

PREFACE

The scope of this paper is not as wide as the field of the law which may be covered by the system. Corporate bodies are defined as those which are not a local government authority and are not a statutory corporation. Such are, however, not the subject of this paper. The scope of this paper is confined to the subject of corporate bodies.

CORPORATE MANAGEMENT:

WHO CONTROLS THE AFFAIRS AND  
MANAGEMENT OF CORPORATE BODIES

A DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF

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## PREFACE

The scope of this paper is not as wide as the title of the paper may suggest to the reader. Corporate bodies are of various kinds. A University and a local government authority are just two examples of corporate bodies. Such are, however, not the subject of this paper. The scope of this paper is confined to yet another kind of corporate body, the company registered under the companies Act<sup>I</sup> (hereinafter known as the Act). The Act provides that "From the date of incorporation, the subscribers to the memorandum, together with such other persons as may from time to time become members of the company, shall be a body corporate ....."<sup>2</sup>

Various kinds of companies may be registered under the Act.

"Any seven or more persons, or, where the company to be formed will be a private company, any two or more persons, associated for any lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requirements of this Act in respect of registration, form an incorporated company, with or without limited liability."<sup>3</sup>

A company registered under the Act may therefore be any of four major types. It may be private or "not private."<sup>4</sup>

Each of these may be limited or unlimited in liability.

A private company is one which restricts the right to transfer its shares by the shareholders, limits the number of the members to fifty as a maximum<sup>5</sup>, and prohibits any invitation to the public to subscribe for any shares or debentures of the company.<sup>6</sup>

Any other company, that is any company not subject to the above limitations, is a public company.

The Act defines a limited company as a "company limited by shares or a company limited by guarantee".<sup>7</sup>

A Company limited by shares is one having the liability of its members limited by the memorandum of association to the amount, if any, unpaid on the shares respectively held by them.<sup>8</sup> That is, each member is liable to contribute when called upon to do so the full nominal value (in money or money's worth) of the shares held by him or any prior holder of those shares.

A company limited by guarantee is one having the liability of its members limited by the memorandum to such amounts as the members may respectively thereby undertake to contribute to the assets of the company in the event of its being wound up.<sup>9</sup> The member may be called upon to contribute only when the company is wound up when he is still a member or within one year of his ceasing to be a member of the company.<sup>10</sup>

A company limited by guarantee may be with or without a share capital. The latter is the pure form of guarantee company, for example charitable and quasi-charitable organisations. The former is a hybrid guarantee company, in which a member is under a two-fold liability. While the company is a going concern he is liable to pay up to the nominal amount of his shares, and once the company goes into liquidation, he is liable on the guarantee as in the case of a pure guarantee company.

Another type of company is one whose members' liability is unlimited.<sup>11</sup> The members are in effect guarantors of the company's obligations without restriction on amount. An unlimited, like a guarantee company, may be one with or without a share capital.

The point in outlining in a preface the kinds of companies registrable under the company's Act is to show that the scope of this paper is narrowed further.

The paper does not discuss the control and management of all companies registrable under the Act. Guarantee companies and unlimited companies do not take an important role in commercial activity. Most companies <sup>are</sup> limited by shares, private and otherwise. Also, a greater part of company law bears on companies limited by shares.

Therefore this paper discusses the management and control of companies limited by shares. It is in the main concerned with public limited companies, but where there is an important distinction with private limited companies this is pointed out here and there.

Management and control of companies is both a practical and an academic problem. It seems to have been settled as long ago as in the first decade of this century that where the articles of association of a company place the general management of a company in the hands of directors, the directors will manage the company without any interference from the general meeting of members of the company.<sup>12</sup> This in effect means the directors will be in direct control of the company. Yet in the 'seventies courts are still faced with cases bearing disputes over management and control of companies by the various organs, even in companies where articles place management in directors. In this sense, management and control of companies is still a practical problem.

Despite the authorities of the cases, the issue of which organ should control the affairs of a company is not yet settled as incontrovertible. The academic controversy in this connection is two-fold. First, it is on who should control the management of the company? That is, what is the law? It is settled that most companies adopt article 80 in the First Schedule to the Companies Act to define the division of powers between their organs.

Lawyers are not yet agreed on the correct meaning of this article and articles of its type. Secondly, although Courts have time and time again adjudicated on this article, legal writers still differ on the ~~and~~ ratio decidendi of these cases. They give different views of what the Courts laid down in the cases. These are the two academic issues on the question of who should control the management of companies. A further academic issue is on who actually (in practice) controls the affairs of a company in view of the intricate rules and regulations of management as provided by the Act and the articles of companies. That is, who, in practice, controls the Company?

In this paper, it is intended to show three things, First it will attempt to show that companies which adopt articles 80 of the First Schedule to the Companies Act place Management of the Company solely in the hands of the boards of directors. That is, it attempts to discuss the problem of interpretation of article 80 and the relevant cases. Secondly, it is submitted in this paper that there is what may be called theoretical control of the affairs of a company, placed in the general meeting of the members of a company—the ultimate power of control in law. Thirdly, and which is the final conclusion of this paper, it is intended to show that the practical control of the company lies in the board of directors.

The arrangement of this paper therefore is mainly based on the above sequence. The first chapter deals with the Constitution of Companies. The Second Chapter discusses the organs of a company and the decision-making processes and techniques of these organs. The third chapter deals with the details of the division of powers between the organs of a company. The fourth chapter deals with control of the company in theory and in practice.

This paper pays some special attention to what it calls "African Companies".

For this purpose, an African Company is that company in this country which is wholly owned by Africans. The paper pays attention to the African companies that are new, that is, established within the first decade of independence. The paper discusses some aspects of **management** and control which are peculiar to these companies. Therefore the fifth chapter of this paper is on management and control in African companies.

Finally the paper attempts to suggest some reforms necessary in the law and rules of management and control of companies. This is the subject of the sixth chapter.

The Companies Act (Cap. 486, Laws of Kenya) is the main source of company law in Kenya. References to "the Act" in this paper, except where otherwise stated mean the Companies Act Cap. 486 Laws of Kenya, and references to sections <sup>means sections</sup> of the Act. The Act is based on the English Companies Act, 1948. English cases therefore feature prominently in this paper as authorities for the various principles.

Materials on African Companies are mainly a result of some interviews held with a number of members of some African Companies.

## CONTENTS

<u>CHAPTER</u>		<u>PAGE</u>
I	THE CONSTITUTION OF A COMPANY	I
II	ORGANS OF MANAGEMENT OF A COMPANY AND THE DECISION-MAKING PROCESSES.	5
	1. INTRODUCTORY	5
	2. THE BOARD OF DIRECTORS	6
	3. THE GENERAL MEETING	15
III	DIVISION OF POWERS BETWEEN THE BOARD OF DIRECTORS AND THE GENERAL MEETING	23
	1. INTRODUCTORY	23
	2. CONSTRUCTION OF ARTICLE 80 TABLE A	23
IV	CONTROL OF AFFAIRS AND MANAGEMENT: THEORY AND PRACTICE	35
	1. INTRODUCTORY	35
	2. CONTROL IN THEORY	35
	3. CONTROL IN PRACTICE	40
	4. CONCLUSION	47
V	MANAGEMENT IN AFRICAN COMPANIES	48
VI	PROPOSALS FOR REFORM	53

## ABBREVIATIONS

### CASES:

A.C.	-	Appeal Cases (Law Reports)
All E.R.	-	All England Law Reports.
Atk.	-	Atkyns Reports (in Chancery, Vol. 3)
Ch.	-	Chancery (Law Reports)
Ch. App.	⊖	Chancery Appeal.
Ch. D	-	Chancery Division (Law Reports)
E.A.	-	East Africa Law Reports.
Eq.	⊖	Equity Cases (Law Reports)
Ex.	-	Exchequer (Law Reports)
Ex. D	-	Exchequer Division (Law Reports)
H.L.	-	House of Lords (decisions) <sup>1</sup> / <sub>2</sub>
H.L. Cas	-	House of Lords Cases
Hare	-	Hare Reports (Vice-Chancellor's Series)
K.B.	-	King's Bench (Law Reports)
L.T.	-	Law Times Reports
Q.B.	-	Queen's Bench (Law Reports)
Q.B.D.	-	Queen's Bench Division (Law Reports)
T.L.R.	-	Times Law Reports.

### JOURNAL

Mod. Law Rev.	-	Modern Law Review.
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## CHAPTER I

### THE CONSTITUTION OF A COMPANY

The Constitution of a company registered under the Act is contained in two documents. The basic constitutional document is the memorandum of association.<sup>13</sup> The regulations of internal administration of the company are contained in a second document, the articles of association.<sup>14</sup>

It is worth noting that the Act lays down the form a constitution of the company should take. The original constitution of the company, that is, the substance, is mainly the making of the promoters of the company. They have complete freedom in drafting the constitution of their company provided they set out the constitutional documents in the required statutory form.<sup>15</sup>

The company owes its existence to the memorandum of association. It is from this document that a company derives its powers.

Specimen forms of memoranda are in Tables B, C, D and E of the First Schedule to the Act. So far as possible the memorandum of a company must be in the form set out in the appropriate Table.<sup>16</sup>

But contents of the memorandum may differ with those of the specimen forms.

As the basic constitutional document of a company, the Act requires a memorandum to contain certain matters. It contains the name of the company; a statement that the registered office shall be situated in Kenya; the objects of the company; where applicable, that the liability of the company is limited, the share capital with which the company is registered and the nominal value of each share in which the share capital is divided.<sup>17</sup>

Since the memorandum of association owes its validity to the Act, it is alterable only to the extent permitted by the Act.

18

The second document, the articles of association is the more important of the two in so far as management of the company is concerned. It lays down the manner in which a company's affairs shall be run.

A company limited by shares (the one with which this paper is concerned) may register articles of association with the memorandum.<sup>19</sup>

Table A of the First Schedule to the Act contains Model articles of association. A company may adopt all or any of the regulations in Table A. Three courses are therefore open to a company. It may adopt Table A in full, or it may adopt Table A with modifications, or it may register its own articles excluding Table A altogether.

If a company limited by shares does not register articles of association, or if it registers articles of association, or if it registers articles in so far as these do not modify or exclude the regulations in Table A, then these regulations automatically become the company's articles of association.<sup>20</sup>

The utmost flexibility is allowed the promoters in organising the management of their company. The Act does not require the articles of a company to provide for ~~any~~ specific matters. The contents of the articles of companies may vary substantially with the various companies.

However, most companies adopt Table A, either fully or with minor modifications. Consequently, articles of companies always provide for certain specific matters in practice. They define the rights of different classes of members, determine their voting rights; they provide for appointment of a board of directors and they specify the powers and duties of the directors.

In interpreting the memorandum and articles of association the courts follow the ordinary rules of construction of written instruments.<sup>21</sup> But some rules in these documents may be of a special character and may override the special rules applicable in construction of instruments in writing.<sup>22</sup> Both the memorandum and articles must be read subject to the provisions of the Act. Any provision inconsistent with the Act is void. 23

As between the two documents the articles of association are subordinate to the memorandum. If there is any inconsistency between them the memorandum prevails, and the articles are void to the extent of the conflict.<sup>24</sup>

However, an ambiguity in the memorandum may be explained by reference to the articles.<sup>25</sup>

Constitution-making for a company is part of the process of incorporation leading to registration of the company. The Act provides that "the memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member to observe all the provisions of the memorandum and of the articles."<sup>26</sup>

This section creates two contractual relationships. First, the memorandum and articles constitute a contract between the company and each member of the company. The existence of this kind of contract was recognised by the courts despite the odd wording of S.22 (I). The section states that these two documents shall be binding "as if signed by each member". It does not state, "as if signed by each member and by the company". But the section itself expressly states that the documents shall bind "the company and the members thereof".

