COMPANY LAW

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PREFACE

THE object of this book is to provide a thorough grounding in the elements of company law for the student who is entering upon a career, whether in industry, commerce, accountancy, or law, calling for a practical knowledge of the subject. Accordingly it is from this angle that the writer has conceived both the treatment of the subject matter and the plan of the whole. For instance, the Act of 1929 has been taken as the groundwork of the subject rather than as a revise of the older law which it is for the practitioner. Again in writing he has tried to bear in mind that students are apt to be put off by the technical language of the law. A more or less popular style has therefore been adopted, and technicalities have been avoided unless previously explained. Nevertheless it is hoped that the book will still prove useful to its possessor long after his examinations are behind him, even in the case of those making a profession of the law, for as much care has been taken over the drafting of the rules as in a practitioner's work. Indeed this differs from such a work mainly in the omission of a great mass of detail that must necessarily there find a place, and of subjects with which as a rule only a lawyer is called upon to deal.

The writer has freely consulted the leading authorities, such as *Buckley's Companies Acts* (11th edition, 1930), Mr. Topham's edition (1930) of *Palmer's Company Law*, and *Gore-Brown's Handbook* (1930), but in every case he has gone to the cases or the Act for the formulation of the rule. He is greatly indebted to the kindness of Mr. H. C. Gutteridge, K.C., for invaluable criticism and some most helpful suggestions. Grateful thanks are also due to Mr. Robert Ives of these Chambers for a careful perusal of the whole and many thoughtful reminders of a student's difficulties.

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NOTE TO THE READER

THE first question the student usually asks himself on opening a law book is "How much need I learn?" On this occasion the question is an idle one, because the answer is "Everything." The usual business of deciding how much may safely be left out has already been done for him by the author. The reader may rest assured that every effort has been made by the elimination of all but essentials to keep as close as possible to a student's minimum.

The core of the whole work is Table A. The student who really knows his Table A cannot go far wrong whether it be in the Examination or the Board Room, in the Counting House or the Court of Appeal. The Table has accordingly been divided up into sections and printed as an Appendix to the various sections of the book—if Appendix it can be called, for all that goes before in the section really leads up to the clauses of the Table and is intended to be studied as such. The sections of the Act can be taken in the student's stride, that is to say, wherever he finds a section cited in the footnotes he should glance through it and, unless it is obviously mentioned for reference merely, make his own notes as he goes along. Close reading of the sections is in any case valuable because it develops the habit of accurate statement—so necessary in the law—which many imagine to acquire by mechanical memorising. As a rule the footnotes are intended to provide fuller illustration than seemed desirable in the text and are for reference mainly, though the student who aims at honours will not treat them as such but will study them as carefully as the rest. None but the professed law student will need to look up in the Reports the cases of which only the titles are given. For his benefit Order 53B, which sets out the procedure in company matters, is printed as an appendix, so that the nature of the proceedings alluded to in the illustrative cases can be conveniently checked.

It is no bad thing, especially if the daily routine of company work is to form part of the student's business or professional career, to have handy a work such as Alfred Palmer's admirable *Company Secretarial Practice*, or Oldham's *Guide to Company Secretarial Work*, which gives the forms in general use.

The writer trusts that he has done his best towards making the study of this subject a little less forbidding than the study of a chapter in the law is sometimes made to appear.

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CHAPTER I

THE FORMATION OF THE COMPANY

(A) THE COMPANY AS A CORPORATE ENTITY

Introductory. The formation of a company marks as a rule a definite stage in the growth of a business, and though the law has been designed to meet other circumstances as well in which companies come into existence, this will serve as a starting-point for the treatment of the ordinary law governing the normal trading company. The business has developed to a point where more capital is needed than can be provided out of the profits of the concern, or where amalgamation with a similar or rival concern would be an advantage, or where fresh partners are required, but the interests of the business would be best served by their coming in as responsible directors rather than independent proprietors. In circumstances such as these the business will ordinarily be converted into a company.

The Meaning of Corporate Personality. This conversion is of the utmost importance in the eye of the law, as becomes evident as soon as one considers its practical consequences. Thus, the business may have been owned and conducted by John Brown, with or without the help of partners. As soon as the conversion has taken place John Brown Ltd. is as different from John Brown as Arthur Smith, Patrick O'Hara, or any one else. Selina Brown may have been employed by her father as the cashier of the business; she is not an employee of John Brown Ltd., though she continues to act as cashier precisely as before. She will have no claim against the company unless she is in fact taken into the company's service. And the same applies to all others who in the ordinary way of business stood in contractual relationship to John Brown. As for the business premises or other property owned by John Brown, it does not belong to the company, unless he makes it so, and the company cannot sue where the right of action is his. The company has a distinct legal personality, and that corporate personality is something quite distinct from the personalities of its members.[1] This is a basic principle of company law, and is well illustrated in one of the most important of all the leading cases in this branch of the law.

Salomon sold his boot-business for £30,000 to a company consisting of his wife, daughter, and four sons, who each took one £1 share, and himself, who took 20,000 £1 shares. As this left £10,000 still owing to him, he allowed this to stand as a loan to the company, taking debentures by way of security. Bad times came and the company failed. Assets, £6,000; owing to unsecured creditors, £7,000.

The creditors claimed that, as a man could not owe money to himself, their £7,000 should come before his £10,000. The House of Lords held against them. There was no fraud. Salomon and Salomon & Co., Ltd., were different persons, and Salomon could keep the £6,000 in part-payment of his loan. (*Salomon* v. *Salomon & Co., Ltd.*, [1897] A.C. 22.)

Similarly during the war with Germany a company registered and carrying on business in England sought to bring an action for the price of goods sold and delivered before the war. Every shareholder in the company except one, the secretary, a naturalized German resident in England, was a German national resident in Germany. A reminder from the House of Lords was necessary that this did not make the company a German company. The enemy or friendly character of the individual shareholders cannot of itself affect the character of the company. Though the same tribunal found a way of avoiding the practical

[1] "When a body of twenty, or two thousand or two hundred thousand men bind themselves together to act in a particular way for some common purpose, they create a body which by no fiction of law but by the very nature of things differs from the individuals of whom it is constituted." (A. V. Dicey, *Harvard Law Review*, XVII, 511.)

inconveniences of the principle and would not allow the action to be maintained. (*Daimler Co., Ltd.* v. *Continental Tyre & Rubber Co. (Great Britain), Ltd.*, [1916] 2 A.C. 307.)

Different Modes of Incorporation. The normal trading company here dealt with is incorporated under the Companies Act, 1929, and regulated by its provisions, but this is not the only way in which companies come to be incorporated. In public utility undertakings, e.g. for the construction and running of railways, for the supply of gas, water, or electricity, the company is incorporated by virtue of a special Act of Parliament, the provisions of which regulate the company's constitution and management. This has been the practice ever since the early railway companies found the method convenient, from about 1821. The special feature of this mode of incorporation is that the company may exercise compulsory powers, e.g. take land on giving the limited compensation allowed by statute, and commit what, but for its special powers and immunities, would be nuisances at common law, involving it in constant litigation and heavy damages. Again, there are still in existence companies incorporated by virtue of a Royal Charter, e.g. the Bank of England (1694), the Hudson Bay Company, and a few others. Such companies, except for the right of the Crown to annul a charter where the conditions of the grant have been disregarded, are in no way limited as to what they may do; they are unaffected by the doctrine of *ultra vires.* But this mode of incorporation is rarely, if ever, resorted to in the case of a trading company to-day. There might also be mentioned in this connection building societies, and industrial and friendly societies which bear many superficial resemblances to companies though they cannot properly be regarded as companies at all. There is special legislation dealing with them. As for trade unions, it is expressly forbidden to register them under the Companies Act.[1]

[1] Trade Union Act, 1871, s. 5.

Historical. The true forerunner of the present-day limited liability company was the large unincorporated company of the seventeenth century. Incorporation by Royal Charter was always possible (as it theoretically still is), but owing to the delay and expense involved it has never been a method much in favour. Business men might well look askance at it seeing that the grant usually depended on whether the officers of the Crown favoured the project, and on the Board of Trade, it may be remembered, sat—the Archbishop of Canterbury! So it came about that from the seventeenth century onwards joint stock enterprise took the form of large unincorporated companies, which were constituted by the agreement of all the members, where, though liability could not be limited, the risk would be minimised the wider the liability was spread, and where the large capital needed could be obtained from many small subscriptions. Unfortunately the law failed to recognise these large unincorporated bodies, and its treatment of them was most uncertain. This was due to the inherent incapacity of our law to grasp the notion of fictitious personality.[1] Natural persons it could understand, but that there could be anything in the nature of personality attaching to organised groups of men, an idea quite elementary in the Roman Law, it

[1] Incorporation was borrowed from the Roman law, but very little use seems to have been made of it. The Inns of Court themselves never availed themselves of it. "The English judges," says Maitland (*Trust and Corporation, Collected Papers*, III, p. 371), "who received and repeated a great deal of the canonistic learning about corporations . . . had never found that the want of juristic personality was a serious misfortune. Our lawyers were rich and influential people. They could easily have obtained incorporation had they desired it. They did not desire it." In fact the main function of corporation in the common law was to generate the peculiarly English notion of a "corporation sole," where all idea of association is lost because there is only one member. "The honour of inventing corporations," says Blackstone (1 Comm. 469) "entirely belongs to the Romans . . . our laws have considerably refined and improved upon the invention, according to the usual genius of the English nation: particularly with regard to sole corporations, consisting of one person only, of which the Roman lawyers had no notion!" It became a legal fiction useful for securing continuity in the cases of an office holder, principally the parson.

failed to see. Thus even in the case of partnership, coeval with business itself, it had no notion to cover the partnership as distinct from the partners carrying on the business. No matter how long a business might have been established, the firm name might have become a household word, the law saw only the actual partners carrying on business together. And on this footing no partner could substitute another in his place or transfer his share without bringing about a dissolution of the partnership. The death of any one partner automatically brought the partnership to an end. There was no continuity; creditors need never accept the liability of the incoming partners in exchange for that of the outgoing. The liability of the firm meant the joint and several liability of all the partners to the full extent of their resources. Any act of any one partner within the scope of the partnership business bound all the others individually. Such was and still is the law with regard to partnerships. But this exaggerated individualism had a further consequence in the case of the incipient joint stock companies. Quite apart from any recognition of the company once formed, the law doubted whether the very existence of the company did not involve all the members in illegality and expose them to penalties like ordinary criminals. Moreover events in the early part of the eighteenth century were hardly favourable to a liberal development of the law. It was the period of the South Sea Bubble; and though, doubtless, the wild speculation associated with it called for some measure of repression, the Bubble Act of 1719 went altogether too far.[1] The precarious position under it of admittedly sound concerns is well illustrated in the case of *R.* v. *Webb and Others* (1811).[2] Some 2,500 persons in Birmingham entered into a deed of co-partnership to raise a large capital (£20,000) by small subscriptions of

[1] "A panic-stricken parliament issued a law, which, even when we now read it, seems to scream at us from the statute book." (*Maitland, Collected Papers*, III, p. 390.)

[2] 14 East, 406.

£1 per share and to carry on business, under the management of a committee, as The Birmingham Flour & Bread Co. No partner was to hold more than twenty shares, each was to purchase from the company in respect of each £1 share a weekly shillingsworth of flour or bread, and no one should assign his share to anyone who would not enter into similar covenants. A majority at a public meeting was to have power to make bye-laws to bind all the members. Webb and certain other members were indicted for a public nuisance under the Bubble Act. The jury found that the company was formed from laudable motives, for the regular supply of flour and bread to Birmingham, and was beneficial to the inhabitants at large, though prejudicial to the bakers and millers of the town. On this verdict Webb was fortunate enough to escape the penalty, Lord Ellenborough deciding that he was entitled to an acquittal. The learned judge's reasoning makes peculiarly interesting reading. The mischief the Bubble Act aimed at was the raising of subscriptions upon dangerous and mischievous projects where the pretences of the public good were false, and where the unwary were the persons who were drawn in to subscribe. It was not the object of this undertaking to raise stock for the purposes of transfer, nor to make such stock a subject of commercial speculation or adventure. Moreover *they had not presumed to act as a body corporate*. This at first sight seems somewhat startling, but it is consistent enough with the general attitude of the law to corporate bodies already described. "It was urged that they assumed a common name, which however does not appear to have been the case [i.e. in that it was not so found by the jury], that they have a committee, general meetings and power to make bye-laws; but are these unequivocal *indicia* and characteristics of a corporation? How many unincorporated insurance companies and other descriptions of persons are there that use a common name and have their committees, general meetings, and bye-laws?

Are these all illegal? Or which of these particulars can be stated as being, of itself, the distinctive and peculiar criterion of a corporation? Taking it, then, that these subscribers have not acted peculiarly as a body corporate. . . ."

If an enterprise of this kind could subject the shareholders to the risk of prosecution it was but cold comfort for the insurance companies to know that a liberal-minded judge might query whether their illegality was not really academic! The Bubble Act, it is true, was repealed in 1825 but this did little to diminish the doubts and uncertainty in which joint stock enterprise found itself. A measure of recognition, partial it must be confessed, came in 1844, though nothing was conceded in the way of limitation of liability. On the contrary, the Act expressly declared the liability of members for the company's debts to be the same as that of partners. It did however enable companies to become corporate bodies holding property and conducting legal proceedings in their own right. Moreover all companies subsequently formed were to be registered. It was not till 1862 that the principle of limitation of liability was accepted and acted upon. This great Act (a veritable charter of corporate enterprise) simplified the procedure for the formation of companies and greatly reduced its expense. All it required for incorporation was the seven signatures to the Memorandum of Association. On the registration of the Memorandum (and the payment of the proper fees) a certificate of incorporation was to be granted entitling the company to commence business at once. Limitation of liability was to be secured by inserting a clause in the Memorandum to that effect (as now), and making the word "Ltd." part of the trade name of the company. This Act was amended in detail and extended in various ways by a number of acts during the next forty years till the multiplicity of statutes and decisions left the law in a very uncertain state once more. Consequently a consolidating statute was called for and the Companies Act of 1908 came into being. This may be regarded as the first revise of our present code. It has been replaced by the Act of 1929 which along with the relevant decisions constitutes the text of the law governing the trading company to-day.

(B) THE PROMOTER

Who is a Promoter? Before entering upon any of the legal formalities necessary for bringing the company into existence, a number of practical matters have to be taken in hand first. Negotiations, varying with the circumstances, have to be entered into: the owners of property or plant which it is desired to purchase have to be approached with a view to a sale: solicitors, surveyors, engineers, or other technical men, have to be instructed; underwriters or those who propose to arrange the issue of the shares need to be consulted. Needless to say, all this involves very considerable work and it is usually undertaken by men who, by reason of their special experience and often great skill as negotiators, have come to make a business of it. They are commonly known as company promoters, though the title is sometimes resented and generally disavowed.

Now the first point to be observed in this connection is this: In law a person may be considered a promoter, incurring all the liabilities of the promoter under the Companies Act and otherwise, though he would not call himself a company promoter or be regarded as such in the commercial world. It is always a question of fact whether a person has acted as a promoter or not.[1] A promoter may be described as one who undertakes to form a company with reference to a given project, and to set it going, and who takes the necessary steps to accomplish that purpose.[2] But a definition of this kind is not

[1] *Jubilee Cotton Mills, Ltd.* v. *Lewis*, [1924] A.C. 958.
[2] See *Twycross* v. *Grant* (1877), 2 C.P.D. 541.

intended to be exhaustive; nor is it to be narrowly applied. No hard and fast meaning can be said to attach to the term.

A person will be liable[1] as a promoter though he took but a subordinate part in the promotion of the company, though as a rule the mere rendering of professional services, such as those of a solicitor,[2] will not of itself make a person liable. He will be none the less a promoter in that he is himself a dupe of the arch promoter.[3] It will be noted that the terms used in s. 35 (which deals with disclosure in the prospectus) are very wide; the section speaks of "any person who has been *engaged* or *interested in* the formation of the company."

His Legal Position and Liability. The promoter is not a trustee for the company about to be formed. Thus he may sell his own property, or property to be acquired by him, to the company at a profit.[4] But he stands in a fiduciary relationship to the company and must make full and frank disclosure to the company of all material facts which the company ought to know.[5]

[1] If the law on this point seems couched in somewhat unflattering terms, it is due to the fact that it is only where misfortune or fraud has brought the company into difficulties that the promoter's conduct comes to be considered by the courts. It need hardly be said that in the vast majority of cases nothing in any way dishonourable attaches to the promoter or to any one connected with the formation of the company.

[2] *The Great Wheal Polgooth, Ltd.* (1883), 49 L.T.20; see also s. 37 (4).

[3] Jubilee Cotton Mills Case *supra*. "But the fact remains that Lewis took part in the promotion. The part he played was no doubt subordinate to that played by Hooley, but he acted on his own account, not as a servant or professional man. It appears to be impossible to frame any definition of the term 'promoter,' which would not include one who took the part which Lewis did in bringing this company into existence," per Viscount Finlay at p. 965. (Lewis had agreed to promote a company with a capital grossly in excess of what he could possibly have considered justifiable, which was to purchase a mill in which he had an interest and for which he was to receive 75,000 £1 shares. His interest in the mill was not disclosed. The worthless shares were fraudulently unloaded on the market though the benefit enured to Hooley, to whom before the end of the month Lewis had been made to transfer them. It was argued for Lewis that the company formed was not the one he intended.)

[4] *Omnium Electric Palaces, Ltd.* v. *Baines*, [1914] 1 Ch. 332, C. A. Sargant, J., pp. 345–8.

[5] See *Erlanger* v. *New Sombrero Phosphate Co.* (1879), 3 App. Cas. 1218.

The owners of Olympia were in difficulties, and there were heavy mortgages and other charges on the property. A company was formed with the object of acquiring Olympia. The directors were Gluckstein, Lyons, Hart, and Hartley. They were also the promoters of the company. Moreover, it was they who bought Olympia from the owners and they who sold it to the company. A clause of their agreement with the company provided that the validity of the sale should not be impeached on the ground that the vendors as promoters or otherwise stood in a fiduciary relationship to the company. The prospectus issued to the public pointed out that the four were selling to the company for £180,000 ("being nearly £18,000 less than the amount of Messrs. Driver & Co.'s valuation,") while they themselves had bought at £140,000 ("payable in cash"). There was thus a disclosure of their profit of £40,000. But, for all that, as Lord Macnaughten said, "the sum of £140,000 was not the sum they were going to pay, and they knew that well enough. They had provided themselves with counters obtained at little price, which in reckoning the price would be taken, as they knew, at their face value, so that the price of the property to them would only be about £120,000." One of the "counters" was a mortgage for £10,000 which they had bought in at the very outset for £500. The only reference to it, however, in the prospectus was in these terms. "Any other profits made by the syndicate from interim investments are excluded from the sale to the company." The Lords were of opinion that the want of proper disclosure amounted to a gross fraud, and all who were parties to it were responsible to make good to the company what they had obtained and withheld from the shareholders.

"These gentlemen set about forming a company to pay them a handsome sum for taking off their hands a property which they had contracted to buy with that end in view. They bring the company into existence by means of the usual machinery. They appoint themselves sole guardians and protectors of this creature of theirs, half fledged and just struggling into life, bound hand and foot while yet unborn by contracts tending to their private advantage, and so fashioned by its makers that it could only act by their hands and only see through their eyes. They issue a prospectus representing that they had agreed to purchase the property for a sum largely in excess of the amount which they had, in fact, to pay. On the faith of this prospectus they collect subscriptions from a confiding and credulous public. And then comes the last act. Secretly, and therefore dishonestly, they put into their own pockets the difference between the real and the pretended price. After a brief career, the company is ordered to be wound up. In the course of the liquidation the trick is discovered. Mr. Gluckstein is called upon to make good a portion of the sum which he and his associates had misappropriated. . . . He may or may not be able to recover a contribution from those who joined with him in defrauding the company. He can bring an action at law if he likes. If he hesitates to take that course or takes it and fails, then his only remedy lies in an appeal to that sense of honour which is popularly supposed to exist among robbers of a humbler type." (*Gluckstein* v. *Barnes*, [1900] A.C. 240.)

Similarly in *In re Leeds and Hawley Theatres of Variety Ltd.*, [1902] 2 Ch. 809 (C.A.) it was held that—

The promoters as such stood in a fiduciary position towards the persons who were invited to take shares in the company and that it was their duty to disclose to these persons the fact that they were the real vendors to the company. (They had employed a man of straw to appear as vendor and paid him £5 for the use of his name.) They were held liable to account to the company for the profit they had made on the purchase and resale of the property.

He cannot relieve himself of such equitable obligations by any astuteness in the drafting of the articles of association of the company.[1] The prospectus must state the amount paid within the two preceding years or intended to be paid to any promoter, and the consideration for any such payment.[2]

Provided full disclosure is made to the company, promoters are not precluded from appointing their own nominees as directors.[3] But directors may not receive

[1] *Omnium Electric Palaces, Ltd.* v. *Baines*, [1914] 1 Ch. 332, C.A., p. 347.

[2] S. 35, Sch. IV, Part 1, 12.

[3] See *Lagunas Nitrate Co.* v. *Lagunas Syndicate*, [1899] 2 Ch. 392 per Lindley M.R. at p. 425–6.

their qualifying shares from a promoter.[1] Where a prospectus contains untrue or misleading[2] statements, a promoter who is a party to the preparation of it or to such part of it as contains the untrue or misleading matter is liable to pay compensation to all who subscribe for shares or debentures on the faith of the prospectus and suffer loss as a consequence, unless the promoter can prove (1) that he had reasonable grounds for believing the statement to be true, or (2) that it was a statement in the report of an expert whose competence he had no reason to doubt—by expert is meant a person whose profession gives authority to a statement made by him, such as an engineer, valuer, or accountant—or (3) that it was a statement correctly copied from a public official document.[3] This is, of course, in addition to any remedy the aggrieved person may have at common law, e.g. in fraud. In the winding up of the company, a promoter who has been guilty of any misfeasance or breach of trust in relation to the company, may be ordered to contribute such sum to the assets of the company as the court thinks just.[4]

On the principle that a person purporting to act for a non-existent principal is himself liable on the contract, a person who enters into contracts on behalf of a company about to be formed is personally liable, and the company cannot be bound by them even after formation and even though it takes the benefit of them. The promoter therefore will have no claim against the company for services rendered prior to formation, even though he performs them at the request of those who become the first directors

[1] Cf. *In re London and South Western Canal, Ltd.*, [1911] 1 Ch. 346. ("Were it not for the peculiar circumstances of their qualification [as a gift from the promoters, see p. 125 below] it would appear inexplicable how six days after the company was registered the directors could have resolved to buy for £88,000 property that had cost the vendor £500 about three months previously.")

[2] *Greenwood* v. *Leather Shod Wheel Co., Ltd.*, [1900] 1 Ch. 421 C.A. per Lindley M.R., p. 434.

[3] See s. 37 for the full terms.

[4] S. 276.

of the company. Moreover he will be personally liable on contracts he makes for the benefit of the company to be formed, unless he stipulates for his liability to cease should the company adopt the contracts, and, failing adoption within a specified and reasonable time, for a right to rescind.[1]

(C) THE FORMALITIES OF INCORPORATION

As soon as all preliminary negotiations are completed the company is ready to be formed. The formalities necessary are now in reality very simple. A document called the Memorandum of Association, stating that the signatories, who agree to take so many shares, are desirous of being formed into a company, is signed by seven of the proposed shareholders. The seven may include, though not necessarily, some of the proposed directors. This document, a form of which is set out in the first Schedule to the Act and will be referred to below, is filed with the Registrar of Companies. Certain other documents, namely, The Articles of Association, A List of Persons who have consented to act as Directors, A Statement of the nominal capital of the company, A Statutory Declaration to the effect that all the statutory requirements for the registration of the company have been complied with, have to be filed along with the Memorandum of Association. Whereupon the Registrar issues his certificate[2] of incorporation and as from the

[1] Cf. *In re National Motor Mail-Coach Co., Ltd.* (*Clinton's Claim*), [1908] 2 Ch. 515, C.A. pp. 520–1, 522–6.

[2] This certificate is conclusive (s. 15 (1)). The Court is bound to recognise the company as incorporated and to give effect to all the consequences of such incorporation. Thus, in *Hammond* v. *Prentice Brothers, Ltd.*, [1920] 1 Ch. 201, the plaintiffs sought to impugn the freehold title of the defendants and to maintain that a right of way and exemption from tolls had never vested in the defendant company because the company ought never, according to their contention, to have been registered. But the Court refused to entertain the idea. The certificate was conclusive evidence that it was a company authorised to be registered under the Act, even if it had been formed for the mere purpose of being so registered.

date of incorporation[1] inserted in the certificate the company comes into existence. But though the company is now an incorporated body, enjoying legal capacity as such,[2] it is important to bear in mind that the company may not commence business[3] or exercise any of its borrowing powers until it has received from the Registrar the certificate entitling it to commence business (s. 94). This matter will be dealt with more fully below. Here it is sufficient to emphasise that the certificate of incorporation does not of itself entitle the company to exercise any of its powers. The company must wait until the grant of the further certificate.

The Memorandum and Articles. Though all the documents that have to be filed in order to secure the certificate of incorporation are equally essential, that is to say, the absence of any one of them will prevent the issue of the certificate, from the practical point of view of the company's future working, two of them are in a class by themselves. They are the Memorandum of Association and the Articles. The Memorandum defines the objects of the company, and, once filed, cannot afterwards be altered[4] except by the Court. The Articles set forth the constitution of the company, defining the rights of the shareholders as members of the company, and these may be altered by the votes of the members. It is, of course, open to the promoters of the company to make their own constitution, to frame their own rules for the procedure of the company's meetings, the voting rights of the members, the management of the company's affairs, the duties of the directors, and so forth. But as a matter of practice this is very

[1] In point of time "from the date of incorporation" does not mean from the commencement of the next day; the corporation must be treated as having been in existence for the whole of the day of incorporation (*Jubilee Cotton Mills, Ltd.* v. *Lewis*, [1924] A.C. 958).

Nothing in the statute authorises the registrar to antedate the incorporation (*ibid.* p. 974).

[2] S. 13 (2).

[3] An exception is to be found in the case of a private company, but for this see p. 188.

[4] S. 4.

rarely done. The Act has provided a model constitution, a set of Articles always referred to as Table A[1] ("Regulations for Management of a Company limited by Shares") and the almost invariable practice now is for companies to adopt Table A with such modifications as their special circumstances require. If the company has no Articles of its own, Table A applies automatically.[2] Every member is entitled to have a copy of the Memorandum and Articles[3] and, of course, any article so long as it is in force binds all the members. In the language of the Act, the Memorandum and Articles bind the company and the members just as if they had been signed and sealed by each member.[4] The Memorandum and Articles, though generally bracketed together in this way, are quite distinct things. Most companies can use in substance the Articles provided by the Act; the Memorandum similarly provided can, of course, only be used as a form. It will be here used to illustrate the law that has grown up round each of its clauses.

The Memorandum scheduled to the Act is as follows—

FORM OF MEMORANDUM OF ASSOCIATION OF A COMPANY LIMITED BY SHARES

1st. The name of the company is "The Eastern Steam Packet Company, Limited."

2nd. The registered office of the company will be situate in England.

3rd. The objects for which the company is established are: "The conveyance of passengers and goods in ships or boats between such places as the company may from time to time determine, and the doing all such other things as are incidental or conducive to the attainment of the above object."

4th. The liability of members is limited.

5th. The share capital of the company is two hundred thousand pounds divided into one thousand shares of two hundred pounds each.

[1] If the reader cares to sample them at this stage, he might glance at page 54.

[2] S. 8. [3] S. 23. [4] S. 20.

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company, in pursuance of this Memorandum of Association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names.

Names, Addresses, and Descriptions of Subscribers			Number of shares taken by each Subscriber
"1. John Jones of	in the county of	merchant	200
"2. John Smith of	in the county of	—	25
"3. Thomas Green of	in the county of	—	30
"4. John Thompson of	in the county of	—	40
"5. Caleb White of	in the county of	—	15
"6. Andrew Brown of	in the county of	—	5
"7. Caesar White of	in the county of	—	10
		Total shares taken	325"

Dated the day of 19 .

Witness to the above signatures,
A. B., No. 13 Hute Street, Clerkenwell,
London.

(1) THE NAME OF THE COMPANY

A. Limited. The word "Limited" or some abbreviation, usually "Ltd.," must form part of the company's name, coming at the end.[1] The company's name—"The Eastern Steam Packet Co., Ltd."—must appear in a conspicuous position, in letters easily legible, outside every office or place of business of the company, and similarly on the company's stationery, advertisements, notices, documents, and seal.[2]

It may be useful to bear in mind that the omission of the word "limited" from the company's bills of exchange or orders may render the officer so signing personally liable if the company fails to pay. Thus where order forms, say

[1] S. 2. The Board of Trade may dispense with "Ltd." in the case of charitable and similar companies (s. 18). The omission of the word in the case of trading companies and all companies not exempted under s. 18 may involve the officers of the company in a fine of £50 (s. 93).
[2] S. 93.

in a restaurant, are signed "p.p. Eastern Steam Packet, Jock Anderson, Publicity Manager," or some such convenient form, if the company fails to pay for the food consumed Jock Anderson will himself be liable though he had made it clear that he was ordering for and on behalf of the company.[1]

B. Choice of Name. The company may choose to be registered under any name it pleases, subject only to the following qualifications.

(*a*) The following words may not be used as part of a trading company's name: "Red Cross," "Anzac," "Building Society," "Chamber of Commerce,"[2] or, in the case of a money-lending company, "Bank," or without permission of the Board of Trade, "Royal," "Imperial," "Municipal," "Chartered," or "Co-operative."[3]

(*b*) The name chosen may not be the same as that of a company already registered[4] or of a business already established[5] or so nearly resemble it as to be calculated to deceive.

C. Names Calculated to Deceive. In this connection it is necessary to consider in what circumstances similarity of names will disentitle a company to make use of the name it has chosen because it may be said to be calculated to deceive.

First, intention is immaterial. It is not necessary for the plaintiff to make out that the defendant copied the plaintiff's name, or to prove any fraudulent intent on the part of the defendant; and conversely it is no defence for a company to say that they did not know that they were infringing a well-established trade name.[6] On the other

[1] S. 93 (4) and see *Civil Service Co-operative Society, Ltd.* v. *Chapman* (1914), 30 T.L.R. 679.

[2] Except under s. 18.

[3] S. 17.

[4] S. 17 (1) (*a*).

[5] Cf. Ewing's Case below.

[6] "The law prevented a man from carrying on a business in such a way, *whether he knew it or not*, as to represent that his business was the business of another man," per Jessel M.R. in *Merchant Banking Co. of London* v. *Merchants Joint Stock Bank* (1878), 9 Ch.D. 560, 563. See further, *Waring & Gillow, Ltd.* v. *Gillow & Gillow, Ltd.* (1916), 32 T.L.R. 389.

hand, where the names are sufficiently distinguishable, it does not matter that the particular combination of words in the defendant company's name suggested itself to the defendants' minds because the plaintiffs had used a similar combination.[1] In whatever way, or for whatever reason the name may have been chosen the sole question is: Is the name in itself calculated to deceive?

Secondly, "Calculated to deceive" does not necessarily mean that a person desiring to be a customer of, or have dealings with the one company is induced by the similarity of names to deal with the other company. It is enough if confusion may arise between the two businesses, e.g. by suggesting that the two businesses are in some way connected. Thus—

Ewing carried on business as the Buttercup Dairy Co., or, popularly, the Buttercup. He had 150 shops in Scotland and the North of England, and sold some 50 tons of margarine a week. Twelve years or more after the business had been established, the defendant company came into being, with a head office in London, choosing the name Buttercup Margarine Co., Ltd. The Court forbade the use of the name. (*Ewing* v. *Buttercup Margarine Co., Ltd.*, [1917] 2 Ch. 1 C.A. See also *Harrods, Ltd.* v. *R. Harrod, Ltd.* (1923), 40 T.L.R. 195.)

But there must be more than a bare possibility of confusion. Merely because a thoughtless person might unwarrantably jump to the conclusion that the two businesses were connected, that is no ground for preventing the use of a name. There must be a tangible risk of injury to the plaintiff's business reputation owing to the similarity of names. Thus—

A trade protection society registered under the name of "The Society of Motor Manufacturers & Traders, Ltd." sought to prevent an insurance company using the name "Motor Manufacturers' & Traders' Mutual Insurance Co., Ltd.," but the Court of Appeal held against them. The

[1] See *The Society of Motor Manufacturers & Traders, Ltd.* v. *Motor Manufacturers' & Traders' Mutual Insurance Co., Ltd.*, [1925] 1 Ch. 675 C.A., p. 685.

plaintiff was not entitled to a monopoly of descriptive words, and there was no tangible risk of injury to the plaintiff's business reputation owing to the similarity of names, which in any case were sufficiently distinguishable ([1925] 1 Ch. 675 (C.A.), see Lawrence, J., p. 684–90).

Waring & Gillow, Ltd., the well-known furniture dealers in Oxford Street, sought to restrain Gillow & Gillow, Ltd., the company into which Mr. C. L. Gillow, an auctioneer (largely of Oriental rugs), had converted his business, from using that name, but their action failed. The defendant company was not likely, on any reasonable or legitimate ground, to be mistaken for the plaintiff company. (*Waring & Gillow, Ltd.* v. *Gillow & Gillow, Ltd.* (1916), 32 T.L.R. 389.)

Where the Registrar, having fairly exercised his discretion, declines to register a name because of such similarity the Court will not interfere.[1]

D. Change of Name. A company may change[2] its name, with the approval of the Board of Trade, by means of a special resolution.[3]

(2) THE REGISTERED OFFICE

As from the day on which the company begins to carry on business and, at the latest, twenty-eight days from incorporation, the company must have a registered office, otherwise the company and its officers are liable to a default fine.[4]

The registered office must be situate either in England or Scotland.[5]

In the past a company was occasionally incorporated in the Channel Islands, ostensibly for the purpose of avoiding income tax, though really for more questionable purposes. This abuse has now been remedied. Such company, if it carries on business in England or Scotland, must file documents and make returns to the Registrar

[1] *R.* v. *Registrar of Companies*, [1912] 3 K.B. 23.

[2] S. 19.

[3] The nature and requirements of a special resolution are dealt with below, p. 91.

[4] S. 92.

[5] S. 2.

just as if it were registered in the country where it carries on business.

This clause in the memorandum is not conclusive as to the liability of the company to income tax.[1] It does not of itself determine that the company is a person residing in the United Kingdom; it depends on where the real business is carried on.

(3) THE OBJECTS

Before this most important topic can be properly appreciated, it is necessary to consider some of the peculiarities of the English law as to corporate personality, and more particularly a difficult, though fundamental, principle known as the Doctrine of *Ultra Vires*.

Though, as was said above, a company from the date of its incorporation enjoys legal capacity as such, that capacity is by no means unrestricted as it is in the case of the ordinary individual trader. Caleb White when he can get no freights or passengers for his ships may employ them in any other conceivable way which might bring him some return. Nor need he confine himself to his shipping business; he can run as many businesses simultaneously as he can conveniently manage. In entering into any contract he never need pause for a moment to consider whether it is within the scope of any of his businesses. In all his acts, provided only they be lawful, he is absolutely free. But no sooner has he become The Eastern Steam Packet Co., Ltd., than this absolute freedom is gone. He can contract only within the scope of the powers enjoyed by the company. If the object of the company is to carry "passengers and goods in ships or boats" he cannot run an air service, even though that helps to increase the boat traffic. The company having been formed to carry on one business may not carry on another. With reference to any act of the company it has

[1] S. 52. *Egyptian Delta Land & Investment Co., Ltd.* v. *Todd*, [1929] A.C.1.

always to be considered whether or not the act can reasonably be said to come within the powers possessed by the company. This is the effect of the doctrine of *ultra vires*.

Meaning and Purpose of Ultra Vires. Two things, it will be readily seen, are here implied. First, that a company has a proper function of its own. Secondly, anything beyond or outside its scope is forbidden and illegal. The Eastern Steam Packet Company is there to carry passengers and goods by boat. It may not engage in any other business. How is the proper function of a company to be determined? By looking to the terms of the Objects Clause. The purpose of the Objects Clause is to define the main business of the company. That purpose, it has been said, is twofold. "The first is that the intending corporator who contemplates the investment of his capital shall know within what field it is to be put at risk. The second is that any one who shall deal with the company shall know without reasonable doubt whether the contractual relation into which he contemplates entering with the company is one relating to a matter within its corporate objects."[1] This incidentally provides the practical answer to the question, "Why should not a company be allowed to trade precisely as an individual?" Why should not the Eastern Steam Packet Co. run airships just as Caleb White might do? The answer is that those who would willingly invest in a steam-boat company might hesitate before putting their money into an air line. Those who had invested in a steamship company would have, quite apart from the law, a genuine grievance if the directors have been losing money on a new glider. Consequently each company has its own proper business and must confine itself to that. That business is defined by the Objects Clause. But for the proper understanding of the clause and the way it operates a careful consideration of the principle of *ultra*

[1] Per Lord Wrenbury in *Cotman* v. *Brougham*, [1918] A.C. 514, 522.

vires is necessary. The best definition of that principle is still to be found in the language of the leading case on the subject.

Definition of the Principle. The objects of a company as stated in the Memorandum of Association cannot be departed from.

The Memorandum defines the ambit and extent of the powers which by law are given to the company, and in doing so necessarily implies that nothing shall be done beyond that ambit, and that no attempt shall be made to use the corporate life of the company for any other purpose than that so specified.

Consequently, a contract made by the directors upon a matter going beyond the Memorandum or not warranted by it is *ultra vires* and void.

Such a contract cannot be rendered binding on the company—or on the other parties to it—though afterwards expressly ratified by all the shareholders.

The Ashbury Railway Carriage Co., Ltd., was formed to make and sell railway carriages. The directors agreed to purchase a concession for *constructing a railway* in Belgium. The House of Lords held the agreement bad, though the Articles purported to give power to the company to extend its business beyond the Memorandum by special resolution, and the agreement had been so confirmed. (*Ashbury Railway Carriage Co., Ltd.* v. *Riche* (1875), L.R. 7 H.L. 653.)

Again, the Trustees of Dundee Harbour, an incorporated body, had power to maintain a ferry service on the Tay between Dundee and Newport. When the steamers were not in use, they were employed on excursion trips in the upper reaches of the Tay, beyond the ferry limits. Nicol, who used his steamers for similar excursion trips found that this interfered with his trade. He accordingly applied for an injunction[1] to restrain the Harbour Trustees. The House of Lords held he was entitled to it. What the Harbour Trustees were doing was *ultra vires*. To run excursion steamers beyond the ferry limits is no part of the business of a ferry service. (*Dundee Harbour Trustees* v. *Nicol*, [1915] A.C. 550.)

[1] Strictly an interdict in Scotland.

To be Reasonably Construed. But the doctrine of *ultra vires* is to be reasonably applied. Whatever may be fairly regarded as incidental to or consequent upon the main objects specified in the Memorandum ought not (unless expressly prohibited) to be held *ultra vires*.[1]

Thus, a gas company had power (*a*) to make and supply gas (*b*) to convert and sell residual products. . . . (*f*) to provide such apparatus and materials as they deemed requisite for those purposes. In order to convert their residual naphthalene into a marketable product they required caustic soda. Held they were entitled to manufacture the caustic soda required. The company have express powers to convert naphthalene into beta-naphthol; they have by reasonable implication a power to provide the proper reagent—namely caustic soda; a proper and reasonable means of providing that substance is to make it, and to do so not being excluded, they have by reasonable implication the power to provide the substance by that means. (*Deuchar* v. *Gas Light & Coke Co.*, [1925] A.C. 691.)

Brunner Mond & Co., Ltd., was formed with the primary object of carrying on business as chemical manufacturers and for various other objects ancillary thereto. The list concluded with "(*s*) The doing of all such business and things as may be incidental or conducive to the attainment of the above objects, or any of them." The company duly passed a resolution authorising the directors to distribute to the Universities or other scientific institutions in the United Kingdom as they might select, the sum of £100,000 for the furtherance of scientific education or research.

A shareholder objected. It was the community at large not the company that would be benefited by the proposed expenditure. The money could be applied for education which would in no way benefit the company and might even indirectly help foreign rivals in active competition with the company.

The company tendered evidence to show that it was desirable to attract men of ability to scientific research so as to increase the class from which they could select their

[1] See *A. G.* v. *G.E.R.* (1880), 5 App. Cas. 473, 478, and *Evans* v. *Brunner Mond, Ltd.*, [1921] 1 Ch. at p. 364 (cited below, p. 25). Cf. *Egyptian Salt & Soda Co., Ltd.* v. *Port Said Salt Association, Ltd.*, [1931] A.C. 677 P.C. 682.

technical experts, and that the existence of such a class was necessary for the continued progress of the company as chemical manufacturers.

On this evidence the Court held the proposed expenditure not *ultra vires*. It was reasonably conducive and indeed necessary for the company's continued progress as chemical manufacturers. (*Evans* v. *Brunner Mond & Co., Ltd.*, [1921] 1 Ch. 359.)

Contrast *Tomkinson* v. *S.E.R.* (1887), 35 Ch.D. 675.

The South Eastern Railway Company authorised the directors to subscribe £1,000 towards the erection of the Imperial Institute. Mr. Tomkinson objected. The Railway Company replied that it had inherent power to do whatever might be conducive to its popularity or to the objects of its undertaking. The Court disallowed it. "The Imperial Institute has no more connection with this railway company than . . . Madame Tussaud's. I do not mean to disparage the enormous importance of the Imperial Institute. It may be established for the highest possible objects of interest to this country; but still the only reason given to me why this railway company thinks it right to spend part of its funds in subscribing to it is this, that it will probably greatly increase the traffic of the company by inducing many people to travel up to visit this Institute. I cannot accept that as a reason for a moment. . . . I know of no authority whatever for saying that the payment of £1,000 subscription to the Imperial Institute would be within the powers of a railway company."

Where there is an express power to employ labour there is an implied power to provide pensions or superannuation allowances, for though such payments do not arise until the employment has ceased they are most conducive to efficient and loyal service. (*Wimbledon and Putney Common Conservators* v. *Tuely*, [1931] 1 Ch., 190.)[1]

The fact that a particular use of the company's property is profitable and in that way helpful to the company's main undertaking is beside the point. The use in question

[1] But not an annuity to the widow of a former director five years after his death (*In re Lee, Behrens & Co., Ltd.* (1932), 48 T.L.R. 248).

is not on that account incidental within the meaning of the rule.

Thus, in the Dundee Harbour Case it was urged that the use of the steamers for excursion purposes was incidental to the main purpose of the ferry. But the House of Lords rejected the contention. "The circumstance that one of these steamers is normally in reserve and that it is economically desirable to use it when the business of the ferries does not require it, cannot make what is proposed *intra vires*. For a power to send excursion steamers beyond the statutory limits, within which alone the appellants' steamers are authorised by the statute to sail, is not implied in nor is in any sense incidental to a power to sail within limits so defined."[1]

It is not enough to show that the act impugned is "incidental" under one or other of the headings specified in the Memorandum. To be *intra vires* it must be incidental or conducive to the main or paramount purpose of the company.

In construing the "incidental or conducive" clause[2] in the Brunner Mond Case, Eve, J., said "That clause again must be read with certain qualifications. You cannot pick out some of the objects enumerated under the letters (*a*) to (*r*), and having determined the particular act to be incidental or conducive to that object thereupon decide that the act is *intra vires*. The wide and general objects are to be construed as ancillary to the company's main purpose, and I apprehend that the act to be *intra vires* must be one which can fairly be regarded as incidental or conducive to the main or paramount purpose for which the company was formed."[3]

In *Ashbury* v. *Riche* it was contended that even if the construction of a railway was not positively authorised by the words of the Memorandum, it was not prohibited by

[1] Per Viscount Haldane, L.C., [1915] A.C. at p. 557.

[2] Above p. 23.

[3] [1921] 1 Ch. at p. 364. "Incidental" in my view means incidental to the main purpose of the main business." (Lord Dunedin in *Dundee Harbour Trustees* v. *Nicol*, [1915] A.C. 550 at p. 561.)

them, and the words "general contractors" ("to carry on the business of mechanical engineers and general contractors") were large enough to include the making of any contract, at any rate relating to lands and buildings. But the Court rejected the contention. If the words were not interpreted to mean the making of such contracts as mechnical engineers are in the habit of making, they would stand without any limit whatsoever. They "would authorise the making of contracts of any and every description, and the Memorandum, in place of specifying a particular kind of business, would virtually point to the carrying on of business of any kind whatsoever and would be, therefore, altogether unmeaning."[1]

The Framing of the Objects Clause. The Objects Clause in the Memorandum appended to the Act, though intended to serve as a model, is very rarely to be found in practice in the same concise form. The ordinary trading company's clause is usually lengthy and often extremely detailed. As will be seen, the law does not altogether approve of this departure from a good precedent, but the fact is, it is a matter of some nicety if not of difficulty to draft the Memorandum in such a way that the company's officials will feel secure and not need to be continually seeking advice as to whether their trading operations are *ultra vires* or not.

It might be as well to refer to the only positive requirements of the Act with regard to it. S. 2 provides that the Memorandum of every company must state the objects of the company, and the schedule provides a model objects clause to which the company's clause must conform as nearly as circumstances admit.[2]

It almost goes without saying that the objects stated must be legal, otherwise the Registrar will refuse his certificate. Though once the certificate has been granted it is conclusive on this point as well.[3] Where a company was formed for the purpose of selling Irish Sweepstake

[1] See L.R. 7 H.L. at p. 665.
[2] S. 11.
[3] Cf. *Cotman* v. *Brougham*, [1918] A.C. 514, 517, 523.

tickets in England (where the sale is illegal, being prohibited by s. 44 of the Lotteries Act, 1823) the Registrar declined to register the company and, on the promoters appealing, the Court of Appeal upheld him.[1]

The Objects Clause must delimit and identify the objects in such plain and unambiguous manner as that the reader can identify the field of industry within which the corporate activities are to be confined. It is to be noted that the Act says "Objects" not "Powers." The powers to be exercised in effecting its objects are not the same as the objects themselves and a distinction must be drawn between the two. "Powers are not required to be, and ought not to be specified in the Memorandum. The Act intended that the company, if it be a trading company, should by its Memorandum define the trade, not that it should specify the various acts which it should be within the power of the company to do in carrying on the trade."[2]

It should be pointed out, however, in explanation of the practice that has grown up and, incidentally, in deprecation of the severe strictures passed by learned judges upon the practice from time to time, that express inclusion of a particular class of acts which the company is to have power to do removes a great burden from the shoulders of the directors and other officials of the company.[3] Whether the proposed undertaking be more properly a "power" than an "object," express authorisation to do that particular kind of thing gives no handle to disgruntled shareholders, while the omission of it leaves the directors with nothing but an expensive hope that

[1] *R.* v. *Registrar of Joint Stock Companies, ex parte More,* [1931] 2 K.B. 197 C.A. See further *Bowman* v. *Secular Society, Ltd.*, [1917] A.C. 406.

[2] See *Cotman* v. *Brougham,* [1918] A.C. 514, 522, *infra* p. 28.

[3] The subject has assumed a special importance in recent times, because scientific inventions and discoveries follow one another so rapidly, enabling manufacturers and others to develop profitable lines of business never contemplated at the time of the formation of the company. A company will naturally wish to take power to utilise by-products in as many ways as possible.

"incidental and conducive" will be stretched by the Court to cover them. The following maxims should enable a clause to be drawn satisfying every legitimate requirement of business convenience without exceeding the limits laid down by the courts.

1. Whatever the company may be, there is clearly something that can be considered its main business.[1]

2. Where that business does not fall within any one recognised trade or industry, or where the practical considerations are otherwise such as to require it, it is as well to specify the main undertakings, bearing in mind the distinction between objects and powers; it is not necessary to indicate every class of act which the company is to have power to do.

3. The terms employed should not be too wide because they may then be construed against the company.[2] Persons trading with the company will want to know whether their contracts are good and if the language is too general they may not be able to tell at all.[3]

4. The Clause should not be too detailed or prolix, "so as to bury beneath a mass of words the real object of the company."[4]

[1] Cf. *In re German Date Coffee Co.* (1882), 20 Ch.D. 169 (company formed to work a German patent for manufacturing coffee from dates and to acquire any other inventions for similar purposes. The intended patent was never granted, but the company made coffee from dates in Hamburg and sold it. The Court held that the main object of the company had gone and it should, therefore, be wound up. "Its business was not to make a substitute for coffee from dates, but to work a German patent invention in Germany," per Jessel M.R., p. 186.) See also s. 5 (1) (6).

[2] Cf. the quotation from *Ashbury* v. *Riche*, *ante* p. 26.

[3] See per Lord Wrenbury in *Cotman* v. *Brougham*, [1918] A.C. 514, p. 522, *ante* p. 21.

[4] Cf. *Cotman* v. *Brougham* v.s. The memorandum of the company in question contained an Objects Clause with 30 sub-clauses enabling the company to carry on almost every conceivable kind of business, and the House of Lords queried whether such a memorandum was in compliance with (what is now) s. 2 of the Companies Act. From the practical point of view, however, the Clause served its purpose; the House, though severely criticising the way in which it had been drawn up, had no alternative but to hold that the act impugned (underwriting of shares) was *intra vires*.

There is no way of extending or altering the Objects Clause without going to the Court.[1]

Alteration of the Objects Clause. The Court, however, has power to sanction an alteration of the Objects Clause so as to permit a company to carry on in addition a wholly different business where it is capable of being conveniently and advantageously combined with the company's existing business.

Whether it can be so combined is a question for the directors and shareholders, but it must not be destructive of, or inconsistent with, the existing business.

Thus, the Dunlop Pneumatic Tyre Co., Ltd., afterwards called the "Parent Tyre Co., Ltd.," did not manufacture or deal in tyres itself but was a holding company.

At the date in question it held securities in two other companies valued at over £2,500,000. Power was sought to alter the Objects Clause so as to permit of a banking and underwriting business being carried on as well. The Court sanctioned the alteration, though Mr. Adams, a small dissenting shareholder, was allowed his costs because opposition is useful, wholesome, and ought to be encouraged. (*In re Parent Tyre Co.*, [1923] 2 Ch. 222.)

Moreover in proper circumstances the Court will require a consequental change in the company's name, so that persons having dealings with the company may not be misled.

Money could no longer be profitably invested in the better-class government stocks, so powers were sought to invest in industrials as well. The Court sanctioned the necessary alteration in the Objects Clause, but on condition that some such words as "and other securities" were added to the company's name. (*In re Governments Stock Investment Co.* (No. 2), [1892] 1 Ch. 597. See also *In re National Boiler Insurance Co.*, [1892] 1 Ch. 306; *In re Egyptian Delta Land & Investment Co.*, [1907] W.N. 16.)

[1] See s. 5. Before the Court will confirm an alteration notice must be given to every creditor, debenture holder, or other person whose interests may be affected, so that objections can be heard. See further below p. 204.

In sanctioning such alteration the Court may impose such terms and conditions as it thinks fit. It will have regard to the interests of the different classes of shareholders and creditors and will see that the necessary steps have been taken to ascertain their views.[1]

Although the Jewish Colonial Trust, Limited, was formed as a result of a Zionist Congress which had for its aim the establishment of a publicly and legally secured home in Palestine for the Jewish people, the Objects Clause authorised colonisation schemes in any other part of the world. It was sought to vary this clause so as to restrict the operations of the company to Palestine and adjacent lands.

The nominal capital of the company was £2,000,000, with 100 founders shares, £1 each, and the rest ordinary £1 shares, of which 253,265 had been issued and were fully paid. The shareholders were scattered all over the world.

The special resolution approving the alteration was passed by 4,488 votes against 697 of the ordinary shareholders and confirmed[2] by 4,174 to 2. At both meetings, all the votes upon the founders shares were given in favour of the resolution.

When the Petition came on for hearing on 9th July, 1907, the Court ordered the Petition to stand over until 7th April, 1908, and in the meantime directed advertisements to be inserted in a number of papers circulating amongst the Jewish race in various parts of the world inviting shareholders to communicate their assent to or dissent from the proposed alterations.

18,493 members holding 59,543 shares replied. 16,006 holding 50,117 shares supported and 2,487 holding 9,426 shares opposed the alteration.

Mr. Israel Zangwill, the novelist, appeared in person (along with others) to oppose the Petition.

The Court refused to sanction the alteration; the vast majority of shareholders, representing over three-fourths of the share capital, had given no indication of their wishes on the subject and in any case there was nothing to prevent those in control of the company who were in favour of the alteration allowing the more extended powers of the company to remain dormant.

[1] See s. 5, of which all the provisions should be carefully studied.

[2] As the law then stood, a special resolution required confirmation at a subsequent meeting.

"The council of the company . . . have it in their power, so long as they are so minded, to restrict the operations of the company in the manner and to the extent to which they are now confined and . . . it is quite possible that the extended powers of the company, now dormant, will never be called into activity. But, although the Court cannot, and indeed would not wish to, control this state of things, it is a very different thing where it is appealed to to take a step, the effect of which will be to secure its permanency, whatever be the opinion of the majority of the shareholders for the time being, and whatever be the political exigencies affecting the prosperity—possibly in some parts of the world the very existence—of a great people.

"I think if I were to sanction these alterations I should be doing very little for those who advocate them and inflicting an unfair restraint—possibly an injustice—on those who oppose them and accordingly I dismiss the Petition." (*In re Jewish Colonial Trust, Limited*, [1908] 2 Ch. 287.)

(4) LIMITATION OF LIABILITY

It should perhaps be pointed out that technically speaking it is still possible for a company to be formed under the Act with unlimited liability on the part of the members and in Table E will be found the appropriate Memorandum of Association, though it is very unlikely that any trading company of this character will actually be found in existence.

Where the liability of members is limited it need not necessarily be according to the amount of the member's shares, though this is almost invariably the case in ordinary trading companies. Limitation may be by guarantee. Where the company is formed not strictly for commercial ends, though trading or business operations are involved, as e.g. in the running of a school, this method is sometimes adopted. It is also sometimes adopted in purely commercial concerns, e.g. by shipowners clubs, i.e. mutual insurance associations, and pools. In that case the Memorandum will state that in the event of a winding-up a member will be liable up to a specified amount, say £10 or £25.[1]

(5) THE SHARE CAPITAL

This should not be fixed at a figure higher than the present needs of the business, or the likely needs in the near future, would suggest because stamp duty has to be paid according to the amount,[2] and the capital can be increased when and as desired without the necessity of going to the Court. Provided it be authorised by the articles, the company can increase its share capital by an ordinary resolution, in general meeting.[3] Notice of such increase must be given to the registrar within 15 days of the resolution, but confirmation by the Court is not required.

[1] See ss. 2 and 11. [2] Schedule 10. [3] S. 50.

CHAPTER II

THE CAPITAL OF THE COMPANY

(A) THE PROSPECTUS

As soon as the company is formed the public will be invited to take shares.

The invitation takes the form of a prospectus, which describes the nature of the business the company has been formed to carry on and usually indicates its prospects of success. It is in the prospects as a rule that the inducement lies, and as promoters are mostly sanguine persons apt to overestimate the chances of the company, the law steps in to protect the investor. This it does in two ways. It first of all requires certain specified matters to be set out in every prospectus. These are detailed at length in the Fourth Schedule, and will be discussed below. Secondly it requires all statements appearing in the prospectus, whether required for compliance with the Act or not, to be true and not misleading.

This prospectus serves as the basis of the contract between the company and the prospective shareholder, and quite apart from fraud, any untrue statement gives rise to a claim against every person responsible for its issue.[1] Evasion of the requirements of the law is rendered as difficult as possible. A term requiring the subscriber[2] to waive any of the statutory requirements in his favour

[1] A person who has been induced to take shares in a company by a misleading prospectus has the following remedies open to him—

(1) Claim damages or compensation under s. 35 or s. 37 in respect of any damage he may have suffered.

(2) Repudiate the allotment and claim rescission of the contract. He should take immediate steps to have his name removed from the register (see *First National Reinsurance Co.* v. *Greenfield*, [1921] 2 K.B. 260, and see further below, p. 44). The rectification will be done by order of the Court if necessary under s. 100.

(3) In proper circumstances claim damages at common law for fraud.

[2] S. 35 (2).

is void and of no effect, and no departure from common form or any abridgment will prevent the document being regarded as a prospectus.[1] By definition the term includes any invitation to the public to subscribe for shares, no matter what form it may take.[2] Nor is evasion any longer possible by having an Issuing House issue the prospectus in place of the company.[3] And where no prospectus is issued at all a statement in lieu of prospectus must be filed with the Registrar.[4] The prospectus must be dated, signed by every director, and filed.[5] One further point remains, and as will be seen little opportunity for quibbling is afforded here either. What is meant by *the public* in this connection?

The question is important for another reason. The distinction between a public and a private company really turns upon the invitation to the public to subscribe. Up till now we have been regarding the ordinary trading company as arising out of a privately owned business or partnership, but very often there is an intermediate stage. The fresh capital required can be obtained from private sources and there is no need to go to the public for money. In such circumstances the business may be converted into a private company, when the same limitation of liability can be enjoyed and all the advantages of incorporation, without incurring quite a number of the heavy statutory obligations imposed in the case of the public company. Afterwards, when the business has grown too big for this form of management, it can readily be converted into a public company. Indeed strictly speaking there is no peculiar aptness in law of either form of company to any stage in the growth of a business; the law knows of two kinds of companies, private and public, and business men

[1] The abridged prospectus which was often used for newspaper advertisements has now been rendered unlawful (s. 35 (3)).

[2] S. 380 "any prospectus, notice, circular, advertisement, or other invitation offering to the public for subscription or purchase any shares or debentures of a company."

[3] S. 38. [4] S. 40. [5] S. 34.

are free to choose. There are many privileges, as will be seen later on,[1] attaching to the position of a private company. It is, however, subject to the restriction in question, it may not go to the public for money. What then is meant by the public?

The offer will be to the public[2] when it is such as to be open to any one who cares to subscribe, but not where the offer is confined to a group of existing shareholders or a group of friends or business acquaintances.[3] Where, however, a promoter distributed 3,000 circulars among shareholders of gas companies that was held to be an offer to the public.[4]

Underwriting of Shares. It is very usual to offer the shares to the public through the medium of an Issuing House, when in return for a commission called an underwriting commission those who undertake the flotation guarantee the whole issue. They take up all shares which the public fails to subscribe for. This proceeding is perfectly legitimate, and the Act makes special provision for the underwriting commission which would otherwise be illegal, because it amounts to a discount on the shares and, apart from the exceptional cases to be mentioned, shares may never be issued at a discount. The maximum commission allowable is 10 per cent of the price at which the shares are issued.[5] The Articles of the company must

[1] See below, p. 188.

[2] "'The public' . . . is, of course, a general word. No particular numbers are prescribed. Anything from two to infinity may serve; perhaps even one if he is intended to be the first of a series of subscribers, but makes further proceedings needless by himself subscribing the whole. *The point is that the offer is such as to be open to any one who brings his money and applies in due form, whether the prospectus was addressed to him on behalf of the company or not.* A private communication is not thus open," per Lord Sumner in *Nash* v. *Lynde*, [1929] A.C. 158, 169.

[3] Cf. *Booth* v. *New Afrikander Gold Mining Co.*, [1903] 1 Ch. 295; *Sherwell* v. *Combined Incandescent Mantles Syndicate* (1907), 23 T.L.R. 482.

[4] *In re South of England Natural Gas Co., Ltd.*, [1911] 1 Ch. 573.

[5] This leaves a wide margin, being three to four times the ordinary underwriting commission. For the position where the commission is illegal, cf. *Andreae* v. *Zinc Mines of Great Britain*, [1918] 2 K.B. 454.

authorise it and mention must be made of it in the prospectus [1] and, until written off, in the balance sheet.[2]

Share Hawking. From the legitimate offering to the public of the company's shares for subscription must be carefully distinguished what is commonly known as "share-hawking" or "share-pushing." This has now been made an offence punishable with six months imprisonment and £200 fine, or £500 fine and twelve months imprisonment for a subsequent offence. The offence consists in going from house to house (other than offices used for business purposes) offering shares for subscription or purchase to the public. It is also an offence to offer shares for sale in writing unless the offer is accompanied by a statement containing the full particulars required by the Act.[3]

Special Requirements of the Prospectus. Immediately following this section will be found the Fourth Schedule of the Act, in which all the particulars required of a prospectus are set out. The list is a long and detailed one, and there is no convenient abridgment that can possibly serve as a substitute.[4] Attention is however specially drawn to the following requirements.

The interest of the directors must be fully disclosed. The extent as well as the nature of their interests must be stated, the amount actually paid or to be paid to each, and whether in cash, shares, or otherwise. The director is of course not entitled to make any secret profit out of the formation of the company, even if (which is unlikely) the circumstances do not bring it under one or other heading of the things that have to be disclosed.

Anything paid or payable by way of underwriting commission must be stated, as also the amount or estimated amount of preliminary expenses.

[1] S. 43. [2] S. 44. [3] S. 356.

[4] The student can best familiarise himself with the contents of the schedule by obtaining copies of the prospectuses usually to be found on bank counters and the like, or appearing in the daily papers, and comparing them paragraph by paragraph with the schedule.

The names and addresses of the sellers of property bought or to be bought by the company, and the amount payable to each must be stated. Seller or vendor includes not merely the person from whom the company actually buys the property, but any one who has entered into a contract to buy or sell for resale to the company.[1]

Every material contract[2] must be mentioned with dates and names of parties. Every contract is material "which upon a reasonable construction of its purport and effect would assist a person in determining whether he would become a shareholder."[3]

Thus, Mrs. Coles took shares in a greyhound racing company on the faith of a prospectus which said that the land was "eminently suitable" for the purpose. In fact, but unknown to the Directors, the land had been scheduled to a town planning scheme and unless the consent of the local authority could be obtained before any building were erected, no compensation would be payable on removal.

The Directors, on discovering this, immediately circularised the shareholders and very candidly stated the facts. Mrs. Coles claimed rescission. Held by the Court of Appeal that she was entitled to it, because a material fact had been omitted from the prospectus, though in entire good faith. The land was not "eminently suitable," and the phrase conveyed a mistaken impression to the ordinary mind. (*Coles* v. *White City (Manchester) Greyhound Association, Ltd.* (1929), 45 T.L.R. 230.)[4]

There can be no doubt that very considerable scope is left for the exercise of the directors' discretion in drawing up the prospectus, but it cannot be too strongly insisted that the only safe way, indeed the only way of complying with the law, is not to ask in a doubtful case, "Need this

[1] This provision is to prevent abuses such as buying for the company at a greatly inflated price through a nominee of the promoters as in the case previously cited (p. 11) of *Leeds & Hawley Theatres of Variety, Ltd.*

[2] Not being a contract in the ordinary course of business, e.g. purchases or sales of provisions in a grocery business.

[3] *Sullivan* v. *Mitcalfe* (1880), 5 C.P.D. 455.

[4] See further as to representations in a prospectus *De Tchihatchef* v. *The Salerni Coupling, Ltd.*, [1932] 1 Ch. 330.

fact be disclosed?" but frankly to disclose it. The cases hold out no encouragement to those who think to comply with the law by disclosing no more than they must. The surest guide is probably to be found in the words of Wright, J. (though used in another[1] connection), "if a man of scrupulous honour were asking his friend to lend him money for his concern" how would he state the position?

It is a criminal offence to publish a prospectus knowing it to be false in a material particular, with intent to induce persons to advance money or property to the company.

Throughout the period 1921 to 1927, the R.M.S.P. was working at a loss. Dividends, however, were paid year by year, aggregating £5,000,000 out of undisclosed transfers of secret reserves and non-recurring items of revenue.

In 1928, a prospectus was issued stating that, although the company in common with other shipping companies, had suffered from depression, the audited accounts of the company showed that during the previous ten years the "average annual available balance" had been sufficient to pay the interest on the present issue (i.e. £500,000) more than five times over.

The statement taken literally clause by clause was true, but its effect as a whole was demonstrably false and calculated to deceive the intending investor.

Lord Kylsant, the Chairman of the Company, was found guilty of the above offence and sentenced to 12 months imprisonment.[2]

[1] To contrast *criminal* liability, in his summing up to the jury in *R.* v. *Kylsant* (below) "That was the view from the point of honour; but they were dealing with the strict rules of an alleged criminal act."

[2] See *The Times* newspaper, 31st July, 1931, for Wright, J.'s, summing up, and for the C.C.A., 23 Cr.App.Rep. 83.

FOURTH SCHEDULE

PART I

MATTERS REQUIRED TO BE STATED IN PROSPECTUS

1. Except where the prospectus is published as a newspaper advertisement, the contents of the memorandum, with the names, descriptions, and addresses of the signatories, and the number of shares subscribed for by them respectively.

2. The number of founders or management or deferred shares, if any, and the nature and extent of the interest of the holders in the property and profits of the company.

3. The number of shares, if any, fixed by the articles as the qualification of a director, and any provision in the articles as to the remuneration of the directors.

4. The names, descriptions, and addresses of the directors or proposed directors.

5. Where shares are offered to the public for subscription particulars as to—

(i) The minimum amount which, in the opinion of the directors, must be raised by the issue of those shares in order to provide the sums, or, if any part thereof is to be defrayed in any other manner, the balance of the sums, required to be provided in respect of each of the following matters—

(*a*) The purchase price of any property purchased or to be purchased which is to be defrayed in whole or in part out of the proceeds of the issue;

(*b*) Any preliminary expenses payable by the company, and any commission so payable to any person in consideration of his agreeing to subscribe for, or of his procuring or agreeing to procure subscriptions for, any shares in the company;

(*c*) The repayment of any moneys borrowed by the company in respect of any of the foregoing matters;

(*d*) Working capital; and

(ii) The amounts to be provided in respect of the matters aforesaid otherwise than out of the proceeds of the issue and the sources out of which those amounts are to be provided.

6. The amount payable on application and allotment on each share, and, in the case of a second or subsequent offer of shares, the amount offered for subscription on each previous allotment made within the two preceding years, the amount actually allotted, and the amount, if any, paid on the shares so allotted.

7. The number and amount of shares and debentures which within the two preceding years have been issued, or agreed to be issued, as fully or partly paid up otherwise than in cash, and in the latter case the extent to which they are so paid up, and in either case the consideration for which those shares or debentures have been issued or are proposed or intended to be issued.

8. The names and addresses of the vendors of any property purchased or acquired by the company, or proposed so to be purchased or acquired, which is to be paid for wholly or partly out of the proceeds of the issue offered for subscription by the prospectus, or the purchase or acquisition of which has not been completed at the date of issue of the prospectus, and the amount payable in cash, shares, or debentures, to the vendor, and where there is more than one separate vendor, or the company is a sub-purchaser, the amount so payable to each vendor.

9. The amount, if any, paid or payable as purchase money in cash, shares, or debentures, for any such property as aforesaid, specifying the amount, if any, payable for goodwill.

10. The amount, if any, paid within the two preceding years, or payable, as commission (but not including commission to sub-underwriters) for subscribing or agreeing to subscribe, or procuring or agreeing to procure subscriptions, for any shares in, or debentures of, the company, or the rate of any such commission.

11. The amount or estimated amount of preliminary expenses.

12. The amount paid within the two preceding years or intended to be paid to any promoter, and the consideration for any such payment.

13. The dates of and parties to every material contract, not being a contract entered into in the ordinary course of the business carried on or intended to be carried on by the company or a contract entered into more than two years before the date of issue of the prospectus, and a reasonable time and place at which any such material contract or a copy thereof may be inspected.

14. The names and addresses of the auditors, if any, of the company.

15. Full particulars of the nature and extent of the interest, if any, of every director in the promotion of, or in the property proposed to be acquired by, the company, or, where the interest of such a director consists in being a partner in a firm, the

nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares or otherwise by any person either to induce him to become, or to qualify him as, a director, or, otherwise for services rendered by him or by the firm in connection with the promotion or formation of the company.

16. If the prospectus invites the public to subscribe for shares in the company and the share capital of the company is divided into different classes of shares, the right of voting at meetings of the company conferred by, and the rights in respect of capital and dividends attached to the several classes of shares respectively.

17. In the case of a company which has been carrying on business, or of a business which has been carried on for less than three years, the length of time during which the business of the company or the business to be acquired, as the case may be, has been carried on.

Part II

Reports to be Set Out in Prospectus

1. A report by the auditors of the company with respect to the profits of the company in respect of each of the three financial years immediately preceding the issue of the prospectus, and with respect to the rates of the dividends, if any, paid by the company in respect of each class of shares in the company in respect of each of the said three years, giving particulars of each such class of shares on which such dividends have been paid and particulars of the cases in which no dividends have been paid in respect of any class of shares in respect of any of those years, and, if no accounts have been made up in respect of any part of the period of three years ending on a date three months before the issue of the prospectus, containing a statement of that fact.

2. If the proceeds, or any part of the proceeds, of the issue of the shares or debentures are or is to be applied directly or indirectly in the purchase of any business, a report made by accountants who shall be named in the prospectus upon the profits of the business in respect of each of the three financial years immediately preceding the issue of the prospectus.

