Company Law Amendment Committee

1925-26

REPORT

Presented to Parliament by
Command of His Majesty

COMPANIES ACTS, 1908 to 1917

MINUTES OF APPOINTMENT.

The Board of Trade are hereby pleased to appoint the undermentioned gentlemen to be a Committee to consider and report to them what amendments are desirable in the Companies Acts, 1908 to 1917:-

Mr. Wilfield Greene, K.C. (Chairman),
Mr. A. Andrewes-Uthwatt
The Hon. R. H. Brand, O.M.G
Mr. Harold Brown
Mr. Archibald H. Campbell
Mr.William Cash, F.C.A.,
Mr. E.R. Eddison, C.M.G.,
Sir Edward Manville,
Sir James Martin,
Mr. W.E. Mortimer,
Mr. Arthur Stiebel,
and
Mr. R. Hugh Tennant.

The Board are further pleased to appoint Mr. W.W. Coombs, M.B.E., to be Secretary to the Committee.

Board of Trade,
6th January, 1925.

(Signed) P. Cunliffe–Lister.

Read this Board's minute dated the 6th January, 1925 appointing a Committee to consider and report to them what amendments are desirable in the Companies Acts, 1908 to 1917.
The Board of Trade are hereby pleased to appoint the undermentioned gentlemen to be additional members of the said Committee: -

Sir William McLintock, K.B.E., C.V.O.,
Mr. G.W. Wilton, K.C.

Board of Trade,
19th February, 1925

(Signed) P.Cunliffe-Lister

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APPENDIX.

To the Right Honourable
Sir Philip Cunliffe-Lister, K.B.E., M.P.,
President of the Board of Trade.

SIR,

PRELIMINARY.

1. By Minutes dated the 6th January and 19th February, 1925, the Board of Trade were pleased to appoint this Committee to consider and report what amendments are desirable in the Companies Acts, 1908 to 1917.

2. Our terms of reference extend to the whole filed of company law. This is the first general review of the operation of the Companies Acts which has taken place since the Loreburn Committee was appointed in the year 1905, for the matters dealt with by the Wrenbury Committee in the year 1918 were limited in scope. Our task has therefore been a heavy one.

3. Before embarking upon the examination of witnesses, the Committee caused a memorandum setting out the various headings under which suggestions were invited, to be sent to such individuals, corporations and institutions as the Committee thought best able to assist them, and in response thereto the Committee received a large number of careful and suggestive observations which have already been printed with the oral evidence taken. The memorandum itself together with the names of those to whom it was sent is printed in the appendix to this Report. In addition, a special memorandum (also printed in the appendix) dealing with matters of Scottish Law was sent out. The observations thus received by the Committee were supplemented by the oral evidence of witnesses, and the Committee desire to place on record their appreciation of the help which they have received from those who have submitted written suggestions as well as from those who have attended to give evidence.

4. The Committee has held 38 meetings, and has examined 39 witnesses whose names appear in the appendix. The Committee has also received a very large number of suggestions from other sources to all of which is has given careful consideration.

5. The total number of companies with a share capital on the register at the 31st December, 1924 (the latest date to which figures are available) was as follows:-

	Public	Private	Total.
England……..	8,193	76,189	84,382
Scotland…….	916	5,620	6,536
	9,109	81,809	90,918

6. The system of company law and practice in force in England and Scotland has been gradually evolved to meet the needs of the community at large and the commercial community in particular. We consider that in general it fulfils this object in a highly satisfactory manner. It is a system well understood by those who have to deal with in, it has stood the test of years, and in our opinion should not be altered in any matter of principle except where alteration is imperatively demanded.

7. The evidence satisfies us that the great majority of limited companies both public and private are honestly and conscientiously managed. Cases in which fraud or lesser forms of dishonesty or improper dealing occur are comparatively few, and the public interest which such cases naturally arouse tends to divert attention from the vast number of honestly conducted concerns and to create an exaggerated idea of the evils connected with limited companies and their activities. We are further satisfied that the abnormal conditions prevailing during and since the war have been largely responsible for some of the matters which have given rise to unfavourable public comment, and we are of opinion that the return to more normal conditions will tend to eliminate certain unsatisfactory features which have shown themselves in recent years.

8. Many of the suggestions made to us show that the idea that fraud and lesser malpractices can be stopped by the simple expedient of a prohibition in an Act of Parliament, dies hard. Other witnesses with a view to making such malpractices impossible have advocated the imposition of statutory regulations and prohibitions calculated, not merely to put a stop to the activities of the wrongdoer, but to place quite intolerable fetters upon honest business. It is often forgotten that in dealing with a matter such as company law, which affects so closely the whole business life of the nation, a certain amount of elasticity is essential, if the system is to work in practice.

9. Impressed by these considerations we have refrained from recommending any important change which was not, in our view, quire clearly demanded and justified by the evidence before us. We realise that the system of limited liability leaves opportunities for abuse. Some of these we consider to be part of the price which the community has to pay for the adoption of a system so beneficial to its trade and industry. It appears to us, as a matter of general principle, must undesirable, in order to defeat an occasional wrongdoer, to impose restrictions which would seriously hamper the activities of honest men and would inevitably re-act upon the commence and prosperity of the country.

10. A number of suggestions have also been made to us, the object of which was to remove certain of the restriction imposed by the present law upon

limited companies and those concerned in their formation and management. Here again, we have not felt justified in making any recommendations except such as appeared to us to be called for by a strong body of business opinion and as to which we have satisfied ourselves that no undesirable consequences are likely to follow. In dealing with in instrument so nicely balanced as the existing law relating to limited companies there is always the danger that some alteration, apparently desirable in itself, may have unexpected repercussions throughout the whole mechanism.

11. Nevertheless, there are a number of matters of principle as to which we are unanimous in recommending an alteration of the law. These recommendations are set forth in the First Part of this Report which also contains our general observations on the principal matters brought to our attention. In addition, there are numerous alterations of a minor character which we recommend and these are set out in the Second Part of the Report. We refer to the latter as minor alterations because they do not affect any broad question of principle. They are none the less in our view very desirable, since they will tend to smooth away difficulties and remove anomalies in the existing law. In the Third Part of the Report we set out recommendations with regard to the law of Scotland. References throughout are to the Companies (Consolidation) Act, 1908, except where otherwise stated.

12. We desire respectfully to urge that if an amending Act be passed by Parliament it should be followed immediately by a consolidating Act. Constant reference has to be made to the Companies Acts by business men and the advantages of having the Statute Law embodied in a single code which can easily be referred to without the necessity for cross-reference are obvious.

13. We wish to express our appreciation of the way in which Mr. W.W. Coombs, M.B.E., has performed his duties as secretary to the Committee. His ability and industry have been of the greatest assistance to us in our work.

PART 1.
OBSERVATIONS AND RECOMMENDATIONS.

A – Constitution and Incorporation.
Memorandum and Articles of Association.

14. The Wrenbury Committee in paragraphs 53 to 55* of its Report criticises the modern form of memorandum and recommends that the objects of the company should alone be inserted in the memorandum and its powers relegated to the articles. While recognising that the distinction between objects and powers is a logical one, we venture respectfully to doubt the possibility of observing it in practice. In any case, upon the evidence before use, we do not find ourselves able to concur in the recommendations of the Wrenbury Committee. The weight of commercial

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* *Paragraphs 53 to 55 of the Report of the Wrenbury Committee.*

53. The companies Acts require that the memorandum of association of a company shall state "the objects of the Company." It was laid down more than forty years ago in Ashbury Railway Carriage Company v. Riche, L.R.7, H.I., 653, that the memorandum of association is the company's charter and defines the limitation of its activities and the destination of its capital. IT is perhaps not matter of surprise that under these circumstances commercial men looked to see whether in the memorandum of association were to be found words justifying the particular commercial transaction into which they contemplated entering. But in so doing they forgot that which the Act required the memorandum to state was "the objects of the company," and not the powers by the exercise of which those objects were to be attained. For instance, the object of the company might be to open and carry on an hotel at Dover. To achieve that object the company must have poser to hold land to erect a building, to buy furniture, to employ staff of servants, and so on. But none of these were objects. They might and probably would further want to borrow money, giving very likely a mortgage on the property. But borrowing was not their "object"; It was and act which the would do if they could in order to achieve their object, viz., to run their hotel as a commercial success. However, an evil practice grew up of crowding into the memorandum of association words that would cover every conceivable act which the corporation could under any circumstances desire to do. Objects were buried and concealed in and accumulated mass of powers. The resulting mischief was twofold. The intending investor who ought to have been informed with reasonable clearness as to what was the trade in which his money was to be risked could often learn nothing except that his money might be used for any conceivable purpose. And the intending creditor was deprived of the advantage of knowing what his intending debtor could and could not do in the employment of its capital.

54. This abuse reached its climax in the case of the Angle-Cuban Company, recently argued in the House of Lords under the name of Cotman v. Brougham. The memorandum of association of the company there in question after 30 paragraphs of the widest kind, very few of which defined objects at all, concluded with a clause to the effect that the objects set forth in any paragraph should not be restricted by the terms of any other paragraph and that none of the paragraphs or the objects specified in them should be deemed subsidiary or auxiliary to the objects mentioned in the first paragraph. Having regard to the provision in Section 17

opinion is decidedly against the suggested change, and the circumstance that in some cases, such as that of the Angle-Cuban Company referred to in the Wrenbury Report, abuses occur does not in our view justify any changes in the law.

A further suggesting was made to us that many common form clauses might usefully be set out in the Act so as to shorten the memorandum. Although this might be found convenient in the case of some smaller companies we do not recommend it. Commercial opinion is against it and the desirability of having one document only to which reference can be made when a question of ultra vires arises appears to us to outweigh all other considerations. The experience of Table A. shows the danger of incorporating statutory common forms which tend rapidly to get out of date and this danger would for obvious reasons be more serious in the case of the memorandum.

Table A.

15. We have purposely refrained from making any recommendations for the revisions of Table A.

Name.

16. (a) At present the only restrictions on the name of a company are those contained in section 8.

The evidence shows that the use of the words referred to in our recommendations below is calculated to mislead the public and at present there is no means of preventing it.

(b) We have considered whether some restriction ought to be placed on the use of such words as "British," "National," &c., but as any such restriction would presumable have to be based on the nationality of those connected with the company, it appeared to us that questions of public policy would arise which did not fall within the scope of our reference.

Of the Act of 1908 that the Registrar's certificate of incorporation is conclusive evidence that all requirements of the 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 the Act, the House of Lords was compelled to assume that this was a memorandum of association which stated "the objects of the company."

55. We recommend that the Act be amended by providing that the memorandum of association must state the objects but must not state the powers of the company, that such powers of the company as it is thought necessary to state shall be stated in the articles, and that there should be introduced into the Act a section providing that every company shall have certain powers as detailed in the section except in so far as the articles of association exclude them. The power of borrowing of subscribing for shares in other companies of purchasing other businesses and a number of similar and other powers would then find their proper place and the memorandum of association would be reduced to its proper function in defining the trade of the company or other the object which it is to pursue with a view to earning profit.

within the scope of our reference. The matter is dealt with in paragraph 37* of the Report of the Wrenbury Committee.

(c) We are unable to accept suggestions made to us to the effect that the use of names of towns and commodities or the word "Exchange" should be prohibited.

RECOMMENDATIONS

17. I. We recommend that no company should without the consent of the Board of Trade be registered with a name including (I) the words "Royal" or "Imperial" or any other title or name suggesting the patronage of His Majesty, or any member of the Royal Family or connection with His Majesty's Government or (ii) the words "Bank" or "Banking."

The fact that a company had obtained an such consent would not, of course imply Government approval or recognition and a penalty might be imposed on anyone who made use of the fact that such consent had been obtained for the purpose of inducing people to believe that a company had such approval or recognition.

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* *Paragraph 37 of the Report of the Wrenbury Committee*

37. We have a further recommendation to make in the direction of disclosure. The name by which a company is called is from may points of view a matter of no moment. But if a name be used which conveys a misrepresentation of the nationality of the company it may have a wide commercial effect. We think that there should be machinery for controlling the name employed so that a representation of nationality where the company in not British shall as far as possible be prevented. For this purpose we recommend that:-

(a) When application is made for registration of a new company and the name suggested states or conveys expressly or by implication British nationality the Registrar may require to be satisfied upon the question of nationality and may refuse to accept the name unless the articles of association contain clauses providing to the satisfaction of the Registrar or the Board of Trade that the new company will in fact be British. This would apply not only when the work British or some similar work forms part of the name, but to all cases in which an implication of British nationality arises which in the opinion of the Registrar would be liable to mislead. The question whether the proposed name is liable to mislead or not should be left largely to the discretion of the Registrar. For the question whether a name will mislead or not is necessarily matter of opinion.

(b) When an existing company is trading under a name which states or conveys expressly or, in the opinion of the Registrar, by implication British nationality and the Registrar is satisfied that the nationality is not British, he may (subject to a right in the company to apply to the Court) call upon the company to change its name to an approved name, and if within a limited time the company fails to do so the Registrar may (subject to the like right) by order under his hand change the name to such name as he approves, and that name shall there forward and until some further authorised alteration of name be the statutory name of the company.

[Note – There are cases in which the Registrar has already assumed that he has a power of control over such words as "Royal" or "Imperial." If legislation such as we suggest is adopted, it should be so expressed as to give the Registrar a discretion in that class of case.]

II. We recommend that the use of the words "Chamber of Commerce" should be confined to companies registered under section 20. Chambers of Commerce fulfils important functions and the use of the name by companies registered in the ordinary way is calculated to mislead.

B – Share Capital

Capital Duties.

18. Many witnesses to those testimony we attach weight call attention to the serious handicap on enterprise cause by the present high rate of capital duty, but we recognise that this magger falls outside the scope of our reference.

Issue of Shares at a Discount.

19. This matter was fully dealt with in the Report of the Wrenbury Committee, paragraphs 45 and 46. * There is a substantial but by no means

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* *Paragraphs 45 and 46 of the Report of the Wrenbury Committee.*

45. Issue of Shares at a Discount – The original principle as stated in Lord Macnaghten's words has been already so infringed that is cannot be said to continue to exist as a cardinal principle. The evidence before us is that commercially the issue of shares at a discount is desirable. There is we agree no principle in this. It is a concession to commercial experience. Principle, however, has as instanced above already been abandoned, and issue of shares at a discount is but accepting in practice that which has already been conceded in fact by allowing payment of commission in consideration of a person subscribing for shares.

46. At the same time we think that the amount of discount should be so controlled at that the provisions of the Act in respect of capital shall not be illusory. There should be a statutory limit to the discount allowable, and if the disease is so deep-rooted as that the statutory limit is not sufficient for the purpose the matter should be left to winding up. For these purposes the issue of shares at a discount should be controlled as follows. It should not be allowed at the beginning or at the earlier stages of a company's career. It should be allowed only when the company's issued share capital is at a discount, and a maximum percentage of discount should be fixed. We recommend that five years after commencement of business shall be the earliest date for issue, and that the price shall not be lower than five per cent, below the market value of the similar existing shares in issue if there be a market price, or five per cent below the price at which the existing shares would upon transfer be taken and ad valorem stamp duty under the Stamp Act if there is o market price, and that the discount shall never exceed 50 per cent. Thus, if the £10 share stood in the market at £6 the price should not be lower than £5 14s that is to say the discount should not exceed £4 6s., and in no case should the discount exceed £5. Further there should be ample provision for complete publicity. The balance sheet, the annual statement, and every prospectus should state in plain terms the discount which has been given. Section 89 of the Act of 1908 should be so amended as to exclude commission payable to a person in consideration of his subscribing for shares and to confine the word "commission" to meaning either brokerage which is a payment made for services rendered or underwriting commission which is a payment made for a guarantee given.

overwhelming body of commercial opinion in favour of giving companies power to issue shares at a discount and there is no doubt that in many cases such a power could be extremely useful. The Committee as a whole is not prepared to dissent from the findings of the Wrenbury Committee. Some of us think that the change might be attended by risks which it is not easy to guard against and in particular that the consequential inflation of the nominal issued capital of a company might lead to unsound finance. Other members of the Committee take the view that the suggestion that shares cannot be issued at a discount under the existing law is misleading, seeing that shares can be issued as fully paid up for goodwill, patents and other items of that character, the value of which is uncertain and fluctuating, and that if the issue of shares at a discount were frankly authorised and the public notified that shares could be issued at a discount it might induce the public to realise that the nominal value of a share is no guide whatever as to its intrinsic worth, and that a share is nothing more than a taken representing a certain proportion of the profits and assets of the company. For the same reason some members of the Committee are inclined to favour the issue of shares of no par value, for if a share has no nominal value on the face of it a person taking such share cannot be misled as to the value of the share by the amount printed on the face of the certificate as the nominal value thereof. If the recommendation of the Wrenbury Committee is adopted we think that the limit of five per cent below market value would be increased to ten per cent.

Reduction of Capital

20. (a) We consider that the present law and practice with regard to reduction of capital, with the exceptions below mentioned, is satisfactory and should not be altered. In particular we are unable to adopt the suggestion made by some witnesses that in cases where creditors are not affected, the sanction of the Court should not be necessary. Although ordinary reductions receive the sanction of the Court without difficulty we are of opinion that the necessity for that sanction is an important safeguard, while the procedure itself is quick and inexpensive. On the other hand the evidence is unanimous that the use of the words "and reduced" fulfils no useful purpose in the ordinary case, and, moreover, tends unnecessarily to affect the company's credit.

