Empire Ltd.:

Law and the Rise of Transnational Companies

in the First Era of Globalization (1844-1914)

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Introduction

GLOBALIZED COMPANY LAW

In 1844 William Gladstone, President of the Board of Trade and future Prime Minister, convinced the British Parliament to introduce general incorporation, making the joint-stock company form freely accessible by registration cum disclosure. The premise of the General Incorporation Act of 1844 was domestic. The drafters of the first general companies act thought only of Britain, its railways, canals, breweries, coal mines, banks, and insurance companies, and on the Manchester, Birmingham, and London stock exchanges. In the 70 years between general incorporation and the Great War, the British Empire expanded rapidly. At its peak, the British Empire controlled nearly a quarter of the world's population and a quarter of the Earth’s land area. For a century, it was the dominant superpower, "the empire on which the *sun never sets*". It governed directly and indirectly some 140 distinct territories, small islands, strategically located ports, a sub-continent, and a newly discovered continent; a company ruled raj turned into a Viceroyalty, crown colonies, protectorates, dominions and mandates.

Young Gladstone did not envision the global expansion of company laws and of companies. In the second half of the nineteenth century, things rapidly changed. Beginning with Australia (New South Wales), India, and Canada in 1849-51, territory after territory in the British Empire adopted general company laws. The same process of adopting general incorporation also took place in European and American countries. There were good reasons to think that company law would be copied and pasted from Britain to the rest of the empire. British company law was at the cutting edge globally. Uniformity throughout the Empire was valuable for entrepreneurs and investors. However, this is not what actually happened. The end product was a mumble-jumble of policy statements and apologetic explanations, and a patchwork company legislation in different territories throughout the Empire. The new imperial and global company law patchwork reality looked quite different from the perspective of incorporators, investors, and their lawyers. Unlike Westminster and Whitehall, the City of London celebrated the failure of the company law unification project. From the perspective of the City, the patchwork and the mess were an opportunity. The legislative policy of the Metropole, Colonial Office, Board of Trade, and Parliament, the actual expansion of company legislation by colonial officials throughout the Empire, and the ways in which this mess was used by shrewd businesspersons and their smart lawyers have not been investigated yet.

FLOW OF CAPITAL

The capital that accumulated during the first industrial revolution and the early stages of the second industrial revolution was in search of investment opportunities overseas. Between 1865 and 1914, more than £4.1 billion of British capital was invested in shares and bonds of joint stock companies and in the bonds of foreign and colonial governments.[1] More than 5% of the British GDP was invested annually overseas. Of the total British capital stock, a third was accumulated abroad, totaling no less than £4,000 million by 1913. Never before, or since, has one nation exported so much of its national income and savings to create capital formation abroad. Almost two-thirds of the total were exported through investment in business corporations, in the form of shares and bonds.[2] These two-thirds and the companies in which they were invested are at the heart of this book. The first era of globalization was the era in which the transnational corporation emerged. Who were the business corporations through which this capital was invested? Where were they incorporated and listed? Who controlled them and how? It is quite astonishing that the legal means for achieving this unprecedented capital flow, which had a huge global impact, were not explored.

The listings of the London Stock Exchange were transformed from mostly government bonds and domestic railway shares to a lengthy list of corporate shares and bonds from all over the world and a variety of sectors. Law firms, banks, and accounting firms expanded, internationalized, and specialized. In 1911, the *Economist* observed that "in a sense London is often more concerned with the course of events in Mexico than with what happens in the Midlands. and is more upset by a strike on the Canadian Pacific than by one in the Cambrian collieries".[3] The City of London was transformed from a mercantile center at the beginning of the nineteenth century into the capital of global capital finance at its close. This book provides the first analysis of the legal and organizational framework in which this enormous capital flow took place.

THE FIRST TRANSNATIONAL COMPANIES

[1] These 4.1 billion pounds are now worth 4.34 trillion pounds. In full digits £4,100,000,000 in 1900 prices (to take a conservative year as a mean timing of investment within the 1865 to 1914 range) is the equivalent of £434,000,000,000 trillion (or US $585,000,000,000) in 2025 based on the Bank of England's Consumer Price Index (CPI) inflation data: https://www.bankofengland.co.uk/monetary-policy/inflation/inflation-calculator.

[2] The other third was the issuing in London of foreign governments in Latin America, the United States, and Russia, and colonial governments in Australia, India, and Canada.

[3] "The Financing of Industries at Home and Abroad," *Economist*, 20 May, 1911. taken from Youssef Cassis, *Capitals of Capital: A History of International Financial Centres 1780–2005*, trans. Jacqueline Collier (Cambridge: Cambridge University Press, 2006), 84.

The newly designed corporate economy led to the global expansion of capitalism and of transnational companies.[4] The company lawyer Edward Manson sensed in 1899 that "The whole world is now become the hunting-ground of English joint stock enterprise”.[5] Merchant and shipping companies integrated global trade from Australia to Asia, Africa, and the Americas. Railway Companies constructed and operated networks that covered the pampas of South America, the prairies of North America, and the Gangetic plain and the Deccan in India. These networks facilitated immigration, integrated markets, and enabled inland urbanization. The newly incorporated submarine telegraph companies laid Transatlantic cables, cables across the Mediterranean, down the Red Sea, and through the Arabian Sea, and connected Bombay and Calcutta to London. They went on to connect Hong Kong, Shanghai, Singapore, and Sydney to a global electrified messaging system. Corporations cleared jungles and replaced them with labor-intensive tea and rubber plantations in India and Malaya, funded and managed sheep farms in Australia, dug coal mines in western Canada, gold mines in Australia, and diamond mines in South Africa. Towards the end of our period, they also conducted early oil explorations in Persia and Burma. Many of these companies were incorporated in Britain based on its companies acts, a few were registered in Australian territories, Canadian provinces, the United States, India, Hong Kong, and Singapore. Many of these companies raised capital in the London Stock Exchange, some in newly established colonial stock exchanges, or in New York. Some companies were dually listed in more than one Exchange, and some had Share Registers in more than one location. This new corporate world was designed and orchestrated by lawyers, bankers, and accountants who worked closely with each other and with their corporate clients in the City of London, reaching ever-increasing levels of sophistication. The book analyzes how

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[4] There is a body of literature that deals with terminology and classification of corporations having international manifestation. The main terms used include: transnational, multinational, international and global. The dimensions along which the classification is made varies: whether there is a centralized headquarters or a more decentralized management, what is the level of multinationalization in shareholding, management, assets, sales, does the company operates uniformly or adjust to local circumstances, and more. See: Christopher A. Bartlett and Sumantra Ghoshal, "Managing Across Borders: New Organizational Responses," *MIT Sloan Managment Review* 29, no. 1 (1987); Christopher A. Bartlett and Sumantra Ghoshal, *Managing Across Borders: The Transnational Solution* (Boston: Harvard Business School Press, 1989); Anne-Wil Harzing, "An Empirical Analysis and Extension of the Bartlett and Ghoshal Typology of Multinational Companies," *Journal of International Business Studies* 31, no. 1 (2000); Siew Meng Leong and Chin Tiong Tan, "Managing Across Borders: An Empirical Test of the Bartlett and Ghoshal [1989] Organizational Typology," *Journal of International Business Studies* 24, no. 3 (1993); Raj Aggarwal et al., "What is a Multinational Company? Classifying the Degree of Firm-Level Multinationality," *International Business Review* 20, no. 5 (2011). In this book I will not delve deeper into the issue of classification. I will use in this book transnational corporations and multinational corporations almost interchangeably, preferring the first when the center of gravity of management, investment and law was in Britain, and the latter when significant components beynd the business activity were taking place overseas in a colony or an independent country.

[5] Edward Manson, "The Status of English Trading Companies Abroad," *Journal of the Society of Comparative Legislation* 1 (1899). Manson was Barrister-at-Law, Joint-editor of the *Journal of Comparative Legislation,* Registrar of the High Court for Companies Winding-up, and author.

different sectors projected their capital, governance, and management using different models of corporate organization that fitted their needs and addressed their concerns.

GLOBALIZATION OR COLONIALISM

The corporate economy developed hand-in-hand with globalization, in terms of trade, capital flows, and market integration. Was it also as closely connected to the expansion of the British Empire, the projection of British sovereignty over territories beyond Europe? Let's recall Gilbert and Sullivan's musical *Utopia Limited* (1893), and particularly the proclamation made by King Paramount, the First, King of Utopia, to Mr. Goldbury, a company promoter, "We'll go down in posterity renowned As the First Sovereign in Christendom Who registered his Crown and Country under The Joint Stock Company's Act of Sixty-Two". Based on this recollection one may conclude that companies served as a backbone of colonialism.[6] Gilbert and Sullivan reflected their own life experience which encountered companies such as the Imperial British East Africa Company, Royal Niger Company and British South Africa Company that were incorporated just a few years before. These companies have recently received much attention in the literature on corporate colonialism, the "company state" and the history of international law of empires. I shall argue in the following chapters to the contrary, that the center of gravity of forming and directing the joint-stock business corporations that operated overseas shifted from Whitehall to the City of London. The ability of the British state to regulate and direct large business corporations was considerably constraint by globalization and by the transnational nature of new corporations.

THE CORE ARGUMENT - CORPORATIONS ESCAPE THE CONTROL OF STATES

As can already be perceived, the main aim of the book is to create a roadmap that established new connections between issues that were hitherto delt with in isolation from each other, and put on the map topics that were altogether neglected. It is more of an agenda setting kind of book that a single argument establishing kind of book. It nevertheless makes arguments. I have already indicated arguments about the transplantation of company legislation, the organization of capital export, the history of transnational companies and the role of companies in colonialism. However my main original argument, which is not an intervention in preexisting debates, is, in a nutshell, that in the last few decades of the 19th century, the business corporation escaped state control. By this I mean the control of any state, be it the British State and any colonial or foreign state. From the birth of the business corporation around 1600 and

[6] https://gsarchive.net/utopia/libretto.txt

up until the middle of the century, business corporations could be incorporated only through charters and could be chartered only if they served the interests of rulers and states well. Chartered business corporations were semi-public in their functions. States regulated and restrained business corporations through the terms of the charters of incorporation. While the Government was preoccupied with expanding, but not over-expanding, the sovereign reach of the British Empire, while holding at bay other empires, Germany, Japan, Russia, and the United States, the City of London immersed itself in the largest capital export in human history.

A key question to be explored is, did transnational companies opt primarily for the strategy of influencing the content of law through lobbying, or looked for ways to avoid and bypass the law. Did they want the British government to leave them alone or protect their investments? Generally speaking, post-general incorporation business corporations wanted to be left alone. The best way to be left alone was to go global. Going global was best achieved by combining business activities overseas and shopping between company laws and stock exchanges. The fuller answer is more complicated. Intuitively one would expect British companies to take the advantage of being British. Being part of the largest Empire that ever existed, at the height of *pax britanica,* backed by the oceans dominating Royal Navy, why not benefit from the umbrella of the gun boat policy at the price of subjecting themselves to British company law and government regulation?

The answer varies by sector and region. Let us start with sectoral analysis. Colonial companies were part of the government's imperial project, often a proxy sovereign in parts of Africa for which the government was reluctant to take full responsibility. Railway companies could be assured of the protection of their investment as long as they constructed lines within the Empire. Nevertheless, outside the formal Empire they needed their home government's protection against expropriation by predatory or shortsighted foreign governments as soon as they completed the lump sum investment in the construction. On the other end of the spectrum, trade companies, shipping companies and telegraph companies drew much of their revenues from activities on the high seas and outside the Empire. Banks and insurance companies that were incorporated outside of Britain were able to avoid the dense financial regulation that applied in Britain.

Regionally, companies that did their business within the Empire, irrespectively of their place of incorporation and listing, enjoyed the defense of the Empire, the uniformity of the Sterling Zone, the free access to markets without tariffs, and the reliable commitment of colonial government throughout the Empire not to expropriate. Companies active in the informal Empire in Latin America, China and the Middle East, could expect to do business on favorable terms, say most favorable nation clause, and to be saved by the British Empire from foreign governments, by the gunboat policy. On the other hand, Britain could not resort to gunboat policy against the US after 1812. The huge British investments in the US, particularly in railways, had to protect themselves legally based on the London Stock Exchange, investment banks such as JS Morgan and American law and courts.

The expansion of company law to the Empire and beyond it, and the globalization of the economy in the closing decades of the nineteenth century, dramatically changed the environment in which business corporations functioned. This change opened up the opportunity for business corporations to evade and escape state, any state, control. Corporations used this opportunity pragmatically, relying on the British Empire when needed and evading it when it limited them.

The book further argues that the international corporate legal framework that was created in this formative period 1844 – 1914, has long lasting impact. Today's political economy, in which multinational and transnational corporations flow freely globally, benefit from forum shopping, tax havens, regulatory arbitrage, transnational insolvencies, and multi-listing of stock, is rooted in this period. The ability to select where to incorporate, yet to be recognized as a corporation globally beyond the place of incorporation, and to avoid regulation and taxation was created in our period. In it the basic building blocks of today's global corporate economy, were neatly and shrewdly designed. These building blocks allow business corporations to rival, match and surpass governments.

GEOGRAPHICAL AND TEMPORAL FRAMEWORK

The book has dual focal points, the British Empire and British capital investments overseas, which makes the setting of its temporal and spatial framework a tricky matter. The formal start date of the book is 1844, the year in which general and free incorporation was legislated in Britain. As we shall see throughout the book, charters and specific acts of parliament were used as tools of incorporation for a few more decades, yet the opening of an opportunity for free incorporation was highly impactful for the globalization of company law. A story that focuses only on capital flows would begin only around 1870, whereas our story, which incorporates the law, must start earlier, in 1844. A story that follows the expansion of the British Empire could take us all the way to the 1920s, when the Empire reached its maximum expansion, adding mandates granted by the League of Nations over territories in Africa, the Middle East and the Pacific, that were until the War part of the defeated Ottoman Empire and German Empire.[7] I'll

[7] For example, Chapter 3 investigates post-war company legislation in Iraq, Palestine, and Tanganyika.

use 1914 as the cutoff for this book as it was when the first era of globalization demised into a global military and economic warfare, capital flows declined, and multinationals looked inward.

From the perspective of company law, only the Empire is the playing field of this book. The Colonial Office could not direct company legislation beyond it. However, when following the money, one gets well beyond the Empire. As we shall see in Chapter 1, much of the capital investment was outside the Empire. Historians of the informal empire critique colonial and imperial historians because they "have been mesmerized by formal empire and maps of the world with regions colored red" while ignoring "The bulk of British emigration, trade, and capital [that] went to areas outside the formal British Empire".[8] Historians such as Robinson and Gallagher, Cain and Hopkins, Davis Huttenback, and Darwin looked beyond the Empire, at Latin America, China, the Ottoman Empire, and Persia, which they label the informal empire. So, do I. Unlike many of them, though, when I follow the money, I find it impossible to look only at regions and countries considered the informal empire. Can I stop short of looking at investments in the US? On the one hand, the US was not part of the Empire since 1776 and was not considered part of the informal empire, but was rather a fully independent, rapidly developing economy turned into a global power. On the other hand, the US was the largest recipient of British capital investment. The solution was to look in the US only on the largest sectoral investments made in the construction of US railroads. Chapter 8 devotes a long section to investment in four US railroads and to Anglo-American investment banks involved in these investments. Investments in other European countries, such as the Russian Empire and Austro-Hungarian Empire, was not studied in the book mainly in order to make it manageable. Investments in Japan were only briefly mentioned for the same reason.

SETTING THIS PROJECT IN THE HISTORICAL LITERATURE

This book maps an uncharted terrain. This is a terra incognita, not a terra nullius. Various scholars touched upon segments of this terrain, yet the synthetic connection of the pieces into a full map is a major contribution of this book. Financial historians paid much attention to the flow of capital from London to the rest of the world, measuring its volume, timing, and destinations.[9] They were also interested in the history of the London Stock Exchange, its

[8] William Roger Louis, *Imperialism: The Robinson and Gallagher Controversy* (New York: New Viewpoints, 1976), 4.

[9] Michael Edelstein, *Overseas Investment in the Age of High Imperialism: The United Kingdom, 1850-1914* (New York: Columbia University Press, 1982). Lance E. Davis and Robert A. Huttenback, *Mammon and the Pursuit of Empire: The political Economy of British Imperialism, 1860-1912* (Cambridge University Press, 1986). Michael Edelstein, "Review of Stone, Irving, *The Global Export of Capital from Great Britain 1865-1914: A Statistical Survey*," *EH.Net, H-Net Reviews.* (1999).

changing nature, and its position in relation to other stock exchanges in Europe and North America.[10] Some financial and business historians measured the rate of return on domestic stocks compared to overseas stocks. Business historians studied some of the corporate groups and individual families that I also analyze. They were interested in different aspects than I, how these groups were managed and by whom, what their business strategies were, and which informal organizational models they used.[11] I am focused on the legal-corporate aspects of these companies: in which jurisdictions did they decide to incorporate and why, did they form subsidiaries, what their stock structure was, and by which governance tools were they controlled. Historians of the business corporation in Britain in the period 1844-1914 are obsessed with two issues: the introduction of general limited liability and its effects, and the transformation from companies having a large controlling shareholder to companies having a widely dispersed ownership (following the footstep of similar American investigations inspired by Berle and Means observation.[12] I, on the other hand, examine other aspects of company law, mostly international aspects such as choosing a place of incorporation, where to register subsidiaries, the status of foreign corporations, and cross-border insolvencies. Legal historians of the British Empire pay attention to the exercise of sovereign political powers over colonial territories, the taking of indigenous lands, the disciplining of native populations through criminal law and colonial courts.[13] Other legal historians employing global and international legal history perspective examines the ways in which law legitimizes colonialism.[14] On the whole, legal historians leave commercial and business aspects of the law, including company law, outside their agenda. I take the task of investigating these neglected but not irrelevant

[10] Ranald C. Michie, *The London Stock Exchange: A History* (New York: Oxford University Press, 1999); Cassis, *Capitals of Capital: A History of International Financial Centres 1780–2005*.

[11] Geoffrey Jones, Merchants to Multinationals: British Trading Companies in the Nineteenth and Twentieth Centuries (Oxford: Oxford University Press, 2000); Stanley Chapman, Merchant Enterprise in Britain: From the Industrial Revolution to World War I (Cambridge: Cambridge University Press, 1992). Mira Wilkins, "The Free-Standing Company, 1870-1914: An Important Type of British Foreign Direct Investment," Economic History Review 41, no. 2 (1988).

