b) If the Certificate states that it is fully paid up, the bonafide purchaser is protected and the Company is estopped from denying the title.

iii) Duplicate: May be issued if the Original is lost (under an indemnity bond).

Ch. 8-4. Share Warrant: (Sn. 114)

A Public Company has a right to convert its fully paid up shares into share warrants. For this A/A must give the power and the Central Govt. must give its approval.

A Share Warrant must be issued under the seal of the Company. It must state the shares held by the member. Such a share warrant may be transferred by mere delivery. Registration of transfer is not necessary. Dividends may be paid by issuing coupons.

The name of the member shall be removed from the Register of members and date of issue of warrant should be written in the Register.

The bearer of such Share-Warrant may get the Warrant cancelled and his name entered as a member.

Ch. 8.5. Annual Returns :

Every company is under an obligation to file Annual Returns to the Registrar furnishing particulars as per Schedule V. part I of Companies Act regarding.

i) Its registered office.

ii) Register of members, debenture holders.

iii) Names of Directors, Secretaries, Managing Director, etc.

vi) Shares and Debentures, etc.

(Separate returns are to be filed by Companies having no share Capital).

It should be filed within 50 days from the date for the General Body Meeting. It must be duly signed by a Director and a Manager or Secretary.

A Private Company should also file its Annual returns with the necessary certificates.

If not so filed, penalty may be imposed on 'every officer in default'.

Ch. 8.6. Register of Members (Sn 150)

a) Every Company should maintain a Register of Members with the particulars :-

i) Name, address, occupation of each member, ii) The number of shares held by him paid up or not - The share certificate number should be entered, iii) Date of entry in the Register. iv)Date of ceasing to be a member v) Index of Members - if more than 50.

b) Default in maintenance of the Register is penalised.

c) The Register is to be kept in the Regd. Office and should be open for inspection by any member or debenture-holder. Mistakes, if any, may be rectified.

CHAPTER 9
BORROWING

Ch. 9.1. Borrowing Powers:

The General Rule is that the M/A must authorise the Company to borrow money. However, a trading company need not have such an authority and borrowing is an implied power. Borrowings without express or implied authority is Ultra Vires.

A non-trading Company cannot borrow unless such power has been expressly given by the M/A.

The power to borrow includes the implied power to provide for the security to repay ; Further uncalled capital can be so charged if the M/A so provides. Reserve Capital cannot be charged.

Borrowings may be done in various ways : i)

Any unsecured loans ii) By making

P/N.

iii) By mortgage or charge on property

iv) By issuing debentures.

In all these cases, it is necessary to know whether the Company has power to borrow, whether the Director has power to borrow without the sanction of the General Body, whether there is any limit to borrow etc.

The restriction imposed by the Companies Act:

1. For the Directors to borrow :

Sanction in the General Meeting is essential (This will not apply to a private company).

2. Directors shall not issue debentures except by means of resolution passed at the Board meeting (Board's power may be delegated). The loan and the security both become ultra vires if borrowed beyond powers. Hence null and void.

But if a person lends in good faith without knowledge of excess of limits, then the loan is valid. Re-payment can be enforced by an injunction if the money can be identified. If already utilised, he may recover by suit. If the money is already paid to discharge a loan, he is suborgated to the place of such a creditor and hence can sue.

Ch. 9.2. Debentures :

A Debenture is a certificate of loan issued by a Company. It is a

type of security. Sn. 2(12) of the Companies Act defines it. Debenture includes debenture stock, bonds and other securities, of the Company whether constituting a charge on the company's assets or not.

Features:

i) It is issued in the form of a Certificate under the seal of the Company.

ii) It is a debt or acknowledgement of indebtedness, iii) Debentures may be subject to some contingency, iv) It carries a fixed interest per annum. **Kinds of debentures:**

1. Redeemable Debentures:

On the expiry of the term of loan, the Company has a right to pay back the debenture holders. The property gets released from the mortgage or charge.

2. Perpetual Debenture:

This is irredeemable. The debenture may be subject to a contingency and on the happening of it, may become irredeemable.

3. Registered holder:

A Company which floats debentures should keep a separate register of holders of Debentures. The names of the holders must be placed on the Certificate and the Register. Such a person is a registered holder. Transfer of debenture is allowed, but must be registered with the Company.

Share-holder	**Debenture-holder**
1. He is a member of the company and is entitled to various rights and privileges.	1. Not a member
2. He gets a dividend when declared.	2. Gets a fixed rate of interest.
3. Cannot be paid back as long as the company is there.	3. Company may pay back (Not in case of Irredeemable Debentures)
4. On winding up share-holder gets, after all other claims are paid.	4. As a secured creditor he gets priority.