(b) The absence of a wide discretion in the Court to dispense with lists of creditors has frequently led to inconvenience and expense.

(c) Section 40 should, in our opinion, be repealed (see the criticism of this section in Buckley on the Companies Acts, 10th Edition, pages 125, et seq.)

RECOMMENDATIONS.

21. We therefore recommend that :-
    I. Section 40 should be repealed.
    II. Where capital is reduced the obligation imposed by section 48, to use the words "and reduced" before the hearing of the petition should be abolished and the company should only be bound to use the words if the Court on making the confirmatory order for special reasons so directs.
    III. The Court should be empowered in special circumstances to dispense with a list or consent of creditors even where there is a diminution of liability in respect of unpaid share capital or payment to a share-holder of paid up share capital.

Modification of Rights Clauses.

22. Modification of rights clauses in articles sometimes operate so as to cause hardship. This is particularly the case where, for example, preference shareholders whose rights it is proposed to cut down, hold ordinary shares which will be benefited by the modification and use their votes as preference shareholders at the preference shareholders' meeting to secure such benefit to themselves against the interest of the general body of preference shareholders. Modifications of the rights of preference shareholders have been carried out in a number of cases since the war, the reason being in many instances that companies have found themselves unable to pay the high rate of dividend carried by preference issues made during the war and the period immediately following the armistice. Modification of rights clauses serve a most useful purpose and we do not think that their operation should be restricted to any serious extent. Nor do we think it practicable to prohibit the holders of e.g., ordinary shares from voting at a meeting of preference shareholders. We consider that the remedy lies in giving to the Court in proper cases a power to review the resolution of a class meeting and our recommendation will, in our opinion, be sufficient to prevent injustice without interfering with the beneficial operation of these clauses. In framing it, we have borne in mind the importance of a speedy decision.

RECOMMENDATION

23. We recommend that where under a provision in the articles a resolution is passed at a separate meeting of holders of shares of a particular class or an agreement is entered into whereby the rights or privileges of such class are to be affected, the holders of not less than 15 per cent in the aggregate of the issued shares of that class who did not vote in favour of the resolution, should be entitled, by one or more of their number appointed for the

purpose to apply to the Court in a summary way to have such resolution disallowed, and where such an application is made, the resolution should not have effect unless and until it is confirmed by the Court. This should be absolutely conditional on the summons being taken out within seven days from the passing of the resolution, and the Court should have no power to extend the time. On the hearing of the application, any mergers of the class should be entitled to be heard. The decision of the Judge of first instance should be final and conclusive.

Distinguishing Numbers of Shares.

24. Upon the evidence before us, the matter stands in the same position as it did when the Wrenbury Committee reported (see paragraph 62 of its Report)* and we do not recommend any change.

Certificates of Shares, &c.

25. Section 92 of the Act requires certificates of shares, debentures and certificates of debenture stock to be complete and ready for delivery within two months of allotment or registration. In the course of the evidence we heard many complaints as to the time that clapses between the lodgment of a transfer and the issue of a certificate.

RECOMMENDATION.

26. We recommend that certificates, etc., should be complete and ready for delivery within two months of the lodgment of a transfer duly stamped and otherwise in proper order. This should not apply where the company is entitled to refuse to register the transfer, but in such case any refusal should be notified within the two months. The company should (as at present) be entitled to contract out of the section by the conditions of issue. A summary remedy should be given to any person aggrieved by non-compliance with the section.

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* *Paragraph 62 of the Report of the Wrenbury Committee.*

62. Section 22 of the Act 1908 requires that each share shall be distinguished by its appropriate number. The present system of denoting numbers attached to shares creates a very large amount of clerical work. Shares of very small nominal amount-not infrequently as low as a shilling, and very frequently as law as £1- are now common, and this is true of very large concerns. The preparation and checking of transfers and the records in the company'' books in such cases involve a large amount of clerical work. We have been pressed in evidence by gentlemen who represented the Institute of Secretaries to recommend that upon these grounds the distinguishing numbers of shares shall be abandoned. We are not satisfied that as regards fully paid shares- or even as regards partly paid shares- the distinguishing numbers are essential for any useful purpose. But we find that the Committee of the Stock Exchange and some of the Banks wish to retain them (although others do not), while the Chambers of Commerce are divided in opinion. On the whole we do not in this state of opinion recommend that distinguishing numbers be abandoned.

Shares of No Par Value

27. Shares of no par value have recently been introduced in Canada, the United States and certain other countries. Their adoption in this country would involve some alterations in the law of a radical nature and although we have heard a certain amount of evidence on the subject we do not feel able to make any recommendation. There appears to be some demand in this country for shares of this nature and we think that the system as it works in other countries might usefully be studied, by the sources of information open to us have not enable us to go deeply into the matter. One of the advantages which might be expected to follow from the adoption of the principle of shares of not pare value has already been referred to in para. 19 of this Report under the heading "Issue of shares at a discount".

Redeemable Preference Shares

28. We think that the power to issue redeemable preference shares would prove useful in certain cases and provided that proper safeguards are adopted we see no reason shy this power should not be given. Our recommendation could, however, only be made effective if a reduction in capital duties were made in the case of redeemable preference shares, and if a low rate is charged on the re-issue of such shares.

RECOMMENDATION.

29. We recommend that a company taking the necessary power in its articles should be empowered to issue redeemable preference shares subject to the following provisions:-
    (a) No redemption should be allowed except out of profits which would otherwise be available for dividend or out of the proceeds of a fresh issue of shares made simultaneously with and for the purpose of such redemption.
    (b) A note should be appended to every balance-sheet of the company and to every business or other document issued by or on behalf of the company in which a statement off the company's issued capital appears, stating how much of its issued capital consists of redeemable preference shares and the date on or before which they are liable to be redeemed.
    (c) Only fully paid shares should be redeemed.
    (d) Where redemption is effected out of profits it should be limited to the amount of undistributed profits available for dividend and there should be transferred to a permanent capital redemption reserve a sum equivalent to the amount applied in redemption of preference shares. This reserve should be capable of reduction or extinction as in a reduction of capital.

    Subject to these restrictions, the terms on which and the manner in which redemption is to be effected should be left to the company's articles to provide.

Company Providing Money for the Purchase of its own Shares

30. A practice has made its appearance in recent years which we consider to by highly improper. A syndicate agrees to purchase from the existing shareholders sufficient shares to control the company, the purchase money is provided by a temporary loan from a bank for a day or two, the syndicate's nominees are appointed directors in place of the old board and immediately proceed lend to the syndicate out of the company's funds (often without security) the money required to pay off the bank. Thus in effect the company provides money for the purchase of its own shares. This is typical example although there are, of course, many variations. Such an arrangement appears to us to offend against the spirit if not the letter of the law which prohibits a company from trafficking in its own shares and the practice is open to the gravest abuses.

RECOMMENDATION.

31. We recommend that companies should be prohibited from directly or indirectly providing any financial assistance in connection with a purchase (made or to be made) of their own shares by third persons, whether such assistance takes the form of loan, guarantee, provision of security, or otherwise. This should not apply in the case of companies whose ordinary business includes the lending of money, to money let in the ordinary course of such business, or to scheme by which a company puts up money in the hands of trustees for purchasing shares of the company to be held for the benefit of employees or to loans direct to employees for the same purpose.

Reorganisation of Share Capital.

32. Having regard to the wide construction placed by the Courts on section 120 there appears to us to be little necessity to retain section 45, since everything or nearly everything that can be done under that section could equally well be done under section 120. Moreover, the fact that in schemes involving any of the matters specifically mentioned in section 45 both that section and section 120 have usually to be complied with involved unnecessary complication (see re Palace Hotel, 1912, 2 Ch. 438 re Nordberg, 1915, 2 Ch. 439), particularly in view of the fact that it is often a matter of great difficulty to obtain the very large and exceptional majority required by section 45.

RECOMMENDAION.

33. We recommend that section 45 should be repealed, but in order to avoid any doubts it will be desirable so to amend section 120 as to show that the powers conferred by that section are to include all the powers now conferred by section 45.

C.-MEETINGS.

Special Resolutions.

34. (a) The weight of evidence is distinctly in favour of the abolition of the necessity for two meetings in the case of special resolutions. In practice it is found that where the resolution has been passed by the requisite majority at the first meeting the second meeting is a mere matter of form. It is at the first meeting that criticism of or opposition to the proposed resolution makes itself heard; and the suggestion that the necessity for confirmation affords a useful locus poenitentiae is not in our opinion justified. It is often a matter of considerable difficulty to get a quorum at the second meeting and this not infrequently causes embarrassment and delay. We accordingly recommend the abolition of the second meeting, but in order to give time to the shareholders to consider the proposed resolution and if necessary to get into touch with one another in order to arrange for any particular line of action we think that the minimum length of the notice convening the meeting should be fixed by at 14 days.
(b)An alternative suggestion made to us that the three-fourths majority should be required at the second instead of the first meeting does not commend itself to us.
(c) If our recommendation is not adopted we think that a statutory minimum of 12 days for the length of the notice of the first meeting should be fixed and the interval between the two meetings reduced to ten days.

RECOMMENDATIONS.

35. We recommend that the necessity for two meetings for a special resolution should be abolished. In all cases where under the Acts or the memorandum or articles of association made sufficient to pass the resolution at one meeting convened by a notice not less than 14 days in length (unless every shareholder entitles to vote agrees to accept a shorter notice in respect of any particular meeting). The majority required at the meeting should be the same as that required for an extraordinary resolution under section 69 (1), but that subsection should in any case (and whether or not our recommendation is adopted) be amended by inserting the works “and vote” and the words “are present.”

Adjournment of Meetings.

36. The case of Neuschild v. British Equatorial Oil Co. (1925 Ch. 346) and the earlier cases therein cited show that resolutions passed at any adjourned meetings are in law considered to be passed on the day on which the original meeting was held. This may lead to ante-dating liquidations and other inconvenient results.

RECOMMENDATION.

37. We recommend that there should be an amendment of the Act providing that every resolution shall be deemed to have been passed on the actual day when it was in fact passed.

D. PROSPECTUSES AND "OFFERS FOR SALE"

Prospectuses.

38. The existing law with regard to prospectuses properly so called is in our opinion on the whole satisfactory. No evidence was given before us to justify any relaxation of the law in this respect except in one minor particular (see infra). The statutory requirements are strict and in some cases no doubt may prove unnecessarily onerous, but we consider that the public should continue to receive the protection which it at present enjoys. On the other hand we find that there is one respect in which the law relating to prospectuses ought to be strengthened. At present a company is not required to give any statement as to the dividends which it has paid in the past or as to the profits of any business which it proposes to acquire. It is, of course, rare to find that information of this character is omitted by a number of prospectuses have been brought to our notice where no such information is given. We consider that the public is entitled to be told the facts which are obviously most relevant for it to know. Their suppression is calculated to mislead the unwary and although instances may occur where non-disclosure might be justified in view of some exceptional circumstance we think that even here the public has a right to a full disclosure upon which it can form its own judgment. The practice of giving a statement of average profits or dividends over a period of years without a separate statement for each year is in our view often calculated to mislead, and we therefore recommend that each year's profits or dividends should be separately stated.

We consider that the not uncommon practice of issuing "abridged prospectuses" with an application form annexed or containing an invitation to subscribe should be prohibited.

RECOMMENDATIONS.

39. We recommended that:

I Section 81 should be amended as follows:-

(i) by adding to paragraph (n) of subsection (1) a requirement to state the rights of each class of shares in respect of dividend and capital, and confining that paragraph to cases where shares are offered for subscription: at present it applies to issues of debentures and debenture stock;

(ii) by adding a new paragraph (o) requiring a statement of the dividends, if any, paid by the company on each class of share during the three financial years immediately preceding the issue of the prospectus; if no dividend has been paid on any

particular class during any of such years, the fact should be stated;

(iii) by adding a new paragraph (p) providing that in cases where the proceeds of the issue or any part thereof are proposed to be applied in the purchase of a business, the prospectus should contain a statement certified by the auditors showing separately the net profits of the business during each of the three years immediately preceding the issue of the prospectus.

(iv) By adding to subsection (6) a proviso exempting a director, etc., from liability for non-compliance in respect of any matters which in the circumstance of the case, the Court considers immaterial

II. It should be made illegal to issue an "abridged prospectus" in respect of shares, debentures, or debenture stock containing, or having annexed to, or sent with it, an application form or otherwise inviting a subscription for such shares, debenture, or debenture stock. A heavy penalty should be imposed.

Offers for Sale.

40. The case of "offers for sale" stands on a different footing. There is no doubt that this method of placing shares with the public has in many cases been adopted for the purpose of avoiding the strict requirements of the law with regard to prospectuses, with the result that the public has been deprived of the protection which the legislature intended it to have. In the year 1924, a Bill was introduced in the House of Commons which was intended to deal with this matter, but we doubt its efficacy for the purpose, while in certain respects it appears to go too far. Our own recommendation is designed to hit those cases and those cases only where the offer is or may properly be deemed to be made in complicity with the company itself. It will not affect cases where the independent holder of a block of shares desires to realise them by means of a public offer. In the last mentioned cases it may obviously be impossible for the holder of the shares to obtain from the company the necessary information to comply with the law relating to prospectuses, and there could be no justification for placing the company under any liability in the matter. On the other hand, in those cases where the shares are acquired in contemplation of an offer to the public, the persons acquiring them can have no difficulty in imposing on the company as a term of the contract the obligation of furnishing the necessary information. Moreover we consider that where a company issues shares in such circumstances and the directors know that there is going to be a public offer, they should be under the same liability to see that the public has proper information as they would be if the company itself were issuing a prospectus. It cannot, in our view, be right that, where the offerors are morally, although not in law, the agents of the company to place the shares with the public, the company or its directors should be able to avoid their responsibilities, as they can at present. As a

matter of fact, in the cases which we have in mind the draft of the offer is very frequently submitted, formally or informally, to the company for approval, and in practice the company would have no difficulty in making it a condition of the allotment that its approval of the form of offer should be obtained before it is issued.

RECOMMENDATION.

41. Our recommendation is as follows:-

(a) Where a company allots or agrees to allot shares debentures or debenture stock in contemplation of an offer of such shares debentures or debenture stock or any part thereof to the public the offer when made should be deemed to be a prospectus issued by the company and all the relevant provisions of statute and common law relating to the contents of and liability for statements in and omissions from prospectuses (including the liability of directors of the company) and to signature by directors of the company and filing should apply accordingly, without prejudice to the liability, if any, of the actual offerors in respect of mis-statements, &c., in the offer.

(b) For the purpose of this provisions and in addition to cases where the allotment or agreement is proved to have been in fact made in contemplation of the offer, an allotment or agreement to allot should be deemed to have been made in contemplation of such an offer where

(i) the offer is made within 6 months of the allotment or agreement to allot, or

(ii) the entire consideration for the shares debentures or debenture stock has not been satisfied at the date of the offer.

(c) Every offer covered by this provision should state the net consideration received or to be received by the company for the shares debentures or debenture stock in question, and should state a place and time where and when the contract under which the shares debentures or debenture stock have been or are to be allotted can be inspected.

E. MINIMUM SUBSORIPTION.

42. The existing law as to minimum subscription has become in practice useless owing to the law minimum which is usually fixed in articles of association. We consider that an alteration in the law should be made so as to bring it as nearly as possible within the original intention of the legislature.

RECOMMENDATION.

43. We recommend that section 81 (d) should be amended by deleting the requirements as to minimum subscription and in lieu thereof every

prospectus should be required to state the minimum amount which in the opinion of the directors is required from the issue in order to provide for each of the following matters:-

(i) the purchase price of any property purchased or acquired or proposed to be purchased or acquired in so far as the same is to be paid for out of the proceeds of the issue;

(ii) any preliminary expenses and underwriting commission payable by the company;

(iii) working capital;

and section 85 should be amended so as to prohibit the directors from proceeding to allotment unless the aggregate amount so stated is subscribed. These provisions should not extend to the case of a company which only files a statement in lieu of prospectus.

If this recommendation is adopted section 85 (I) should be amended so as to make equivalent to payment a cheque given and received in good faith where the directors have no reason to believe that the cheque will not be met.

F. UNDERWRITING COMMISSION.

44. At present the only limit on the amount of underwriting commission is to be found in the company's articles of association and cases not infrequently occur where a company is empowered to pay underwriting commission up to 50 per cent or even more. This has enabled companies in effect to issue shares at a heavy discount and is in our opinion in other respects undesirable.

RECOMMENDATION.

45. We recommend that a limit should be placed on the amount payable for underwriting commission so as to make it a genuine "commission" and we suggest 10 per cent on the nominal value of the shares underwritten.

