly vested in rural sanitary authorities and highway authorities were transferred to rural councils for the respective districts; and parish councils and parish meetings were constituted for rural parishes.

Generally, rural councils are not invested with sanitary powers of such an extensive character as urban councils; but powers common to both are those relative to sewerage and drainage, water supply, nuisances, inspection and regulation of lodging-houses, the provision of hospitals, cemeteries, and mortuaries. What are known as "urban powers" may be conferred by the Ministry of Health on particular rural councils, such as those which relate to new streets, to town improvements, to lighting and the regulation of traffic.

The general expenses of rural councils are payable out of the poor rate.

Parish councils and parish meetings exercise powers chiefly with regard to the provision or acquisition of buildings for public purposes, and the regulation of open spaces. They also possess certain limited powers in reference to drainage and water supply. The expenses of these bodies are chargeable to the poor rate.

The limited nature of the powers conferred upon authorities charged with the administration of the Education and the Poor Law Acts is sufficiently indicated in the titles of the respective Acts.

So far, the way is comparatively clear; and if it be borne in mind that, under the Local Government Act, 1888, county councils exercise functions not unlike those exercised by borough councils under the Municipal Corporations Act, 1882, it is permissible to adopt a broad classification of borrowings by local authorities (apart from poor law and education purposes) under the two headings of "borrowings for sanitary and public health purposes" and "borrowings for municipal purposes." There are, however, many of what may be termed subsidiary general Acts of Parliament which lay upon local authorities duties additional to those of the basic Acts, and authorize

borrowing for their respective objects; and it is here that the first difficulty is met with in applying a hard-and-fast rule for the limitation of borrowing. Many of these subsidiary general Acts, for instance, empower the local authorities charged with their administration to borrow money for purposes distinct from those of the basic Acts, although applying the restrictions on borrowing and the conditions imposed by the latter: while there are other Acts, such as the Education Act, 1921, which, while authorizing borrowing by the authorities responsible for the administration of education in accordance with the provisions of the Local Government Act, 1888, and the Public Health Acts, expressly exclude the limitations imposed by these Acts. An Education Authority may, therefore, borrow for the purposes of education, in addition to any debt which it may have incurred under other Statutes. There are also some subsidiary Acts which contain an indirect limitation on borrowing by means of a restriction on rating for the purposes of the particular Act, e.g. Museums and Gymnasiums Act, 1891; and others again, such as the Housing Acts, which contain separate and distinct provisions as to borrowing and include powers additional to those granted under other Acts.

These subsidiary Acts are very numerous, but it would appear that, where the objects of the Act are of a sanitary or general nature, the borrowing provisions of the Public Health Acts will apply: where, on the other hand, the objects are of a special character the borrowing will be additional to any powers already possessed by the Authority under the basic Acts, and the tendency of our present legislation is to confer separate borrowing powers under the various Acts which Local Authorities are called upon to administer. A lender, however, requires to be provided with something more than an abstract statement of the principles which underlie local government borrowings; and it is possible to furnish a standard which will serve as a guide, not by setting out in tiresome detail the borrowing provisions of each individual Act, but by showing those Acts which limit the amount that may be borrowed for the purposes of the Act. The position with regard to these powers may, therefore, it is conceived, be summarized as follows:—

1. Direct Limitations.

County Councils.—Generally speaking, County Councils derive their Borrowing Powers from the Local Government Act, 1888, or from Acts incorporating the Borrowing Provisions thereof. Under the Act of 1888, the total amount of Loans outstanding (after deducting Sinking Funds in hand) is limited to one-tenth of the Rateable Value of the Administrative County. This limit may, however, be extended by a Provisional Order, and Loans under certain Acts are expressly excluded from the limit. The chief of these are :—

Housing Acts, 1890–1923.
Public Libraries Act, 1892–1919.
Small Dwellings Acquisition Act, 1899.
Small Holdings and Allotments Act, 1908.
Mental Deficiency Act, 1913.
Education Act, 1921.

Borough Councils (in the capacity of Urban Sanitary Authorities) and **Urban District Councils.**—The outstanding balances of Loans raised by Urban Sanitary Authorities under the Public Health Acts, 1875 to 1907 (i.e. Borough Councils, when acting in that capacity, and Urban District Councils), are limited by Section 234(2) of the Act of 1875 to a total amount not exceeding twice the Assessable Value of the Borough or District. This limitation is extended to include also Loans raised under the following Acts :—

Baths and Washhouses Act, 1846–1882.
Highways and Bridges Act, 1891.
Museums and Gymnasiums Act, 1891.
Open Spaces Act, 1906.
Small Holdings and Allotments Act, 1908.

Note.—There are no limits placed on the loans of Borough Councils acting otherwise than as Sanitary Authorities. See M.C. Act, page 23 *ante*.

Rural District Councils.—The limitation of Loans under Section 234(2) of the Public Health Act, 1875, applies also to the Loans of Rural District Councils raised under the Public Health Acts, 1875–1907, the Highways and Bridges Act, 1891, and the Open Spaces Act, 1906.

Parish Councils.—Before raising a Loan, Parish Councils must obtain the consent of the Parish Meeting and the County Council, in addition to the Ministry of Health. The outstanding Loans of Parish Councils are limited by Section 12 of the Local Government Act of 1894 to one-half of the Assessable Value of the Parish. This limit does not, however, apply to Loans for Allotments raised under the Small Holdings and Allotments Act, 1908.

Port Sanitary Authorities and Joint Boards.—These Authorities are under the same limitation as an Urban District Council under Section 234(2) of the Public Health Act, 1875.

Metropolitan Borough Councils.—There is no limitation on the Loans of Metropolitan Boroughs, except under the Museums and Gymnasiums Act, 1891, and the Public Libraries Act, 1892, where the limitations of the Public Health Act apply.

Boards of Guardians.—Under the Poor Law Act, 1889, Section 2, the outstanding Loans of Boards of Guardians must not exceed in the aggregate one-quarter of the Rateable Value of the Parishes in the Union, unless this limit is extended by Provisional Order.

NOTE.—Under Section 6(1) of the Local Authorities (Financial Provisions) Act, 1921, as extended by Section 2 of the Local Authorities (Emergency Provisions) Act, 1923, Loans borrowed before April 1, 1924,[1] for the purposes of Unemployment Relief Works, and Loans borrowed for the purpose of providing for current expenses, are excluded from all the above limitations.

2. INDIRECT LIMITATIONS.

The Powers of Local Authorities to raise Loans are indirectly restricted in several Acts by the limit which is placed on the expenditure which may be incurred out of the Rates in any one year. County Councils are thus limited as regards expenditure on Small Holdings, Small Dwellings and Mental Deficiency, while Borough and Urban District Councils are similarly limited as regards Small Dwellings, Museums and Gymnasiums, and Mental Deficiency (County Boroughs) and Rural District Councils as regards Small Dwellings only. The expenses of a

[1] Local Authorities, etc., Act, 1924, extends term to April 1, 1926.

Parish Council, other than those incurred under the Adoptive Acts,[1] must not exceed a yearly rate of 6*d.* in the £.

For purposes such as electric lighting, allotments, housing, education and administration of the Burial Acts, Local Authorities, therefore, possess unlimited borrowing powers, assuming the consent of the requisite Government Department to be forthcoming, and such borrowing is in addition to the debt which may be incurred under other Statutes. It should also be remembered that where a Town Council, acting as a Municipal Corporation, administers any Acts, such as the Lunacy Act, 1890, which apply the borrowing provisions of the Municipal Corporations Act, 1882, there is no statutory limitation of the amount which may be borrowed, subject to the necessary consent.

County Councils may also, under the Local Government Act, 1894, Sect. 12(2), and irrespective of any limit of borrowing, raise loans for the purpose of advances to parish councils, subject to the Local Government Board's [2] Order of November 5, 1895, with respect to the time for repayment. They are also charged with the duties under the Public Health Acts, on default by a Rural District Council; and, in such circumstances, may exercise all the powers of the latter.

Post-war legislation also saw an extension of the principle which was first given effect to by the "Small Holdings and Allotments Act, 1908," whereby a County Council might promote, or assist, by means of grants or loans, or guarantee advances to, small-holdings associations if registered under the Industrial and Provident Societies Acts, 1893–1913. The Land Settlement (Facilities) Acts, 1919–1921, empower County Councils, with the consent of the Ministry of Agriculture, to guarantee advances to small-holders; while the Housing Act, 1919, authorizes a local authority, including a county council, to guarantee the payment of interest, or money borrowed, by a Public Utility Society, or Housing Trust registered under the Industrial, etc., Societies Acts abovementioned, subject to conditions imposed by the Ministry of

[1] Lighting and Watching Act, 1833. Baths, etc., Acts, 1846–1882. Burial Acts, 1852–1882. Public Improvements Act, 1860. Public Libraries Act, 1892, etc.

[2] Now Ministry of Health.

Health. The Electricity Supply Act, 1919, also contains provisions of a like nature.

These general Acts lay upon the authorities administering them clearly defined duties; and while by Section 235 of the Public Health Act, 1875, additional borrowing may be exercised on mortgage of sewage lands, *without consent* (provided that the amount proposed to be borrowed does not exceed three-fourths of the purchase price of such lands), borrowing, except for financial adjustments [1] consequent upon the extension or alteration of boundaries and for re-borrowing under Local Government Act, 1888 (Sects. 62 and 69), is only exercisable under these Acts, *subject to the consent of the statutory authority, usually the Minister of Health.* Also it is restricted in amount (except in the case of borough councils in their municipal capacity, and Education Authorities [2]) and limited as to time; while the nature of the security to be given is specified. Further, such borrowing, practically in all cases, must be for permanent purposes, i.e. for capital expenditure; and the Acts contain regulations for the provision of sinking funds for debt redemption.

The limitations mentioned, however, only apply to purposes authorized by the several Acts; and it requires to be clearly understood that an authority may act in more than one capacity. For instance, where a Borough Council acts in the triple capacity of Municipal Corporation, Sanitary Authority, and Education Authority, it may borrow in accordance with the provisions of (1) the Municipal Corporations Act, 1882, (2) the Public Health Act, 1875, and (3) the Education Act, 1921. The borrowings for each purpose are quite separate and distinct.

Joint Boards and Committees for various purposes are frequently constituted by Local Authorities; but, as a general rule, Committees have no power to raise loans. For instance, Joint Committees for the purpose of the Burial Acts are prohibited from borrowing by the Local Government (Joint Committees) Act, 1897; and similar restrictions prevail in the case of Isolation Hospital Committees by virtue of the Isolation Hospital Act, 1893. Any money required is borrowed by the

[1] Sanction of Ministry of Health must, however, be obtained to period of repayment.

[2] See page 40 *post*, for limitation on rating.

Councils appointing the Joint Committee; but where Joint Boards are formed under the provisions of the Public Health Act, 1875, these Joint Boards and Port Sanitary Authorities are vested with independent borrowing powers, in accordance with that Act (Sect. 244).

Overseers of the Poor are not empowered to borrow, except under the Vestries Act, 1850, and then only for the purpose of vestry rooms, and without statutory limitation on amount.

Scottish Authorities

With regard to Local Authorities in Scotland, the Statutes which these bodies administer contain provisions with regard to borrowing which, in principle, are similar to those in force relating to Local Authorities in England and Wales.

County Councils were created by the Local Government (Scotland) Act, 1889, and are authorized by that Act, and other subsequent statutes, to borrow moneys for certain specified purposes, subject, however, to the consent of the Standing Joint Committee, a Committee consisting of not more than seven County Councillors, and not more than seven Commissioners of Supply, with the Sheriff of the county as a member *ex officio*, or one of his substitutes appointed by him. There is a Standing Joint Committee for each county in Scotland; and there is no body with similar functions in English local government. It examines proposals involving capital expenditure in the county or any district thereof, and furnishes ratepayers with an opportunity for making any representations with regard thereto: in short, a County Council cannot borrow for capital purposes, and charge as security the appropriate rate, without first obtaining the consent of this Committee, in writing, signed by two members and the county clerk. This consent fixes the amount which may be borrowed for these capital works, and should further moneys be required the Committee must again be applied to for consent.

A County Council is authorized to borrow for works involving capital expenditure on buildings, roads and bridges, drainage or water supply, and the acquisition of land for such works: for purposes of lunatic asylums, police stations, sheriff-court houses, sewers, water supply, hospitals, prisons, etc.; for

boundary adjustments; and for aiding schemes of emigration or colonization; while under the County Council (Scotland) (Finance) Order, 1907, a Council may borrow for various purposes connected with special Lighting, and special Scavenging Districts: and under the Military Lands Acts, 1892, for the acquisition of land for military purposes.

All receipts of the Council, from whatsoever source, must be passed to the credit of the "County" Fund and all payments in the first instance must be made out of that Fund.

Town Councils may borrow by a formal resolution in Council for the purposes of carrying out capital works authorized by the statutes which they administer. But both Town Councils and County Councils must obtain the consent of the Scottish Board of Health, or the Secretary for Scotland, for expenditure under the Housing and certain other Acts.

The Local Government (Scotland) Act, 1894, imposes on Parish Councils a general limitation to their borrowings. A Parish Council may, with the consent of the Scottish Board of Health, borrow (*a*) for the acquisition of any land or the erection of any buildings which they are authorized to purchase or erect or (*b*) for any permanent work they are authorized to do. These loans must be repaid within such time as the Board may direct, the period not to exceed forty years for the former class and thirty years for the latter. Where the total amount of loans exceeds one-fifth of the annual value of lands and heritages in the rateable area, no further loan, other than of a temporary character, can be raised without the consent of the Scottish Board of Health. Before borrowing for capital purposes, a Council must obtain from the Board a certificate to the effect that the rates have been properly charged with the proper proportion of principal and interest of any previous borrowings.

In the case of parishes of under 100,000 inhabitants the Poor Law (Scotland) Amendment Act, 1845, limits the borrowing for the provision of poorhouses, etc., to an amount which must not exceed three times the amount of the poor rate raised in the preceding year, and no further loans for this purpose can be raised until the existing loans are paid off. Where the population is in excess of 100,000 this restriction as to further loans does not apply.

Parish Councils may also borrow for the purposes of the Lunacy Act, 1866, i.e. for the erection, maintenance, etc., of pauper asylums, on the security of the buildings and the rates.

Parish Councils must keep two banking accounts—a general parish fund and a special parish fund, the first representing the receipts and payments in connection with the powers and duties of the old Parochial Boards, the other representing receipts and payments in connection with the new powers conferred, by the Local Government (Scotland) Act, 1894, on rural districts. The two accounts cannot be set-off in respect of balance or charges, since rates must be applied to the specific purpose for which they are made.

Education Authorities can only borrow for purposes of capital works with the consent of the Scottish Education Department, and the limitation in this case is the amount authorized by the Department.

Moneys borrowed by Local Authorities are secured on the rate leviable by the Authorities under the Act which authorizes the borrowing. Town Councils, however, may borrow temporarily under the Burgh Police Act, 1903, Sect. 49, on the security of the appropriate assessment for *any* expense which they are authorized to pay by borrowing, on condition that the loan is repaid within six months after the end of the current financial year: and where there is a "common good" in a burgh, the Secretary for Scotland, on the application of the Town Council, may authorize the Council to borrow on the security thereof, according to its capital value. The figures are published in the *Edinburgh Gazette*, and the Council forthwith has a separate statutory borrowing power to that amount.

As security, Parish Councils may assign the rates, present and future, leviable by them, by bond in the form prescribed by the Poor Law Loans and Relief (Scotland) Act, 1886.

Education Authorities who are separate bodies by virtue of the Education (Scotland) Act, 1918, may borrow on the security of the school rate and may mortgage that rate in accordance with the provisions of the Commissioners' Clauses Act, 1847.

County and Town Councils possess unlimited rating powers with respect to housing, child welfare, tuberculosis treatment,

Venereal Diseases Acts, and a guarantee rate for stocks.

A lender should, therefore, satisfy himself regarding (1) the valuation of the rating area, (2) the actual rate in force as compared with the maximum rate, if any, authorized by the Act, (3) if the maximum rate is already imposed, that additional rating powers have been granted after a resolution of the Council, approval of the Standing Joint Committee, or consent by the Scottish Board of Health or the Secretary for Scotland.

Terms of repayment are laid down in the Act under which the borrowing is effected. Under the Local Government (Scotland) Act, 1889, the term is thirty years: under the Local Government Loans (Scotland) Act, 1891, sixty years, and under the Local Government (Scotland) Act, 1894, thirty years or forty years: while under the Housing Acts it is eighty years.

All these Authorities may borrow without consent for current annual expenditure, on the security of the rates to be collected during the current year, i.e. on such part as is still due and not received. The limits of such borrowing differ according to the class of Authority. County and Parish Councils are limited to one-half of the rates remaining to be collected, and repayment must be made before borrowing on the security of the rates of any other year is made. Parish Councils are also empowered under the Poor Law Emergency Provisions (Scotland) Act, 1921,[1] subject to the consent of the Scottish Board of Health, to borrow for the relief of unemployment. Borrowings must be repaid within five years, although, in special circumstances, the period may be extended to ten years: and any sum borrowed, before the passing of the Act, with the consent of the Board, is deemed to have been validly borrowed, even though it should have been in excess of one-half of the amount due and received. Town Councils may borrow for current expenditure, subject to repayment out of the rates before the end of the financial year in which the borrowing is incurred.

Education Authorities may borrow on the security of the school rate and school fund, subject to repayment before a further loan is raised on the security of the rate of any other year.

[1] And see Local Authorities (Emergency Provisions) Acts, 1923–1924.

A lender should therefore call for the production of the Minute of the Authority authorizing the borrowing, and take particular note of the limitations and the date when the loan must by law be paid off.

District Boards of Control were established under the provisions of the Mental Deficiency and Lunacy (Scotland) Act, 1913, and are empowered to borrow for certain capital expenditure. They may also borrow for current expenditure by virtue of the Mental Deficiency, etc. (Amendment), Act, 1919.

It should be borne in mind that there are many Statutes of a subsidiary nature which these Authorities operate: and consequently that it is only by reference to these Statutes that the powers regulating rating, borrowing and spending can be ascertained. In one particular respect these Scottish Authorities have a marked advantage over their English prototype in that they have statutory power to borrow in order to meet current expenditure. A somewhat belated recognition of this useful provision is evident in recent legislation with respect to English Local Government in the shape of the Local Authorities (Financial Provisions) Acts, 1921–1923, referred to later.

Borrowing by means of Local Acts

A local Act is a private Act of Parliament passed for the benefit of the inhabitants of a particular place, and, as such, is distinguished from a public Act of Parliament which is passed for the benefit of the community at large.

The councils of many of the principal towns follow the practice of obtaining by means of local (or special) Acts of Parliament, authority to raise nearly all capital moneys which they require for sanitary or other purposes, and seldom exercise borrowing powers under the Public Health Acts or other General Acts. In fact, a very large proportion of the outstanding debt of town councils has been contracted under local Acts; and the works and undertakings for which these Acts authorize borrowing are of the greatest possible variety.

These local Acts fix the amount which may be borrowed, also period and method of borrowing and of repayment; and it is now the general practice of the Ministry of Health to require

the insertion of clauses in local Acts which seek fresh borrowing powers, providing for an annual return in respect of the new powers granted and of all existing loans. The following particulars are required :—

1 to 4. Name of Authority, Date of Return, etc., etc.
5. Purpose of Loan.
6. Amount of Loan.
7. Date of Borrowing.
8. Date when first payment to Sinking Fund became due.
9. Rate of interest or other basis on which payments to the fund are calculated.

Amount paid into the Sinking Fund during the year :—

10. Annual payment.
11. Payments in respect of interest on accumulations or on part of the fund applied in payment of debt.
12. Other payments into the fund.
13. Amount applied in repayment of loan during the year.
14. Total amount of loan paid off not to be re-borrowed.

Total amount of Sinking Fund at the end of the year :—

15. Invested.
16. Not invested.
17. Description of securities in which invested.
18. Nominal value of such securities.
19. Rate of interest payable thereon.

It is, therefore, apparent that the Ministry keeps a very close watch on borrowings under local Acts ; and although the consent of the Ministry is not a condition of borrowing, any default by an authority in complying with the terms of repayment would cause the Department to take action.

The mode of borrowing under local Acts is by mortgage, stock or bills ; and where an undertaking, such as a waterworks, has been established under a local Act, it is not competent for the local authority to borrow for it under a general Act, unless the local Act confers a special authority to do so. If the borrowing powers under the local Act become exhausted and additional money is required, a further local Act must be obtained, or the existing Act extended by Provisional Order.

"Many Municipal Corporations and District Councils are alive to the fact that there is much more probability of getting

easy terms from Parliament than from Government Departments ; and they, therefore, seek borrowing powers under local Acts instead of applying to the Central Authorities for sanction to loans under the provisions of the General Law" (*vide* "Loans of Local Authorities," Biddell).

The powers of the borrowing authority must therefore be sought within the compass of the local Act, and any Provisional Order amending the Act.

Borrowing under Provisional Orders

Provisional Orders are made by a Government Department and confirmed by Parliament, and they define strictly the conditions under which borrowing may be exercised. The making of a Provisional Order is the method occasionally employed to extend the objects of a local Act ; but these Orders are most frequently obtained under certain General Acts, which also apply to Scotland, such as the Tramways Act, 1870, the Light Railways Act, 1896, the Gas and Water Works Facilities Act, 1870, and Gas Regulation Act, 1920, and the Electricity (Supply) Acts, 1882–1922.

The Electricity Supply Act, 1919, created a new body to be known as the Electricity Commissioners, who are empowered to formulate schemes for the appointment of Joint Electricity Authorities by Provisional Order. Under the provisions of the Electricity (Supply) Act, 1922, these authorities, with the consent of the Commissioners, and subject to regulations to be made by the Minister of Transport with the approval of the Treasury, may borrow temporarily, or issue bonds, or make arrangements with their bankers. The borrowing may be for the purpose of capital expenditure, or for payment for any permanent work, or for working capital : and may be charged on the undertaking and on the revenue of the Authority, repayments to be effected within a period not exceeding sixty years.

