This I believe to be unsound. The various state corporation laws are not codes in the true sense, though some of them are so described. Nor is the British Companies Act, despite its length and elaboration. All the statutes presuppose basic common law and equitable principles most of which are nowhere embodied in legislation. And these basic principles are derived from the same roots in our common heritage. Furthermore, the various corporation laws show striking similarities. That all this is so as regards the various states of the Union is recognized by your national law schools, which teach, not the corporate law of any particular state, but the general principles of American corporation law. That these principles are generally the same as those applying to English corporation law is the only ground on which the Harvard Law School could attempt to justify their temerity in bringing me, an English lawyer, to Harvard to teach American corporation law.

In the course of this teaching (and learning) I have been struck by the basic similarities. But I have also been impressed by the divergencies. These divergencies are, I believe, of some interest and significance and worthy of study by the lawyers of both our countries. If I fail to convince you of this, it will, I think, be due to my own deficiencies (of which I am very conscious at this moment) rather than to the inherent barrenness of my subject.

The seeds of the Anglo-American business corporation—now probably the most important economic institution in the world—had been sown prior to the eighteenth century but had not then produced any very notable fruit. All that the American colonists took with them from England was an embryonic law of corporations—municipal rather than business corporations—and an embryonic law of partnership. The first English attempt at corporate legislation, the wordy and obscure Bubble Act, was passed in 1720 as a result of the South Sea Bubble. It was designed to curb the growth of unincorporated joint-stock companies, but its actual result was very different, as we now know from the pioneer research work of an American scholar, Dr. Armand Dubois. Paradoxically it
caused the government to exhibit great reluctance to
grant charters of incorporation and thus produced a re-
birth of the unincorporated association which the act had
sought to destroy. It was not until 1844, when a general
act of Parliament provided for incorporation by simple
registration, that incorporation was readily granted in
England. Moreover, even then the members of the cor-
poration remained fully liable for the corporation’s debts;
it took another eleven years before limited liability was
recognized. This somewhat arbitrary separation between
incorporation and limited liability accounts for the fact
that to this day in Britain every limited company has to
announce its members’ irresponsibility by having the
word “Limited” at the end of its name. Such a separation
between incorporation and limited liability was not, of
course, unknown in America (for some years it prevailed
in Massachusetts), but in general you made much less
heavy weather of this matter than we did, and none of
your states insists on the word “Limited” as the sole per-
missible indication of incorporation.

In England, therefore, incorporation with limited lia-
ibility by a simple process of registration is less than a
hundred years old—it attains its centenary only this year.
Having regard to the transcendent role played by Eng-
land in the mercantile community during the nineteenth
and early twentieth centuries this is difficult to credit;
but so it is. Prior to 1855 joint-stock enterprise had existed
but had operated principally in the guise of the unincor-
porated company or partnership. The legislation of 1844
and 1855 adopted this familiar form of organization and
confined on it the boon of corporate personality and
limited liability. Hence the modern English business
corporation has evolved from the unincorporated partner-
ship based on mutual agreement rather than from the
corporation based on a grant from the state and owes
more to partnership principles than to rules based on
corporate personality. This is reflected in the fact that we
in England still do not talk about “business corporations”
or about “corporation law” but about “companies and
corporation law.”

In America, on the other hand, the Bubble Act seems,
wisely, to have been ignored—despite the fact that it had
been extended to the Colonies by an act of 1741. After
the Declaration of Independence, incorporation, by special
acts of the state legislatures, was granted far more readily
than in England, and the unincorporated joint-stock
company, though not unknown, was correspondingly less
important. In a number of industrially important states
incorporation by registration under a general act came
earlier than in England—thirty-three years earlier in
New York—and, when it came, the model which the
legislative draftsmen had in mind was the statutory cor-
poration rather than the unincorporated company or
partnership. Hence modern American corporation law
owes less to partnership and more to corporate principles.

But, although America was earlier in her recognition
of the distinctive roles of partnerships and corporations,
she never drew the distinction between them with the
same clarity as England has since 1844. We then recog-
nized that the partnership form was not intrinsically
suited to large joint-stock enterprise, for partnership prin-
ciples presuppose mutual trust and confidence among the
members which is impossible if their number is unduly
large. The English legislature therefore prescribed a limit
—a limit which is now twenty. If the number of mem-
bers exceeds twenty, the association must register as a
partnership. By a stroke of the pen the formerly common
unincorporated joint-stock company with a large mem-
bership became impossible. In America no such devel-
lopment occurred, and in states where incorporation for cer-
tain purposes was not recognized until a late date the
unincorporated association continued to flourish. Hence
the Massachusetts or business trust which represents the
final evolution of the unincorporated company, distin-
guished now from the partnership in that the members
are free from personal liability—a refinement which Eng-
land never succeeded in attaining.