In HICKMAN V. KENT OR ROMNEY ASSOC.,<sup>27</sup> Astbury, J. explained this oddity,

" A company cannot in the ordinary course be bound otherwise than by statute or contract and it is in this section that this obligation must be found. As far as the members are concerned the section does not say with whom they are to be deemed to have covenanted, but the section cannot mean that the company is not to be bound when it says it is to be bound, as if, C .....

" Much of the difficulty is removed if the company be regarded, as the framers of the section may well have regarded it, as being treated in law as a party to its own memorandum and articles".<sup>28</sup>

Secondly the memorandum and articles of association constitute a contract between the members inter se.<sup>29</sup>

S. 22 gives the memorandum and articles contractual effect only in so far as they confer rights and obligations on the member in his capacity as a member, both in the contract with his fellow members and with the company.

Thus where a solicitor wanted to enforce purported contract, in the articles, between himself as solicitor and the company, it was held that he could not succeed because articles could not constitute a contract between him as solicitor and the company.<sup>30</sup>

And in a case where the plaintiff alleged a purported contract in the articles between her as a director and the company, it was held she could not maintain an action on such purported contract.<sup>31</sup>

S. 13 (I) of the Act provides that a company may by special resolution alter or add to its articles. Sub- S.2 provides that any alteration or addition so made shall be as valid as if originally contained therein, and be subject in like manner to alteration by special resolution. The power of alteration is a statutory power which, by a clause in the articles, the company cannot deprive itself of,<sup>32</sup> or exempt any article from liability to alteration under S.13. A company cannot also contract not to alter its ~~arti~~ articles.<sup>33</sup>

The importance of the power to alter articles and the significance of the requirement of a special majority for alteration of articles are discussed later in the paper in connection with control of the company.

CHAPTER II.

ORGANS OF MANAGEMENT OF A COMPANY

AND THE DECISION-MAKING PROCESSES.

I. INTRODUCTORY.

The famous case of SALOMON V. SALOMON & CO.<sup>34</sup> established that a company which has been validly constituted under (the Act) is a legal person distinct from its members. It is therefore an artificial person. If it has to exercise its powers as a person, it can only do so through natural persons. As Cairns L. J. said in FERGUSON V. WILSON,<sup>35</sup>

"The company itself cannot act in its own person, for it has no person; it can only act through directors and the case is, as regards those directors, merely the ordinary case of principal and agent."

The necessity of natural persons to act on behalf of and for the company is what gives rise <sup>to</sup> organs of the company.

This chapter deals with the appointment of these organs and outlines their means of functioning.

Since ATTORNEY - GENERAL V. DAYV<sup>36</sup> the decisions of the majority of the members of the company in general meeting are regarded as decisions of the company itself. The court stated in that case

"It cannot be disputed that whenever a certain number are incorporated a major part of them may do any corporate act, so if all are summoned, and part appear, a major part of those that appear may do a corporate act .... "

And in FOSS V. HARBOTTLE,<sup>37</sup> Wigram V-C. referred to the members in general meetings as "the supreme governing body of a company."

Attorney General V. Davy solved a big problem that faced company law. Since the company was an artificial person, it could only act through natural persons. The question was, how were these natural persons to be appointed since the company was an artificial person? We have seen that this was solved by regarding the decisions of the majority of the members in general meeting as the decision of the artificial person, the company.

The first organ of a company therefore is the general meeting of the members.

But decision-making by the cumbersome medium of the general meeting is not practicable on a day-to-day basis. It is practically impossible for a general meeting to be held every day to make even the most petty decisions. For example during the time when notice is sent to the members it would be impossible to make any decision for the management of the company.

The Act therefore provides that "every company (other than a private company) registered <sup>under</sup> after the appointed<sup>38</sup> day shall have at least two directors, and every company registered before the appointed day and every private company shall have at least one director."<sup>39</sup>

In practice, therefore, the initial constitution of a company provides for the appointment of a board of directors. This is the second organ of a company.

## 2. The Board of Directors.

The Act does not provide the method of appointment of a board of directors. This is left to the articles of association of each company.

In practice most articles of companies provide for initial appointment of directors by the subscribers to the memorandum of association of the company ( unless actually named in the articles), or by a majority of them.<sup>40</sup> If there is neither an appointment by the articles, nor an article expressly providing for the manner in which an appointment is to be made, the appointment can nevertheless be made by all the subscribers, if they are unanimous. But the subscribers, may not be unanimous. In that case the appointment of directors can then be made in a general meeting of the company. There is still a problem here, because at that stage the only members of the company are subscribers to the memorandum.<sup>41</sup> If they could not be unanimous as subscribers they may as well fail to be unanimous as members, and there may be a difficulty of assembling all the subscribers to constitute a general meeting. This may be solved by reverting to the use of S.134(b) which provides that two or more members holding not less than one-tenth of the issued share capital, or if the company has none, not less than five per cent in number of the members may convene a meeting.

Articles usually provide for the annual retirement thereafter of a certain proportion of the directors and for the filling of the vacancies at that annual general meeting at which they have retired.<sup>42</sup>

It is also customary to empower directors to fill a casual vacancy and to appoint additional directors within the maximum prescribed by the articles.<sup>43</sup>

The Act provides that each appointment is to be voted on individually except in the case of a private company or unless the meeting shall agree unanimously that two or more persons be included in a single resolution.<sup>44</sup>

In normal practice an ordinary resolution suffices to elect a director. The Act is quiet on this issue and does not tell whether an ordinary or special resolution is required to elect a director as is the practice, a member holding 51% of the voting shares can therefore be sure to elect the whole board of directors.

The Act does not require any special qualifications for a person to hold the office of directorship. However, it lays down certain disabling factors. For example a person cannot hold a directorship unless he is at least twenty-one years and not more than seventy years of age.<sup>45</sup>

The Act does not require a director to be a member of the company. But the articles of a company may require a share qualification for a person to be a director. If a share qualification is required under the articles the shares must be taken up within two months of the appointment of the director, and the office will be vacated if they are not so taken or if they are later relinquished.<sup>46</sup>

Sometimes the articles entitle a director to appoint an alternate director to act for him at any board meeting that he is unable to attend.

A person or a company may be given the power by contract to appoint a director to the board. The courts will recognise and uphold such contractual right even if it is in conflict with the articles In SOUTHERN FOUNDRIES V. SHIRLAW,<sup>47</sup> Lord Porter said, *orbited*,

" A company cannot be precluded from altering its articles thereby giving itself power to act upon the provisions of the altered articles - but so to act may nevertheless be a breach of contract if it is contrary to a stipulation in a contract validly made before the alteration ....."<sup>48</sup>



Therefore, although the altered articles had the effect of making the plaintiff company not able to appoint directors, the court recognised there was a contract which was breached.

In whatever way they are appointed, the directors form a board. An interesting point is that while the Act requires that every company shall have a director or directors, it does not provide what the directors are supposed to do. However, as we have seen, the necessity for directors arose from the impracticability of the general meeting exercising the powers of ~~day~~-to-day management of the company. The company therefore delegates certain powers of management to the directors.

What powers of management the directors will wield depends entirely on the articles of the company. Usually articles give the board of directors the general power to manage the company's affairs in the form of article 80 of Table A. We shall see the extent and limits of these powers in the next chapter. Here we are concerned with the means of exercise of directors' powers.

Powers are conferred on the directors as a board, not individually.<sup>49</sup> The powers can therefore be exercised by the directors in a board meeting.

Although the Act goes to great lengths to detail the procedure for general meetings, it says nothing on directors' meetings except by stating in S.145 that minutes of directors' meetings shall be kept. Even the articles of association usually leave the directors very much to themselves to settle their own procedure.

For example art. 98 of Table A provides that "the directors may meet together for the despatch of business, adjourn and otherwise regulate their meetings as they think fit."

Prime facie, the directors must act by resolution at a board meeting duly convened and constituted,<sup>50</sup> "for the company is entitled to the benefit of their combined wisdom in board meeting assembled." <sup>51</sup>But as we have seen, Table A provides that "the directors may meet together .....

Apparently if they manage to reach a decision somehow without meeting the decision would still be valid.

Act. 98 of Table A states that it shall not be necessary to give notice of a meeting of directors to a director who for the time being is outside Kenya. This is the only place where the articles make mention of a notice for directors' meetings. Apparently it is necessary to give notice to all the directors who are for the time being within Kenya.

Although the Act or articles do not expressly require notice of meeting to be given to directors, it is apparent that unless the articles of a company provide to the contrary due notice of a meeting of directors must be given, otherwise the proceedings will be void.<sup>52</sup> The articles do not state any length of notice, if notice is given at all. In BROWNIE v. LATRINIDAD<sup>53</sup> it was held that reasonable notice should be given, having regard to the practice of the company. In that case notice of less than ten minutes for a board meeting was held to be reasonable notice in the circumstances of the case. In the same case it was also held that verbal notice suffices, it need not be written.

Act. 98 of Table A provides that "a director may, and the secretary on the requisition of a director shall, at any

summon a meeting of the directors ....."

Any director can therefore call or cause to be called, a meeting of the directors.

Act.99 provides that the quorum necessary for the transaction of the business of the directors may be fixed by the directors and unless so fixed shall be two."

In Re NORTH EASTERN INSURANCE Co.<sup>54</sup> it was held that a quorum means a quorum competent to transact and vote on the business before the board, and a resolution passed only <sup>by</sup> what would be a quorum if one <sup>of</sup> the ~~member~~ was not interested and prohibited from voting is invalid. This means that if any of the directors present at a meeting is somehow disqualified from sitting and voting at that particular meeting, then he is not counted towards a quorum. The directors cannot make an ad loc reduction in their quorum such as in art.98.<sup>55</sup> For example, if, under this power, the directors have fixed their quorum at four, they cannot say, 'today, and for the purpose of this meeting only, our quorum will be three.'

Art. 101 provides that "the directors may elect a chairman of their meetings and determine the period for which he is to hold office; but if no such chairman is not present within five minutes after the time appointed for holding the same, the directors present may choose one of their <sup>number</sup> ~~member~~ to be a chairman of the meeting."

Questions arising at any meeting of directors are decided by a majority of votes.<sup>56</sup> The chairman has a casting vote.

Sometimes articles provide that a resolution in writing, signed by the directors without meeting is as effective as a resolution passed at a meeting.<sup>57</sup> Where there is no such article, must the directors always pass their resolutions gathered together in a meeting?

In RE BONNELLI'S TELEGRAPH CO, COLLIE'S CLAIM,<sup>58</sup>

Sir James Bacon, V - C said about this problem,

"..... I do not know that it is necessary that (the directors) shall all meet in one place. I can conceive a great many circumstances where .... where three directors cannot be procured, but *where* their combination can be most effectually secured by correspondence, by transmission of messages or by other means which may be resorted to.

"If you are satisfied that the person whose concurrence is necessary to give validity to the act did so concur, with full knowledge of all that they were doing ..... *the* terms of the law are fully satisfied, and it is not necessary that whatever is done by directors should be done under some roof, in some place where they are all ..... assembled."<sup>59</sup>

Directors can therefore pass an effective resolution without meeting. This conclusion is supported by the use of the word "may" in art. 98 on director's meetings.

