MALAYSIA'S NEW COMPANY LAW

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1. *Introduction.*

Malaysia is revising the companies legislation. Four Ordinances are now in force: one for each of the units of the Federation.

In the State of Singapore company law is governed by a Straits Settlements Ordinance of 1940,[1] modelled on the United Kingdom Companies Act, 1929.[2] Similar legislation governs the former Federation of Malaya by virtue originally of section 3(1) of the Companies Ordinance, 1946 (No. 13) of the Malayan Union [3] which provides that the Straits Settlements Ordinance, 1940, "shall apply, with such modifications as may be necessary, in the Malay States as well as in the Settlements, and the said Ordinance shall accordingly have effect throughout the Union." The Sarawak Companies Ordinance [4] is similar to the Sabah Companies Ordinance [5] which is based upon the Hong Kong companies legislation which in turn is modelled on the United Kingdom Act of 1929. Thus, each Ordinance has a common ancestor, the English companies legislation of 1929.

Uniform legislation has been facilitated by the provisions of the Federation Constitution.

The Malaysian Constitution, in Part VI which governs the relations between the Federation and the States, and deals in chapter 1 with the distribution of legislative powers, provides that "Without prejudice to any power to make laws conferred on it by any other Article, Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List (that is to say, the First or Third List set out in the Ninth Schedule).

The Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List." [6]

Chapter 2 regulates the distribution of executive powers. Art. 80 provides that "Subject to the following provisions of this Article

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[1] No. 49 of 1940; Now, Revised Law of Singapore, 1955. Ch. 174. (hereinafter referred to as Sin.).

[2] 19 & 20 Geo. 5 c. 23.

[3] (hereinafter referred to as Ma.).

[4] Ch. 65 (hereinafter referred to as Sar.).

[5] Ch. 26 (hereinafter referred to as Sa.).

[6] Constitution of Malaysia, Art. 74(1), (2).

the executive authority of the Federation extends to all matters with respect to which Parliament may make laws, and the executive authority of a State to all matters with respect to which the Legislature of that State may make laws." [7]

The Federal List includes the "incorporation, regulation and winding up of corporations other than municipal corporations (but including the municipal corporation of the federal capital); regulation of foreign corporations; bounties on production in or export from the Federation." [8]

In order to assist in the speedy preparation of a new Companies Act for Malaysia, the Government constituted on 30 October 1963 a committee to advise in the forms and content of the new legislation. The Committee, which included representatives of the Bar Council, the Society of Accountants, and the Society of Chartered Secretaries, was chaired by Raja Mohar bin Raja Badiozaman, Secretary to the Ministry of Commerce and Industry.

Working closely with the Attorney-General's Department the Committee has considered the current Australian and English legislation, the Cohen's Report and the Jenkins' Report, as well as the Report and Draft Code prepared for Ghana by Professor Gower and the many submissions for improving the law which have been sent to the Government by interested persons and bodies within Malaysia.

As a result of the deliberations of the Committee, a draft Companies Bill has been prepared by the Draftsman of the Australian uniform legislation, Mr. J.C. Finemore.

2. *Scheme of the Malaysia Companies Bill* (1964) *Draft*

The Malaysia Companies Bill (1964) Draft [9] bears a very close resemblance to the Australian model.[10]

In spite of its length,[11] the Act has achieved some measure of coherence in arrangement which is lacking in the present legislation. Thus, provisions regarding Shares [12] and Debentures,[13] Registration of Charges [14] and Restrictions on Sale and Offer for Sale of Shares [15]

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[7] Constitution of Malaysia, Art. 80(1).

[8] Ninth Schedule, List I—Federal List, Art. 8 concerning Trade, commerce and industry, item (c).

[9] (hereinafter referred to as the Act or Act).

[10] Australian Uniform Companies Act, (hereinafter referred to as Aust.) The section references are substantially the same for the Acts and Ordinances of all States and Territories of Australia. But *vide*, in particular, Victoria No. 6839/1961 as amended.

[11] It has 373 sections organized in Parts, Divisions and Subdivisions.

[12] *Vide* text at Section 8, *infra*.

[13] *Vide* text at Section 9, *infra*.

[14] *Vide* text at Section 12, *infra*.

[15] *Vide* text at Section 6, *infra*.

are brought together under Part IV entitled "Shares, Debentures and Charges" whereas they are dispersed in Parts III, IV and XI in the existing Ordinances.

Part I (ss. 1-6) is devoted to the short title, commencement, repeals and transitory provisions. Section 4(1) is important being the interpretation section and contains some seventy definitions of terms, although it is by no maens exhaustive as a definition-section.

Section 5 adopts with some modification the definitions of a subsidiary company and a holding company[16] contained in Section 154 of the United Kingdom Companies Act, 1948.[17]

Under Section 154 of the English legislatios, the test of a holding company is three-fold: (i) control of the composition of the subsidiary's board of directors; (ii) the holding of more than half the subsidiary's equity share capital; (iii) being the holding company of an intermediate company which is itself the holding company of the subsidiary. To these, Section 5 adds the control of more than half of the voting power of the subsidiary.

Section 6 defines a corporation as being related to another when (i) it is the holding company of another; (ii) it is a subsidiary of another company; or (iii) it is a subsidiary of the holding company of another company.

In Part II, Section 7 provides for the appointment (and removal) of a Registrar of Companies, as well as of Regional Registrars, Deputy Registrars, Assistant Registrars, clerks and servants as the Minister for the time being charged with responsibility for companies may think necessary for the proper administration of the Act. Sections 8, 9, and 10 deal with company auditor [18] and liquidators, their appointment, qualifications and disqualification. They must be approved by the Minister charged with responsibility for finance. Pursuant to Section 11, the Register shall, subject to the Act, keep such registers as he considers necessary in such form as he thinks fit. Any person who pays the prescribed fee may inspect any document filed or lodged with the Registrar, or require a certificate of the incorporation of any company or any other certificate issued under the Act or a copy of or extract from any document kept by the Registrar, said copies to have the same evidentiary value as the original document. The Act carries provisions for the case of loss or destruction of old records (s. 11(7)), for the enforcement

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[16] *Vide* text at Section 20, *infra*.

[17] (11 & 12 Geo. VI c. 38) (hereinafter referred to as U.K.). While the Malaysian Act reads: "(a) (ii) controls more than half of the voting power of the first-mentioned corporation; or", the English Act reads: s. 154(1)(a) (ii) "holds more than half in nominal value of any equity share capital;"

[18] *Vide* text at Section 17, *infra*.

of duty to make returns (s. 12), and for the relodging of lost registered documents (s. 13).

Part III (ss. 14-38), entitled "Constitution of Companies", is divided into two parts. Division 1 called "Incorporation [19] and the "requirements as to the memorandum." Division 2 entitled "Powers" deals with the capacity of a company including its powers to alter the objects embodied in the memorandum and in the articles of association.[20]

Part IV, entitled "Shares, Debentures and Charges", is divided into seven divisions as follows: Prospectuses,[21] Restrictions on allotment and Commencement of business, Shares, Debentures, Interests other than shares, debentures, etc.,[22] Title and Transfer,[23] and Registration of charges.

The provisions governing the "Administration and Management" of companies are found in Part V (ss. 119-166) which is divided as follows: Office and Name,[24] Directors and Officers,[25] Meetings and Proceedings,[26] Register of Members and Annual Return.

Part VI (ss. 167-175) deals with Accounts and Audits. In the Australian uniform legislation, this Part includes a further division on Investigations which in the Act is in Part IX.[27] Reconstructions and Arrangements are in Part VII. This latter part contains some new sections dealing with take-over bids.[28]

Part VIII (ss. 182-192) deals with Receivers and Managers of company property.

The provisions governing winding-up of companies are found in Part X (ss. 211-318), which has five divisions. Under the Act there will be two modes of winding up: voluntary or by the court. Winding up subject to the supervision of the court will be abolished. In practice the last form is seldom resorted to.

Part XI (ss. 319-349) provides for the regulation of no-liability companies under the title "Various types of companies." This part is divided into Investment companies [29] and Foreign companies.[30]

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[19] *Vide* text at Section 3, *infra*.
[20] *Vide* text at Section 5, *infra*.
[21] *Vide* text at Section 6, *infra*.
[22] *Vide* text at Section 10, *infra*.
[23] *Vide* text at Section 11, *infra*.
[24] *Vide* text at Section 13, *infra*.
[25] *Vide* text at Section 14, *infra*.
[26] *Vide* text at Section 16, *infra*.
[27] *Vide* text at Section 19, *infra*.
[28] *Vide* text at Section 18, *infra*.
[29] *Vide* text at Section 21, *infra*.
[30] *Vide* text at Section 22, *infra*.

Part XII (ss. 350-373) contains provisions which could not be conveniently allocated to some other part of the Act. Division 1 deals with enforcement of the Act and regulates procedures as regards service of documents, inspection of registers, etc. Division 2 is devoted to Offenses against the various provisions of the statute. The term "default fine", used throughout the existing legislation, is replaced by "default penalty,"[31] following the Australian uniform legislation. The section of the existing legislation [32] placing restrictions on offers to sell companies' securities appears in an amplified form in Section 363. The Act has ten schedules.

The First Schedule contains a list of Ordinances which will be repealed when the Act comes into force. The Second Schedule [33] contains a Table of Fees to be paid to the Registrar as provided for in Sections 7 and 373.

The Third Schedule [34] contains a comprehensive list of "powers" which unless expressly excluded or modified by the memorandum or articles of the company, are deemed to be incorporated in the memorandum or articles whether the company is incorporated either before or after the commencement of the Act. An examination of the clauses in the Schedule reveals that a difficulty may arise as to the use of the term "power" in contradistinction to the term "objects". The Schedule in its original form in the New Zealand Companies Act of 1955 [35] set these out as "incidental powers in the objects clause of the memorandum."

The Fourth Schedule contains only part of the First Schedule of the present legislation.

The Fifth Schedule [36] governing prospectuses contains a substantial list of reports to be set out and matters to be stated and has a new addition providing for the inclusion in a prospectus of matters relating to invitations to the public to deposit money with or lend money to a corporation.

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[31] This is defined in s. 370 of the Act as indicating that "any person who is convicted of an offense against this Act in relation to [any section or part of a section of this Act at the foot of which the expression 'default penalty' appears] shall be guilty of a further offense against this Act if the offense continues after he is so convicted and liable to an additional penalty for each day during which the offense so continues of not more than the amount expressed in the section or part as the amount of the default penalty, or if an amount is not so expressed, of not more than fifty dollars." Ma., s. 336; Sa., s. 331; Sin., s. 336; Sar., s. 322; Aust., s. 380; U.K., s. 440.

[32] Ma., s. 312; Sa., s. 311; Sin., s. 312; Sar., s. 318; Aust., s. 374.

[33] Ma., Second Schedule; Sa., Eleventh Schedule; Sar., Eighth Schedule; Aust., Second Schedule.

[34] Aust., Third Schedule.

[35] No. 63 of 1955.

[36] Ma., Fourth Schedule; Sa., Fourth Schedule; Sin., Fourth Schedule; Sar., Third Schedule; Aust., Fifth Schedule; U.K., Fourth Schedule.

Reports and matters to be included in a statement in lieu of prospectus are governed by the Sixth Schedule [37] which, like the previous, provides for a greater measure of disclosure on the part of those who are responsible for or who authorize the issue of statement in lieu of a prospectus.

The issue or proposed issue of, or offer of, any "interest" to the public for subscription or purchase must be preceded by the issue of a statement in the form provided for, and containing the particulars required to be set out in, the Seventh Schedule.[38] Such a statements is to be treated in the same way as a prospectus issued in the case of shares issued or offered for subscription or purchase.

The Eighth Schedule [39] governs the annual return of company having a share capital.

The Ninth Schedule [40] provides for matters to be stated in the Profit and Loss Accounts and Balance Sheets of a company. Separate accounts are required for holding and subsidiary companies.

Statements to be filed in the case of a take-over offer, both on the part of the Offeror company and the Offeree company, are governed by the Tenth Schedule.[41]

3. *The incorporation of a Malaysian company*

To put it in the words of Dr. Kahn-Freund, *Salomon* v. *Salomon & Co., Ltd.*[42] has, alas, survived many Companies Acts, and one is becoming resigned to its immortality.[43]

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[37] Ma., Third and Fifth Schedules; Sa., Third and Fifth Schedules; Sin., Third and Fifth Schedules; Sar., Second and Fourth Schedules; Aust., Sixth Schedule; U.K., Third and Fifth Schedules.

[38] Aust., Seventh Schedule.

[39] Ma., Sixth Schedule; Sa., Sixth Schedule; Sin., Sixth Schedule; Sar., Fifth Schedule; Aust., Eighth Schedule; U.K., Sixth Schedule.

[40] Aust., Ninth Schedule; U.K., Eighth Schedule.