G. DIRECTORS : MANAGEMENT

Directors' Liability

46. The decision in the City Equitable case (1925 Ch. 407) has directed public attention to the common article which exempts directors from liability for loss except when it is due to their "wilful neglect or default." Another form of article which has become common in recent years goes even farther and exempts directors in every case except that of actual dishonesty (see Brazilian Rubber Estates, 1911, 1 Ch. 425). We consider that this type of article gives a quire unjustifiable protection to directors. Under it a director may with impunity be guilty of the grossest negligence provided that he does not consciously do anything which he recognises to be improper. The evidence satisfies us that in the great majority of companies in this country directors conscientiously endeavour to do their

duty. The public interest excited when exceptions are brought to light is perhaps the best proof of their rarity. But the position is one which in our opinion calls for an alteration of the law. To attempt by statute to define the duties of directors would be a hopeless task and the proper course in our view is to prohibit articles and contracts directed to relieving directors and other officers of a company from their liability under the general law for negligence and breach of duty or breach of trust. We are satisfied that such an enactment would not cause any hardship to a conscientious director or make his position more onerous and, in our view, there is no foundation whatever for the suggestion that it would discourage may otherwise desirable persons from accepting office. A director who accepts office does not consciously do so upon the footing that he may be as negligent as he pleases without incurring liability. It is only when he has been negligent and the company have suffered a loss, that he is content to take shelter behind the article. It is, moreover, in our opinion fallacious to say that the shareholders must be taken to have agreed that their directors should be placed in this remarkable position. The articles are drafted on the instructions of those concerned in the formation of the company, and it is obviously a matter of great difficulty and delicacy for shareholders to attempt to alter such an article as that under consideration.

On the other hand it has been forcibly brought to our notice that under the modern conditions of company administration it is in many cases quite impossible for every director to have an intimate knowledge of or to exercise more than a quite general supervision over the company's business. Moreover, it often happens that a director is appointed owing to some special knowledge of a particular branch or aspect of the company's affairs or because he is in a position to obtain business for the company. It is not to be expected that such a director should be bound t have so close an acquaintance with the general business of the company as other members of the board. We are of opinion that the general law of negligence is sufficient to deal with such a case but in order to remove any possible hardship we recommend that the Court in exercising its power to grant relief should give attention to considerations of the nature indicated.

RECOMMENDATION.

47. We recommend that any conduct or provision (whither contained in the company's articles or otherwise) whereby a director, manager or other officer of the company is to be excused from or indemnified against his liability under the general law for negligence or breach of duty or breach of trust should be declared void. This should extend to contracts or provisions existing at the date when the amending Act comes into force, but as regards such contracts or provisions it should not take effect until (say) six months from that date.

If this recommendation is adopted we consider that section 279 of the Act (which enables the Court to relieve directors from liability for negligence or breach of trust) should be amended by adding a provision to the effect that in determining whether a director ought to be excused the Court shall take into consideration all the circumstances relating to his director who has been appointed because of his special knowledge or for a special purpose and not to direct the business of the company generally.

Loans to Directors, &c.

48. We consider that shareholder are entitled to know shat loans have been made out of the company's funds to the directors, managers and other officers of the company. It is not, in our view, practicable or desirable to prohibit such loans, but auditors should be required to state their aggregate amount (including loans repaid) during the period covered by the accounts. In the case of any exceptional loans we understand this to be the general practice of auditors at present, but cases occur where it is not followed. We do not think that this requirement should extend to banks, &c., if they make loans to their officers as the do to any members of the public nor should it extend to the small loans to employees which it is the practice of many companies to make.

RECOMMENDATION.

49. We recommend that auditors should be required to state in a note to the accounts, unless the accounts themselves show it, the total amount of money lent to directors, managers, or other officers of the company during the period covered by the accounts, including loans repaid before the date up to which the accounts are make up, and (as a separate item) any loans made in previous periods and still outstanding. This should include not only money lent by the company but also money lent by third persons upon the guarantee of or security provided by the company. There should be excluded from these provisions (i) in the case of companies whose ordinary business includes the lending of money, money lent in the ordinary course of such business, (ii) any loan not exceeding £2,000 to an employee of the company as to which the directors certify that the loan was made in accordance sith a practice adopted or proposed to be adopted by the company with regard to loans to employees.

It should be sufficient to state the aggregate amount of the loans without specifying the amount lent to any individual, but loans to directors should be set out separately from those to managers and other officers.

50. The question as to the disclosure of remuneration paid to directors is a difficult one. There is a fairly widespread demand that shareholders should be entitled to more information than in some cases they receive, and we consider that there is considerable justification for it. The disclosure of fees paid to directors as such does not meet the case. On the other hand, the disclosure of remuneration paid to e.g., managing directors might be harmful to the company, since cases not infrequently occur of attempts by competitors to induce a managing director to charge his employment by offers of higher remuneration, and this practice disclose as a matter of course the remuneration which they pay. Another matter to be considered is that of the fees received by directors from subsidiaries on whose boards they sit, fees which often run into large figures, but are not as a general rule disclosed in the accounts of the parent company.

    We consider that shareholders representing a substantial portion of the voting power (not the shareholding) should have the right to requisition a certified statement of the remuneration, &c., paid to directors, including managing directors. We have fixed this proportion at 25 per cent., so as to ensure that the demand is backed by a substantial body of opinion in the company, and to prevent competitors and others from acquiring a few shares for the purpose of obtaining information.

51. The Wrenbury Committee, in para. 61 of its Report*, recommended that payment of fees to directors free of income tax or super-tax should be forbidden. Tax so paid is really additional remuneration and we venture respectfully to question the necessity of special legislation on the point. In any case, if our recommendation with regard to disclosure is adopted the suggested evils would, in our view, be satisfactorily met for all practical purposes.

**Paragraph 61 of the Report of the Wrenbury Committee.*

61. We have learned that there exists a practice in some companies of making the payments to directors qua directors free of income tax, including super-tax. Assume that a director's fees are to be £100 a year free of income tax and super-tax. The additional sum which he in fact is paid by reason of his being relieved of income tax is a sum not fixed by varying according to what his aggregate income from all sources may be. The rate demandable from him for income tax may be 0s, in the pound or may be some less sum. Further (and this is the mischief at which we point in particular) the super-tax of which he is relieved may vary in a very much larger degree. If his aggregate income is small there may be no super-tax demandable at all. If it be large the super-tax may be 4s. 6d. in the pound. The payments which the directors receive should be of an amount openly stated and plainly known without any necessity of computation to every member of the company. The sums payable to directors are in some cases large, so that the additional sum due to relief at the expense of the company from income tax and super-tax may be substantial. The shareholders ought to know what the directors' remuneration is. We recommend that payment to directors free of income tax or of super-tax shall be forbidden.

RECOMMENDATION.

52. We recommend that upon a written requisition signed by the holders of shares carrying at least 25 per cent of the voting power at the time of requisition, the directors should be bound to furnish to all shareholders a statement (certified by the auditors) of all remuneration paid to or other emoluments received by directors (whether as such or in any other capacity connected with the management of the company) during the three preceding financial year, including remuneration received personally from any company on whose board a director sits as a nominee of the company in question. Where any such remuneration is paid tax free the amount of any tax paid should be added. It should 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.

Directors' Qualification.

53. Although this is in many cases illusory we do not find ourselves able to recommend any alteration in the law. The fixing of a compulsory qualification would in many cases prevent the election of persons (e.g., employees of the company) whose financial positions does not permit them to make any substantial investment in the company while the suggestion made to us that directors should be bound to hold their qualification in their own right would, if adopted, prevent trustees from taking office unless they happened to hold shares in their individual capacity.

Assignment of Office of Director or Manager.

54. Our attention has been directed to cases where the articles provide that the office of director or manager may be assigned at the will of the holder. It may be questioned whether such a provision is lawful, at any rate in the cause of directors, but in any case we consider that the practice is a most undesirable one and that any such assignment should be prohibited unless it is sanctioned by the company. When such a provisions is in force the company is deprived of all effective control other is directors and managers and the holder of the office is in a positions to force upon the company or his own profit any person, whether suitable

RECOMMENDATION.

55. We recommend that where under provisions contained in the articles or in a contract directors or managers are empowered to assign their offices, any such assignment should be void unless and until it receives the sanction of a special resolution.

Undischarged Bankrupts as Directors.

56. The evidence upon this subject discloses a state of affairs which is difficult to deal with but in our opinion demands a remedy. Many cases have been brought to our notice where bankrupts who have not obtained their discharge have been able, by using the machinery of the Companies Acts, to continue trading under the disguise of a limited company, with results often disastrous to those who have given credit to the company. In many cases, traders have been far too ready to give credit to private companies of which they know nothing, without making any or sufficient inquiries as to the financial standing of the company or the persons who control it, and to this extent it may fairly be said that the trouble lies at their own door. This is particularly the case where manufacturers in periods of trade depression have been eager at any risk to find a sale for their good. But in spite of these considerations, we are of opinion that an amendment of the law so as to prohibit an undischarged bankrupt from taking part in the management of a company without the leave of the Bankruptcy Court concerned is desirable. An absolute prohibition would, we think operate unfairly and we suggest the Bankruptcy Court as the one to give the necessary sanction because the Judge of that Court will more readily be acquainted with the circumstances attending the bankruptcy. Having regard to the class of individual concerned in the majority of cases, we consider it essential that any breach of the provision which we recommend should be punishable by imprisonment.

RECOMMENDATION

57. We recommend that no undischarged bankrupt should be permitted to be a director of or in any way directly or indirectly to be concerned or take part in the management of any company without the leave of the Bankruptcy Court by whom the adjudication was made, and any breach of this provision would be made punishable by imprisonment. Every application under this provision should be served upon the official receiver whose duty is should be to oppose the application if he considers that in the public interest it should be refused.

H. INVESTIGATION : DELINQUENT DIRECTORS AND OTHERS.

58. Under this head we have grouped recommendations which are intended to strengthen the law with regard to the investigation and prosecution of offences. At present the law is not, in our opinion, in a satisfactory state, and the evidence convinces us that persons who have been guilty of offences not infrequently escape prosecution. There are several reasons for this. In the first place, while the company is a gong concern an investigation under section 109 is difficult to obtain, and share-holders are discouraged from applying for it by the fact that in general they are required to give security for costs, while the costs in the last resort fall either on themselves or on the company in which they are interested, and

further the company may have not assets. In the next place, where the company is being wound up, the costs of a prosecution under section 217 fall to be paid out of the company's assets, a circumstance which discourages any action under this section. Moreover, in the case of voluntary liquidators the liquidator is too often influenced by the fact that creditors who have already suffered losses prefer to let the offenders escape rather than incur the further expense of a prosecution. The result is that applications under section 217 (2) are comparatively rare.

In our opinion, no satisfactory solution for this state of affairs can be found unless better facilities are provided for enabling prosecutions to be instituted in suitable cases by the Director of Public Prosecutions at the public expense. The English system of leaving prosecutions of this character to private initiative has failed and it appears to us that the public interest demands an alteration in the law. Our recommendations are designed to meet this end. In this connection we may refer to our later recommendation giving creditors an effective control in the voluntary winding-up of insolvent companies, one of the results of which, if it is adopted, will be to make it less likely that the liquidator in such cases will remain inactive where he discovers that an offence has been committed.

59. Complaints have been made to us with regard to a number of comparatively recent flotations which have apparently caused considerable losses to a number of small investors. From the evidence placed before us it appears that the matters complained of in connection with the formation and administration of these companies fall under the following heads:-

    (1) The alleged offering of shares to the public by means of documents which did not comply with the statutory requirements as to prospectuses and in some cases, according to the allegations made, were misleading and untrue.
    (2) The fact that profits made on a resale to the company were not disclosed.
    (3) Alleged untrue statements contained in statements in lieu of prospectus.
    (4) Alleged misfeasance (fraudulent and otherwise) by directors and others, including speculation in and over-valuation of commodities dealt in or owned by the company.
    (5) Difficulty in obtaining a prosecution of alleged offenders.

With regard to (1), (3) and (4) it si perhaps sufficient to point out that if the allegations made before us are correct the law has been broken and a remedy exists. It is merely a question of proving the facts. In so far as the persons whose actions are complained of may not be in a financial position to meet claims for damages, that is the misfortune of the investors and no alteration of the law would improve matters. If criminal offences have been committed a prosecution will lie; and in so far as the existing

law with regard to prosecutions may be unsatisfactory we make below recommendations which if adopted will strengthen it. Again, in so far as directors may escape civil liability for misfeasance owing to "wilful default" articles, we have made a recommendation to meet the case. Beyond this we do not find anything which would justify us in recommending an alteration of the law to meet the possibility of such cases recurring. No law can prevent its own reach; all that can be done is to see that those who break the law are made liable to proper penalties, and in our view the penalties already provided, coupled with the recommendations which we make, are adequate. To make the law more stringent and the penalties more formidable would, in our opinion, merely hamper the activities of hones men without affecting the operations of the deliberate wrongdoer. The careless speculator who is willing to accept at their face value statements which are obviously insufficient and unsatisfactory cannot justly expect special protection where that would involve a serious and unwarranted interference with the ordinary hones person.

With regard to the particular point mentioned in (2) above we cannot agree with the suggestion that a vendor who has brought and paid for property and then re-sells it to a company should be bound to disclose the profit which he has made. Such a provision would, in our view, hamper enterprise to an unjustifiable extent, and although it may well be that vendors in some cases make extravagant profits we consider this to be by far the lesser of two evils.

RECOMMENDATIONS.

60. Our recommendations are as follows:-

1. Section 109 should be amended (i) by altering the provision as to security for costs in sub-section (2) so as to fix a nominal sum (not more than £100) as a guarantee of good faith; (ii)by deleting subsection (7); and (iii) by adding further subsections to the following effect:-

"(7) If from the report it appears to the Board of Trade that nay past or present director, manager, officer, or member of the company has been guilty of any offence in relation to the company for which he is criminally responsible and that the matter is one for prosecution by the director of Public Prosecutions they shall refer the matter to him.

"(8) Where any matter is so referred to the Director of Public Prosecutions it shall be his duty, if he considers the circumstances are such as to render a prosecution desirable, to institute and carry on the prosecution and all officers and agents (including auditors, bankers and solicitors) of the company (other than those against whom the prosecution is bought) shall be bound to give him all the assistance in their power in connection with such prosecution.

"(9) All expenses of and incidental to an investigation under this section shall, where a prosecution is instituted, be defrayed out of moneys provided by Parliament and shall, where no such prosecution is instituted by defrayed by the company unless the Board of Trade shall direct that the same or some part thereof shall be paid by the applicants which the Board of Trade is hereby authorised to do."

II Section 217 should be repealed and the following section substituted:

"217 (1) If it appears to the Court in the course of a winding up by or subject to the supervision of the Court that any past or present director, manager, officer, or member of the company has been guilty of any offence in relation to the company for which he is criminally responsible the Court may on the application in a summary way of any person interested in the winding up or of its own motion direct the liquidator either himself to prosecute the offender or to refer the matter to the Director of Public Prosecutions.

"(2) If it appears to the liquidator in the course of a voluntary winding up that any past or present director, manager, officer, or member of the company has been guilty of any offence in relation to the company for which he is criminally responsible the following provisions shall have effect:

"(a) It shall be the duty of the liquidator forthwith to report the fact to the Director of Public Prosecutions and to furnish and disclose to him all information and documents in the possession or under the control of the liquidator with regard to the matter in question which the Director of Public Prosecutions may require.

"(b) The Director of Public Prosecutions may, if he thinks fit, refer the matter for further inquiry to the Board to Trade, who shall thereupon investigate the matter and the Board of Trade may, if they think if necessary, apply to the Court in a summary way for an order conferring on the Board of Trade in respect of the company in question all or any of the powers of investigation which exist in the case of a compulsory liquidation.

"(c) If the Director of Pubic Prosecutions considers that the matter is not one for prosecution by the Director of Public Prosecutions the liquidator, with the previous sanction of the Court, may prosecute the offender

"(3) If it appears to the Court in the course of a voluntary winding up that any past or present director manager, officer or member of the company has been guilty of any such offences as aforesaid and that no

report has been made by the liquidator to the Director of Public Prosecutions pursuant to sub-section (2) of this section, the Court may on the application in a summary way of nay person interested in the winding up or of its own motion direct the liquidator to make such reports, and upon such report being made the provisions of this section shall apply as though the report had been made pursuant to sub-section (2) of this section.

"(4) Where any matter is reported or referred to the Director of Public Prosecutions under this section, it shall be his duty, if he considers that the circumstances are such as to render a prosecution desirable, to institute and carry on the prosecution and the liquidator shall be bound to give to him all the assistance in his power in connection with such prosecution.

"(5) In case the liquidator shall neglect or refuse to perform an of the obligations imposed upon him by subsection 4 of this section, the Court shall upon the application in a summary way of the Director of Public Prosecutions, direct the liquidator to perform such obligations, and upon any such application being made, unless it shall appear that the neglect or refusal was due to a lack of available assets in his hands, the Court may direct that the costs thereof be borne by the liquidator personally.

"(6) Where the liquidator by the direction or with the sanction of the Court prosecutes under this section, all costs and expenses properly incurred by him in prosecution shall be payable out of the assets of the company in priority to all other liabilities provided that the Board of Trade may, with the consent of the Treasury, direct that the whole or part of such costs and expenses shall be defrayed out of moneys provided by Parliament."

I. FRAUDULENT TRADING

61. This subject is in practice closely connected with that of undischarged bankrupts dealt with above. Our attention has been directed particularly to the case (met with principally in private companies) where the person in control of the company holds a floating charge and, while knowing that the company is on the verge of liquidation, "fills up" his security by means of good obtained on credit and then appoints a receiver.

We consider that this state of affairs cannot satisfactorily he dealt with by altering the law as to floating charges. This form of security is too common and important an element in company finance to be interfered with. On the other hand we consider that not only should the person whom the Court finds to have been guilty of fraudulent trading, etc., be subjected to unlimited personal liability but any security over assets of the company held by him or on his behalf or previously held by him or no his

behalf or previously held by him or on his behalf and assigned to any one save a bona fide holder for value should be charged with the liability. Further, trading of this character should be made a criminal offence in the directors in so far as it may not be one already, and should be a ground for disqualification to act as director, etc., of a company for a period of years.