Part III

Provisions Applying to Parts I and II of Schedule

1. The provisions of this Schedule with respect to the memorandum and the qualification, remuneration, and interest

of directors, the names, descriptions, and addresses of directors or proposed directors, and the amount or estimated amount of the preliminary expenses, shall not apply in the case of a prospectus issued more than two years after the date at which the company is entitled to commence business.

2. Every person shall for the purposes of this Schedule be deemed to be a vendor who has entered into any contract, absolute or conditional, for the sale or purchase, or for any option of purchase, of any property to be acquired by the company, in any case where—

(*a*) The purchase money is not fully paid at the date of the issue of the prospectus;

(*b*) The purchase money is to be paid or satisfied wholly or in part out of the proceeds of the issue offered for subscription by the prospectus;

(*c*) The contract depends for its validity or fulfilment on the result of that issue.

3. Where any property to be acquired by the company is to be taken on lease, this Schedule shall have effect as if the expression "vendor" included the lessor, and the expression "purchase money" included the consideration for the lease, and the expression "sub-purchaser" included a sub-lessee.

4. For the purposes of paragraph 8 of Part I of this Schedule where the vendors or any of them are a firm, the members of the firm shall not be treated as separate vendors.

5. If in the case of a company which has been carrying on business, or of a business which has been carried on for less than three years, the accounts of the company or business have only been made up in respect of two years or one year, Part II of this Schedule shall have effect as if references to two years or one year, as the case may be, were substituted for references to three years.

6. The expression "financial year" in Part II of this Schedule means the year in respect of which the accounts of the company or of the business, as the case may be, are made up, and where by reason of any alteration of the date on which the financial year of the company or business terminates the accounts of the company or business have been made up for a period greater or less than a year, that greater or less period shall for the purpose of the said Part of this Schedule be deemed to be a financial year.

(B) ALLOTMENT OF SHARES

As soon as the applications for shares have come in in response to the prospectus the directors proceed to allotment, or, to be rather more precise, so soon as the amount subscribed reaches the minimum figure specified in the prospectus. This is a new provision of the last Act. In the past the Articles of Association fixed a minimum subscription as required by the Act of 1908, but it was usually a purely nominal one "seven shares," thus rendering a salutary provision of the law wholly nugatory.

The section was designed to prevent the directors, where the issue was a failure, going to allotment merely to recoup themselves for the expenditure already incurred and also perhaps for their trouble, and then after a decent interval winding up. This abuse has now been remedied. The minimum subscription must be sufficient to cover (1) the purchase price of any property to be bought out of the proceeds of the issue, (2) preliminary expenses and underwriting commission, and (3) working capital. This has to be estimated before the prospectus is issued, for it has to appear, each item separately, in the prospectus.[1] If the minimum is not reached, then within forty days after the first issue of the prospectus the moneys received must be returned to the applicants; and if this is not done, the directors become jointly and severally liable after forty-eight days to repay the amounts with 5 per cent interest.[2] The allotment must be made within a reasonable time, otherwise the applicant will not be bound to take the shares.

Thus, M. applied for shares in the usual way on 8th June. On 8th November, having received no communication from the company he withdrew his application. On 23rd November the directors allotted him 50 shares and made the first call. Held he was not bound to accept them. The allotment

[1] See Fourth Schedule, Part I, 5.
[2] S. 39, the provisions of which should be carefully noted.

must be made within a reasonable time and the interval from June to November was not reasonable. (*Ramsgate Victoria Hotel Co., Ltd.* v. *Montefiore* (1866), L.R. 1 Ex. 109.)

The Share Register. As soon as the allotment is complete a register of members must be compiled. One of the books that a company is by law required to keep is a register[1] showing the names, addresses, occupations of the members, and the numbers of the shares held by each of them. It must also give the date of entry as a member and the date of ceasing to be a member, and also the amount paid up in respect of each share. This register must be open to public inspection for at least two hours every business day, and may only be closed for at most thirty days in the year, and then only after advertisement. It is to the compilation of this register that the secretary now addresses himself.

The importance of this register is far greater than would at first sight appear. It is not kept merely for the convenience of the directors or of the shareholders as a record; it serves as evidence of title. And shares being essentially a marketable security, this is a matter of the utmost consequence to the business world. The register is not conclusive[2]; the Court has power to rectify in proper circumstances, but for most practical purposes Registration may be regarded as Title. In other words, if a person's name is shown on the register as the holder of the shares, that person is the owner, no matter what claims anybody else may have in respect of them. In this connection three points,[3] of no small practical importance, deserve to be noticed.

1. Transfer of Shares and Registration. A transfer of shares is completed by registration.

The manner of transfer is not prescribed by the Act,

[1] With index (if there are more than 50 members), unless the Register itself is in the form of an index (ss. 95, 96).

[2] See s. 102 "*prima facie* evidence of matters authorised to be inserted therein."

[3] (2) and (3) will be found on pp. 48 and 50 below.

and shares can be transferred in any way provided by the Articles. The instrument of transfer need not be under seal,[1] but it must be in writing; an oral transfer will not do.[2] Table A provides a common form, and this (or whatever similar form may have been approved by the directors) should be adhered to in substance. That does not mean "that the transfer is bad if the i's are not properly dotted and the t's not properly crossed," but everything which is material should be included accordingly.[3] Should any expense be entailed in the preparation of the transfer, it must be borne by the purchaser[4] and it is not for the seller but for the buyer to procure the necessary registration. When the instrument has been properly executed and lodged with the company's secretary together with the share certificate, and all being in order, the transferee will be registered in respect of the share in question in place of the transferor. The transferee's title is then, from that moment on, complete.[5] How important a matter this may sometimes be is well illustrated in the following case.

Under the Articles of the Revelation Suit Case Co., Ltd., the directors had to have a share qualification, and the Board was empowered to appoint a "qualified person" to fill a casual vacancy. The Board proposed to appoint M; so at a Board Meeting on Saturday, 14th November, transfers to M were produced and passed for registration. M was then elected a member of the Board. On Monday, 16th November, the Secretary made the necessary entries in the Register. The appointment was held bad. It was argued that on the Saturday M had a present, absolute, unconditional right to registration, which purely ministerial act the company was bound to perform and did on the Monday

[1] *In re Tahiti Cotton Co., Ltd., ex parte Sargent* (1874), 17 Eq. 273.
[2] S. 63 so provides to prevent the evasion of stamp duty.
[3] *In re Letheby & Christopher, Ltd.*, [1904] 1 Ch. 815 (number of share—the only one belonging to transferor—and her address omitted; transfer held good).
[4] Cf. *Birkett* v. *Cowper-Coles* (1919), 35 T.L.R. 298.
[5] Until then his title is equitable, the transferor being trustee of the shares for him, cf. *Hardoon* v. *Belilios*, [1901] A.C. 118, 123 (P.C.).

so perform. But the Court would not entertain it. M did not hold any shares until the Monday. On the Saturday previous he was not a qualified person. (*Spencer* v. *Kennedy*, [1926] 1 Ch. 125.)

Apart from any restrictions on transfer that the Articles may contain, the right of the shareholder to transfer his shares is absolute; he may, when the company is *in extremis*, transfer to a pauper or man of straw for the express purpose of minimising or escaping liability. And the company can be compelled to register such a transfer.[1] In the case of irregularity where the company do not deem it safe or proper to register the transfer, the correct course to adopt is to give the transferor notice that unless within a strictly limited time he takes legal proceedings to prevent the company registering they will proceed, when the time allowed has expired, to register the transfer lodged with them.[2]

It is, of course, always open to the company to restrict such transfers, or any other transfers deemed objectionable, by means of the Articles.[3]

Sometimes the sale is effected by means of a transfer in blank, that is to say the owner signs the instrument of transfer leaving the space for the transferee's name blank. This can afterwards be filled in by the purchaser wishing to become the registered owner. It is useful when the purchaser intends immediately to resell or is buying on behalf of some one else. It is also much used when the owner is mortgaging his shares.[4]

Where the articles permit,[5] share warrants may be issued in respect of fully paid shares.[6] Being negotiable instruments they are transferable by mere delivery. When a

[1] *In re Discoverers Finance Corporation, Ltd.*, [1910] 1 Ch. 312 C.A.
[2] *Grundy* v. *Briggs*, [1910] 1 Ch. 444, 449.
[3] Cf. Table A, cl. 19.
[4] See below, p. 66.
[5] S. 70. It is perhaps not without significance that the clauses in Table A of the 1908 Act making provision for the issue of such warrants do not appear in the present schedule.
[6] Except in the case of private companies.

warrant is issued, the name of the member is removed from the register, and the issue and date of the warrant recorded instead, along with a statement of the shares included in the warrant. Should a holder desire to be registered, the warrant must be returned for cancellation[1] and it will be replaced by a share certificate which can only be transferred in the two ways[2] above mentioned. A director cannot qualify by holding share warrants. Dividends are paid by means of coupons attached to the warrant.

An infant (i.e. a person under 21) may be registered as a shareholder, though on coming of age he may repudiate, without however being able to recover the money subscribed for the shares. Thus:

> Tulip, aged 18, applied for shares in a film company, and 500, in respect of which she paid £250, were in due course allotted to her. She received no dividend. Eighteen months later she brought an action (by her next friend) claiming (1) rectification of the register by striking out her name, (2) the return of the £250. As to (1) the company had no alternative but to agree, and did not contest the matter. As to (2) the Court of Appeal held the company must succeed. She had received consideration for her money: the shares were by no means worthless; her claim therefore failed. (*Steinberg* v. *Scala* (*Leeds*), *Ltd.*, [1923] 2 Ch. 452 C.A.)

A company cannot be registered as the holder of its own shares.[3] There is no objection, however, to shares being transferred to a nominee of the company (where the company is not the purchaser) to hold them for the company's benefit, and to exercise the voting rights attaching to them as the company may direct.[4]

[1] S. 97 (2).
[2] See pp. 45 and 46.
[3] See below, p. 60.
[4] *Kirby* v. *Wilkins*, [1929] 2 Ch. 444. (Vendors having been overpaid through mistake in valuation voluntarily transferred 3,000 shares to the Chairman upon trust to sell and use them for the benefit of the company. Injunction to restrain him from voting as the registered holder, and declaration that the shares were held for the benefit of the individual shareholders, and the trust consequently void, both refused.)

2. Equities Affecting Shares. The company is not concerned with any equities affecting any transfer it is requested to register.

S. 101 expressly provides that no notice of any trust express, implied, or constructive, shall be entered on the register or be receivable by the Registrar.

Perhaps this is a convenient place to point out that though a large number of shareholders are the owners of their shares, in the full sense of the word, themselves, that is to say, they take and spend the dividends and dispose of the shares when and as they please, an equally large number may do no such thing. They are owners in name merely; they hold on behalf of others. Indeed a large majority of those who derive their income from dividends are most probably not themselves the owners of the shares. Michael and Mary, aged 20 and 18 respectively, receive a handsome allowance from kind Uncle James, but Uncle James could not do otherwise with the money; but then neither Michael nor Mary could touch the shares. Uncle James is the legal owner, the registered holder; but he holds as trustee, and therefore has nothing but bare legal title. Michael and Mary are the beneficiaries—*cestuis que trust* is the technical name surviving from medieval times—or equitable owners, enjoying the income and indeed having everything except legal title. The trust deed, or settlement, as it is called, under which he is appointed will state precisely what he is to do and how he is to do it, in what he may invest the trust funds and how he is to apply the income. This distinction between legal and equitable ownership plays a very large part in law. For instance, when Uncle James sells the shares to Mr. Brown, Mr. Brown becomes equitable owner immediately the sale is concluded, but he is not the owner in law until his name is substituted on the register for that of Uncle James. Incidentally in the meantime there will be two equitable owners, Mr. Brown on the one hand and Michael and Mary on the other. How can these conflicting claims be reconciled? That question will recur later on, but here it is sufficient to point out that more than one person may have a claim in equity in respect of the same shares. The term equity or trust covers a number of claims ranging from full beneficial ownership at one end to a mere demand for money that somehow affects the shares at the other. The co-existence of many equities in respect of the same shares is one of the reasons for the rule at the head of this section. An equally important reason is the following.

Trusts off Title. The framers of the law were exceedingly anxious that the transfer of shares which, it can hardly be too often recalled, are a marketable security, should not go the way of conveyances of land in the past and become so complicated and technical that no one would feel safe in purchasing without first taking legal advice. If that was not to happen it was of the utmost importance that trusts should in all cases be kept off the title. Transfers were to be made as easy and simple as possible. S. 101 was enacted accordingly. It means that a company is in no way concerned with the relations of its registered holders to any one else. If they are in fact trustees, it need not inquire whether they are acting within their powers in dealing with the shares.[1] The company looks solely to the registered holder. The entry of the name of the Public Trustee on the register does not constitute notice of a trust.[2]

"It seems to me extremely important not to throw any doubt on the principle that companies have nothing whatever to do with the relations between trustees and their *cestuis que trust* in respect of the shares of the company. If a trustee is on the company's register and is a holder of shares, the relations he may have with some other person in respect of the shares are matters with which the company have nothing whatever to do, they

[1] Cf. *Simpson* v. *Molson's Bank*, [1895] A.C. 270.
[2] See Public Trustee Act, 1906, s. 11 (5)

can look only to the man whose name is upon the register."[1]

The rule does not mean that the company may *knowingly* aid and abet a breach of trust or fraud; but they must not gratuitously assume that a transfer involves a breach of trust.[2] Where the company is itself an interested party, s. 101 in no way relieves it from seeking and doing equity like every one else.[3]

3. **Calls on Shares.** So long as a person's name remains on the register, he is liable for calls.

But in order to understand the full bearings of this it is necessary first to inquire as to the different classes of shares and the liabilities attaching to them.

(C) THE SHARES

1. **Different Classes of Shares.** The shares of a company are not always of the same class, e.g. 100,000 £1 shares, but may be either Ordinary, as in the example, or Preference as, for instance, 10,000 5 per cent Preference of £3 each, or sometimes in addition to either or both of these classes, Deferred or Founders' shares.[4] The rights attaching to each class will ordinarily be defined in the Memorandum and Articles. The Ordinary shareholders are entitled to whatever dividend may be declared for the year, but if there are also Preference shares, the dividend at the rate agreed, 5 per cent in the example given, must be paid before anything is divided among the Ordinary shareholders. If there is not enough to meet this in any one year, the Preference shareholders are entitled to have the deficit

[1] Per Lord Coleridge, C.J. in *In re Perkins* (1890), 24 Q.B.D. 613, C.A. Similarly, where the registered holder is a trustee, e.g. for the mortgagee of the shares, the company is not concerned if he casts his vote contrary to the wishes of the mortgagor. (*Siemens Brothers and Co.* v. *Burns*, [1918] 2 Ch. 324.)

[2] Cf. *Grundy* v. *Briggs*, [1910] 1 Ch. 444.

[3] See further below p. 75.

[4] A company does not usually issue all three kinds. Where there are Preferred and Deferred, but no Ordinary, they are sometimes called "Preferred Ordinary" and "Deferred Ordinary."

made good in the following years.[1] That is why these shares are called Cumulative, but the addition of the word to the title of the shares, 5 per cent Cumulative Preference shares, though commonly done, adds nothing to the rights of the shareholders because, unless the shares are expressly made non-cumulative,[2] the dividend is cumulative.[3] But when they have received the agreed dividend in full they are entitled, apart from anything expressly conferred,[4] to nothing further.[5] It follows that the Preference shareholder is as a rule in no way concerned in the surplus profits.[6] On a winding-up the preference comes to an end and the shares have no priority over the Ordinary shares. When Madame Tussaud's was wound up, after paying all debts and returning the whole of the paid-up capital, there were surplus assets of £70,000. The Court held that the Preference shareholders had no preference as to this, but the amount must be distributed equally among all shareholders in proportion to the amount paid up on their shares.[7] It might perhaps be mentioned that the Preference shareholder is not entitled to his (say) 5 per cent as if it were interest. It is dividend, and if none be declared he is entitled to none, though there may be sufficient funds when the company is wound up to pay him the amount to which he otherwise would have been entitled.[8]

[1] Cf. *Webb* v. *Earle* (1875), L.R. 20 Eq. 556, 44 L.J. Ch. 608.

[2] Cf. *Staples* v. *Eastman Photographic Materials Co., Ltd.*, [1896] 2 Ch. 303.

[3] *Webb* v. *Earle*, above.

[4] It always depends on the terms of the Memorandum and Articles. Cf. *Steel Co. of Canada, Ltd.* v. *Ramsay*, [1931] A.C. 270, P.C.

[5] *Will* v. *United Lankat Plantations Co., Ltd.*, [1914] A.C. 11.

[6] Cf. *Collaroy Co., Ltd.* v. *Giffard*, [1928] Ch. 144, but contrast *In re Fraser & Chalmers, Ltd.*, [1919] 2 Ch. 114; *Anglo-French Music Co.* v. *Nicoll*, [1921] 1 Ch. 386, and the cases cited in the next note.

[7] *Re Madame Tussaud & Sons, Ltd.*, [1927] 1 Ch. 657; see also *In re John Day Steam Tugs, Ltd.*, [1932] 1 Ch. 594, and *In re William Metcalfe & Sons, Ltd.*, [1933] 1 Ch. 142, C.A. Of course, the shares can be expressly made preferential both as to dividend and as to capital.

[8] *In re Roberts and Cooper, Ltd.*, [1929] 2 Ch. 383. (At the date of the winding up there was a surplus sufficient to pay arrears of dividend.) Cf. also *Coulson* v. *Austin Motor Co. Ltd.* (1927), 43 T.L.R. 493.

If a shareholder wishes to get back the money he has invested in a company the only way open to him as a rule is to sell his shares in the open market. So long as the company is a going concern, he cannot recover it from the company. It is only in a winding-up that the capital can be returned to the members. Under s. 46, however, Redeemable Preference Shares may be issued, so that this class of shareholders may be paid off out of profits or the proceeds of a fresh issue. The profits set aside for the purpose must be carried to a Capital Redemption Reserve Fund, and particulars of such shares must appear in the annual balance sheet.

Founders' or Deferred shares, as their name implies, are only entitled to dividend after claims of the Preference and Ordinary shareholders have been met, but the actual rights attaching to these shares vary very widely and must be gathered in each case from the Memorandum and Articles.

Issue of Shares at a Discount. It is now trite law that a company may not issue shares at a discount.[1] A special exception, however, has also to be noted. Where a class of shares is already in existence, a further issue of such shares may be made at a discount on such terms as may be sanctioned by the Court.[2] To secure the sanction of the Court, the following conditions must be complied with: (1) the company must have been lawfully carrying on business for at least a year; (2) the proposed issue and discount must have been approved in general meeting. The issue must be made within a month of the Court's sanction being obtained or such further time as the Court may allow. Debentures, though looked upon by the investing public as shares, and though, even in carefully

[1] *Ooregum Gold Mining Company of India, Limited* v. *Roper,* [1892] A.C. 125. (Original shares at a great discount; £1 preference shares accordingly issued with 15s. credited as paid; issue held bad and original allottees liable for the 15s. a share.)

[2] S. 47 (particulars of the discount must henceforth appear in all balance sheets and prospectuses).

drawn prospectuses, one finds the term Loan Capital, form no part of the share capital of the company and will be dealt with later in a more suitable context.

Conversion. Shares may be converted into stock at any time by the company, when the Articles, as they usually do, so allow; provided only that the shares be fully paid. From the shareholder's point of view it means little more than that his holding is expressed in pounds instead of in so many shares, £200 stock instead of 200 Ordinary £1 shares. As Lord Hatherly put it, stock is "simply a set of shares put together in a bundle."[1] The company cannot at the outset issue stock, but it can convert its shares into stock as soon as they are fully paid up.[2]

Similarly the company can alter the respective rights of different classes of shareholders and convert, in effect, one class of share into another. S. 50 confers very wide powers; it can consolidate and divide all or any of its share capital into shares of larger amount, or convert all or any of its paid-up shares into stock and reconvert into shares of any denomination.[3]

[1] *Morrice* v. *Aylmer* (1875), L.R. 7 H.L. 725.

[2] As to irregularities of conversion and on the whole subject, see *In re Home and Foreign Investment & Agency Co.*, [1912] 1 Ch. 72.

[3] Such powers, however, are, as a rule, only exercised in the case of reorganisation of the company. The law relating to such conversions will be dealt with below under that heading, see p. 198.

TABLE A (CLAUSES 2 TO 6)

SHARES

2. Subject to the provisions, if any, in that behalf of the Memorandum of Association, and without prejudice to any special rights previously conferred on the holders of existing shares, any share may be issued with such preferred, deferred, or other special rights, or such restrictions, whether in regard to dividend voting, return of share capital, or otherwise, as the company may from time to time by special resolution determine, and any preference share may, with the sanction of a special resolution, be issued on the terms that it is, or at the option of the company is liable, to be redeemed.

3. If at any time the share capital is divided into different classes of shares, the rights attached to any class (unless otherwise provided by the terms of issue of the shares of that class) may be varied with the consent in writing of the holders of three-fourths of the issued shares of that class, or with the sanction of an extraordinary resolution passed at a separate general meeting of the holders of the shares of that class. To every such separate general meeting the provisions of these regulations relating to general meetings shall *mutatis mutandis* apply, but so that the necessary quorum shall be two persons at least holding or representing by proxy one-third of the issued shares of the class and that any holder of shares of the class present in person or by proxy may demand a poll.

4. Every person whose name is entered as a member in the Register of Members shall, without payment, be entitled to a certificate under the seal of the company specifying the share or shares held by him and the amount paid up thereon, provided that in respect of a share or shares held jointly by several persons the company shall not be bound to issue more than one certificate, and delivery of a certificate for a share to one of several joint holders shall be sufficient delivery to all.

5. If a share certificate is defaced, lost, or destroyed, it may be renewed on payment of such fee, if any, not exceeding one shilling, and on such terms, if any, as to evidence and indemnity as the directors think fit.

6. No part of the funds of the company shall directly or indirectly be employed in the purchase of, or in loans upon the security of, the company's shares, but nothing in this regulation shall prohibit transactions mentioned in the proviso to s. 45 (1) of the Act.

2. Calls. To every member's share there usually attaches a liability—the liability to calls. When the company needs fresh working capital, say a further £100,000, it can often raise it by calling upon the shareholders to pay a further instalment on their shares. Thus, assume the capital of the company to consist of 100,000 £5 shares, £2 10s. 0d. being paid up, the necessary fresh capital can be raised by calling upon the shareholders to pay £1 on each share. Whether from a business point of view this is desirable or not, whether it is more satisfactory than, say, issuing further shares within the limits of the nominal capital, does not concern us. On that question the proper person to advise the directors, if anyone, is the company's auditor or the Issuing House and not the company's counsel or solicitor. A call is a perfectly legitimate mode of raising fresh capital and of course it is no defence to a shareholder who objects to paying to plead that the company's affairs have been mismanaged, and but for the directors' mistakes no call need have been made. Such things may be said, if anywhere, at a company meeting; no Court will pay any attention to them.

How Made. The proper persons to decide whether a call is to be made are the directors. It is entirely a matter for their discretion, and short of a call for a purpose *ultra vires* the company, the Court will not interfere. The Act does not specify how a call is to be made and the matter is usually regulated by the Articles.[1] The normal procedure is as follows. After the resolution has been approved at a board meeting,[2] the secretary serves a notice on all shareholders. This must specify the time and place of payment. If this is absent from the resolution the call is bad and may be resisted.[3] The notice is usually fourteen days and, subject to any defence referred to below, the

[1] E.g. Table A, 11–16.

[2] The call cannot be resisted because of some irregularity in the appointment of the directors, see s. 143 & Table A cl. 88.

[3] Cf. *In re Cawley & Co.* (1889), 42 Ch.D. 209.

shareholder must pay the amount specified on the date named.

When Valid. In exercising their discretion the directors must, of course, act *bona fide* in the interests of the company. They may not, e.g. make a call in such a way that they themselves will not be liable.[1] The call must be made on all shareholders alike, unless the Articles give power under s. 48[2] to discriminate. The power to make a call should not be used for disciplinary purposes.

Thus, Messrs. Galloway & Holt were members of the Hallé Concerts Society (a company limited by guarantee). They were opposed to the policy of the committee and gave trouble. They refused to pay a call of £3 in June, 1913, and went so far as to allow themselves to be sued in Court for the amount. In the following year they refused again to pay a call, whereupon the committee passed a resolution making a call of the whole amount outstanding (about £80) against these two members *only*. It was urged on behalf of the committee that it was done in the best interests of the Society as a whole; otherwise the Society would be put to continual trouble and expense in recovering repeated small calls. The Court declined to entertain the argument and held the call bad. (*Galloway* v. *Hallé Concerts Society*, [1915] 2 Ch. 233).

Nature and Duration of the Liability. The obligation on the shareholder to pay a call is statutory. It is no defence for him to set up that the prospectus stated "it is not anticipated that any further calls will be made,"[3] or that he was induced to take the shares by misrepresentation. If he was so induced he should have taken prompt steps to have his name removed from the register.[4] So long as a person's name remains on the register, he remains liable.[5]

[1] Cf. *Alexander* v. *Automatic Telephone Co., Ltd.*, [1900] 2 Ch. 56.

[2] To make arrangements *on the issue of shares* for a difference between the shareholders in the amounts and times of payment of calls on their shares.

[3] *Accidental Insurance Co.* v. *Davis* (1866), 15 L.T. 182.

[4] Cf. *First National Reinsurance Co., Ltd.* v. *Greenfield*, [1921] 2 K.B. 260.

[5] See *Aaron's Reefs* v. *Twiss*, [1896] A.C. 273.

If he be dead, his estate will be liable.[1] And if he sells his shares he must pay the call just the same, though he can recover from his purchaser, there being an implied obligation on the part of the purchaser to indemnify him against calls made before his name is removed from the register, and this though the sale be effected by means of a transfer in blank.[2]

Nor is his liability wiped out when his name is properly removed from the register, because if the company is wound up within a year he will be placed on the "B" list of contributories. That is to say he will be liable for any amount left unpaid on the shares he transferred which the present registered holders (who appear on the "A" list) are unable to meet. E.g. the shares are Ordinary £1, 10s. paid up. In the winding-up (or before) a call is made, the registered holder can pay only 4s., the "B" list contributory in the winding-up may have to make good the remaining 6s. per share.

The liability of those on the "B" list to contribute is created by statute, and is restricted to so much of the amount left unpaid on their shares by their associated "A" contributories as does not exceed the balance of the debts and liabilities of the company, contracted before they respectively ceased to be members, which remains unpaid after the assets of the company and the contributions of the "A" contributors have been applied *pari passu* towards the payment of all the debts of the company whenever contracted.

Let us assume for simplicity's sake that a block of shares

[1] Cf. *New Zealand Gold Extraction Co., Ltd.* v. *Peacock*, [1894] 1 Q.B. 662.

[2] *Spencer* v. *Ashworth Partington & Co.*, [1925] 1 K.B. 589. (The owner of shares in a cotton mill, on which there was a heavy liability to calls, sold them and gave the purchaser a transfer in blank. The purchaser resold them to a third person, to whom he handed over the blank transfer. The third person did not register the transfer and, calls having been made in the meantime, became bankrupt. Thereupon, the original seller on whom the calls were made sued his immediate purchaser for an indemnity against those calls. The Court of Appeal held he was entitled to recover.)

belonging to Caleb, Caesar and Andrew White have been transferred to a syndicate six months before winding up. The shares are 10,000 £1 Ordinary, 14s. paid up. In the winding up, the liquidator makes a call of 6s. The syndicate is being wound up itself and no more than 1s. a share is realised. Therefore, the White Brothers become liable to make good 5s. per share. But the £500 (realised from the A list) plus the assets of the company are sufficient to meet all debts and liabilities of the company with the exception of some £5,000. Of these debts, £3,000 worth were contracted subsequent to the transfer to the syndicate. The White Brothers can only be called upon to make good £2,000. A 4s. call, therefore, is all that may be made on the B contributories. Assuming the £2,000 had been £3,000, i.e. requiring a 6s. call per share, the liquidator could yet have made no call in excess of 5s., because in no case can a B contributory be liable for more than can be called upon the share, and 1s. has already been realised.

The company was incorporated on 5th August, 1908, and carried on a reinsurance business. Its capital was £500,000 in £1 shares, of which at the date of the winding up, 1,601 were fully paid and the remaining 498,399 were paid up to the extent of 6s. a share. The winding up began on 3rd February, 1922, and on the previous 18th July the 2,170 holders of the partly paid up shares had transferred them to the City Equitable Associated, Ltd., who remained the registered holders at the date of the liquidation. The City Equitable was placed on the A list and the 2,170 holders on the B list.

The liquidator had made two calls on the B contributories, the first of 1s. a share in 1925 and the second of 1s. 6d. in 1927. The amount realised by those calls exceeded by some £10,000 the total of the debts of the company contracted before the past shareholders had ceased to be members, but the total realised by all the calls was still not sufficient to pay 20s. in the £ to all the creditors of the company. For this reason, the liquidator claimed to retain the £10,000.

The Court held it must be refunded. To do otherwise would be to increase the liability of the B contributories in a way for which there was no statutory justification. (*In re City of London Insurance Co., Ltd.*, [1932] 1 Ch. 226.)

TABLE A (CLAUSES 11 TO 16)

Calls on Shares

11. The directors may from time to time make calls upon the members in respect of any moneys unpaid on their shares provided that no call shall exceed one-fourth of the nominal amount of the share, or be payable at less than one month from the last call, and each member shall (subject to receiving at least fourteen days' notice specifying the time or times of payment) pay to the company at the time or times so specified the amount called on his shares.

12. The joint holders of a share shall be jointly and severally liable to pay all calls in respect thereof.

13. If a sum called in respect of a share is not paid before or on the day appointed for payment thereof, the person from whom the sum is due shall pay interest upon the sum at the rate of five pounds per centum per annum from the day appointed for the payment thereof to the time of the actual payment, but the directors shall be at liberty to waive payment of that interest wholly or in part.

14. The provisions of these regulations as to the liability of joint holders and as to payment of interest shall apply in the case of non-payment of any sum which, by the terms of issue of a share, becomes payable at a fixed time, whether on account of the amount of the share, or by way of premium, as if the same had become payable by virtue of a call duly made and notified.

15. The directors may make arrangements on the issue of shares for a difference between the holders in the amount of calls to be paid and in the times of payment.

16. The directors may, if they think fit, receive from any member willing to advance the same all or any part of the moneys uncalled and unpaid upon any shares held by him, and upon all or any of the moneys so advanced may (until the same would, but for such advance, become presently payable) pay interest at such rate (not exceeding, without the sanction of the company in general meeting, 6 per cent) as may be agreed upon between the member paying the sum in advance, and the directors.

3. **Forfeiture.** If the member is unable to pay a call on his shares, are the shares liable to be forfeited? The answer to this innocent looking question is not nearly as simple as might be expected, because important and difficult questions of principle are involved. In the first place if shares are forfeited to the company, the company becomes owner of its own shares and for obvious reasons a company cannot be a shareholder in itself. Then, secondly, a forfeiture of shares indirectly effects a reduction of capital, e.g. where the paid-up capital consists of 100,000 fully paid £1 shares and 20,000 shares owned by an obnoxious group are forfeited and cancelled, the capital of the company will be £80,000 instead of £100,000. A company may not reduce its capital without the sanction of the Court. However, an exception is made in the case of shares on which the owner is unable to meet calls.

Where the Articles so empower,[1] the directors may forfeit the shares. But it is important to note that this power of forfeiture cannot be used in any other case or for any other purpose,[2] e.g. if the shareholder is indebted to the company and cannot pay, say, he is heavily overdrawn at the bank and is the holder of bank shares, his shares may on no account be forfeited, and an article purporting to authorise it is void and of no effect.[3] When the power is exercised care must be taken to see that it

[1] See Table A, clauses 23–29.

[2] Cf. *Bellerby* v. *Rowland & Marwood's S.S. Co., Ltd.*, [1902] 2 Ch. 14 C.A.

[3] This, as will occur to the advanced law student, offends for yet another reason; it is a clog on the equity of redemption. For an interesting illustration, cf. *Hopkinson* v. *Mortimer, Harley & Co., Ltd.*, [1917] 1 Ch. 646. See further *Symphony Gramophone & Radio (Foreign), Ltd.* v. *Gill* (1933), unreported. (G unable to pay £340, the nominal value of the shares he had agreed to take from the company. The company therefore, accepted £68 in cash in respect of certain of the shares, and a forfeiture of the remainder in complete discharge of his liability. Subsequently, the company went into voluntary liquidation and G was sued for £272. Held he must pay; the agreement to accept a forfeiture of shares because the shareholder could not pay for them was null and void, there was therefore no consideration for giving up the balance of £272 and the money remained owing to the company.)

complies in all respects with the provisions laid down in the Articles. The company may reissue the forfeited shares for what they will fetch, and this does not offend against the rule that a company may not issue shares at a discount. When the shares have been reissued the company may make fresh calls in respect of amounts not paid up.[1] The shareholder whose shares have been forfeited may remain liable for the amount of the call as a debt to the company (with interest) when the Articles, as they commonly do, so provide.[2] The company may accept a surrender of shares in lieu of forfeiture.[3]

In order to render the subject of calls complete one further fact needs to be pointed out. As a rule the company takes power to itself[4] to exercise a *lien* on shares not fully paid up in respect of possible calls.[5] This means that a company can sell the shares if the holder makes default, or keep back dividends to the extent of what may be owing or realise in any other way that the circumstances permit. The lien is a security and entitles the company to prove as a secured creditor in the bankruptcy of the member. It operates as an equitable charge. "Mortgage," says the definition section of the Law of Property Act, 1925, "includes any charge or lien on any property for securing money or money's worth."[6]

It can readily be seen how nice questions may arise as to the respective rights of the company and others who may have a similar lien or mortgage on the shares of

[1] Cf. *New Balkis Eersteling, Ltd.* v. *Randt Gold Mining Co.*, [1904] A.C. 165 (5s. shares; 3s. 4d. paid up, call for remaining 1s. 8d. Certain shareholders failed to pay, their shares were duly forfeited and later sold to X. A call was then made on X for 1s. 3d. a share. X resisted it, but the House of Lords held he must pay).

[2] See *Ladies Dress Association, Ltd.* v. *Pulbrook*, [1900] 2 Q.B. 376 (where winding up took place more than 12 months after the forfeiture and P, who could not be placed even on the "B" list, was held liable to pay).

[3] See generally *Trevor* v. *Whitworth* (1888), 12 App. Cas. 409.

[4] Cf. Table A, clause 7.

[5] The lien may also be made to extend to all debts owing by the shareholder to the company.

[6] S. 205 (1) (xvi).

the member. There must be very few shareholders indeed who have not at one time or another deposited some of their shares with the bank to secure an overdraft. If there is a sudden slump and the shares are not worth the amount of the unpaid calls, who comes first, the company with its lien or the bank with its charge?

In the circumstances as they arise this is by no means always an easy question to answer, though the law itself is reasonably clear on the subject.

But first a word is necessary as to the different kinds of mortgage that may exist in connection with shares.

TABLE A (CLAUSES 23 TO 29)

FORFEITURE OF SHARES

23. If a member fails to pay any call or instalment of a call on the day appointed for payment thereof, the directors may, at any time thereafter during such time as any part of such call or instalment remains unpaid, serve a notice on him requiring payment of so much of the call or instalment as is unpaid, together with any interest which may have accrued.

24. The notice shall name a further day (not earlier than the expiration of fourteen days from the date of the notice on or before which the payment required by the notice is to be made, and shall state that in the event of non-payment at or before the time appointed the shares in respect of which the call was made will be liable to be forfeited.

25. If the requirements of any such notice as aforesaid are not complied with, any share in respect of which the notice has been given may at any time thereafter, before the payment required by the notice has been made, be forfeited by a resolution of the directors to that effect.

26. A forfeited share may be sold or otherwise disposed of on such terms and in such manner as the directors think fit, and at any time before a sale or disposition the forfeiture may be cancelled on such terms as the directors think fit.

27. A person whose shares have been forfeited shall cease to be a member in respect of the forfeited shares, but shall, notwithstanding, remain liable to pay to the company all moneys which, at the date of forfeiture, were presently payable by him to the company in respect of the shares, but his liability shall cease if and when the company receive payment in full of the nominal amount of the shares.

28. A statutory declaration in writing that the declarant is a director of the company, and that a share in the company has been duly forfeited on a date stated in the declaration, shall be conclusive evidence of the facts therein stated as against all persons claiming to be entitled to the share. The company may receive the consideration, if any, given for the share on any sale or disposition thereof, and may execute a transfer of the share in favour of the person to whom the share is sold or disposed of and he shall thereupon be registered as the holder of the share, and shall not be bound to see to the application of the purchase money, if any, nor shall his title to the share be affected by any irregularity or invalidity in the proceedings in reference to the forfeiture, sale, or disposal of the share.

29. The provisions of these regulations as to forfeiture shall apply in the case of non-payment of any sum which, by the terms of issue of a share, becomes payable at a fixed time, whether on account of the amount of the share, or by way of premium, as if the same had been payable by virtue of a call duly made and notified.

4. **Mortgages.** The distinction which was emphasised above between legal and equitable title plays a large part in connection with mortgages. A mortgage, the practical effects of which are familiar enough, is in law the making over of ownership to the lender as security for the loan, with the proviso that when the money borrowed is repaid ownership shall revert to the borrower. Ownership, as we have already seen, may be legal or equitable, and mortgages are of both kinds accordingly. X, the registered holder of 50 Ordinary shares in the G.W.R., may transfer them to Y as security for the loan, and Y's name will be registered instead. An instrument[1] is drawn up reciting the agreement to advance the £400, or whatever the sum may be, the transfer of the shares to Y's name, the promise by X, the mortgagor, to pay the principal and interest, the promise (covenant is the more usual term in this connection, the instrument being under seal) by the mortgagee to re-transfer the shares on repayment of the loan. This strict legal mortgage of shares is common enough, but it is nevertheless the exception in everyday life and in business. An equitable mortgage, that is to say, where the borrower gives an equity in his shares to the lender, but remains the registered holder all the time himself, is much more convenient. The mere deposit of the share certificates with the lender creates an equitable charge in his favour. The lender has a lien in respect of any advance made. This is what ordinarily happens when the bank allows an overdraft. Once he has deposited his share certificates the customer can overdraw to his heart's content, or rather to the agreed amount. He is as a rule asked to sign a Memorandum of Charge as well, but this is only because the bank likes to be on the safe side. The Memorandum[2] is good evidence of the

[1] The law student will find a precedent in the *Encyclopedia of Forms and Precedents*, Second Edition, Vol. 10, p. 422 (No. 193).

[2] It is to be feared that many readers will be only too familiar with this document, but if happily not, a precedent will be found *op. cit.* pp. 496–7 (Nos. 222, 223).

transaction and incidentally makes it quite clear to the customer on what conditions he is being accommodated. Another mode of effecting an equitable mortgage is by the deposit of the share certificates along with blank transfers. This becomes a legal mortgage as soon as the transfer is duly completed and registered. It is not a particularly good method and the banks do not now make use of it, but it has to be mentioned if only for the number of times it is referred to in the illustrative cases below. If the company's articles (as they usually [1] do) require a transfer to be under seal, the instrument should contain a power of attorney or authorisation to insert the name of the person who is to be the registered holder.[2] This enables the lender, on default being made, to insert his own name or that of his purchaser or nominee. This method, though possibly a better safeguard for the lender than the previous one, is still not a legal mortgage, and most of the practical objections to other forms of equitable mortgage apply to this. It is these that now call for consideration.

The objections or difficulties are in the main practical, though they are always discussed in connection with the subject of Priorities. An illustration will at once make clear what is meant. Michael is now registered holder of his shares. Under the will or settlement Uncle James was to be rid of his responsibilities on Michael's attaining the age of 23. That happy event occurred in 1929 and Uncle James, whose management of the trust funds did not entitle him to a penny for his pains, was only too glad to make the necessary transfers. Now Michael did not approve of Uncle James's old-fashioned ways. War Loan at 5 per cent was not much use to him. So he sold out, and bought Sea Shells Ltd. Deferred, 500 of them at 50s.

[1] Writing (not under seal) is sufficient to comply with s. 63.

[2] Those who have had anything to do with the sale of War Loan and the like will have noticed that they are required to execute a power of attorney to enable the transfer to be made, and that notice of transfer is sent from the Power of Attorney Department of the Bank of England.

(everybody said they would go to £10). On these he borrowed £600 from a friend, merely giving a letter to say the shares were the security. Six months later he wanted some more money (pleasures cannot be postponed), so he borrowed a further £250, this time from Mary, or rather Mary's husband, Jack. By 1931 the shares had fallen to 17s. 6d., and there (despite Conversion, Reflation and all) they have obstinately remained. Less than £500 of assets to meet claims of £850! Who is to come first, the friend or the brother-in-law? The friend, one would suppose, and ordinarily it would be, but Jack's surname was Robinson, and he got himself registered straight away, knowing nothing of the previous loan. But at this point it is best to look at the rules themselves.

Priorities. With regard to equitable mortgages, if all are equitable, priority goes by time; the earlier charge has priority over a later. But where a person having an equitable interest in the shares is enabled to be placed on the register, then his subsequent legal title has priority over an earlier equitable one. The first transferee to get himself registered gets priority. When the equities are equal the law prevails.

Thus, Mrs. Ireland was the beneficial or equitable owner of shares which stood registered in her husband's name, he being her trustee. Finding himself in financial difficulties, he handed a blank transfer to Hart for a loan of £500. On 23rd November, Hart lodged the transfer and requested the company to place his name on the register. The managing director thereupon had some conversation with Ireland and reported to the Board. This was on the 27th. But no resolution regarding the transfer was passed and it was not registered. On the same day, Mrs. Ireland claimed an injunction against the company to prevent them registering Hart's title. At the commencement of the action, the position then was: Ireland was the registered holder, Mrs. Ireland and Hart had equitable titles to the shares. The Court held that on 27th November, Hart not being registered and not having what might be regarded as its equivalent, a "present, absolute, and unconditional right" to be registered, Mrs. Ireland's title must prevail, being prior in point of time. (*Ireland v. Hart*, [1902] 1 Ch. 522.)

But for a subsequent legal title to prevail over an earlier equitable one, the shares must have been obtained for value *without notice of any irregularity*.

Thus, in 1893, Annie Coleman made a settlement, with Edward Coleman as trustee, of certain shares[1] in a private family company, executing a deed of transfer to Edward, who kept possession of the shares and of the transfer, *which he failed to have registered.*

In 1894, one of the beneficiaries under the settlement assigned his interest to Florence Coleman.

In 1911, Annie somehow possessed of the shares, deposited them with the Bank as security for an overdraft accompanied by the usual declaration of charge. The Bank gave notice of the charge to Edward[2] who acknowledged it but made no reference to the settlement.

In 1914, after Edward's death, the Bank learnt for the first time of the settlement. Immediately a second transfer from Annie was secured by the Bank and at once registered.

Florence claimed her shares from the Bank.

The Court held she must succeed. "She is prior in point of time to the Bank, and I can see no ground upon which the equity of the Bank can be said to be a better equity than hers." The second transfer was *subsequent to notice*. (*Coleman v. London, County and Westminster Bank, Ltd.*, [1916] 2 Ch. 353.)

The Earl of Sheffield gave certificates and blank transfers to a moneylender for the purpose of obtaining £26,000.

The moneylender advanced the money, and, in turn, borrowed on these securities from his Bank, to whose nominees he filled up the blank transfers.

The transfers were registered.

From their business dealings with him the Bank should have known that the securities might belong not to him but to his customers. The moneylender became bankrupt owing

[1] See next note.

[2] They were, in fact, debentures, but as the principle is the same and as debentures have yet to be dealt with they are here treated as shares. Edward was at the same time sole trustee under the debenture trust deed (see below p. 180) and in this capacity received the notice from the Bank.

large sums to the Bank. In respect of these sums they claimed to be entitled to realise the securities.

The House of Lords held against them, and decided that on the repayment to the Bank of the £26,000, Lord Sheffield was entitled to have the securities back. Though the Bank had legal title, *they were not purchasers for value without notice*. If they had reason to think that the securities might belong not to the moneylender but to somebody else, they were bound to inquire. (*Earl of Sheffield v. London Joint Stock Bank, Ltd.* (1888), 13 App. Cas. 333.)

THE POSITION OF THE LENDER. Clearly the position of the lender is by no means an enviable one! And the serious risks he runs are particularly well brought out in the Coleman case because there there was a complete absence of fraud. What must be the position of a lender where the borrower in his anxiety to obtain an advance stops at nothing, but having deposited his share certificates with one lender obtains fresh ones from the company to borrow from another, pretending that the former certificates have been lost or any other plausible tale his nimble wits suggest? It must be admitted that risks cannot wholly be eliminated where an equitable mortgage is being taken, but certain safeguards have been devised.

NOTICE IN LIEU OF DISTRINGAS. There is in the first place what is known as the Notice in lieu of Distringas. A prudent lender as soon as the mortgage is complete will swear an affidavit setting out the facts of the loan and draw up a notice, and file both at the Central Office of the Supreme Court. He will then serve the company with an office copy of the affidavit and a duplicate of the notice. The notice requests the company not to transfer the shares in question. This is called Notice in lieu of Distringas.[1] The effect of the notice is this. If any one seeks to have a transfer of the same shares registered the company must immediately notify the person who gave the notice and

[1] See R.S.C., O.46 rr. 3–11. The name is derived from an old Exchequer writ directed to the sheriff bidding him distrain (distringas) a man for a debt due to the Crown.

give him eight days in which to take legal proceedings to prevent the transfer. If they fail to notify, the company may be liable in damages for registering the transfer. In this way a mortgagee is enabled to prevent a subsequent equitable mortgagee obtaining legal title. But, it may be asked, why should it be necessary to employ so elaborate a procedure? Why should not an informal or at any rate formal notice of his charge to the company be enough? The answer is, because of the rule embodied in s. 101. Trusts must be kept off the title. No notice of any trust is receivable by the Registrar.[1]

THE CHECK ON UNCONDITIONAL TRANSFERS. Another safeguard is also to be found in the common practice of taking power in the Articles to decline to register transfers unconditionally. Thus Table A, cl. 19, empowers the directors to decline to register a transferee of whom they do not approve.[2] This power can be used to make inquiries, and in proper circumstances to refuse registration. Under this power it has become a very common practice always to advise the transferor that a transfer purporting to be signed by him has been lodged with the company for registration, and failing objection from him it will be taken to be in order and submitted to the directors for their approval. This practice is, of course, no safeguard to the lender where the transferor himself is the fraudulent party, but it is a very useful provision, especially where the fraud is being perpetrated by some one who has gained possession of the share certificates, a much more frequent cause of loss to one or both of two innocent parties.

THE CASE OF FORGERY. From the case of fraudulent dealing in genuine transfers must be carefully distinguished the case of the forged transfer. A person who takes a valid transfer in good faith and for value from a person

[1] See *ante* p. 48.

[2] Incidentally, where the directors are equally divided, the transfer must be registered. (*In re Hackney Pavilion, Ltd.*, [1924] 1 Ch. 276.)

acting in fraud of the true owner gets something; as we have already seen he gets an equitable title second only to that of any former equitable owner, and if he is enabled to be registered he takes before any one else. But if he advances money on a forged transfer he gets nothing but so much waste paper. Under a forged transfer no rights whatsoever pass. If the company act upon the forgery or register the name of the transferee, they must reinstate the name of the true owner and pay him all dividends that may have been declared in the meantime. The rule is absolute, but the loss it inflicts on the company may in practice often be made good by the operation of another rule. A person lodging a transfer impliedly guarantees its genuineness. The company can accordingly recover from the broker or other person who innocently lodged the forged transfer.

Thus, in April, 1893, Timbrell forged Honnywill's signature to a transfer of Sheffield Corporation Stock and borrowed money from Barclays Bank. This Bank later sold the stock to third parties and sent the forged transfer to the Corporation for registration. In 1899, Timbrell died and the forgery was discovered. Honnywill thereupon sued the Corporation for rectification of the register and damages, and, of course, recovered. Whereupon, the Corporation sued the Bank, claiming that the Bank had impliedly warranted the transfer sent for registration to be in order. The House of Lords held they were entitled to recover. The Bank was bound to indemnify the Corporation in respect of their loss. (*Sheffield Corporation* v. *Barclay*, [1905] A.C. 392.)

TABLE A (CLAUSES 17 TO 22)

TRANSFER AND TRANSMISSION OF SHARES

17. The instrument of transfer of any share shall be executed by or on behalf of the transferor and transferee, and the transferor shall be deemed to remain a holder of the share until the name of the transferee is entered in the Register of Members in respect thereof.

18. Shares shall be transferred in the following form, or in any usual or common form which the directors shall approve

I, A. B., of , in consideration of the sum of £ paid to me by C. D. of (hereinafter called "the said transferee") do hereby transfer to the said transferee the share (or shares) numbered in the undertaking called the Company, Limited, to hold unto the said transferee subject to the several conditions on which I hold the same: and I, the said transferee, do hereby agree to take the said share (or shares) subject to the conditions aforesaid. As witness our hands the day of . Witness to the signatures of, etc.

19. The directors may decline to register any transfer of shares, not being fully paid shares, to a person of whom they do not approve, and may also decline to register any transfer of shares on which the company has a lien. The directors may also suspend the registration of transfers during the fourteen days immediately preceding the ordinary general meeting in each year. The directors may decline to recognise any instrument of transfer unless—

(*a*) A fee not exceeding two shillings and sixpence is paid to the company in respect thereof; and

(*b*) The instrument of transfer is accompanied by the certificate of the shares to which it relates, and such other evidence as the directors may reasonably require to show the right of the transferor to make the transfer.

If the directors refuse to register a transfer of any shares, they shall within two months after the date on which the transfer was lodged with the company send to the transferee notice of the refusal.

20. The legal personal representatives of a deceased sole holder of a share shall be the only persons recognised by the company as having any title to the share. In the case of a share registered in the names of two or more holders, the survivors or survivor, or the legal personal representatives

of the deceased survivor, shall be the only persons recognised by the company as having any title to the share.

21. Any person becoming entitled to a share in consequence of the death or bankruptcy of a member shall upon such evidence being produced as may from time to time be properly required by the directors, have the right, either to be registered as a member in respect of the share or, instead of being registered himself, to make such transfer of the share as the deceased or bankrupt person could have made, but the directors shall in either case, have the same right to decline or suspend registration as they would have had in the case of a transfer of the share by the deceased or bankrupt person before the death or bankruptcy.

22. A person becoming entitled to a share by reason of the death or bankruptcy of the holder shall be entitled to the same dividends and other advantages to which he would be entitled if he were the registered holder of the share, except that he shall not, before being registered as a member in respect of the share, be entitled in respect of it to exercise any right conferred by membership in relation to meetings of the company.

5. **Lien.** We are now in a position to deal with the question regarding the priority of the company's lien for unpaid calls with a fair grasp of the practical bearings of the subject. As was then[1] indicated the principle governing is simple enough, it is only the complicated circumstances that may arise that render the answer difficult in any particular instance. The principle, of course, is that *Qui prior est tempore potior est iure*: where the equities are equal the earlier prevails. Accordingly the articles usually provide that the company shall have a lien on all unpaid shares to the extent of possible calls.[2] This lien arises at the very outset, simultaneously with the issue of the share, so that though the original allotment is made to a trustee, the company's equitable interest (the lien) takes precedence of the interest of the equitable owner. There is also a power in the Articles entitling the directors to refuse registration in the case of any shares subject to the company's lien.[3] This lien may also extend to the entire indebtedness of the shareholder to the company; it need not be confined to the amount left unpaid on the shares.

Thus, Mee and another were, as trustees of a marriage settlement, the registered holders of 123 £20 shares in a bank whose articles of association gave a paramount lien for all moneys owing. Mee later became insolvent, owing the Bank jointly on his acceptances, £4,000. The Bank claimed to exercise its lien in respect of this sum. The Court of Appeal gave judgment for the Bank.

"The case is clearly within the terms of the Articles of Association. Mee acquired the shares under that contract; he is bound by it. But it is said that Mee was a trustee for others, that he bought these shares with other people's money and held them on their behalf, and that the debt to the company, having arisen since the purchase, must be postponed in equity to the equitable rights of the *cestuis que trust*, on the ground that the equitable charge which is first in time is first in right. The answer to that is, that

[1] See *ante* p. 61.
[2] Cf Table A, clause 7.
[3] Cf. Table A, clause 10

the charge of the Bank is first in right and indeed first in time. The charge of the Bank took effect as one of the terms on which the registration was made, it was this: "We will admit you, Mee, as a shareholder in this Bank on the terms that whenever you owe us any money we shall have an equitable charge on the shares." That contract was perfect at the moment when the shares were registered; there is no possibility, therefore, of the title of the *cestuis que trust* being prior. That alone would be conclusive, but there is another ground equally conclusive, which is this: The *cestui que trust* buys in the name of the trustee property subject to a charge in a given event, can the *cestui que trust* get the benefit of the purchase, and not comply with its terms?" (Per Jessel M.R., *New London & Brazilian Bank, Ltd.* v. *Brocklebank and Mee* (1882), 21 Ch.D. 302, 305–6.)[1]

Though both parties may have equitable titles, the equities will clearly not be equal if the subsequent lender had notice of the previous equity. A company's lien in respect of advances or other debts arising after notice of other equities cannot take precedence of such equities; and the rule that a company is not to be affected with notice of any trust in respect of its shares has no application where the company is an interested party.

Article 103 gave a paramount lien in similar form to the case last cited. In 1879, a coal merchant deposited his shares in Henry Briggs, Ltd., with the Bradford Bank to secure an overdraft. *The Bank gave notice to the company.* In 1883 he became insolvent, owing Henry Briggs, Ltd. for coal supplied, approximately £1,600. Could the company exercise its lien in respect of the £1,600, or had the Bank first claim in respect of its overdraft? The House of Lords held that the company could not, after notice, claim priority over the Bank.

It would not help the company to say that no notice of any trust in respect of the shares need affect them. The Bank by giving notice of the deposit did not seek to affect the company with notice of a trust, but only to affect the company in their capacity as traders with notice of

[1] The passage quoted has been very slightly abridged.

the interest of the Bank. (*Bradford Banking Co., Ltd.* v. *Henry Briggs, Ltd.* (1887), 12 App. Cas. 29.)

Similarly, in *Mackereth* v. *Wigan Coal and Iron Co., Ltd.*, [1916] 2 Ch. 293, it was held that the paramount lien clause will not help a company which makes advances to a shareholder in the face of express notice that the shareholder is holding for beneficial owners.

TABLE A (CLAUSES 7 TO 10)

LIEN

7. The company shall have a lien on every share (not being a fully paid share) for all moneys (whether presently payable or not) called or payable at a fixed time in respect of that share, and the company shall also have a lien on all shares (other than fully paid shares) standing registered in the name of a single person for all moneys presently payable by him or his estate to the company, but the directors may at any time declare any share to be wholly or in part exempt from the provisions of this regulation. The company's lien, if any, on a share shall extend to all dividends payable thereon.

8. The company may sell, in such manner as the directors think fit, any shares on which the company has a lien, but no sale shall be made unless some sum in respect of which the lien exists is presently payable, nor until the expiration of fourteen days after a notice in writing, stating and demanding payment of such part of the amount in respect of which the lien exists as is presently payable, has been given to the registered holder for the time being of the share, or the person entitled thereto by reason of his death or bankruptcy.

9. For giving effect to any such sale, the directors may authorise some person to transfer the shares sold to the purchaser thereof. The purchaser shall be registered as the holder of the shares comprised in any such transfer and he shall not be bound to see to the application of the purchase money, nor shall his title to the shares be affected by any irregularity or invalidity in the proceedings in reference to the sale.

10. The proceeds of the sale shall be received by the company and applied in payment of such part of the amount in respect of which the lien exists as is presently payable, and the residue shall (subject to a like lien for sums not presently payable as existed upon the shares prior to the sale) be paid to the person entitled to the shares at the date of the sale.

(D) THE SHARE CAPITAL OF THE COMPANY

To round off this somewhat lengthy chapter, of which the title is the Capital of the Company, a few words of explanation may be in place as to various expressions in common use.

The Memorandum of Association says that the share capital of The Eastern Steam Packet Co., Ltd., is £200,000, divided into a thousand shares of £200 each. That is the *Nominal Capital* of the company. Let us assume that 750 shares only have been issued, then £150,000 will be the *Issued Capital* of the company. But on these shares £100 only may have been paid up. So the *Paid-up Capital* will be £75,000. There is another £75,000 that might be raised by means of calls. To increase confidence in the company, the directors might agree to set aside, say, £50,000 of that sum as a reserve. This they may not charge in any way; it is only liable to be called up in case of winding up. This is known as *Reserve Capital*. There is finally the term *Capital Assets*, which denotes the actual property of the company and, of course, may be either more or less than the paid-up capital.

CHAPTER III

CONDUCT OF BUSINESS BY THE COMPANY

(A) THE CERTIFICATE TO COMMENCE BUSINESS

As has already been emphasised, the company is not entitled to commence business or to exercise any of its borrowing powers until it has received from the Registrar a certificate to the effect that it is entitled to commence business. A contract made before the issue of such certificate is not binding on the company until the date of the issue and is in fact conditional upon such issue.[1] Thus, the "Otto" Electrical Manufacturing Co. (1905), Ltd. was registered on 29th May, 1905. The company never received the certificate and was ultimately wound up before the end of the year. Jenkins had supplied £240 worth of office furniture and claimed to be paid for it in the winding up. Held:[2] he had no claim, his agreement was dependent upon the company's becoming entitled to carry on business, and it was no argument that this outlay was part of a preliminary equipment to enable the company to carry on its business when entitled to. The Act says "any contract."

To obtain the issue of this certificate the secretary or one of the directors must file a statutory declaration, in prescribed form, stating—

1. That applications for shares have been received, together with the sums required to be paid, sufficient to entitle the company to proceed to allotment, and

2. That all the directors have taken up their qualification.[3]

[1] In the words of the section 94 (4) "the contract . . . shall be provisional only."

[2] *In re "Otto" Electrical Manufacturing Co.* (1905), *Ltd.*, [1906] 2 Ch. 390.

[3] See *post* p. 124.

On the delivery of this statutory declaration the Registrar issues his certificate,[1] and the certificate once granted is conclusive. No question can subsequently be raised as to the company being entitled to carry on business.[2]

(B) THE LIABILITY OF THE COMPANY IN ITS BUSINESS RELATIONS

The Rule in Turquand's Case. In the course of carrying on its business, whatever it may be, the company will be brought into relation with other parties. Such relations, whether contractual or otherwise, rarely give rise to any special difficulties so long as the principle of *ultra vires* is respected. Provided the contract or act be *intra vires*, the other party is perfectly safe in dealing with the company. He is not concerned with the way the shareholders or directors carry out the terms of their Articles of Association. He is entitled to assume that the company's acts are in order.[3] He should make himself acquainted with the documents on the Registrar's file, which now include special resolutions, but he need do no more; mere domestic irregularities will not affect him. This on the principle of what is always referred to as the Rule in Turquand's Case.[4] The directors of the Royal British Bank issued bonds to Turquand, as they had power to do if a special resolution so authorised them. In fact, no such resolution had been passed. Held: that Turquand could sue on his bonds; he was entitled to assume that the necessary resolution had been passed.

If the Articles of Association give a power, persons dealing with the company, though they are deemed to have notice of the extent of the power, are not bound to

[1] Provided the company satisfies the statutory requirements in this way, the Registrar has no power to refuse his certificate.

[2] See s. 94.

[3] Lord Hatherley's speech in *Mahony* v. *East Holyford Mining Co.* (1875), 7 H.L. 869, p. 893, is a *locus classicus* on this subject.

[4] (1856), 6 E. & B. 327.

inquire into what is called the "indoor management" of the company to see whether the power has been properly and regularly exercised with all the prescribed formalities, and if they find an officer of the company openly exercising an authority which the directors have power to confer upon him, they are relieved from the duty of further inquiry and are entitled to assume that the power has been regularly and duly conferred.[1]

Moreover, a mere domestic irregularity can be subsequently cured by an act of ratification of all the shareholders, and provided all the members ratify, it need not take the form of a formal resolution passed at a properly convened meeting. Thus, A lent a company £1,750 and received a debenture for his loan. There was some irregularity in the issue, but all the shareholders knew of the debenture and approved it in turn, though there was no attempt to cure the irregularity by means of a formal resolution. In the winding-up the creditors sought to deprive A of his security on the ground of the irregularity. The Court declined to give them any assistance.[2]

But the rule applies only to irregularities that otherwise might affect a genuine transaction. It cannot apply to a forgery.[3] Thus, Clarke was the Manchester Branch Manager of S., Ltd., general carriers in London. In fraud of S., Ltd., he drew bills in their name for the purchase of toys, signing them on behalf of the company, "S. Clarke, Manchester Manager." The company was held not liable on the bills.[4]

Problems not peculiar to company law, but of some difficulty because of the special circumstances, are presented by the nature and extent of the agent's authority. There is always some element of risk when a person is dealing with a principal through his agent; nice points

[1] *British Thomson-Houston Co., Ltd*, v. *Federated European Bank, Ltd.*, [1932] 2 K.B. 176, 180 C.A.

[2] *Parker & Cooper, Ltd.* v. *Reading*, [1926] Ch. 975.

[3] See *Ruben* v. *Great Fingall Consolidated*, [1906] A.C. 439.

[4] *Kreditbank Cassel G.m.b.H.* v. *Schenkers, Ltd.*, [1927] 1 K.B. 826. See further *Slingsby* v. *District Bank, Ltd.*, [1931] 2 K.B. 588.

may easily arise as to whether a particular transaction is covered by the ostensible authority of the agent or not. In the case of a company which must necessarily act through agents this element is hardly diminished. In the main the above Rule in Turquand's Case and its corollaries should afford sufficient protection to third parties. Thus in *Dey* v. *Pullinger Engineering Co.*[1] the Memorandum gave power to the company to draw and accept bills of exchange, and the Articles provided that the business of the company should be managed by the directors. The directors drew a bill for £2,000 in proper form on behalf of the company, and of this bill the plaintiff became holder in due course. Held: the plaintiff was in no way affected by the fact that the directors had never been expressly authorised by resolution to draw bills on behalf of the company. Again, a document purporting to be a guarantee executed by the company was given to the plaintiffs, signed "The F.E.B., Ltd., (signed) N. P." N. P. was a director and had written to the plaintiffs signing himself "N. P., Chairman." The company was held liable on the guarantee. The plaintiffs were entitled to assume that N. P. had been duly authorised by the directors.[2]

But where the circumstances are unusual or otherwise such as to put a person upon inquiry, it will not be safe to deal with the company without first ascertaining that the person purporting to act on behalf of the company is properly authorised. Thus, some fruit brokers entered into an agreement with Lowe, a director of two fruit importing companies, purporting to bind the one company in respect of a debt of the other. Lowe had in fact no authority to bind the company, and the brokers, to guard themselves against this possibility, asked to have the agreement confirmed by the company. The secretary accordingly wrote a letter of confirmation, which he signed

[1] [1921] 1 K.B. 77.
[2] *British Thomson-Houston Co., Ltd.,* v. *Federated European Bank, Ltd.,* [1932] 2 K.B. 176, C.A.

on behalf of the company. But he had no authority to give any such confirmation, and the other directors, when they were informed of what had been done, repudiated the agreement. Held: the company was not liable, the Rule in Turquand's Case that persons dealing with the company are not bound to inquire into matters of the internal management of the company, such as the delegation of its powers by a board of directors to individual officers of the company, has no application to a case where the contracting parties are put on inquiry by reason of the unusual nature of the transaction.[1]

The Act provides in terms that a bill of exchange is deemed to be made, accepted, or endorsed on behalf of the company if made, accepted, or endorsed in the name or on behalf of the company by any person acting under its authority.[2]

So far as the form of its contracts goes, the company is placed in the same position as the ordinary private person. If the contract requires neither seal nor writing, it may

[1] *Houghton & Co.* v. *Nothard, Lowe & Wills, Ltd.*, [1927] 1 K.B. 246 (C.A.) affirmed, [1928] A.C. 1. "Whatever may be the exact scope of the rule in Turquand's Case, I think it is quite clear on principle and on the authorities . . . that it can never be relied upon by a person who is put on inquiry," per Wright, J., in *B. Liggett (Liverpool), Ltd.* v. *Barclays Bank, Ltd.*, [1928] 1 K.B. 48.

The position is well summed up in an admirable note by the learned reporter to the *British Thomson-Houston* case (pp. 183–4):

1. If the company has only a limited power to do the act in question, e.g. a power to borrow up to a certain amount, a person dealing with the company is affected with notice of the limitation.

2. If the Articles give the officer authority to do the act, provided certain directions are observed, a person dealing with the company is entitled to assume that the directions have been followed.

3. If the Articles merely empower the directors to delegate authority to an officer to do the act, then

(*a*) if the act is one which would ordinarily be beyond the powers of such an officer, a person dealing with the company cannot assume that the directors have delegated the necessary power. If, in fact, the directors have not done so, such person cannot recover against the company;

(*b*) if the act is one which would ordinarily be within the powers of such an officer, the company cannot dispute the officer's authority to do the act whatever actual authority they may or may not have given him.

[2] S. 30.

be made verbally by any person acting on behalf of the company, whether his authority be express or implied.[1]

On principles similar to those prevailing in the case of contract, the company can be made liable to third parties for the torts or wrongs committed by its officers or agents.[2] The company may also act as agent for another company, or for an individual principal and will itself be liable or render its principal liable according to the ordinary law of agency.[3]

(C) CAN A COMPANY BE MADE CRIMINALLY LIABLE FOR ITS ACTS?

There is clear authority—if authority were needed—for saying that a company cannot be committed for trial on indictment. In *R.* v. *Daily Mirror Newspapers, Ltd.*,[4] the company owning the *Daily Mirror* was charged with an election offence, committed for trial, convicted, and sentenced. The company appealed, contending that in any case the committal was bad. The warrant was in the usual form: "These are therefore to command you, the said constables, to take the said accused and them safely to convey to H.M. Prison at Brixton aforesaid, and there to deliver them to the Governor thereof together with this precept." The Court of Criminal Appeal held this could have no application to a limited company, it being impossible to execute it physically, and quashed the conviction. To overcome the difficulty here presented, the Criminal Justice Act of 1925 provided that when a

[1] S. 29.

[2] "And there can be no doubt that if the agents employed conduct themselves fraudulently, so that if they had been acting for private employers the persons for whom they were acting would have been affected by their fraud, the same principle must prevail when the principal under whom the agent acts is a corporation." Per Lord Cranworth in *Ranger* v. *G.W.R.* (1854), 5 H.L.C. 72, p. 86. See also the case cited in the following note.

[3] Cf. *Rainham Chemical Works, Ltd.* v. *Belvedere Fish Guano Co., Ltd.*, [1921] 2 A.C. 465 (company held responsible for explosion on land which it was occupying, as also were two of its directors whose agent the company must be taken to be).

[4] [1922] 2 K.B. 530 C.C.A.

corporation was charged with an indictable offence instead of committing for trial the magistrates might make an order empowering the prosecutor to present a bill to the grand jury and such order should be deemed a committal for trial. But this provision being merely procedural does not affect the substantive law, the question of the criminal liability of a corporation remaining precisely as before. It was again raised in *R.* v. *Cory Brothers & Co., Ltd.* To prevent trespassing the company had set up electric wires on its land. A fatal injury was thereby inflicted on a would-be trespasser. Whereupon the company was indicted for manslaughter. Before pleading to any charge the company moved to quash the indictment. The Court held the indictment bad. A corporation may be indicted for breach of a duty imposed upon it by law, *though not for a felony or for crimes involving personal violence.*[1] For other crimes a company may be indicted where the penalty is only a fine.[2] So for crimes which are also, or only summary offences the company can be convicted and fined,[3] and the Companies Act makes special provision for offences under that Act to be prosecuted under the Summary Jurisdiction Acts.[4]

(D) THE SECRETARY AND HIS STATUS

The ordinary formal mode of communication with the company will be through the company's secretary at the

[1] [1927] 1 K.B. 810. The arguments in this case merit the closest attention on the part of the law student, especially that for the Crown.

[2] Lord Blackburn in *Pharmaceutical Society* v. *London and Provincial Supply Association, Ltd.* (1880), 5 App. Cas. 857, suggested that a company might be fined for libel or nuisance (p. 870). In *Hawke* v. *Hulton & Co., Ltd.*, [1909] 2 K.B. 93, it was attempted to make a company liable under s. 41 of the Lotteries Act, 1823, for "Limericks" appearing in its newspaper, where the penalty is imprisonment and whipping, because a fine might be imposed instead, but the attempt failed. Civil proceedings in respect of common law offences, e.g. maintenance, will lie against a company. Cf. *Neville* v. *London Express Newspapers Ltd.*, [1919] A.C. 368.

[3] Most industrial offences (e.g. breaches of safety regulations under the Factory Acts) are of this character and are prosecuted accordingly.