[41] Aust., Tenth Schedule.

[42] [1897] A.C. 22. Salomon converted his boot business into a company, for which the company paid him £30,000. This sum was satisfied by issue to Salomon and his family of 20,000 fully paid up £1 shares and debentures for £10,000 to Salomon (a secured creditor). The company failed, and on a winding up the assets realized were not sufficient to pay the amount of the debenture, let alone the unsecured creditors to the extent of £7,000. Salomon claimed the proceeds of the winding up, but the creditors objected on the grounds that as Salomon held practically all the shares in the company, he was in fact the company, and accordingly could not have a mortgage on his own property. They in effect claimed that Salomon Ltd. was really the same person as Salomon and he could not owe money to himself. The House of Lords held that Salomon and the company were entirely different persons and accordingly the debenture was good and must therefore take priority over the unsecured creditors.

[43] Kahn-Freund, "Company Law Reform. A Review of the Report of the Committee on Company Law Amendment," (1946) 9 Modern L. Rev. 235 to 238.

The Act provides that "any two or more persons associated for any lawful purpose may by subscribing their names to a memorandum and complying with the requirements as to registration form an incorporated company".[44] If at any time the number of members of a company (other than a company the whole of the issued shares of which are held by a holding company)[45] is reduced below two and it carries on business for more than six months while the number is so reduced, every person who is a member of the company during the time that it so carries on business after those six months and is cognizant of the fact that it is carrying on business with fewer than two members shall be severally liable for the payment of the whole debts of the company contracted during the time that it so carries on business after those six months and may be severally sued therefor, and the company and every such member shall be guilty of an offense against the Act if the company so carries on business after those six months. The penalty for violation of this provision is a fine of two hundred and fifty dollars; default penalty.[46]

The Court may order the winding up if the number of members is reduced in the case of a company (other than a company the whole of the issued shares in which are held by a holding company) below two.[47]

An association or partnership shall not be formed for the purpose of carrying on any business which has for its object the acquisition of gain by the association or partnership or the individual members thereof unless (a) in the case of an association or partnership formed for the purpose of carrying on any profession or calling which is declared by proclamation of the Yang di-Pertuan Agong (the Supreme Head of the Federation of Malaysia) to be a profession or calling which is not customarily carried on by an association or partnership incorporated under the Act, it consists of not more than fifty persons, (b) in the case of any other association or partnership it consists of not more than twenty members,[48] (c) it is in-

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[44] Act, s. 14(1); Aust., s. 14.

[45] Defined by s. 5. *Vide* text at Section 20, *infra*.

[46] Act, s. 36; Ma., s. 30; Sa., s. 30; Sin., s. 30; Sar., s. 31; Aust., s. 36; U.K., s. 31.

[47] Act, s. 218(1)(d); Ma., s. 168; Sa,. s. 168 Sin., s. 168; Sar., s. 172; Aust., s. 222; U.K., ss. 222, 223.

[48] It has been held that a Chinese loan association does not fall within this prohibition on the ground that its only function is to arrange a re-distribution from time to time of funds contributed by the members among themselves, no interest being charged, and that this was not carrying on a business. Further, that although a sum so received by an individual member might be gainfully employed by him such gain was not an object of the association's activities. Vide, Soh Hood Beng v. Khoo Chye Neo (1896) 4 S.S.L.R. 115.

corporated under the Act, or (d) it is formed in pursuance of some other Act or letters patent.[49]

Under s. 17(1) of the Act "a corporation cannot be a member of a company which is its holding company, and any allotment or transfer of shares in a company to its subsidiary shall be void".[50] The aforesaid provision, however, shall not apply where the subsidiary or holding company is concerned as a personal representative, or where it is concerned as trustee, unless the holding company or a subsidiary thereof is beneficially interested under the trust and is not so interested only by way of security for the purposes of a transaction entered into by it in the ordinary course of a business which includes the lending of money.[51] Read together these two subsections reaffirm and implement the doctrine laid down in the case of *Trevor v. Whitworth*.[52] In that case a company incorporated under the Companies Act, 1862 was empowered by its memorandum of association to acquire and carry on a particular manufacturing business, and any other business that the company might consider to be in any way conducive or auxiliary thereto or in any way connected therewith. The articles of association purported to authorize the company to purchase its own shares. The company bought and partly paid for certain shares of one of its members. On a claim made in the winding-up of the company by the member for the balance of the purchase-money, the House of Lords held that the purchase was void because it was a trafficking in shares not within the objects of the company as defined by the memorandum, and because such a purchase, even if it had been expressly authorized by the memorandum, was not a "lawful object" for which the company could have been incorporated under the Companies Act, 1862, and was also a mode of reducing capital impliedly prohibited by the 1867 and 1877 Acts.

A subsidiary which is at the commencement of the Act a member of its holding company shall not be prevented from continuing to be a member but, subject to the aforesaid subsection,[53] the subsidiary shall have no right to vote at the meetings of the holding company or any class of members thereof.[54]

Nothing in the Act shall prevent a subsidiary from continuing to be a member of its holding company if, at the time when it be-

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[49] Act, s. 14(3); Ma., s. 331; Sin., s. 331; Sar., s. 328; Aust., s. 14; U.K., s. 27.

[50] Aust., s. 17; U.K., s. 27.

[51] Act, s. 17(2); Aust., s. 17(2); U.K., s. 27(2).

[52] (1887) 12 App. Cas. 409.

[53] *Vide* text at footnote (51), *supra*.

[54] Act, s. 17(3); Aust., s. 17(3); U.K., s. 27(3).

comes a subsidiary thereof, it already holds shares in that holding company, but (a) subject to sub-section (2) of s. 17, the subsidiary shall have no right to vote at meetings of the holding company or any class of members thereof, and (b) the subsidiary shall within the period of twelve months or such longer period as the Court may allow after becoming the subsidiary of its holding company, dispose of all of its shares in the holding company.[55]

Subject to sub-section (2)[56] of s. 17, sub-sections (1),[57] (3)[58] and (4)[59] thereof shall apply in relation to a nominee for a corporation which is a subsidiary as if references in those sub-sectons to such a corporation included references to a nominee for it.[60]

This provision is contrary to the principle which seems to have found acceptance since the decision in *In re Castiglione's Will Trusts* [61] that although a company cannot hold its own shares, there can be a trust for the company under which certain nominees may hold said shares for the company as beneficiary.

4. *Names of companies*

The Registrar may refuse to register a company by a name which in his opinion is undesirable or which is of a kind that the Minister has directed the Registrar not to accept for registration. In the case of the former, the Minister may overrule the Registrar and grant his consent. Directions given by the Minister as to the kinds of a name for a company which should not be considered for registration shall be published in the *Gazette*.

Every company shall have "Berhad" or the abbreviation "Bhd." as part of and at the end of its name. The word "Berhad" is the

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[55] Act, s. 17(4); Aust., s. 17(4).
[56] *Vide* text at footnote (51), *supra*.
[57] *Vide* text at footnote (50), *supra*.
[58] *Vide* text at footnote (54), *supra*.
[59] *Vide* text at footnote (55), *supra*.
[60] Act, s. 17(5); Aust., s. 17(5); U.K., s. 27(4).
[61] [1958] Ch 549. A testator directed that 1,000 ordinary shares in Castiglione, Erskine & Co. Ltd., should be held in trust for his son for life, and if the son should die without issue the trustees of the will were to "transfer" them to Castiglione, Erskine & Co. Ltd. at the date of his death. There were certain restrictions on the transfer of shares in the articles of the company. On the death of the son without issue the court was asked to determine whether the shares should be transferred to nominees of the company (one of whom was qualified under the articles while the other was not), or whether they fell into the testator's residuary estate. The court held that although the company could not hold its own shares, since it could not be a member of itself, there could be a trust for the company under which certain persons, registered as holders of the shares, held them on trust for the company as beneficiary; accordingly, the company was entitled to direct that the shares should be transferred into the names of nominees, who must be properly qualified under the company's articles of association to hold the shares.

equivalent of the English word "Limited" in Malay, the National Language.

In the case of private companies they shall have the word "Sendirian" or the abbreviation "Sdn." as part of their names, inserted immediately before the word "Berhad." In the case of an unlimited company the word "Sendirian" should appear at the end of its name.

Any person intending to form a company may apply in the prescribed form for reservation of a name of an intended company, or a name to which a company proposed to change its name or the name under which a foreign company proposes to be registered, either originally or on change of name. Application is to be made to the Registrar, who upon being satisfied as to the *bona fides* of the application and that the name sought to be reserved is not in contravention with the provisions of this section, shall reserve the nanes for a period of two months from the date of the lodging of the application. The reservation operates to prevent others from applying to register a proposed company with a name, or to change the name of an existing company to a name, which is a reserved name or which is likely to be mistaken for a reserved name.[62]

Upon the commencement of the Act, every company which has the word "Limited" or the abbreviation "Ltd." as its last name shall be deemed to have substituted the words "Berhad" and "Bhd." in their places respectively but shall continue to use the words in English for two years from the date of commencement of the Act.[63]

Section 23(6) provides that a change of name pursuant to the Act shall not affect the identity of the company or any rights or obligations of the company or render defective any legal proceedings by or against the company and any legal proceedings that might have been continued or commenced by or against it by its former name may be continued or commenced by or against it by its new name.[64]

5. *The doctrine of ultra vires and the powers of a company*

The *ultra vires* doctrine was criticized by the Cohen Committee in its Report on Company Law Amendment [65] as follows:

"11. Existing provisions—Section 1 of the Companies Act, 1929, lays down that persons wishing to form a company, must subscribe

[62] Act, s. 22; Ma., ss. 4 and 19; Sa., ss. 4 and 19; Sin., ss. 4 and 19; Sar., ss. 5 and 20; Aust., s. 22; U.K., s. 17.

[63] Act, s. 23(5); Ma., s. 21; Sa., s. 21; Sin., s. 21; Sar., s. 22; Aust., s. 23; U.K., s. 18.

[64] Ma., s. 21(6); Sa., s. 21(16); Sin., s. 21(6); Sar., s. 22(6); Aust., s. 23(6); U.K. s. 18(4).

[65] Cmd. 6659/1945.

their names to a memorandum of association. Section 2 requires that the memorandum must state, among other things, the objects of the company. Section 5 provides that a company may, by special resolution, either the provisions of its memorandum with respect to its objects, subject to confirmation of the alteration by the Court. Section 11 provides that the form of the memorandum shall be in accordance with forms set out in the First Schedule to the Act 'or as near thereto as circumstances admit'. The forms set out the objects of the company briefly. The memorandum of a company defines its objects and a company's objects are limited to those expressly mentioned and such as are anvillary to the expressed objects A contract by the directors upon a matter not within the ambit of the company's objects in *ultra vires* to the company, and therefore, beyond the powers of the directors. This principle is intended to protect both those who deal with the company, and its shareholders.

12. Doctrine of *ultra vires*.—Had memoranda of association closely followed the forms in the First Schedule to the Act, this protection might have been real, but, partly with a view to obviating the necessity of applying to the Court for confirmation of an alteration of objects, a practice has grown up of drafting memoranda of association very widely and at great length so as to enable the company to engage in any form of activity in which it might conceivably at some later date wish to engage and so as to confer on it all ancillary powers which it might conceivably require in connection with such activities. In consequence the doctrine of *ultra vires* is an illusory protection for the shareholders and yet may be a pitfall for third parties dealing with the company. For example, if a company which has not taken powers to carry on a taxi-cab service, nevertheless does so, third persons who have sold the taxi-cabs to the company or who have been employed to drive them, may have no legal right to recover payment from the company. We consider that, as now applied to companies, the *ultra vires* doctrine serves no positive purpose but is, on the other hand, a cause of unnecessary prolixity and vexation. We think that every company, whether incorporated before or after the passing of a new Companies Act, should, notwithstanding anything omitted from its memorandum of association, have as regards third parties the same powers as an individual. Existing provisions in memoranda as regards the powers of companies and any like provisions introduced into memoranda in the future should operate solely as a contract between a company and its shareholders as to the powers exercisable by the directors. In our view it would then be sufficient safeguard if such

provisions were alterable by special resolution without the necessity of obtaining the sanction of the Court, subject in cases where debentures have been issued before the coming into force of a new Act, to the consent of the debenture-holders by extra-ordinary resolution passed at a meeting held under the provisions contained in the trust deed or (in the absence of such provisions) convened by the Court."

The Jenkins Committee did not share the view of the Cohen Committee as regards total abolition of the *ultra vires* doctrine. Instead it recommended [66] its retention but in a modified form, so far as its detrimental effect on a party contracting with the company is concerned.

