PUBLIC WORKS DEPARTMENT,

RAILWAY BRANCH.

21st March 1890

READ the following :—

Letter from the Secretary
Siliguri Railway Company Ltd
No. - dated 19th March 1890.

FOR ORDERS.

Sidney Smith
Major R.E.
for Jt. Secy. to Govt. P.W.D. Ry. Br.

This letter & enclosure should be printed Emergently and then suspend further remarks of the Govt Solicitor. Also without waiting for the Govt Solicitors reply printed copy of the papers should be sent to India with a letter to the following effect.

In cont. of my letter No. dated I am directed to enclose copy of a letter received from the Siliguri Railway Comp.y ~~to~~ in response to the letter from the Govt Solicitor already forwarded; and to say that the further opinion of the Law Officers of this Govt on the subject will be forwarded on receipt.

Ans
22 Mar.

Draft response to the first letter need not be sent now to be passed at all these Siliguri Rly papers to be kept apart & in the charge of a responsible Officer.

SS/
24/3/90.

D.A.R.
Take action accordingly
Let me see draft of
reply to
Govt Solicitor
SS
24/3/90

FOR ORDERS.

Special

PUBLIC WORKS SECRETARIAT,

RAILWAY BRANCH.

Station Cootacamund date 5th July 1890.

NOTE.

With reference to the Honorable Member's observation regarding a mistake in para 12 of Messrs Cordell & Winterton's letter of 17th June 1890 printed in G.O. No: 492 dated 11th April 1890, the undersigned submits the original papers including the letter referred to, in which the words "Board of Revenue" appear.-

So Does - perhaps it was
and the Member was talking
with some person
Nevertheless
7/7/90

C. Stewart

Ag: Secy: to Government P.W. Dep

GOVERNMENT OF MADRAS.

PUBLIC WORKS DEPARTMENT.

Railway.

Read again the following paper :—

G.O., dated 27th March 1890, No. 433 R., Public Works.

Read the following papers :—

Letter to the Secretary, Nílgiri Railway Company, dated 12th March 1890, No. 1342 C.

From P. W. WOOLLEY, Esq., Secretary, Nílgiri Railway Company, Limited, to the Joint Secretary to Government, Public Works Department, Railway Branch, dated Woodcote, Coonoor, 19th March 1890.

I have the honor to acknowledge receipt of your No. 1342 C. of the 12th current covering a letter addressed to you by the Government Solicitor, No. 113 of the 4th idem, in which he deals with the question as to whether the Nílgiri Railway Company has, in raising its capital as it deems best, complied with the terms of the contracts of 30th September 1885 and 29th June 1888.

2. In reply, I am instructed to inform you that the Company has probably the best authority in the world for asserting its belief that it has complied with all the conditions of those contracts, as far as it can, without the co-operation of the Government, and to express the hope of the Directors that the Government will, after perusing the letter of the Company's Solicitors of the 17th current and its appendix, forwarded herewith, without further delay take such measures as will enable the Company to proceed in carrying out its engagements with the Secretary of State for India on the terms so clearly specified in those contracts.

ENCLOSURES.

From Messrs. COWDELL AND WINTERTON, Solicitors, Ootacamund, to the Secretary, Nílgiri Railway Company, Limited, Coonoor, dated Ootacamund, 17th March 1890.

re *Nilgiri Railway*.

We have the honor to acknowledge receipt of the Government Solicitor's letter of the 4th instant with covering letter from the Joint Secretary to Government, Public Works Department, Railway Branch.

We have carefully perused and considered this communication and think it well to call your attention to the spirit in which it appears to be made. There is nothing to show that the Government are anxious or even ready to carry out their engagement, but the Government Solicitor proceeds as if his duty or implied instructions were to find some reason why the contract should not be performed. Then the Company are not asked for information on the points raised but are put on their defence, and sternly called upon for an explanation. The covering letter is equally unsatisfactory, and is scarcely of a character to promote confidence. The Government has encouraged the Company and Mr. Woolley to use their best endeavours to promote the scheme, and now that success has crowned their efforts, they are met only with coldness and criticism.

We trust that we are wrong, but it is difficult to read this communication, made after three months' delay, without receiving such an impression.

From the preamble of the letter, we notice that the question is whether under the arrangements made by the Company, the terms of the contracts entered into with Government have so

far been complied with. In this view we concur, and presume that as regards the private arrangements of the Company and Mr. Woolley, the Government claims to, and can have, no concern.

Mr. Woolley placed the business at home in the hands of Sir Thomas Paine's firm (Messrs. Paine, Son and Pollock), Solicitors of position and great experience in Company matters, and acted under the advice of Mr. Seward Brice, Q.C., (the well known authority on Public Companies, and the author of the work on "*Ultra vires*," whose opinions may be sent for perusal, if desired), and you have every reason to suppose that the business has been carried out in a regular and efficient manner. At the same time nothing would be gained by discussing, nor can we admit that the Government have the right to criticise, the acts either of the Company or Mr. Woolley, except so far as to ascertain whether the contracts with the Government have been complied with.

Without prejudice, however, to this position, we see no reason why the Company should not make the following remarks regarding the points raised in the Government Solicitor's letter.

The Memorandum and Articles of Association of the Company were prepared in Madras by a leading firm of Solicitors, and the objects are of that general character which enable a Company to engage in every sort of business from keeping a petty bazaar or lodging house, to founding a colony. In addition to these objects, however, para. 3 (*o*) refers to the power of raising and borrowing money as being *an object of the Company*. Such a power is incidental to every Company, and is redundant or out of place in the Memorandum of Association. The powers of the Directors to borrow money are inserted in the Articles of Association, and that is sufficient, and they are so inserted here. The power to raise or borrow money is obviously one which enables the Company to carry out the objects agreed upon, but is not the object itself (*vide* authorities in appendix). In this case it cannot be urged that the money is raised otherwise than for the objects of the Company stated in the memorandum, and the powers given in the articles have been strictly followed, and are amply sufficient for this purpose.

But, if it were necessary to show that the borrowing or raising of money were also in accordance with object 3 (*o*) of the Memorandum of Association, it would be easy to do this. The Company has agreed to pay or remunerate the contractor, for making the Railway, in a particular manner, and has raised the money to pay the contractor by debentures. The issue of the debentures for a specified sum is a payment of money, and a Company equally raises this money, whether the debentures are taken up by the shareholders or others, or are accepted by the contractor as payment.

Moreover, they are a part of the consideration given to the contractor for raising the capital, and subscribing for the shares, and the paragraph in question provides for the Company borrowing and raising money "*in such manner as they think fit*," which is sufficiently wide.

Briefly, however, we say that a power to borrow or raise money need not be contained in the Memorandum of Association, and that the powers contained in the articles can equally be exercised without it.

As to the question whether the subscription has been duly made, we need only point out that no public offer of the shares is necessary. Mr. Woolley's subscription is surely as good as that of any one else, and the transaction contains the strongest proof of his solvency and ability to raise the money.

The Deed or Finance Agreement by which this is done is before the Board of Revenue, and we see no objection why the Government should not peruse it in reference to this matter. The Company has undertaken to assist Mr. Woolley in disposing of the shares and debentures if required; but this in no way affects the position that Mr. Woolley's subscription was complete and n time.

Mr. Woolley is no doubt at present by far the largest shareholder; but there is no reason why he should not be, or to suppose that he will retain all his shares, or that he will be virtually the Company, supposing that this was a valid objection.

Debentures of the nominal value of £ 220,000 have been duly issued, and it was for those who accepted them to consider whether they were worth taking up. At any rate a respectable and powerful Company in London, the Union Debenture Company, with full knowledge of the facts (the arrangements having been made to suit their views), has agreed to purchase them, and has paid a substantial sum in respect of the purchase, and is now asking to be allowed to pay the balance of the money at earlier dates than was arranged, though this does not practically affect the issue, which is already completed by Mr. Woolley's acceptance. The circumstances connected with it were duly notified to the Government, your Company having been advised to be perfectly communicative on all points, though not to admit the right of the Government to interfere outside the terms of their own contracts.

Mr. Woolley, having a full knowledge of the facts, has accepted the debentures, and has paid his subscription, and is, of course, bound to the Company in respect of his subscription for the remaining calls. These calls are practically guaranteed by the powerful Company in question, so that it is seldom that a Company is so favorably situated as regards its capital. Supposing a

list of from five to ten thousand shareholders, including a large proportion of natives, as might otherwise be anticipated; surely the risk would be immeasurably greater.