RECOMMENDATION.

62. Our recommendations are as follows:-

1. The Act should be amended by inserting a section to the following effect:-

(a) Where in the course of winding up a company it appears that any business of the company has been carried on with the intent to defraud creditors of the company or of any other company or person or for any fraudulent or illegal purpose the Court should be empowered upon the application of the official receiver or of the liquidator or of any creditor or contributory to declare that all or any of the responsible directors of he company present or past shall be subject to unlimited personal liabilities in respect of all or any of the debts or other liabilities of the company and to make any necessary consequential orders for the purpose of enforcing such liability.

(b) Where any such declaration is made the Court should be empowered to charge the liability of any director affected by the declaration upon any debt or obligation due from the company to and upon any mortgage or charge or any interest in any mortgage or charge on any assets of the company held by or bested in him or any company or person on his behalf or in any assignee from or claiming through such director, company or person, other than an assignee for valuable consideration (excluding marriage consideration) given in good faith and without notice of any of the matters in respect of which the declaration is made. For the purpose of this provision the expression "assignee" should include any person to whom or in whose favour by the directions of the director the debt obligation, mortgage or charge was issued or transferred or the interest created. The Court should also have power to make any necessary consequential orders for the purpose of enforcing a charge imposed by it under this provision.

(c) Provisions corresponding to those in sub-sections (2) and (3) of section 215 should be added.

(d) The carrying on of any business of a company with any such intent or any such purpose and the obtaining of credit by or for the company in such circumstances that, if an individual were concerned, the offence of obtaining credit by fraud would have been committed should (so far as not already a criminal offence) he declared to be a criminal offence and every director who is

knowingly a party to such carrying on or such obtaining of credit should be liable to imprisonment.

(e) Where the Court makes a declaration under this section or where there has been a conviction the Court should be empowered to order that the person affected by the declaration or conviction shall not without the leave of the Court be a director of or in any way directly or indirectly be concerned or take part in the management of a company for a period not exceeding five years. Non-compliance with such an order should be years. Non-compliance with such an order should be made a criminal offence punishable by imprisonment.

(f) For the purpose of these provisions the expression "director" should be defined so as to include any person in accordance with whose directions or instructions the directors of the company have been accustomed to act.

II. A new sub-section should be added to section 148 providing that where the official receiver reports fraud the Court may upon his application make an order prohibiting the guilty party from holding office similar to that referred to in our last preceding recommendation. Such application should be served on the person accused and he should have an opportunity of appearing and calling evidence.

III. We consider that sections 154 and 156 of the Bankruptcy Act 1914 (with any amendments made pursuant to the recommendations of the Bankruptcy Law Committee) should be adapted to the case of directors and officers of a company which is in liquidation.

J. RETURNS.

63. In many cases companies neglect to make the statutory returns, etc., or make them such long delay that the file becomes out of date. Penalties have not proved effective to prevent this since it is rare to find them enforced.

RECOMMENDATION.

64. We recommend that the Court should be given power upon the application in a summary way of any member or creditor of the company or of the registrar of companies to make and enforce in the ordinary way by process of sequestration or attachment orders requiring the company and its responsible officials to make any necessary returns, etc., required for bringing the company's file up to date and to order the company or the officials responsible to pay the costs of the application. In order to prevent attempts to harass the company by unnecessary applications to the Court

it should be provided that no such application should be made unless notice requiring the company to make good the default complained of has been served on the company and it ahs failed for (say) 10 days after such service to comply with the requirements of the notice.

K. MORTGAGES AND CHARGES.

65. (a) Some of the witnesses advocated the extension of the registration provisions of section 93 to all property of the company. With this suggestion we are quite unable to agree, since its adoption (particularly in the case of commercial documents) would destroy in a large measure one of the most important methods by which companies obtain financial assistance. The section was no doubt originally drafted in its present limited form with a view to avoiding any such result, and with the exception of the addition of certain specified classes of incumbrance to the list of those requiring registration we recommend that no change in the law should be made in this respect.

(b) The period of 3 months in section 212 has proved in practice too short. It is often possible to stave off creditors and so avoid the presentation of a winding-up petition until the three months have expired with the result that the debenture becomes valid.

(c) The effect of the provisions of section 104 as to the reissuing of redeemed debentures is not clear and we recommend that the section be redrafted in order to clear up certain points of difficulty.

(d) Our other recommendations under this heading are designed to give some further information and to remove certain inconveniences which have been found to exist in practice.

RECOMMENDATIONS.

66. Our recommendations are as follows:-

I. Section 93 should be amended so as to include among the incumbrances requiring to be registered

- (i) mortgages or charges subject to which property of a kind covered by the section is acquired by a company;
- (ii) mortgages or charges on (a) calls made but not paid (b) ships or shares in ships (c) goodwill patents and licences under patents, trademarks and copyrights.

Omission to register mortgages or charges coming under (i) (supra) should be the subject of a penalty and should not affect the validity of the mortgage or charge.

Omission to register mortgages or charges coming under (ii) (supra) should have the same effect as the omission to register any other mortgage or charge which requires registration under the Act.

The section should also be extended with any necessary consequential modifications to incumbrances on property in England created by companies incorporated outside England.

Any mortgages or changes existing or created before the passing of the amending Act which would have required registration if the above provisions had been in force should be registered within a specified period (say six months) and a penalty should be provided for non-compliance (see Companies Act 1907 section 12) with power to the Court to extend the time as under section 96. In this case commission to register should not invalidate the mortgage or charge.

II. Copies of trust deeds and of one debenture of each series should be filed with the registrar.

III. Section 212 should be amended by substituting the period of six months for the three months as at present.

IV. (a) A summary process should be provided whereby receivers other than those appointed by the Court should be compelled to render accounts and pay over balances to the liquidator and the Court should be given power upon a summary application by the liquidator to fix the remuneration of such receivers.

(b) Rules should be made under the Act defining the duties of receivers and managers appointed by the Court.

V. Section 104 should be redrafted and amended so as to cover and make clear the following points:

(1) Subject to any contract express or implied to the contrary the company should be entitled to re-issue debentures unless by resolution or by entry of satisfaction at Somerset House or otherwise it has done some act definitely cancelling them.

(2) The re-issued debentures should be entitled to the same priorities as if they had never been redeemed.

(3) No transfer to a nominee should be necessary in order to keep debentures alive.

(4) Where the debentures are redeemed and can be re-issued and there has been no cancellation the debentures which can be re-issued should be shown on the balance-sheet.

L. ACCOUNTS.

67. Under the present law there is no direct statutory obligation on a company to keep proper accounts. We consider that the law should be altered so as to make the keeping of such accounts compulsory. In the case of companies it is for obvious reason impossible to specify with any elaboration the accounts to be kept and our recommendation goes as far in this direction as we consider to be practicable. Experience shows that in many instances, particularly in the case of private companies, accounts are not properly kept, with the result that when liquidation ensues the company's books are found to be so defective and confused that it is impossible to find out what has become of good and money belonging to it. There can be no doubt that default of this kind is often deliberate and

we consider that heavy penalties should be imposed, with imprisonment when the default is wilful.

68. We consider that the present facilities give to share-holders for obtaining copies of the balance-sheet and directors' and auditors' reports and insufficient.

69. With regard to the form of accounts, although in general we consider that shareholders and others concerned have little ground for complaint cases occur where the information given by the accounts is of a scanty nature, particularly where assets are so grouped together under one heading that the true position of the company cannot readily be ascertained.

We think it most undesirable to attempt to lay down hard and fast rules as to the form which a balance-sheet should take, but we consider that the recommendations set out below will help to remove some of these grounds for complaint. The matter of accounts is one in which we are satisfied upon the evidence before us that within reasonable limits companies should be left a free hand.

70. With regard to the filing of published accounts, section 26(3) has not worked well in practice. The form of statement required by that sub-section is not satisfactory and it is permissible to file the same statement year after year. We consider that in lieu of the present statement the last audited balance-sheet of the company should be filed. As the sub-section only applies to public companies we are of opinion that there can be no objection to this course. One result of this recommendation, if adopted, will be to enable the registrar to tell, in cases where he cannot easily do so at present, whether a company is defunct or not. We have considered the question whether private companies should be compelled to file accounts and, in our opinion, the present exemption enjoyed by these companies should be continued.

71. The position of holding companies with particular reference to the form of their accounts has been much discussed before us and the evidence discloses a considerable divergence of views on the subject among both commercial men and accountants. Complaints have undoubtedly been heard from shareholders in such companies that the information given to them b the accounts of the holding companies is unintelligible without fuller details as to the position of the subsidiary and associated companies. Some witnesses take the view that the publication of a consolidated or combined balance-sheet for the whole group of companies should be made compulsory. We do not agree with this. Many holding companies have adopted the practice already and we consider that the matter should be left to the shareholders to make such requirements as to the form of their company's accounts as they may think proper. It is often forgotten

that it may be in the best interests of the shareholders themselves that the accounts should be in a certain from, and we consider that undue interference by the legislature in the internal affairs of companies is to be avoided, even if some risk of hardship in individual cases is involved. In view of the divergence of opinion upon this and cognate matters we only find ourselves able to make recommendations of a quite limited character. One of these requires a short explanation. In law there is nothing to prevent a holding company from using the dividend received from profit-making subsidiaries in order to pay a dividend on its own shares without taking into account losses suffered by other subsidiaries, and the effect of this may be that the holding company is paying a dividend at a time when the group as a whole is in debit on the year's working. Although this practice may in general be unsound, particularly if it is continued for any period, we do not think that any case has been made for prohibiting it altogether. On the other hand, we consider 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.

RECOMMENDATIONS.

72. Our recommendations on the subject of accounts are:-

I. Directors should be bound to see that proper accounts are kept and to lay a profit and loss account and balance-sheet before the company in general meeting once a year at least and we recommend that articles 103, 104, 106 and 107 of Table A should be made compulsory in the case of all companies. In addition to the accounts referred to tin article 103 there should be accounts of al goods sold and bought and we suggest that the provisions of section 158 (3) of the Bankruptcy Act. 1914, as proposed to be amended by Clause 7 (b) of the Bankruptcy (Amendment) Bill* now before Parliament should be adapted to meet the case of companies. A heavy penalty should be imposed for failure to comply; wilful failure should be made punishable by imprisonment.

**Clause 7 of the Bankruptcy (Amendment) Bill.*

7. As from the expiration of a period of two years after the commencement of this Act, section one hundred and fifty-eight of the principal Act (which relates to the failure of bankrupts to keep proper accounts) shall have effect as if –

(a) there were substituted for sub-section (1) thereof the following sub-section, that is to say:-

"(1) Any person who has been adjudged bankrupt or in respect of whose estate a receiving order ahs been made shall be guilty of a misdemeanour, if, having been engaged in any trade or business during any period in the two years immediately preceding the date of the presentation of the bankruptcy petition, he has not kept proper books of account throughout that period and throughout any further period in which he was so engaged between the date of the presentation of the petition and the date of the receiving order, or has not preserved all books of account so kept.

II. If articles 106 and 107 are given statutory force they should be amended by requiring the annual balance sheet and profit and loss account to be submitted to the general meeting at latest within nine months of the end of the company's financial year of, in the case of companies carrying on business or having interests abroad, twelve months, with power to the Board of Trade in either case to extend the period.

III. Sub-section (3) of section 113 should be amended by substituting for the concluding paragraph a provision requiring copies of the balance sheet and directors' and auditors' reports to be sent to all members entitled to attend the meeting before which the balance sheet is to be laid; they should be sent with the notices of the meeting as in article 108 of Table A. This amendment should not apply to private companies.

IV. If the above recommendations are adopted, section 114 should be repealed and the following section substituted:-
"114. – (1) The holders of preference shares (if not otherwise entitled to receive a copy of the balance sheet of the company and the directors; and auditors' reports) and the holders of debentures of a company shall be entitled to be furnished with a copy of the latest balance sheet of the company and the auditors' report thereon and the directors' report at a charge not exceeding six-pence for every hundred words.
"(2) This section shall not apply to a private company."

Provided that a person who has not kept or has not preserved such books of account shall not be convicted of an offence under this section-

(a) if his unsecured liabilities at eh date of the receiving order did not exceed, in the case of a person who has not on any previous occasion been adjudged bankrupt or made a composition or arrangement with his creditors five hundred pounds, or in any other case one hundred pounds; or

(b) if he proves that in the circumstances in which he traded or carried on business the omission was honest and excusable."

and

(c) there were substituted for sub-section (3) thereof the following sub-section, that is to say:-

"(3) For the purposes of this section, a person shall be deemed not to have kept proper books of account if he has not kept such books or accounts as are necessary to exhibit or explain his transaction and financial position in his trade or business, including a book or books containing entries from day to day in sufficient detail of all cash received and cash paid, and, where the trade or business has involved dealing in goods, statements of annual stocktakings, and (except in the case of goods sold by way of retail trade to the actual consumer) accounts of all goods sold and purchased showing the buyers and sellers thereof in sufficient detail to enable the goods and the buyers and sellers thereof to be identified."

"(3) If default is made in complying with the requirements of this section the company and every director, manager, secretary, and other officer of the company who is knowingly a party to the default shall be liable to a fine not exceeding one pound for every day during which the default continues.

V. (a) It should be provided that every balance sheet shall contain a summary of the company's share capital and shall give such particulars as will disclose the general nature of the liabilities and assets of the company and how the values of the fixed assets have been arrived at.

(b) Preliminary expenses and goodwill (where it is shown as a separate item I or is otherwise ascertainable from the books or papers of the company) should be separately stated in the balance sheet.

(d) Investments in, and loans to or from subsidiary companies (as defined below in sub-paragraph VII of this paragraph) should be stated in the balance sheet separately from all other assets and the loans should be stated separately from the investments. It will be sufficient to state the aggregate of the loans and the aggregate of the investments without distinguishing loans to or investments in particular companies.

VI. Section 26 (3) should be amended so as to provide for the annual filing of a certified copy of the last audited balance sheet together with the auditors' certificate in lieu of the present statement.

It should be provided that the balance sheet to be filed may be printed typewritten and that if it is in a foreign language a translation should be filed with it.

VII. A section should be inserted in the Act to provide that where a company (hereinafter called the "holding company") holds shares in a subsidiary company a certificate signed by the same persons as sign the balance sheet should be appended to the balance sheet of the holding company and filed with it stating how the aggregate profits and losses of any subsidiary company.

The following definition of a subsidiary company for the purpose of this provision is suggested:-

"When a company includes among its assets and holds either directly or through a nominee or nominees shares in another company and (i) by means of such holding either (a) has more than fifty per cent of the

voting power in such other company, or (b) holds more than fifty per cent of the issued share capital of such other company or (ii) has power to appoint or nominate the majority of the directors or persons occupying the position of directors, by whatsoever name called, of such other company then such other company shall be deemed to be a subsidiary company for the purpose of this section."

In order to meet cases where the subsidiary company as above defined is not actually controlled by the holding company it should be provided that where the directors of the holding company certify in writing that the holding company is not lawfully entitled or is otherwise unable to obtain the information required for the purpose of the certificate mentioned above, such certificate of the directors should be appended to the balance sheet in lieu of the certificate mentioned above.

M. AUDITORS.

73. We are of opinion that in general the law as it stands with regard to the powers and duties of auditors is satisfactory. It would be a mistake in our view to attempt further to define these by statute having regard to the multifarious circumstance which in practice arise. It appears to us far better that the law should retain its elasticity in this respect than that an attempt should be made to confine it within the bounds of a rigid formula. Cases in which auditors fall below the level of their duty are few and far between. On the other hand, we consider that the protection which the ordinary "wilful default" clause gives to auditors as was decided in the City Equitable case is as unwarranted as it is in the case of directors, and we recommend that it should be forbidden. As a corollary to this, we consider that auditors should be entitled to relief under section 279 in the same manner as directors.

Certain of the alterations in the law which we have recommended on the subject of accounts will strengthen the position of auditors by giving statutory sanction to what is already the best professional practice.

74. The City Equitable case has also drawn attention to the question of the duties of auditors in connection with the verification of securities belonging to the company. It has been suggested to us that the certificate which an auditor should be entitled t accept as to the existence and custody of the company's securities should be fixed by statute, e.g., the certificate of a bank. The evidence does not in out opinion show that any such change in the law is required. Circumstances may justify the acceptance of a certificate in one case which a careful auditor would refuse to accept in another and we would prefer to see the matter left to the ordinary law of negligence which is sufficiently elastic to meet all cases as they arise. Our recommendation with regard to "wilful default" clauses in articles gives point to this argument.

RECOMMENDATIONS.

75. We recommend that:-

I. The provision mentioned in paragraph 47 above with regard to directors' liability for negligence or breach of duty should be extended to auditors and section 279 should be amended so as to include auditors.

II. Except in the case of private companies, partners and employees of directors or other officers of the company should be ineligible for appointment as auditors.

N. WINDING-UP

76. The provisions of section 131 with regard to the jurisdiction of the various Courts have not worked satisfactorily. The paid up capital of a company is not necessarily a true guide either to the value of its assets or to the importance and difficulty of the questions which may arise in its liquidation. As the law stands at present a petition to wind up a company with £10,000 or less of paid up capital must, if the registered office of the company is situated within the jurisdiction of a County Court, be presented in the County Court, although its assets may be largely in excess of that sum, and questions may arise in the liquidation which would obviously be more suitable for the determination of the High Court. Under the recommendation which we make below the High Court will have concurrent jurisdiction but wherever convenient a local official receiver can be nominated.