In particular, the Jenkins Committee recommended that: (i) the company shall no longer be able to plead that a contract which it entered into with another party who acted in good faith shall be invalid as being *ultra vires:* (ii) in entering into such a contract the other party, if acting in good faith, shall be entitled to assume without investigation that the company is in fact possessed of the necessary power and the doctrine of constructive notice shall not apply in that respect; (iii) the doctrine of constructive notice shall not apply with respect to *ultra vires* acts of directors; [67] (iv) a table shall be provided listing the specified powers which every company shall possess, except if any of the items are expressly or impliedly excluded. This last recommendation follows the Australian model.

The Malaysia Company Law Revision Committee, adopting the Australian view of the *ultra vires* doctrine, appears to have accepted the Cohen Committee's recommendation "that Section 5 be repealed and a new section be inserted in the Act to give effect to our suggestions in paragraph 12". But it has done so only to the extent of protecting shareholders and bondholders of a company, as well as third parties dealing with the company, from operations *ultra vires* of the management.

The Act provides that, subject to sub-section (2) of s. 19, which contains restrictions as to power of certain companies to hold lands,[68]

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[66] Cmd. 1749/62, para. 42.

[67] This recommendation would virtually overrule the decision of Slade, J. *in Rama Corporation v. Proved Tin & General Investments Ltd.* [1952] 2 Q.B. 147; distinguished by the Court of Appeals in *Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd.* [1964] 2 W.L.R. 618.

[68] S. 19(2) provides: "A company formed for the purpose of providing recreation or amusement or promoting commerce, industry, art, science, religion, or any other like object not involving the acquisition of gain by the company or by the individual members shall not acquire any land without the license of the Minister but the Minister may by license empower any such company to hold lands in such quantity and subject to such conditions as he thinks fit.

(3) A license given by the Minister under sub-section (2) of this section

the powers of a company, whether incorporated before or after the commencement of the Act, shall include (a) power to make donations for patriotic or for charitable purposes, (b) power to transact any lawful business in aid of Malaysia in the prosecution of any war in which Malaysia is engaged, and (c) unless expressly excluded or modified by the memorandum or articles, the power set forth in the Third Schedule; but the powers of a company which, by the license of the Minister pursuant to Section 24 has been registered without the word "berhad" or pursuant to any corresponding previous enactment been registered without the addition of the word "limited" to its name shall not include the powers set for in the Third Schedule unless expressly incorporated by the memorandum or articles.

The Third Schedule of the Act lists, in 26 very detailed items, the powers of a company.

According to Section 20,

"(1) No act or purported act of a company (including the entering into of an agreement by the company and including any act done on behalf of a company by an officer or agent of the company under any purported authority, whether express or implied, of the company) and no conveyance or transfer of property, whether real or personal, to or by a company shall be invalid by reason only of the fact that the company was without capacity or power to do such act or to execute or take such conveyance or transfer.

(2) Any such lack of capacity or power may be asserted or relied upon only in—

(a) proceedings against the company by any member of the company or, where the company has issued debentures secured by a floating charge over all or any of the company's property, by the holder of any of those debentures or the trustees for the holders of those debentures to restrain the doing of any act or acts or the conveyance or transfer of any property to or by the company;

(b) any proceedings by the company or by any member of the company against the present or former officers of the company; or

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shall be in the prescribed form or as near thereto as circumstances admit.

(4) Any company which is dissatisfied with any decision of the Minister under sub-section (2) of this section may within one month of such decision appeal to the Yang di-Pertuan Agong who shall have power to confirm, reverse or vary such decision.

(5) Every decision by the Minister under this section, unless such decision is reversed or varied by the Yang di-Pertuan Agong under this section, shall be final and shall not be called into question by any court."

Ma., s. 16; Sa., s. 16; Sin., s. 16; Sar., s. 16.

(b) any proceedings by the company or by any member of the company against the present or former officers of the company; or

(c) any petition by the Minister to wind up the company.

(3) If the authorized act, conveyance or transfer sought to be restrained in any proceedings under paragraph (a) of sub-section (2) of this section is being or is to be performed or made pursuant to any contract to which the company is a party, the Court may if all the parties to the contract are parties to the proceedings and if the Court deems it to be just and equitable, set aside and restrain the performance of the contract and may allow to the company or to the other parties to the contract (as the case requires) compensation for the loss or damage sustained by either of them which may result from the action of the Court in setting aside and restraining the performance of the contract, but anticipated profits to be derived from performance of the contract shall not be awarded by the Court as a loss or damange sustained." [69]

The provisions of the Act render justice to the dissenting opinion handed down as early as 1867 Blackburn J. in the case of *Taylor v. Chichester and Midhurst Railway Company.*[70]

"The legislature, in passing special acts by which railway and other trading companies are incorporated, have in view two distinct purposes. They incorporate a body of shareholders who seek as a trading speculation to carry out a particular scheme for their own benefit, and they at the same time, being satisfied that the scheme will be for the benefit of the public, confer on the body thus incorporated certain privileges, and impose on them certain restrictions, for the benefit of the public.

As the shareholders are in substance partners in a trading concern the management of which is committed to the body corporate, a trust is by implication created in favor of the shareholders that the corporation will manage the corporate affairs, and apply the corporate funds for the purpose of carrying out the original speculation. The rights thus conferred on the shareholders, as between them and the corporation, are very analogous to those between partners *inter se* and like those, depend upon the terms on which the parties entered on the joint speculation. Any shareholder has a right to object to any act being done which is in contravention of the rights thus given to him. Though the majority of the shareholders, or even all but himself approve, yet he has a right to object to the making

[69] Act, s. 20; Aust., s. 20.
[70] (1867) L.R. 2 Ex. 356.

or the enforcing of any contract to do any unauthorized act which would affect his individual interest.

But the shareholder may waive any right which is given to him for own protection only; and if he has either expressly or tacitly done so, he can no longer object; and neither a stranger, nor the body corporate itself, can raise such an objection to a contract made by the corporation, if no shareholders choose to raise it for themselves.

But the legislature, with a view to public policy, does, sometimes expressly, sometimes by implication, prohibit the doing of certain acts by companies thus incorporated, and when an act is thus made malum prohibitum, any contract to do it is illegal; and if there is an attempt made to enforce such a contract, the defendant, whether a company or an individual, may, if his conscience permit him, set up the illegality to which he was a party; for *in pari delicto potior est conditio defendentis*. Though every shareholder in the company has assented to the making of a particular contract, yet if the legislature have, not merely for the protection of the shareholders, but for the good of the public, forbidden the making of it, it is illegal, and the corporation whose shareholders have all assented is in no worse position for raising the defense than the chairman of the company who has personally entered into the contract, and yet may, as was decided in *Macgregor* v. *Dover and Deal Railway Company* (18 Q.B. 618; 22 L.J. (Q.B.) 69) set up the provisions of the railway acts as making his personal contract illegal.

The question whether a particular thing is then prohibited by the statutes must in every case depend upon the true construction of them.

I think it very unfortunate that the same phrase of "ultra vires" has been used to express both an excess of authority, as against the shareholders, and the doing of an act illegal as being malum prohibitum: for the two things are substantially different; and I think the use of the same phrase for both has produced confusion." [71]

There is some risk that the doctrine of constructive notice might defeat the purpose of Section 20. Under the section a company could be successful in raising the objection that its directors or its agents were under no authority to enter into a contract incidental to some object beyond the listed objects of the memorandum of association, by putting forward the argument that the third party dealing with the company had constructive notice of such lack of authority. Should the objection be raised, it is submitted that it shall be the

[71] *Ibid.* at 378-379.

duty of the courts to abandon any suggestion of a doctrine of constructive notice, as the draftsmen of the Act seem to have abandoned it when they adopted a provision, recurrent in American corporation law and Model Business Corporation Acts,[72] which ignores such doctrine.

The American Model Business Corporation Act of 1928, that the draftsmen seem to have taken as pattern,[73] contains a provision which reads:

"Section 10. Effect of filing or recording papers required to be filed. The filing or recording of the articles of incorporation, or amendments thereto, or of any other papers pursuant to the provisions of this Act is required for the purpose of affording all persons the opportunity of acquiring knowledge of the contents thereof, but no person dealing with the corporation shall be charged with constructive notice of the contents of any such articles or perhaps by reason of such filing or recording".[74]

Section 20(2) provides that any lack of capacity or power may be asserted or relied upon not only in proceedings against the company by any member of the company, but also by any debenture-holder or by the trustee for such debenture-holder.[75] It seems, then, that the doctrine of the case *Lawrence* v. *West Somerset Mineral*

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[72] *Vide:* Ballantine, *Corporations* (Chicago, 1946) 221 ff.; Frey, *Cases and Materials on Corporations and Partnership* (Boston, 1951) 631 ff.; Lattin and Jennings, *Cases and Materials on Corporations* (Chicago, 1959) 194 ff.; Oleck, *Modern Corporation Law* Vol. 2 (Indianapolis, 1960) 624 ff. *Vide* also: California Corporations Code, s. 908; Florida Statute, s. 608.50 (1951) as amended by L. 1955 c. 29886, s. 16; North Carolina Business Corporation Act, ss. 55-18 (The North Carolina provisions follow rather closely those of section 6 of the American Bar Association Model Business Corporation Act (Rev. 1953) but differ somewhat from the Model Act.); Ohio General Corporation Law, s. 1701.13; Pennsylavnia Business Corporation Law, s. 303. The Illinois Business Corporation Act, section 8, the District of Columbia Business Corporation Act, section 7, the Alaska Business Corporation Act, section 6 likewise follow the American Bar Association Model Act.

[73] *Vide* also: Pennsylvania Business Corporation Law "s. 9. Effects of filing papers required to be lled. The filing of the articles or of any other papers or documents, pursuant to the provisions of this act, is required for the purpose of affording all persons the opportunity of acquiring knowledge of the contents thereof, but no persons dealing with the corporation shall be charged with constructive notice of the contents of any such articles, papers or documents by reason of such filing." (1933, May 5, P.L. 364, art. III, s. 9).

Vide also: Draft Companies Code Bill 1961, prepared for Ghana by Professor L.C.B. Gower "s. 141. Except as mentioned in s. 118 of this Code, regarding particulars in the register of particulars of charges, a person shall not be deemed to have knowledge of any particulars, documents or the contents of documents merely because such particulars or documents are registered by the Registrar or referred to in any particulars or documents so registered".

[74] 9 U.L.A., 140.

[75] *Ashbury Railway Carriage and Iron Co. v. Riche* (1875) L.R. 7 H.L. 653.

Railway Company [76] should be definitely abandoned; debenture-holders, although they do not have direct or immediate interest in, or immediately enforceable charge upon, a particular fund of a company, should, on the basis of Section 20(2), be able to maintain an action to restrain the company from applying such fund in the payment of dividends on share capital if the assets of the company are insufficient to provide for payment on the loan capital.

The purpose of the last sub-section falls in line with the recommendation of the Cohen Committee which wanted the operation of the *ultra vires* doctrine to be confined to the relationships between shareholders and bondholders on one hand and director of the company on the other hand.[77] If the opinion of Blackburn, J. in *Taylor's* case had prevailed, the law today would have been relieved of much confusion and would certainly be far more just to persons who enter into contracts with companies.[78] The intention of the Act is still not very clear, having regard to the expression "the Court may, if all the parties to the contract are parties to the proceedings and if the Court deems it to be just and equitable, set aside and restrain the performance of the contract". Should a person dealing with a company complete a transaction known to be *ultra vires* the company, will the Court, upholding the constructive notice doctrine whereby "any person dealing with a company is deemed to have notice of its articles of association",[79] deem it to be just and equitable to set aside

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[76] [1918] 2 Ch. 250. The plaintiff was the holder of debenture stock in a railway company incorporated in 1855, whose capital was represented by ordinary shares, loan capital and debenture stock. The railway had been worked by an iron and steel company which paid the railway company a rental sufficient to pay the interest on its loan and share capital and the dividends on the debenture stock. From the year 1898 no traffic had been carried on the railway, and in 1917 the rails had been taken up and sold. The company had been paid the rent, the last half-yearly payment of which would expire in September 1919, and it had paid the dividends and interest on the debenture stock and loan and share capital. Plaintiff, on behalf of himself and the other debenture-holders, bought an action claiming that the defendant company ought to treat the sums received as capital and might be restrained from treating the sums payable to the iron and steel company as profits available for paying dividends. The court held that, assuming there would be a deficiency of assets in 1919 to provide for the company's loan capital, the company could go on distributing an annual surplus of the rent or price paid by the iron and steel company remaining after paying the interest on the loan capital and expenses as dividends on the share capital, and that the action by a debenture stock holder with no enforceable charge, and whose annuity was not in arrear, was, for want of his direct interest in the administration of the company, not competent.

[77] This recommendation was disregarded when the English Companies Act of 1948 was being drafted.

[78] *Vide:* Pennington, *The Principles of Company Law* (London, 1959) 67.