[4] SS. 365, 366.

registered office. As soon as it commences business it must have a registered office to which all communications and notices may be sent, and the address must be notified to the Registrar within twenty-eight days of the company's incorporation (and if the address is changed, within twenty-eight days of the change).[1] Outside the office the company's name must appear in a conspicuous position, in letters easily legible.[2] At this office will be kept the register of shareholders for inspection by members and the public,[3] as also the register of directors,[4] the minute books,[5] the books of account,[6] and all other books or documents required to be kept under the Act. In charge of these will be the secretary. His position is one of great responsibility, far greater than his title would indicate, and his legal position calls for some consideration.

In the first place the secretary plays a dual role. He is at the same time a servant[7] of the company, drawing an agreed salary and obeying orders or directions as given him by the directors, and also an officer of the company

[1] See s. 92. [2] S. 93. [3] S. 98. [4] S. 144. [5] S. 121. [6] S. 122.

[7] Even to the extent of claiming preferential payment of salary in a winding-up; though *Cairney* v. *Back*, [1906] 2 K.B. 746, is a good illustration of a secretary being a statutory officer without being in all respects a servant, at any rate for the purpose of preferential claims. "In order to ascertain whether the defendant has any claim as a "clerk or servant' under these Acts, it is necessary to consider what his duties were and what were the services he rendered. In his evidence he described his duties as the ordinary duties of a secretary; he had to attend directors' meetings, attend to correspondence and callers, and keep the minute book. If the evidence had stopped there, I think I should have held that he was a clerk or servant within the Act. But the defendant further stated that he had no particular hours of attendance at the company's office, but he was generally there from 12 to 2, that he had a clerk whom he paid, whose hours of attendance were from 10 to 5. The defendant was also registrar of another company, his duties to which required his attendance from 10 to 4. The evidence really amounts to this, that the defendant called at the office of the Consolidated Mines, Ltd., to see what was going on; he attended meetings of the directors and whenever he was sent for, but the general work of the company which would have fallen within his department was really done by the clerk, whom the defendant paid. In my opinion, the priority given to the section was intended to apply to the wages due in respect of the personal services rendered by the clerk or servant. The defendant did not exactly serve the company, but provided services, attending himself occasionally when required." p. 752.

with statutory duties and liabilities. To perform his duties properly he must have acquired a knowledge of company law and practice, and be thoroughly familiar with the Memorandum and Articles, and indeed with all the filed documents of his company.

Among his more important duties are the following: to deal with the company's correspondence and forward all the required documents to the Registrar, notably the Annual Return, which if not signed by a director or manager he is required to sign;[1] to make the required declarations and where necessary to authenticate company documents;[2] to send out the appropriate notice summoning meetings of the company; to attend all meetings of the board of directors and of the company and to keep the minutes. If at a board meeting some provision of the law has been overlooked in arriving at a decision, he will usually be expected to draw the directors' attention to the fact. And generally it is his duty to see that the company is not put to inconvenience or loss owing to technical infractions of the law. He also acts as Registrar.[3]

It is important to bear in mind that though he is a statutory officer of the company he can only act in a ministerial capacity. For instance, though he is the proper person to compile and make all entries in the shareholders' register, he cannot register a transfer of shares except under and in accordance with the board's instructions.[4] Again, though he is the proper person to

[1] S. 110. [2] S. 33.

[3] It is perhaps unfortunate that the registrar of companies and the company's registrar are so similarly designated, but no confusion should arise, because the latter's duties are entirely domestic, confined, so to speak, within the four walls of the company's head office, while the former, operating from Somerset House, is concerned with all the companies in the kingdom.

[4] *Chida Mines Ltd.* v. *Anderson* (1905), 22 T.L.R. 27. The secretary entered a transfer without waiting to see whether the board would approve or not, the directors never having before refused to sanction a transfer. Subsequently the board declined to pass the transfer. The transfer so recorded was held bad. See also *George Whitechurch Ltd.* v. *Cavanagh*, [1902] A.C. 117. (If the secretary acts without authority

summon meetings he cannot do so on his own responsibility. If he does so, the proceedings will be invalid; it is something more than an irregularity that can be cured by the assent of all the members.[1]

As a rule he will incur no personal responsibility on the company's contracts, but in signing a bill of exchange he should take care to make it perfectly clear that he signs only as scribe and not as a party, that he is acting only for and on behalf of the company, for otherwise he will be personally liable.[2]

In tort he is, of course, personally liable, whether in the circumstances he renders the company liable as well or not. He is also liable, with all other officers of the company, to misfeasance proceedings.[3]

the company is not estopped from setting up the want of authority.) Notice to the secretary in his private capacity is not notice to the company. (*Société Générale de Paris* v. *Walker* (1885), 11 App. Cas. 20), nor is notice given to him as an officer of another company. (*In re Fenwick, Stodart & Co., Ltd.*, [1902] 1 Ch. 507.—H was secretary of the D Company, the holders of a bill of which F. S. & Co. were the drawers and endorsers. H being also the secretary of F. S. & Co. As secretary of the D Company he knew the bill was dishonoured. Held in the circumstances there was no notice of dishonour to F. S. & Co. It is not true as a general proposition that a fact which comes to the knowledge of a man as secretary to one company is notice to him as secretary of the other company from the mere existence of the common relationship.)

[1] e.g. *In re State of Wyoming Syndicate*, [1901] 2 Ch. 431. "If he does summon a meeting without authority, I do not think I ought to hold that a resolution passed at the meeting is valid. If it had been a mere question of informality with reference to the constitution of the board which summoned the meeting, for instance, some question as to whether there was a proper quorum present, I might have applied the principle of *Browne* v. *La Trinidad* (1887), 37 Ch. D. 1, but I think I should be going too far if I held that it applied to the present case." p. 437.

[2] "J. H. Smethurst's Laundry & Dye Works Ltd., J. H. Smethurst, Managing Director"—this signature on a promissory note was held not to render J.H.S. personally liable, though the note began with "I" and not "we promise." (*Chapman* v. *Smethurst*, [1909] 1 K.B. 927 C.A.) See also *Elliott* v. *Bax-Ironside*, [1925] 2 K.B. 301 C.A.

[3] S. 276. See *post* p. 137.

CHAPTER IV

MEETINGS OF THE COMPANY

(A) THE STATUTORY MEETING

THE next important event in the history of the Eastern Steam Packet Co., Ltd., to be asterisked in the law student's diary is the Statutory Meeting.[1] There is only one Statutory Meeting in the whole history of the company. It must take place within a period of not less than one month but not more than three months from the date at which the company is entitled to commence business.[2] It must be convened as such. A meeting that happens to be held within the time limits of the section cannot afterwards be treated as the Statutory Meeting.[3]

It is open to any member present to discuss any matter relating to the formation of the company, though no notice has been given of the matter in question. The

[1] The name should not mislead students. All meetings are held in accordance with the provisions of the governing statute and in that sense are statutory, but the Statutory Meeting is unique and is the meeting described in the text.

[2] S. 113.

[3] The Torquay Electric Theatre Ltd. held only two meetings, one for the purpose of passing, the other for the purpose of confirming, a special resolution for increasing the company's capital. The earlier meeting was held too soon to be the Statutory Meeting; the notices convening the latter referred only to the confirmation of the resolution. The Court held that there had been no Statutory Meeting; if the latter meeting was to have been the Statutory Meeting, the notices should have so stated.

"It was pressed on me in argument, and I agree, that in the particular circumstances of the Torquay Company the provisions of the Act as to the Statutory Meeting could serve no useful purpose. The company had only two shareholders, namely the two gentlemen who signed the Memorandum of Association. Each held only one 5s. share. One was a director and the other the secretary of the company. Both were fully aware of all the circumstances connected with its promotion. . . . Still, the provisions of the Act as to the Statutory Meeting are incumbent on every company incorporated under the Act, and their breach makes a company liable to a compulsory winding-up." (*Gardner* v. *Iredale* [1912] 1 Ch. 700, 713.)

meeting, however, cannot pass a resolution of which proper notice has not been given.[1] In practice this meeting is usually little more than a formality. The chairman, after a few remarks on the general position, invites questions, and as soon as he has answered them declares the meeting closed. But the Act intended that the shareholders should have an opportunity of reviewing the whole position and indeed the opportunity is there if only the members choose to avail themselves of it. To enable them to do this the more effectively the Act requires a detailed report known as the Statutory Report to be circulated to members seven days before the meeting.

The Statutory Report. This report must set out—

1. The total number of shares allotted, to what extent paid up, whether in cash or otherwise, and the consideration for the allotment.
2. The total amount of cash received.
3. An abstract of the receipts and payments to within seven days of the date of the report, and the balance in hand.
4. An account or estimate of the preliminary expenses.

These four items must be certified by the company's auditors.

5. The names, addresses, and descriptions of the directors, auditors, managers, and secretary of the company.
6. The particulars of any contract the modification of which is to be submitted to the meeting for approval, together with particulars of the modification.

A copy of this report must be filed with the Registrar. Failure to do so or to hold the Statutory Meeting entitles the Court to wind up the company. A shareholder may so petition at the expiration of fourteen days after the last day for holding the meeting.[2] The allotment list must be available for inspection by members throughout the meeting.

(B) OTHER MEETINGS

The Annual General Meeting. Once in the course of every calendar year and not more than fifteen months

[1] S. 113 (7). [2] SS. 168 (2), 170 (1) (*b*).

after the last general meeting a company must hold its Annual General Meeting. This meeting is known as an Ordinary meeting, while other meetings held in between in order to transact business which it may be necessary to bring before the shareholders are called, merely by way of distinction, Extraordinary meetings.

Apart, therefore, from the Statutory Meeting, all meetings are either Ordinary or Extraordinary. It is very common for the Articles to prescribe that the only business to be transacted at the Annual General Meeting shall consist of the Directors' Report and the Accounts, the declaration of a dividend, and the election or re-election of officers; all other business to be special. In that case, if any other business falls to be transacted, an extraordinary general meeting can be summoned to follow immediately upon the conclusion of the ordinary meeting. Such a clause in the Articles, though very usual, is not obligatory, and there is much to be said for the view that the Annual General Meeting as such should have power to deal with any business referred to in the notice convening. It must be admitted, however, that the general practice is to the contrary. Now though special business requires to be transacted at an extraordinary meeting, the student needs to be on his guard against a confusion of terms.

Special business does not necessarily require special resolutions, nor are resolutions at extraordinary meetings ordinarily extraordinary. The customary nomenclature is apt to be misleading and the different kinds of resolution have to be carefully distinguished.

Ordinary Resolutions. An Ordinary resolution is one carried by a bare majority of the members voting. It will ordinarily be carried by a show of hands unless a poll is demanded, when votes of absent members can be counted by means of proxies.[1]

Special Resolutions. A Special resolution requires a

[1] See below, p. 101.

three to one majority at a meeting of which twenty-one clear days notice has been given, the notice specifying that the resolution is to be proposed as a special resolution.[1]

For certain matters a special resolution is necessary under the provisions of the Act itself, notably for the alteration of the Articles.[2] Other examples will be met with later on in the course of this work. In other cases the requirement arises under the Articles. A copy of every special resolution must be filed with the Registrar within fifteen days of its passing.

Extraordinary Resolutions. An Extraordinary resolution also requires a three to one majority of those voting, and must be specified as such in the notice, but the length of the notice is not prescribed by the Act.[3]

An extraordinary resolution is required for a voluntary winding-up, where the company cannot carry on by reason of its liabilities,[4] and under the Articles, for the removal of a director.[5] But its main use is in connection with winding-up.[6] These resolutions must also be similarly filed.

Notice. Very great care must be taken over these notices. They must be sent to all members entitled to attend. Apart from giving the time and place of meeting and specifying any special (or extraordinary) resolutions, the notice must indicate with sufficient clearness the general nature of the business to be transacted. The notice must do more than indicate the formal nature of the business, e.g. "to alter the Articles of Association." It must put the shareholder in possession of the substance of what is proposed to be done. It must put him in a position to judge for himself whether to stay away and acquiesce or attend and vote. A notice that is unsatisfactory from

[1] S. 117. If all the members entitled to vote agree, the notice may be less than twenty-one days.
[2] S. 10.
[3] Seven days will be the period under Table A, cl. 42. See also s. 115.
[4] S. 225 (1) (c).
[5] Cf. Table A, cl. 80.
[6] See ss. 191, 248 (1) (d), 251, 283.

this point of view may invalidate the resolution which the meeting adopts.

Thus, directors entered into an agreement the effect of which, to put it tersely as in one of the judgments, was that each "would quit the company with large profits in his pocket." The company obtained a private Act whereby the agreement was confirmed subject to its being adopted by a resolution passed by 75 per cent of the shareholders present personally or by proxy at any meeting of the shareholders called for that purpose. A resolution was passed by the required majority, but the notice convening the meeting *did not state the effect of the agreement*, and the proxies of the shareholders, who before the meeting had no opportunity of knowing the contents of the agreement, were used in support of the resolution. The Articles of Association provided that in the case of special business the notice should state its general nature. Four years later, when it was contended that the shareholders had by their acts and conduct adopted and acquiesced in the agreement, the company and two shareholders acting on behalf of all, brought an action to set aside the debentures created in pursuance of the agreement.

Held: that the Act made the adoption of the agreement in the manner thereby prescribed a condition to its validity; that the resolution was ineffective *owing to the absence of notice of the contents of the agreement*, and that *the agreement and the acts done in pursuance of it were consequently* ultra vires *the company and incapable of being made valid by acquiescence on the part of the shareholders*. (*Pacific Coast Coal Mines, Ltd.* v. *Arbuthnot*, [1917] A.C. 607 P.C.)

In the course of six or seven years the directors had put £44,000 into their own pockets. In 1913 the auditors discovered it, and thereupon pointed out that it needed the sanction of the shareholders. A meeting was accordingly convened and the notice was accompanied by an explanatory circular, but neither notice nor circular gave any idea of the above figure. At the meeting the chairman read out a long rigmarole, the upshot of it being that if you went back to 1881 the amount equally divided among the directors would only come to about £320 per annum each. The sanctioning resolution was duly passed.

The Court held the resolution bad because the notice was "tricky"; it did not give a sufficiently full and frank disclosure to the shareholders of the facts upon which they were asked to vote.

"This notice, coupled with the circular, and I think also with the statements made by the chairman at the meeting, seems to me to be not frank, not open, not clear, and not in any way satisfactory." (*Baillie* v. *Oriental Telephone and Electric Company., Ltd.*, [1915] Ch. 503, 514, C.A.)

On the other hand, where because the directors were personally interested in a contract a general meeting had to be called to confirm it, but the notice did not state that that was why confirmation was needed, the notice was held sufficient. (*Grant* v. *United Kingdom Switchback Railways Co.* (1888), 40 Ch. D. 135 C.A.)

The notice ran:"to pass resolution to increase capital of the company." Once before the capital had been raised from £1,000 to £2,000. At the meeting it transpired that the capital was now to be raised to £3,500, and a resolution was passed to that effect.

The Court held it bad. The notice must show an intention to make the specific increase embodied in the resolution that is actually passed. (*MacConnell* v. *E. Prill & Co.*, [1916] 2 Ch. 57.)

A new clause in Table A (cl. 43) provides that the accidental omission of a member in the sending of notices shall not invalidate the proceedings at the meeting.

(c) REQUISITIONING A MEETING

The proper course for members to adopt if they disapprove of the conduct of the affairs of the company is to make their criticisms and urge their proposals in general meeting. If necessary the directors can be requested to summon an extraordinary general meeting for the purpose. Certainly the shareholders should not have recourse to the Courts until all their available remedies on these lines have been exhausted. "We must bear in mind the decisions in *Foss* v. *Harbottle* ((1843), 2 Hare 461) and the line of cases following it in which this Court has constantly and consistently refused to interfere on behalf of shareholders until they have done the best they can to set right the matters of which they complain by calling a general meeting."[1] If the directors are unwilling to meet reasonable requests of this kind the shareholders can fall back on their rights under s. 114[2] and requisition a meeting. Members holding one-tenth of the paid-up capital carrying voting rights[3]—normally that will be one-tenth of the paid-up shares—may deposit their signed requisitions stating the objects of the meeting they wish to have called, whereupon the directors *must* within twenty-one days convene an extraordinary general meeting for the purpose. If the directors fail to do so, on the expiry of the twenty-one days the requisitionists or any of them representing more then half of their voting power, may summon the meeting themselves at the expense of the company, who may deduct the amount of such expenses from any fees payable to the directors. If the directors fail to summon the annual general meeting in accordance with the Articles, Table A, cl. 39 allows any two members to summon it. Where for any reason it is impracticable to call a meeting in this way, or on requisition, the Court has power to order a meeting.[4]

[1] Cited in *Fruit & Vegetable Growers' Association, Ltd.* v. *Kekewich*, [1912] 2 Ch. 52, p. 57.

[2] The section will over-ride any narrower rights (or procedure) set out in the Articles.

[3] Nominal capital, £60,000; Issued capital, 22,357 £1 shares of which 5,094 were fully paid; Requisitionists represented 690 fully paid shares. Held, sufficient, and a slight discrepancy between the wording of the two documents lodged held immaterial. The *Fruit Growers Case, supra*. N.B. The one-tenth does not refer to the whole of the issued share capital, but one-tenth of such proportion as is paid up.

[4] S. 115 (2).

TABLE A (CLAUSES 39 TO 43, 103 TO 107)

GENERAL MEETINGS

39. A general meeting shall be held once in every calendar year at such time (not being more than fifteen months after the holding of the last preceding general meeting) and place as may be prescribed by the company in general meeting, or, in default, at such time in the third month following that in which the anniversary of the company's incorporation occurs, and at such place as the directors shall appoint. In default of a general meeting being so held, a general meeting shall be held in the month next following, and may be convened by any two members in the same manner as nearly as possible as that in which meetings are to be convened by the directors.

40. The above-mentioned general meetings shall be called ordinary general meetings; all other general meetings shall be called extraordinary general meetings.

41. The directors may, whenever they think fit, convene an extraordinary general meeting, and extraordinary general meetings shall also be convened on such requisition, or, in default, may be convened by such requisitionists, as provided by s. 114 of the Act. If at any time there are not within the United Kingdom sufficient directors capable of acting to form a quorum, any director or any two members of the company may convene an extraordinary general meeting in the same manner as nearly as possible as that in which meetings may be convened by the directors.

NOTICE OF GENERAL MEETINGS

42. Subject to the provisions of s. 117 (2) of the Act relating to special resolutions, seven days' notice at the least (exclusive of the day on which the notice is served or deemed to be served, but inclusive of the day for which notice is given) specifying the place, the day, and the hour of meeting and, in case of special business, the general nature of that business shall be given in manner hereinafter mentioned, or in such other manner, if any, as may be prescribed by the company in general meeting, to such persons as are, under the regulations of the company, entitled to receive such notices from the company; but with the consent of all the members entitled to receive notice of some particular meeting, that meeting may be convened by such shorter notice and in such manner as those members may think fit.

43. The accidental omission to give notice of a meeting to, or

the non-receipt of notice of a meeting by, any member shall not invalidate the proceedings at any meeting.

NOTICES

103. A notice may be given by the company to any member either personally or by sending it by post to him to his registered address, or (if he has no registered address within the United Kingdom) to the address, if any, within the United Kingdom supplied by him to the company for the giving of notices to him.

Where a notice is sent by post, service of the notice shall be deemed to be effected in the case of a notice of a meeting at the expiration of 24 hours after the letter containing the same is posted, and in any other case at the time at which the letter would be delivered in the ordinary course of post.

104. If a member has no registered address within the United Kingdom and has not supplied to the company an address within the United Kingdom for the giving of notices to him, a notice addressed to him and advertised in a newspaper circulating the neighbourhood of the registered office of the company, shall be deemed to be duly given to him at noon on the day on which the advertisement appears.

105. A notice may be given by the company to the joint holders of a share by giving the notice to the joint holder named first in the register of members in respect of the share.

106. A notice may be given by the company to the persons entitled to a share in consequence of the death or bankruptcy of a member by sending it through the post in a prepaid letter addressed to them by name, or by the title of representatives of the deceased, or trustee of the bankrupt, or by any like description, at the address, if any, within the United Kingdom supplied for the purpose by the persons claiming to be so entitled, or (until such an address has been so supplied) by giving the notice in any manner in which the same might have been given if the death or bankruptcy had not occurred.

107. Notice of every general meeting shall be given in some manner hereinbefore authorised to (*a*) every member except those members who (having no registered address within the United Kingdom) have not supplied to the company an address within the United Kingdom for the giving of notices to them, and also to (*b*) every person entitled to a share in consequence of the death or bankruptcy of a member, who, but for his death or bankruptcy, would be entitled to receive notices for general meetings.

CHAPTER V

PROCEDURE AT COMPANY MEETINGS

Taking the Chair. The meeting usually commences with the chairman of the company taking the chair on the stroke of the clock for which the meeting has been summoned. But it may happen that the chairman is unable to be present—perhaps it is the first time that he finds himself in such a position and a pardonable nervousness induces a plea of indisposition, perhaps he is abroad on the business of the company, possibly his car has had a breakdown on the road. Whatever the reason, if the moments of grace allowed him by the Articles have passed, the person next designated by the Articles takes the chair, or if there be no such person, then a leading shareholder will rise and move that Mr. Bigg-Noyse do take the chair for this meeting. A low murmur of applause and Mr. Bigg-Noyse seats himself in the chair and calls the meeting to order.

The Quorum. In prosperous and peaceful times it may be necessary for the chairman to cast a glance along the empty benches in front of him to make quite sure that a quorum as prescribed by the Articles is present,[1] though

[1] "One shareholder only attended the meeting. He held the proxies of other shareholders and he took the chair and passed a resolution making a call, and then proposed a vote of thanks to himself. In giving judgment in the Court of Appeal, Lord Coleridge, C.J., said:'The word "meeting" *prima facie* means a coming together of more than one person. It is, of course, possible to show that the word "meeting" has a meaning different from the ordinary meaning.' . . . But now what I have to consider is whether this is not one of the cases referred to by Lord Coleridge, C.J. . . . I think on the whole that I may give effect to obvious common sense by holding that in this particular case, where there is only one shareholder of the class, in the true construction of the Memorandum, the expression 'meeting' may be held to include that case." So that where all the shares of a class required to meet are held by one person, one person may constitute a meeting. (*East* v. *Bennett Brothers, Ltd.*, [1911] 1 Ch. 163.)

a vigilant secretary will have seen to it that the necessary number of supporters is in attendance.[1] In more difficult times the usual stuffy hall will be crowded, and those standing against the wall at the back will leave him in no doubt that in this respect at any rate the law has been complied with.

The Agenda : Notices and Minutes. The first item on every agenda, no matter what the purpose of the meeting, is the reading by the secretary of the notice convening the meeting. This is only a formality, but should not be omitted.[2] Some secretaries are apt to mumble their notices; their voices reach the back of the hall hardly above a whisper. This is by no means to be commended. The secretary should adopt a positive, if deferential, manner in his reading (as if to say, "I may only be the bad bold secretary, but I am worth at least twice my present salary to the company"). In some companies the minutes of the last meeting are then read. If this practice is adopted, one of the gentlemen at the back with a sheaf of notes in his hand is sure to get up and ask an irrelevant question, or make inappropriate observations. The chairman should at once call him to order. The only question then before the meeting is the correctness of the minutes as a record. If they are correct, the chairman signs them, or if they call for amendment they are amended accordingly and then signed. This is sometimes spoken of as confirming the minutes, but the phrase is not altogether happy, as there is not, or ought not to be, anything requiring confirmation, and the better practice is for the chairman to inquire of the meeting, "Is it your pleasure that I sign these minutes as correct?" In many companies the item is omitted from the agenda altogether by the simple device of the chairman signing the minutes as

[1] A proxy for a corporation can be counted for the purpose. *In re Kelantan Coco Nut Estates, Ltd. and Reduced,* [1920] W.N. 274.

[2] If it is taken as read, it will still form part of the proceedings and can be made evidence in any subsequent legal action. (Cf. *Betts & Co., Ltd.* v. *Macnaghten,* [1910] 1 Ch. 430, 434–5.)

soon as prepared after the conclusion of each meeting. This is a sufficient compliance with the law.

Conduct of the Meeting. The chairman then proceeds to the main business of the meeting. If it be a series of special resolutions, say, to alter one or more of the Articles of Association, he will in a short introductory speech explain the nature and effect of the alterations and the reasons which have led the board to propose them. He will then, when he has concluded his speech, invite questions. This is usually the signal for the dissatisfied to make their presence felt. The chairman should deal with them tactfully but firmly. "Undoubtedly it is the duty of the chairman and his function to preserve order and to take care that the proceedings are conducted in a proper manner "[1] but he should not attempt to be dictatorial. If the meeting is hostile, he cannot override it and dissolve it at his own will and pleasure.[2] He must do his best to ride the storm, and so long as he acts fairly the law will stand by him. By the date of the extraordinary general meeting in question, the London and Northern Assets Corporation somewhat belied its name. "It had not a railway, a train, a canal, a factory, or anything of the kind. It was what is called a finance company" and the minority led by Mr. Wall expressed its opinion of what the directors proposed to do in no uncertain terms. After having heard their views, the meeting came to the conclusion that they had heard enough and did not want to hear any more, though Mr. Wall was prepared to go on talking. And indeed because the chairman closured the discussion, he brought his action against the company. The Court refused to lend him its aid. The decision of Lord Eldon in *Const* v. *Harris* ((1824), T. & R. 496) does not mean that a minority bent on obstructing business and resolved on talking for ever should not be put down. The majority are not to be tyrannical,

[1] Per Chitty, J., *National Dwellings Society* v. *Sykes*, [1894] 3 Ch. 159, 162.

[2] Ibid.

but after hearing what is to be said, may say "We have heard enough. We are not bound to listen till everybody is tired of talking."[1] In order to be sure that he has the sense of the meeting with him, he should take a show of hands, for that is "what may be termed the common law of the country as to voting at meetings."[2] So, in this way he should put the resolutions, one by one,[3] which the meeting has been called to consider. It is related of a certain chairman who began his career as an army officer in India that after a long and not necessarily sympathetic discussion he would rap the table sharply with his cane, and declare the resolution carried. If a shareholder wishes to challenge a declaration of this kind, he must do so at once. It is no good waiting and then afterwards going to the Courts.[4] The proper course for him to adopt is to demand a poll, and provided he satisfies such requirements as the Articles lay down—three people must join in the demand, or if less, then they must hold 15 per cent of the paid-up capital, assuming Table A[5] to be in force—the chairman has no option but to take a poll. He can either take it there and then or adjourn for the purpose. But this is not necessary. He can fix a day, or make some arrangement for the holding of the poll and then proceed to the transaction of any other business that may be before the company.

Taking a Poll: Proxies. It is a common error to suppose that when a poll is taken voting is entirely by post. This is not so. Proxies are, of course, counted—they are not counted on a show of hands—but voters must appear

[1] *Wall* v. *London & Northern Assets Corporation*, [1898] 2 Ch. 469 C.A. 480, 481.

[2] Per Jessel, M.R., *In re Horbury Bridge Coal, Iron and Waggon Co.* (1879), 11 Ch. D. 109, 115. But in declaring the result he is not bound, even in the case of a special or extraordinary resolution, to give the numbers for and against. (S. 117 (3).)

[3] Cf. *Patent Wood Keg Syndicate* v. *Pearse*, [1906] W.N. 161.

[4] Cf. *Arnot* v. *United African Lands, Ltd.*, [1901] 1 Ch. 518 C.A. A declaration of the chairman that a resolution has been carried, a poll not having been demanded, is, in the absence of fraud, absolutely conclusive of the fact that the resolution has been carried.

[5] See cl. 50.

either in person or by proxy,[1] unless the Articles otherwise provide. It is open to the chairman to try and persuade members to vote for the policy which the board is advocating, and he is entitled to charge the company with the cost of printing, stamping, and posting of proxy forms, nominating him or one of the director proxies for the purpose.[2] It is for the chairman to decide whether a proxy form is in order and the vote validly tendered. His decision will not afterwards be reviewed by the Court. At a meeting of the Exchange Investment Corporation, Ltd., the chairman held a proxy, which he had satisfied himself was in order, in respect of a batch of 292 votes. Without these votes the resolution for winding up the company could not have been carried. Mr. Wall (the same Mr. Wall, so it happens, as in the previous case) took objection to the proxy, but the chairman overruled him. He thereupon went to the Courts, but they would give him no assistance, holding the chairman's decision to be final.[3] By giving a proxy a shareholder does not disable himself from voting in person should he afterwards so decide. The right of the shareholder is paramount.

The Articles provided (as so often) that a vote by proxy shall be valid, notwithstanding revocation, provided no notice of revocation is received at the office before the meeting.

Mr. Cousins moved (by way of an amendment) that instead of re-electing the chairman, Mr. Carr be elected. The resolution to re-elect was declared carried on a show

[1] See *McMillan* v. *Le Roi Mining Co.*, [1906] 1 Ch. 331. If necessary the Court will compel the proxy by mandatory injunction to vote in accordance with the wishes of the person he represents. (Miss Puddephatt held 2,500 shares in the London & Cosmopolitan Mining Co. Ltd., which she mortgaged to Leith, a director of the company. He wrote "Though the shares will be in my name and my voice may give the vote, I shall vote in all cases as you wish me to do." The Court compelled him to vote as she directed. (*Puddephatt* v. *Leith*, [1916] 1 Ch. 200.))

[2] *Peel* v. *L.N.W.R.*, [1907] 1 Ch. 5.

[3] *Wall* v. *Exchange Investment Corporation, Ltd.*, [1926] 1 Ch. 143 C.A. The decision turned upon the Articles but it is submitted that it must be of general application.

of hands and Mr. Cousins demanded a poll. The meeting (20th October) was accordingly adjourned to 3rd November.

At the adjourned meeting the amendment was put, and Mr. Cousins tendered (*inter alia*) the following proxies (*a*) 36,991 votes of shareholders who had intended to revoke their proxies, but notice of revocation was given between 20th October and 3rd November. These shareholders did not attend on 3rd November. (*b*) 11,396 votes of shareholders who had given similar notice but who attended and voted against him.

The Court of Appeal held that Mr. Carr was not elected because, though Mr. Cousins was entitled to count the 36,991 votes in that the notice of revocation was inoperative, having been received after 20th October,[1] he was not entitled to count the 11,396 without which his amendment was lost. The persons who had given these proxies were present, and instead of allowing the proxies to take effect they determined to exercise their alternative right and vote personally, and in a contrary sense to the proxies. (*Cousins* v. *International Brick Co., Ltd.*, [1931] 2 Ch. 90 C.A.[2])

Amendments. The chairman is sometimes placed in an awkward position when hostile amendments are moved. If, on the one hand, he yields to his own inclination and rules them out of order he may thereby invalidate the resolution he succeeds in carrying.[3] If, on the other hand,

[1] For further illustration see *Shaw* v. *Tati Concessions Ltd.*, [1913] 1 Ch. 292.

[2] The object of the Article was to protect the company from any liability to inquire whether a proxy validly used had been revoked or not.

Conversely, if the shareholder is disabled from voting by reason of being an enemy alien in time of war the vote cannot be exercised by proxy. See *Robson* v. *Premier Oil & Pipe Line Co., Ltd.*, [1915] 2 Ch. 124 C.A.

[3] Cf. *Henderson* v. *Bank of Australasia* (1890), 45 Ch.D. 330, where the Court of Appeal held that the resolution passed at the meeting must be set aside, because the chairman, on the advice of the company's solicitor present, had ruled out an amendment which should have been put.

he decides to allow them, it may be that they will prove invalid because not within the scope of the notice. What is a circumspect chairman to do? Or, in other words, when will an amendment be in order? It need not be submitted in writing; it is sufficient if its effect is made reasonably clear to the meeting.[1] It must, however, be an amendment to a resolution properly moved, and, if notice be required, to a resolution of which due notice has been given. In substance it must fairly fall within the scope of the original notice. Thus a notice was given of a meeting to pass certain resolutions (with such amendments, etc.) including one for the appointment of three named persons as directors. At the meeting an amendment was moved and carried that two other named persons should be appointed as well. Was the amendment in order? Eve, J., held that it was, "No one could have thought that the meeting was convened to appoint the three named individuals without the power to substitute other qualified persons for all or any of such individuals. . . . . . ."

"The special business indicated in the notice being the election of directors for the ensuing year, I think a recipient of the notice must be taken to have known that the company in general meeting might make any appointments within the limit imposed by their regulations."[2] If the amendment alters the character of the business as notified to such an extent that no reasonable person from reading the notice would expect such a proposal, it cannot be said to fall within the scope of the notice.[3]

If because of the number of resolutions or amendments, or for any reason, the end of the agenda cannot conveniently be reached, the chairman may adjourn the meeting, and the business may lawfully be completed at the

[1] *Henderson's Case.*
[2] *Betts & Co., Ltd.* v. *Macnaghten*, [1910] 1 Ch. 430.
[3] Ibid., p. 435. See further the cases under notice, *ante* p. 93.

adjourned meeting.[1] But in this,[2] as in all other matters with regard to the conduct of the meeting, a prudent chairman will see that he has the sense of the meeting with him. To judge by a mere perusal of the relevant clauses of Table A, the conduct of a company meeting would appear to be a matter of no great difficulty. But in practice, no matter how anxious the chairman may be for the regularity of his proceedings, no matter how well advised, it is all too easy, in the heat of debate, or in the complications of actual business, for some irregularity to occur. Such minor irregularities will not vitiate the proceedings so long as the chairman acts fairly and impartially and takes the sense of the meeting as his guide. The rule in *Foss* v. *Harbottle*[3] will protect him: "It is an elementary principle . . . that the Court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so."[4]

Privilege. Again, what a speaker on the spur of the moment may say of a director in a matter concerning the affairs of the company is privileged, and no action of defamation will lie. And the privilege is not lost by reason of the Press being present, as is customary, to report the proceedings. Of course, the meeting is not to be used as a forum for ventilating private opinions of the directors or officers personally. To the maliciously minded the law holds out no encouragement. Thus at a meeting of the Elandsfontein No. 2 Gold Mining Co., Mr. Samuel, one of the directors, said in the course of his remarks, "In the recent arbitration proceedings between us, Mr. Marks

[1] See the cases cited in *Neuschild* v. *British Equatorial Oil Co., Ltd.*, [1925] Ch. 346. The date of the adjourned meeting will be the date of the resolutions then passed (and not the date of the original meeting), for e.g. filing, and for all purposes. (S. 119.)

[2] Table A does not leave the question of adjournment as in *Salisbury Gold Mining Co.* v. *Hathorn*, [1897] A.C. 268 P.C., to the chairman's discretion.

[3] (1843), 2 Hare 461.

[4] *Burland* v. *Earle*, [1902] A.C. 83, 93 P.C.

(another director) was taxed with having brought a blackmailing action against me. He was awfully indignant about it and wanted to know if it was on my instructions that my counsel had accused him of having brought a blackmailing action. My counsel said it was upon his own evidence," whereupon Mr. Marks brought an action of slander against Mr. Samuel. The judge at the trial thought it was a case of the pot calling the kettle black, and after hearing Mr. Marks cross-examined, the jury stopped the case and found for the defendant. Privilege was pleaded. The Court of Appeal ordered a new trial none the less.[1]

Conclusion. The meeting ends as a rule with a return to the amenities, and the final paragraph of the minutes will run somewhat as follows—

> The meeting terminated with a cordial vote of thanks to Mr. Marks and the Board of Directors, moved by Mr. Samuel, and seconded by Mr. McLeod, to which the Chairman suitably responded and declared the meeting closed.

[1] *Marks* v. *Samuel*, [1904] 2 K.B. 287.

TABLE A (CLAUSES 44 TO 63)

PROCEEDINGS AT GENERAL MEETINGS

44. All business shall be deemed special that is transacted at an extraordinary meeting, and all that is transacted at an ordinary meeting, with the exception of sanctioning a dividend, the consideration of the accounts, balance sheets, and the ordinary report of the directors and auditors, the election of directors and other officers in the place of those retiring by rotation, and the fixing of the remuneration of the auditors.

45. No business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business; save as herein otherwise provided, three members personally present shall be a quorum.

46. If within half an hour from the time appointed for the meeting a quorum is not present, the meeting, if convened upon the requisition of members shall be dissolved; in any other case it shall stand adjourned to the same day in the next week, at the same time and place, and if at the adjourned meeting a quorum is not present within half an hour from the time appointed for the meeting the members present shall be a quorum.

47. The chairman, if any, of the board of directors shall preside as chairman at every general meeting of the company.

48. If there is no such chairman, or if at any meeting he is not present with fifteen minutes after the time appointed for holding the meeting or is unwilling to act as chairman, the members present shall choose some one of their number to be chairman.

49. The chairman may with the consent of any meeting at which a quorum is present (and shall if so directed by the meeting), adjourn the meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place. When a meeting is adjourned for ten days or more, notice of the adjourned meeting shall be given as in the case of an original meeting. Save as aforesaid it shall not be necessary to give any notice of an adjournment or of the business to be transacted at an adjourned meeting.

50. At any general meeting a resolution put to the vote of the meeting shall be decided on a show of hands, unless a poll is (before or on the declaration of the result of the show of hands) demanded by at least three members present in person

or by proxy entitled to vote or by one member or two members so present and entitled, if that member or those two members together hold not less than 15 per cent of the paid-up capital of the company, and, unless a poll is so demanded, a declaration by the chairman that a resolution has, on a show of hands, been carried, or carried unanimously, or by a particular majority, or lost, and an entry to that effect in the book of the proceedings of the company shall be conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of, or against that resolution.

51. If a poll is duly demanded it shall be taken in such manner as the chairman directs and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded.

52. In the case of an equality of votes, whether on a show of hands or on a poll, the chairman of the meeting at which the show of hands takes place or at which the poll is demanded, shall be entitled to a second or casting vote.

53. A poll demanded on the election of a chairman or on a question of adjournment, shall be taken forthwith. A poll demanded on any other question shall be taken at such time as the chairman of the meeting directs.

VOTES OF MEMBERS

54. On a show of hands every member present in person shall have one vote. On a poll every member shall have one vote for each share of which he is the holder.

55. In the case of joint holders the vote of the senior who tenders a vote, whether in person or by proxy, shall be accepted to the exclusion of the votes of the other joint holders; and for this purpose seniority shall be determined by the order in which the names stand in the register of members.

56. A member of unsound mind, or in respect of whom an order has been made by any court having jurisdiction in lunacy, may vote, whether on a show of hands or on a poll, by his committee, *curator bonis*, or other person in the nature of a committee or *curator bonis*, appointed by that court, and any such committee, *curator bonis*, or other person may, on a poll, vote by proxy.

57. No member shall be entitled to vote at any general meeting unless all calls or other sums presently payable by him in respect of shares in the company have been paid.

58. On a poll votes may be given either personally or by proxy.

59. The instrument appointing a proxy shall be in writing under the hand of the appointor or of his attorney duly authorised in writing, or, if the appointor is a corporation, either under seal or under the hand of an officer or attorney duly authorised. A proxy need not be a member of the company.

60. The instrument appointing a proxy and the power of attorney or other authority, if any, under which it is signed or a notarially certified copy of that power or authority shall be deposited at the registered office of the company not less than forty-eight hours before the time for holding the meeting or adjourned meeting, at which the person named in the instrument proposes to vote, and in default the instrument of proxy shall not be treated as valid.

61. An instrument appointing a proxy may be in the following form or any other form which the directors shall approve—

Company, Limited.

"I , of , in the county of , being a member of the Company, Limited, hereby appoint , of , as my proxy, to vote for me and on my behalf at the [*ordinary or extraordinary, as the case may be*] general meeting of the company to be held on the day of and at any adjournment thereof."

Signed this day of

62. The instrument appointing a proxy shall be deemed to confer authority to demand or join in demanding a poll.

CORPORATIONS ACTING BY REPRESENTATIVES AT MEETINGS

63. Any corporation which is a member of the company may by resolution of its directors or other governing body authorise such person as it thinks fit to act as its representative at any meeting of the company or of any class of members of the company, and the person so authorised shall be entitled to exercise the same powers on behalf of the corporation which he represents as that corporation could exercise if it were an individual member of the company.

CHAPTER VI

THE DIRECTORS

(A) BOARD MEETINGS

THE conduct of the business of the company devolves, under the Articles, on the directors, who for the purpose of transacting such business hold Board meetings at regular intervals or as occasion demands. At these meetings the directors should proceed with rather more formality than perhaps they have been accustomed to as partners in a private concern, e.g. the Act requires minutes to be kept of their proceedings.[1] But compared with the stiff formality of the general meetings of shareholders, the Board meeting is quite an informal affair. Businesslike dispatch is what is aimed at, and the law makes large allowances with this end in view. The position arrived at is the result of a number of well established rules. First, there is the proposition already dealt with,[2] that persons dealing with the company are entitled to presume the regularity of the domestic proceedings.[3] Secondly, what is done informally can always, if necessary, be afterwards ratified by the Board.[4] Thirdly, even where an act is *ultra vires* the Board, not a mere irregularity in the exercise of a power possessed by the Board, it can subsequently be ratified and rendered valid by the shareholders.[5] The articles usually provide that a defect in the appointment of a director or a disqualification shall

[1] S. 120 (1) (2).
[2] See *ante* p. 80.
[3] See also s. 120 (3).
[4] Cf. *Hooper* v. *Kerr, Stuart & Co., Ltd.* (1900), 17 T.L.R. 162. (10th December, Secretary, without the directors' authority, convened an extraordinary general meeting; 13th December, Plaintiff issued his writ for an injunction to restrain the meeting; 14th December, Directors met and ratified the secretary's act in sending out the notices. Held that the ratification rendered the notice good for all purposes.)
[5] Cf. *Parker and Cooper, Ltd.* v. *Reading*, [1926] Ch. 975.

not, when afterwards discovered, invalidate what has been done by the Board.[1]

Notice. Notice of a proposed meeting (if required at all)[2] must be sent to *all* the directors who can be communicated with,[3] but the notice need not specify the agenda, and in any case the directors are not confined to the items there set out; they can deal with any business they like.[4] When the meeting is over the business

[1] Cf. cl. 88 in Table A, and see further *Channel Collieries Trust, Ltd.* v. *Dover, etc., Light Railway*, [1914] 2 Ch. 506.

[2] Cf. Table A, cl. 43.

[3] Cf. *In re Portuguese Consolidated Copper Mines, Ltd.* (1889), 42 Ch.D. 160 C.A. (Lord Inchiquin, a director, received no notice. "Lord Inchiquin only went to Ireland, and there is a daily post to Ireland, so that there was no want of means of communication . . . assuming that notice to all would have made the meeting held on the 24th a good meeting, yet in point of fact notice was not given or sent to all the directors when it could have been given to all or sent to all, the meeting was a bad one," per Cotton, L.J., p. 168.) See also *Young* v. *Ladies Imperial Club*, [1920] 2 K.B. 523, 527, 528. (Notice held bad because not sent to the Duchess of Abercorn, who only consented to remain on the committee because she was promised that she would not be troubled.)

[4] *La Compagnie de Mayville* v. *Whitley*, [1896] 1 Ch. 788 C.A. ("This case involves one question which is of great importance to companies. . . . The great point is whether, when a directors' meeting is to be held, it is necessary to give a notice not only of the meeting, but of the business to be transacted at the meeting. I am not prepared to say as a matter of law that it is necessary. As a matter of prudence it is very often done, and it is a very wise thing to do it; but it strikes me, as it struck Lord Tenterden in *Rex* v. *Pulsford* (1829), 8 B. & C. 350, that there is an immense difference between the meetings of shareholders or corporators and meetings of those whose business it is to attend to the transaction of the affairs of the company or corporation. It is not uncommon for directors conducting a company's business to meet on stated days without any previous notice being given either of the day or of what they are going to do. Being paid for their services . . . it is their duty to go when there is any business to be done, and to attend to that business whatever it is; and I cannot now say for the first time that as a matter of law the business conducted at a directors' meeting is invalid if the directors have had no notice of the kind of business which is to come before them. Such a rule would be extremely embarrassing in the transaction of the business of companies," per Lindley, L.J., p. 796.)

The Articles may provide (though it is unusual in the case of trading companies) that for certain or special kinds of business special notice specifying the business shall be given, in that case the proceedings will be invalid in the absence of proper notice. See *Young* v. *Ladies Imperial Club, supra*.

A few minutes' notice may suffice; shortness of notice will not be allowed to invalidate proceedings unless immediately and justifiably objected to. See *Browne* v. *La Trinidad* (1887), 37 Ch.D. 1, 9 C.A.

transacted should be recorded on the minutes by the secretary and signed by the chairman.[1] They can delegate any of their work to a committee, and a single director may constitute that committee.[2]

Procedure. The position then can be summed up in a proposition: Subject only to what has been said above the acts of a Board meeting are perfectly valid, even though the business is conducted in an entirely informal way.

Thus, there were only two directors of a company, and the one proposed to the other that they should appoint a third to fill a casual vacancy which had recently occurred. Blair, the chairman, thereupon summoned Tilden Smith to attend a Board meeting on 21st February at the company's offices. Tilden Smith did not attend the Board meeting, but telephoned to say that he would see Blair at his own office at 2.30. Blair accordingly went there and saw Tilden Smith in the passage outside the door of his private room. Blair said, after explaining the necessity for the appointment, "I nominate Foulkes." Tilden Smith said he objected. Blair replied that by his casting vote he declared Foulkes duly elected. The Court held the appointment good; there is no reason why a meeting should not be held in the passage. "So far as I can see Foulkes was validly elected." (*Smith* v. *Paringa Mines, Ltd.*, [1906] 2 Ch. 193, 197.)

But this informality is not without its limits.

Thus, of The British Scagumite Co., Ltd., Canon Barron and Mr. Potter were the sole directors. But it was impossible to hold a Board meeting because the Canon refused to meet or even speak to Mr. Potter. Mr. Potter therefore decided that the Board should appoint additional directors. He accordingly put himself to the trouble of meeting the train by which the Canon should arrive at

[1] S. 120 (1) (2). "Minutes of the Board meetings are kept in order that the shareholders of the company may know exactly what their directors have been doing, why it was done, and when it was done," per Lord Esher, M.R., *In re Cawley & Co.* (1889), 42 Ch.D. 209, p. 226. If any alteration or addition is called for it should be done by resolution, not by clerical correction, *ibid.*

[2] *In re Fireproof Doors, Ltd., Umney* v. *The Company*, [1916] 2 Ch. 142.

Paddington, and awaited the train's arrival with the law of *Smith* v. *Paringa* in mind. On the Canon's alighting he ran along the platform beside him, and laying a friendly hand on the ecclesiastical arm said: "I formally propose that we add the Rev. Herbert, Mr. Barnard, and Mr. Musgrave as additional directors. Do you agree or object?" But the Canon allowed no unchristian expletive to escape him, but kept his eyes glued to a distant taxi as if he had not even heard the names and held his peace. Whereupon Mr. Potter said: "In my capacity as chairman I give my casting vote in their favour and declare them duly elected. Thank you. Good day"; and the Board adjourned. But Mr. Potter apparently had misgivings. Perhaps he talked it over with his wife; because, next day, when the shareholders were arriving for the extraordinary meeting summoned by the Canon for the purpose of getting rid of Mr. Potter and substituting a new director in his place, he buttonholed the Canon as he was entering the inner room where the meeting was to be held and said: "I propose Mrs. Clara Rose Potter, Miss Florence Hewitt, and Mr. Burnet as additional directors," and when the Canon gave no sign of agreeing said, "Then I give my casting vote; they are elected." The extraordinary meeting then began. Well, were they elected? It was strenuously urged by learned counsel that it was not open to the Canon to behave in such a way as to nullify a meeting which, he said, had every ingredient of a valid board meeting and, what was more, one within the rule in *Smith* v. *Paringa*. The Court thought otherwise. A director cannot have a Board thrust upon him, without his consent and against his will. The Canon came with the deliberate intention of not attending a Board meeting. "There was therefore no Board meeting at which Canon Barron was present. Mr. Potter was alone present, so that there was no quorum, and I must hold that the three additional directors named by him were not validly appointed." (*Barron* v. *Potter*, [1914] 1 Ch. 895, 901.)

Personal Interest of the Director. The Articles usually provide[1] that no director shall vote at a Board in respect of any contract or transaction in which he is interested,

[1] Cf. Table A, cl. 34. "A director shall not vote in respect of any contract in which he is interested or any matter arising thereout, and if he does so vote his vote shall not be counted."

i.e. where the transaction is such that his personal interest[1] may be in conflict with the duty he owes to the company. The object of the clause being that the company should be able to rely upon his unbiased and independent judgment.[2] If he is so interested he cannot be counted for the purposes of a quorum. Where the Articles prescribe a quorum,[3] failing determination of the quorum by the Board, the directors cannot alter *ad hoc* the number required so as to circumvent the disqualification, or deal with what is essentially a single transaction by splitting up the resolution into two.

Thus, Mr. Dobbie and Mr. Young had advanced considerable sums to the North Eastern Insurance Co., Ltd., of which they were directors. At a Board meeting held on 16th June, 1913, it was resolved to issue debentures to those gentlemen by way of security for the loan. There were only four directors of the company in all, and three were required by the Articles to form a quorum. To get over the difficulty two resolutions were passed: one for the issue of a debenture to Mr. Dobbie, when Mr. Dobbie refrained from voting, and one for a similar issue to Mr. Young when he likewise abstained.

On 4th September the Board met again, Mr. Dobbie being absent. As it was proposed to issue a debenture to him in respect of all moneys due from the company to him and Mr. Young, a resolution was passed to reduce the quorum to two for the purpose of this resolution, which was then carried.

All the resolutions were held bad; the issue (on 16th June) of the two debentures in fact constituted one transaction in which both directors were equally interested, and the resolution (on 4th September) to reduce the quorum was in itself bad. (*In re North Eastern Insurance Co., Ltd.*, [1919] 1 Ch. 198.)

Where a debenture is issued to someone having dealings

[1] It is immaterial whether this conflicting interest belongs to him beneficially or as a trustee for others. *Transvaal Lands Co.* v. *New Belgium (Transvaal) Land and Development Co.*, [1914] 2 Ch. 488, 503 C.A.

[2] See *Victors, Ltd.* v. *Lingard*, [1927] 1 Ch. 323, 329.

[3] Cf. Table A, cl. 44.

with the company, other than a director, e.g. the company's bank, though the issue may be bad on account of a director being thus interested the company may afterwards, by conduct or the circumstances of the case, be estopped from setting up the invalidity.[1] If a person dealing with the company has notice of the irregularity which renders the resolution bad, the company may obtain rescission of the transaction even after completion, if only rescission is still possible.[2] On the other hand the company may, in the exercise of its undoubted right to cure irregularities by ratification,[3] confirm a transaction of the Board which is invalid because carried by the vote of an interested director, e.g. where Mrs. Foster helped to appoint herself managing director of W. Foster & Son, Ltd., at the rate of £300 to £500 per annum, the Court held that it was open to the company to confirm her appointment, and the irregularity was not such as to give a dissentient minority a right to sue.[4]

[1] *Victors, Ltd.* v. *Lingard*, [1927] 1 Ch. 323. On Estoppel see *Bloomenthal* v. *Ford*, [1897] A.C. 156 at p. 168.

[2] *Transvaal Lands Co. Case, supra.* ("The provisions of this Article were not observed when the resolution to purchase the Lydenberg shares was carried, as Harvey voted in favour of it, and without his vote being counted there was no quorum, whereof the defendants, the other contracting party, had full notice. The result is that the contract was voidable, and has been duly avoided, and the plaintiffs are accordingly entitled to have the purchase money repaid, but they must return the Lydenberg shares," p. 505.)

[3] See above p. 110.

[4] *Foster* v. *Foster*, [1916] 1 Ch. 532.

TABLE A (CLAUSES 81 TO 88, 73 TO 80)

PROCEEDINGS OF DIRECTORS

81. The directors may meet together for the dispatch of business, adjourn, and otherwise regulate their meetings, as they think fit. Questions arising at any meeting shall be decided by a majority of votes. In case of an equality of votes *the chairman shall have a second or casting vote.* A director may, and the secretary on the requisition of a director shall, at any time summon a meeting of the directors.

82. The quorum necessary for the transaction of the business of the directors may be fixed by the directors, and unless so fixed shall, when the number of directors exceeds three, be three, and when the number of directors does not exceed three, be two.

83. The continuing directors may act notwithstanding any vacancy in their body, but, if and so long as their number is reduced below the number fixed by or pursuant to the regulations of the company as the necessary quorum of directors, the continuing directors may act for the purpose of increasing the number of directors to that number, or of summoning a general meeting of the company, but for no other purpose.

84. The directors may elect a chairman of their meetings and determine the period for which he is to hold office; but if no such chairman is elected, or if at any meeting the chairman is not present within five minutes after the time appointed for holding the same, the directors present may choose one of their number to be chairman of the meeting.

85. The directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit; any committee so formed shall in the exercise of the powers so delegated conform to any regulations that may be imposed on it by the directors.

86. A committee may elect a chairman of its meetings; if no such chairman is elected, or if at any meeting the chairman is not present within five minutes after the time appointed for holding the same, the members present may choose one of their number to be chairman of the meeting.

87. A committee may meet and adjourn as it thinks proper. Questions arising at any meeting shall be determined by a majority of votes of the members present, and in case of an equality of votes the chairman shall have a second or casting vote.

88. All acts done by any meeting of the directors or of a committee of directors, or by any person acting as a director, shall, notwithstanding that it be afterwards discovered that

there was some defect in the appointment of any such director or person acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director.

ROTATION OF DIRECTORS

73. At the first ordinary general meeting of the company the whole of the directors shall retire from office, and at the ordinary general meeting in every subsequent year one-third of the directors for the time being, or, if their number is not three or a multiple of three, then the number nearest one-third, shall retire from office.

74. The directors to retire in every year shall be those who have been longest in office since their last election, but as between persons who became directors on the same day those to retire shall (unless they otherwise agree among themselves) be determined by lot.

75. A retiring director shall be eligible for re-election.

76. The company at the general meeting at which a director retires in manner aforesaid may fill up the vacated office by electing a person thereto, and in default the retiring director shall be deemed to have been re-elected unless at such meeting *it is resolved not to fill up such vacated office.*

77. The company may from time to time in general meeting increase or reduce the number of directors, and may also determine in what rotation the increased or reduced number is to go out of office.

78. Any casual vacancy occurring in the board of directors may be filled up by the directors, but the person so chosen shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected a director.

79. The directors shall have power at any time, and from time to time, to appoint a person as an additional director who shall retire from office at the next following ordinary general meeting, but shall be eligible for election by the company at that meeting as an additional director.

80. The company may by extraordinary resolution remove any director before the expiration of his period of office, and may by an ordinary resolution appoint another person in his stead. The person so appointed shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected a director.

(B) THE POWERS OF DIRECTORS

It would be a mistake to suppose from the last or any other illustration in this chapter, that in the management of the company's affairs there is anything like a division of powers between the shareholders and the directors. The management is almost always entrusted by the Articles[1] to the directors, and they exercise all the powers for the conduct of the business possessed by the company. They may do anything within the scope of that business. Of course, it is always open to the company to frame articles in such a way that certain acts can only be done by the company in general meeting. But for obvious reasons it is difficult to generalize about such restrictions. They depend entirely on the special circumstances of the individual business. Where all the shares are held by three or four holders the restrictions may be very numerous, and the trading operations of the directors, without the authorization of the holders, very narrowly confined. But this is an unusual and possibly an extreme case. At the other end of the scale there may be but a single restriction, the directors are not to borrow beyond a certain amount without the authorization of a general meeting, or they are not to acquire fresh premises, or in the case of an investment trust they are not to invest more than x per cent of the company's moneys in any one or in any one kind of security. But even where such restrictions exist, so long as they are observed the directors have a free hand; the shareholders cannot interfere with them.

If the extent of the Board's powers seems out of harmony with the notion of a joint-stock company, a few moments' reflection will show that the law could hardly be otherwise. If the directors have lost the confidence of the company, the remedy of dismissal is always open to the company. But so long as they enjoy the confidence of the shareholders they must be allowed to carry on the

[1] See Table A, cl. 67

business in their own way. It would be intolerable if their ordinary business dealings could be nullified by a snatch vote of a general meeting. Suppose the directors of the Eastern Steam Packet Co. have obtained a good offer of the *Cruising Star*, but before completion a self-styled vigilant shareholder fills an extraordinary meeting with his friends and carries a resolution disapproving the purchase, how could the company's business be carried on at all? The law, therefore, is that once the powers of management have been vested in the directors under the Articles, nothing short of an alteration in the Articles can restrict their powers.

"Even a resolution of a numerical majority at a general meeting of the company cannot impose its will upon the directors when the Articles have confided to them the control of the company's affairs. The directors are not servants to obey directions given by the shareholders as individuals; they are not agents appointed by and bound to serve the shareholders as their principals. They are persons who may by the regulations be entrusted with the control of the business, and, if so entrusted, they can be dispossessed from that control only by the statutory majority which can alter the Articles. Directors are not, I think, bound to comply with the directions even of all the corporators acting as individuals. Of course, the corporators have it in their power by proper resolutions, which would generally be special resolutions, to remove directors who do not act as they desire, but this in no way answers the question here to be considered, which is whether the corporators are engaged in carrying on the business[1] of the corporation. In my opinion they are not. To say that they are involves a complete confusion of ideas."[2]

[1] The passage is taken from an income tax case. An English company owned all the shares in a German company. Could the English company be said to be carrying on the German company's business even for income tax purposes?

[2] *Gramophone and Typewriter, Ltd.* v. *Stanley*, [1908] 2 K.B. 89 C.A.

The Articles provided that no resolution of the Board for borrowing money, entering into any contract exceeding in value £1,000, for selling, letting, or mortgaging any property, opening any additional shop or branch, etc., should be valid unless twenty-four hours' notice in writing were given to A and S, ordinary shareholders of the company, and neither of them dissented from the proposed resolution.

Resolutions were passed by the Board for the acquisition of certain premises and for the letting of certain other premises, but S dissented and gave proper notice of his dissent.

An extraordinary general meeting of the company was summoned and an ordinary resolution approving the directors' proposals was carried by a simple majority.

Although the Articles contained the usual provision[1] that the Board exercised all the company's powers "subject nevertheless . . . to such regulations[2] (being not inconsistent with any such provisions of these Articles) as may be prescribed by the company in general meeting," the Court held the resolutions bad and granted an injunction restraining the company from acting upon them.

The Articles mean "that the directors should manage the business; and the company therefore are not to manage the business unless there is provision to that effect. Further, the directors cannot manage it in a particular way—that is to say, they cannot do certain things if either Mr. Salmon or Mr. Axtens objects. Now I cannot agree . . . that the failure of the directors, upon the objection of Mr. Salmon to grant these leases of itself remitted the matter to the discretion of the company in general meeting. They could still manage the business, but not altogether in the way they desired." (Per Lord Loreburn, L.C., *Quinn and Axtens* v. *Salmon*, [1909] 1 Ch. 311, C.A., [1909] A.C. 442, 443–4.)

[1] Cf. Table A, cl. 67.

[2] Lord Loreburn, L.C., thought that "regulations" must mean Articles.

TABLE A (CLAUSES 67 TO 71)

POWERS AND DUTIES OF DIRECTORS

67. The business of the company shall be managed by the directors, who may pay all expenses incurred in getting up and registering the company, and may exercise all such powers of the company, as are not, by the Act, or by these Articles, required to be exercised by the company in general meeting, subject, nevertheless, to any regulation of these Articles, to the provisions of the Act, and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made.

68. The directors may from time to time appoint one or more of their body to the office of managing director or manager for such term and at such remuneration (whether by way of salary, or commission, or participation in profits, or partly in one way and partly in another) as they may think fit, and a director so appointed shall not, while holding that office, be subject to retirement by rotation, or taken into account in determining the rotation or retirement of directors; but his appointment shall be subject to determination *ipso facto* if he ceases from any cause to be a director, or if the company in general meeting resolve that his tenure of the office of managing director or manager be determined.

69. The amount for the time being remaining undischarged of moneys borrowed or raised by the directors for the purposes of the company (otherwise than by the issue of share capital) shall not at any time exceed the issued share capital of the company without the sanction of the company in general meeting.

70. The directors shall cause minutes to be made in books provided for the purpose:

(*a*) of all appointments of officers made by the directors;

(*b*) of the names of the directors present at each meeting of the directors and of any committee of the directors;

(*c*) of all resolutions and proceedings at all meetings of the company, and of the directors, and of committees of directors;

and every director present at any meeting of directors or committee of directors shall sign his name in a book to be kept for that purpose.

THE SEAL

71. The seal of the company shall not be affixed to any instrument except by the authority of a resolution of the board of directors, and in the presence of a director and of the secretary or such other person as the directors may appoint for the purpose; and that director and the secretary or other person as aforesaid shall sign every instrument to which the seal of the company is so affixed in their presence.

(C) THE QUALIFICATION OF THE DIRECTOR

In view of what was said in the previous section with regard to the disqualification of a director from voting at a Board meeting, it becomes necessary to consider generally the broad question of what constitutes disqualification in a director, and also the converse subject of qualification.

First, there is no disqualification on the ground of nationality. A director of a company registered in England need not be a British subject, but if he be of any other nationality, or was formerly of other nationality, the fact must be entered in the Register of Directors, and must appear in all circulars, letter headings, etc.,[1] e.g. one sometimes sees a list of directors such as this—

The Marquess of Basingstoke.
J. Levinski. (British, formerly American.)
Pamela Brown.

For an undischarged bankrupt to act (without leave of the Bankruptcy Court) as a director is a very serious offence.[2] As a rule the Articles provide that the office of director shall be vacated[3] if the director becomes bankrupt.[4] They sometimes provide for vacation in case of insolvency. In that case there need be no admission of insolvency or a definite act of insolvency on a definite day on the part of the director; it is sufficient if in fact he is unable to pay his debts as they fall due. A question arose as to whether a director of the Brighton Picture Palaces, Ltd., was entitled to a quarter's salary from 2nd November, 1912. In his evidence he admitted that throughout the summer of 1912 he did not pay his debts, but he said that if given time he would liquidate all his liabilities; he had never called a meeting of his creditors.

[1] See ss. 144, 145. [2] S. 142.
[3] i.e. *ipso facto*. *In re Bodega Co., Ltd.*, [1904] 1 Ch. 276; the Board have no power of waiver in such an event.
[4] Cf. Table A, cl. 72.

The Court held that he was insolvent within the meaning of the Article, the office was therefore vacated and nothing was due.[1]

Unsoundness of mind is similarly made a disqualification. More important still is the usual provision that his office shall be vacated if he is interested even indirectly in any contract with the company, or participates in the profits of such contract without disclosing the fact. If the directors divert business from the company to themselves they must account for the profits to the company, and a resolution passed in general meeting by means of their votes to the effect that the company had no interest in the contract is invalid.[2]

But by far the most important cause of disqualification is the failure to obtain the necessary qualifying shares within the required time. So important is this subject that a director's qualification has come to bear the primary meaning of the shares he is required to hold in order to act as director, and this both in ordinary commercial idiom and in law.[3] Strictly speaking this requirement is not one of law. The Act does not say that in order to qualify as a director a person must be a member of the company. The Act says that if by the Articles a director is required to hold a specified share qualification—and without such requirement the company's shares could never be quoted on the London Stock Exchange—he must obtain his qualification within the time fixed by the Articles, and at latest within two months from the date of his appointment.[4] If he does not obtain his qualification

[1] *London and Counties Assets Co., Ltd.* v. *Brighton Grand Concert Hall and Picture Palace, Ltd.*, [1915] 2 K.B. 493 C.A.

[2] *Cook* v. *Deeks*, [1916] 1 A.C. 554 P.C.

[3] e.g. in *Spencer* v. *Kennedy*, [1926] 1 Ch. 125; it was at least arguable that "qualified" in the Article in question meant fit or suitable in other respects, but the Court refused to entertain it and held, though it rendered the decision a somewhat technical one, that the word bore its ordinary meaning.

[4] S. 141. The first directors are usually appointed under the Articles, and they are required to give signed consents to be filed (s. 140). The company may afterwards in general meeting dismiss them and appoint others in their place. There must be at least two directors (s. 139).

his office is *ipso facto* vacated at the end of the period, and acting after that involves him in default fines at the rate of £5 a day. If after appointment the qualification is raised, e.g. from 50 Ordinary Shares to 250 Ordinary Shares, failure to obtain the additional qualification does not automatically avoid the office. On the contrary the company can place his name on the register for the additional shares, and he is under a contractual liability to take them up and pay for them.[1]

The object of requiring a director to hold a qualification is "to give him a personal interest in the affairs of the company, and to induce him to attend to them in a way very different to what he would do if he had no interest."[2]

It is gross impropriety for a director to receive his qualification from a promoter. Whatever the pretence adopted to conceal the fact, such director will render himself liable to misfeasance proceedings.

A company was formed to buy the Basingstoke Canal. The vendor was the promoter's private secretary who had himself purchased the Canal for £500 about three months previously, and was now selling to the company for £88,000. All five directors were nominees of the promoter. Five transfers of his shares were passed by the Board; in each case £100 was stated to be the consideration, but no money passed. Two directors received their qualification as an out-and-out gift from the promoter, the other three held their shares in trust for him and, having given him blank transfers, at his will. The Court held all the directors liable to the company for the par value of the shares. (*In re London and South Western Canal, Ltd.*, [1911] 1 Ch. 346.)

Directors' Remuneration. The Articles usually provide that the remuneration of the directors shall from time to time be determined by the company in general meeting. In the absence of a clause such as this the director is not

[1] *Molineaux* v. *London Birmingham, and Manchester Insurance Co.*, [1902] 2 K.B. 589. Of course, there is nothing to prevent his resignation if he disapproves of the raising of the qualification.

[2] *Archer's Case*, [1892] 1 Ch. 322, 337.

as such entitled to any remuneration.[1] If his original appointment was invalid he can recover nothing, not even on a *quantum meruit*, however long he may have served.[2] The company may subsequently vary the rate of remuneration originally voted,[3] and at any time the shareholders, on written demand on the part of those entitled to one-fourth of the voting power, must be furnished with a statement from the company's auditors of the total emoluments of all the directors in respect of each of the previous three years, whether in respect of the company or its subsidiaries.[4] If the company sells part of its undertaking so that a director thereby loses some of his emoluments, he is not entitled to any payment to compensate him for such loss. Indeed, the Act expressly declares such payment unlawful, though where there is full disclosure the company may approve it.[5]

In conclusion it should be pointed out with regard to the appointment, qualification, and disqualification of directors, that there is always a residuary power in the company to act where the directors' powers are defective, or they themselves are unable or unwilling to act.[6]

In *Latchford Premier Cinema, Ltd.* v. *Ennion*, [1931] 2 Ch. 409, although the directors' argument was probably bad in any case, the overriding power of the shareholders put them out of Court at the very outset. In general meeting they tendered their resignation, which was accepted.

[1] In such a case the Board cannot by resolution entitle him to any. Cf. *Kerr* v. *Marine Products, Ltd.* (1928), 44 T.L.R. 292, where the plaintiff had to refund to the company the salary already paid him. If his remuneration has been fixed at so much a year, is he entitled to anything for a broken period? It is submitted that he is, though *Moriarty* v. *Regent's Garage Co.*, [1921] 2 K.B. 766, decided to the contrary, but it is to be noted that the Court of Appeal held that the application of the Apportionment Act, 1870, not having been raised in the County Court, could not be discussed on appeal.

[2] *Woolf* v. *East Nigel Gold Mining Co., Ltd.* (1905), 21 T.L.R. 660.

[3] Cf. *Foster* v. *Foster*, [1916] 1 Ch. 532.

[4] S. 148. It is a sufficient compliance with s. 128 if the annual accounts show the directors' fees and not the total amounts paid to them.

[5] S. 150.

[6] Cf. *Barron* v. *Potter supra*.

They afterwards purported to act as directors on the ground that the resignation was not in writing; the Articles providing that the office of director shall be *ipso facto* vacated if notice be given in writing. The Court had no difficulty in coming to the conclusion that their oral resignation was effective.

TABLE A (CLAUSES 64 TO 66, AND 72)

DIRECTORS

64. The number of the directors and the names of the first directors shall be determined in writing by a majority of the subscribers of the Memorandum of Association.

65. The remuneration of the directors shall from time to time be determined by the company in general meeting.

66. The qualification of a director shall be the holding of at least one share in the company.

DISQUALIFICATION OF DIRECTORS

72. The office of director shall be vacated, if the director—

(*a*) Ceases to be a director by virtue of s. 141 of the Act; or

(*b*) without the consent of the company in general meeting holds any other office of profit under the company except that of managing director or manager; or

(*c*) becomes bankrupt; or

(*d*) becomes prohibited from being a director by reason of any order made under ss. 217 or 275 of the Act; or

(*e*) is found lunatic or becomes of unsound mind; or

(*f*) resigns his office by notice in writing to the company; or

(*g*) is directly or indirectly interested in any contract with the company or participates in the profits of any contract with the company.

Provided, however, that a director shall not vacate his office by reason of his being a member of any corporation which has entered into contracts with or done any work for the company if he shall have declared the nature of his interest in manner required by s. 149 of the Act, but the director shall not vote in respect of any such contract or work or any matter arising thereout, and if he does so vote his vote shall not be counted.