We think that the Government should at once be made aware of the serious loss entailed by delay. The first instalment of the subscribed capital, upon which we presume the Government will pay the guaranteed interest of 3 per cent. from date of subscription, is lying idle. There are variations in the rate of exchange, which may seriously affect the amount of money produced by the sterling price of the debentures. The rate for bridge work, iron and steel rails, machinery, and plant has already risen to the prejudice of the contractor. The contractor is also suffering loss of time and credit, and may at any time make a heavy claim upon the Company for the delay; which, in self-defence, the Company would then repeat against the Government.

These and other considerations make it incumbent upon your Company to press for a final decision without further delay or discussion.

We advise a firm but conciliatory attitude, evincing every disposition to fulfil the obligations of the Company, and offering even to accept or to make modifications, if of a slight and practical character. It is desirable to avoid friction, further delay, and the unnecessary expenses of litigation. But at the same time the Company ought to demand considerate and fair treatment from the Government, for whom not only they, but also the Nilgiri Rigi Railway Company, and Mr. Woolley have already gratuitously expended so much time, attention and money.

The letter evinces some jealousy or prejudice regarding Mr. Woolley's monopolising the Company, and the work; but this is no new position, and as the Company extends its membership, and the debentures are again disposed of, and the work passes into the hands of the Engineer and sub-contractors, this monopoly will gradually disappear.

Trusting that the Government will imitate the Company's promptitude in the matter of a reply, and so enable your Company to decide without delay what step they ought to take, both on their own account, and for the sake of the other parties interested, viz., the Contractor, the Union Debenture Company, the Debenture-holders, and the Debenture Trustees.

APPENDIX.

Articles of Association.

Mr. Pulbrook, Editor of the Companies Acts, and author of the law and practice of Joint Stock Companies, at page 87 says:—

"*Clauses in Articles of Association giving* borrowing powers should be strictly acted upon in accordance with the provisions."

Companies Act, Sec. 68.

Section 68 of the Indian Companies Act takes it for granted that Companies may borrow money by debentures and mortgages.

"Every limited Company under this Act shall keep a register of all mortgages and charges specifically affecting property of the Company, and shall enter in such register, in respect of each mortgage or charge, a short description of the property mortgaged or charged, the amount of charge created, and the names of the mortgagees or persons entitled to such charge.

Borrowing powers conferred by Articles of Association.

"As to the *power of a Company through its Directors* to borrow money upon its own shares, such power being *within the purview of its Memorandum and Articles*, see Purmanandas Jivandas *v.* H. R. Cormack, I.L.R. 6, Bom., 327; as to how far the *borrowing powers of Directors*, if exceeded by them, may be ratified by the Company, see Irvine *v.* Union Bank of Australia, 2 Ap. Ca., 366; L.R. 4-I. A. 86; I.L.R. 3, Cal., 380.

"In *in re* Hamilton's Windsor Iron Works *ex-parte* Pitman and Edwards, 12 Ch. Div., 707, it was held that a trading Company *has general power* to borrow money to an extent *which is reasonable and necessary* for the purposes of its business.

"When *by the Articles of Association* the Directors had power 'to raise or borrow .... sums of money .... by bonds, debentures, or promissory notes, or in such other manner as they deem best,' it was held that though power to borrow money on bills of exchange was not specifically given, yet bills of exchange being in many respects analogous to promissory notes which were specifically mentioned, the power to raise money by an equally well known and recognized mode, viz., by drawing, indorsing or accepting bills of exchange, must be deemed to be included in the *general words* 'or *in such other manner as they deem best.*' *In re* The New Fleming S. and W. Co., I.L.R. 3, Bom., 439, affirmed on appeal, I.L.R. 4, Bom., 275. See this case referred to in note to Sec. 72, post. And see Choonilal Seal *v.* Spence's Hotel Co., 1-B., L.R., O.C., 16; and compare *in re* Port Canning Co. 7-B., L.R. 583.

Contract with Government not affected.

"Debentures which are intended to be a general floating security over all the property of the Company as it exists at the time when they are to be put in force have not the effect of in any way preventing the carrying on of the business in all or any of the ways in which it is carried on in the ordinary course Wheatley *v.* Silkstone and Haigh Moor Coal Co.; 29 Ch. D., 715.

"*In re* Florence Land and Public Works Co., *ex-parte* Moor, 10 Ch. Div., 530; instruments called 'obligations,' by which the Company bound themselves, 'their successors and assigns and all their property, estate and effects' to repay the sums mentioned therein at a future date, were held to constitute, when *read with reference* to *the Articles of Association*, a charge on the property of the Company, subject to the power of the Directors to dispose of any part of such property in the ordinary course of their business.

"The borrowing powers of Companies under Sec. 42 of the Companies Clauses Act, 1845 (8 Vic., c. 16), were considered in Landowners' West of England, &c., Land, &c., Co. *v.* Ashford, 16 Ch. Div., 411.

See the Nílgiri Railway Company's articles.

"In *in re* Medla Tea Company, I.L.R. 9, Cal., 14, it was held that there is a distinction between loans which a Company is empowered to raise *under its borrowing powers*, and debts which, in meeting its current liabilities and in the actual carrying on of its affairs, the Company, or its Agents on its behalf, have contracted, and the cases of Cefn Cilcen Mining Company, L.R. 7 Eq., 88, and Waterlow *v.* Sharp, L.R. 8 Eq. 501, were followed; but it is to be observed that the case of Landowners' Company *v.* Ashford, 16 Ch. Div. 411, 437, was not referred to in the argument in that case, q.v., also on the question of ratification of a borrowing *in excess of the powers contained in the Articles of Association*, as to which see further post. See also Buckley, 4th ed., 153. See further, as to overdrawing a banker's account by a Building Society being *ultra vires*, Blackburn Building Society *v.* Cunliffe Brookes and Co., 22 Ch. Div., 61; per Lord Selborne, L.C., at p. 70: 'The general principles applicable to a case of this description are, we think, sufficiently well settled. There can be no doubt that when there is an express prohibition against borrowing, it must be obeyed. There is also no doubt that when there is not an express prohibition against borrowing in a case of a Company or a Society constituted for special purposes, no borrowing can be permitted without express authority, unless it be properly incident to the cause and conduct of the business for its proper purposes.'

Ratification by shareholders.

"Shareholders may ratify a borrowing by Directors in excess of the powers conferred upon them *by the Articles of Association*, where the limitation in the articles does not form part of the constitution of the Company; but a ratification of past acts will not extend to future acts on the part of the Directors—see Irvine *v.* Union Bank of Australia, L.R. 4, I. A. 86; I.L.R. 3, Cal., 280.

"Per Lord Esher, M.R., Ashbury *v.* Watson, 30 Ch. Div., p. 381, 'ratification consists in adopting something which has been done or assumed to have been done for the person ratifying, with full knowledge that it has been done.' For observations as to the effect of acquiescence by shareholders in the acts and contracts of their Directors, see London Financial Association *v.* Kelk, 26 Ch. D., 107.

"All these cases seem to show that power to borrow money may be conferred by the articles and is controlled by them and that it is not necessary to name it amongst the objects of the Company in the Memorandum of Association."

(Signed) COWDELL AND WINTERTON.

Order—dated 27th March 1890, No. 433, R., Public Works.

Ordered that the following letter be addressed to the Government of India.

(Here enter No. 434 R., dated 27th March 1890.)

(True Extract.)

(Signed) C. J. SMITH, Colonel, R.E.,
Joint Secy. to Govt., P.W.D.,
Railway Branch.

Letter—from Colonel C. J. SMITH, R.E., Joint Secretary to the Government of Madras, Public Works Department, Railway Branch, to the Secretary to the Government of India, Public Works Department, dated Madras, 27th March 1890, No. 434 R.

In continuation of my letter, No. 361 R., dated 13th March 1890, I am directed to enclose copy of reply * received from the Nílgiri Railway Company in reference to the letter from the Government Solicitor, already forwarded, and to say that the further opinion of the law officers of this Government on the subject will be forwarded on receipt.

* Dated 19th March 1890, with two enclosures.

Read also the following papers:—

From Colonel C. J. SMITH, R.E., Joint Secretary to Government, Public Works Department, Railway Branch, to the Government Solicitor, Madras, dated Madras, 27th March 1890, No. 1656 C.

I am directed to forward, for favor of your remarks, a printed copy of the reply * from the Secretary, Nílgiri Railway Company, to your letter No. 113 of the 4th instant, on the question as to whether the Company has complied with the terms of the contracts of 30th September 1885 and 29th June 1888.

* Dated 19th March 1890, with two enclosures.

From ERNEST BARCLAY, Esq., Government Solicitor, Madras, to the Joint Secretary to Government, Public Works Department, Railway Branch, dated Madras, 27th March 1890, No. 167.