At this time a further development took place which
may have had some significance. During the course of the
nineteenth century (starting with New York and Con-
necticut in 1822), most American states borrowed
from continental Europe the device of the limited part-
nership. England did not do so until 1907; until then
legal freedom from personal liability could be attained
only through incorporation. Accordingly, the business
world and its astute legal advisers proceeded to adapt the
formal corporate form for use by the one-man firm or small-
family concern, thus defeating the obvious legislative in-
tent to restrict corporations to large associations and
partnerships to small ones. This development, finally
sanctified by the House of Lords in the famous case of
Salomon v. Salomon in 1897, led to the private company
to which a few years later the legislature itself granted
special immunities. American efforts to evolve the close
company as a suitable substitute for the partnership,
limited or unlimited, did not come until somewhat later
and met with difficulties to which I shall refer later.

I have stressed these differences in the relationship be-
tween partnerships and corporations at various times in
our respective histories because I believe they explain
many of the present differences between our modern
systems of corporate law. But before I elaborate this
point perhaps I may bring up to date this rapid historical
survey by a brief reference to the twentieth-century de-
velopments. In the main we have both been concerned
with the same two vital problems: first, the protection
of investors when they buy corporate securities, and,
second, the subjecting of corporate management to some
sort of control by the stockholders. In England measures
to this end have been taken by revisions of the Companies
Act at intervals of roughly twenty years after a detailed
investigation by an expert committee appointed by the
Board of Trade—the government department exercising general supervision over companies. In America all but two of the states have tackled the first problem by blue-sky laws, which, if they have done nothing else, have produced a nation-wide picture of such devastating complication as seriously to hamper the tasks of an interstate issuer and of the securities industry. But, happily, you have more recently made a determined attack on both problems through federal legislation setting up the Securities and Exchange Commission and, in so doing, have produced a body of rational corporation law which, in many respects, is the envy of the English-speaking world. To this, too, I shall revert later.

It is in the context of this historical sketch that I want to draw attention to certain contrasting aspects of our modern systems of corporate law. In the time at my disposal I have had to paint the history in the broadest strokes, and similarly I can only select a few topics for further treatment in outline only.

I have already stressed the differing reliance on partnership principles. Let me illustrate this further. In both England and America it is recognized that the business corporation performs at least two distinct economic purposes. First, it enables skilled entrepreneurs to enlist large masses of capital which they employ to the advantage of the absentee owners. Here we have the publicly owned corporation, the wealth and importance of which may exceed that of most of the states of North America. Second, it enables the small partnership or single trader to personify the business and to separate its assets and liabilities from those of its members. Here we have what England calls the "private company" and America the "close corporation." Economically, it is less important than the public corporation, but it is anything but insignificant; indeed, in view of the grave expense of making a public issue of securities, it is probably a vital link in the process of growth from private firm to large public company. In some respects the needs of the two types differ. The public corporation needs centralized management distinguished from the owners. In the private or close corporation this may not be needed or desired; probably the managers and the shareholders will be the same people and will not clearly differentiate what they do in one capacity from what they do in the other. The idea that they must manage as fiduciary directors for the benefit of themselves as passive beneficial owners will strike them as legalistic nonsense. Again, in the public company the shares of stock must be freely transferable; the so-called "owners" demand a liquid investment. In the close corporation this is not likely to be wanted any more than it is in a partnership. The incorporators want to continue as partners albeit with the advantages of corporate personality; they do not want other people to be able to step into the shoes of their co-partners.

Both England and America have evolved a type of corporate body brilliantly suited to meet the requirements of the public company. England has succeeded in adapting the same form so that it also meets the requirements of the incorporated partnership. America has not been quite so successful. Why?