[12] Leslie Hannah, *The Rise of the Corporate Economy* (London: Methuen, 1976); R. Brian Cheffins, *Corporate Ownership and Control: British Business Transformed* (Oxford: Oxford University Press, 2008). Christopher Coyle, Aldo Musacchio, and John D. Turner, "Law and Finance in Britain c.1900," *Financial History Review* 26, no. 3 (2019).

[13] Lisa Ford, *The King's Peace: Law and Order in the British Empire* (Harvard University Press, 2021); Robert Travers, *Empires of Complaints: Mughal Law and the Making of British India, 1765–1793* (Cambridge: Cambridge University Press, 2022). Elizabeth Kolsky, *Colonial Justice in British India* (Cambridge: Cambridge University Press, 2010); Mitra Sharafi, *Law and Identity in Colonial South Asia: Parsi Legal Culture, 1772–1947* (Cambridge: Cambridge University Press, 2014). Renisa Mawani, *Across Oceans of Law: The Komagata Maru and Jurisdiction in the Time of Empire* (New York: Duke University Press, 2018); Nandini Chatterjee, *The Making of Indian Secularism: Empire, Law and Christianity, 1830-1960* (Palgrave Macmillan, 2011). Debjani Bhattacharyya, *Empire and Ecology in the Bengal Delta: The Making of Calcutta* (Cambridge: Cambridge University Press, 2018).

[14] Lauren Benton and Lisa Ford, *Rage for Order: The British Empire and the Origins of International Law, 1800–1850* (Harvard University Press, 2016); Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (Cambridge: Cambridge University Press, 2002).

aspects of colonial law. The New History of Capitalism is interested in global trade and globalization, and in the centrality of coercion and exploitation of labor and slavery around the globe. The New History of Capitalism is inspired by Marxist interpretations and critiques of capitalism and colonialism, such as "Imperialism, the Highest Stage of Capitalism", written by Lenin in 1916, at the end of our period. However, surprisingly, finance, stock markets, business corporations, and the city of London are, on the whole, absent in the canonical books of this school.[15] This new historical school offers a new history of Capitalism, yet unlike Lenin, without capital.[16] The absence may be partly explained by the disciplinary and ideological antagonism of this school to economic, business, and financial history, an objection that leaves them short in tools and data.

The missing pieces of the map I am trying to complete are missing for a reason. Some are missing due to the limits of each of the academic disciplines, some because there were other fashionable topics on the agenda, some due to the scarcity of readily available corpuses of resources, some due to ideological and political tilt.

METHODOLOGY IN A NUTSHELL

The research project works on two levels. One is collecting systematic data on laws and on companies. The project surveys the transplantation of company law into some 40 different colonies across the Empire. These jurisdictions are not a random sample. They were selected either because they were the largest, economically or population-wise, in the Empire, or because they represent a specific type of company legislation. Records of the legislative process can be found primarily in the National Archives, in a series of files produced mainly by the Colonial Office, the Board of Trade, and the Foreign Office. The puzzle was completed by surveying the records kept in the Colonies, notably the India records, which are now kept in India Office Records of the British Library, as well as records from Hong Kong, Australia, and Canada. The second part of the book is based on case studies of over 60 early transnationals in sectors such as international trade, banking, railways, steam shipping and telegraph, colonial governance, and mining, oil and raw materials.

Companies were not statistically sampled either. Here too companies were selected either because they were the largest, in terms of market capitalization, or because they represent a specific sector or organizational model, or because their records were available and relatively

[15] One of its constitutive books, Sven Beckert, *Empire of Cotton: A Global History* (New York: Alfred A. Knopf, 2014).substantiates my claim.
[16] Lenin investigated capital exports, investments and returns, the role of banks, companies, and stock exchanges, and the building blocks of financial capitalism.

complete on the organizational aspects. Locating company records was tricky. With the exception of original registration records and annual reports that were filed with Companies House, and are now kept in the National Archive, or similar colonial archives, these are private records. Some of these companies are still active to this day, even as Fortune Global 500 companies. Their records are kept behind closed doors unless deposited.[17] The files of numerous companies have been deposited over the years in Guildhall Archive and London Metropolitan Archive (now London Archive). The files of telegraph companies were deposited in PK Porthcurno the archive of Cable & Wireless and its forerunners. Some of the records of colonial companies operating in Africa were found in the Foreign Office Records in the National Archives. Records of Indian Railways were in the India Office Records in the British Library. This is just a partial survey of relevant archives; the full details are to be found in the footnotes of the chapters from 6 and on. Archival sources were complemented by company histories, legal records, and economic newspaper advertisements and reports. A team of talented and devoted LLB students (whose names are recognized in the acknowledgement) assisted me in studying this large number of companies as well as of company legislation in numerous jurisdictions. The company case studies focus on the companies' legal decision-making: where and how to incorporate, where to raise capital, and on which stock exchanges to list shares, whether to form subsidiaries, where to hold board meetings, where to pay taxes, and when to migrate.

The second level of research work was to collect the preexisting pieces, stitch them together, and get a sense of what was still missing. It involved identifying seemingly technical and neglected topics such as Colonial Register, Share Register, prohibited company names, managing agents, foreign companies, preferred stock, Hong Kong China Company, understand the high stakes hidden in their technicalities, and stitch them into the map. To decode these outdated technicalities, one needs to acquire a sufficient understanding of contemporary company law doctrines and of corporate and organizational theory. Once I draw a road map of the terra incognita, I will offer a new and exciting tour in which a new historical narrative of globalization and the rise of the corporate economy will be offered. The narrative is a product of interdisciplinary work that combines legal history, British social and political history, business history, colonial and imperial history, and economic and financial history. Yet, the narrative does not assume high level of command of any of these disciplines. The new story

[17] For example the files of HSBC are still in the company's archives in London and Hong Kong. I was able to access some of them due to the cooperation and assistance of the archivists. The files of Jardine Matheson were deposited with the Cambridge Library and can be accessed subject to prior permission.

opens a new agenda for others who will be able to construct more nuanced narratives and more complete and authoritative answers.

THE STRUCTURE OF THE BOOK

The first five chapters of the book analyze company law, while the next six chapters investigate transnational companies. ***Chapter 1*** establishes the legal starting point by showing the domestic nature of company law until 1844, the shift from a chartering regime to a regime of free incorporation, and the challenges posed by the early transnationals. It also maps the export of capital from Britain with an eye on the corporate instruments used. ***Chapter 2*** examines the shaping of imperial company law policy. It examines the push to uniformity and opposition to it. ***Chapter 3*** follows company legislation throughout the Empire in the period 1849-1914 (and occasionally beyond). It devotes much attention to India and its orbits (from Singapore and Malaya to Aden and Iraq), Australian territories, New Zealand, and Canadian provinces. It identifies a few legislative models used in the company law "backyard": Africa, the Middle East, and the Caribbean. Once company law became global rather than domestic, a new set of legal complications arose. These included the questions: how to determine which company law would apply to which company, which court would litigate disputes among company constituencies, and more. ***Chapter 4*** is devoted to the emergence of a new field of law, private international company law. ***Chapter 5*** begins with examining the major legal players in our story, the new law firms that specialize in company law. It places the lawyers in the wider network of professionals: accountants, company promoters, investment bankers, and stockbrokers that made the City the financial hub of the First Era of Globalization. The last six chapters examine each a business sector or an organizational model. ***Chapter 6*** looks at the long transition of merchant houses and shipping firms from the family firm and partnership model to the model of joint-stock limited liability company. ***Chapter 7*** studies an organizational model, the managing agency, in which a managing partnership takes control of various companies without holding a large stake of shares. This model was used in and around India for managing labor intensive tea and rubber plantations and cotton and jute mills. Chapters 8 and 9 investigate communication networks. In ***Chapter 8***, we uncover the means used to protect British investments in railways abroad against expropriation by host states. In ***Chapter 9***, the organization of submarine telegraph, a sector with high technology-related risks, involves interconnected companies in order to mitigate the risk. ***Chapter 10*** looks at how company law architecture was created for the informal empire, using the example of Hong Kong, Shanghai, and late imperial China. ***Chapter 11*** analyzes the abortive attempt to use the corporate form for territorial colonial expansion in Borneo and Africa.

4

Beyond Borders: Private International Company Law's Formative Era

THE GLOBAL CHALLENGE TO COMPANY LAW

In 1899, Edward Manson, Barrister-at-Law and Registrar of the High Court for Companies Winding-up, published an article titled "The Status of English Trading Companies Abroad" in the Journal of Comparative Legislation. The title touched upon a hot topic at the turn of the 20th century. The Journal he chose to publish in was, as we have seen in Chapter 2, an aspiring venue for promoting imperial legal uniformity. Manson wrote:

> The whole world is now become the hunting-ground of English joint stock enterprise; and as its pioneers, bent on exploration and exploitation, push their way into the territories of every British colony and foreign state, survey mankind, if not in the poetic, in the scientific sense, from China to Peru, the question at once presents itself and presses for solution, What is the status of the English company in these colonies or foreign lands which it invades; what its contracting powers, what its rights and liabilities generally?[1]

This chapter will address Manson's questions within the context he describes and provide the first comprehensive mapping and analysis of the emergence of the new private international company law field. This field has developed to address the legal connections between companies and the multitude of laws and legal forums they have encountered between birth and death. It also had to deal with the emergence of transnational and multinational companies, companies that had stakeholders, including shareholders, creditors, and managers, in various jurisdictions.

The historical context for the development of the field was set in previous chapters. In 1844, Britain enacted general and free incorporation by simple administrative registration. Other European countries followed it: France in 1867, Spain in 1869, the German Confederation in

[1] Manson, "The Status of English Trading Companies Abroad."Manson was Barrister-at-Law, Joint-editor of the *Journal of Comparative Legislation,* Registrar of the High Court for Companies Winding-up, and author.

1870, and Belgium in 1873. In the United States, twenty-seven states (out of the thirty-seven formed by then) legislated general incorporation statutes between 1846 and 1876. Within a few decades from 1844, most territories in the British Empire adopted general incorporation legislation of one model or another.[2] The paradigm shift from state discretion over whether to incorporate or not to administrative registration and open access regime opened the possibility of selecting the jurisdiction to incorporate. The number of incorporated companies grew globally from barely dozens to tens of thousands. General incorporation and its contractual nature shifted company law from the realm of public law to the realm of private law. Globalization opened the arena to transnational companies. These faced legal challenges and opportunities in more than one location. Given these momentous historical developments, company law could no longer be viewed as domestic law and had to face the challenges posed by general incorporation, the rapid expansion of the British Empire and other European empires, the new era of globalization, and the massive capital flows accompanying it.

THE EVOLVING INTERSECTION OF PRIVATE INTERNATIONAL LAW AND COMPANY LAW

Before zooming in on private international company law, let's examine how the wider legal field of conflict of laws, also called private international law, was affected by globalization. The field did not begin with globalization. Did it dramatically and disruptively respond to globalization, or did it show more continuity and slow change? The idea that a legal system is not confined to one territory was not new. In fact, in pre-modern times, it was very common. Empires, from the Holy Roman Empire, through the Ottoman Empire to the Mughal Empire, were legally pluralistic because different persons in the same territory were subjected to different laws based on religion, ethnicity, or occupation. The same or similar law could apply to persons who resided in different territorial realms. For example, Jewish Talmudic law, Islamic Sharia law, and Christian Catholic canon law applied based on personal religious identity beyond a single territorial political unit, in a manner in which law that was developed by Rabbis, Qadis, or the Pope in one territory also applied to coreligionists in other territories. The pre-modern legal reality often gave rise to issues of conflict of laws. The common law became a territorial law that applied to everyone in England. On the way to this status, it demolished local laws and integrated merchant law, admiralty law, and canon law into its framework. The personal status of individuals became irrelevant to the choice of law. England

[2] See Chapter 3.

reached a point when conflict of laws ceased being a relevant field of law.[3] The field of conflict of laws, which was pushed aside by the emergence of nation-states having all-encompassing territorial law, resurfaced with the creation of early modern federations, notably the Dutch Republic and the United States.

It is not a coincidence that two of the leading jurists in the field were the Dutch Ulrik Huber (1635-94) and the American Joseph Story (1779-1845).[4] Federations often encountered conflicts between the laws of their constitutive provinces or states. In Britain, the field began reemerging in the middle of the 19th century.[5] Figure 4.1 is a Google Ngram Viewer analysis of texts included in Google's text corpus

Figure 4.1 – Google Ngram Viewer Analysis of the Conflict of Laws and Private International Law Terms

It shows that the use of the term "conflict of laws" was in a sharp rise from around 1830 the timing of Story's book. This might be possibly explained by the rise of conflicts of law disputes within the American federation in the period leading to the Civil War. The term "private international law" rose sharply in the 1850s and again in the 1870s and 1880s, possibly with the progress of globalization and the rapid expansion of the British Empire.[6]

[3] Hessel E. Yntema, "The Historic Bases of Private International Law," *American Journal of Comparative Law* 2, no. 3 (1953); Yntema, "The Historic Bases of Private International Law."; Peter E. Nygh, "The Territorial Origin of English Private International Law," *University of Tasmania Law Review* 1 (1964).
[4] Ulrik Huber, "Conflictu Legum," chapt. X in Ulrik Huber, Ulrici Huberi De jure civitatis, libri tres. Novam juris publici universalis disciplinam continentes. Insertis aliquot de jure sacrorum & ecclesiæ, capitibus (Franeker: Strickii, Leonardi, 1698); Joseph Story, Commentaries on the Conflict of Laws, Foreign and Domestic, in Regard to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions, and Judgments (Charleston, SC: Nabu Public Domain Reprints, 1834); D. J. Davies, "The Influence of Huber's De Conflictu Legum on English Private International Law," British Yearbook of International Law 18 (1937).
[5] Renown works attributed with the reemergence of the field include:John Hosack, *A Treatise on the Conflict of Laws of England and Scotland* (W. Blackwood and sons, 1847)., John Westlake, *A Treatise on Private International Law: Or the Conflict of Laws, with Principal Reference to Its Practice in the English and Other Cognate Systems of Jurisprudence* (W. Maxwell, 1858).,William Henry Rattigan, *Private International Law* (Stevens, 1895). and most famously Albert Venn Dicey and John Bassett Moore, *A Digest of the Law of England with Reference to the Conflict of Laws* (Stevens and Sons, 1896).
[6] The decline in the use of the term "private international law" in the 1860 calls for an additional investigation.

The rise in the use of the term "conflict of laws" after 1895 might be connected to the intensifying conflicts between the major powers that eventually led to the outbreak of World War I. It may also be explained by the entrance of Albert Venn Dicey (1835-1922), one of the greatest jurists of his generation, to the field. Dicey published his major contribution to the field in 1896.[7] Dicey's impact may contribute to explaining the trends observed in this Figure. Dicey promoted a conception in which the term "private international law" was a misnomer. He purposefully chose the title A Digest of the Law of England with Reference to the Conflict of Laws for his book, avoiding the word "international" and emphasizing "the laws of England".[8] Dicey viewed this field as an integral part of the law of England rather than part of international law. This was not the common wisdom until his time. In previous centuries, conflicts were discussed within the framework of Roman law texts and with their interpretation offered by a network of jurists writing in Latin and located in universities throughout Europe. They were often dealt within multinational empires, such as the Holy Roman Empire, the Habsburg Empire, The German Reich, the Ottoman Empire, or the Russian Empire, in which no single ruler could set the rules for all ethnic and religious groups. Dicey challenged this international conception of the field and aimed to replace it with a territorial conception. His territorial conception was based on the positive sovereign authority of Parliament and the Courts. Dicey rarely cited European treatises and rejected the principle of comity. For him, the field of conflict of laws was based primarily on the rulings of the common law courts and was part of private law.[9] Dicey reiterates territoriality and reminds his readers that the idea that the law was personal and not territorial was long rejected as the common law developed. Dicey's view of the field of conflict of laws fits well with his view of the Constitution. He was the most influential articulator of the concept of the Supremacy of Parliament which trumps any view of private international law that imposes external rules within the domestic legal system. It also fits his traditional liberal views that supported the Empire's unity and objected to the Little Englander version of liberalism that Gladstone and his followers promoted.[10] Dicey and other leading scholars in the field in the second half of the 19th century created the basic distinction between issues of jurisdiction and forum, issues of choice of law, and issues of enforcement of

[7] Seven years after his foundational Introduction to the Study of the Law of the Constitution, and nine years before his seminal Lectures on the Relation between Law & Public Opinion in England during the Nineteenth Century.
[8] Dicey and Moore, *A Digest of the Law of England with Reference to the Conflict of Laws*.. See also: Albert Venn Dicey, "On Private International Law as a Branch of the Law of England," *Law Quarterly Review* 6 (1890).
[9] Parliament had the sovereign power and the supremacy to legislate whatever it wished in this field irrespectively of other nations, but it did not.
[10] Dicey argued that the British Empire was a necessary force to preserve order and freedom to large parts of the world at a relatively low-cost, and its dismemberment would lead to geopolitical instability. *See* Albert Venn Dicey, *Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century* (Macmillan, 1905), 453-54.

foreign court decisions. They focused on contracts, torts, and family law. References to company law were scattered, brief, and unsystematic.

Dicey's conception that Parliament could impose its will on foreign companies in Britain, on all jurisdictions in the Empire, and in a sense also globally, with disregard to international principles and to reciprocity, could be highly instrumental to the Empire and its companies. Legislators in Westminster, English judges and company law jurists could use Dicey's views on international law and on the Empire as an excellent basis for shaping rules of conflicts of law in company law that would serve the interests of the British Empire and of British companies. However these were not adopted wholesale in private international company law. As we shall see, while private international company law was not shaped in a manner that was detrimental to the Empire and to British companies and investors, there was no master plan and no coherency in the evolving field. There was no uniform comprehension as to which rules would best serve British interests, and there were doctrinal deviations out of which non-British could benefit.