77. We are of opinion that an amendment of the law is required in order to give to creditors effective control of voluntary liquidations where the company is insolvent. At present in such cases many matters are left to the shareholders sho have no real interest in the winding up except in so far as their shares may not be fully paid. They appoint the liquidator and fill up vacancies in his office, they fix his remuneration, it is their sanction which is required under-section 914, the liquidator's accounts are laid before them, and in many other ways the winding-up is treated as being their affair instead of that of the creditors. This position is highly anomalous. We have already referred to one result, namely, the failure of liquidators to take steps to prosecute offences and there are many other inconveniences under the present system. In the great majority of voluntary liquidations the company is unable to pay its debts and in such cases we consider that the powers of the shareholders should be transferred to the creditors. As a practical test of solvency we suggest a statutory declaration by the directors. Our recommendations are framed so as to ensure that the original appointment of the liquidator shall be made by the creditors contemporaneously with the passing of the winding-up resolution. This appears to us essential, since, if a provisional

liquidator were appointed by the shareholders to be replaced subsequently by the creditors' nominee, unnecessary expense and duplication of work would result.

78. Although we are not sure whether questions arising under the Winding-Up Rules fall within the scope of our reference, there are two matters of much practical importance to which we wish to direct attention:
    (a) Under Rule 142 it is impossible at present for a creditor to give a general proxy to anyone not in his employment. This rule was no doubt intended to prevent the canvassing of creditors but is has caused great inconvenience and we recommend its alteration.
    (b) Under Rule 42 there is an automatic transfer of debenture-holders actions to the companies winding-up Court as soon as a winding-up order is made. There was evidence that this has in some cases caused inconvenience and delay.

79. The law as to the property of dissolved companies is in some respects uncertain and we recommend the adoption of a uniform principle by which all such property (including debts) shall in every case vest in the Crown as bona vacantia.

RECOMMENDATIONS.

80. Our recommendations on these and other points connected with liquidation are as follows:-

I. The High Court should be given jurisdiction to wind up all companies registered in England, such jurisdiction being concurrent with that of the other courts mentioned in section 131, where they have jurisdiction. In order to enable liquidations in the High Court under this amendment and other liquidations in the High Court where the business is of a local character to be conducted conveniently and inexpensively, section 146 should be amended so as to include in the definition of "official receiver" any official receiver whom the Court may specially appoint. This will enable the High Court to appoint the official receiver attached to a County Court circuit in cases where the details of the liquidation can most conveniently be carried out locally.

II. Where a company is in liquidation or a receiver and manager has been appointed the fact should be stated on all notepaper invoices, etc.

III. (a) In order to give creditors more effective control in voluntary liquidations where the company is or is expected to be unable to pay its debts in full, it should be provided that in all cases where the directors (or where the company has two or more directors, two

directors at least) do not, at a board meeting held before the notices of the meeting at which a resolution for winding up is t be proposed are sent out, make a statutory declaration that the company is in their opinion able to pay its debts in full within a period not exceeding six months after the commencement of the liquidation, a meeting of creditors shall be summoned by notice issued at the same time as the notices to the shareholders. The creditors' meeting should be held on the same day as (or at latest the day after) the meeting of shareholders at which the resolution for winding up is to be proposed and at the meeting the creditors (to the exclusion of the shareholders) should either appoint the liquidator or nominate one of eh member to apply to the Court for a compulsory order. A director of the company should preside over the creditors' meeting and a full statement of the company's position together with a list of the creditors and the estimated amount of their claims should be laid before it. The meeting and any subsequent meeting of creditors should have power to appoint a committee of inspection; the shareholders' meeting at which the voluntary winding-up resolution is passed or any subsequent meeting of shareholders should have power to nominate member of the committee of inspection by the creditors should (unless over-ruled by the Court) have power of refusing the persons so nominated. If the shareholders' meeting is adjourned and a winding-up resolution is passed at the adjourned meeting, any resolution passed at the creditors' meeting should be as effective as though it had been passed immediately after the winding-up resolution. Any statutory declaration under this provision should be filed with the registrar of companies and there should be a heavy penalty imposed if the declaration is false.

If this recommendation is adopted, section 188 should be repealed and any necessary consequential alterations in the winding up rules should be made.

(c) To meet the case of liquidations where not apply and the remuneration of the liquidator should be fixed by the committee of inspection (if any) or by the creditors:

(i) Section 186 (ii) would not apply and the remuneration of the liquidator should be fixed by the committee of inspection (if any) or by the creditors:

(ii) The power of the company to sanction the continuance of the powers of the directors should be given to the committee of inspection (if any) or to the creditors (section 186 (iii))

(iii) The power to till a vacancy in the office of liquidator under section 189 should be given to the creditors:
(iv) Section 190 should be repealed:
(v) The powers of the liquidator under section 192 should be exercisable only with the sanction of the Court or the committee of inspection:
(vi) The provisions of section 194 (2) with regard to the annual meeting of the company should include similar annual meetings of creditors:
(vii) There should be a final meeting of creditors corresponding to the final meeting of the company under section 195:
(viii) The powers of the liquidator under section 214 (1) should be made exercisable with the sanction either of the Court or of the committee of inspection:
(ix) Section 222 (1) (b) should be amended so as to give the decision as to disposal of the company's books and papers to the committee of inspection (if any) or the creditors.

Rules would have to be made as to the holding of and voting at meetings. Solicitation by a liquidator in obtaining proxies or procuring his appointment as liquidator should entitle the Court to deprive him of his remuneration as is the case at present in compulsory liquidations (Winding-Up Rule 144).

IV. The winding up rules should be amended so as to enable a creditor to give a general proxy to any person whether in his employment or not.

V. The winding up practice should be amended so as to provide that on a winding up order, all mortgage and debenture actions shall be transferred to the winding up Judge subject to the Judge who is seised of the action having power to make an order to prevent the transfer in any particular case (See Winding-Up Rule 42 (1)).

VI. The liquidator in any winding up should be given power to disclaim onerous property corresponding to the power given to a trustee in bankruptcy under section 54 of the Bankruptcy Act, 1914 but it should be necessary to obtain the leave of the Court in every case.

VII. The Act (section 201-211) should be amended so as to introduce the rules as to execution, etc., contained in sections 40 and 41 of the Bankruptcy Act, 1914.

VIII. All property of a dissolved company should vest in the Crown as bona vacantia but this should be without prejudice to any application under section 223 or sub-section (6) of section 242 and should not apply to property held on trust (see Trustee Act, 1925, section 44 (1) and Law of Property Act, 1925, section 181).

O. RECONSTRUCTION AND AMALGAMATION.

81. The existing law as to stamp duties imposes a heavy burden in cases of reconstruction. We are not sure whether our recommendation on this subject falls strictly within the scope of our reference, but we may point out that, in our opinion, at any rate where the shareholders in the old and the new company are substantially the same, there can be no justification for charging ad valorem duty on so much of the capital of the new company as represents capital of the old company on which duty has already been paid. The effect is in substance a double taxation which places a heavy, and, in our opinion, unjustifiable burden on industry and seriously interferes with the beneficial process of reconstruction. With regard to ad volorem duty on the transfer of the old company's property to the new company, we think that there should be a statutory provision that this duty should not be exacted where the shareholders are substantially the same.

82. The question of simplifying the process of reconstruction has had our careful consideration. As is pointed out by the Wrenbury Committee in paragraph 47 of its Report, * the objections by the present method of reconstruction are two, expense and the commercial prejudice which may

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**Paragraphs 47 and 48 of the Report of the Wrenbury Committee.*

47. Assessment- The object which is sought to be attained by assessment is now attained by what is called reconstruction. Reconstruction is a proceeding by which the company is put into liquidation and the assets are sold to a new company formed for the purpose with a share capital so arranged as that such of the shareholders as assent take shares in the new company with a further liability, and those who do not are paid off in liquidation. The objection to this mode of procedure are principally first that it is very expensive, and secondly that a winding up always creates commercially a certain amount of prejudice. The expense arises principally from the fact that new revenue duties have to be paid exactly as in the case of a new company, although in fact the transaction really consists in rejuvenation an old one; and that a very large amount of clerical work is involved. If issued of shares at a discount is to be allowed we see no objection to allowing assessment. It sins against the original principle in a manner which is the converse to that in issue of shares at a discount. The latter allows a reduction, the former allows and increase in the amount which accordingly to the original principle of limited liability was to be the member's limit of liability. A matters stand assessment is but achieving in another and a cheaper form that which can be done already.

48. For the protection of the minority of shareholders, however, we recommend that there shall be the following restriction. A power to the commercial prejudice which may be

be caused by a winding up. If our recommendation with regard to duties is adopted the question of expense will lose much of its importance. We also make tow recommendations which if adopted will do away with the necessity of winding up in some cases. In cases of reconstruction where there is no amalgamation we can suggest no means of avoiding a winding up other than that of assessment suggested by the Wrenbury Committee in paragraphs 47 and 48 of its Report *. So far, however, as the evidence give before us goes, we find considerable divergence of opinion as to the desirability of allowing assessments on shareholders. In this connection we wish to draw attention to the possible bearing of the case of Agricultural Wholesale Society v. Biddulph and District Agricultural Society (1925, Ch. 679) on the law relating to limited companies. Some of the dicta in this case may have to be considered when the appeal to the House of Lords which is now pending has been decided.

83. Some witnesses think that upon a reconstruction the new company should not be allowed to adopt the same name as the old company, but should be compelled to insert, e.g., a date in order to distinguish it. The inconveniences which are said to arise from the absence of such a distinguishing mark do not appear to us sufficiently serious to justify the suggested alteration in the law having regard to the commercial value of the name of the old company.

84. In some amalgamations between companies it is necessary that the concern which is in substance being taken over should be kept alive and the amalgamation should be carried through by a transfer of shares and not by a sale of assets. The reason in some cases is the necessity of preserving the goodwill associated with the name of the company taken over an in other cases is that part of its property (e.g., a licence to utilise a patent assignable only with a consent which cannot be obtained) cannot be assigned. The acquiring company generally desires to obtain the whole of the share capital of the company which is being taken over and in some cases will not entertain the business except on that basis.

It has been represented to us that holders of a small number of shares of the company which is being taken over (either from a desire to exact better terms.

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assess shares should not be allowed to be included in the memorandum or articles of association of the company either originally or by alteration of the articles. An assessment should only be made under the authority of a special resolution approving the particular assessment proposed. It should further be provided that every special resolution must mention a sum per share to be paid in cash to such member as dissent and that the dissentient member shall be entitled at his option either to accept that sum or to demand an arbitration to determine what sum shall be paid with a further provision that there shall be only one arbitration and in that arbitration the dissentients shall appear together, but with power to any dissentient to appear separately at his own expense, or if the arbitrator shall so order at the expense, or if the arbitrator shall so order at the expense of the company. The costs of the arbitration to be borne as the arbitrator shall direct.

than their fellow shareholders are content to accept or from lack of real interest in the matter) frequently fail to come into an arrangement which commends itself to the vast majority of their fellow shareholders, with the result that the transaction fails to materialise.

In our opinion this position – which is in effect an oppression of the majority by a minority – should be met.

RECOMMENDATIONS.

85. We Recommend that:-

I. On a reconstruction under which at least ninety per cent. Of the original capital of the new company is held by shareholders in the old company.

(a) No ad valorem stamp duty should be charged on the transfer of property of the company to the new company.

(b) Ad valorem stamp duty on the capital of the new company should only be charged on the amount (if any) by which such capital exceeds the capital of the old company.

This recommendation if adopted would apply also to amalgamations where 90 per cent. of the capital of the new company is held by shareholders of the amalgamating companies.

II. The Court should be given power to sanction schemes for the amalgamation of two or more companies without the necessity of either or any of them going into liquidation. Any such scheme would have to provide among other things for:

(a) The protection of creditors secured and unsecured of the amalgamating companies.

(b) The vesting of assets in the amalgamated company.

(c) The capital organisation of the amalgamated company and the distribution of its shares among shareholders of the amalgamating companies.

(d) Consolidation of the files of the amalgamating companies.

The Court should be given power to order meetings of creditors and shareholders of different classes of the amalgamating companies as under section 120 and the majority provisions of that section should be adopted for the purpose of any such scheme. The discretion of the Court to sanction schemes should be left as wide as possible.

III. Where a scheme of amalgamation involving the transfer of shares or a class of shares has been sanctioned by the holders of at least 90 per cent. of the shares involved, the purchasing concern should be entitled

as of right within a limited time to acquire the shares of non-assenting holders on the same terms as those accepted by the assenting shareholders, with a right of appeal to the Court on any question of value or oppression.

IV. Section 192 should be amended by providing that the transferee company may be a foreign company (see Thomas v. United Butter Companies, 1909, 2, Ch. 484).

P. PRIVATE COMPANIES

86. Private companies have been subjected to a certain amount of criticism, both on the evidence before us and elsewhere. Although this criticism may be justified in some cases, we are satisfied that the great majority of the private companies on the register are honestly conducted. Much of the criticism in question is directed to cases of fraudulent trading by undischarged bankrupts and others through the medium of a private company and cases of directors holding debentures which they enforce at a time convenient to themselves. These specific evils have been dealt with by us above, and with these exceptions we do not consider that any alteration of the law to meet the special case of private companies is desirable. In particular, we cannot accept that suggestion which has been made that private companies should be compelled to file accounts, etc., in the same way as public companies.

87. One development of the private company requires special mention lest it should be thought that we have overlooked it. It has become the practice of public companies to form or acquire private companies for the purpose of carrying on particular departments of their business and the result in many cases is that the parent company becomes a mere holding company carrying on business through a group of private subsidiaries. By this means disclosure of matters relating to what in substance is the business of the parent company is avoided. We have considered whether in cases such as this any alteration of the law is desirable with a view to depriving the subsidiaries of the privileges which they enjoy as private companies so far as filing accounts, etc., is concerned. We are of opinion, however, upon the evidence before us that no such evils flow from the present system as to justify us in making any recommendation. The complaint with regard to the insufficiency of information will be to some extent met by the recommendations which we have made with regard to the accounts of the parent company. Beyond this we are not prepared to go. The system by which a large company departmentalises its business by means of a number of private subsidiaries has been found convenient and beneficial in practice and undue disclosure with regard to subsidiaries would give to competitors both here and abroad useful information as to the success or

failure of the various branches of the business. In practice, the parent company cannot afford not to support its subsidiaries and the evidence does not disclose any cause for complaint on the part of creditors. It is said that in some cases the system leads to unsound methods of inter-company finance. We thing that in a quite limited number of cases this may be true but we do not find the evil to be so serious or so widespread as to call for any alteration in the law.

88. The law as to converting a private company into a public company is complicated and raises many difficult questions. In order to set these at rest we make the following.

RECOMMENDATION.

89. Section 121 (2) should be re-drafted so as to provide:-

(1) That a private company shall become a public company if it alters its articles in such a way that they no longer contain the provisions which the articles of every private company must contain.

(2) That a company should be required under a penalty to file within a specified period of such alteration (i) a prospectus or a statement in lieu of a prospectus and (ii) such as statutory declaration as is at present required.

In addition a new form of statement in lieu should be provided. The present form in the second schedule to the Act is not adapted to meet the case of a private company which has already been in existence for some time or may at some period in its history have been a public company.

In this connection we have recommended that section 72 should not apply to companies which have commenced business before becoming public companies (Part II section 72 infra). In such cases the directors are already in office and have obtained their qualification.

Q. COMPANIES ESTABLISHED OUTSIDE GREAT BRITAIN

90. (a) Under this head we have certain recommendations to make with a view to supplementing the information available with regard to these companies and ensuring that it be kept up to date, a thing which is often neglected.

(b) We see no reason why these companies should be in a better position than British companies with regard to the contents of prospectuses and we recommend that the relevant sections should be made applicable to them with any necessary modifications.

(c) Companies are not infrequently found which carry on business in England or Scotland but are incorporated in Ireland or in the Channel Islands or the Isle of Man. In such cases we consider that the same returns

should be mad in England or Scotland (as the case may be) as would have to be made if the company was incorporated there. It is a matter of great inconvenience to have to refer to a file kept in Ireland or in the Channel Islands or the Isle of Man.

(d) We believe that in many foreign countries companies not incorporated under the local law are in practice unable to carry on business except through a local subsidiary. This may be effected by express enactment or indirectly by imposing capital duty on the whole of the company's capital and not only on so much of it as may be embarked in local trade. Foreign companies in this country enjoy many advantages, and in particular escape the heavy capital duties imposed on British companies, and we suggest that it is a matter for consideration whither or not special legislation should be passed in order to compel a foreign company, which desires to carry on business here, to register a subsidiary in this country. There are, however, disadvantages as well as advantages in such a course, and in any case we feel that this question is one of public policy, extending beyond the scope of our reference.

RECOMMENDATIONS.

91. I. We consider that section 274 should apply to companies which have established a place of business in Great Britain before the commencement of the Act of 1908. Registrations should be made in part of Great Britain where the company establishes a place of business or if it establishes a place of business other in England and Scotland, in both. Provision should be made for the discontinuance of business and for a person ceasing to have authority to accept service, and generally for keeping particulars up to date. If there is no one on the register who has authority to accept service, the Courts of this county should have the same posers of substituted service as they would have if the company were registered under the Act. Copies of all alterations and not only notice of alterations should be filed.

