The Impact of the Historical Development of Company Groups

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Abstract

A group of companies consists of a holding company and all the companies that it controls directly or indirectly, as subsidiaries. Many business activities are conducted by groups of companies. The companies in a group will remain separate juristic persons with limited liability. The use of these groups has many benefits, but may also cause harm to parties who interact with the group. An analysis of the history of separate juristic personality, limited liability and the legal recognition of groups, insofar as it is relevant for South Africa, can provide useful insights into the reasons why the law on groups takes its current form, and it may be useful to any attempts to address deficiencies in the law regarding company groups.

First, the development of companies as separate juristic persons with a joint stock and limited liability is considered for England, and some comparable developments for the Netherlands, France and the United States are mentioned. Then the history of company groups is evaluated. The widely accepted view that corporate shareholding and groups were accepted in England without due consideration of their negative consequences is open to criticism. The final decisions to allow groups were made when limited liability and its consequences had become fully developed and universally understood. There was some reluctance to allow corporate shareholding, but it was finally decided to broadly leave the matter to private ordering. This approach to groups was transplanted from England to South Africa.

Corporate shareholding in the United States was slow to develop. Unique political and legal features meant that there were various obstacles to the recognition of groups of corporations. Although the impression that it was universally impossible for corporations to hold shares in other corporations and across state lines until the late 19th century is not correct, there were greater constraints on such shareholding in the United States than in England. This changed when states, with New Jersey at the forefront, started to compete for incorporations, and it came to be accepted that concentrations of companies should be regulated in terms of the *Sherman Act*, rather than corporate law. Again, it is apparent that authors who contend that this change in the law was the result of inattention cannot be supported. The changes in the legal position were the result of conscious policy choices. They were made at a time when limited liability was already entrenched.

The assertion that corporate groups are an accident of history is mostly made to justify radical reform of the law of groups, especially that separate juristic personality of separate companies in a group should no longer be recognised. However, a careful historical analysis shows that this assertion is not tenable. Nevertheless, this does not mean that there is no need to reform the law on groups to reflect current values. In England and South Africa, it became apparent that there is a need to enact legal rules that would prevent abuse of company groups. Yet attempts to generally disregard juristic personality in groups that form single economic entities failed in both jurisdictions. The problems with company groups can mostly be addressed more effectively by means of more specific rules in and outside of company law.

Keywords

History of company law; holding company; subsidiary; group of companies; separate juristic personality; limited liability; chartered corporations; deed of settlement companies; joint stock companies; Dutch East India Company; *ultra vires*; antitrust; economic entity approach; piercing of the veil; fiduciary duties.

1 Introduction

Business is often done in company groups. A group of companies consists of a holding company with all its subsidiaries.[1] Holding companies hold controlling interests in subsidiary companies.[2] A subsidiary is a company that is controlled by another company, which then constitutes its holding company. The nature of control that is required here is not a matter for detailed consideration in this contribution, but broadly it concerns the ability to exercise a majority of voting rights attached to securities or other rights to appoint a majority of directors. This is how the concept "group" will be understood in this contribution. The first South African cases to refer to groups contained a somewhat different definition. Innes CJ stated that groups involve "the management and direction of the policy and affairs of the various companies by some controlling authority through nominee directors".[3] However, this definition does not necessarily focus on holding companies.[4] It is aimed at addressing the issue of nominee directors, who are found inside but also outside of company groups.[5]

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1 See the definition in s 1 of the *Companies Act* 71 of 2008 (henceforth current *Companies Act*). See *R v Milne and Erleigh (7)* 1951 1 SA 791 (A) 827: "[a]n association of companies, created not by resolutions to associate but by the acts of individuals, and depending on the facts that they have a single secretary, generally itself a company, and are controlled as to the appointment of their directors, and therefore as to the administration of their affairs, by one or a few people". In Australia in *Walker v Wimborne* (1976) 137 CLR 1 (HC of A) it was stated that "[t]he word 'group' is generally applied to a number of companies which are associated by common or interlocking shareholdings, allied to unified control or capacity to control"; also see *Linter Group Ltd v Goldberg* (1992) 7 ACSR 580 SC (Vic) 620 and *Australia's Residential Builder Pty Ltd (in liq) v Wiederstein* [2018] VSC 37 (2018) para 45. Also see Botha 1982 *De Jure* 108, which also describes it as a complex economic entity.

2 In jurisdictions that are not English-speaking reference is often made to mother and daughter companies: *Mutter und Tochtergesellschaft* in Germany, *filiale* and *omnium* (less common) *société mére* in French and *moeder* and *dochter* in Dutch; see Sannes *Rechtsverhouding van Moeder- en Dochtermaatschappij* 40-44.

3 *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 196-197. See *Hull v Turf Mines* 1906 TS 68 (henceforth the *Hull* case) 77 where a group mine was described as one where "the policy of the company should be avowedly directed by individuals or firms outside the company who have nominees on the board". The definition was probably based on the special nature of mining groups. See Lansdown *et al Lansdown Commission Report* (the *Lansdown Commission Report)* para 216.