At the same time as the field of private international law shifted from preoccupation with federations to dealing with imperialism and globalization so did the field of company law shift from being a subfield of the constitutional law of the Crown preoccupied with charters to being a subfield of private law, preoccupied with memorandum and articles, separated from partnership law. While private international law treaties did not devote chapters to company law, company law legal treatises devoted chapters to foreign and international aspects. Numerous company law cases dealt with transnational and foreign companies, and company law book authors had to fit them into their book schemes. Nathaniel Lindley (1828-1921), possibly the greatest company jurists of the generation, barrister, author and since 1875, Justice of the High Court, Privy Council and House of Lords, devoted the first Appendix of the fifth edition of his famous *A Treatise on the Law of Companies,* published in 1889 to "Foreign Companies". This was the first-ever comprehensive treatment of the issue in a British treatise and a recognition of the establishment of the subfield of private international company law.[11]

The most comprehensive text of private international company law *Foreign Companies and Other Corporations* was published in 1912.[12] Surprisingly, it was not written by any of the prominent private international law jurists of the time such as Dicey, nor by a leading company

[11] Nathaniel Lindley Lindley, Walter B. Lindley, and William C. Gull, *A Treatise on the Law of Companies: Considered as a Branch of the Law of Partnership*, 5th ed. (London: Sweet and Maxwell, 1889).This was by the way the first edition in which companies replaced partnerships in the title. The previous edition was Nathaniel Lindley Lindley, Samuel Dickinson, and Marshall D. Ewell, *A Treatise on the Law of Partnership: Including its Application to Companies*, 4th ed. (Chicago: Callaghan & Co., 1881).
[12] E. Hilton Young, *Foreign Companies and Other Corporations* (Cambridge University Press, 1912).

law expert like Lindley. It was published by Edward Hilton Young (1879-1960), whose legal career lasted just a few months. Young was later in his life a financial journalist, a politician, and a director in several companies. His aspirations in these directions may explain his exceptional early interest in the field. Young was the first to comprehensively map the legal issues at hand as they were generated in Britain during the previous seventy years of the globalization of companies and evolving company law. I will organize the rest of this chapter based on themes formulated by Young in the closing years of our seventy-year period. This seems more historically apt than using contemporary twenty-first-century themes and terminologies. Based on Young and the case law, this chapter focuses on four major themes.

The first theme was the recognition of foreign companies as juridical personalities for the most basic capacities of suing and being sued in court, owning property, and contracting. A related issue was whether companies could incorporate in more than one jurisdiction to avoid being viewed as foreign companies. Another related theme was whether foreigners could incorporate in Britain in order to avoid doing business through a foreign company.

A second theme was which law would apply to the internal affairs of which company. For example, would foreign and pseudo-foreign companies that litigate their internal disputes in England be subjected to English company law? The issue gradually formulated around two tests for choice of law for internal affairs, "place of incorporation" and place of "real seat".

The third set of issues was the law applicable in cases of insolvency and dissolution. Did English company liquidation proceedings apply only to English creditors and to assets in England, or did they apply universally. Could creditors in Britain sue locally for debt owed by foreign or colonial companies that were subject to dissolution proceedings in their own countries? Which jurisdiction determined whether a company's shareholders' liability was limited, that of its domicile or that of its creditors' domicile? Another related issue was whether English courts could wind up, liquidate and end the life of insolvent foreign companies.

A fourth and last theme to be analyzed in this chapter is how would choice of law be made with respect to regulation (antitrust and trading with enemy) and taxation? Would the test for the choice of law in these contexts be connected in any way to the choice of law in internal affairs or in dissolution?

The answers to these questions emerged gradually over the seven decades that predated Young's authorship of the book. It was not an easy task for me to reconstruct in this chapter the historical process that predated Young. Identifying and analyzing the relevant sources was challenging because they were scattered in numerous seemingly unrelated court decisions.

Occasionally, British legislation and international treaties were relevant. The entire conceptual framework for organizing and analyzing the case law in the emerging field was still in disarray at the time. No comprehensive history of private international company law in the period 1844-1914 was ever written. In the remainder of this chapter, I will follow the development of English law that began to answer the above set of questions. As needed, I will go beyond Young. In relevant places, I will look at the interaction with other jurisdictions. I will follow the evolution of the issues to be dealt with and the relevant doctrines until 1914 and look at later sources only as much as they provide insights into the Pre-War period.

RECOGNITION OF FOREIGN CORPORATIONS

The first issue encountered by British jurists in the era after the introduction of general incorporation in Europe, in numerous colonies and in the Americas, was whether incorporated entities outside Britain should be recognized as corporate entities in Britain. This is reflected in the first topic to be encountered in the Appendix to Lindley's *A Treatise on the Law of Companies*, titled "Foreign Companies," which was the status in Britain of companies incorporated outside Britain.[13] Young also wrote an elaborate survey on this topic. Initially, each chartered company had business in its home country and its overseas colonial destination. The *English East India Company* had no legal business in the Dutch Republic, and conversely, *the Dutch East India Company* had no such business in England. They encountered each other in conflicts in Asia, such as the Amboyna Massacre (1623), and en route to Asia, as in the Anglo-Dutch Wars. The East India companies cared about public international law and the law of the seas but not about private international law.[14]

By the eighteenth century, chartered companies were more numerous, and their business activities more diverse and sometimes overlapped or were conducted within other European countries. In 1730, the *Dutch West India Company* sued Jacob Lopes Henriques, a Portuguese Jew, who fled Amsterdam to London, and four of his colleagues in the Court of Common Pleas in London for a loan they took from the Company in Amsterdam and did not pay back. The legal proceedings occurred in London because the borrower absconded and fled to England. Once the company won the case, Henriques on error (appeal), argued that the company could not sue in an English court because it was not incorporated in England and was not recognized as a corporate entity there. The court was willing to take evidence to the fact that *the West India Company* was properly chartered in the Dutch Republic and thus had a legal personality that

[13] Concerning the recognition of foreign corporations see: Manson, "The Status of English Trading Companies Abroad."; Elvin R. Latty, "Pseudo-Foreign Corporations," *Yale Law Journal* 65 (1955).
[14] They enlisted legal luminaries such as Hugo Grotius and John Selden, who debated the status of the seas in public international law.

could sue in English courts.[15] From that point on it became a common practice in English courts to recognize foreign corporations as corporate entities that can sue and be sued in English courts.[16] Once the Empire expanded a new category appeared, that of colonial companies, namely companies that were not formed at home or in foreign countries but rather in British colonies. It somehow became obvious that companies incorporated in colonies were recognized as corporate entities in the homeland. But I was unable to find a single authority that explicitly explained why this was obvious. Was the rationale based on comity, on the constitutional inferiority of the colonies, on analogy with foreign companies, on specific act of parliament or on the common law? I was unable to locate a juristic statement that would answer this question.

While England recognized foreign companies routinely, the issue became contentious on the continent around the middle of the nineteenth century. Some countries refused to recognize companies from other countries. The most notable case was the refusal of Belgium to recognize French companies and the French retaliation.[17] Why Belgium and why then? The immediate motivation may have been the desire of a small European country that became independent after a long struggle just recently (1830-9) to protect its sovereignty. In particular, Belgium was concerned about the French takeover, and also concerned that the presence of French companies in Belgium would assist this. Another explanation for Belgium being an early mover may have been the role played by François Laurent (1810-87), the noted Belgian jurist, historian, administrator, and author of *Le droit civil international*. For Belgium, as a small country, public international law, private international law, and comparative law were important means for legitimizing its sovereignty. Beyond Belgium, those who were concerned by the rise of free trade and globalization preferred that companies could not float around freely. The introduction of general incorporation and general limited liability created a divergence between early adopters and late adopters, which could make a country's decision to liberalize its company law impactful on its neighbors.

In Germany, the recognition of foreign companies was debated in the context of the drafting of the Commercial Code as well as the Civil Code. The initial drafts included a clause that recognized foreign corporations and corporations from other German states if they were legally created in their place of registration. But as the deliberation of the draft progressed, it turned out that several states, including Bavaria and Hesse, objected to this permissive rule of

[15] Henriques v. The Gen. Privileged Dutch Co. Trading to the W. Indies, [1728] 92 E.R. 494.
[16] Lindley, Lindley, and Gull, *A Treatise on the Law of Companies: Considered as a Branch of the Law of Partnership*, 909-10.
[17] Bernhard Großfeld, "Zur Geschichte der Anerkennungsproblematik bei Aktiengesellschaften," *Rabels Zeitschrift für Ausländisches und Internationales Privatrecht/The Rabel Journal of Comparative and International Private Law* 38, no. H. 2/3 (1974).

recognition. Eventually, after deliberation with Prussia, the Hanseatic towns, and the Federal Foreign Office, it was decided not to include this clause and to base recognition of foreign companies only on bilateral treaties.[18]

Turning to the path of bilateral treaties was not the first choice to British jurists. A French Law of May 30, 1857, established a mechanism for recognizing foreign companies. An Imperial Decree based on it recognized Belgian companies (and another one Portuguese companies). British companies in France operated without any legal recognition as the French Law of 1857 required foreign companies to receive explicit imperial decrees for legal recognition.[19] British companies like the *Agra Bank Company* and *London Gas Company* faced legal challenges in France. British businesspersons and companies protested in London and Paris for being discriminated against by not being recognized as corporate entities in France.[20] The British government shifted from inaction to engagement.[21] Ambassador Cowley approached the French Foreign Office. The Foreign Minister Thouvenel responded that France expects Britain to legislate a law recognizing French companies, just as Belgium did.[22] Some lawyers in Britain argued that Britain has long recognized foreign companies based on its common law. Private international law in Britain is a matter for the courts and not for Parliament. The common law of private international law held that the conception of “comity”, reciprocity by behavior, was a good enough rationale for the recognition of foreign companies duly incorporated in their home jurisdiction.[23] Initially, the government objected to French demands for mutual legislation, arguing that French companies already enjoyed recognition in Britain under "existing law and practice" and only France had to legislate.[24]

Eventually, as a compromise between the French demand for legislation and the British insistence on common law, a compromise was reached. Britain and France turned to the treaty path. On April 30, 1862, Britain signed a convention with France for the mutual recognition of

[18] Großfeld, "Zur Geschichte der Anerkennungsproblematik bei Aktiengesellschaften," 358-70.
[19] The law was first applied to Belgian companies, with Article 2 providing that the privileges granted may be extended to other countries if reciprocity was provided. These privileges were also extended to Turkish, Sardinian, Portuguese, and Luxembourg companies. TNA: FO 27/1388, Cowley to Russell, 22nd March, 1861; TNA: FO 27/1414, Foreign Office to Board of Trade, 22nd March, 1861.
[20] TNA: FO 27/1417, Russell to Board of Trade, 5th September, 1861.;
[21] British companies operating in France also pressed the French Minister of Foreign Affairs, Édouard de Thouvenel, to bring the matter before the French Commerce Office.TNA: FO 27/1396, Cowley to Russell, 20th September, 1861.
[22] TNA: FO 27/1417, Thouvenel to Cowley, 16th September, 1861.
[23] TNA: FO 27/1380, Foreign Office to Cowley, 14th October, 1861.
[24] The Foreign Office instructed Cowley, the British Ambassador in France, to press the French Government to grant equal rights for British companies, as reciprocity was already met since foreign companies could sue in Britain.TNA: FO 27/1375, Foreign Office to Cowley, 10th April, 1861.; The British government expressed concern that new legislation might actually "*throw a doubt on the existing practice of our Courts, and tend to narrow the present liberal recognition of Foreign Companies in our Jurisprudence*". TNA: FO 27/1415, Committee of Privy Council for Trade to Foreign Office, 4th June, 1861.

companies.[25] Instead of passing new domestic legislation or settling for the common law (as Dicey's territorial approach would expect), Britain pursued a treaty-based approach, securing company recognition through bilateral agreements.[26] This strategy aimed to protect British companies abroad while avoiding changes to domestic legal principles. A thorny issue was how the treaty should be drafted. In France, until 1867, the establishment of companies required government authorization,[27] whereas in Britain incorporation was fascilitated by law, through registration.[28] Another issue was which types of organizational forms were to be recognized based on the treaty. France had a full array of organizational forms including limited partnerships, share partnerships and private companies (SARL) next to public companies. After consultations between the Foreign Office, Board of Trade and the Exchequer, and back and forth with France, Britain agreed to a treaty text that yielded towards the French requests.[29] The convention with France marked the beginning of this approach, establishing a framework for mutual recognition without compromising Britain's existing legal system.

Belgium, as we have seen, refused to recognize French companies. It followed France closely, and just half a year later, on November 13, 1862, signed a convention with Britain for mutual recognition of each other's companies.[30] The initiative came from Belgium, with its Minister in London proposing an agreement identical to the recently concluded French treaty.[31] Belgium was interested in concluding a treaty with Britain to demonstrate to the French that recognition could not be enforced by them upon Belgium and that Belgium already had the

[25] Convention between Great Britain and France, relative to Joint Stock Companies. - Signed at Paris, April 30, 1862. Art. I. of the treaty states "The high contracting parties declare that they mutually grant to all companies and other associations, commercial, industrial, or financial, constituted and authorized in conformity with the laws in force in either of the two countries, the power of exercising all their rights, and of appearing before the tribunals, whether for the purpose of bringing an action, or for defending the same, throughout the dominions and possessions of the other Power, subject to the sole condition of conforming to the laws of such dominions and possessions".
[26] Britain viewed a convention as the most appropriate means of achieving reciprocity, however, the government was willing to make minor enactments if the French Government insisted on legislation action. TNA: FO 27/1417, Committee of Privy Council for Trade to Foreign Office, 9th October, 1861; TNA: FO 27/1380, Foreign Office to Cowley, 14th October, 1861.
[27] "Law of July 24, 1867."; Charles E. Freedeman, "Joint-Stock Business Organization in France, 1807-1867," *The Business History Review* 39, no. 2 (1965).
[28] The Board of Trade offered two drafts for the convention: Draft A referred to companies "constituted and authorized according to law," ensuring coverage of all British corporate forms, while Draft B required companies to be subject "to the authorization of their Government, and have obtained it" in line with French law. TNA: FO 27/1459, Board of Trade to Unknown, 18th January, 1862.;TNA: FO 27/1419, Foreign Office to Cowley, 29th January, 1862.
[29] France ultimately accepted the principle of Draft A after minor revisions. TNA: FO 27/1435, Cowley to Russell, 13th March, 1862.;TNA: FO 27/1459, Committee of Privy Council for Trade to Foreign Office, 28th March, 1862.;TNA: FO 27/1421, Foreign Office to Cowley, 29th March, 1862.
[30] TNA: FO 93/14/20, Convention between Great Britain and Belgium, relative to Joint Stock Companies, November 13, 1862.
[31] The Foreign Office referred Belgium's proposal to the Committee of Privy Council for Trade, which raised no objection to the conclusion of the Convention with Belgium, in terms similar to those with France.TNA: FO 10/247,Russell to Board of Trade, 31st July, 1862.; TNA: FO 10/247, J. Emerson Tennent to Committee of Privy Council for Trade, 2nd August, 1862.

world superpower as a treaty partner. Britain signed additional treaties with some minor variation in the following years, with Italy (1867),[32] Germany (1874),[33] Spain (1883) and Greece (1888).[34]

Apparently, the French authorities dealt with many de facto French companies which were registered in London, trying to avoid requirements and regulations imposed by French law, and relied on the 1862 treaty with Britain. As this phenomenon expanded, French authorities looked for ways to make it difficult for French businesspersons to benefit from such incorporation abroad.[35] Later on, in 1904, a bill was introduced in France stating that all companies which have their principal establishments in France shall be subject to French law even if they were constituted under the law of a foreign country.[36]

An example of a trigger to the legislation can be found in the following case. *La Construction Limited* was registered in England in 1888.[37] By 1890 its directors were all French, they met in France and constructed a casino in France. A creditor of one of the directors wanted to collect on company casino assets arguing that the company was null and void according to French law. He argued that the company was registered in England only to bypass French law and defraud creditors. The company argued that it should be recognized in France based on the Anglo-French mutual recognition treaty of 1862. The case began in the local court, went to the Court of Appeals in Aix en Provance and ended up in the Court of Cassation. That court ruled that the company was void and that this determination is not a violation of the bilateral treaty.[38] The

[32] Following complaints from British Company over the lack of legal recognition in Italy, the Italian Government proposed a reciprocal convention on joint stock companies. The Foreign Office referred the proposal to the Board of Trade, which supported it and suggested using the 1862 Britain-France convention as a model.TNA: BT 22/1/9, Foreign Office to Board of Trade, 2nd July, 1867.; TNA: BT 22/1/9, Board of Trade to the Secretary of State for Foreign Affairs, 2nd August, 1867.

[33] In 1913, the agreement was extended to Protectorates and Consular Court districts *"so that the companies of either Party established in its Dominions, Protectorates and Consular Court districts shall be entitled in the Dominions, Protectorates, and Consular Court districts of the other Party to all the rights and privileges accorded by that Agreement."*.Declaration Additional to the Agreement of March 27, 1874, between the United Kingdom and Germany Respecting the Recognition of Joint Stock Companies. Signed at Berlin, March 25, 1913.

[34] Israel Davis, "Some Notes on Foreign Companies in England," *Journal of the Society of Comparative Legislation* 2, no. 2 (1900); TNA: FO 93/14/20, Convention between Great Britain and Belgium, relative to Joint Stock Companies, November 13, 1862; TNA: FO 93/48/4 Declaration Exchanged Between Great Britain and Italy Relative to Joint Stock Companies, November 26, 1867; TNA: FO 93/36/7, Agreement between the United Kindom and Germany Respecting the Recognition of Joint Stock Companies, March 27, 1874; TNA: FO 93/99/31, Decleration between the Governments of Great Britain and Spain relative to the status of Joint Stock Companies, January 29, 1883; TNA: FO 93/38/14, Agreement between Great Britain and Greece, for Regulating the Position of Joint Stock Companies, August 4, 1888.

[35] "Franco-British Companies," *Financial Times*, no. 4, 925 (1905).

[36] "Franco-British Companies."

[37] TNA: BT 31/4139/26697, Memorandum and Articles of Association of La Construction, Limited.

[38] Thomas Barclay, "Status of British Companies in France," *Law Quarterly Review* 13, no. 4 (1897); Thomas Barclay, *Companies in France: The Law Relating to British Companies and Securities in France and the Formation of French Companies* (London, Edinburgh: Sweet & Maxwell Ltd. ; Wm. Green & Sons, 1899).

judgment rests on the propositions that the nationality and domicile of such companies depend on the place of their principal establishment and that French law should not facilitate the escape by companies of the rules of French law.