[79] "—some of the cases go further and say that he must be deemed to understand them, an extensive presumption sometimes—", Srutton, L.J. in the case *Kreditbank Cassel G.m.b.H. v. Schenkers, Limited* [1927] 1 K.B. 826 at 837-838.

the contract? Or will it disregard "the doctrine enunciated in a line of cases, of which *Mahony* v. *East Holyford Mining Co.*[80] is an instance?" [81]

Under Section 28 of the Act, a company may by special resolution alter the provisions of its memorandum with respect to the objects of the company.

When a company proposes to alter its memorandum, with respect to the objects of the company, it shall give by post twenty-one days' written notice specifying the intention to propose the resolution as a special resolution and to submit it for passing to a meeting of the company to be held on a day specified in the notice. The notice shall be given to all members, and to all trustees for debenture holders and if there are no trustees for any class of debenture holders to all debenture holders of that class whose names are, at the time of the posting of the notice, known to the company, but the Court may in the case of any person or class of persons for such reasons as to it seem sufficient dispense with the notice.

If an application for the cancellation of an alteration is made to the Court in accordance with the Act by (a) the holders of not less in the aggregate than ten per centum in nominal value of the company's issued share capital or any class of that capital or, if the company is not limited by shares, not less than ten per centum of the company's members, (b) the holders of not less than ten per centum in nominal value of the company's debentures, the alteration shall not have effect except so far it is confirmed by the Court.

The application shall be made within twenty-one days after the date on which the resolution altering the company's objects was passed, and may be made on behalf of the persons entitled to make the application by such one or more of their number as they appoint in writing for the purpose.

On the application the Court (a) shall have regard to the rights and interests of the members of the company or of any class of them as well as to the rights and interests of the creditors, (b) may, if it thinks fit, adjourn the proceedings in order that an arrangement may be made to the satisfaction of the Court for the purchase (otherwise than by the company) of the interest of dissententient members, (c) may give such directions and make such orders as it thinks expedient for facilitating or carrying into effect any such arrangement,

[80] (1975) L.R. 7 H.L. 869.
Vide in particular, from the opinion laid down by Lord Hatherley at 983-894.
[81] Note (79), *supra* at 841.

and (d) may make an order cancelling the alteration or confirming the alteration either wholly or in part and on such terms and conditions as it thinks fit.

Notwithstanding any other provision of the Act a copy of a resolution altering the objects of a company shall not be lodged with the Registrar before the expiration of twenty-one days after the passing of the resolution or if any application to the Court has been made before the application has been determined by the Court, whichever is the later. A copy of the resolution shall be lodged with the Registrar by the company within fourteen days after the expiration of the twenty-one days referred to above, but if an application has been made to the Court in accordance with s. 28 the copy shall be lodged with the Registrar together with an office copy of the order of the Court within fourteen days after the application has been determnied by the Court.

On compliance by a company with the last mentioned provisions the alteration (if any) of the objects shall take effect.[82]

There is no restriction, as there is in the United Kingdom Act of 1948,[83] on the purposes for which the objects may be amended.

6. *Prospectuses, securities and disclosure*

It is a well known fact that the chief characteristics of securities regulation bear the mark of British ancestry and, to some extent, draw from British experience. But, while the years 1696,[84] 1720,[85]

[82] Act, s. 28; Aust., s. 28; U.K., s. 5.

[83] U.K., s. 5(9).

[84] Following a report of the Commissioners of Trade (the forerunners of the Board of Trade) "which seems to be the first instance of this department interesting itself in a branch of company law" (Grower, *op. cit.* note 22 at p. 26), the English Parliament adopted "An Act to Restrain the Number and Ill Practice of Brokers and Stock Jobbers" (8 & 9 Will. 3, 1697, c. 32). The report had charged promoters with spreading false and misleading statements about the prospects of the companies they had formed and brokers of artificiously raising and lowering the price of securities.

Read the Act:

"From 1 May, 1697, no person to act as a broker in London or Westminster, or bills of mortality, without license of the lord mayor of London, etc. Broker on admittance to take an oath. Lord mayor, etc. to administer the oath. Broker in three months after admittance, to take oaths 1 W. & M. ff. 1 c. 8. and subscribe to the association, 7 & 8 W. 3 c. 37. and enter into an obligation. Number of brokers not to exceed 100. Admittance fees not to exceed 40s. Brokers' names and places of abode to be affixed on the royal exchange, and in Guild hall, London. Pena ty on person acting as a broker, if not admitted according to this act, and on persons employing them. Penalty on person not being a sworn broker, who shall act in discounting tallies, Exchequer bills, etc. Sworn broker to keep a register book, and to enter all contracts, etc. within three days after made, etc. Broker shall not take more than 10s. per cent brokerage. Broker after admittance to carry about him a silver medal of the King's Arms, etc. with the broker's name, etc. Penalty on broker dealing for himself, etc. or making any gain, etc. over and above the brokerage allowed by this act. Policies, contracts, etc. entered into, on which any pre-

1844,[86] 1862,[87] 1867,[88] 1900,[89] and 1907 [90] remain milestones in the development of securities legislation, and indeed the Companies Act of 1900 projects its influence on the laws of England,[91] the United

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mium shall be given to accept any share, etc. in joint stock, tallies, etc. to be void; except such policies, etc. as are to be performed in three days. Penalty on sworn broker not making discovery of other persons acting as such. This act to continue for three years. Person buying or selling cattle, corn, etc. not to be deemed a broker. Sworn brokers from 1 May, 1697, etc. not to drive any bargain for tallies, etc. on any fund granted by parliament, unless licensed by the treasury."

Some of the requirements of this Act, e.g., the display of the stock-broker license, have remained in modern legislatioi (Nova Scotia Securities Act, Regulation 16-5).

[85] In that year the English Parliament passed the Royal Exchange and London Assurance Corporation Act, 1720 (6 Geo. 1, c. 18) the so-called Bubble Act, which provided among others, for the nullity of transactions by un-chartered companies, with the consequent action for (treble) damages by the injured party, and severe penalties for brokers dealing in un-authorized stock.

"If the legislature had intended the Bubble Act to suppress companies they had succeeded beyond their reasonable expectations; if, as seems more probable, they intended to protect investors from ruin and to safeguard the South Sea Company, they failed miserably" (Grower, The Principles of Modern Company Law (London, 1957), 30).

[86] In that year Gladstone presented the Report of the Selected Committee on Joint Stock Companies (7 B.P.P., 1844) the recommendation of which were adopted in the Joint Stock Companies Act, 1844 (7 & 8 Vict., c. 110). *Vide*, in particular s. 4.

Section 35 contained provisions for the drafting of a balance sheet and for supervision by the auditors; s. 36 called for the exhibition of the balance sheet to the shareholders; s. 37 disciplined the inspection of accounts by shareholders; s. 38 concerned the appointment of auditors and their compensation, while ss. 39, 40 and 41 governed the examination of the balance, the powers and the report of the auditors, respectively.

[87] *Vide* s. 56 of Companies Act, 1862 (25 & 26 Vict., c. 89). As regards the duty of disclosure of information concerning the company, *vide* s. 174(5).

[88] *Vide* s. 38 of Companies Act, 1867 (30 & 31 Vict. c. 131).

[89] *Vide* ss. 9, 10 and 30 of Companies Act, 1900 (63 & 64 Vict. c. 48).

[90] *Vide* s. 1 of Companies Act, 1907 (7 Edw. 7, c. 50). Mention must be made also of the Directors' Liability Act of 1890 (53 & 54 Vict. c. 63). Under this Act, directors and others associated with the prospectus could be made liable for damages if the complaining shareholder could show that the contract was induced by an untrue statement of a material fact, whether made innocently or not.

Vide, in particular, Section 10 of the 1890 Act which has become s. 43 of the English Companies Act of 1948. Through the Australian reform, this section has been received in s. 46 of the Uniform Bill and finally in s. 46 of the Malaysian Act.

Section 46 which governs civil liabilities re-enacts the provisions of the present legislation (*vide:* Ma., s. 39; Sa., s. 39; Sin., s. 39; Sar., s. 40) but with a notable addition. The section applies to all prospectuses whether issued in respect of an offer to subscribe for shares or an offer to purchase shares. It must be recalled that the section of the existing Ordinances (Ma., s. 39; Sa., s. 39; Sin., s. 39 Sar., s. 40) was based upon a similar section in the United Kingdom Companies Act of 1929 which in turn re-enacted and extended the scope of the Directors Liability Act, 1890. This last provision put into statutory form the common law rules relating to misleading prospectuses but the 1929 Act removed the need to prove fraud. All that is required to be proved is the publication of an untrue statement or the wilful non-disclosure of a material fact.

[91] Companies Act, 1948, 11 & 12 Geo. 6, c. 38.

States,[92] and Canada,[93] tribute must be paid to the impetus given to a sound regulation of securities by the first Roosevelt Administration. The United States Securities Act of 1933, although influenced by English legislation, and particularly by the Directors' Liability Act of 1890, was but one of the starting points of the political and economic philosophy of President Roosevelt, the fulfillment of one of the pledges of the New Deal, and one of the prides of his far reaching social, economic and political reforms.[94]

Against this background, Section 37 of the Act provides the requirement to issue a form of application for shares or debentures with a prospectus.

A person shall not issue, circulate, or distribute any form of application for shares in or debentures of a corporation unless the form is issued, circulated or distributed together with a prospectus,

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[92] *Vide:* Securities Act of 1933 (May 27, 1933, ch. 38, Stat. 74 (1933), 15 U.S.C. s. 77 a ff. (1958). *Vide* also: Securities Exchange Act of 1934 (June 6, 1934, ch. 404, 48 Stat. 881 (1933). 15 U.S.C. s. 78 a ff. (1958); Public Utility Holding Company Act of 1935 (August 26, 1935, ch. 687, 49 Stat. 838 (1935), 15 U.S.C. s. 79 ff. (1958); Trust Indenture Act of 1939 August 3, 1939 ch. 411, 53 Stat. 1149 (1939), 15 U.S.C. See 77 aaa ff. (1958); Investment Company Act of 1940 (August 22, 1940. ch. 686, 54 Stat. 847 (1940), 15 U.S.C. s. 80a—51 ff. (1958); Investment Advisers Act of 1940 (August 22, 1940 ch. 686, 54 Stat. 857 (1940), 15 U.S.C. s. 80b—21 ff. (1958).

[93] *Vide:* Dominion Companies Act, R.SC., c. 53, and particularly s. 73-82. Legislation has also been enacted in each Province for provincial companies, either in the companies act or in a separate statute, or in both.

[94] "To go back to this dry subject of finance. . . . in a comprehensive planning for the reconstruction of the great credit groups, including Government credit, I list an important place for that prize statement of principle in the platform here adopted calling for the letting in of the light of day on issues of securities, foreign and domestic, which are offered for sale to the investing public.

"My friends, you and I as common-sense citizens know that it would help to protect the savings of the country from the dishonesty of crooks and from the lack of honor of some men in high financial places. Publicity is the enemy of crookedness.": Franklin Delano Roosevelt's New Deal Speech before the Democratic National Convention, Chicago, Illinois, July 2, 1932.

"As we review the achievements of this session of the Seventy-third Congress, it is made increasingly clear that its task was essentially that of completing and fortifying the work it has begun in March, 1933 . . . I mention only a few major enactments . . .
It strengthened the integrity of finance through the regulation of securities exchanges . . .", President Roosevelt's Fireside Chat reviewing the Achievements of the Seventy-Third Congress, Washington, D.C., June 28, 1934.
"The recovery we sought was not to be merely temporary. It was to be a recovery protected from the causes of previous disasters. With that aim in view—to prevent a future similar crisis—you and I joined in a series of enactments . . . protection for the investor in securities . . .", President Roosevelt's Annual Message to Congress, Washington D.C., January 6, 1937.

"I repeated to the Congress that neither it nor the Chief Executive can afford to weaken or destroy great reforms which, during the past five years, have been effected on behalf of the American people . . . in our supervision of stock exchanges and public utility holding companies and the issuance of new securities, . . . the electorate of America wants no backward steps taken," President Roosevelt's Fireside Chat on Economic Conditions, Washington, D.C., April 14, 1938.

a copy of which has been registered by the Registrar. The penalty for violation of this provision is that of imprisonment for two years or a fine of five thousand dollars. The preceding provision shall not apply if (a) the form of application is issued, circulated or distributed in connection with shares or debentures which are not offered to the public, (b) the form of application is issued, circulated or distributed in connection with a take-over scheme which complies with the provisions of the Act applicable to such schemes; but otherwise that sub-section shall apply to any such form of application whether issued, circulated or distributed on or with reference to the formation of a corporation or subsequently.[95]

As to what constitutes an offer to the public, the Act[96] is not too clear:

"(6) Any reference in this Act to offering shares or debentures to the public shall, unless the contrary intention appears, be construed as including a reference to offering them to any section of the public, whether selected as clients of the person issuing the prospectus or in any other manner; but a bona fide offer or invitation with respect to shares or debentures shall not be deemed to be an offer to the public if it is—

(a) an offer or invitation to enter into an underwriting agreement;

(b) made to a person whose ordinary business is to buy or sell shares or debentures whether as principal or agent;

unless a prospectus has been lodged with the Register,[97] and the prospectus contains an acknowledgment by the corporation that such a

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[95] Act, s. 37; Ma., ss. 37(3), 310; Sa., ss. 37(3), 309; Sin., ss. 37(3), 310; Sar., ss. 38(3), 316; Aust., s. 37; U.K., s. 38(3), (5).