4 *Hull* case 77, where the court referred to mines held in different companies controlled by a partnership, Eckstein & Co, as "a group of mines" and later referred to this as the Eckstein group and "companies of the Eckstein group".

5 See on the development of groups in South Africa below 3.1, text next to fn 177, and 6, text next to fn 310.

Groups organise their activities in different related companies in a manner that reduces their risks, promotes efficiency and certainty, optimises tax benefits[6] and addresses regulatory requirements.[7] However, the organisation of business activities in groups may harm parties that interact with the group. They are often unaware of or unable to protect themselves against the fragmentation of assets, liabilities and activities within the group. Moreover, groups by virtue of their size frequently exercise enormous economic power. Problematic cases include: delictual claims against underfunded subsidiaries, especially if holding companies are not in the same jurisdiction as the plaintiff, insolvency proceedings in groups where assets have been moved around, the protection of minority shareholders in group-controlled subsidiaries, and the responsibility of directors within groups who act in the interest of the group rather than the companies of which they are directors. This contribution attempts to determine how different jurisdictions that are relevant to South African company law have come to the point where they allow companies to operate as separate persons that operate in company groups. It is proposed that this may enrich an understanding of how the law deals with groups and could promote solutions that would address some of the problems that have been created because of the formation of company groups.

2 Juristic personality, limited liability and general incorporation

Companies are separate juristic persons. This is completely settled in South African company law.[8] The Constitutional Court has held that "[i]t is trite that a company is a legal entity altogether separate and distinct from its members, that its continued existence is independent of the continued existence of its members, and that its assets are its exclusive property".[9]

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6 For an early perspective, see Sannes *Rechtsverhouding van Moeder- en Dochtermaatschappij* 58.

7 See generally Elson 1930 *St Louis Law Review* 334-335; Murphy 1998 *Bond LR* 246-250; Douglas and Shanks 1929 *Yale LJ* 193. For the economic argument, see Pargendler 2023 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4412997 9, 13. In the *Hull* case 77, the court stated: "[i]t is possible that economy and efficiency may be promoted by it [groups]. It is also possible that the interest of the industry as a whole may be thereby furthered. I cannot say. There is not sufficient information before the Court to warrant an opinion upon that point." In particular, subsidiaries are often used in cross-national activities: Sannes *Rechtsverhouding van Moeder- en Dochtermaatschappij* 58-59.

8 The *Companies Act* 61 of 1973 (henceforth *Companies Act* 1973) s 65(1) describes a company as a body corporate. The current *Companies Act* s 19(1) states that a company is a juristic person. It also sets out many of the features of juristic persons. S 19(2) sets out the principle of limited liability.

9 *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Services; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 43, also referred to in *My Vote Counts NPC v Speaker of the*

Companies exist as discreet entities within groups, because different companies have separate juristic personality.[10] The group does not itself have any legal existence.[11] Every company has its own rights and liabilities. Many of the difficulties that exist with groups arise from the recognition of their separate juristic personality and limited liability[12] achieved in terms of general incorporation legislation. Limited liability is the principle that shareholders will not be required to contribute to the assets of the company beyond the amount they initially paid for the shares.[13]

The South African private law concepts of juristic personality and limited liability, for the purposes of company law, were derived mostly from England.[14] This part of this paper will therefore focus on the history of

National Assembly 2015 JDR 2087 (CC) fn 177. In the latter case reference was also made to *Weare v Ndebele* 2009 1 SA 600 (CC) para 53, where the Constitutional Court held that "[t]he most relevant characteristics of a juristic person are its separate legal personality and the limited liability of the natural persons involved", although the emphasis here on limited liability of natural persons is of only limited relevance in the context of this article. Also see the more recent *Hlumisa Investment Holdings (RF) Ltd v Kirkinis* 2020 5 SA 419 (SCA) para 17.

10 See the general principle set out in *Ritz Hotel Ltd v Charles of the Ritz Ltd* 1988 3 SA 290 (A) (henceforth the *Ritz Hotel* case) 314-316; *Wambach v Maizecor Industries (Edms) Bpk* 1993 2 SA 669 (A) 675, but see below 5.2, text next to fn 292; *Dithaba Platinum (Pty) Ltd v Erconovaal Ltd* 1985 4 SA 615 (T) 625; *Intramed (Pty) Ltd (in liquidation) v Standard Bank of SA Ltd* 2005 1 All SA 460 (W) 474, 481-482; *Pepkor Holdings Ltd v AJVH Holdings (Pty) Ltd* 2021 5 SA 115 (SCA) para 43. Also see for Australia, *Qintex Australia Finance Ltd v Schroeders Australia Ltd* (1990) 3 ACSR 267 SC(NSW) 269 with reference to *Industrial Equity Ltd v Blackburn* (1977) 137 CLR 567, although the court was critical of this approach and proposed that it be reconsidered; see below 5, especially fn 272.