Initially very few foreign companies showed up in Britain. The number of foreign companies doing business activities in Britain increased in the nineteenth century. Around 1900 a new phenomenon emerged, that of pseudo-foreign companies, companies that were British in all respects except being incorporated abroad, typically in the Channel Islands. In addition, Britain was the corporate home of companies that were registered in Britain but were involved exclusively in business activities in colonies and foreign countries. These were foreign companies in other jurisdictions, Britain had an interest in whether these jurisdictions would recognize foreign companies.

The Hague Conference on Private International Law (HCCH), an intergovernmental organization, held conferences in 1893, 1894, 1900 and 1904, and produced private international law conventions on various topics. In none of these conferences the issue of recognition of foreign companies was on the agenda. On the other hand, the International Law Association (Founded in Brussels in 1873), a private association of jurists, economists, legislators, politicians, formed in its 1903 conference in Antwerp a committee to draft a code for the Recognition of Foreign Companies. The goal was to standardize the conditions for corporations operating and doing business outside their domicile, in foreign countries.[39] This draft code was intended to serve as a model to be adopted by legislatures in the various states. The association approved the code in its Berlin Conference in 1906.[40] However, very few countries adopted the code into their domestic systems. Britain was not one of them.

Looked at from the British perspective, it had to take a stand whether the phenomenon of mass migration of companies was a blessed or objected phenomenon. Until 1900 the major trend was of foreign companies, mostly from the colonies and from the Continent, immigrating to Britain. Colonial companies migrated to Britain to attract British investors in the London Stock Exchange and the City. European companies migrated to avoid the stricter company domestic legislation. In 1900 the later trend was reversed because the Companies Act 1900 tightened the regulation of British companies.

[39] Justice Kennedy and T. G. Carver, "The Antwerp Conference of the International Law Association, 1903," *Journal of the Society of Comparative Legislation* 5, no. 2 (1904).
[40] Thomas Baty, "International Law Association at Berlin," *Journal of the Society of Comparative Legislation* 7, no. 2 (1906).

A Law Quarterly Review author called attention to the phenomenon of mass migration of companies, emphasizing the reversal:

> Alien immigration has of late been exercising the minds of a great many persons, and it seems probable that the immigration of alien corporations will in the future come in for a good deal more attention. Here at home we find ourselves invaded by hundreds of companies registered in Guernsey, and by virtue of their domicil of origin emancipated from all the checks imposed by the Companies Act, 1900.[41]

The British had to take a stand on whether shopping for convenient company law was a blessed or objectionable phenomenon. They had to decide whether to treat similarly the migration of foreign, mostly European, companies to incorporate in Britain and of British companies to incorporate offshore in the Channel Islands, notably Guernsey, and the Isle of Man.[42]

The Loreburn Company Law Committee of 1906 devoted more attention to foreign companies than the previous committee on the topic, the Davey Committee of 1895.[43] When gathering evidence, it asked Chambers of Commerce throughout Britain for their opinion on whether to regulate foreign companies. Most responded positively. The larger Chambers, those of Liverpool and Manchester, made more detailed recommendations, requesting not only registration and filling of information but also the deposit of funds to secure creditors. The committee also invited a survey of the attitude of German law to foreign companies. The ultimate recommendations were to include in the new companies act a requirement for filing and disclosure. The committee also stressed that the overall recommendations would reduce the motivation of British companies to migrate to the Channel Islands because British law will be more pro-companies.

The British Companies Act 1907 included for the first time a section (#35) titled "Requirements as to companies established outside the United Kingdom".[44] The requirements included the filing of the Memorandum (or charter or statute) and Articles of the company, list of directors, name and address of the representative in Britain, the mentioning in letterheads of the country of incorporation, and a few other details. This section is a continuation of the committee recommendations and not an implementation of the model code of the previous year, which was not endorsed by Britain.

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41 "Notes," *Law Quarterly Review* 21, no. 2 (1905): 105.
42 The New Zealand Companies Act 1903 was the first in the empire to deal with the registration of foreign companies. (3 EDW VII 1903 No 53) clause 302, 303, 307.
43 1906 [Cd. 3052] Report of the Company Law Amendment Committee, sec. 18
44 Companies Act, 1907, 7 Edw. 7, c. 50.

The British position on the recognition of foreign companies evolved in a few phases. Initially the conception was that only corporations that were formed by Charter or Act in Britain are recognized as corporate entities in Britain. Next, in the eighteenth century, the common law recognized some foreign companies for some purposes. Next a doctrine of comity, recognition based on reciprocity, was formulated by jurists. After the middle of the 19^{th} century a wave of bilateral treaties were ratified by Britain. Around the turn of the 20^{th} century a draft of a model code was prepared but almost no country adopted it. Lastly, in 1907 Britain included for the first time in its companies act a section that set the requirements for the recognition of foreign companies in Britain, irrespectively of comity or treaty.

One of the main channels through which general incorporation impacted private international law was the transformation of corporate entity theory. As we have seen in Chapter 1, the transition from the chartering era to the general incorporation era, undermined the grant theory or (concession theory) or the corporate entity and gave rise to the contractual theory (also known as aggregate theory) of corporate judicial personality. The corporation was viewed under this theory as an aggregation of individuals that agreed to form a joint entity. This theory expected one to look behind the corporate veil at the shareholder in order to determine domicile, jurisdiction and choice of law. In a way, the adoption of this theory meant that the dramatic shift to general incorporation did not pose new challenges to private international law. One would still look behind the corporate entity at the individual shareholders and their domicile, just as one looks through the partnership at the domicile of the partners.

But this was not the final word in corporate theory discourse. In the closing decades of the century, a new corporate entity theory was conceptualized, the real entity theory (sometimes termed the natural entity theory). The theory was first formulated by von Gierke in Germany and then by Maitland in England, Freund in the US, and other jurists and political scientists.[45] The rationale for the birth of a new legal personality was social reality, not a constitutive legal act. Like humans, corporate entities were created naturally and were just as real. The implication for private international law was that corporations were considered as corporations everywhere, not only in the state that established them. Foreign companies had to be recognized because they were real, not because of the doctrine of comity or a bilateral treaty. The issues of domicile, choice of law and jurisdiction should not be sorted out based on the identity of the shareholders.

[45] Ron Harris, "The Transplantation of the Legal Discourse on Corporate Personality Theories: From German Codification to British Political Pluralism and American Big Business," *Washington and Lee Law Review* 63, no. 4 (2006): 1421.

The Floatation of Companies Between Jurisdictions

The *Assam Company*, whose story was outlined in Chapter 1, is an excellent illustration of the phenomenon of companies having connections in more than one legal system. *Assam Company* raised investments in London and Calcutta for the planting and cultivation of tea in Assam in Northeastern India. It had managers on the ground in Assam as well as in the City closer to the London Stock Exchange. Each group of shareholders and managers preferred to incorporate in a different jurisdiction and to be subjected to its laws. Eventually, the shareholders and managers in Britain had the upper hand.

When Shares Became Empire: The case of Suez Canal

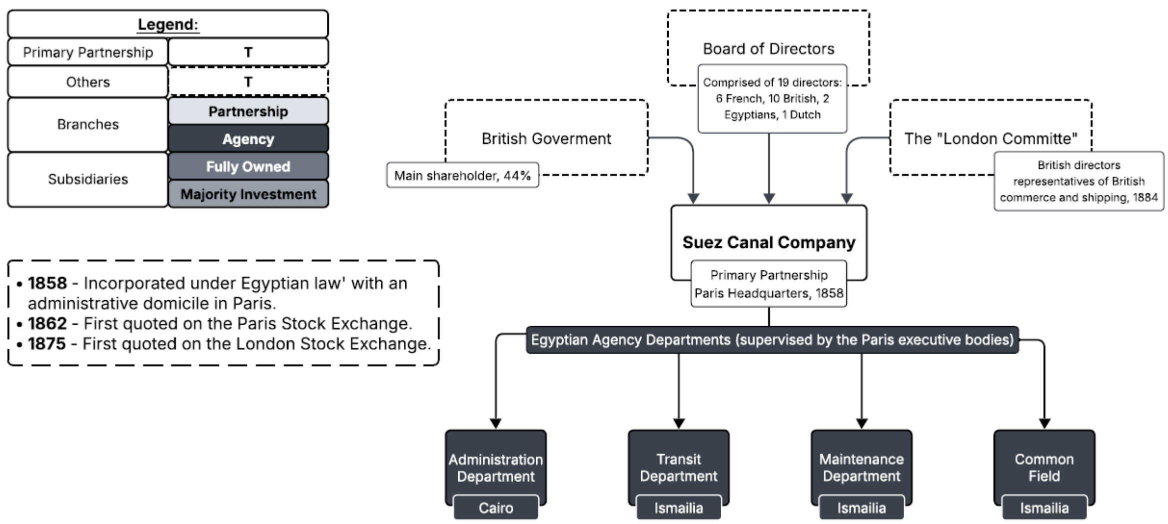
The *Suez Canal Company* case, which we also briefly encountered in Chapter 1, is another remarkable example. It shows that even after the middle of the nineteenth century, the questions of whether a company could incorporate in more than one jurisdiction and whether it can move from one jurisdiction to another were not yet settled. The company was formed by a Firman (a decree containing a concession) issued by the Ottoman Governor of Egypt in 1856 to the French diplomat Ferdinand de Lesseps. It was also subsequently formed by articles of association, which de Lesseps deposited with the Paris notary Jean François Constant Mocquard in 1858. As such, it was a French société anonyme, and its articles had to conform with French law. Article 3 of the Articles of Association declared that "The company has its seat at Alexandria and its administrative domicile in Paris."[46] One can speculate that the nationality of the company was intentionally left vague or universal.[47] The double origins and the confused legal status of the Company are epitomized in Article 16 of the Third Concession (The Firman issued by Ismail Pasha in 1866):

> The Universal Company of the Suez ship canal being Egyptian, it shall be governed by the laws and practices of that country; however, as far as its status as a company and the relationship between the associates are concerned, it shall, by special agreement, be governed by the legislation which governs joint-stock companies in France. It is agreed that any disputes arising out of this provision, shall be settled in France by arbitrators with appeal to the Imperial Court of Paris.[48]

[46] Article 3 of the Company's Articles of Association as presented in: Percy Hetherington Fitzgerald, *The Great Canal at Suez: Its Political, Engineering, and Financial History. With an Account of the Struggles of Its Projector, Ferdinand de Lesseps*, vol. 1 (Tinsley Brothers, 1876), 310.
[47] Farnie Douglas A., *East and West of Suez: The Suez Canal in History, 1854-1956* (Oxford: Clarendon Press, 1969), 215.
[48] Concession of February 22, 1866 as presented in: Fitzgerald, *The Great Canal at Suez: Its Political, Engineering, and Financial History. With an Account of the Struggles of Its Projector, Ferdinand de Lesseps*, 1, 332.

When Isma'il Pasha, the Khedive of Egypt, who held 44% of the Canal’s shares, was unable to repay the loan he took to finance the war in Ethiopia and the purchase of his Canal shares, he decided to sell his shares in the Suez Canal.[49] In 1875, six years after the opening of the canal, Disraeli, the British Prime Minister, approached the Khedive offering to buy the shares.[50] The British Government ended up a holder of 44% of the shares of the *Suez Canal Company*.[51] The *Suez Canal Company* was forced in 1884, under pressure from British shipping companies that were its major customers, to accept seven additional British Directors, known as “The London Committee,” into the Board, increasing the number of British directors to ten out of a total of thirty-two. Directors included senior managers and partners in *P&O* (the largest shipping client of the Canal), *MacKinnon Mackenzie & Co.*, and the *British Indian Steam Navigation Company*.

Figure 4.2 – *Suez Canal Company* Organizational Hierarchy (1875-1956)



The Anglo-Egyptian War (1882) and the British conquest of Egypt (1882) subjected Egypt to indirect British rule, part of the informal empire. It is debated among historians of the British Empire to what extent British concerns about the Suez Canal motivated the conquest of Egypt. The Canal became more British and less French and Ottoman step-by-step by way of significant

[49] All his 44% in the Company. At first, he planned to sell them to French financiers, or at least, to use them as security for a fresh loan.
[50] One of the main reasons presented is that Great Britain was determined that the shares should not fall into French hands. Thus, making the purchase a political move and not an economic one. The purchase was funded by a loan from the Rotschild family bank to bypass potential objections in Parliament. For more reading about the politics of the purchase: Percy Hetherington Fitzgerald, *The Great Canal at Suez ; Its Political, Engineering, and Financial History; with an Account of the Struggles of Its Projector, Ferdinand De Lesseps* (London: Tinsley Bros., 1876);
[51] Arnold Talbot Wilson, *The Suez Canal: Its Past, Present, and Future* (London: Oxford University Press, 1933), 54.

British state share ownership, a contingent of British directors, having its shares listed on the London Stock Exchange, and British shipping companies as its primary users. The history of the growing British involvement in the *Suez Canal Company* did not answer the question whether the internal affairs of the company are subjected to English law, either exclusively or next to Ottoman and French law.

The Bulkeley v. Schutz Case: Limits of Corporate Jurisdiction

Could a company be obliged to incorporate in Britain? Could a foreign corporation be incorporated also in Britain? The case of *Bulkeley and Fleming v. Schutz* (1869-71), dealt with these questions respect to another company that had connections both in Egypt and in Britain. The railway between Alexandria in Egypt and its suburb Ramleh gave rise to an intriguing litigation in the British imperial court system. In 1860, the Egyptian government gave Sir Edward San John Firmin, a British engineer and businessman, the concession to build a railway line linking Alexandria to its suburb of Ramleh. The Egyptian concession stated that the shareholders would have limited liability, and one of its clauses stated that "The Company is constituted under the jurisdiction of Her Majesty's Consulate". In 1862 *The Alexandria and Ramleh Railway Company* was promoted to raise capital for the line's completion. The first line was completed in 1865.[52] In 1867, a dispute arose among the directors. The root cause may have been mismanagement, money tunneling to private pockets, or the naming of stations. The actual suit was filed by a Dutch shareholder (Schutz) against two British directors (Bulkeley and Fleming), the only two that resided within the jurisdiction of the Alexandria consulate, requesting the remedy of specific performance, namely enforcing the incorporation contract and registering the company according to English law. Could the Consular Court of Alexandria, or any court in the empire, order a company to incorporate according to English law? There were two complicating factors. First, the company was already incorporated in Egypt by a specific decree. Could a foreign company be, at the same time, a British company? Another was that the litigation did not take place in a colony but rather in a Khedivate of the Ottoman Empire. Egypt was not under British rule or subject to British or colonial company law. The jurisdiction over the case was based on extraterritorial consular jurisdiction (the capitulation system), which was personal and not territorial. Egypt, like China to which we will turn in Chapter 10, was an exception to rules that applied in the Empire and to rules that applied outside the Empire. The legal status of Alexandria concerning British-led companies was similar to that of Shanghai, with the exception that Shanghai had Hong Kong as a nearby British colony option

[52] Ronny Van Pellecom, "Alexandria & Ramleh Railway Co Ltd," *Les Cahiers de l'AAHA*, no. 61 (2010).At that time, 5 stations were in use: St. Mustafa, St. Bulkeley, St. Fleming, St. Bacos and St. Schutz. The stations were named after the executive members of the Company.

for registering companies that Alexandria lacked. So British company law did not apply in Egypt, in the British Consulate in Alexandria, or over the *Alexandria and Ramleh Railway Company* as a company incorporated in Egypt.

The case was decided in the Consular Court in Alexandria, which ordered against enforcement of registration; it was appealed to the British Supreme Court in Constantinople, which ordered the directors to register the company in London. It was finally appealed on the second round to the Privy Council in London as a last resort.[53] Lord Justice James for The Privy Council held:

> Their Lordships are clearly of opinion, that Act [the Companies Act, 1862] never contemplated that a Foreign partnership, actually complete and existing in a Foreign Country, could be brought within the purview of the English Act of Parliament, the English Legislature having no power over the Shareholders of such a Company. The only mode in which they could have done it would have been, not to register themselves as a Company, which was the only thing they could do honestly towards their Shareholders, or literally to comply with the Order, but to have gone through the form of dissolving the Company and of forming a new Company altogether, which is a totally different thing.[54]

The case rules that registration in England cannot be enforced on a foreign incorporated company even if it has British directors and shareholders. The case of *Bulkeley and Fleming* v. *Schutz* highlights the ability of British businesspersons to decide where to incorporate their business. The Privy Council did not buy into the idea that a company could be incorporated in two jurisdictions at the same time.

The Case of Bateman v. Service

The principle established in *Bulkeley* v. *Schutz* regarding foreign company registration requirements was further developed and applied in colonial contexts through the case of *Bateman* v. *Service*. That case, which raised somewhat similar issues, was decided by the Privy Council a decade later, in 1881.[55] The *Rockingham Jarrah Timber Company, Limited* was incorporated as a limited liability company in Victoria Australia, which enacted its first Companies Ordinance in 1864. The company was not registered as a limited liability company in accordance with the Western Australia Companies Ordinance.

[53] Bulkeley v. Schutz, [1871] 3 L.R 764 (P.C.).
[54] *Bulkeley v. Schutz, [1871] 3 L.R 764 (P.C.)*, 769.
[55] Bateman V. Service, [1881] 6 App. Cas. 386

The *Jarrah Company* had its main business activity in Victoria and most shareholders and directors resided in that colony. It conducted some business in Western Australia, and owed Bateman £1,233 in Western Australia. Bateman sued Service, who was a shareholder and director of the company for the purpose of recovering his debt. The question that arose was whether Service, a director of the company, could be personally liable for the company's debt to Bateman. The case was initially decided by the Acting Chief Justice of Western Australia and appealed to the Privy Council in London. Bateman claimed that because the company didn't comply with the Western Australian Ordinance it did not qualify to be one of limited liability and so Service could be sued individually. The fact that such a pleading could be made and could go all the way to the Privy Council is indicative of the fact that the issue was not yet settled in 1881. The court began by examining the Western Australian Companies Ordinance of 1858 to see if there are any specific rules applying to foreign companies. He argued that according to the Ordinance, any ten or more persons wishing to do business in Western Australia are required to register based on the Ordinance.[56] On this Lord Couch for the Privy Council held that the clause was intended for persons wishing to start a new business in Western Australia and not to persons that are already doing their business in a foreign jurisdiction and are already incorporated there. A Victoria company is not ten persons but rather one juristic person. The court added that it was impractical to expect foreign companies to incorporate also in Western Australia because its Ordinance required local presence, not only a registered office but also to hold shareholders' general meetings in the territory. The court concluded that the legislation did not refer to foreign companies. For if it were addressing foreign companies, it would make it nearly impossible for them to be registered in compliance with Western Australian Legislation. Therefore, the demands of the legislation from limited liability companies were deemed to address Western Australian companies only, meaning that the legislation was silent on foreign ones.