I beg to acknowledge receipt of your letter of this date, No. 1656 C., with its enclosures.

2. Messrs. Cowdell and Winterton's letter of 17th instant does not meet the main point raised in my letter of 4th instant, No. 113, but is directed chiefly to the question of the power of the Nílgiri Railway Company, Limited, to borrow and raise money on debentures. I have not disputed the right of the Company to do this, the power to borrow and raise money on debentures being clearly given by para. 3 (*o*) of the Company's Memorandum of Association. But what I do say is, that it is not open to the Company to issue debentures for any other purpose except that of borrowing and raising money (that is, other than capital) and that it appears by the works contract of 20th December 1889, that, in consideration of Mr. Woolley undertaking to raise the capital of the Company, the Company was to issue the debentures to Mr. Woolley; so that the object of the issue was not for the Company to borrow or raise money, but to enable Mr. Woolley to raise the capital, so that the transaction could not put one six-pence more in the Company's coffers. But if I am right in my contention that the Company has not the power to issue debentures except for the purpose of borrowing and raising money, and the debentures are therefore invalid, the consideration for Mr. Woolley raising the capital fails, and he could at any time apply to have the register of shareholders rectified by the removal of his name therefrom, on the ground of such failure, and the Company would not under those circumstances have complied with the terms of the agreement of 29th June 1888.

3. I should be glad to see a copy of Mr. Seward Brice's opinions referred to in Messrs. Cowdell and Winterton's letter and which they say may be sent for perusal if desired.

To the Secretary, Nílgiri Railway Company, dated 31st March 1890, No. 1709 C.

From P. W. WOOLLEY, Esq., Secretary, Nílgiri Railway Company, Limited, to the Under-Secretary to Government, Public Works Department, Railway Branch, dated Woodcote, Coonoor, 3rd April 1890.

In reply to your No. 1709-C. of the 31st ultimo, I have the honor to send herewith, for the information of Government, a copy of the opinion of Mr. Seward Brice, Q.C., of the 1st of October last.

And at the same time I beg to inform the Government that a second instalment of the amount which the Union Debenture Company undertook to advance to Mr. Woolley—making with the remittance in December last, Rs. 6,75,000, a quarter of the Company's capital—was received in Madras on the 1st current, a fact which should dispel all doubts as to the *bona fides* of his subscription for the Company's shares, and of his ability to pay for them in due course.

Enclosure.

re THE NILGIRI RAILWAY COMPANY.

Opinion.

I have carefully considered the facts stated and the suggestions made in the instructions and the provisions contained in the various agreements sent with the case, and my views in reference to what is desired to be done are as follows :—

1, 2 & 3. (*a*) I am of opinion that the Company has full and unrestricted power of borrowing for the purposes of its undertaking.

(*b*) I am of opinion that the Company may enter into a contract with Mr. R. Woolley, or any other competent contractor, for the construction and equipment of the railway and incidental works, and that it may agree to pay as the consideration for such railway and works, the sum of Rs. 25,00,000 either in cash or shares, and the further amount of £ 200,000 nominal in debentures, charged as a first charge on the Company's undertaking and assets, and further may agree to issue to the contractor or as he shall direct, in advance, and before the works are done or indeed even entered upon, the whole or any part of the debentures, subject only to this—that the amount of the consideration to be paid by the Company is to be, having regard to the circumstances and the mode of payment, a reasonable and proper amount to be paid and satisfied as agreed to, and also that, under the circumstances, the issue in advance and in anticipation of the contract being duly carried out by the contractor, of the debentures, or any part thereof, will be a reasonable and proper thing in the interests of the Company. Companies may make almost any contracts relating to their business and objects and impose upon themselves almost any liabilities incidental to such contracts, provided only that the provisions of such contracts as against the Companies and the liabilities incurred by them are not altogether unreasonable—see Taff Vale Railway Company *v.* I. R. 6, I. and L. 169 ; *re* Dagenham (Thames) Dock Company, I. R. 8 Ch. 1022; Lewine's case Alb. Arb. Reilly 174.

(*c*) I think that the best course to accomplish what is desired will be somewhat as follows :—(*a*) that a contract be made between the Company and Mr. Woolley for the construction of the railway for an agreed amount, say, Rs. 25,00,000 in cash, and debentures to the nominal amount of £ 200,000, the contract to be in the usual form with all proper stipulations for the protection of both parties, but to provide as regards the debentures that the whole of them or such amount as Mr. Woolley requires shall be issued to him, or as he shall direct, before execution in whole or in part and in anticipation of the work to be done under it. (*b*) Mr. Woolley will then require the debentures or such an amount of them as he may require for financing the matter to be issued to him. (*c*) Having received the debentures, Mr. Woolley will, in ordinary form, apply for shares of the Company to the amount of Rs. 25,00,000 — it was stated in conference as well as in the case that a sufficient amount can be raised by means of the debentures for £ 200,000 nominal to equal Rs. 25,00,000 cash. (*d*) With the proceeds of the debentures Mr. Woolley will pay the amount called up in respect of the shares subscribed for by him, either wholly or partly as the case may be.

(*d*) I am of opinion that, by a course substantially as here indicated, the provisions of the agreement with the Secretary of State can be in fact and legally discharged. The application by Mr. Woolley or any other persons (for of course any one may apply for the shares) will be simple and unqualified and involve him and them in liability to pay the amount in full either in money or money's worth. By the above plan the amount will be paid in money. Of course if Mr. Woolley or whoever applies for the shares is to be fully protected, the amount of the shares should be provided at the commencement and paid to the Company and fully paid certificates thereupon issued.

4. I am of opinion that unless the Indian Law differs materially from English Laws (and I do not think that it does), no arrangement can be made whereby a subscription could be made for the shares of the Company without imposing liability upon the subscriber to pay in money or money's worth the full amount of the shares.

5. (*a*) I am of opinion that it is advisable that articles 5, 6, 14 and 94 (*c*) of the Articles of Association should be altered substantially in the form of the draft which I have initialled, but I do not think it necessary to alter article 95, for as it stands there is unlimited power of borrowing, though the Company has to sanction it, and there may be very good reason why the general powers of the Directors should be subject to this restriction.

(*b*) I do not advise the adoption of the course suggested in this question, and I very much doubt whether such a course would be a valid subscription within the meaning of the Agreement with the Secretary of State, or would in other respects be satisfactory.

6. I think the course suggested in this question could be validly adopted, but as I understand the facts it will be impracticable.

7. I have not settled the necessary resolutions to be passed by the Company, but they would be special resolutions, in common form, for varying the Articles of Association, and, in addition, an ordinary resolution to sanction the issue of the debentures, and at the same time it would be advisable, by ordinary resolution, to formally sanction and approve of the Agreement with Mr. Woolley for the construction of the railway and works.

(Signed) SEWARD BRICE,
5 New Ch. Line Inn.

1st October 1889.

Order—dated 11th April 1890, No. 492 R., Public Works.

The last paper above recorded will be communicated to the Government Solicitor with reference to para. 3 of his letter, No. 167, dated 27th March 1890, with the request that he will now give Government definite advice whether the arrangements made by the Company and Mr. Woolley should or should not be accepted as constituting valid subscription of the capital.

2. A copy of these Proceedings will be forwarded for the information of the Government of India in continuation of this department letter, No. 434 R., dated 27th March 1890.

(Here enter No. 493 R., dated 11th April 1890.)

(True Extract.)

(Signed) SIDNEY SMITH, Major, R.E.,
Under-Secy. to Govt., P.W.D.,
Railway Branch.

To the Government Solicitor.

Endorsement—dated 11th April 1890, No. 493 R., Public Works.

Forwarded.

(By Order.)

(Signed) R. R. E. DRAKE-BROCKMAN, Lt.-Col., R.E.,
Ag. Joint Secy. to Govt., P.W.D.,
Railway Branch.

Exd. A. Aubert.
Spare Copies

RAILWAY.

Govt. of {1890} Madras.

PUBLIC WORKS.

Dated April, 11th.

Recd. *Encl.*

G.O., 11th April 1890, Nos. 492, 493 R.

APRIL.

Nilgiri Railway Company

Forwarding copy of Proceedings referring to the Government Solicitor correspondence regarding the arrangements made by the — for raising their capital.

Railway Co. Limited

Ootacamund
17th March 1890.

From

Messrs Cowdell & Winterton
Ootacamund.

To

P. W. Woolley Esqr, Secretary
Nilgiri Railway Company Limited.
Coonoor.

Sir

re Nilgiri Railway.