The reason for our success, I think, is that the constitution of the English business corporation is still regarded as essentially contractual. Whereas the American statutes tend to lay down mandatory rules, the English Companies Act relies far more on the technique of the Partnership Act, providing a standard form which applies only in the absence of contrary agreement by the parties. Much that in America is mandatory is in England included only in the optional model constitution—the famous Table A. And this, or whatever the parties substitute for it, is expressly declared by the act to bind the company and the members as though it were a contract under seal. In particular this contractual constitution deals with the method of appointing the directors, with the division of powers between them and the stockholders, and, subject to important exceptions, with the meetings and votes of each. In America these matters have generally been fixed by statute and fixed in a way which shows that the draftsman envisaged their application to publicly owned corporations. I need not remind you of the difficulties which these statutory norms have caused to those wishing to provide safeguards perfectly reasonable in the case of close corporations. Leading cases, such as McQuade v. Stoneham, Clark v. Dodge, and Benintendi v. Kenton Hotels, illustrate these difficulties. To an Englishman it is strange that corporate codes such as that of Delaware, which are notoriously lax in failing to provide important safeguards against abuses, should nevertheless be strict in matters which seem to us to be essentially matters for the parties themselves to settle. There are now clear indications that the same view is beginning to appeal to American courts and legislatures. As a result of the Benintendi case the New York statute was modified so as to provide in one jurisdiction some of the flexibility inherent in the English model.
More recently a New Jersey case (Katcher v. Ohsman) has shown a marked change in judicial attitude which may herald a general reversal of the earlier rigid rule.

Similar considerations apply to restrictions on the transfer of shares. English law has always regarded company shares as creatures of the company's constitution and therefore as essentially contractual choses in action. Hence there is no legal objection to the contract forbidding or restraining the freedom of transferability of the shares or rights which it creates. Indeed, one of the essential conditions of recognition as a private company is that the constitution should "restrict the right to transfer its shares." The most common form of restriction is to give the directors an unfettered veto on transfers, thus enabling them to preserve the essentially personal nature of the association just as effectively as in a partnership. No one has ever argued that such a far-reaching restriction, or an option or right of first refusal vested in the other shareholders, is invalid. (Perhaps I may here add in parentheses that the option must be vested in the other shareholders, not in the company itself, for in England a company cannot purchase its own shares unless they were expressly issued as redeemable preferred shares and then only subject to stringent safeguards.)

This conception of a share as a contractual chose in action is not, of course, unknown in America. As Holmes said in one of his early cases: "Stock in a corporation . . . creates a personal relation analogous otherwise than technically to a partnership. There seems to be no greater objection to obtaining the right of choosing one's associates in a corporation than in a firm." But in America the contractual aspect has always had to struggle with the conflicting notion that a share is "property," the alienation of which must not be unreasonably restrained. Hence restrictions which in England would have been freely allowed have been struck down. Only recently do the American courts seem to be allowing the contractual concept to triumph. A strong example of this is the recent Massachusetts case of Lewis v. Hood. But as yet this development has stopped short of allowing an absolute veto.

Similarly in the sphere of taxation English law has allowed the partnership analogy to prevail to a greater extent than in America. True, England agrees with America in regarding the incorporated company as a separate taxing person and to this extent distinguishes it from a partnership which is not. True, too, there is the possibility that corporations will be subject to taxes from which individuals are free. On the other hand, the corporation is not subject to the additional surtax applicable to individuals in the higher tax brackets, and, within limits similar to those imposed by your accumulated earnings tax, surtax will be avoided on plowed-back profits. As regards distributed profits, the stockholders will be liable to surtax on the dividends received but not to ordinary income tax—the company's assessment is deemed to have accounted for that. In other words, corporate trading is freed from the double taxation involved in America. This somewhat illogical mixture of corporate and partnership principles means that corporate trading is far less likely than in America to be disadvantageous tax-wise and at least equally likely to be advantageous. Whereas English tax law has tended to encourage the private company, American revenue law has tended to discourage the close corporation; the new provision in the Internal Revenue Code entitling certain partnerships to elect to be taxed as corporations (but not vice versa) may perhaps accentuate this tendency.

Before leaving the private company I ought to make it clear that its evolution has not proceeded entirely without problems. The famous case of Salomon v. Salomon, which is its parent, laid down the corporate entity principle with such rigor that English judges have found much greater difficulty than their American colleagues in piercing the corporate veil when public policy demands. Further, the granting of various immunities to private companies caused advantage to be taken of them by public companies which found it convenient to operate through private subsidiaries. This abuse made it necessary for the legislature to subdivide private companies into two classes—exempt and nonexempt—and to restrict the most prized advantage (freedom from publishing to the world its balance sheet and profit-and-loss account) to the exempt class. To be exempt, companies must satisfy detailed and rigorous conditions designed to insure that they are genuine family concerns. Still, allowing for these complications, there can be little doubt that the private company has satisfactorily met a need felt equally in America but for which American law has not as yet supplied an equally satisfactory instrument.