Once clearing aside, the Western Australia Companies Ordinance as inapplicable to foreign companies the court moved on the question of whether the limited liability attribute of the Victoria company was in force in Western Australia. The answer was yes. The Lord based his holding on Story's general principle that foreign law applies unless it is explicitly rejected by local legislation or is in contradiction to public policy or clear interest of the host jurisdiction.

[56] A similar clause was included in the British Companies Act and many colonial acts, the number varying between 10 and 20. A colonial example:Young, *Foreign Companies and Other Corporations*, 190-91; The Transvaal Companies Act, No. 31 of 1909.. The 1862 British Companies Act declared that any business comprising of 20 persons or more was required to be registered under the Act. Interestingly, the field of banking was an exception to the rule and for the purpose of banking, a business required registration only if it was comprised of 10 individuals or more. *The Companies Act, 1862, 25 & 26 Vict. c. 89*.

In particular, it relied on Lindley's recent edition (presumably the 4th edition published in 1881) of his *A Treatise on the Law of Partnership: Including Its Application to Companies* in which he argued that the limited liability feature of a foreign company applies in the host jurisdiction, as long as the company was duly incorporated in its home jurisdiction.

The court explains that the conclusion mentioned above is in accordance with *Bulkeley* v. *Schutz*,[57] that as we have seen above held that foreign companies could not be compelled to register as a company under the English Joint Stock Companies Acts. In *Service* v. *Bateman* the same principle was applied but this time to two colonial jurisdictions. It was by now clear that a company should only incorporate in one jurisdiction, and in order to incorporate in a second jurisdiction, it has to be dissolved first. The effects of having a legal personality in one jurisdiction are carried over to other foreign jurisdictions.

COULD NON-BRITISH COMPANIES INCORPORATE IN BRITAIN?

Could any group of entrepreneurs, anywhere in the Empire or even outside the Empire around the globe, decide to take advantage of the advanced British company legislation and incorporate in London? Could they do this even if they conducted no part of their business in Britain? The British Company Act 1862, which was in force throughout much of the period says nothing explicit about this issue. Section six of that Act says: "Any seven or more persons may … form an incorporated company, with or without limited liability".[58] It says nothing about the identity and subjecthood or citezenship of these persons or on the territory in which the business of that company will be conducted. This is not surprising. We have already seen in Chapters 1 and 2, the first British companies' Acts 1844, 1856, 1862, did not envision globalization and did not address the possibility that company legislation will be enacted outside Britain and that companies will function transnationally. The 1862 Act required that a company specify in its Memorandum of Association the Part of the UK (England, Scotland, Ireland) in which "the registered Office of the Company is proposed to be situate". The plain interpretation of the Act is that in order to incorporate in Britain a company does not have to have British members or British business, but only a registered office in Britain.

In 1871 in the case of *Princess of Reuss* v. *Bos*, it was held explicitly that the nationality of its members has no effect upon the character of a corporation. A company may be registered under the British Company Acts although all the persons applying for registration are foreigners and intend to operate abroad.[59] This is a clear invitation to foreigners to incorporate in Britain

[57] *Bulkeley v. Schutz, [1871] 3 L.R 764 (P.C.).*
[58] *The Companies Act, 1862, 25 & 26 Vict. c. 89.*
[59] Princess of Reuss v. Bos, [1871] 5 LRE & I App. 176 (H.L.).

. Whether that company will be recognized as a corporation in jurisdictions outside Britain is a separate question. It depends on the private international law of recognizing foreign companies in the various jurisdictions. If there is a bilateral convention between Britain and that jurisdiction, the company is assured of being recognized.

CHOICE OF LAW: INTERNAL AFFAIRS

What about business associations from the colonies? Will those that prefer to incorporate in Britain be recognized in the colony? Here we have no international conventions. But the intuition is that they were considered corporate entities based on some imperial mutual respect. The common wisdom is that the globe was split, and is still divided, into two choice of law regimes with respect to the internal affairs of companies, mainly conflicts between shareholders and directors and conflicts between minority and majority shareholders. The first is called the place of registration regime and the second the place of control, or real seat regime.[60] Britain and its colonies and former colonies applied the place of registration regime. Much of Continental Europe and its colonies and satellites chose the real seat regime. This section will examine whether this simplistic common wisdom is accurate. It will next explore when, how and why did the world's legal systems split into different regimes. It will evaluate who benefited and who lost from this split. As an aftermath, it will also hint at how this formative period created the current "code of capital" that facilitates jurisdictional competition, the free flow of transnational corporations, their capital and business activities.

British company law applies to the internal affairs of companies that are incorporated based on it. This is plainly what the wording of the Companies Act 1862 is declaring. Several court rulings clarify that the choice of law based on place of incorporation is not overshadowed by the fact that a company has its center of business activity outside Britain. In *Buenos Ayres Railway Company* v. *The Northern Railway Company of Buenos Ayres,* it was held that the two companies registered under the British Company Acts are considered British corporations although their sole business activity was the construction and operation of railway lines in Argentina.[61] Based on these characteristics the two companies can be clasiffied as Free Standing Companies. As we'll see in Chapter 8, practically all railways constructed and financed by British entrepreneurs in Latin America were incorporated in London. This decision confirmed that companies registerred in Britain were subjected to British law in their internal affairs. In *Attorney General* v. *the Jewish Colonization Association*,[62] it was held that the

[60] Marc-Philippe Weller et al., "Companies," (The Lypiatts, 15 Lansdown Road, Cheltenham, Glos GL50 2JA UK: Edward Elgar Publishing Limited, 2017).
[61] Buenos Ayres & Ensenada Port Ry. Co v. Northern Ry. Co of Buenos Ayres, [1877] 2 Q.B.D. 210.
[62] Att'y Gen. v. Jewish Colonization Ass'n, [1901] 1 Q.B.D 123.

personal law of the company does not depend upon the place of residence of its founder, Baron Maurice Hirsch, who was born in Bavaria and lived mainly in Paris, the place at which its center of administrative business was situated, its place of philanthropic activity, which was to facilitate the mass emigration of Jews from Russia and Eastern Europe and settling them in agricultural settlements in North America, South America (mainly Argentina) and Ottoman Palestine. The choice of law for its internal affairs was only based on the place at which it was registered, England.[63] In *Queen* v. *Arnaud and Powell*, it was held that the nationality of the members of a corporation cannot affect its national characteristics or personal law.[64] This series of cases established that the doctrine of place of incorporation was not shattered by any other characterization of the company, its shareholders, or management of regions of activity but only by place of registration. This series of cases not only adopts the place of incorporation text but also rejects a contractual or partnership conception of the nature of the juristic personality of a corporation. Companies from all over the Empire and the world could register in London and, by this, secure the application of British company law to their internal affairs, and usually also secure access to British courts to litigate disputes involving shareholders and directors. The establishment of place of incorporation as the exclusive test for choice of law may have started with the rule for choice of law with respect to contracts.[65] The companies' Memorandum and Articles were seen as British contracts subject to British law. Over time the rule for companies was separated from the rule for contract and became independent from the former.

English company law did not apply in the colonies, except for a handful of specific issues that were expressly applied by Parliament to the Empire as a whole.[66] Because colonial company legislation was in most cases based on one version or another of British legislation, it also incorporated the place of incorporation test to the choice of law in these jurisdictions. The shared imperial system, the legitimacy of every legislature within the Empire, and reciprocity between colonies ascertained that each jurisdiction within the British Empire would recognize foreign companies from within the Empire. The move from Scottish and Irish companies to colonial companies is just a matter of degree. The adoption of place of incorporation choice of law throughout the Empire and the recognition of foreign companies from within the Empire enabled incorporators to select which law to apply in their internal affairs. This generated a

[63] See the judgement by Smith M.R, 129-130 and the judgement by Stirling L.J. 144-145. The law that applied to the will of Baron Hirsch was also English and was mentioned as another factor.
[64] R. v. Arnaud, [1846] 9 Q.B. 1485, 1489.
[65] See: Pickering v. Stephenson, [1872] 14 L.R. Eq. 322.
[66] The Westminster Parliament, as the supreme sovereign in the United Kingdom and its Empire, could constitutionally legislate for the Empire. It rarely did this. Legislation for the Empire was done by colonial governments and legislatures. Fundamental legislation for the colonies was done from London using Queen/King Orders in Council, which were in fact drafted by the Colonial Office. On a few rare occasions parliament legislated for the Empire, for example, in copyright law and nearer to our issue, in bankruptcy.

forum shopping. Notice that this is not a jurisdictional competition in the American sense because colonies could not alter their company law freely and independently in order to attract incorporators.[67] Incorporators made the forum selection by registering either in London or in one of the colonies as they saw fit. Note that colonies could not compete with each other or with London, as say Nevadacan compete with Delaware.[68] As we shall see in the next part of this book, railway and telegraph companies selected incorporation in London even though their activities were in colonies, overseas or underwater. Trading, shipping, and manufacturing groups often incorporated subsidiary companies in different colonies while registering the parent company in London. Tea plantations and other agency-managed companies in India split between "rupee companies" registered in India and "sterling companies" that were registered in London, a prototypical forum shopping. The private international law rules that facilitated forum shopping were not offering a hypothetical option but rather an option that was resorted to extensively.

From the mid of nineteenth century, several key jurisdictions in continental Europe departed from the place/state of incorporation doctrine and began to follow the real seat doctrine in order to prevent local corporations from taking advantage of more liberal laws in Britain.[69] The real seat doctrine allows states to apply their laws, and their jurisdiction, to companies that were incorporated elsewhere. The real seat is not as clear test as the place of incorporation, because different systems can adopt different versions of the test, say main office, meeting place of board of directors, major place of business or profit generation, or even the domicile of most shareholders. The facts to be applied to the legal test can also be wider and more ambiguous. The real seat is thus, for better or worse, a more open and flexible test that can vary between jurisdictions and periods.

In Britain, in *Butt* v. *Monteaux* (1854), it was argued that a French company must be treated as an English company because it was in fact managed in London and its connection with France was only nominal. However, this argument was rejected, and one can see this as an early

[67]Weller et al., "Companies."; Edward Q. Keasbey, "New Jersey and the Great Corporations," *Harvard Law Review* (1899).; Henry N. Butler, "Nineteenth-Century Jurisdictional Competition in the Granting of Corporate Privileges," *Journal of Legal Studies* 14, no. 1 (1985).; Charles M. Yablon, "The Historical Race Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880-1910," *Journal of Corporation Law* 32, no. 2 (2007).
[68] The causes and timing of the application and the place of incorporation on internal affairs in the US are debated. One explanation is that the constitution necessitates it, with variations as to which clause and which court cases stated this and when. The dominant view is that the adoption of the doctrine in the US took place after the Civil War. Other explanations, beyond constitutional requirement, were that states imitated each other for reciprocity, and that it was adopted by the several states independently of each other because it is more efficient. I cannot further elaborate on the history of internal affairs doctrine in the US in this context. For more see: Frederick Tung, "Before Competition: Origins of the Internal Affairs Doctrine," *Journal of Corporation Law* 32, no. 06-04 (2006).
[69] Christian Kersting, "Corporate Choice of Law-a Comparison of the United States and European Systems and a Proposal for a European Directive," *Brooklyn Journal of International Law* 28 (2002): 50.

rejection of the real seat test in Britain.[70] The Belgian legislator was the first to adopt expressly the real seat rule in its first general incorporation act of 1873.[71] The courts of France used this doctrine to determine a company's nationality since the end of the nineteenth century, and the German courts since the early twentieth century.[72]

It became a common phenomenon among French firms seeking to incorporate but to avoid the demands of French law to incorporate in London.[73] French entrepreneurs were apparently attracted by the *laissez-faire* nature of English company law in the period 1862-1900 that almost never intervened with the contractual freedom of incorporators to draft their Articles with respect to internal affairs as they wished. For example, in France there was a requirement for an appraisal of property contributed for the company in exchange for shares and in England there was no such a requirement.[74] In England there was no minimum capital requirements and minimum disclosure requirements.[75] From the English perspective, they were subjected to English law with respect to their internal affairs because this is the law of their place of registration. From the French perspective, they were subjected to French law because this is the law of their real seat. How could the French perspective prevail? A French court refused to recognize a company incorporated by a group of French entrepreneurs in England as a company in France. In other words, it refused to recognize pseudo-foreign companies. Companies that are not really foreign but only turned abroad to bypass French company law. I will not follow this path of avoiding local law and the counter responses that resulted from the intersection of place of incorporation and real seat choice of law regimes because it diverts from the confines of the current book. I will only mention that eventually, this historical path led to the European Court of Justice decisions in the famous cases of *Centros* (1999) and *Inspire Art* (2003), which prevented discrimination against foreign or pseudo-foreign companies and opened up forum shopping and competition over incorporation between jurisdictions in the EU, in which Britain

[70] Butt v. Monteaux, [1854] 69 E.R. 345, 395-96. Sixty years later Young reiterated the British rejection of real seat doctrine: But we should look in vain for any authority for the proposition that a company registered under the Company Acts ceases to be controlled by those Acts when it removes its center of administrative business out of the United Kingdom; or for the proposition that a company registered outside the United Kingdom becomes subject to those Acts when it establishes its centre of administrative business here. On the contrary, there are, as has been seen, express decisions to the effect that the Company Acts are not under any circumstances applicable to companies registered abroad.

Young, *Foreign Companies and Other Corporations*, 205.

[71] The adoption was done through the Belgian Companies Act, Le code de commerce Belge, 1873, Art.129.

[72] António Frada de Sousa, *A Company's Cross-border Transfer of Seat in the EU after Cartesio* (New York: NYU School of Law, 2009).

[73] Latty, "Pseudo-Foreign Corporations," 166.

[74] Latty, "Pseudo-Foreign Corporations," 166.

[75] Guinnane, Harris, and Lamoreaux, "Contractual Freedom and Corporate Governance in Britain in the Late Nineteenth and Early Twentieth Centuries."

again took the lead in the early twenty-first century (until Brexit) like it did in the late nineteenth century.[76]

The last few decades of the nineteenth century are the formative period in which, over several decades, the rules of choice of law in company internal affairs separated from the rules of choice of law in contracts. Two regimes were crystalized, initially place of incorporation and then place of the real seat. Although the regimes were roughly aligned with the common law–civil law traditions, they had nothing to do with the legal origins and fundamental characteristics of these traditions. They responded to contemporary circumstances and needs. Place of incorporation seems to serve well the needs of the economic and political superpower of the era – Britain. The real seat regime looks like a counter response of those jurisdictions who wanted to keep their corporations at home and make it harder for them to incorporate in London unless these companies wanted to migrate to London in a full fledge.

CHOICE OF LAW AND JURISDICTION: WINDING UP AND DISSOLUTION OF COMPANIES

As incorporation became available throughout the empire, and as companies that incorporated in the colonies had branches, offices, shareholders, and assets in Britain, and the more market fluctuations and mismanagement led to the failure of transnational companies, a new set of issues surfaced that, in due time, would be labeled cross-border corporate insolvency. The initial question was whether English courts had jurisdiction in cases in which English creditors of companies formed in the colonies initiated claims against these companies and their assets in England.

Two early cases involved companies established in India. The case of *Union Bank of Calcutta* was decided as early as 1850.[77] Involved a joint stock bank that was established as an unincorporated company in India. It had business in England as well. When it became insolvent one of its English shareholders petitioned to an English court based on the English Companies Winding-up Act. The Vice-Chancellor dismissed the petition on the ground that it "is against the expediency of interfering in this case" and that "much more mischief would arise from acting on this petition than from declining now to interfere".

The next case was early in the era of general incorporation in the colonies. The case of *In re Commercial Bank Of India* (1868) created more confusion than it resolved. It dealt with a company that was formed in Bombay in 1845 by a deed of settlement. It was incorporated in

[76] Centros Ltd v. Erhvervs- Og Selskabsstyrelsen, [1999] E.C.R I-1459 Case C-212/97; Kamer Van Koophandel En Fabrieken Voor Amsterdam v. Inspire Art Ltd, [2003] E.C.R I-10155 Case C-167/01.
[77] In re Union Bank of Calcutta, (1850) 64 E.R. 467 (V.C.).

India in 1860 based on the Companies Act 1857. In 1863, a new company was established by a charter, *Commercial Bank Corporation of India and the East*, to take over the business of the old bank and it eventually became insolvent. An English deposit creditor of the old bank petitioned for its winding-up. Lord Romilly, the Master of the Rolls, held in 1868 that he had jurisdiction, justifying his decision by stating "if the company is not wound up here, these persons will not be able to get their money."[78] This decision is perplexing. Romilly might have read section 199 of Companies Act 1862 in a highly literal manner, authorizing the court to wind-up not only companies registered based on the Companies Act but also unregistered ones. Alternatively, he might have based his decision on general considerations of efficiency and fairness. Either way, the fact that the company was registered in India based on the Indian Companies Act was ignored. He treated the *Commercial Bank of England* as though it was pre-general incorporation English bank.

The next two interesting cases come not from India but from Australia and New Zealand. *Matheson Brothers Ltd* was registered in New Zealand under the Companies Act 1862. The company had a branch office in London, accumulated liabilities, and a few assets in England. It became insolvent, and its English creditors petitioned to liquidate its assets in England. Judge Kay of the Chancey Division expressed his reservation about the holding in the case of *Commercial Bank of India*, which viewed a company registered in a colony as unregistered but nevertheless felt bound to follow that precedent.[79] He decided to order the minimum, appoint a provisional liquidator that would secure the English assets until liquidation proceedings in New Zealand reached a stage in which assets in England would be distributed on equal footing (*pari passu)* to creditors with the other assets of the company.

Petitions were made in England by a creditor and by a shareholder of the *Commercial Bank of Australia* that was incorporated in 1878 by a private Act of the South Australian Parliament. In 1886 the bank suspended payment. At the time he had numerous creditors and substantial assets also in England. In this case, unlike the previous, a winding up order was already issued in Australia. Judge North in the Chancery Division issued in 1886 a winding-up order in London.[80] He held that the English creditors should not be sent to join proceedings in Australia for assets held in England. However, the winding-up proceedings in London are ancillary to the ones in Australia. North declared that he would take care that no conflicts would evolve between the two proceedings and that he would not disregard the interests of the Australian creditors.