Power is also given for Local Authorities of districts with a population of not less than 50,000, to lend any money to the Joint Electricity Authority which the latter is authorized to borrow, or to guarantee the payment of interest on any money borrowed, but a County Council (except London County Council) or a Borough Council, must first obtain the consent

of the Ministry of Health, and rating for the purpose is limited to a penny in the pound where the Authority is not the supplier. Where Local Authorities borrow for the purpose of lending money to the Joint Authority, the money borrowed must not be reckoned as part of their borrowing under the Public Health Acts, 1875–1907, the Local Government Act, 1888, or the Metropolis Management Acts, 1855–1893, as the case may be.

Where, under the Tramways Act, a Local Authority obtains a Provisional Order, it may borrow on the credit of the local rate an amount not exceeding the sum sanctioned by the Board of Trade under the Order, and for a period not exceeding thirty years, the provisions of the Commissioners' Clauses Act, 1847, to apply with respect to the mortgages given as security.

Under the Light Railways Act, application for an Order must be made to the Light Railway Commissioners [1]; and when the Order is made it limits the amount which may be borrowed and regulates the terms of the borrowing and the period, not exceeding 60 years, within which it must be repaid, subject to the proviso that the Board of Trade, on application by the authority, may extend the amount which may be borrowed. The Act not only authorizes Local Authorities, on the Order being issued, to construct and work the railway; but they may lend to, or take shares in, a light railway company, or join any Local Authority, person or persons in constructing or working a railway.

The Gas and Water Works Facilities Act, 1870, and Gas Regulation Act, 1920, empower the Board of Trade, on the application of a Local Authority, to make a Provisional Order for the acquisition or construction of gasworks and waterworks. The Order prescribes the conditions under which the borrowing may be effected, and the period within which it must be repaid. An authority may also acquire gasworks under the provisions of the Public Health Act, 1875 (Sect. 162), and construct, lease, hire or purchase waterworks (Sect. 51).

Provisional Orders invariably contain regulations as to sinking funds for the redemption of debt.

It is general knowledge that many of the public utility undertakings of this country are owned by Local Authorities (or Joint Boards or Committees of Local Authorities, e.g. Derwent

[1] Minister of Transport is now the sanctioning authority.

Valley Water Board): and it should be borne in mind that a Local Authority may proceed to the acquisition or the carrying out of those undertakings either by Provisional Order under the above Acts; or, as is frequently the case, by promoting a local Act; when the power of borrowing is again a separate and distinct power.

With regard to productive undertakings, it by no means follows that municipal activities are confined to the provision of transport, gas, and water facilities. The corporations of the larger towns, in some instances, have become possessed of wide powers with respect to trading enterprises under the terms of their local Acts.

It will now be apparent that the method of borrowing by Local Authorities is subject to statutory conditions and restrictions which vary according to the particular statute, general or special, under which borrowing is exercised; and, from a perusal of the various decisions of the Courts from time to time, the following guiding principles appear:—

(1) Where a Local Authority is authorized to borrow in a specified manner and on specified security, any right to borrow otherwise, even without security, is excluded, and the public is assumed to have knowledge of these limited powers (Rex *v.* Locke).

(2) Moneys raised under a borrowing power must be applied to the specific objects indicated by the statute or order under which the borrowing is effected (Attorney-General *v.* West Ham Corporation).

Accounts for the various undertakings of the authority should be kept separately, and loans or overdrafts in connexion with one cannot be discharged or reduced out of moneys appropriated to another or even out of moneys available for general purposes, i.e. the various accounts cannot be set off. It is not uncommon to find the Elementary Education Account and the Higher Education Account set off. It is submitted that inasmuch as in the case of town councils of non-county boroughs, and urban district councils, there is a statutory limit for rating for the latter purpose, to set off these accounts would obviously defeat the intention of the legislature. A county council's expenditure on Higher Education is not now subject to limitation in rating; but the very fact that the proceeds of

the rate must be devoted to a specific object appears to preclude any set-off in this case also.

At this stage it is necessary to remark that while it is incumbent upon Local Authorities to keep separate accounts in their own offices for their various undertakings, there is apparently no similar obligation laid upon them to keep separate banking accounts. Where a Local Authority has only one banking account, it follows that any lending would be made by way of a separate loan, against which the banker would not be entitled to set off the balance of the general account.

(3) An *ultra vires* loan is not recoverable; but in certain cases the doctrine of subrogation may be invoked where moneys irregularly borrowed have been applied in payment of previous properly incurred debts (L. & P. Bank, Ltd., *v.* Tottenham U.D.C.). Also the payment of interest on an *ultra vires* lending is as illegal as the lending itself (Attorney-General *v.* De Winton).

Capital loans for obvious reasons do not commend themselves to bankers; but there are frequent occasions when overdraft is required for general expenditure. In Rex *v.* Locke the Court appeared to recognize that it might be proper for a Local Authority, on occasion, to overdraw for temporary purposes; but in "Chambers *v.* Manchester, etc., Railway Co." a contrary view was taken; and it only remains to be pointed out that *overdrawing is borrowing* and that the various statutes do not contemplate borrowing by means of overdraft. But borrowings of this nature may now be regularized by obtaining the consent of the Minister of Health under the provisions of the Local Authorities (Financial Provisions) Act, 1921[1]: otherwise they are irregular, and the remedy of subrogation would even be of doubtful application if the overdraft represented payments outside a period of six months of making the rate.

Of recent years this difficulty has received growing recognition: that except by an unusual coincidence, the collection of the rates cannot keep pace with the Local Authorities' outgoings, and consequently that there should be a sufficient reserve to meet this contingency, as well as the possibility of outstanding debt and stock, culminating in overdraft. As a result, the Local Authorities (Financial Provisions) Act, 1921, above mentioned

[1] As amended and extended by the Local Authorities (Emergency Provisions) Acts, 1923–1924.

was recently passed, and, under its provisions, local authorities may borrow on short term loans by way of temporary loan or overdraft from their bankers, in order to provide temporarily for current expenses. The consent of the Ministry of Health is required to the borrowing: the amount must not exceed that sanctioned by the Ministry: and must be repaid out of the revenue received in respect of the financial year in which the expenses are incurred, although the Ministry in its discretion may extend the term of repayment of money borrowed before April 1, 1923, for a period not exceeding ten years. A later Act, the Local Authorities (Emergency Provisions) Act, 1923, extends the provisions of the foregoing Act to money borrowed before April 1, 1924.[1] The sums borrowed form a charge, *pari passu* with other mortgages, stocks and securities, on the funds, revenues, properties and rates of the Local Authority, and these powers are in addition to, and not in derogation of any other powers exerciseable by the Authority. The provisions of these Acts affirm the principle that temporary borrowings are irregular in the case of an English Authority unless sanctioned by the Ministry of Health and conforming strictly to the terms of such sanction.

The Act defines a Local Authority as the Council of any Borough *and* any Authority whose accounts are audited by District Auditor.

A banker may also be called upon to permit temporary overdrawing on the revenue account of a council's productive undertaking, pending the collection of accounts, or, it may be, for the purchase of stores. An overdraft of this nature is not unreasonable; the objectionable feature arises where the overdraft becomes more or less permanent: and it may then be discovered that the overdraft represents loss on trading which should have been provided for in the relative half-year's rate. Capital borrowings cannot be applied to wipe out such losses, and a banker in this case also should only lend on production of the consent of the Ministry of Health under the Local Authorities, etc., Acts mentioned above. It is, however, now generally recognized that especially in the early years of a municipal trading undertaking, overdraft for working capital is almost inevitable, and within recent years there has been

[1] Local Authorities, etc., Act, 1924, extends term to April 1, 1926.

a tendency to make provision for this in the Local Acts obtained by Parliamentary procedure, either in the form of authorizing appropriations of surplus revenue specifically for the purpose which would otherwise be credited to the borough or general district rate, or in the form of a specific loan—a borrowing power which would be exercised in *precisely* the same way as for expenditure on capital works authorized by a Local Act or a Provisional Order relating thereto.

When an advance is *ultra vires*, any ratepayer may petition the Attorney-General to intervene and forbid repayment from the rate or funds under the control of the authority borrowing.

The foregoing will give a general idea of the powers of Local Authorities, but a word of caution is necessary, as the following illustration will show:—

"Although, in the majority of cases, Town Councils provide and maintain pleasure-grounds, parks, works of water supply, and markets, as Sanitary Authorities under the Public Health Act, 1875, and borrow for them under the provisions of that Act, there are many cases in which such undertakings vest in Town Councils, acting as Municipal Corporations, and loans in respect of them are raised under the Municipal Corporations Act, 1882, or under Local Acts" (*vide* "Loans of Local Authorities," Biddell). This, though liable to lead to confusion, does not affect the general principles underlying the exercise of those powers.

A further point to be borne in mind is that, where a Municipal Corporation is incorporated by Royal Charter, it can, under its common seal, borrow and contract in the same way as an ordinary person; in fact, so complete is this corporate autonomy that it is said to be unaffected even by a direction contained in the creating Charter limiting the powers (*vide* Palmer's "Company Law").

Under the Public Health Acts (Amendment) Act, 1890, and the Local Government Act, 1888, the Ministry of Health may consent to borrowing authorities issuing Stock under the Stock Regulations and County Stock Regulations, 1891, 1897, 1901, while the Local Loans Act, 1875, regulates the issue of Debentures and Debenture Stock. In Scotland, issues of stock by Local Authorities are regulated by the provisions of the Local Authorities (Scotland) Loans Act, 1891.

The provisions of these Acts are not, however, of outstanding interest to the banker, whose standpoint is that of a lender, not an investor. When he lends on security, it is usually on a mortgage of the rates, under the Public Health Acts (Sect. 236) or under the Municipal Corporations Act, 1882 (Sect. 106).

Finally, in actual practice, the difficulty of ascertaining the extent to which a Local Authority may borrow is greatly simplified by obtaining, on an application for a loan, a copy of the resolution of the council authorizing the borrowing. This resolution, passed by the full council, sets out, for instance, "*that . . . Committee be, and they are hereby authorized to purchase an area of land at . . . for the purpose of . . . and that the Finance Committee be, and they are hereby instructed to apply to the Ministry of Health for sanction to borrow the necessary purchase money.*"

If, therefore, the necessary consent of the Ministry be produced, together with the copy resolution, it is evidence that statutory conditions have been complied with; and that the limit of borrowing, if any, is not being exceeded. Where the borrowing is effected in accordance with the provisions of the Public Health Act, 1875, the Local Government Act, 1888 or 1894, or the Poor Law Acts, 1889–1897, it is not unusual to call for particulars of the rateable value of the district and the amount of outstanding loans in order to see that the statutory limit has not been exceeded.

It is now necessary to mention briefly the various Metropolitan Authorities.

The Corporation of the City of London has numerous charters, but there is no charter nor any Act of Parliament which really defines its constitution and the powers of the governing bodies. The sanction of a Government Department is not necessary to the raising of loans by the Corporation. They have the right to borrow on the credit of their property and revenues, and they also have obtained borrowing powers from Parliament under a number of Local Acts.

The County Council of London was created by the Local Government Act, 1888; and its duties and powers are multifarious; in fact one writer has declared that its powers "touch the lives of London's citizens from the cradle to the

grave." The Council borrows by means of annual Money Acts, which come before Parliament as ordinary Private Bills, and borrowing is supervised by the Treasury. The Council cannot raise loans on mortgage; they borrow by issuing Stock or Bills. The Council sanctions the bulk of Metropolitan Borough Councils' loans; and they may borrow for lending to those and other local bodies.

Metropolitan Borough Councils are the local sanitary authorities for those parts of London which are outside the City of London, and were constituted under the London Government Act, 1899. They borrow [1] under the provisions of various Acts, subject, however, to sanction in all cases. For certain purposes, under the Metropolis Management Act, 1855, the sanction of the London County Council is necessary, and in such cases the County Council may advance the loan; while under the Public Health (London) Act, 1891; Public Libraries Acts; and the Baths and Wash-houses Acts, the Minister of Health is the sanctioning authority; under the Burial Acts, the Treasury.[2] A large portion of the existing debt of these Councils has been obtained from the County Council.

Metropolitan Poor Law Authorities, including the Asylums Board, exercise the same powers under the Poor Law Act as similar Boards and Managers in other parts.

The Metropolitan Water Board was established under the Metropolitan Water Act, 1902, and reference should be made to that Act. Stock, however, is created, issued, transferred and redeemed in accordance with regulations made by the Local Government Board (now Ministry of Health).

BUILDING SOCIETIES

The statutes relating to incorporated Building Societies are the Building Societies Acts, 1874 to 1894.

A Building Society is not a Joint Stock Company nor is it a common-law partnership; it is an association of a special kind formed and regulated under particular Acts of Parliament for special purposes, and the rights and liabilities of the

[1] Without limitation except under Museums, etc., Act, 1891, and Public Libraries Acts, 1892–1901, to which apply limitations of Public Health Act, 1875.

[2] Now the Minister of Health sanctions.

members depend upon the contract into which they have entered, and which is to be found in the rules of the Society (*vide* "The Law relating to Building Societies," Wurtzburg).

Building Societies are of two kinds: (1) Terminating, (2) Permanent. The first means a Society which, by its rules, is to terminate at a fixed date, or when a result specified in its rules is obtained; the second means a Society which has not, by its rules, any such fixed date or specific result at which it shall terminate. The rules, set out in Section 16 (1874) and Section 1 (1894), the adoption of which is compulsory, form practically the charter of the Society, although the Act itself enlarges its privileges in certain respects, Section 37 (1874) authorizing the purchase or acquisition of premises for the conduct of its business; Section 2 (1877) provides for a change of the chief office, while by Section 18 (1874) Societies are given wide discretionary powers, within statutory limits, of altering their rules.

So far as they are regulated by statute, Building Societies, permanent or terminating, are divided into two classes:—

(1) Unincorporated.

(2) Incorporated.

The only unincorporated Societies now in existence, which have a proper legal constitution, are those which were certified between the years 1836 and 1856 inclusive, under the old Building Societies Act of 1836, and the two old and long-repealed Friendly Societies Acts of 1829 and 1834. These Societies may, however, obtain a certificate of incorporation under the Act of 1874.

The second class consists of Societies regulated by the Building Societies Acts, 1874–1894, and Regulations, viz.:—

(*a*) Societies established since November 2, 1874; or

(*b*) Societies established previously thereto under the Act of 1836, but which have obtained certificates of incorporation under the Act of 1874.

There is a third class of Building Societies, unregistered, and therefore subject only to the general law. If, however, such Societies consist of more than twenty persons, they would appear to be illegal under Section 1 of the Companies Act, 1908, as being associations for gain, unless registered under that Act.

Lastly, the business of a Building Society may be carried on

by an ordinary Joint Stock Company, formed and registered under the Companies Acts. Where such is the case, the Society must observe the statutory requirements of those Acts; the Building Societies Acts are not applicable.

Section 1 (1894) enacts that the rules of every Society established under the Acts, or substituting a new set of rules for its existing rules, must state, *inter alia*, whether the Society intends to borrow money, and if so, within what limits, not exceeding those prescribed by the Acts.

Section 15 (1874) sets out the limits in question: (1) A permanent Society may receive on deposit or loan a sum not exceeding two-thirds of the amount for the time being secured to the Society by mortgages from its members and (2) a terminating Society a sum not exceeding such two-thirds, or a sum not exceeding twelve months' subscriptions on the Shares for the time being in force. In ascertaining the "amount for the time being secured to the Society by mortgages from its members" such amount includes "all sums due on the members' securities at the time of the loans to the Society, whether for principal, or interest, or fines, or otherwise, and all instalments not then accrued due but secured by the mortgage and outstanding; also all moneys secured to the Society by mortgages from its members though not advanced to them in respect of their shares" (*vide* "Wurtzburg on Building Societies"). But Section 14 (1894) provides that it must not include mortgages where, at the date of last Balance Sheet, payments were upwards of twelve months in arrear or the Society had been twelve months in possession.

The question of a Society's power to give security for its borrowing frequently arises—we refer to incorporated Societies—and it is preferable that power to give security should be conferred by its rules; but we quote again the leading work on "Building Societies":—

"It would seem that the Society may properly give security for the money borrowed, as being incident to an effective exercise of the borrowing powers: and the legislature appears to have acted upon this view, for although the Act 1874 contains no express power to give security, it provides (Sect. 15, sub-sect. 5, and Sect. 19) for the form of the securities which, it is taken for granted, will be given by a Society for loans

advanced to it under the borrowing power. If security is given, it generally takes the form of a sub-mortgage by deposit of the securities given to the Society by its members, a Building Society as a rule having no other property which it can offer as security" ("Wurtzburg on Building Societies").

Certain decisions are quoted in support of this view; but there appears to be some little doubt on the point; and certainly if the rules, upon their true construction, are inconsistent with the power (where, for instance, "sums borrowed shall form a preferable charge against the funds, etc., of the Society"), a specific mortgage would be invalid. Lenders must rank *pari passu* where there is such a rule (Murray *v.* Scott, L.R.9. App. 519). The rules must provide for the safe custody of securities while in the hands of the Society, but legal opinion regards this as merely directory; and that it does not operate to restrict the Society in the exercise of its general powers.

Unincorporated Societies.—The origin of these Societies has already been referred to. The Act of 1836 is silent on the question of borrowing powers; and the rules of each particular Society are the authority which must be consulted. The rules may confer an unlimited power to borrow, or may confer a limited power, or no power at all. It has been held that the power to borrow need not be express (*re* West London and General Permanent Benefit Bldg. Society (1894), 2 Ch. 352); but in such a case it would be well to seek qualified legal advice before making any advance. A power to give security would appear to be incidental to the power to borrow, unless there is anything in the rules inconsistent therewith.

Unincorporated Societies, are, of course, a diminishing class.

It will, therefore, be perceived that the rules must be carefully consulted in cases where the Society desires to become a borrower, bearing in mind that the powers of incorporated Societies are limited by statute (Sect. 15 (1874)). If the required advance be within the Society's powers, the Secretary must furnish the usual statutory declaration of outstanding borrowings, together with copy resolution; and the lending should be made by way of loan. If made on current account, every cheque paid constitutes a fresh advance, with a possible overstepping of the borrowing limit, and a consequent irregular borrowing.

An *ultra vires* borrowing on the part of Directors creates no debt against the Society (Blackburn Benefit Building Society *v.* Cunliffe Brooks & Co., 29 Ch. D. 902, 1885); nor can it properly be repaid out of the Society's assets. The bankers of the Society, in suing the Society for recovery of the overdraft, were held to be entitled only to subrogation; but the case of Sinclair *v.* Brougham, 1914 (House of Lords), modified this doctrine to the extent that where bankers have received payment from a Society of an *ultra vires* loan, the money cannot be recovered from them, as the Society has only returned to the bankers the latter's own money.

If security be given, there is no registration of the charge necessary.

Section 43 (1874) provides that the Directors or Committee of Management of a Society, receiving loans or deposits in excess of the prescribed limit, shall be held personally liable for the amount received in excess.

A Building Society may come to an end by—(1) its termination; (2) dissolution in manner prescribed by its rules; (3) dissolution under an instrument of dissolution; (4) dissolution by award of the Registrar; (5) dissolution under Section 26 of the Act of 10 Geo. IV, c. 56, assuming this section to be applicable to the case of a Building Society; (6) winding-up under the Companies Acts. Of these the first and last apply both to incorporated and unincorporated Societies, and the second, third and fourth apply only to incorporated Societies; the fifth applies (if at all) only to unincorporated Societies (*vide* "Wurtzburg on Building Societies").

The Registrar under the Acts is the Chief Registrar of Friendly Societies; and any number of persons, not less than three, may establish a Building Society.

Finally, under the Housing, Town Planning, etc., Act, 1909, county councils are empowered, subject to the consent of, and subject to regulations made by, the Ministry of Health, to borrow for the purpose of making grants or advances to a building society for the objects of the Housing Acts, or they may guarantee advances made to the Society.

Subject to the necessary modifications the provisions of the Building Societies Acts apply to Scotland.

FRIENDLY SOCIETIES

The Friendly Societies Acts, 1896 and 1908, which also apply to Scotland, affect the following Clubs and Societies :—

(*a*) Friendly Societies ;
(*b*) Cattle Insurance Societies ;
(*c*) Benevolent Societies ;
(*d*) Working-men's Clubs ;
(*e*) Specially Authorized Societies (Sect. 8).

The Section further defines " Friendly Societies " as follows : Societies which are formed for—

(1) Relief in sickness or other infirmity, in old age, widowhood, or orphanhood.
(2) Payments on birth or death.
(3) Payments in distress, to seekers for employment, and in case of shipwreck or damage at sea.
(4) Endowments.
(5) Insurance of tools against fire.

Section 15 authorizes registration of certain " Dividing Societies."

A Society, to obtain registration under the Acts, must have a membership of *seven* persons at least (Sect. 9) : and the Registrar (the Chief Registrar of Friendly Societies), on being satisfied that the provisions of the Acts as to registry have been complied with, will issue an acknowledgment of the registration of the Society.

The rules, if a registered Society intends to borrow money as provided by Section 47, must give the necessary power to do so, but the Section contemplates *only* a borrowing on mortgage of the Society's property. A Mortgagee is not bound to inquire as to the Trustees' authority ; and if money has been borrowed and applied for the benefit of a Society, the debt cannot be repudiated for lack of formality in the security. There is no registration of the security required.

Although the Chief Registrar has held, on general principles, that a registered Society has implied power to borrow for the purposes of its business, the words of the section are explicit ; and a banker disregarding the condition and making an unsecured advance would probably have trouble in a winding-

up, with the necessity of recourse to the right of equitable subrogation for the recovery of his money.

"Loan Societies" may be established under the Acts to create funds by monthly or other subscriptions from members, only to be lent out to, or invested for, the members of a Society, or for their benefit. Such Societies do not, of course, borrow in the accepted sense of the word, they only accept deposits from members; but under "The Societies' Borrowing Powers Act, 1898" certain specially authorized Societies (registered under the Friendly Societies Acts) may, if their rules so provide, borrow money from any person—whether a member or not—provided no profit is to be divided amongst their members; and the application of the money lent is approved. Many loan Societies have been registered as "specially authorized Societies"; but now "agricultural credit Societies" are practically the only class which receives "special authorization." Certified loan Societies are dealt with later: and it should be borne in mind that loan Societies may be formed and registered under the Companies Acts.