Art. 100 Table A provides that directors may act notwithstanding a vacancy in their number. But if the number of directors falls below the fixed quorum, then the continuing directors may only act for the purpose of increasing the number of the directors to that required for a quorum or for summoning a general meeting of the company, but for no other purpose.

Since a board of directors must act collectively, it has no *inherent* power to delegate any of its powers to one or more of its members or to other persons.<sup>60</sup>

But articles usually empower the board to appoint committees consisting of one or more of the directors and to delegate any of the powers of directors to such committees.<sup>61</sup>

The board is also empowered to appoint one or more of its ~~member~~ <sup>number</sup> to the office of managing director for such a period as the board think fit, and delegate any of its powers of management to him.<sup>62</sup> It is usual for the articles to subject the managing director or committee to the overriding control of the board of directors.<sup>63</sup> Under such a provision, the board may revoke, restrict, or modify the duties and responsibilities of the managing director during the course of his term.<sup>64</sup>

It seems that even when the power to delegate is worded as in act. 109 of Table A, the directors cannot delegate those powers expressly given to them by the articles.

Article 109 Table A provides that:

"The directors may entrust to and confer upon a managing director any of the powers exercisable by them upon such terms and conditions and with such restrictions as they may think fit, and either collaterally with or to the exclusion of their own powers ....."

One would think that this article gives the board of directors the power to delegate any of its powers.

However, in the case of Re COUNTY PALANTINE,<sup>65</sup> the directors had under the articles the express power to buy shares in the company and to appoint a manager. They appointed a manager. A shareholder agreed with the manager for the sale to the company of his shares, and executed a transfer of his shares to two directors who were trustees for the company. It was held that the directors had no authority to delegate to a manager the power to buy shares. Sir G. Mellish, L.J. said,<sup>66</sup>

" It appears to ~~them~~ <sup>me</sup> that a mere power to appoint a general manager would not authorise the directors to transfer to him the power to purchase shares, because that power is by the articles expressly given to the directors themselves; whilst the only duties which they could delegate to the general

manager are those which belong to the management of the ordinary commercial business of such a company ..... the directors could not delegate to another person those powers which they would not have had except under this particular provision in the articles."

Two of the ways in which directors may vacate office are ~~imp~~ important for the purposes of this paper.

First, directors may vacate office by rotation. Articles, especially those of public companies, usually provide that a fraction of the directors shall retire each year by rotation, and empower the members to fill the vacancies at the annual general meeting.<sup>67</sup> All the directors retire at the first annual general meeting of the company, and at the annual general meeting in every subsequent year one-third of the directors retire, or if their ~~number~~<sup>number</sup> is not three or a multiple of three, then the ~~number~~<sup>number</sup> nearest one-third retire. If there are only two directors then one will retire each year.<sup>68</sup> If no annual general meeting is held, the appropriate ~~number~~<sup>number</sup> of directors will retire at the end of the calendar year in which it should have been held.<sup>69</sup>

Art.90 of Table A provides that the directors who retire are those who have been longest in office, but if two directors were appointed on same day and only one of them is to retire <sup>the one to retire</sup> shall be selected by lot.<sup>70</sup>

Articles usually provide that directors vacating office by rotation shall be eligible for re-election.<sup>71</sup>

Secondly, the Act gives the company the power to remove a director.<sup>72</sup> This can be done by ordinary resolution<sup>73</sup> in general meeting. This notwithstanding anything in the articles or in any agreement between the director and the company. But the section does not enable a private company to remove a director who held office for life at the commencement of the Act.

Such ordinary resolution requires special notice. That is, the notice of intention to put the resolution for the removal of a director to the vote must be given to the company twenty-eight days before the meeting at which the resolution is to be put and the company must give notice to the members of the company when it gives members notice of the meeting to which the resolution is to be put.<sup>74</sup>

### 3. The General Meeting

We saw that ATT. GEN. V. DAVY established that the acts of a majority of members assembled in a meeting of the company are taken to be the acts of the company, and we also saw that the need for directors arose when it was realised that it was impracticable for day to-day decisions of the company to be taken in general meeting.

The foremost organ of a company, therefore, is the general meeting of the company.

Generally the regulation of a company's general meetings is left to the articles of each company. However, the Act lays down a number of provisions which must be complied with.<sup>75</sup> The result of this is that there is a considerable measure of uniformity in the regulations of meetings of companies.

The Act provides for three types of general meetings. First, S.130 requires every public company limited by shares or limited by guarantee with a share capital to convene a general meeting for a date not less than one month or more than three months from the date when the company was entitled to commence business. This is known as the statutory meeting. At this meeting the members present are entitled to discuss any matters relating to the company's formation or arising out of the statutory report required by S.130(2), without any formal resolution being moved.

Secondly every company must hold an annual general meeting in each year;<sup>76</sup> not more than fifteen months should elapse between one annual general meeting and the next, but if a company holds its first annual general meeting within eighteen months of its incorporation, it need not hold an annual general meeting in the year of its incorporation or in the following year.<sup>77</sup>

The third type of meeting is the extra-ordinary general meeting. The Act does not provide for the calling of extra-ordinary general meetings by that name in the text. But in S. 132 the Act contemplates that general meetings other than statutory or annual general meetings shall be called on the requisition of members. The side note to that section reads:

"Convening of extra-ordinary general meeting on requisition." And art.48 Table A provides that all general meetings other than annual general meetings shall be called extra-ordinary general meetings." Ofcourse this does not include a statutory meeting, which occurs only once in the life of a company.

A general meeting of a company may be convened in four possible ways.

First the articles empower the board of directors to convene meetings of the company. If the company is governed under Table A, the directors may call statutory and annual general meetings under the general powers conferred by art.80, and extra-ordinary general meetings under art.49.

The second method applies only to the annual general meeting. If a company fails to hold an annual general meeting within the time limited for doing so, any member may apply to the Registrar of companies to call the meeting. The Registrar may then direct that a general meeting shall be held when and where he thinks fit.<sup>78</sup> S.132(2) provides that if such meeting is held after the year in which it should have been held, it is deemed to be the annual general meeting for that year only, unless the meeting resolves by ordinary resolution that it shall be deemed to be the annual general meeting for the year in which it is held.

The third method of convening a meeting of the company is by requisitioning. By S.132(I) of the Act the holders of not less than one-tenth of the paid-up capital of the company carrying voting rights may require the directors to call an extra-ordinary general meeting forthwith. The requisition must be in writing signed by the requisitionists and must state the purpose or objects of the meeting. If the directors fail to call a meeting within twenty-one days pursuant to the requisition, the requisitionists or any of them representing more than one half of the total voting rights of all of them, may convene a meeting, provided it is held within three months of the date of the requisition.<sup>79</sup>

Fourthly a general meeting of the company may be called by the court.<sup>80</sup> This may happen only if, for any reason, it is impracticable to call a meeting of the company by any manner by which meetings of that company may be called, or to conduct the meeting of the company in Manner prescribed by the articles or the Act.



The court may, either of its own motion, or on application of any director or member who would be entitled to attend and vote at the meeting, order a meeting to be held and give all ancillary and consequential directions. Any meeting so held is deemed to be of the company for all purposes. A good example of this type of convening was in the case of Re EDINBURGH WORKMEN'S HOUSES IMPROVEMENT Co.<sup>81</sup>

In that case there were fifty - four share holders, of whom only fourteen resided near Edinburgh, and the quorum required for a meeting was thirteen members personally present. A meeting of the company convened for the alteration of its articles and reduction of its capital, there were present only two shareholders in person and twenty-one by proxy. The company presented a petition for the confirmation of the reduction of its capital purported to have been effected at the meeting, and the point was taken that the resolutions had not been duly passed. The court, however, ordered a meeting under the ~~procurator~~<sup>precursor</sup> of S.135, directing that five members personally present shall constitute a quorum.

The length of notice of meetings and how and to whom notice shall be sent is primarily a matter for the company's articles. However, S.133 of the Act states that any provision of a company's articles shall be void in so far as it provides for the calling of a meeting by a shorter notice ~~by~~<sup>than</sup> twenty-one days' notice in writing.

Meetings can however be convened on a shorter notice if it is so agreed by all the members entitled to attend and vote, in the case of an annual general meeting, and by a majority in number of members having a right to attend and vote at ~~the~~ meetings, and holding not less than 95 per cent. ~~in~~<sup>in</sup> nominal value of the shares giving a right to attend and vote for other meetings.<sup>82</sup> In the case of a special resolution the members must agree to that specific resolution being passed on shorter notice.<sup>83</sup>

The number of days' notice required by the Act or the articles excludes the day on which notice is sent and the day on which the meeting is held.<sup>84</sup>

S.142 of the Act provides that where special notice is required of a resolution (e.g. a resolution to remove director) the mover of the resolution must give notice of his intention to the company at least twenty-eight days before the day the meeting is to be

held, and the company must give at least twenty-one days' notice of it to the members, i.e at the same time and in the same Manner as notice of the meeting is given. If that is impracticable, the resolution must either be advertised in a newspaper with an appropriate circulation or be notified to the members in some other way permitted by the articles at least twenty-one days before the meeting. But if the mover of the resolution gives his notice to the company before the meeting is held less than twenty-eight days afterwards, the notice is nevertheless validly given.

Unless the articles of a company provide otherwise, notice must be given to all the members of a company, in the manner in which notices are required to be served by the articles. The question raised here is whether notice must be given even to a member who has no right to attend meetings or that particular meeting or to vote thereat.

On the construction of S.134(a) it seems that, in the absence of provision to the contrary in the articles, notice must be given to every member, whether he is entitled to attend and vote at the meeting or not. Whether any particular class of member has a right to attend meetings depends on the rights attached to the shares as determined by the articles and terms of issue. Anyone having a vote at meeting will undoubtedly have a right to attend, and therefore to be given notice.

In Re MACKENZIE & Co. LTD<sup>85</sup> it was held that members who have no voting rights have no right to attend and need ~~to~~<sup>not</sup> be summoned to attend.

Pennington<sup>86</sup> makes a distinction between "notice of a meeting" and a "summons to attend a meeting." The latter was used in Re Mackenzie. Pennington apparently implies that Re Mackenzie did not hold that members who are not entitled to attend the meeting and vote are not entitled to be given notice (because of the use of the term 'summons' in that case). He says,<sup>87</sup>

"The distinction between notice of a meeting and a summons to attend it is a fine one, but nevertheless important. The obiter dictum of Cohen J. in *Re Ward & Hotchkiss, Ltd*, (1954) 111 E.R. 507, 512, that members who cannot vote need not be given notice of a meeting must, it is submitted, be confined to that particular case, where the company's articles merely required 'Members', not 'every member', to be given notice."

Notice of a meeting is given to members to alert them of an impending meeting so that they may decide to attend. In fact it can be said that asking members to attend a meeting is the most important purpose served by a notice. Therefore where a "summons to attend" is used as in *Re Mackenzie*, it must be taken to mean the same thing as "notice of a meeting". *Re Mackenzie* must therefore be taken to have held that where some members have no right to attend and/or vote, they need not be given notice of the meeting.

Table A provides for service either personally or by post to the member's registered address. Articles 131-134 are incorporated into the Act.<sup>88</sup>

A meeting cannot be validly held unless notice is given to all the members entitled to receive notice.<sup>89</sup>

The notice must indicate the title and place of the meeting, and the nature of the business to be transacted at the meeting, in sufficient detail to enable the members to decide whether they should attend the meeting.<sup>90</sup> If the notice is not sufficiently clear over the nature of the business to be dealt with then the meeting is invalid.<sup>91</sup>

The notice calling a meeting is usually accompanied by a circular containing the reasoning of the directors in favour of their own proposals or against the proposals of others, and exhorting the members to vote in support of the board's views. The company meets the expenses of sending these circulars to the members. What is commonly known as the "battle of the circulars" is an important aspect in the struggle for control of the company between the members and the directors. We shall see this in detail when we look at control of the affairs of the company.