[78] In re Commercial Bank of India, [1868] L.R. 6 Eq. 517.
[79] In re Matheson Brothers, Limited, [1884] 27 Ch. 225.
[80] In re Commercial Bank Of South Australia, [1886] 33 Ch. 174.

While he could not dissolve the juridical personality of a company created in Australia, he could wind up its assets in England.

The field of choice of jurisdiction or forum in company winding up began as a mess, in which the boundaries between unregistered and registered, colonial and English companies were confused. Gradually, over three and a half decades, basic distinctions were created. Unregistered companies became a past relic, colonial companies became very common, and a clear distinction between winding-up of assets and dissolving of a juridical personality were drawn. Many questions were not yet settled. Which law would apply to the company, its liability regime, its contracts, and its assets? Would access to English courts provide English creditors with a priority? Could colonial courts do the same and hold that they have jurisdiction over the winding-up of English companies to benefit colonial creditors?

Corporate insolvency cases are located at the crossroads between two subfields of private international law, contract and company law. On the one hand, the contract between the indebted company and its creditor is governed by the choice of law rules of private international law of contracts. This law sets a test based on the place in which the parties contracted, the place in which the contract is executed, or the place with which it has the most connections. I will not get into the differences between the tests and the question of whether the test is objective or subjective. I will also not question to what extent the parties can choose their own law in the contract. In company law, as we have seen previously in this Chapter, the rules for choice of law as developed in our period are place of incorporation or place of domicile (or management). In the daily lives of companies, each of the subfields is independent of the other in determining which law applies to company internal affairs and to contracts to which the company is a party. The two fields collide in insolvency proceedings and, ultimately, in the winding-up of companies. The collision materializes when the law of the original contract with the creditor and the law of dissolving the company is different.

The Gibbs Rule: Cross-Border Insolvency and Contractual Jurisdiction

Antony Gibbs & Sons v. *La Societe Industrielle et Commerciale des Metaux* (1890) [Gibbs] took the settling of the law a step beyond *Commercial Bank of Australia* case. It is possibly the most influential and frequently cited case of all cross-border bankruptcy cases to date.[81] The case of Antony Gibbs established the foundational principle that foreign insolvency proceedings do not automatically bar creditors from pursuing claims in English courts under

[81] Antony Gibbs & Sons v. La Société Industrielle Et Commerciale Des Métaux, [1890] 4 Q.B.D 399.

English law. *La Societe Industrielle et Commerciale des Metaux* was a trading company that carried out business in Paris and was established according to the law of France. *Antony Gibbs & Sons* was a British international trading partnership group, involved mainly with trade, shipping and finance with Latin America and Australia, which we will discuss in greater detail in Chapter 6. The French company owed a copper trade debt to the English partnership and before the English firm sued, the French company went into liquidation in France, by order of judicial liquidation issued by the Tribunal of Commerce of the Seine. Gibbs sued for the debt irrespectively of the French liquidation. For Gibbs, this was a small trade debt of a minor customer, in a side market, but they had no intention to give it up. The French liquidator of the company argued that the company does not exist as a legal person, that with the initiation of the liquidation proceedings a stay was placed on all claims against the company, that the liquidation is subject only to French law, and that hence the plaintiff English firm was part to the liquidation it is thus bound by it. Gibbs argued that the trade contract was subjected to English law, that French liquidation has no effect in English territory and that it was entitled to collect the money owed to it based on French company assets that were located in England.

Asher, the Master of the Roll, held that Gibbs was not bound by French law, the case must be determined by English law, and the claim against the French company in liquidation was not stopped and could proceed. Lindley, here in his capacity as a Justice, held that the contract was English, in the sense that it was subject to English contract law and to the jurisdiction of English courts. The domicile of any of the parties did not change this. English courts were not asked to place a stay on this suit and if asked had no reason to grant it. The property which Gibbs wished to collect on was still owned by the company, and no evidence was presented that in French law it was owned by the liquidator, creditors or third parties. Thus, Gibbs can continue its suit in England and collect on assets in England. Lord Justice Lopes, in a short opinion, concurred, saying that a bankruptcy debt discharge in France (if there is such at all) does not apply to English contracts. He relied on Story and two earlier English cases to hold that the domicile of the defendant is irrelevant, only the law that applies to the contract is. Asher relied on the notable private international law jurist John Westlake (1828-1913), and Lindley cited Westlake and Foote as holding that the domicile of the French company was immaterial. The Gibbs case, the three opinions taken together, is presented by Young as an exception to the rule that applies to the company's personal law in internal affairs. Insolvency is not an internal affair of shareholders, directors, and officers.[82] It involves third-party creditors, the company was not

[82] Young, *Foreign Companies and Other Corporations*, 190-91.

released from contractual obligations that were supposed to be performed in England under English law. This is the essence of the famous Gibbs Rule.[83]

The case of *New Zealand Loan and Mercantile Agency Company, Limited* v. *Morrison* (1897) was a variation on Gibbs.[84] Here too, an insolvent company was incorporated in one jurisdiction while its creditor contacted with it in another jurisdiction. But here the company was British and not French and the creditor colonial Australian and not British. The *New Zealand Loan and Mercantile Agency Company, Limited* was incorporated in London in 1865. It was one of numerous colonial companies, including The *Australian Agricultural Company* and *Dalgety & Company Limited*, that we'll encounter in Chapter 11, which were formed in London aiming to channel capital that was accumulated there for financing trade, agriculture, and settlement in Australia and New Zealand. The *New Zealand Loan and Mercantile Agency Company* was one of the key players in the financial crisis of 1893-5. Its losses during the crisis forced it into a financial reorganization. On July 12, 1893 winding-up proceedings were initiated by creditors of the company in a Victoria court. But these were not pursued. On the same date proceedings for winding-up the company began at the initiation of the company in the High Court of Justice in England. The proceedings in London led to a financial reorganization of the company. The original company was wounded up, a new one was formed, and the majority of creditors agreed upon a cram-down (write-off) of the some of their debts. The proceedings were based on the English Joint Stock Companies Arrangement Act 1870, which was an add-on to the Companies Act 1862 and authorized the court to compel the minority of the creditors to reduce the debt owed to them by the company (the cram-down). The court approved the reorganization in 1894. This was not the end of the story, as the company became more involved in raising capital in Australia over time, and had accumulated Australian creditors as well. Christina Morrison, one of these creditors who deposited money with the company, was unsatisfied with the debt reduction the London creditors and court forced upon her. She sued the company in Victoria for the unrepaid part of her deposit of £3,700 with the company. The case went through trial and appeal courts in Australia and reached the Privy Council.

[83] The rule is still viewed as very relevant today. For example, three leading scholars who put forward a new approach to the field of cross-border bankruptcy mention it no less than 23 times in a recent programmatic essay: Anthony Casey, Aurelio Gurrea-Martínez, and Robert K. Rasmussen, "A Commitment Rule for Insolvency Forum," *European Corporate Governance Institute-Law Working Paper* (2024).

[84] New Zealand Loan & Mercantile Agency v. Christina Morrison, [1898] A.C. 349 (P.C.); Morrison v. The New Zealand Loan & Mercantile Agent Co., (1895) 21 V.L.R. 22 (Vict. Sup. Ct.); Morrison v. The New Zealand Loan & Mercantile Agency Co., (1896) 22 V.L.R. 209 (Vict. Full Ct.).

The first question the court had to deal with was whether the Joint Stock Companies Arrangement Act 1870, based on which the reorganization and cram-down was forced upon objecting creditors, applied in the Australian colonies. If it applied than Morrison was barred from suing in Victoria. Lord Davey, for the Privy Council, ruled that the Act was not an Imperial act; it applied only in Britain and not in the colonies. Davey found no explicit or implicit mention in the wording of the Act that it applied to the colonies. Once the Act was put aside as inapplicable, Davey ruled that as Victoria was analogous to a foreign country. Next, he came to the conclusion that the rule set up in Gibbs applies to his case as well. The analogy was that just as the French dissolution decision was not a defense that barred an English creditor from suing in England, hence an English court's creditor arrangement decision was not a good defense against a claim made by Australian creditor in Victoria. Finally, Davey rejects the argument that by dealing with a company, a creditor consents to be subjected to the law of the domicile of that company. As Morrison was ultimately decided not by a Victoria court but rather by the Privy Council in London, its effective (though not formal) ruling applied to all the British colonies worldwide.

Within seven years, the cross-border bankruptcy regime in Britain and its Empire was set in place. It was shaped by jurists and not by the business-oriented processionals of the City. The regime inclined towards what it termed today "territorialism" preferring it over "universalism". Universalism's approach is that a single court in a single jurisdiction should be in charge of all creditors' claims and corporate assets wherever they are. Gibbs and Morrison rejected universalism by allowing creditors in England in the first case and in Australia in the second to conduct suits and collect assets in their home jurisdiction. Universalism would have held a single dissolution process, in which all creditors universally had to make their claims. Wouldn't the world's Empire prefer universalism that would turn its courts to the global courts of corporate insolvency? Gibbs ruling seemed to favor British creditors by providing them with a double deep. They could try their luck with the French (or any other foreign) dissolution proceedings with other creditors and company assets. If these would not yield good enough dividends, they could claim in British court to collect out of the company's assets in Britain. The Financial Times reported about Gibbs favorably which might be an indication that it served well interests in the City of London.[85] Morrison is more puzzling. It disintegrated corporate dissolution proceedings in the Empire. The fact that a company was wounded up in Britain or in any one colony did not end its life throughout the Empire. Claims against the dissolved company could still go on. Assets in the colonies could not be used by the liquidator in the

[85] Queen's Bench Division, "Action Against the Societe Des Metaux," *Financial Times*, February 18, 1890.

mother country to satisfy all creditors irrespective of their domicile and the law that applied to their contracts. This did not create centralization and harmonization and did not serve British creditors well. It is not clear that Lord Davey considered all these effects when applying Gibbs to the Empire in Morrison. Dicey, too, thought on the issue from a narrow legal perspective. He was preoccupied with questions of jurisdiction, pushing forward his sovereign territoriality view of conflicts of law. He endorsed Lindley as sharing his views.[86] What was important for these Justices and Jurists was, as I have shown here, jurisdiction and not a well-functioning credit market or efficient dissolution of companies.

Upon registration, attributes are being attached to a company by its incorporators in the Memorandum and Articles of Association. Most of these attributes relate to internal affairs, the dividend and voting attributes of its shares, the structure election and authority of the Board, the way the General Meetings of the shareholders are being summoned and run, and more. One attribute stands out, the level of limitation of the personal liability of shareholders. It is exceptional because it deals with relationships with outsiders to the company and future creditors. This attribute becomes relevant upon winding-up when corporate assets are not sufficient for paying the corporate debts in full. This is why we discuss the choice of law with respect to the liability regime in this section and not in the previous one. Should the law of the place in which the company was formed, or the law of the place in which the debt and the creditors are, determine the liability of shareholders v. creditors? Over the second half of the nineteenth century and the early twentieth century, most jurisdictions globally converged to the regime of full limitation of liability of shareholders.[87] California was an outlier.[88]

Limited Liability Across Borders: The Risdon Case

The principles established in cross-border company law gave rise to an intriguing case, *Risdon Iron and Locomotive Works* v. *Furness* (1906), in which English courts established that the limited liability of shareholders in a British company is preserved even when the company operates in California, where local law imposed personal liability on shareholders. *Copper King, Limited* was registered with limited liability under the British Company Act. Its main purpose was to acquire and operate copper and other mines in the United States and Australia. Its main business was in California. *Risdon Iron and Locomotive Works*, a California company, supplied *Copper King* with mining machinery in California. Shortly thereafter, *Copper King* became insolvent. It was sued by various creditors in California. *Risdon* decided to follow one

[86] Dicey and Moore, *A Digest of the Law of England with Reference to the Conflict of Laws*, 306-08, 44.
[87]
[88] Mark I. Weinstein, "Limited Liability in California 1928-31: It's the Lawyers," *American Law and Economics Review* 7, no. 2 (2005).

of *Copper King's* major shareholders, a man named Furness (who owned nearly 20% of its shares), and collect from him personally in Britain part of the company's debt. This is an insightful case because, at the time, England had general limited liability while California did not have it until 1931. *Risdon* argued that according to Californian law, every shareholder of a company trading in California, whether incorporated in California or elsewhere, is personally liable for his proportion of the company's debts (based on his stake). California law also stated: "No corporation organized outside the limits of this State shall be allowed to transact business within this State on more favorable terms than are prescribed by law to similar corporations organized under the laws of this State."

It was held by the King's Bench (Kennedy) that no agent of *Copper King* (that is no director, manager or employee) had the authority to bind shareholders personally for the company's contracts and debts. The authority of the company's shareholders was determined at incorporation in Britain by its constitution. In other words, the Memorandum that set the limitation of liability of shareholders overrode any contract made in California or the laws of California. If agents pretended to impose personal liability on Furness and the other shareholders, this was done *ultra vires* and was void.[89] Upon appeal by *Risdon*, the Court of Appeal (Collins, Romer, and Mathew) reiterated the King's Bench decision. Thus, it appears that the limitation of liability is part of the constitution of an English company; it is subject to its personal law, the law of its place of incorporation – England.[90] From the perspective of English law, shareholders' limitation of liability travels with a company wherever it goes, even to jurisdictions such as California, in which shareholders of a domestic company could not be fully limited. Creditors of an insolvent and even dissolved company cannot sue its shareholders personally in Britain.

This case demonstrates the connection between choice of law and choice of forum in company law. Would California courts follow *Risdon?* The question is not what would have happened if the *Copper King Company* had been incorporated in California. The question is: had *Risdon Iron and Locomotive Works* sued in California rather than in Britain, was the outcome likely to be different? California courts were likely to allow California creditors of the company to collect personally from shareholders a pro-rata of their shareholding on the rationale that California contract law overrides Britain's company law in such circumstances. We did not encounter an analogous case, so this is a conjecture. However, such a scenario

[89] Risdon Iron & Locomotive Works v. Furness, [1906] A.C. 49, 56-60; Risdon Iron & Locomotive Works v. Furness, [1906] A.C. 49, 56-60; Risdon Iron & Locomotive Works v. Furness, [1906] A.C. 49, 56-60; Risdon Iron & Locomotive Works v. Furness, [1906] A.C. 49, 56-60. Risdon Iron & Locomotive Works v. Furness, [1905] 1 K.B. 304, 310-15.Risdon Iron & Locomotive Works V Furness, [1906] 1 A.C. 49, 56-60.
[90] Young, *Foreign Companies and Other Corporations*, 186.

could give rise to forum shopping, as creditors may strategically choose the most favorable jurisdiction in which to sue. Given that different jurisdictions apply different choice-of-law rules, a creditor, in this case, would likely prefer California courts over British courts if the former were more likely to impose shareholder personal liability, whereas the latter may apply a rule that shields the shareholders. However, a British court could refuse to enforce a foreign judgment of a California court aimed at the assets in Britain of a British shareholder in a British company. Forum shopping is a matter for sophisticated creditors and lawyers.

The *Risdon* decision attracted much attention from British jurists, for example, Young, who opened the Preface to his book, by attributing his attraction to the topic and motivation to writing his book on foreign companies to *Risdon*.[91] It also attracted attention across the ocean from no less a legal luminary than Wesley Newcomb Hohfeld (1879-1918). Within a span of one year, the thirty-year-old Hohfeld published no less than four articles on the subject, three of which bearing the same title, "Individual Liability of Stockholders and the Conflict of Laws".[92] I suspect that Hohfeld was not particularly interested in companies, was only somewhat interested in conflicts of law, but was rather attracted to *Risdon* and the topic because he was particularly interested in complex legal issues that challenged his exceptional analytical and jurisprudential skills.

A full survey of Hohfeld's analysis of the issues raised by *Risdon* is beyond the scope of this chapter, but it serves as a keyhole through which various other problems in the intersection of private international law could be observed. His overall conclusion is that shareholders are not always protected by limitation of liability in the company's place of incorporation. Liability depends on the place of residence of the shareholder, the creditor, the law applicable to the contract, and the forum that deliberates the case. Hohfeld's analysis was based on a "legal fiction" theory of corporate juristic personality.[93] Hohfeld's analysis does not demonstrate intimate familiarity with contemporary corporate theory discourse because he reduces the company to an aggregate of individuals, conflates the grant theory and contractual theory of corporate personality into a fictitious personality theory, and ignores the real or natural entity theory that rose to an influential position in the early twentieth century.[94] By reducing an

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[91] Young, *Foreign Companies and Other Corporations*.
[92]Wesley Newcomb Hohfeld, "Nature of Stockholders' Individual Liability for Corporation Debts," *Columbia Law Review* 9 (1909).; Dicey and Moore, *A Digest of the Law of England with Reference to the Conflict of Laws*, 306-08, 44; Wesley Newcomb Hohfeld, "The Individual Liability of Stockholders and the Conflict of Laws," *Columbia Law Review* 9, no. 6 (1909); Wesley Newcomb Hohfeld, "The Individual Liability of Stockholders and the Conflict of Laws," *Columbia Law Review* 10, no. 4 (1910).
[93] Inspired by Chief Justice Taney's decision in Bank of Augusta v. Earle, 38 U.S. 519 (1839).which states that a corporation is "an artificial person created by the law".
[94] Harris, "The Transplantation of the Legal Discourse on Corporate Personality Theories: From German Codification to British Political Pluralism and American Big Business," 1421.

incorporated company to rights and liabilities-bearing individuals, Hohfeld bypasses the problem. Nevertheless, it is quite amazing and not well known that in a very short and abrupt academic career, in which he published less than a dozen articles, four were devoted to the *Risdon* case and the questions it raised.[95] California's convergence to the full limited liability regime made the subject less practical in the United States. Yet, during the heyday of globalization, it was relevant.

BEYOND COMPANY LAW: ANTITRUST, ENEMY COMPANIES AND TAXATION

We will now examine how the globalization of company law and the expansion of transnational companies were treated in the choice of applicable law in fields other than company law. Specifically, we will examine antitrust, trading with enemy companies, and the taxation of companies that operate in more than one jurisdiction. We will look into the question of whether the way in which companies were conceptualized in private international law and in these three fields was consistent with each other. A spoiler, it was not. The next question is who was served by the inconsistency and whether the rules that have developed in these fields facilitated companies' ability to escape the control of the state, any state, by selectively going abroad in some aspects of their activities but not in others. The most famous example could be offshore tax havens. This section aims to push the history of these to the pre-WWI period and go beyond the history of these to additional fields relevant to transnational companies.