Ch. 9.3. Floating Charge:

There are two types of charges: Fixed and floating. A mortgage is a charge on fixed asset. But, the floating charge is highly beneficial to run the company without the assets being tied up. It is

floating with the property it intends to cover. It is a charge which floats like a cloud over the whole assets from time to time. It does not get attached to any specific asset.

Stock in trade: The floating charge on this enables the Company to borrow, without fixing up the stocks. It may use the stock from time to time. However, if the creditor or bank desires to enforce its floating charge and legally seize the stock, then the stocks become 'crystallised' i.e., fixed.

In Panama New Zealand Company case, the Company under a floating charge raised debentures for affixed period. But before that the Company was wound up. It was held that the floating charge over the entire asset of the Company past and present.

The essentials are:

1. It should be a charge on the *warn*
both past and present.

2. The asset-stock in trade-must be one which is changing from
time to time.

3. the company has a right to use the stocks until some legal steps are taken by the debenture-holder or mortgagee to crystallise it.

Restriction: According to Companies Act Sn539any floating charge created 12 months earlier to winding is invalid.

Jones &Co. V. Ranjit Roy executed a deed charged all its machinery, stock in trade to be in the lender's possession. It was held that this was not a floating charge, as this took away the rights of the Company to use the assets in the ordinary course of business.

CHAPTER 10 DIRECTORS

Ch. 10.1. Directors :

i) As the Company is a legal or juristic person, its business and affairs are entrusted to the officials of the Company.

ii) Status :

According to the companies Act there should be at least three Directors in a Public Company and at least two Directors in a Private Company.

A Director is not a servant of the Company. He is the Controller of the affairs of the Company.

The Directors are sometimes described as agents, as trustees and as Managing Partners. The latest concept is that they form the **Primary Organ** of the Company.

The Directors form the Board. The Board is the brain and the only brain of the Company. The Company can and does act only through them (Bath V. Standard Land Co.). Hence as Lord Bowen says **when brain functions, the Corporation is said to function.**

The success of a Company is dependent on the Board Directors. Hence, individuals alone can be Directors.

iii) Appointment:

The first Directors are those appointed by the subscribers of the M/A (If not appointed all become Directors).

They should take within 30 days the consent of the Registrar to act as Directors. They hold offices as Directors until the First Annual Meeting of the Company. The new Directors are appointed by that meeting.

To prevent any mischief of permanent Directors, provisions are made in the Companies Act (Sn. 255) to appoint by rotation. In a Public Company, only one third can be permanent Directors. The others are appointed by rotation. At the Annual Meeting 1/3 of these Directors, are to retire. Provisions have been made for reappointment.

Method :

1. Each Director should be individually appointed by voting at the General Meeting. If two or more are appointed in a resolution the appointment is bad. But by unanimous resolution more than one may be appointed.

2. In some circumstances, by special resolution, the Directors are to be appointed.

3. The Board has powers to appoint to fill casual vacancy, of a Director.

4. To prevent oppression and mismanagement, the Central Government, has powers to appoint Directors (Sn. 408).

5. Courts have power to appoint to prevent oppression and mismanagement.

iv) a) Qualification:

The A/A of a Company may provide for certain number of shares to be held by a person to become a Director. These are 'Qualification shares'. If appointed, without this qualification shares, he may acquire them within 2 months, or his place becomes vacant. But if he continues he becomes liable to penalty.

The other qualification may be prescribed by the share holders.

The majority of shareholders may exercise their right to control the actions of the Board in cases of its malafides or incompetency.

Certain powers are stated in the companies Act, which should be exercised with a resolution of the Board Meeting i.e., to make calls, to issue debentures, to borrow money etc. Certain other restrictions are in Sn. 291. The General Meeting should authorise the Board in selling or leasing the Companies undertaking/borrowings etc. They have no powers to make political contribution.

vi) Duties of the Directors :

a) duty to attend Board Meetings : The Directors should attend the periodical Board Meetings. If a Director is absent for three consecutive meetings, (without the permission of the Board), he is deemed to have vacated his seat. It shows his negligence and is liable if due to his absence, there is a breach of trust by others.

b) To discharge duties personally : The shareholders appoint a Director on the strength of his integrity, managerial skill and compe tence, hence, he should not delegate his duties to others. But accord ing to A/A only, he may delegate his duties.

c) He must discharge his duties with utmost good faith and work for the benefit of the Company. He should not take advantage of his status to enrich himself.

The leading case is Cook V. Decks. The Directors diverted a contract of the Company to themselves. They had 3/4 majority voting power and hence got a majority resolution. Held that the benefit of the contract belonged in equity to the Company and hence the Direc-

tors were liable.