A Registered Society may change its name (Sect. 69); and it may, by Special Resolution, determine to convert itself into a Company, under the Companies Acts, 1862–1917; or to amalgamate or transfer its engagements to any such Company (Sect. 71); or it may, by Section 78, be dissolved or terminated on the happening of a contingency specified in its rules; or by dissolution, following Resolutions duly passed by the Members; or by the award of the Registrar.

Unregistered Societies.—"Such Societies, having lawful objects in view, not being the acquisition of gain by the Society or its Members, and not being the issue of policies of insurances on human life, or the granting of annuities, do not become unlawful merely because they fail to acquire a statutory basis" (*vide* Pratt's "Friendly Societies").

Legally, such a Society is merely a partnership or club, and any advances should be secured by obtaining the personal responsibility of the Executive. There is, of course, a distinction between a club and a partnership, and a Friendly Society partakes of the character of both. In a partnership, one member can bind the rest; in a club or voluntary Society, not for trading purposes, which, by its rules, does not contemplate

incurring debt, the Committee cannot pledge the credit of the other members.

INDUSTRIAL AND PROVIDENT SOCIETIES

These Societies are frequently called "Co-operative Societies" and are regulated by the Industrial and Provident Societies Acts, 1893–1913, the provisions of which also apply to Scotland. They are, in the eyes of the law, incorporated bodies, thus differing from Friendly Societies which have to act through Trustees.

A Society may be formed under the Acts for the purpose of carrying on any industries, businesses or trades specified or authorized by its rules, whether wholesale or retail, and including dealings of any description with land; but no member, other than a registered Society, can have a share interest exceeding £200; and a Society with any withdrawable share capital cannot carry on the business of banking (Sects. 4, 19).

An application to register must be made to the Chief Registrar of Friendly Societies, by not less than seven persons (Sect. 5), and if the formalities and rules are in order, an acknowledgment of registry will be issued, with limited liability (Sect. 21).

By Section 10, the rules of a registered Society must contain, *inter alia*, "Determination whether the Society may contract loans or receive money on deposit . . .; and, if so, under what conditions, on what security, and to what limits of amount."

The adoption of borrowing power is thus optional; and, while Section 36 authorizes (if the rules do not otherwise direct) borrowing only on mortgage of freehold or leasehold properties, it has long been settled that, if the rules authorize, a registered Society may borrow to an unlimited extent, for business purposes, on debentures or debenture stock (*vide* Simonson, "Debentures and Debenture Stock").

As in the case of Building Societies and Friendly Societies, there are no statutory provisions under the Industrial and Provident Societies Acts for the registration of charges. Therefore, debentures and debenture or debenture stockholders' covering deeds, which create a charge on the chattels of an Industrial and Provident Society, come within the scope of, and require registration under, the Bills of Sale Act, 1887;

they are not exempted by Section 17 of that Act, inasmuch as a Society is not a "Company" within any of the accepted meanings of the word (G.N. Rly. Co. *v.* Coal Co-operative Society (1896), 1 Ch. 187; N. Wales Supply Society, etc., *ex parte* S. Priddle, 1922).

A registered Society may therefore borrow in the manner prescribed by its rules, but the conditions must be strictly observed.

A registered Society may be dissolved by the machinery provided by the Companies' Winding-up Rules, 1909, or by a majority of the members testifying, by their signatures, to an instrument of dissolution (Sect. 58).

Reference has been made to specially authorized Societies, registered under the Friendly Societies Acts, and to the fact that special authorization is now practically confined to Agricultural Credit Societies,[1] but recent legislation in the shape of the Agricultural Credits Act, 1923, provides for the organization of Societies, to be approved by the Treasury. Where a Society is approved by the Treasury, the Public Works Loan Commissioners are empowered to lend to the Association such money as it may require on the security of recognized mortgages, or make advances direct to borrowers on similar securities or transfers thereof (Sect. 1). Recognized mortgages are strictly defined by the Act. Further, the borrower must be a person who has agreed to purchase the land comprised in the mortgage between April 5, 1917, and June 27, 1921: the land must be wholly, or mainly, agricultural land of freehold or copyhold tenure, free from prior encumbrance except land charge: and the amount secured must not exceed 75 per cent. of the assessed value at the date the advance is made (Sect. 1, Sub-Sect. 2). The maximum period for repayment of these loans is sixty years, and these approved Societies may include a "Smallholdings or Allotments Association" registered under the Industrial and Provident Societies Acts [2] (Sect. 1, Sub-Sect. 5). These loans may be made at any time within five years from July 31, 1923.

The Act (Sect. 2) also empowers the Minister of Agriculture and Fisheries to promote the formation or extension of Agricultural Credit Societies. These Societies are defined as

[1] Page 51 *ante*. [2] Page 52 *ante*.

Societies, approved by the Minister and registered under the Industrial and Provident Societies Acts, having for their object, or one of their objects, the making of certain loans to members for agricultural purposes. Subject to any regulations which may be prescribed by the Treasury, the Minister may make advances within certain limits to such a Society at any time up to July 31, 1926, or such further period as the Treasury may decide. Under the provisions of the Industrial and Provident Societies Acts the rules of a registered Society must state whether the Society may contract loans or receive deposits [1]: but in the case of the Societies now under review the Agricultural Credits Act, 1923 (Schedule Part 2) provides that such Societies shall not accept deposits nor borrow money, without the consent of the Minister. From this it would appear that, subject to such consent, Agricultural Credit Societies may borrow, but as regards "approved Associations" the Act merely lays down regulations with regard to borrowings from the Public Works Loan Commissioners, and it would depend upon the constitution of the Association, and the terms of approval by the Treasury, whether ordinary borrowings from other sources can be effected.

TRADE UNIONS

The Companies Acts, 1862–1917, do not apply to any Trade Union; and registration of a Trade Union under them is void.

The purposes for which a Trade Union is formed are well known, and they take their constitution under the Trade Union Acts, 1871–1917. Any combination which is for the time being registered as a Trade Union (the Chief Registrar of Friendly Societies is the Registrar under the Acts) is deemed to be a Trade Union—so long as it continues to be registered. The certificate of the Registrar, so long as it is in force, is conclusive for all purposes.

In the first schedule to the Act of 1871 are detailed the several provisions as to management which it is incumbent upon a registered Union to adopt in its rules. Section 7 of the same Act confers power to purchase land, not exceeding one acre

[1] Page 52 *ante*.

in extent, in the names of the Trustees of the Union and to borrow upon mortgage of the land, no mortgagee being bound to inquire as to the authority of the Trustees to mortgage.

Unlike the corresponding Sections of the Friendly Societies Acts and the Industrial and Provident Societies Acts, there is no stipulation that the rules must declare the intention to borrow, and while the Trustees have wide powers of mortgaging, it would be imprudent, should a Trade Union desire to borrow, to make the advance without being satisfied that the rules, or a resolution passed for the purpose, authorize the borrowing.

There is no statutory provision for the registration of charges; and, for the purpose of borrowing, every branch of a Trade Union is considered to be a distinct Union.

The provisions of these Acts also apply to Scotland.

ASSURANCE COMPANIES

The Assurance Companies Act, 1909, applies to all persons or bodies of persons, corporate and unincorporate (exclusive of Friendly Societies and Trade Unions), whether established before or after July 1, 1910, and whether established within, or without, the United Kingdom for the purpose of carrying on within the United Kingdom the business of life assurance; fire insurance; accident and sickness insurance; employers' liability insurance; or bond investment business. There are special rules and provisions with regard to each class of business, contained in Sects. 30 to 34 of the Act.

Apart from the provisions requiring a company to deposit in Court £20,000 in respect of each class of business—life, fire, accident, employers' liability and bond investment—the various sections of the Act are mainly concerned with the differentiation of the Company's funds: the preparation of balance sheets and accounts in scheduled form; and periodical investigation and valuation of the assets. Copies of the accounts are deposited with the Board of Trade, whose duties in respect thereto are of a supervisory nature, the Act being designed to secure as far as possible the financial soundness of the undertakings. There are also important provisions with regard to transfer and

amalgamation, all with a view to the protection of the interests of policy-holders.

The borrowing powers of corporate bodies transacting assurance business are outside of the provisions of the above-mentioned Act, and are governed entirely by the Memorandum and Articles of Association—if registered under the Companies Acts, 1862 to 1917: if incorporated under a special Act, then by the provisions of that Act or Deed of Settlement; or if registered, as is sometimes the case with industrial assurance companies, under the Industrial and Provident Societies Acts, 1893 to 1913, then by the Company's rules. But where the business carried on is of the industrial class, that is, assurances upon human lives, the premiums in respect of which are received by collectors, the provisions of the Industrial Assurance Act, 1923, require attention. This Act provides that industrial assurance business shall not be carried on, except by a registered Friendly Society, referred to in the Act as a Collecting Society, or by an assurance Company within the meaning of the Assurance Companies Act, 1909, which is either registered under the Companies Acts, or the Industrial and Provident Societies Acts, 1893 to 1913, or incorporated by special Act. Under the Act, the Chief Registrar of Friendly Societies assumes the office of Industrial Assurance Commissioner: and he is charged with supervisory duties with regard to industrial assurance business generally. The Act really confines the business of industrial assurance to assurance Companies and to collecting Societies. The provisions of the Act are mainly concerned with matters of domestic management, and the control to be exercised by the Industrial Assurance Commissioner, with a view to the fullest possible protection being afforded policy-holders, and the correction of abuses which have undoubtedly existed. Before an assurance company can undertake industrial assurance business, a deposit of £20,000 must be made with the Board of Trade, whether such business comprises their sole business, or forms a *separate* class of their assurance business. The Act similarly provides for a deposit of £20,000 in the case of a collecting Society, commencing business after the passing of the Act: but as regards Societies registered prior to, and carrying on business at, the date mentioned, the Commissioner may postpone the payment of the deposit for a period of five years, provided he

is satisfied with the financial position of the Society. A collecting Society, after the passing of the Act, must insert "Collecting Society" as the last words in its name.

By Section 13 of the Act it is provided that an Industrial Assurance Company shall not, after the commencement of the Act, issue any debentures or debenture stock, or raise any loan, charged or purporting to be charged on any assets of the Company in which the industrial assurance fund is invested, and any such charge shall be void. A borrowing by way of temporary bank overdraft is, however, expressly exempted from the provisions of the section: and, assuming that the usual copy Resolution is forthcoming, it appears that a banker may safely make temporary advances on security of the investments comprising the industrial assurance fund. But with regard to collecting Societies, the Act is silent respecting borrowing: and in view of the care which has been taken to confer on industrial assurance Companies a power of this character, it is submitted that a borrowing by a collecting Society would be unauthorized and irregular.

METALLIFEROUS MINES AND TIN STREAMING WORKS WITHIN THE STANNARIES OF CORNWALL AND DEVON

The Companies Act, 1908 (Sect. 1 (2)), prohibits the formation of partnerships of more than twenty persons for the acquisition of gain; but excludes from the operation of the Section, *inter alia*, a Company engaged in working mines within the stannaries and subject to the jurisdiction of the Stannaries Court. The Stannaries Act, 1887, defines the term "Company" as "any persons, or partnership body, joint stock Company, Company constituted under the Companies Act, 1862, or any statutory modification thereof, and whether corporate or unincorporate, and whether limited or unlimited."

Partnerships or associations of more than twenty persons, formed for the purpose mentioned, are legal. A partner may transfer his shares, when all calls are paid, without the consent of his co-partner; but in order to bind the partnership in a contract of borrowing there must be consent by the partnership, by resolution passed in general meeting, or in manner provided

by the rules and regulations governing the partnership. A member is liable to creditors for all debts incurred while he is a member.

The term "Company" is generally understood as applying to a Company registered under the Companies Acts, 1862–1917; but the definition employed in the Stannaries Act is very comprehensive, and where the Company desires to borrow, the lender should consult the Company's Memorandum and Articles of Association, or its governing regulations, for information as to the conditions on which the Company may borrow.

Where a Company, as defined by the Act, by mortgage or mortgage debentures, or other document whatever, gives power to any person to take possession of any mining effects of or on a mine, the Mortgagee, in order to obtain priority over trade creditors and claims for wages and labour (except the three months' wages due to miners and others which, by Section 4, are made a statutory first charge on all the assets of the Company), must register his charge with the Registrar of the Stannaries Court within twenty-eight days of its date (Sect. 19). This registration is *in addition* to that required by Section 93 in the case of Companies registered under the Companies Acts.

In a winding-up, the jurisdiction of the old Stannaries Court is now exercised by the County Court of Cornwall, so far as is consistent with the provisions of the Companies Acts as regards the winding-up of Companies.

ASSOCIATIONS NOT FOR PROFIT

(Scientific, Literary and other Societies)

Associations established for promoting commerce, art, science, religion, charity, or any other useful object, where the intention is to apply the profits or income solely in promoting the objects of the Association, and not in payment of dividend to the members, may be incorporated under the Companies Acts, and, under the license of the Board of Trade, may be registered with limited liability without the addition of the word "limited" to their name (Sect. 20). Certain restrictions (Sect. 19) are laid on such Associations with regard to the holding of

land. Incorporation may also be obtained by means of Royal Charter or special Act of Parliament.[1]

Further, the "Literary and Scientific Institutions Act," passed in 1854, applies to institutions formed for the purposes of *Science, Literature and the Fine Arts.* Under the Act, these institutions may hold land not exceeding one acre in extent (Sect. 1); and by Section 19 the trustees, where they have incurred expenses on account of the institution for which they have a right to be indemnified, and have not been repaid these expenses, may mortgage the premises or part thereof, and repay themselves with the proceeds. It would appear that the trustees' power in this respect is unrestricted and arises immediately on failure of the institution to repay the trustees' disbursements.

CERTIFIED LOAN SOCIETIES

These Societies are established under the "Loan Societies Act, 1840," the certifying authority being the Registrar of Friendly Societies. They must not be confounded with the registered loan Societies, established as "specially authorized" Societies under the Friendly Societies Acts; nor with those incorporated under the Industrial and Provident Societies Acts for carrying on the business of banking; nor with incorporated loan Companies.

Such Societies may be formed, by not less than three persons, for the purpose of establishing a fund to be employed in making loans to the industrious classes, and taking repayment by instalments. The rules must be passed and certified by the Registrar: and such Societies are exempted from the provisions of the Money Lenders Act, 1900.

A certified Society may receive deposits, but the Act is silent as regards a Society's power to borrow; in fact, such a contingency does not appear to be contemplated, inasmuch as not only has a Society power to issue debentures to its *depositors*, which form a charge on the capital and property of the society; but Section 15 expressly prohibits the transfer (as security) of

[1] Scientific, literary or artistic societies may also be registered under the Friendly Societies Act, 1896.

notes of hand, bills, or securities for the payment of money taken by the Society ; if such security is taken it cannot be sued upon by anyone except the Society. Nor could a banker, who makes advances to a Society, safely rely on an implied power to borrow for the purposes of its business : the Act simply contemplates the formation of a fund, by means of depositors' subscriptions, for making loans : the amount of the fund available being the limit within which the business of lending may be conducted. A banker might, however, be disposed to accept the personal guarantee of the Trustees—if it expressly recognized responsibility, notwithstanding the irregular character of the lending.

PUBLIC UTILITY SOCIETIES

The constitution and powers of public utility Companies have already been considered ; but there is also a class of Societies formed for public services, registered under, and exercising the powers conferred by, the "Industrial and Provident Societies Acts, 1893 to 1913." On registration, these Societies become corporate bodies with capacity to contract.

A Society may be a public utility Society for the purposes of the Housing Acts ; and local authorities, or a county council, are empowered to promote or assist such a Society by grant, loan, share subscription or guarantee, subject to the consent of the Minister of Health : and the Society may obtain loans from the Public Works Loan Commissioners on mortgage.

In accordance with the provisions of the Industrial and Provident Societies Acts, the rules of these registered Societies must state whether the Society may borrow ; and if so, under what conditions, on what security, and to what limits of amount. It should be borne in mind that, if the rules authorize, a registered Society may borrow on debentures or debenture stock.

It should be particularly noted that, by the Housing and Town Planning Act, 1919, local authorities may guarantee the interest and repayment of loans (Sect. 18 c.).

A preliminary to borrowing is, therefore, the production of the necessary copy Resolution, together with a copy of the Society's Rules.

SMALLHOLDINGS' & ALLOTMENTS' ASSOCIATIONS

These Associations, working on a co-operative basis, are fairly numerous, and they may register under the "Industrial and Provident Societies Acts, 1893–1913." By so doing, they become corporate bodies, and may exercise borrowing, as provided by that Act, if their rules so direct. By the "Small Holdings and Allotments Act, 1908," a County Council may, with the sanction of the Minister of Health, promote or assist a Society by means of grants or loans, or guarantee advances to the Society (Sect. 49 (1, 2)).

Borrowing in this case also is exercised by Resolution of the Association, in conformity with the Rules.

COMMISSIONERS OF SEWERS, AND DRAINAGE BOARDS

In accordance with the provisions of the "Land Drainage Act, 1861," Commissioners of Sewers may be appointed on the recommendation of the Inclosure Commissioners (now the Ministry of Agriculture and Fisheries). The Act applies only to England, and the Metropolis is expressly excluded from its operations.

Commissioners, duly constituted, have rating powers in their respective areas; and they may, for the purpose of defraying *any* costs, charges, and expenses, borrow on mortgage of such rate, subject to the consent of the Ministry of Agriculture, repayment to be made within a period not exceeding thirty years.

The same Act authorizes the election of Drainage Boards, subject to the consent of the Ministry and confirmation by Parliament; and, once constituted, these Boards may exercise borrowing powers in the same way as Commissioners of Sewers.

Borrowing, therefore, by these bodies can only be exercised in accordance with the provisions of the Act, i.e. on mortgage of the rate, subject to sanction. There is no provision for borrowing otherwise; and where a banker, considering it expedient, allows overdraft pending the collection of a rate, he may find that mortgagees have in the meantime obtained the appointment of a Receiver, and that recovery of his money is doubtful.

With regard to the nature of the security, the Act provides that the Commissioners' Clauses Act, 1847, shall apply. A mortgage and transfer of mortgage must, therefore, be in the statutory form prescribed by that Act ; a register of mortgages must be kept by the borrowing Authority ; and, where default is made in payment of interest, a power of appointing a Receiver may be exercised on the lines laid down by the Act.

The Land Drainage Act, 1918, confers upon the Ministry wide powers with regard to the alteration of existing drainage and sewer areas, and the Ministry may confer additional powers of levying drainage rates, or borrowing powers, as may be necessary, or may alter or supplement the provisions of any Local Act or of any Provisional Order, subject, however, to the proviso that, where the Order proposed to be made by the Board is opposed, Parliamentary sanction must first be obtained.

In any negotiations for a loan, the copy Resolution of the Commissioners, or of the Board, must be produced, together with the consent of the Ministry.

These Drainage Boards must not be confused with the Boards which, under the provisions of the Public Health Act, 1875, may be formed by Provisional Order of the Ministry of Health (Public Health Act, 1875, Sect. 279) or by special Act of Parliament.

FISHERY BOARDS

These Boards are bodies corporate, having perpetual succession and a Common Seal, with power to contract, and to sue, and be sued, under a common name. Originally constituted under the provisions of the "Salmon Fishery Acts, 1861–1865," they are now governed by the provisions of the "Salmon and Fresh Water Fisheries Act, 1923." They have power to hold land for the purposes of this Act without license in mortmain, and to sell or lease any land held which is not required for the purposes of the Fishery Board. A power to borrow, subject only to the consent of the Ministry of Agriculture and Fisheries, is conferred by Section 56 of the Act, on the credit of any revenue receivable by, or on any other property belonging to, the Board.

These borrowing powers may be exercised for the purpose of

defraying *any* expenditure incurred, or to be incurred, by the Board in the administration of the Act. There is no limitation of the amount which may be borrowed, nor is there a period fixed by the Act within which repayment must be made. Mortgages, issued as security for the borrowing, must conform to the requirements of the Commissioners' Clauses Act, 1847.

A Fishery Board is therefore a statutory body, with limitations of which all have notice through the medium of the controlling Act; and to lend otherwise than in conformity with the conditions imposed may be expedient in the judgment of the banker, but it obviously has its attendant risks.

Where a loan is proposed, the copy Resolution of the Board must be produced, together with the consent of the Ministry.

It should be borne in mind that while these bodies may be constituted under the general law, there are also bodies, charged with conservancy duties, which are formed under special Acts. Instances of these are furnished by the Thames Conservancy Act, 1894, and the Lea Conservancy Act, 1868.

SOCIETIES AND CLUBS

The terms "Society" and "Club" are here used to signify associations of persons, neither registered nor incorporated, formed for the promotion of the Arts or of sport, and for other purposes too numerous to mention. These associations act by their trustees and/or committee of management, who have only such authority to contract on behalf of the members generally as may be given to them expressly or by necessary implication of the rules. Members of the committee of management, as such, have no power to pledge the credit of other members of the committee.

Any lending to such an association should, therefore, be conducted with caution, inasmuch as the association being unincorporated, it has no legal existence and cannot be sued, although trustees may sue or be sued in respect of club property vested in them. Personal responsibility may, however, attach to the signatories to cheques drawn on the account, and to the members of the committee, if the documents or the authorities opening the account can be so construed (Coutts & Co. *v.* The

Irish Exhibition), but the question is best placed beyond doubt by lending only against responsible guarantees.

Incorporated clubs may, if their rules so permit, borrow money on debentures, the trustees or committee undertaking to repay out of the club funds, but not otherwise. In effect, the club property and assets, exclusive of personal chattels, are charged by the debentures, but the members, having accepted no individual responsibility, are not liable. Registration is not necessary, and the debentures need not be under seal, if signed in the manner authorized by the members of the club.

Nothing that is said here must be taken as applying to those bodies which are registered under the Companies Acts, as is now frequently the case with sports clubs.

LIGHTHOUSE AUTHORITIES

Subject to any powers or rights exercised by "Local Lighthouse Authorities," the management of lighthouses, buoys and beacons is vested in the following bodies, namely:—

England and Wales, the Channel Islands and the adjacent seas and islands, and at Gibraltar. Trinity House;

Scotland and adjacent seas and islands, and the Isle of Man. The Commissioners of Northern Lighthouses; and

Ireland and adjacent seas and islands. The Commissioners of Irish Lights.

These are "General Lighthouse Authorities," and they act under the supervision and control of the Board of Trade.