In most respects, therefore, the English legislature and courts have relied on partnership principles to a greater extent than have the American. But there are some respects in which the converse is true. One example is in connection with the doctrine of pre-emptive rights under which the existing stockholders have the right to subscribe for further capital issued by the company. England has never adopted this doctrine as a compulsory legal rule. Commonly similar rights are expressly conferred in the constitution of a private company, and, until the latest revision, the optional Table A so provided. But in the absence of express provision the only restraint on the directors is that entailed by the rule that they must act as fiduciaries when issuing further capital. In other words, English law has always been what some American writers wish American law had been and what it has now become in many states. The original strict rule, however, was a logical application of partnership principles, and the partnership analogy was expressly adopted when the rule was originally formulated in 1807 in the

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Addendum

Well, that's it for the first twenty-five! It might simplify procedures if you would let the Law School know from time to time what you are doing for the next twenty-five. This brings to mind the fact that, after the above success story, the School might think it exaggerated unless some healthy contributions are forthcoming from every one of you. The Law School has made great strides. Those of you who are in touch know that there truly are a new set of "greats" training the minds of the future. The School has outgrown its physical capacity. It needs your help and deserves your support.

To all of you the best of everything to be wished for. To those of you who have taken the trouble to fill out your questionnaire, it has been a real pleasure to hear from you; it is a genuine loss to the School not to have heard from the others. Looking ahead to our fiftieth, however, it is hoped that another classmate will groom himself to further this adulatory saga of the Class of '30.

Corporation Law—
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Of Gray v. Portland Bank. Why in this respect England should have rejected an obvious partnership analogy I cannot explain; but, when I review the difficulties that the strict rule has caused in America, I cannot but think that we were wise to do so.

Again, the American courts have adopted the partnership analogy as regards the stockholders' rights to inspect the corporate books and records. The English courts have rejected it, holding that a stockholder as such has no right to inspect the financial records. It is perhaps doubtful whether in practice this puts the American stockholder in a much stronger position than his English confrere. Reports suggest that in many (perhaps most) cases his rights will not be recognized by the corporation without a lawsuit. Without this he may even be denied access to the list of stockholders—something that he could always obtain in England. Still, in the absence of statutory regulation, he clearly has greater legal rights—rights which may be a source of grave embarrassment to the company. Rightly or wrongly, English law has in this respect treated the stockholder as a creditor rather than a partner.

I turn now to a consideration of the two matters which I have previously described as the vital corporate problems of this century: the protection of purchasers of securities and the control of stockholders over management. Both are, of course, aspects of the generic problem of investor protection.

On the first aspect I do not propose to say much. Both our countries (at least if most of your state "blue-sky laws" be disregarded) have relied in the main on the same philosophy—that of disclosure. Both have provided sanctions, civil and criminal, for misstatements or material omissions which supplement and indeed reverse the strict common-law fraud principles. But ex post facto sanctions are far less effective than initial scrutiny of the prospectus to insure its accuracy and completeness. In America this vital task of initial screening has been intrusted to government agencies—the Securities and Exchange Commission—in cases to which the Securities Act applies. It is here that English law appears extraordinarily lax to the American observer. The Companies Act requires registration at the Companies Registry of the prospectus and prescribes its contents. But neither the Registry nor anyone else is given the task of preliminary investigation to insure the accuracy of the information disclosed, and until 1948 there was not even a mandatory "waiting period." The explanation of this apparent anomaly is found in the different and infinitely simpler organization of the securities industry in England. The over-the-counter market scarcely exists, and in practice no public offering can be made without obtaining a quotation for the shares on one of the recognized stock exchanges, normally London. These stock exchanges have their own rules which in many respects are far more stringent than those of the act and which require the publication of the prospectus in the national press where it will be commented on and criticized by the financial columnists. The issue must be sponsored by members of the Exchange and, in practice, will be undertaken and underwritten by one of a small number of issuing houses ("investment bankers," as you call them) of high repute. To protect their own reputations and to preserve their freedom from possible legal sanctions, these brokers, dealers, and issuing houses subject the issues which they back to the most stringent scrutiny. This scrutiny, moreover, transcends investigation merely of accuracy—the sponsors will want to insure that the issue is sound financially as well as legally. In other words, we, with our simpler and more unified organization, have been able to leave the vital task of screening to private enterprise instead of to public authorities. That this system works pretty well is, I think, shown by the fact that in recent years there have been only a handful of criminal prosecutions arising out of misleading pro-

