I do not doubt that the conclusion reached by the Court below ought not to be disturbed.

Their Lordships dismissed the appeal with expenses.

Counsel for the Appellants—J. A. Walter, K.C.—H. P. Macmillan, K.C.—Sinclair. Agents—Maclay, Murray, & Spens, Writers (Glasgow)—J. & J. Ross, W.S. (Edinburgh)—Nicholls, Herbert, & Company (London).

Counsel for the Respondents—J. A. Clyde, K.C.—Condie Sandeman, K.C.—M. A. Robertson. Agents—R. & J. M. Hill Brown & Company, Writers (Glasgow)—Webster, Will, & Company, W.S. (Edinburgh)—Grahames, Currey, & Spens (Westminster).

COURT OF SESSION.

Friday, January 23.

FIRST DIVISION.

JOHN WALKER & SONS, LIMITED, PETITIONERS.

Company — Alteration of Memorandum — Companies (Consolidation) Act 1908 (8 *Edw. VII, cap.* 69), *sec.* 9 (1).

The Companies (Consolidation) Act 1908 enacts—Section 9 (1)—"Subject to the provisions of this section, a company may, by special resolution, alter the provisions of its memorandum with respect to the objects of the company, so far as may be required to enable it (*a*) to carry on its business more economically or more efficiently, or (*b*) to attain its main purpose by new or improved means. . . ."

A company by special resolution altered its memorandum of association so as to include, *inter alia*, the following additional objects—"To amalgamate with . . . any firm, person, or company," and "to sell, . . . exchange, lease, mortgage, dispose of, turn to account, or otherwise deal with the undertaking of this company. . . ."

On a petition by the company for confirmation of the proposed alterations the Court *refused* to confirm.

This was a petition by John Walker & Sons, Limited, incorporated under the Companies Acts 1862 to 1886, for confirmation of a number of alterations in its memorandum of association.

The petition, *inter alia*, set forth—"The objects for which the company was established, as set forth in clause III of its memorandum of association, as altered by special resolution of the company passed on 21st December 1893 and confirmed on 8th January 1894, and confirmed by your Lordships by interlocutor dated 20th March 1894, are as follows, viz.—'1. To carry through and complete a transaction for the purchase and payment of the price of "Walker's bonded stores and offices," Strand Street and Croft Street, Kilmarnock, in the parish of Kilmarnock and county of Ayr, belonging to Alexander Walker, wine merchant, Kilmarnock, or the firm of John Walker & Sons, wine merchants there, of which the said Alexander Walker is the only individual partner, together with the goodwill of the business of said firm of John Walker & Sons, and their registered trade mark and whole machinery, fittings, and other apparatus in the said premises, and the whole stock-in-trade and other effects belonging to the said Alexander Walker or to his said firm; and of the lease of the shop and premises in Portland Street and Strand Street, Kilmarnock, held by the said firm of John Walker & Sons or the said Alexander Walker as an individual, and likewise the lease of the offices, vaults, and premises at 3 Crosby Square, Bishopgate Street, London, occupied by the said firm of John Walker & Sons, with the whole machinery, fittings, and other apparatus and whole stock-in-trade and other effects belonging to the said firm. 2. To work the business hitherto carried on by the said firm of John Walker & Sons, as bonded store keepers, wine and spirit merchants, Italian warehousemen, and commission agents, and to make the purchases and sales required in the said business, and to purchase and sell all such materials and goods as may be in any way used in connection with the said business, and also to carry on such other business operations as are connected with or incident to the said business. 3. To acquire the distillery known as Cardow Distillery, in the parish of Knockando, Morayshire, with the goodwill of the business now or lately carried on at said distillery, and the whole pertinents of the said distillery and business. 4. To carry on, in the United Kingdom or elsewhere, the business of distillers, maltsters, and merchants. 5. To purchase, take, or otherwise acquire any heritable or real property upon lease, feu, or ground annual or otherwise; and to sell, alienate, or dispose of any heritable or real property in like manner. 6. To acquire, hold, and exercise any patent right or licence, and to grant licences to others to use and exercise such patent right; also to disclaim, alter, or modify the same. 7. To register at home or abroad trade marks; to use such marks, and to grant licences or permissions to others to use them. 8. To let or hire all or any part of the property or effects of the company. 9. To draw, make, accept, endorse, and execute, and to discount and sell promissory-notes, bills of exchange, and other negotiable instruments. 10. To borrow any sum or sums of money by way of discount, cash credit, or overdraft, or upon bond, debenture, mortgage, promissory-note, or receipt, or in any other manner, and to grant security for all or any of the sums so borrowed, or for which the company may be or may become liable, and by way of such security to dispone, mortgage, pledge, or charge the whole or any part of the property, assets, or revenue of the company (including uncalled capital), or to dispone, transfer, or convey the same absolutely or in trust, and to give to lenders or creditors powers of sale and other usual and necessary powers, and also to raise money