Three kinds of resolutions may be passed at a general meeting of a company, special resolution, extraordinary resolution and ordinary resolution.

S.141 provides that a special resolution is one passed by a majority of not less than three-fourths of the members who are entitled to vote and do vote in person or by proxy at a general meeting of which not less than twenty-eight days notice specifying the intention to propose the resolution as a special resolution has been duly given.

An extra-ordinary resolution is one which requires a majority of three-fourths but no special notice (at least twenty-eight days) is required as in the case of a special resolution.

An ~~extra~~-ordinary resolution is one passed by a simple majority of those voting, and is used for all matters not requiring an extra-ordinary or a special resolution under the articles or the Act.

Although S.141, in defining a special resolution refers to a three-fourths majority of members voting, it should be noted that on a poll each share has a vote. Therefore it may be more correct to say that a special and an extra-ordinary resolution require a three-fourths majority of the votes cast, rather than of the members voting.

Where the Act required certain matters to be decided by a special or extra-ordinary resolution (e.g. a special resolution for alteration of articles), the articles or memorandum cannot provide for this to be done in any other way.<sup>92</sup>

It should be noted that the Act does not define an ordinary resolution. A good definition was made in BUSHELL V. FAITH<sup>93</sup> ~~93~~  
In that case, Lord Upjohn said,<sup>94</sup>

"An ordinary resolution is not defined nor used in the body of the 1948 Act although the phrase occurs in some of the articles of Table A Schedule I to the Act. But its meaning is, in my opinion, clear. An ordinary resolution is in the first place passed by a bare majority on a show of hands by the members entitled to vote who are present personally or by proxy and on such a vote each member has one vote regardless of his shareholding.

"If a poll is demanded, then for an ordinary resolution still only a bare majority of votes is required ....."

In so far as the articles of a company do not provide otherwise the quorum for a general meeting is two members personally present in

the case of a private company, and three members personally present in the case of any other company.<sup>95</sup> Art. 53 of Table A provides that three members personally present constitute a quorum.

If the articles merely require, as in art 53 of Table A, that no business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business, and if there is a quorum, the meeting may validly complete business even though the number of members who remain present do not make a quorum.<sup>96</sup> The wording of article 53 seems to require a quorum only when the meeting opens, and not throughout the time of the meeting.

But a meeting cannot hold valid proceedings with only one member present.<sup>97</sup>

Who the chairman of a general meeting shall be depends on the provisions of the articles of a company. Table A provides that the chairman of the board of directors if present and willing shall be the chairman of the general meeting of the company.<sup>98</sup> If he is not present or unwilling to act, the members present choose one of their ~~member~~<sup>number</sup> to be chairman of the meeting.

A member may attend a meeting either in person or by proxy. The Act provides that every member of a company who is entitled to attend and vote at a meeting has the right to appoint a proxy to attend and vote on his behalf.<sup>99</sup> The word "proxy" has two connotations. In the first place it refers to the "agent" appointed by a member to attend and vote on his behalf a meeting at which he is entitled to vote. Secondly, the term proxy refers to the document by which such an agent is appointed.

In a public company a member may appoint more than one proxy. Only one proxy is permissible in a private company.

The notice calling a meeting must notify members of their right to appoint proxies, and that proxies need not be members of the company.

Proxies are not entitled to vote except on a poll.<sup>100</sup>

Like circulars, proxies are an important instrument of control of the affairs of the company as we shall see later in this paper.

Decisions in a general meeting are reached by majority vote on a show of hands.

In this connection, each member present and voting has one vote, irrespective of the number of shares held.<sup>101</sup> A proxy does not vote on a show of hands, unless the articles provide that ~~he~~ she may so vote. On the declaration of the result of the vote any member<sup>102</sup> or any proxy<sup>103</sup> may demand a poll, unless the articles otherwise provide. Table A does not provide anything to the contrary. The Act requires that a poll must be held on any resolution except a resolution for the appointment of a chairman or on a motion of adjournment, if it is demanded by not less than five members, or by members who possess at least one-tenth of the total number of votes which may be cast on a poll, or by members who hold shares on which there has been paid up at least one-tenth of the capital paid up on all the shares which carry the right to vote at the meeting.<sup>104</sup>

On a poll, unless the articles provide otherwise, every member has one vote for each share he holds.<sup>105</sup> Table A is quiet on this. Therefore, presumably, according to Table A, every share has a vote on a poll, in accordance with the Act.

CHAPTER III.

DIVISION OF POWERS BETWEEN THE GENERAL  
MEETING AND THE BOARD OF DIRECTORS.

I. Introductory.

As it was stated earlier on in the paper when dealing with the constitution of a company, a company has complete freedom to set out how its affairs shall be run. Every company may formulate its own articles. In this way, every company may decide who will exercise what powers in its running.

If the articles of a company give the powers of management of the company to both the board of directors and the general meeting, the division of the powers between the two organs will depend entirely on the construction of those articles, more specifically on the relevant article which delegates powers to the organs.<sup>106</sup>

However, most public companies adopt Table A fully or with minor modifications. Even those companies which do not adopt Table A are influenced by it when drafting their articles.

Therefore in almost all companies article 80 of Table A is the relevant article delegating powers to the organs of the company, or at least an article with the same or similar construction as article 80 of Table A.

In this chapter, an attempt is made to establish the construction and interpretation of article 80. As it was indicated in the preface to this paper, the interpretation of article 80 has not been without controversy among legal academicians, despite the large number of cases on it that have gone to the courts. Two reasons have accounted for this difference of opinion. Firstly, the wording of article 80 has been construed differently. Even there have been differences over the meaning of some words in the article. Secondly there have been differences of opinion over what exactly was established by the cases that have been adjudicated on article 80.<sup>107</sup>

2. CONSTRUCTION OF ARTICLE 80 TABLE A

Article 80 of Table A states:

" The business of the company shall be managed by the directors, who may pay all expenses incurred in promoting and registering the company, and may exercise all such powers of the company as are not, by the Act or by these regulations, required to be exercised by the company in general meeting, subject, nevertheless, to any of these

regulations, to the provisions of the Act and to such regulations, ~~being~~ not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that had not been made."

There are certain clear points which can be seen from the words of this article. First, it is clear that powers of general management<sup>ent</sup> of the business of the company <sup>are vested in the board of directors.</sup> Secondly, it is clear that directors are prohibited from exercising those powers which may be specifically reserved to the general meeting of the company.

So far, this is a clear division of powers. But the important and controversial question is this: A part from exercising the powers specifically reserved to them can the members in general meeting also exercise the powers of management generally wielded by the directors by virtue of article 80?

Until around the end of the nineteenth century, the general view seemed to be that the general meeting was the company whereas the directors were merely the agents of the company subject to the control of the company in general meeting. In ISLE OF WIGHT V. TAHOURDIN<sup>108</sup> Cotton L.J. stated,<sup>109</sup>

"It is a very strong thing indeed to prevent shareholders from holding a meeting of the company, when such a meeting is the only way in which they can interfere, if the majority of them think that the course taken by the directors, in a matter which is intra vires of the directors, is not for the benefit of the company."

Later in the same case, his Lordship said,<sup>110</sup>

"Directors have great powers and the court refuses to interfere with their management of the company's affairs if they keep within their powers, and if a shareholder complains of the conduct of directors while they keep within their powers, the court says to him, 'If you want to alter the management of the affairs of the company go to a general meeting and if they agree with you they will pass a resolution obliging the directors to alter their course of proceeding.'"



These two dicta of Lord Justice Cotton established, in effect, that where the directors are entrusted with the powers of management of the business of the company the members in general meeting can interfere with them by issuing directives to the directors to do something or not to do another thing or "to alter their course of proceeding."

The relationship was seen as a relationship of principal and agent.

Later cases, however, expressed views different from *Isle of Wight V. Tahourdin*, and all of them stated a view which is popularly accepted to be the correct one. An examination of the cases will help us to understand the correct view on the division of powers between the directors, and the general meeting.

The first of these important cases is AUTOMATIC SELF-CLEANSING FILTER SYNDICATE B. CUNINGHAME<sup>111</sup>

In that case, the plaintiff company's articles included what is now article 80 of Table A. They also included an article by which the directors were specifically empowered to sell or otherwise deal with any property of the company on such terms as they might think fit.<sup>112</sup> The members of the company in general meeting passed a resolution instructing the directors to carry out a certain sale of the company's property. The directors, believing that the terms of the sale were not in ~~the~~ best interest, of the company declined to carry out the sale. The company brought proceedings to the court to compel the directors to carry out the sale. It was held that the directors could not be compelled to sell, that the general meeting cannot interfere with the powers given to the directors by the articles.

But the controversial question over this case has been whether the decision meant that where powers are generally given to directors, members in general meeting cannot interfere with them, or whether it referred only to the article which gave specific powers of sale to the directors. It is necessary to quote Warrington J. at first instance in that case, in this connection. He said,<sup>113</sup>

"The only articles which are material are articles 96 and 97 (article 96 gave general powers to directors in a similar way as article 80 of Table A, while article 97 gave the directors specific powers of sale.)"

After discussing article 97 briefly, Warrington J. went on,

"But (the whole matter) does not rest there. Art.96 provides that the management of the business and control of the company are to be vested in the directors.

"Now, that article, which is for the protection of the shareholders, can only be altered by a special resolution .....If that provision could be revoked by a resolution of the shareholders passed by a simple majority, I can see no reason for the provision in article 81 that the directors can only be removed by a special resolution.

"(If article 96 were constructed to mean that the shareholders can overrule the directors by simple majority) the result would be that when a majority of the shareholders disagree with the policy of the directors, though they cannot remove the directors except by special resolution, they might carry on the whole of the business of the company as they pleased, and thus, though not able to remove the directors, overrule every act which the board might otherwise do,"

In affirming Warrington J's judgement the court of Appeal agreed with his reasoning at first instance. This makes it clear that in reaching the conclusion that the general meeting cannot interfere with the powers vested in the directors in this case, the court did not just rely on the article that gave specific powers of sale to the directors. In fact the courts' reasoning was largely based on the article that gave general powers to the directors, in similar terms as article 80 of Table A.

Warrington made this clear when he finally said,<sup>114</sup>

"It seems to me on the true construction of these articles that the management of the business and the control of the company are vested in the directors, and consequently that the control of the company as to any particular matter, or the management of any particular transaction or any particular part of the business of the company, can only be removed from the board by alteration of the articles, such alteration of course requiring a special resolution."

Therefore, it is apparent that the argument of one lawyer,<sup>115</sup> that the decision in Automatic self-cleansing was reached simply because of the inclusion of an article that gave specific powers of sale in the articles, is not correct.

The second case was QUIN & AXTENS V. SALMON<sup>116</sup>. In that case the House of Lords was concerned with a company whose articles included the equivalent of article 80 Table A. The articles also included one article which provided that no resolution of a meeting of directors having for its object the acquisition or letting of premises should be valid unless notice should have been given to each of the managing directors and neither of them had dissented therefrom. The directors passed resolutions with the object of acquiring and letting premises, from which one of the directors, the plaintiff, duly dissented; but resolutions to the same effect were passed by an extra-ordinary general meeting of the company by a simple majority of the shareholders. At the suit of the plaintiff who brought a representative action, their Lordships unanimously held that the resolutions of the company were inconsistent with the provisions of the articles and that the company must be restrained from acting on them.