Wolfson, Leo.—Partner, C. J. Wolfson & Co. Formerly associated with law firm now known as Levinson, Becker & Peebles, 1930–42, at which time left practice of law to be associated with present business. Former president, Men’s Club of Beth Ann; former president, Men’s Apparel Club of Indiana. Former vice-president, National Association of Men’s Apparel Clubs. Married to Janet Harris, Ph.B. University of Chicago, 1932. Has two sons, ages twelve and sixteen. Home address: 7733 Luella Ave., Chicago 49. Office: 307 W. Van Buren St., Chicago 7.

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spectuses, and, since the war, not a single reported case of a civil action for damages or recision.

There is, however, one respect in which we are more socialized than you in this field. Since the beginning of the war, the consent of the Treasury has been required for any issue by which a company raises more than £50,000 (say, $150,000) in any year. This restriction is, of course, designed to insure that our limited capital resources are employed in accordance with national priorities. But even here the Treasury has subcontracted (as it were) to private enterprise (much as you did with your Voluntary Credit Restraint Program in 1950-52), for the Treasury acts on the advice of a committee of industrialists, bankers, and the like known as the Capital Issues Committee, which works on instructions about priorities given to it from time to time by the Chancellor of the Exchequer. In practice this curb has not proved too painful to the business world; indeed, in recent months consent has been granted so readily that there is talk of repealing the restriction as no longer needed. The main complaints in the past have been about the former policy of refusing permission for bonus issues (“stock dividends,” as you call them) which, rather anomalously, require Treasury consent notwithstanding that no new money is raised.

More interesting, perhaps, are our different attempts to solve the problem of the management-shareholder relationship. The fundamental principle is, of course, the same in both countries: the directors and officers are fiduciaries owing duties of care, loyalty, and a modicum of skill. By and large the application of this principle to particular facts is, so far as I can judge, much the same. English courts tend to be strict when they can apply a rule of thumb—such as the rule that directors must not take personal advantage of a corporate opportunity. They move with less assurance when they have no fixed standard to guide them: American courts are perhaps rather more ready—or, perhaps, I should say less unready—to hold that directors’ actions exceed the permissible bounds of their business judgment. In both countries some difficulty has been found when the controlling directors have taken the precaution of securing a favorable resolution at a general meeting. In both countries lip service is paid to the alleged rule that the majority must exercise their votes as fiduciaries. But in neither country do the decisions, as I understand them, really support this. In both the true rule seems to be that the majority must not expropriate the property of the company or of the minority, and here again I think that American courts have been more successful in applying this rule. Certain it is that the supervision of the SEC in certain reorganizations has prevented unfairness to minority interests, such as preferred shareholders, in circumstances in which the English requirement of confirmation by the court has failed to provide an adequate safeguard. America, too, is far in advance of England as regards restraining abuse of inside information in dealings in the corporation’s securities. We have hardly started even to develop your “special facts” doctrine, and we have no “insider-trading” rules comparable to those under the Securities Exchange Act. The farthest we have gone is to provide for a special register of directors’ holdings, so that any dealings in shares by directors should be revealed.

Both countries have been oppressed by the difficulty of evolving a satisfactory procedure for enforcing the directors’ duties. In both it is recognized that, unless a stockholder’s individual rights are infringed, the primary remedy is an action by the company or a stockholder’s derivative suit. We in England do not call it a “derivative action,” but we recognize that that is what it is. On the other hand, the rule prevailing in many jurisdictions and under the Federal Rules of Procedure that the stockholder must first serve a demand for action on the directors and sometimes on stockholders also does not prevail in England, although it seems to be derived from the old rule in Pox v. Harbottle, which still survives in England in an emasculated and somewhat mysterious form.

In practice derivative actions are in England relatively uncommon. We have not been faced with the same problem of “strike” or blackmailing suits and have not had to enact special legislation to curb this abuse. This is because of the general English rule that the loser pays the whole of the costs, including the winner’s advocate’s fees. Any litigation, and especially the more fancy types, is therefore an unattractive gamble. Hence actions against directors have been rare. Normally they occur only if the company goes into liquidation, when the Companies Act affords the liquidator a summary remedy against miscreant directors and officers. Our main problem has been that, while the company remains a going concern, the derivative action is not an effective sanction.