II. Sub-section (3) of section 274 will require amendment if our recommendation as to filing balance sheets is adopted (see paragraph 72 VI above).

III. Sub-section (4) of section 274 should apply whether the company does or does not use the work "limited" as part of its name. Every prospectus should comply with the requirements of sections 80 and 81 so far as applicable and if our recommendations with regard to "offers for sale" and "abridged prospectuses" are adopted they should apply equally to these companies. All companies which are limited should show this fact. The prospectus should be required whether or not eh company has established a place of business in Great Britain

We have already recommended that section 93 with regard the registration of incumbrances should be made to apply to these companies in so far as property in England may be affected

IV. Companies incorporated in Ireland or in the Channel Islands or the Isle of Man which establish a place of business in England or Scotland should be bound to make the same returns, etc., to the English or Scottish registrar as the case may be, as they would if incorporated in England or Scotland and the file so kept should be evidence.

R. "SHARE HAWKING."

92. A great deal of evidence ahs been placed before us with regard to the activities of persons who deal in shares, etc., of a worthless or, at best, highly speculative nature, or so-called "Units" representing shares or fractions of shares, etc., either by offers made broadcast by letter or by personal "hawking" from house to house. There seems to be good reason to suppose that many unsuspecting investors have been induced in this way to purchase securities which turn out to be quite valueless, and there can be little doubt that in many instances they have been induced to do so by fraud. The fact that the companies in question are in many cases incorporated outside Great Britain makes fraud and mis-statement more easy and their proof more difficult. This method of "share pushing," particularly the house to house type, is comparatively new in this country.

In cases where fraudulent misrepresentations are made the law provides a remedy, but in view of the difficulty of proving the facts and in most cases lack of means in the victims, it is usually found impracticable to institute any proceedings, whether criminal or civil. It is regrettable that frauds of this kind should go unpunished, particularly when the victims belong to the poorer and less educated portion of the community. It is, however, not easy to suggest alterations in the law to protect persons of whatever class who, in the rash hope of large profits, are prepared without taking advice to purchase shares in a company of which they know nothing beyond the flourishing and incomplete statements made by the individuals who offer them. At the best their action amounts to the rashest kind of speculation; at the worst it shows a complete absence of the first elements of prudence and good sense. Nevertheless, the evil is one against which, in our opinion, some provision should if possible be made. We are under no illusions as to the possibility of preventing the fraudulent from preying upon the unsuspecting, particularly when the alter are eager to speculate, and in submitting the following remarks for consideration we have borne in mind what we consider to be the practical limits within which legislation of this kind must necessarily be confined. In any case, we venture to suggest that the matter is one to be dealt with by separate legislation rather than by amendment of the Companies Acts. In this

connection we may point out that a somewhat similar class of business is being conducted with regard to plots of land in the Dominions and in foreign countries which are alleged to contain oil or precious metals, and it appears to us that this might conveniently be dealt with by legislation at the same time as sales of securities.

One suggestion that has been made to us is that all persons dealing in securities should be required to take out a licence and deposit a substantial sum. We have carefully considered this proposal, and although at first sight it appears attractive, we do not find ourselves able to recommend its adoption. One of the essential requirements of any system of licensing is that it should be possible to revoke a licence without the necessity of any elaborate or difficult inquiry. In the cases under consideration we do not see how it would prove possible in practice to revoke a licence on the ground that the holder had been guilty of some misrepresentation without establishing at the least a strong prima facie case, and where, as in the great majority of cases, the company is incorporated and its property is situate outside Great Britain, the difficulties of proof would almost certainly be for practical purposes insuperable. In addition, the fact that the holder of a licence would be able to describe himself as such would undoubtedly give to any person with whom he dealt a false sense of security. We think that legislation to meet the particular circumstances existing in this country should proceed on different lines, and we doubt whether much assistance can be gained by a study of legislation in other countries where conditions are different from those which prevail here.

Two classes of individual are concerned, viz.-

(1) those who go from house to house offering for subscription or sale share, &c., generally in the form of certificates to bearer;

(2) those who circularise the public with offers to sell shares, &c.

As to (1). We consider that "share hawking" of this description cannot be justified and its prohibition would not interfere with any legitimate business. The absence of any check upon the verbal statements of the "hawker," generally an agent paid by commission, coupled with the fact that the persons approached are in may, if not most, instances without any business experience, opens the door to the gravest abuses.

As to (2). This is a more difficult case, since there is an obvious risk of interfering with legitimate business if legislation of too stringent a character were to be introduced. Many offers to the public by circular, &c., are no doubt made by honest and reputable persons, and we do not think it desirable to make any alteration in the law which would press unduly upon persons such as these. On the other hand, it must be remembered that a share in a company is a class of property peculiar in the sense that there is nothing on its face from which its value can be known or the nature of the company's business or assets ascertained. Where the company itself offers shares to the public the Legislature has

thought fit to require it to furnish a certain amount of information in order that those who are invited to subscribe may know what it is they are buying. The extension of this principle within proper limits to sales of shares to the public appears to us to be logically justifiable, although, of course, it is out of the question to require the same information to be given in such cases as is necessary in the case of a public issue by the company itself. Accordingly we think that in the cases under consideration it should be made compulsory to furnish a certain minimum of information. Whether or not this would serve to put the recipients on their guard is perhaps open to doubt. But the obligation to furnish it would probably tend to hamper the activities of the dishonest trader without placing any undue obstacle in the way of legitimate business, since the class of information which we have in mind should be readily available. Our recommendations under this head do not extend to offers for subscription, which are already covered by the law relating to prospectuses or to offers for sale falling under paragraph 41 above.

RECOMMENDATIONS.

93. As to (1). We recommend that the offering from house to house of share, stock, bonds, debentures or debenture stock or similar securities of any company wherever incorporated, either for subscription or sale should be made an offence punishable on summary conviction, by a heavy fine or, in the case of a second or subsequent offence, imprisonment. The liability should extend both to principals and to agents and, where the principal is a company, wherever incorporated, to every director and every person concerned in the management of the company.

As to (2). We recommend that where a person in writing offers for sale to any member of the public shares, stock, bonds, debentures, or debenture stock or other similar securities of any company wheresoever incorporated and does not contemporaneously with such offer supply a written statement signed by the offeror of the prescribed particulars or supplies a statement of such particulars which is false in any material respect he should be guilty of an offence punishable on summary conviction by a heavy fine or in the case of a second subsequent offence imprisonment. The liability should extend to principals and agents and directors, &c., as under (1) above.

The prescribed particulars should be set out separately without comment and not intermingled with other matter without comment and not intermingled with other matter and in type as large and clear as any type used in the offer itself or any document sent in connection therewith and should include-

(a) a statement whether the offeror is acting as principal or agent and if as agent the name of his principal and an address in Great Britain where such principal can be served with process;

(b) the date and country of incorporation of the company and its registered or principal office;

(c) its authorised share or stock capital and the amount thereof issued, the classes into which such shares or stock are divided, with the rights of each class in respect of capital dividends and voting;

(d) the dividends, if any, paid by the company on each class of share or stock during each of the three financial years immediately preceding the offer, and, if no dividend has been paid on any particular class during any of such years, the fact should be expressly stated;

(e) the total amount of any bonds, debentures or debenture stock or other similar obligations issued and outstanding together with the rate of interest payable thereon;

(f) the names and addresses of the directors of the company;

(g) a statement whether or not and to what extent the shares offered are fully paid up;

(h) a statement whether or not the shares, &c., are quoted on or permission to deal therein has been granted by any and what recognised Stock Exchange in the United Kingdom or elsewhere and if not the fact should be expressly stated.

Our recommendation under this head with the exception of (h) does not apply to offers of any shares &c., quoted on or in respect of which permission to deal has been granted by the London or any Provincial Stock Exchange in Great Britain.

In the case of both (1) and (2) the provisions should be extended to cover cases of offers of "units" representing a share or a fraction of a share or stock, bond, debenture or debenture stock and in such cases under (2) the prescribed particulars should include a statement of the names and addresses of the persons in whom the shares &c. represented by "Units" are vested, the date of and parties to any document on the terms of which such shares &c. are held and a place in Great Britain where such document or a copy thereof can be inspected.

In the case of both (1) and (2) the Court which the offence is tried might be given power to declare any contract void in any case where it has power to convict and to order repayment of any money paid.

PART 2.

MINOR AMENDMENTS.

The minor amendments which we recommend are as follows: -

The provision requiring a company limited by guarantee and having a share capital, to state the amount of such share capital in its articles, should be repealed.

Copies of any Act of Parliament altering the memorandum of association should be supplied to member on payment of a proper fee. The penalties imposed by this section should be imposed not only on the company but also on every director, manager and secretary or other officer of the company who knowingly and wilfully authorises or permits the default.

The words "and directors and managers" should be omitted.

The penalty should be extended so as to cover a "secretary or other officer."

In all cases the secretary should be required to keep an index at the company's registered office and such index should be open to inspection. The return should set out the company's registered office. Having regard to sections 43 and 285 of the Act, all references to stock should be omitted. At present the expression "share" apparently includes stock in some cases but not in others.

14 days should be substituted for seven days in this subsection.

The penalty should be extended to the "secretary or other officer." The section should be made applicable to companies not having a share capital, although of course in such cases many of the particulars would not apply.

Where copies are required under this subsection be consider that there should be a provision that they should be supplied within three days if there are 500 members or less and that an extra day should be given for every additional 1,000 members but so that the time for supplying copies shall in no case exceed 21 days.

The Court should have power to order copies to be supplied and the penalty should extend to the "secretary or other officer."

This section and sections 32, 96 and 101 of the Act should be amended so as to give "the Court" the powers specially conferred by the Act. The expression "the Court" is used in some sections of the Act and sometimes as in this section "any Judge of the High Court" and sometimes other expressions.

The expression "Colony" in this section should include any part of His Majesty's Dominions exclusive of Great Britain, the Channel Islands and the Isle of Man.

There should be a time limit within which notice should be given of the situation of the office where the colonial register is kept, and also a time limit for notices of change of such office and of discontinuance of such office. A penalty for failure to comply with these provisions and those contained in section 35 (3) should be imposed.

Particulars with regard to a Colonial register should be included in the next return rendered under section 26 after such particulars are received in this country.

This section should apply not only to companies limited by shares but also to companies limited by guarantee and having a share capital.

Every copy of the memorandum issued after the date of any alteration thereof whether such alteration is made under this section or not should be in accordance with the alteration. The penalty in this section should extend to the "secretary or other officer."

This section should extend to notice of cancellation of shares under section 41 (1) (e). There should be a time limit for making this return and a penalty should be imposed.

A copy of the actual resolution increasing share capital and such particulars as would show the different classes of shares comprised in such increase and the rights and conditions of issue should be filed. The penalty under this section should extend to the "secretary or other officer."

This section should apply not only to companies limited by shares, but also to companies limited by guarantee and having a share capital.

The penalties under these sections should extend to the "secretary or other officer."

This section should be repealed having regard to the proposed alterations in sections 41 and 46.

A time limit should be imposed by this section and the penalty should apply not only to the company but to directors, managers, secretaries and other officers of the company. The penalty should not be confined to cases where the company is carrying on business.

This section should apply to unlimited as well as to limited companies.

The penalty should extend to a "secretary or other officer."

The penalty should not extend to a "secretary or other officer of the company."

This section should apply not only to companies limited by shares, but also to companies limited by guarantee and having a share capital. We consider, however, that it should not apply to private companies. It should show clearly that a private company is not required to prepare a statutory report.

A penalty should be imposed on directors who do not comply with the section.

Under this section as at present drawn, holders of shares carrying no voting rights can requisition a meeting. This is anomalous. The requisitionists should be "holders of shares carrying at least 10 per cent of the voting power at the time of the requisition "and not" holders of not less than one-tenth of the issued share capital of the company upon which al calls or other sums then due have been paid." The "majority in value "in sub-sections (3) and (4) would then be the "majority in voting power."

This sub-section should make it clear that the meeting is to be called (not held) within 21 days of the requisition. A subsection should be added at the end of the section providing that "where directors fail to comply by calling a meeting in accordance with a requisition the company shall repay the requisitionists' reasonable expenses incurred."

Should be repealed and the following section should be substituted: -

> "67 – (1) In so far as the articles of a company do not otherwise provide for the matters herein specified.
>
> "(1) A meeting of a company may be called by seven days notice in writing.
>
> "(2) A notice of meeting of a company shall be served on every member in manner in which notices are required to be served by Table A in the first schedule to this Act.
>
> "(3) Two members may call a meeting.
>
> "(4) Two members personally present shall be a quorum.
>
> "(5) Any member elected by the members present at a meeting may be chairman thereof.
>
> "(6) In the case of companies having a share capital every member shall have one vote for each share held by him and in the case of all other companies each member shall have one vote.
>
> "(2) Where for any reason it si impracticable to convene a meeting of a company in manner applicable to the company or to conduct a meeting in manner prescribed by the articles or this Act, the Court may direct a meeting of the company to be called held and conducted in such manner as the Court shall think fit and give such ancillary or consequential directions as to the Court may seem expedient and any meeting taking place in accordance with such directions shall be deemed to be a meeting of the company duly called held and conducted."

Should be amended so as to include foreign corporations which are members of another company. It should also enable companies and corporations which are creditors or debenture holders of another company to

appoint representatives at meetings held under the Act or rules thereunder any debenture or trust deed.

All resolutions and agreements affecting class rights should be filed. Resolutions which have been passed by every member of a company or a class and which but for their unanimity would have required a special or extraordinary resolution or a class resolution or agreement and resolutions for voluntary winding u under section 182 (1) should be filed. Copies of all such documents and of extraordinary resolutions and not only of special resolutions should be forwarded to members and embodied in or annexed to the Articles. The penalty should extend to the "secretary or other officer" and also to the liquidator of a company in winding up.

The obligation to print special and extraordinary resolutions and other documents under the section should be abolished in the case of private companies.

As to the appointment and qualifications of directors. This should not apply to companies which have not a share capital or to companies which have commenced business before becoming public companies. It should include directors named in a prospectus issued in relation to any intended company. The persons who sign and file such a contract in writing as is referred to in sub-section 1 (ii) should be placed in the same position as regards the shares mentioned in such contract as if they had subscribed the memorandum of association for such shares.

This section should be recast having regard to the Companies (Particulars as to Directors) Act, 1917. A time should be fixed for sending in the copy register and for notifying changes in the directorate. A certain doubt has been raised as to the legality of Form 9 now used by the Board of Trade. This form is for the purpose of enabling one return to be made under this section and the Companies (Particulars as to Directors) Act, 1917. Any doubt on the subject should be removed. The penalty should extend to a "secretary or other officer." There should be power to inspect the register on payment of a fee and if inspection is refused the Court should be empowered to order immediate inspection.

Statement in lieu of prospectus. These provisions should only apply to companies having a share capital. They should be made applicable where a company has issued a prospectus but not gone to allotment. In case of non-compliance with the provisions of the section a penalty should be imposed on the company and its directors and section 86 should apply. This will remove the doubts which exist as to the effect of an allotment made before the statement is filed (see the Jubilee Cotton Mills case, 1923, 1, Ch. 1, and 1924 A.C. 958). A new and more satisfactory form of statement should be prepared.

This section should only apply to companies which are required to hold a statutory meeting.

This sub-section might be repealed.

It might be expressly stated that this section only applies to companies which have a share capital.

Should be varied so as to meet the case of a private company converting itself into a public company and other cases where there would be no statutory meeting or no statutory meeting after allotments, etc., of shares to the public.

This section should only apply to companies having a share capital.

This section should apply to companies limited by shares and companies limited by guarantee and having a share capital.

The "statement in the prescribed form" mentioned in sub-section (1) (b) should be filed before the commission is paid. A penalty should be imposed for omission to file.

A penalty should be imposed for non-compliance with the section.

It should be made possible for a higher rate of interest than 4 per cent. to be prescribed by Order in Council and the work "lower" should be struck out accordingly.

A penalty should be imposed for non-compliance with this sub-section.

To meet the case of charges on property situate in some part of the United Kingdom other than England which require to be registered by the local law, we suggest the following addition to sub-section (1) of section 93.

> "When a mortgage or charge comprises property situate in some part of the United Kingdom other than England and registration is necessary to make the mortgage or charge valid or effectual according to the law of that part of the United Kingdom the delivery to and the receipt by the registrar of a copy of the instrument by which the mortgage or charge is created or evidenced such copy to be verified in the prescribed manner together with a statement in the prescribed form showing the fact that and the date when such mortgage or charge was presented for such registration as aforesaid shall have the same effect for the purposes of this section as delivery and receipt of the instrument itself."

Receivers or managers should be required to file the accounts required by this section, whether they have taken possession or omission to do this should be a continuing offence. Abstracts should run from appointment of receiver or manager and the totals should be brought forward.

This section should be extended to cancelling and correcting mis-statements in a memorandum of satisfaction.

This section should show clearly that floating charges are to be entered in the register of mortgages and should require the register to be kept at the company's registered office.

The debentures or debenture stock certificates, and not the articles should specify the period for the closing of the register.

A summary remedy for non-compliance with the section should be given.

The word "forthwith" should be omitted.

The fine imposed by these sub-sections is too small to be effective. There should be power to report the refusal to the Court, and the Court should have power to treat the matter as a contempt of Court.