By Section 662 of the Merchant Shipping Act, 1894, the Board of Trade is empowered to mortgage the Mercantile Marine Fund, and any dues, rates, or other payments payable thereto, for the construction and repair of lighthouses or other extraordinary expenses. The mortgage is to be in the form, and executed in the manner directed by the Board of Trade, and a mortgagee is not bound to inquire as to the disposal of the money borrowed.

In addition to this method of raising money the Act (Sects. 661, 663) empowers both the Treasury and the Public Works Loan Commissioners to make advances upon the security of the Mercantile Marine Fund.

The borrowing powers of these Authorities can only be exercised in the manner and for the purposes indicated; ordinary establishment expenses are defrayed by the Mercantile Marine Fund.

Following more recent legislation the Mercantile Marine Fund is now known as the General Lighthouse Fund.

SMALLHOLDERS

By the "Smallholdings and Allotments Act, 1908," already referred to in the remarks on "Smallholdings' Associations," County Councils may borrow in accordance with the Local Government Act, 1888, and the Councils of County Boroughs in accordance with the Public Health Acts, for the provision of smallholdings; while the Councils of Boroughs and Urban Districts may borrow in accordance with the Public Health Acts, and Parish Councils in accordance with the Local Government Act, 1894, for the provision of allotments.

An important extension of powers, particularly with regard to the erection of dwellings, is granted to a County Council by Section 12 of the Land Settlement (Facilities) Act, 1919. Where land has been acquired under the provisions of the principal Act,[1] the Council may, with the consent of the Ministry of Agriculture and the Ministry of Health, *mortgage* such land for a period to be determined by the latter. In addition, therefore, to its power under the Smallholdings and Allotments Act to charge the County Fund and Revenues for the acquisition of land, a Council has now an express power to give a specific mortgage over the land, with the dual consent of the two Ministries: but it is provided that the consent of the Ministry of Agriculture will not be necessary after March 31, 1926. Further, Section 18 provides that, subject to Treasury regulations, a Council, or the Ministry of Agriculture, may guarantee any advance by way of loan to any tenant of a smallholding for the purchase of live stock, seeds, etc., if the Council or the Ministry considers that co-operative facilities for making advances are inadequate. In practice, this statutory power to guarantee is exercised by the Council executing, under its

[1] Smallholdings and Allotments Act, 1908.

common seal, a guarantee in the bank's favour to cover all loans made to customers of that particular bank within the county.

CHARITIES

Charitable corporations may be created (1) by royal charter, a method frequently employed; (2) by royal charter conferring authority on the holder of an office to create corporations indefinitely, e.g. the power which has at times been exercised by the Chancellor of the University of Oxford; (3) by persons acting under royal licence, as in Sutton's Hospital case; (4) by special Act of Parliament; (5) by deed enrolled in Chancery under 39 Eliz. c. 5; (6) under the Companies Acts, 1862 to 1917; (7) by the Charity Commissioners under the Charity Trustees Incorporation Act, 1872 ("Laws of England," Halsbury).

Corporations, as a rule, may be trustees for charitable purposes in the same manner as individuals; and they are similarly subject to the jurisdiction of the Court in dealings with their trust property: their powers must be looked for in the deed or instrument of incorporation. Mention has already been made of the special privileges attaching to incorporation by royal charter: practically the only jurisdiction which the Court can exercise in such cases is that of seeing that the provisions of the charter are observed—where improper conduct is alleged. Where the charity is regulated by special Act of Parliament, the Court cannot interfere, unless the provisions of the Act have not been carried out. In cases where the charity, an eleemosynary corporation, owes its existence to an original endowment under royal licence, the founder, in the endowment deed, may provide for its government and for the application of the revenues in perpetuity.

Of charitable institutions, hospitals probably appear to bankers most frequently in the guise of borrowers. Many modern hospitals are managed by an incorporated body of governors or trustees, others by governors or trustees who have not been incorporated. Assuming, however, that the constitution of the managing body and its powers have been ascertained, the question then arises as to whether, under the

provisions of the Charitable Trusts Acts, 1853 to 1894, the property of the charity is within the jurisdiction of the Board of Charity Commissioners.

For the purposes of the Acts in question, charities are practically divided into three classes: (1) Foundations or institutions in England or Wales, including Roman Catholic Charities, which are endowed for charitable purposes and are not expressly exempted from the operation of the Charitable Trusts Acts; (2) Unendowed charities, or charities supported wholly by voluntary contributions; (3) "Mixed" charities, i.e. partly endowed and partly supported by voluntary contributions.

Endowment is defined as property of every description belonging to or held *in trust* for a charity, whether held for its general purposes or for any special purpose, and whether upon trusts or conditions which render it lawful to apply the capital to the maintenance of the charity, or upon trusts which confine the charitable application to the income. Freehold or leasehold land occupied by the charity, but not producing income, is an endowment ("Laws of England," Halsbury).

On the other hand, donations and bequests to mixed charities for their general purposes, that is to say, not specially applied or appropriated by the donor or testator and which may be applied as income, are outside the Commissioners' jurisdiction.

Certain charities, universities, colleges and religious institutions are expressly exempted from the operation of the Acts: but, speaking broadly, the jurisdiction of the Commissioners extends to all endowed charities, whilst unendowed charities are outside their control. Between these extremes there are degrees which can only be determined by the facts of each particular case; and it is clearly desirable that advances to such institutions should only be made by bankers under competent legal advice. It should always be borne in mind that the burden of proof that a charity is unendowed rests on the lender.

The law governing charges on charitable property may be summarized as follows:—

Where the trustees are not bound by the restrictions of the Charitable Trusts Acts, they may mortgage charity lands on

their own responsibility, whether they have express power to do so or not: but in such circumstances it rests upon the mortgagee to show that the transaction resulted in benefit to the charity, and upon the trustees to show that they had acted in accordance with prudent management. Such mortgages are, therefore, not the best of security.

Whether a power of sale authorizes trustees to mortgage the property depends, as a rule, upon the construction of the instrument of trust and the intention of the settlor as manifested therein. The Court may, however, sanction mortgages of charity lands by trustees, and where this sanction is obtained the mortgagee's position is materially strengthened.

Where charity estates are not exempt from the provisions of the Charitable Trusts Acts, trustees are powerless to mortgage or charge the estate, whether or not the instrument of trust confers such a power, unless authorized (1) by Parliament, (2) or by a judge or court of competent jurisdiction, (3) or according to a scheme legally established, (4) or with the approval of the Charity Commissioners, (5) or, in the case of educational endowments, with the approval of the Board of Education.

A borrowing from a bank by way of overdraft is a "charge" of the estate within the prohibition mentioned, although there may be no written document to carry out the transaction.

The consent of the Charity Commissioners is required to an application to the Court to sanction a mortgage of land, purchased partly by means of savings of income, and held, with the buildings erected thereon, *upon trusts* constituting a permanent endowment, and also to the mortgage itself. Consent is not necessary if the land is held upon such trusts that it can be lawfully applied as income ("Laws of England," Halsbury).

With the authority of the Charity Commissioners, the trustees may charge the charity estates for building, repairs and improvements on the estates, if not inconsistent with the trusts of the foundation.

Mortgages authorized by the Commissioners do not usually contain powers of sale, and the trustees must make provision to discharge the loan within thirty years of its date, or by means of a sinking fund.

The powers of the Charity Commissioners in respect of charities solely educational are now exercised by the Board of

Education, and where charities come within the scope of the Endowed Schools Acts, 1869 to 1889, the Board, as successor to the Endowed Schools Commissioners, exercises a special jurisdiction: but these special powers are limited in various ways. The charity must be an educational endowment, that is to say, the property must be subject to charitable trusts for purposes of education: but nothing in the Acts applies to Eton, Winchester, Westminster, Charterhouse, Harrow, Shrewsbury, Rugby, or their endowments. These schools are the subject of special legislation by virtue of the Public Schools Acts, 1868 to 1873.

Further exceptions are set out in the Acts, but the provisions are only of material interest in so far as the Board, in the exercise of its jurisdiction, may alter existing trusts, or make new trusts, or deal with the constitution, rights and powers of the governing bodies of such charities.

In Scotland there are no statutory enactments with regard to Charities and Charitable Institutions. They are mostly voluntary, and are regulated by formal Deed of Constitution which determines the powers which the Trustees may exercise with respect to the property and funds forming the Trust.

Finally, Trustees for ecclesiastical or charitable purposes may charge land under the provisions of the Agricultural Holdings Act, 1923, subject to approval of the Charity Commissioners and Board of Education, and the corresponding Act for Scotland provides that ministers (*i.e.* of the Established Church) may charge the glebe lands for the purposes of the Act with the approval of the Presbytery; and Trustees for ecclesiastical, educational or charitable purposes, with the approval of the Secretary for Scotland.

UNIVERSITIES AND SCHOOLS UNDER THE PUBLIC SCHOOLS ACTS

There is no legal definition of the term "University," but it is generally understood to mean a corporation for the purposes of education, possessing various endowments and privileges.

In early days, these corporations were founded by papal bull, or by charter, whilst the more modern institutions have

their inception in a royal charter, or special Act of Parliament. The colleges of universities are independent corporations similarly founded.

The constitution, powers and privileges of universities are governed by their instruments of foundation, or by Acts of Parliament: and so far as it is possible to apply the general law to such institutions, they come within the law of corporations or of charitable trusts. The executive government is usually in the hands of the council or senate, subject to the conditions imposed by the charter of incorporation, or Act of Parliament. As corporations, their dealings in land are subject to certain restrictions, but they enjoy, to a great extent, exemption from the operation of the Mortmain Acts.

Under the Universities and College Estates Acts, 1858 to 1898, Oxford, Cambridge, and Durham Universities, with the colleges therein, have statutory power to mortgage their lands. They may borrow money for the purpose of certain improvements[1]; but where a sale of their landed property is proposed, the Ministry of Agriculture and Fisheries has some control.

The Public Schools Acts apply only to seven schools, namely, Eton, Winchester, Westminster, Charterhouse, Harrow, Rugby and Shrewsbury. These are subject to the general law of corporations with respect to landed property, except in so far as they are exempted by general or special statute. With the exception of Eton and Winchester, they can deal with their land only under the control of the Board of Education, whilst the provisions of the Universities and Colleges Estates Acts apply to Eton and Winchester.

The foundations of many Public Schools, for instance, Marlborough, Haileybury and Bradfield, have obtained charters, and others Acts of Parliament; and these instruments of foundation provide for their administration and government.

With regard to the Scottish Universities, viz.: Aberdeen, Edinburgh, Glasgow and St. Andrews, the Universities (Scotland) Acts, 1858–1889, endow there spective University Courts with a corporate legal existence, with perpetual succession and a common seal. These Courts have power to administer and manage the revenues and property of the University, and

[1] To be repaid within such period, not exceeding fifty years, as the Ministry of Agriculture shall decide.

generally to have all the powers necessary for such purposes. An express power to borrow is not conferred, but it would appear to be implied.

ORDINARY PARTNERSHIPS

The law of partnership has been much simplified by codification by means of the "Partnership Act, 1890." The "Registration of Business Names Act, 1916," must, in certain circumstances, be considered.

Partnership is defined by this Act of 1890 (Sect. 1) as the relation which subsists between persons carrying on a business in common with a view to profit. This definition must always be borne clearly in mind in considering whether a person is a partner in a business or not. The question as to whether a person is or is not a partner is important to bankers and creditors, because if he is a partner he is liable for the partnership debts; whereas if he is only in the position, say, of a financier who has lent money to a partnership, he is not only not liable for the debts, but he is entitled to prove for his loan along with the other creditors as against the partnership assets. There must, to constitute a partnership, be a *business*: mere co-ownership of property is not sufficient.

Partnerships of more than twenty persons for the acquisition of gain, and of more than ten persons for the business of banking, are prohibited, unless registered under the Companies Acts, 1862–1917, or some other Act of Parliament.

A firm, as distinguished from a statutory company, is not a separate legal entity. The partners together constitute the firm: they are the joint owners of the firm's property, and a partner in a trading firm has implied authority to bind the firm by borrowing money for the purposes of its business. He may sell any goods or personal chattels of the firm, although legal estate in land must be conveyed or charged by all the partners, or by one authorized by deed. He may, for the purpose of securing money borrowed for the purposes of partnership, pledge any of the firm's goods or chattels, and give effective charges under hand on deeds or other documents belonging to the firm. A member of a mercantile firm may make, accept,

and issue bills and other negotiable instruments in the name of the firm. It is not, however, prudent to assume that a partner of a firm, other than a mercantile firm, has power to borrow on the credit of the firm, without inquiry. A partner has no implied authority to bind the firm by a deed, nor to give a guarantee in the name of the firm.

"As between the partners and the outside world (whatever may be their private relations between themselves) each partner is the unlimited agent of every other in every matter connected with the partnership business, or which he represents as partnership business and not being in its nature beyond the scope of the partnership" (Baird's Case (1870), L.R. 5 Ch.).

Every partner is liable jointly with the other partners for all debts incurred by or on behalf of the firm in the ordinary course of business while he is a partner: and the estate of a deceased partner is severally liable in a due course of administration, subject to the prior payment in England or Ireland of his separate debts. A partner's estate is also severally liable for wrongs and misapplication of property; and where a partner, if a trustee, improperly employs the trust property in the business, partners, unaware of the breach, are not liable to the beneficiaries, although the latter have a remedy in their right to follow the trust money if still in the possession or under the control of the firm.

Every one who by words spoken or written, or by conduct represents himself, or who knowingly allows himself to be represented as a partner, is liable just as if he were a partner to anyone who has given credit to the firm, relying on the faith of such representation.

Anyone entering an existing firm as a partner does not assume liability for debts incurred before he became a partner, although he may do so by arrangement with the creditors.

Subject to any agreement between the partners, a partnership is dissolved by the bankruptcy or death of a partner, or where a partner allows his share of the partnership property to be charged for his separate debt. A partnership may also be dissolved by agreement between the partners, or, in certain circumstances, by order of the Court. After the dissolution, the authority of the partners to bind the firm continues, so far as may be necessary for the winding-up, and to complete

transactions begun but unfinished at the date of dissolution. The power of the survivors of a deceased partner to mortgage the assets for fresh advances will depend on the circumstances of each case ; and where a mortgage is taken to secure the old advance, the deed should be taken only with the concurrence of the deceased partner's personal representatives.

A change in the composition of a firm amounts in law to the dissolution of the old firm and the creation of a new one. There is no continuity of existence, as in the case of a statutory company : and rights of recourse against a debtor firm and its sureties will only be preserved by the banker breaking the account when any change in the firm comes to his knowledge.

An infant may be a partner, but he is not personally liable to creditors.

Further, it may be well to recall the rules in bankruptcy governing the administration of bankrupt and insolvent partners' estates. The partnership property is termed the joint estate, and the separate properties of the individual partners are termed the separate estates. The rule is that joint estate is applied in payment of the debts of the partnership, and separate estate in payment of the individual debts of the partner to whom it belongs : if in either case any surplus remains, the surplus of a separate estate will be transferred to the joint estate if the latter is deficient : and the joint estate surplus is divided among the respective separate estates in proportion to the right and interest of each partner in the joint estate.

The Partnership Act, 1890, also applies to Scotland, but its provisions are modified in certain respects owing to a distinctive feature of Scots law in that a firm or partnership in that country is a legal person, as distinct from the members of which it is composed. It may enter into obligations and contracts ; and the property and assets belong to the partnership itself and not, as in England, to the partners jointly.

A partner in a mercantile firm has an implied power to borrow money for the purposes of the partnership : and a lender's remedy for the recovery of his money in the Scottish Courts must be exercised, in the first instance, against the firm itself, although ultimately each partner is jointly and severally liable with his co-partners for all debts and obligations of the

firm. If the firm be trading under a proper name, such as F.S. & Co., it is sued in that name: but if it be trading under a descriptive name, such as the "Gem Trading Coy.," certain requirements must be observed with regard to joining the names of the partners in the action.

In Scotland, a firm may be sequestrated while its members remain solvent: and it should be noted that the creditors of a firm are entitled to rank on the partnership estate, to the entire exclusion of the private creditors of the partners; and also to rank equally with the private creditors, on the individual estates of the partners, after deducting the amount they are entitled to receive from the firm's estate ("Banking Law," Wallace & M'Neil, 5th ed., p. 325). The procedure thus differs from that which prevails under English Bankruptcy Law.

LIMITED PARTNERSHIPS

The "Limited Partnerships Act, 1907," which also applies to Scotland, came into operation on January 1, 1908, Section 4 (2) repeating the prohibition of large partnerships contained in Section 1 of the Companies (Consolidation) Act, 1908, and providing that, subject to such prohibition, limited partnerships may be formed consisting of one or more general partners who will be liable for all debts and obligations of the firm; and one or more limited partners who will be liable only to the extent of the capital contributed by them on entering the business.

Limited partnerships must be registered with the Registrar of Joint Stock Companies.

A limited partner is liable for the debts of the firm to the extent only of the capital he contributes, unless he takes any part in the management, when he becomes liable as a general partner for such period as he so takes part in the management. A limited partnership is not dissolved by the death or bankruptcy of a limited partner, nor by his being certified a lunatic, unless his share cannot be otherwise ascertained and realized than by dissolution. He may, with the consent of the general partners, assign his share: a person may be introduced as a

partner without his consent: and, finally, he is not entitled to dissolve the partnership by notice.

A limited partner cannot bind the firm: but a general partner is liable for all the debts and obligations of the firm, and he may borrow on the credit of the firm and pledge its property in the same way as a partner in an ordinary trading partnership. Subject to certain modifications, limited partnerships may be made bankrupt in the same way as ordinary partnerships; and, if all the general partners are adjudged bankrupt, the assets of the firm vest in the trustee.

A body corporate may be a limited partner.

The Limited Partnerships Act, 1907, has, however, not been very popular with the commercial community, and registrations under the Act are rare.

MARRIED WOMEN

The Married Women's Property Act, 1882, now governs the position of married women. Where a married woman borrows money and fails to repay, the lender may obtain judgment; but execution can only be levied against any separate property which she may have "free from restraint on anticipation." She is not personally liable to attachment on non-payment of the debt.

Where, however, she is carrying on a business separately, or with her husband, she is subject to the bankruptcy laws.

With regard to the position of married women in Scotland the Married Women's Property (Scotland) Act, 1920, brought about important changes. Previously a married woman could not, without the consent of her husband, assign the income or dispose of any estate whether acquired before, or during, the marriage, and vested in her as her separate estate: but now under the Act mentioned, which came into operation on December 23, 1920, the husband's right of administration is abolished, and a married woman may deal with her property, heritable or movable, i.e. *personal*, as if she were unmarried. She is now capable of entering into contracts, and incurring obligations as if she were a single woman. She is capable of suing and being sued, and her husband incurs no liability in

connexion with any contract or obligation she may undertake on her own behalf. "She may sign guarantees, bonds of credit, bills or cautionary obligations, and the creditor is entitled to enforce these obligations against the estates, both heritable and moveable, of a married woman to the like extent as if she were unmarried. She may sell her private estate, dispone or assign that estate in security of the obligations of herself or a third party" . . . ("Banking Law," Wallace & M'Neil, 5th ed., p. 59).

FREEHOLD LAND SOCIETIES

These should not be confounded with Building Societies. A Land Society acquires land with the funds contributed by its members, and divides the land amongst them. The legality of such a Society with over twenty members, where the acquisition of gain is not an object, has already been commented on. Where a Land Society desires to borrow, it could only do so as an exceptional matter, and each case would call for consideration on its merits.

Nothing that is said here must be taken as applying to an Association or Company formed for dealing in land, with a view to making profits for its members. These may be formed under the provisions of the Companies Acts, or of the Industrial and Provident Societies Acts, or under a special Act.

EXECUTORS

An executor takes his title from the Will itself; and immediately on the death of the testator, all property, real and personal, vests in him, subject to payment of the deceased's lawful debts and funeral expenses. He has *power to pledge* specific assets and to realize the personal estate even before production of probate: but a contract of borrowing made by him, after the death of the testator, is made personally, he having the right to recoup himself out of the estate. There is no loan to the estate, and the lender cannot stand as a creditor upon the estate.

Where overdraft is desired for the purpose of carrying on the

testator's business, legal advice should be taken as to the powers contained in the Will. Such directions must be clear and distinct: and if the amount of capital to be employed is not stated, then no more may be employed than was employed at the date of testator's death. If an overdraft were allowed of which the Will did not permit, the Executors, although personally liable for the borrowing, would be unable to recoup themselves out of the Estate.

Executors are regarded in law as one person, the acts of one being deemed the acts of all.

A banker cannot retain a credit balance on the Executors' account against a debt owing to him by the deceased, and when an Executor pledges specific assets on a lending to him as Executor, the banker has no lien on the security for any debt owing by the deceased.

In this connexion it is of interest to note that there are judicial decisions of the Scottish Courts to the effect that where a customer is at the time of his death indebted to a bank, and the executors in administering his estate pay into the bank to the credit of an account opened in their names as executors, a sum of money which practically balances the sum due by the deceased customer, the bank are entitled to compensate or set-off the one sum against the other or to retain the amount in satisfaction of their debt ("Banking Law," Wallace & M'Neil, 5th ed., page 85).

The title of an executor-nominate in Scotland is completed by confirmation granted by the Sheriff of the county in which the deceased was domiciled at his death, or by the Sheriff of the county of Edinburgh, in the case of persons dying abroad, or having no fixed place of abode, and leaving property in Scotland. Legally, an executor has no power to intromit or intermeddle with the estate until confirmation of his title.

ADMINISTRATORS

An administrator takes his title from the grant of administration, and has no legal status till the grant is made (although, on appointment, his title relates back to the death). He administers the estate according to law.

In other respects the remarks regarding executors may be read as applying equally to administrators.

In Scotland, an executor-dative, the equivalent of an administrator under English law, is appointed by the Sheriff and confirmed as in the case of an executor-nominate.

TRUSTEES

There is no objection to an account being opened for Trustees as such, but where the Trustees of a Will or of a Settlement contract a borrowing, the liability on the contract is a personal one, and if the Trustee may not recover against the trust funds, neither may the lender, i.e. the power to bind the estate by borrowing must be conferred by the Will or Settlement, on the terms of which will also depend the trustees' power to mortgage.