One solution is to cause the company to cease to be a going concern. The winding-up of companies has long been separated from jurisdiction in bankruptcy, and rules for liquidation—voluntary and compulsory—have comprised a large part of our companies’ legislation. Of particular importance in the present context is the rule enabling the court to wind up a company on the ground that it is just and equitable—a ground which is another relic of the partnership. This power can be used to put an end to a course of oppressive conduct on the part of the controllers. Once a winding-up is made, the liquidator, supervised and supported by the court and the Board of Trade, has effective powers of investigation and recovery. A similar solution seems to be available in America as part of the inherent equity jurisdiction, and greater use of it has been advocated. But a recent attempt in New York to employ this expedient in the case of a foreign corporation was not successful.

The weakness of this solution, however, is that liquidation may be singularly unfortunate from the viewpoint of those oppressed, particularly if they are preferred
stockholders with restricted rights to repayment of capital. Hence the latest English Act provides by Section 210 an alternative remedy under which any shareholder who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members may petition the court, which may impose upon the parties whatever settlement it considers just. The court's order may regulate the future conduct of the company's affairs, may alter the terms of its constitution, or may direct one party to buy out the other. This remedy, it will be observed, resembles Section 225 of the Delaware Corporation Law and Section 25 of the New York General Corporation Laws in that it enables an individual shareholder to bring an action in his own right free from the restrictive provisions applying to derivative actions. But, unlike these sections, it is of general application and not restricted to, or primarily directed at, disputed elections.

There have as yet been few reported instances of the application of this section, and, so far as my information goes, none of them—reported or otherwise—has been successful. Nevertheless, I can testify from personal experience that the section has been of undoubted value especially in the case of small companies. Threats of an application have in many cases brought the misbehaving directors to heel without further action, and, in view of the difficulties under an adversary system of enabling the court to find a solution and forcing it on the parties, I suspect that this new weapon in the shareholders' armory will always be more effective when brandished in terrors than when actually wielded in court. But it is a weapon of real value, and I commend it to your attention.

The other difficulty, and this would apply not only to a derivative action but equally to our new alternative remedy if it stood alone, is that a stockholder is at a great disadvantage vis-à-vis the management as regards the information at his disposal. Something can be done by compulsory disclosure through annual returns and reports and in particular through annual accounts. Until recently we have been in advance of you in the amount of publicity thus required, but, in the case of companies to which the SEC Acts and Regulations apply, you have now caught and overtaken us. The main flaw in the American picture is that these regulations do not apply to all companies or even to all public ones. In any event, disclosure of this type, though it may enable the stockholders to detect the symptoms of sickness in the corporate body, is not likely to show him the cause of the ailment. It will certainly not provide him with the evidence which he needs to bring a lawsuit against those whom he suspects to be the source of the infection. What he needs is some means of finding out before he embarks on litigation whether his suspicions are well founded.

In England an interesting solution to this problem has been found by conferring upon the Board of Trade power to appoint an inspector to investigate the affairs of a company. This is one of the very few respects in which the powers of the Board of Trade exceed those of your SEC. The Board may exercise this power in a variety of circumstances; for example, if there are circumstances suggesting oppression of minorities, or fraud or misconduct by the directors, or failure to give the stockholders information which they might reasonably expect. The inspector (normally an independent barrister, solicitor, or accountant) reports to the Board, and normally the report is published. This alone may cause the wrong to be remedied; indeed, that may occur as a result of preliminary investigations by the officials of the Board. If this does not suffice, the report should at least provide the stockholder with the essential ammunition. But he himself may still not need to use it, for the Board of Trade is empowered to institute civil or criminal proceedings or to petition for winding up or for the new alternative remedy under Section 210. Hence, if the individual stockholder can persuade the Board to act, he may find that all his chests are pulled out of the fire for him without any expense to himself. It is therefore not surprising that this remedy is of growing popularity and that complaints have been made to the Board in well over a hundred cases in the last six years. Inspectors have been appointed in sixteen of these cases, and in many others preliminary discussions have brought about a settlement agreeable to the complainant.