(D) THE LIABILITY OF THE DIRECTOR

As the preceding sections of this chapter go to show, the directors manage the affairs of the company subject to the criticism and supervision of the shareholders. The Board, therefore, always acts under a sense of responsibility. Both in the annual report and on other occasions they have to give an account of their stewardship, and this implies that in all their dealings they will have to bear in mind the possible disapproval of the shareholders. Members always have the right to dismiss directors who have earned their disapproval and elect others in their stead. But it can hardly be contended that this is a practical check on improvident courses. Such considerations will weigh, no doubt, with the ordinary upright business man. But where the self-willed are concerned the remedy may well be worse than the disease. For the directors know the business, the shareholders can only criticise. And a change of directors may well convert a small profit into a substantial loss. The control therefore of the shareholders is, from the practical point of view, a poor check upon the grosser forms of mismanagement.

But if a director of a reckless disposition goes undeterred by the thought of a possible loss of emoluments and prestige, he will not so readily incur the more unpleasant consequences of breaking the law. He may be uncertain as to exactly where legal liability begins, but he would prefer to stop somewhat short of it. How then is his legal liability to the shareholders to be defined?

Such terms as Agent, Partner, or Trustee readily suggest themselves in this connection. But Jessel, M.R., the outstanding figure in the Chancery Courts during the latter part of the nineteenth century when our Company Law was taking shape, deprecated the use of all such terms. He protested[1] that the position of a director was not truly comparable to that of a trustee of a settlement.

[1] Cf. *Marzetti's Case* below.

Though, he said, "it does not much matter what you call them, so long as you understand what their true position is, which is that they are really commercial men managing a trading concern for the benefit of themselves and of all the other shareholders in it."[1] This has remained the position except possibly that the Courts to-day might reverse the order and stress rather the benefit of the shareholders.[2]

Errors of Judgment. Clearly, then, a director will not be liable for pursuing a policy that afterwards proves to be mistaken. *Humanum est errare*, and the law hath regard to human infirmities. To make him liable, that is to say, to compel him to make good to the company the loss which it has suffered through him, it is necessary to show something more than a mere error of judgment. It must be shown that in some way he has fallen short of the standard the law expects of him. A positive breach of duty must be brought home to him.

What is Expected of a Director. "It has sometimes been said that directors are trustees. If this means no more than that directors in the performance of their duties stand in a fiduciary relationship to the company, the statement is true enough. But if the statement is meant to be an indication, by way of analogy, of what those duties are, it appears to me to be wholly misleading. I can see but little resemblance between the duties of a director and the duties of a trustee of a will or of a marriage settlement. It is, indeed, impossible to describe the duty of directors in general terms, whether by way of analogy or otherwise. The position of a director of a company carrying on a small retail business is very different from that of a director of a railway company. The duties of a bank director may differ widely from those of an insurance director, and the duties of a director of

[1] *In re Forest of Dean Coal Mining Co.* (1878), 10 Ch.D. 450, 452.

[2] See by way of contrast the language of Romer, J., in *Victors, Ltd.* v. *Lingard*, [1927] 1 Ch. 323.

one insurance company may differ from those of a director of another. In one company, for instance, matters may normally be attended to by the manager or other members of the staff that in another company are attended to by the directors themselves. The larger the business carried on by the company the more numerous, and the more important, the matters that must of necessity be left to the managers, the accountants, and the rest of the staff. The manner in which the work of the company is to be distributed between the board of directors and the staff is, in truth, a business matter to be decided on business lines. To use the words of Lord Macnaghten in *Dovey* v. *Cory*:[1] 'I do not think it desirable for any tribunal to do that which Parliament has abstained from doing—that is, to formulate precise rules for the guidance or embarrassment of business men in the conduct of business affairs. There never has been, and I think there never will be, much difficulty in dealing with any particular case on its own facts and circumstances; and, speaking for myself, I rather doubt the wisdom of attempting to do more.'

Honesty. "In order, therefore, to ascertain the duties that a person appointed to the Board of an established company undertakes to perform, it is necessary to consider not only the nature of the company's business, but also the manner in which the work of the company is, in fact, distributed between the directors and the other officials of the company, provided always that this distribution is a reasonable one in the circumstances, and is not inconsistent with any express provisions of the Articles of Association. *In discharging the duties of his position thus ascertained a director must, of course, act honestly; but he must also exercise some degree of both skill and diligence.* To the question of what is the particular degree of skill and diligence required of him, the authorities do not, I think, give any very clear answer. It has been laid

[1] [1901] A.C. 477, 488.

down that so long as a director acts honestly he cannot be made responsible in damages unless guilty of gross or culpable negligence in a business sense. But as pointed out by Neville, J., in *In re Brazilian Rubber Plantations and Estates, Ltd.*,[1] one cannot say whether a man has been guilty of negligence, gross or otherwise, unless one can determine what is the extent of the duty which he is alleged to have neglected. For myself, I confess to feeling some difficulty in understanding the difference between negligence and gross negligence, ... The care that he is bound to take has been described by Neville, J., in the case referred to above, as 'reasonable care' to be measured by the care an ordinary man might be expected to take in the circumstances on his own behalf. In saying this, Neville, J., was only following what was laid down in *Overend and Gurney Co.* v. *Gibb*[2] as being the proper test to apply, namely: 'Whether or not the directors exceeded the powers entrusted to them, or whether if they did not so exceed their powers they were cognisant of circumstances of such a character, so plain, so manifest, and so simple of appreciation, that no men with any ordinary degree of prudence, acting on their own behalf, would have entered into such a transaction as they entered into?'

Reasonable Skill and Care. "There are, in addition, one or two other general propositions that seem to be warranted by the reported cases: (1) *A director need not exhibit in the performance of his duties a greater degree of skill than may be reasonably expected from a person of his knowledge and experience.* A director of a life insurance company, for instance, does not guarantee that he has the skill of an actuary or of a physician. In the words of Lindley, M.R.: 'If directors act within their powers, if they act with such care as is reasonably to be expected from them, having regard to their knowledge and experience, and if they act honestly

[1] [1911] 1 Ch. 425, 437.
[2] (1872), L.R. 5 H.L. 480. 486.

for the benefit of the company they represent, they discharge both their equitable as well as their legal duty to the company'; see *Lagunas Nitrate Co.* v. *Lagunas Syndicate.*[1] It is perhaps only another way of stating the same proposition to say that directors are not liable for mere errors of judgment. (2) *A director is not bound to give continuous attention to the affairs of his company.* His duties are of an intermittent nature to be performed at periodical Board meetings, and at meetings of any committee of the Board upon which he happens to be placed. *He is not, however, bound to attend all such meetings, though he ought to attend whenever, in the circumstances, he is reasonably able to do so.*[2] (3) In respect of all duties that, having regard to the exigencies of business, and the Articles of Association, may properly be left to some other official, *a director, is in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly.* In the judgment of the Court of Appeal in *In re National Bank of Wales, Ltd.*,[3] the following passage occurs in relation to a director who had been deceived by the manager and managing director, as to matters within their own particular sphere of activity: 'Was it his duty to test the accuracy or completeness of what he was told by the general manager and the managing director? This is a question on which opinions may differ, but we are not prepared to say that he failed in his legal duty. Business cannot be carried on upon principles of distrust. Men in responsible positions must be trusted by those above them, as well as by those below them, until there is reason to distrust them.' . . . . I agree with what was said by Sir George Jessel in *Hallmark's Case*,[4] and by Chitty, J., in *In re Denham & Co.*,[5] that directors are not

[1] [1899] 2 Ch. 392, 435.

[2] If a director is unable to attend Board meetings with any regularity it is always open to him (subject to the approval of his co-directors) to appoint someone to take his place. This substitute is known as an alternate director.

[3] [1899] 2 Ch. 629, 673.

[4] (1878), 9 Ch.D. 329.

[5] (1883), 25 Ch.D. 752.

bound to examine entries in the company's books. It was the duty of the general manager and (possibly) of the chairman to go carefully through the returns from the branches, and to bring before the Board any matter requiring their consideration; but the respondent was not, in my opinion, guilty of negligence in not examining them for himself, notwithstanding that they were laid on the table of the Board for reference." (*Bevan's Case: In re City Equitable Fire Insurance Co.*, [1925] Ch. 407, C.A. 426–430.)

Signing Cheques. Before any director signs a cheque or parts with a cheque signed by him he should satisfy himself that a resolution has been passed by the Board, or committee of the Board (as the case may be), authorising the signature of the cheque; and where a cheque has to be signed between meetings, he should obtain the confirmation of the Board subsequently to his signature.

The authority given by the Board or committee should not be for the signing of numerous cheques to an aggregate amount, but a proper list of the individual cheques, mentioning the payee and the amount of each, should be read out at the Board or committee and subsequently transcribed into the minutes of the meeting. If this procedure is adopted improper payments are the more readily detected.[1] A director who signs a cheque that appears to be drawn for a legitimate purpose is not responsible for seeing that the money is in fact required for that purpose, or that it is subsequently applied for that purpose, assuming, of course, that the cheque comes before him for signature in the regular way having regard to the usual practice of the company. If this were not so, the business of a large company could not be carried on. In the case of an insurance company, for instance, the cheques to be signed at the Board meeting would often include cheques in payment of insurance claims. If a claim appears to have been examined into and passed

[1] *Ibid.*, pp. 459–460.

by the manager or other proper official for the purpose, a director who signs the necessary cheque in payment of the claim (the cheque being brought before him in the customary way) cannot be expected to investigate the whole matter over again, for the purpose of satisfying himself that the claim is well founded. A director must, of necessity, trust to the officials of the company to perform properly and honestly the duties allocated to those officials. In many large companies—it was so in the case of the City Equitable—it is the duty of the manager to pay the salaries and wages of the staff. For that purpose cheques are drawn by the directors in his favour, the exact amounts required being calculated by him. So long as there is nothing suspicious about the amount, the directors are justified in trusting him to calculate it correctly, and to use the proceeds of the cheque for the purpose for which it was drawn.[1]

Care of the Company's Investments. It is the duty of each director to see that the company's moneys are from time to time in a proper state of investment, except in so far as the company's Articles of Association may justify him in delegating that duty to others.[2]

It could not reasonably be expected of such a director that he should keep himself acquainted at all times with the details of the company's investments. Speaking generally, he would be justified in trusting to the finance committee to perform properly the duties delegated to them. But the duty of making a report to the company in general meeting as to the state of the company's affairs and the amount recommended to be paid in dividend is the duty of the Board of directors as a whole. For the purpose of enabling them to make such report it is essential that there should be prepared for their use and information a complete list of the company's assets, though the task of checking the book values of the respective securities may be delegated to a committee by

[1] *Ibid.*, pp. 452–3. [2] p. 467.

the Board.[1] They are not justified in relying for the values of such assets on the assurances of the chairman, however distinguished or honourable, or on the expressions of belief of an auditor. however trustworthy or competent.[2]

It is not the duty of a director of a company in a large way of business to see in person to the safe custody of securities. That is one of the matters which the directors must almost of necessity leave to some official who is at the office daily, such as the manager, accountant, or secretary.[3]

Liability for Misapplication of Company's Moneys. Where the money of the company has been misapplied, an innocent co-director may be personally liable to make good the loss.

The promoter of a company conspired with one of the directors to rig the market for the company's shares. Subsequently the Board passed two cheques to the promoter ostensibly for preliminary expenses, but really in respect of his fraudulent Stock Exchange transactions. Marzetti was present at the Board when the cheques were passed, and without inquiry joined in voting for the necessary resolution. He was held liable to make good those sums to the company on the liquidator's application.

"I will give Mr. Marzetti the benefit of the statement of counsel, and I said they need not put him into the box to prove that he did not know about the rigging of the market. He is an innocent man; he is a warehouseman in the city and does not understand these things, and all he knew was that somebody said at the Board, 'We are to pay Colonel Davison a cheque for preliminary expenses.' I give him the benefit of all that. . . . I say a man who acts in this way is liable if he has paid the money away wrongfully. Would he in his own business as a warehouseman have paid away £662 3s. without knowing what it was for? Could he be heard to say in any Court of Justice that this is a defence, when he pays away other people's money without any inquiry at all, and it turns out to have been paid wrongfully? But I go further, and say, if he had understood what he ought to have understood in his business as a director, he would have inquired what the brokerage and commission

[1] p. 471. [2] p. 474. [3] p. 475.

was for, and then he would have been told it was for brokerage and commission, and the papers spoke for themselves. They would have shown that the sums in question had been paid for a most improper purpose; that they were paid after the registration of the company and were, therefore, not preliminary expenses at all. We do not want authority to show that Mr. Marzetti under these circumstances is liable." (Per Jessel, M.R., in *Marzetti's Case* approved in the Court of Appeal (1880), 42 L.T. 206.) The directors of the City Equitable would have been so liable but for a protecting clause in the Articles which the law has now, since the Act of 1929, rendered inoperative and void.[1]

Misfeasance Proceedings. Where a director has been guilty of any misfeasance or breach of trust, on the application of the Official Receiver or the liquidator in the winding up, the Court may compel him by way of compensation for the misapplication or misfeasance to contribute such sum to the assets of the company as it thinks just.[2]

Where, however, a director guilty of negligence or default has acted honestly and reasonably, and ought in all the circumstances fairly to be excused, the Court has power to relieve him.[3]

[1] S. 152, which should be carefully noted.

[2] S. 276.

[3] S. 372. The Court may relieve even where the act complained of was wholly *ultra vires* the company. See *In re Claridge's Patent Asphalte Co*, [1921] 1 Ch. 543.

CHAPTER VII

THE ANNUAL AUDIT

(A) THE ACCOUNTS TO BE KEPT

The Annual Return. Every year a Return has to be made in the form appended to the Act. This Return, which sets forth what has happened to the share capital during the year, along with the Balance Sheet, which gives the results of the year's trading, may be said to constitute an epitome of the financial position of the company. This is filed with the Registrar. With regard to the Return little calls to be said; its general nature can best be gathered from a study of the particulars which it contains.[1] With regard to the Balance Sheet attention may be drawn to certain improvements introduced as a result of the last Act.

1. The keeping of proper accounts is now obligatory. The company must keep (at its registered office and open to inspection by the directors) proper books of account as to (*a*) receipts and expenditure, (*b*) sales and purchases, (*c*) assets and liabilities.[2]

If a company is wound up and it is found that proper accounts have not been kept for the preceding two years, the directors and other officers may be liable to fine or imprisonment.[3]

2. The directors must prepare a Profit and Loss Account. This must be done in the first instance not later than eighteen months[4] after incorporation, and thenceforth once in every calendar year.

There must also be laid before the company in general

[1] The form will be found on page 141 below.
[2] S. 122. What are proper books of account will depend upon the business in which the company is engaged. See further s. 274 (2).
[3] S. 274.
[4] In proper circumstances the Board of Trade can extend the period to two years.

meeting[1] a Balance Sheet as at the date to which the Profit and Loss Account is made up. Attached to the Balance Sheet must be a directors' report with respect to the state of the company's affairs, the dividend recommended, and the amount they propose to carry to reserve.[2]

3. In the drawing up of the Balance Sheet certain specified particulars *must* be included.[3]

(i) A summary of the authorised share capital, the issued share capital, and the liabilities and assets (with some indication as to how the figures are arrived at).

Care must be taken to distinguish the Fixed and Floating Assets.

(ii) Preliminary expenses.

(iii) Expenses incurred in connection with any issue of shares or debentures.

(iv) Goodwill, patents, and trade-marks.

(v) Liabilities secured on the assets of the company.

(vi) Loans to Directors or officers.

4. In the case of a Holding Company,[4] that is to say, a company holding directly or through a nominee over 50 per cent of another company's issued share capital or voting power, or appointing a majority of the directors, the aggregate amounts of such assets (i.e. (*a*) shares in or (*b*) money owed by the subsidiary company) and liabilities (i.e. amounts owing to the subsidiary) must be shown separately. There must also be a statement attached showing how the profits and losses of the subsidiary have been dealt with, though the actual amount need not be specified.

[1] It must be circulated to members at least seven days before the meeting. Every member is entitled to a copy free of charge. (S. 130.)

[2] S. 123.

[3] See s. 124. The list here given is not exhaustive, and the particulars are not all taken from this section. Further statutory requirements will be found in ss. 44, 45, 46, 47, 54, 75, 128.

[4] See ss. 125–7.

TABLE A (CLAUSES 97 TO 102)

ACCOUNTS

97. The directors shall cause proper books of account to be kept with respect to—

All sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place;

All sales and purchases of goods by the company; and

The assets and liabilities of the company.

98. The books of account shall be kept at the registered office of the company, or at such other place or places as the directors think fit, and shall always be open to the inspection of the directors.

99. The directors shall from time to time determine whether and to what extent and at what times and places and under what conditions or regulations the accounts and books of the company or any of them shall be open to the inspection of members not being directors, and no member (not being a director) shall have any right of inspecting any account or book or document of the company except as conferred by statute or authorised by the directors or by the company in general meeting.

100. The directors shall from time to time in accordance with s. 123 of the Act, cause to be prepared and to be laid before the company in general meeting such profit and loss accounts, balance sheets, and reports as are referred to in that section.

101. A copy of every balance sheet (including every document required by law to be annexed thereto) which is to be laid before the company in general meeting together with a copy of the Auditors' report shall not less than seven days before the date of the meeting be sent to all persons entitled to receive notices of general meetings of the company.

AUDIT

102. Auditors shall be appointed and their duties regulated in accordance with ss. 132, 133, and 134 of the Act.

SIXTH SCHEDULE

FORM OF ANNUAL RETURN OF A COMPANY HAVING A SHARE CAPITAL

Annual Return of the Company, Limited, made up to the day of 19 (being the fourteenth day after the date of the first or only ordinary general meeting in 19).

The address of the registered office of the Company is as follows—

Summary of Share Capital and Shares

Nominal Share Capital £ divided into[1]	£	shares of each.
	£	shares of each.
Total number of shares taken up[1] to the day of 19 being the date of the return (which number must agree with the total shown in the list as held by existing members).		
Number of shares issued subject to payment wholly in cash.		
Number of shares issued as fully paid up otherwise than in cash.		
Number of shares issued as partly paid up to the extent of per share otherwise than in cash.		
[2] Number of shares (if any) issued at a discount.		
Total amount of discount on the issue of shares which has not been written off at the date of this Return.	£	

[1] Where there are shares of different kinds or amounts (e.g. Preference and Ordinary or £1 and 1s.) state the number and nominal values separately.

[2] If the shares are of different kinds, state them separately.

[1] There has been called up on each of shares.	£
[1] There has been called up on each of shares.	£
[1] There has been called up on each of shares.	£
[2] Total amount of calls received, including payments on application and allotment.	£
Total amount (if any) agreed to be considered as paid on shares which have been issued as fully paid up otherwise than in cash.	£
Total amount (if any) agreed to be considered as paid on shares which have been issued as partly paid up to the extent of per share otherwise than in cash.	£
Total amount of calls unpaid	£
Total amount of the sums (if any) paid by way of commission in respect of any shares or debentures or allowed by way of discount in respect of any debentures since the date of the last Return.	£
Total number of shares forfeited . .	
Total amount paid (if any) on shares forfeited.	£
Total amount of shares for which share warrants to bearer are outstanding.	£
Total amount of share warrants to bearer issued and surrendered respectively since the date of the last Return.	Issued £ Surrendered £
Number of shares comprised in each share warrant to bearer.	
Total amount of the indebtedness of the Company in respect of all mortgages and charges of the kind which are required (or, in the case of a Company registered in Scotland, which, if the Company had been registered in England, would be required) to be registered with the Registrar of Companies under the Companies Act, 1929.	£

[1] Where various amounts have been called, or there are shares of different kinds, state them separately.

[2] Include what has been received on forfeited as well as on existing shares.

Copy of last audited Balance Sheet of the Company

NOTE. Except where the Company is (1) a "Private Company" within the meaning of s. 26 of the Companies Act, 1929, or is (2) an Assurance Company which has complied with the provisions of s. 7 (4) of the Assurance Companies Act, 1909, this Return must include a written copy, certified by a Director or by the Manager or Secretary of the Company to be a true copy, of the last balance sheet which has been audited by the Company's auditors (including every document required by law to be annexed thereto) together with a copy of the report of the auditors thereon (certified as aforesaid), and if any such balance sheet is in a foreign language there must also be annexed to it a translation thereof in English certified in the prescribed manner to be a correct translation. If the said last balance sheet did not comply with the requirements of the law as in force at the date of the audit with respect to the form of balance sheets there must be made such additions to and corrections in the said copy as would have been required to be made in the said balance sheet in order to make it comply with the said requirements, and the fact that the said copy has been so amended must be stated thereon.

Private Company

Certificates to be given by a Private Company.

A. "I certify that the Company has not since the date of the [1] last Annual Return issued any invitation to the public to subscribe for any shares or debentures of the Company."

(Signature)

(State whether Director or Secretary.)

B. Should the number of members of the Company exceed fifty the following certificate is also required—

"I certify that the excess of members of the Company above fifty consists wholly of persons who are in the employment of the Company and/or of persons who, having been formerly in the employment of the Company were while in such employment, and have continued after the determination of such employment to be, members of the Company."

(Signature)

(State whether Director or Secretary.)

[1] In the case of the first Annual Return strike out the words "last Annual Return" and substitute therefore the words "Incorporation of the Company."

NOTE. Banking companies must add a list of all their places of business.

The Return must be signed at the end by a Director or by the Manager or Secretary of the Company.

Delivered for filing by

Particulars of the [1] Directors of the
Company, Limited, at the date of the Annual Return.

[2]The present Christian Name or Names and Surname	Any former Christian Name or Names and Surname	Nationality	Nationality of origin (if other than the present nationality)	Usual residential address	[3]Other business occupation if any. If none state so

[1] "Director" includes any person who occupied the position of a Director by whatever name called and any person in accordance with whose directions or instructions the Directors of a Company are accustomed to act.

[2] In the case of a Corporation its corporate name and registered or principal office should be shown.

[3] In the case of an individual who has no business occupation but holds any other directorship or directorships particulars of that directorship or of some one of those directorships must be entered.

List of Persons holding Shares in the Company, Limited, on the day of 19 , and of Persons who have held Shares therein at any time since the date of the last Return, or (in the case of the first Return) of the incorporation of the Company, showing their Names and Addresses, and an Account of the Shares so held.

N.B. If the names in this list are not arranged in alphabetical order, an index sufficient to enable the name of any person in the list to be readily found must be annexed to this list.

Folio in Register Ledger, containing Particulars	Names, Addresses, and Occupations				Account of Shares					Remarks
	Surname	Christian Name	Address	Occupation	[1]Number of Shares held by existing Members at date of Return[2]	[2]Particulars of Shares Transferred since the date of the last Return, or (in the case of the first Return) of the incorporation of the Company, by persons who are still Members		[3]Particulars of Shares Transferred since the date of the last Return, or (in the case of the first Return) of the incorporation of the Company by persons who have ceased to be Members		
						Number[2]	Date of Registration of Transfer	Number[2]	Date of Registration of Transfer	

(Signature)

(State whether Director or Manager or Secretary)

[1] The aggregate Number of Shares held, and not the Distinctive Numbers, must be stated, and the column must be added up throughout so as to make one total to agree with that stated in the Summary to have been taken up.

[2] When the Shares are of different classes these columns may be subdivided so that the number of each class held, or transferred, may be shown separately. Where any Shares have been converted into Stock the amount of Stock held by each member must be shown.

[3] The date of Registration of each Transfer should be given as well as the Number of Shares transferred on each date. The Particulars should be placed opposite the name of the Transferor, and not opposite that of the Transferee, but the name of the Transferee may be inserted in the "Remarks" column immediately opposite the particulars of each Transfer.

HOLDING COMPANIES' ACCOUNTS

"In the development of joint-stock enterprise holding companies have come to occupy an increasingly important position. This was recognised in the Companies Act of 1928, and in the Consolidation Act passed in the following year. These were the first legislative steps taken to ensure that the accounts of holding companies should be made more informative and intelligible than previously they had been. Certain defects have come to light in the short time that the Act has been in operation, and they are exposed in a revised edition of *Holding Companies and their Published Accounts*, by Sir Gilbert Garnsey (Gee & Co., 8 Kirby Street, E.C.1). A holding company's function is to hold the shares and stock of one or more companies with the object of controlling their operations. They have come into existence chiefly to enable industry and trade to be carried on in much larger units than were economically necessary in the nineteenth century. In that period the volume of production was smaller and foreign competition was less keen than to-day. Nowadays all the competition that is required to keep industry efficient can be obtained from foreign sources, and therefore internal competition becomes a wasteful luxury when the energy expended upon it can be put to better use. Large units alone can afford to carry on systematic research, and to apply the latest scientific principles to production and distribution. The book deals briefly with the thorny question of the organisation and management of holding companies, but it is mainly concerned with their accountancy problems."

IMPORTANT DEFECTS

"The first defect in the 1929 Act to which the author draws attention arises out of the provisions relating to subsidiary companies' losses. The Company Law Amendment Committee expressed the opinion that 'shareholders and others concerned are entitled to know whether the dividends proposed to be declared by the holding company are justified by the results of the group as a whole.' Sir Gilbert, however, points out that under the Act the actual amount of losses or profits of subsidiaries need not, in fact, be given. All that it is necessary to reveal is that subsidiary companies have made profits or losses as the case may be. Thus, if three subsidiaries made losses and a fourth made a profit, the shareholders would be informed of those facts, but might not be told that the losses of the three companies amounted to £1,000,000, and the profits of the one subsidiary to only a tenth of that sum. The directors of the holding company may elect to say simply that the losses have been carried forward in the accounts of the subsidiary companies, and have not been dealt with in the accounts of the holding company, though the losses may have brought the business to the verge of insolvency. Another defect of the Act is that no obligation rests upon the holding company to refer to any accumulations of profits or losses in previous years shown in subsidiary companies' Balance Sheets. Only current results need be taken into account. Obviously, if past subsidiary losses really left the parent company with an adverse balance, the absence of any statement explaining this would seriously mislead both the shareholders and the public."

CASE FOR CONSOLIDATED ACCOUNTS

"A remarkable omission from the Act is the absence of any provision dealing with the subsidiary company of a subsidiary —a sub-subsidiary. In a number of large enterprises sub-subsidiary companies exist, and therefore the omission, as Sir Gilbert Garnsey points out, is important. Unscrupulous company promoters and directors will obviously be tempted to evade disclosure of unpleasant matters which should be brought to the notice of shareholders by simply transferring the inconvenient transaction to a sub-subsidiary, and where such do not exist to form a sub-subsidiary for the express purpose of avoiding the legal obligation which applies to subsidiary companies' accounts. These and many other interesting points made in this valuable book point strongly to the conclusion that the only way in which to make the accounts of holding companies really intelligible and informative is to put the companies under an obligation to publish a consolidated Balance Sheet. Such a Balance Sheet should, of course, bring in the figures of sub-subsidiaries. A striking illustration of the points made in the book is given in an appendix, which includes a draft Balance Sheet of a holding company such as might be issued under present circumstances, and one amended on the lines suggested in the book. In the first case a profit balance of £479,000 is shown, while in the amended draft the company is shown to have a loss of £21,877." (*The Times*, 19th Oct., 1931.)

(B) AUDITORS AND THEIR DUTIES

Meaning of Audit. Before the Balance Sheet is presented to the shareholders it has to be audited, and for that purpose every year in annual general meeting auditors are appointed. In considering what this audit involves, it may not be out of place to recall that auditing is something entirely different from accounting. The preparation of the accounts is one thing; the checking of them in the interests of the shareholders, auditing in the true sense of the term, quite another. Accountants themselves are sometimes apt to blur the distinction as the following case well illustrates, but the law requires an audit, and nothing less and nothing else will serve. Some accountants were instructed to prepare the accounts of a business for income tax purposes. Having done so they sent in a bill "for the preparation of accounts and the auditing of the books." The owner of the business was, in fact, being robbed by her son who was managing the business, and she was eventually made bankrupt. The son was duly convicted; whereupon the trustee in bankruptcy sought to make the accountants liable for the benefit of the creditors. The Court found in their favour; they were not in the circumstances negligent in having failed to discover the frauds; they were not guilty of breach of contract. They had carried out what they had been instructed to do, namely, accountancy work, not auditing. "An auditor who was instructed to make a full audit of a business was responsible not only for getting out such accounts as the books, when properly made, appeared to show, but also for ascertaining the true position of the business whether disclosed properly by the books or not." [1] If an accountant is called in to prepare the year's accounts he is responsible alone to the directors who appointed him, and, as in any other contract

[1] *Apfel's Trustee* v. *Annan, Dexter & Co.* per Astbury, J. (unreported). *The Accountant* (1926), LXXV, 686, 693. See also *In re Fulton & Co.*, [1932] N.I. 35, below p. 156.

for services, must carry out their instructions. If he is appointed auditor for the year, although much of the actual work may be the same, he is responsible to the shareholders, and his audit serves as a check upon the directors.

Who may be Appointed Auditor. A person cannot be appointed auditor unless he has been nominated, and fourteen days' notice of such nomination given before the annual general meeting.[1] An auditor must be appointed at such meeting, and failing appointment the Board of Trade has power to appoint.[2] The company can appoint any one they choose other than (1) an officer or director of the company, (2) a person in the employment of, or in partnership with an officer of the company,[3] (3) a body corporate.[4]

His Statutory Duties. The statutory duties of auditors fall under two heads. (1) They must audit the accounts. (2) They must make a report to the shareholders. This report must state (*a*) whether they have obtained all the information and explanations they have required, and (*b*) whether, in their opinion, the Balance Sheet is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs.[5] They must use reasonable care and skill before they believe what they certify to be true;[6] and if they are not satisfied with the explanations given, or think it proper that further information should be given to the shareholders, it becomes their duty to qualify their report. They have a statutory right to be present when the accounts are laid before the company, and to make any statement or explanation they desire with respect to them.[7]

Standard of Care Required of an Auditor. Negligence in the performance of their duties may involve them in

[1] Except in the case of a retiring auditor. [2] S. 132.
[3] This does not apply to private companies. [4] S. 133.
[5] S. 134.
[6] *London and General Bank* (No. 2), [1895] 2 Ch. 673 below.
[7] S. 134 (3), which is new.

heavy liability. Instances will be found in the cases cited below. Along with other officers of the company they are liable to misfeasance proceedings. It becomes therefore necessary to consider what standard of care and skill they must bring to bear on their work. The question has been very fully discussed in a number of cases, and it almost invariably arises in this way. A serious fraud has been cunningly perpetrated on the company; when at last it comes to light the aggrieved persons not unnaturally want to blame some one, and, as naturally, the auditors are among the first to come to mind. Why did not the auditors detect it? The question of law, however, is *Ought* they to have detected it?

The following passages from the judgment of Lindley, L.J., in the *London and General Bank Case* are always quoted in this connection.

> His business is to ascertain and state the true financial position of the company at the time of the audit; and his duty is confined to that. But then comes the question: How is he to ascertain that position? The answer is: By examining the books of the company. But he does not discharge his duty by doing this without inquiry, and without taking any trouble to see that the books themselves show the company's true position. He must take reasonable care to ascertain that they do so. Unless he does this his audit would be worse than an idle farce. Assuming the books to be so kept as to show the true position of a company, the auditor has to frame a Balance Sheet showing that position according to the books, and to certify that the Balance Sheet presented is correct in that sense. But his first duty is to examine the books not merely for the purpose of ascertaining what they do show, but also for the purpose of satisfying himself that they show the true financial position of the company. This is quite in accordance with the decision of Stirling, J., in *Leeds Estate Building and Investment Co.* v. *Shepherd* (36 Ch.D. 802). An auditor, however, is not bound to do more than exercise reasonable care and skill in making inquiries and investigations. He is not an insurer; he does not guarantee that the books do correctly show the true position of the company's affairs:

he does not even guarantee that his Balance Sheet is accurate according to the books of the company. If he did, he would be responsible for error on his part, even if he were himself deceived without any want of reasonable care on his part, say, by the fraudulent concealment of a book from him. His obligation is not so onerous as this.

Such I take to be the duty of the auditor: he must be honest, i.e. he must not certify what he does not believe to be true, and he must take reasonable care and skill before he believes that what he certifies is true. What is reasonable care in any particular case must depend upon the circumstances of that case. Where there is nothing to excite suspicion, very little inquiry will be reasonably sufficient, and in practice, I believe, business men select a few cases at haphazard, see that they are right, and assume that others like them are correct also. Where suspicion is aroused more care is obviously necessary; but, still, an auditor is not bound to exercise more than reasonable care and skill, even in a case of suspicion, and he is perfectly justified in acting on the opinion of an expert where special knowledge is required.

It is no part of an auditor's duty to give advice either to directors or shareholders as to what they ought to do. An auditor has nothing to do with the prudence or imprudence of making loans with or without security. It is nothing to him whether the business of the company is being conducted prudently or imprudently, profitably or unprofitably. It is nothing to him whether dividends are properly or improperly declared, provided he discharges his duty to the shareholders. ([1895] 2 Ch. pp. 682–3.)

The auditor must acquaint himself with the relevant provisions of the Articles of Association and of the Companies Act.[1]

The following cases illustrate the standard of care required of auditors in making their annual audit and report.

Verification. From 1870 to the winding up in 1882 the company (for making advances on security) never made a

[1] *In re Republic of Bolivia Exploration Syndicate*, [1914] 1 Ch. 139. (The auditors had passed certain payments not authorised by Table A. In the circumstances they were excused but, the audit being unsatisfactory, were derprived of their costs.)

profit—except for the year 1876 when a small profit of less than 5 per cent was earned. The Articles provided that when the company paid a dividend of 5 per cent the directors should receive 10s. for each weekly attendance, and a further 2s. 6d. in respect of every additional 1 per cent. Every year a dividend of between 5 and 10 per cent was paid. The auditor wrote to the directors in 1871, saying, "Of course it would have been better if the parties had agreed to divide nothing for a few years until a good accumulation had taken place, but a dividend was no doubt a necessity"; but every year he certified the accounts as correct: "I certify that I have examined the above accounts and find them to be a true copy of those shown in the books of the company." The liquidator sued the directors in damages for the benefit of the creditors making the auditor a defendant as well, the first time, apparently, an auditor being so joined. The Court held him liable[1] to the extent of the *dividends*, directors' fees, and bonuses wrongfully declared and paid, the payment being the natural and immediate consequence of his breach of duty.

It was the duty of the auditor in auditing the accounts not to confine himself to verifying the arithmetical accuracy of the Balance Sheet, but to inquire into its substantial accuracy and to ascertain that it was properly drawn up so as to contain a true and correct representation of the state of the company's affairs. (*Leeds Estate, Building and Investment Co.* v. *Shepherd* (1887), 36 Ch.D. 787.)

Warning. The auditors warned the directors of the insufficiency of the securities in which the capital of the company was invested. They also, in one year, added: "We cannot conclude without expressing our opinion unhesitatingly that no dividend should be paid this year." This sentence, however, Jabez Balfour, the chairman of the company, induced them to strike out. The only warning they gave the shareholders was in this form: "We certify that it (the Balance Sheet) is a correct summary of the accounts therein recorded. The value of the assets as shown in the Balance Sheet is dependent upon realization." The Court of Appeal, affirming Vaughan Williams, J., held them liable.

"Possibly he [the auditor] did not realise the extent of his duty to the shareholders as distinguished from the directors, and he, unfortunately, consented to leave the chairman to explain the true state of the company to the

[1] Except so far as he was protected by the Statute of Limitations.

shareholders instead of doing so himself." (*In re London and General Bank*, No. 2, [1895] 2 Ch. 673 C.A. per Lindley, L.J., 686.)

Extent of Investigations: (i) Taking Stock. For several years frauds were committed by the manager who, in order to bolster up the company and make it appear flourishing when it was the reverse, deliberately exaggerated both the quantities and values of the cotton and yarn in the company's mills. The auditors failed to detect these overvaluations, and Vaughan Williams, J., held them liable. "Now it is plain to me that if the auditors had added to the stock-in-trade at the beginning of any year the purchases of raw material in that year and had deducted therefrom the sales, they must have seen that the statement of the stock-in-trade at the end of the year was so remarkable as to call for explanation, and they called for none. It is said that it is no part of the duty of an auditor to take stock. I agree it is not; but when it is said that it is no part of his duty to test the accuracy of the manager's certificate by a comparison of the figures in the books that require auditing, I cannot agree. I think, therefore, that I must hold the auditors liable for the preference dividends which have been paid."

But the Court of Appeal reversed his decision. "An auditor is not bound to be a detective. . . . He is a watch-dog but not a bloodhound. He is justified in believing tried servants of the company. He is entitled to assume that they are honest, and to rely upon their representations provided he takes reasonable care. If there is anything calculated to excite suspicion he should probe it to the bottom; but in the absence of anything of that kind he is only bound to be reasonably cautious and careful." (*In re Kingston Cotton Mill Co., Ltd.* (No. 2), [1896] 1 Ch. 331, 350; [1896] 2 Ch. 279, 288, 289.)

But it is at least arguable that Vaughan Williams's, J., decision is to be preferred to that of the Court of Appeal, more particularly in view of the decision in the following case. "An auditor," says Mr. de Paula, "would be running considerable risks if he acted too literally upon this decision" (i.e. of the Court of Appeal). "In duty to his clients and to himself an auditor in every case should investigate the stock most carefully and apply thereto every reasonable test."[1]

[1] F. R. M. de Paula, *Principles of Auditing* (1930), pp. 203, 204.

(ii) **Personal Inspection of Securities.** In the winding up of the City Equitable Fire Insurance Co., Ltd., a shortage of funds to the extent of over £1,200,000 was discovered. The shortage was in the main due to the deliberate fraud of one Bevan, a financier, whose integrity no one suspected, who was at the same time chairman of the company and senior partner in Ellis & Co., the company's brokers. Bevan having been sentenced, it was sought to make the auditors as well as the directors civilly liable, on the following grounds—

1. Large sums of money had been lent to the general manager and left in the hands of Ellis & Co. These were described in the Balance Sheet as "Loans at call or short notice," or "Cash at hand and in bank," the auditors having been misled and deceived. The Court held that even if the misdescription did amount to negligence, it caused no damage to the company. Had the money been included under the heading "Cash at bank and in hand and on other accounts" the auditors would not have been open to criticism, and the course of events would have been in no way altered.

2. The auditors failed to detect Bevan's "window-dressing"—an operation consisting of the pretended purchase by Ellis & Co. of Treasury Bills shortly before, and a pretended resale of the Bills soon after, the close of the financial year. The effect of the operation was to reduce to comparatively insignificant proportions the sum shown to be due from Ellis & Co. on Investment Account at that date, e.g. for the year ending 28th February, 1919, there appears among the company's investments £200,000 Treasury Bills, and the debt of Ellis & Co. is brought in at £51,423. In fact there was no such investment, and the indebtedness should have been increased by £198,576.

The Court held there was no negligence in the auditors failing to discover the fraud from an inspection of the company's books, but had they insisted on a personal inspection [1] of the Treasury Bills (and the various other securities) instead of accepting the broker's certificate for them, which in many cases were non-existent, they would have discovered it.

An auditor is not ever justified in omitting to make personal inspection of securities that are in the custody of a person or company with whom it is not proper that they should be left, whenever such personal inspection is practicable.

[1] This omission was the third ground of negligence.

A company's stockbrokers, however respectable and responsible they may be, are not proper persons to have the custody of its securities except on such occasions when for short periods securities must of necessity be left with them; but immediately such necessity ceases the securities should be lodged in the company's strong-room or in the bank, or placed in other proper and usual safe keeping.

When an auditor discovers that the securities are not in proper custody he must require the matter to be put right, and failing compliance report to the shareholders, and this whether he make personal inspection or not.

Under this heading the auditors were negligent, but Art. 150 exonerating officers of the company except in the case of wilful neglect or default,[1] they were held not liable, because throughout they had acted honestly and carefully discharged what they conceived to be the whole of their duty to the company.

"It appears that Mr. Lepine (the auditor) did discover and ask for explanations which do him credit; for it must be remembered that he had to overcome—if he was to succeed in the task which it is now suggested he ought to have succeeded in—the cunning of a dishonest chairman, and he had to circumvent the ingenuity of the general manager. . . . Mr. Lepine had therefore set before him a task which must be a difficult one at any time, but one about which, if he failed in it, there would only have been recorded of him that he failed to do what would have been a very signal achievement if he had succeeded." (p. 504.) "The duty of an auditor is verification and not detection." (p. 509.) (*In re City Equitable Fire Insurance Co., Ltd.*, [1925] 1 Ch. 407 C.A.)

Wilful Default. The auditor of a company in Northern Ireland also acted as its accountant and registrar. He prepared the company's Balance Sheets, but made no report

[1] The definition of wilful default laid down by Romer, J., in this case was followed in. *In re Vickery, Vickery* v. *Stephens*, [1931] 1 Ch. 572. For default to be wilful there must be either a consciousness of negligence or breach of duty, or a recklessness in the performance of a duty. But the matter is no longer of the same importance. "The question of wilful default was more troublesome. It would not trouble the Court in future, because by the Companies Act, 1929, any Article exempting directors from the consequences of negligence or wilful default would be void. It would be contrary to public policy," per Scrutton, L.J., in *Combined Pulp and Paper Mills, Ltd.* v. *Oppenheimer and Others*, *Times* Newspaper, 28th July, 1932.

as required by the Act.[1] Summarised Balance Sheets were, however, sent by him to the Registrar bearing the words "Audited Henry Jenkinson."

The Court held that these acts and omissions constituted "wilful acts or defaults," and rendered him liable to make good the sums paid away as preference dividend in consequence. (*In re Fulton & Co.*, [1932] N.I. 35.)

(C) THE DIVIDEND

How Profits are Arrived At. So far as the shareholder is concerned his main interest in the yearly accounts is to see whether or not they show a profit, and if so, how much, because the dividend payable and indirectly the market value of his shares will depend upon it. Needless to say, the profit will be a deceptive one unless it is arrived at on sound commercial principles. It is, therefore, of the utmost importance to ascertain on what principles profits are to be arrived at. The matter is of even greater moment from the point of view of the directors and officers of the company, because a wrongful declaration of dividend may involve them in the most serious liability, and possibly even in the penalties of the criminal law.

It must be admitted at the very outset that a curious discrepancy exists between sound commercial principles and the bare requirements of the law. The law lags behind the best accounting practice; in some circumstances a declaration of dividend that on ordinary accounting principles would be regarded as improper would not in law be wrongful. For example, assume that the Eastern Steam Packet Co. has just bought the S.S. "Neuchatel." She cost £30,000, and though good for ten years will at the end of that time have to be broken up. There is, therefore, roughly an annual depreciation or wasting of capital to the extent of £3,000. The company need not, in law, make any allowance for this before declaring a dividend. In other words, £3,000 of the takings, which on sound principles of business should go to the replacement

[1] See above p. 149.

of capital, may be distributed as dividend. The law, however, is punctilious in another direction. If at the end of the year, say, the stocks of whisky for the consumption of passengers in the ship's bar have been depleted to the extent of £300, that must be replaced. The position is curious, but it should be added, as will soon be evident, that the law does nothing to discourage the very strictest methods of accounting in arriving at the year's profits.

It is necessary to consider in detail the rules that have been laid down governing the matter.

The basic principle is this: Dividends should only be paid out of profits. They must never be paid out of capital.

This principle[1] admits of no qualification or exception[2] whatsoever. The only difficulty it presents is that of definition of terms. What do we mean by capital? What is meant by Profits?

"Profits mean the profits arising from the carrying on of the company's business—in other words, the credit balance in each year's Profit and Loss Account."[3]

With regard to capital a distinction has to be drawn between Fixed and Circulating capital. In the above example the ships themselves constitute the Eastern Steam

[1] "The law is much more accurately expressed by saying that dividends cannot be paid out of capital, than by saying that they can only be paid out of profits. The last expression leads to the inference that the capital must always be kept up and be represented by assets which, if sold, would produce it; and this is more than is required by law. Perhaps the shortest way of expressing the distinction which I am endeavouring to explain, is to say that fixed capital may be sunk and lost, and yet that the excess of current receipts over current payments may be divided, but that floating or circulating capital must be kept up, as otherwise it will enter into and form part of such excess, in which case to divide such excess without deducting the capital which forms part of it will be contrary to law." (Per Lindley, L.J., in *Verner* v. *General and Commercial Investment Trust*, [1894] 2 Ch. 239, 266, 267.)

[2] The provisions of s. 54 constitute only an apparent exception. The Board of Trade may authorise, for a very limited period, the payment out of capital of what is in effect and name interest, at the rate of 4 per cent, on shares issued for raising money for the construction of buildings or plant.

[3] *Evling* v. *Israel and Oppenheimer Ltd.*, [1918] 1 Ch. 101, 109.

Packet Company's fixed capital, while the food and drinks consumed by the passengers are circulating capital.

"The distinction between 'fixed' capital and 'circulating' capital is not to be found in any of the Companies Acts; it appears to have first found its way into the Law Reports in *Lee* v. *Neuchatel Asphalte Co.* (1889), 41 Ch.D. 1, where Lindley, L.J., in his judgment, adopted the expression which had been used by Sir Horace Davey in argument, derived from writers on political economy. It is necessary to consider the sense in which the expressions 'fixed capital' and 'circulating capital' were used in that case, and in *Verner's Case,* [1894] 2 Ch. 239. What is fixed capital? That which a company retains in the shape of assets upon which the subscribed capital has been expended, and which assets either themselves produce income, independent of any further action by the company, or being retained by the company are made use of to produce income or gain profits. A trust company formed to acquire and hold stocks, shares, and securities, and from time to time to divide the dividends and income arising therefrom, is an instance of the former. A manufacturing company acquiring or erecting works with machinery and plant is an instance of the latter. In these cases, the capital is fixed in the sense of being invested in assets intended to be retained by the company more or less permanently and used in producing an income. What is circulating capital? It is a portion of the subscribed capital of the company intended to be used by being temporarily parted with and circulated in business, in the form of money, goods, or other assets, and which, or the proceeds of which, are intended to return to the company with an increment, and are intended to be used again and again, and to always return with some accretion. Thus the capital with which a trader buys goods circulates; he parts with it, and with the goods bought by it, intending to receive it back again with profit arising from the resale of the goods. A banker lending money to a customer parts with his money, and thus circulates it, hoping and intending to receive it back with interest. He retains, more or less permanently, bank premises in which the money invested becomes fixed capital. It must not, however, be assumed that the division into which capital thus falls is permanent. The language is merely used to describe the purpose to which it is for the time being appropriated. This purpose may be changed as often as considered desirable, and as the constitution of the bank may allow. Thus bank premises may be sold, and conversely the money used as circulating capital may be expended in acquiring bank premises. The terms 'fixed' and 'circulating' are merely terms convenient for describing the purpose to which the capital is for the time being devoted when considering its position in respect to the profits available for dividend. Thus, when circulating capital is expended in buying goods which are sold at a profit, or in buying raw materials from which goods are manufactured and sold at a profit, the amount so expended must be charged against, or deducted from, receipts before the amount of any profits can be arrived at. This is quite a truism, but it is necessary to bear it in mind when you are considering what part of current receipts are available for division as profit."[1]

Thus, the Balance Sheet for 31st December, 1910, showed a loss of £19,028 5s. 4d., comprising a sum of £10,601 16s. 7d., representing depreciation on buildings, machinery, and plant. This depreciation fund was increased to £13,702 15s. 7d. by 31st July, 1911.

At a board meeting on 12th July, 1911, it was resolved that, having regard to the various bore-holes that had been made, and the amount of knowledge that had been acquired of the brine and salt land, it was desirable to revalue the land, and two directors were deputed to make the valuation.

On revaluation, which was approved in general meeting, the value of the land was increased in the Balance Sheet for 31st July, 1911, by £20,542 2s. 8d. On the other side of

[1] *Ammonia Soda Co., Ltd.* v. *Chamberlain*, [1918] 1 Ch. 266, 286–8.

the account this additional value appeared under the heading of "Reserve Account," and from it were deducted the above debit to Profit and Loss Account (£19,028 5s. 4d.), leaving, after sundry additions and subtractions, a balance to Reserve Account of £4,091 4s. 5d.

In the following year (on 30th September, 1912) dividends were paid out of the profits shown in the Profit and Loss Account for the year. It was sought to recover these from the directors as dividends paid out of capital.

The claim failed. A company is not prohibited from distributing the clear net profit of the year's trading because its paid up capital is not intact, or because it has not made good all trading losses incurred in previous years.

There is no rule of law which forbids a company setting off an appreciation in the value of its capital assets, as ascertained by a *bona fide* valuation against losses in Revenue Account. (*Ammonia Soda Co., Ltd.* v. *Chamberlain*, [1918] 1 Ch. 266, C.A.)[1]

The amount by which capital assets, as a whole,[2] have appreciated may be distributed as dividend.

Thus, the undertakings in Germany of the Imperial Continental Gas Association were taken from them during the War by the German Government, who subsequently, under the Treaty of Peace, paid compensation. The German undertakings stood in the books of the Association, after writing off depreciation, at £4,397,400. The Association received by way of compensation £5,864,594, *viz.* a profit of £1,467,194. Of this sum the directors proposed (*a*) to appropriate £1,228,495 towards writing down various assets of the Association, and (*b*) to distribute the balance of £238,698 as dividend. To this distribution the plaintiff objected and challenged its legality. The Court, however, allowed it. "It cannot be disputed that there has been a total appreciation of capital assets by at least the sum in question. It is not denied by the plaintiff that if the proposed distribution be made every penny of the paid up capital of the Association will still remain intact." (*Cross* v. *Imperial Continental Gas Association*, [1923] 2 Ch. 553.)

[1] See also *Lawrence* v. *West Somerset Mineral Railway Co.*, [1918] 2 Ch. 250.

[2] A profit resulting from paying off debentures at less than par cannot be distributed if there has been a corresponding depreciation in the value of the capital assets of the company (*Wall* v. *London and Provincial Trust*, [1920] 2 Ch. 582.)

Profits need not, unless the Articles otherwise provide, be distributed as dividend. They may be carried to reserve or capitalised. Once capitalised they are no longer available for dividend. But so long as they are held in reserve, no matter under what name or heading, they may be distributed.[1] The test is: Has the company finally and irrevocably capitalised the profits so as to disentitle itself from ever afterwards dealing with them as profits?

The company may, if it thinks fit, write back to Profit Account so much of the depreciation written off goodwill as has proved to have been in excess of proper requirements.

Up to and including 1906 the Balance Sheets of the company contained an item of £140,000 for goodwill. In 1906 £10,000 was written off the goodwill out of profits. That process was continued from time to time until, in 1917, the goodwill had been written down to £51,000. Meanwhile a reserve fund of £50,000 had been built up out of profits, and, out of the 1917 profits, £11,000 was added. The Goodwill Account was then eliminated from the Balance Sheet for 1918 by writing it off against the Reserve Account, that is, the goodwill disappeared from the assets side and the reserve fund was reduced to £10,000. In 1920 the reserve fund amounted to £25,000, and the balance of profits brought forward from the previous year to £33,000. The company capitalised the reserve fund and £15,000 of the balance of profits by issuing 40,000 bonus ordinary shares of £1 each. In 1921 and 1922 the company made a net loss, and the debit balance to Profit and Loss Account at 31st December, 1922, amounted to £20,504 16s. 6d. In 1923 the company made a net profit of £13,430 8s. 8d. The preference dividends for 1921, 1922, and 1923 were unpaid, and the directors in their report for 1923, after pointing out that £180,000, which might have been divided, had been retained in the business by writing off the amount, £140,000, at which the goodwill originally stood in the Balance Sheet, and by the issue of 40,000 £1 bonus shares, recommended that the three years' dividend accrued on the preference shares to 31st December, 1923, should be paid out of the

[1] Cf. *In re Hoare & Co., Ltd., and Reduced*, [1904] 2 Ch. 208.

current year's profits, and that the debit balance to Profit and Loss Account as at 31st December, 1922, should be carried to a Suspense Account and written off against a reserve of £40,000 created by writing back to reserve £40,000 of the profits applies in the past in writing off goodwill. Doubts being entertained of the legality of the proposed payment, application was made to the Court for an injunction against the directors. The Court refused to interfere. (*Stapley* v. *Read Bros., Ltd.*, [1924] 2 Ch. 1.)

The company had since its incorporation built up a reserve of £292,612 18s. 1d., made up as follows: premiums received for leases, £48,737 18s. 1d.; premiums received on issue of preference shares, £252,000; general reserve fund, £50,000, these two last items being subject to a deduction of £58,125 in respect of dividends paid on the preference and A preference shares to 7th October, 1903. The general reserve fund consisted of undistributed profits accumulated since 1896. The reserve fund was used in the company's business and was not kept separately invested. The company had recently caused a valuation to be made of its brewery premises, public houses, and loans, and ascertained that those items were of less value than the amount at which they stood in the company's Balance Sheet by the sum of £591,707 13s. 10d. It was proposed to deal with this loss as follows: £396,00 to be written off by extinguishing a corresponding amount of the preferred ordinary shares and deferred ordinary shares, and £195,707 13s. 10d. to be met by writing off the like amount part of the reserve fund of the company.

"The question arises in a case where there was a reserve fund properly set apart by the company under the provisions of their Articles. That reserve fund was a fund which at the time at which it was created arose from the fact that there were available assets (after deducting all liabilities of every kind, including the amount which is represented by the share capital) which might have been applied as the company thought fit without thereby doing any violence to the provisions of the Companies Acts, or to the Articles of the company. In other words, the surplus which was carried to the reserve fund represented that which might have been properly applied at the time, if the company had so thought fit, in paying further dividends to the shareholders, and no person could have complained if they had done so. It was, therefore, a reserve fund properly created, and that reserve fund could subsequently have been dealt with by the company in accordance with the provisions of the Articles as they thought fit. They might have utilised it in equalising dividends or, if they had chosen, they might have applied it in making good lost capital, or have applied it to any purpose they thought fit within the objects of the company. Now what does such a fund as that represent? To my mind it in no wise represents the Capital Account properly so called. Test it in this way. In this case the company might, if they thought fit, have taken assets, and set them apart to represent the reserve fund, and might have kept those assets wholly apart from all the other accounts of the company. They might have kept the assets representing the reserve fund strictly to answer that reserve fund, and not have dealt with them in any way as part of the general assets of the company. So long as they did that, it is clear to my mind that the reserve fund could not be properly called in itself a capital asset. But in this case the company did what they had power to do, and what is often done in similar cases, namely, they did not set apart special assets to represent the reserve fund, but they allowed the matter to rest in account, and the assets generally to be dealt with by the company in the ordinary way of business, whether those assets might be said so far to represent the reserve fund, or whether they represented the capital account and the other liabilities of the company. Now what happened in that state of things was this. After some subsequent trading it was found that there was a great loss of assets—so great that after taking the liabilities properly so called of the company, apart from the reserve fund and the capital account, there was insufficient to pay the reserve fund and to meet the capital liability. In that case, what ought to be done with regard to the loss? Ought it to be attributed wholly to the capital account, or wholly to the reserve fund, or ought it to be treated as apportioned? In my opinion, under the circumstances of this case, the loss ought to be treated as apportioned between the reserve fund and the capital account properly so called—that is, the share capital. In the present case the company proposes to do more than that. They propose to attribute a larger portion of the loss of assets to the reserve fund than they do to the capital account. In my opinion that was a thing which they were not absolutely bound to do, but which they certainly had a right to do; and so far, I think, no complaint can be made of their not wiping out the whole of the reserve fund, but treating a certain part of the assets as representing the reserve fund as written down by them." (*In re Hoare & Co., Ltd., and Reduced,* [1904] 2 Ch. 208, 213–15.)

Even though the directors would be justified in declaring a dividend, there is nothing to prevent them making provision *bona fide* in the interests of the company for reserve or redemption or any other legitimate financial object, even though this results in wiping out the expected dividend altogether.

Thus a company was incorporated in 1925 to acquire a newspaper known as the *People.* At first it was not successful, and in 1927 and 1928 issued 8 per cent convertible notes which also entitled the holders to share in the "profits available for dividend." At the beginning of 1928 there was a debit to Profit and Loss Account of £49,072 15s., representing trading losses to date. For the year ending 31st December, 1928, there was a profit of £17,803 16s. 8d. after paying the 8 per cent to the noteholders. The directors proposed to apply this profit in reduction of the above debit balance. The noteholders claimed that it should be distributed as dividend. The Court held against them and upheld the directors. (*Long Acre Press, Ltd.* v. *Odhams Press, Ltd.*, [1930] 2 Ch. 196.)

Until a dividend has been declared in accordance with the provisions of the Articles, the shareholder has no claim against the company in respect thereof.[1] Once a dividend has been declared it becomes a debt due from the company, and can be recovered as such. As between transferor and transferee of shares the material date is that of declaration, not payment. If the purchase takes place after declaration, but before payment, the dividends belong to the seller, not the purchaser.[2]

[1] *Bond* v. *Barrow Haematite Steel Co.*, [1902] 1 Ch. 353, 362. "The Courts have, no doubt, in many cases, overruled directors who proposed to pay dividends, but I am not aware of any case in which the Court has compelled them to pay when they have expressed their opinion that the state of the accounts did not admit of any such payment." (p. 368.)

[2] *In re Kidner*, [1929] 2 Ch. 121. In paying arrears of dividend, if the fund available is insufficient to meet the arrears in full, the fund should be distributed rateably. (*First Garden City* v. *Bonham-Carter*, [1928] Ch. 53.)

TABLE A (CLAUSES 89 TO 96)

DIVIDENDS AND RESERVE

89. The company in general meeting may declare dividends, but no dividend shall exceed the amount recommended by the directors.

90. The directors may from time to time pay to the members such interim dividends as appear to the directors to be justified by the profits of the company.

91. No dividend shall be paid otherwise than out of profits.

92. Subject to the rights of persons, if any, entitled to shares with special rights as to dividends, all dividends shall be declared and paid according to the amounts paid on the shares, but if and so long as nothing is paid up on any of the shares in the company dividends may be declared and paid according to the amounts of the shares. No amount paid on a share in advance of calls shall, while carrying interest, be treated for the purposes of this article as paid on the share.

93. The directors may, before recommending any dividend, set aside out of the profits of the company such sums as they think proper as a reserve or reserves which shall, at the discretion of the directors, be applicable for meeting contingencies, or for equalising dividends, or for any other purpose to which the profits of the company may be properly applied, and pending such application may, at the like discretion, either be employed in the business of the company or be invested in such investments (other than shares of the company) as the directors may from time to time think fit.

94. If several persons are registered as joint holders of any share, any one of them may give effectual receipts for any dividend or other moneys payable on or in respect of the share.

95. Any dividend may be paid by cheque or warrant sent through the post to the registered address of the member or person entitled thereto, or in the case of joint holders to any one of such joint holders at his registered address, or to such person and such address as the member or person entitled or such joint holders as the case may be may direct. Every such cheque or warrant shall be made payable to the order of the person to whom it is sent, or to the order of such other person as the member or person entitled or such joint holders as the case may be may direct.

96. No dividend shall bear interest against the company.

DISCLOSURE OF INNER RESERVES

Much attention has been directed recently to the question of whether the amount of information in the accounts of public companies drawn up in accordance with the Companies Act is sufficient, and to the desirability or otherwise of legislation enforcing the disclosure of secret or inner reserves. Lord Plender, a past-president of the Institute of Chartered Accountants, discussed these matters at the Annual Meeting (1932) of the Chartered Accountant Students' Society of London, while the report has just been issued of the committee appointed in November last year by the Society of Incorporated Accountants and Auditors to consider the advisability of any amendment to the Companies Act, 1929.

Lord Plender said he doubted if the general public appreciated the many and varied forms in which inner reserves might exist and be dealt with. The average investor was not, he thought, averse to directors adopting a prudent and cautious policy in strengthening the financial position of a company by reasonable inner provisions for contingencies which overtook most companies at some period of their existence. The concern which recent happenings had aroused was largely due to the use of such provisions in such a way as to give an incorrect view of a company's earning capacity year by year.

Lord Plender gave the following examples to show how the results of trading for any one year as shown in a Profit and Loss Account were bound to be in practically all cases an approximation based upon facts, estimates, and opinions—

1. The value of the stock in trade was a matter of opinion based upon supply and demand, world prices, physical condition, etc. Over-caution in stock valuation in one year might benefit the succeeding year when values were more stabilised, or a less conservative policy was necessary.

2. The extent to which debts might prove irrecoverable was a matter of estimate, and debts which had the appearance of being perfectly good at the end of a financial year in respect of operations of that year might, subsequent to the date of the accounts, be found to be partly or wholly irrecoverable. The converse might apply.

3. Outstanding claims upon a company might take a long period to materialise and agree, and estimates of other liabilities might prove difficult to formulate. Provisions made might in fact not be ultimately required or be less than required.

4. Where trade was conducted abroad fluctuations in the

rate of exchange might result in additional profit or loss on outstanding transactions which, at the date of the Balance Sheet, were valued by reference to the rate of exchange then ruling.

5. It was always a matter of difficulty to make close estimates of accruing profit on long-period contracts.

6. The sale of machinery at a profit or loss might show that the provisions made for depreciation had in the past been either on too liberal or too low a scale. If too liberal, the normal charge in subsequent years might be reduced or suspended until the excess provision was exhausted.

7. Fluctuations in the value of investments year by year might be ignored, and merely noted on the Balance Sheet pending their realisation for purposes of the business. The ultimate profit or loss might be dealt with in the Profit and Loss Account only on realisation.

8. The legal tax provision based upon the profits of the previous year might operate unfairly as between one year and another by reason of rising or falling profits.

The net effect of over or under provisions from those and like causes, continued Lord Plender, might result in surplus or deficiency of inner reserves from time to time.

TAPPING RESERVES TO AUGMENT PROFITS

In addition, directors not infrequently made some overriding inner provision by setting aside a portion of the profits as a contingency reserve. He could not say that compulsory disclosure on a Balance Sheet of the amounts of all such inner provisions or reserves was to be desired in every case, and so long as they were made honestly and prudently and with the intent that the company's best interests should be served, there were many advantages and often considerable justification for their existence. But while their creation and the additions to them out of profits might well require mention or indication, a stronger case could be made out for the disclosure of any sums abstracted from such reserves in order to supplement profits, especially if the sums abstracted were large when compared with the operating results of the year.

No absolute rule could be framed to apply to every case, nor could he support a demand for legislative action that might compel uniformity in treatment without due regard to the fact that in practice no two sets of circumstances were identical.

He was surprised that directors of public companies, who were vitally interested in the subject, refrained from expressing their views. Many of them were giving fuller information in accounts, but others set themselves against more disclosure than a minimum in spite of advice the auditor might give. Lack of information in many cases in regard to subsidiary companies' assets, liabilities, and trading results was a matter which called for action on the part of shareholders, and if legislation in regard to company accounts was contemplated, that particular matter should receive consideration.

Non-recurring credits in a Profit and Loss Account, and also extraneous or special items, should not be disguised or hidden, but clearly referred to, and, if material, the amounts mentioned.

INCORPORATED ACCOUNTANTS' RECOMMENDATIONS

The report of the committee appointed by the Council of the Society of Incorporated Accountants and Auditors (which has been submitted to the Board of Trade) states that they have reviewed the provisions of the Companies Act, 1929, in the light of happenings in public company practice since the report of the Company Law Amendment Committee in 1926, particularly in the years 1928 and 1929, and in connection with the proceedings in the *Royal Mail Case* in 1931. They are of opinion that the provisions of the Companies Act, 1929, relating to accounts and audit, do not sufficiently protect the investing public in certain particulars. They recommend, therefore, that the Government should be asked to appoint a Departmental Committee to consider amending legislation, and that provisions to the following effect should be included in any amending legislation—

(*a*) That the Profit and Loss Account should show the true balance of profit or loss for the period covered by such account.

(*b*) That in the Profit and Loss Account any debits or credits which are abnormal in character, or extraneous in their nature to the ordinary transactions of the company, together with any reserves from a previous period no longer required, should be stated separately.

(*c*) That free reserves should be disclosed on the face of the Balance Sheet. The need for such disclosure should not extend to provisions made for estimated losses or expenses not definitely ascertainable at the date of making up the company's accounts, but to which losses or expenses it is sound and proper to have regard in arriving at the profit or loss for the year or other period.

(*d*) That where a holding company has investments in one or more subsidiary and/or sub-subsidiary companies, there should be stated on the face of the accounts of the holding company the total amount of the ascertained profits or losses of such subsidiary and/or sub-subsidiary companies appertaining to the interest of the holding company in such subsidiary and/or sub-subsidiary companies, in so far as such profits or losses have not been brought into account in the Profit and Loss Account of the holding company.

The committee state that they are conscious of certain difficulties which must arise in endeavouring to give effect to their recommendations in the case of banking and similar institutions, but they feel that the paramount consideration is the maintenance of public confidence in the administration of industrial, commercial, and financial undertakings.

They do not consider it desirable to make any recommendations for alterations of a voluntary character in the compilation and/or certification of company accounts, "since in dealing with such alterations auditors might be placed in a difficult position in regard to the law as it now stands. The only effective action must be by amending legislation."

The members of the committee are: Mr. Henry Morgan (Chairman), Mr. E. Cassleton Elliott, Mr. Thomas Keens, Sir James Martin, and Mr. C. Hewetson Nelson. (*The Times*, 27th April, 1932.)

CHAPTER VIII

THE BORROWING POWERS OF THE COMPANY

(A) THE BORROWING POWER AND THE DOCTRINE OF *ULTRA VIRES*

EVERY trading company will need from time to time to borrow money for the purposes of its business. Such necessary power is implied, but it will be subject as to its exercise and extent to any provisions that may be laid down in the Articles. A fixed upward limit, say £10,000, may be prescribed, though this is rare, or the permissible limits may represent a certain proportion of the share capital or, subject to confirmation in general meeting, the directors may be authorised to borrow up to any amount.[1] The borrowing powers cannot, of course, be exercised until the issue of the certificate entitling the company to commence business.[2]

Even if the articles are wholly silent on the point, a trading company has implied power to borrow money for the purposes of its business.[3]

Consequences of "Ultra vires" Borrowing. But the money cannot be borrowed for an *ultra vires* object.

Thus the Literary and Scientific Institute at Stourbridge sought to borrow money for the purpose of providing facilities for billiards and ping-pong. A resolution in support had been passed by a large majority. The sanction of the Court was accordingly asked for the execution of a mortgage on the Institute premises for the purpose. The Court refused it and held the Institute had no such power. (*In re Badger*, [1905] 1 Ch. 568.)

[1] Table A, cl. 69, provides: "The amount for the time being remaining undischarged of moneys borrowed or raised by the directors for the purposes of the company (otherwise than by the issue of share capital) shall not at any time exceed the issued share capital of the company without the sanction of the company in general meeting."

[2] S. 94 and *ante* p. 79.

[3] Cf. *In re Badger*, [1905] 1 Ch. 568, 574.

Where a company borrows money *ultra vires*, whether because borrowing is expressly prohibited altogether, or only permitted within certain limits and such limits have been exceeded, the transaction is null and void. The lender cannot in such circumstances recover his money in an action for money had and received, and any security he may hold will be void.[1]

This rule, though it may appear hard on the lender, is quite general in its application. It admits of only apparent exceptions. Thus where a company has exhausted its borrowing powers and borrows afresh, if the money thus borrowed is applied in reducing its old indebtedness so that the outstanding liability on loan account does not exceed the prescribed limits, the lender can recover. But it is incorrect to speak of such lender being subrogated to the rights of the person paid off with his money.[2] Such lender does not get the priority that the person paid off with his money may have had.

Thus in 1897 the Wrexham Mold Rly. Co. had exhausted its borrowing powers. Three successive debentures for large amounts had been issued, and there was no money to pay the interest on any of them. The bank therefore paid the interest amounting to £9,672. A receiver having been appointed, the bank claimed to be repaid its £9,672 in priority to any payment to the debenture-holders, or alternatively to be repaid £3,850, the amount of interest paid to the first debenture-holders in priority to the second and third debenture-holders. The Court rejected both claims; the bank loan was valid because the money had been applied in discharging valid liabilities of the company, but the bank had no priority either as claimed or at all. (*In re Wrexham Mold Rly. Co.*, [1899] 1 Ch. 440 C.A.)[3]

When the money improperly borrowed has not been parted with the lender can obtain an injunction to prevent the company parting with it. So, too, where the

[1] See *Sinclair* v. *Brougham* below.

[2] See *In re Wrexham Mold Rly. Co.*, [1899] 1 Ch. 440, 447 C.A.

[3] See also *Sumner* v. *Harris Calculating Machine Co., Ltd.*, [1914] 1 Ch. 920.

money can be traced to any particular asset, the company can be compelled to make restitution. Equity will not allow a company unjustly to enrich itself at the expense of *ultra vires* lenders

Thus the Birkbeck Building Society carried on *ultra vires*, for forty years and more, a banking business. In 1911 the business failed with nearly £1,000,000 owing to shareholders, and over £7,000,000 to depositors. Assets about £5,000,000, which represented securities, etc., indiscriminately bought with moneys which the society was entitled to receive and moneys received *ultra vires*. How were the assets to be distributed? If the only right of an *ultra vires* lender is to be put in the shoes of a creditor paid with his money, the depositors would get nothing and the shareholders would be enriched to the extent of 500 per cent. On the other hand, if the banking business had been *intra vires* the depositors, like ordinary creditors, would have come first and the shareholders would have got nothing. The House of Lords held that though an action for money had and received would not be maintainable by the *ultra vires* depositors against the society, it would be inequitable for the society to retain the moneys, and that on equitable principles the assets must be divided rateably among the shareholders and depositors ranking equally. (*Sinclair* v. *Brougham*, [1914] A.C. 398.)