Lord Loreburn, L. C. said,<sup>117</sup>

"The bargain made between the shareholders is contained in articles 75 (giving general powers of management to the directors) and 80 (special provision as to directors' resolutions for acquisition and letting premises)...., and it amounts for the purpose in hand to this: that the directors should manage the business; and the company therefore are not to manage the business unless there is provision to that effect."

The court relied on both articles in reaching the decision. Farwell,

J. said,<sup>118</sup>

"This case is... governed, if not by the decision, at any rate by the reasoning of the Lord Justice in Automatic Self-cleansing Case, and the Gramophone & Typewriter Case (1908) 2 K.B. 89). I will only refer to one passage in Bewelley L.J.'s judgement in the latter case. He says: 'This Court decided not long since, in Automatic Self-cleansing that even a **resolution** of a numerical majority at a general meeting of the company cannot impose its will upon the directors when the articles have confided to them the control of the company's affairs. The directors are not servants to obey directions given by the shareholders as individuals .....They are not agents appointed by and bound to serve the shareholders as their principals. They are persons who may by the regulations be entrusted with the control of the business, and if so entrusted they can be dispossessed from that control by the statutory majority which can alter the articles.' "That appears to me to be express the true view."

The decision was that where powers of management are entrusted in the directors, the members in general meeting cannot interfere with the exercise of those powers unless it is by way of altering the articles giving those powers, which alteration requires a special majority.=

The third of these cases was SHAW & SONS LTD. V SHAW<sup>119</sup>. The issue was whether or not proceedings brought in the name of the company were authorised. Certain of the directors (called the "permanent directors" in the articles) were the instituting force.

An article in similar terms as present articles 80 was included in the articles of that company. In that case the permanent directors, in the name of the company, had decided to bring proceedings against fellow directors. A general meeting of the company passed a resolution instructing the directors to discontinue the proceedings. The question was whether, because of that resolution of the general meeting, the directors had no authority to bring those proceedings. The court held that bringing proceedings in the name of the company was a power of the directors and the general meeting could not interfere with its exercise.

Goldberg<sup>120</sup> argues that since, in *Shaw V Shaw*, Greer L.J. held that the proceedings were authorised, Slessor L.J. that they were not and Roche L.J..... "by a different road ....reach(ed) the same result as Greer L.J.", it is difficult to extract a ratio from the decision, but that it is not important to do so because article 80 was not prominent in the reasoning of any of their Lordships.

This argument seems faulty. Slessor L.J. found that the proceedings were not authorised not because the general meeting had instructed the directors to discontinue them, but because he had decided that the permanent directors had faltered in making the decision to bring the proceeding in that no notice of the directors' meeting in which the decision was made had been given to the ordinary directors. In fact, he stated that if the directors had validly passed the resolution to bring proceedings the members' resolution instructing the directors to discontinue the proceedings would be invalid as an interference in the exercise of directors' powers. He said,<sup>121</sup>

"As to the third ground of want of authority, that the shareholders instructed the directors to discontinue the action ..... If the permanent directors had authority to bring the action, I do not see how the shareholders could interfere with that power, otherwise than by altering the articles which they have not proposed to do. This would seem to be the effect of the decision of Quin & Axten V. Salmon ....."

Article 80 was prominent in the reasoning of Greer L.J.

He said,<sup>122</sup>

"I think the judge was also right in refusing to give effect to the resolution of the meeting of the shareholders requiring the chairman to instruct the company solicitors not to proceed further with the action. "A company is an entity distinct alike from its shareholders and its directors. Some of its powers may, according to its articles, be exercised by its directors certain other powers may be reserved for shareholders in general meeting. If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of the shareholders can control the exercise of these powers vested by the articles in the directors is by altering their articles, or if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove.

"They cannot themselves <sup>usurp</sup> using the powers which by the articles are vested in the directors any more than the directors can <sup>usurp</sup> using the powers vested by the articles in the general body of shareholders."

The article which gave powers to the company in that case was similar to article 80. Shaw v. Shaw therefore expresses the view that where powers are entrusted to the directors in the terms of article 80, the members cannot interfere with the exercise of those powers.

The last of the four cases is SCOTT v. SCOTT<sup>123</sup>. The plaintiffs were two and the defendants the remaining members of a private company whose articles of association incorporated Table A of the Act. The plaintiffs successfully maintained that resolutions to the effect; (1) that weekly sums calculated on the paid-up capital in preference shares be paid to each preference shareholder as interest-free advance until the payment of the dividend for the current year, that the sums be deducted from the dividend when declared, and that if the dividend was insufficient, the deficiency be repaid to the company, and (2) that a firm of accountants be appointed to investigate the financial affairs of the company for the previous two financial years, were invalid, as being attempts by the company in general meeting to <sup>usurp</sup> using the powers of the financial direction of the company which under the articles rested solely in the hands of the directors. A further article specifically gave the directors power to declare an interim dividend. Admittedly, Lord Clauson relied on the article which gave specific powers to the directors to declare an interim dividend. But it should be noted, however, that in reaching his decision he proceeded along two lines of thought. Firstly, he found that the resolution of the general meeting amounted to instructing the directors to declare an interim dividend, and since declaration of interim dividend was a power specifically, entrusted to the directors by the articles, the resolution of the general meeting was invalid for reason that it was an interference with the exercise of directors' powers<sup>124</sup>.

Secondly, he reasoned that, on the footing that the resolution of the ~~gene~~ general meeting was not an attempt to declare an interim dividend, the resolution would still be invalid as an attempt to interfere with the directors' general powers of management and control of the company's affairs.

Lord Clauson said,<sup>125</sup>

"I am, however, prepared to assume that I may be wrong in that view and that there may be something in that ~~point~~ point that, for one reason or another, this cannot be treated as an attempt to declare an interim dividend, and that it is merely a direction that certain loans shall be paid to ~~certain~~ certain shareholders out of the funds of the company. "Let me test the matter on that footing. It appears to me quite clear from these articles that one thing which is to be managed by the directors and with which ~~the~~ company may interfere only by removing the directors or by having an investigation under the statutory provisions, is the management of the business of company .....

"It seems to me it is quite clear that this resolution if it is not aimed at declaring an interim dividend, is aimed at interfering with the management of the business by the directors, and ~~the~~ <sup>as</sup> such it is in my view wholly inoperative, and the general meeting had no power to pass it."

It can be seen that his Lordship relied as much on article 80-as on the article which gave specific power to directors to declare an interim dividend, in reaching the ruling that the members could not interfere with directors' powers.



The true view, therefore, is that under an article in the terms of article 80 of Table A the members in general meeting cannot give directions on how the company's affairs are to be managed, nor can they overrule a decision come to by the directors in the conduct of its business.

It is submitted that the other view, as expressed by Golberg,<sup>126</sup> that article 80 leaves the directors under the general control of the shareholders in general meeting, is not true. We have seen how Goldberg attempted to show that those historical cases discussed above did not point to the conclusion that article 80 leaves directors in exclusive general control of the company. Goldberg reached his view by interpreting the wording of article 80. He contends that the phrase "such regulations ..... as may be prescribed by the company in general meeting" means resolutions passed by a simple majority of the members in the general meeting, which could thus overrule decisions of directors.

But in QUIN & AXTENS V. SALMON<sup>127</sup> Lord Loreburn, L.C. stated that in an article similar to article 80, the words "regulations" and "articles" mean the same thing. This was accepted by Slessor, L.J. in SHAW v. SHAW<sup>128</sup>.

Therefore "such regulations ..... as may be prescribed by the company in general meeting" means articles which are incorporated as an alteration to the existing articles. And these require a special resolution of the company.

Therefore, on the basis of article 80 of Table A, the directors are in general and direct control of the company to the exclusion of direct interference by the members in general meeting.

CHAPTER IV: CONTROL OF AFFAIRS AND MANAGEMENT: THEORY AND PRACTICE

I. Introductory:

As it was stated in the preface, control of the affairs of a company is not just determined by the construction of articles 80 Table A only. The whole machinery of the organs of a company has to be looked at and other factors which determine the organ that controls the affairs of the company sorted out.

In other words, it is submitted that there is theoretical power of control of the affairs of a company, the theoretical power of control of a company lies in the members in general meeting. The practical control of a company lies with the directors.

In this chapter it is attempted to explore the basis of the theoretical control of the company's affairs being in the general meeting, and the factors which enable the board of directors to be in practical control of the company.

2. Control in theory

The members of a company in general meeting wield the powers of ultimate control of the company's affairs. This ultimate control can be affected by the members exercising their power:

- (a) to alter the articles of association of the company;<sup>129</sup>
- (b) to remove a director or directors of the company;<sup>130</sup>
- (c) to refuse to reelect the incumbent director or directors who come up for re-election at the annual general meeting of the company; <sup>131</sup>
- (d) to bring an action in the name of the company against the directors of the company;<sup>132</sup>
- (e) to apply to the court for investigation of the affairs of the company.<sup>133</sup>

S.13 of the Act provides that subject to the Act and to the conditions of the memorandum of association, a company may by special resolution alter or add to its articles.

A special resolution is one passed by a three-quarters majority of votes at a general meeting of the company.<sup>134</sup>

This power gives the members in general meeting control over the affairs of the company in a two-fold way. Firstly the members may alter the articles so as to curtail the powers of directors, and perhaps vest them in another organ. They may even alter the articles so as to put the directors under the general control of the members in general meeting in the former's exercise of their powers of management of the company's affairs. This would put the general meeting in a position whereby they may, even by a simple majority, overrule the decisions of directors in the management and on the affairs of the company. Secondly, the very realisation in itself, that the members have this power to alter articles to the detriment of the directors, may have an effect on the directors. The directors may be keen to consider sympathetically the views of the members, <sup>lest</sup> the members vote to curtail the directors' powers. In this way the members may have their ~~views~~ views prevail in the management of the company. Where a director holds office under a contract which incorporates the relevant article, the members may terminate the services of such a director by altering the relevant article.<sup>135</sup> Infact, even where a director holds office under an independent contract, the members may all the same alter articles the effect of which would be to remove the director,<sup>136</sup> though with the consequence of subjecting the company to liability to pay damages to the dismissed director. What is important here is that the use of the power to alter articles may serve the members to remove a director to whose views they are opposed. This gives them a chance to elect a person with whose views over the management of the company they agree, thus enabling them to influence the management of the company.

S.185 of the Act gives the company the power to remove, by ordinary resolution, a director before the expiration of his term of office, notwithstanding any provision in the company's articles, or any agreement between the director and the company. Such an ordinary resolution for the removal of a director, however, requires special notice, that is notice of intention to put a motion of a resolution to remove a director must be given to the company not less than twenty-eight days before the meeting at which the resolution is to be put. The company must then give notice of the resolution to the members of the company when they are sent notice of the meeting. On receipt of the notice of the intended resolution the company must send a copy of it to the director concerned, who is entitled to have his written representations sent to every member of the company to whom notice of the meeting is sent, or if this is not possible, the director may, without prejudice to his right to be heard orally, require that the representations shall be read out at the meeting.

Removal of a director under S.185 does not deprive the director of his right to compensation or damages for wrongful dismissal if such dismissal is a breach of a contract of service between the director and the company.<sup>137</sup>

or

In theory, therefore, short of owning/controlling a majority shareholding, any director could be removed from office by a simple majority of shareholders in a general meeting of the company.