We have the honor to acknowledge receipt of the Government Solicitor's letter of the 4th Inst: with covering letter from the Joint Secretary to Government P. W. D. Railway Branch

We have carefully perused and considered this communication and think it well to call your attention to the spirit in which it appears to be made. There is nothing to shew that the Government are anxious or even ready to carry out their engagement but the Government Solicitor proceeds as if his duty or implied instructions were to find some reason why the Contract should not be per-formed. Then the Company are not asked for information on the points raised but are put on their defence, and sternly called upon for an explanation. The covering letter is equally unsatisfactory, and is scarcely of a character to promote confidence. The Government has encouraged the

1.

engagements with the Secretary of ... v
on the terms so clearly specified in those contracts.

I have the honor to be
Sir
Your most obedient servant
Percy P. Woolley.
Secretary.

Nilgiri Railway Company

Forwarding copy of Proceedings referring to the Government Solicitor correspondence regarding the arrangements made by the — for raising their capital.

3 E/P

Company and Mr. Woolley to use their best endeavours to promote the scheme, and now that success has crowned their efforts, they are met only with coldness and criticism.

We trust that we are wrong but it is difficult to read this communication, made after three months' delay, without receiving such an impression.

From the preamble of the letter, we notice that the question is whether under the arrangements made by the Company, the terms of the Contracts entered into with Government have so far been complied with. In this view we concur; and presume that as regards the private arrangements of the Company and Mr. Woolley, the Government claims to, and can have, no concern.

Mr. Woolley placed the business at home in the hands of Sir. Thomas Paine's firm (Messrs. Paine, Son & Pollock) Solicitors of position and great experience in Company matters, and acted under the advice of Mr. Seward Brice Q.C. (the well known authority on Public Companies, and the author of the work on "Ultra Vires" whose opinions may be sent for perusal, if desired) and you have every reason to suppose that the business has been carried out in a regular and efficient manner. At the same time nothing would be gained by discussing nor can we admit that the Government have the right

Nilgiri Railway Company

Forwarding copy of Proceedings referring to the Government Solicitor correspondence regarding the arrangements made by the — for raising their capital.

ELL & WOOLLEY
O ACAMUND

to criticise the acts either of the Company or Mr. Woolley, except so far as to ascertain whether the contracts with the Government have been complied with.

Without prejudice however to this position, we see no reason why the Company should not make the following remarks regarding the points raised in the Government Solicitor's letter.

The memo and Articles of Association of the Company were prepared in Madras by a leading firm of Solicitors and the objects are of that general character which enable a Company to engage in every sort of business from keeping a petty bazaar or lodging house, to founding a colony. In addition to these objects, however para 3 (o) refers to the power of raising and borrowing money as being an object of the Company. Such a power is incidental to every Company, and is redundant or out of place in the Memo of Association. The Powers of the Directors to borrow money are inserted in the Articles of Association, and that is sufficient and they are so inserted here. The power to raise or borrow money is obviously one which enables the Company to carry out the objects agreed upon, but is not the object itself. (wide authorities in Appendix) In this

case it cannot be urged that the money is raised otherwise than for the objects of the Company stated in the memo, and the powers given in the articles have been strictly followed and are amply sufficient for this purpose.

But, if it were necessary to show that the borrowing or raising of money were also in accordance with object 3 (a) of the memo of Association it would be easy to do this. The Company has agreed to pay or remunerate the Contractor for making the Railway, in a particular manner, and has raised the money to pay the Contractor by Debentures. The issue of the Debentures for a specified sum is a payment

Nilgiri Railway Company

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of money, and a Company equally raises this money, whether the Debentures are taken up by the shareholders or others, or are accepted by the Contractor as payment.

Moreover, they are a part of the consideration given to the Contractor for raising the capital, and subscribing for the shares, and the para in question provides for the Company borrowing and raising money "in such manner as they think fit", which is sufficiently wide.

Briefly, however, we say that a power to borrow or raise money need not be contained in the memo of Association, and that the powers contained in the Articles can equally be exercised without it.

As to the question whether the subscription has been duly made, we need only point out that no public offer of the shares is necessary. Mr Woolley's subscription is surely as good as that of anyone else and the transaction contains the strongest proof of his solvency and ability to raise the money.

The Deed or Finance Agreement by which this is done is before the Board of Revenue, and we see no objection why the Government should not peruse it in reference to this matter. The Company has undertaken to assist Mr Woolley in disposing of the shares and Debentures if required, but this in no way affects the position that

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Mr Woolleys subscription was complete and in time.

Mr Woolley is no doubt at present by far the largest shareholder, but there is no reason why he should not be ~~=~~, or to suppose that he will retain all his shares, or that he will be virtually the Company, supposing that this was a valid objection.

Debentures of the nominal value of £220,000. have been duly issued, and it was for those who accepted them to consider whether they were worth taking up. At any rate a respectable and powerful Company in London, the Union Debenture Company, with full knowledge of the facts (the arrangements having been made to suit their views) has agreed to purchase them, and has paid a substantial sum in respect of the purchase, and is now asking to be allowed to pay the balance of the money at earlier dates than was arranged, though this does not practically affect the issue, which is already completed by Mr Woolleys acceptance. The circumstances connected with it were duly notified to the Government, Your Company having been advised to be perfectly communicative on all points, though not to admit the right of the Government to interfere outside the terms of their own contracts.

Mr Woolley, having a full knowledge of the facts, has accepted the Debentures, and has paid his subscription, and is, of course, bound to

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Nilgiri Railway Company

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the Company in respect of his subscription for the remaining calls. These calls are practically guaranteed by the powerful Company in question, so that it is seldom that a Company is so favorably situated as regards its capital. Supposing a list of from five to ten thousand shareholders, including a large proportion of natives, as ~~was~~ might otherwise be anticipated; surely the risk would be immeasurably greater.

We think that the Government should atonce be made aware of the serious loss entailed by delay. The first instalment of the subscribed capital upon which we presume the Government will pay the guaranteed interest of 3% from date of subscription is lying idle. There are variations in the rate of exchange, which may seriously affect the amount of money produced by the Sterling price of the Debentures. The rates for bridge work, iron and steel rails, machinery, and plant has already risen to the prejudice of the Contractor. The Contractor is also suffering loss of time and credit, and may at any time make a heavy claim upon the Company for the delay; which in self defence the Company would then repeat against the Government.

These and other considerations make it incumbent upon your Company to press for a final decision without further delay or discussion.

7

Nilgiri Railway Company

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We advise a firm but conciliatory attitude, evincing every disposition to fulfil the obligations of the Company, and offering even to accept or to make modifications, if of a slight and practical character. It is desirable to avoid friction, further delay, and the unnecessary expenses of litigation. But at the same time the Company ought to demand considerate and fair treatment from the Government, for whom not only they, but also the Nilgiri Rigi Railway Company, and Mr Woolley have already gratuitously expended so much time, attention & money.

The letter evinces some jealousy or prejudice regarding Mr Woolley's monopolising the Company and the work, but this is no new position, and as the Company extends its membership, and the Debentures are again disposed of, and the work passes into the hands of the Engineer and Sub-Contractors, this monopoly will gradually disappear.

~~We would refer the Government to the correspondence~~ ~~of the Company with Mr Woolley, and to the~~ ~~Proceedings of the Board, which will show~~ ~~that the Company have always~~ ~~[illegible]~~

Trusting that the Government will imitate the Company's promptitude in the matter of a reply, and so enable your Company to decide

8

Nilgiri Railway Company

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without delay what step they ought to take, both on their own account, and for the sake of the other parties interested, viz: the Contractor, the Union Debenture Company, the Debenture holders and the Debenture Trustees,

We have the honor to be
Sir
Your most obedient servants.

Edward Watkins

9

Nilgiri Railway Company

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Appendix

Articles of Association.