There is no provision for the case of directors not appointing auditors before the statutory meeting, and they should be empowered to appoint auditors until the first annual general meeting. We recommend that the sub-section be repealed and the following substituted for it: -

> "(5) The first auditors of the company may be appointed by the directors before the first annual general meeting and if so appointed shall hold office until such first annual general meeting unless previously removed by a resolution of the company in general meeting in which case the company at that meeting may appoint auditors. If no auditors have been appointed by the directors under the power conferred by this sub-section the company in general meeting may appoint the first auditors and thereupon the power to appoint auditors by this sub-section conferred on the directors shall cease."

The work "members" should be substituted for the work "shareholders" in sub-sections (2) and (3). This will meet the case where the company has no share capital. A penalty should be imposed for failure to supply a copy of the balance sheet or the auditor's report. (See also Part 1 of this Report, para. 72.)

The articles in forms C and D in the Third Schedule to the Act should be altered.

Form C.

This form relates to a company limited by guarantee and having a share capital.

The articles in this form do not state the amount of share capital with which the company proposes to be registered. This is required by section 10 (3) of the Act – but we have recommended the repeal of this provision.

The directors are empowered with the sanction of the company in general meeting to reduce the amount of shares in the company and to cancel any shares in the company.

In 1862, when the share capital of the company was not required to be in the memorandum, such provisions were in order; now the would appear to be

wrong. (See section 56 of the Act as to reducing the capital of such a company).

All the articles of Table A are incorporated, but some of them are not applicable to such a company, e.g., article 5, in so far as it relates to section 88 of the Act; articles 31 to 40 as to conversion of shares into stock and share warrants; article 44 in so far as it relates to consolidation, sub-division and cancellation of unissued shares; article 45 as to holding the statutory meeting; article 74 as to notice of consolidation of capital.

We have, however, recommended that most of the sections of the Act referred to in the articles above mentioned should apply to guarantee companies having a share capital.

Form D.

This applies to unlimited companies having a share capital.

This too incorporates Table A and some of the articles, e.g., those mentioned above, are not applicable. This form is taken from the 1862 Act and there it referred to a totally different Table A. It would seen that it was time for it to be reconsidered and revised.

(3) Table and forms when altered should be published in the Edinburgh Gazette as well as in the London Gazette.

All orders under this section should be filed with the registrar of companies and no order should be effective until this is done. Also copies of orders made under this section should be annexed to the memorandum of association of the company. Sub-section (2) should be amended by adding the words "and voting" after the word "present."

This sub-section might be altered so as to meet the case of the holder of a share warrant and contributories in companies which have no share capital. The Court should have power to order a petitioner to advertise his petition.

The winding up should be deemed to commence at the date of the petition or of voluntary winding up, whichever is the earlier. If the voluntary winding up has preceded the compulsory winding up, all proceedings in the voluntary winding up should stand unless the Court otherwise directs on proof of fraud or manifest error.

The stay of actions provided for by this section should apply not only where a winding-up order has been made, but also where a provisional liquidator has been appointed.

Rules might be made requiring the registrar in Companies (Winding Up) to send the copy order required by this section and the company might be absolved from this duty. A similar provision might be made in the case of supervision orders.

The liquidator or official receiver might be empowered to apply for a stay of winding-up. On any application under this section the Court should have power to require a report by the official receiver.

The Court should have power to dispense with a statement of affairs as it si sometimes impossible to get one. The powers to call on officers, &c., to give information should extend to the case where a provisional order has been made. They should also extend to all persons who are or who have within one year been in the company's employ whom the official receiver considers capable of giving information and to all persons who are or have within the year been directors, managers, or employees of any company which is a director, manager or secretary of the company in liquidation.

This sub-section should extend to the case where a provisional liquidator has been appointed.

It should not be necessary for the Court or committee of inspection to sanction the employment of an agent other than a solicitor, and sub-section (2) of section 151 should be amended to include the appointment of an agent. The Court in England should have the same power as the Court has in Scotland under sub-section (1) (d) to sanction the appointment of a solicitor to assist the liquidator in the performance of his duties. Section 151 (1) (c) should accordingly be repealed and the words "in the case of a winding-up in Scotland or Ireland" should be struck out of section 151 (1) (d).

The Court should have power to dispense with the settlement of a list of contributories where it is not necessary to make a call or adjust the rights of contributories.

A time limit for the liquidator's report should be imposed.

This section should be extended to the case where a provisional liquidator has been appointed.

The words "as to the conduct of the examination but not as to costs" should be struck out.

"All winding-up resolutions should be gazetted. This should be done within (say) a week of the passing of the resolution, and there should be a continuing penalty on the liquidator directors and secretaries for non-compliance.

The words "on the application of a contributory" should be omitted.

We have already recommended that this section should be repealed (see Part I of this Report, paragraph 80 III (a)), but suggestions have been put forward that a penalty should be imposed for failure to comply with the section and that the Court has no power to waive non-compliance with any detail of this section. It has also been said that it would be desirable that creditors should have power to appoint a creditor to present a petition for compulsory winding up, and that the functions of the committee of inspection mentioned in the section should be defined by the Act. In the event of the section being retained, we agree with these suggestions.

In the event of section 188 being retained, it should not apply to a liquidator appointed under this section.

A penalty should be imposed for non-compliance with this subsection.

The account required by this section should be filed. This section should be amended to provide that if a quorum is not present at the final meeting, the liquidator shall make a return as to such meeting having been summoned and as to the absence of a quorum, and that the filing of such return shall have the same effect as the filing of a return of the holding of the meeting. A penalty should be imposed in the event of the account not being filed within a specified period.

Where there is a voluntary winding up it should not be necessary for a creditor to show prejudice before obtaining a compulsory order. This section should be amended accordingly.

Having regard to the proposed alteration of section 139, this section should be repealed.

The words "by special or extraordinary resolution" should be deleted. (As to notifying the registrar of companies of a supervision order, see above-section 143.)

If section 188 is to be retained it should not apply where a liquidator is appointed under this section.

The Crown's right on winding-up should be limited to the year of assessment immediately preceding winging-up. Persons who have advanced money to pay wages or salaries should have the same preference for such moneys as the persons paid would have had. The date of the commencement of the winding-up should be the date for all purposes.

The Unemployment Insurance Act, 1920, as amended by the Widows' Orphans' and Old Age Contributory Pensions Act, 1925, and the National Health Insurance Act, 1924, do not apparently give preference over floating charges, and the date fixed by the Workmen's Compensation Act, 1925, is the commencement of the winding-up in all cases. These anomalies should be corrected.

"The presentation of the bankruptcy petition" should be substituted for the expression "the act of bankruptcy" and the commencement of the winding-up should be the date in all cases.

These section apply respectively only to English and Scottish companies. They might be extended to cases of Scottish companies' property in England and English companies' property in Scotland.

We have made some recommendations with regard to this sub-section in paragraph 80 III (b) of Part I of this Report, but whether the company is solvent or insolvent we think that the books and papers should not be destroyed until 28 days' notice of the intention to destroy them has been given to the Board of Trade. The Board of Trade should be given power to direct that such books shall not be destroyed for a given period and a liquidator or any creditor or contributory should be entitled to appeal to the Court from such a direction.

The words "or such further time as the Court shall allow" should be inserted after the words "seven days."

Section 155 deals with accounts in compulsory winding-up cases and the provisions as to the accounts to be filed under this section should be made to apply only in voluntary liquidations.

This should be extended to enable judicial notice to be taken of the signature of officers of County Courts.

The Court should have power to wind-up a company notwithstanding that it ahs been removed from the register under this section.

The work "may" should be substituted for the word "shall" in the third line.

The words "from the company" in the first and second lines should be omitted and the sub-section should read "if the registrar either receives an answer to the effect that the company is not carrying on" etc.

The words "After notice by the registrar demanding the returns has been sent by post to the company or to the liquidator at his last place of business" should be omitted.

In the last line but one after the words "to the company" the words "or the liquidator, if any" should be added. In the last line but two of this sub-section substitute the words "shall publish" for the words "may publish." Consequential alterations will have to be made in sub-section (7). The section might provide for the filing of orders and a penalty for omission should be imposed.

Provision should be made for power to destroy documents after a lapse of 20 years from dissolution.

There should be a new scale of fees for companies not having a share capital. (Table B II in the First Schedule to the Act).

£2 where the number of members as stated in the articles does not exceed 25.

£1 for every additional 25 members up to 100.

5s. for every additional 50 or less than 50 members. The rest of the Table B II should be as at present. The 5s. fee for registering documents should be extended to all documents required to be sent or forwarded to the registrar. (Table "B" I and II.)

This section should be made to apply to foreign partnership, associations or companies even where they have not got as many as seven members.

The Court should have power to order property of a registered company to vest I the liquidator.

The penalties for false statement imposed by this section should extend to false statements in a prospectus.

The words "or any contraction or imitation of the word limited" should be added after the work "limited" in these sections.

The necessary corrections in the Act should be made though out.

Companies (Foreign Interests) Act, 1917.

Alterations and resolutions which contravene the provisions of this Act should be made the subject of a penalty to be imposed on the director and should not be avoided.

Companies (Particulars as to Directors) Act, 1917.

A provision should be inserted in this Act that where a director of a company has another occupation, it should be sufficient if he states such other occupation and not any other directorship he holds and that where such director has no other occupation except other directorships it should be sufficient to state one of such directorships.

PART 3.

SCOTLAND.

1. Upon matters specially affecting Scotland, the Committee issued a questionnaire prepared by the members of Committee specially charged with Scottish interests to various legal societies, corporate bodies of accountants, banking institutions, stock exchanges and other representative bodies in Scotland, and to certain officials connected with or interested in the administration of company matters in Scotland. The Committee carefully considered the replies from such associations or societies and officials along with the evidence of witnesses from Scotland, and with information otherwise received by the Committee upon matters more or less pertaining specially to Scotland.

Insolvent Liquidations.

2. Scottish liquidations are not involved to any extent with the conflicting rights, as in England, of receivers for debenture holders whether in respect of fixed or floating charges or other wise. Floating charges cannot be validly created over Scottish assets. No desire has been expressed on behalf of any Scottish interest, professional, commercial or otherwise, for the introduction of such securities into Scottish law and practice. No such official as a receiver is known in Scotland, or any person with power analogous to a receiver according to English practice. The liquidator realises all company assets in the interests of all parties, including bondholders or mortgagees. There is also in Scotland no official receiver charged with duties in regard to the winding up of companies as is the

case in England. The Board of Trade exercise no functions in Scotland with regard to the liquidation of Scottish companies. In Scotland estates in bankruptcy of individuals and of partnerships are realised by trustees appointed by the creditors, and the accounts and conduct of such trustees are subject to the supervision of the Accountant of Court. This system has worked very well in practice for many years. There has been a growing desire that creditors of insolvent companies registered in Scotland should have practically the same absolute voice with regard to the nomination of liquidators as they have in the election of trustees in bankruptcy. The various legal bodies, together with the Scottish banks, are practically unanimous in its advocacy. Scottish procedure in bankruptcy, it is thought, can be easily adopted in the case of company liquidations whether voluntary or compulsory with the view of vesting such control in creditors.

RECOMMENDATION.

We recommend that, in all insolvent company liquidations in Scotland, the appointment of liquidators should be (just as is recommended as to English companies) in the sole control of the creditors and should be determined by a majority of the creditors in general meeting in accordance with the amount of their claims.

3. In regard to committees of inspection, there is no provision in the Act of 1908 for their appointment as regards Scotland in judicial liquidations, and no provision is made in the Act with regard to their duties in voluntary liquidations.

RECOMMENDATION.

We recommend that committees of inspection should be retained in Scotland; that they should be appointed in all liquidations at the same time as the liquidator; that in insolvent liquidations they should be composed of creditors only; and that their powers and duties as regards Scotland should be defined on the general lines of section 160 of the Act of 1908, and be made at the same time more or less analogous also to those of Commissioners in Scottish sequestrations or bankruptcies.

4. Scottish professional opinion is in complete accord, it is believed, to the effect that section 208 of the Act of 1908 should include in addition to the bankruptcy rules there specified with regard to voting and ranking for dividends, the provisions of sections 21, 22 and 24 of the Scottish Bankruptcy Act, 1913, in regard to the lodging of claims and affidavits in liquidations by company and other creditors, section 96 of that Act in regard to votes of creditors and the exclusion of claims under £20 in voting computations, section 105 thereof as to the interruption of prescription and

section 189 as to providing for stamp duty exemptions. By inadvertence the Finance Act, 1895, section 16, in reference to this exemption, only dealt with English liquidations, and only applied to compulsory liquidations. Scottish liquidations should be treated in the same way in this matter as English liquidations. There seems no reason why voluntary liquidations of insolvent companies should not receive the benefit of stamp duty exemption.

RECOMMENDATION.

We recommend that such additional bankruptcy rules should be made applicable to the liquidations of insolvent companies in Scotland, and that, the substance of section 31 on the English Bankruptcy Act, 1914, should be made an express bankruptcy rule in Scottish company liquidations.

5. The law of Scotland differs considerably from that of England in regard to the cutting down of diligence, or, as it is termed in England, execution. In 1886 provision was made, for the first time, that all diligence done against a company by way of arrestment or poinding within sixty days of the commencement of its winding-up by the Court should be ineffectual. Voluntary liquidation does not of itself have this result, and it was provided in 1886 that to have this effect supervision of such liquidation required to be applied for so as to cut down all diligence against the company executed on or after the sixtieth day prior to the presentation of the petition for the supervision order. Such provisions find expression in section 213 of the Act of 1908. Experience has proved since then that a further advance in the case of the voluntary liquidation of an insolvent company should be made in accordance with the unanimous views submitted to the Committee. The appropriate amendment in this direction would establish in Scotland the confidence of creditors in voluntary liquidations as to the protection of the interests as a body, and render almost entirely unnecessary any applications for supervision orders, and at the same time greatly diminish the necessity for compulsory orders.

RECOMMENDATION.

We recommend that the operative date for accomplishing the avoidance of diligence or execution in voluntary liquidations should be the date of the resolution therefor; that this date should remain effective whether or not the voluntary liquidation is superseded by an official winding-up order; that sub-sections (1), (2) and (4) of section 213 should be repealed; and that other provisions should be substituted therefor giving effect to the changes now recommended in this behalf.

6. In reference to the avoidance of preferences under section 210 of the Act of 1908 the language of this section suggests that the Scottish Law of

Bankruptcy was not present to the mind of the draughtsman and that that the provisions of the English Bankruptcy Act as to the relation period of three months prior to an act of bankruptcy solely regulated the question of illegal preference.

RECOMMENDATION.

We recommend that section 210 should be amended to the effect of providing that for the purposes thereof as regards Scotland the Scottish Law of Bankruptcy as to fraudulent or illegal preferences and alienations under Statute and at common law should be specifically applied.

7. The Board of Trade take cognisance of the conduct of liquidators of companies wound up by the Court in England in regard to the faithful performance of their duties, entertain complaints against them by creditors or contributories, and undertake the audit of their receipts and payments. Reference may be made in particular to section 155 and 159 of the Act of 1908. In Scotland there is no provision for such special supervision with regard to any liquidations, compulsory or voluntary. The Accountant of Court under the Bankruptcy (Scotland) Act, 1913, and particularly by sections 158 and 160 thereof, takes cognisance of the conduct of trustees and commissioners in all sequestrations or bankruptcies of individuals and firms and of his own motion or at the instigation of creditors, he reports thereon to the Court, with the result that such disciplinary action may be taken as the justice of the case requires. There is a considerable body of opinion in Scotland in favour of placing the supervision of the conduct of liquidators in Scotland similarly in the hands of the Accountant of Court, but on the other hand all the legal societies are not unanimous in its support, and the Accountancy bodies are opposed to any change. In this divergent state of opinion the Committee do not make any recommendation for amendment.

Judicial Administration.

8. According to the practice of the Court of Session under the Court of Session Act of 1868 and of subsequent Acts, the First and Second Divisions of the Court of Session (co-ordinate in their jurisdiction, forming the Supreme Appellate Courts in Scotland and known in combination as the Inner House) have exercised exclusive and original jurisdiction in all statutory applications to the Court under the Companies Acts in regard to the rectification of the register of members, extension of objects, reorganisation and reduction of share capital, arrangement schemes, and liquidation. Since 1886 these Divisions have remitted to one of the Permanent Lords Ordinary of the Outer House the subsequent proceedings in liquidations of companies ordered to be wound up, or resolved on voluntarily and continued under supervision. In vacation, the

Bill Chamber Judge is the Court invested with winding up jurisdiction and as such able to dispose of all company applications, whether relating to liquidation or not, so submitted to him. It has been suggested that as one Judge of first instance thus during session disposes of all questions n remitted liquidation affairs and a Judge in vacation can entertain and decide any company application, the original jurisdiction in all company matter, including liquidation, should be, as in England in the case of the Chancery Judges, with Judges of the first instance, i.e., any of the five Permanent Lords Ordinary constituting the Outer House, or preferably with one exclusively appointed for the disposal of all company and bankruptcy proceedings, with the usual provision for review, as the case may be, of their or his judgments. The Committee express no views on this matter because the reform of judicial procedure of the Court of Session is under inquiry by a Royal Commission.

9. The jurisdiction of the Sheriffs in Scotland is very extensive. In many respects, it is concurrent with that of the Supreme Court, and particularly so in regard to the magnitude of interests with which the Sheriff Court can deal as a tribunal of first instance.

RECOMMENDATION.