This power, too, provides a two-fold way of controlling the company's affairs by the general meeting. Firstly the members may remove a director to whose views they are opposed and replace him with a director who subscribes to their views on the running of the company.<sup>138</sup> Secondly, directors conscious of

the members' power to remove them, may be more ready to adopt the views of the general meeting on the affairs of the company.

Courts have recognised that the provision in articles which requires a proportion of the directors to retire at every annual general meeting and new directors to be elected or the old ones to be re-elected, serves to enable the members to influence the management of the company. This is the import of Greer L.J.'s dictum in SHAW & SONS v SHAW<sup>139</sup> where he said,

"..... The only way in which the general body of the shareholders can control the exercise of the powers vested by the articles in the directors is by altering their articles or, if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove....."

Therefore, where the articles of a company provide for the rotation of directors as in Table A, opportunity will always arise for the members in general meeting to exercise control over the management of the company. The members may refuse to re-elect directors of whose views they disapprove and replace them with people whose views they approve. This way, the members may be able to influence decisions on the affairs of the company - through "their" directors (directors who subscribe to the members' views). Secondly, directors who know they are due to retire at the next annual general meeting may tend to side with the members if they wish to be re-elected.

The rule in Foss v. HARBOTTLE states that if complaint is made that directors have breached their duties, the right plaintiff, and the only right plaintiff, against the directors, is the company<sup>140</sup>. Later the courts extended this rule to cover cases where what is complained of is an irregularity in the management of the company. For example, where it was complained that a poll was wrongfully refused

by the director who presided, it was held that the company would be the proper plaintiff.<sup>141</sup>

As an incident of management of the company, the directors are the appropriate agency to institute proceedings in the name of the company<sup>142</sup>. Naturally when the directors themselves are supposed to be the defendants, it is most unlikely that they will start an action in the name of the company.

If the directors will not or cannot start proceedings in the name of the company the power to do so reverts to the general meeting.<sup>143</sup> The practice is that any member of the company will start proceedings in the name of the company. If the director<sup>s</sup> do not challenge his right to do so, the proceedings will continue. But most likely the directors will challenge the authority to start proceedings in the name of the company. The court will then stay proceedings until a general meeting of the company *decides* whether or not the proceedings should resume and continue in the company's name. This gives the members the chance to decide whether to proceed against the directors for irregular management of the company.

Other default powers of the general meeting give the members occasion to exercise direct control of the affairs of the company. Where the directors cannot exercise their duties, for example where there is a deadlock in the running of the affairs of the company, the power to manage reverts to the general meeting of the company.<sup>144</sup> In BARON v. POTTER,<sup>145</sup> according to the articles of a private company incorporated in 1912, the number of directors was to be not less than ten. Another article stated that the quorum of the directors was to be two unless otherwise fixed by the directors. By 1914 there were two directors. One of the two directors refused to attend any board meeting with the other because of

held-up capital of the company as at the  
a misunderstanding between them. It was held that  
in these circumstances the power to appoint additional  
directors reverted to the general meeting although  
under the articles this power rested with the board.

S.166 of the Act provides that the court "shall  
appoint one or more competent inspectors to investi-  
gate the affairs of a company and to report thereon  
in such manner as the court directs, if the company  
by special resolution declares that its affairs  
ought to be investigated by an inspector appointed  
by the court." This provision may be used by the  
members in general meeting to keep check on the  
activities of the directors on the running of the  
affairs of the company.

In law, therefore, the members in general meet-  
ing wield the power to ultimately control the affairs  
of the company. Whether the members actually control  
the company by use of these powers depends on how  
practicable and how practical it is for the general  
meeting to exercise those powers. This is the  
subject of the next part of this chapter.

### 3. Control in practice

It is one thing for the general meeting to wield  
the powers of ultimate control of the affairs of the  
company. It is quite another for it to ultimately  
control the affairs of the company. This part of  
the chapter will discuss factors which make it impra-  
ctical for the general meeting to control the company,  
leaving practical control in the hands of directors.

Firstly, if the members may be able to exercise  
their ultimate powers of control when they want, they  
should be in a position to convene or to cause to be  
convened a general meeting of the company at any time.  
The act provides a means by which the members may  
convene a meeting of the company. This is by requi-  
sitioning <sup>146</sup>. But to what extent is it practical to  
requisition a meeting of the company? The act pro-  
vides that the requisition must be signed by members  
of the company holding not less than one-tenth of

such of the paid-up capital of the company as at the date of deposit of the requisition carries the right of voting at general meetings of the company<sup>147</sup>. It seems that in companies where the directors hold more than nine-tenths of the paid-up capital with voting rights it will be impossible for members to requisition a meeting of the company if they intend to discuss against the directors.

Even where the directors do not hold such a majority of voting rights, in a large and dispersed membership of a company, it is very difficult for a few members to muster the support of so many members as to account for one-tenth of the paid-up capital carrying voting rights. Usually, in cases where a dissident group of shareholders want an extra-ordinary meeting to be convened, the big shareholders will side with the directors in a bid to save the company from internal chaos (they have a bigger risk to guard against). This means the dissident members would have to rely on soliciting for requisitionists from among the holders of small shares. To reach a target of at least one-tenth of the paid-up capital with voting rights the dissident group has the difficult task of winning over a large dispersed membership of small shareholders, a task which may be formidable in view of the expenses involved. Very rarely do dissident shareholders manage to requisition a meeting of the company. They usually wait for the annual general meeting. For the whole year unpopular directors will stay put in the office.

But a more difficult hurdle in the way of members is to get a majority in general meeting. In companies where directors own or control a majority shareholding, the members in general meeting cannot exercise their power of control. Although the directors vote in their capacity as members, their views and proposals as directors will always prevail.

Even taking a company in which directors do not own or control a majority shareholding, in practice, the scales are tipped so much in favour of the direc-



tors that, in most cases, they are bound to control majority support in general meetings.

Firstly, there is the general strong influence of the directors over the members. To a large number of members the directors are in the know about the affairs of the company. They know what is good for the company. In some cases the directors are actually knowledgeable in matters of the company. All this gives the directors considerable power of influence on the members of the company. The latter may vote for the directors' side without first considering the issues.

Secondly directors are favoured by the use of circulars, coupled with their control of the proxy system.

When the directors convene a general meeting to discuss matters other than ordinary business, the notice calling the meeting will be accompanied by a circular explaining the reasons for the directors' stand on the matter in question. In effect the circular contains the reasoned case of the directors in favour of their proposals or against the proposals of the opposition.

The directors send out these circulars at the expense of the company. They are sure to send circulars to every member of the company, and to state their case fully.

On the other hand, where the Act gives the members (requisitionists of a resolution) to use the machinery of the company to send statements to the members, it provides that the statements may not be of more than one thousand words<sup>148</sup>. The members may be hampered by lack of funds. Even if they had funds they may not be able to present their case fully because of the one-thousand word limit.

But in most cases the opposition will wait to put their case to the meeting itself. The directors have the advantage of having their case heard first. And first impressions are more likely to stick.

Even where the opposition send out statements using the company's machinery, the directors have the advantage of reading the opposition's case <sup>and</sup> countering it in the same circulars, possibly rendering the opposition's case as useless as unstated to the members. For this reason, members tend to avoid the use of S.140, in which case directors will be in a more advantageous position.

The importance of circulars in determining the voting operates in conjunction with the importance of proxies<sup>149</sup>. Every member entitled to attend and vote at a meeting is entitled to appoint another person, member or not, as his proxy, to attend and possibly vote on his behalf. If the directors can <sup>have more members appoint them as proxies they are sure to</sup> get more votes in their favour. This is especially so in large public companies with a dispersed membership, where only a small proportion of the members attend in person. The issued at a meeting will most likely be decided in advance by the proxies<sup>150</sup>.

Therefore it all depends on who are in a position to get more proxies. In this connection, directors are at an advantage over the members. They solicit proxies at the company's expense. When they send out circulars they may accompany these with the documents soliciting proxies. Although the Act requires when invitations to appoint particular persons as proxies are sent out by the directors at the company's expense, such proxy instruments must be sent to all persons entitled to attend the meeting and vote thereat by proxy, and not to a select few, this does not adversely affect the directors advantage. They still possess the advantage of tendering their solicitings, <sup>first</sup> ~~but perhaps to members who have already filled proxies in favour of directors.~~ Many members may fill proxies after hearing or reading only one side of the case, the director's side. Although the members may withdraw their proxies if they change their minds before the meeting<sup>151</sup>, this will not usually happen. A member who is not keen to attend the meeting personally will not be keen to follow up the arguments after he has already filled

the proxy.

The right of management to use corporate funds, both in influencing action and in gathering votes gives it great advantage over dissentient groups who must personally finance opposition.

In PEEL v. LONDON & N.W. RLY,<sup>152</sup> the court stated the rationale for this right: that it is the duty of directors to inform the shareholders of the facts, of their policy, and the reasons why they considered that this policy should be maintained and supported by the shareholders, and that they are justified in trying to influence and secure votes for this purpose, and so the expenses which are bona-fide incurred in the interest of the company are properly payable out of the funds of the company.

It would seem, from the explanation, that corporate funds cannot be used where the directors are merely seeking re-election. But in an American case, the court upheld such use of corporate funds when re-election was tantamount to shareholder approval of a plan directors hoped to ~~effectuate~~<sup>effectuate</sup>.<sup>153</sup> Perhaps East African courts would hold the same view.

All these are just general difficulties or obstacles which account for the passiveness and inability of the general meeting to exercise its power of ultimate control.

There are other difficulties peculiar to each method of control by the general meeting, which usually prevents the exercise of that power by the general meeting.

In the case of the power to alter the articles of association, a three-quarters majority is required for a resolution to alter the articles. In view of the difficulties stated above, it is all the more difficult for the general meeting to achieve a three-quarters majority to alter the articles of association.

In the case of the power of the general meeting to remove directors and replace them with those whose views are acceptable, there are more difficulties that make the exercise of this power almost impracticable. The intention of the Act was that, short of owning or controlling a majority of the shareholders, *any director could be removed from office by simple majority.*

But that objective has not actually been accomplished. The obstacles in achieving a majority have been stated.

S.185 may also be avoided by inserting special provisions as to voting in the event that a resolution is put to the company for the removal of a director. In FAITH v. BUSHELL<sup>154</sup> the articles of a company contained a provision whereby "in the event of a resolution being proposed at any general meeting of the company for the removal from office of any director, any shares held by that director shall on a poll in respect of such resolution carry the right to three votes per share". The effect of this article, in the words of Lord Reid, was to make it "impossible in the circumstances of this case for any resolution for the removal of any director to be passed if the director votes against it".

In the court of Appeal Ungood-Thomas J. stated that "it would make a mockery of the law if the courts were to hold that in such a case a director was to be irremovable".

But in the House of Lords, Lord Upjohn said,<sup>155</sup>  
"I venture to state that Ungood-Thomas J. overlooked the importance of article 2, Table A, which gives to a company, a completely unfettered right to attach to any share or class of shares special voting rights on a poll or to restrict those rights as the company may think fit."

In conclusion, he said,

"There is no fetter which compels the company to make the voting rights or restrictions of general application, and it seems to me clear

that such rights or restrictions can be attached to special circumstances and particular types of resolutions.<sup>155</sup>

The House of Lords therefore approved the effectiveness of the method of avoiding S.185. This method will usually be found in private companies or in small public companies. In such cases, it is almost impossible for members to remove a director.

Secondly, the effectiveness of S.185 is greatly diminished by sub-s,6 which provides that "nothing in this section shall be taken as 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 of director.

If therefore the director has a service agreement with the company his rights thereunder are preserved. On the face of it, this is fair enough; the company having elected to bind itself by contract, cannot complain if damages become payable when the service is brought to a premature conclusion.