Mr. Pulbrook Editor of the Companies acts, and author of the law and practice of Joint Stock Companies at page 87 says:-

"Clauses in Articles of Association giving
"borrowing powers should be strictly acted upon
"in accordance with the provisions"

Section 68 of the Indian Companies act takes it for granted that Companies may borrow money by Debentures and Mortgages

Companies act Sec 68. "Every limited Company under this Act shall keep
"a register of all mortgages and charges specifically
"affecting property of the Company, and shall
"enter in such register, in respect of each
"mortgage or charge, a short description of the
"property mortgaged or charged, the amount of
"charge created, and the names of the Mortgagees
"or persons entitled to such charge

Borrowing Powers Conferred by Articles of Association. "As to the power of a Company through its
"directors to borrow money upon its own shares,
"such power being within the purview of its
"memorandum and articles, See Purmanandas
"Jivandas v H.R. Cormack, I.L.R. 6 Bom. 327;
"as to how far the borrowing powers of directors,

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"if exceeded by them, may be ratified by the Company
"see Irvine v Union Bank of Australia, 2 App Ca 366;
"L.R. 4 I.A. 86; I.L.R. 3 Calc 380
"In. In re Hamilton's Windsor Iron Works ex parte
"pitman and Edwards 12 Ch. Div. 707, it was held
"that a trading Company has general power to
"borrow money to an extent which is reasonable
"and necessary for the purposes of its business
"When by the articles of Association the directors
"had power" to raise or borrow .... sums of money
"... by bonds, debentures, or promissory notes, or
"in such other manner as they deem best," it was
"held that though power to borrow money on bills
"of exchange was not specifically given yet bills
"of exchange being in many respects analogous
"to promissory notes which were specifically
"mentioned, the power to raise money by an
"equally well-known and recognized mode, viz.,
"by drawing, indorsing or accepting bills of
"exchange, must be deemed to be included in
"the general words" or in such other manner as
"they deem best". In re The New Fleming S and
"W Co.; I.L.R. 3 Bom. 439, affirmed on appeal,
"I.L.R. 4 Bom 275. See this case referred to in
"note to Sec. 72, post. And see Khoonilal Seal v

Nilgiri Railway Company

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"Spence's Hotel Co., 1 B. L. R. O. C. 16; and Compare
"In re Port Canning Co., 7 B. L. R. 583.

Contract with Government not affected.

"Debentures which are intended to be a general
"floating security over all the property of the
"Company as it exists at the time when they are
"to be put in force have not the effect of in any way
"preventing the carrying on of the business in
"all or any of the ways in which it is carried
"on in the ordinary course Wheatley v Silkstone
"and Haigh Moor Coal Co.; 29 ch D 715,

"In re Florence Land and Public Works Co.,
"ex-parte Moor, 10 ch. Div. 530; instruments
"called "Obligations", by which the Company bound
"themselves, their successors and assigns and all
"their property, estate and effects" to repay the
"sums mentioned therein at a future date, were
"held to constitute, when read with reference
"to the articles of association, a charge on the
"property of the Company, subject to the power
"of the directors to dispose of any part of such
"property in the ordinary course of their business

The borrowing powers of Companies under
sec. 42 of the Companies Clauses Act 1845
(8 Vic., C. 16), were considered in Landowners'
West of England, &c Land &c., Co v. Ashford 16 ch Div. 411.

Nilgiri Railway Company

Forwarding copy of Proceedings referring to the Government Solicitor correspondence regarding the arrangements made by the — for raising their capital.

See the Nilgiri Railway Company's articles.

"In In re Medla Tea Co., I.L.R. 9 Calc. 14, it was "held that there is a distinction between loans which "a company is empowered to raise under its "borrowing powers, and debts which, in meeting its "current liabilities and in the actual carrying on "of its affairs, the Company, or its agents on its behalf, "have contracted, and the cases of Keyn Leicester Mining "Co., L.R. 7 Eq. 88, and Waterlow v Sharp, L.R. 8 Eq. "501, were followed; but it is to be observed that the case "of Landowners Co. v. Ashford, 16 Ch. Div. 411, 437 "was not referred to in the argument in that case, "q.v.; also on the question of ratification of a "borrowing in excess of the powers contained in the "articles of association, as to which see further, post. "See also Buckley, 4th ed, 153. See further, as to "overdrawing a banker's account by a Building "Society being Ultra vires, Blackburn Building Society "v Cunliffe Brookes and Co., 22 Ch. Div. 61; per "Lord Selborne, L. C., at p. 70: "The general "principles applicable to a case of this description are, "we think, sufficiently well settled. There can be "no doubt that when there is an express prohibition "against borrowing, it must be obeyed. There is "also no doubt that when there is not an express

Nilgiri Railway Company

Forwarding copy of Proceedings referring to the Government Solicitor correspondence regarding the arrangements made by the — for raising their capital.

"prohibition against borrowing in a case of a Company
"or a Society constituted for special purposes, no
"borrowing can be permitted without express authority,
"unless it be properly incident to the cause and
"conduct of the business for its proper purposes.

Ratification by shareholders

"Shareholders may ratify a borrowing by directors
"in excess of the powers conferred upon them by the
"articles of association, where the limitation in the
"articles does not form part of the constitution of the
"Company; but a ratification of past acts will not
"extend to future acts on the part of the directors, see
"Irvine v Union Bank of Australia, L.R. 4, I.A. 86;
"I L.R., 3 Calc., 280.

"Per Lord Esher, M.R., Ashbury v Watson, 30 Ch.
"Div., p. 381 "Ratification consists in adopting
"something which has been done or assumed to have
"been done for the person ratifying, with full knowledge
"that it has been done." For observations as to the
"effect of acquiescence by shareholders in the acts
"and contracts of their directors, see London
"Financial Association v Kelk, 26 Ch. D., 107.

"All these cases seem to show that power to
"borrow money may be conferred by the articles and is
"controlled by them and that it is not necessary to name it
"it amongst the objects of the Company in the memo of association

Russell Wilkinson

Already in print

The Nilgiri Railway Co. Limited

Woodcote. Coonoor

March 19. 1890

To

The Joint Secretary to Government

Railway Branch

Sir

I have the honor to acknowledge receipt of your No 1342 e of the 12th curt covering a letter addressed to you by the Government Solicitor No. 113 of the 4th idem in which he deals with the question as to whether The Nilgiri Railway Company has, in raising its capital as it deems best, complied with the terms of the Contracts of 30th Sept 1885 and 29th June 1888.

2 In reply I am instructed to inform you that the Company has probably the best authority in the world for asserting its belief that it has complied with all the conditions of those Contracts, as far as it can, without the cooperation of the Government: and to express the hope of the Directors, that the Government will, after perusing the letter of the Company's Solicitors of the 17th curt and its appendix, forwarded herewith, without further delay take such measures as will enable the company to proceed in carrying out its engagements with the Secretary of State for India on the terms so clearly specified in those contracts.

I have the honor to be

Sir

Your most obedient servant

Percy F. Woolley.

Secretary.

Pub Lec 2581/90

Ld 26/3/90 papers.

Nilgiri Railway Company

Forwarding copy of Proceedings referring to the Government Solicitor correspondence regarding the arrangements made by the — for raising their capital.

From P. W. WOOLLEY, Esq., Secretary, Nílgiri Railway Company, Limited, to the Joint Secretary to Government, Public Works Department, Railway Branch, dated Woodcote, Coonoor, 19th March 1890.

I have the honor to acknowledge receipt of your No. 1342 C. of the 12th current covering a letter addressed to you by the Government Solicitor, No. 113 of the 4th idem, in which he deals with the question as to whether the Nílgiri Railway Company has, in raising its capital as it deems best, complied with the terms of the contracts of 30th September 1885 and 29th June 1888.

2. In reply, I am instructed to inform you that the Company has probably the best authority in the world for asserting its belief that it has complied with all the conditions of those contracts, as far as it can, without the co-operation of the Government, and to express the hope of the Directors that the Government will, after perusing the letter of the Company's Solicitors of the 17th current and its appendix, forwarded herewith, without further delay take such measures as will enable the Company to proceed in carrying out its engagements with the Secretary of State for India on the terms so clearly specified in those contracts.

ENCLOSURES.

From Messrs. COWDELL AND WINTERTON, Solicitors, Ootacamund, to the Secretary, Nílgiri Railway Company, Limited, Coonoor, dated Ootacamund, 17th March 1890.

re *Nilgiri Railway.*

We have the honor to acknowledge receipt of the Government Solicitor's letter of the 4th instant with covering letter from the Joint Secretary to Government, Public Works Department, Railway Branch.

We have carefully perused and considered this communication and think it well to call your attention to the spirit in which it appears to be made. There is nothing to show that the Government are anxious or even ready to carry out their engagement, but the Government Solicitor proceeds as if his duty or implied instructions were to find some reason why the contract should not be performed. Then the Company are not asked for information on the points raised but are put on their defence, and sternly called upon for an explanation. The covering letter is equally unsatisfactory, and is scarcely of a character to promote confidence. The Government has encouraged the Company and Mr. Woolley to use their best endeavours to promote the scheme, and now that success has crowned their efforts, they are met only with coldness and criticism.

We trust that we are wrong, but it is difficult to read this communication, made after three months' delay, without receiving such an impression.

From the preamble of the letter, we notice that the question is whether under the arrangements made by the Company, the terms of the contracts entered into with Government have so far been complied with. In this view we concur, and presume that as regards the private arrangements of the Company and Mr. Woolley, the Government claims to, and can have, no concern.