This solution of the problem is similar to that which certain American writers have advocated. It has the great merit that it prevents expense from deterring the prosecution of just complaints, while obviating the danger of strike actions. The Board of Trade will not appoint an inspector unless satisfied that there are strong grounds for suspicion, but, if an appointment is made and misconduct revealed, they will see that it is rectified, without leaving this to the hazards of private litigation. Further, as a method of obtaining information, it has certain obvious advantages over the American rule allowing the stockholder himself to snoop through the company's records. As I have already pointed out, he will normally have to fight an action before he is allowed to exercise that right, and, if he is ultimately successful, he may abuse the confidential information thus obtained. Both these disadvantages are avoided by the English solution.

Fortunately, however, misconduct by directors is relatively rare. Of greater practical importance than the pursuit of the dishonest is the removal of the lazy or incompetent. In other words, the crux of the management-shareholder problem is to make more effective the exercise of the stockholders' rights at general meetings—especially their right to "hire and fire" the directorate.

Until recently the American rules relating to general meetings have been, to English eyes, extraordinarily lax. And in some respects they still are, despite the SEC
proxy rules. If, as I have previously suggested, American acts make mandatory certain things which might well be left to the incorporators to settle, there are other matters which we in England have thought it essential to regulate by statute which your acts have left to the parties. For example, we have thought it right to insist that a certain proportion (10 per cent) of the stockholders shall have power to compel the convening of a special general meeting. Under many of your statutes the stockholders cannot do so unless the by-laws happen so to provide. And it seems strange to us that in most states the stockholders have no power to remove directors—at any rate, in the absence of misconduct—until the expiration of their terms of office. Hence, if the staggered system of election is in operation, one who has acquired a majority of the stock may have to wait not merely to the next annual meeting but perhaps for several years before he can gain control of the board.

Only if staggered elections are banned is the majority shareholder in a reasonably strong position; if the recent decision in Wolfson v. Avery is upheld on appeal, this is so under Illinois law. But in some states the staggered voting system, especially if coupled with cumulative voting, may postpone for many years the time when the winner of a proxy fight can enjoy the full fruits of his victory. In England not only can a meeting be summoned forthwith but the whole of the existing board can then be dismissed by ordinary resolution. This, you may think, is carrying majority rule and stockholder democracy too far.

As you will have gathered, cumulative voting is unknown in England, and I have never heard it advocated. We still like to think of boards of directors as united teams of managers rather than as representative of divergent interests overseeing the management. Perhaps we are very old-fashioned and behind the times—but that is a national characteristic. However, the contrary idea is not particularly modern—the Germans have for some time recognized the distinction between managers and overseers to which you now seem to be tending.

Our rules are also generally stricter than yours as regards length of notice of meetings and the extent to which the business of the meeting must be detailed in the notice. On most important matters at least twenty-one days' previous notice must be given, and it is invariably the practice, and generally legally essential, to set out the precise resolutions to be proposed unless these are merely part of the ordinary business of the annual general meeting. Resolutions of which the stockholders have not been warned are therefore unknown, because they cannot lawfully be moved. Even amendments to resolutions included in the notice are only permissible within very narrow limits.

However, all this is unimportant compared with the problem of minimizing the advantage enjoyed by the existing management through their control of the proxy voting machinery. And, here, your SEC proxy rules, when they apply, are far more effective than anything we have in England. There permission to vote by proxy is mandatory, and the notice of the meeting must advertise the right to vote in this way. If the management solicit proxies at the company's expense, they must solicit all stockholders and not just a selected few—a point not covered in the SEC proxy rules. Two-way proxies are not compulsory under the act but are under the rules of the London Stock Exchange, which amounts to the same thing in the case of publicly held companies. Moreover, these rules provide that proxy forms must be sent out by management when any proposals (other than of a purely routine nature) are being considered—here again we are ahead of the SEC rules. But, and this is the grave weakness, we have no detailed regulations regarding the contents of proxy statements. In connection with some types of reorganization the act, it is true, provides for the disclosure of certain matters—for example, the interests of directors—but, in general, we rely on the common-law rule banning tricky or misleading circulars.

Similarly our stockholder-proposal rule is but a pale imitation of yours. Though it provides for inclusion of members' resolutions and circulation of supporting literature, it only applies when invoked by a hundred members or those representing one-twentih or more of the voting rights, and the expense has to be borne by them. Only in one respect is it superior—the supporting statement may run to a thousand words instead of merely to a hundred. This at least has the advantage of enabling the statement to be expressed in reasonable English instead of the jingle-ese prevalent here. In practice little use is made of this provision. As your experience has shown, a resolution so proposed has virtually no chance of passing without independent proxy solicitation, and we have little of that.