by the issue of debenture stock. 11. To advance money by way of loan, with or without security, to any company, society, or individual who are or may be customers of the company, where such advances shall be deemed to be for the convenience or advantage of the company or the furtherance of its interests; to allow time for the repayment of any such loan, and to allow time for payment of any debt which may be due to the company. 12. To enter into and subscribe all writings necessary for carrying through the said transactions, and conducting the business and otherwise carrying out the objects and transacting the business of the company. . . . At an extraordinary general meeting of the company duly convened, held on 30th June 1913, the following resolution was duly passed, and at a subsequent extraordinary general meeting, also duly convened, held on 18th July 1913, the same was duly confirmed, so as to become a special resolution of the company, viz.—'That clause III of the memorandum of association of the company be altered so as to include the following additional objects, namely—13. To subscribe for, take, purchase, or otherwise acquire and hold shares or other interests in or securities of any other company having objects altogether or in part similar to those of this company or carrying on any business capable of being conducted so as directly or indirectly to benefit this company. 14. To enter into arrangements with local, municipal, and other authorities or companies, corporations, or persons, and to obtain any rights, guarantees, or privileges, and to carry out such arrangements. 15. To acquire, carry on, or undertake the whole of the business and assets and to undertake the liabilities of any person, firm or company possessing any property suitable for any of the purposes of this company, or carrying on any business which this company is authorised to carry on or which can conveniently be carried on in connection with the same, and as consideration or part of the consideration for such acquisition to pay cash or to issue shares, stock, or obligations, or to acquire any interest or to amalgamate with or enter into any arrangement for sharing profits or co-operation with any firm, person, or company. 16. To establish and support associations and institutions to benefit the employees of this company, to subscribe money for charitable or benevolent objects, and to give pensions to the servants and employees of this company. 17. To sell, improve, manage, develop, exchange, lease, mortgage, dispose of, turn to account, or otherwise deal with the undertaking of this company, and all or any part of the property and rights of this company, either for cash, shares, debentures, or debenture stock, or any other consideration. 18. To do all or any of the above-mentioned things as principals or agents or otherwise, or by trustees, agents, or otherwise, and either alone or in partnership. 19. To do all such other things as may be incidental to or connected with any of the above mentioned objects.'"

On 15th October 1913 the Court remitted to Sir George M. Paul, W.S., "to inquire into the regularity of the procedure and the reason for the proposed alteration of the memorandum of association, and to report."

In December 1913 Sir George M. Paul reported that the procedure had been regular and that the proposed alteration might be confirmed, but only subject to the deletion of the power to amalgamate from the proposed article 15, and the power to sell, exchange, lease, mortgage, dispose of, turn to account, or otherwise deal with the undertaking of the company from the proposed article 17.

The petition came before the First Division on 15th January 1914.