Where a company has a general power to borrow money, a lender is not required to see to it that the money is applied for legitimate objects. If the money is subsequently misapplied by the company the lender is not affected.[1]

(B) THE FLOATING CHARGE

Assuming then that the company is entirely within its rights in borrowing money as it proposes to do, the money may be raised in any manner usual in the case of a private

[1] The lender "cannot look into the affairs of the company and say, 'Your purposes do not require it now; this borrowing is unnecessary; you must show me exactly why you want it.'" (*In re David Payne & Co., Ltd.*, [1904] 2 Ch. 608, 619 C.A.)

trader; bills may be drawn, or an overdraft secured from the bank with or without security, or specific properties may be mortgaged. But there is another mode peculiar to companies, and this is what is usually meant when a company is said to exercise its borrowing powers. A floating charge is created and the money secured by means of debentures.[1]

Floating Charge. It is called a floating charge to distinguish it from a fixed or specific charge where the money is secured upon specific properties or assets. It covers all the assets of the company or all of a class of assets, which in the ordinary course of business are constantly changing, but it does not take effect until the company goes into liquidation, when it is said to crystallise.

In the much quoted words of Lord Macnaghten, "A floating security is an equitable charge on the assets for the time being of a going concern. It attaches to the subject charged in the varying condition in which it happens to be from time to time. It is of the essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes; . . . he may exercise his right whenever he pleases after default."[2]

"A specific charge is one that without more fastens on ascertained and definite property, or property capable of being ascertained and defined; a floating charge, on the other hand, is ambulatory and shifting in its nature,

[1] In origin the term goes back at least as far as the seventeenth century; a debenture having been ordained by a Rump Act in 1649 to be in the nature of a bond or bill to charge the Commonwealth to pay the soldier-creditor the sum due upon auditing the account of his arrears. See *Lemon* v. *Austin Friars Investment Trust*, [1926] 1 Ch. 1, p. 4.

Some readers might prefer to glance first at p. 177 before proceeding any further with this section.

[2] *Governments Stock Investment Co.* v. *Manila Rly. Co.*, [1897] A.C. 81, p. 86.

The right is ordinarily exercised by the commencement of a Debenture-Holders' Action (see below p. 184).

hovering over and, so to speak, floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp."[1]

Lord Macnaghten was here keeping in view the two characteristic features of floating charges: (1) the non-permanence of the property which is the subject of the charge, and its constant change from time to time, and (2) that a floating charge does not of itself fasten and settle even on the property existing at the moment.

Accordingly, so long as the charge remains dormant the company carries on its business in the ordinary way without paying any regard to the charge. The company can sell or mortgage any or all of its assets, which from the business point of view are, in fact, the security for the charge. There is nothing to prevent the company disposing of the whole of its undertaking.

Thus, a company sold, as it had power to do, the whole of its property and assets to another company, and under the agreement of sale precluded itself from carrying on any part of its main business, i.e. the manufacture and sale of borax and similar substances

A debenture-holders' action was begun in which it was claimed that by reason of the sale their charge crystallised. The claim failed. The debentures gave the holders no right to interfere with what the company had done. (*In re Borax*, [1901] 1 Ch. 326 C.A.)

Crystallisation of Charge. The floating charge will be turned into a fixed charge by the debenture holders taking the appropriate steps at the proper time. The charge will not crystallise merely because of a demand for repayment of principal, or because of notice to the company's bankers not to pay a judgment creditor, but to retain the money on their behalf.

[1] *Illingworth* v. *Houldsworth*, [1904] A.C. 355, p. 358.

Thus, in April a judgment creditor obtained a garnishee[1] order *nisi* against the company's banking account. The debenture-holder gave notice to the bank that he contested the creditor's right to attach the company's bank balance, but took no proceedings against the company to enforce his security. Held he had no claim to contest the creditor's right, and the garnishee order must be made absolute. (*Evans* v *Rival Granite Quarries, Ltd.*, [1910] 2 K.B. 979 C.A.)[2]

Contrast the following case

On 17th January, Yates & Co. obtained judgment against the company for £529 4s. 2d., and on the same day they obtained and served on Henry Tate & Sons, Ltd., a garnishee order *nisi* for a debt of £434 13s. 10d. owed by them to the company. On 19th January the debenture-holders secured the appointment of a receiver, one of the grounds for the appointment being the above judgment against the company. Notice of this appointment was immediately served on Yates & Co by letter which was received on 20th January, on which day the garnishee order *nisi* was made absolute.

Who had prior claim to the £434 13s. 10d.? The Receiver for the debenture-holders or Yates & Co.? Clearly the debenture-holders, because their charge over all the assets of the company, including this sum, had crystallised before the property in it had passed to anyone else.

"The receiver here was appointed on 19th January, and it seems to me that when the receiver was appointed, his appointment operated on everything which was the property of the company at the moment of his appointment. As I have already said, this debt, though bound by the garnishee order, was still the property of the company, and therefore the receiver became entitled to receive this debt,

[1] This somewhat forbidding term can be readily explained in non technical language. Its origin is unknown to the writer, but rather suggests the garnishings of an otherwise empty dish. X owes money to A but has none. Z, however, is indebted to him (X) in a sum of, say, £100. X's creditor A can get an order from the Court requiring Z to pay the £100 to him. Thus a garnishee order can be made against a banker (Z) on the application of his customer's (X's) judgment creditor (A). The order is in the first instance *nisi* only so as to give the garnishee Z an opportunity to object. Failing objection it is made absolute. O.S.C. 45, r. 1.

[2] See further *Heaton and Dugard, Ltd.* v. *Cutting Brothers, Ltd.*, [1925] 1 K.B. 655.

subject to such rights as the garnishee might have. But in my judgment the garnishee had no right as against the debenture-holders, because by virtue of the charge which existed at the date when the garnishee order had been obtained the debenture-holders had obtained from the Court an order which gave somebody, not the garnishee, the right to receive this debt—namely, the receiver for the debenture-holders." (*Norton* v. *Yates*, [1906] 1 K.B. 112.)

The moment the business of the company comes to an end by winding up the charge crystallises, even though the winding up is purely for purposes of reconstruction and, by the terms of the debenture, a winding up for reorganisation, reconstruction, or amalgamation is expressly excepted.

Thus, in 1895 a company issued a series of debentures[1] for £100,000.

[1] The debentures, which were all in the same form, provided that the company would on 1st January, 1920, or on such earlier day as the principal moneys thereby secured should become payable in accordance with the conditions endorsed thereon, pay to the registered holder £100 and interest in the meantime at 5 per cent per annum, and the company thereby charged with such payment all its property whatsoever and wheresoever both present and future except such parts thereof as were included in a certain trust deed dated 26th January, 1895.

The material conditions were the following—

1. "This debenture is one of a series of 1,000 debentures for securing the total principal sum of £100,000 issued or about to be issued by the company, and all ranking *pari passu* as a first charge on the undertaking and property of the company, subject nevertheless as mentioned in the indenture hereinafter referred to."

8. "The holders of the debentures of this issue are and will be entitled *pari passu*, to the benefit of an indenture dated the 26th day of January, 1895, and made between the company of the one part and "two trustees therein named" of the other part, whereby certain property was vested or intended to be vested in trustees for securing the payment of the principal moneys and interest payable in respect of the debentures."

10. "The principal moneys hereby secured shall become immediately payable (*a*) if the company makes default in payment of any interest 'as therein specified'; or (*b*) if an order is made or an effective resolution is passed for winding up the company, otherwise than for the purposes of reorganisation, reconstruction, or amalgamation; or (*c*) if an order is made appointing a receiver of the property or undertaking of the company, but until such order is made, or such resolution is passed, the company may, for the purposes of its business, dispose or deal with any of the property hereby charged in accordance with the regulations for the time being of the company, but not so as to create any mortgage or charge on any such property, in priority to or concurrently with the said debentures."

The trust deed contained similar provisions.

In June, 1913, the resolution for winding up was passed, and the assets were subsequently transferred to a new company. The business flourished equally well under the new company as under the old.

A debenture-holders' action was thereupon begun claiming (1) to have the trusts of the trust deed carried into execution under the order of the Court, (2) to have a receiver appointed of the property comprised in the deed.

Both claims were successful; the charge crystallised on the winding up of the company, reconstruction and the exceptions clause in the debenture notwithstanding, and the prosperity of the new company being beside the point, a receiver must be appointed.

"Now a company which is being wound up ceases to carry on its business. That business ceases to be a going concern. It is no answer to say that where the winding up is for reconstruction only, someone else comes in and carries on the business. The business carried on by that person is not the business charged by the debentures, and the assets acquired by him are not the assets charged by the debentures. The licence given by the debentures to the company to use the assets charged for the purposes of its business is not a licence to a new company to use those assets. The undertaking which is the subject-matter of the debentures comes to an end."

"I think the right to the appointment of a receiver is one of the ordinary rights which accrue to a mortgagee, and especially to an equitable mortgagee who has no means of taking possession, and whose security has become realisable as one of the steps in such realisation . . . but inasmuch as the new company is a prosperous company, while making an immediate appointment I direct that the receiver shall not take possession of the assets until the expiration of a limited time."[1] (*In re Crompton & Co., Ltd.*, [1914] 1 Ch. 954.)

(C) DEBENTURES AND THEIR CREATION

Debentures are usually created pursuant to a resolution of the Board, who will have carefully considered the conditions under which they are to be issued. The documents themselves, almost invariably (though not necessarily)[2]

[1] This last quotation is very slightly abridged.

[2] Cf. per Lawrence, J., in *Lemon* v. *Austin Friars* below.

under seal, vary in form, but the essential feature is the declaration of indebtedness. There may be a single debenture, but they are usually created in a series. These documents are almost always accompanied by an instrument of charge, the trust deed which sets forth the nature of the charge and the rights of the debenture holders.

Redeemable and Perpetual Debentures. Debentures may be issued in such a form that the company can redeem them by paying back the money advanced, either after a certain number of years, or after giving the prescribed notice. Or they may be made irredeemable,[1] that is to say, they are not intended to be paid off so long as the company is in existence, either at the option of the company or of the holder. Sometimes the conditions provide that the holder cannot demand repayment, but the company may redeem at its option. Such debentures also are usually, though incorrectly, called irredeemable. "Perpetual" is the more appropriate term to apply to them. Where debentures are issued in a series it is usual to provide by means of the *pari passu* clause that all holders of any of the series are to rank alike, for otherwise some would obtain priority over others according to the date of issue.

Issue of Debentures. Debentures may be issued at a discount. The court may order specific performance of a contract to subscribe for debentures.[2]

Debentures carry a fixed rate of interest.

Debentures may be issued payable to bearer, and such securities are by mercantile custom negotiable instruments.

The company has power to reissue debentures which it has redeemed or bought in. The holders of such reissued debentures are taken to have the same priorities as the original holders. Particulars of debentures which can be reissued in this way must be included in every Balance Sheet.[3]

[1] The issue of irredeemable debentures is made possible by s. 74.
[2] S. 76. [3] S. 75.

Conditions of Issue. Every issue of debentures is subject to certain highly important statutory requirements of which the following are the principal.

1. *Registration.* Within twenty-one days of creation the debenture or charge must be registered.[1]

The following particulars must be supplied to the Registrar—

(*a*) The total amount secured by the whole series.

(*b*) The dates of the resolutions authorising the issue of the series, and the date of the covering deed (if any) by which the security is created or defined.

(*c*) A general description of the property charged.

(*d*) The names of the trustees (if any) for the debenture-holders. And also the deed containing the charge or, if none, one of the debentures of the series.[2]

2. *Endorsement of the Registrar's Certificate.* Every debenture or certificate of debenture stock issued by the company must have a copy of the Registrar's certificate endorsed upon it.[3]

Wilfully permitting the delivery of any debenture without such endorsement is an offence punishable with £100 fine.

3. *Inspection.* The company's register of debentures must, like the share register, be open to inspection, and all debenture-holders are entitled to have copies of the trust deed.[4]

4. *Publication.* Particulars must be furnished in the annual statement and balance sheet.[5]

These statutory requirements can by no means be evaded by disguising the form of the instrument. If it is in fact a debenture that is being issued, it makes no difference what it is called or what else it purports to be. The court looks at the substance of the transaction.

Thus, a company issued "Income Stock Certificates" payable out of profits in certain events. A holder, who had been

[1] S. 79. [2] S. 79 (8). [3] S 83.
[4] S. 73. [5] See sixth schedule (above p. 142).

refused inspection of the register, claimed a declaration that the certificates were debentures and an injunction to restrain the company from interfering with the exercise of his statutory right. The Court of Appeal upheld his claim. These certificates whatever they might be called were, in fact, debentures in that they contained an acknowledgment of present indebtedness, even though payment was made conditional upon profits being earned in the future; they also contained a charge on assets of the company, namely, a portion of profits as and when ascertained. (*Lemon* v. *Austin Friars Investment Trust*, [1926] Ch. 1.)

(D) DEBENTURE-HOLDERS' RIGHTS

The position of the debenture-holders is usually safeguarded by means of the trust deed[1] in which their rights and remedies are carefully defined. Trustees are appointed and, though the holders are apt to grumble at their fees, which are substantial enough, and at their services, which are not so obvious, they perform many useful functions. They can act promptly in an emergency to enforce the security; they can call meetings of the holders to discuss any modification of their rights, and generally they can act in the interests of the holders. Should the trust deed contain a power to sell certain assets in the event of default, the trustees can sell without application to the Court.

Priorities. The value of the security will to a great extent depend upon the terms of the issue. If the company retains power to issue further debentures ranking with the present issue, or even in priority to the present issue, there is nothing to prevent it. As has already been seen there is nothing to prevent the company mortgaging or selling any specific properties or assets, though it is a very common practice to insert a condition that no subsequent mortgage shall rank in priority to the present charge. But it must be borne in mind that without such a condition even a subsequent floating charge can be given priority over the earlier one.

[1] It is only where the deed exists that the debenture is properly called a mortgage debenture.

Thus, in January, 1925, the company issued a series of debentures for £50,000 in the ordinary form of a general floating charge over all the assets of the company present and future.

In August, 1925, the company issued a debenture for £12,000 as a floating charge upon a specific part of its assets, *with priority over the January debentures.*

Was this priority effective? The Court of Appeal held that it was, in that the January trust deed expressly reserved power to the company to create specific charges over part of its assets with such priority. (*Osborne* v. *Automatic Bottle Makers, Ltd.*, [1926] 1 Ch. 412 C.A.)

Where some or all of a series of debentures are redeemed and reissued the holder gets the same priorities as the original holder. On a reissue of redeemed debentures the person entitled to the debentures shall have, and shall be deemed always to have had, the same priorities as if the debentures had never been redeemed.[1]

Invalid Debentures. An important rule exists in the case of debentures issued within six months of winding up, and its object is to guard against fraudulent preference, that is to say, to prevent special privileges being given to one creditor over another. The financial position of the company is precarious in the extreme. A creditor who has made extensive advances to the company without security wishes to protect his own interest; he accordingly calls upon the company to repay his loan or give him a debenture for the amount. If the company is wound up within six months of such issue the debenture is void. The rule is also a safeguard against fraud; for instance, when the directors are themselves large holders (or in the case of a private company practically owners of the business) they might want to give a debenture to some nominee who would seize all the assets under the debenture, thereby preventing the trade creditors getting anything and then, after the forms of winding up had been gone through, return the business shorn of all its liabilities

[1] S. 75 (2).

to the directors. But it must be carefully noted that the rule does not operate to invalidate a debenture *bona fide* issued in order to raise money to meet current liabilities. A, asked to lend money to the company, refuses unless a debenture is issued in return for the money to be advanced. Such a debenture, the transaction being *bona fide* in the ordinary course of business, is good. The rule, more accurately stated, is as follows—

A floating charge created within six months of winding up is invalid unless the company is solvent at the time, except to the amount of any cash paid to the company in consideration for the charge, and at the time[1] of its creation, together with interest at 5 per cent per annum.[2]

It should be carefully observed that though the charge is thus avoided, nothing is said as to the contractual obligations arising under the debenture; these accordingly may stand. Where the money borrowed has been paid back it cannot be recovered by the company because the charge may have been invalid.

Thus, a company was insolvent continuously from 1st March, 1927. On 15th June the company sold the goodwill of its motor omnibus business to the Birmingham and Midland Motor Omnibus Co., Ltd.

On the same day the company executed a debenture in favour of Ling, who was acting as trustee for half a dozen pressing creditors.

On 27th July, the purchase money having been received from the Birmingham and Midland Co., the company paid off the debentures. On 14th September an order for winding up was made on the petition of the bank.

[1] See *In re F. and E. Stanton, Ltd.*, [1929] 1 Ch. 180.

[2] S. 266. "The section was designed apparently to prevent companies on their last legs from creating floating charges to secure past debts, or for moneys which do not go to swell their assets and become available for creditors." (*In re Orleans Motor Co.*, [1911] 2 Ch. 41, 45.)

The debenture might also be avoided under the Statute of Elizabeth (13 Eliz. c. 5) where it is "devised and contrived of malice fraud covin collusion or guile to the end purpose and intent to delay hinder or defraud creditors," but in the only reported case in recent times where the attempt was made to have a debenture avoided in this way it failed. (*In re Lloyd's Furniture Palace*, [1925] 1 Ch. 853.)

The County Court judge ordered Ling to repay to the company's liquidator the moneys received by him on 27th July on the ground that his debenture was invalid.

The Divisional Court on appeal set aside his decision. The charge was invalid; but the rest of the document, the covenants to pay principal and interest survived and were valid. Nothing in the section affected them. (*In re Parkes Garage (Swadlincote), Ltd.*, [1929] 1 Ch. 139.)[1]

Where the debentures are issued[2] *bona fide* partly for a past debt and partly for a fresh advance on current account, so far as issued for the past debt they are invalid, and so far as issued for the fresh advance on current account they are only valid to the extent of the money actually owing on that account at the date of the winding up.[3]

Where a debenture is *bona fide* issued to secure an advance to the company in the ordinary course of its business it will be valid, even after a petition for winding up has been presented.

A petition for winding up was presented on the Tuesday. On the Friday following the company needed £1,200 to pay its workmen. Mr. Rowley (who knew all the circumstances) agreed to lend this sum on condition of receiving a debenture for it. The debenture was accordingly issued and within a month the order for compulsory winding up was made.

Mr. Rowley took out a summons for an order validating his debenture. The Court regarding the transaction as one carried out in the ordinary course of the company's business and for the company's benefit (for the company was thus enabled to be sold as a going concern) made the order, and allowed his costs to be added to the security and the liquidator's costs to be costs in the liquidation. (*In re Park Ward & Co., Ltd.*, [1926] Ch. 828.)

[1] The payment to Ling of his debt in full might in the circumstances have amounted to a fraudulent preference, but that is another matter.

[2] In the circumstances contemplated by s. 266.

[3] *In re Hayman, Christy and Lilly, Ltd.*, [1917] 1 Ch. 283, 286. (As nothing was then owing on current account and the charge was invalid so far as the past loan was concerned, the debenture was worth nothing to the holder.)

(E) THE DEBENTURE-HOLDERS' ACTION

The debenture-holders seek to realise their security by means of what is known as the Debenture-holders' Action. It is a representative action brought either by the trustees (if any), or one or two of the holders acting on behalf of themselves and all other debenture-holders. The remedy sought is the appointment of a Receiver, who takes possession of whatever assets may be subject to the charge in the interests of the debenture-holders. The floating charge is thus converted into a fixed charge.

In some cases the trustees themselves can act. The trust deed may empower them to sell certain specified assets, or take such other steps as may have been agreed upon, but even in such cases recourse to the courts may be necessary, because almost certainly the directors will want to challenge the trustees' action. So that from the practical point of view the debenture-holders' action is the normal mode of bringing a floating charge to an end.

The conditions entitling the debenture-holders to enforce their security—default in the payment of interest, the levying of execution, the presentation of a petition for winding up and the rest—are usually specified in the terms of the debentures or the trust deed. But quite apart from any such express provision, the debenture-holders are entitled to proceed once their security can be said to be in jeopardy.

Jeopardy. In the circumstances of any particular case it may be difficult to determine whether or not a case of jeopardy can be made out. Obviously, a comprehensive definition covering all possible cases is out of the question, while in the multifarious forms in which disaster overtakes a business new features are constantly bound to present themselves. It is, however, possible to lay down the following general rule for guidance—

Mere insufficiency of assets does not amount to jeopardy; but where the substratum of the company's business has gone, the debenture-holders are entitled to have a receiver appointed, even though none of the events, which under the terms of the debenture entitled the holders to enforce their security, have occurred.

"The plaintiff alleges that his security is in jeopardy and asks for a receiver. Two years' interest is no doubt in arrear, but payment of that has been duly postponed by the debenture-holders' meeting to 1st January, 1913, so that no interest is payable at present. Again, the sale of the taxicabs to the Mason Seaman Company was duly authorised and is beyond reproach. The real ground of the plaintiff's application is that his security appears to be insufficient to pay the principal or interest of the debentures. . . . In these circumstances the plaintiff alleges that his security is in jeopardy. But is there in fact any such jeopardy as to require the interference of the Court? The assets are in no danger of being seized. No creditor is pressing or threatening proceedings. The company is not in any pecuniary difficulty. No doubt it cannot pay the debenture interest in full yet, and will not be able to do so for some considerable time. But it is always open to a meeting of debenture-holders to give further time for payment. The assets are not in jeopardy in the sense that there is any risk of their being seized or taken to pay claims not really prior to the claim of the debenture-holders. The company is a going concern." (*In re New York Taxicab Co., Ltd.*, [1913] 1 Ch. 17.)

"The event which has happened is this. The company in question was a mining company, owning a mine in Newfoundland, for which they paid £220,000, of which £80,000 in cash was raised by an issue of debentures. Subsequently this company leased their property to another company, and the lessee company worked the mines and divided the profits between itself and its lessor. Things continued on this footing for a considerable length of time, until, unfortunately, the mines were discovered to be worked out, and the lessees having a power of determining their lease, gave notice to determine it on 31st August in this year. At this time the principal asset of the company is a sum which we will call a sum of £10,000, although it may be less. . . . The business of the company is at an end, or will be at an end on 31st August. There is no suggestion that the company can or will direct, or has any intention of directing, its energies to any further undertakings, but what it says is this: 'We have got a fund of, say, £10,000 which represents accumulated profits, and we propose to divide this fund amongst our shareholders.' . . . Is it right that I should allow this to take place; or, having regard to what has occurred, the fact that the business is at an end, and that the mortgagees will never get more than the merest fraction of their security, is it right to appoint a receiver? In my opinion it is right." (*In re Tilt Cove Copper Co.*, [1913] 2 Ch. 588.)

CHAPTER IX

ALTERATION OF THE ARTICLES

(A) THE POSITION OF THE PRIVATE COMPANY

As has already been indicated, a previous stage in the history of many businesses which are now public companies is that of the private company. A firm, most probably a family concern, has grown too large to carry on conveniently as a partnership,[1] or possibly the senior partner is retiring and wishes to give an interest in the business to others beside his sons who are to succeed him, and so the conversion of the business into a limited liability company is desired. Not necessarily into a public company, because no outside money is wanted, and should this ever become necessary it is a simple matter to convert a private into a public company. For the time being the advantages of a private company are enough. Indeed, so far as the law goes, incorporation as a private company gives all the advantages of incorporation without a number of the heavy statutory obligations falling upon a public company.

What is a Private Company. A private company is one which by its Articles prohibits any invitation to the public to subscribe for any of its shares or debentures, restricts[2] the right to transfer its shares, and limits its membership to fifty, exclusive of past or present member-servants.[3]

In reckoning the fifty the secretary is, but a director

[1] Where the firm consists of twenty partners, or ten in the case of a banking concern, it must be converted into a company (S. 357).

[2] An article giving the directors a discretion to refuse to register a transfer (cf. page 70 above) is sufficient.

[3] S. 26.

is not,[1] in the employment of the company. Joint-holders of shares count as single members.

Differences between Public and Private Companies. The following are the principal ways in which a private company differs from a public—

Instead of the seven signatures to the Memorandum of Association two are sufficient.[2]

The company is entitled to commence business immediately upon the grant of the certificate of incorporation.[3] "The company attains maturity on its birth. There is no period of minority—no interval of incapacity."[4]

No statutory meeting or statutory report is required.[5]

There need be no more than one director of the company.[6] If, however, he becomes the sole member and so carries on business for six months, he will become personally liable for all debts of the company contracted thereafter.[7]

The Balance Sheet need not be circulated to members free of charge[8] or attached to the return to be made to the Registrar,[9] but it must be laid before the company in general meeting,[10] and a certificate must be sent to the Registrar to the effect that no invitation has been issued to the public to subscribe for shares or debentures.[11]

Conversion of Private into Public Company. When it is desired to convert into a public company, this can be very simply effected by altering the Articles in such a way that they no longer contain the provisions set out above required in the case of a private company. Within fourteen days of the alteration a prospectus or statement in lieu in prescribed form[12] must be filed with the Registrar.[13]

[1] *Normandy* v. *Ind, Coope & Co., Ltd.*, [1908] 1 Ch. 84, p. 104.
[2] S. 1. [3] S. 94 (7).
[4] *Salomon's Case* per Lord Macnaghten, [1897] A.C., p. 51.
[5] S. 113 (10). [6] S. 139 (2). [7] S. 28.
[8] S. 130 (1), but they may have copies at a charge of 6d. per 100 words, s. 130 (2).
[9] S. 110 (3). [10] S. 123. [11] S. 111.
[12] Third schedule. [13] S. 27.

THIRD SCHEDULE

Section 27.

FORM OF STATEMENT IN LIEU OF PROSPECTUS TO BE DELIVERED TO REGISTRAR BY A PRIVATE COMPANY ON BECOMING A PUBLIC COMPANY

THE COMPANIES ACT, 1929

Statement in lieu of Prospectus delivered for registration by

[*Insert the name of the Company*]

Pursuant to Section 27 of the Companies Act, 1929

Delivered for registration by

The nominal share capital of the Company.	£
Divided into	Shares of £ each " " " " " "
Amount (if any) of above capital which consists of redeemable preference shares.	Shares of £ each.
The date on or before which these shares are, or are liable, to be redeemed.	
Names, descriptions, and addresses of directors or proposed directors.	
Amount of shares issued . .	Shares
Amount of commissions paid in connection therewith.	
Amount of discount, if any, allowed on the issue of any shares, or so much thereof as has not been written off at the date of the statement.	
Unless more than one year has elapsed since the date on which the Company was entitled to commence business—	
Amount of preliminary expenses.	£
Amount paid to any promoter	Name of promoter. Amount £ .
Consideration for the payment	Consideration—

If the share capital of the Company is divided into different classes of shares, the right of voting at meetings of the Company conferred by, and the rights in respect of capital and dividends attached to, the several classes of shares respectively.	
Number and amount of shares and debentures issued within the two years preceding the date of this statement as fully or partly paid up otherwise than for cash or agreed to be so issued at the date of this statement.	1. shares of £ fully paid. 2. shares upon which £ per share credited as paid.
Consideration for the issue of those shares or debentures.	3. debenture £ . 4. Consideration—
Names and addresses of Vendors of Property (1) purchased or acquired by the Company within the two years preceding the date of this statement or (2) agreed or proposed to be purchased or acquired by the Company.	
Amount (in cash, shares, or debentures) paid or payable to each separate vendor.	
Amount paid or payable in cash, shares, or debentures for any such property, specifying the amount paid or payable for goodwill.	Total purchase price £ Cash . . £ Shares . £ Debentures £ Goodwill . £
Dates of, and parties to, every material contract (other than contracts entered into in the ordinary course of business or entered into more than two years before the delivery of this statement).	

Time and place at which the contracts or copies thereof may be inspected.

Names and addresses of the auditors of the Company.

Full particulars of the nature and extent of the interest of every director in any property purchased or acquired by the Company within the two years preceding the date of the statement or proposed to be purchased or acquired by the Company or, where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares, or otherwise by any person either to induce him to become, or to qualify him as, a director, or otherwise for services rendered or to be rendered to the Company by him or by the firm.

Rates of the dividends (if any) paid by the Company in respect of each class of shares in the Company in each of the three financial years immediately preceding the date of this statement or since the incorporation of the Company, whichever period is the shorter.

Particulars of the cases in which no dividends have been paid in respect of any class of shares in any of these years.

If any of the unissued shares or debentures are to be applied in the purchase of any business the amount, as certified by the persons by whom the accounts of the business have been audited, of the net profits of the business in respect of each of the three financial years immediately preceding the date of this statement, provided that in the case of a business which has been carried on for less than three years and the accounts of which have only been made up in respect of two years or one year, the above requirement shall have effect as if references to two years or one year, as the case may be, were substituted for references to three years, and in any such case the statement shall say how long the business to be acquired has been carried on.

(Signatures of the persons above-named as directors or proposed directors or of their agents authorised in writing.)

....

....

Date

....

NOTE.—In this Form the expression "vendor" includes a vendor as defined in Part III of the Fourth Schedule to this Act, and the expression "financial year" has the meaning assigned to it in that Part of the said Schedule.

(B) FOREIGN COMPANIES

There is nothing to prevent a foreign company becoming incorporated in this country, and if it does so it is then in all respects a British company. There are no special provisions applicable to it. But such incorporation, though usual enough, is not necessary. A foreign company can carry on business here without it. In that case the Act makes special provision with the object of assimilating the position of the company to that of British companies and placing them under the same obligations. Thus where a company incorporated outside Great Britain, say in Canada or Italy, has established a place of business within Great Britain it must file the following documents: (1) the instrument defining the constitution of the company (with translation if not already in English) corresponding to the Memorandum and Articles, (2) a list of directors with particulars similar to those required in the case of directors of a British company, (3) the name and address of some person authorised to accept service on behalf of the company in legal proceedings and to receive notices, and the Registrar must be notified of any change of particulars under any of these heads.[1] If a foreign company has once established a place of business in the United Kingdom, it remains its duty under the section,[2] even if it ceases to carry on business at the place of business so established, to keep upon the register the name and address of a representative in the United Kingdom authorised to accept on behalf of the company service of process required to be served upon the company.[3] Moreover, the company must file an annual balance sheet of the same form, particulars, and contents as of a company incorporated in this country.[4] On every

[1] S. 346. [2] S. 344.

[3] *Sabatier* v. *The Trading Co.*, [1927] 1 Ch. 495, 506 ("33 Eastcheap is a place at which certain activities of the Russian Company are being carried on—certain administrative activities—although there is no evidence of actual trading activities,"—the service was held good.)

[4] S. 347.

prospectus, advertisement, and bill-head the country of incorporation must be stated, along with the name of the company and whether limited or not. The prospectus must conform to the ordinary statutory requirements.[1]

Where such a company ceases to carry on business in Great Britain it may be wound up in the ordinary way, and it is no objection to such proceedings that the company has been dissolved or has ceased to exist under the law of the country of incorporation.[2]

(C) MODE AND EXTENT OF ALTERATION OF ARTICLES

Should it become necessary or desirable for any reason to alter, or add to, the Articles of Association, s. 10 confers the very widest powers for the purpose. The power of alteration is not confined to matters of administration or management. The constitution of the company, the rights attaching to the different classes of shares,[3] the powers possessed by the directors, all can be affected by such alteration. The objects clause in the Memorandum cannot, of course, be extended or amplified in this way, and no doubt this clause may impose practical limits on the actual alterations possible. But short of this anything that is desired can be effected by means of fresh Articles.

The Articles Can be Made Retrospective in effect. Thus, Z held 27,885 fully paid shares and 36,435 ordinary shares partly paid up.

On 4th February Z died, owing the company £6,000 arrears of calls and £800 interest. His estate was worth considerably less than this amount.

[1] SS. 354, 355.

[2] S. 338 (2). See also *Employers Liability Assurance Co., Ltd.* v. *Sedgwick, Collins & Co., Ltd.*, [1927] A.C. 95.

[3] "A person taking shares under the Companies (Consolidation) Act of 1908 [1929] enters into a bargain the exact nature of which as pointed out by Lindley, M.R., it is rather difficult to define; but whatever its terms may be, it is at all events a bargain which involves as one of its terms the statutory liability to alteration by a resort to the powers of s. 13 [10] of the Act." (Per Warrington, L.J., *Sidebottom's Case* below at p. 168.)

Accordingly, on 18th February, a meeting was held for the purpose of passing a special resolution to alter the usual lien clause in the Articles—giving the company a lien for all debts, etc., upon shares "not being fully paid"—by striking out the words "not being fully paid," thus giving the company a lien in the 27,885 fully paid shares.

Although Z was dead, although he had been the only holder of fully paid up shares, the Court of Appeal held the alteration good. (*Allen* v. *Gold Reefs of West Africa, Ltd.*, [1900] 1 Ch. 656 C.A.)

Alteration Must be in Good Faith. This power must be exercised *bona fide* in the interests of the company.[1] If it is used for the purpose of expropriating the shares of an obnoxious member, or of a weak minority in the interests of the majority, or where there is fraud, the company may be restrained.[2] But provided the alteration proposed is primarily for the benefit of the company as a whole, not for a mere section of the company, it is no objection to the proposal that it will bear more hardly upon some shareholders than upon others, or that it will be to the detriment of some individual shareholder.[3] It is for the company and not for the Court to decide what is in the best interests of the company.

A private trading company in which the majority of the shares were held by the directors, passed a special resolution to alter the Articles by giving the directors power to call upon any shareholder, who carried on business in competition with the company, to transfer his shares at their full value. Sidebottom, who considered that the resolution was aimed at him, took proceedings to have the new Article declared invalid. The Court of Appeal held

[1] "Like all other powers (it) must be exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities and enabling them to bind minorities. It must be exercised not only in the manner required by law, but also *bona fide* for the benefit of the company as a whole, and it must not be exceeded." (Per Lindley, M.R., ibid. p. 671.)

[2] See *Brown* v. *British Abrasive Wheel Co.*, [1919] 1 Ch. 290.

[3] "It may be that a particular course may be to the disadvantage of some individual shareholder; but, notwithstanding that, it might still be for the benefit of the company at large that that course should be pursued." (Per Warrington, L.J., *Sidebottom's Case* at p. 171.)

against him and upheld the Article. The company under s. 10 has power to introduce into its altered Articles anything that might have been included in its original Articles, provided the alteration is made *bona fide* for the benefit of the company as a whole. (*Sidebottom* v. *Kershaw, Leese & Co., Ltd.*, [1920] 1 Ch. 154 C.A.)

The Bedstead Makers formed a Federation for the protection of their trade interests, including the regulation of prices and the like. As an adjunct to the Federation, a limited liability company was formed for the investment of moneys received from the members. One of the company's Articles provided that the company in general meeting might resolve to offer any members' £1 shares to the other members at 1s. The intention of the Article was disciplinary, but it was quite general in its terms (for fear that otherwise the company might be regarded as a trade union and therefore incapable of registration as a limited company).[1]

The plaintiff, a leading member, indignant at being accused of having broken the Federation's rules when there was but a technical infraction, if that, resigned in November, 1914. In the following April the company passed the requisite resolution for the sale of his shares.

The plaintiff sought an injunction, but the Court of Appeal held that he was not entitled. The Court came to the conclusion that the resolution was within the Article. The resolution having been passed *bona fide* and without fraud, the Article gave it the necessary effect; the plaintiff was therefore not entitled to relief. (*Phillips* v. *Manufacturers' Securities, Ltd.* (1917), 116 L.T 290 C.A.)

S, a director, who was also yard manager, failed to account on twenty-two occasions in the course of eleven months for moneys received by him on behalf of the company. When this was discovered he was summarily dismissed, but there was no power under the Articles to deprive him of his directorship. At a general meeting it was accordingly resolved to amend Article 22, "The office of a director shall be vacated" by adding the words "(*g*) if he be requested in writing by all the other directors to resign his office." The Court of Appeal held the alteration and subsequent vacation of office good.

"It is not the business of the Court to manage the affairs of the company. That is for the shareholders and directors. The absence of any reasonable ground for deciding that

[1] See *ante* p. 3.

a certain course of action is conducive to the benefit of the company may be a ground for finding lack of good faith, or for finding that the shareholders, with the best motives, have not considered the matters which they might have considered. On either of these findings their decision might be set aside. But I should be sorry to see the Court go beyond this and take upon itself the management of concerns which others may understand far better than the Court does." (*Shuttleworth* v. *Cox Brothers & Co. (Maidenhead), Ltd.*, [1927] 2 K.B. 9 C.A., per Scrutton, L.J., at p. 23. See also *Burland* v. *Earle*, [1902] A.C. 83 P.C.)

Limitations on the Exercise of the Power of Alteration. A company cannot alter its Articles in breach of contract with those having dealings with the company. A company cannot break its contracts by altering its Articles.

An agreement provided that so long as the plaintiffs held 5,000 shares they should have the right of nominating two directors, and cl. 88 of the Articles provided accordingly. In 1915 the company refused to accept the persons so nominated, and a meeting was called to cancel cl. 88. The Court[1] granted the plaintiffs an injunction to restrain the holding of the meeting. (*British Murac Syndicate, Ltd.* v. *Alperton Rubber Co., Ltd.*, [1915] 2 Ch. 186.)

Although the rights of the shareholder may legitimately be altered by an alteration of the Articles, the principle of limitation of liability, that is to say, that a member cannot as such be made liable to the company for more than the face value of his share, must not be thereby infringed. It is not inconsistent with limited liability for the Articles to provide that in certain events the shareholder shall be required to take up additional shares.[2] But where no such provision exists an unwilling member cannot be compelled to take up additional shares by means of an alteration in the Articles.[3]

[1] It was also held that the agreement was not incapable of being specifically enforced, and a declaration ought to be made that the persons nominated by the plaintiffs were directors of the company.

[2] *Hole* v. *Garnsey*, [1930] A.C. 472, 485.

[3] *Biddulph and District Agricultural Society, Ltd.* v. *Agricultural Wholesale Society, Ltd.*, [1927] A.C. 76, as explained in *Hole* v. *Garnsey*. See also s. 22.

Thus, where the shareholders are themselves corporate bodies, an Article requiring them to take up further shares in proportion to their increase in membership, say one share for every 50 new members, is not invalid. But for a company to raise fresh capital by altering the Articles so as to require a member to take up further shares, say, in an agricultural marketing concern according to the number of dairy cows he owned from time to time, is against all principle.

Protection of Minorities. The interests of a minority may also be adversely affected when a variation of the rights of the shareholders is brought about. Subject, however, to the general principle of fairness enunciated above, the company has complete power to vary the nature of its capital, to consolidate shares into stock, to reconvert stock into shares, etc.,[1] and it is no objection that the alteration will press more hardly upon some shareholders than upon others. There must be something more than a mere substitution of meal for malt before the Court will refuse to confirm a scheme on the ground of its being unfair.

When the Welsbach Gas Mantle Company was formed in 1897 it had a capital of £3,500,000 made up as follows: (*a*) 300,000 £5 preference shares (£1 paid up) carrying a dividend of 5 per cent, (*b*) 1,350,000 £1 ordinary shares carrying a fixed cumulative dividend of 7 per cent after 5 per cent had been paid on the preference shares, and (*c*) £650,000 £1 deferred shares carrying a like dividend of 7 per cent, but ranking after the ordinary shares, any surplus profits to be divided equally between the ordinary shareholders and the deferred. The Articles gave power to vary these rights.

By 1903 £2,134,039 of this capital had been lost. It was accordingly resolved (i) to reduce the capital of the company to £1,345,000, to write down the preference shares to 13s., the ordinary shares to 5s., and the deferred shares to 1s.; (ii) to consolidate the preference shares into preference stock and the remaining shares into ordinary stock; (iii) to divide the preference stock into two sections in the ratio of 40 : 25, the one to consist of 6 per cent cumulative preference stock and the other of ordinary stock, and then to

[1] S. 50.

convert each section into £1 shares. The capital would then consist of 600,000 6 per cent £1 cumulative preference shares and 375,000 £1 ordinary shares held by the former preference group, 337,500 £1 ordinary held by the former ordinary class, and 32,500 £1 ordinary held by the former deferred class.

Some of the preference holders objected to the scheme as unfair and inequitable; it amounted to a partial confiscation of their interests.

"How could it be desirable," asked Vaughan Williams, L.J., "in the interest of anyone to make this great alteration in the rights of the shareholders *inter se?*"

In the end, however, the Court sanctioned the scheme.

"In my judgment," said Vaughan Williams, L.J., "this is a fair scheme . . . the majorities which have been obtained go far to show that the shareholders, and in particular the preference shareholders, regarded this as a fair scheme." (*In re Welsbach Incandescent Gas Light Co., Ltd.*, [1904] 1 Ch. 87 C.A.)

Alteration of Capital and of Holders' Rights. An alteration of capital may be sanctioned even though it involves differentiation between holders of the same class of shares.

A scheme of reduction differentiated between the holders of the same class of shares to the extent of paying off some and not others, and imposed upon those whose shares were to be extinguished the obligation to accept debenture stock in lieu of cash. The holders of 2,000 out of 26,000 of the shares in question objected.

"They assert that it is inequitable and unfair . . . upon the ground that the B shareholder whose shares are to be extinguished is to receive in exchange something which he may not want to accept, bearing a reduced rate of interest and without any corresponding advantage or addition in the way of security."

Nevertheless, the Court sanctioned the scheme on the condition that debenture stock to be issued to the B shareholder was to be made repayable at the expiration of forty years instead of being perpetual, and the dissentient to be allowed his costs because of the material assistance afforded the Court by his criticism. (*In re De La Rue & Co., Ltd., and Reduced*, [1911] 2 Ch. 361.)

Reduction of Capital. As indicated by De La Rue's case the company has power to reduce its share capital, but this power can only be exercised with the permission of the Court. In confirming the reduction the Court may order the company to add the words "and reduced" to its name for such time as it thinks fit, and to publish the reasons for the reduction and its causes with a view to giving proper information to the public.[1] No matter how disastrous the company's history has been, in proper circumstances the Court will sanction the reduction.[2]

[1] S. 57.

[2] STEEL "RATIONALISATION"
£5,000,000 REDUCTION OF CAPITAL
In re English Steel Corporation, Ltd.
Before MR. JUSTICE BENNETT

His Lordship sanctioned a scheme confirming the reduction of the capital of the English Steel Corporation, Ltd., from £8,234,889 to £2,862,069.

Mr. Gordon Brown, applying for the order, said that it was desired to reduce the capital of the company by writing 19s. off each £1 Ordinary share. The figures were very large.

Mr. Justice Bennett: There seems to be a loss of £5,000,000.

Mr. Brown said that the company was an amalgamation of the steel businesses of Vickers; Armstrong, Whitworth; and Cammell Laird & Co. The evidence showed that the basis on which the amalgamation was arranged, although approved by eminent accountants, was altogether too hopeful, and it was now necessary to put the matter right. The company was incorporated in March, 1929.

Mr. Justice Bennett: And it has lost £5,000,000 in three years?

Mr. Brown: You can hardly call it a loss. It is the result of a revaluation of assets. It was an amalgamation with a view to closing down various works, and it was realised that there would be a large loss with regard to the works closed down. It was, however, thought that there would be a corresponding increase of profit as a result of the amalgamation.

Mr. Justice Bennett: But it didn't work?

Mr. Brown: No.

Mr. Justice Bennett: Is that the rationalisation of industry?

(Laughter.)

Mr. Brown said that nothing was proposed to be written off the Preference share capital, but the Preference shareholders had agreed that in future their shares should be non-cumulative. All the shares in the company, with the exception of 9,007 Preference shares, were held by the three amalgamated companies. The necessary resolutions had been carried unanimously by each class of the shareholders.

The company was formed in pursuance of a rationalising scheme.

Mr. Justice Bennett: What exactly does "rationalisation" mean?

Mr. Brown: It is a new word invented by Parliament to mean the same thing as amalgamation.

The statutory safeguard for minorities should always be borne in mind. Where the rights of a particular class of shareholders are being varied, the holders of 15 per cent of the issued shares of that class, who object to the variation approved by the rest of their class, can appeal to the Court against it, and the Court has power, if satisfied that the applicants are being unfairly prejudiced, to disallow the variation.[1] The Court must be satisfied that the proposal is in fact unfair. If what the shareholder is going to get under the new scheme is, in all the circumstances, a fair substitute for what he had under the old, he has no cause to complain. "It is after all a question of degree. If that which the company is offering to the shareholder is so illusory as to be inadequate consideration for the capital represented by his share, no Court will confirm the proposal; but if the question comes to this, whether as a matter of business that which is offered in exchange for the share is a fair and reasonable exchange, then in ninety-nine cases out of a hundred I am quite satisfied it is the duty of the Court, as far as possible, to leave those who are participating in the exchange to decide as to the adequacy or inadequacy of the consideration which they are offered."[2]

Mr. Justice Bennett: Did it originate in Parliament?

Mr. Brown: I am not sure about that. It originated among politicians.

Mr. Justice Bennett: Its main object is to get rid of competition.

Mr. Brown: That is so.

Continuing, counsel said that the benefits anticipated from the amalgamation had not been realised.

Mr. Justice Bennett: This is rather strange. The closed works, which stand in the books as at some £2,300,000, are now valued at some £156,000. That is to say, there is a loss on that item of over £2,000,000. Was it supposed that, as a result of rationalisation, the remaining assets would be increased by that sum?

Mr. Brown: Apparently, my Lord. It was considered that, if the company made large profits, the increased value of the goodwill would make up the difference.

Mr. Justice Bennett: Somebody made a big mistake in valuing at over £2,000,000 what is worth £156,000.

As stated above, his Lordship made the order asked for.

(*The Times*.)

[1] S. 61.

[2] *In re De La Rue & Co., Ltd.*, [1911] 2 Ch. 361, 366.

TABLE A (CLAUSES 30 TO 38)

CONVERSION OF SHARES INTO STOCK

30. The company may by ordinary resolution convert any paid up shares into stock, and reconvert any stock into paid up shares of any denomination.

31. The holders of stock may transfer the same, or any part thereof, in the same manner, and subject to the same regulations, as, and subject to which, the shares from which the stock arose might previously to conversion have been transferred, or as near thereto as circumstances admit; but the directors may from time to time fix the minimum amount of stock transferable, and restrict or forbid the transfer of fractions of that minimum, but the minimum shall not exceed the nominal amount of the shares from which the stock arose.

32. The holders of stock shall, according to the amount of the stock held by them, have the same rights, privileges, and advantages as regards dividends, voting at meetings of the company, and other matters as if they held the shares from which the stock arose, but no such privilege or advantage (except participation in the dividends and profits of the company) shall be conferred by any such aliquot part of stock as would not, if existing in shares, have conferred that privilege or advantage.

33. Such of the regulations of the company as are applicable to paid up shares shall apply to stock, and the words "share" and "shareholder" therein shall include "stock" and "stockholder."

ALTERATION OF CAPITAL

34. The company may from time to time by ordinary resolution increase the share capital by such sum, to be divided into shares of such amount, as the resolution shall prescribe.

35. Subject to any direction to the contrary that may be given by the company in general meeting, all new shares shall, before issue, be offered to such persons as at the date of the offer are entitled to receive notices from the company of general meetings in proportion, as nearly as the circumstances admit, to the amount of the existing shares to which they are entitled. The offer shall be made by notice specifying the number of shares offered, and limiting a time within which the offer, if not accepted, will be deemed to be declined, and after the expiration of that time, or on the receipt of an intimation from the person to whom the offer is made that he declines to

accept the shares offered, the directors may dispose of those shares in such manner as they think most beneficial to the company. The directors may likewise so dispose of any new shares which (by reason of the ratio which the new shares bear to shares held by persons entitled to an offer of new shares) cannot, in the opinion of the directors, be conveniently offered under this Article.

36. The new shares shall be subject to the same provisions with reference to the payment of calls, lien, transfer, transmission, forfeiture, and otherwise as the shares in the original share capital.

37. The company may by ordinary resolution—

(*a*) Consolidate and divide all or any of its share capital into shares of larger amount than its existing shares;

(*b*) Subdivide its existing shares, or any of them, into shares of smaller amount than is fixed by the Memorandum of Association subject, nevertheless, to the provisions of s. 50 (1) (*d*) of the Act;

(*c*) Cancel any shares which, at the date of the passing of the resolution, have not been taken or agreed to be taken by any person.

38. The company may by special resolution reduce its share capital and any capital redemption reserve fund in any manner and with, and subject to, any incident authorised, and consent required, by law.

CHAPTER X

RECONSTRUCTION

A TIME may come in the history of a company when it outgrows its original character altogether. Even though its powers have been drafted so widely that almost any incidental business could be carried on so long as it was profitable, there may yet come a fresh opening which, convenient enough from a business point of view, could hardly be said to fall under the express objects of the company. The Eastern Steam Packet Co. may have power to invest in shipbuilding and any kind of business conducive to its own prosperity. Perhaps it has ceased to run its ships altogether, and is now entirely a holding company or investment trust. Could it transfer its investments to steel rolling or coal mining concerns? It would be very surprising if it could, yet the character of the company may have been changing so gradually that those responsible for its management fail to see that the new departure alters the whole basis of the company. At this point reconstruction is necessary; a mere alteration of the objects clause is not enough. That is all very well when some amplification of the existing powers is all that is sought, when a business that can conveniently be combined with the principal business, one that might well have been included under the original objects had it but occurred to the draughtsman, is sought to be carried on. Here it is something much wider that is being attempted. In law the practical distinction here drawn turns upon s. 5, those alterations in the objects clause that fall within the section and those that do not. As to the scope of the section there is no doubt at all.

The section in no way enables a company to alter its Memorandum at its will or pleasure, nor does it confer any such power upon the Court. The permissive cases are specifically set out and the power of the Court is confined to them.[1] The section now confers power to sanction alterations with a view to facilitating amalgamations, but otherwise a change altering the whole basis[2] of the company will not be approved.

Thus, the main business of a "shipowners' club" was mutual insurance. An alteration of the Memorandum was sought so as to enable the club to compel its members to use standard forms of charter-party as approved by the Chamber of Shipping. The Court refused to sanction it; it entirely altered the basis of the Association. (*In re North of England Protecting and Indemnity Association* (1929), 45 T.L.R. 296.)

Reconstruction, then, for the purpose of a fundamental change in the objects of the company, or for a radical alteration of the rights of the different classes of shareholders with a view to raising fresh capital, or for amalgamation with subsidiary or rival concerns, may have to be effected, and it usually takes one or other of the following forms—

(*a*) By a sale (i) of all the shares to another company, or (ii) of the whole of the undertaking to another company.

(*b*) By a sale and dissolution under s. 234.

(*c*) By a scheme of arrangement (sometimes called a "fair scheme") under s. 153.

(*a*) **Sale of all the Shares.** This method is very simple

[1] *In re Governments' Stock Investment Co.*, [1891] 1 Ch. 649.

[2] It is not such an alteration to allow of fees being paid to the directors when by the Memorandum such payment was originally prohibited. The main purpose of the company was to improve the breeding of poultry. "It was not the encouragement and improvement of poultry breeding that was sought to be changed, but that the business should be managed in a more efficient way by making payment to those who were prepared to devote much time to it."

"It was often difficult to distinguish between the objects and the powers of a company, but the object for which the association was founded was still its main purpose; only efficiency was lost because of the difficulty of finding persons who would give their full time without some payment." (*In re Scientific Poultry Breeders' Association, Ltd.*, [1933] 1 Ch. 227, C.A.)

but of somewhat limited application. In the first case where an outside company desires to obtain a controlling interest, and the shareholders are all agreed, no difficulty is presented. The shares are transferred to and registered in the name of the purchasing company, and that is all that needs to be done. A dissentient minority, however, may have to be reckoned with. In that case s. 155 provides that where nine-tenths (in value) of the shareholders of a particular class have approved the terms of the transfer, the rest can be compelled to transfer on the same terms on notice being served upon them. But a dissenting shareholder may within a month of the notice apply to the Court, and the Court may order otherwise. This, of course, is a useful safeguard for minority rights, but it means that where the opposition to the scheme is strong this method of reconstruction may not be the most practicable.

Sale of the Undertaking. The second method of selling, not the shares, but the undertaking as a going concern to another company may often be suitable, especially where it is the provision of fresh capital that is the main object in view, because the acquiring company may be in a better position than the selling company for raising the necessary money. But it must always be borne in mind that the method cannot be used to deprive a dissentient minority of the rights it would have under the other scheme to be mentioned. This was laid down in one of the leading cases on the subject, a case of peculiar interest because of the thoroughness with which first principles were explored.

Henderson's Estates had issued fully paid £1 shares. A scheme of reconstruction was approved in general meeting whereby the company's undertaking was to be sold to a company to be formed, and the shareholders were to receive a like number of £1 shares in the new company with, however, only 17s. 6d. credited as paid. The scheme was a device to extract further capital from the holders of fully paid shares in the old company, and to avoid paying to dissentient shareholders the full value of their interest.

Mr., Bisgood claiming that the scheme was *ultra vires*, sought an injunction to prevent it being proceeded with. The Court of Appeal held he was entitled to it.

"This is a case of the first importance. The question involved is whether by clauses, even in the Memorandum of Association of a company limited by shares, the limit upon the shareholder's liability can be raised—whether the constitution of the company can provide that the majority may impose upon the minority a scheme under which the member must either come under an increased liability or accept such compensation as the scheme offers him. S. 161 of the Companies Act, 1862,[1] protects the dissentient member by securing him the value of his interest to be determined by arbitration or agreement. . . . That is a section which speaks not only after liquidation, but when the company is proposed to be, as well as when it is in the course of being, wound up. The special resolution may be passed antecedently to or concurrently with the resolution for winding up. It is a section which enables the liquidator, instead of converting the assets into money, to exchange them for shares or like interests for the purpose of distribution amongst the members, but it safeguards the dissentient member by providing for the purchase of his interest at a price to be determined as mentioned in the Act of Parliament. The dissentient member being thus in a position, by taking proper steps, to obtain the value of his interest in the company, there is no hardship upon him in any of the following arrangements within reasonable limits: (1) That the shares for distribution be partly-paid shares, or (2) that if he wants the shares he must apply for them within a limited time, or (3) that shares unapplied for are to be at the disposal of the new company, or (4) that shares unapplied for may be sold and the member who does not assent shall take the proceeds (for this is giving him something more than that to which he would be otherwise entitled), or (5) that the shares shall not go to the company and be assets of the company, but shall go direct to the members. It has accordingly been held that all these are legitimate in sales under that section. On the other hand, if there are dissentient members unpaid, the company may be put under an undertaking not to part with the

[1] See now s. 234.

assets until provision is made for them: *In re Hester & Co.*[1] And, further, the creditors are not injured, for under the last words of the section the sale is invalid if within a year a winding up order be obtained. But none of these things are true if the sale be made, not under s. 161, but under clauses in the Memorandum such as are here relied upon, for when the shareholder cannot obtain the value of his interest all the above are a hardship upon him. In substance he is placed in the position that he must either take the shares with the liability, take them within a limited time, and so on, or else find himself dispossessed of his proportionate share of the assets of the old company. And the creditor is injured, for the distribution of the shares direct to the members before the debts are paid leaves the creditor with nothing to look to but such part of the assets, if any, as goes to non-assenting members. Under s. 161 the creditor can stop the sale under the last words of the section; under the Memorandum of Association he cannot. Moreover, if the creditor resorts, as he naturally will in the first instance, to the last-mentioned assets, the non-assenting members will see those swept away by the creditors, while the assenting members have received and gone away with their shares. All this is wholly at variance with the right of the member who is not minded to take the new shares with the liability upon them. His right is to have the assets, including the shares in the new company, realised and applied first in payment of the debts, and then to have his proportionate share of the balance."[2] (*Bisgood* v. *Henderson's Transvaal Estates, Ltd.*, [1908] 1 Ch. 743 C.A.)

(*b*) **Sale and Dissolution under S. 234.** This scheme will at first sight appear rather complicated, but it is none the less in suitable circumstances a very convenient one.

To begin with a resolution for voluntary winding up is passed, and at the same time the liquidator is empowered to sell the company's business for shares in the new company. These shares, when the whole of the operation has been carried out, will be distributed among the members who, in the meantime and throughout, are bound by what

[1] [1875] W.N. 179; 44 L.J. (Ch.) 757.

[2] This judgment, from which only a short extract can here be given, deserves the closest attention on the part of the law student, both for its lucidity and its analysis of first principles.

the liquidator does. When an arrangement of this kind is proposed it is difficult to please all the shareholders or, at any rate, all equally. It is accordingly provided that those who do not vote in favour of the special resolution may call upon the liquidator to buy them out. The procedure here is somewhat technical. Notice must be served upon the liquidator at the registered office of the company within seven days of the passing of the resolution. It should be carefully observed that this right belongs not merely to those who actively opposed the resolution, but also to any who did not vote in favour of it. The notice must give the liquidator the option of either abandoning the scheme or buying the member out. The notice must be in this form; if it does not give the liquidator the alternative it is bad.[1] The price at which the dissentient is to be bought out has then to be settled. If the member is willing to agree a figure no difficulty is presented, but if not, it has to be fixed by arbitration. The current market price of the shares cannot (in the absence of agreement) be taken, because a shareholder in a winding up is entitled to an aliquot share of the net assets of the company, and this may be more or less than the current market value of the shares. Nor can the necessity for arbitration be evaded by a provision in the Articles fixing a method of valuation; that does not constitute agreement for this purpose.[2] Once the price is settled the practical difficulty arises as to how the necessary money is to be raised, because the purchase money must be paid before the company is dissolved. If the money is not paid a dissatisfied member can go for a compulsory winding up. To forestall this difficulty it is not uncommon for a slightly different procedure to be adopted at the very outset. Instead of having a purely voluntary winding up, application is made to the Court for winding up under

[1] See *In re Demarara Rubber Co., Ltd.*, [1913] 1 Ch. 331.

[2] *Baring-Gould* v. *Sharpington Combined Pick and Shovel Syndicate*, [1899] 2 Ch. 80.

supervision.[1] In this way the protection of the Court, and the directions of the Court if necessary, can be obtained for the steps taken by the liquidator.

In this connection the following propositions have been laid down [2]—

1. When a so-called scheme is really and truly a sale and dissolution under s. 234, that section must be complied with and cannot be evaded by calling it a scheme of arrangement under s. 153.

2. Where a scheme of arrangement cannot be carried through under s. 234, though it involves a sale to another company for "shares, policies, or other like interests," and for liquidation and distribution of the proceeds, the Court can sanction it under s. 153 if it is fair and reasonable in accordance with the principles upon which the Court acts in these cases, and it may, but only if it thinks fit, insist as a term of its sanction on the dissentient shareholders being protected in manner similar to that provided for in s. 234.

3. Where a scheme of arrangement is one entirely outside s. 234, *a fortiori* can the Court act as in proposition 2. In order to take advantage of the powers of the Court here indicated and thus avoid what is often a great practical stumbling block, the difficulty of raising the money to buy out shareholders who would rather have their money than go on with the scheme (for, it must be remembered, it is not only the active opposition that must be bought off, but any who refrain from voting in favour of the scheme and then serve their notices), the scheme is not framed in this form, but is rendered practicable in the manner now to be mentioned.

(*c*) **Scheme of Arrangement under S. 153.** One of the reasons why a company may need fresh capital is that it is temporarily in financial straits. The bank declines to allow any further overdraft and the company cannot meet

[1] See below p. 216.
[2] *In re Anglo-Continental Supply Co., Ltd.*, [1922] 2 Ch. 723.

its current expenses. The concern may be a thoroughly sound one and, once tided over its difficulties, exceedingly prosperous. In such circumstances fresh capital may be readily available, but the lenders would not unnaturally insist that some arrangement be come to with regard to outstanding liabilities. Arrangements with creditors can, of course, be made in the ordinary course on a purely voluntary basis, but there may be a number of creditors who for good reason or bad refuse to come in. This is where the section comes into operation. Where three-fourths (in value) of any particular class of creditors agree to a compromise or arrangement, the remaining creditors of the class can be compelled to accept it, if only it is approved by the Court.[1] If necessary the Court will order and give directions as to the holding of meetings of the various classes of creditors.[2]

This machinery can be used where it is not an arrangement with creditors that is the primary object, but a reorganisation of the share capital or other form of reconstruction.[3] Meetings of the various classes of shareholders

[1] S. 153 (2). [2] S. 153 (1).

[3] *In re John Broadwood & Sons, Ltd.*, before Mr. Justice Eve.

His Lordship sanctioned a reduction of capital and a scheme of arrangement made between John Broadwood & Sons, Ltd , the pianoforte manufacturers, and the First and Second Mortgage debenture-holders and the unsecured creditors of the company.

Mr. Cecil W. Turner, who appeared for the company and the debenture-holders, said that the object of the petition was to endeavour to give a new lease of life to the very old pianoforte business of Broadwoods, which was established in the reign of George II, since when they had been Royal Warrant holders. The scheme had only been rendered possible by the generosity of Mr. Cuthbert Eden Heath, a loan creditor for £136,516, who was renouncing all claims against the company in respect of his loans and the arrears of interest on them.

There were £109,600 6 per cent First Mortgage debentures and £69,500 4½ per cent Second Mortgage debentures, on which there were large arrears of interest. The trade creditors accounted for the comparatively small sum of £11,527. On 23rd March, 1931, a receiver was appointed on behalf of the debenture-holders, and at present he had a substantial sum in hand. The share capital was nominally £100,000, of which £75,791 £1 shares had been issued, and by the scheme they would be reduced to 1s. each. New "A" and "B" Ordinary shares of 5s. each would be created and issued. The company would adopt new Articles of Association converting it from a private into a public company.

can be ordered and the same three-fourths majority is binding.[1]

Thus, assume a not uncommon case of a Golf Club in need of reconstruction. The Wivenhoe, with a 9-hole course owned not by the club, but by a company. There are heavy debentures, most owned by members of the club, and a big overdraft. Two facts are clear, the company is paying away more than it can afford by way of interest on its borrowed money, and the club (of which the membership has become stationary) must either go forward or go under altogether. The matter is brought to a head by the bank (although the manager was captain the year before last and is now down to scratch) refusing to allow any further overdraft. The policy of the club is to buy the five meadows on the slope adjacent to the fifth hole, lay out an 18-hole course with a suitable club house, and attract members from the overcrowded Loo and Mitcham Clubs. To do this £10,000 is needed. It is accordingly proposed to form a new company to buy Wivenhoe Park, the main asset of the company, and carry out the developments suggested; to give shares in this new company in exchange for shares in the present company, each new £5 share being credited £3 paid. The debentures bearing 5 per cent interest are to be replaced by preference shares fully paid in the new bearing 4½ per cent interest, and the unsecured creditors (over £50) are to receive 25 per cent cash and the rest in ordinary shares. This is where s. 153 comes in, because the key to

The holders of the First Mortgage debentures were to surrender their rights on receiving arrears of interest up to 30th September, 1930, payment in cash of 2s. 6d. in the pound, and the allotment to them or their nominees of 54,800 new "A" Ordinary shares of 5s. each credited as fully paid, and of new 6 per cent Income Debenture stock, fully paid to the extent of four-fifths of their present holdings, the Debenture stock to be secured by a trust deed. The holders of the Second Mortgage debentures would surrender their claims for an allotment of one 5s. "B" Ordinary share for every £1 of the nominal value of the debentures. The lessors of the company's premises at 158 New Bond Street, which had been assigned by the company, would receive a sum in cash in discharge of all their claims. The claims of unsecured creditors would be satisfied by the issue of one 5s. "B" share for each £5 of their claims as on 23rd March, 1931.

His Lordship made an order sanctioning the scheme.

[1] S. 153 (5). The meeting must be truly representative of the persons concerned. The practical difficulties that may arise are well illustrated in *British America Nickel Corporation, Ltd.* v. *M. J. O'Brien, Ltd.*, [1927] A.C. 369 P.C., where a considered statement of the law will be found.

the whole scheme is the arrangement with the creditors. The unsecured creditors have every inducement to agree because otherwise, if the company is wound up, the club dissolved and the assets sold for what they will fetch, the debenture-holders will seize everything and they will be squeezed out. But, doubtless, some of the members will feel a sense of grievance; they are receiving only a quarter of what is owed them, and for the rest shares, which are only of value if the 18-hole course is a success where the 9-hole course has been a failure. The Court may, however, well approve the scheme, especially if the objectors are but a small minority (with an appropriately high handicap). The debenture-holders again have reason to acquiesce though probably grudgingly, because they are going to receive a lower rate of interest and no security for their loan. But cumulative preference shares in a prospering club may well be better than a charge over a wasting security (and in any case the "tigers" will be holding three-fourths of the debentures). Here, however, a powerful minority may succeed in getting better terms for all, say preference shares as to half and debentures for the rest. But whatever the scheme eventually decided upon, it is the negotiations with the creditors and their agreements amongst themselves that ultimately determine its character.

Where such scheme of arrangement is part of a plan of reconstruction or amalgamation, the Court has very wide powers [1] of facilitating the scheme. Thus the Court may provide for the dissolution, without winding up, of any transferor company; it may also make provision for the dissentients without requiring that they should be paid out as under s. 234. This is of great practical importance, because the need of finding the money to buy out dissentients is often the cause of failure of the whole scheme. Provided only they are fairly dealt with, the Court will be satisfied. The Court itself has power to determine on what terms dissentients are to be bought out, and may vary the scheme accordingly.[2]

Under this section the transferee must be a company, which is not the case under s. 234.

[1] S. 154.

[2] Cf. *In re Castner-Kellner Alkali Co., Ltd.*, [1930] 2 Ch. 349.

CHAPTER XI

WINDING UP

(A) VOLUNTARY

THERE must be many who attended the last annual meeting of the Eastern Steam Packet Co., realising that it would be the company's last. A small dividend it is true had been declared, but it was as clear as noonday that the company was fast losing its remaining traffic to its upstart rival, the Eastern Air Packet Co. Obviously the time has come for winding up, while it will still be possible to pay 20s. in the £ all round. The directors being sensible men, however unwilling to make a break with an honourable past, reluctantly accept the necessity for it and take the initial steps to bring it about.

A Board meeting is held when the affairs of the company are carefully looked into. After satisfying themselves that all the creditors can be paid in full within a period of twelve months, the directors make a formal declaration of solvency. This declaration is at once filed with the Registrar. At the same time the Secretary is instructed to convene an extraordinary meeting of the company, and to give notice of a special resolution to the effect that the Eastern Steam Packet Co. shall be wound up voluntarily.

Members' Voluntary Winding Up. In due course the shareholders meet and pass the special resolution. The resolution has, of course, to be filed; it has also to be published in the *Gazette* within seven days. The commencement of the winding up dates from the resolution, and from that moment the company ceases to carry on business, except for the purposes of a beneficial winding up. Moreover, the directors cease to act; they give place to the liquidator, who is appointed at the same meeting.

This is not the place to deal in any detail with the functions of the liquidator or the business of winding up. Very briefly, his duty may be said to be to get in all outstanding debts, to realise the assets of the company to the best advantage, and to pay all creditors. If there is any surplus it will be returned to the shareholders in accordance with the rights attaching to their shares.

Creditors' Voluntary Winding Up. If there is not enough to pay all the creditors in full the procedure is slightly different. There will be no declaration of solvency when the directors of Treasure Island Gold Mining Co. decide to wind up. It will be a "creditors' voluntary winding up" in contradistinction to the "members' voluntary winding up"[1] just described. Moreover, in that the company by reason of its liabilities cannot continue its business,[2] the resolution will be an extraordinary one. This, incidentally, has the advantage of being a much quicker process.[3] The creditors may, if they choose, appoint a committee of inspection or a liquidator to act jointly with or in place of the liquidator appointed by the shareholders.

It should be borne in mind that though the company thus ceases to carry on business it still continues its corporate existence. It has not ceased to be a company, and throughout the winding up any legal proceedings that have to be conducted by the liquidator are taken in the name of the company (in liquidation).

Account of the Winding Up. As soon as the business of winding up is completed the liquidator must make up an account, showing how the property of the company has been disposed of, for presentation to the shareholders, and in a creditors' voluntary winding up to the creditors as well. He calls both meetings by means of notices in the *Gazette*, and the length of such notice must be at least

[1] These terms are statutory. See s. 230 (3).
[2] See s. 225.
[3] Because of the length of notice required. See *ante* p. 92.

one month. He can call both meetings on the same day if convenient.

Final Meeting. This last meeting of the company is in any event a gloomy affair, and it may be difficult to secure a quorum. But it matters little because the liquidator can make a return to the effect that the meeting was duly summoned, but there was no quorum and the law is satisfied. The meeting, if a quorum is present, has no other business than the consideration of the account of the winding up. No further resolution is necessary in the winding up or for dissolution.

Within seven days the liquidator files this account with the Registrar.