But so far as concerns the entry into service contracts, the company is normally the directors, for it is the board that will have the powers to appoint and to fix the terms of service.

The members may therefore find, when they seek to exercise their powers of dismissal, that the directors have entrenched themselves with long-term contracts of service which will thereby be broken, giving rise to heavy claims for damages. In such cases, when a resolution for removal of a director is put, the other directors, to save their colleague, will use the fact of a contract to dissuade members from voting from voting for the resolution. Members will usually be restrained due to their concern for the funds of the company which may be depleted by payment of compensation.

It is significant that special notice is required for a resolution to remove a director, and that the director may have his representations sent out to the members at the expense of the company. This would give the director an advantage in that he will put his side of the case to the members before the proposers of the resolution. In fact it is recognised that this provision is designed to help a director so that he may not be removed from office of profit without being heard.

S185 does not apply to a director holding office for life in a private company at the commencement of the operation of the Act. Such director is irremovable by ordinary resolution in accordance with S.185.

Default powers of the general meeting are not quite effective as a means of control since their exercise is only contingent upon the directors' not exercising their powers. Such occasions are not frequent in practice.

Where directors have a controlling shareholding in the company, action by the company against the directors may be impossible to put into practice since such directors are not prevented from voting in a general meeting to decide whether proceedings should be instituted in the company's name<sup>156</sup>. Again a shareholder is not quite ready to start proceedings in the name of the company because if proceedings are stayed and the general meeting decides against continuance of the proceedings, the proceedings will be dismissed and the individual who instituted proceedings and his advocate on record will be liable for costs<sup>157</sup>. Members may fear this eventually.

3. Conclusion: It is submitted that while article 80 of Table A gives directors the power to control the management of the company without interference from the general meeting, the general meeting wields the ultimate power of control, but in practice the Board of Directors controls the affairs and management of the company.

CHAPTER V: MANAGEMENT IN THE AFRICAN COMPANIES IN KENYA.

An incorporated company, having a separate legal existence from the shareholders, is not capable of having racial attributes.<sup>158</sup> But for the purposes of this paper a company whose membership is wholly African shall be called an African Company. "African" describes the membership rather than the company itself.

What has been said of companies in general, as far as management is concerned, is also true of African companies. It is true that just like in most other companies, control of management in African companies is practically in the hands of the directors of the company. And the reasons for this position in companies are equally applicable to African companies.

However, African companies deserve a special treatment in this paper for three reasons. First over the last ten years there has been a spate of promotion of companies by Africans, both private companies and companies other than private. For example of the public companies placed on the register in Kenya in the three and a half years (1st June 1964 to 30th June 1967), thirty-seven (the total registered in those three and a half years was seventy-three) were African trading and farming ventures.<sup>159</sup> That is, half of the public companies registered in those three and a half years were African companies. Since then the rate of registration of African companies has been sharply on the increase.

Bearing in mind that only twelve or so years ago there was barely any public company (and an insignificant number of private companies) with a wholly African membership, the present statistics of African companies are spectacular and will tend to attract some interest into how these companies are faring. And the first important aspect is management.

The second reason for a special mention of African companies is this: that although, like all other companies, control of management is practically in the hands of the director, there seem to be certain reasons, peculiar to these African companies, that account for this practical total control by directors. This paper intends to examine some of these reasons.

Thirdly African companies have manifested an interesting degree of total failure resulting in liquidation, or a high degree of mismanagement and other irregularities. The Registrar of companies states that the result of a survey in the latter part of 1967 of the files of the thirty-seven African public companies reig registered in the above stated period revealed that of the thirty-seven companies, only three appeared to have complied with all the registration requirements of the companies Act. Of the other thirty-four, twenty-eight had neither held a statutory meeting, filed a statutory report made a return of allotments. In no case had a prospectus been filed, although in all, except seven cases, statements in lieu of prospectus had been lodged to enable certificates to commence business to be attained.

The Registrar goes on to state that out of the thirty-seven companies registered during the period, although twenty-eight were now due to file their first or second annual return, only four were not in default over this requirement. Where such returns had been submitted there had been considerable correspondence before they could be accepted for registration.<sup>160</sup>

The reason why I have stated this rather alarmist report is this: it will be discovered that the reasons that account for the control of the company totally by the directors are nearly the same reasons that account for mismanagement and irregularities.

Before going into examining these reasons it is important to distinguish between several modes of African companies. First there is the private trading company of a few individuals whose shareholding in the company is almost equal. In such a company, it is usual that the members will be persons who either have had some substantial education and are not handicapped by illetteracy or semi-literacy, or persons who have been long in business, albeit as sole traders, and are very much alive to the goings on of a business concern. In such cases, there are no features peculiar to them as an African company. Only the general problems of division of powers in company law apply to them.



Secondly there is the private company with a fairly large membership by the standards of private companies. One important feature in some of such company is this: you find that two or three long standing businessmen, or just workers who have money and knowledge go to their local area and mobilise a number of people to join them in a private company. Usually, these people are simple shop owners in the local market place, not very well versed in business and usually with very little educational background. The business of the private company is usually in a big town, for example Nairobi, Nakuru, Mombasa or Kisumu, perhaps at least a hundred miles away from the larger number of the shareholders ( this was at least the case in the number of members of African companies I asked questions in the western most part of Kenya. The businesses of their companies were based in Kisumu ( at least 100 miles away), Nakuru, Kitale, Eldoret and Nairobi (all at least 250 miles away).

A third mode of African company is the public farming company with large farms, especially in the Rift Valley. I only managed to talk to very few of the members of such companies, but their answers pointed to a possible general conclusion. These companies have a fairly large and dispersed membership, at least by the standards of African companies ( One case was of 80 members, another 2000 members). One company drew members from the Central and Western Provinces and the Kisii District of Nyanza Province. This is quite a dispersed membership.

It should be noted that according to the registers of these companies, they usually adopt the articles in the relevant Tables of the companies Act. Therefore they are prone to the same features of management and problems of division of powers as other companies in general.

However, there are other features peculiar to African companies in the second and third categories above.

The first problem is ignorance of the general shareholders. The average shareholder in these companies is handicapped either by lack of basic education or by ignorance of the affairs of a company.

The consequence of this is that the members do not know what are their rights and what are their duties as far as management of the company and division of powers is concerned. I asked a number of members of a company what they would do if they did not like the ideas of a particular director. They said they would wait until he came up for re-election and they would refuse to vote for him. And that was the only way they knew could deal with a director, although the articles of this company had provisions for removal of director. This ignorance generally leaves the directors without any apprehension of being controlled within the provisions of the articles of the company and so you find that the directors even exercise the powers reserved to the general meeting. Many members are not aware that such powers cannot be exercised by the directors.

Secondly, and probably as a result of the first, there is a general mood of apathy among members of African companies. Provided they receive dividends, they do not mind how the company is run so long as it does not show signs of going to ruins. The members do not usually attend meetings. This may partly be partly be attributed to distances. When I asked one member of a farming company based in Kitale whether he attended meetings, he said that he did not see any reason why he should leave his shop (more than 150 miles away from Kitale) to go for a meeting while he knew very well he was "going to say nothing" and while they had appointed "some people to run the company". This is the general attitude of many members of African companies. In the case of another farming company, some group of members had written a letter to the registrar of companies complaining that the directors and the secretary of the company had embezzled Sh 75,000/= belonging to the company. I asked a member what he thought about this. His answer was that some people were "trying to bring politics in the company".

This raises another point. In some African companies you may find that where there are a few members who are interested in the running of the company and who happen to raise protests against the running of the company, a large part of the members' first impressions will be that these members are "indulging in politics" or personality clashes in the company.

This general attitude of apathy leaves the directors, sometimes out of necessity, to control the company the way they want.

While inactivity, for whatever reason, on the part of shareholders, affects the the company, there are also certain reasons attributable to directors, which have the effect of confirming control of the company to the directors, or disabling the members from exercising any control in the company.

Firstly, the directors themselves are in many cases ignorant about the running of companies.<sup>161</sup> They may exercise the powers reserved to the general meeting simply because they are not aware that their action is under a power reserved to the general meeting. And because the members, for any of the reasons given above, do not act to prevent the directors from acting beyond their powers, this state of affairs is kept intact, and the directors practically exercise all the powers of the company.

Secondly, directors sometimes capitalise on the ignorance or apathy of the members, to hold the affairs of the company in their grip. The impression I got from the only director I managed to ask questions is that he equated directorship of a company to political power. He appeared to be elated by the fact that he was "ruling" the members of the company. Such directors will always exploit the attitude of apathy and the ignorance of the members to control the company unchecked.

It is largely for these reasons that it is commonly found in African companies that although article 80 of Table A ( or the relevant article for) a private company) is incorporated in their articles, the directors are infact in total practical control of the company, and the members are simply passive recipients of dividends. Infact occasions to use the advantages of directors in fighting a battle with the shareholders do not usually arise in the case of African companies since, for above reasons, clashes between directors and members are virtually unknown.

PROPOSALS FOR REFORM

Reform of company law on the aspect of division of powers and control of management should be geared towards one important objective: to provide for a more practicable way for the shareholders to exercise the ultimate powers of control of the affairs of the company.

It cannot be suggested that the day-to-day running of the company be vested in the general meeting. This is not practicable, in view of the cumbersome nature of the medium of the general meeting. However, it is desirable that the shareholders should not have their chance of participating in the the running of the company and having a final say, whittled away by the intricacies of the decision-making processes and the general advantageous position of the directors. It is important that a balance be struck between enabling the company to run unhampered by deadlock between directors and shareholders, and giving the people who have a stake in the company (the shareholders) a more exercisable power to determine the ultimate course of the affairs of the company.

Reform to this end could take either or both of two courses: to give (positively) more ways of ultimate control to the general meeting or/ and to make it easier for the general meeting to exercise the already established powers of control of the management of the company.

The latter is more preferable. The powers of control of the affairs of the company by the general meeting, as discussed above in this paper, are quite sufficient, if only they would be made more easily exercisable. The following suggestions for reform are therefore suggestions for making the present powers of ultimate control of the company's affairs by the general meeting more easily exercisable in a practical way.

First the importance of the general meeting of the Company must be appreciated. A general meeting of the Company is the only medium through which the members can participate in the running of the Company and the only means by which they can exercise any powers of control of the company. As we have seen, summoning of the general meeting of the company is incumbent upon the directors. It cannot be ruled out that the directors can misuse this power by refusing to summon a general meeting of the company, except perhaps the annual general meeting. One way in which the Company's Act has attempted to provide against the abuse of this power by the directors is to provide for a power of requisitioning a meeting by the members. However, as we have seen, it has not been all that easy to exercise this power by the members. It is therefore submitted that S.132 of the Company's Act should be reformed in two ways to make it easier for the members to requisition a general meeting of the company. Let us just have a cursory look at the relevant provisions of S.132 and S.140 of the Act.

S.132 provides that a meeting of the company shall be called on the requisition of members holding not less than one-tenth of the paid up capital carrying voting rights. S.140 provides for the requisitioning of a resolution by any number of shareholders holding not less than one-twentieth of the total voting rights or not less than one-hundred members holding shares on which there has been paid up on average sum per member of £100.

Either or both of these sections may prove satisfactorily workable in the case of a small company with a low voting capital, and a low voting membership. There is also a better chance in such company of the members being mutually acquainted

But in the case of a company with a large voting capital and a large voting membership the picture and the result are different. The average individual shareholder finds himself at grave disadvantage. He requires a formidable canvass for votes and a fighting fund at the outset. Several of such large companies are governed by boards of directors holding, absolutely and proportionately, large share qualifications.