Mr. Woolley placed the business at home in the hands of Sir Thomas Paine's firm (Messrs. Paine, Son and Pollock), Solicitors of position and great experience in Company matters, and acted under the advice of Mr. Seward Brice, Q.C., (the well known authority on Public Companies, and the author of the work on "*Ultra vires*," whose opinions may be sent for perusal, if desired), and you have every reason to suppose that the business has been carried out in a regular and efficient manner. At the same time nothing would be gained by discussing, nor can we admit that the Government have the right to criticise, the acts either of the Company or Mr. Woolley, except so far as to ascertain whether the contracts with the Government have been complied with.

Without prejudice, however, to this position, we see no reason why the Company should not make the following remarks regarding the points raised in the Government Solicitor's letter.

The Memorandum and Articles of Association of the Company were prepared in Madras by a leading firm of Solicitors, and the objects are of that general character which enable a Company to engage in every sort of business from keeping a petty bazaar or lodging house, to founding a

colony. In addition to these objects, however, para. 3 (*o*) refers to the power of raising and borrowing money as being *an object of the Company*. Such a power is incidental to every Company, and is redundant or out of place in the Memorandum of Association. The powers of the Directors to borrow money are inserted in the Articles of Association, and that is sufficient, and they are so inserted here. The power to raise or borrow money is obviously one which enables the Company to carry out the objects agreed upon, but is not the object itself (*vide* authorities in appendix). In this case it cannot be urged that the money is raised otherwise than for the objects of the Company stated in the memorandum, and the powers given in the articles have been strictly followed, and are amply sufficient for this purpose.

But, if it were necessary to show that the borrowing or raising of money were also in accordance with object 3 (*o*) of the Memorandum of Association, it would be easy to do this. The Company has agreed to pay or remunerate the contractor, for making the Railway, in a particular manner, and has raised the money to pay the contractor by debentures. The issue of the debentures for a specified sum is a payment of money, and a Company equally raises this money, whether the debentures are taken up by the shareholders or others, or are accepted by the contractor as payment.

Moreover, they are a part of the consideration given to the contractor for raising the capital, and subscribing for the shares, and the paragraph in question provides for the Company borrowing and raising money "*in such manner as they think fit*," which is sufficiently wide.

Briefly, however, we say that a power to borrow or raise money need not be contained in the Memorandum of Association, and that the powers contained in the articles can equally be exercised without it.

As to the question whether the subscription has been duly made, we need only point out that no public offer of the shares is necessary. Mr. Woolley's subscription is surely as good as that of any one else, and the transaction contains the strongest proof of his solvency and ability to raise the money.

The Deed or Finance Agreement by which this is done is before the Board of Revenue, and we see no objection why the Government should not peruse it in reference to this matter. The Company has undertaken to assist Mr. Woolley in disposing of the shares and debentures if required; but this in no way affects the position that Mr. Woolley's subscription was complete and in time.

Mr. Woolley is no doubt at present by far the largest shareholder; but there is no reason why he should not be, or to suppose that he will retain all his shares, or that he will be virtually the Company, supposing that this was a valid objection.

Debentures of the nominal value of £ 220,000 have been duly issued, and it was for those who accepted them to consider whether they were worth taking up. At any rate a respectable and powerful Company in London, the Union Debenture Company, with full knowledge of the facts (the arrangements having been made to suit their views), has agreed to purchase them, and has paid a substantial sum in respect of the purchase, and is now asking to be allowed to pay the balance of the money at earlier dates than was arranged, though this does not practically affect the issue, which is already completed by Mr. Woolley's acceptance. The circumstances connected with it were duly notified to the Government, your Company having been advised to be perfectly communicative on all points, though not to admit the right of the Government to interfere outside the terms of their own contracts.

Mr. Woolley, having a full knowledge of the facts, has accepted the debentures, and has paid his subscription, and is, of course, bound to the Company in respect of his subscription for the remaining calls. These calls are practically guaranteed by the powerful Company in question, so that it is seldom that a Company is so favorably situated as regards its capital. Supposing a list of from five to ten thousand shareholders, including a large proportion of natives, as might otherwise be anticipated; surely the risk would be immeasurably greater.

We think that the Government should at once be made aware of the serious loss entailed by delay. The first instalment of the subscribed capital, upon which we presume the Government will pay the guaranteed interest of 3 per cent. from date of subscription, is lying idle. There are variations in the rate of exchange, which may seriously affect the amount of money produced by the sterling price of the debentures. The rate for bridge work, iron and steel rails, machinery, and plant has already risen to the prejudice of the contractor. The contractor is also suffering loss of time and credit, and may at any time make a heavy claim upon the Company for the delay; which, in self-defence, the Company would then repeat against the Government.

These and other considerations make it incumbent upon your Company to press for a final decision without further delay or discussion.

We advise a firm but conciliatory attitude, evincing every disposition to fulfil the obligations of the Company, and offering even to accept or to make modifications, if of a slight and practical character. It is desirable to avoid friction, further delay, and the unnecessary expenses of litigation. But at the same time the Company ought to demand considerate and fair treatment from the Government, for whom not only they, but also the Nilgiri Rigi Railway Company, and Mr. Woolley have already gratuitously expended so much time, attention and money.

The letter evinces some jealousy or prejudice regarding Mr. Woolley's monopolising the Company, and the work; but this is no new position, and as the Company extends its membership, and the debentures are again disposed of, and the work passes into the hands of the Engineer and sub-contractors, this monopoly will gradually disappear.

Trusting that the Government will imitate the Company's promptitude in the matter of a reply, and so enable your Company to decide without delay what step they ought to take, both on their own account, and for the sake of the other parties interested, viz., the Contractor, the Union Debenture Company, the Debenture-holders, and the Debenture Trustees.

APPENDIX.

Mr. Pulbrook, Editor of the Companies Acts, and author of the law and practice of Joint Stock Companies, at page 87 says:— Articles of Association.

"*Clauses in Articles of Association giving* borrowing powers should be strictly acted upon in accordance with the provisions."

Section 68 of the Indian Companies Act takes it for granted that Companies may borrow money by debentures and mortgages. Companies Act, Sec. 68.

"Every limited Company under this Act shall keep a register of all mortgages and charges specifically affecting property of the Company, and shall enter in such register, in respect of each mortgage or charge, a short description of the property mortgaged or charged, the amount of charge created, and the names of the mortgagees or persons entitled to such charge.

"As to the *power of a Company through its Directors* to borrow money upon its own shares, such power being *within the purview of its Memorandum and Articles*, see Purmanandas Jivandas *v.* H. R. Cormack, I.L.R. 6, Bom., 327; as to how far the *borrowing powers of Directors*, if exceeded by them, may be ratified by the Company, see Irvine *v.* Union Bank of Australia, 2 Ap. Ca., 366; L.R. 4-I. A. 86; I.L.R. 3, Cal., 380. Borrowing powers conferred by Articles of Association.

"In *in re* Hamilton's Windsor Iron Works *ex-parte* Pitman and Edwards, 12 Ch. Div., 707, it was held that a trading Company *has general power* to borrow money to an extent *which is reasonable and necessary* for the purposes of its business.

"When *by the Articles of Association* the Directors had power 'to raise or borrow .... sums of money .... by bonds, debentures, or promissory notes, or in such other manner as they deem best,' it was held that though power to borrow money on bills of exchange was not specifically given, yet bills of exchange being in many respects analogous to promissory notes which were specifically mentioned, the power to raise money by an equally well known and recognized mode, viz., by drawing, indorsing or accepting bills of exchange, must be deemed to be included in the *general words* 'or *in such other manner as they deem best.*' *In re* The New Fleming S. and W. Co., I.L.R. 3, Bom., 439, affirmed on appeal, I.L.R. 4, Bom., 275. See this case referred to in note to Sec. 72, post. And see Choonilal Seal *v.* Spence's Hotel Co., 1-B., L.R., O.C., 16; and compare *in re* Port Canning Co. 7-B., L.R. 583.

"Debentures which are intended to be a general floating security over all the property of the Company as it exists at the time when they are to be put in force have not the effect of in any way preventing the carrying on of the business in all or any of the ways in which it is carried on in the ordinary course Wheatley *v.* Silkstone and Haigh Moor Coal Co.; 29 Ch. D., 715. Contract with Government not affected.

"*In re* Florence Land and Public Works Co., *ex-parte* Moor, 10 Ch. Div., 530; instruments called 'obligations,' by which the Company bound themselves, 'their successors and assigns and all their property, estate and effects' to repay the sums mentioned therein at a future date, were held to constitute, when *read with reference* to *the Articles of Association*, a charge on the property of the Company, subject to the power of the Directors to dispose of any part of such property in the ordinary course of their business.