The company then lives on for another three months, but when the three months have expired the company dissolves and is no more.

Dissolution. The body corporate that is has ceased to exist, but it does not altogether pass from history at that moment. Its ghost, so to speak, continues to walk the earth for a period of two years. At any time within two years the liquidator or any other person who appears to the Court to be interested may make application,[1] and the Court, if it thinks fit, may declare the dissolution void. Proceedings may then be taken just as if the company had never been dissolved.

The Company's Books and Papers. What is to happen to the Eastern Steam Packet Co's books and papers? The company may have made provision for this by extraordinary resolution. If not, the liquidator should keep them for five years from the date of the dissolution, after which he may destroy them or send them to the British Museum or do whatever else he pleases with them.[2]

(B) WINDING UP UNDER SUPERVISION

Where a company has passed a resolution for a voluntary winding up the Court may make an order for the

[1] See s. 294. See s. 283.

voluntary winding up to continue, but subject to the supervision of the Court.[1]

The Eastern Air Packet Co. is about to amalgamate with the New Glider and Transantarctic Transport, Ltd. A special resolution for voluntary winding up is passed, and the liquidator is to sell to the New Glider under s. 234. Some of the shareholders have little faith in the New Glider and are likely to give trouble. Application is made to the Court for the winding up to continue under supervision.

The Austin Friars Bucket Shop, Ltd., has fallen upon evil days. Its remaining assets are few and, if it is compulsorily wound up, the assets will all be swallowed up in the process. But a creditors' voluntary winding up is difficult, because the landlord is pressing for his arrears of rent, and the wiser or less considerate creditors are threatening proceedings. The company can be wound up under supervision for the order, as soon as made, operates as a stay of all proceedings.[2]

Macintosh Tweeds, Ltd., is going in for reconstruction. Voluntary winding up has been resolved upon and Mr. Angus Macintosh is appointed liquidator. As it happens Mr. Angus is in no way related to the Macintosh whose name the company bears, but his appointment is displeasing to the creditors. The Court will appoint Mr. Cape instead, and order him to make periodical reports as to the progress of the winding up, and not to pay solicitors', accountants', auctioneers', and similar charges except as allowed by the Registrar.

(c) COMPULSORY

There is, finally, compulsory winding up by the Court. The chief ground for a compulsory winding up can be indicated at once. The creditors cannot get paid. In the words of the Act, *the company is unable to pay its debts.* A sum of £50 or more is due; the creditor has left at the registered office of the company a demand in writing for the amount; three weeks elapse without payment or

[1] S. 256.

[2] See ss. 259 and 177, and cf. *Bowkett* v. *Fullers United Electric Works, Ltd.*, [1923] 1 K.B. 160. Where a company is in voluntary liquidation and judgment is obtained against it, there will be a stay of execution unless there are very exceptional reasons for ordering otherwise. Cf. *Anglo-Baltic and Mediterranean Bank* v. *Barber & Co.*, [1924] 2 K.B. 410 C.A.

composition; then, even if it be only that the company does not choose to pay the debt, it is deemed to be unable to and the petition is in order.

The company itself may petition in such circumstances but it is unusual, for a voluntary winding up under supervision will ordinarily meet the case.

The fact that voluntary winding up has been resolved upon or is already in progress is no bar to a creditor's petition, though in the absence of special circumstances the Court will not make a compulsory order against the wishes of a majority of the creditors.

Such a petition may be the creditor's only remedy, especially where his claim has been wrongly disallowed in a voluntary winding up. Moreover, disallowance of a claim by the Registrar in a voluntary winding up does not estop the creditor from presenting a petition.

Mrs. Rivette had obtained judgment against Inecto, Ltd., in respect of damage done to her hair by the use of the company's dye, Inecto Rapid.

In the voluntary winding up pursuant to a resolution of 13th October, 1921, Mrs. Rivette believing the company to be insolvent submitted to the jurisdiction of the Registrar, who made an order that her claim should not be admitted to proof. She subsequently discovered that shortly before 13th October a new company had been registered, Rapidol, Ltd., in which all the shares were held by the same three members of the Duckers family who owned Inecto, Ltd., and to Rapidol, Ltd., practically all the assets of Inecto, Ltd., were sold. Moreover, in September the capital of Phyllis Earle, Ltd., in which the Duckers and Inecto, Ltd., held all the shares, had been increased from £10,000 to £14,000.

The Court made an order for compulsory winding up; the transactions disclosed were so suspicious that they ought to be investigated by the Official Receiver, and that a compulsory order ought to be made not merely for enabling the debts of the company to be paid, but for inquiring into what looked like serious frauds. (*In re Inecto, Ltd.* (1922), 38 T.L.R. 797.)

The only other ground for a compulsory order—apart from the cases where winding up may be said to be by operation of law[1]—where the statutory meeting is not held, where the statutory report is not filed, where the number of members falls below seven or two, and the rest—is where in all the circumstances the Court thinks it just and equitable that the company should be wound up. This "just and equitable" clause has been the subject of a good deal of consideration on the part of the Courts.

The "Just and Equitable" Ground. In the first place it is to be noted that it is a ground in itself. The clause is not to be construed on the *ejusdem generis* principle; that is to say, it is not to be confined to cases similar to, though not included under, the previous clauses of the section.[2]

The words just and equitable are words of the widest significance, and do not limit the jurisdiction of the Court to any case. It is a question of fact, and each case must depend on its own circumstances.[3]

The just and equitable clause has been relied on in the following cases-

(i) Where the substratum of the company was gone, the capital misapplied, and the company so constituted that it was deprived of its usual remedies.

> "M. Blériot is, as everybody knows, an inventor of aircraft of world-wide repute. He gave to Mr. Casson, the chairman of the syndicate, an option to purchase his English business, and the syndicate entered into an agreement with the company to sell to them at a large profit. The prime mover in the whole matter was Lawson. . . . By a series of contrivances exhibiting considerable astuteness he has managed to get the affairs of the company under his control. . . . The company had the option of acquiring the business of M. Blériot, and I think that if the company had been honestly formed he would probably have completed, but he very soon found that the company was not in a

[1] See s. 168 (2) (3) (4) and *ante* p. 90.
[2] See *Loch* v. *John Blackwood, Ltd.*, [1924] A.C. 783.
[3] *In re Blériot Manufacturing Aircraft Co., Ltd.* (1916), 32 T.L.R. 253.

the illustrations, that every matter of account between the officer and the company is one to be pursued in this way. Emphasis should be placed upon the word "guilty." There must be some misfeasance in the nature of a breach of trust of which the officer has been guilty.[1]

Thus, the Secretary took a trip (unauthorised) to America, costing some £265, and overdrew his salary to the extent of £108. The liquidators sought to recover these amounts by means of misfeasance proceedings. The Court held they were not applicable. It is not every claim that can be pursued in this way, but only where it arises from a loss caused to the company by the officer's breach of duty. (*In re Etic*, [1928] Ch. 861, where the authorities are carefully considered.)

Dissolution. When the affairs of the company have been completely wound up the Court makes an order for dissolution, and the company is dissolved from the date of the order. The liquidator must report the order within fourteen days to the Registrar, who enters a minute accordingly. As a warning to the dilatory there is a £5 fine for every day in which the liquidator is in default in notifying the dissolution.[2]

Defunct Companies. There are a certain number of companies, fortunately very few, that are, so to speak, abandoned by their promoters. The business has long since dwindled to nothing, or more probably there never was any business at all—the company was formed to work some invention of which the misguided backers hoped untold wealth, but which in reality was doomed from the very start, "perpetual motion" or some other hoary chimaera under a new name. When £30,000 has been sunk and lost, and with it all confidence except that of the inventor, no one will have anything further to do with the

[1] For mere technical breaches of trust, where an officer has acted honestly and reasonably and ought in all the circumstances fairly to be excused, the Court has power to relieve, s. 372; even though the transaction was *ultra vires* though honestly and reasonably believed to be *intra vires*. (*Claridges Patent Asphalte Co., Ltd.*, [1921] 1 Ch. 543.)

[2] S. 221.

company. Who wants to incur expense for mere formality's sake? Consequently the Self-Generating Power Co., Ltd., remains on the register, but no annual statement is filed, no replies are received by the Registrar, and there is not a living soul at the company's office. But in the eye of the law the company, though defunct, is not dead; accordingly special provision is made for its dissolution.

The Registrar must first write and inquire whether the company is still in operation. If there is no reply by the end of a month, he must send another letter within fourteen days, registered this time, referring to the former letter and want of reply, and intimating that failing an answer within a month a notice will be published in the *Gazette* with a view to striking the name of the company off the register.

No reply being received by the end of the month, he publishes in the *Gazette*, and sends to the company, a notice that at the end of three months, unless cause is shown to the contrary, the company will be struck off and dissolved.

But a member or creditor who is aggrieved at the striking off has twenty years (from the publication of the notice in the *Gazette*) in which to apply for the company to be reinstated, and in proper circumstances the Court will order the name of the company to be restored to the register.[1]

[1] S. 295.

APPENDIX A

THE COMPANIES ACT, 1929

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows—

Part I.

Incorporation of Companies and Matters incidental thereto.

Memorandum of Association.

Mode of forming incorporated company.

1.—(1) Any seven or more persons, or, where the company to be formed will be a private company, any two or more persons, associated for any lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requirements of this Act in respect of registration, form an incorporated company, with or without limited liability.

(2) Such a company may be either—

(*a*) A company having the liability of its members limited by the memorandum to the amount, if any, unpaid on the shares respectively held by them (in this Act termed " a company limited by shares "); or

(*b*) A company having the liability of its members limited by the memorandum to such amount as the members may respectively thereby undertake to contribute to the assets of the company in the event of its being wound up (in this Act termed " a company limited by guarantee "); or

(*c*) A company not having any limit on the liability of its members (in this Act termed " an unlimited company ").

Requirements with respect to memorandum

2.—(1) The memorandum of every company must state—

(*a*) The name of the company, with " Limited " as the last word of the name in the case of a company limited by shares or by guarantee;

(*b*) Whether the registered office of the company is to be situate in England or in Scotland;

(*c*) The objects of the company.

(2) The memorandum of a company limited by shares or by guarantee must also state that the liability of its members is limited.

(3) The memorandum of a company limited by guarantee must also state that each member undertakes to contribute to the assets of the company in the event of its being wound up while he is a member, or within one year after he ceases to be a member, for payment of the debts and liabilities of the company contracted before he ceases to be a member, and of the costs, charges, and expenses of winding up, and for adjustment of the

rights of the contributories among themselves, such amount as may be required, not exceeding a specified amount.

(4) In the case of a company having a share capital—

(a) The memorandum must also, unless the company is an unlimited company, state the amount of share capital with which the company proposes to be registered and the division thereof into shares of a fixed amount;

(b) No subscriber of the memorandum may take less than one share;

(c) Each subscriber must write opposite to his name the number of shares he takes.

Stamp and signature of memorandum.

3. The memorandum must bear the same stamp as if it were a deed, and must be signed by each subscriber in the presence of at least one witness who must attest the signature, and that attestation shall be sufficient in Scotland as well as in England.

Restriction on alteration of memorandum.

4. A company may not alter the conditions contained in its memorandum except in the cases, in the mode and to the extent for which express provision is made in this Act.

Mode in which and extent to which objects of company may be altered.

5.—(1) Subject to the provisions of this section, a company may, by special resolution, alter the provisions of its memorandum with respect to the objects of the company, so far as may be required to enable it—

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

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

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

(d) to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company; or

(e) to restrict or abandon any of the objects specified in the memorandum; or

(f) to sell or dispose of the whole or any part of the undertaking of the company; or

(g) to amalgamate with any other company or body of persons.

(2) The alteration shall not take effect until, and except in so far as, it is confirmed on petition by the court.

(3) Before confirming the alteration the court must be satisfied—

(a) that sufficient notice has been given to every holder of debentures of the company, and to any persons or class of persons whose interests will, in the opinion of the court, be affected by the alteration; and

(b) that, with respect to every creditor who in the opinion of the court is entitled to object and who signifies his objection in manner directed by the court, either his consent to the alteration has been obtained or his debt or claim has been discharged or has determined, or has been secured to the satisfaction of the court:

Provided that the court may, in the case of any person or class, for special reasons, dispense with the notice required by this section.

(4) The court may make an order confirming the alteration either wholly or in part, and on such terms and conditions as it thinks fit.

(5) The court shall, in exercising its discretion under this section, have regard to the rights and interests of the members of the company or of any class of them, as well as to the rights

and interests of the creditors, and may, if it thinks fit, adjourn the proceedings in order that an arrangement may be made to the satisfaction of the court for the purchase of the interests of dissentient members, and may give such directions and make such orders as it may think expedient for facilitating or carrying into effect any such arrangement:

Provided that no part of the capital of the company shall be expended in any such purchase.

(6) An office copy of the order confirming the alteration, together with a printed copy of the memorandum as altered, shall, within fifteen days from the date of the order, be delivered by the company to the registrar of companies, and he shall register the copy so delivered and shall certify the registration under his hand, and the certificate shall be conclusive evidence that all the requirements of this Act with respect to the alteration and the confirmation thereof have been complied with, and thenceforth the memorandum as so altered shall be the memorandum of the company.

The court may by order at any time extend the time for the delivery of documents to the registrar under this section for such period as the court may think proper.

(7) If a company makes default in delivering to the registrar of companies any document required by this section to be delivered to him, the company shall be liable to a fine not exceeding ten pounds for every day during which the default continues.

Articles of Association.

6. There may in the case of a company limited by shares, and there shall in the case of a company limited by guarantee or unlimited, be registered with the memorandum articles of association signed by the subscribers to the memorandum and prescribing regulations for the company. **Articles prescribing regulations for companies.**

7.—(1) In the case of an unlimited company the articles, if the company has a share capital, must state the amount of share capital with which the company proposes to be registered. **Regulations required in case of unlimited company or company limited by guarantee.**

(2) In the case of an unlimited company or a company limited by guarantee, the articles, if the company has not a share capital, must state the number of members with which the company proposes to be registered.

(3) Where a company not having a share capital has increased the number of its members beyond the registered number, it shall, within fifteen days after the increase was resolved on or took place, give to the registrar of companies notice of the increase, and the registrar shall record the increase.

If default is made in complying with this subsection, the company and every officer of the company who is in default shall be liable to a default fine.

8.—(1) Articles of association may adopt all or any of the regulations contained in Table A. **Adoption an application of Table A.**

(2) In the case of a company limited by shares and registered after the commencement of this Act, if articles are not registered, or, if articles are registered, in so far as the articles do not exclude or modify the regulations contained in Table A, those regulations shall, so far as applicable, be the regulations of the company in the same manner and to the same extent as if they were contained in duly registered articles.

Printing, stamp, and signature of articles.

9. Articles must—
(1) be printed;
(2) be divided into paragraphs numbered consecutively;
(3) bear the same stamp as if they were contained in a deed;
(4) be signed by each subscriber of the memorandum of association in the presence of at least one witness who must attest the signature, and that attestation shall be sufficient in Scotland as well as in England.

Alteration of articles by special resolution.

10.—(1) Subject to the provisions of this Act and to the conditions contained in its memorandum, a company may by special resolution alter or add to its articles.

(2) Any alteration or addition so made in the articles shall, subject to the provisions of this Act, be as valid as if originally contained therein, and be subject in like manner to alteration by special resolution.

Form of Memorandum and Articles.

Statutory forms of memorandum and articles.

11. The form of—
(1) the memorandum of association of a company limited by shares;
(2) the memorandum and articles of association of a company limited by guarantee and not having a share capital;
(3) the memorandum and articles of association of a company limited by guarantee and having a share capital;
(4) the memorandum and articles of association of an unlimited company having a share capital;
shall be respectively in accordance with the forms set out in Tables B, C, D and E in the First Schedule to this Act, or as near thereto as circumstances admit.

Registration.

Registration of memorandum and articles.

12. The memorandum and the articles, if any, shall be delivered to the registrar of companies for England or the registrar of companies for Scotland according as the registered office of the company is stated by the memorandum to be situate in England or Scotland, and the registrar shall retain and register them.

Effect of registration.

13.—(1) On the registration of the memorandum of a company the registrar shall certify under his hand that the company is incorporated and, in the case of a limited company, that the company is limited.

(2) From the date of incorporation mentioned in the certificate of incorporation, the subscribers of the memorandum, together with such other persons as may from time to time become members of the company, shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is mentioned in this Act.

Power of company to hold lands.

14.—(1) A company incorporated under this Act shall have power to hold lands, and as regards lands in any part of the United Kingdom without licence in mortmain:

Provided that a company formed for the purpose of promoting art, science, religion, charity or any other like object not involving the acquisition of gain by the company or by its individual members, shall not, without the licence of the Board of Trade, hold more than two acres of land, but the Board may by licence empower any such company to hold lands in such quantity, and subject to such conditions, as the Board think fit.

(2) A licence given by the Board of Trade under this section shall be in accordance with the form set out in the Second Schedule to this Act, or as near thereto as circumstances admit.

Conclusiveness of certificate of incorporation.

15.—(1) A certificate of incorporation given by the registrar in respect of any association shall be conclusive evidence that all the requirements of this Act in respect of registration and of matters precedent and incidental thereto have been complied with, and that the association is a company authorised to be registered and duly registered under this Act.

(2) A statutory declaration by a solicitor of the Supreme Court, and in Scotland by an enrolled law agent, engaged in the formation of the company, or by a person named in the articles as a director or secretary of the company, of compliance with all or any of the said requirements shall be produced to the registrar, and the registrar may accept such a declaration as sufficient evidence of compliance.

Registration of unlimited company as limited.

16.—(1) Subject to the provisions of this section, a company registered as unlimited may register under this Act as limited, or a company already registered as a limited company may re-register under this Act, but the registration of an unlimited company as a limited company shall not affect the rights or liabilities of the company in respect of any debt or obligation incurred, or any contract entered into, by, to, with, or on behalf of the company before the registration, and those rights or liabilities may be enforced in manner provided by Part IX of this Act in the case of a company registered in pursuance of that Part.

(2) On registration in pursuance of this section the registrar shall close the former registration of the company, and may dispense with the delivery to him of copies of any documents with copies of which he was furnished on the occasion of the original registration of the company, but, save as aforesaid, the registration shall take place in the same manner and shall have effect as if it were the first registration of the company under this Act, and as if the provisions of the Acts under which the company was previously registered and regulated had been contained in different Acts from those under which the company is registered as a limited company.

Provisions with respect to Names of Companies.

Restriction on registration of companies by certain names.

17.—(1) No company shall be registered by a name which—

(*a*) is identical with that by which a company in existence is already registered, or so nearly resembles that name as to be calculated to deceive, except where the company in existence is in the course of being dissolved and signifies its consent in such manner as the registrar requires; or

(*b*) contains the words "Chamber of Commerce," unless the company is a company which is to be registered under a licence granted in pursuance of the next following section of this Act without the addition of the word "Limited" to its name; or

(*c*) contains the words "Building Society."

(2) Except with the consent of the Board of Trade no company shall be registered by a name which—

(*a*) contains the words "Royal" or "Imperial" or in the opinion of the registrar suggests, or is calculated to suggest, the patronage of His Majesty or of any member of the Royal Family or connection with His Majesty's Government or any department thereof; or

(*b*) contains the words "Municipal" or "Chartered" or in the opinion of the registrar suggests, or is calculated to suggest, connection with any municipality or other local authority or with any society or body incorporated by Royal Charter; or

(*c*) contains the word "Co-operative."

Power to dispense with "Limited" in name of charitable and other companies.

18.—(1) Where it is proved to the satisfaction of the Board of Trade that an association about to be formed as a limited company is to be formed for promoting commerce, art, science, religion, charity, or any other useful object, and intends to apply its profits, if any, or other income in promoting its objects, and to prohibit the payment of any dividend to its members, the Board may by licence direct that the association may be registered as a company with limited liability, without the addition of the word "Limited" to its name, and the association may be registered accordingly.

(2) A licence by the Board of Trade under this section may be granted on such conditions and subject to such regulations as the Board think fit, and those conditions and regulations shall be binding on the association, and shall, if the Board so direct, be inserted in the memorandum and articles, or in one of those documents.

(3) The association shall on registration enjoy all the privileges of limited companies, and be subject to all their obligations, except those of using the word "Limited" as any part of its name, and of publishing its name, and of sending lists of members to the registrar of companies.

(4) A licence under this section may at any time be revoked by the Board of Trade, and upon revocation the registrar shall enter the word "Limited" at the end of the name of the association upon the register, and the association shall cease to enjoy the exemptions and privileges granted by this section:

Provided that, before a licence is so revoked, the Board shall give to the association notice in writing of their intention, and shall afford the association an opportunity of being heard in opposition to the revocation.

(5) Where the name of the association contains the words "Chamber of Commerce," the notice to be given as aforesaid shall include a statement of the effect of the provisions of sub-section (3) of the next following section of this Act.

Change of name.

19.—(1) A company may, by special resolution and with the approval of the Board of Trade signified in writing, change its name.

(2) If a company, through inadvertence or otherwise, is, without such consent as is mentioned in paragraph (*a*) of sub-section (1) of section seventeen of this Act, registered by a name which is identical with that by which a company in existence is previously registered, or which so nearly resembles that name as to be calculated to deceive, the first-mentioned company may change its name with the sanction of the registrar.

(3) Where a licence granted in pursuance of the last foregoing section of this Act to a company the name of which contains the words "Chamber of Commerce" is revoked, the company shall, within a period of six weeks from the date of the revocation or such longer period as the Board of Trade may think fit to allow, change its name to a name which does not contain those words.

If a company makes default in complying with the requirements of this subsection, it shall be liable to a fine not exceeding fifty pounds for every day during which the default continues.

(4) Where a company changes its name, the registrar shall enter the new name on the register in place of the former name, and shall issue a certificate of incorporation altered to meet the circumstances of the case.

(5) The change of name shall not affect any rights or obligations of the company, or render defective any legal proceedings by or against the company, and any legal proceedings that might have been continued or commenced against it by its former name may be continued or commenced against it by its new name.

General Provisions with respect to Memorandum and Articles.

Effect of memorandum and articles.

20.—(1) Subject to the provisions of this Act, the memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member to observe all the provisions of the memorandum and of the articles.

(2) All money payable by any member to the company under the memorandum or articles shall be a debt due from him to the company, and in England be of the nature of a specialty debt.

Provision as to memorandum and articles of companies limited by guarantee.

21.—(1) In the case of a company limited by guarantee and not having a share capital, and registered on or after the first day of January, nineteen hundred and one, every provision in the memorandum or articles or in any resolution of the company purporting to give any person a right to participate in the divisible profits of the company otherwise than as a member shall be void.

(2) For the purpose of the provisions of this Act relating to the memorandum of a company limited by guarantee and of this section, every provision in the memorandum or articles, or in any resolution, of a company limited by guarantee and registered on or after the date aforesaid, purporting to divide the undertaking of the company into shares or interests shall be treated as a provision for a share capital, notwithstanding that the nominal amount or number of the shares or interests is not specified thereby.

Alterations in memorandum or articles increasing liability to contribute to share capital not to bind existing members without consent.

22. Notwithstanding anything in the memorandum or articles of a company, no member of the company shall be bound by an alteration made in the memorandum or articles after the date on which he became a member, if and so far as the alteration requires him to take or subscribe for more shares than the number held by him at the date on which the alteration is made, or in any way increases his liability as at that date to contribute to the share capital of, or otherwise to pay money to, the company:

Provided that this section shall not apply in any case where the member agrees in writing, either before or after the alteration is made, to be bound thereby.

Copies of memorandum and articles to be given to members.

23.—(1) A company shall, on being so required by any member, send to him a copy of the memorandum and of the articles, if any, and a copy of any Act of Parliament which alters the memorandum, subject to payment, in the case of a copy of the *memorandum and of the articles, of one shilling or such less sum* as the company may prescribe, and, in the case of a copy of an Act, of such sum not exceeding the published price thereof as the company may require.

(2) If a company makes default in complying with this section, the company and every officer of the company who is in default shall be liable for each offence to a fine not exceeding one pound.

Issued copies of memorandum to embody alterations.

24.—(1) Where an alteration is made in the memorandum of a company, every copy of the memorandum issued after the date of the alteration shall be in accordance with the alteration.

(2) If, where any such alteration has been made, the company at any time after the date of the alteration issues any copies of the memorandum which are not in accordance with the alteration, it shall be liable to a fine not exceeding one pound for each copy so issued, and every officer of the company who is in default shall be liable to the like penalty.

Membership of Company.

Definition of member.

25.—(1) The subscribers of the memorandum of a company shall be deemed to have agreed to become members of the company, and on its registration shall be entered as members in its register of members.

(2) Every other person who agrees to become a member of a company, and whose name is entered in its register of members, shall be a member of the company.

Private Companies.

Meaning of "private company."

26.—(1) For the purposes of this Act, the expression "private company" means a company which by its articles—

(*a*) restricts the right to transfer its shares; and

(*b*) limits the number of its members to fifty, not including persons who are in the employment of the company and persons who, having been formerly in the employment of the company, were while in that employment, and have continued after the determination of that employment to be, members of the company; and

(*c*) prohibits any invitation to the public to subscribe for any shares or debentures of the company.

(2) Where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of this section, be treated as a single member.

Circumstances in which company ceases to be, or to enjoy privileges of, a private company.

27.—(1) If a company, being a private company, alters its articles in such manner that they no longer include the provisions which, under the last foregoing section of this Act, are required to be included in the articles of a company in order to constitute it a private company, the company shall, as on the date of the alteration, cease to be a private company and shall, within a period of fourteen days after the said date, deliver to the registrar of companies for registration a prospectus or a statement in lieu of prospectus in the form and containing the particulars set out in the Third Schedule to this Act.

(2) If default is made in complying with subsection (1) of this section, the company and every officer of the company who is in default shall be liable to a default fine of fifty pounds.

(3) Where the articles of a company include the provisions aforesaid but default is made in complying with any of those provisions, the company shall cease to be entitled to the privileges and exemptions conferred on private companies under the provisions contained in section twenty-eight, subsection (3) of section one hundred and ten, subsection (1) of section one hundred and thirty and paragraph (4) of section one hundred and sixty-eight of this Act, and thereupon the said provisions shall apply to the company as if it were not a private company:

Provided that the court, on being satisfied that the failure to comply with the conditions was accidental or due to inadvertence or to some other sufficient cause, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any other person interested and on such terms and conditions as seem to the court just and expedient, order that the company be relieved from such consequences as aforesaid.

Reduction of Number of Members below Legal Minimum.

Prohibition of carrying on business with fewer than seven or, in the case of a private company, two members.

28. If at any time the number of members of a company is reduced, in the case of a private company, below two, or, in the case of any other company, below seven, and it carries on business for more than six months while the number is so reduced, every person who is a member of the company during the time that it so carries on business after those six months and is cognisant of the fact that it is carrying on business with fewer than two members, or seven members, as the case may be, shall be severally liable for the payment of the whole debts of the company contracted during that time, and may be severally sued therefor.

Contracts, etc.

Form of contracts

29.—(1) Contracts on behalf of a company may be made as follows—

(*a*) A contract which if made between private persons would be by law required to be in writing, and if made according to English law to be under seal, may be made on behalf of the company in writing under the common seal of the company;

(*b*) A contract which if made between private persons would be by law required to be in writing, signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under its authority, express or implied:

(*c*) A contract which if made between private persons would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under its authority, express or implied.

(2) A contract made according to this section shall be effectual in law, and shall bind the company and its successors and all other parties thereto.

(3) A contract made according to this section may be varied or discharged in the same manner in which it is authorised by this section to be made.

(4) A deed to which a company is a party shall be held to be

validly executed in Scotland on behalf of the company if it is executed in accordance with the provisions of this Act or is sealed with the common seal of the company and subscribed on behalf of the company by two of the directors and the secretary of the company, and such subscription on behalf of the company shall be binding whether attested by witnesses or not.

Bills of exchange and promissory notes.

30. A bill of exchange or promissory note shall be deemed to have been made, accepted, or endorsed on behalf of a company if made, accepted, or endorsed in the name of, or by or on behalf or on account of, the company by any person acting under its authority.

Execution of deeds abroad.

31.—(1) A company may, by writing under its common seal, empower any person, either generally or in respect of any specified matters, as its attorney, to execute deeds on its behalf in any place not situate in the United Kingdom.

(2) A deed signed by such an attorney on behalf of the company and under his seal shall bind the company and have the same effect as if it were under its common seal.

Power for company to have official seal for use abroad.

32.—(1) A company whose objects require or comprise the transaction of business in foreign countries may, if authorised by its articles, have for use in any territory, district, or place not situate in the United Kingdom, an official seal, which shall be a facsimile of the common seal of the company, with the addition on its face of the name of every territory, district, or place where it is to be used.

(2) A deed or other document to which an official seal is duly affixed shall bind the company as if it had been sealed with the common seal of the company.

(3) A company having an official seal for use in any such territory, district or place may, by writing under its common seal, authorise any person appointed for the purpose in that territory, district or place, to affix the official seal to any deed or other document to which the company is party in that territory, district or place.

(4) The authority of any such agent shall, as between the company and any person dealing with the agent, continue during the period, if any, mentioned in the instrument conferring the authority, or if no period is there mentioned, then until notice of the revocation or determination of the agent's authority has been given to the person dealing with him.

(5) The person affixing any such official seal shall, by writing under his hand, certify on the deed or other instrument, to which the seal is affixed, the date on which and the place at which it is affixed.

Authentication of Documents.

Authentication of documents.

33. A document or proceeding requiring authentication by a company may be signed by a director, secretary, or other authorised officer of the company, and need not be under its common seal.

PART II.

SHARE CAPITAL AND DEBENTURES.

Prospectus.

Dating and registration of prospectus.

34.—(1) A prospectus issued by or on behalf of a company or in relation to an intended company shall be dated, and that date shall, unless the contrary is proved, be taken as the date of publication of the prospectus.

(2) A copy of every such prospectus, signed by every person who is named therein as a director or proposed director of the company, or by his agent authorised in writing, shall be delivered to the registrar of companies for registration on or before the date of its publication, and no such prospectus shall be issued until a copy thereof has been so delivered for registration.

(3) The registrar shall not register any prospectus unless it is dated, and the copy thereof signed, in manner required by this section.

(4) Every prospectus shall state on the face of it that a copy has been delivered for registration as required by this section.

(5) If a prospectus is issued without a copy thereof being so delivered, the company, and every person who is knowingly a party to the issue of the prospectus, shall be liable to a fine not exceeding five pounds for every day from the date of the issue of the prospectus until a copy thereof is so delivered.

Specific requirements as to particulars in prospectus.

35.—(1) Every prospectus issued by or on behalf of a company, or by or on behalf of any person who is or has been engaged or interested in the formation of the company, must state the matters specified in Part I of the Fourth Schedule to this Act and set out the reports specified in Part II of that Schedule, and the said Parts I and II shall have effect subject to the provisions contained in Part III of the said Schedule.

(2) A condition requiring or binding an applicant for shares in or debentures of a company to waive compliance with any requirement of this section, or purporting to affect him with notice of any contract, document, or matter not specifically referred to in the prospectus, shall be void.

(3) It shall not be lawful to issue any form of application for shares in or debentures of a company unless the form is issued with a prospectus which complies with the requirements of this section:

Provided that this subsection shall not apply if it is shown that the form of application was issued either—

(*a*) in connection with a bonâ fide invitation to a person to enter into an underwriting agreement with respect to the shares or debentures; or

(*b*) in relation to shares or debentures which were not offered to the public.

If any person acts in contravention of the provisions of this subsection, he shall be liable to a fine not exceeding five hundred pounds.

(4) In the event of non-compliance with or contravention of any of the requirements of this section, a director or other person responsible for the prospectus shall not incur any liability by reason of the non-compliance or contravention, if—

(*a*) as regards any matter not disclosed, he proves that he was not cognisant thereof; or

(*b*) he proves that the non-compliance or contravention arose from an honest mistake of fact on his part; or

(*c*) the non-compliance or contravention was in respect of matters which in the opinion of the court dealing with the case were immaterial or was otherwise such as ought, in the opinion of that court, having regard to all the circumstances of the case, reasonably to be excused:

Provided that, in the event of failure to include in a prospectus a statement with respect to the matters specified in paragraph 15 of Part I of the Fourth Schedule to this Act, no director or other person shall incur any liability in respect of the failure unless it be proved that he had knowledge of the matters not disclosed.

(5) This section shall not apply to the issue to existing members or debenture holders of a company of a prospectus or form of application relating to shares in or debentures of the company, whether an applicant for shares or debentures will or will not have the right to renounce in favour of other persons, but subject as aforesaid, this section shall apply to a prospectus or a form of application whether issued on or with reference to the formation of a company or subsequently.

(6) Nothing in this section shall limit or diminish any liability which any person may incur under the general law or this Act apart from this section.

Restriction on alteration of terms mentioned in prospectus or statement in lieu of prospectus.

36.—(1) A company limited by shares or a company limited by guarantee and having a share capital shall not previously to the statutory meeting vary the terms of a contract referred to in the prospectus, or statement in lieu of prospectus, except subject to the approval of the statutory meeting.

(2) This section shall not apply to a private company.

Liability for statements in prospectus.

37.—(1) Where a prospectus invites persons to subscribe for shares in or debentures of a company—

(*a*) every person who is a director of the company at the time of the issue of the prospectus; and

(*b*) every person who has authorised himself to be named and is named in the prospectus as a director or as having agreed to become a director either immediately or after an interval of time; and

(*c*) every person being a promoter of the company; and

(*d*) every person who has authorised the issue of the prospectus,

shall be liable to pay compensation to all persons who subscribe for any shares or debentures on the faith of the prospectus for the loss or damage they may have sustained by reason of any untrue statement therein, or in any report or memorandum appearing on the face thereof, or by reference incorporated therein or issued therewith, unless it is proved—

(i) that having consented to become a director of the company he withdrew his consent before the issue of the prospectus, and that it was issued without his authority or consent; or

(ii) that the prospectus was issued without his knowledge or consent, and that on becoming aware of its issue he forthwith gave reasonable public notice that it was issued without his knowledge or consent; or

(iii) that after the issue of the prospectus and before allotment thereunder, he, on becoming aware of any untrue statement therein, withdrew his consent thereto, and gave reasonable public notice of the withdrawal, and of the reason therefor; or

(iv) that—

(*a*) as regards every untrue statement not purporting to be made on the authority of an expert or of a public official document or statement, he had reasonable ground to believe, and did up to the time of the allotment of the shares or debentures, as the case may be, believe, that the statement was true; and

(*b*) as regards every untrue statement purporting to be a statement by an expert or contained in what purports to be a copy of or extract from a report or valuation of an expert, it fairly represented the statement, or was a correct and fair copy of or extract from the report or valuation; and

(c) as regards every untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, it was a correct and fair representation of the statement or copy of or extract from the document:

Provided that a person shall be liable to pay compensation as aforesaid if it is proved that he had no reasonable ground to believe that the person making any such statement, report or valuation as is mentioned in paragraph (iv) (b) of this subsection was competent to make it.

(2) Where the prospectus contains the name of a person as a director of the company, or as having agreed to become a director thereof, and he has not consented to become a director, or has withdrawn his consent before the issue of the prospectus, and has not authorised or consented to the issue thereof, the directors of the company, except any without whose knowledge or consent the prospectus was issued, and any other person who authorised the issue thereof, shall be liable to indemnify the person named as aforesaid against all damages, costs, and expenses to which he may be made liable by reason of his name having been inserted in the prospectus, or in defending himself against any action or legal proceedings brought against him in respect thereof.

(3) Every person who, by reason of his being a director or named as a director or as having agreed to become a director, or of his having authorised the issue of the prospectus, becomes liable to make any payment under this section may recover contribution, as in cases of contract, from any other person who, if sued separately, would have been liable to make the same payment, unless the person who has become so liable was, and that other person was not, guilty of fraudulent misrepresentation.

(4) For the purposes of this section—

The expression "promoter" means a promoter who was a party to the preparation of the prospectus, or of the portion thereof containing the untrue statement, but does not include any person by reason of his acting in a professional capacity for persons engaged in procuring the formation of the company;

The expression "expert" includes engineer, valuer, accountant, and any other person whose profession gives authority to a statement made by him.

Document containing offer of shares or debentures for sale to be deemed prospectus.

38.—(1) Where a company allots or agrees to allot any shares in or debentures of the company with a view to all or any of those shares or debentures being offered for sale to the public, any document by which the offer for sale to the public is made shall for all purposes be deemed to be a prospectus issued by the company, and all enactments and rules of law as to the contents of prospectuses and to liability in respect of statements in and omissions from prospectuses, or otherwise relating to prospectuses, shall apply and have effect accordingly, as if the shares or debentures had been offered to the public for subscription and as if persons accepting the offer in respect of any shares or debentures were subscribers for those shares or debentures, but without prejudice to the liability, if any, of the persons by whom the offer is made, in respect of mis-statements contained in the document or otherwise in respect thereof.

(2) For the purposes of this Act, it shall, unless the contrary is proved, be evidence that an allotment of, or an agreement to allot, shares or debentures was made with a view to the shares or debentures being offered for sale to the public if it is shown—

(a) that an offer of the shares or debentures or of any of them for sale to the public was made within six months after the allotment or agreement to allot; or

(b) that at the date when the offer was made the whole consideration to be received by the company in respect of the shares or debentures had not been so received.

(3) Section thirty-four of this Act as applied by this section shall have effect as though the persons making the offer were persons named in a prospectus as directors of a company, and section thirty-five of this Act as applied by this section shall have effect as if it required a prospectus to state in addition to the matters required by that section to be stated in a prospectus—

(a) the net amount of the consideration received or to be received by the company in respect of the shares or debentures to which the offer relates; and

(b) the place and time at which the contract under which the said shares or debentures have been or are to be allotted may be inspected.

(4) Where a person making an offer to which this section relates is a company or a firm, it shall be sufficient if the document aforesaid is signed on behalf of the company or firm by two directors of the company or not less than half of the partners, as the case may be, and any such director or partner may sign by his agent authorised in writing.

Allotment.

Prohibition of allotment unless minimum subscription received.

39.—(1) No allotment shall be made of any share capital of a company offered to the public for subscription unless the amount stated in the prospectus as the minimum amount which, in the opinion of the directors, must be raised by the issue of share capital in order to provide for the matters specified in paragraph 5 in Part I of the Fourth Schedule to this Act has been subscribed, and the sum payable on application for the amount so stated has been paid to and received by the company.

For the purposes of this subsection, a sum shall be deemed to have been paid to and received by the company if a cheque for that sum has been received in good faith by the company and the directors of the company have no reason for suspecting that the cheque will not be paid.

(2) The amount so stated in the prospectus shall be reckoned exclusively of any amount payable otherwise than in cash and is in this Act referred to as "the minimum subscription."

(3) The amount payable on application on each share shall not be less than five per cent. of the nominal amount of the share.

(4) If the conditions aforesaid have not been complied with on the expiration of forty days after the first issue of the prospectus, all money received from applicants for shares shall be forthwith repaid to them without interest, and, if any such money is not so repaid within forty-eight days after the issue of the

prospectus, the directors of the company shall be jointly and severally liable to repay that money with interest at the rate of five per centum per annum from the expiration of the forty-eighth day:

Provided that a director shall not be liable if he proves that the default in the repayment of the money was not due to any misconduct or negligence on his part.

(5) Any condition requiring or binding any applicant for shares to waive compliance with any requirement of this section shall be void.

(6) This section, except subsection (3) thereof, shall not apply to any allotment of shares subsequent to the first allotment of shares offered to the public for subscription.

Prohibition of allotment in certain cases unless statement in lieu of prospectus delivered to registrar.

40.—(1) A company having a share capital which does not issue a prospectus on or with reference to its formation, or which has issued such a prospectus but has not proceeded to allot any of the shares offered to the public for subscription, shall not allot any of its shares or debentures unless at least three days before the first allotment of either shares or debentures there has been delivered to the registrar of companies for registration a statement in lieu of prospectus, signed by every person who is named therein as a director or a proposed director of the company or by his agent authorised in writing, in the form and containing the particulars set out in the Fifth Schedule to this Act.

(2) This section shall not apply to a private company.

(3) If a company acts in contravention of this section, the company and every director of the company who knowingly authorises or permits the contravention shall be liable to a fine not exceeding one hundred pounds.

Effect of irregular allotment.

41.—(1) An allotment made by a company to an applicant in contravention of the provisions of the two last foregoing sections of this Act, shall be voidable at the instance of the applicant within one month after the holding of the statutory meeting of the company and not later, or, in any case where the company is not required to hold a statutory meeting, or where the allotment is made after the holding of the statutory meeting, within one month after the date of the allotment, and not later, and shall be so voidable notwithstanding that the company is in course of being wound up.

(2) If any director of a company knowingly contravenes, or permits or authorises the contravention of, any of the provisions of the said sections with respect to allotment, he shall be liable to compensate the company and the allottee respectively for any loss, damages, or costs which the company or the allottee may have sustained or incurred thereby:

Provided that proceedings to recover any such loss, damages, or costs shall not be commenced after the expiration of two years from the date of the allotment.

Return as to allotments.

42.—(1) Whenever a company limited by shares or a company limited by guarantee and having a share capital makes any allotment of its shares, the company shall within one month thereafter deliver to the registrar of companies for registration—

(a) a return of the allotments, stating the number and nominal amount of the shares comprised in the allotment, the names, addresses, and descriptions of the allottees, and the amount, if any, paid or due and payable on each share; and (*b*) in the case of shares allotted as fully or partly paid up otherwise than in cash, a contract in writing constituting the title of the allottee to the allotment together with any contract of sale, or for services or other consideration in respect of which that allotment was made, such contracts being duly stamped, and a return stating the number and nominal amount of shares so allotted, the extent to which they are to be treated as paid up, and the consideration for which they have been allotted.

(2) Where such a contract as above mentioned is not reduced to writing, the company shall within one month after the allotment deliver to the registrar of companies for registration the prescribed particulars of the contract stamped with the same stamp duty as would have been payable if the contract had been reduced to writing, and those particulars shall be deemed to be an instrument within the meaning of the Stamp Act, 1891, and the registrar may, as a condition of filing the particulars, require that the duty payable thereon be adjudicated under section twelve of that Act.

54 & 55 Vict. c. 39.

(3) If default is made in complying with this section, every director, manager, secretary, or other officer of the company, who is knowingly a party to the default, shall be liable to a fine not exceeding fifty pounds for every day during which the default continues:

Provided that, in case of default in delivering to the registrar of companies within one month after the allotment any document required to be delivered by this section, the company, or any person liable for the default, may apply to the court for relief, and the court, if satisfied that the omission to deliver the document was accidental or due to inadvertence or that it is just and equitable to grant relief, may make an order extending the time for the delivery of the document for such period as the court may think proper.

Commissions and Discounts.

Power to pay certain commissions, and prohibition of payment of all other commissions, discounts, &c.

43.—(1) It shall be lawful for a company to pay a commission to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares in the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company if—

(*a*) the payment of the commission is authorised by the articles; and

(*b*) the commission paid or agreed to be paid does not exceed ten per cent. of the price at which the shares are issued or the amount or rate authorised by the articles, whichever is the less; and

(*c*) the amount or rate per cent. of the commission paid or agreed to be paid is—

(i) in the case of shares offered to the public for subscription, disclosed in the prospectus; or

(ii) in the case of shares not offered to the public for subscription, disclosed in the statement in lieu of prospectus, or in a statement in the prescribed form signed in like manner as a statement in lieu of prospectus and delivered before the payment of the commission to the registrar of companies for registration, and, where a circular or notice, not being a prospectus, inviting subscription for the shares is issued, also disclosed in that circular or notice; and

(*d*) the number of shares which persons have agreed for a commission to subscribe absolutely is disclosed in manner aforesaid.

(2) Save as aforesaid, no company shall apply any of its shares or capital money either directly or indirectly in payment of any commission, discount, or allowance, to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, whether the shares or money be so applied by being added to the purchase money of any property acquired by the company or to the contract price of any work to be executed for the company, or the money be paid out of the nominal purchase money or contract price, or otherwise.

(3) Nothing in this section shall affect the power of any company to pay such brokerage as it has heretofore been lawful for a company to pay.

(4) A vendor to, promoter of, or other person who receives payment in money or shares from, a company shall have and shall be deemed always to have had power to apply any part of the money or shares so received in payment of any commission, the payment of which, if made directly by the company, would have been legal under this section.

(5) If default is made in complying with the provisions of this section relating to the delivery to the registrar of the statement in the prescribed form, the company and every officer of the company who is in default shall be liable to a fine not exceeding twenty-five pounds.

Statement in balance sheet as to commissions and discounts.

44.—(1) Where a company has paid any sums by way of commission in respect of any shares or debentures, or allowed any sums by way of discount in respect of any debentures, the total amount so paid or allowed, or so much thereof as has not been written off, shall be stated in every balance sheet of the company until the whole amount thereof has been written off.

(2) If default is made in complying with this section, the company and every officer of the company who is in default shall be liable to a default fine.

Prohibition of provision of financial assistance by company for purchase of its own shares.

45.—(1) Subject as provided in this section, it shall not be lawful for a company to give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase made or to be made by any person of any shares in the company:

Provided that nothing in this section shall be taken to prohibit—

(*a*) where the lending of money is part of the ordinary business of a company, the lending of money by the company in the ordinary course of its business;

(*b*) the provision by a company, in accordance with any scheme for the time being in force, of money for the purchase by trustees of fully-paid shares in the company to be held or for the benefit of employees of the company, including any director holding a salaried employment or office in the company;

(c) the making by a company of loans to persons, other than directors, bonâ fide in the employment of the company with a view to enabling those persons to purchase fully-paid shares in the company to be held by themselves by way of beneficial ownership.

(2) The aggregate amount of any outstanding loans made under the authority of provisos (b) and (c) to subsection (1) of this section shall be shown as a separate item in every balance sheet of the company.

(3) If a company acts in contravention of this section, the company and every officer of the company who is in default shall be liable to a fine not exceeding one hundred pounds.

Issue of Redeemable Preference Shares and Shares at Discount.

Power to issue redeemable preference shares.

46.—(1) Subject to the provisions of this section, a company limited by shares may, if so authorised by its articles, issue preference shares which are, or at the option of the company are to be liable, to be redeemed:

Provided that—

(a) no such shares shall be redeemed except out of profits of the company which would otherwise be available for dividend or out of the proceeds of a fresh issue of shares made for the purposes of the redemption;

(b) no such shares shall be redeemed unless they are fully paid;

(c) where any such shares are redeemed otherwise than out of the proceeds of a fresh issue, there shall out of profits which would otherwise have been available for dividend be transferred to a reserve fund, to be called "the capital redemption reserve fund," a sum equal to the amount applied in redeeming the shares, and the provisions of this Act relating to the reduction of the share capital of a company shall, except as provided in this section, apply as if the capital redemption reserve fund were paid-up share capital of the company;

(d) where any such shares are redeemed out of the proceeds of a fresh issue, the premium, if any, payable on redemption, must have been provided for out of the profits of the company before the shares are redeemed.

(2) There shall be included in every balance sheet of a company which has issued redeemable preference shares a statement specifying what part of the issued capital of the company consists of such shares and the date on or before which those shares are, or are to be liable, to be redeemed.

If a company fails to comply with the provisions of this subsection, the company and every officer of the company who is in default shall be liable to a fine not exceeding one hundred pounds.

(3) Subject to the provisions of this section, the redemption of preference shares thereunder may be effected on such terms and in such manner as may be provided by the articles of the company.

(4) Where in pursuance of this section a company has redeemed or is about to redeem any preference shares, it shall have power to issue shares up to the nominal amount of the shares redeemed or to be redeemed as if those shares had never been issued, and

accordingly the share capital of the company shall not for the purposes of any enactments relating to stamp duty be deemed to be increased by the issue of shares in pursuance of this subsection:

Provided that, where new shares are issued before the redemption of the old shares, the new shares shall not, so far as relates to stamp duty, be deemed to have been issued in pursuance of this subsection unless the old shares are redeemed within one month after the issue of the new shares.

(5) Where new shares have been issued in pursuance of the last foregoing subsection, the capital redemption reserve fund may, notwithstanding anything in this section, be applied by the company, up to an amount equal to the amount of the shares so issued, in paying up unissued shares of the company to be issued to members of the company as fully paid bonus shares.

Power to issue shares at a discount

47.—(1) Subject as provided in this section, it shall be lawful for a company to issue at a discount shares in the company of a class already issued:

Provided that—

(a) the issue of the shares at a discount must be authorised by resolution passed in general meeting of the company, and must be sanctioned by the court;

(b) the resolution must specify the maximum rate of discount at which the shares are to be issued;

(c) not less than one year must at the date of the issue have elapsed since the date on which the company was entitled to commence business;

(d) the shares to be issued at a discount must be issued within one month after the date on which the issue is sanctioned by the court or within such extended time as the court may allow.

(2) Where a company has passed a resolution authorising the issue of shares at a discount, it may apply to the court for an order sanctioning the issue, and on any such application the court, if, having regard to all the circumstances of the case, it thinks proper so to do, may make an order sanctioning the issue on such terms and conditions as it thinks fit.

(3) Every prospectus relating to the issue of the shares and every balance sheet issued by the company subsequently to the issue of the shares must contain particulars of the discount allowed on the issue of the shares or of so much of that discount as has not been written off at the date of the issue of the document in question.

If default is made in complying with this subsection, the company and every officer of the company who is in default shall be liable to a default fine.

Miscellaneous Provisions as to Share Capital.

Power of company to arrange for different amounts being paid on shares.

48. A company, if so authorised by its articles, may do any one or more of the following things—

(1) Make arrangements on the issue of shares for a difference between the shareholders in the amounts and times of payment of calls on their shares:

(2) Accept from any member the whole or a part of the amount remaining unpaid on any shares held by him, although no part of that amount has been called up:

(3) Pay dividend in proportion to the amount paid up on each

share where a larger amount is paid up on some shares than on others.

Reserve liability of limited company.

49. A limited company may by special resolution determine that any portion of its share capital which has not been already called up shall not be capable of being called up, except in the event and for the purposes of the company being wound up, and thereupon that portion of its share capital shall not be capable of being called up except in the event and for the purposes aforesaid.

Power of company limited by shares to alter its share capital.

50.—(1) A company limited by shares or a company limited by guarantee and having a share capital, if so authorised by its articles, may alter the conditions of its memorandum as follows, that is to say, it may—

(*a*) increase its share capital by new shares of such amount as it thinks expedient;

(*b*) consolidate and divide all or any of its share capital into shares of larger amount than its existing shares;

(*c*) convert all or any of its paid-up shares into stock, and reconvert that stock into paid-up shares of any denomination;

(*d*) subdivide its shares, or any of them, into shares of smaller amount than is fixed by the memorandum, so, however, that in the subdivision the proportion between the amount paid and the amount, if any, unpaid on each reduced share shall be the same as it was in the case of the share from which the reduced share is derived;

(*e*) cancel shares which, at the date of the passing of the resolution in that behalf, have not been taken or agreed to be taken by any person, and diminish the amount of its share capital by the amount of the shares so cancelled.

(2) The powers conferred by this section must be exercised by the company in general meeting.

(3) A cancellation of shares in pursuance of this section shall not be deemed to be a reduction of share capital within the meaning of this Act.

Notice to registrar of consolidation of share capital, conversion of shares into stock, &c.

51.—(1) If a company having a share capital has—

(*a*) consolidated and divided its share capital into shares of larger amount than its existing shares; or

(*b*) converted any shares into stock; or

(*c*) re-converted stock into shares; or

(*d*) subdivided its shares or any of them; or

(*e*) redeemed any redeemable preference shares; or

(*f*) cancelled any shares, otherwise than in connection with a reduction of share capital under section fifty-five of this Act,

it shall within one month after so doing give notice thereof to the registrar of companies specifying, as the case may be, the shares consolidated, divided, converted, subdivided, redeemed or cancelled, or the stock re-converted.

(2) If default is made in complying with this section, the company and every officer of the company who is in default shall be liable to a default fine.

Notice of increase of share capital.

52.—(1) Where a company having a share capital, whether its shares have or have not been converted into stock, has increased its share capital beyond the registered capital, it shall within fifteen days after the passing of the resolution authorising the increase, give to the registrar of companies notice of the increase, and the registrar shall record the increase.

(2) The notice to be given as aforesaid shall include such particulars as may be prescribed with respect to the classes of shares affected and the conditions subject to which the new shares have been or are to be issued, and there shall be forwarded to the registrar of companies together with the notice a printed copy of the resolution authorising the increase.

(3) If default is made in complying with this section, the company and every officer of the company who is in default shall be liable to a default fine.

Power of unlimited company to provide for reserve share capital on registration.

53. An unlimited company having a share capital may, by its resolution for registration as a limited company in pursuance of this Act, do either or both of the following things, namely—

(1) Increase the nominal amount of its share capital by increasing the nominal amount of each of its shares, but subject to the condition that no part of the increased capital shall be capable of being called up except in the event and for the purposes of the company being wound up;

(2) Provide that a specified portion of its uncalled share capital shall not be capable of being called up except in the event and for the purposes of the company being wound up.

Power of company to pay interest out of capital in certain cases.

54.—(1) Where any shares of a company are issued for the purpose of raising money to defray the expenses of the construction of any works or buildings or the provision of any plant which cannot be made profitable for a lengthened period, the company may pay interest on so much of that share capital as is for the time being paid up for the period and subject to the conditions and restrictions in this section mentioned, and may charge the sum so paid by way of interest to capital as part of the cost of construction of the work or building, or the provision of plant:

Provided that—

(*a*) No such payment shall be made unless it is authorised by the articles or by special resolution:

(*b*) No such payment, whether authorised by the articles or by special resolution, shall be made without the previous sanction of the Board of Trade:

(*c*) Before sanctioning any such payment the Board of Trade may, at the expense of the company, appoint a person to inquire and report to them as to the circumstances of the case, and may, before making the appointment, require the company to give security for the payment of the cost of the inquiry;

(*d*) The payment shall be made only for such period as may be determined by the Board of Trade, and that period shall in no case extend beyond the close of the half year next after the half year during which the works or buildings have been actually completed or the plant provided:

(*e*) The rate of interest shall in no case exceed four per cent. per annum or such other rate as may for the time being be prescribed by Order in Council:

(*f*) The payment of the interest shall not operate as a reduction of the amount paid up on the shares in respect of which it is paid:

(*g*) The accounts of the company shall show the share capital on which, and the rate at which, interest has been paid out of capital during the period to which the accounts relate;

(*h*) Nothing in this section shall affect any company to which the Indian Railways Act, 1894, as amended by any subsequent enactment, applies.

(2) If default is made in complying with proviso (*g*) to subsection (1) of this section, the company and every officer of the company who is in default shall be liable to a fine not exceeding fifty pounds.

Reduction of Share Capital.

Special resolution for reduction of share capital.

55.—(1) Subject to confirmation by the court, a company limited by shares or a company limited by guarantee and having a share capital may, if so authorised by its articles, by special resolution reduce its share capital in any way, and in particular, without prejudice to the generality of the foregoing power, may—

(*a*) extinguish or reduce the liability on any of its shares in respect of share capital not paid up; or

(*b*) either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share capital which is lost or unrepresented by available assets; or

(*c*) either with or without extinguishing or reducing liability on any of its shares, pay off any paid-up share capital which is in excess of the wants of the company,

and may, if and so far as is necessary, alter its memorandum by reducing the amount of its share capital and of its shares accordingly.

(2) A special resolution under this section is in this Act referred to as " a resolution for reducing share capital."

Application to court for confirming order, objections by creditors, and settlement of list of objecting creditors.

56.—(1) Where a company has passed a resolution for reducing share capital, it may apply by petition to the court for an order confirming the reduction.

(2) Where the proposed reduction of share capital involves either diminution of liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, and in any other case if the court so directs, the following provisions shall have effect, subject nevertheless to the next following subsection—

(*a*) Every creditor of the company who at the date fixed by the court is entitled to any debt or claim which, if that date were the commencement of the winding up of the company, would be admissible in proof against the company, shall be entitled to object to the reduction:

(*b*) The court shall settle a list of creditors so entitled to object, and for that purpose shall ascertain, as far as possible without requiring an application from any creditor, the names of those creditors and the nature and amount of their debts or claims, and may publish notices fixing a day or days within which creditors not entered on the list are to claim to be so entered or are to be excluded from the right of objecting to the reduction:

(*c*) Where a creditor entered on the list whose debt or claim is not discharged or has not determined does not consent to the reduction, the court may, if it thinks fit, dispense with the consent of that creditor, on the company securing payment of his debt or claim by appropriating, as the court may direct, the following amount—

(i) If the company admits the full amount of the debt or claim, or, though not admitting it, is willing to provide for it, then the full amount of the debt or claim;

(ii) If the company does not admit and is not willing to provide for the full amount of the debt or claim, or if the amount is contingent or not ascertained, then an amount fixed by the court after the like inquiry and adjudication as if the company were being wound up by the court.

(3) Where a proposed reduction of share capital involves either the diminution of any liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, the court may, if having regard to any special circumstances of the case it thinks proper so to do, direct that subsection (2) of this section shall not apply as regards any class or any classes of creditors.

Order confirming reduction and powers of court on making such order.

57.—(1) The court, if satisfied, with respect to every creditor of the company who under the last foregoing section is entitled to object to the reduction, that either his consent to the reduction has been obtained or his debt or claim has been discharged or has determined, or has been secured, may make an order confirming the reduction on such terms and conditions as it thinks fit.

(2) Where the court makes any such order, it may—

(*a*) if for any special reason it thinks proper so to do, make an order directing that the company shall, during such period, commencing on or at any time after the date of the order, as is specified in the order, add to its name as the last words thereof the words "and reduced"; and

(*b*) make an order requiring the company to publish as the court directs the reasons for reduction or such other information in regard thereto as the court may think expedient with a view to giving proper information to the public, and, if the court thinks fit, the causes which led to the reduction.

(3) Where a company is ordered to add to its name the words "and reduced," those words shall, until the expiration of the period specified in the order, be deemed to be part of the name of the company.

Registration of order and minute of reduction.

58.—(1) The registrar of companies, on production to him of an order of the court confirming the reduction of the share capital of a company, and the delivery to him of a copy of the order and of a minute approved by the court, showing with respect to the share capital of the company, as altered by the order, the amount of the share capital, the number of shares into which it is to be divided, and the amount of each share, and the amount, if any, at the date of the registration deemed to be paid up on each share, shall register the order and minute.

(2) On the registration of the order and minute, and not before, the resolution for reducing share capital as confirmed by the order so registered shall take effect.

(3) Notice of the registration shall be published in such manner as the court may direct.

(4) The registrar shall certify under his hand the registration of the order and minute, and his certificate shall be conclusive evidence that all the requirements of this Act with respect to reduction of share capital have been complied with, and that the share capital of the company is such as is stated in the minute.

(5) The minute when registered shall be deemed to be substituted for the corresponding part of the memorandum, and shall be valid and alterable as if it had been originally contained therein.

(6) The substitution of any such minute as aforesaid for part of the memorandum of the company shall be deemed to be an alteration of the memorandum within the meaning of section twenty-four of this Act.

Liability of members in respect of reduced shares.

59.—(1) In the case of a reduction of share capital, a member of the company, past or present, shall not be liable in respect of any share to any call or contribution exceeding in amount the difference, if any, between the amount of the share as fixed by the minute and the amount paid, or the reduced amount, if any, which is to be deemed to have been paid, on the share, as the case may be:

Provided that, if any creditor, entitled in respect of any debt or claim to object to the reduction of share capital, is, by reason of his ignorance of the proceedings for reduction, or of their nature and effect with respect to his claim, not entered on the list of creditors, and, after the reduction, the company is unable, within the meaning of the provisions of this Act with respect to winding up by the court, to pay the amount of his debt or claim, then—

(*a*) every person who was a member of the company at the date of the registration of the order for reduction and minute, shall be liable to contribute for the payment to that debt or claim an amount not exceeding the amount which he would have been liable to contribute if the company had commenced to be wound up on the day before the said date; and

(*b*) if the company is wound up, the court, on the application of any such creditor and proof of his ignorance as aforesaid, may, if it thinks fit, settle accordingly a list of persons so liable to contribute, and make and enforce calls and orders on the contributories settled on the list, as if they were ordinary contributories in a winding up.

(2) Nothing in this section shall affect the rights of the contributories among themselves.

Penalty on concealment of name of creditor.

60. If any director, manager, secretary or other officer of the company—

(1) wilfully conceals the name of any creditor entitled to object to the reduction; or

(2) wilfully misrepresents the nature or amount of the debt or claim of any creditor; or

(3) aids, abets or is privy to any such concealment or misrepresentation as aforesaid,

he shall be guilty of a misdemeanour.

Variation of Shareholders' Rights.

Rights of holders of special classes of shares.

61.—(1) If in the case of a company, the share capital of which is divided into different classes of shares, provision is made by the memorandum or articles for authorising the variation of the rights attached to any class of shares in the company, subject to the consent of any specified proportion of the holders of the issued shares of that class or the sanction of a resolution passed at a separate meeting of the holders of those shares, and in pursuance of the said provision the rights attached to any such class of shares are at any time varied, the holders of not less in the aggregate than fifteen per cent. of the issued shares of that class, being persons who did not consent to or vote in favour of the resolution for the variation, may apply to the court to have the variation cancelled, and, where any such application is made, the variation shall not have effect unless and until it is confirmed by the court.

(2) An application under this section must be made within seven days after the date on which the consent was given or the resolution was passed, as the case may be, and may be made on behalf of the shareholders entitled to make the application by such one or more of their number as they may appoint in writing for the purpose.

(3) On any such application the court, after hearing the applicant and any other persons who apply to the court to be heard and appear to the court to be interested in the application, may, if it is satisfied, having regard to all the circumstances of the case, that the variation would unfairly prejudice the shareholders of the class represented by the applicant, disallow the variation and shall, if not so satisfied, confirm the variation.

(4) The decision of the court on any such application shall be final.

(5) The company shall within fifteen days after the making of an order by the court on any such application forward a copy of the order to the registrar of companies, and, if default is made in complying with this provision, the company and every officer of the company who is in default shall be liable to a default fine.

(6) The expression "variation" in this section includes abrogation and the expression "varied" shall be construed accordingly.

Transfer of Shares and Debentures, Evidence of Titles, etc.

62.—(1) The shares or other interest of any member in a company shall be personal estate, transferable in manner provided by the articles of the company, and shall not be of the nature of real estate. **Nature of shares.**

(2) Each share in a company having a share capital shall be distinguished by its appropriate number.

63. Notwithstanding anything in the articles of a company, it shall not be lawful for the company to register a transfer of shares in or debentures of the company unless a proper instrument of transfer has been delivered to the company: **Transfer not to be registered except on production of instrument of transfer.**

Provided that nothing in this section shall prejudice any power of the company to register as shareholder or debenture holder any person to whom the right to any shares in or debentures of the company has been transmitted by operation of law.

64. A transfer of the share or other interest of a deceased member of a company made by his personal representative shall, although the personal representative is not himself a member of the company, be as valid as if he had been such a member at the time of the execution of the instrument of transfer. **Transfer by personal representative.**

65. On the application of the transferor of any share or interest in a company, the company shall enter in its register of members the name of the transferee in the same manner and subject to the same conditions as if the application for the entry were made by the transferee. **Registration of transfer at request of transferor.**

Notice of refusal to register transfer.

66.—(1) If a company refuses to register a transfer of any shares or debentures, the company shall, within two months after the date on which the transfer was lodged with the company, send to the transferee notice of the refusal.

(2) If default is made in complying with this section, the company and every director, manager, secretary or other officer of the company who is knowingly a party to the default shall be liable to a fine not exceeding five pounds for every day during which the default continues.

Duties of company with respect to issue of certificates.

67.—(1) Every company shall, within two months after the allotment of any of its shares, debentures, or debenture stock, and within two months after the date on which a transfer of any such shares, debentures, or debenture stock, is lodged with the company, complete and have ready for delivery the certificates of all shares, the debentures, and the certificates of all debenture stock allotted or transferred, unless the conditions of issue of the shares, debentures, or debenture stock otherwise provide.

The expression " transfer " for the purpose of this subsection means a transfer duly stamped and otherwise valid, and does not include such a transfer as the company is for any reason entitled to refuse to register and does not register.

(2) If default is made in complying with this section, the company and every director, manager, secretary, or other officer of the company who is knowingly a party to the default shall be liable to a fine not exceeding five pounds for every day during which the default continues.

(3) If any company on whom a notice has been served requiring the company to make good any default in complying with the provisions of subsection (1) of this section fails to make good the default within ten days after the service of the notice, the court may, on the application of the person entitled to have the certificates or the debentures delivered to him, make an order directing the company and any officer of the company to make good the default within such time as may be specified in the order, and any such order may provide that all costs of and incidental to the application shall be borne by the company or by any officer of the company responsible for the default.

Certificate to be evidence of title.

68. A certificate, under the common seal of the company, specifying any shares held by any member, shall be prima facie evidence of the title of the member to the shares.

Evidence of grant of probate.

69. The production to a company of any document which is by law sufficient evidence of probate of the will, or letters of administration of the estate, or confirmation as executor, of a deceased person having been granted to some person shall be accepted by the company, notwithstanding anything in its articles, as sufficient evidence of the grant.

Issue and effect of share warrants to bearer.

70.—(1) A company limited by shares, if so authorised by its articles, may, with respect to any fully paid-up shares, issue under its common seal a warrant stating that the bearer of the warrant is entitled to the shares therein specified, and may provide, by coupons or otherwise, for the payment of the future dividends on the shares included in the warrant.

(2) Such a warrant as aforesaid is in this Act termed a " share warrant."

(3) A share warrant shall entitle the bearer thereof to the shares therein specified, and the shares may be transferred by delivery of the warrant.

71. If any person falsely and deceitfully personates any owner of any share or interest in any company, or of any share warrant or coupon, issued in pursuance of this Act, and thereby obtains or endeavours to obtain any such share or interest or share warrant or coupon, or receives or endeavours to receive any money due to any such owner, as if the offender were the true and lawful owner, he shall be guilty of felony, and shall on conviction thereof be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years.

Penalty for personation of shareholder.

72.—(1) If in Scotland any person—

Offences in connection with share warrants in Scotland.

(*a*) with intent to defraud, forges or alters, or offers, utters, disposes of, or puts off, knowing the same to be forged or altered, any share warrant or coupon, or any document purporting to be a share warrant or coupon, issued in pursuance of this Act; or

(*b*) by means of any such forged or altered share warrant, coupon, or document, purporting as aforesaid, demands or endeavours to obtain or receive any share or interest in any company under this Act, or to receive any dividend or money payable in respect thereof, knowing the warrant, coupon, or document to be forged or altered;

he shall be guilty of felony and shall on conviction thereof be liable at the discretion of the court to be kept in penal servitude for life or for any term not less than three years.

(2) If in Scotland any person without lawful authority or excuse, proof whereof shall lie on him—

(*a*) engraves or makes on any plate, wood, stone, or other material any share warrant or coupon purporting to be—

(i) a share warrant or coupon issued or made by any particular company in pursuance of this Act; or

(ii) a blank share warrant or coupon so issued or made; or

(iii) a part of such a share warrant or coupon; or

(*b*) uses any such plate, wood, stone or other material for the making or printing of any such share warrant or coupon, or of any such blank share warrant or coupon, or any part thereof respectively; or

(*c*) knowingly has in his custody or possession any such plate, wood, stone, or other material;

he shall be guilty of felony, and shall on conviction thereof be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years.

Special Provisions as to Debentures.

73.—(1) Every register of holders of debentures of a company shall, except when duly closed, be open to the inspection of the registered holder of any such debentures, and of any holder of shares in the company, but subject to such reasonable restrictions as the company may in general meeting impose, so that not less than two hours in each day shall be allowed for inspection.

Right of debenture holders and shareholders to inspect register of debenture holders and to have copies of trust deed.

For the purposes of this subsection, a register shall be deemed to be duly closed if closed in accordance with provisions contained in the articles or in the debentures or, in the case of debenture stock, in the stock certificates, or in the trust deed or other document securing the debentures or debenture stock, during such period or periods, not exceeding in the whole thirty days in any year, as may be therein specified.

(2) Every registered holder of debentures and every holder of shares in a company may require a copy of the register of the holders of debentures of the company or any part thereof on payment of sixpence for every hundred words required to be copied.

(3) A copy of any trust deed for securing any issue of debentures shall be forwarded to every holder of any such debentures at his request on payment in the case of a printed trust deed of the sum of one shilling or such less sum as may be prescribed by the company, or, where the trust deed has not been printed, on payment of sixpence for every hundred words required to be copied.

(4) If inspection is refused, or a copy is refused or not forwarded, the company and every officer of the company who is in default shall be liable to a fine not exceeding five pounds, and further shall be liable to a default fine of two pounds.

(5) Where a company is in default as aforesaid, the court may by order compel an immediate inspection of the register or direct that the copies required shall be sent to the person requiring them.

Perpetual debentures.

74. A condition contained in any debentures or in any deed for securing any debentures, whether issued or executed before or after the commencement of this Act, shall not be invalid by reason only that the debentures are thereby made irredeemable or redeemable only on the happening of a contingency, however remote, or on the expiration of a period, however long, any rule of equity to the contrary notwithstanding.