As in America, battles for control have recently been frequent, though none has been on the mammoth scale regarded as appropriate here or not anything like a million dollars. Nor have we yet had to decide whether the "outs" can recover their costs from the corporate treasury if they succeed in becoming "ins." Nor have professional firms of proxy solicitors yet reared their well-groomed heads. We have one practice, however, which you might perhaps borrow—that of providing that proxy forms must be lodged with the company prior to the meeting. This prevents the deliberate prolongation of the meeting so that high-powered solicitation may cause the absent stockholders to change their votes. This provision is not mandatory but is invariably adopted in the constitution; to prevent abuse, the act insists that the time of lodgment shall not be longer than forty-eight hours before the meeting.

In this short discussion I have deliberately stressed those matters in which it seemed to me that English
experience might be worth your attention. I trust that in so doing I have not given the impression that I regard English corporate law as generally superior. Nothing could be farther from the truth, and, had I been addressing a British audience, the emphasis would have been very different. I should then have extolled the virtues of your SEC legislation, from which we could certainly borrow. I have already touched on some instances. There are others; for example, the regulation of trust indentures and trustees for bondholders under the trust indenture act.

I should have pointed out that most of your states have either abolished the anachronistic ultra vires doctrine or so drawn its teeth that it can no longer inflict much hurt. In contrast, we in England have mitigated its rigor only to the extent of making it easier for a company to alter its authorized objects. In a recent English case all but one of the debts of a company could not be proved in its liquidation, because the company had omitted to take advantage of this facility when it changed its activities.

I should also have emphasized that most of your courts have rightly refused to saddle those dealing with a corporation with constructive notice of the contents of its charter and by-laws. The unfortunate English rule in this regard has partially destroyed the efficiency of the admirable rule in Royal British Bank v. Turquem. This rule, that outsiders are not to be damnedified by defects in indoor management, has rightly been envied by many American observers, but it would in practice be far more useful if it were not for the limitations imposed by the unrealistic constructive notice doctrine.

I should have chided us with being nearly fifty years behind the times in our refusal to allow no-par-value shares which are certainly far more logical and easily comprehended than those with an arbitrary nominal value. We recently appointed a committee to consider the legalization of no-par shares, and it reported favorably. Despite the opposition of the Trades Union Congress—for entirely unworthy reasons to my mind—the government has recently announced that it will introduce legislation "in due course." So we may catch you up before too long and perhaps avoid your mistaken policy of making no-par shares unpopular by tax discrimination.

Finally, I should have pointed out that American corporation law is now incomparably richer and more highly developed than its English parent. Answers to many questions which have never been litigated in England can be found in the American reports. But, alas, how rarely any Englishman tries to find them. I cannot call to mind any case in recent years in which American authorities on a point of corporate law have been drawn to the attention of an English court. The reason is not far to seek: most practitioners think of American corporation law as an entirely alien system with different statutes and different principles. In fact, as I have tried to emphasize today, the statutes may be different, but most of the principles are the same. Even when we carry out the periodical overhaul of our legislation, we do not, I fear, pay as much attention as we should to American practice. For example, the Cohen Committee declared that it would be impossible to produce a legislative formula insuring the independence of trustees for de­­n­­t­­ure holders. They do not seem even to have considered Section 310(b) of the Trust Indenture Act. Admittedly the Committee on No-Par Shares carefully reviewed American experience; but they could hardly do otherwise, since they were being asked to adopt an American child.

Unhappily the same is true of American reliance on English authorities. Until the first World War it was common to find English decisions cited in American corporation cases. Now it is very rare. And you do not even have the excuse that English reports are inaccessible, as American reports often are in England. I have already admitted that on a nation-wide basis your case law is incomparably rich, but English law is at least as rich as that of most single states. Yet a Chicago lawyer who cannot find an Illinois case in point will diligently search until he finds one in New Mexico or Missouri. I would have thought that an English authority would be at least as persuasive, but he won't try to find one. The reason, I suppose, is that it isn't in Shepard.

Whatever the reasons for this mutual ignorance, it is, I think, unfortunate, for cross-fertilization might well improve the strain of both breeds. If anything I have said today should cause but one of you to evince sufficient interest in English company law to turn to it as a last resort, I shall feel that my time has not been wasted. I can only hope that you will not think that I have wasted yours.