[96] Act, s. 4(6); Aust., s. 4(6).

[97] [1929] A.C. 158.

A company being in want of further capital, a document was prepared by the appellant, who was the managing director, and signed by the other directors, stating the position of the company, that it was proposed to issue 20,000 preference shares, and giving an estimate of the profits after the new capital was available. Attached was an application form for preference shares. A second document was also prepared by the appellant, written on the company's paper and addressed to a fellow director, marked "Strictly private and confidential," which, after setting out the amount of nominal and issued capital, stated the purposes for which the additional capital was required, and concluded thus: "I shall be very happy to discuss this proposition in all its details with any one who is really interested." Attached was a form of application for ordinary shares. Several copies of these documents were given to the appellant's fellow director, who sent a copy to a solicitor, with a request, in substance, that he should find some client willing to provide the capital required. The solicitor sent the documents to the respondent's brother-in-law, and he in turn sent them to the respondent, who on the faith of the statements they contained, subscribed for 300 ordinary shares in the company. Subsequently ascertaining that a considerable part of the issued capital had been issued otherwise than for cash—a fact that was not stated in either

loan or deposit is "an unsecured note or unsecured deposit note" or "a mortgage debenture or certificate of debenture stock." Further, within two months of acceptance of the deposit or loan the corporation is obliged to issue to the depositor or lender a document acknowledging the indebtedness of the corporation in respect of that debt or loan.[98]

"Prescribed corporations" are exempted from the requirements of this section.[99] A "prescribed corporation" is either a banking corporation or any other corporation which has been recommended by the Bank Negara (the Central Bank of Malaysia) and approved and declared by the Minister of Finance to be a prescribed corporation for the purposes of this section.[100]

Section 40 of the Act contains provisions which apply to all enactments and rules of law, as to the contents of prospectus and as to liability in respect of statements in and omissions from prospectuses, to every advertisement, offering or calling attention to an offer or intended offer of shares on or debentures of a corporation or proposed listed in the section.[102]

By Section 41, "a corporation shall not accept or retain subscriptions to a debenture issue in excess of the amount of the issue as disclosed in the prospectus unless the corporation has specified in the prospectus—

(a) that it expressly reserves the right to accept or retain over-subscriptions;

(b) a limit expressed as a specific sum of money on the amount of over-subscriptions that may be accepted or retained being not more than twenty-five per centum in excess of the amount of the issue as disclosed in the prospectus.

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of the documents—he sued the appellant for damages for the loss he had sustained through the omission by the appellant to comply with the requirements of s. 81, sub-s. 1(e), of the Companies (Consolidation) Act, 1908, concerning the issue of a prospectus.

At the trial the jury found that the two documents were an offer of shares by the company to the public. In answer to the question, whether they were in fact issued to the public, the jury said: "There is no proof of this." The jury further found that the respondent sustained damage to the amount of £2000. After argument, the trial judge held that there had been no breach of s. 81, sub-s. 1(e), and gave judgment for the appellant, but his judgment was reversed by the Court of Appeals. The House of Lords, reversing the decision of the Court of Appeals, held that the documents were not issued as a prospectus within the meaning of s. 81, sub-s. 1(e).

[98] At 169.

[99] Act, s. 38(6); Aust., s. 38(7).

[100] Act, s. 38(7); Aust., s. 38(8).

[101] Act, s. 39; Ma., ss. 36, 311; Sa., ss. 36, 310; Sin., ss. 36, 311; Sar., ss. 37, 317; Aust., s. 39; U.K., s. 37, 38.

[102] Act, s. 40; Aust., s. 40.

(2) Subject to the provisions contained in the Fifth Schedule where a corporation specifies in a prospectus relating to a debenture issue that it reserves the right to accept or retain over-subscription—

(a) the corporation shall not make, authorize or permit any statement of or reference to the asset-backing for the issue to be made or contained in any prospectus relating to the issue, other than a statement or reference to the total tangible assets and the total liabilities of the corporation and of its guarantor corporations; and

(b) the prospectus shall contain a statement or reference as to what the total assets and total liabilities of the corporation would be if over-subscriptions to the limit specified in the prospectus were accepted or retained.

Penalty: Imprisonment for two years or five thousand dollars." [103]

A prospectus shall not be issued, circulated or distributed by any person unless a copy thereof has first been registered by the Registrar, according to a certain procedure specified in s. 42 of the Act.[104]

Section 43 of the Act follows the United Kingdom Act of 1948 [105] in providing:

"Where a corporation allots or agrees to allot to any person any shares in or debentures of the corporation with a view to all or any of them being offered for sale to the public, any document by which the offer for sale to the public is made, shall for all purposes be deemed to be a prospectus issued by the corporation, and all enactments and rules of law as to the contents of prospectuses and to liability in respect of statements and non-disclosures in prospectuses, or otherwise relating to prospectuses, shall apply and have effect accordingly as if the shares or debentures had been offered to the public and as if persons accepting the offer in respect of any shares or debentures were subscribers therefor but without prejudice to the liability, if any, of the persons by whom the offer is made, in respect of statements or non-disclosures in the document or otherwise.

(2) For the purposes of this Act it shall, unless the contrary is proved, be evidenced that an allotment of, or an agreement to allot,

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[103] Act, s. 41; Aust., s. 41.

[104] Act, s. 42; Ma., ss. 36, 310; Sa., ss. 36, 309; Sin., ss. 36, 310; Sar., ss. 37, 316; Aust., s. 42; U.K., s. 41.

[105] U.K., s. 45.

shares or debentures was made with a view to the shares or debentures being offered for sale to the public if it is shown—

(a) that an offer of the shares or debentures or of any of them for sale to the public was made within six months after the allotment or agreement to allot; or

(b) that at the date when the offer was made the whole consideration to be received by the corporation in respect of the shares or debentures had not been so received.

(3) The requirements of this Division as to prospectuses shall have effect as though the persons making an offer to which this section relates were persons named in a prospectus as directors of a corporation.

(4) In addition to complying with the other requirements of this Division the document making the offer shall state—

(a) the net amount of the consideration received or to be received by the corporation in respect of shares or debentures to which the offer relates; and

(b) the place and time at which a copy of the contract under which the shares or debentures have been or are to be allotted may be inspected.

(5) Where an offer to which this section relates is made by a corporation or a firm, it shall be sufficient if the document referred to in subsection (1) of this section is signed on behalf of the corporation or firm by two directors of the corporation or not less than half of the members of the firm, as the case may be, and any such director or member may sign by his agent authorized in writing." [106]

Whereas in Australia and in the United Kingdom protection of investors by legislation has been supplemented by the listing requirement of Stock Exchanges, this is not provided for in the existing legislation. Now, by Section 44 of the Act the existence of these unofficial controls are given statutory recognition. Under this section where a prospectus states that an application has been made or well be made for listing on a stock exchange, any allotment made on an application in pursuance of the prospectus will be void if the permission is not applied for and granted within the time limits set out in s. 44.[107]

Secton 45 concerns the expert's consent to issue a prospectus containing a statement by him.[108]

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[106] Act, s. 43; Ma., s. 40; Sa., s. 40; Sin., s. 40; Sar., s. 41; Aust., s. 43; U.K., s. 45.

[107] Act, s. 44; Aust., s. 44; U.K., s. 51.

[108] Act, s. 45; Aust., s. 45; U.K., s. 40.

Sections 46 [109] and 47 contain provisions with regard to the civil and criminal liability, respectively, for statements in the prospectus.

The provision for criminal liability for mis-statements is new and is based on Section 44 of the United Kingdom Companies Act, 1948. This section [110] provides that if a prospectus includes any untrue statement, any person who authorized the issue of the prospectus containing the untrue statement shall be liable to imprisonment for a term of two years or a fine of five thousand dollars or both.

The defenses available to a defendant under this section are that he must prove either that the statement was immaterial or that he had reasonable grounds to believe and did believe the statement to be true. An expert does not "authorize the issue" of a misleading prospectus merely by giving his written consent under Section 45.[111]

7. Restriction on allotment and commencement of business

Section 48 of the Act prohibits the allotment of shares offered to the public unless the minimum subscription of five per cent of the nominal value of each share for, if the shares are issued at a premium, of the nominal value of and the premium payable on, each share has been subscribed, and the sum payable on application for shares so subscribed has been received. If payment is made by check the company is not deemed to have received payment until the check is paid by the bank on which it is drawn. If these conditions are complied with within four months of the date of issue of the prospectus, all moneys received must be refunded to the applicants. If the refund is not made within five months of the date of issue of the prospectus the directors will be severally and jointly liable to repay the same with interest at five per cent unless they can prove that the default in repayment was not due to any misconduct or negligence on their part. If an allotment has been made in contravention of this section or of Section 50(1), an allottee may elect to avoid the translation by serving written notice on the company not later than one month after the holding of the statutory meeting of the company.

All directors who knowingly contravene or permit the contravention of the statutory provisions are subject to civil and criminal liabilities, in the form of pecuniary compensation to be paid to the

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[109] Act, s. 46; Ma., s. 39; Sa., s. 39; Sin., s. 39; Sar., s. 40; Aust., s. 46; U.K., s. 43.

[110] Act, s. 47; Aust., s. 47; U.K., s. 44.

[111] Aust., s. 45; U.K., s. 40.

company or to the allottee for loss, damages and costs sustained or imprisonment for one year or a fine of two thousand five hundred dollars, respectively.[112]

Section 49 is a new provision which makes a company or the directors and promoters of a proposed company, trustees of any moneys paid in advance by an applicant before allotment is made. Where the money is deposited with a bank or a third party, neither shall be required to make inquiries as to whether there is proper application of the money deposited with them and they will not be liable for misapplication of funds so long as they act in good faith.[113]

Where a public company with a share capital does not issue a prospectus upon its formation it must not allot any share or debentures unless three days before, it does so and lodges a statement in lieu of prospectus with the Registrar.[114] Such a statement must meet all the statutory requirements as regards disclosure of matters and reports stated in Section 51 and in both Parts of the Sixth Schedule to the Act.

Criminal sanctions similar to those applicable to prospectus issued under Section 37 attach to directors for any untrue statements or willful non-disclosure of material facts, and similar defenses are provided for.[115] However, an allottee who relies on a statement in lieu of prospectus does not appear to have any civil remedies similar to that provided under Section 46. It is doubtful whether he had a common law remedy of deceit available to him, unless the statement has been made with the deliberate intent of leading a particular investor to subscribe for shares or debentures.

Section 52 provides for restrictions on commencement of business without the issue of a prospectus or a statement in lieu of prospectus and prohibits a company from commencing where money is to be refunded to applicants on failure to apply for or to obtain permission for Stock Exchange listing.[116]

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[112] Act, s. 48; Ma., s. 41; Sin., s. 41; Sar., s. 42; Aust., s. 48; U.K., ss. 47 and 49.

[113] Act, s. 49; Aust., s. 49.

[114] Art, s. 50; Ma., s. 42; Sa., s. 42; Sin., s. 42; Sar., s. 43; Aust., s. 50; U.K., s. 48.

[115] Act, s. 51(3); Aust., s. 51(3); U.K., s. 48(5).

[116] Act, s. 52; Ma., s. 95; Sa., s. 95; Sin., s. 95; Sar., s. 94; Aust., s.52; U.K., s. 109.

[117] Defined in s. 4(1) as "any share which is not a preference share". By the same section a preference share means "a share by whatever name called, which does not entitle the holder thereof to any right to vote at a general meeting in the cases specified in the proviso to sub-section (2) of section 148 or to any right to participate beyond a specified amount in any distribution whether by way of dividend, or on redemption, in a winding up, or otherwise." *Vide* also Aust., s. 5(1).

8. *Shares*

Section 55 is a new provision not found in the Australian uniform legislation or the United Kingdom Companies Act, 1948. It provides that notwithstanding any provision in the Act or memorandum or articles of association every equity share [117] issued after the commencement of the Act shall carry the right on a poll at a general meeting of the company to at least one vote per share. In the case of equity shares issued by a public company a right on a poll attached to equity shares shall give the holder one vote only for each dollar or part of a dollar that has been paid up on that share. Any equity shares issued before the commencement of the Act by a private company or any other company, shall not be issued for subscription or purchase until the voting rights attached to such shares have been duly varied so as to confer this right. Any variation of preference shares so that they become equity shares shall be treated as an issue of equity shares.