"The borrowing powers of Companies under Sec. 42 of the Companies Clauses Act, 1845 (8 Vic., c. 16), were considered in Landowners' West of England, &c., Land, &c., Co. *v.* Ashford, 16 Ch. Div., 411.

"In *in re* Medla Tea Company, I.L.R. 9, Cal., 14, it was held that there is a distinction between loans which a Company is empowered to raise *under its borrowing powers*, and debts which, in meeting its current liabilities and in the actual carrying on of its affairs, the Company, or its Agents on its behalf, have contracted, and the cases of Cefn Cilcen Mining Company, L.R. 7 Eq., 88, and Waterlow *v.* Sharp, L.R. 8 Eq. 501, were followed; but it is to be observed that the case of Landowners' Company *v.* Ashford, 16 Ch. Div. 411, 437, was not referred to in the argument in that case, q.v., also on the question of ratification of a borrowing *in excess of the powers contained in the Articles of Association*, as to which see further post. See also Buckley, 4th ed., 153. See further, as to overdrawing a banker's account by a Building Society being *ultra vires*, Blackburn Building Society *v.* Cunliffe Brookes and Co., 22 Ch. Div., 61; per Lord Selborne, L.C., at p. 70: 'The general principles applicable to a case of this description are, we think, See the Nilgiri Railway Company's articles.

sufficiently well settled. There can be no doubt that when there is an express prohibition against borrowing, it must be obeyed. There is also no doubt that when there is not an express prohibition against borrowing in a case of a Company or a Society constituted for special purposes, no borrowing can be permitted without express authority, unless it be properly incident to the cause and conduct of the business for its proper purposes.'

Ratification by shareholders.

"Shareholders may ratify a borrowing by Directors in excess of the powers conferred upon them *by the Articles of Association*, where the limitation in the articles does not form part of the constitution of the Company; but a ratification of past acts will not extend to future acts on the part of the Directors—see Irvine *v.* Union Bank of Australia, L.R. 4, I. A. 86; I.L.R. 3, Cal., 280.

"Per Lord Esher, M.R., Ashbury *v.* Watson, 30 Ch. Div., p. 381, 'ratification consists in adopting something which has been done or assumed to have been done for the person ratifying, with full knowledge that it has been done.' For observations as to the effect of acquiescence by shareholders in the acts and contracts of their Directors, see London Financial Association *v.* Kelk, 26 Ch. D., 107.

"All these cases seem to show that power to borrow money may be conferred by the articles and is controlled by them and that it is not necessary to name it amongst the objects of the Company in the Memorandum of Association."

(Signed) COWDELL AND WINTERTON.

No. 1342 C

Government of Madras.

WORKS DEPARTMENT,

RAILWAY BRANCH.

Then this letter are to be forwarded to Secretariat

C.J.

11.3.90

Secretary

Nilgiri Railway Company

Wardcote, Connoor

12th March 1890.

I am directed to forward for your consideration and for any observations you may wish to offer, a letter addressed to Government by the Government Solicitor relating to the arrangements that appear to have been made by the Nilgiri Railway Company for

* No. 113 dy 4th March 1890.

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sufficiently well settled. There can
borrowing, it must be obeyed. T
prohibition against borrowing in a
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No. 1342 C

Government of Madras.

PUBLIC WORKS DEPARTMENT,

RAILWAY BRANCH.

To

The Secretary

Nilgiri Railway Company

Woodcote, Coonoor

12th March 1890.

SIR,

I am directed to forward

for your consideration

and for any observations

you may wish to offer,

a* letter addressed

to Government by the

Government Solicitor

relating to the arrange-

-ments that appear to

have been made by the

Nilgiri Railway Company

for

* No. 113 dated March 1890.

Hds
to Mem

for raising their Capital.

Dft. Letter
12/3/90.

No. 1342 C dy 12-3-90

No. 433 R.

PUBLIC WORKS DEPARTMENT,

RAILWAY BRANCH.

PROCEEDINGS OF THE MADRAS GOVERNMENT.

UNDER date the 27th March 1890

READ the following

Letter to the Secy: Nilgiri Railway Company } (Ack. No. 1342 C dy 12th March 90

Letter from - Do - Do (" " - " 19th Do)

ORDERED that the following letter be addressed to the Government of India -

Ack. No. 434 R dy 27th March 90.

Dft.
28/3/90

D.R.

No. 434 R 500

Government of Madras.

WORKS DEPARTMENT,
RAILWAY BRANCH.

To the Secy: to the Govt. of India
Public Works Department
Simla

27th March 1890.

In continuation of my letter No. 361 R dated 13th March 1890, I am directed to enclose copy of reply received from the Nilgiri Railway Company in reference to the letter from the Government Solicitor already forwarded, and to say that the further opinion of the law officers of this Government on the subject will be forwarded on receipt.

26.3.90
D.R.

5598

Wilson

Copy of Govt. Solicitor's letter

D Rs copy

Cey

14/4

Print

No. 434 R

50

Government of Madras.

PUBLIC WORKS DEPARTMENT,

RAILWAY BRANCH.

To

The Secy: to the Govt. of India

Public Works Department

Simla

27th March 1890.

SIR,

In continuation of my letter No. 361 R dated 13th March 1890, I am directed to enclose copy of reply received from the Nilgiri Railway Company in reference to the letter from the Government Solicitor already forwarded, and to say that the further opinion of the law officers of this Government on the subject will be forwarded on receipt.

Dd. 26.3.90
D.R.

Dated 19th March 1890 with two enclosures.

Info despatched to India 28/3/90.

Enclosures to the Public Works Department Railway Branch Letter No. 1656-C dated 27th March 1890.

Very urgent

No. 1656-C

Government of Madras.

PUBLIC WORKS DEPARTMENT,

RAILWAY BRANCH.

To

The Government Solicitor

Madras

27th March 1890.

SIR,

I am directed to forward, for favour of your remarks, a printed copy of the reply* from the Secretary Nilgiri Railway Company to your letter No. 113 of the 4th instant, on the question as to whether the Company has complied with the terms of the contracts of 30th Septr 1885 and 29th June 1888.—

Ls.
27.3.90
D.R.

Print

600

Read also the following Papers:-

† Dated 19th March 1890 with two enclosures

Desp by hand 27-3-90 MM

No. 167.

Madras. 27th March 1890.

From,

Ernest Barclay,

Government Solicitor

Madras.

To,

The Joint Secretary to Government

Public Works Department

Railway Branch.

Sir,

I I beg to acknowledge receipt of your letter of this date No 1656 C with its enclosures.

2. Messrs Cowdell and Wintertons letter of 17th instant - does not meet the main point raised in my letter of 4th instant - No 113; but, is directed chiefly to the question of the power of the Nilgiri Railway Company Limited to borrow/raise money on Debentures. I have not disputed the right of the Company to do this, the power - to borrow and raise money on debentures being clearly given by - para 3 (o) of the Company's Memorandum of Association. But, what I do say is, that it is not open to the Company to issue debentures for - any other purpose except that of borrowing and raising money/(that is, other than capital)/and that it appears by the Works Contract of - 20th December 1889 that, in consideration of Mr Woolley undertaking to raise the capital of the Company, the Company was to issue the - debentures to Mr Woolley. So that the object of the issue was not for the Company to borrow or raise money; but, to enable Mr Woolley to - raise the capital, so that the transaction could not put one six - pence more in the Company's coffers. But, if I am right in my conten- tion that the Company has not the power to issue debentures except for the purpose of borrowing and raising money, and the debentures are therefore invalid, the consideration for Mr Woolley raising the

capital fails, and he could at any time apply to have the register of shareholders rectified by the removal of his name therefrom, on the ground of such failure, and the Company would not, under those circumstances, have complied with the terms of the agreement of 20th June 1888,

3. I should be glad to see a copy of Mr Seward Brices opinions referred to in Messrs Cowdell and Wintertons letter and which they say may be sent for perusal if desired.

I have the honor to be,

Sir

Your Obedient Servant,

Ernest Hawtrey

Government Solicitor,

No. 1709. C

Government of Madras.

PUBLIC WORKS DEPARTMENT,

RAILWAY BRANCH.

To

The Secretary

Nilgiri Railway Coy Ld.

Woodcote

Connoor

31st March 1890.

SIR,

With reference to your letter of the 19th instant in reply to my No. 1362 C. of the 12th idem, forwarding the opinion of the Govt. Solicitor on the question as to whether the Nilgiri Ry: Coy: has complied with the terms of the Contracts of 30th September 1885 and 29th June 1888, I am directed to request that you will be so good as to furnish me, for the information of Government, with a copy of the opinion of Mr. Seward Brice Q.C., referred to in para 5 of letter from Messrs. Cordell & Winterton received with

Your

Your letter referred to above.-

L.S.
28-3-90

D 1/4

D. R.

1342 Cy 12-3-90
433 Ry 27-3-90
434 Ry 27-3-90
1656 Cy 27-3-90

No 1709. C dy 31-3-90

A.M. 26-3-90. R 31-3-90

Enclosure

Re:- The Nilgiri Railway Company

Print

G.P.O.