Trustees in Bankruptcy.—By Section 56 (5) of the Bankruptcy Act, 1914, a Trustee may, with the permission of the Committee of Inspection, mortgage or pledge any part of the property of the bankrupt for the purpose of raising money for the payment of the bankrupt's debts. When the Official Receiver is Trustee, and there is no committee of inspection, he must obtain the permission of the Board of Trade.

Where a Trustee opens an account at a local bank (which he can only do under the authority of the Board of Trade), cheques must be signed by the Trustee and countersigned by one member of the committee of inspection and such other person, if any, as may be appointed by the committee or the creditors; where there is no committee, cheques must be countersigned by such person, if any, as the Board of Trade may direct.

Where a Trustee in bankruptcy borrows in accordance with the Act, he incurs a personal responsibility for which he is entitled to be indemnified by the estate.

Under the Bankruptcy (Scotland) Act, 1913, there are no express powers, similar to those under English law, which enable a Trustee to borrow and give security over the estate of the bankrupt. The moneys collected by him during realization must be lodged in a bank appointed by a majority of the creditors, in number and value, at any general meeting. Failing this appointment on the part of the creditors, the

account, which must be opened in the name of the Trustee in his official character, may be placed with any joint stock bank of issue in Scotland, provided the Trustee is not an acting partner, manager, agent or cashier of such bank (Sect. 78).

With regard to Voluntary Trust Deeds for behoof of all the creditors equally, the Act contains provisions for the audit of the Trustee's accounts (Sect. 185): and under the Deed, the Trustee may enter into obligations and bind the trust estate, if necessary, for carrying the provisions of the Deed into effect. This would appear to imply a power to borrow: and the Trustee, although he cannot delegate his authority, may also appoint a factor.

LIQUIDATORS

Where a Company is being wound up voluntarily, the liquidator, who must be duly appointed either by a special or extraordinary Resolution of the Company in General Meeting, may borrow for the purposes of the liquidation and pledge such specific assets as the Company is able to offer. This is a statutory power conferred on a liquidator by the Companies (Consolidation) Act, 1908 (Sect. 186), but invariably he obtains the sanction of the Court before borrowing money, since a contributory, or a creditor, has the right to call his action in question by an appeal to the Court. In borrowing, the liquidator acts as the Agent of the Company; and incurs no personal responsibility, unless he agrees to accept the liability.

Where a Company is being wound up by the Court, Sect. 151 of the Companies, etc., Act, 1908, authorizes a liquidator, for the purposes of a winding-up, to raise on the security of the assets of the Company any money requisite; but the exercise of this power is subject to the control of the Court, and, as in the case of a voluntary winding-up, the liquidator invariably seeks the sanction of the Court before borrowing money. No personal responsibility attaches to him in any contract of borrowing unless he accepts the liability; he acts as an Agent of the Company, but subject to the control of the Court exercising jurisdiction in the winding-up.

Debts incurred by a liquidator in the course of carrying on the business of the Company with a view to winding-up are paid in priority to debts and liabilities incurred before the commencement of the liquidation.

It should be remembered that in a winding-up by the Court, the liquidator can only open a local banking account with the sanction of the Board of Trade (Sect. 154), while Rule 164, Companies (Winding-up) Rules, provides for the signing of cheques.

RECEIVERS AND MANAGERS

Where in bankruptcy proceedings a special manager of the debtor's estate is appointed, Section 74 (*b*) of the Bankruptcy Act, 1914, empowers the official receiver to authorize the special manager to raise money or make advances for the purposes of the estate in any case where, in the interests of the creditors, it appears necessary so to do.

Where in a debenture-holders' action a receiver, or a receiver and manager, is appointed by the Court, he accepts the duty of entering into proper contracts on his own responsibility for the purposes of the business, and he has a right to be indemnified out of the assets against liabilities incurred in the execution of his duty (Moss Steamship Company Limited *v.* Whinney (1912), App. Ca. 254). There are occasions when the Court, exercising its jurisdiction, authorizes a receiver to borrow money (if necessary to preserve the Company's business as a going concern) in priority to the debentures or debenture stock (Greenwood *v.* Algeciras Railway, 1894, 2 Ch. 205), but in such circumstances the limit imposed should be observed, inasmuch as the receiver, though not deprived of his general right to indemnity for expenses justifiably incurred, is not entitled to borrow to an unlimited extent without leave of the Court. The receiver will not be liable personally for loans made in pursuance of such authority unless he takes personal responsibility by the terms of the loan (Hoffmann *v.* A. Boynton Limited, 1910, 1 Ch. 519).

A receiver, or a receiver and manager, may, therefore, if provision be not otherwise made by the Court, enter into a personal contract of borrowing to meet justifiable expenses, with a right to be indemnified by the estate.

Where a receiver, or a receiver and manager, has been appointed by debenture-holders, or their trustees, under an express power in the debentures or the covering deed, it should be ascertained whether he is appointed as an agent of the Company. If he is so appointed, his dealings are governed by the ordinary law of agency, and he may bind the Company, his principals, in the usual course of business until liquidation, when he ceases to act as agent. The debenture-holders, or their trustees, upon the Company going into liquidation, are not liable for the debts incurred by the receiver, unless they authorize him to pledge their credit. If there are no words in his appointment declaring him to be agent of the Company, the debenture-holders who appoint him are his principals, and are liable upon the contracts he makes as their agent. He does not pledge his own credit, so long as he discloses the fact that he is acting as an agent. Where the receiver appointed by the debenture-holders is empowered to borrow for carrying on the business, he may give a charge on the assets ranking in priority to the debentures.

Where a receiver has been appointed as agent of the Company, and the Company afterwards goes into liquidation, his right to represent the Company ceases. Should he continue to carry on the business, without obtaining fresh authority from the debenture-holders, he is in danger of incurring personal responsibility on contracts entered into by him.

BORROWERS ON A JOINT ACCOUNT

Where a banker makes a loan on a joint account (other than that of a trading partnership) and there is no written acceptance of joint and several responsibility by the borrowers, no claim can be sustained, on the death of any one of them, against his estate, unless, possibly, in an administration in equity; and the banker must look to the survivor for repayment. In the event of the bankruptcy of a joint borrower, the solvent party or parties becomes liable for the whole debt.

It follows that, in order to prevent the operation of the Statute of Limitations, where there are joint borrowers, it is necessary to take an acknowledgment of the debt from each,

unless one is authorized to sign for himself and the others. The acknowledgment of one, however, will not prevent the others from pleading the Statute.

In practice, it is usual, in making an advance on joint account, to take from the borrowers a signed acknowledgment of joint and several liability; otherwise a banker may find that death has taken away the borrower on whom he chiefly relied, and that for repayment he must look to the survivor, who, it may be, is a poor man. Where an acknowledgment is held, the account should be stopped on the death of one, or other, of the parties.

Under Scottish law, survivorship is not implied. Therefore, in the event of his death, the liability of a joint borrower devolves upon his estate: and the account should be stopped in order to safeguard the banker's rights against the estate.

MINORS

It is now generally accepted that a banker may safely allow a minor to open an account and draw cheques upon it, so long as it is kept in credit, and is not allowed to become overdrawn. Should overdraft be allowed, no action for its recovery can be maintained, as any engagement on the minor's part to repay is absolutely void, and any security given by him inoperative. If, however, the security were given by a third party, e.g. a guarantee, it is enforceable against the surety; and where a minor has obtained a loan by misrepresenting his age, he cannot, in any subsequent action for its recovery, claim relief by proving that he was at the time under twenty-one years of age.

An infant is not liable to bankruptcy proceedings against a firm of which he is a partner.

Although, in England, the term "minor" is generally used in speaking of a person who has not reached the age of twenty-one, in place of the technical term "infant," in Scottish law it refers only to children who, in the case of males, have reached the age of fourteen, and, in the case of females, the age of twelve. Prior to that age children come under the legal designation of "pupils." There are, at times, circumstances which necessitate the appointment of a legal guardian; and Scottish

law, therefore, recognizes the office of tutor, in the case of pupils, and curator, in the case of minors. The former has control over the person and estates of the pupil, and can act entirely on his own responsibility, whereas a curator acts along with his ward, but exercises a control over the estates, his consent being necessary to validate contracts entered into by the minor, although a minor who is carrying on business may incur mercantile obligations without his curator's consent which are as binding on him as if he had attained his majority. Apart, however, from these trading obligations, there may be circumstances under which a minor may appeal to the Court for relief, e.g. in the case of a cautionary obligation entered into by him, or in a personal bond for borrowed money : and in Scotland, as in England, a banker will usually decide that dealings with minors are to be avoided.

AGENTS

In commercial law the term " agency " signifies employment for the purpose of bringing the employer into legal relationship with third parties. Any person, having the legal capacity to contract, may appoint an agent to do any act for him, provided the circumstances do not imperatively call for the personal services of the principal himself. It is not necessary that an agent should have the legal capacity to contract : and a minor may therefore be appointed, or a married woman, or an undischarged bankrupt. A limited company may also act, if permitted by its regulations.

In borrowing, by overdraft or otherwise, an agent can only bind his principal in so far as he has express or implied authority, or an authority which may be inferred from the principal's subsequent recognition of the borrowing.

A partner is recognized as an agent of the partnership in all matters appertaining to the firm's business, and a director performs the duties of an agent on behalf of his company. Each has an implied authority : but, in opening the account, a banker takes the written instructions of the partners in the one case : and in the other, the instructions of the directors, as signified by resolution of the Board, i.e. the banker acts under

an express authority. A further instance of agency, in a limited sense, arises where a customer authorizes a person to sign cheques on his behalf. In this case, the authority handed to the banker must state definitely whether the authorization is intended to cover overdrawing.

It is rarely, therefore, if ever, that a banker deals with an agent except under express authority of the principal; but, under the Factors Acts, mercantile agents have power to pledge goods and the documents of title to goods which, with the consent of the owner, are in their possession in the ordinary course of business. These mercantile "documents of title" include bills of lading, dock and warehouse warrants, delivery orders, etc., and anyone dealing *in good faith* with the agent is protected.

MONEYLENDERS

A moneylender may borrow as much as his banker is willing to lend him; but where he pledges securities, negotiable or otherwise, the banker must be satisfied that the borrower is not over-pledging his customers' securities. In Earl of Sheffield *v.* The London Joint Stock Bank (House of Lords) it was decided that no general or established custom had been proved whereby a moneylender in the City of London is entitled to pledge his customers' securities for his own indebtedness: that the Bank knew that Mozley (the moneylender) held the securities in question, as pledgee only, in respect of an advance made upon them; that the Bank had constructive notice of this, from the nature of his business; and that, in such circumstances, the Bank were bound to inquire whether Mozley had authority to pledge the securities for the full extent of his indebtedness to the Bank.

This restricted right of moneylenders, in dealing with customers' securities, is in marked contrast to the established custom of stockbrokers, to pledge with their bankers negotiable securities belonging to clients, the pledge in the latter case conferring upon the bankers a valid title, provided the transaction is in good faith and in the ordinary course of business. In the case of London Joint Stock Bank *v.* Simmons, this distinction was very clearly drawn.

The Money Lenders Act of 1900 excludes from its provisions Societies registered under the Friendly Societies Acts or Societies certified under those Acts; Building Societies under the Building Societies Acts; Societies under the Loan Societies Act, 1840; any body corporate empowered by a special Act of Parliament to lend money; banking and insurance companies; and any body corporate, exempted from registration under the Act by the Board of Trade.

STOCKBROKERS

A stockbroker, in the course of his business, may agree to finance clients in the purchase of stocks and shares; and may, for the purpose, as well as for other reasons, resort to his banker for the necessary accommodation, pledging, with the clients' authority, their security as cover. Where a banker is aware of the fact that securities belong to a client of the broker and are deposited with his authority, it is incumbent upon the banker to ascertain the nature and extent of the authority. He will not be permitted to retain the securities for an amount in excess of that named in the authority; the client will be entitled to redeem on payment of the amount due to the broker. Wilful abstention from inquiry, in the event of any circumstances which might reasonably raise suspicion, is equivalent in its legal effect to a knowledge of the facts.

These principles are of general application and the Court will give every protection to innocent third parties: but it is well settled that where the securities come within the class of negotiable instruments, a banker taking in good faith and for value has a title valid against all the world. If securities registered in the name of a client are proposed to be deposited, the banker is on reasonably safe ground with a broker dealing in good faith, provided the respective certificates are accompanied by transfers in blank executed by the registered holder, but it should be clearly understood that in such circumstances a banker has not the legal title in the securities. His right is only an equitable one.

In everyday practice, however, it is seldom that the banker is called upon to consider his position towards third parties.

He agrees to allow loan facilities against securities registered in the names of the Bank's nominees, on condition that a certain margin of value is maintained: such securities may be withdrawn from time to time, as required by the broker, on his undertaking to replace them or deposit securities of equivalent value within a specified time. The broker gives a form of general charge; and, as a rule, shares are not taken on which there is an uncalled liability. The nominees must sign a Declaration of Trust.

SHIPOWNERS

Every British ship, unless exempted from registry, must be registered under the Merchant Shipping Act, 1894 (Sect. 2).

Ships may be purchased and owned by one or more persons, but the property in every ship is divided into sixty-four shares, and no more than sixty-four persons may be registered at the same time as owners of a ship; but any share may be held in joint ownership, and the joint owners, not exceeding five in number, may be registered as a single owner; while any number of persons may have a beneficial interest in a single share, the registered owner representing them. A Corporation may be registered as owner by its corporate name (Sect. 5).

We are here concerned with the powers which may be exercised by the owners, or their representatives, as borrowers.

A registered ship or any share therein may be mortgaged (1) by a direct mortgage with registration (Sect. 31); (2) by a mortgage under a mortgage certificate (Sect. 39). The mortgage must be in statutory form, according to the specimen in the first schedule to the Act; it must be registered with the Registrar at the vessel's port of registry, and if there are more mortgages than one registered, priority is determined strictly according to the date of entry of each mortgage in the Register. This priority is not affected by any notice, express, implied or constructive (Sect. 33). A registered mortgage does not transfer the ownership (Sect. 34); but a registered Mortgagee of a ship or share of a ship has a statutory power of sale, subject to provisions for the protection of prior mortgages (Sect. 35); and, although the Mortgagor may become bankrupt while the ship is "in his possession, order and disposition," the Mort-

gagee's rights are protected against the Trustee in Bankruptcy (Sect. 36).

An equitable mortgage may be created by the deposit of the Builder's Certificate of an unfinished ship.

No notice of any trust, express, implied or constructive, can be entered on the Register (Sect. 56).

Registration, therefore, places a Mortgagee in a strong position; but it should not be overlooked that there are certain maritime liens which have priority over a mortgage, e.g. the first and paramount lien of a salvor; the claim of a crew for wages; a shipwright's commercial lien for repairs. A bottomry bondholder's claim is preferential to that of a Mortgagee.

Co-owners are not of necessity partners; in many cases they are tenants in common, and are not, in the absence of contract, agents for one another. Frequently, one owner is appointed by the others to act as managing owner. He must be registered as such (Sect. 59); and he can bind such co-owners as give him authority, express or implied, to do so. He has an implied authority to do what is necessary in the ordinary course to carry out on shore all that concerns the employment of the ship.

A ship's husband must also be registered, and he can bind the owners, as their agent, within the limit of the authority conferred, but unless authorized he has no power to bind the owners by borrowing.

A master, in the absence of the owners, and if communication is impossible in time, may borrow on the credit of the owners for necessities to be supplied; or he may raise money for necessary purposes by means of a bottomry bond which confers on the holder a maritime lien on the ship, and/or freight. If the ship and freight are insufficient, he may, in case of utter necessity, and, if the interests of the cargo owners require it, pledge the cargo, either alone by a respondentia bond; or, together with the ship and freight, by a bottomry bond. A master must not sacrifice the ship to the cargo, nor the cargo to the ship. He has no authority to raise money by mortgage of the ship or by assignment of freights; but he may, in very exceptional circumstances, sell the cargo.

Transmission of a ship or shares in a ship by marriage (of a female owner), or on death, must be registered (Sect. 27); and

joint owners of a share cannot dispose in severalty of any interest in a ship or share (Sect. 5, 4).

THE WINDING-UP OF COMPANIES

In any treatise dealing chiefly with the borrowing powers of corporate bodies, it seems appropriate that the remedies for the recovery of their money which are available to creditors should be indicated.

The creditors of a limited Company may, in general, take the same steps to recover their debts as are available to the creditors of a private individual. For example, they may obtain judgment against the Company and proceed to enforce the judgment by legal execution, e.g. by writ of *fi. fa.* against the Company's personal property, or *elegit* against its realty. Equitable execution, such as garnishee, may also be available; and in addition to these remedies the creditors may have the Company wound up, a procedure which has its counterpart in the bankruptcy of an individual.

The regulations for the winding-up of trading companies and associations are contained in Part 4 of the Companies (Consolidation) Act of 1908, while the procedure and practice to be followed are prescribed by the Companies (Winding-up) Rules, 1909.

Besides Companies registered under the Act, the Court has jurisdiction over Companies registered under the earlier Companies Acts (Sects. 245/247); Trustee Savings Banks (Trustee Savings Bank Act, 1887, Sect. 3); Building Societies (Building Societies Act, 1894, Sect. 8); and Industrial and Provident Societies (Industrial and Provident Societies Act, 1913, Sect. 58). There is, however, no similar provision in the Friendly Societies Acts, the method employed in winding up Societies registered under these Acts (where the Society does not automatically terminate by its Rules) being by instrument of dissolution, or by the award of the Registrar.

Unregistered Companies may be wound up under the Act (Sects. 267 and 268) if the Company is dissolved or has ceased to carry on its business; or is unable to pay its debts; or if the Court is of opinion that it is just and equitable that the

Company should be wound up. Unregistered Companies include any partnership, association or Company consisting of more than seven members, except a railway Company incorporated by Act of Parliament (unless it is duly authorized to abandon the whole of its railway). The provisions of the Act, therefore, apply to Companies incorporated by special Act, or by Provisional Order of the Board of Trade, or by Royal Charter (except Royal Societies); and where the undertaking is of a public nature, as in the case of a tramway, gas, or other Company, the fact that the Company is rendering services of public utility is no bar to the winding-up, although the Court will take the circumstances of each particular case into consideration in order to prevent the infliction of any injustice.

An assurance company (which by the Assurance Companies Act, 1909, may consist of an individual or a firm or any number of persons) may be wound up under the Act, if carrying on business within the United Kingdom. Foreign Companies and corporations, if they establish a branch of their business in the United Kingdom, come within the provisions of the Act, although the liquidator's powers can only be exercised in relation to the English assets.

Partnerships consisting of eight or more members may also be wound up by the Court; or of two persons, if they are engaged in working metalliferous mines in the Stannaries.

Limited partnerships are now wound up under the provisions of the Bankruptcy Act, 1914 (Sect. 127).

A lender's remedies against municipal corporations and local authorities are generally (on application to the Court) the appointment of a receiver of the rates and revenues of the corporation or authority charged as security.

Illegal associations (Sect. 1) cannot be wound up under the Act.

The Court having jurisdiction to wind up Companies registered in England are the High Court; the Chancery Courts of the Counties Palatine of Lancaster and Durham; and the County Courts. If the paid-up capital of the Company exceeds £10,000 or if the registered office of the Company is within the Metropolis, the petition to wind up must be presented to the High Court. If the registered office of the Company is within the jurisdiction of either of the Palatine Courts mentioned,

the petition may be presented to the High Court, or to either of the Palatine Courts having jurisdiction (Sect. 131).

The Lord Chancellor may exclude a County Court having jurisdiction and may attach its district for the purpose of such jurisdiction to the High Court, or to another County Court; County Courts not having jurisdiction in bankruptcy are excluded. The powers of a County Court can only be exercised where the paid-up capital of the Company does not exceed £10,000, and the petition must be presented in the County Court of the district where the registered office of the Company is situated; although the presentation of a petition in a wrong Court will not invalidate the proceedings. The jurisdiction formerly exercised by the Stannaries Court is now vested in the County Court of Cornwall, whatever the capital of the Company.

In Scotland the Court of Session in either Division exercises jurisdiction, with power to remit subsequent proceedings to a permanent Lord Ordinary.

Methods of Winding-up

The Act recognizes three methods of liquidation, viz.:—

1. By order of the Court, generally known as "compulsory liquidation."
2. Voluntary: (*a*) purely voluntary, (*b*) Under the supervision of the Court.

Compulsory Liquidation.—The compulsory liquidation of a Company takes place under an order of the Court, made upon the petition of a creditor, a contributory, or of the Company, in any of the following events (Sect. 129):—

(*a*) If the Company has by special resolution resolved that the Company be wound up by the Court:

(*b*) If default is made in filing the statutory report, or in holding the statutory meeting;

(*c*) If the Company does not commence its business within a year from its incorporation, or suspends its business for a whole year;

(*d*) If the number of members is reduced, in the case of a private Company, below two; or, in the case of any other Company, below seven;

(*e*) If the Company is unable to pay its debts;

(*f*) If the Court is of opinion that it is just and equitable that the Company should be wound up.

In the first case, the Company takes the initiative ; while, in the second, the failure to fulfil what are statutory duties may be excused by the Court, and instead of directing that the Company be wound up, an order may be made for the report to be filed or the meeting to be held (Sect. 65, 9). The third ground is a question of fact, and the jurisdiction, in such circumstances, discretionary. If the delay or interruption can be satisfactorily explained, the Court may refuse the order. In addition to these powers of the Court, the Registrar has discretionary power to strike off the register a Company which does not within a prescribed period reply satisfactorily to his inquiry whether it is carrying on business (Sect. 242). In this latter case there is no winding-up. Where the number of members falls below the legal minimum, an order may be made ; but Section 115 expressly provides that if business is carried on for more than six months while the numbers are so reduced, every member who is aware of the fact is personally liable for the whole debts of the Company contracted after the expiry of the six months. Under the just and equitable clause (*f*) the Court will make an order where the substratum of the Company's business is gone ; or where there is a complete deadlock in the management of the Company's affairs (*re* American Pioneer Leather Co. (1918), 1 Ch. 556) ; or where the whole object of the Company is fraudulent (*re* T. E. Brinsmead & Sons (1897), 1 Ch. 45, 406).