If the average shareholder wishes to ameliorate such a state of affairs in the company, he is overwhelmed by enhanced difficulties under S.132 and hardly less so under S.140. He usually has little or no knowledge of the identity of his fellow members, at any rate without an elaborate, prolonged and expensive search. The risk, outlay and labour are out of all proportions to his means and preoccupations.

Each of the two sections should be amended so as to render the obstacles substantially smaller in the case of large Companies. Subject to the statutory definitions of the large companies in grades of size, a minimum number (not proportion) of shareholders holding a minimum number (not proportion) of votes should be entitled to be heard on requisition of a meeting and of circulars. This would infact make it easier for members to requisition a meeting, it would provide fresh encouragement to shareholders to form their own judgment and forswear apathy, and correspondingly, there would be incentive to management to put its house in order.

S.185 had as one of its objectives the abolition of life directors in a company. But the Courts have established that life directors can infact be created by a simple evasive device which has received the blessing of the Court as evidenced in the case

of FAITH v. BUSHELL.<sup>162</sup> This enables a director to stay in office against the majority of the members simply because he carries a majority of the votes. Bearing in mind that S.185 expressly provides that the right of the shareholders to remove a director from office by ordinary majority cannot be affected ~~by~~ by the articles or by contract, the Court should have ~~refused~~ refused an attempt at achieving the prohibited result by ~~trebling~~ trebling the votes on a motion of removal of director.

The legislature should stifle the effect of FAITH v. BUSHELL<sup>162</sup> by adding to S.185 a provision that there should be no special voting provisions attached to a proposal for removal of director which would have the effect of giving that director an undue majority of votes.

We have seen the difficulty encountered by a dissentient group in organising an effective opposition to the directors, especially the director's advantageous position in gaining votes by the use of circulars and the control of proxies. Directors' use of corporate funds in sending out circulars and soliciting proxies has been justified on the ground that members should be provided with an easy way of participating in company meetings and that they should be provided with information useful in making absentee decisions. However, it is also realised that the right of directors to use corporate funds, both in influencing action and in gathering votes gives it great advantage over dissentient groups who must personally finance opposition. This position could be reformed, at least in certain aspects, by providing in the Act that members seek to exercise their ultimate powers of control, i.e. where a resolution is proposed for the removal of a director or the alteration of articles to the detriment of directors or their powers, the directors shall have the duty of presenting the opposition's side in the circulars at the same

time as they present their case to the members by circular. Such a provision would make it easier for the members to organise an opposition, in that they would not be hampered by lack of funds, and their case would be presented at the same time as the directors; thus enabling a member to appoint a proxy after hearing both sides of the case.



FOOTNOTES

1. Cap. 486, Laws of Kenya.
2. S.16 (2)
3. S.4 (I)
4. Commonly known as 'public' company.
5. Not including persons who are in the employment of the company and persons who, having been formerly in employment of the company, were, while in that employment, and have continued after the determination.
6. S30 Companies Act.
7. S.2
8. S.4 (2) (a) Companies Act
9. S.4 (2) (6)
10. S.5 (3)
11. S.4 (2) (c)
12. Automatic Self-Cleansing Filter Syndicate Co. v Cunninghame (1906)2 Ct.34, C.A.
13. S.4 (I)
14. S.9
15. GAIMAN v. NATIONAL ASSOCIATION FOR MENTAL HEALTH (1970) 2 A II R.362
16. S.14
17. S.5
18. S.8
19. S.9
20. S.11
21. INTERNATIONAL CONTRACT COMPANY CASE (1869) 17 W.R. 454
22. Palmer's Company Precedents, 16th Edn., p. 425
23. TREVOR V. WHITWORTH (1887) 12 App. Ca. 409
24. GUINNESS V. LAND CORP. OF IRELAND (1882) 22 ct. D. 349

25. Re SOUTH DURHAM BREWERY CO. (1885) 31 ch D. 261
26. S. 22 (I)
27. ( 1915) I ch.881
28. (1915) I ch.881, at p. 897.
29. RAYFIELD V. HANDS ( 1958) 2 W.L.R. 851, (1960) ch.I
30. ELEY V. POSITIVE LIFE ASSURANCE Co. I Ex.D. 20
31. BEATTIE V. BEATTIE ( 1938) ch.708.
32. MALLENSON V. NATIONAL INSURANCE (1894) I ch.200
33. PUNT B. SYMONS (1903) 2 ch. 506.
34. (1897) A. C.22. Also LEE V. LEE'S AIR FARMING LTD (1961) A.C. 12.
35. (1866) L.R. 2 ch. at p.89
36. (1741) 2 Atk. 212
37. (1843) 2 Hare 461, at p.493
38. S.2: "appointment day means the commencement of this Act.
39. S.177
40. Art.75 Table A.
41. S.28 (I)
42. Arts. 89-94 Table A
43. art. 94
44. S.184
45. S.186. But see Sub-S.5 of this section which allows the appointment of a person under or over age if this is stated before appointment and special notice is given for such resolution and the company approves in general meeting.
46. R.V, IVAN ARTHUR CAMP ( 1962) E.A. 403 HOLMES V. KEYES (1959) ch. 199, C.A.
47. (1940) A.C. 701 ( H.L.)
48. at pp. 740-741
49. D'ARCY V. TAMAR, Co., L.R. 2 Ex.158
50. HAYCRAFT GOLD REDUCTION & MINING Co. ( 1900) 2 ch. 230
51. PALMER'S COMPANY PRESENTS, 17th Ed., p.575.
52. Re Homer District Consolidated Gold Mines (1888) 39 ch.D. 546;  
Re Portuguese Consolidated Gold Mines (1889) 42 ch. D. 160  
Ellis V. Bailey & Co. ( E.A) Ltd ( 1962) E.A. 626.

53. ( 1888) 37 ch. D. I
54. ( 1919) Ich. 198
55. PALMER'S COMPANY PRECEDENTS, 17th Edn. p.580
56. art.98, Table A
57. art. 106, Table A.
58. ( 1871) L.R. 12 Eq. 246
59. at p. 258
60. Re COUNTY PALATINE LOAN & DISCOUNT Co. (1874) 9 App. Cas. 691
61. art. 102, Table A.
62. art. 107, Table A.
63. art. 109, Table A.
64. ELLIS V. BAILEY & Co. ( E.A) LTD ( 1962) E.A. 626  
HAROLD HOLSWORTH & Co. V. CADDIES ( 1955) I ALL E.R.725
65. (1874) 9 App. Cas. 691.
66. at p. 695.
67. art. 89 Table A.
68. In the case of a public company an election would have to be made immediately at that annual general meeting to fill the vacancy so as to conform with the requirement of s.177 that a public company should have at least two directors.  
RE DAVID MOSLEY & SONS, LTD (1939) 2 ALL E.R. 791
69. MORRIS V. KANSSEN ( 1946) I ALL E.R. 586
70. EYRE B. MILTON PROPRIETARY LTD (1936) ch 244
71. art.91, Table A.
72. s. 185
73. Simple majority of those attending and voting.
74. MWANYI DEALERS LTD. V. SELIWA UNITED FARMERS LTD ( 1970) E.A. 109
75. ss. 130 - 146
76. 'year' here mean 'calendar year' : GIBSON V. BARTON  
( 185) L.R. 10 Q.B. 329.
77. S.131
78. S.131(2)
79. BUGERERE COFFEE GROWERS LTD V. SEBADUKA ( 1970) E.A. 147.
80. S.135
81. ( 1935) S.C. 56
82. S.L~~3~~ (3)
83. S.141 (I)

84. art. 50, Table A, Re HECTOR WHALING, LTD ( 1936) ch.208
85. ( 1916) 2 ch. 450.
86. Robert R. Pennington, Company Law, 3rd Edn. at p. 538, foot note (r)
87. at p. 538, foot note (r)
88. S. 134 (a)
89. SMITH V. DARLEY ( 1849) 2 H.L. Cas. 789.
90. CHIPPINGTON COLLIERIES LTD B. JOHNSON ( 1944) I A II E.R. 762
91. ALEXANDER V. SIMPSON ( 1889) 43 ch. D. 139.
92. AYRE V. SKELSY'S ADAMANT CEMENT Co. LTD. ( 1905) 21 T.L. 464.
93. ( 1970) I AII E.R. 53
94. at p. 56
95. S. 134 (c)
96. Re HARTLEY BAIRD LTD ( 1954) 3 AII E.R. 695
97. Re LONDON FLATS ( 1969) 2 A II E.R. 944.
98. art. 55
99. S.136
100. S.136
101. art. 62 Table A
102. R.V WIMBLEDON LOC. BOARD ( 1882) Q.B.D. 459
103. S.137 (2) Companies Act.
104. S.137 (I)
105. S.134 (c)
106. AUTOMATIC SELF-CLEANSING FILTER SYNDICATE Co. V. CUNINGHAME  
( 1906)2 ch. 34, C.A.
107. See G.D. GOLDBERG, "Article 80 of Table A of the companies Act,  
in 33 MOD. LAW REV.177.
108. ( 1883 ) 25 ch. D. 320.
109. at p. 329
110. at p. 330
111. ( 1906) 2 ch. 34, C.A.
112. ( 1906) 2 ch. 34, at p. 35
113. ( 1906) 2 ch. 34, at p. 38
114. ( 1906) 2ch. 34, at p. 39
115. G.D. GOLDVERG, "Article 80 of Table A of the Companies  
Act, 1948, " in 33 MOD. LAW REV.177
116. (1909) Ich. 311, C.A.; ( 1909) A.C. 442, H.L.
117. (1909) A.C. 442, at p.443.

118. (1909) Ich. 311, at p. 319.
119. ( 1935) 2 K.B. 113
120. 33 Mod. Law Rev.
121. (1935) 2K.B. 113, at p.143
122. (1935 2K.B.113. at p.134
123. ( 1943 ) I All E.R. 582
124. ibid at p.584
125. ibid at p.585
126. G.D. GOLDBERG, "Article 80 of Table A of the Companies Act, 1948", un Mod. Law Rev. 177.
127. ( 1909 ) A.C. 442.
128. ( 1935) 2K.B. 113
129. S.13 of the Act
130. S.185 of the Act
131. Article 89 Table A
132. PENDER B. LUSHINGTON (1877) 6 ch.D.70
133. S.166 of the Act
134. S. 141 of the Act
135. READ V. ASTORIA GARAGE ( 1952) I All E.R. 922.
136. SOUTHERN FOUNDRIES B. SHORLEW
137. S.185 (6) of the Act.
138. BUGHERERE COFFEE GROWERS LTD V. SEBADUKA ( 1970 ) E.A. 147  
Re CHINESE ENGINEERING & MINING Co. ( 1957) 107 L.J. 275
139. (1935) 2 K.B. 113, C.A; at p. 134
140. FOSS B. HARBOTTLE (1843) Hare 461
141. MACDOUGALL V. GARDINER (1875) I ch. D. 13
142. GRANT B. U.K. SWITCHBACKRLY (1888) 40 ch. D. 435.
143. PENDER V. LUSHINGTON (1877) 6 ch. D. 70
144. BARRON V. POTTER ( 1914) I ch. 895
145. ibid.
146. S.132
147. S.132 (I)
148. S.140
149. S.136
150. Proxies may vote only on a poll. On heate issues, members will always ask for a poll.
151. COUSINS V. INTERNATIONAL BRICK Co. (1931) 2 ch.90 C.A.