We recommend that as in England with regard to the County Courts, jurisdiction is company matters should be extended to the Sheriff Courts of Scotland under similar limitations as exist or are now recommended in regard to English County Court jurisdiction; that powers, similar to that conferred on the Lord Chancellor, should be vested in the Lord President of the Court of Session; that provision should be made for remits, according to circumstances, from the Sheriff Court to the Court of Session, or from the Court of Session to the Sheriff Court, of liquidations, according as large or small assets exist, more suitable for the Supreme Court or the Inferior Courts as the case may be; and that provision should be made for the opinion of the Court of Session being obtained on any questions of law arising in any Sheriff Court liquidation.

10. In connection with the liquidation of companies wound up by the Court in England, the directors or other chief officers are placed under section 147 of the Act of 1908 under obligation to submit a statement of affairs of their company. The official receiver practically controls this matter in an English winding-up.

RECOMMENDATIONS.

We recommend that as regards Scotland, the Court, in any official winding-up, should be empowered to direct the attendance of any director of other officer at the first meeting of creditors for the purpose of giving all necessary explanations.

11. Provision should be made by way of amendment for other miscellaneous matters of purely Scottish interest in terms of our recommendation.

RECOMMENDATION.

We recommend:-

1. Unclaimed dividends and undistributable balances should be consigned in Bank upon receipt in name of the Accountant of Court, and such, so far as unclaimed, should be handed over to the Crown in the same manner as in Scottish sequestrations.

2. Liquidators should have power to apply under section 144 of the Act of 1908 for recall or stay of liquidation proceedings.

3. Applications should be permitted under section 193 in restraint of litigation by virtue of section 142 after the commencement of voluntary liquidation in reconciliation with the same practice in England.

4. Costs of unopposed applications by creditors for leave to proceed with actions should be added to the amount of their claims according to English practice.

5. Any company should possess the right to have confirmed by the Court as an alteration of its memorandum objects under section 9 of the Act of 1908 a power to sell its whole assets to or to amalgamate with another company so that the decision of the Court of Session in John Walker and Sons 1914 S.C. 280 may be got rid of.

6. Prescribed particulars should be filed in liquidations with the registrar and inspection thereof by creditors should be allowed on the lines of sub-sections (1), (2) and (3) of section 224 of the Act of 1908.

7. Sub-section (4) of section 215 of the Act of 1908 should be repealed.

8. All restrictions in section 151 (2) of the Act of 1908 upon the powers of liquidators in Scottish liquidations as regards realisation of assets should be removed.

9. Realisation by liquidators in voluntary liquidations of heritable assets burdened with securities should be authorised without the necessity of placing such liquidations under supervision and in the same way as a realisation by a trustee in bankruptcy under sections 108 to 113 of the Scottish Bankruptcy Act of 1913 with consequential amendment of sub-section (3) of section 213 of the Act of 1908.

General Observation.

12. In so far as the Committee have made recommendations of new or amended provisions applicable to England and Scotland generally, and in the event of their adoption by Parliamentary enactment, drafting clauses (by way of interpretation section or otherwise) would naturally require to be made, if otherwise appropriate and necessary, for their operation in Scotland in view of its law and practice, where different, in relation to the subject matter of such recommendations.

W. A. Greene *(Chairman).*	William McLintock.
A. Andrewes-Uthwatt.	E. Manville.
R. H. Brand.	James Martin.
Harold G. Brown.*	WM. Egerton Mortimer.
Archibald H. Campbell	Arthur Stiebel
WM. Cash	R. Hugh Tennant.
E. R. Eddison +	G. W. Wilton

W. Walter Coombs,
Secretary.

8th May, 1926.

* I have signed the Report, but if is to be made illegal for directors and auditors and other officers of the company to contract out their common law liability for negligence, in my opinion section 279 of the Act should be altered so as to give the Court a wider discretion than it has under the section to relieve directors from liability where they have acted honestly.

H. G. B.

\+ In signing this Report I wish to express my dissent from the recommendation in paragraph 17 relating to the words of "Bank" or "Banking." I am afraid that, in spite of the safeguards suggested, the express consent of the Board of Trade to the use of such words in a company's name might be wrongly regarded by the public as implying some sort of Government guarantee.

E. R. E.

APPENDIX.

1. General Memorandum.

Your views are invited as to whether any and what changes in the existing law are desirable with regard to any or all of the following matters. You are requested to state your views so far as possible under the headings indicated, but it is not desired that you should deal with all the matters referred to unless you are interested therein.

1. *Constitution and incorporation.*
   - (a) Form and contents of memorandum and articles of association.
   - (b) Restriction on name of company.
   - (c) Power of a company to alter.
     - (i) its objects
     - (ii) other provisions in its memorandum
   - (d) Effect of certificate of incorporation.
   - (e) Preliminary expenses.
   - (f) Miscellaneous.

2. *Share capital.*
   - (a) Reduction of capital.
   - (b) Issue of shares at a discount.
   - (c) Underwriting commission.
   - (d) Rights of preference shareholders.
   - (e) Shares of no par value.
   - (f) Distinguishing numbers of shares.
   - (g) Miscellaneous.

3. *Issues and offers of shares and debentures.*
   - (a) Contents of prospectus.
   - (b) Liability for statements in prospectus.
   - (c) Offers for sale, circulars, advertisements issued to comply with Stock Exchange requirements and other press notices.
   - (d) Statement in lieu of prospectus.
   - (e) Minimum subscription.
   - (f) Miscellaneous.

4. *Mortgagees and charges.*
   - (a) Registration and right of inspection.
   - (b) Floating charges.
   - (c) Preferential payments.
   - (d) Restrictions on rights of secured creditors.
   - (e) Miscellaneous.

5. *Directors.*
   - (a) Qualification shares.
   - (b) Remuneration including payment of fees free tax.
   - (c) Liability for negligence and indemnity clauses in articles.
   - (d) Contracts and other transactions between a company and its directors.
   - (e) Miscellaneous.

6. *Accounts.*
   - (a) Obligation to keep and form.
   - (b) Form and contents including matters to be disclosed with a view to protection shareholders or intending shareholders and creditors.
   - (c) Filing,

(d) Rights of shareholders to inspect.
(e) Accounts of holding companies and their subsidiaries.
(f) Secret reserve.
(g) Miscellaneous.

7. *Ascertained and devisable profits including payment of dividend out of capital.*

8. *Auditors.*
   (a) Rights of auditors to demand information and inspection.
   (b) Duties of auditors with regard to:-
      (i) inspection of securities etc.;
      (ii) calling the attention of shareholders to matters which it is desirable they should know (such as loans to officers of the company);
      (iii) generally.
   (c) Indemnity clauses in articles.
   (d) Miscellaneous.

9. *Reorganisation.*
   (a) Schemes of arrangement.
   (b) Reconstruction.
   (c) Rights of minorities.
   (d) Power to make a compulsory levy on shareholders.
   (e) Miscellaneous.

10. *Winding up*
   (a) Voluntary.
   (b) Compulsory.
   (c) Under supervision.
   (d) Miscellaneous.

   Under these headings, some or all of the following matters may call for consideration.

   Circumstances in which a company may be wound up; jurisdiction powers and duties of courts; appointment powers and duties of Official Receiver, liquidators and Committees of inspection; powers of Board of Trade; avoidance of transfer of shares, dispositions of property, attachments executions, etc.; proof of debts and rights of secured, unsecured and preferential creditors; dissolution and removal of defunct companies from the register accounts. Auditors, unclaimed funds; information as to pending liquidations.

11. *Private Companies.*
   (a) Trading by individuals under the name of a private company.
   (b) Exemption from filing accounts and other privileges
   (c) Miscellaneous.

12. *Companies establish outside the United Kingdom.*

13. *Miscellaneous.*

MEMORANDUM DEALING WITH MATTERS Scottish Law.

I. – Going Companies

(1) *Objects and Powers.*

Whether the power to a company to sell its whole assets or to amalgamate with another company not granted in Scotland by the Court by way of alteration of the Memorandum

objects under Section 9 of the Act of 1908 should be authorised as regards Scottish companies. See John Walter & Sons, 1914, S.C. 280.

(2) *Judicial Administration.*

1. Whether statutory applications for confirmation by the Court of alterations of the Memorandum provisions in regard to the objects or the share capital of companies should be made in the first instance to a Lord Ordinary?
2. Whether the necessity for "and Reduced" should be abolished?

II. – COMPANIES IN LIQUIDATION

(1) *Control by Creditors.*

Whether, so soon as a company resolves upon voluntary liquidation or an order for its winding up is made in either case in respect of its avowed insolvency, the shareholders, having no interest in the assets, and the creditors having the sole interest, the selection of the liquidator should be placed in the absolute control of the creditors as in the bankruptcy in Scotland of individuals or partnership estates?

(2) *Supervision by Accountant of Court.*

Whether all liquidations (voluntary or subject to supervision or official) should be placed under the charge of the Accountant of Court with right to creditors to inspect all returns of accounts made to him?

(2) Judicial Administration.

(a) Court of Session.

Whether all applications for and in connection with the liquidation of companies should be made, in the first instance, to a Lord Ordinary of the Court of Session with provision, where appropriate, for review of his judgement?

(b) *Sheriff Court.*

Small Liquidations.

Whether companies with a paid up, or credited as paid up share capital not exceeding £10,000 and registered in Scotland should not be wound up in the Sheriff Court, with right of appeal, where appropriate, to the Court of Session?

(4) *Committees of Advice or Inspection.*

Whether, so far as Scotland is concerned, a Committee of Inspection or Advice composed of creditors only in insolvent liquidations, and of shareholders or contributories only in solvent liquidations, with powers analogous to those of Scottish Commissioners in bankruptcy should be provided for, and whether such Committee, where the company is insolvent should be elected by the creditors at the same time as the liquidator, and, where it is solvent, by the shareholders?

(5) *State of Affairs.*

Whether, so soon as a company declares its insolvency be resolution or a winding up order is made against it in virtue of insolvency, it should be incumbent upon the secretary or other principal official, at the reasonable expense of the assets of the company, to prepare and lodge with the order, a state of the affairs of the company and certified by the directors as at the date of the resolution or order respectively for inspection alike by contributories or shareholders?

(6) *Powers of Liquidators.*

1. *Realisation of Assets.*

1. Whether a liquidator of a Scottish Company should not have the same free hand that the liquidator of an English company has, whether the winding up is compulsory or voluntary, in reference to all acts of administration in selling heritable or movable property, and generally in all other ways?

2. Whether the liquidator in a voluntary liquidation should have the same powers as a trustee in bankruptcy in regard to the realisation of heritable assets, burdened with securities under Section 108 to 113 and 116 of the Bankruptcy (Scotland) Act 1913, without the necessity for placing the liquidation under the supervision of the court?

2. *Wrongful actings of Directors and others.*

Whether the liquidator should have power to ask the Court of Session to direct the public examination of promoters, directors and other officers either in respect of fraud or on general grounds where enquiry might seem proper apart form fraud and also to deal with complaints under Section 215 of the Act of 1908 of misconduct on the part of promoters and directors and in relation to all kinds of property?

(7) *Illegal preferences by Execution or Diligence.*

Whether the date of the resolution for voluntary liquidation should correspond with the date of the presentation of a petition for an official winding up in regard to its operative effect under Section 213 of the Act for the purposes of defeating diligence in Scotland within sixty days of the date of the resolution, such date remaining the operative date, whether the liquidation is placed under supervision or is superseded by a compulsory winding up?

(8) *Extension of Application of Bankruptcy rules in regard to Claims of Creditors.*

1. Whether Section 24 of the Bankruptcy (Scotland) Act 1913 in regard to the lodging of claims and affidavits for companies, Section 96 of that Act in regard to claims of creditors under £20 in voting computations, Section 105 thereof as to interruption of prescription, and Section 189 likewise as to stamp duty exemptions should be made applicable to liquidations in Scotland or be included in the rules for voting and ranking under Section 208 of the Act of 1908.
2. Whether the costs of unopposed applications for leave to proceed with actions should be added to the account of the claim of the creditor as in English practice?
3. Whether provision should be made for setting aside and consigning dividends in respect of future and contingent claims and for the consignation of undistributable assets in Bank in name of the Accountant of Court?
4. Whether the "mutual dealings" section of the English Bankruptcy Act of 1914 should be introduced into Scottish liquidation?

(9) *Miscellaneous.*

1. Whether the Court should be authorised, according to English practice, to interdict litigation under Section 142 of the Act of 1908 after voluntary liquidation ensues in virtue of applications made under Section 193"
2. Whether the liquidator should have the right to apply under Section 144 for the recall of a liquidation?
3. Whether all liquidators should find security for their intromissions in relation to the total amount of the estimated assets?
4. Whether all liquidators should have the right to obtain from the Court or the Accountant of Court a formal certificate of discharge upon the final completion of their duties in any liquidation, so that, except for fraud, their actings could not be thereafter challenged by contributories or creditors?
5. Whether the Registrar should have power to destroy all papers in the file of a company upon the expiry of five years from the date of its dissolution of being struck off the Register?

3. LIST OF INDIVIDUALS, CORPORATIOSN AND INSTITUTEIONS TO WHOM THE GENERAL MEMORANDUM WAS SENT.

Mr. A. C. Clauston, C.B.E., K.C.
The Hon. Mr. Justice Eve.
Mr. F. A. Szarvasy.
Mr. F. O. Tiarks.
Mr. A. F. Topham, K. C.
Mr. F. Whinney.
The Director of Public Prosecutions.
The Registrar of Friendly Societies.
The Senior Official Receiver in Companies Liquidation.
The Official Receiver, Birmingham.
" " Liverpool.
" " Manchester.
The Registrar of Companies (London).
The Association of British Chambers of Commerce.
The British Bankers Association.
The British Insurance Association.
The Central Association of Accountants Limited.
The Chartered Institute of Secretaries.
The City of London Solicitors Company
The Committee of London Clearing Banks.
The Co-operative Union.
The Corporation of Certified Secretaries Ltd.
The Council of Associated Stock Exchanges.
The Federation of British Industries.
The Incorporated Secretaries Association Limited.
The Institute of Charted Accountants
The Law Society.
The London Chamber of Commerce.
The Mercantile Investment and General Trust Company, Ltd. (as representing the Trust Companies).
The National Chamber of Trade.
The National Union of Manufacturers Incorporated.
The Society of Incorporated Accountants and Auditors.
The Stock Exchange Committee.
The Trade Union Congress

4. LIST OF INDIVIDUALS; CORPORATIONS AND INSTITUTIONS DEALING WITH MATTERS TO WHOM THE GENERAL MEMORANDUM AND THE MEMORANDUM OF SCOTTISH LAW WERE SENT.

The Lord President, Court of Session, Edinburgh.
The Right Hon. Hugh P. Macmillan, P.C., K.C.
The Registrar of Companies (Edinburgh).
The Chartered Accountants of Scotland.
The Faculty of Procurators, Glasgow.
The Glasgow Chamber of Commerce.
The Scottish Bank Managers.
The Scottish Law Agents Society.
The Society of Advocates, Aberdeen.
The Society of Solicitors in the supreme Courts of Scotland.
The Stock Exchange, Glasgow.

5. NAMES OF THE WITNESSES WHO HAVE GIVEN EVIDENCE.

Mr. A. V. Alexander, M.P. (Co-operative Congress).
Dr. James Andrew (Faculty of Procurators).
Mr. G. E. Baldry (British Bankers Association).
Mr. T. F. Birch (National Association of Trade Protection Societies).
Sir A. H. Bodkin, K.C.B. (Director of Public Prosecutions).
Mr. A. B. Bryden (Scottish Chartered Accountants).
Mr. H. E. Burgess, C.B.E. (Senior Official Receiver in Companies Liquidation).
Mr. A. E. Campbell-Taylor, O.B.E. (Registrar of Companies).
Mr. L. B. Carslake (Law Society).
Mr. S. E. Cash (Federation of British Industries).
Mr. J. H. Clifford-Johnston (Trust Companies).
Mr. F. D'Arcy Cooper.
Mr. C. A. Coward (Law Society).
The Hon. Mr. Justice Eve.
Mr. H. D. P. Francis (City of London Solicitors' Company).
Mr. J. Grant Gibson (Official Receiver, Manchester).
Mr. J. Girvan (Scottish Law Agents Society).
Mr. F. M. Guedalla (City of London Solicitors Company).
Mr. D. Hickey (Manchester Chamber of Commerce).
Mr. H. Lakin-Smith (Associated Stock Exchanges).
Mr. H. D. Lawrie (Associated Stock Exchanges).
Mr. W. L. Morton (Treasury Solicitor).
Mr. S. Pears (Institute of Chartered Accountants).
Mr. G. S. Pitt (Society of Incorporated Accountants and Auditors).
Mr. G. S. Pott (City of London Solicitors Company).
Mr. W. Reid (Scottish Chartered Accountants).
Mr. G. Stuart Robertson, K.C. (Chief Registrar of Friendly Societies).
Mr. W. H. Stentiford (Chartered Institute of Secretaries).
Mr. A. C. Stanley-Stone (London Chamber of Commerce).
Mr. E. Raymone Streat (Manchester Chamber of Commerce).
Mr F. A. Szarvasy.
Mr. F. C. Tiarks.
Mr. A. F. Topham, K, C.
Mr. J. A. Torrnes-Johnson (Stock Exchange Committee).
Mr W. Vickers (Registrar of Companies, Edinburgh).
Dr. J. Watt (Society of Writers to the Signet).
Mr. F. Whinney.
Mr. H. Whittaker (Shareholders and Loanholders Association).
Mr. R. S. Wright (National Union of Manufacturers).