Power to re-issue redeemed debentures in certain cases.

75.—(1) Where either before or after the commencement of this Act a company has redeemed any debentures previously issued, then—

(*a*) unless any provision to the contrary, whether express or implied, is contained in the articles or in any contract entered into by the company; or

(*b*) unless the company has, by passing a resolution to that effect or by some other act, manifested its intention that the debentures shall be cancelled,

the company shall have, and shall be deemed always to have had, power to re-issue the debentures, either by re-issuing the same debentures or by issuing other debentures in their place.

(2) On a re-issue of redeemed debentures the person entitled to the debentures shall have, and shall be deemed always to have had, the same priorities as if the debentures had never been redeemed.

(3) Where a company has power to re-issue debentures which have been redeemed, particulars with respect to the debentures which can be so re-issued shall be included in every balance sheet of the company.

(4) Where a company has either before or after the passing of this Act deposited any of its debentures to secure advances from time to time on current account or otherwise, the debentures shall not be deemed to have been redeemed by reason only of the account of the company having ceased to be in debit whilst the debentures remained so deposited.

(5) The re-issue of a debenture or the issue of another debenture in its place under the power by this section given to, or

deemed to have been possessed by, a company, whether the re-issue or issue was made before or after the passing of this Act, shall be treated as the issue of a new debenture for the purposes of stamp duty, but it shall not be so treated for the purposes of any provision limiting the amount or number of debentures to be issued:

Provided that any person lending money on the security of a debenture re-issued under this section which appears to be duly stamped may give the debenture in evidence in any proceedings for enforcing his security without payment of the stamp duty or any penalty in respect thereof, unless he had notice or, but for his negligence, might have discovered, that the debenture was not duly stamped, but in any such case the company shall be liable to pay the proper stamp duty and penalty.

(6) Where any debentures which have been redeemed before the date of the commencement of this Act are re-issued subsequently to that date, the re-issue of the debentures shall not prejudice any right or priority which any person would have had under or by virtue of any mortgage or charge created before the date of the commencement of this Act, if section one hundred and four of the Companies (Consolidation) Act, 1908, as originally enacted, had been enacted in this Act instead of this section.

Specific performance of contracts to subscribe for debentures.

76. A contract with a company to take up and pay for any debentures of the company may be enforced by an order for specific performance.

Validity of debentures to bearer in Scotland.

77. It is hereby declared that, notwithstanding anything contained in the statute of the Scots Parliament of 1696, chapter twenty-five, debentures to bearer issued in Scotland are valid and binding according to their terms.

Payment of certain debts out of assets subject to floating charge in priority to claims under the charge.

78.—(1) Where, in the case of a company registered in England, either a receiver is appointed on behalf of the holders of any debentures of the company secured by a floating charge, or possession is taken by or on behalf of those debenture holders of any property comprised in or subject to the charge, then, if the company is not at the time in course of being wound up, the debts which in every winding-up are under the provisions of Part V of this Act relating to preferential payments to be paid in priority to all other debts, shall be paid out of any assets coming to the hands of the receiver or other person taking possession as aforesaid in priority to any claim for principal or interest in respect of the debentures.

(2) The periods of time mentioned in the said provisions of Part V of this Act shall be reckoned from the date of the appointment of the receiver or of possession being taken as aforesaid, as the case may be.

(3) Any payments made under this section shall be recouped as far as may be out of the assets of the company available for payment of general creditors.

PART III

REGISTRATION OF CHARGES.

Registration of Charges with Registrar of Companies.

79.—(1) Subject to the provisions of this Part of this Act, every charge created after the fixed date by a company registered

Registration of charges created by companies registered in England.

in England and being a charge to which this section applies shall, so far as any security on the company's property or undertaking is conferred thereby, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the charge, together with the instrument, if any, by which the charge is created or evidenced, are delivered to or received by the registrar of companies for registration in manner required by this Act within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a charge becomes void under this section the money secured thereby shall immediately become payable.

(2) This section applies to the following charges—

(*a*) a charge for the purpose of securing any issue of debentures;

(*b*) a charge on uncalled share capital of the company;

(*c*) a charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale;

(*d*) a charge on land, wherever situate, or any interest therein;

(*e*) a charge on book debts of the company;

(*f*) a floating charge on the undertaking or property of the company;

(*g*) a charge on calls made but not paid;

(*h*) a charge on a ship or any share in a ship;

(*i*) a charge on goodwill, on a patent or a licence under a patent, on a trademark or on a copyright or a licence under a copyright.

(3) In the case of a charge created out of the United Kingdom comprising solely property situate outside the United Kingdom, the delivery to and the receipt by the registrar of a copy verified in the prescribed manner of the instrument by which the charge is created or evidenced, shall have the same effect for the purposes of this section as the delivery and receipt of the instrument itself, and twenty-one days after the date on which the instrument or copy could, in due course of post, and if despatched with due diligence, have been received in the United Kingdom, shall be substituted for twenty-one days after the date of the creation of the charge, as the time within which the particulars and instrument or copy are to be delivered to the registrar.

(4) Where a charge is created in the United Kingdom but comprises property outside the United Kingdom, the instrument creating or purporting to create the charge may be sent for registration under this section notwithstanding that further proceedings may be necessary to make the charge valid or effectual according to the law of the country in which the property is situate.

(5) Where a charge comprises property situate in Scotland or Northern Ireland and registration in the country where the property is situate is necessary to make the charge valid or effectual according to the law of that country, the delivery to and the receipt by the registrar of a copy verified in the prescribed manner of the instrument by which the charge is created or evidenced, together with a certificate in the prescribed form stating that the charge was presented for registration in Scotland or Northern Ireland, as the case may be, on the date on which it was so presented shall, for the purposes of this section, have the same effect as the delivery and receipt of the instrument itself.

(6) Where a negotiable instrument has been given to secure the payment of any book debts of a company the deposit of the instrument for the purpose of securing an advance to the company shall not for the purposes of this section be treated as a charge on those book debts.

(7) The holding of debentures entitling the holder to a charge on land shall not for the purposes of this section be deemed to be an interest in land.

(8) Where a series of debentures containing, or giving by reference to any other instrument, any charge to the benefit of which the debenture holders of that series are entitled pari passu is created by a company, it shall for the purposes of this section be sufficient if there are delivered to or received by the registrar within twenty-one days after the execution of the deed containing the charge or, if there is no such deed, after the execution of any debentures of the series, the following particulars—

(*a*) the total amount secured by the whole series; and

(*b*) the dates of the resolutions authorising the issue of the series and the date of the covering deed, if any, by which the security is created or defined; and

(*c*) a general description of the property charged; and

(*d*) the names of the trustees, if any, for the debenture holders;

together with the deed containing the charge, or, if there is no such deed, one of the debentures of the series:

Provided that, where more than one issue is made of debentures in the series, there shall be sent to the registrar for entry in the register particulars of the date and amount of each issue, but an omission to do this shall not affect the validity of the debentures issued.

(9) Where any commission, allowance, or discount has been paid or made either directly or indirectly by a company to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any debentures of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any such debentures, the particulars required to be sent for registration under this section shall include particulars as to the amount or rate per cent. of the commission, discount, or allowance so paid or made, but omission to do this shall not affect the validity of the debentures issued:

Provided that the deposit of any debentures as security for any debt or the company shall not for the purposes of this subsection be treated as the issue of the debentures at a discount.

(10) In this Part of this Act—

(*a*) the expression " charge " includes mortgage;

(*b*) the expression " the fixed date " means in relation to the charges specified in paragraphs (*a*) to (*f*), both inclusive, of subsection (2) of this section, the first day of July, nineteen hundred and eight, and in relation to the charges specified in paragraphs (*g*) to (*i*), both inclusive, of the said subsection, the commencement of this Act.

Duty of company to register charges created by company.

80.—(1) It shall be the duty of a company to send to the registrar of companies for registration the particulars of every charge created by the company and of the issues of debentures of a series, requiring registration under the last foregoing section, but registration of any such charge may be effected on the application of any person interested therein.

(2) Where registration is effected on the application of some person other than the company, that person shall be entitled to

recover from the company the amount of any fees properly paid by him to the registrar on the registration.

(3) If any company makes default in sending to the registrar for registration the particulars of any charge created by the company, or of the issues of debentures of a series, requiring registration as aforesaid, then, unless the registration has been effected on the application of some other person, the company and every director, manager, secretary or other person, who is knowingly a party to the default shall be liable to a fine not exceeding fifty pounds for every day during which the default continues.

Duty of company to register charges existing on property acquired.

81.—(1) Where after the commencement of this Act a company registered in England acquires any property which is subject to a charge of any such kind as would, if it had been created by the company after the acquisition of the property, have been required to be registered under this Part of this Act, the company shall cause the prescribed particulars of the charge, together with a copy (certified in the prescribed manner to be a correct copy) of the instrument, if any, by which the charge was created or is evidenced, to be delivered to the registrar of companies for registration in manner required by this Act within twenty-one days after the date on which the acquisition is completed:

Provided that, if the property is situate and the charge was created outside Great Britain, twenty-one days after the date on which the copy of the instrument could in due course of post, and if despatched with due diligence, have been received in the United Kingdom shall be substituted for twenty-one days after the completion of the acquisition as the time within which the particulars and the copy of the instrument are to be delivered to the registrar.

(2) If default is made in complying with this section, the company and every officer of the company who is in default shall be liable to a default fine of fifty pounds.

Register of charges to be kept by registrar of companies.

82.—(1) The registrar of companies shall keep, with respect to each company, a register in the prescribed form of all the charges requiring registration under this Part of this Act, and shall, on payment of the prescribed fee, enter in the register with respect to such charges the following particulars—

(*a*) in the case of a charge to the benefit of which the holders of a series of debentures are entitled, such particulars as are specified in subsection (8) of section seventy-nine of this Act;

(*b*) in the case of any other charge—

(i) if the charge is a charge created by the company, the date of its creation, and if the charge was a charge existing on property acquired by the company, the date of the acquisition of the property; and

(ii) the amount secured by the charge; and

(iii) short particulars of the property charged; and

(iv) the persons entitled to the charge.

(2) The registrar shall give a certificate under his hand of the registration of any charge registered in pursuance of this Part of this Act, stating the amount thereby secured, and the certificate shall be conclusive evidence that the requirements of this Part of this Act as to registration have been complied with.

(3) The register kept in pursuance of this section shall be open

to inspection by any person on payment of the prescribed fee, not exceeding one shilling for each inspection.

(4) The registrar shall keep a chronological index, in the prescribed form and with the prescribed particulars, of the charges entered in the register.

83.—(1) The company shall cause a copy of every certificate of registration given under the last foregoing section to be endorsed on every debenture or certificate of debenture stock which is issued by the company, and the payment of which is secured by the charge so registered: Endorsement of certificate of registration on debentures.

Provided that nothing in this subsection shall be construed as requiring a company to cause a certificate of registration of any charge so given to be endorsed on any debenture or certificate of debenture stock issued by the company before the charge was created.

(2) If any person knowingly and wilfully authorises or permits the delivery of any debenture or certificate of debenture stock which under the provisions of this section is required to have endorsed on it a copy of a certificate of registration without the copy being so endorsed upon it, he shall, without prejudice to any other liability, be liable to a fine not exceeding one hundred pounds.

84. The registrar of companies may, on evidence being given to his satisfaction that the debt for which any registered charge was given has been paid or satisfied, order that a memorandum of satisfaction be entered on the register, and shall, if required, furnish the company with a copy thereof. Entry of satisfaction.

85. The court, on being satisfied that the omission to register a charge within the time required by this Act, or that the omission or misstatement of any particular with respect to any such charge or in a memorandum of satisfaction, was accidental, or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the company, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any person interested, and on such terms and conditions as seem to the court just and expedient, order that the time for registration shall be extended, or, as the case may be, that the omission or misstatement shall be rectified. Rectification of register of charges.

86.—(1) If any person obtains an order for the appointment of a receiver or manager of the property of a company, or appoints such a receiver or manager under any powers contained in any instrument, he shall, within seven days from the date of the order or of the appointment under the said powers, give notice of the fact to the registrar of companies, and the registrar shall, on payment of the prescribed fee, enter the fact in the register of charges. Registration of enforcement of security.

(2) Where any person appointed receiver or manager of the property of a company under the powers contained in any instrument ceases to act as such receiver or manager, he shall, on so ceasing, give the registrar of companies notice to that effect, and the registrar shall enter the notice in the register of charges.

(3) If any person makes default in complying with the requirements of this section, he shall be liable to a fine not exceeding five pounds for every day during which the default continues.

Provisions as to Company's Register of Charges and as to Copies of Instruments creating Charges.

Copies of instruments creating charges to be kept by company.

87. Every company shall cause a copy of every instrument creating any charge requiring registration under this Part of this Act to be kept at the registered office of the company:

Provided that, in the case of a series of uniform debentures, a copy of one debenture of the series shall be sufficient.

Company's register of charges.

88.—(1) Every limited company shall keep at the registered office of the company a register of charges and enter therein all charges specifically affecting property of the company and all floating charges on the undertaking or any property of the company, giving in each case a short description of the property charged, the amount of the charge, and, except in the case of securities to bearer, the names of the persons entitled thereto.

(2) If any director, manager, or other officer of the company knowingly and wilfully authorises or permits the omission of any entry required to be made in pursuance of this section, he shall be liable to a fine not exceeding fifty pounds.

Right to inspect copies of instruments creating mortgages and charges and company's register of charges.

89.—(1) The copies of instruments creating any charge requiring registration under this Part of this Act with the registrar of companies, and the register of charges kept in pursuance of the last foregoing section, shall be open during business hours (but subject to such reasonable restrictions as the company in general meeting may impose, so that not less than two hours in each day shall be allowed for inspection) to the inspection of any creditor or member of the company without fee, and the register of charges shall also be open to the inspection of any other person on payment of such fee, not exceeding one shilling for each inspection, as the company may prescribe.

(2) If inspection of the said copies or register is refused, any officer of the company refusing inspection, and every director and manager of the company authorising or knowingly and wilfully permitting the refusal, shall be liable to a fine not exceeding five pounds, and a further fine not exceeding two pounds for every day during which the refusal continues.

(3) If any such refusal occurs in relation to a company registered in England, the court may by order compel an immediate inspection of the copies or register.

Application of Part III to charges created and property subject to charge acquired by company incorporated outside England.

Application of Part III to Companies incorporated outside England.

90. The provisions of this Part of this Act shall extend to charges on property in England which are created, and to charges on property in England which is acquired, after the commencement of this Act by a company (whether a company within the meaning of this Act or not) incorporated outside England which has an established place of business in England.

Transitional Provision as to matters required to be registered under this Act, but not under former Acts.

Provision as to charges created, and charges on property acquired, by company before commencement of Act.

91.—(1) It shall be the duty of a company within six months after the commencement of this Act to send to the registrar of companies for registration the prescribed particulars of—

(*a*) any charge created by the company before the date of the commencement of this Act and remaining unsatisfied at that date, which would have been required to be registered under the provisions of paragraphs (*g*), (*h*) and (*i*) of subsection (2) of section seventy-nine of this Act or under the provisions of section ninety of this Act, if the charge had been created after the commencement of this Act; and

(b) any charge to which any property acquired by the company before the commencement of this Act is subject and which would have been required to be registered under the provisions of section eighty-one of this Act or under the provisions of section ninety of this Act, if the property had been acquired after the commencement of this Act.

(2) The registrar, on payment of the prescribed fee, shall enter the said particulars on the register kept by him in pursuance of this Part of this Act

(3) If a company fails to comply with this section, the company and every director, manager, secretary or other officer of the company, or other person who is knowingly a party to the default shall be liable to a fine not exceeding fifty pounds for every day during which the default continues:

Provided that the failure of the company shall not prejudice any rights which any person in whose favour the charge was made may have thereunder.

(4) For the purposes of this section, the expression "company" includes a company (whether a company within the meaning of this Act or not) incorporated outside England which has an established place of business in England

PART IV.

MANAGEMENT AND ADMINISTRATION

Registered Office and Name.

92.—(1) A company shall, as from the day on which it begins to carry on business or as from the twenty-eighth day after the date of its incorporation, whichever is the earlier, have a registered office to which all communications and notices may be addressed. **Registered office of company.**

(2) Notice of the situation of the registered office, and of any change therein, shall be given within twenty-eight days after the date of the incorporation of the company or of the change, as the case may be, to the registrar of companies, who shall record the same.

The inclusion in the annual return of a company of a statement as to the address of its registered office shall not be taken to satisfy the obligation imposed by this subsection.

(3) If default is made in complying with this section, the company and every officer of the company who is in default shall be liable to a default fine.

93.—(1) Every company— **Publication of name by company.**

(a) shall paint or affix, and keep painted or affixed, its name on the outside of every office or place in which its business is carried on, in a conspicuous position, in letters easily legible;

(b) shall have its name engraven in legible characters on its seal;

(c) shall have its name mentioned in legible characters in all notices, advertisements, and other official publications of the company, and in all bills of exchange, promissory notes, endorsements, cheques, and orders for money or goods purporting to be signed by or on behalf of the company, and in all bills of parcels, invoices, receipts, and letters of credit of the company.

(2) If a company does not paint or affix its name in manner directed by this Act, the company and every officer of the company who is in default shall be liable to a fine not exceeding five pounds, and if a company does not keep its name painted or affixed in manner so directed, the company and every officer of the company who is in default shall be liable to a default fine.

(3) If a company fails to comply with paragraph (*b*) or paragraph (*c*) of subsection (1) of this section, the company shall be liable to a fine not exceeding fifty pounds.

(4) If a director, manager, or officer of a company, or any person on its behalf—

(*a*) uses or authorises the use of any seal purporting to be a seal of the company whereon its name is not so engraven as aforesaid; or

(*b*) issues or authorises the issue of any notice, advertisement, or other official publication of the company, or signs or authorises to be signed on behalf of the company any bill of exchange, promissory note, endorsement, cheque, or order for money or goods, wherein its name is not mentioned in manner aforesaid; or

(*c*) issues or authorises the issue of any bill of parcels, invoice, receipt, or letter of credit of the company, wherein its name is not mentioned in manner aforesaid;

he shall be liable to a fine not exceeding fifty pounds, and shall further be personally liable to the holder of the bill of exchange, promissory note, cheque, or order for money or goods, for the amount thereof, unless it is duly paid by the company.

Restrictions on Commencement of Business.

Restrictions on commencement of business.

94.—(1) Where a company having a share capital has issued a prospectus inviting the public to subscribe for its shares, the company shall not commence any business or exercise any borrowing powers unless—

(*a*) shares held subject to the payment of the whole amount thereof in cash have been allotted to an amount not less in the whole than the minimum subscription; and

(*b*) every director of the company has paid to the company, on each of the shares taken or contracted to be taken by him and for which he is liable to pay in cash, a proportion equal to the proportion payable on application and allotment on the shares offered for public subscription; and

(*c*) there has been delivered to the registrar of companies for registration a statutory declaration by the secretary or one of the directors, in the prescribed form, that the aforesaid conditions have been complied with.

(2) Where a company having a share capital has not issued a prospectus inviting the public to subscribe for its shares, the company shall not commence any business or exercise any borrowing powers, unless—

(*a*) there has been delivered to the registrar of companies for registration a statement in lieu of prospectus; and

(*b*) every director of the company has paid to the company, on each of the shares taken or contracted to be taken by him and for which he is liable to pay in cash, a proportion equal to the proportion payable on application and allotment on the shares payable in cash; and

(c) there has been delivered to the registrar of companies for registration a statutory declaration by the secretary or one of the directors in the prescribed form that paragraph (b) of this subsection has been complied with.

(3) The registrar of companies shall, on the delivery to him of the said statutory declaration, and, in the case of a company which is required by this section to deliver a statement in lieu of prospectus, of such a statement, certify that the company is entitled to commence business, and that certificate shall be conclusive evidence that the company is so entitled.

(4) Any contract made by a company before the date at which it is entitled to commence business shall be provisional only, and shall not be binding on the company until that date, and on that date it shall become binding.

(5) Nothing in this section shall prevent the simultaneous offer for subscription or allotment of any shares and debentures or the receipt of any money payable on application for debentures.

(6) If any company commences business or exercises borrowing powers in contravention of this section, every person who is responsible for the contravention shall, without prejudice to any other liability, be liable to a fine not exceeding fifty pounds for every day during which the contravention continues.

(7) Nothing in this section shall apply to—

(a) a private company; or

(b) a company registered before the first day of January, nineteen hundred and one; or

(c) a company registered before the first day of July, nineteen hundred and eight, which has not issued a prospectus inviting the public to subscribe for its shares.

Register of Members.

95.—(1) Every company shall keep in one or more books a register of its members, and enter therein the following particulars— **Register of members.**

(a) The names and addresses, and the occupations, if any, of the members, and in the case of a company having a share capital a statement of the shares held by each member, distinguishing each share by its number, and of the amount paid or agreed to be considered as paid on the shares of each member;

(b) The date at which each person was entered in the register as a member;

(c) The date at which any person ceased to be a member:

Provided that, where the company has converted any of its shares into stock and given notice of the conversion to the registrar of companies, the register shall show the amount of stock held by each member instead of the amount of shares and the particulars relating to shares specified in paragraph (a) of this subsection.

(2) If default is made in complying with this section, the company and every officer of the company who is in default shall be liable to a default fine.

96.—(1) Every company having more than fifty members shall, unless the register of members is in such a form as to constitute in itself an index, keep an index of the names of the members of the company and shall, within fourteen days after the date on which any alteration is made in the register of members, make any necessary alteration in the index. **Index of members of company.**

(2) The index, which may be in the form of a card index, shall in respect of each member contain a sufficient indication to enable the account of that member in the register to be readily found.

(3) If default is made in complying with this section, the company and every officer of the company who is in default shall be liable to a default fine.

Provisions as to entries in register in relation to share warrants.

97.—(1) On the issue of a share warrant the company shall strike out of its register of members the name of the member then entered therein as holding the shares specified in the warrant as if he had ceased to be a member, and shall enter in the register the following particulars, namely—

(*a*) The fact of the issue of the warrant;

(*b*) A statement of the shares included in the warrant, distinguishing each share by its number; and

(*c*) The date of the issue of the warrant.

(2) The bearer of a share warrant shall, subject to the articles of the company, be entitled, on surrendering it for cancellation, to have his name entered as a member in the register of members

(3) The company shall be responsible for any loss incurred by any person by reason of the company entering in the register the name of a bearer of a share warrant in respect of the shares therein specified without the warrant being surrendered and cancelled.

(4) Until the warrant is surrendered, the particulars specified in subsection (1) of this section shall be deemed to be the particulars required by this Act to be entered in the register of members, and, on the surrender, the date of the surrender must be entered

(5) Subject to the provisions of this Act, the bearer of a share warrant may, if the articles of the company so provide, be deemed to be a member of the company within the meaning of this Act, either to the full extent or for any purposes defined in the articles.

Inspection of register of members.

98.—(1) The register of members, commencing from the date of the registration of the company, and the index of the names of members, shall be kept at the registered office of the company, and, except when the register is closed under the provisions of this Act, shall during business hours (subject to such reasonable restrictions as the company in general meeting may impose, so that not less than two hours in each day be allowed for inspection) be open to the inspection of any member without charge and of any other person on payment of one shilling, or such less sum as the company may prescribe, for each inspection.

(2) Any member or other person may require a copy of the register, or of any part thereof, on payment of sixpence, or such less sum as the company may prescribe, for every hundred words or fractional part thereof required to be copied.

The company shall cause any copy so required by any person to be sent to that person within a period of ten days commencing on the day next after the day on which the requirement is received by the company.

(3) If any inspection required under this section is refused or if any copy required under this section is not sent within the proper period, the company and every officer of the company who is in default shall be liable in respect of each offence to a fine not exceeding two pounds, and further to a default fine of two pounds.

(4) In the case of any such refusal or default, the court may by order compel an immediate inspection of the register and index or direct that the copies required shall be sent to the persons requiring them.

99 A company may, on giving notice by advertisement in some newspaper circulating in the district in which the registered office of the company is situate, close the register of members for any time or times not exceeding in the whole thirty days in each year. Power to close register.

100.—(1) If—

(a) the name of any person is, without sufficient cause, entered in or omitted from the register of members of a company; or Power of court to rectify register.

(b) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member;

the person aggrieved, or any member of the company, or the company, may apply to the court for rectification of the register.

(2) Where an application is made under this section, the court may either refuse the application or may order rectification of the register and payment by the company of any damages sustained by any party aggrieved.

(3) On an application under this section the court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the company on the other hand, and generally may decide any question necessary or expedient to be decided for rectification of the register.

(4) In the case of a company required by this Act to send a list of its members to the registrar of companies, the court, when making an order for rectification of the register, shall by its order direct notice of the rectification to be given to the registrar.

101. No notice of any trust, expressed, implied, or constructive, shall be entered on the register, or be receivable by the registrar, in the case of companies registered in England. Trusts not to be entered on register in England.

102. The register of members shall be prima facie evidence of any matters by this Act directed or authorised to be inserted therein. Register to be evidence.

Dominion Register.

103.—(1) A company having a share capital whose objects comprise the transaction of business in any part of His Majesty's dominions outside Great Britain, the Channel Islands, or the Isle of Man may cause to be kept in any such part of His Majesty's dominions in which it transacts business a branch register of members resident in that part (in this Act called a "dominion register"). Power for company to keep dominion register.

(2) The company shall give to the registrar of companies notice of the situation of the office where any dominion register is kept and of any change in its situation, and if it is discontinued of its discontinuance, and any such notice shall be given within fourteen days of the opening of the office or of the change or discontinuance, as the case may be.

(3) If default is made in complying with subsection (2) of this section, the company and every officer of the company who is in default shall be liable to a default fine.

(4) References to a colonial register occurring in any articles registered before the commencement of this Act shall be construed as references to a dominion register.

Regulations as to dominion register.

104.—(1) A dominion register shall be deemed to be part of the company's register of members (in this and the next following section called "the principal register").

(2) It shall be kept in the same manner in which the principal register is by this Act required to be kept, except that the advertisement before closing the register shall be inserted in some newspaper circulating in the district where the dominion register is kept, and that any competent court in that part of His Majesty's dominions where the register is kept may exercise the same jurisdiction of rectifying the register as is under this Act exerciseable by the court, and that the offences of refusing inspection or copies of a dominion register, and of authorising or permitting the refusal may be prosecuted summarily before any tribunal having summary criminal jurisdiction in that part of His Majesty's dominions.

(3) The company shall transmit to its registered office a copy of every entry in its dominion register as soon as may be after the entry is made, and shall cause to be kept at its registered office, duly entered up from time to time, a duplicate of its dominion register.

Every such duplicate shall, for all the purposes of this Act, be deemed to be part of the principal register.

(4) Subject to the provisions of this section with respect to the duplicate register, the shares registered in a dominion register shall be distinguished from the shares registered in the principal register, and no transaction with respect to any shares registered in a dominion register shall, during the continuance of that registration, be registered in any other register.

(5) A company may discontinue to keep a dominion register, and thereupon all entries in that register shall be transferred to some other dominion register kept by the company in the same part of His Majesty's dominions, or to the principal register.

(6) Subject to the provisions of this Act, any company may, by its articles, make such provisions as it may think fit respecting the keeping of dominion registers.

(7) If default is made in complying with subsection (3) of this section, the company and every officer of the company who is in default shall be liable to a default fine.

Stamp duties in case of shares registered in dominion registers.

105. An instrument of transfer of a share registered in a dominion register, other than such a register kept in Northern Ireland, shall be deemed to be a transfer of property situate out of the United Kingdom, and, unless executed in any part of the United Kingdom, shall be exempt from stamp duty chargeable in Great Britain.

Power to extend provisions as to dominion registers to other countries.

106.—(1) The Foreign Jurisdiction Act, 1890, shall have effect as if the last three foregoing sections of this Act were included among the enactments which by virtue of section five of that Act may be applied by Order in Council to foreign countries in which for the time being His Majesty has jurisdiction.

(2) His Majesty may by Order in Council direct that the said sections, including any enactments for the time being in force amending or substituted for those sections, shall extend, with or without any exceptions, adaptations or modifications specified in the Order, to any territories under His Majesty's protection

to which those sections cannot be extended under the Foreign Jurisdiction Act, 1890, as amended by subsection (1) of this section.

His Majesty may by Order in Council revoke or vary any Order made under this subsection.

107.—(1) If by virtue of the law in force in any part of His Majesty's dominions outside Great Britain companies incorporated under that law have power to keep in Great Britain branch registers of their members resident in Great Britain, His Majesty may by Order in Council direct that sections ninety-eight and one hundred of this Act shall, subject to any modifications and adaptations specified in the Order, apply to and in relation to any such branch registers kept in Great Britain as they apply to and in relation to the registers of companies within the meaning of this Act.

Provisions as to branch registers of dominion companies kept in the United Kingdom.

(2) For the purposes of this section, the expression "His Majesty's dominions" includes any territory which is under His Majesty's protection or in respect of which a mandate under the League of Nations has been accepted by His Majesty.

Annual Return.

108.—(1) Every company having a share capital shall once at least in every year make a return containing a list of all persons who, on the fourteenth day after the first or only ordinary general meeting in the year, are members of the company, and of all persons who have ceased to be members since the date of the last return or, in the case of the first return, of the incorporation of the company.

Annual return to be made by company having a share capital

(2) The list must state the names, addresses, and occupations of all the past and present members therein mentioned, and the number of shares held by each of the existing members at the date of the return, specifying shares transferred since the date of the last return or, in the case of the first return, of the incorporation of the company by persons who are still members and have ceased to be members respectively and the dates of registration of the transfers, and, if the names therein are not arranged in alphabetical order, must have annexed to it an index sufficient to enable the name of any person in the list to be readily found:

Provided that, where the company has converted any of its shares into stock and given notice of the conversion to the registrar of companies, the list must state the amount of stock held by each of the existing members instead of the amount of shares and the particulars relating to shares hereinbefore required.

(3) The return must also state the address of the registered office of the company and must contain a summary distinguishing between shares issued for cash and shares issued as fully or partly paid up otherwise than in cash, and specifying the following particulars—

(a) The amount of the share capital of the company, and the number of the shares into which it is divided;

(b) The number of shares taken from the commencement of the company up to the date of the return;

(c) The amount called up on each share;

(d) The total amount of calls received;

(e) The total amount of calls unpaid;

(f) The total amount of the sums, if any, paid by way of commission in respect of any shares or debentures;

(g) Particulars of the discount allowed on the issue of any shares issued at a discount, or of so much of that discount as has not been written off at the date on which the return is made;

(h) The total amount of the sums, if any, allowed by way of discount in respect of any debentures, since the date of the last return;

(i) The total number of shares forfeited;

(k) The total amount of shares for which share warrants are outstanding at the date of the return;

(l) The total amount of share warrants issued and surrendered respectively since the date of the last return;

(m) The number of shares comprised in each share warrant;

(n) All such particulars with respect to the persons who at the date of the return are the directors of the company as are by this Act required to be contained with respect to directors in the register of the directors of a company;

(o) The total amount of the indebtedness of the company in respect of all mortgages and charges which are required (or, in the case of a company registered in Scotland, which, if the company had been registered in England, would be required) to be registered with the registrar of companies under this Act, or which would have been required so to be registered if created after the first day of July, nineteen hundred and eight

(4) The return shall be in accordance with the form set out in the Sixth Schedule to this Act, or as near thereto as circumstances admit.

(5) In the case of a company keeping a dominion register, the particulars of the entries in that register shall, so far as they relate to matters which are required to be stated in the return, be included in the return made next after copies of those entries are received at the registered office of the company.

Annual return to be made by company not having share capital.

109.—(1) Every company not having a share capital shall once at least in every calendar year make a return stating—

(a) the address of the registered office of the company;

(b) all such particulars with respect to the persons who at the date of the return are the directors of the company as are by this Act required to be contained with respect to directors in the register of directors of a company.

(2) There shall be annexed to the return a statement containing particulars of the total amount of the indebtedness of the company in respect of all mortgages and charges which are required (or, in the case of a company registered in Scotland, which, if the company had been registered in England, would be required) to be registered with the registrar of companies under this Act, or which would have been required so to be registered if created after the first day of July, nineteen hundred and eight.

General provisions as to annual returns.

110.—(1) The annual return must be contained in a separate part of the register of members, and must be completed within twenty-eight days after the first or only general meeting in the year, and the company must forthwith forward to the registrar of companies a copy signed by a director or by the manager or by the secretary of the company.

(2) Section ninety-eight of this Act shall apply to the annual return as it applies to the register of members.

(3) Except where the company is a private company, or is an

assurance company which has complied with the provisions of subsection (4) of section seven of the Assurance Companies Act, 1909, the annual return shall include a written copy, certified by a director or the manager or secretary of the company to be a true copy, of the last balance sheet which has been audited by the company's auditors, including every document required by law to be annexed thereto, together with a copy of the report of the auditors thereon certified as aforesaid, and if any such balance sheet is in a foreign language there shall also be annexed to it a translation thereof in English, certified in the prescribed manner to be a correct translation:

Provided that, if the said last balance sheet did not comply with the requirements of the law as in force at the date of the audit with respect to the form of balance sheets there shall be made such additions to and corrections in the said copy as would have been required to be made in the said balance sheet in order to make it comply with the said requirements, and the fact that the said copy has been so amended shall be stated thereon

(4) If a company fails to comply with this section or either of the two last foregoing sections of this Act, the company and every officer of the company who is in default shall be liable to a default fine.

(5) For the purposes of subsection (4) of this section, the expression "officer," and for the purposes of the last two foregoing sections of this Act the expression "director," shall include any person in accordance with whose directions or instructions the directors of the company are accustomed to act.

111. A private company shall send with the annual return required by section one hundred and eight of this Act a certificate signed by a director or the secretary of the company that the company has not, since the date of the last return, or, in the case of a first return, since the date of the incorporation of the company, issued any invitation to the public to subscribe for any shares or debentures of the company, and, where the annual return discloses the fact that the number of members of the company exceeds fifty, also a certificate so signed that the excess consists wholly of persons who under paragraph (*b*) of subsection (1) of section twenty-six of this Act, are not to be included in reckoning the number of fifty. Certificates to be sent by private company with annual return.

Meetings and Proceedings.

112.—(1) A general meeting of every company shall be held once at the least in every calendar year, and not more than fifteen months after the holding of the last preceding general meeting. Annual general meeting.

(2) If default is made in holding a meeting of the company in accordance with the provisions of this section, the company, and every director or manager of the company who is knowingly a party to the default shall be liable to a fine not exceeding fifty pounds.

(3) If default is made as aforesaid, the court may, on the application of any member of the company, call, or direct the calling of, a general meeting of the company.

113.—(1) Every company limited by shares and every company limited by guarantee and having a share capital shall, within a period of not less than one month nor more than three months from the date at which the company is entitled to commence Statutory meeting and statutory report.

business, hold a general meeting of the members of the company, which shall be called " the statutory meeting."

(2) The directors shall, at least seven days before the day on which the meeting is held, forward a report (in this Act referred to as " the statutory report ") to every member of the company.

(3) The statutory report shall be certified by not less than two directors of the company, or, where there are less than two directors, by the sole director and manager, and shall state—

(a) the total number of shares allotted, distinguishing shares allotted as fully or partly paid up otherwise than in cash, and stating in the case of shares partly paid up the extent to which they are so paid up, and in either case the consideration for which they have been allotted;

(b) the total amount of cash received by the company in respect of all the shares allotted, distinguished as aforesaid;

(c) an abstract of the receipts of the company and of the payments made thereout, up to a date within seven days of the date of the report, exhibiting under distinctive headings the receipts of the company from shares and debentures and other sources, the payments made thereout, and particulars concerning the balance remaining in hand, and an account or estimate of the preliminary expenses of the company;

(d) the names, addresses, and descriptions of the directors, auditors, if any, managers, if any, and secretary of the company; and

(e) the particulars of any contract, the modification of which is to be submitted to the meeting for its approval, together with the particulars of the modification or proposed modification.

(4) The statutory report shall, so far as it relates to the shares allotted by the company, and to the cash received in respect of such shares, and to the receipts and payments of the company on capital account, be certified as correct by the auditors, if any, of the company.

(5) The directors shall cause a copy of the statutory report, certified as required by this section, to be delivered to the registrar of companies for registration forthwith after the sending thereof to the members of the company

(6) The directors shall cause a list showing the names, descriptions, and addresses of the members of the company, and the number of shares held by them respectively, to be produced at the commencement of the meeting, and to remain open and accessible to any member of the company during the continuance of the meeting.

(7) The members of the company present at the meeting shall be at liberty to discuss any matter relating to the formation of the company, or arising out of the statutory report, whether previous notice has been given or not, but no resolution of which notice has not been given in accordance with the articles may be passed.

(8) The meeting may adjourn from time to time, and at any adjourned meeting any resolution of which notice has been given in accordance with the articles, either before or subsequently to the former meeting, may be passed, and the adjourned meeting shall have the same powers as an original meeting.

(9) In the event of any default in complying with the provisions of this section every director of the company who is guilty of or who knowingly and wilfully authorises or permits the default shall be liable to a fine not exceeding fifty pounds.

(10) This section shall not apply to a private company.

Convening of extraordinary general meeting on requisition.

114.—(1) The directors of a company, notwithstanding anything in its articles, shall, on the requisition of members of the company holding at the date of the deposit of the requisition not less than one-tenth of such of the paid-up capital of the company as at the date of the deposit carries the right of voting at general meetings of the company, or, in the case of a company not having a share capital, members of the company representing not less than one-tenth of the total voting rights of all the members having at the said date a right to vote at general meetings of the company, forthwith proceed duly to convene an extraordinary general meeting of the company.

(2) The requisition must state the objects of the meeting, and must be signed by the requisitionists and deposited at the registered office of the company, and may consist of several documents in like form, each signed by one or more requisitionists.

(3) If the directors do not within twenty-one days from the date of the deposit of the requisition proceed duly to convene a meeting, the requisitionists, or any of them representing more than one half of the total voting rights of all of them, may themselves convene a meeting, but any meeting so convened shall not be held after the expiration of three months from the said date.

(4) A meeting convened under this section by the requisitionists shall be convened in the same manner, as nearly as possible, as that in which meetings are to be convened by directors.

(5) Any reasonable expenses incurred by the requisitionists by reason of the failure of the directors duly to convene a meeting shall be repaid to the requisitionists by the company, and any sum so repaid shall be retained by the company out of any sums due or to become due from the company by way of fees or other remuneration in respect of their services to such of the directors as were in default.

(6) For the purposes of this section, the directors shall, in the case of a meeting at which a resolution is to be proposed as a special resolution, be deemed not to have duly convened the meeting if they do not give such notice thereof as is required by section one hundred and seventeen of this Act.

Provisions as to meetings and votes.

115.—(1) The following provisions shall have effect in so far as the articles of the company do not make other provision in that behalf—

(a) a meeting of a company, other than a meeting for the passing of a special resolution, may be called by seven days' notice in writing;

(b) notice of the meeting of a company shall be served on every member of the company in the manner in which notices are required to be served by Table A, and for the purpose of this paragraph the expression "Table A" means that Table as for the time being in force;

(c) two or more members holding not less than one-tenth of the issued share capital or, if the company has not a share capital, not less than five per cent. in number of the members of the company may call a meeting;

(*d*) in the case of a private company two members, and in the case of any other company three members, personally present shall be a quorum;

(*e*) any member elected by the members present at a meeting may be chairman thereof;

(*f*) in the case of a company originally having a share capital every member shall have one vote in respect of each share or each ten pounds of stock held by him, and in any other case every member shall have one vote.

(2) If for any reason it is impracticable to call a meeting of a company in any manner in which meetings of that company may be called, or to conduct the meeting of the company in manner prescribed by the articles or this Act, the court may, either of its own motion or on the application of any director of the company or of any member of the company who would be entitled to vote at the meeting, order a meeting of the company to be called, held and conducted in such manner as the court thinks fit, and where any such order is made may give such ancillary or consequential directions as it thinks expedient, and any meeting called, held and conducted in accordance with any such order shall for all purposes be deemed to be a meeting of the company duly called, held and conducted.

Representation of companies at meetings of other companies and of creditors.

116.—(1) A corporation, whether a company within the meaning of this Act or not, may—

(*a*) if it is a member of another corporation, being a company within the meaning of this Act, by resolution of its directors or other governing body authorise such person as it thinks fit to act as its representative at any meeting of the company or at any meeting of any class of members of the company;

(*b*) if it is a creditor (including a holder of debentures) of another corporation, being a company within the meaning of this Act, by resolution of its directors or other governing body authorise such person as it thinks fit to act as its representative at any meeting of any creditors of the company held in pursuance of this Act or of any rules made thereunder, or in pursuance of the provisions contained in any debenture or trust deed, as the case may be.

(2) A person authorised as aforesaid shall be entitled to exercise the same powers on behalf of the corporation which he represents as that corporation could exercise if it were an individual shareholder, creditor, or holder of debentures, of that other company.

Provisions as to extraordinary and special resolutions.

117.—(1) A resolution shall be an extraordinary resolution when it has been passed by a majority of not less than three-fourths of such members as, being entitled so to do, vote in person or, where proxies are allowed, by proxy, at a general meeting of which notice specifying the intention to propose the resolution as an extraordinary resolution has been duly given.

(2) A resolution shall be a special resolution when it has been passed by such a majority as is required for the passing of an extraordinary resolution and at a general meeting of which not less than twenty-one days' notice, specifying the intention to propose the resolution as a special resolution, has been duly given:

Provided that, if all the members entitled to attend and vote at any such meeting so agree, a resolution may be proposed and passed as a special resolution at a meeting of which less than twenty-one days' notice has been given.

(3) At any meeting at which an extraordinary resolution or a special resolution is submitted to be passed, a declaration of the chairman that the resolution is carried shall, unless a poll is demanded, be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against the resolution.

(4) At any meeting at which an extraordinary resolution or a special resolution is submitted to be passed a poll shall be taken to be effectively demanded, if demanded—

(a) by such number of members for the time being entitled under the articles to vote at the meeting as may be specified in the articles, so, however, that it shall not in any case be necessary for more than five members to make the demand; or

(b) if no provision is made by the articles with respect to the right to demand the poll, by three members so entitled or by one member or two members so entitled, if that member holds or those two members together hold not less than fifteen per cent. of the paid-up share capital of the company.

(5) When a poll is demanded in accordance with this section, in computing the majority on the poll reference shall be had to the number of votes to which each member is entitled by virtue of this Act or of the articles of the company.

(6) For the purposes of this section, notice of a meeting shall be deemed to be duly given and the meeting to be duly held when the notice is given and the meeting held in manner provided by this Act or the articles.

Registration and copies of certain resolutions and agreements.

118.—(1) A printed copy of every resolution or agreement to which this section applies shall, within fifteen days after the passing or making thereof, be forwarded to the registrar of companies and recorded by him.

(2) Where articles have been registered, a copy of every such resolution or agreement for the time being in force shall be embodied in or annexed to every copy of the articles issued after the passing of the resolution or the making of the agreement.

(3) Where articles have not been registered, a printed copy of every such resolution or agreement shall be forwarded to any member at his request, on payment of one shilling or such less sum as the company may direct.

(4) This section shall apply to—

(a) Special resolutions;

(b) Extraordinary resolutions;

(c) Resolutions which have been agreed to by all the members of a company, but which, if not so agreed to, would not have been effective for their purpose unless, as the case may be, they had been passed as special resolutions or as extraordinary resolutions;

(d) Resolutions or agreements which have been agreed to by all the members of some class of shareholders, but which, if not so agreed to, would not have been effective for their purpose unless they had been passed by some particular majority or otherwise in some particular manner, and all resolutions or agreements which effectively bind all the members of any class of shareholders though not agreed to by all those members;

(*e*) Resolutions requiring a company to be wound up voluntarily, passed under paragraph (*a*) of subsection (1) of section two hundred and twenty-five of this Act

(5) If a company fails to comply with subsection (1) of this section, the company and every officer of the company who is in default shall be liable to a default fine of two pounds.

(6) If a company fails to comply with subsection (2) or subsection (3) of this section, the company and every officer of the company who is in default shall be liable to a fine not exceeding one pound for each copy in respect of which default is made.

(7) For the purposes of the last two foregoing subsections, a liquidator of the company shall be deemed to be an officer of the company.

Resolutions passed at adjourned meetings.

119. Where after the commencement of this Act a resolution is passed at an adjourned meeting of—

(*a*) a company;

(*b*) the holders of any class of shares in a company;

(*c*) the directors of a company;

the resolution shall for all purposes be treated as having been passed on the date on which it was in fact passed, and shall not be deemed to have been passed on any earlier date.

Minutes of proceedings of meetings and directors.

120.—(1) Every company shall cause minutes of all proceedings of general meetings, and where there are directors or managers, of all proceedings at meetings of its directors or of its managers, to be entered in books kept for that purpose.

(2) Any such minute if purporting to be signed by the chairman of the meeting at which the proceedings were had, or by the chairman of the next succeeding meeting, shall be evidence of the proceedings.

(3) Where minutes have been made in accordance with the provisions of this section of the proceedings at any general meeting of the company or meeting of directors or managers, then, until the contrary is proved, the meeting shall be deemed to have been duly held and convened, and all proceedings had thereat to have been duly had, and all appointments of directors, managers, or liquidators, shall be deemed to be valid.

Inspection of minute books.

121.—(1) The books containing the minutes of proceedings of any general meeting of a company held after the commencement of this Act shall be kept at the registered office of the company, and shall during business hours (subject to such reasonable restrictions as the company may by its articles or in general meeting impose, so that no less than two hours in each day be allowed for inspection) be open to the inspection of any member without charge.

(2) Any member shall be entitled to be furnished within seven days after he has made a request in that behalf to the company with a copy of any such minutes as aforesaid at a charge not exceeding sixpence for every hundred words.

(3) If any inspection required under this section is refused or if any copy required under this section is not sent within the proper time, the company and every officer of the company who is in default shall be liable in respect of each offence to a fine not exceeding two pounds and further to a default fine of two pounds.

(4) In the case of any such refusal or default, the court may by order compel an immediate inspection of the books in respect of

all proceedings of general meetings or direct that the copies required shall be sent to the persons requiring them.

Accounts and Audit.

122.—(1) Every company shall cause to be kept proper books of account with respect to— **Keeping of books of account.**

(*a*) all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place;

(*b*) all sales and purchases of goods by the company;

(*c*) the assets and liabilities of the company.

(2) The books of account shall be kept at the registered office of the company or at such other place as the directors think fit, and shall at all times be open to inspection by the directors.

(3) If any person being a director of a company fails to take all reasonable steps to secure compliance by the company with the requirements of this section, or has by his own wilful act been the cause of any default by the company thereunder, he shall, in respect of each offence, be liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding two hundred pounds:

Provided that a person shall not be sentenced to imprisonment for an offence under this section unless, in the opinion of the court dealing with the case, the offence was committed wilfully.

123.—(1) The directors of every company shall at some date not later than eighteen months after the incorporation of the company and subsequently once at least in every calendar year lay before the company in general meeting a profit and loss account or, in the case of a company not trading for profit, an income and expenditure account for the period, in the case of the first account, since the incorporation of the company, and, in any other case, since the preceding account, made up to a date not earlier than the date of the meeting by more than nine months, or, in the case of a company carrying on business or having interests abroad, by more than twelve months: ***Profit and* loss account and balance sheet.**

Provided that the Board of Trade, if for any special reason they think fit so to do, may, in the case of any company, extend the period of eighteen months aforesaid, and in the case of any company and with respect to any year extend the periods of nine and twelve months aforesaid.

(2) The directors shall cause to be made out in every calendar year, and to be laid before the company in general meeting, a balance sheet as at the date to which the profit and loss acount, or the income and expenditure account, as the case may be, is made up, and there shall be attached to every such balance sheet a report by the directors with respect to the state of the company's affairs, the amount, if any, which they recommend should be paid by way of dividend, and the amount, if any, which they propose to carry to the reserve fund, general reserve or reserve account shown specifically on the balance sheet, or to a reserve fund, general reserve or reserve account to be shown specifically on a subsequent balance sheet.

(3) If any person being a director of a company fails to take all reasonable steps to comply with the provisions of this section, he shall, in respect of each offence, be liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding two hundred pounds:

Provided that a person shall not be sentenced to imprisonment for an offence under this section unless in the opinion of the court dealing with the case, the offence was committed wilfully.

Contents of balance sheet.

124.—(1) Every balance sheet of a company shall contain a summary of the authorised share capital and of the issued share capital of the company, its liabilities and its assets, together with such particulars as are necessary to disclose the general nature of the liabilities and the assets of the company and to distinguish between the amounts respectively of the fixed assets and of the floating assets, and shall state how the values of the fixed assets have been arrived at.

(2) There shall be stated under separate headings in the balance sheet, so far as they are not written off—

(a) the preliminary expenses of the company; and

(b) any expenses incurred in connection with any issue of share capital or debentures; and

(c) if it is shown as a separate item in or is otherwise ascertainable from the books of the company, or from any contract for the sale or purchase of any property to be acquired by the company, or from any documents in the possession of the company relating to the stamp duty payable in respect of any such contract or the conveyance of any such property, the amount of the goodwill and of any patents and trademarks as so shown or ascertained.

(3) Where any liability of the company is secured otherwise than by operation of law on any assets of the company, the balance sheet shall include a statement that that liability is so secured, but it shall not be necessary to specify in the balance sheet the assets on which the liability is secured.

(4) The provisions of this section are in addition to other provisions of this Act requiring other matters to be stated in balance sheets.

Assets consisting of shares in subsidiary companies to be set out separately in balance sheet.

125. Where any of the assets of a company consist of shares in, or amounts owing (whether on account of a loan or otherwise) from a subsidiary company or subsidiary companies, the aggregate amount of those assets, distinguishing shares and indebtedness, shall be set out in the balance sheet of the first-mentioned company separately from all its other assets, and where a company is indebted, whether on account of a loan or otherwise, to a subsidiary company or subsidiary companies, the aggregate amount of that indebtedness shall be set out in the balance sheet of that company separately from all its other liabilities.

Balance sheet to include particulars as to subsidiary companies.

126.—(1) Where a company (in this section referred to as "the holding company") holds shares either directly or through a nominee in a subsidiary company or in two or more subsidiary companies, there shall be annexed to the balance sheet of the holding company a statement, signed by the persons by whom in pursuance of section one hundred and twenty-nine of this Act the balance sheet is signed, stating how the profits and losses of the subsidiary company, or, where there are two or more subsidiary companies, the aggregate profits and losses of those companies, have, so far as they concern the holding company, been dealt with in, or for the purposes of, the accounts of the holding company, and in particular how, and to what extent,—

(a) provision has been made for the losses of a subsidiary company either in the accounts of that company or of the holding company, or of both; and

(b) losses of a subsidiary company have been taken into account by the directors of the holding company in arriving at the profits and losses of the holding company as disclosed in its accounts:

Provided that it shall not be necessary to specify in any such statement the actual amount of the profits or losses of any subsidiary company, or the actual amount of any part of any such profits or losses which has been dealt with in any particular manner.

(2) If in the case of a subsidiary company the auditors' report on the balance sheet of the company does not state without qualification that the auditors have obtained all the information and explanations they have required and that the balance sheet is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs according to the best of their information and the explanations given to them and as shown by the books of the company, the statement which is to be annexed as aforesaid to the balance sheet of the holding company shall contain particulars of the manner in which the report is qualified.

(3) For the purposes of this section, the profits or losses of a subsidiary company mean the profits or losses shown in any accounts of the subsidiary company made up to a date within the period to which the accounts of the holding company relate, or, if there are no such accounts of the subsidiary company available at the time when the accounts of the holding company are made up, the profits or losses shown in the last previous accounts of the subsidiary company which became available within that period.

(4) If for any reason the directors of the holding company are unable to obtain such information as is necessary for the preparation of the statement aforesaid, the directors who sign the balance sheet shall so report in writing and their report shall be annexed to the balance sheet in lieu of the statement

127.—(1) Where the assets of a company consist in whole or in part of shares in another company, whether held directly or through a nominee and whether that other company is a company within the meaning of this Act or not, and— Meaning of subsidiary company.

(a) the amount of the shares so held is at the time when the accounts of the holding company are made up more than fifty per cent. of the issued share capital of that other company or such as to entitle the company to more than fifty per cent. of the voting power in that other company; or

(b) the company has power (not being power vested in it by virtue only of the provisions of a debenture trust deed or by virtue of shares issued to it for the purpose in pursuance of those provisions) directly or indirectly to appoint the majority of the directors of that other company,

that other company shall be deemed to be a subsidiary company within the meaning of this Act, and the expression "subsidiary company" in this Act means a company in the case of which the conditions of this section are satisfied.

(2) Where a company the ordinary business of which includes the lending of money holds shares in another company as security only, no account shall for the purpose of determining under this section whether that other company is a subsidiary company be taken of the shares so held.

Accounts to contain particulars as to loans to, and remuneration of, directors, &c.

128.—(1) The accounts which in pursuance of this Act are to be laid before every company in general meeting shall, subject to the provisions of this section, contain particulars showing—

(a) the amount of any loans which during the period to which the accounts relate have been made either by the company or by any other person under a guarantee from or on a security provided by the company to any director or officer of the company, including any such loans which were repaid during the said period; and

(b) the amount of any loans made in manner aforesaid to any director or officer at any time before the period aforesaid and outstanding at the expiration thereof; and

(c) the total of the amount paid to the directors as remuneration for their services, inclusive of all fees, percentages, or other emoluments, paid to or receivable by them by or from the company or by or from any subsidiary company.

(2) The provisions of subsection (1) of this section with respect to loans shall not apply—

(a) in the case of a company the ordinary business of which includes the lending of money, to a loan made by the company in the ordinary course of its business; or

(b) to a loan made by the company to any employee of the company if the loan does not exceed two thousand pounds and is certified by the directors of the company to have been made in accordance with any practice adopted or about to be adopted by the company with respect to loans to its employees

(3) The provisions of subsection (1) of this section with respect to the remuneration paid to directors shall not apply in relation to a managing director of the company, and in the case of any other director who holds any salaried employment or office in the company there shall not be required to be included in the said total amount any sums paid to him except sums paid by way of directors' fees.

(4) If in the case of any such accounts as aforesaid the requirements of this section are not complied with, it shall be the duty of the auditors of the company by whom the accounts are examined to include in their report on the balance sheet of the company, so far as they are reasonably able to do so, a statement giving the required particulars.

(5) In this section the expression "emoluments" includes fees, percentages and other payments made or consideration given, directly or indirectly, to a director as such, and the money value of any allowances or perquisites belonging to his office.

Signing of balance sheet.

129.—(1) Every balance sheet of a company shall be signed on behalf of the board by two of the directors of the company, or, if there is only one director, by that director, and the auditors' report shall be attached to the balance sheet, and the report shall be read before the company in general meeting, and shall be open to inspection by any member.

(2) In the case of a banking company registered after the fifteenth day of August, eighteen hundred and seventy-nine, the balance sheet must be signed by the secretary or manager, if any, and where there are more than three directors of the company by at least three of those directors, and where there are not more than three directors by all the directors.

(3) If any copy of a balance sheet which has not been signed as required by this section is issued, circulated, or published, or

if any copy of a balance sheet is issued, circulated, or published without having a copy of the auditors' report attached thereto, the company, and every director, manager, secretary, or other officer of the company who is knowingly a party to the default, shall on conviction be liable to a fine not exceeding fifty pounds.

Right to receive copies of balance sheets and auditors' report.

130.—(1) In the case of a company not being a private company—

(*a*) a copy of every balance sheet, including every document required by law to be annexed thereto, which is to be laid before the company in general meeting, together with a copy of the auditors' report, shall, not less than seven days before the date of the meeting, be sent to all persons entitled to receive notices of general meetings of the company;

(*b*) any member of the company, whether he is or is not entitled to have sent to him copies of the company's balance sheets, and any holder of debentures of the company, shall be entitled to be furnished on demand without charge with a copy of the last balance sheet of the company, including every document required by law to be annexed thereto, together with a copy of the auditors' report on the balance sheet.

If default is made in complying with paragraph (*a*) of this subsection, the company and every officer of the company who is in default shall be liable to a fine not exceeding twenty pounds, and if, where any person makes a demand for a document with which he is by virtue of paragraph (*b*) of this subsection entitled to be furnished, default is made in complying with the demand within seven days after the making thereof, the company and every director, manager, secretary or other officer of the company who is knowingly a party to the default shall be liable to a fine not exceeding five pounds for every day during which the default continues, unless it is proved that that person has already made a demand for and been furnished with a copy of the document

(2) In the case of a company being a private company, any member shall be entitled to be furnished, within seven days after he has made a request in that behalf to the company, with a copy of the balance sheet and auditors' report at a charge not exceeding sixpence for every hundred words.

If default is made in furnishing such a copy to any member who demands it and tenders to the company the amount of the proper charge therefor, the company and every officer of the company who is in default shall be liable to a default fine.

Banking and certain other companies to publish periodical statement.

131.—(1) Every company, being a limited banking company or an insurance company or a deposit, provident, or benefit society, shall, before it commences business, and also on the first Monday in February and the first Tuesday in August in every year during which it carries on business, make a statement in the form set out in the Seventh Schedule to this Act, or as near thereto as circumstances admit.

(2) A copy of the statement shall be put up in a conspicuous place in the registered office of the company, and in every branch office or place where the business of the company is carried on.

(3) Every member and every creditor of the company shall be entitled to a copy of the statement, on payment of a sum not exceeding sixpence.

(4) If default is made in complying with this section, the

company and every director and manager of the company who knowingly and wilfully authorises or permits the default shall be liable to a fine not exceeding five pounds for every day during which the default continues.

(5) For the purposes of this Act a company which carries on the business of insurance in common with any other business or businesses shall be deemed to be an insurance company.

(6) This section shall not apply to any assurance company to which the provisions of the Assurance Companies Act, 1909, as to the accounts and balance sheet to be prepared annually and deposited by such a company apply, if the company complies with those provisions.

Appointment and remuneration of auditors.

132.—(1) Every company shall at each annual general meeting appoint an auditor or auditors to hold office until the next annual general meeting.

(2) If an appointment of auditors is not made at an annual general meeting, the Board of Trade may, on the application of any member of the company, appoint an auditor of the company for the current year

(3) A person, other than a retiring auditor, shall not be capable of being appointed auditor at an annual general meeting unless notice of an intention to nominate that person to the office of auditor has been given by a member to the company not less than fourteen days before the annual general meeting, and the company shall send a copy of any such notice to the retiring auditor, and shall give notice thereof to the members, either by advertisement or in any other mode allowed by the articles, not less than seven days before the annual general meeting:

Provided that if, after notice of the intention to nominate an auditor has been so given, an annual general meeting is called for a date fourteen days or less after the notice has been given, the notice, though not given within the time required by this subsection, shall be deemed to have been properly given for the purposes thereof, and the notice to be sent or given by the company may, instead of being sent or given within the time required by this subsection, be sent or given at the same time as the notice of the annual general meeting.

(4) Subject as hereinafter provided, the first auditors of the company may be appointed by the directors at any time before the first annual general meeting, and auditors so appointed shall hold office until that meeting:

Provided that—

(*a*) the company may at a general meeting of which notice has been served on the auditors in the same manner as on members of the company remove any such auditors and appoint in their place any other persons being persons who have been nominated for appointment by any member of the company and of whose nomination notice has been given to the members of the company not less than seven days before the date of the meeting; and

(*b*) if the directors fail to exercise their powers under this subsection, the company in general meeting may appoint the first auditors, and thereupon the said powers of the directors shall cease.

(5) The directors may fill any casual vacancy in the office of auditor, but while any such vacancy continues the surviving or continuing auditor or auditors, if any, may act.

(6) The remuneration of the auditors of a company shall be fixed by the company in general meeting, except that the remuneration of an auditor appointed before the first annual general meeting, or of an auditor appointed to fill a casual vacancy, may be fixed by the directors, and that the remuneration of an auditor appointed by the Board of Trade may be fixed by the Board.

Disqualification for appointment as auditor.

133.—(1) None of the following persons shall be qualified for appointment as auditor of a company—

(a) a director or officer of the company;

(b) except where the company is a private company, a person who is a partner of or in the employment of an officer of the company;

(c) a body corporate.

(2) Nothing in this section shall disqualify a body corporate from acting as auditor of a company if acting under an appointment made before the third day of August, nineteen hundred and twenty-eight, but subject as aforesaid any body corporate which acts as auditor of a company shall be liable to a fine not exceeding one hundred pounds.

(3) In the application of this section to Scotland the expression "body corporate" does not include a firm.

Auditors' report and auditors' right of access to books and right to attend general meetings.

134.—(1) The auditors shall make a report to the members on the accounts examined by them, and on every balance sheet laid before the company in general meeting during their tenure of office, and the report shall state—

(a) whether or not they have obtained all the information and explanations they have required; and

(b) whether, in their opinion, the balance sheet referred to in the report is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs according to the best of their information and the explanations given to them, and as shown by the books of the company.

(2) Every auditor of a company shall have a right of access at all times to the books and accounts and vouchers of the company, and shall be entitled to require from the directors and officers of the company such information and explanation as may be necessary for the performance of the duties of the auditors:

Provided that, in the case of a banking company which was registered after the fifteenth day of August, eighteen hundred and seventy-nine, and which has branch banks beyond the limits of Europe, it shall be sufficient if the auditor is allowed access to such copies and extracts from such books and accounts of any such branch as have been transmitted to the head office of the company in Great Britain.

(3) The auditors of a company shall be entitled to attend any general meeting of the company at which any accounts which have been examined or reported on by them are to be laid before the company and to make any statement or explanation they desire with respect to the accounts.

Inspection.

Investigation of affairs of company by Board of Trade inspectors.

135.—(1) The Board of Trade may appoint one or more competent inspectors to investigate the affairs of a company and to report thereon in such manner as the Board direct—

(a) In the case of a banking company having a share capital, on the application of members holding not less than one-third of the shares issued:

(b) In the case of any other company having a share capital, on the application of members holding not less than one-tenth of the shares issued:

(c) In the case of a company not having a share capital, on the application of not less than one-fifth in number of the persons on the company's register of members

(2) The application shall be supported by such evidence as the Board of Trade may require for the purpose of showing that the applicants have good reason for, and are not actuated by malicious motives in, requiring the investigation, and the Board may, before appointing an inspector, require the applicants to give security, to an amount not exceeding one hundred pounds, for payment of the costs of the inquiry.

(3) It shall be the duty of all officers and agents of the company to produce to the inspectors all books and documents in their custody or power.

(4) An inspector may examine on oath the officers and agents of the company in relation to its business, and may administer an oath accordingly.

(5) If any officer or agent of the company refuses to produce to the inspectors any book or document which it is his duty under this section so to produce, or refuses to answer any question which is put to him by the inspectors with respect to the affairs of the company, the inspectors may certify the refusal under their hand to the court, and the court may thereupon enquire into the case, and after hearing any witnesses who may be produced against or on behalf of the alleged offender and after hearing any statement which may be offered in defence, punish the offender in like manner as if he had been guilty of contempt of the court.

(6) On the conclusion of the investigation the inspectors shall report their opinion to the Board of Trade, and a copy of the report shall be forwarded by the Board to the registered office of the company, and a further copy shall, at the request of the applicants for the investigation, be delivered to them.

The report shall be written or printed, as the Board direct.

Proceedings on report by inspectors.

136.—(1) If from any report made under the last foregoing section it appears to the Board of Trade that any person has been guilty of any offence in relation to the company for which he is criminally liable the Board shall proceed as follows—

(i) in the case of an offence in England, if it appears to the Board that the case is one in which the prosecution ought to be undertaken by the Director of Public Prosecutions, the Board shall refer the matter to him;

(ii) in the case of an offence in Scotland the Board shall refer the matter to the Lord Advocate.

(2) If where any matter is referred to the Director of Public Prosecutions under this section he considers that the case is one in which a prosecution ought to be instituted and, further, that it is desirable in the public interest that the proceedings in the prosecution should be conducted by him, he shall institute proceedings accordingly, and it shall be the duty of all officers and agents of the company, past and present (other than the defendant in the proceedings), to give to him all assistance in connection with the prosecution which they are reasonably able to give.

For the purposes of this subsection, the expression "agents" in relation to a company shall be deemed to include the bankers and solicitors of the company and any persons employed by the company as auditors, whether those persons are or are not officers of the company.

(3) The expenses of and incidental to an investigation under the last preceding section of this Act (in this subsection referred to as "the expenses") shall be defrayed as follows—

(a) Where as a result of the investigation a prosecution is instituted by the Director of Public Prosecutions or by or on behalf of the Lord Advocate, the expenses shall be defrayed by the Board of Trade;

(b) In any other case the expenses shall be defrayed by the company unless the Board of Trade think proper to direct, as the Board are hereby authorised to do, that they shall either be paid by the applicants or in part by the company and in part by the applicants

Provided that—

(i) if the company fails to pay the whole or any part of the sum which it is liable to pay under this subsection, the applicants shall make good the deficiency up to the amount by which the security given by them under the last preceding section exceeds the amount, if any, which they have under this subsection been directed by the Board to pay; and

(ii) any balance of the expenses not defrayed either by the company or the applicants shall be defrayed by the Board.

(4) Subsection (3) of section thirteen of the Economy (Miscellaneous Provisions) Act, 1926 (which provides for the issue out of the Bankruptcy and Companies Winding-up (Fees) Account of sums towards meeting the charges estimated by the Board of Trade in respect of salaries and expenses under this Act in relation to the winding up of companies in England) shall have effect as if expenses to be defrayed by the Board under this section were expenses incurred by the Board under this Act in relation to the winding up of companies in England.

137.—(1) A company may by special resolution appoint inspectors to investigate its affairs. **Power of company to appoint inspectors.**

(2) Inspectors so appointed shall have the same powers and duties as inspectors appointed by the Board of Trade, except that, instead of reporting to the Board, they shall report in such manner and to such persons as the company in general meeting may direct.

(3) If any officer or agent of the company refuses to produce to the inspectors any book or document which it is his duty under this section so to produce, or refuses to answer any question which is put to him by the inspectors with respect to the affairs of the company, he shall be liable to be proceeded against in the same manner as if the inspectors had been inspectors appointed by the Board of Trade.

138. A copy of the report of any inspectors appointed under this Act, authenticated by the seal of the company whose affairs they have investigated, shall be admissible in any legal proceeding as evidence of the opinion of the inspectors in relation to any matter contained in the report. **Report of inspectors to be evidence.**

Directors and Managers.

Number of directors.

139.—(1) Every company registered after the commencement of this Act shall have at least two directors.

(2) This section shall not apply to a private company.

Restrictions on appointment or advertisement of director.

140.—(1) A person shall not be capable of being appointed director of a company by the articles, and shall not be named as a director or proposed director of a company in a prospectus issued by or on behalf of the company, or as proposed director of an intended company in a prospectus issued in relation to that intended company, or in a statement in lieu of prospectus delivered to the registrar by or on behalf of a company, unless, before the registration of the articles or the publication of the prospectus, or the delivery of the statement in lieu of prospectus, as the case may be, he has by himself or by his agent authorised in writing—

(*a*) signed and delivered to the registrar of companies for registration a consent in writing to act as such director;

(*b*) either—

(i) signed the memorandum for a number of shares not less than his qualification, if any; or

(ii) taken from the company and paid or agreed to pay for his qualification shares, if any; or

(iii) signed and delivered to the registrar for registration an undertaking in writing to take from the company and pay for his qualification shares, if any; or

(iv) made and delivered to the registrar for registration a statutory declaration to the effect that a number of shares, not less than his qualification, if any, are registered in his name.

(2) Where a person has signed and delivered as aforesaid an undertaking to take and pay for his qualification shares, he shall, as regards those shares, be in the same position as if he had signed the memorandum for that number of shares.

(3) On the application for registration of the memorandum and articles of a company the applicant shall deliver to the registrar a list of the persons who have consented to be directors of the company, and, if this list contains the name of any person who has not so consented, the applicant shall be liable to a fine not exceeding fifty pounds.

(4) This section shall not apply to—

(*a*) a company not having a share capital; or

(*b*) a private company; or

(*c*) a company which was a private company before becoming a public company; or

(*d*) a prospectus issued by or on behalf of a company after the expiration of one year from the date on which the company was entitled to commence business.

Qualification of director or manager.

141.—(1) Without prejudice to the restrictions imposed by the last foregoing section, it shall be the duty of every director who is by the articles of the company required to hold a specified share qualification, and who is not already qualified, to obtain his qualification within two months after his appointment, or such shorter time as may be fixed by the articles.

(2) For the purpose of any provision in the articles requiring a director or manager to hold a specified share qualification, the bearer of a share warrant shall not be deemed to be the holder of the shares specified in the warrant.

(3) The office of director of a company shall be vacated if the director does not within two months from the date of his appointment, or within such shorter time as may be fixed by the articles, obtain his qualification, or if after the expiration of the said period or shorter time he ceases at any time to hold his qualification.

(4) A person vacating office under this section shall be incapable of being re-appointed director of the company until he has obtained his qualification.