The most common ground, however, for the filing of a petition is the inability of a Company to pay its debts ; and by Section 130 a Company is deemed to be unable to pay its debts—

(*a*) If a creditor, by assignment or otherwise, for over £50 has served a demand for payment by leaving it at the registered office of the Company, and the Company has for three weeks neglected to pay, secure, or compound for the debt ; or

(*b*) if execution on a judgment is returned unsatisfied in whole or in part ; or

(*c*) if it is proved to the satisfaction of the Court that the Company, taking into account its contingent and prospective liabilities, is unable to pay its debts.

Either of the first two clauses furnishes a method whereby a creditor can show evidence of inability to pay ; and, unless the Company disputes the debt or can give a reason satisfactory to the Court for neglecting to pay, the Court will make an order ; but it is also open to a creditor to prove the necessary inability to pay, under the third head, if he can show that the Company dishonours its acceptances, or that he is informed by a responsible officer of the Company that there are no assets (Yate Colliery Co. (1883), W.N. 171).

In considering the solvency or otherwise of a Company, its unpaid capital is an important asset, unless it has been declared to be reserve capital (Sects. 58, 59), i.e. callable only in the event, and for the purpose, of winding-up the Company.

All persons served with the petition and all creditors and contributories may appear and support or oppose the petition, provided notice be given to the petitioner of their intention to appear. The Court will have regard to the wishes of the majority of the creditors ; and, where there is likely to be a surplus available, to the wishes of the majority of the shareholders as well (Sects. 145 and 201).

A creditor's petition may be dismissed, or be ordered to stand over ; or, at the wish of the majority of the creditors, the Court may make a supervision order instead of a compulsory order ; but an order will not be refused on the ground that the assets have been fully mortgaged, or that there are no assets (Sect. 141).

Who may present a Petition.—The petition for winding-up a Company may be presented by—

(*a*) One or more of its contributories ; or

(*b*) One or more of its creditors ; or

(*c*) The company itself, on special resolution, and acting through its directors ; *or by its liquidators, if the Company is in voluntary liquidation* ;

(*d*) The official receiver where the Company is already being wound up voluntarily (Sect. 137 (2)) or by all or any of these parties.

In addition to his power to petition when the number of members has fallen below the legal minimum, a contributory may also petition, provided he is an original allottee, or he has held shares in the Company for at least six months during the

eighteen months before petition, or the shares have devolved upon him through death, or during the whole or any part of the six months aforementioned have been held by his wife or by his or her trustee (Sect. 137).

A creditor, whether secured or not, may petition whatever the amount of his debt and whether he is the original creditor or merely assignee of the debt. Contingent or prospective creditors may also petition; but the petition will not be heard until security for costs be given, and a *prima facie* case for winding-up is established to the satisfaction of the Court, (Section 137 (*c*)).

Under Section 137 the official receiver in a voluntary winding-up, or in a winding-up subject to supervision, may petition for a compulsory winding-up on the ground that, otherwise, the interests of the creditors or contributories will suffer; and a person *becoming* a creditor *in a voluntary winding-up* may petition for a compulsory order.

A "contributory" is defined as a person liable to contribute to the assets of a Company in the event of its being wound up, the term including anyone alleged to be a contributory (Sect. 124); and a contributory can obtain a compulsory order for winding-up a Company in voluntary liquidation where he shows that a continuance of the voluntary liquidation will prejudice the rights of the contributories.

Procedure in obtaining a Winding-up Order.—Although the formalities involved in applying for a winding-up order will necessarily be the care of the petitioner's legal adviser, who will act in accordance with the procedure laid down by the Companies (Winding-up) Rules, 1909, it may be of interest to the reader to have the main points indicated. The Courts having jurisdiction have already been mentioned (*ante*, p. 89).

1. The petition, containing the name, address and description of the petitioner, must be presented at the office of the Registrar in winding-up; and must show the capital, objects and nature of the Company; the title of the petitioner to present the petition; and the circumstances on which reliance is placed for obtaining the order, following the form given in the Rules. The Registrar will appoint the time and place of hearing.
2. The petition must be advertised seven clear days, before

the hearing, in the *London Gazette*, and in, at least, one local newspaper. The form of advertisement, given in the Rules, must be used.

3. Where the petition is not prsented by the Company, service must be made at the registered office or the principal place of business of the Company, on some member, officer or servant of the Company. If the Company does not appear at the hearing, service must be proved by affidavit, unless the Company's authorized solicitor has accepted service. (Regent United Service Stores (1878), 8 Ch. D. 75.)

These are the main formalities which must be observed ; and the petition must not be wanting in any material particular, otherwise there is a risk of a preliminary objection causing the hearing to be adjourned for an amending of the petition, with the probability of the petitioner being ordered to pay the costs of the abortive hearing.

The advertisement is notice to all the world of the presentation of the petition, within a reasonable time of its appearance ; and a winding-up by the Court is deemed to commence at the date of the presentation of the petition (Sect. 139).

Effect of a Winding-up Order.—Immediately a winding-up order becomes operative, the Official Receiver, attached to the Court for bankruptcy purposes, becomes the provisional liquidator of the Company, under the title of " Official Receiver and Liquidator," until the appointment of some other person as liquidator. He takes into his custody and under his control the property and assets of the Company (Sect. 150, 1). The responsible officers of the Company must submit to him a full statement of the affairs of the Company, within fourteen days, or such extended time as the Court or the Official Receiver may allow (Sect. 147). One of the first duties devolving upon the Official Receiver, when a winding-up order has been made, is to summon separate meetings of creditors and of contributories to determine :—

(*a*) Whether application shall be made to the Court to appoint a liquidator in place of the Official Receiver ; and

(*b*) Whether an application is to be made to the Court for the appointment of a committee to act with the liquidator ;

and who are to be members of the committee if appointed (Sect. 152).

Votes may be given personally or by proxy (Rule 139) and the determination of the meetings is expressed by resolution of a majority in number and in value of those voting, whether personally or by proxy. The value of contributories is reckoned according to votes given by the Company's Articles.

If the two meetings pass the same resolutions, the Court makes a confirmatory order forthwith; if the resolutions are discordant, the Court's decision is binding.

If any person, other than the Official Receiver, is appointed liquidator by the Court he cannot act until he has notified his appointment to the Registrar of Companies and given security to the satisfaction of the Board of Trade. If the office of liquidator becomes vacant, the vacancy is filled by the Court; in the interval, the Official Receiver acts as liquidator (Sect. 149). The Court has also power to appoint a provisional liquidator on presentation of a petition, if the Company's property and assets are alleged to be in danger.

Once a winding-up order has been made, no action or proceeding can be maintained or commenced against the Company except by leave of the Court (Sect. 142); and if an unregistered Company is being wound up under Part VIII. of the Act, no contributory can be sued by the creditors without the leave of the Court (Sect. 271).

A petitioner cannot take his case out of the list for hearing without leave of the Court, even where the Company offers to satisfy the debt. The Court will, in such circumstances, consider the rights of other creditors to proceed with the petition or to require payment of their debts. Under Sections 144 and 203, the Court may stay proceedings in a winding-up by the Court, or under supervision, on motion made by a creditor or a contributory, but not on an application by the Company alone.

The making of a compulsory order has effects similar to a receiving order under the bankruptcy statutes.

From the date when the winding-up order becomes effective the conduct of the Company's business passes from the control of its directors into that of the liquidator, although it is to be noted that the assets remain vested in the Company in whose name the liquidator thenceforth acts. The Company retains

its corporate identity, but only in the liquidator's hands for the purpose of winding-up. All transactions on the Company's banking account, therefore, cease, the liquidator conducting any necessary business through an account opened for the purpose, subject to the requirements of Section 154, and of Section 224 as regards payment of undistributed or surplus moneys into the Companies Liquidation Account at the Bank of England.

With regard to transactions between the date of the presentation of the petition and the making of the winding-up order, the Court generally gives effect to dispositions of property of the Company made in the ordinary course of business, *bona fide*, and completed before the winding-up order. It does not assist those which remain only in contract (*re* Oriental Bank Corporation *ex p.* Guillemin (1885), 28 Ch. D. 634). Money paid or property transferred to the Company during the period in question is not affected, and the payment is a good satisfaction of the debt; but in the case of a payment made by the Company the recipient will be compelled to refund the amount and prove for his debt (Mersey Steel & Iron Co. *v.* Naylor Benzon & Company (1884), 9 App. Ca. 434).

The reputed ownership clause of the Bankruptcy Acts is not applicable in the winding-up of Companies.

Proof of Debts.—The creditors of a Company in liquidation must prove their debts in conformity with the Companies (Winding-up) Rules, 1909.

At the first meeting of creditors and contributories, no creditor can vote unless his proof of debt against the Company is lodged before the time appointed for that purpose in the notice convening the meeting; and no vote may be given in respect of an unliquidated or contingent debt or any debt the value of which is not ascertained (Rules 133 and 134). A debt "the value of which cannot be ascertained" means one dependent on the happening of some future event.

The rule governing the procedure to be observed by secured creditors is of the greatest importance (Rule 135). A failure to observe its provisions may deprive the creditor of his security. In preparing his proof, he must furnish particulars of his security; its character, date, and the value at which he assesses it; and unless he surrenders his security, he is entitled to vote only in respect of the balance. If he votes for the full amount

of his debt, he is deemed to have surrendered his security, although if, on application, the Court is satisfied that the failure to value the security is an oversight, it will generally allow the proof to be rectified, with this proviso, however, that if the position of the Company has altered in the belief that no security is claimed, relief will be refused.

Where a debt is secured by a bill of exchange or a promissory note, a creditor can only vote in respect of the balance, after valuing and deducting the liability thereon of antecedent parties who have not been adjudged bankrupt (Rule 134).

The Official Receiver or liquidator has power to redeem, within twenty-eight days, the security at the value assessed in the proof for voting, at such assessed value, plus 20 per cent.; but the creditor has the right to amend the valuation, although, should he exercise this right, the 20 per cent. will no longer be payable, if a surrender be required. (Rule 136.)

Upon overdue debts, on which interest has not been reserved, or agreed for, the creditor may prove for interest at 4 per cent., where :—

(*a*) The debt was payable under written instrument at a certain time ; or

(*b*) If payable otherwise, then from the time when a demand in writing has been made, giving notice that interest will be claimed from the date of the demand until payment (Rule 97).

While the procedure to be observed is of general application, there are many cases where, for instance, a banker lends on the security of debentures or of a trust deed securing an issue of debentures, and in terms of the security reserves to himself power to appoint a receiver on non-compliance by the Company with a demand for repayment of the amount secured. Where this power is conferred by the debentures, or by the trust deed, the appointment of a receiver may be made by the debenture-holder, on default being made, without any application to the Court ; although it is open to any creditor or contributory, or to the Company itself, to present a petition for liquidation. Where winding-up proceedings have been commenced ; and it is necessary for debenture-holders or mortgagees to bring an action to enforce their security (as where the security does not confer power to appoint a receiver), the Court will appoint the

liquidator to be receiver unless the assets are likely to be absorbed in satisfying the debentures, when, as a rule, the receiver nominated by the debenture-holders will be appointed.

Voluntary Winding-up.—A voluntary winding-up differs from a compulsory winding-up in that the former is the act of the Company, following upon a resolution of the Company.

Section 182 provides that a Company may be wound up voluntarily :—

(1) When the period fixed by the Articles, for the duration of the Company, expires, or an event occurs, on the occurrence of which the Articles provide that it shall be dissolved, and the Company passes a resolution, in general meeting, to that effect.
(2) If the Company passes a special resolution to that effect.
(3) If the Company passes an extraordinary resolution to the effect that it cannot, by reason of its liabilities, continue its business, and that it is advisable to wind up.

The great majority of liquidations take place voluntarily, and, most frequently, in pursuance of the course prescribed by Sub-section 2.

A voluntary winding-up commences at the time of the passing of the resolution, that is, in the case of a special resolution, when it is confirmed (Sect. 183) ; and the Company must give notice of the resolution by advertisement in the *Gazette*.

On the confirmation of the special resolution (Sub-sect. 2), or the passing of the extraordinary resolution (Sub-sect. 3), the Company ceases to carry on its business, except so far as may be necessary for the winding-up. It continues its corporate existence until it is dissolved ; and while, to a considerable extent, the winding-up is controlled by the members, they act through the appointed liquidator, who in turn is subject to the statutes as embodied in the Acts. It would, however, appear that, although the powers of the directors cease with the appointment of the liquidator, the Company in general meeting, or the liquidator, may sanction their exercising powers (Sect. 186, 3), but only in process of winding-up. A banker, therefore, on the passing of the resolution for winding-up must draw a line in the Company's account and cease transactions thereon.

A liquidator must be appointed in general meeting for the

purpose of winding-up. If no appointment be made, the Court is empowered, on application by a contributory, to appoint a liquidator. A liquidator, when appointed, may exercise all the powers of a liquidator in a compulsory winding-up ; and in addition he may exercise, without requiring the sanction of the Court, all the powers given by the Act to an official liquidator.

The property of the Company is applied in satisfaction of its liabilities in accordance with their respective priorities, if any ; or if none have priority, *pari passu* ; and subject thereto, unless the Articles otherwise provide, is distributed amongst the members according to their rights and interests in the Company (Sect. 186, 1).

The fact that a Company is being wound up voluntarily forms no bar to an application to the Court by any creditor or contributory for a compulsory order ; and if the Court is of opinion that the application is justified, and that the continuation of a voluntary winding-up will prejudice the rights of the petitioning creditor or of contributories, a compulsory order will be made (Sect. 197) ; or the voluntary winding-up may be continued, subject to the supervision of the Court (Sect. 199). The practical effect of the sections in question is to render void the proceedings under the voluntary winding-up, the compulsory order becoming effective only from the date of the presentation of the petition to the Court, although it is within the option of the Court to adopt any of the proceedings in the voluntary liquidation (Sect. 198). Refusal by the Court to exercise this right of adoption may affect the rights of parties ; but the Court apparently has no power to alter the date from which the liquidation is to commence.

Unregistered Companies can only be wound up by the Court.

Winding-up under the supervision of the Court.—Where a Company has gone into voluntary liquidation, any of the creditors or contributories may apply to the Court for a supervision order in the same manner as for a compulsory order, and the Court may make an order for the voluntary winding-up to continue, subject to such supervision (Sects. 199, 200) and with such liberty for creditors, contributories or others to apply to the Court ; and generally upon such terms and subject to such conditions as the Court thinks just. Briefly, the Court may leave in the hands of the liquidators whatever of their

powers it thinks fit; and may exclude from their powers whatever matters it thinks ought to be reserved to the Court; but there is very little to be gained by a supervision order, as Section 193 confers on any creditor or contributory in a voluntary liquidation a right to apply to the Court.

It may be noted that the Court is not often willing to make the order; if it does, the voluntary liquidation proceeds, subject, however, to any restrictions which may be imposed by the Court, and the sanction of the Court takes the place of extraordinary resolution of the Company.

Preferential Payments.—Priority in the winding-up of Companies is now regulated by Section 209 of the Act, while special provisions relating to preferential payments in the winding-up of Companies within the Stannaries are contained in Sections 239, 240 and 241.

By Section 209, the following debts have priority:—

(1) Parochial and local rates due within the year preceding the commencement of the winding-up, and assessed taxes, land tax, property tax and income tax assessed up to April 5th preceding the same date, but not exceeding the amount due for one year.

(2) Wages or salary of clerk or servant, not exceeding £50, for services rendered during four months before the commencement of the winding-up.

(3) Wages of labourer or workman, not exceeding £25, for services rendered during two months before the commencement of the winding-up.

(4) Wages of agricultural labourer, who has agreed for a lump sum at the end of the year of hiring, to an amount proportionate to the time of service up to the winding-up.

(5) All amounts (not exceeding £100) for which the Company is liable under the Workmen's Compensation Acts, where the liability has accrued before the winding-up order. If the compensation is a weekly payment, the amount due in respect thereof shall be taken to be the amount of the lump sum for which the weekly payment could be redeemed.

The foregoing debts rank equally amongst themselves, and are to be immediately paid, subject to retention of a sufficient

sum to meet the expenses of winding-up; and where distress for rent is levied within three months of winding-up, the goods seized or the proceeds of the sale under distraint are subject to the payment of all preferential debts. If the assets are insufficient to pay preferential claims, the claims abate in equal proportions. By Section 240 the preferential right of clerks and servants in the Stannaries for wages is restricted to three months, while miners' wages have a similar priority, but there is no maximum amount stated as in Section 209.

Where, in England or Ireland,[1] a receiver is appointed on behalf of the holders of debentures or debenture stock secured by a floating charge created by the Company, or possession of any property, subject to the charge, is taken, the preferential debts take priority of the debenture-holders' claims (Sect. 107).

The liquidator, therefore, distributes the realized assets in the following order:—

1. The costs of liquidation, including his own remuneration;
2. Preferential debts;
3. Ordinary debts;
4. Contributories who will divide the available surplus (if a solvent Company) according to any conditions which may be imposed by the Articles.

A receiver, however, acting on behalf of debenture-holders, is only concerned with the settlement of preferential debts (a duty laid upon him by the statutes) and the satisfaction of the debenture-holders' security. He must hand over any surplus to the Company or to the liquidator if a liquidator has been appointed.

Arrangements with Creditors.—The Deeds of Arrangement Act, 1914, does not apply to Companies; but by Section 120 of the Act of 1908, a Company is empowered to arrange or compromise with its creditors. This may be effected, without going into liquidation, although, if the Company is in liquidation, the arrangement or compromise may be made binding upon the liquidator and the contributories.

The procedure lies in an application to the Court by the Company, or by a creditor, or by a member of the Company, or, in a winding-up, by the liquidator. The Court will order a meeting of the creditors or members to be summoned; and

[1] See page 13 *ante*.

if the majority in number, representing three-fourths in value, agree to the suggested compromise or arrangement, it is binding, if sanctioned by the Court, except in the case of non-assenting foreign or colonial creditors who may resort to their own Courts to enforce their claims against the Company.

Finally, by Section 214, a liquidator has power to compromise with dissenting creditors. For this purpose, the consent of the Court or the committee of inspection is required in a compulsory winding-up; the sanction of the Court in a winding-up under supervision; and an extraordinary resolution of the Company in a voluntary winding-up.

Municipal Corporations and Local Authorities.—These bodies do not come within the Act, and the question naturally arises as to the remedy available to lenders in the event of default. This is generally provided for in the Act, general or special, which authorizes the borrowing and usually consists of a right, exercisable by the lender, of applying to the Court for the appointment of a receiver of the rate on which the mortgage security is granted.

With regard to borrowing under the Public Health Act, 1875, a mortgagee's rights, on default by the authority, are defined as follows:—

"If at the expiration of six months from the time when any principal money or interest has become due on any mortgage of rates made under this Act, and after demand in writing, the same is not paid, the mortgagee or other person entitled thereto may, without prejudice to any other mode of recovery, apply to a court of summary jurisdiction for the appointment of a receiver, and such court may, after hearing the parties, appoint in writing under their hands and seals, some person to collect and receive the whole or a competent part of the rates liable to the payment of the principal or interest in respect of which the application is made, until such principal or interest, or both, as the case may be, together with the costs of the application and of collection, are fully paid.

"On such appointment being made all such rates, or such competent part thereof, as aforesaid, shall be paid to the person appointed, and when so paid shall be so much money received by or to the use of the mortgage or mortgagees of such rates, and shall be rateably apportioned between them;

" Provided that no such application shall be entertained unless the sum or sums due and owing to the applicant amount to £1,000 or unless a joint application is made by two or more mortgagees or other persons to whom there may be due, after such lapse of time and demand as last aforesaid, moneys collectively amounting to that sum " (Sect. 239).

It is, however, common for corporations and authorities to issue stock under the Stock Regulations Acts. While these Acts confer on lenders rights similar to those conferred by the Public Health Act, the High Court exercising jurisdiction is substituted for the court of summary jurisdiction, and the receiver is invested with the power of assessing, making and recovering all rates for the purpose of obtaining the moneys which, by the regulations, should be applied to the redemption of the stock, the period of default being limited to two months instead of six months.

The Commissioners' Clauses Act, 1847, the provisions of which are often adopted in the special Acts obtained by Municipal bodies and Local Authorities, contain regulations for the appointment of a receiver of the rates, which are to be read in conjunction with those of the special Act. The right of application to two Justices is available in the event of default for thirty days in the payment of interest, or for six months in the payment of principal, and if, at the expiry of these periods, repayment is not forthcoming on demand.

The Local Loans Act, 1875, requires application to the County Court ; and where default has been made for a period of twenty-one days in paying an amount not less than £500, not only may the Court appoint a receiver of the local rate forming the security, but, on appointment, the statute confers upon the receiver the rating powers of the Authority to the extent necessary to effect the object of his appointment. Where the security gives a power of sale, he may sell the property, subject to the directions of the Court. Inasmuch as the Act in question, where adopted by the issuing Authority, regulates the issue of debentures and debenture stock, the remedies are not dissimilar to those enjoyed by debenture-holders of trading Companies. Owing, however, to the inconvenient sinking-fund provisions of this Act, it is not in favour with Local Authorities.

Finally, a lender's remedies are not confined to the right of

the appointment of a receiver. He may also exercise the common law right to sue for recovery.

Companies issuing Debentures under the Companies Clauses Consolidation Act, 1845.—Reference has already been made (*ante*, p. 17) to the case of joint stock Companies to whose borrowings the provisions of the Companies Clauses Act apply, and it now remains to indicate the remedies available to holders of debentures and mortgages issued under that Act.

Where, under the special Act incorporating the Company, the mortgagees of the Company are empowered to enforce their security by the appointment of a receiver, then, at the expiry of thirty days after the interest has become due, or at the expiry of six months after the principal has become due, they may, if payment is not forthcoming on demand, apply to two Justices for the appointment of a receiver of the tolls liable to the payment of interest and principal, and the Justices are empowered to make the order. But this does not deprive the mortgagees of their right to sue for the interest or principal in arrear in any of the superior Courts, and in no way interferes with the jurisdiction of the Court of Chancery to appoint a receiver.

Finally, the mortgagees may present a petition for winding-up (except in the case of a railway company incorporated by Act of Parliament), but the Court will not order the sale of an undertaking of a public nature in a debenture-holders' action, although, if such a Company be wound up by the Court, the Company's property may be sold, in the winding-up, by the liquidator.

Where debenture stock is issued by a joint stock Company incorporated by special Act, under the provisions of the Companies Clauses Acts, 1863 to 1869, the stockholder's remedies are similar to those given to debenture-holders and mortgagees under the Act of 1845.