Antitrust

British company law was used to construct cartels and achieve monopolistic advantages on the global markets. I will use two high-impact examples for this use, in the oil and tobacco sectors, in this order. *Royal Dutch Shell* was a combination created in 1907 to compete with the American oil giant *Standard Oil*. *Royal Dutch Petroleum Company* was incorporated in the Netherlands in 1890. The *"Shell" Transport and Trading Company* was incorporated in England in 1897. The two companies decided to take the monopolistic advantages of a merger without fully merging. The two companies created two subsidiaries, one in the Netherlands for production and refining and one in Britain for transportation and storage. *Royal Dutch* held 60% of the two subsidiaries, and Shell held 40% of their shares. This unique corporate structure

[95] His academic career lasted just 14 years, between his graduation from Harvard in 1904 and his untimely death during the Spanish Flu Epidemic at the age of 39 in 1918. It is puzzling that most scholars ignored Hohfeld's fascination with Risdon and conflict of laws. See, for example, *Wesley Hohfeld a Century Later: Edited Work, Select Personal Papers, and Original Commentaries*, ed. Shyamkrishna Balganesh, Ted M. Sichelman, and Henry E. Smith (Cambridge: Cambridge University Press, 2022). This is puzzling because shortly after writing these articles he turned his attention to his seminal *Fundamental Legal Conceptions as Applied in Judicial Reasoning* and to the famous analysis of jural relationships as embodied in his renowned table of four pairs of correlatives.

allowed them to maintain national identities but at the same time have a stable oil production and supply cartel that benefited from monopolistic rent. *Royal Dutch Shell* benefited from the fact that it was not subjected to an effective antitrust legislation. Its main American competitor for global hegemony *Standard Oil* was forced to split in 1911 by the United States Supreme Court based on the Sherman Antitrust Act (1890) into thirty-four separate companies.

British-American Tobacco Company Ltd. was formed in 1902 by two parent companies, the American-registered *American Tobacco Company* (founded and led by James Buchanan Duke) and the British-registered *Imperial Tobacco Company*. Each of the two held shares based on its size, about 2/3 *American Tobbaco Company* and 1/3 *Imperial Tobbaco Company*. *British-American Tobacco* was incorporated in Britain to bypass American antitrust regulation. Nine years later, in 1911, on the same day that it dissolved *Standard Oil*, the United States Supreme Court ruled that *American Tobacco Company* violated the Sherman Antitrust Act and ordered its dissolution.[96] The United States Supreme Court could not apply the American antitrust regulation to *British American Tobacco* because it was a British company and this company remained intact. The result of the court ruling was that the American stock was split into small segments and *Imperial Tobacco* became the largest, though not the majority, stockholder of *British American Tobacco*.

These two examples show that by the early twentieth century, one could select to register a company in Britain and, by this, on the one hand, operate globally within and beyond the British Empire and, on the other hand, avoid harsh American antitrust legislation. In private international law terms it meant that the place of registration of a company was taken at face value as the basis for applying to it antitrust law, in this case, the absent British antitrust law. The fact that most shareholders were not British but rather American or Dutch was considered irrelevant for choice of law purposes. Similarly, it was considered irrelevant that most of the business activities of both companies were outside Britain. The bottom line was monopolies in the oil and tobacco market operating under the hospitality of British company law.

Enemy Companies

Continental Tyre and Rubber Company (Great Britain) Limited was incorporated in England in 1905, and its registered office was in London. It was a subsidiary of *Continental*, a German tire manufacturer. The company's purpose was to sell in England tires made in Germany by *Continental*. All the directors of *Continental (Great Britain)* were subjects of the German Empire and after fleeing Britain following the outbreak of the Great War, they were German

[96] *United States* v. *American Tobacco Co.*, 221 U.S. 106 (1911).

residents as well. The only British office holder in *Continental* was its Secretary, Mr. Walter (who held one of its twenty-five thousand shares). Walter, of German origin, was naturalized as a British subject in 1910. *Daimler Company Limited* was a British company, a subsidiary of The *Birmingham Small Arms Company*, that bought the right to the use of the *Daimler* name in Britain.

After WWI started *Continental Tyre and Rubber Co. (Great Britain) Ltd.* commenced an action for payment of a trade debt of *Daimler Company Limited*. *Daimler Co. Ltd.* alleged that *Continental Tyre and Rubber Co. Ltd.* was an alien enemy company and that the debt's payment would constitute trading with the enemy in contravention of the Trading with the Enemy Act, 1914. In other words, *Daimler* wanted to take advantage of the War and avoid paying its debt to *Continental*.

The prolonged litigation began on October 30, 1914, not long after the outbreak of the War and the legislation of the first Trading with the Enemy Act. The Master, Macdonell, decided that the contract between *Continental* and *Daimler* was valid and ruled in favor of *Continental*. *Daimler* appealed. In the Court of Appeal, four Justices held that *Continental Tyre and Rubber Co. Ltd.* remained an English company notwithstanding the fact that all its directors and shareholders resided in an alien enemy country, Germany, on the outbreak of the War. Based on *Salomon* v. *Salomon & Co.* which was taken to reiterate that a company formed and registered under the Companies Acts has a real existence with rights and liabilities as a separate legal entity from its shareholders. The character of the company must be classified according to its place of incorporation. Once a corporation has been created in accordance with the requirements of the law it is an English company notwithstanding that all its shareholders may be aliens. Enemy identity was attaches only to incorporated bodies that were incorporated in an enemy country. A company is not a mere name or mask or cloak or device to conceal the identity of persons. It is not suggested that the company was formed for any dishonest or fraudulent purpose. Considering payment to a company with a majority of enemy shareholders as payment to an enemy company would harm the other shareholders.

Lord Justice Buckley dissented, holding that the character of the company must be classified according to its corporators' identity. In our case the analysis should be different from that in *Salomon* v. *Salomon & Co.*[97] because it concerns public policy considerations. The artificial legal entity created by incorporation under the Companies Acts, apart from its corporators, cannot have neither thoughts, wishes, nor intentions, for it has no mind other than the minds of

[97] Salomon v. Salomon & Co Ltd, [1897] A.C. 22 (H.L.).

the corporators. In other words, Buckley rejected the real entity theory of corporate personhood and endorsed the aggregate, partnership like, theory of legal personality. *Continental Tyre and Rubber Co. Ltd.* is German in fact although British in form, because all its corporators who can have thoughts, wishes, or intentions are Germans. There is no sense in claiming that enemy shareholders can sue during the war in the King's Court based on the claim that it is the British corporation that sues, not them.

The House of Lords unanimously reversed the order of the Court of Appeal, saying the secretary was not authorized to commence the action, and it was dismissed. Hulsbury, joined by most Lords, agreed with Buckley that for the purpose of trading with the enemy a company's nature should be classified according to its corporators and where it is operating. A company registered in the United Kingdom but having all of its shareholders in Germany and carrying on business in an enemy country is to be regarded as an enemy company. Two of the Lords, while agreeing with the outcome held that there is no necessary correlation between the nationality of a company and the nationality of its majority shareholders. A British company's right to sue or its liability to be sued does not go away because of the enemy character of its shareholders. They seemed to aim at maintaining coherency between the method in which domicile is being determined in company law and trading with the enemy law. They seem to prefer a strong separation between the personality of a corporation and that of its shareholders. They seem to prefer the newer juristic person theory, the real entity theory, rather than reverting back to the older aggregate theory. They dismissed *Continental's* suit on technicality. It was defective because its secretary was not authorized to file a suit on the company's behalf, and the directors who were absent could not decide to sue.

Another case that illustrates the complexity of enemy companies is the example of *British-American Tobacco Company*, that was already discussed in the previous section in the context of antitrust. At the outbreak of World War I *BAT* was a British company, with a Hong Kong subsidiary. However, as will be discussed in greater detail in Chapter 10, many of the leading figures in its operations in China were Americans.

The China Order in Council and the Hong Kong Companies Ordinance 1915 placed it in a fragile position. While it was not considered an enemy company, it failed to meet the requirement that all of its directors must be British. Because of its unique composition, which included non-British and non-colonial shareholders and directors, *BAT* faced problems during the war due to the Trading with the Enemy Regulation. For example, it faced obstacles when wishing to distribute dividends to foreign shareholders, including Americans.[98]

After the end of the War problems were not over for *BAT*. The China Order in Council 1919 explicitly required that managing directors and others in position of control in China Companies had to be British subjects. Official government correspondence at the time reveals that *BAT* was seen as the most severely and negatively affected by the Order because it was a British company with significant British states, but with Americans holding the majority of the shares and management offices. In addition, it so happened that Americans played a major role in China through a subsidiary in Shanghai which was a "China Company" but did not meet the new Britishness requirement for such companies.

The initial attempt was to insert a discretion into the Order in Council that would allow London to approve deviations from the British management rule, which would be permitted in the form of licenses. This initiative failed. *BAT* was left with two options. One was to ask American managers and directors to step down and to be replaced by less experienced and informed British managers. The other was to move the center of management and the Board meetings to Hong Kong. This required that American directors would move from Shanghai to Hong Kong. By doing this, *BAT* 's subsidiaries would change their status from China Companies to Hong Kong-China Companies. The Order in Council did not apply to the latter and the managers of such companies did not have to be British. Absurdly, the Americans could stay in office once moving to Hong Kong.

In February 1919, the London management restructured its operations in China by creating a new holding company, *BAT Co. (China) Ltd.*, registered in Shanghai, which acquired the assets of both the *British Cigarette Co.* and *Mustard & Co.*. Although the Board of Directors of *BAT Co. (China)* initially included many members of *BAT*'s American management in China, in 1920, due to the stipulation of the British authorities over the nationality of directors of British China companies, most of these directors were instructed to stand down. The changes acted to give the London Board a much stronger hand over the management of the China subsidiary during the inter-war years.[99] Trading with the enemy regulation affected companies even after the end of the war, and as far as China and America.

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98 "British-American Tobacco's Stock Dividend Postponed," *Wall Street Journal*, February 24, 1917.

99 Howard Cox, *The Global Cigarette: Origins and Evolution of British American Tobacco, 1880-1945* (Oxford University Press, 2000), 162-67.

Taxing Corporations

The burgeoning literature on the history of tax havens initially dealt with the period from the 1970s onwards, then with the Post-World War II period, and more recently extended backwards to investigating the interwar period.[100] Taxation has become an important factor in the incorporation and management of business corporations only slowly and lately. It became more relevant as new types of taxes were introduced and as tax rates rose. This was the case because the rate and base of taxation leaped forward with each World War, making the formation of tax havens more valuable to those wishing to pay less.

The challenge of this section is to find earlier roots in the pre-WWI first era of globalization. One can look for such roots with respect to the taxation of corporate income tax, taxation of dividends, inheritance, and death tax applicable to corporate stock and stamp duties on corporate stock certificates. We will not provide here a comprehensive survey of international taxation, but we will deal here only with how corporate residence was determined for the various types of taxes. Let's start with income tax.

The cases of *The Cesena Sulphur Company (Limited)* and of *The Calcutta Jute Mills Company (Limited)* are instructive.[101] The Income Tax Commissioners assessed all incomes of these companies regardless of where they were generated and charged them with UK income tax. Each of the companies appealed, and the Exchequer Division decided to deliberate with them jointly because of their similarities. It issued its decisions together in 1876. British income tax at the time was charged based on residency in Britain irrespectively of their territorial origins, on what is called today a personal basis. The relevant section of the Act determined: "for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere". The question to be decided was whether these companies resided in the United Kingdom. The legal doctrines for determining the residency of natural persons were quite well settled by 1876. But what about juristic persons? This was a new issue that only became relevant with general incorporation and globalization. Both companies generated their profits from business done outside Britain. *Cesena* was engaged in sulfur mining, manufacturing, and trade in Italy. *Calcutta Jute Mills* was engaged in purchasing and

[100]Tsilly Dagan, "The Global Market for Tax and Legal Rules," *Florida Tax Review* 21, no. 1 (2017).;Gabriel Zucman, *The Hidden Wealth of Nations: The Scourge of Tax Havens* (Chicago: The University of Chicago Press, 2015).;Vanessa Ogle, "'Funk Money': The End of Empires, The Expansion of Tax Havens, and Decolonization as an Economic and Financial Event," *Past & Present* 249, no. 1 (2020).; Ronen Palan, Richard Murphy, and Christian Chavagneux, *Tax Havens: How Globalization Really Works* (Ithaca, NY: Cornell University Press, 2010).

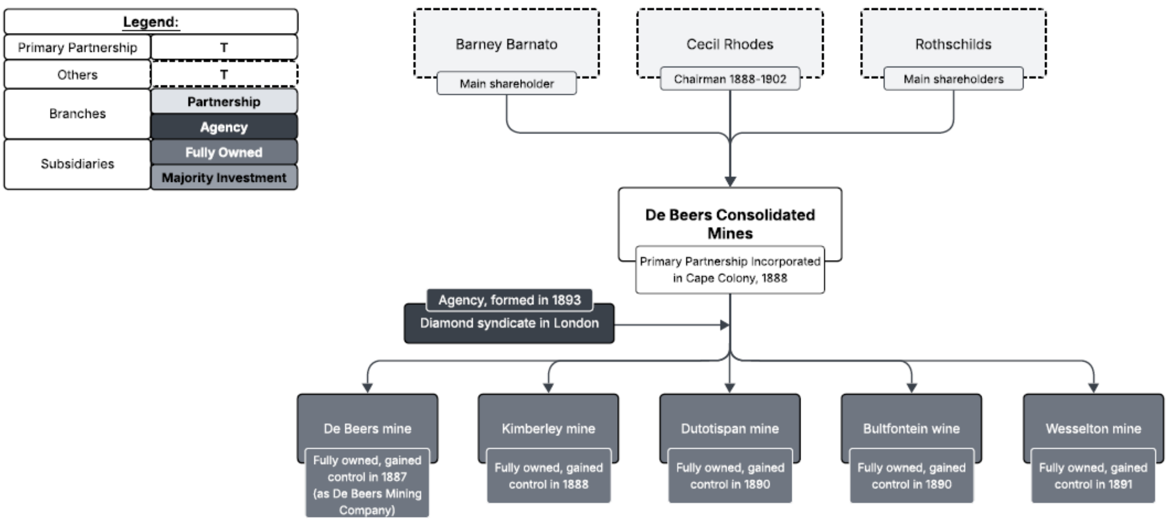
[101] Cesena Sulphur Co Ltd v. Nicholson v. Calcutta Jute Mills Co Ltd v. Nicholson, [1876] 1 Exch. Div. 428.

constructing jute mills in Bengal and selling their products. Both companies were registered in Britain based on the Companies Act. There were two distinctions between the Cases. *Cesena* was registered also in Italy, while *Calcutta Jute Mills* was not registered in India. *Calcutta Jute Mills* did its business activities and had its shareholders within the Empire while *Cesena* had business only outside the Empire.

The two justices on the bench were Chief Baron Kelly and Baron Huddleston. Both analyzed the Memorandum of Association and Articles of Association of the two companies and their actual business activities. Both justices agreed on the bottom line, namely that both companies were subject to income tax in the UK on all of their global income. Their rationale for the bottom-line decision was different. Kelly views the place of registration for incorporation as a very important factor in determining a company's residency. In addition to place of incorporation, Kelly views the place in which the registered office of a company is located and place of meeting of directors and of shareowners. As the registered office has to be in the part of the UK in which the company is registered this factor is identical to place of incorporation. For Kelly, the location of the business activity of the company, mines, mills, employees, storage, and sales, is not relevant. Irrelevant is also the place in which shareholders or directors reside. Kelly does not differentiate between the two modern concepts, place of incorporation on the one hand and place of control (aka real seat) on the other. Anyway, both lead in the same direction, and this is sufficient for Kelly. Huddleston asserts that place of incorporation is not a determinative factor. Just as natural persons can be born in one place and have residency in another, so can juristic persons be detached from their place of incorporation. He states that he does not endorse the American authorities that hold that "a corporation resides only in the country under whose laws it was created and constituted." For Huddleston "the central point of the business" is determinative. The central point takes into account where the board of directors and the general meeting of the shareholders are taking place. However, other indications of the central point of the business can also be taken into account. He does not confine his observations to the organs of the corporation, the board, and the general meeting, but looks at other business activities, where the administration of the company is situated, where agents are appointed, and where money flows. For him, these take place in both companies in England and not in Italy or India. One cannot distill from the holdings of the two Barons a single and clear test for determining the residence of companies for tax purposes. The implication of its bottom line is that a corporation that was incorporated in Britain and was running its corporate affairs from Britain was subject to British taxation. A corporation that did either of the two was likely to be subjected to British taxation. However, there was uncertainty that was created by the ambiguities of the tests offered by each of the Justices and the disagreements between them.

The next case became canonical in tax law. *De Beers Consolidates Mines Limited* was incorporated in 1888 in Kimberley under the Joint Stock Companies Acts of the colony of the Cape of Good Hope. It consolidated numerous smaller mining companies at the initiation of Cecil Rhodes and became the largest diamond producer in the world. It floated shares at the London Stock Exchange. Rhodes approached Nathan Rothschild and his bank initially for loan and eventually the Rothschilds became the largest shareholders at De Beers. The company was managed both from London and from Kimberley. The Income Tax Commissioners determined that *De Beers* was a resident of the UK and had to pay income tax on all its income.