Under the present legislation [118] it is possible to issue share warrants but by Section 57 of the act this will be prohibited.[119] It is felt that this restriction although of little practical value, is necessary because it will remove one means by which the identity of shareholders can remain secret. It will also mean that stamp duty payable on transfers of shares cannot be avoided by means of share warrants.

The power to issue shares at a discount is retained but the Act introduces a new restriction on the issue of shares of a class. Subsection (4) prohibits the issue of such shares unless offered to every holder of shares of that class in proportion to the number of shares held by him. A notice specifying the number of shares to which a shareholder is entitled and stating a time limit (which should not be less than twenty-one days) within which the member must exercise his option to accept or reject them, must be given. If he does not avail himself of this opportunity the company is entitled to offer them to the public but on terms not more favorable then those offered to shareholders.[120]

The Act restricts companies from using extra funds arising from a premium issue. Under the existing law, such moneys may be used to pay a dividend, provided the company's share capital would not be matched by assets up to the payment of the dividends. Under the Act a sum equal to the value of the premium is to be

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[118] Ma., s. 73; Sa., s. 73; Sin., s. 73; Sar., s. 73.

[119] Act, s. 57; Aust., s. 57.

[120] Act, s. 59; Ma., s. 50; Sa., s. 50; Sin., s. 50; Sar., s. 50; Aust., s. 59 U.K., s. 57.

transferred to a "Share Premium Account." The provisions of the Act relating to reduction of share capital of the company shall, subject to Section 60, apply as if the Share Premium Account were paid up share capital of the company. Such an Account may be used for bonus issues, for discharging liability on unpaid shares, for writing off preliminary expenses or others such as commissions, brokerage or discount allowed on the issue of shares or debentures or for providing for premium payable on redemption of debentures or redeemable preference shares.[121] This section applies whether the premium is received in cash or kind. So a share premium account must be established if the shares are allotted in consideration of a transfer of assets the value of which exceeds the nominal value of the shares. But, whether the court would question the company's valuation of the property or the shares given in consideration of a transfer of shares is doubtful.

Art. 42 of the new Fourth Schedule contains an innovation: the company may by special resolution reduce the share premium account.[122]

By a new provision in Section 63 the court is empowered to validate an issue or allotment of shares which is invalid by reason of any provision in the Act, memorandum or articles of association if the court is satisfied that in all the circumstances it is "just and equitable" so to do.[123]

Section 65 deals with the variation or abrogation of the rights attached to any class of shares and provides that such variation or abrogation may be made but the holders of at least ten per cent of the issued shares of that class whose rights are varied may apply to the court for cancellation of the variation. Under the existing legislation [124] the holders making such an application must have at least fifteen per cent of the shares of that class. In this regard sub-section (6) provides that the issue of preference shares ranking *pari passu* with existing preference shares is deemed to be a variation.[125]

Section 66, which is a new section, prohibits the allotment or issue of preference shares unless the rights of holders are set out in the memorandum or articles of association.[126] Therefore, if the rights appear in the memorandum and there is no provision therein

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[121] Act, s. 60; Aust., s. 60; U.K., s. 56.
[122] Ma., art. 38, First Schedule; Sa., art. 38, First Schedule; Sin., art. 38, First Schedule; Sar., art. 38, First Schedule; Aust., art. 42, Fourth Schedule.
[123] Act, s. 63; Aust. s. 63.
[124] Ma., s. 64; Sa., s. 64: Sin., s. 64 Sar., s. 64.
[125] Act, s. 65; Aust., s. 65; U.K., s. 72.
[126] Act, s. 66; Aust., s. 66.

for variation of those rights, they may not be varied. To do this, the articles must be amended before the issue of preference shares unless in the original articles provision is made for the particular issues showing in detail the rights attached to such preference shares.

A public company is allowed to grant options to any person to take up unissued shares but such an option must be exercisable within five years of the date of the grant. It would be void otherwise. This does not apply to the redemption of debentures by way of an exercise of an option to take up shares.[127] The Fifth Schedule which deals with matters to be stated in prospectuses requires that full details of options, present or future, over shares or debentures must be disclosed. Because of the time-limit and the disclosure requirement, two important incentives given to promoters of companies will be reduced.

9. *Debentures*

Section 70 re-enacts the provisions of the existing legislation providing for a register of debentures (other than debentures transferable by delivery) and the rights of debenture-holders and shareholders to inspect the register.[128]

Section 72 repeats the provisions of the present law allowing the creation of perpetual debentures.[129]

The Act introduces comprehensive provisions governing the qualifications, retirement, duties and obligations of trustees for debentures holders.

After the commencement of the Act, any corporation which offers debentures to the public for subscription or purchase must make provision in the debentures or in a trust deed relating to those debentures for the appointment of a trustee corporation as trustee for the debenture-holders. Unless the trustee corporation has accepted to act, no allotment of debenture is permitted.

Appointment of a trustee corporation must be made with leave of court. Section 74(3) prohibits a corporation from being appointed a trustee corporation if it is (a) a director of the borrowing corporaton; (b) a shareholder that beneficially holds shares in the borrowing corporation; (c) beneficially entitled to moneys owed by

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[127] Act, s. 68; Aust., s. 68.

[128] Act, s. 70; Ma., s. 75; Sa., s. 75; Sin., s. 75; Sar., s. 75; Aust., s. 70; U.K., s. 87.

[129] Act, s. 72; Ma., s. 76; Sa., s. 76; Sin., s. 76; Sar., s. 76; Aust., s. 72; U.K., s. 89.

the borrowing corporation to it; (d) a corporation that has entered into a guarantee in respect of the principal debt secured by those debentures or in respect of interest thereon; or (e) a corporation that is by virtue of the Act[130] deemed to be related to any corporation of a kind referred to in paragraphs (a) to (d) inclusive, or to the borrowing corporation.[131]

Retirement of trustees and continuity of office are provided for in Section 75. A trustee will not cease to be a trusutee until a successor has been duly appointed, either by a provision made in the debentures or in the trust-deed or if there is none, by the borrowing corporation.

Where a trustee corporation has ceased to exist, or fails to remain qualified or refuses to act, application may be made to court by the borrowing corporation or the trustee for debenture-holders or a debenture-holder or the Minister for the appointment of another corporation in its place.[132]

Every debenture or trust relating to a debenture must contain statutory covenants are to be included in the debenture or the relevant trust deed. These include, on the part of the borrowing corporation covenants that it "will use its best endeavors to carry on and conduct its business in a proper and efficient manner;" that, to the same extent as if the trustee for debenture-holders were a director of the borrowing corporation, the corporation will make available for inspection all necessary accounts, give such information as required with respect to all matters relating to the accounts; that, on the application of not less than one-tenth in nominal value of the issued debentures delivered to its registered office, by special notice, the borrowing corporation will summon a meeting of debenture-holders to consider the accounts and balance sheet of the corporation and to give the trustees directions in relation to the exercise of their powers.[133]

By Section 77 is provided notwithstanding anything in any debenture or trust deed, the security for any debentures which are irredeemable or redeemable inly on the happening of a contingency shall, if the Court so orders, be enforceable, forthwith or at such other time as the Court directs, on the application of the trustee for the holders of the debentures or, where there is no trustee, on the application of the holder of any of the debentures. This is subject to the condition that the court must be satisfied that "at the time of the issue of the debentures the assets of the corporation which

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130 *Vide* text after footnote (17), *supra*.
131 Act, s. 74.
132 Act, s. 75; Aust., s. 74A.
133 Act, s. 76; Aust., s. 74B.

constituted . . . the security were sufficient to discharge the principal debt . . .; that such security, if realized under the circumstances existing at the time of the application, would be likely to bring not more than sixty per cent of the principal sum of moneys outstanding and that the assets covered by the security, on a fair valuation . . . are worth less than the principal sum and the borrowing corporation is not making sufficient profit to pay the interest due on the principal sum . . ." This section shall not affect any power to vary rights or accept any compromise or arrangement created by the terms of the debentures or between the borrowing corporation and its creditors.[134]

Section 78 lays down the duties of a trustee for debenture-holders [135] and Section 79 empowers the trustee to apply to the Court for directions in relation to any matter arising in connection with the performance of the functions of the trustee or to determine any question in relation to the interests of debenture-holders.[136] Section 80 [137] requires the directors of the borrowing corporation to report in detail to the trustee for debenture-holders any matters adversely affecting the security or the interests of debenture-holders.

In addition the directors of the borrowing corporation and of every guarantor corporation (if any) which has guaranteed the repayment of the moneys raised by the issue of those debentures must submit various accounts and balance sheet to the trustee for debenture-holders.

Where money required for certain projects stated in the prospectus have been loaned to or deposited with the borrowing corporation and after the stipulated time the project has not been completed the trustee may, if in his opinion it is necessary for the protection of the debenture-holders, give notice to the borrowing corporation asking for a refund. Upon receipt of such a notice the borrowing corporation shall be liable to repay, and on demand in writing by him, shall immediately repay to any person entitled thereto, such moneys loaned or deposited by him. However, if before accepting the money loaned to or deposited with it the borrowing corporation by notice informs the individual debenture-holders of the project for which the moneys received would in fact be applied, and no demand is made by the individual debenture-holders for a refund within fourteen days of receipt of the notice, the borrowing corporation is not liable to repay.[138]

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[134] Act, s. 77; Aust., s. 74C.
[135] Act, s. 78; Aust., s. 74D.
[136] Act, s. 79; Aust., s. 74E.
[137] Act, s. 80; Aust., s. 74F.
[138] Act, s. 82.

Section 83 renders void any provision in the trust deed exempting a trustee from or indemnifying it against liability for breach of trust where it fails to show the degree of care and diligence required of it as trustee. However, a trustee may be released from liability for acts or omissions provided an agreement to do so has received the approval of a majority of not less than three-fourths in nominal value of the debenture holders present and voting at a meeting summoned for the purpose.[139]

10. *Unit trusts.*

The unit trusts, which had little fortune up until recently in England,[140] where they are now defined for the purpose of the Prevention of Fraud (Investments) Act, 1958,[141] as schemes under which "arrangements [are] made for the purpose, or having the effect, of providing facilities for the participation by persons as beneficiaries under [the] trust, in profits or income arising from the acquisition, holding, management, or disposal of securities or any other property whatsoever," have been introduced in the Act from the Australian model.[142]

The Act provides in Section 80 that interests [143] are to be issued by companies or their agents only [144] and in Section 90 that before a company issues or offers interests for subscription or purchase it must issue a prospectus which must state all the matters and set out all the reports listed in the Seventh Schedule to the Act. All the

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[139] Act, s. 83, Aust., s. 75; U.K., s. 88.

[140] In the past century they were actually called management trusts. After the passing of the Companies Acts which forbade unregistered associations of more than twenty persons carrying on business for profit, management trusts were declared illegal and forced either to register as companies or to wind up. (Vide: *Sykes v. Beadon* (1879) Ch. D. 170, but also: *Smith v. Anderson* (1880) 15 Ch. D. 247, C.A.).

[141] 6 & 7 Eliz. 2, c. 45, s. 26(1).

[142] Act, ss. 84 to 97; Aust., ss. 76 to 89.

[143] An "interest" is defined in s. 84(1) as: "any right to participate or interest whether enforceable or not and whether actual, prospective or contingent—

(a) in any profits, assets or realization of any financial or business undertaking or scheme whether in Malaysia or elsewhere;
(b) in any common enterprise whether in Malaysia or elsewhere in which the holder of the right or interest is led to expect profits, rent or interest from the efforts of the promoter to the enterprise or a third party; or
(c) in any investment contract—whether or not the right or interest is evidenced by a formal document and whether or not the right of interest relates to a physical asset, but does not include—
(d) any share in or debenture of a corporation;
(e) any interest in or arising out of a policy of life insurance; or
(f) any interest in a partnership agreement."

Vide also, Aust., s. 76(1).

[144] Act, s. 89; Aust., s. 81.

provisions in the Act and rules of law applicable to a prospectus are to apply to prospectuses issued under Section 90.[145]

Before a prospectus is issued there must be an approved deed for each interest.[146]

Section 92 [147] provides for a register of interest holders and the contents of the register are similar to those in a register of debenture holders. In addition the management company must submit annual returns relating to the interests in the same manner as submitting annual returns in relation to shares.[148]

The trustee of interest holders may apply to the Court for an order confirming a resolution to wind up the management company provided such a resolution is approved by a majority in number representing three-fourths in value of the interest holders present and voting at a meeting called for the purpose. Such a meeting may be summoned where the management company is in liquidation, or where, in the opinion of the trustee, the management company has ceased to carry on business or has, to the prejudice of the interest holders, failed to comply with any provisions of the deed.[149]

Section 96 provides that the Minister may by notice published in the *Gazette* exempt the company from full compliance with the provisions of the Act.[150]

As in the case of trustees for debenture-holders, a trustee for interest holders may not contract out of liability for breach of trust although he may be released from liability for any act or omission provided at least three-fourths of the interest holders agree to such a release.[151]

11. *Title and transfers*

Section 99 [152] provides that in certain circumstances, shares need not have a distinguishing number. These are (i) if all the issued shares or all issued shares of a class are fully paid up and rank equally for all purposes; or (ii) if all the issued shares are evidenced by certificates which contain all the particulars required by Section 100.