Railway Companies issuing Debentures and Debenture Stock.—By Section 4 of the Railway Companies Act, 1867, it is enacted that the rolling stock in use and provided for the operation of the railway is not liable to be taken in execution; but a creditor who has recovered judgment against the Company (including debenture and debenture-stockholders who have obtained judgment against it) has a remedy in an application

to the Court for the appointment of a receiver, or a receiver and manager, of the undertaking. The Section further provides that all money received by such receiver or receiver and manager shall be applied in providing working expenses and outgoings of the undertaking, the surplus being then distributed under the direction of the Court in payment of the Company's debts in order of priority.

By Section 268 of the Companies (Consolidation) Act, 1908, an unregistered railway company, incorporated by Act of Parliament, is excluded from the winding-up provisions of the Section, unless it has been authorized to abandon the whole of its railway.

Finally, the directors of a railway company which is unable to meet its engagements with its creditors may prepare a scheme of arrangement between the Company and its creditors. The scheme must be filed and notice thereof given in the *London Gazette*, after which the Court may restrain any action against the Company, on such terms as the Court thinks fit, during the maturing of the scheme, if it makes reasonable provision for the payment of creditors and landowners, and there is reasonable expectation of obtaining the requisite assents of secured creditors.

ECCLESIASTICAL CORPORATIONS AND PERSONS

Property which is owned by a person, solely in the capacity of a representative of the Church of England, is ecclesiastical property: and, within the Church, there are a number of ecclesiastical corporations, sole and aggregate, the former comprising archbishops, bishops, some deans, prebendaries, vicars-choral, canons, all archdeacons, rectors, vicars, and perpetual curates; and the latter, chapters of cathedrals, and others.

A corporation sole, which is recognized by the law as having perpetual succession in right of an office or function of a spiritual character, is an ecclesiastical corporation. A corporation aggregate, which is constituted for a spiritual purpose, is an ecclesiastical corporation.

No person, holding a spiritual office, can alienate Church

property committed to him, in virtue of his office, except under the conditions imposed by the ecclesiastical statutes. Strictly speaking, the powers of alienation possessed by these ecclesiastical corporations are only interesting to bankers and to the commercial community in so far as dealings with property, other than for consecrated uses, are permitted. A bishop cannot alienate without the consent of the Chapter, nor can other ecclesiastical corporations sole, without the consent of the bishop: and there are certain bodies, such as the Ecclesiastical Commissioners and the Charity Commissioners, who have a jurisdiction in the matter of ecclesiastical lands.

Parochial Church Councils

By virtue of "The Church of England Assembly (Powers) Act, 1919," powers with regard to the self-government of the Church are conferred on the National Assembly of the Church of England, and one of the first steps taken by the Assembly was the promotion of the "Parochial Church Councils (Powers) Measure" which received parliamentary sanction on July 1, 1921.

Prior to the passing of this measure, the Churchwardens were a quasi-corporation, for the purpose of holding in perpetual succession the goods of the Church of England, and in the City of London they possessed power to hold land. They could, with the consent of the Vestry, bishop, and incumbent, borrow, on the security of the Church rates, and with the consent of the Ecclesiastical Commissioners, on the surplus pew rents, money for church or chapel repairs, while the Church Trustees were a body corporate, with perpetual succession, having a common seal and possessing capacity to contract. By the constitution of the Assembly as defined in "The Church, etc., Assembly (Powers), Act, 1919," regulations are laid down for the formation of Parochial Church Councils, and the measure of July 1, 1921, defines the powers conferred by the Assembly on these Councils.

It is enacted that every Council shall be a body corporate by the name of the Parochial Church Council and shall have perpetual succession. Where any act of the Council requires to be under seal, the instrument may be executed under the hands

and seals of the Chairman presiding at the meeting and two other members of the Council.

All the powers, duties and liabilities of the Churchwardens of the Parish with regard to the financial affairs of the Church, including the collection and administration of all moneys which may be raised for Church purposes, are transferred to the Council, and also all powers and liabilities of the Church Trustees (if any) appointed under the Compulsory Church Rate Abolition Act, 1868. The rights of the Vestry, as regards the administration of Ecclesiastical Charities and the power to make a voluntary Church Rate, remain, however, in the Vestry, although there is also power expressly conferred on the Council (Sect. 6) to make a voluntary Church Rate.

The Council is empowered to acquire, by way of gift or otherwise, and to manage and administer, any property for any ecclesiastical purpose affecting the parish; but the exercise of this power in regard to real property is subject to the consent of the Diocesan Authority: and, if this consent be forthcoming, the legal interest in the property vests in the Diocesan Authority. By this Authority is meant the Diocesan Board of Finance, or any body appointed by the Diocesan Conference to act as Trustees of Diocesan trust property. The power of sale and exchange of any such property, and the power of taking legal proceedings, can only be exercised with the consent of the Authority.

The Act does not confer upon Councils an express power to borrow money: but there are general powers conferred by Sect. 6 which comprise *inter alia* power "to take such steps as they think necessary for the raising, collecting and allocating of such moneys," which might be held to include the raising of money by borrowing. But where such a power is sought to be exercised on the security of Church property used for ecclesiastical or other purposes, it is necessary that legal advice be taken, since there are controlling authorities whose consent is essential to dealings with the property.

Where overdraft is applied for by a Council, the simplest and most obvious course for a banker to take is to obtain a guarantee from approved parties together with a copy Resolution of the Council authorizing the borrowing, and as a further precaution against any legal limitation or disability on the part of the

principal to borrow, the guarantee should contain a clause to the effect that the money is recoverable from the guarantor as if he were the sole or principal debtor.

Clerks in Holy Orders

A clergyman of the Church of England may borrow in the same way as any other individual; but, where the advance is made without security and in reliance only on the income derived from his benefice, it should be borne in mind that, on a judgment entered against him for debt, or on his bankruptcy, possession of the property and profits of the benefice can only be obtained under a warrant of sequestration issued by the bishop.

He may, in addition to his ecclesiastical duties, engage in farming to a limited extent, but he is debarred from engaging in trade unless as a sleeping partner in a partnership of more than six persons. He may, however, keep a school; or he may take an active part as manager, director, or partner of a benefit society, or fire or life assurance society.

Charges on a benefice or any of the property or profits, to secure the payment of money, are unlawful and void except where the borrowing is authorized by the Ecclesiastical Commissioners under the provisions of the Ecclesiastical Houses of Residence Act, 1842, for the purpose of expenditure on house or glebe or chancel, subject, however, to the consent of the bishop of the diocese and of the patron of the benefice being obtained by the incumbent. The maximum period for repayment is thirty-five years. Generally, however, these moneys are advanced by the Governors of Queen Anne's Bounty.

Loans may also be raised by the bishop of the diocese for the erection of a Parsonage House on mortgage of the glebe, tithes, and other profits of the benefice, and for the purposes of the Agricultural Holdings Act, 1923, subject to consent of Ecclesiastical Commissioners.

Under certain local and personal Acts constituting Companies with power to advance money for improvement of lands, and also under the Improvement of Land Act, 1864, incumbents may create a terminable charge on the lands of their benefices for securing the repayment of money borrowed for the improvement thereof; but the patron of the benefice and the bishop of

the diocese must both give their written consent to every such improvement and charge. Arrears of the charges may be recovered by a sale of the lands charged ; but if a portion of the lands is compulsorily purchased under statutory powers, the remaining payments of the charge will not be ordered to be paid off in advance out of the purchase money.

Mortgages and charges may be made on the land of a benefice by the incumbent, or a sequestrator, or the patron for the purpose of redeeming the land tax thereon, or for purchasing an assignment of the redeemed land tax.

Incumbents have power to charge the expenses defrayable by them in connexion with the commutation of the tithe of their benefices, upon the rent charge for which the tithe is commuted, or to borrow the expenses on the security of a charge on such rent charge, but the charge must be paid off in twenty years.

Religious Bodies other than Church of England

Any freehold, leasehold, copyhold or customary property acquired by, or by trustees in connexion with, any congregation or society or body of persons associated for religious purposes as a chapel, meeting-house, or other place of religious worship, or as a dwelling-house for the minister of such congregation with offices, garden and glebe, or as an endowment or provision for expenses, or as a burial ground, or as a hall or rooms for the meeting or transaction of business of the congregation, society, or body, or as a place for the education of students, may be conveyed or assured subject to any trust for the congregation, society or body of persons, or in favour of the individual members composing it. The effect of such conveyance or assurance will be not only to vest the estate in the parties named therein as trustees, but also effectually to vest the freehold, leasehold, copyhold, or customary property in their successors in office for the time being with the continuing trustees, if any, successors being chosen and appointed in the manner set out in the conveyance or assurance, or in any separate deed declaring the trusts, or if no such mode is prescribed, then in such manner as shall be agreed upon by the congregation, society or body. After the expiration of six months from the date of the instru-

ment purporting to appoint trustees for such purpose, the persons appearing to be appointed are for the purpose of any sale or *mortgage* to be deemed to have been validly appointed. Every such choice and appointment of a new trustee must be made to appear by some deed under the hand and seal of the chairman of the meeting at which such choice and appointment are made. It must be executed in the presence of the meeting and attested by at least two witnesses, and may be given and must be received in any court as evidence of the truth of the matters contained in it (*vide* Halsbury's "Laws of England").

In Scotland the property must be dealt with in accordance with the law governing heritable property [1] and with the provisions of the deed constituting the trust.

EXTRACTS FROM "COMPANIES CLAUSES CONSOLIDATION ACT, 1845."

CLAUSE XXXVIII.—If the Company be authorized by the special Act to borrow Money on Mortgage or Bond, it shall be lawful for them, subject to the Restrictions contained in the special Act, to borrow on Mortgage or Bond such Sums of Money as shall from Time to Time, by an Order of a General Meeting of the Company, be authorized to be borrowed, not exceeding in the whole the Sum prescribed by the special Act, and for securing the Repayment of the Money so borrowed, with Interest, to mortgage the Undertaking, and the future Calls on the Shareholders, or to give Bonds in manner hereinafter mentioned.

CLAUSE XXXIX.—If, after having borrowed any Part of the Money so authorized to be borrowed on Mortgage or Bond, the Company pay off the same, it shall be lawful for them again to borrow the Amount so paid off, and so from Time to Time: but such Power of re-borrowing shall not be exercised without the Authority of a General Meeting of the Company, unless the Money be so re-borrowed in order to pay off any existing Mortgage or Bond.

CLAUSE XL.—Where by the special Act the Company shall be restricted from borrowing any Money on Mortgage or

[1] Page 13 *ante*.

Bond until a definite Portion of their Capital shall be subscribed or paid up, or where by this or the special Act the Authority of a General Meeting is required for such borrowing, the Certificate of a Justice that such definite Portion of the Capital has been subscribed or paid up, and a Copy of the Order of a General Meeting of the Company authorizing the borrowing of any money, certified by one of the Directors or by the Secretary to be a true Copy, shall be sufficient Evidence of the Fact of the Capital required to be subscribed or paid up having been so subscribed or paid up, and of the Order for borrowing Money having been made; and upon Production to any Justice of the Books of the Company, and of such other Evidence as he shall think sufficient, such Justice shall grant the Certificate aforesaid.

EXTRACTS FROM THE PUBLIC HEALTH ACT, 1875

(38 and 39 Vict. c. 55)

Power to borrow on credit of rates.

233. Any local authority may, with the sanction of the Local Government Board, for the purpose of defraying any costs, charges, and expenses incurred, or to be incurred by them in the execution of the Sanitary Acts or of this Act, or for the purpose of discharging any loans contracted under the Sanitary Acts or this Act, borrow or re-borrow, and take up at interest, any sums of money necessary for defraying any such costs, charges, and expenses or for discharging any such loans as aforesaid.

An urban authority may borrow or re-borrow any such sums on the credit of any fund or all or any rates or rate out of which they are authorized to defray expenses incurred by them in the execution of this Act, and for the purpose of securing the repayment of any sums so borrowed, with interest thereon, they may mortgage to the persons by or on behalf of whom such sums are advanced any such fund or rates or rate.

[Continued on p. 114

COMPARISON OF THE CAPITAL ACCOUNTS OF MUNICIPAL CORPORATIONS AND PUBLIC COMPANIES

	Municipal Undertakings.	Public Company Undertakings.
SECURING BORROWING POWERS.	(*a*) Sanction of Parliament i. By Local Act. ii. Approval of Provisional Order. iii. Under General Act in one or two instances, e.g. on credit of sewerage lands under P.H. Act, 1875. (*b*) By approval of Government Department authorized by Parliament to deal with applications for Loans, e.g. Ministry of Health. Board of Education. Board of Trade. Ministry of Agriculture and Fisheries.	(*a*) By Company's own procedure, when i. Authorized by its Articles. ii. Its memorandum is altered so as to increase its share capital. iii. Extraordinary resolution has been passed. (*b*) By Directors only, borrowing on mortgage or debenture. Sanction of shareholders needed when Articles do not authorize.
RAISING CAPITAL MONEYS.	Various methods adopted :— (*a*) Redeemable Stock. (*b*) Debentures, etc., under Local Loans Act. (*c*) Mortgage Loans. (*d*) Short-term Mortgages. (*e*) Bank Overdraft. (*f*) Bills of Exchange. (*g*) Utilization of Sinking Funds. (*h*) Housing Bonds.	(*a*) Issue of Stock or Shares. (*b*) Issue of a series of Debentures. (*c*) Mortgage. (*d*) Bank Overdraft. (*e*) Use of Reserve Funds. (*f*) Floating Loans.

II. Expending on Capital Account.	(*a*) Controlling authorities :— i. Ministry of Health. ii. Town Council. iii. Auditors. (*b*) Purposes. Under sanction only. *Not as Working Capital.*	(*a*) Controlling authorities :— i. Company and Directors. ii. Auditors. (*b*) For the purpose of acquisition and extension of an undertaking and also as working capital.
V. Redeeming Capital.	(*a*) Period determined by loan sanction. (*b*) Repayment to be out of Revenue. (*c*) Method of repayment :— 1. By equal annual instalments of original loan—Instalment method. 2. By equal annual instalments of principal and interest combined —Annuity method. 3. By accumulation of Sinking Fund. *Note.*—Repayment of particular loans fixed by instrument securing.	(*a*) No obligation to repay share Capital. (*b*) Repayment optional when authorized by Articles and by Court. (*c*) Debentures when redeemed usually dealt with by following methods : 1. By issue of New Capital for purpose. 2. By application of surplus cash. 3. By revenue contributions to a sinking fund or insurance policy. *Note.*—Repayment of debentures often by ballot.
'. Publishing of Accounts.	(*a*) No statutory form. (*b*) No model form authorized. (*c*) Double account system always. (*d*) Detailed capital account essential. (*e*) Capital money only available for specific purposes. (*f*) Unappropriated Capital, therefore, to be shown separately.	(*a*) No statutory form, generally, but only for special Companies. (*b*) Table A. of Companies Acts gives model form of Balance Sheet. (*c*) Only statutory companies, generally speaking, publish detailed capital accounts. (*d*) Capital being available for general use is not necessarily shown in detail. (*e*) Unappropriated capital commonly used as working capital, and merged in Revenue Cash Account.

A rural authority may borrow or re-borrow any such sums, if applied or intended to be applied to general expenses of such authority, on the credit of the common fund out of which such expenses are payable, and if applied or intended to be applied to special expenses of such authority on the credit of any rate or rates out of which such expenses are payable, and for the purposes of securing the repayment of any sums so borrowed, with interest thereon, they may mortgage to the persons by or on behalf of whom such sums are advanced any such fund, rate or rates.

Regulations as to exercise of borrowing powers.

234. The exercise of the powers of borrowing conferred by this Act shall be subject to the following regulations namely :—

(1) Money shall not be borrowed except for permanent works (including under this expression any works of which the cost ought, in the opinion of the Local Government Board, to be spread over a term of years).

(2) The sum borrowed shall not at any time exceed, with the balances of all the outstanding loans contracted by the local authority under the Sanitary Acts and this Act, in the whole the assessable value for two years of the premises assessable within the district in respect of which such money may be borrowed.

(3) Where the sum proposed to be borrowed, with such balances (if any), would exceed the assessable value for one year of such premises, the Local Government Board shall not give their sanction to such loan until one of their inspectors has held a local inquiry and reported to the said Board.

(4) The money may be borrowed for such time, not exceeding sixty years, as the local authority, with the sanction of the Local Government Board, determine in each case; and, subject as aforesaid, the local authority shall either pay off the moneys so borrowed by equal annual instalments of principal or of principal

and interest, or they shall in every year set apart as a sinking fund, and accumulate in the way of compound interest by investing the same in the purchase of Exchequer Bills or other Government securities, such sum as will with accumulations in the way of compound interest, be sufficient, after payment of all expenses, to pay off the moneys so borrowed within the period sanctioned.

(5) A local authority may at any time apply the whole or any part of a sinking fund set apart under this Act in or towards the discharge of the moneys for the repayment of which the fund has been established: Provided that they pay into the fund in each year, and accumulate until the whole of the moneys borrowed are discharged, a sum equivalent to the interest which would have been produced by the sinking fund, or the part of the sinking fund so applied.

(6) Where money is borrowed for the purpose of discharging a previous loan, the time for repayment of the money so borrowed shall not extend beyond the unexpired portion of the period for which the original loan was sanctioned, unless with the sanction of the Local Government Board, and shall in no case be extended beyond the period of sixty years from the date of the original loan.

Where any urban authority borrow any money for the purpose of defraying private improvement expenses, or expenses in respect of which they have determined a part only of the district to be liable, it shall be the duty of such authority, as between the ratepayers of the district, to make good, so far as they can, the money so borrowed, as occasion requires, either out of private improvement rates, or out of a rate levied in such part of the district as aforesaid.

Power to borrow on credit of sewage land and plant.

235. Where any local authority are possessed of any land, works, or other property for the purposes of disposal of sewage pursuant to this Act, they may

borrow any moneys on the credit of such lands, works, or other property, and may mortgage such lands, works, or other property to any person advancing such moneys, in the same manner in all respects as if they were the absolute owner, both at law and in equity, of the lands, works, or other property so mortgaged. The moneys so borrowed shall be applied for purposes for which moneys may be borrowed under this Act; but it shall not be in any way incumbent on the mortgagees to see to the application of such moneys, nor shall they be responsible for any misapplication thereof.

The powers of borrowing conferred by this section shall, where the sums borrowed do not exceed three-fourths of the purchase-money of such lands (but not otherwise) be deemed to be distinct from and in addition to the general borrowing powers conferred on a local authority by this Act. Any local authority may pay out of any rates leviable by them for purposes of this Act the interest of any moneys borrowed by such authority in pursuance of this section.

Form of mortgage.

236. Every mortgage authorized to be made under this Act shall be by deed, truly stating the date, consideration and the time and place of payment, and shall be sealed with the common seal of the local authority, and may be made according to the form in Schedule 4 of this Act, or to the like effect.

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Borrowing powers of joint boards and certain other authorities.

244. Joint Boards and port sanitary authorities under this Act, and the local board of health of any main sewerage district, and any joint sewerage board constituted under any of the Sanitary Acts and existing at the time of the passing of this Act shall, for the purposes of their constitution, have like powers of borrowing on the credit of any fund or rate applicable by them to the purposes of this Act, or on the credit of sewage land and plant, as are by this Act conferred on local authorities, and in the exercise of those powers shall be subject to the like restrictions of those and the Public Works Loan Commissioners may make any

loan to any of the above-mentioned authorities which they may make to a local authority under this Act.

EXTRACTS FROM THE MUNICIPAL CORPORATIONS ACT, 1882

(45 and 46 Vict. c. 50)

Power to borrow.

106. The Council may, with the approval of the Local Government Board, borrow at interest on the security of any corporate land, or of any land proposed to be purchased by the council under this Act, or of the borough fund or borough rate, or of all or any of those securities, such sums as the council from time to time think requisite for the purchase of land or for the building of any building which the council are by this Act authorized to build.

Sites for Working-men's dwellings.

111. (1) If a municipal corporation determines to convert any corporate land into sites for working-men's dwellings, and obtains the approval of the Local Government Board for so doing, the corporation may, for that purpose, make grants or leases for terms of nine hundred and ninety-nine years or any shorter term, of any parts of the corporate land.

(2) The corporation may make on the land any roads, drains, walls, fences, or other works requisite for converting the same into building land, at an expense not exceeding such sum as the Local Government Board approve.

(5) All costs and expenses incurred or authorized by a corporation in carrying into execution or otherwise in pursuance of this section, shall be paid out of the borough fund and borough rate, or by money borrowed by the corporation under this Part.

Power for L.G.B. to impose conditions as to repayment of money borrowed.

112. (1) Where the Local Government Board approve a mortgage or charge under this Part they may, as a condition of their approval, require that the money borrowed on the security of the mortgage or charge be repaid, with all interest thereon, in thirty years, or any less period, and either by instalments or by means of a sinking fund, or both.

(2) In that case the sums required for providing for the repayment of the principal and interest of the money borrowed shall be by virtue of this Act a charge on all or any of the following securities, namely, the land comprised in the mortgage (without prejudice to the security thereby created) or any other corporate land, or the borough fund or other rates legally applicable to payment of the money borrowed or of the expenses which the money is borrowed to defray, as the Local Government Board directs.

Provisions as to sinking fund.

113. (1) Where money borrowed under this Part is directed to be repaid by means of a sinking fund, the council shall, out of the rents and profits of the land on which, or out of the borough fund or rates on which, the sums required for the sinking fund are charged under this Act, invest such sums, at such times, and in such Government annuities, as the Local Government Board direct and shall also from time to time invest in like manner all dividends of those annuities.

(2) The annuities shall, in the books of the Bank of England, be placed to the account of the corporation, and in the matter of this Act or of any previous Act under which the investment is made.

(3) The dividends of the annuities shall be received and invested by such persons as the Council by power of attorney under the corporate seal from time to time appoint.

(4) No transfer shall be made of the annuities, or of any part thereof, without the consent in writing of the Local Government Board addressed to the chief accountant of the Bank of England.

(5) The direction in writing of the council by power of attorney under the corporate seal, with the consent

in writing of the Local Government Board, shall be sufficient authority to the Bank for permitting any such transfer.

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Maintenance of Borough Bridges.