Argued for the petitioners—The additional powers as passed by the company should be confirmed without alteration. No doubt in *Young's Paraffin, Light, and Mineral Oil Company, Limited*, January 16, 1894, 21 R. 384, 31 S.L.R. 303, powers to purchase other businesses, to sell the company's own business, and to amalgamate were refused confirmation, but even in that case the Court was prepared to consider any special transaction, and what was objected to was the granting of general powers. The view against granting general powers had now been departed from. In the *Glasgow Tramway and Omnibus Company, Limited*, v. *Magistrates of Glasgow*, March 13, 1891, 28 R. 675, 28 S.L.R. 467, power to promote and dispose of tramways was refused confirmation, but that was on the ground that such a power was foreign to the original purposes of the memorandum of association. Of recent years the practice both in England and Scotland had been to include powers to sell and to amalgamate in original memoranda. These powers had also been granted by the Court in Scotland —*Innerleithen Gas Company*, 1902 (not reported); *London and Edinburgh Shipping Company, Limited*, 1909 S.C. 1, 46 S.L.R. 85; *The King Line, Limited*, January 30, 1902, 4 F. 504, 39 S.L.R. 337. The *King Line* could not, however, be founded on as an authority, as it appeared from the session papers that power to amalgamate was contained in the original memorandum. In the recent case of the *Biggar Auction Mart*, decided by the First Division on 14th May 1912, powers to sell and amalgamate were refused, but that case should be reconsidered. The English practice was to sanction powers to sell and to amalgamate—*re New Westminster Brewery Company, Limited*, 105 L.T.,N.S. 946; *re Anglo-American Telegraph Company, Limited*, 105 L.T.,N.S. 947. The opinion expressed in Palmer's Company Law, 9th ed. p. 416, against confirmation of power to dispose of the undertaking, was omitted from Palmer's Company Precedents, 11th ed. 1311-1313. *The Cyclists' Touring Club*, 1907, 1 Ch. 269, did not apply. Section 9 should be interpreted in the broad practical sense, not in a narrow technical sense. Power to sell the undertaking to a new company was a convenient method of effecting a reconstruction, and a company so reconstructed

although theoretically a new company practically continued the life of the old company. Such a reconstruction therefore came within the spirit of section 9 (1) (*b*).

At advising—

LORD JOHNSTON—John Walker & Sons, Limited, were incorporated in 1886.

The main, indeed the sole object of the constitution of the company as set forth in the original memorandum of association was the acquisition of the business of an existing firm of spirit merchants, embracing (*a*) goodwill, (*b*) premises in Kilmarnock and London, and (*c*) plant and stock-in-trade in or connected with these premises, and having acquired the business of bonded storekeepers, wine and spirit merchants, Italian warehousemen, and commission agents (to give it its full description), to carry it on, and to carry on also such other business operations as should be connected or incident to said business.

Proceeding under the Companies (Memorandum of Association) Act 1890, sec. 1, the company in 1894, with the sanction of the Court, altered the existing memorandum of association. But in so doing it did nothing which affected the object of its existing constitution. The purpose of this alteration was to enable the company to acquire a particular distillery in Morayshire, and to carry on the business of distillers in the United Kingdom or elsewhere. Such addition to the business of the company, though hardly warranted by the terms of the original memorandum, viz., to carry on such other business operations as should be connected or incident to its original business, was one which might be made under the express terms of the Act 1890, sec. 1 (5) (*d*), because it would enable the company "to carry on some business or businesses which under existing circumstances may conveniently or advantageously be combined with the business of the company."

Now the company, taking advantage of the Companies (Consolidation) Act 1908, sec. 9, proposes still further to alter the memorandum of association by the addition of seven new articles. Of these, six, if they are not practically already included in the original memorandum, are alterations which are completely covered by the terms of the above section, and to these the reporter has taken no exception. But there is a seventh, of very doubtful propriety in itself, and which the reporter holds to be outwith the purview of the above section. In this I agree with him.