(5) If after the expiration of the said period or shorter time any unqualified person acts as a director of the company, he shall be liable to a fine not exceeding five pounds for every day between the expiration of the said period or shorter time or the day on which he ceased to be qualified, as the case may be, and the last day on which it is proved that he acted as a director.

142.—(1) If any person being an undischarged bankrupt acts as director of, or directly or indirectly takes part in or is concerned in the management of, any company except with the leave of the court by which he was adjudged bankrupt, he shall be liable on conviction on indictment to imprisonment for a term not exceeding two years, or on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding five hundred pounds, or to both such imprisonment and fine. Provisions as to undischarged bankrupts acting as directors.

Provided that a person shall not be guilty of an offence under this section by reason that he, being an undischarged bankrupt, has acted as director of, or taken part or been concerned in the management of, a company, if he was on the third day of August, nineteen hundred and twenty-eight, acting as director of, or taking part or being concerned in the management of, that company and has continuously so acted, taken part, or been concerned since that date and the bankruptcy was prior to that date.

(2) In England the leave of the court for the purposes of this section shall not be given unless notice of intention to apply therefor has been served on the official receiver and it shall be the duty of the official receiver, if he is of opinion that it is contrary to the public interest that any such application should be granted, to attend on the hearing of and oppose the granting of the application.

(3) In this section the expression "company" includes an unregistered company and a company incorporated outside Great Britain which has an established place of business within Great Britain, and the expression "official receiver" means the official receiver in bankruptcy.

(4) Subsection (1) of this section in its application to Scotland shall have effect as if the words "sequestration of his estates was awarded" were substituted for the words "he was adjudged bankrupt."

143. The acts of a director or manager shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification. Validity of acts of directors.

144.—(1) Every company shall keep at its registered office a register of its directors or managers containing with respect to each of them the following particulars, that is to say— Register of directors.

(a) in the case of an individual, his present christian name and surname, any former christian name or surname, his usual residential address, his nationality, and, if that nationality is not the nationality of origin, his nationality of origin, and his business occupation, if any, or, if he has no business occupation but holds any other directorship or directorships, particulars of that directorship or of some one of those directorships; and

(b) in the case of a corporation, its corporate name and registered or principal office.

(2) The company shall, within the periods respectively mentioned in this subsection, send to the registrar of companies a return in the prescribed form containing the particulars specified in the said register and a notification in the prescribed form of any change among its directors or in any of the particulars contained in the register.

The period within which the said return is to be sent shall be a period of fourteen days from the appointment of the first directors of the company, and the period within which the said notification of a change is to be sent shall be fourteen days from the happening thereof.

(3) The register to be kept under this section shall during business hours (subject to such reasonable restrictions as the company may by its articles or in general meeting impose, so that not less than two hours in each day be allowed for inspection) be open to the inspection of any member of the company without charge and of any other person on payment of one shilling, or such less sum as the company may prescribe, for each inspection.

(4) If any inspection required under this section is refused or if default is made in complying with subsection (1) or subsection (2) of this section, the company and every officer of the company who is in default shall be liable to a default fine.

(5) In the case of any such refusal, the court may by order compel an immediate inspection of the register.

(6) For the purpose of this section, a person in accordance with whose directions or instructions the directors of a company are accustomed to act shall be deemed to be a director and officer of the company.

Particulars with respect to directors in trade catalogues, circulars, etc.

145.—(1) Every company to which this section applies shall, in all trade catalogues, trade circulars, showcards and business letters on or in which the company's name appears and which are issued or sent by the company to any person in any part of His Majesty's dominions, state in legible characters with respect to every director being a corporation, the corporate name, and with respect to every director being an individual, the following particulars—

(a) his present christian name, or the initials thereof, and present surname;

(b) any former christian names and surnames;

(c) his nationality, if not British;

(d) his nationality of origin, if his nationality is not the nationality of origin:

Provided that, if special circumstances exist which render it in the opinion of the Board of Trade expedient that such an exemption should be granted, the Board may by order grant, subject to such conditions as may be specified in the order, exemption from the obligations imposed by this subsection.

(2) This section shall apply to—

(a) every company registered under this Act or the Acts repealed by this Act unless it was registered before the twenty-third day of November, nineteen hundred and sixteen; and

(*b*) every company incorporated outside Great Britain which has an established place of business within Great Britain, unless it had established such a place of business before the said date; and

(*c*) every company licensed under the Moneylenders Act, 1927, whenever it was registered or whenever it established a place of business. 17 & 18 Geo. 5. c. 21.

(3) If a company makes default in complying with this section, every director of the company shall be liable on summary conviction for each offence to a fine not exceeding five pounds, and, in the case of a director being a corporation, every director, secretary and officer of the corporation, who is knowingly a party to the default, shall be liable to a like penalty:

Provided that in England no proceedings shall be instituted under this section except by, or with the consent of, the Board of Trade.

(4) For the purposes of this section—

(*a*) the expression "director" includes any person in accordance with whose directions or instructions the directors of the company are accustomed to act;

(*b*) the expression "christian name" includes a forename;

(*c*) the expression "initials" includes a recognised abbreviation of a christian name;

(*d*) in the case of a peer or person usually known by a title different from his surname, the expression "surname" means that title,

(*e*) references to a former christian name or surname do not include—

(i) in the case of a peer or a person usually known by a British title different from his surname, the name by which he was known previous to the adoption of or succession to the title; or

(ii) in the case of natural born British subjects, a former christian name or surname where that name or surname was changed or disused before the person bearing the name attained the age of eighteen years; or

(iii) in the case of a married woman, the name or surname by which she was known previous to the marriage;

(*f*) the expression "showcards" means cards containing or exhibiting articles dealt with, or samples or representations thereof.

Limited company may have directors with unlimited liability.

146.—(1) In a limited company the liability of the directors or managers, or of the managing director, may, if so provided by the memorandum, be unlimited.

(2) In a limited company in which the liability of a director or manager is unlimited, the directors or managers of the company, if any, and the member who proposes a person for election or appointment to the office of director or manager, shall add to that proposal a statement that the liability of the person holding that office will be unlimited, and the promoters, directors, managers, and secretary, if any, of the company, or one of them, shall, before the person accepts the office or acts therein, give him notice in writing that his liability will be unlimited.

(3) If any director, manager, or proposer makes default in

adding such a statement, or if any promoter, director, manager, or secretary makes default in giving such a notice, he shall be liable to a fine not exceeding one hundred pounds, and shall also be liable for any damage which the person so elected or appointed may sustain from the default, but the liability of the person elected or appointed shall not be affected by the default.

Special resolution of limited company making liability of directors unlimited.

147.—(1) A limited company, if so authorised by its articles, may, by special resolution, alter its memorandum so as to render unlimited the liability of its directors, or managers, or of any managing director.

(2) Upon the passing of any such special resolution the provisions thereof shall be as valid as if they had been originally contained in the memorandum.

Statement as to remuneration of directors to be furnished to shareholders.

148.—(1) Subject as hereinafter provided, the directors of a company shall, on a demand in that behalf made to them in writing by members of the company entitled to not less than one-fourth of the aggregate number of votes to which all the members of the company are together entitled, furnish to all the members of the company within a period of one month from the receipt of the demand a statement, certified as correct, or with such qualifications as may be necessary, by the auditors of the company, showing as respects each of the last three preceding years in respect of which the accounts of the company have been made up the aggregate amount received in that year by way of remuneration or other emoluments by persons being directors of the company, whether as such directors or otherwise in connection with the management of the affairs of the company, and there shall, in respect of any such director who is—

(a) a director of any other company which is in relation to the first-mentioned company a subsidiary company; or

(b) by virtue of the nomination whether direct, or indirect, of the company a director of any other company;

be included in the said aggregate amount any remuneration or other emoluments received by him for his own use whether as a director of, or otherwise in connection with the management of the affairs of, that other company:

Provided that—

(i) a demand for a statement under this section shall be of no effect if the company within one month after the date on which the demand is made resolve that the statement shall not be furnished; and

(ii) it shall be sufficient to state the total aggregate of all sums paid to or other emoluments received by all the directors, in each year without specifying the amount received by any individual.

(2) In computing for the purpose of this section the amount of any remuneration or emoluments received by any director, the amount actually received by him shall, if the company has paid on his behalf any sum by way of income tax (including super-tax and sur-tax) in respect of the remuneration or emoluments, be increased by the amount of the sum so paid.

(3) If any director fails to comply with the requirements of this section, he shall be liable to a fine not exceeding fifty pounds.

(4) In this section the expression "emoluments" includes fees, percentages and other payments made or consideration given, directly or indirectly, to a director as such, and the money value of any allowances or perquisites to his office.

Disclosure by directors of interest in contracts.

149.—(1) Subject to the provisions of this section, it shall be the duty of a director of a company who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the company to declare the nature of his interest at a meeting of the directors of the company.

(2) In the case of a proposed contract the declaration required by this section to be made by a director shall be made at the meeting of the directors at which the question of entering into the contract is first taken into consideration, or if the director was not at the date of that meeting interested in the proposed contract, at the next meeting of the directors held after he became so interested, and in a case where the director becomes interested in a contract after it is made, the said declaration shall be made at the first meeting of the directors held after the director becomes so interested.

(3) For the purpose of this section, a general notice given to the directors of a company by a director to the effect that he is a member of a specified company or firm and is to be regarded as interested in any contract which may, after the date of the notice, be made with that company or firm shall be deemed to be a sufficient declaration of interest in relation to any contract so made.

(4) Any director who fails to comply with the provisions of this section shall be liable to a fine not exceeding one hundred pounds.

(5) Nothing in this section shall be taken to prejudice the operation of any rule of law restricting directors of a company from having any interest in contracts with the company.

Provision as to payments received by directors for loss of office or on retirement.

150.—(1) It is hereby declared that it is not lawful in connection with the transfer of the whole or any part of the undertaking or property of a company for any payment to be made to any director of the company by way of compensation for loss of office, or as consideration for or in connection with his retirement from office, unless particulars with respect to the proposed payment, including the amount thereof, have been disclosed to the members of the company and the proposal approved by the company.

(2) Where a payment which is hereby declared to be illegal is made to a director of the company, the amount received shall be deemed to have been received by him in trust for the company.

(3) Where a payment is to be made as aforesaid to a director of a company in connection with the transfer to any persons, as a result of an offer made to the general body of shareholders, of all or any of the shares in the company, it shall be the duty of that director to take all reasonable steps to secure that particulars with respect to the proposed payment, including the amount thereof, shall be included in or sent with any notice of the offer made for their shares which is given to any shareholders.

(4) If any such director fails to take reasonable steps as aforesaid, or if any person who has been properly required by any such director to include the said particulars in or send them with any such notice fails so to do, he shall be liable to a fine not exceeding twenty-five pounds, and if the requirements of the last foregoing subsection are not complied with in relation to any such payment as is mentioned in the said subsection, any sum received by the director on account of the payment shall be deemed to have been received by him in trust for any persons who have sold their shares as a result of the offer made.

(5) If in connection with any such transfer as aforesaid the price to be paid to a director of the company whose office is to be abolished or who is to retire from office for any shares in the company held by him is in excess of the price which could at the time have been obtained by other holders of the like shares or any valuable consideration is given to any such director, the excess or the money value of the consideration, as the case may be, shall, for the purposes of this section, be deemed to have been a payment made to him by way of compensation for loss of office or as consideration for, or in connection with, his retirement from office.

(6) Nothing in this section shall be taken to prejudice the operation of any rule of law requiring disclosure to be made with respect to any such payments as are mentioned in this section, or with respect to any other like payments made or to be made to the directors of a company.

Provisions as to assignment of office by directors.

151. If in the case of any company provision is made by the articles or by any agreement entered into between any person and the company for empowering a director or manager of the company to assign his office as such to another person, any assignment of office made in pursuance of the said provision shall, notwithstanding anything to the contrary contained in the said provision, be of no effect unless and until it is approved by a special resolution of the company.

Avoidance of Provisions in Articles or Contracts relieving Officers from Liability.

Provisions as to liability of officers and auditors.

152. Subject as hereinafter provided, any provision, whether contained in the articles of a company or in any contract with a company or otherwise, for exempting any director, manager or officer of the company, or any person (whether an officer of the company or not) employed by the company as auditor from, or indemnifying him against, any liability which by virtue of any rule of law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company shall be void:

Provided that—

(*a*) in relation to any such provision which is in force at the date of the commencement of this Act, this section shall have effect only on the expiration of a period of six months from that date; and

(*b*) nothing in this section shall operate to deprive any person of any exemption or right to be indemnified in respect of anything done or omitted to be done by him while any such provision was in force; and

(*c*) notwithstanding anything in this section, a company may, in pursuance of any such provision as aforesaid, indemnify any such director, manager, officer or auditor against any liability incurred by him in defending any proceedings, whether civil or criminal, in which judgment is given in his favour or in which he is acquitted or in connection with any application under section three hundred and seventy-two of this Act in which relief is granted to him by the court.

Arrangements and Reconstructions.

Power to compromise with creditors and members.

153.—(1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the court may, on the application in a summary way of the company or of any creditor or member of the company, or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be summoned in such manner as the court directs.

(2) If a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members, as the case may be, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement the compromise or arrangement shall, if sanctioned by the court, be binding on all the creditors or the class of creditors, or on the members or class of members, as the case may be, and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.

(3) An order made under subsection (2) of this section shall have no effect until an office copy of the order has been delivered to the registrar of companies for registration, and a copy of every such order shall be annexed to every copy of the memorandum of the company issued after the order has been made, or, in the case of a company not having a memorandum, of every copy so issued of the instrument constituting or defining the constitution of the company.

(4) If a company makes default in complying with subsection (3) of this section, the company and every officer of the company who is in default shall be liable to a fine not exceeding one pound for each copy in respect of which default is made.

(5) In this section the expression "company" means any company liable to be wound up under this Act, and the expression "arrangement" includes a re-organisation of the share capital of the company by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both those methods.

Provisions for facilitating reconstruction and amalgamation of companies.

154.—(1) Where an application is made to the court under the last foregoing section of this Act for the sanctioning of a compromise or arrangement proposed between a company and any such persons as are mentioned in that section, and it is shown to the court that the compromise or arrangement has been proposed for the purposes of or in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any two or more companies, and that under the scheme the whole or any part of the undertaking or the property of any company concerned in the scheme (in this section referred to as "a transferor company") is to be transferred to another company (in this section referred to as "the transferee company"), the court may, either by the order sanctioning the compromise or arrangement or by any subsequent order, make provision for all or any of the following matters—

(*a*) the transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company;

(*b*) the allotting or appropriation by the transferee company of any shares, debentures, policies, or other like interests in that company which under the compromise or arrangement are to be allotted or appropriated by that company to or for any person;

(c) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;

(d) the dissolution, without winding up, of any transferor company;

(e) the provision to be made for any persons, who within such time and in such manner as the court direct, dissent from the compromise or arrangement;

(f) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out.

(2) Where an order under this section provides for the transfer of property or liabilities, that property shall, by virtue of the order, be transferred to and vest in, and those liabilities shall, by virtue of the order, be transferred to and become the liabilities of, the transferee company, and in the case of any property, if the order so directs, freed from any charge which is by virtue of the compromise or arrangement to cease to have effect.

(3) Where an order is made under this section, every company in relation to which the order is made shall cause an office copy thereof to be delivered to the registrar of companies for registration within seven days after the making of the order, and if default is made in complying with this subsection, the company and every officer of the company who is in default shall be liable to a default fine.

(4) In this section the expression "property" includes property, rights and powers of every description, and the expression "liabilities" includes duties.

(5) Notwithstanding the provisions of subsection (5) of the last foregoing section, the expression "company" in this section does not include any company other than a company within the meaning of this Act.

Power to acquire shares of shareholders dissenting from scheme or contract approved by majority.

155.—(1) Where a scheme or contract involving the transfer of shares or any class of shares in a company (in this section referred to as "the transferor company") to another company, whether a company within the meaning of this Act or not (in this section referred to as "the transferee company"), has within four months after the making of the offer in that behalf by the transferee company been approved by the holders of not less than nine-tenths in value of the shares affected, the transferee company may, at any time within two months after the expiration of the said four months, give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares, and where such a notice is given the transferee company shall, unless on an application made by the dissenting shareholder within one month from the date on which the notice was given the court thinks fit to order otherwise, be entitled and bound to acquire those shares on the terms on which under the scheme or contract the shares of the approving shareholders are to be transferred to the transferee company:

Provided that, where any such scheme or contract has been so approved at any time before the commencement of this Act, the court may by order, on an application made to it by the transferee company within two months after the commencement of this Act, authorise notice to be given under this section at any time within fourteen days after the making of the order, and this section shall apply accordingly, except that the terms on which the shares of the dissenting shareholder are to be acquired shall be such terms as the court may by the order direct instead of the terms provided by the scheme or contract.

(2) Where a notice has been given by the transferee company under this section and the court has not, on an application made by the dissenting shareholder, ordered to the contrary, the transferee company shall, on the expiration of one month from the date on which the notice has been given, or, if an application to the court by the dissenting shareholder is then pending, after that application has been disposed of, transmit a copy of the notice to the transferor company and pay or transfer to the transferor company the amount or other consideration representing the price payable by the transferee company for the shares which by virtue of this section that company is entitled to acquire, and the transferor company shall thereupon register the transferee company as the holder of those shares.

(3) Any sums received by the transferor company under this section shall be paid into a separate bank account, and any such sums and any other consideration so received shall be held by that company on trust for the several persons entitled to the shares in respect of which the said sums or other consideration were respectively received.

(4) In this section the expression "dissenting shareholder" includes a shareholder who has not assented to the scheme or contract and any shareholder who has failed or refused to transfer his shares to the transferee company in accordance with the scheme or contract.

PART V.

WINDING UP.

(i) PRELIMINARY.

Modes of Winding Up.

156.—(1) The winding up of a company may be either— **Modes of winding up.**

(*a*) by the court; or

(*b*) voluntary; or

(*c*) subject to the supervision of the court.

(2) The provisions of this Act with respect to winding up apply, unless the contrary appears, to the winding up of a company in any of those modes.

Contributories.

157.—(1) In the event of a company being wound up, every present and past member shall be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities, and the costs, charges, and expenses of the winding up, and for the adjustment of the rights of the contributories among themselves, subject to the provisions of subsection (2) of this section and the following qualifications— **Liability as contributories of present and past members.**

(*a*) a past member shall not be liable to contribute if he has ceased to be a member for one year or upwards before the commencement of the winding up:

(*b*) a past member shall not be liable to contribute in respect of any debt or liability of the company contracted after he ceased to be a member:

(*c*) a past member shall not be liable to contribute unless it appears to the court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this Act:

(*d*) in the case of a company limited by shares no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member:

(*e*) in the case of a company limited by guarantee, no contribution shall, subject to the provisions of subsection (3) of this section, be required from any member exceeding the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up:

(*f*) nothing in this Act shall invalidate any provision contained in any policy of insurance or other contract whereby the liability of individual members on the policy or contract is restricted, or whereby the funds of the company are alone made liable in respect of the policy or contract:

(*g*) a sum due to any member of a company, in his character of a member, by way of dividends, profits or otherwise, shall not be deemed to be a debt of the company, payable to that member in a case of competition between himself and any other creditor not a member of the company, but any such sum may be taken into account for the purpose of the final adjustment of the rights of the contributories among themselves

(2) In the winding up of a limited company, any director or manager, whether past or present, whose liability is, under the provisions of this Act, unlimited, shall, in addition to his liability (if any) to contribute as an ordinary member, be liable to make a further contribution as if he were at the commencement of the winding up a member of an unlimited company:

Provided that—

(*a*) a past director or manager shall not be liable to make such further contribution if he has ceased to hold office for a year or upwards before the commencement of the winding up:

(*b*) a past director or manager shall not be liable to make such further contribution in respect of any debt or liability of the company contracted after he ceased to hold office:

(*c*) subject to the articles of the company, a director or manager shall not be liable to make such further contribution unless the court deems it necessary to require that contribution in order to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of the winding up.

(3) In the winding up of a company limited by guarantee which has a share capital, every member of the company shall be liable, in addition to the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up, to contribute to the extent of any sums unpaid on any shares held by him.

Definition of contributory.

158. The term "contributory" means every person liable to contribute to the assets of a company in the event of its being wound up, and for the purposes of all proceedings for determining, and all proceedings prior to the final determination of, the persons who are to be deemed contributories, includes any person alleged to be a contributory.

Nature of liability of contributory.

159. The liability of a contributory shall create a debt (in England of the nature of a specialty) accruing due from him at the time when his liability commenced, but payable at the times when calls are made for enforcing the liability.

160.—(1) If a contributory dies either before or after he has been placed on the list of contributories, his personal representatives, and the heirs and legatees of heritage of his heritable estate in Scotland, shall be liable in a due course of administration to contribute to the assets of the company in discharge of his liability and shall be contributories accordingly — Contributories in case of death of member.

(2) Where the personal representatives are placed on the list of contributories, the heirs or legatees of heritage need not be added, but they may be added as and when the court thinks fit.

(3) If in England the personal representatives make default in paying any money ordered to be paid by them, proceedings may be taken for administering the estate of the deceased contributory, and for compelling payment thereout of the money due.

161. If a contributory becomes bankrupt, either before or after he has been placed on the list of contributories— Contributories in case of bankruptcy of member

(1) his trustee in bankruptcy shall represent him for all the purposes of the winding up, and shall be a contributory accordingly, and may be called on to admit to proof against the estate of the bankrupt, or otherwise to allow to be paid out of his assets in due course of law, any money due from the bankrupt in respect of his liability to contribute to the assets of the company; and

(2) there may be proved against the estate of the bankrupt the estimated value of his liability to future calls as well as calls already made.

162.—(1) The husband of a female contributory married before the date of the commencement of the Married Women's Property Act, 1882, or the Married Women's Property (Scotland) Act, 1881, as the case may be, shall, during the continuance of the marriage, be liable, as respects any liability attaching to any shares acquired by her before that date, to contribute to the assets of the company the same sum as she would have been liable to contribute if she had not married, and he shall be a contributory accordingly. — Provision as to married women. 45 & 46 Vict. c. 75. 44 & 45 Vict. c. 21.

(2) Subject as aforesaid, nothing in this Act shall affect the provisions of the Married Women's Property Act, 1882, or the Married Women's Property (Scotland) Act, 1881.

Cases in which Company may be wound up by Court.

163. A company may be wound up by the court if— Circumstances in which company may be wound up by court.

(1) the company has by special resolution resolved that the company be wound up by the court:

(2) default is made in delivering the statutory report to the registrar or in holding the statutory meeting:

(3) the company does not commence its business within a year from its incorporation, or suspends its business for a whole year:

(4) the number of members is reduced, in the case of a private company, below two, or, in the case of any other company, below seven:

(5) the company is unable to pay its debts:

(6) the court is of opinion that it is just and equitable that the company should be wound up.

Definition of inability to pay debts.

169. A company shall be deemed to be unable to pay its debts—

(1) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding fifty pounds then due, has served on the company, by leaving it at the registered office of the company, a demand under his hand requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or

(2) if, in England or Northern Ireland, execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or

(3) if, in Scotland, the induciae of a charge for payment on an extract decree, or an extract registered bond, or an extract registered protest have expired without payment being made; or

(4) if it is proved to the satisfaction of the court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company.

(iii) Voluntary Winding Up.

Resolutions for, and commencement of Voluntary Winding Up.

Circumstances in which company may be wound up voluntarily.

225.—(1) A company may be wound up voluntarily—

(*a*) When the period, if any, fixed for the duration of the company by the articles expires, or the event, if any, occurs, on the occurrence of which the articles provide that the company is to be dissolved, and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily:

(*b*) If the company resolves by special resolution that the company be wound up voluntarily:

(*c*) If the company resolves by extraordinary resolution to the effect that it cannot by reason of its liabilities continue its business, and that it is advisable to wind up.

(2) In this Act the expression "a resolution for voluntary winding up" means a resolution passed under any of the provisions of subsection (1) of this section.

Notice of resolution to wind up voluntarily.

226.—(1) When a company has passed a resolution for voluntary winding up, it shall, within seven days after the passing of the resolution, give notice of the resolution by advertisement in the *Gazette*.

(2) If default is made in complying with this section, the company and every officer of the company who is in default shall be liable to a default fine, and for the purposes of this subsection the liquidator of the company shall be deemed to be an officer of the company.

Commencement of voluntary winding up.

227. A voluntary winding up shall be deemed to commence at the time of the passing of the resolution for voluntary winding up.

Consequences of Voluntary Winding Up.

228. In case of a voluntary winding up, the company shall, from the commencement of the winding up, cease to carry on its business, except so far as may be required for the beneficial winding up thereof: **Effect of voluntary winding up on business and status of company.**

Provided that the corporate state and corporate powers of the company shall, notwithstanding anything to the contrary in its articles, continue until it is dissolved.

229. Any transfer of shares, not being a transfer made to or with the sanction of the liquidator, and any alteration in the status of the members of the company, made after the commencement of a voluntary winding up, shall be void. **Avoidance of transfers, &c., after commencement of voluntary winding up.**

Declaration of Solvency.

230.—(1) Where it is proposed to wind up a company voluntarily, the directors of the company or, in the case of a company having more than two directors, the majority of the directors may, at a meeting of the directors held before the date on which the notices of the meeting at which the resolution for the winding up of the company is to be proposed are sent out, make a statutory declaration to the effect that they have made a full inquiry into the affairs of the company, and that, having so done, they have formed the opinion that the company will be able to pay its debts in full within a period, not exceeding twelve months, from the commencement of the winding up **Statutory declaration of solvency in case of proposal to wind up voluntarily.**

(2) A declaration made as aforesaid shall have no effect for the purposes of this Act unless it is delivered to the registrar of companies for registration before the date mentioned in subsection (1) of this section.

(3) A winding up in the case of which a declaration has been made and delivered in accordance with this section is in this Act referred to as "a members' voluntary winding up," and a winding up in the case of which a declaration has not been made and delivered as aforesaid is in this Act referred to as "a creditors' voluntary winding up."

234.—(1) Where a company is proposed to be, or is in course of being, wound up altogether voluntarily, and the whole or part of its business or property is proposed to be transferred or sold to another company, whether a company within the meaning of this Act or not (in this section called "the transferee company") the liquidator of the first-mentioned company (in this section called "the transferor company") may, with the sanction of a special resolution of that company, conferring either a general authority on the liquidator or an authority in respect of any particular arrangement, receive in compensation or part compensation for the transfer or sale, shares, policies, or other like interests in the transferee company, for distribution among the members of the transferor company, or may enter into any other arrangement whereby the members of the transferor company may, in lieu of receiving cash, shares, policies, or other like interests, or in addition thereto, participate in the profits of or receive any other benefit from the transferee company. **Power of liquidator to accept shares, &c., as consideration for sale of property of company.**

(2) Any sale or arrangement in pursuance of this section shall be binding on the members of the transferor company.

(3) If any member of the transferor company who did not vote in favour of the special resolution expresses his dissent therefrom

in writing addressed to the liquidator, and left at the registered office of the company within seven days after the passing of the resolution, he may require the liquidator either to abstain from carrying the resolution into effect, or to purchase his interest at a price to be determined by agreement or by arbitration in manner provided by this section.

(4) If the liquidator elects to purchase the member's interest, the purchase money must be paid before the company is dissolved, and be raised by the liquidator in such manner as may be determined by special resolution.

(5) A special resolution shall not be invalid for the purposes of this section by reason that it is passed before or concurrently with a resolution for voluntary winding up or for appointing liquidators, but, if an order is made within a year for winding up the company by or subject to the supervision of the court, the special resolution shall not be valid unless sanctioned by the court.

(6) For the purposes of an arbitration under this section, the provisions of the Companies Clauses Consolidation Act, 1845, or, in the case of a winding up in Scotland, the Companies Clauses Consolidation (Scotland) Act, 1845, with respect to the settlement of disputes by arbitration shall be incorporated with this Act, and in the construction of those provisions this Act shall be deemed to be the special Act, and "the company" shall mean the transferor company, and any appointment by the said incorporated provisions directed to be made under the hand of the secretary, or any two of the directors, may be made under the hand of the liquidator, or, if there is more than one liquidator, then of any two or more of the liquidators.

8 & 9 Vict. c. 16. 8 & 9 Vict. c. 17.

PART XI.

COMPANIES INCORPORATED OUTSIDE GREAT BRITAIN CARRYING ON BUSINESS WITHIN GREAT BRITAIN.

Companies to which Part XI applies.

343. This Part of this Act shall apply to all companies incorporated outside Great Britain which, after the commencement of this Act, establish a place of business within Great Britain, and to all companies incorporated outside Great Britain which have, before the commencement of this Act, established a place of business within Great Britain and continue to have an established place of business within Great Britain at the commencement of this Act.

Documents, etc., to be delivered to registrar by companies carrying on business in Great Britain.

344.—(1) Companies incorporated outside Great Britain which, after the commencement of this Act, establish a place of business within Great Britain, shall within one month from the establishment of the place of business, deliver to the registrar of companies for registration—

(a) a certified copy of the charter, statutes or memorandum and articles of the company, or other instrument constituting or defining the constitution of the company, and, if the instrument is not written in the English language, a certified translation thereof;

(b) a list of the directors of the company, containing such particulars with respect to the directors as are by this Act required to be contained with respect to directors in the register of the directors of a company;

(c) the names and addresses of some one or more persons resident in Great Britain authorized to accept on behalf of the company service of process and any notices required to be served on the company.

(2) The following companies, namely—

(*a*) companies incorporated outside Great Britain which, before the first day of April, nineteen hundred and nine, established a place of business and at the commencement of this Act continue to have a place of business within Great Britain;

(*b*) companies incorporated in Northern Ireland before the first day of January, nineteen hundred and twenty-two, which at the commencement of this Act have a place of business within Great Britain;

(*c*) companies incorporated in the Irish Free State which, before the twenty-seventh day of March, nineteen hundred and twenty-three, established a place of business and at the commencement of this Act continue to have a place of business within Great Britain;

shall, within one month from the commencement of this Act, deliver to the registrar for registration the documents and particulars specified in the last foregoing subsection.

(3) Companies to which this Part of this Act applies, other than the companies mentioned in subsections (1) and (2) of this section, shall, if at the commencement of this Act they have not delivered to the registrar the documents and particulars specified in paragraphs (*a*), (*b*) and (*c*) of subsection (1) of section two hundred and seventy-four of the Companies (Consolidation) Act, 1908, as amended by the Companies (Particulars as to Directors) Act, 1917, continue subject to the obligation to deliver those documents and particulars in accordance with the said Acts. 7 & 8 Geo. 5 c. 28

Return to be delivered to registrar where documents etc., altered.

346. If in the case of any company to which this Part of this Act applies any alteration is made in—

(1) the charter, statutes, or memorandum and articles of the company or any such instrument as aforesaid; or

(2) the directors of the company or the particulars contained in the list of the directors; or

(3) the names or addresses of the persons authorised to accept service on behalf of the company;

the company shall, within the prescribed time, deliver to the registrar for registration a return containing the prescribed particulars of the alteration.

Balance sheet of company carrying on business in Great Britain.

347.—(1) Every company to which this Part of this Act applies shall in every calendar year make out a balance sheet in such form, and containing such particulars and including such documents, as under the provisions of this Act it would, if it had been a company within the meaning of this Act, have been required to make out and lay before the company in general meeting, and deliver a copy of that balance sheet to the registrar for registration.

(2) If any such balance sheet is not written in the English language, there shall be annexed to it a certified translation thereof.

Obligation to state name of company, whether limited, and country where incorporated.

348. Every company to which this Part of this Act applies shall—

(1) in every prospectus inviting subscriptions for its shares or debentures in Great Britain state the country in which the company is incorporated; and

(2) conspicuously exhibit on every place where it carries on business in Great Britain the name of the company and the country in which the company is incorporated; and

(3) cause the name of the company and of the country in which the company is incorporated to be stated in legible characters in all bill-heads and letter paper, and in all notices, advertisements, and other official publications of the company; and

(4) if the liability of the members of the company is limited, cause notice of that fact to be stated in legible characters in every such prospectus as aforesaid and in all bill-heads, letter paper, notices, advertisements and other official publications of the company in Great Britain, and to be affixed on every place where it carries on its business.

Special Provisions as to Companies incorporated in Channel Islands or Isle of Man.

Obligation of company incorporated in Channel Islands or Isle of Man to deliver documents to registrar.

353. Where a company incorporated in the Channel Islands or the Isle of Man—

(1) after the commencement of this Act establishes a place of business in England or Scotland; or

(2) has before the commencement of this Act established and at the commencement of this Act continues to have a place of business in England or Scotland;

all the provisions of this Act requiring documents to be forwarded or delivered to, or filed with, the registrar of companies (other than provisions requiring the payment of a fee in respect of the registration of a company) shall apply to the company in like manner as if it were a company registered in England or Scotland, as the case may be, and if the company establishes places of business both in England and in Scotland the said provisions shall so apply as if the company were registered both in England and in Scotland:

Provided that, in the case of a company which has established a place of business before the commencement of this Act, the time within which documents must be forwarded or delivered to, or filed with, the registrar shall run from the commencement of this Act.

Part XII.

Restrictions on Sale of Shares and Offers of Shares for Sale.

Provisions with respect to prospectuses of foreign companies inviting subscriptions for shares or offering shares for sale.

354.—(1) It shall not be lawful for any person—

(a) to issue, circulate or distribute in Great Britain any prospectus offering for subscription shares in or debentures of a company incorporated or to be incorporated outside Great Britain, whether the company has or has not established, or when formed will or will not establish, a place of business in Great Britain, unless—

(i) before the issue, circulation or distribution of the prospectus in Great Britain a copy thereof, certified by the chairman and two other directors of the company as having been approved by resolution of the managing body, has been delivered for registration to the registrar of companies;

(ii) the prospectus states on the face of it that the copy has been so delivered;

(iii) the prospectus is dated;

(iv) the prospectus otherwise complies with this Part of this Act; or (*b*) to issue to any person in Great Britain a form of application for shares in or debentures of such a company or intended company as aforesaid, unless the form is issued with a prospectus which complies with this Part of this Act:

Provided that this provision shall not apply if it is shown that the form of application was issued in connection with a bona fide invitation to a person to enter into an underwriting agreement with respect to the shares or debentures.

(2) This section shall not apply to the issue to existing members or debenture holders of a company of a prospectus or form of application relating to shares in or debentures of the company, whether an applicant for shares or debentures will or will not have the right to renounce in favour of other persons, but. subject as aforesaid, this section shall apply to a prospectus or form of application whether issued on or with reference to the formation of a company or subsequently.

(3) Where any document by which any shares in or debentures of a company incorporated outside Great Britain are offered for sale to the public would, if the company concerned had been a company within the meaning of this Act, have been deemed by virtue of section thirty-eight of this Act to be a prospectus issued by the company, that document shall be deemed to be, for the purposes of this section, a prospectus issued by the company.

(4) An offer of shares or debentures for subscription or sale to any person whose ordinary business or part of whose ordinary business it is to buy or sell shares or debentures, whether as principal or agent, shall not be deemed an offer to the public for the purposes of this section.

(5) Section thirty-seven of this Act shall extend to every prospectus to which this section applies.

(6) Any person who is knowingly responsible for the issue, circulation or distribution of any prospectus, or for the issue of a form of application for shares or debentures, in contravention of the provisions of this section shall be liable to a fine not exceeding five hundred pounds.

(7) In this and the next following section the expressions "prospectus," "shares," and "debentures" have the same meanings as when used in relation to a company incorporated under this Act.

355.—(1) In order to comply with this Part of this Act a prospectus in addition to complying with the provisions of sub-paragraphs (ii) and (iii) of paragraph (*a*) of subsection (1) of the last foregoing section must— **Requirements as to prospectus.**

(*a*) contain particulars with respect to the following matters—

(i) the objects of the company;

(ii) the instrument constituting or defining the constitution of the company;

(iii) the enactments, or provisions having the force of an enactment, by or under which the incorporation of the company was effected;

(iv) an address in Great Britain where the said instrument, enactments or provisions, or copies thereof, and if the same are in a foreign language a translation thereof certified in the prescribed manner, can be inspected;

(v) the date on which and the country in which the company was incorporated;

(vi) whether the company has established a place of business in Great Britain, and, if so, the address of its principal office in Great Britain:

Provided that the provisions of sub-paragraphs (i), (ii), (iii) and (iv) of this paragraph shall not apply in the case of a prospectus issued more than two years after the date at which the company is entitled to commence business.

(*b*) subject to the provisions of this section, state the matters specified in Part I of the Fourth Schedule to this Act (other than those specified in paragraph 1 of the said Part I) and set out the reports specified in Part II of that Schedule subject always to the provisions contained in Part III of the said Schedule:

Provided that—

(i) where any prospectus is published as a newspaper advertisement, it shall be a sufficient compliance with the requirement that the prospectus must specify the objects of the company if the advertisement specifies the primary object with which the company was formed; and

(ii) in paragraph 3 of Part I of the said Fourth Schedule a reference to the constitution of the company shall be substituted for the reference to the articles; and

(iii) paragraph 1 of Part III of that Schedule shall have effect as if the reference to the memorandum were omitted therefrom.

(2) Any condition requiring or binding any applicant for shares or debentures to waive compliance with any requirement of this section, or purporting to affect him with notice of any contract, document, or matter not specifically referred to in the prospectus, shall be void.

(3) In the event of non-compliance with or contravention of any of the requirements of this section, a director or other person responsible for the prospectus shall not incur any liability by reason of the non-compliance or contravention, if—

(*a*) as regards any matter not disclosed, he proves that he was not cognisant thereof; or

(*b*) he proves that the non-compliance or contravention arose from an honest mistake of fact on his part; or

(*c*) the non-compliance or contravention was in respect of matters which, in the opinion of the court dealing with the case, were immaterial or were otherwise such as ought, in the opinion of that court, having regard to all the circumstances of the case, reasonably to be excused:

Provided that, in the event of failure to include in a prospectus a statement with respect to the matters contained in paragraph 15 of Part I of the Fourth Schedule to this Act, no director or other person shall incur any liability in respect of the failure unless it be proved that he had knowledge of the matters not disclosed.

(4) Nothing in this section shall limit or diminish any liability which any person may incur under the general law or this Act, apart from this section.

Restrictions on offering of shares for subscription or sale.

356.—(1) It shall not be lawful for any person to go from house to house offering shares for subscription or purchase to the public or any member of the public.

In this subsection the expression "house" shall not include an office used for business purposes.

(2) Subject as hereinafter provided in this subsection, it shall

not be lawful to make an offer in writing to any member of the public (not being a person whose ordinary business or part of whose ordinary business it is to buy or sell shares, whether as principal or agent) of any shares for purchase, unless the offer is accompanied by a statement in writing (which must be signed by the person making the offer and dated) containing such particulars as are required by this section to be included therein and otherwise complying with the requirements of this section, or, in the case of shares in a company incorporated outside Great Britain, either by such a statement as aforesaid, or by such a prospectus as complies with this Part of this Act:

Provided that the provisions of this subsection shall not apply—

(a) where the shares to which the offer relates are shares which are quoted on, or in respect of which permission to deal has been granted by any recognised stock exhange in Great Britain and the offer so states and specifies the stock exchange; or

(b) where the shares to which the offer relates are shares which a company has allotted or agreed to allot with a view to their being offered for sale to the public; or

(c) where the offer was made only to persons with whom the person making the offer has been in the habit of doing regular business in the purchase or sale of shares.

(3) The written statement aforesaid shall not contain any matter other than the particulars required by this section to be included therein, and shall not be in characters less large or less legible than any characters used in the offer or in any document sent therewith.

(4) The said statement shall contain particulars with respect to the following matters—

(a) whether the person making the offer is acting as principal or agent, and if as agent the name of his principal and an address in Great Britain where that principal can be served with process;

(b) the date on which and the country in which the company was incorporated and the address of its registered or principal office in Great Britain;

(c) the authorised share capital of the company and the amount thereof which has been issued, the classes into which it is divided and the rights of each class of shareholders in respect of capital, dividends and voting;

(d) the dividends, if any, paid by the company on each class of shares during each of the three financial years immediately preceding the offer, and if no dividend has been paid in respect of shares of any particular class during any of those years, a statement to that effect;

(e) the total amount of any debentures issued by the company and outstanding at the date of the statement, together with the rate of interest payable thereon;

(f) the names and addresses of the directors of the company;

(g) whether or not the shares offered are fully paid up, and, if not, to what extent they are paid up;

(h) whether or not the shares are quoted on, or permission to deal therein has been granted by, any recognised stock exchange in Great Britain or elsewhere, and, if so, which, and, if not, a statement that they are not so quoted or that no such permission has been granted;

(i) where the offer relates to units, particulars of the name and addresses of the persons in whom the shares represented by the units are vested, the date of and the parties to any document defining the terms on which those shares are held, and an address in Great Britain where that document or a copy thereof can be inspected.

In this subsection the expression "company" means the company by which the shares to which the statement relates were or are to be issued.

(5) If any person acts, or incites, causes or procures any person to act, in contravention of this section, he shall be liable to imprisonment for a term not exceeding six months or to a fine not exceeding two hundred pounds or to both such imprisonment and fine, and in the case of a second or subsequent offence to imprisonment for a term not exceeding twelve months or to a fine not exceeding five hundred pounds, or to both such imprisonment and fine.

(6) Where a person convicted of an offence under this section is a company (whether a company within the meaning of this Act or not), every director and every officer concerned in the management of the company shall be guilty of the like offence unless he proves that the act constituting the offence took place without his knowledge or consent.

(7) In this section, unless the context otherwise requires, the expression "shares" means the shares of a company, whether a company within the meaning of this Act or not, and includes debentures and units, and the expression "unit" means any right or interest (by whatever name called) in a share, and for the purposes of this section a person shall not in relation to a company be regarded as not being a member of the public by reason only that he is a holder of shares in the company or a purchaser of goods from the company.

(8) Where any person is convicted in England of having made an offer in contravention of the provisions of this section, the court before which he is convicted may order that any contract made as a result of the offer shall be void, and, where it makes any such order, may give such consequential directions as it thinks proper for the repayment of any money or the retransfer of any shares.

Where the court makes an order under this subsection (whether with or without consequential directions) an appeal against the order and the consequential directions, if any, shall lie to the High Court.

PART XIII.

MISCELLANEOUS.

Prohibition of Partnerships with more than Twenty Members.

Prohibition of partnerships with more than twenty members.

357. No company, association, or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any business (other than the business of banking) that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of some other Act of Parliament, or of letters patent, or is a company engaged in working mines within the stannaries and subject to the jurisdiction of the court exercising the stannaries jurisdiction.

Provisions relating to Banks.

358. No company, association, or partnership consisting of more than ten persons shall be formed for the purpose of carrying on the business of banking, unless it is registered as a company under this Act, or is formed in pursuance of some other Act of Parliament, or of letters patent. Prohibition of banking partnerships with more than ten members.

Miscellaneous Offences.

362. If any person in any return, report, certificate, balance sheet, or other document, required by or for the purposes of any of the provisions of this Act specified in the Eleventh Schedule hereto, wilfully makes a statement false in any material particular, knowing it to be false, he shall be guilty of a misdemeanor, and shall be liable on conviction in Scotland on indictment to imprisonment for a term not exceeding two years, with or without hard labour, and be liable on summary conviction in England or Scotland to imprisonment for a term not exceeding four months, with or without hard labour, and in either case to a fine in lieu of or in addition to such imprisonment as aforesaid: Penalty for false statement.

Provided that—

(a) the fine imposed on summary conviction shall not exceed one hundred pounds;

(b) nothing in this section shall affect the provisions of the Perjury Act, 1911. 1 & 2 Geo. 5. c. 6.

364. If any person or persons trade or carry on business under any name or title of which " Limited," or any contraction or imitation of that word, is the last word, that person or those persons shall, unless duly incorporated with limited liability, be liable to a fine not exceeding five pounds for every day upon which that name or title has been used. Penalty for improper use of word " Limited."

General Provisions as to Offences.

365.—(1) Where by any enactment in this Act it is provided that a company and every officer of the company who is in default shall be liable to a default fine, the company and every such officer shall, for every day during which the default, refusal or contravention continues, be liable to a fine not exceeding such amount as is specified in the said enactment, or, if the amount of the fine is not so specified, to a fine not exceeding five pounds. Provision with respect to default fines and meaning of " officer in default."

(2) For the purpose of any enactment in this Act which provides that an officer of a company who is in default shall be liable to a fine or penalty, the expression " officer who is in default " means any director, manager, secretary or other officer of the company, who knowingly and wilfully authorises or permits the default, refusal or contravention mentioned in the enactment.

366. All offences under this Act made punishable by any fine may be prosecuted under the Summary Jurisdiction Acts. Prosecution of offences punishable by fine.

367. The court imposing any fine under this Act may direct that the whole or any part thereof shall be applied in or towards payment of the costs of the proceedings, or in or towards the rewarding the person on whose information or at whose suit the fine is recovered, and subject to any such direction all fines under this Act shall, notwithstanding anything in any other Act, be paid into the Exchequer. Application of fines.

Saving as to private prosecutors.

368. Nothing in this Act relating to the institution of criminal proceedings by the Director of Public Prosecutions shall be taken to preclude any person from instituting or carrying on any such proceedings.

Saving for privileged communications.

369. Where proceedings are instituted under this Act against any person by the Director of Public Prosecutions or by or on behalf of the Lord Advocate, nothing in this Act shall be taken to require any person who has acted as solicitor for the defendant to disclose any privileged communication made to him in that capacity.

Service of Documents and Legal Proceedings.

Service of documents on company.

370.—(1) A document may be served on a company by leaving it at or sending it by post to the registered office of the company.

(2) Where a company registered in Scotland carries on business in England, the process of any court in England may be served on the company by leaving it at or sending it by post to the principal place of business of the company in England, addressed to the manager or other head officer in England of the company.

(3) Where process is served on a company under subsection (2) of this section, the person issuing out the process shall send a copy thereof by post to the registered office of the company.

Power of court to grant relief in certain cases.

372.—(1) If in any proceeding for negligence, default, breach of duty, or breach of trust against a person to whom this section applies it appears to the court hearing the case that that person is or may be liable in respect of the negligence, default, breach of duty or breach of trust, but that he has acted honestly and reasonably, and that, having regard to all the circumstances of the case, including those connected with his appointment, he ought fairly to be excused for the negligence, default, breach of duty or breach of trust, that court may relieve him, either wholly or partly, from his liability on such terms as the court may think fit.

(2) Where any person to whom this section applies has reason to apprehend that any claim will or might be made against him in respect of any negligence, default, breach of duty or breach of trust, he may apply to the court for relief, and the court on any such application shall have the same power to relieve him as under this section it would have had if it had been a court before which proceedings against that person for negligence, default, breach of duty or breach of trust had been brought.

(3) Where any case to which subsection (1) of this section applies is being tried by a judge with a jury, the judge, after hearing the evidence, may, if he is satisfied that the defendant ought in pursuance of that subsection to be relieved either in whole or in part from the liability sought to be enforced against him, withdraw the case in whole or in part from the jury and forthwith direct judgment to be entered for the defendant on such terms as to costs or otherwise as the judge may think proper.

(4) The persons to whom this section applies are the following—

(*a*) directors of a company:

(*b*) managers of a company:

(*c*) officers of a company:

(*d*) persons employed by a company as auditors, whether they are or are not officers of the company.

General Provisions as to Board of Trade.

376. The Board of Trade shall cause a general annual report of matters within this Act to be prepared and laid before both Houses of Parliament. Annual report by Board of Trade.

377. Any approval, sanction, or licence, or revocation of licence, which under this Act may be given or made by the Board of Trade may be under the hand of a secretary or assistant secretary of the Board, or of any person authorised in that behalf by the President of the Board. Authentication of documents issued by Board of Trade.

378.—(1) All documents purporting to be orders or certificates made or issued by the Board of Trade for the purposes of this Act and to be sealed with the seal of the Board, or to be signed by a secretary or assistant secretary of the Board, or any person authorised in that behalf by the President of the Board, shall be received in evidence and deemed to be such orders or certificates without further proof, unless the contrary is shown. Orders and certificates of Board to be evidence.

(2) A certificate signed by the President of the Board of Trade that any order made, certificate issued, or act done, is the order, certificate, or act of the Board, shall be conclusive evidence of the fact so certified.

379.—(1) The Board of Trade may alter Table A, the form in the Seventh Schedule and the table of fees in the Tenth Schedule to this Act, so that it does not increase the amount of fees payable to the registrar under the said Tenth Schedule, and may alter or add to Tables B, C, D and E in the First Schedule, and the forms in the Second and Sixth Schedules to this Act. Power to alter tables and forms.

(2) Any such table or form, when altered, shall be published in the London Gazette, and thenceforth shall have the same force as if it were included in one of the Schedules to this Act, but no alteration made by the Board of Trade in Table A shall affect any company registered before the alteration, or repeal, as respects that company, any portion of that Table.

Interpretation.

380.—(1) In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them (that is to say)— Interpretation.

"Annual return" means the return required to be made, in the case of a company having a share capital, under section one hundred and eight, and, in the case of a company not having a share capital, under section one hundred and nine, of this Act;

"Articles" means the articles of association of a company, as originally framed or as altered by special resolution, including, so far as they apply to the company, the regulations contained (as the case may be) in Table B in the Schedule annexed to the Joint Stock Companies Act, 1856, or in Table A in the First Schedule annexed to the Companies Act, 1862, or in that Table as altered in pursuance of section seventy-one of the last-mentioned Act, or in Table A in the First Schedule to the Companies (Consolidation) Act, 1908, or in that Table as altered in pursuance of section one hundred and eighteen of the last mentioned Act, or in Table A in the First Schedule to this Act; 19 & 20 Vict. c. 47.

"Book and paper" and "book or paper" include accounts, deeds, writings, and documents;

"Company" means a company formed and registered under this Act or an existing company;

"Existing company" means a company formed and registered under the Joint Stock Companies Acts, the Companies Act, 1862, or the Companies (Consolidation) Act, 1908, but does not include a company registered under the said enactments in Northern Ireland or the Irish Free State;

"Company within the stannaries" means a company engaged in or formed for working mines within the stannaries;

"The court" used in relation to a company means the court having jurisdiction to wind up the company;

"The court exercising the stannaries jurisdiction" used in relation to any proceedings means the county court in which the jurisdiction formerly exercised by the court of the vice-warden of the stannaries in respect of those proceedings is for the time being vested;

"Debenture" includes debenture stock, bonds and any other securities of a company whether constituting a charge on the assets of the company or not;

"Director" includes any person occupying the position of director by whatever name called;

"Document" includes summons, notice, order, and other legal process, and registers;

"The Gazette" means, as respects companies registered in England, the London Gazette and as respects companies registered in Scotland, the Edinburgh Gazette;

"General rules" means general rules made under section three hundred and five of this Act, and includes forms;

20 & 21 Vict. c. 14. 20 & 21 Vict. c. 49. 21 & 22 Vict. c. 91.

"Joint Stock Companies Acts" means the Joint Stock Companies Act, 1856, the Joint Stock Companies Acts, 1856, 1857, the Joint Stock Banking Companies Act, 1857, and the Act to enable Joint Stock Banking Companies to be formed on the principle of limited liability, or any one or more of those Acts, as the case may require; but does not include the Act passed in the eighth year of the reign of Her Majesty, Queen Victoria, chapter one hundred and ten, intituled An Act for the Registration, Incorporation, and Regulation of Joint Stock Companies;

"Memorandum" means the memorandum of association of a company, as originally framed or as altered in pursuance of any enactment;

"Prescribed" means as respects the provisions of this Act relating to the winding-up of companies, prescribed by general rules, and as respects the other provisions of this Act, prescribed by the Board of Trade;

"Prospectus" means any prospectus, notice, circular, advertisement, or other invitation, offering to the public for subscription or purchase any shares or debentures of a company;

"Real and personal," as respects Scotland, means heritable and moveable;

"The registrar of companies," or, when used in relation to registration of companies, "the registrar," means the registrar or other officer performing under this Act the duty of registration of companies in England or Scotland, or in the stannaries, as the case requires;

"Share" means share in the share capital of a company, and includes stock except where a distinction between stock and shares is expressed or implied;

"Table A" means Table A in the First Schedule to this Act.

(2) A person shall not be deemed to be within the meaning of any provision in this Act a person in accordance with whose directions or instructions the directors of a company are accustomed to act, by reason only that the directors of the company act on advice given by him in a professional capacity.

385.—(1) This Act may be cited as the Companies Act, 1929. Short title and commencement.

(2) This Act shall come into operation on the first day on which, by virtue of Orders made by His Majesty in Council under subsection (4) of section one hundred and eighteen of the Companies Act, 1928, all the provisions of that Act will be in operation. 18 & 19 *Geo. 5, c. 45.*

APPENDIX B

Order LIII B

Procedure on Applications under the Companies Act, 1929.

1. In this Order— Interpretation.

"The Act" means the Companies Act, 1929.

"The Court" includes any Judge of the Chancery Division and any Judge who for the time being exercises the jurisdiction of the High Court to wind-up Companies.

"Judge" means any such Judge as aforesaid and includes any Registrar, Master, or other officer exercising the powers of any such Judge.

"The petition," "The motion," "The summons" mean the petition, motion, or summons presented, made or taken out pursuant to this Order.

"The inquiry" means the inquiry made as to the debts claims or liabilities of or affecting the company or as to any such debts claims or liabilities ordered by the Court under this Order.

"The company" means the company to which any application under this Order relates.

Unless the context otherwise requires, expressions defined in the Act shall have the meanings so defined.

2. Except where otherwise provided in this Order every originating petition, notice of motion, or summons to which this Order relates may at the option of the petitioner or applicant be brought to and issued out of either—(*a*) such office or department as is specified in Order V, Rule 9, or (*b*) the office of the Registrar Companies (Winding Up).

3. The Rules of the Supreme Court for the time being in force and the general practice of that Court including the course of procedure and practice in Chambers shall apply as regards all proceedings in relation to the applications to which this Order relates so far as may be practicable, except if and so far as the Act or this Order otherwise provides. In particular if and when the Court is for the time being a Judge of the Chancery Division, the provisions of Order V, Rule 9A, shall apply to all such proceedings as being business assigned within the meaning of that Rule. Application of Rules of Supreme Court

4.—(1) Every petition, notice of motion and summons and all notices, affidavits and other proceedings under any petition, notice of motion or summons shall be intituled in the High Court of Justice, Chancery Division, and in the matter of the company, and in the matter of "The Companies Act, 1929." *Title of Petition.*

(2) An application for leave under subsection (4) of section two hundred and seventy-five of the Act shall be intituled in the matter of the company whose business was carried on with such intent or for such purpose as is mentioned in subsection (1) of that section and in the matter of the Companies Act, 1929.

5. The following applications shall be made by petition—

(*a*) Applications to confirm an alteration of objects under section five of the Act.

(*b*) Applications to confirm an alteration in the form of the constitution of the company by substituting a memorandum and articles for a deed of settlement under section three hundred and thirty-four of the Act.

(*c*) Applications to confirm a reduction of capital under section fifty-five of the Act.

(*d*) Applications to confirm the reduction of any capital redemption reserve fund under section forty-six (1) (*c*) of the Act.

(*e*) Applications to cancel, disallow or confirm any variation or abrogation of the rights of holders of special classes of shares under section sixty-one of the Act.

(*f*) Applications to sanction the issue of shares at a discount under section forty-seven of the Act.

(*g*) Applications to sanction a compromise or arrangement under section one hundred and fifty-three of the Act.

(*h*) Applications to restore a company's name to the register under section two hundred and ninety-five of the Act.

(*i*) Applications for relief by directors, managers or officers of a company or by persons employed as auditors by a company under section three hundred and seventy-two (2) of the Act

(*j*) Applications by a transferee company for the purpose of acquiring shares under section one hundred and fifty-five of the Act.

6. The following applications shall be made by motion or summons—

(*a*) Applications to rectify the register of members under section one hundred of the Act.

(*b*) Applications to extend the time for registration of a charge or to rectify any omission or mis-statement in any particular with respect to any change or in a memorandum of satisfaction under section eighty-five of the Act.

7. The following applications shall be made by motion—

(*a*) Applications for relief in case of default in delivering documents to the Registrar of Companies under section forty-two of the Act.

(*b*) Applications for relief in case of default by a private company in complying with the provisions of its articles under section twenty-seven (3) of the Act.

(*c*) Applications to inquire into the case of officers or agents of a company who have refused to produce any document or answer any question under section one hundred and thirty-five (5) or section one hundred and thirty-seven (3) of the Act and for orders under the said subsections.

8. The following applications shall be made by summons—

(*a*) Applications to inspect the register of members or the index of the members of a company or the annual return or to obtain copies of such register or annual return under section ninety-eight or section one hundred and ten (2) of the Act.

(*b*) Applications to inspect the minutes of proceedings at general meetings of a company or to be furnished with copies thereof under section one hundred and twenty-one (4) of the Act.

(*c*) Applications to inspect the register of directors under section one hundred and forty-four (5) of the Act.

(*d*) Applications to inspect copies of instruments creating a charge and to inspect the register of charges to be kept at the registered office of a company under section eighty-nine (3) of the Act.

(*e*) Applications to inspect any register of holders of debentures of a company or for orders that copies of any such register or of any trust deed for securing any issue of debentures shall be sent to the persons requiring the same under section seventy-three (5) of the Act.

(*f*) Applications for and in regard to meetings of a company under section one hundred and twelve or section one hundred and fifteen of the Act.

(*g*) Applications for meetings under section one hundred and fifty-three of the Act.

(*h*) Applications for facilitating reconstructions or amalgamations of companies under section one hundred and four of the Act where the matters to which such applications relate have not been dealt with, or fully dealt with, on the hearing of the petition to sanction the compromise or arrangement to which they relate.

(*i*) Applications in regard to certificates of shares debentures or debenture stock certificates and for costs under section sixty-seven of the Act.

(*j*) Applications for enforcing the duty of a company or any other person to make any return and for costs under sections three hundred and eleven or three hundred and fifteen of the Act.

(*k*) Applications for leave under subsection (4) of section two hundred and seventy-five of the Act.

(*l*) Applications to extend the time for registering documents under section five (6) or section three hundred and thirty-four of the Act or under Rule 12 of this Order.

(*m*) Applications to extend the time for the issue of shares at a discount under section forty-seven (1) (*d*) of the Act.

(*n*) Applications by a dissenting shareholder for the purpose of preventing the acquisition of his shares under section one hundred and fifty-five of the Act.

9. A respondent to an originating summons issued pursuant to Rule 6 or Rule 8 of this Order shall not be required to enter an appearance except where such summons is issued pursuant to paragraph (*h*) or paragraph (*j*) of Rule 8.

10.—(1) Where the petition has been presented pursuant to paragraphs (*a*), (*b*), (*c*), (*d*), (*e*), (*i*), or (*j*) of Rule 5 of this Order or where an order is sought under section one hundred and fifty-four of the Act, an application shall, in every case, be made, by summons in chambers, to the Judge, for directions as to the proceedings to be taken. Summons for directions.

(2) Upon the hearing of the summons, or upon any adjourned hearing or hearings thereof or any subsequent application, the Judge may make such order or orders and give such directions as he may think fit as to all the proceedings to be taken, and

more particularly with respect to the following matters, that is to say—

(*a*) The publication of notices.

(*b*) In cases where the Court orders an inquiry as to the debts, claims or liabilities of or affecting a company or as to any of such debts, claims or liabilities, the proceedings to be taken for settling the list of creditors entitled to object, including the dispensing with the observance of section fifty-six (2) of the Act as regards any class or classes of creditors; fixing the date with reference to which the list of such creditors is to be made out, and generally fixing a time for and giving directions as to all other necessary or proper steps in the matter whether expressly mentioned in any of the Rules of this Order or not.

In such cases the first order upon the summons for directions may be in the Form No. 30 in Appendix L with such variations as the circumstances may require.

Affidavit as to creditors.

11. In cases where the Court has ordered any such inquiry as aforesaid, the following provisions shall apply—

(*a*) The company shall, within seven days after such order or such further or other time as the Judge may allow, file in the Central Office of the High Court of Justice, or if the matter is pending in the office of the Registrar, in such office, an affidavit made by some officer or officers of the company competent to make the same, verifying a list containing so far as possible the names and addresses of the creditors of the company to whom such inquiry extends. The said list shall also contain the amounts due to the creditors therein named respectively in respect of debts, claims or liabilities to which the inquiry extends, or in the case of any such debt payable on a contingency or not ascertained or any such claim admissible to proof in a winding-up of the company the value, so far as can be justly estimated, of such debt or claim. Every such list and an office copy of every such affidavit shall be left at the chambers of the Judge or at the office of the Registrar not later than one day after the filing of the affidavit.

Form of Affidavit.

(*b*) The person making any such affidavit shall state therein his belief that the list verified by such affidavit is correct, and that there was not at the date so fixed as aforesaid any debt, claim or liability which, if that date were the commencement of the winding-up of the company, would be admissible in proof against the company, except the debts, claims and liabilities set forth in such list and any debts, claims or liabilities to which the inquiry does not extend, and shall state his means of knowledge of the matters deposed to in such affidavit. Such affidavit may be in the Form No. 31 set out in Appendix L, with such variations as the circumstances of the case may require.

Inspection of list of creditors.

(*c*) Copies of such list containing the names and addresses of such creditors, and the total amount so due to them (including the value of any debts or claims estimated as aforesaid), but omitting the amounts so due to them respectively, or (as the Judge shall think fit) complete copies of such list, shall be kept at the registered office of the company and at the offices of the solicitors to the company and their London agents (if any) and any person desirous of inspecting the same may at any time during the ordinary hours of business inspect and take extracts from the same on payment of the sum of one shilling.

(*d*) The company shall, within seven days after the filing of such affidavit, or such further or other time as the Judge may allow, send to each creditor whose name is entered in the said list a notice stating the amount of the proposed reduction of capital, the effect of the order directing the inquiry and the amount or estimated value of the debt or the contingent debt or claim or both for which such creditor is entered in the said list, and the time (such time to be fixed by the Judge) within which, if he claims to be entitled to be entered on such list as a creditor for a larger amount, he must send in his name and address, and the particulars of his debt or claim, to the solicitor of the company; and such notice shall be sent through the post in a prepaid letter addressed to each such creditor at his last known address or place of abode, and may be in the form or to the effect of the Form No. 32 set out in Appendix L, with such variations as the circumstances of the case may require. Notice to creditors.

(*e*) Notice of the presentation of the petition, of the effect of the order directing the inquiry and of the list of creditors shall, after the filing of the affidavit mentioned in paragraph (*a*) of this Rule be published at such times, and in such newspapers as the Judge shall direct. Every such notice shall state the amount of the proposed reduction of capital, and the places where the aforesaid list of creditors may be inspected, and the time within which creditors of the company who are not but are entitled to be entered on the said list, and are desirous of being entered therein, must send in their names and addresses, and the particulars of their debts or claims, and the names and addresses of their solicitors (if any) to the solicitor of the company. Such notice may be in the Form No. 33 set out in Appendix L, with such variations as the circumstances of the case may require. Advertisement of petition and of list of creditors.

(*f*) The company shall, within such time as the Judge shall direct, file in the Central Office, or in the office of the Registrar as the case may be, an affidavit made by the person to whom the particulars of debts or claims are, by such notices as are mentioned in paragraphs (*d*) and (*e*) of this Rule required to be sent in, stating the result of such notices respectively and verifying a list containing the names and addresses of the persons (if any) who shall have sent in the particulars of their debts or claims in pursuance of such notices respectively, and the amounts of such debts or claims, and some competent officer or officers of the company shall join in such affidavit, and shall in such list distinguish which (if any) of such debts and claims are wholly, or as to any and what part thereof, admitted by the company, and which (if any) of such debts and claims are wholly, or as to any, and what part thereof, disputed by the company, and which (if any) of such debts and claims are alleged by the Affidavit as to result of paragraphs (*d*) and (*e*) of this Rule.

company to be wholly or as to any and what part thereof not included in the inquiry. Such affidavit shall also state which of the persons who are entered in the list as creditors and which of the persons who have sent in particulars of their debts or claims in pursuance of such notices as aforesaid have been paid or have consented to the proposed reduction. Such affidavit may be in the Form No. 34 set out in Appendix L, with such variations as the circumstances of the case may require; and such list and an office copy of such affidavit shall be left at the chambers of the Judge or at the office of the Registrar within such time as the Judge shall direct.

Proceedings where claim not admitted.

(*g*) If the company contends that person is not entitled to be entered in the list of creditors in respect of any debt or claim whether admitted or not or if any debt or claim, the particulars of which are so sent in, shall not be admitted by the company at its full amount, then and in every such case, unless the company is willing to appropriate in such manner as the Judge shall direct the full amount of such debt or claim, the company shall, if the Judge think fit so to direct, send to the creditor a notice that he is required to come in and establish his title to be entered on the list or as the case may be to come in and prove such debt or claim, or such part thereof as is not admitted by the company, by a day to be therein named, being not less than four clear days after such notice, and being the time appointed by the Judge for adjudicating upon such titles, debts and claims and such notice shall be sent in the manner mentioned in paragraph (*d*) of this Rule, and may be in the Form No. 35 set out in Appendix L, with such variations as the circumstances of the case may require.

Costs of proof.

(*h*) Such creditors as come in to prove their titles, debts or claims in pursuance of any such notice as is mentioned in paragraph (*g*) of this Rule shall be allowed their costs of proof against the company and be answerable for costs in the same manner as in the case of persons coming in to prove debts under an administration judgment.

Certificate as to creditors.

(*i*) The result of the settlement of the list of creditors shall be stated in a certificate by the Master or by the Registrar as the case may be, and such certificate shall state what debts or claims (if any) have been disallowed, and shall distinguish the debts or claims the full amount of which the company is willing to appropriate, and the debts or claims (if any) the amount of which has been fixed by inquiry and adjudication in manner provided by section fifty-six (2) of the Act, and this Order, and the debts or claims (if any) the full amount of which the company does not admit or is not willing to appropriate or the amount of which has not been fixed by inquiry and adjudication as aforesaid; and shall show which of the creditors have consented to the proposed reduction, and the total amount of the debts due to them, and the total amount of the debts or claims the payment of which has been secured in manner provided by section fifty-six (2) of the Act and the persons to or by whom the same are due or claimed. The said certificate shall also state what creditors have under paragraph (*g*) of this Rule come in and sought to establish their title to be entered on the list and whether such claims have been allowed or not, but it shall not be necessary to make in such certificate any further or other reference to any creditors who are not entitled to be entered in the list or to any debts or claims to which the inquiry does not extend or to show therein the several amounts of the debts or claims of any persons who have consented to the proposed reduction or the payment of whose debts or claims has been secured as aforesaid.

(j) The consent of any creditor, whether in respect of a debt due or presently due or a debt payable on a contingency or not ascertained or a claim admissible to proof in a winding-up of the company may be evidenced in any manner which the Judge shall think reasonably sufficient having regard to the amount of his debt or claim and all the circumstances of the case. Evidence of consent of creditor.

(k) The petition shall not be heard until the expiration of at least eight clear days from the filing of such certificate as is mentioned in paragraph (i) of this Rule. Certificate before hearing of petition.

(l) Before the hearing of the petition, notices stating the day on which the same is appointed to be heard shall be published at such times and in such newspapers as the Judge shall direct. Such notices may be in the Form No. 36 set out in Appendix L, with such variations as the circumstances of the case may require. Advertisement of hearing

12. Unless in any particular case the Court shall otherwise direct every order sanctioning the issue of shares at a discount shall contain a direction that an office copy of such order shall be delivered to the Registrar of Companies for registration within seven days from the date thereof or within such further or other time as the Court may allow and that the order shall not take effect till such office copy has been so delivered. Delivery of office copy Order under section 47 of the Act to Registrar of Companies.

13. Where an application is made under section one hundred and fifty-four of the Act the order may be in the Form No. 37 set out in Appendix L, with such variations as the circumstances of the case may require. Form of Order under section 154 of the Act.

14. Where a matter is pending in a District Registry, affidavits shall be filed and proceedings shall be taken in such matter in the District Registry. District Registries.

15. Appeals from orders made under the Act by a County Court and appeals under subsection (8) of section three hundred and fifty-six of the Act shall be heard by a Divisional Court of the Chancery Division. Rules 7, 8, 10, 11, 12, 14, 16 and 17 of Order LIX shall apply to such appeals, the words "Office of the Registrar Companies Winding Up" being deemed to be substituted in Rule 11 of the said Order for the words "Crown Office Department of the Central Office." Appeals from inferior Courts.

The Forms set out in Appendix L to these Rules shall stand as Forms 30, 31, 32, 33, 34, 35, 36 and 37 respectively in Appendix L to the Rules of the Supreme Court, 1883. Forms.

These Rules may be cited as the Rules of the Supreme Court (Companies), 1929, and shall come into force on the first day of November, 1929. Citation.

Commencement of Order.

These Rules shall apply to all proceedings in the High Court of Justice under the Companies Act, 1929, other than proceedings for carrying into effect the objects of the Act so far as relates to the winding-up of a company whether commenced before or after the day on which they come into operation, but every such proceeding taken before that day shall have the same validity as it would have had if these Rules had not been made.

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