Statutory restrictions have been imposed on the Directors (in Sns. 319 to 321) of the Companies Act to trace any extra money that Directors may make.

d) Fiduciary position demands that the Director should disclose his interest to the Board.

Liability : The Director is personally liable to various circumstances for violation of statutory duties.

Ch. Managing Director (Sn. 275)

He is a Director who is entrusted with 'substantial power of management'. Such a power may be conferred on him by M/A or A/A or by a resolution of the Board of Directors. It may be conferred even by arrangement. Hence he has a dual capacity as Director and as employee(whole-time).

He is appointed according to the A/A. Usually, it is the Board that appoints one among them as M.D. The appointment of the first M.D. must be approved by the Central Government. Otherwise, the appointment becomes irregular.

The maximum tenure is 5 years, at a time. The remuneration should not exceed 5% of the profits of the company. The Central Government, i.e., Company Law Board has the powers to fix the salary.

His qualifications are the same as a Director for appointment.

The Qualification are the same as a Director for appointment.

The entire management of the Company are in his hands. He is not a servant of the company (though an employee).

His powers and functions are determined by the A/A generally.

CHAPTER 11

SECRETARY, AUDITOR, etc. C.

11.1. Secretary:

He is an individual, appointed to perform the duties which are to be performed by the Secretary under the Companies Act. He may perform ministerial and administrative duties. He must posses the prescribed qualifications.

Status : A Company having 25 lakhs paid up capital or above, must have a Secretary. He is a full-time paid Executive officer. The courts have held that the Secretary is not a humble servant as was understood earlier. He is not a clerk. He is a very important person, with extensive duties and responsibilities e.g. He may hire cars for the administrative purposes of the Company.

In Panorama Development Co. case : P was running car-hire business. D's Company Secretary hired them telling that the cars were to meet the customers, but, he used them for his own purposes it was held that hiring the Cars was essential part of his functions and is within his ostensible authority.

He is the Chief Administrative Officer. He has ostensible Authority to sign contract on behalf of the Company.

He cannot borrow on behalf of the Company. Thus where a Director paid advances to the Company on the request of the Secretary, it was held that the Company was not liable.

He can call meetings and carry on administrative functions as per the A/A.

Liability : The Secretary is liable like a Director of the Company.

Ch. 11.2. Auditor:

The **Auditor is the Watchdog of the Company's affairs**. He is a servant of the shareholders. He is appointed by the General Meeting once in a year and may be re-appointed. He is an independent agency and hence, the shareholders may rely upon his report.

Appointment (Sn.224) :

i) An Auditor is appointed by the General Body at its annual meeting. He must be informed of his appointment within 7 days, and such an auditor must inform the Registrar about his acceptance within 30 days.

ii) The first auditor is appointed within one month of the incorporation of the Company and he holds his office, until the auditor

appointed by the first General Body takes over.

iii) In specified cases, e.g. where a Company is partly held by Government or financial institution an auditor may be appointed only by a special resolution. In such a case, if no auditor is appointed, the Central Government may appoint an auditor.

Qualifications :

i) He must be a Chartered Accountant.

ii) If a firm of auditors, is appointed, all its partners must be duty qualified.

iii) Disqualifications: An officer, or employee of the Company, or a body corporate or a person indebted to the Company or a Director of another Company which is a managing agent of the Company is disqualified.

Removal:

i) At the expiry of the term of appointment the General Body may appoint another auditor.

ii) With the approval of the Central Government an auditor may be removed even before the expiry of his tenure of office.

Powers and duties :

i) He has access to all the books of accounts, vouchers etc. of the Company. No doubt, it is the Directors who prepare the accounts, but it is the Auditors who report to the members on the accounts and on certain vital aspects. The members, get a true and fair view through the Reports. He must enquire into a number of circumstances (Sn. 227) relating to loans, advances, entries in the registers or books, expenses incurred on revenue accounts etc.

ii) He must check the accuracy of the Accounts. It is not just a mechanical addition or substraction. It is a complete examination of what the management has done. He must certify, in his report, that the accounts are correct and reflect true and fair view of the state of affairs of the Company.

iii) He must exercise reasonable skill and care in discharging his functions. He owes his duty to the Company. A person misled by his certificate may sue him for damages.

Hadley Byrne & Co. V. Heller & Partners. Here, A an advertising firm, asked its bank to get the opinion of a Company C whose bank was B. A's bank wrote to B which gave a favourable report but added "without responsibility". A placed orders with C and lost heavily. It sued B.

The court held that the Bank was not liable.

But, when confidence is reposed and opinions are asked of