By this latter article the company proposes to take power "to sell, improve, manage, develop, exchange, lease, mortgage, dispose of, turn to account, or otherwise deal with the undertaking of this company, and all or any part of the property and rights of this company, either for cash, shares, debentures, or debenture stock, or any other consideration." The undertaking of the company can mean nothing but its main object and that which affects it. I cannot find a better descriptive word, though such undoubtedly exists, than the materialisation of its main object, that is, in the present case, the business which it was incorporated to acquire and conduct with its necessary adjuncts. If that is to be improved, managed, or developed, the company will continue to exist and presumably to prosper. But it cannot be sold, exchanged, leased, disposed of, turned to account, or otherwise dealt with without the *raison d'être* of the company ceasing to exist, and consequently the company itself coming to a standstill or becoming dead to the business world. We are told that a power of this sort has become general in all recent companies. That may be or may not be, though I doubt its legality, for I think it inconsistent with the whole conception of the Companies Acts. But we are told further that it has become the practice in England to confer such powers in confirming alterations of the memorandums of association of existing companies under the powers conferred by the Companies Acts with which we are at present concerned. I confess I am somewhat astonished to learn that this is the case, and though we have been supplied with authority for the statement, I am quite at a loss to know how the practice has arisen or how it can be justified.

The English Courts and we are sitting under the same statute and exercising a statutory power and a statutory discretion. By the statute we are bound. Company promoters and managers may think that it is expedient that our powers and discretion should be extended, though I cannot say that I think there is any sound ground for such extension. But we are not drafting *de novo* the memorandum of a company. Nor are we legislating. We are merely performing a statutory duty and exercising a statutory discretion. Our powers are strictly limited, and they do not entitle us to sanction such an alteration as is here proposed.

The ninth section of the 1908 Act is no real variation of the first section of the 1890 Act. All that it does is to put its contents into more logical order but in the same words. It provides in its first sub-section—(1) Subject to the provisions of this section, a company "may by special resolution alter the provisions of its memorandum with respect to the objects of the company, so far as may be required to enable it—(*a*) to carry on its business more economically or more efficiently; or (*b*) to attain its main purpose by new or improved means; or (*c*) to enlarge or change the local area of its operations; or (*d*) to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company; or (*e*) to restrict or abandon any of the objects specified in the memorandum."

I cannot conceive how the disposal of the undertaking of the company can either enable it to carry on its business more economically, or to attain its main purpose by more approved means, or to enlarge the area of its operations, or to carry on a business which may conveniently be combined with its business, or to restrict or abandon any of the objects specified in its memorandum. If anything, it would be to abandon the whole objects specified in its memorandum.

If, then, we confirmed the alteration, we should be acting *ultra vires*.

The defence of the proposal and of the alleged English practice is that a desirable reconstruction of the company can be often conveniently effected by disposing of its undertaking to a new company for payment in shares to be distributed among the shareholders of the old company; that in such case the vendee company is not really but only nominally a new company, and that the operation enables the original company in the words of the statute, section 9 (1) (*a*), to attain its main purpose by new or improved means. But I venture to point out that all that the statute says the company may do is to alter the provisions of its memorandum "so far as may be required to enable it . . . (*b*) to attain its main purpose by new or improved means"—to enable it, the existing company, not to enable some new and different company to do so. The one thing which the statute unquestionably predicates is the continued identity of the company whose memorandum is to be altered.

But the specious suggestion in support of the proposal fails for another and equally sound reason. If the alteration were confirmed the company would be enabled, not merely to reconstruct itself in the assumed innocent form of an *alter ego*, but to sink its identity by amalgamation in another company, or to dispose of its undertaking for cash, while remaining, not in a state even of suspended animation, but beyond resuscitation, yet retaining the form without the substance of a company. Neither of these things does the statute contemplate or authorise.