Opinion

I have carefully considered the facts stated and the suggestions made in the instructions, and the provisions contained in the various agreements sent with the Case, and my views in reference to what is desired to be done are as follows:-

1. 2 & 3. a I am of opinion that the Company has full and unrestricted power of borrowing for the purposes of its undertaking.

b I am of opinion that the Company may enter into a Contract with Mr. R. Woolley, or any other competent contractor, for the construction and equipment of the railway and incidental works, and that it may agree to pay as the consideration for such railway and works the sum of 2,500,000 Rupees either in cash or shares, and the further amount of £200,000 nominal in Debentures, charged as a first charge on the Company's undertaking and assets, and further may agree to issue to the Contractor or as he shall direct, in advance, and before the works are done or indeed even entered upon, the whole or any part of the Debentures. Subject only to this- that the amount of the consideration to be paid by

1. [illegible] for the protection of both parties.

(1)

(2)

A.M. 28-3-90. R 31-3-90

the Company is to be, having regard to the circumstances and the mode of payment, a reasonable and proper amount to be paid and satisfied as agreed to, and also that, under the circumstances, the issue in advance and in anticipation of the contract being duly carried out by the contractor, of the debentures, or any part thereof, will be a reasonable and proper thing in the interests of the Company. Companies may make almost any contracts relating to their business and objects and impose upon themselves almost any liabilities incidental to such contracts, provided only that the provisions of such contracts as against the Companies and the liabilities incurred by them are not altogether unreasonable See Taff Vale Ry: Co: v. I.R 6 I & L. 169; Re Dagenham (Thames) Dock Co: I.R 8 ch. 1022; Lewin's case Alb: A & b: Reilly 174.

c I think that the best course to accomplish what is desired will be somewhat as follows:- (a) that a contract be made between the Co: and Mr: Woolley for the construction of the railway for an agreed amount say 2,500,000 Rupees in cash, and debentures to the nominal amount of £200,000, the contract to be in the usual form with all proper stipulations for the protection of both parties,

but to provide as regards the debenturrs that the whole of them or such amount as Mr. Woolley requires shall be issued to him, or as he shall direct, before execution in whole or in part and in anticipation of the work to be done under it. (b) Mr. Woolley will then require the debenturrs or such an amount of them as he may require for financing the matter to be issued to him. (c) Having received the Debenturrs Mr. Woolley will in ordinary form apply for charrs of the Co: to the amount of 2,500,000 Rupees — it was stated in conference as well as in the Case that a sufficient amount can be raised by means of the Debenturrs for £200,000 nominal to equal 2,500,000 Rupees cash (d) With the proceeds of the debenturrs Mr. Woolley will pay the amount called up in respect of the charrs subscribed for by him, either wholly or partly as the case may be.

d I am of opinion that by a course substantially as here indicated the provisions of the Agreement with the Secretary of State can be in fact and legally discharged. The application by Mr. Woolley or any other persons (for of course any one may apply for the charrs) will be simple and unqualified and involve him and them in liability to pay the amount in full either in money or money's worth.

By the above plan the amount will be paid in money. Of course if Mr Woolley or whoever applies for the shares is to be fully protected the amount of the shares should be provided at the commencement and paid to the Co: and fully paid certificates thereupon issued.

4 I am of opinion that unless the Indian Law differs materially from English Laws (and I do not think that it does) no arrangement can be made whereby a subscription could be made for the shares of the Co: without imposing liability upon the subscriber to pay in money or money's worth the full amount of the shares.

5 (a) I am of opinion that it is advisable that articles 5, 6, 14 & 94(c) of the Articles of association should be altered substantially in the form of the draft which I have initialled, but I do not think it necessary to alter article 95, for as it stands there is unlimited power of borrowing, though the Co: has to sanction it, and there may be very good reason why the general powers of the Directors should be subject to this restriction

(b) I do not advise the adoption of the course suggested in this question and I very much doubt whether such a course would be a valid

subscription within the meaning of the Agreement with the Secretary of State, or would in other respects be satisfactory.

6 I think the course suggested in this question could be validly adopted but as I understand the facts it will be impracticable.

7 I have not settled the necessary resolutions to be passed by the Company, but they would be special resolutions, in common form, for varying the articles of association, and, in addition, an ordinary resolution to sanction the issue of the Debentures, and at the same time it would be advisable by ordinary resolution to formally sanction and approve of the Agreement with W. Woolley for the construction of the railway and works.

(ed) Seward Brice
5 New Ch. Lincs. Inn.
1. 10. 89

Copied by me
5. 4. 90
Ind.

Compared by me
5-4-90

(5)

E.1
PW 3.98

The Nilgiri Railway Co. Ltd
Woodcote - Coonoor

April March 3rd 1890

1400

To

The Under Secretary to Government
P. W. D - Railway Branch
Madras

Sir

In reply to your No. 1709c of the 31st ulto. I have the honor to send herewith for the information of Government a copy of the opinion of Mr. Seward Brice Q.C. of the 1st of October last.

And at the same time I beg to inform the Government that a second instalment of the amount which the Union Debenture Company undertook to advance to Mr. Wooley - making with the remittance in December last Rs 6.75.000 a quarter of the Company's Capital - was received in Madras on the 1st curst. a fact which should dispel all doubts as to the bona fides of his subscription for the Company's shares, and of his ability to pay for them in due course.

I have the honor to be.
Sir
Your most obedient Servant

Percy W. Wooley.
Secretary.

Ry 7.4.90

07 C.S. 35.18

Ry 14-4-90

E.

Sidney Smith

Art Receipts
Signed

To The Hon'ble the H. E. States
C.S.I.

PUBLIC WORKS SECRETARIAT,
RAILWAY BRANCH.

Station Madras date 9th April 1890.

4972/90

OFFICE NOTE.

The letter of the Secretary is wrongly dated 3rd March.

Copy of
These papers should go to the Govt. Solicitor and he should be asked now to give Govt. definite advice whether the arrangements made by the Company & Mr. Woolley should or should not be accepted as constituting valid subscription of the Capital.

The letters should be printed emergently & forwarded to India in cont.n of previous correspondence.

H.C.S.

11 Apr.

Major Smith may issue the drafts from Madras. They need not be sent up here again.

Or if they are required here today I can pass them in time for post this afternoon.

This letter is in reply to ours asking for a copy of the opinion of Mr. Seward Brice for the perusal of the Govt. Solicitor, who asked that it might be sent to him, Mr. Woolley having stated that he would have no objection to do so.

The papers are at Ootacamund

Sidney Smith
Major R.E.
Undersecy to Govt.
Railway Branch.

No. 492 R dy 11th April 90

PUBLIC WORKS DEPARTMENT.

PROCEEDINGS OF THE MADRAS GOVERNMENT.

150

READ again the following

Progs: of the Madras Govt. P.W. Depto:— } M.E. no. 433-34 R dy 27th March 1890

Read also the following:-

Letter to the Govt. Solicitor Madras — } M.E. no: 1656 C dy 27th March 1890

Letter from — do — " — " 167 dy 27th — do —

Letter to the Secretary Nilgiri Railway Compy. } " — " 1709 C dy 31st — do —

Letter from — do — " — " dy 3rd April 90

The last paper above recorded will be communicated to the Government Solicitor with reference to his letter no. 167 dated 27th March 1890, with the request that he will now give Government definite advice whether the arrangements

arrangements made by the Company and Mr. Woolley should or should not be accepted as constituting valid subscription of the Capital.-

2. A copy of these Proceedings will be forwarded for the information of the Govt. of India in continuation of this ~~Government~~ department letter No. 434 R dated 27th March 1890.

Govt. of India

A

No. 492-93 R of 11-4-90

Govt. of India No 493 R of 11th April 1890

Forwarded.

Ld.
14/4/90
D.R.

To
The Government Solicitor
14/4

35.98.

Govt. of 18 Madras.

PUBLIC WORKS.

Ltr. 17.4.90

Dated 14/4/90

Recd. Encl.

G.O., 11th April 1890 No. 492R. 493 R

Pr

Pilgrim Railway Company

Correspondence regarding the arrangements made by the — for raising their Capital expended to the Govt Solicitor

—

Pilgrim Railway Company

—

Forwg copy of Prop. ops: to the Govt Solicitor Correspondence regarding the arrangements made by the — for raising their Capital.

Agreed