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[145] Act, s. 90; Aust., s. 82.
[146] Act, s. 91; Aust., s. 83.
[147] Act, s. 92; Aust., s. 84.
[148] Act, s. 93; Aust., s. 85.
[149] Act, s. 95; Aust., s. 87.
[150] Act, s. 96; Aust., s. 88.
[151] Act, s. 97; Aust., s. 89.
[152] Act, s. 99; Aust., s. 91; U.K., s. 74.

Section 100 requires each share certificate to be issued under the common or official seal of the company and specifying the number of shares held by a member, the name and registered office in Malaysia of the company, the authority under which the company is constituted and the nominal value and class of the share and the extent to which it is paid up.[153] This last requirement will apparently act as an estoppel against the company in favor of a transferee provided of course that the latter has altered his position on the face of such a certificate.

Under the existing legislation,[154] on the application of the transferor the company is obliged to enter the name of the transferee in its register in the same manner as if the application for the entry had been made by the trnsferee, The Act provides in Section 104 that at the request of the transferor, the company may require the person having possession of the share certificate or debenture and the instrument of transfer,[155] or either of them, to bring such documents into the company's office to have them cancelled or rectified or the transfer registered. Further, an application may be made to the Court if such person does not comply with such a notice given by the company.

The new Table A no longer provides for a statutory form of transfer [156] as is to be found in Table A of the present law.[157] Under Article 20 of the new Table A shares may be transferred by an instrument in writing in any usual or common form or in any other form which the directors may approve.

Section 106 is a new provision dealing with certification of transfers.

The certification does not constitute a warranty of the transferor's title nor that the certificate is genuine. It is a statement that documents showing a *prima facie* title to the shares transferred have been lodged, and the fraudulent maker of this statement is liable in damages if the transferee acts on it. However, in order that the company may be made liable the certification must be made by a person who has the company's authority to do so. Thus, in *George Whitechurch, Ltr.* v. *Cavanagh* [158] where the company's secretary fraudulently certified a transfer when the share certificate had not in fact been lodged, the House of Lords refused to hold the company

[153] Act, s. 100; Ma., s. 71; Sa., s. 71; Sin., s. 71; Sar., s. 71; Aust., s. 92; U.K., s. 81.

[154] Ma., s. 68; Sa., s. 68; Sin., s. 68; Sar., s. 68. *Vide* also, U.K., s. 77.

[155] Act, s. 103; Ma., ss. 66-67, 72; Sa., ss. 66-67, 72; Sin., ss. 66-67, 72; Sar., ss. 66-67, 72; Aust., s. 95; U.K., ss. 75, 76, 82.

[156] Act, Fourth Schedule, Table A, Transfer of Shares.

[157] Ma., Sa., Sin., and Sar., First Schedule, Table A, art. 18,

[158] [1902] A.C. 117 H.L.

liable. However in *Lloyd* v. *Grace Smith & Co.*,[159] the House of Lords held that acts might be within the scope of authority of an agent or servant notwithstanding that they were done fraudulently and for his own benefit and not for his own master or principal. The point was raised again in *Kleinwort, Sons & Co.* v. *Associated Automatic Machine Corp.*[160] where the House of Lords held that it was bound by the decision in the *Whitechurch* case.

This unfortunate result is now remedied to a certain extent by the new Section 106. This section confirms the common law rule as to the limited nature of the representation but provides that it shall be deemed to be made by the company provided that it is issued by someone having actual authority to issue certified transfers and purports to be signed by any person who has actual authority to certify or by any officer of the company. So the company will be responsible for the representation and if it is false, whether because of fraud or negligence, the company will be liable to compensate the transferee. It appears that the company can still evade liability either by proving that no actual authority had in fact been given to the officer who certified the transfer or that the signature was not made by an officer authorized to use his signature for the purpose of certifying.[161]

12. *Registration of charges*

A charge is defined as including "a mortgage and any agreement to give or execute a charge or mortgage whether upon demand or otherwise." [162]

Section 108 re-enacts most of the provisions of the present legislation relating to registration of charges. All charges must be registered within thirty days after the creation of the charge. The section extends to charges on a ship or aircraft or any share in a ship or aircraft.

With regard to the duty of the company to register charges and to keep a register of charges and copies of charging instruments and the other provisions relating to endorsement of certificates of registration on debentures, entries of satisfaction and release of the register, the Act [163] re-enacts the provisions contained in the present legislation.[164]

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[159] [1912] A.C. 716 H.L.
[160] (1934) 50 T.L.R. 244 H.L.
[161] Act, s. 106; Aust., s. 98; U.K., s. 79.
[162] Act, s. 4(1); Ma., Sa., Sin., and Sar., s. 80(10)(a); Aust., s. 5(1).
[163] Act, ss. 109 to 118; Aust., ss. 101 to 110.
[164] Ma., Sa., Sin., Sar., ss. 81 to 91. *Vide* also U.K., ss. 96 to 701 and 103 to 105.

13. *Office and name*

The Act introduces some new provisions regarding the registered office and name of a company incorporated under the Act. Every company must have a registered office in Malaysia and immediately it commences business or within fourteen days from the date of incorporation. It must be open and accessible to the public for at least three hours a day, with the exception of weekly and public holidays.[165] Further, the Registrar must be informed of the site of the registered office and the days and hours during which it is open for business, unless it is open for business for at least five hours during business hours on each day.[166]

The name of the company (whether or not it is carrying on business under a business name) must appear in "legible romanized letters" on its seal and on all official correspondence, notices and documents, including checks, receipts, orders and letters of credit. Any person who issues or authorizes the issue of such documents or the use of the seal of the company without the name of the company appearing on them, will be committing an offense under the Act. An officer issuing a bill of exchange or negotiable instrument without the name of the company on such bills of exchange or negotiable instruments will in addition to committing an offense against the Act be personally liable to the holder of the instrument or bill, unless the company agrees to assume responsibility for payment.

A major change consistent with the Government's policy to foster the use of the National Language is the requirement that in addition to affixing the name of the company on signboards of the company's offices or place of business, the premises of the registered office must bear a sign-board with the Malay words "Pejabat Yang di-Daftarkan", the equivalent of "Registered Office". Failure to comply with the statutory provision will render the company liable to a fine of two hundred and fifty dollars. The name of the company, whether on sign-boards or on documents, must be in "legible romanized letters" and must be as large if not larger than in the latter form. Otherwise the provisions of this section are deemed not to be complied with.[167]

14. *Directors*

Under the Act, every company, whether it be public or private, shall have at least two directors who ordinarily reside in Malaysia.

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[165] Act, s. 119; Ma., s. 93; Sa., s. 93; Sin., s. 93; Sar., s. 92; Aust., s. 111; U.K., s. 107.

[166] Act, s. 120; Aust., s. 112;; ;U.K. s. 107.

[167] Act. s. 121; Ma.,, s. 94; Sa., s. 94; Sin., s. 94; Sar., s. 93; Aust., s. 113; U.K., s. 108.

No person other than a natural person shall be a director of a company. The first directors of a company shall be named in the memorandum or articles of the company.[168]

Section 123 concerning restrictions on appointment or advertisement of director,[169] s. 124 concerning qualification of director,[170] s. 125 concerning undischarged bankrupts acting as directors,[171] and s. 127 concerning validity of acts of directors and officers [172] do not differ from the provisions of the existing Ordinances.

New provisions concerning appointment of directors, which must be voted on individually, are contained in s. 126.

"(1) At a general meeting of a public company, a motion for the appointment of two or more persons as directors by a single resolution shall not be made unless a resolution that it shall be so made has first been agreed to the meeting without any vote being given against it.

(2) A resolution passed in pursuance of a motion made in contravention of this section shall be void, whether or not its being so moved was objected to at the time.

(3) Where a resolution pursuant to a motion made in contravention of the section is passed no provision for the automatic reappointment of retiring directors in default of another appointment shall apply.

(4) For the purposes of this section, a motion for approving a person's appointment or for nominating a person for appointment shall be treated as a motion for his appointment.

(5) Nothing is this section shall apply to a resolution altering the company's articles.

(6) Nothing in this section prevents the election of two or more directors by ballot or poll." [173]

By Section 128, a director of a public company may be removed by ordinary resolution before the expiration of his period of office.[174] The corresponding provision of the English Companies Act of 1948

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[168] Act, s. 122; Ma., s. 142; Sa., s. 142; Sin., s. 142; Sar., s. 146; Aust., s. 114; U.K., s. 176.

[169] Act, s. 123; Ma., s. 143; Sa., s. 143; Sin., s. 143; Sar., s. 147; Aust., s. 115; U.K., s. 181.

[170] Act, s. 124; Ma., s. 144; Sa., s. 144; Sin., s. 144; Sar., s. 148; Aust., s. 116; U.K., s. 182.

[171] Act, s. 125; Ma., s. 145; Sa., s. 145; Sin., s. 145; Sar., s. 149; Aust., s. 117; U.K., s. 187.

[172] Act, s. 127; Ma., s. 146; Sa., s. 146; Sin., s. 146; Sar., s. 150; Aust., s. 119; U.K., s. 180.

[173] Act, s. 126; Aust., s. 118; U.K., s. 183.

[174] Act, s. 128(1); Aust., s. 120(1); U.K., s. 184.

is broader insofar as it contemplates the possibility of removal by ordinary resolution of directors of both public and private companies.

Special notice shall be required of any resolution to remove a director or to appoint some person in place of a director so removed at the meeting at which he is removed, and on receipt of notice of an intended resolution to remove a director the company shall forthwith send a copy thereof to the director concerned, and the director (whether or not he is a member of the company) shall be entitled to be heard on the resolution at the meeting. Where notice is given pursuant to the aforesaid provision of s. 128 and the director concerned makes with respect thereto representations in writing to the company (not exceeding a reasonable length) and requests their notification to members of the company, the company shall, unless the representations are received by it too late for it to do so (a) in any notice of the resolution given to members of the company state the fact of the representations having been made and (b) send a copy of the representations to every member of the company to whom notice of the meeting is sent (whether before or after receipt of the representations by the company) and if a copy of the representations is not so sent because they were received too late or because of the company's default the director may (without prejudice to his right to be heard orally) require that the representations shall be read out at the meeting. Notwithstanding the foregoing provisions, copies of the representations need not be sent out and the representations need not be read out at the meeting if, on the application either of the company or of any other person who claims to be aggrieved, the Court is satisfied that the rights conferred by s. 128 are being abused to secure needless publicity for defamatory matter and the Court may order the company's costs on an application under s. 128 to be paid in whole or in part by the director, notwithstanding that he is not a party to the application.

A vacancy created by the removal of a director under s. 128, if not filled at the meeting at which he is removed, may be filled as a casual vacancy.

A person appointed director in place of a person removed according to s. 128 shall be treated, for the purpose of determining the time at which he or any other director is to retire, as if he had become a director on the day on which the person in whose place he is appointeed was left appointed a director.

Nothing in the foregoing provisions shall be taken to depriving a person removed thereunder of compensation or damages payable to him in respect of the termination of his appointment as director or of any appointment terminating with that as director or as de-

rogating from any power to remove a director which may exist apart from s. 128.

A director of a public company shall not be removed by, or be required to vacate his office by reason of, any resolution request or notice of the directors or any of them notwithstanding anything in the articles or any agreement.[175]

A person is disqualified from holding office as a director of a public company or a subsidiary of a public company if he has reached the age of sixty-five years.[176] This new provision, based on a similar provision of the Australian Uniform Bill [177] and of the English Act of 1948,[178] recognizes the quasi-public nature of the office of director. Any act done by an over-aged director shall be valid notwithstanding the discovery of his termination of office by virtue of his exceeding the age-limit.

However by express provision in the company's memorandum or articles of association the age of retirement can be lowered below sixty-five.

Section 130 deals with the power to restrain persons convicted, whether within or without Malaysia, of any offense in connection with the promotion, formation or management of a corporation, or involving fraud or dishonesty punishable with imprisonment for three months or more, from managing companies for a period of five years after conviction or release from prison,[179] while s. 131 contains provisions for a case in which a director finds himself in conflict of interests with the company.

Section 131 provides: "Subject to this section every director of a company who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the company shall as soon as practicable after the relevant facts have come to his knowledge declare the nature of his interest at a meeting of the directors of the company."