I have dealt with this matter, probably at unnecessary length, because of the respectful consideration which I feel I am bound to give to what we are informed has become the English practice. But so far as our own practice is concerned, the matter stands, I think, on authority. I refer in the first place with respectful acceptance to what Lord Kinnear says in the *Glasgow Tramway Company's* case in 18 R., at p. 683, and to his analysis of the statute, and I think that from the way in which he expresses himself *in re The Cyclists' Touring Club*, L.R., 1907, 1 Ch. 269, Warrington, J., would subscribe to the same view of the statute. In the case of *Young's Paraffin Light Company*, 21 R. 384, the present question was raised, though the practical refusal of sanction to the alteration here proposed is merely included in a general refusal. But the precise question which is now raised came nakedly before the Court quite recently in the case of the *Biggar Auction Mart Company* on 14th March 1912. Of this case there is no report, as it was not considered necessary to give a reasoned judgment, but having been one of the Court before which that case came I am able to say that confirmation of the alteration proposed was refused on precisely the grounds which I have stated above for its refusal here. And I am unable to see any reason for departing from the practice then established.

Turning to English authority I find that Mr Buckley (now Lord Justice Buckley), in the 8th edition of his work on the Companies Acts, in commenting on the Act of 1890. says at p. 707—"The Act does not confer upon either the company or the Court a general power of alteration. The operative words in sub-section (1) are limited by 'so far as may be required for any of the purposes hereinafter specified,' and the specification is found in sub-section (5). The proposed alteration must be brought within some one or more of sub-section (5) (*a*) to (*e*). The authority is confined to the definite matters there mentioned. The Court will not confirm alterations which merely amplify the language of the existing object clause." That does not appear to give any countenance to the alleged practice.

In Palmer's Precedents again, 9th ed., vol. i, p. 1153, published in the year 1906, we find the statement that there is no power "to confirm a resolution empowering the company to dispose of its undertaking." But the statement is omitted in the 10th edition published in the year 1911.

I have looked in vain for any authority to justify the change in the more recent edition of Mr Palmer's work. None is given by him, and we were referred by counsel to none, with the exception of two cases decided on the same day by a single judge, Joyce, J., viz., the *New Westminster Brewery Company* and the *Anglo-American Telegraph Company*, only reported in 105 L.T. 1946 and 1947 respectively. I gather from these brief reports that Joyce, J., was following what he conceived to be accepted practice and was not applying his mind to the question. So far as these cases go, they do not seem to me to require us to consider the English practice as based on any proper consideration of the intent of the statute or the powers of the Court.

I therefore propose to your Lordships that before confirming these alterations of memorandum we require the new 17th article to be restricted as suggested by the reporter in his very discriminating report.

LORD SKERRINGTON—The petitioners ask for confirmation by the Court, in terms of section 9 of the Companies (Consolidation) Act 1908, of the alteration of their memorandum of association with respect to the objects of the company set forth in the special resolution of 30th June and 18th July 1913. On referring to the so-called "objects" which the petitioners desire to add to their memorandum, it will be found that these are not objects in the proper sense of the word, but are merely powers which the petitioners consider might be useful to them in the course of their business. This abuse of the word "objects" in connection with registered companies has often been judicially referred to, but I think that it has received judicial approval in a series of applications under the Companies (Memorandum of Association) Act 1890. Further, I think that it has received statutory recognition in the Act of 1908, the provisions of which must have been framed in view of the well-known practice under the Act of 1862. Section 3 of the later Act