119. (1) Every bridge which is either wholly or in part in a borough and which the borough and not the county wherein the borough is situate is legally bound to maintain or repair shall, as to the whole of the bridge if it is wholly in the borough, be maintained, altered, widened, repaired, improved, or rebuilt under the sole management and control of the council.

(2) For that purpose the council shall have all the powers which the justices of a county have with respect to a county bridge, but the notices required in the case of a county bridge shall not be required in the case of a borough bridge.

(3) All expenses incurred for the purposes of this section shall be paid out of the borough fund or borough rate, or out of money borrowed on the security thereof.

(4) The council, with the consent of the Local Government Board, may from time to time borrow on that security such sums as they deem requisite for any of those purposes, and may mortgage the borough fund and borough rate for the purpose of securing the repayment with interest of any money so borrowed.

Loans for Municipal Buildings

Power to borrow for buildings.

120. The council of a borough may borrow money from the Public Works Loans Commissioners for the purpose of building, enlarging, repairing, improving, and fitting up any building which they are by this Act authorized to build, and may levy a rate or an increase of the borough rate for the purpose of paying the principal and interest of the loan, and may mortgage the rate or borough rate to the Commissioners in accordance with the Public Works Loans Act, 1875, or any amendment thereof, in such manner and form as the Commissioners direct.

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EXTRACTS FROM THE LOCAL GOVERNMENT ACT, 1888

(51 and 52 Vict. c. 41)

Adjustment of property and liabilities.

62. (6) The payment of any capital sum required to be paid for the purposes of the adjustment or of an agreement under this Act, or of any award or order made upon any arbitration under this Act, shall be a purpose for which a council may borrow under this Act, or in the case of a borough council, under the Municipal Corporations Act, 1882, or any local Act, and such sum may be borrowed on the security of all or any of the funds, rates and revenues of the council, and either by the creation of stock or in any other manner in which they are for the time being authorized to borrow, and such sum may be borrowed without the consent of the Treasury or any other authority, so that it be repaid within such period as the Local Government Board may sanction, by such method as is mentioned in Part 4 of this Act for paying off a loan, or if the sum is raised by stock under a local Act, by such method as is directed by that Act.

(7) Any capital sum paid to any council for the purpose of any adjustment, or in pursuance of any order or award of an arbitrator under this Act, shall be treated as capital, and applied, with the sanction of the Local Government Board, either in the repayment of debt or for any other purpose for which capital money may be applied.

* * * * *

Borrowing by county council.

69. (1) The county council may from time to time, with the consent of the Local Government Board, borrow, on the security of the county fund, and of any revenues of the council, or on either such fund or revenues, or any part of the revenues, such sums as may be required for the following purposes, or any of them, that is to say :—

(*a*) for consolidating the debts of a county; and

(*b*) for purchasing any land or building any building which the council are authorized by any Act to purchase or build; and

(*c*) for any permanent work or other thing which the county council are authorized to execute or do, and the cost of which ought in the opinion of the Local Government Board to be spread over a term of years; and

(*d*) for making advances (which they are hereby authorized to make) to any person or bodies of persons corporate or incorporate, in aid of the emigration or colonization of inhabitants of the county, with a guarantee for repayment of such advances from any local authority in the county, or the government of any colony; and

(*e*) for any purpose for which quarter sessions or the county council are authorized by any Act to borrow.

But neither the transfer of powers by this Act nor anything else in this Act shall confer on the county council any power to borrow without the consent above mentioned, and that consent shall dispense with the necessity of obtaining any other consent which may be required by the Acts relating to such borrowing, and the Local Government Board, before giving their consent, shall take into consideration any representation made by any ratepayer or owner of property rated to the county fund.

(2) Provided that where the total debt of the county council, after deducting the amount of any sinking fund, exceeds, or if the proposed loan is borrowed will exceed the amount of one-tenth of the annual rateable value of the rateable property in the county, ascertained according to the standard or basis for the county rate, the amount shall not be borrowed, except in pursuance of a Provisional Order made by the Local Government Board and confirmed by Parliament.

(3) A county council may also from time to time, without any consent of the Local Government Board,

during the period which was fixed for the discharge of any loan raised by them under this Act or transferred to them by this Act, borrow on the like security such amount as may be required for the purpose of paying off the whole or any part of such loan, or if any part of such loan has been repaid otherwise than by capital money for re-borrowing the amount so repaid, and for the purpose of this section, " capital money " includes any instalments, annual appropriations, and sinking fund, and the proceeds of the sale of land or other property, but does not include money previously borrowed for the purpose of repaying a loan.

(4) All money re-borrowed shall be repaid within the period fixed for the discharge of the original loan, and every loan for re-borrowing shall for the purpose of the ultimate discharge be deemed to form part of the same loan as the original loan, and the obligations of the council with respect to the discharge of the original loan shall not be in any way affected by means of the re-borrowing.

(5) A loan under this section shall be repaid within such period not exceeding thirty years, as the county council, with the consent of the Local Government Board, determine in each case.

(6) The county council shall pay off every loan either by equal yearly or half-yearly instalments of principal, or of principal and interest combined, or by means of a sinking fund set apart, invested, and applied in accordance with the Local Loans Act, 1875, and the Acts amending the same.

(7) Where a loan is raised for any special county purpose, the council shall take care that the sums payable in respect of the loan are charged to the special account to which the expenditure for that purpose is chargeable.

(8) Where the county council are authorized to borrow any money or loan, they may raise such money either as one loan or several loans, and either by stock issued under this Act, or by debentures or annuity certificates under the Local Loans Act, 1875, and the

Acts amending the same, or, if special reasons exist for so borrowing, by mortgage, in accordance with sections 236 and 237 of the Public Health Act, 1875.

(9) Provided that where a county council have borrowed by means of stock, they shall not borrow by way of mortgage except for a period not exceeding five years.

(10) Where the county council borrow by debentures such debentures may be for any amount not less than five pounds.

(11) The provisions of this section which authorize advances in aid of the emigration or colonization of inhabitants of the county, and borrowing for those advances, excepting the provisions respecting the total debt, shall extend to the councils of boroughs mentioned in the third schedule to this Act.

(12) Nothing in this section shall be taken to empower the Cheshire County Council to borrow on the security of any revenue estimated to accrue from the surplus funds of the River Weaver Navigation.

Issue of County stock.

70. (1) County stock may be created, issued, transferred, dealt with, and redeemed in such manner and in accordance with such regulations as the Local Government Board may from time to time prescribe.

(2) Without prejudice to the generality of the above power such regulations may provide for the discharge of any loan raised by such stock, and in the case of consolidation of debt for extending or varying the times within which loans may be discharged, and may provide for the consent of limited owners and for the application of the Acts relating to stamp duties and to cheques and for the disposal of unclaimed dividends, and may apply for the purposes of this section with or without modification, any enactments of the Local Loans Act, 1875, and the Acts amending the same, and of any Act relating to stock issued by the Metropolitan Board of Works, or by the corporation of any Municipal borough.

(3) Such regulations shall be laid before each House of Parliament for not less than thirty days during which such House sits, and if either House during such thirty

days resolves that such regulations ought not to be proceeded with, the same shall be of no effect, without prejudice nevertheless to the making of further regulation.

(4) If no such resolution is passed, it shall be lawful for His Majesty by Order in Council to confirm such regulations and the same when so confirmed shall be deemed to have been duly made and to be within the powers of this Act, and shall be of the same force as if they were enacted in this Act.

SECTION 2 OF THE POOR LAW ACT, 1889

(52 and 53 Vict. c. 56)

Borrowing by Guardians and Managers of district schools, etc.

Whereas it is expedient to simplify and to express in one enactment the purposes and amount for and to which guardians of unions and managers of district schools and asylums have powers to borrow and otherwise to amend those powers : Be it therefore enacted as follows :—

(1) The guardians of any union may, with the sanction of the Local Government Board, borrow for the purpose of raising the expenses incurred, or proposed to be incurred, for any permanent work, or object, or any other thing the costs of which ought in the opinion of the Local Government Board to be spread over a term of years.

(2) A loan shall not be of such amount as exceeds or will make the total debt of the guardians under the Acts relating to the relief of the poor exceed one-fourth of the total annual rateable value of the union.

(3) The Local Government Board may, by Provisional Order, extend the said maximum to double the amount above authorized, and sections 297 and 298 of the Public Health Act, 1875, shall apply to every such Provisional Order in like manner as if they were herein re-enacted and the guardians were a local authority.

(4) The unapplied balance of any loan raised by any

guardians may, with the consent of the Local Government Board, be applied to any purpose for which a loan can be raised under this Act by such guardians.

(5) This section shall apply to the managers of any school district and to the managers of any asylum district, not being the metropolitan asylum district, in like manner as if they were guardians and this section were in terms made applicable thereto, but with the substitution of one-sixteenth of the annual rateable value of the district for one-fourth of the annual rateable value of the union.

(6) All enactments in the Acts relating to the relief of the poor touching the purposes for which and the amount to which guardians of unions and managers of any school or asylum district to whom this section applies may borrow, shall be repealed without prejudice to anything done thereunder, but every loan under this section shall be made on the like security and be paid off in the like time and manner, and be borrowed and re-borrowed in the like manner as is provided by the enactments in force at the passing of this Act with respect to loans of such guardians and managers.

EXTRACTS FROM THE LOCAL GOVERNMENT ACT, 1894

(56 and 57 Vict. c. 73)

Restrictions on Expenditure.

11. (1) A parish council shall not, without the consent of a parish meeting, incur expenses or liabilities which will involve a rate exceeding threepence in the pound for any local financial year, or which will involve a loan.

(2) A parish council shall not, without the approval of the county council, incur any expense or liability which will involve a loan.

(3) The sum raised in any local financial year by a parish council for their expenses (other than expenses under the adoptive Acts) shall not exceed a sum equal

to a rate of sixpence in the pound on the rateable value of the parish at the commencement of the year, and for the purpose of this enactment the expression "expenses" includes any annual charge, whether of principal or interest, in respect of any loan.

(4) Subject to the provisions of this Act, the expenses of a parish council and of a parish meeting, including the expenses of any poll, shall be paid out of the poor rate; and where there is a parish council that council shall pay the said expenses of the parish meeting of the parish and the parish council, and where there is no parish council, the chairman of the parish meeting shall, for the purpose of obtaining payment of such expenses, have the same powers as a board of guardians have for the purpose of obtaining contributions to their common fund.

(5) The demand note for any rate levied for defraying the expenses of a parish council or a parish meeting, together with other expenses, shall state in the prescribed form the proportion of the rate levied for the expenses of the council or meeting, and the proportion (if any) levied for the purpose of any of the adoptive Acts.

Borrowing by Parish Council.

12. (1) A parish council for any of the following purposes, that is to say:—

(*a*) For purchasing any land, or building any buildings, which the council are authorized to purchase or build; and

(*b*) For any purpose for which the council are authorized to borrow under any of the adoptive Acts; and

(*c*) For any permanent work or other thing which the council are authorized to execute or do, and the cost of which ought, in the opinion of the county council and the Local Government Board, to be spread over a term of years;

May, with the consent of the county council and the Local Government Board, borrow money in like manner and subject to the like conditions as a local authority may borrow for defraying expenses incurred in the execution of the Public Health Acts, and sections 233,

234 and 236–239 of the Public Health Act, 1875, shall apply accordingly, except that the money shall be borrowed on the security of the poor rate of the whole or part of the revenues of the parish council, and except that as respects the limit of the sum to be borrowed, one half of the assessable value shall be substituted for the assessable value for two years.

(2) A county council may lend to a parish council any money which the parish council are authorized to borrow, and may, if necessary, without the sanction of the Local Government Board, and irrespectively of any limit of borrowing, raise the money by loan, subject to the like conditions and in the like manner as any other loan for the execution of their duties, and subject to any further conditions which the Local Government Board may by general or special order impose.

(3) A parish council shall not borrow for the purpose of any of the adoptive Acts otherwise than in accordance with this Act, but the charge for the purpose of any of the adoptive Acts shall ultimately be on the rate applicable to the purposes of that Act.

Adjustment of property and liabilities.

68. (1) Where any adjustment is required for the purpose of this Act, or of any order, or thing made or done under this Act, then, if the adjustment is not otherwise made, the authorities interested may make agreements for the purpose, and may thereby adjust any property, income, debts, liabilities, and expenses, so far as affected by this Act, or such scheme, order, or thing, of the parties to the agreement.

(2) The agreement may provide for the transfer or retention of any property, debts, or liabilities, with or without any conditions, and for the joint use of any property, and for payment by either party to the agreement in respect of property, debts and liabilities so transferred or retained, or of such joint user, and in respect of the salary or remuneration of any officer or person, and that either by way of an annual payment, or, except in the case of a salary or remuneration, by

way of a capital sum, or of a terminable annuity for a period not exceeding that allowed by the Local Government Board: Provided that where any of the authorities interested is a board of guardians, any such agreement, so far as it relates to the joint use of any property, shall be subject to the approval of the Local Government Board.

(3) In default of an agreement, and as far as any such agreement does not extend, such adjustment shall be referred to arbitration in accordance with the Arbitration Act, 1889, and the arbitrator shall have power to disallow as costs in the arbitration the costs of any witness whom he considers to have been called unnecessarily, and any other costs which he considers to have been incurred unnecessarily, and his award may provide for any matter for which an agreement might have provided.

(4) Any sum required to be paid by any authority for the purpose of adjustment may be paid as part of the general expenses of exercising their duties under this Act, or out of such special fund as the authority, with the approval of the Local Government Board, direct, and if it is a capital sum the payment thereof shall be a purpose for which the authority may borrow under the Acts relating to such authority, on the security of all or any of the funds, rates, and revenues of the authority, and any such sum may be borrowed without the consent of any authority, so that it be repaid within such period as the Local Government Board may sanction.

(5) Any capital sum paid to any authority for the purpose of any adjustment under this Act shall be treated as capital, and applied, with the sanction of the Local Government Board, either in the repayment of debt or for any other purpose for which capital money may be applied.

SECTIONS 1 AND 2 OF THE POOR LAW ACT, 1897

(60 and 61 Vict. c. 29)

Provisions as to Poor Law Loans.

1. (1) A loan raised after the passing of this Act under section 2 of the Poor Law Act, 1889, shall be repaid within such period, not exceeding sixty years, as the guardians or managers, with the sanction of the Local Government Board, may determine, either by equal yearly or half-yearly instalments of principal or principal and interest, or by means of a sinking fund.

(2) The sinking fund shall be set apart, invested, and applied in accordance with the Local Loans Act, 1875, and the Acts amending that Act, and for the purpose of such application the prescribed rate shall be a rate not exceeding three per cent. per annum. Provided that the guardians or managers shall not invest in their own securities.

(3) Where any such loan has been contracted to be repaid by annual instalments, it may, with the consent of the lenders, be repaid by half-yearly instalments.

(4) Guardians and managers may borrow money under the said section 2, without the consent of the Local Government Board, for the purpose of repaying any outstanding part of any loan borrowed either before or after the passing of the Poor Law Act, 1889, which they have power to repay.

(5) Any money so borrowed shall be repaid in the manner directed by this Act, and within the same period as that originally sanctioned for the repayment of the loan, unless the Local Government Board consent to the period for repayment being enlarged; but that period shall not exceed sixty years from the date of the original borrowing.

(6) For the purpose of this section the expression "outstanding" means not repaid by instalments, or by means of a sinking fund, or out of capital money

properly applicable to the purpose of repayment other than money borrowed for that purpose.

Explanation and Amendment of 30 and 31 Vict. c. 6.

2. The power to provide land and buildings under the Metropolitan Poor Act, 1867, is hereby declared to include power to provide any land or buildings which may, in the opinion of the Local Government Board, be required for the purposes of that Act, and the provisions of section 2 of the Poor Law Act, 1889, with respect to loans by guardians of unions as amended by this Act, shall apply, for the purpose of borrowing under the Metropolitan Poor Act, 1867, instead of section 17 of the last-mentioned Act, but with the substitution of "one-tenth of the rateable value of the district" for "one-fourth" of the rateable value of the union.

EXTRACTS FROM THE EDUCATION ACT, 1921

(11 and 12 Geo. V. c. 51)

PART I

Local Education Authorities.

3. (1) For the purposes of elementary education :—

(*a*) the council of every county borough as respects their county borough ;

(*b*) the council of a borough with a population of over ten thousand according to the census of nineteen hundred and one as respects their borough ;

(*c*) the council of an urban district with a population of over twenty thousand according to that census as respects their district ; and

(*d*) the council of every county as respects their county (excluding the area of any such borough or urban district) ;

shall be the local education authority.

(2) For the purposes of higher education :—

(*a*) the council of a county as respects their county : and

(*b*) the council of a county borough as respects their borough :

shall be the local education authority, but the councils of non-county boroughs and urban districts, though not local education authorities for higher education, shall have the powers as respects higher education given under this Act.

Education committees.

4. (1) Every council having powers under this Act shall have an education committee or education committees constituted in accordance with this Act:

Provided that a council having powers under this Act as respects higher education only, shall not be obliged to have an education committee if they determine that an education committee is unnecessary in their case.

(2) Subject to the provisions of subsection (2) of section seven of the Ministry of Agriculture and Fisheries Act, 1919:—

(*a*) all matters relating to the exercise by the council of their powers under this Act, or of any powers connected with education conferred by or under any other Act, scheme, or order on the council expressly as a local education authority or as a council having powers under this Act, except the power of raising a rate or borrowing money, shall stand referred to the education committee, and the council, before exercising any such powers, shall, unless in their opinion the matter is urgent, receive and consider the report of the education committee with respect to the matter in question;

(*b*) the council may also delegate to the education committee, with or without any restrictions or conditions as they think fit, any such powers as aforesaid, except the power of raising a rate or borrowing money.

(3) The education committee of a council shall be constituted in accordance with a scheme made by the council, and approved by the Board of Education.

Part VI

* * * * *

Concurrent power of smaller Boroughs and Urban Districts.

70. (2) The council of any non-county borough or urban district shall have power as well as the county council to spend such sums as they think fit for the purpose of supplying or aiding the supply of higher education:

Provided that the amount raised for the purpose of higher education in any year by the council of a non-county borough or urban district out of rates under this section shall not exceed the amount which would be produced by a rate of one penny in the pound.

Part IX

* * * * *

Expenses in counties.

122. (1) The expenses of the council of a county under this Act shall, so far as not otherwise provided for, be paid out of the county fund: Provided that, except in the case of the London County Council:—

(*a*) the county council may, if they think fit (after giving reasonable notice to the overseers of the parish or parishes concerned), charge any expenses incurred by them under this Act with respect to higher education on any parish or parishes which, in the opinion of the council, are served by the school or college in connexion with which the expenses have been incurred: Provided that, before charging any such expenses on any area situate within a borough or urban district the council of which is a local education authority for elementary education, the county council shall consult the council of the borough or urban district; and

(*b*) the county council shall not raise any sum on account of any expenses incurred by them under this Act as a local education authority for elementary education within any borough or urban district, the council of which is the local education authority for that purpose; and

(*c*) the county council may charge such portion as they think fit, not being more than three fourths, of any expenses incurred by them in respect of capital expenditure or rent on account of the provision or improvement of any public elementary school, or in providing means of conveyance for teachers or children attending such a school, on the parish or parishes which, in the opinion of the council, are served by the school; and

(*d*) the county council may raise such portion as they think fit, not being more than three fourths, of any expenses incurred to meet the liabilities, on account of loans or rent of any school board transferred to them under the Education Act, 1902, exclusively within the area which formed the school district in respect of which the liability was incurred so far as it is within their area; and

(*e*) a county council may raise any expenses incurred by them to meet any liability of a school authority under the Elementary Education (Blind and Deaf Children) Act, 1893, or the Elementary Education (Defective and Epileptic Children) Act, 1899, which was transferred to the county council by the Education Act, 1902, off the whole of their area or off any parish or parishes which in the opinion of the council are served by the school in respect of which the liability was incurred.

* * * * *

123. The expenses of a council of a borough under this Act shall, so far as not otherwise provided for, be paid out of the borough fund or rate, or if no borough rate is levied, out of a separate rate to be made, assessed, and levied in like manner as the borough rate.

* * * * *

Expenses in urban districts.

124. The expenses of the council of an urban district other than a borough under this Act shall, so far as not otherwise provided for, be paid out of a fund to

be raised out of the poor rate of the parish or parishes comprised in the district, according to the rateable value of each parish, subject (so long as they continue in operation) to the provisions of section three of the Agricultural Rates Act, 1896; and the urban district council shall, for the purpose of obtaining payment of those expenses, have the same power as a board of guardians have for the purpose of obtaining contributions to their common fund under the Acts relating to the relief of the poor, and the accounts of those expenses shall be audited as the other expenses of the council.

* * * * *

Provisions as to expenses of Orders, etc.

125. Any expenses incurred by a council in connexion with any Provisional Order or Order for the purpose of the acquisition of land under this Act, or any enactment repealed by this Act, shall be defrayed as expenses of the council under this Act, and the payment of those expenses shall be a purpose for which the council may borrow money under this Act.

* * * * *

Borrowing.

132. (1) A council may borrow for the purposes of this Act in the case of a county council as for the purposes of the Local Government Act, 1888, and in the case of the council of a county borough, borough, or urban district as for the purposes of the Public Health Acts, but the money borrowed by a county borough, borough, or urban district council shall be borrowed on the security of the fund or rate out of which the expenses of the council under this Act are payable:

Provided that in the application of section sixty-nine of the Local Government Act, 1888, to money borrowed under this Act by the council of a county, a period not exceeding sixty years shall be substituted for a period not exceeding thirty years as the maximum period within which the borrowed money is to be repaid, and any money reborrowed for the purpose of discharging a loan raised for the purposes of this Act, or any enactments repealed by this Act, may, if the Minister of Health approves and subject to such conditions as he may impose, be repaid within such period, not

exceeding sixty years from the date of the original loan, as the Minister of Health may fix.

(2) Money borrowed under this Act or any enactment repealed by the Act (including for this purpose loans transferred to a council under the Education Act, 1902) shall not be reckoned as part of the total debt of a county for the purposes of section sixty-nine of the Local Government Act, 1888, or as part of the debt of a county borough, borough, or urban district for the purpose of the limitation on borrowing under sub-sections (2) and (3) of section two hundred and thirty-four of the Public Health Act, 1875.

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