The requirements of sub-section (1) of s. 131 shall not apply in any case where the interest of the director consists only of being a member or creditor of a corporation which is interested in a contract or proposed contract with the first-mentioned company if the interest of the director may properly be regarded as not being a material interest.[180]

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[175] Act, ss. 128(2) to 128(8); Aust., ss. 120(2) to 120(8); U.K., s. 184.
[176] Act, s. 129.
[177] Aust., s. 121.
[178] U.K., s. 185.
[179] Act, s. 130; Ma., s. 213; Sa., s. 213; Sin., s. 213; Sar., s. 216; Aust., s. 122; U.K., s. 188.
[180] Act, s. 131(2); Ma., s. 151; Sa., s. 151; Sin., s. 151; Sar., s. 155; Aust., s. 123(2); U.K., s. 199.

"(a) in a case where the contract or proposed contract relates to any loan to the company—that he has guaranteed or joined in guaranteeing the repayment of the loan or any part of the loan; or

(b) in a case where the contract or proposed contract has been or will be made with or for the benefit of or on behalf of a corporation which by virtue of the provisions of Section 6 is deemed to be related to the company—that he is a director of that corporation—

and this sub-section shall have effect not only for the purposes of this Act but also for the purposes of any other law, but shall not affect the operation of any provision in the articles of the company." [181]

For the purposes of sub-section (1) of s. 131, a general notice given to the directors of a company by a director to the effect that he is an officer or member of a specific corporation or a member of a specified firm and is to be regarded as interested in any contract which may, after the date of the notice, be made with that corporation or firm shall be deemed to be a sufficient declaration of interest in relation to any contract so made if it specifies the nature and extent of his interest in the specified corporation or firm and his interest is not different in nature or greater in extent than the nature and extent so specified in the general notice at the time any contract is so made, but no such notice shall be of effect unless either it is given at a meeting of the directors or the director takes reasonable steps to ensure that it is brought up and read at the next meeting of the directors after it is given.[182]

By sub-section (5), "every director of a company who holds any office or possesses any property whereby directly or indirectly duties or interests might be created in conflict with his duties or interests as director shall declare at a meeting of the directors of the company the fact and the nature, character and extent of the conflict."

The declaration is to be made at the first meeting of the directors held—

(a) after he becomes a director; or

(b) (if already a director) after he commenced to hold the office or possess the property—

as the case requires.

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[181] Act, s. 131(3); Ma., s. 151; Sa., s. 151; Sin., s. 151; Sar., s. 155; Aust., s. 123(3); U.K., s. 199.

[182] Act, s. 131(4); Ma., s. 151; Sa., s. 151; Sin., s. 151; Sar., s. 155; Aust., s. 123(4); U.K., s. 199.

Except as provided in sub-section (3) of it, s. 131 shall be in addition to and not in derogation of the operation of any rule of law or any provision in the articles restricting a director from having any interest in contracts with the company or from holding offices or possessing properties involving duties or interests in conflict with his duties or interests as a director.[183]

Besides these fiduciary duties, a director is under a common law duty of care, the rules of which have been laid down *In re The City Equitable Fire Insurance Co.:*

"There are, in addition, one or two other general propositions that seem to be warranted by the reported cases: (1) A director need not exhibit in the performance of his duties a greater degree of skill as may reasonably be expected from a person of his knowledge and experience. A director of a life insurance company, for instance, does not guarantee that he has the skill of an actuary or of a physician. In the words of Lindley M.R.: "If directors act within their powers, if they act with such care as is reasonably to be expected from them, having regard to their knowledge and experience, and if they act honestly for the benefit of the company they represent, they discharge both their equitable as well as their legal duty to the company". (see *Lagunas Nitrate Co.* v. *Lagunas Syndicate* [1899] 2 Ch. 192, 435.) It is perhaps only another way of stating the same proposition to say that directors are not liable for mere errors of judgment. (2) A director is not bound to give continuous attention to the affairs of his company. His duties are of an intermittent nature to be performed at periodical board meetings, and at meetings of any committee of the board upon which he happens to be placed. He is not, however, bound to attend all such meetings, though he ought to attend whenever, in the circumstances, he is reasonably able to do so. (3) In respect of all duties, that, having regard to the exigencies of business, and the articles of association, may properly be left to some other official, a director is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly." [184]

Section 132 of the Act prescribes a statutory duty to act honestly and with diligence.

By sub-section (2) "An officer or agent of a company shall not make use of any information acquired by virtue of his position as an officer or agent of the company to gain directly or indirectly an

[183] Act, s. 131(8) Ma., s. 151; Sa., s. 151; Sin., s. 151; Sar., s. 155; Aust., s. 123(8); U.K., s. 199.

[184] (1925) 1 Ch. 407 at 428-429.

improper advantage for himself or for any other person or to cause detriment to the company."

"An officer or agent who commits a breach of any of the provisions of this section shall be—

(a) liable to the company for any profit made by him or for any damage suffered by the company as a result of the breach of any of those provisions and

(b) guilty of an offense against this Act,

Penalty: Imprisonment for one year or two thousand five hundred dollars." [185]

An officer or agent who directly or indirectly gains an improper advantage for himself or for any other person from dealings in shares or debentures or options relating to shares or debentures of the company by the use of information acquired by virtue of his position as an officer or agent of the company shall be liable to compensate any person who is deprived of a benefit either actual or potential, or who suffers less as a result of the use of such information.

Section 132 is in addition to and not in derogation of any other enactment or rule of law relating to the duty or liability of directors or officers of a company.

For the purposes of this section, officer includes a person who at any time has been an officer of the company; and agent includes a banker, solicitor or auditor of the company who at any time has been a banker, solicitor or auditor of the company.

The Act introduces in Malaysia a provision borrowed from the Australian Uniform Bill,[186] which was already in the English Companies Act of 1948,[187] to the effect that a company shall not make a loan to a director of the company or of a company which by virtue of Section 6 of the Act is demand to be related to that company, or enter into any guarantee or provide any security in connection with a loan made to such a director by any other person.

However, this section does not apply to loans or the undertaking of a guarantee of repayment made by the company to a director for the purposes of providing the director with funds incurred as expenses on behalf of the company or to enable him properly to perform his duties as an officer of the company. Nor does it apply to loans made to a director of a company or of a holding company to enable him to purchase a home, provided the director

[185] Act, s. 132(3); Aust., s. 124(3).
[186] Aust., s. 125.
[187] U.K., s. 190.

is engaged in the full-time employment of the company. Where the general meeting has approved a scheme for making loans to its employees, such a scheme is also outside the scope of this section.

Further, the Act renders any defense of illegality nugatory by providing that "Nothing in this section shall operate to prevent the company from recovering the amount of any loan or amount for which is becomes liable under any guarantee entered into or in respect of any security given contrary to the provisions of this section." [188]

Section 134 of the Act provides that every company shall keep a register showing with respect to each director of the company not only the share or debentures of the company or of a related company held by him or for him but also the shares or debentures over which he had a right of option to purchase.[189]

The register must be kept at the company's registered office and must be open to inspection during business hours to any member or debenture holder of the corporation or of a related corporation. This provision for all-the-year inspection differs from the Australian uniform legislation and is in accord with the recommendation to that effect of the Jenkins Committee.

These provisions for disclosure of equitable interests of directors are a departure from the decision in *Percival* v. *Wright* [190] which held that directors may use inside knowledge for their own investment purposes without having to account to shareholders.

Although the provisions of this section are not as severe as those contained in Section 16 of the United States Securities Exchange Act of 1934,[191] they constitute an adequate safeguard of the shareholders against illicit advantages that directors might derive from the knowledge or the withholding of information of the management of the company, in dealing in company's shares.

Every director must give notice to the company of such matters relating to himself as may be necessary for the purposes of s. 134, concerning the keeping of a register of shareholdings,[192] s. 141, concerning the keeping of a register of directors, managers and secretaries,[193] and s. 179, concerning takeover offers.[194] Any such

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188 Act, s. 133.

189 Act, s. 134: Ma., s. 147; Sa., s. 147; Sin., s. 147; Sar., s. 151; Aust., s. 126; U.K., s. 195.

190 (1902) 2 Ch. 421.

191 June 6, 1934, ch. 404, s. 16; 48 Stat. 896; 15 U.S.C. 78 p (1958).

192 Act, s. 134; Ma., s. 147; Sa., s. 147; Sin., s. 147; Sar., s. 151; Aust., s. 126; U.K., s. 195.

193 Act, s. 141; Aust., s. 134; U.K., s. 200.

194 Act, s. 179; Aust., s. 184.

notice must be given in writing and, if it is not given at a meeting of the directors, the director giving it must take reasonable steps to secure that it is brought up and read at the next meeting of directors after it is given. The penalty for non-compliance with this provision is imprisonment for one year or of a fine of two thousand five hundred dollars.[195]

Prohibition of tax free payments to directors is covered by s. 136, whereby a company shall not pay a director remuneration (whether as director or otherwise) free of income tax, or otherwise calculated by reference to or varying with the amount of his income tax, or the rate of income tax, except under a contract which was in force before the commencement of the Act, and which provides expressly, and not by reference to the articles, for payment of such remuneration. Any provision contained in a company's articles, or in any resolution of a company or of a company's directors for tax free payments to a director shall have effect as if it provided for payments as a gross sum subject to income tax, of the net sum for which it actually provides. These provisions shall not apply to remuneration due before the commencement of the Act or in respect of a period before the commencement of the Act. Where a company contravenes the abovementioned provisions the company and every officer of the company who is in default shall be guilty of an offense against the Act, and subject to a penalty of imprisonment for one year or two thousand five hundred dollars.[196]

Provisions as to payments receiveed by drectors for loss of office or on retirement are contained in s. 137 which provides that it shall not be lawful (a) for a company to make to any director any payment by way of compensation for loss of office as an officer of that company or of a subsidiary of that company or as consideration for or in connection with his retirement from any such office, or (b) for any payment to be made to any director of a company in connection with the transfer of the whole or any part of the undertaking or property of the company unless particulars with respect to the proposed payment (including the amount thereof) have been disclosed to the members of the company and the proposal has been approved by the company in general meeting and when any such payment has been unlawfully made the amount received by the director shall be deemed to have been received by him in trust for the company.[197] Under the English Companies Act of 1948, any payment to a director made within one year before or two years

[195] Act. s. 135; Aust., s. 127; U.K., s. 198.
[196] Act. s. 136; Aust., s. 128; U.K., s. 189
[197] Act. s. 137; Ma., s. 152; Sa., s. 152; Sin., s. 152; Sar., s. 156; Aust., s. 129; U.K., ss. 191 to 194.

after an agreement for the transfer of the whole or any part of the undertaking or property of the company shall be deemed a payment for which approval is required, except insofar as the contrary is shown.[198]

"Section 138. (1) If in the case of any public company provision is made by the articles or by any agreement entered into between any person and the company for empowering a director or manager of the company to assign his office as such to another person, any such assignment of office shall, notwithstanding anything in the said provisions, be of no effect until approved by a special resolution of the company.

(2) This section shall not be construed so as to prevent the appointment by a director (if authorized by the articles and subject thereto) of an alternate or substitute director to act for or on behalf of the director during his inability for any time to act as director." [199]

The section in the Act applies to public companies only whereas in the existing legislation, it refers to "any company."

Section 140 deals with provisions relieving directors or officers from liability incurred in the administration of the company.[200] It is necessary for all companies to keep a register of its directors, managers and secretaries and this must be kept at the registered office of the company. Such a register must contain full personal particulars of the officers and in the case of directors, it must also disclose the directorships in other public companies or subsidiaries of the company held by them.[201]

15. *Secretary*

Under the existing legislation a registered company need not have a secretary. By Section 139 of the Act statutory provision is made for the appointment of one or more secretaries each of whom shall be a natural person who ordinarily resides in Malaysia. The Act does not require a secretary to be qualified in any particular manner, but the nature of the secretary's duties calls for a good knowledge of the Companies Act, of the other Acts which may be relevant to the operation of his company, of the memorandum and articles of association of his company. Secretarial corporations if appointed before the commencement of the Act may continue to act

[198] U.K., s. 194.

[199] Act, s. 138; Ma., s. 153; Sa., s. 153; Sin., s. 153; Sar., s. 157; Aust., s. 130; U.K., s. 204.

[200] Act, s. 140; Ma., s. 154; Sa., s. 154; Sin., s. 154; Sar., s. 158; Aust., s. 133; U.K., s. 205.

[201] Act, s. 141; Aust., s. 134; U.K., s. 200.

as secretaries for a period of twelve months after the Act has come into force.

The secretary or secretaries shall be appointed by the directors and at least one secretary must be present at the registered office of the company by himself or his agent or clerk during ordinary business hours. The duties of a secretary may be performed in his absence by any other officer appointed by the directors but no director may be appointed a secretary or in place of the secretary, so long as he is a director.[202]

[202] Act, s. 139; Aust., s. 132; U.K., ss. 177-179.