Figure 4.3 – *De Beers* Before the 1905 Case



Its counsel appealed in 1905, arguing that it is a resident of the Cape Colony because it was incorporated there. It had all its mining business there. They argued that the company was not a person in the UK. They relied on a famous maxim: "A company incorporated by the laws of a foreign country has no legal existence in this country. It owes its existence to the laws of the foreign country". They relied for holding this principle on the well-known American case *Bank of Augusta* v. *Earle*.[102] In that case, the legal status of a foreign corporation (from another American state) was held not to be equal in legal status to that of a domestic corporation, but could only be prohibited from doing business in the host state by express statute. The Court was not over-impressed by this case that was decided in 1839, in the old days of the chartering Era, in which the grant theory was the only corporate personality theory around. Instead, the court turned into a detailed analysis of how the management and business of *De Beers* was split between London and Kimberley. The judges concluded, with minor variations among them,

[102] 38 U.S. 519 (1839).

that the majority of the directors resided in London, important decisions were taken by the London side of the Board by itself or jointly with the Kimberley side, profits were generated by selling diamonds to a syndicate in London, contracts were concluded in London, dividends were declared jointly with London, the company's seal was kept in London and so on. Only the mining side of the company took place in Kimberley. The bottom line was that "the seat of authority over the affairs of the company was in England".[103] This is as close as one can get as to say that for tax purposes the real seat test rather than the place of incorporation test determines the residency of the company. *De Beers Holding* is a good guidebook on what not to do to avoid paying taxes in the UK. Incorporating abroad is not good enough. This case also demonstrates how double taxation occurred. Both the Cape Colony and the United Kingdom levied income taxes on the company's profits, resulting in de facto double taxation within the British Empire. Although some relief may have been granted by way of deduction for colonial tax, there was no formal mechanism or treaty to avoid overlap. This situation exemplifies the fragmented and uncoordinated fiscal relationship between Britain and its colonies in the years preceding World War I, which required shrewd corporate and tax planning.[104]

De Beers was not registered in England and was nevertheless subjected to tax there. What about the other way around? Only more than 50 years after *Cesena* and *Calcutta Jute Mills* were decided, in the case of *Egyptian Delta Land and Investment Co. Ltd* v. *Todd*, the uncertainty was reduced.[105] The *Egyptian Delta* was incorporated in England in 1904 but transferred all of its executive activities, board meetings and shareholder meetings to Egypt in 1907. Its only presence in Britain was the formal registered office in which registries of shareholders were kept, which it was required to have according to the Companies Act. Now, the court was required to distinguish between the two factors. It could not maintain the ambiguity that was possible in the *Cesana* and *Calcutta Jute Mill* cases in which both pointed at the same direction. The House of Lords held that a company that was fully managed from Egypt was not resident of England for income tax purposes. This was a clear guide to companies and their accountants and lawyers what to do to avoid British taxation.

The Vestey company group was much more sophisticated than any we encountered in this section. Unlike other companies that were stand-alone, and *De Beers*, which eventually formed a corporate group but despite the involvement of sophisticated businesspersons like Rotschild

[103] De Beers Consolidated Mines Ltd v. Howe (Surveyor of Taxes), [1905] 2 K.B. 612, 642; De Beers Consolidated Mines Ltd v. Howe (Surveyor of Taxes), [1906] A.C. 455 (H.L.).
[104] Johann Hattingh and John Avery Jones, "De Beers Consolidated Mines Ltd v Howe (1906): Corporate Residence: An Early Attempt at European Harmonization," in *Landmark Cases in Revenue Law*, ed. John Avery Jones and Peter Harris (2013), 12-13.
[105] Egyptian Delta Land and Investment Co Ltd v .Todd, [1929] A.C. 3 (H.L.).

and Rhodes, did not take advantage of this for tax purposes, the Vestey brothers did. How did they trailblaze global tax avoidance?

The Vestey family of Liverpool expanded its business from butchery to a meat canning factory, to refrigerated steam shipping, to cattle ranches in Brazil, Australia, and more, to meat processing factories in Argentina, Uruguay, Australia, and New Zealand. Shortly after the Great War, they were proud of "killing" more than a million cattle and half a million ships in one year, in their main facility in Argentina alone.[106] At the top of the group was the family partnership Vestey Brothers, having two partners, William Vestey (1859-1940) and Edmund Vestey (1866-1953). As we have seen, a parent partnership was a common practice in trade and shipping. Next to it was a British side of the activities organized in subsidiaries incorporated in England. It was split into a private side that included *Blue Star Line*, a refrigerated shipping company, and a public side, in its center The *Union Cold Storage Company*, which was controlled by the Vestey Brothers partnership but financed mainly by the public through bonds and non-voting preferred shares. Union, through subsidiaries and branches, was involved mostly in storage, wholesale, and retail. Then there was the entire business conducted overseas in the Americas, Australia, Russia, and China organized in over forty companies incorporated mostly overseas. These companies performed various functions throughout the supply chain, from animal husbandry to meat freezing and shipping to the wholesale of the final meat products.[107]

Prior to 1915, Union's earnings, both British and overseas subsidiaries and operations, were treated as a single entity for tax purposes, with all earnings subject to taxation in Britain.[108] In December 1915, *Union* separated its foreign business by entering into an agreement with the *National Cold Storage Company of New York*, a private American company controlled by the Vesteys. Under the terms of the lease, *Union Cold Company* and its subsidiaries granted the *National Cold Company* full and exclusive possession and control for its own benefit of all businesses, premises, goodwill, assets, and operations managed by *Union* outside Britain.[109]

In exchange, *National Cold Company* agreed to pay Union and its subsidiaries a total annual rent of £43,500. Of this amount, £33,000 was attributed to Union's business in China and was

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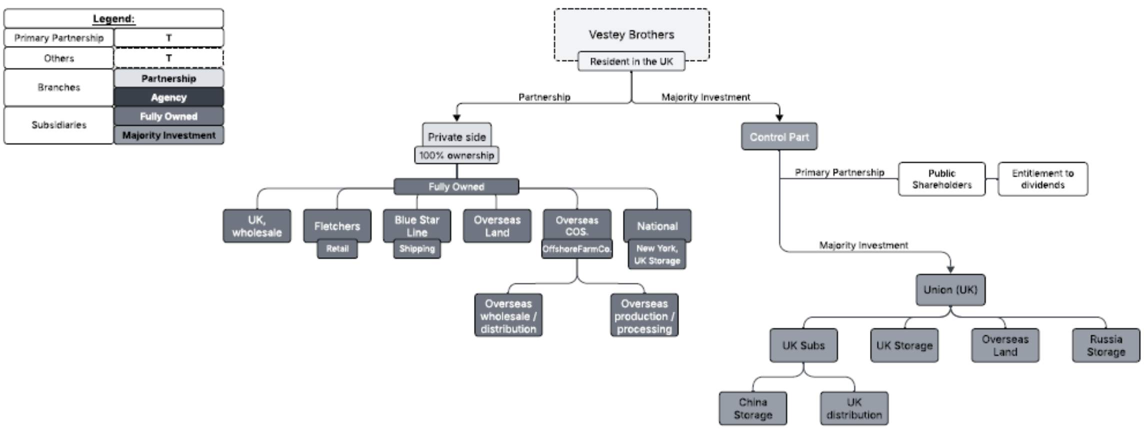
[106] James Hollis, "Union Cold Storage and the Birth of Multinational Tax Planning, 1897-1922," in *Global History of Capitalism Project Case Study No. 9*, ed. Prof. Christopher McKenna (University of Oxford, 2019).
[107] TNA: IR 40/5238, Letters about Lord Vestey, Sir Edmund Vestey, the Union Cold Storage Company Limited and the Vestey Bros. Merchants, London, West Smithfield, 29th December 1921- 26th Feburary 1929.
[108] Before 1915, Union considered its operations in Russia and China as part of a single global business and paid taxes on all profits in Britain. Hollis, "Union Cold Storage and the Birth of Multinational Tax Planning, 1897-1922."
[109] TNA: IR 40/5238, Memorandum of Agreement between the Union company and the National company, 14 December 1915.

subject to taxation in the UK.[110] To avoid the British tax on the remaining £10,500, the Vesteys established an Argentinian company called *Frigorifico Anglo SA*, which acquired the frigorifico (main factory) rights from *Union*. *Anglo SA* subcontracted operation of the plant to *National Cold Company*, which paid the £10,500 annual rent to *Anglo SA*. Since Argentina had no corporate income tax at the time, this portion of the rent was tax-free.[111]

National Cold Company was a United States resident for tax purposes. In 1915, the federal corporate income tax rate in United States was just 1%. As a result, any profits the company earned from Union's overseas businesses, after deducting lease payments, were taxed at a significantly lower rate than in Britain.[112]

As we have seen, in the *De Beers* holding of 1905, a company registered abroad could still be considered a UK resident for income tax purposes if controlled from Britain. The Vesteys made sure that their companies abroad will have a nominal board of directors abroad. All important decisions were made in the London headquarters but were recorded in the formal corporate documents of the subsidiaries as though they were nominally made abroad.[113] The tax authorities have not questioned the genuineness of this arrangement for many years.

Figure 4.4 – Vestey Group Structure pre-1915



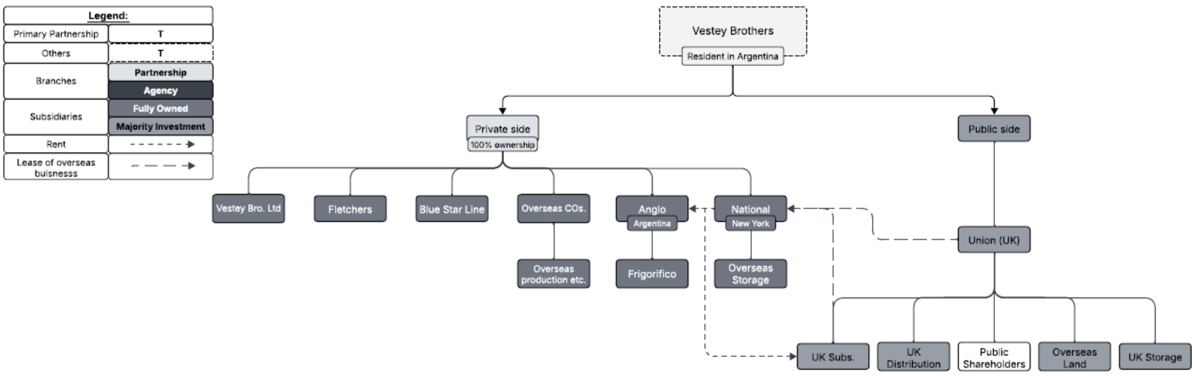
Once the group had companies that were not residents of the UK it made sure that most profits will accumulate in them through the use of transfer prices. Though the term "transfer prices"

[110] An abattoir with attached cold store at Zarate which was expected to provide a significant boost to revenue.
[111] Income tax was introduced only in 1932. Ricardo M. Duwavran, *The Argentine Income Tax* (1942), 20 TAXES 275
[112] The Revenue Act of 1913, ch. 16, 38 Stat. 114 (US).
[113] TNA: IR 40/5238, Letters about Lord Vestey, Sir Edmund Vestey, the Union Cold Storage Company Limited and the Vestey Bros. Merchants, London, West Smithfield, 29th December 1921- 26th Feburary 1929.

was not yet used at the time the Vesteys used the practice, namely they made sure that some in-group transactions will be below market prices and others above market prices so that the English companies will have only as much profit as needed for paying interest on the bonds and minimum dividend on the preferred shares. The rest of the profits accumulated abroad. They could not be distributed to the brothers without paying tax on the dividend income. But they could be used for investment in expansion abroad and could be given on loan to the British companies or to the brothers personally. Loans were not income and were not subject to income tax.

In 1915 the brothers went further. They decided to move their personal residency to Buenos Aires, Argentina, as a response to the tax increase made in order to finance the War. Note that the domicile of the partners determines the domicile of a partnership, so once they migrate it migrates with them. At that stage, they could also distribute dividends to their parent partnership and to themselves from their subsidiaries abroad without paying any taxes in the UK..

Figure 4.5 – Vestey Group Structure in 1915



Notice that unlike the other companies in this section that had to appeal to courts in an attempt not to pay taxes in Britain, the Vesteys had their way. Their innovative and aggressive global tax planning did not leave a trace in any litigation. We know about it in retrospect partly due to a public scandal that broke out when William Vestey was made a peer in 1922. Most of the details were made known only once the Inland Revenue initiated the Atkins Report in 1935 and in several court litigations. The report pieced together the puzzle and uncovered that the companies abroad had been "controlled by Union from London through a secret department of that company" and concluded that the Vesteys brothers were “the most notorious avoiders of tax in this country”.[114]

[114] TNA: IR 40/5238, Report by W. F. Atkins, 24 December 1935.

Given the extent of their global business and sophisticated tax avoidance scheme, it is not surprising that the Vestey family was the second richest family in Britain (in 1940), second only to the Royal Family. The lesson we learn from this case is independent of the particular test employed to determine corporate tax residency in the UK. Whether the test is place of incorporation—which is easily bypassed by incorporating abroad—or the real seat test—which renders tax avoidance somewhat more difficult—a sophisticated family can still succeed in minimizing its tax liability. By utilizing the legal infrastructure and jurisdictional options developed during the first era of globalization, and with the assistance of presumably skilled City lawyers and accountants such as the ones that we will encounter in Chapter 5, such a family can construct a complex corporate structure. This structure may allow it to avoid paying taxes not only in Britain, but potentially anywhere else.

Between 1842 and 1920, British income tax evolved from a uniform source-based low rate levy into a complex, partially progressive higher rate regime that began to distinguish between individuals and corporations.[115] The gradual extension of liability to worldwide income and the lack of coordination with colonial and foreign tax systems produced the first major debates on double taxation and corporate residence. While wartime fiscal pressures accelerated these reforms, they also exposed structural inequities between personal and corporate taxpayers and between the United Kingdom and its Dominions. At the end of the period discussed in this book, the Finance Act 1920 and the Royal Commission's recommendations marked the transition toward a coordinated imperial framework and foreshadowed later developments in international tax law.[116] Yet, by leaving foreign income outside the relief mechanism, Britain effectively encouraged early forms of corporate tax planning and income relocation.[117] Notwithstanding the immediate post war developments, the pre WWI period the formative period in which the basic assumptions and doctrines for the future global taxation were formulated.

[115] Edwin R. A. Seligman, *The Income Tax: A Study of the History, Theory, and Practice of Income Taxation at Home and Abroad* (New York: The Macmillan Company, 1911), 202-06; *Finance Act, 1907, 7 Edw. 7, c.13, ss. 18–28*; *Finance Act, 1910 (1909-10), 10 Edw. 7 & 1 Geo. 5, c.8, s.66*.

[116] The Colwyn Commission on Income Tax, Cmd. 615, sec. VI, 15-16, (United Kingdom: His Majesty's Stationery Office, 1920); Clyde J. Crobaugh, "International Comity in Taxation," *The Bulletin of the National Tax Association* 8, no. 9 (1923): 270.

[117] For example, The Investment Trust Corporation reduced its U.S. holdings from 37 per cent in 1914 to 3 per cent in 1923, and the Arizona Copper Company sold its American division to Phelps Dodge in 1921, both citing double taxation as a key factor. Ryo Izawa, "Double Income Tax Between UK and US, 1914-1945–Impact on UK Multinationals," *Working Paper*, no. 132 (2015): 6-7.

CONCLUSION

Since the mid-nineteenth century, company law has addressed a new set of global and imperial challenges. Parliament, on the whole, did not stand up to the challenge. Judges had no choice but to deal with disputes that were placed on their Bench. Dozens of company law cases with transnational aspects were decided in our period. They were, taken together, far from creating a comprehensive and coherent set of rules and doctrines for the emerging field. Private international company law was able, at the most, in a seventy-year-long process, to produce a set of issues, not answers to problems. Different issues were sorted out in contradictory manners. Who was served by this? The field was a paradise for smart and shrewd lawyers, accountants and businessmen.

The adoption of the "place of incorporation" test in Britain and its Empire, the US, and some continental countries opened the possibility of shopping for the desired company law. The adoption of the "real seat" test was a countervailing measure taken by continental countries, such as France, that were overshadowed by Britain's legal and financial attractiveness. The ability to shop for company law was enhanced by the expansion of recognition of foreign companies based on common law rules, informal comity, formal bilateral treaties, and Model Act, which reduced the ability to ignore foreign incorporation. This trend also had an indirect impact that reduced the ability of jurisdictions to discriminate against foreign corporations compared to domestic companies.

The ability to choose the place of incorporation affected not only the law that would apply in internal affairs and disputes but also the domicile, place of residence, and nationality of a company. Companies such as *British American Tobacco* and *Royal Dutch Shell* were able to avoid the harsh American antitrust legislation and, at the same time, solidify their cartel. Companies could incorporate outside Britain to avoid UK income tax if they made sure not to be formally managed from London. However, incorporation in Britain by Germans was not sufficient in order not to be viewed as an enemy company. Where the state cared less, with respect to monopolies and antitrust, bypasses were the easiest. Where it cared more, as in taxation, one had to be more sophisticated in order to avoid being taxed. Where the state cared the most, as with enemy companies at wartime, using company law for bypasses did not work. In such wartime cases, the basic principles of British company law were ignored, the place of incorporation was deserted, and the domestic corporate entity was looked through to the nationality of enemy shareholders and directors. One can look at things diagonally, from the perspective of investors and capitalists. Where it mattered most for most of them, charging monopoly prices and paying less taxes, the law was shaped in a manner that served their interests well.

Not all private international law doctrines fall neatly into place. In cross-border insolvency the courts adopted rules that favored local creditors over creditors from other jurisdictions. This did not serve City of London investors well. They could do better with a universalist approach in which insolvency proceedings in London could put a stay on collection proceedings anywhere else, and subject assets throughout the Empire and the world to pooling and distribution to creditors, many of them British, by a company liquidator or financial reorganizer in the City.

The fact that the court cases were not all decided in favor of investors and corporations should be interpreted by the complexity of the field, the rapid changes, the multiplicity of interests, and the lack of understanding of the stakes by judges. Private international company law cannot be easily subjected to class-Marxist analysis as was the case with the rights of plebeians in aristocratic estate woods, the relationship between master and servant, or the damages caused by railway sparks to adjacent farmland. Judges did not systematically tilt the law in one direction. They fragmented the field in a manner that yielded itself to legal shopping, regulatory bypasses, and tax avoidance. In the seventy years between General Incorporation and the Great War, the legal building blocks for the international corporate economy were formed. These building blocks allowed business corporations to select where to incorporate, from where to be managed, where to raise investors' capital, how to transfer incomes to “tax havens", and how to evade regulation. Private international company law was the arena in which clever lawyers, bankers, and accountants began their game in favor of their corporate clients and to enrich themselves. This is the formative period in which states lost the ability to monitor and control of transnational business corporations. The corporations took advantage of the global playing field they shaped in the First Era of Globalization. The corporations moved to the uncontrollable globalized arena and multiplicity of jurisdictions and never looked back. From that point in time and on, states were never able to gain control over large multinational and transnational business corporations.