speaks simply of "the objects of the company" in contrast to the more elaborate language of section 8 of the earlier Act. Accordingly I agree with the reporter that most of the suggested alterations of the objects of the petitioning company may competently be sanctioned, and I also agree that there is no reason why such sanction should not now be given. The only difficulty raised by the reporter is in regard to the power proposed to be conferred upon the company to sell its undertaking "either for cash, shares, debentures, or debenture stock, or any other consideration." The reporter recommends that the petitioners should be empowered to sell any subsidiary part of their undertaking, and accordingly the only question is whether they should be empowered to sell their undertaking as a whole in return either for cash or for shares or debentures of the purchasing company. It has for long been customery to insert such a power in the memorandum of newly formed companies, the purpose being to enable the sale of the undertaking to be carried through free from the restrictions of section 161 of the Act of 1862 (section 192 of the 1908 Act). In the case of *Bisgood* v. *Henderson's Transvaal Estates, Limited*, [1908] 1 Ch. 743, the Court of Appeal in England decided, contrary to a long-continued practice, that this purpose could not be legally effected and was *ultra vires*. It is not necessary to consider whether that judgment would be followed in Scotland. I respectfully agree, however, with Buckley, L.J., that the sale by a company of its undertaking means a great deal more than a sale of its whole existing assets, and that a company which has made such a sale has retired once and for all from carrying on its business. In these circumstances I do not see how, on any reasonable construction of section 9 of the Act of 1908, such a power can be held to be requisite in order to enable a company "(*a*) to carry on its business more economically or more efficiently, or (*b*) to attain its main purpose by new or improved means." The section assumes, in my opinion, the continued existence of the company which seeks to have its powers enlarged. It is too metaphysical to say that a company can carry on its business or attain its main purpose by ceasing to exist and transferring its business to a successor. At first sight it may seem unreasonable to confer upon the petitioners power to buy the undertaking of a company carrying on a similar business, but at the same time to refuse them power to sell their undertaking to some other company. Why should the petitioners be authorised to amalgamate by buying and absorbing another company while they are not permitted to amalgamate by selling their business to another company and being themselves absorbed? There is, however, a substantial distinction between the two cases. If the petitioners contented themselves with buying and absorbing other businesses, their company will remain subject to its original memorandum of association, with such alterations and additions as have legally and competently been made thereto. On the other hand, if the petitioners sell their undertaking to and become absorbed in another company, their shareholders might, on a distribution of the assets of the petitioning company, be forced to become shareholders in a company governed by a memorandum of association which need have no limits similar to those contained in the petitioners' memorandum in regard to the kind of business which may be carried on. Such a result would be contrary to the principles of partnership and cannot be easily implied. I am therefore of opinion that the power to sell the whole undertaking ought to be refused. It follows that the express power to amalgamate ought also to be refused as being one which it is either unnecessary or incompetent for us to sanction.

We were informed that, according to the English practice under the Act of 1890, it was usual to confirm resolutions by companies empowering themselves to sell their undertaking either for cash or for shares, and we were referred to several cases in which such resolutions were sanctioned by the Court. We were also referred to a recent Scottish case in which the First Division refused to sanction such a resolution. So far as appears from the reports, no judicial opinions were delivered in any of these cases, and accordingly I have treated the present question as one which is entirely open.

LORD PRESIDENT—I agree in the opinions which have just been delivered. While I regret that the practice of this Court should differ from what we are informed is the practice in the Court of Chancery in the administration of the same statute, in common with your Lordships I can find no good ground whatever for departing from the practice which has hitherto prevailed here, sanctioned by the precedents to which your Lordships have called attention. We shall therefore pronounce an interlocutor in the terms suggested by the reporter.

The Court pronounced this interlocutor—

"Confirm the alteration of the memorandum of association with respect to the objects of the company set forth in the special resolution of the company passed on 30th June and confirmed on 18th July 1913, subject to the following modifications, viz. — In sub-clause 15 delete the words 'amalgamate with or,' and alter sub-clause 17 so that it shall read as follows—'To improve, manage, or develop the undertaking of the company, and all or any part of its property and rights; also to sell, improve, manage, develop, exchange, lease, mortgage, dispose of, turn to account, or otherwise deal with, any branch or part of the company's undertaking which may have been acquired by it as an adjunct to its main business.'"

Counsel for the Petitioners — Watson, K.C. — Wilton. Agents — Davidson & Syme, W.S.