11 *R v Milne and Erleigh (7)* 1951 1 SA 791 (A) 827-828; *Langeberg Koöperasie Bpk v Inverdoorn Farming and Trading Co Ltd* 1965 2 SA 597 (A) 606, where it was stated that a company in a group has a "a personality of its own"; *Swanee's Boerdery (Edms) Bpk v Trust Bank of Africa Ltd* 1986 2 SA 850 (A) 860. The major English cases on this point are *Harold Holdsworth & Co (Wakefield) Ltd v Caddies* [1955] 1 All ER 725, 734; *Charterbridge Corporation Ltd v Lloyds Bank Ltd* 1970 1 Ch 62, 74; *The Albazero* [1977] AC 774, 807; *Lonhro Ltd v Shell Petroleum* [1980] 2 WLR 367, 374-375. Also see the Australian case of *Walker v Wimborne* (1976) 137 CLR 1 (HC of A) 6-7, where it was stated that reference to a "group" is a misnomer.

12 Limited liability and other aspects of separate juristic personality are not always on the same plane. See Advocate General Warner in *Istituto Chemioterapico Italiano SpA and Commercial Solvents Corporation v Commission of the European Communities* (Cases 6 and 7/73) [1974] ECR 223 263 quoted in *Adams v Cape Industries plc* [1990] 1 Ch 433, 535-536 (henceforth the *Adams* case). For an earlier description of this problem, see Sannes *Rechtsverhouding van Moeder- en Dochtermaatschappij* 54, 59.

13 Blackman *et al Commentary* 116; Stoop "Companies (Part I)" para 53. See the clear distinction drawn by Locke 2010 *Stell LR* 476.

14 South African company law is mostly derived from English law. Legislation was often copied from England, see below 2.3, text next to fn 79, and English common law on companies was also taken over: Girvin 1992 *J Leg Hist* 68-69. Reference is nevertheless sometimes made to the Roman-Dutch concept of the *Universitas* in explaining the nature of juristic persons: *Webb & Co Ltd v Northern Rifles, Hobson & Sons v Northern Rifles* 1908 TS 462, 464-465; *Morrison v Standard Building*

general incorporation, separate juristic personality and particularly limited liability in England. However, equivalent developments in the Netherlands and France will also be considered to provide context, especially because South African private law has been derived from the Netherlands and because the Cape was controlled by the Dutch East India Company from 1652-1795 and the Batavian Republic from 1803-1806, while French law strongly impacted on Dutch corporate law. Finally, a short description will be given of the development of these aspects in the United States, because the history of the recognition of company groups in that country will form an important part of this contribution. United States law has exercised significant influence on the current *Companies Act* in South Africa.

2.1 Development of the English company up to the 18th century

The English company primarily developed out of two phenomena, namely the chartered corporation and the deed of settlement company.[15] Initially, corporations with some form of separate personality, in England were established for ecclesiastic or public bodies such as monasteries and boroughs.[16] Moreover, business activities were often regulated and controlled by guilds. These guilds were also frequently chartered from the Crown, as a charter was needed to secure monopolies over commodities for the guilds and their members.[17] Guilds could then allow their members exclusively to engage in the economic activities reserved for them in their charters. But as each member of the guild did business separately and not through the guild, there was no real need to distinguish the rights and duties of the guild from those of the members.[18]

Gower states that the first type of English organisation that was generally given the name "company" was that adopted by the merchant adventurers who engaged in foreign trading.[19] Girvin mentions that "[t]he word 'company' was first used during the Middle Ages in France when several families were associated together for the purpose of tilling soil and rearing cattle and such

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Society 1932 AD 229, 234ff, although it has not played a major role in the development of company law in South Africa.

15 These companies were and are often referred to in the literature as joint stock companies or perhaps more accurately, unincorporated joint stock companies, but this phrase is also used to describe a wider range of companies. Following the example of Gower *Principles* 30-32, the term "deed of settlement" company will be used to avoid confusion.

16 Gower *Principles* 19; Arner 2002 *Southern Methodist Law Review* 25-26; Pollman 2021 *Tex L Rev* 1426.

17 Williston 1888-1889 *Harv L Rev* Part I 106-109.

18 Gower *Principles* 20; Hahlo *Company Law* 6; Schmitthoff 1939 *UTLJ* 80-81. On the impact of guilds on later business forms, see Holdsworth 1916 *Jur Rev* 306-309, 315(d), 316, 322.

19 Gower *Principles* 20. On the role in overseas trading, see Browning 1978 *Man LJ* 360-361.

an association was known as *compaignon*",[20] but he does not provide any authority for this proposition. It would seem that the English term "companion" meaning a person with whom one associates was derived from the Old and Middle French term *compaignon*. This may have developed out of the late Latin term *companio*, which was derived from *cum panis* or with bread. In this sense the word referred to persons eating or having meals or bread together. The word *companio* is first attested to in the *Lex Salica* where it was probably used as a calque for the unattested Gothic word *gahlaiba,* which literally refers to a messmate or someone with whom one habitually has meals (*hlaib* meaning loaf).[21] In Italy, the related term compagnia was used to denote a form of partnership that arose in the 12th century and became widespread in the 13th century.[22] The first English reference to a guild as a company, according to the *Oxford English Dictionary,* is from 1389[23] and the first reference to a company in the context of trading companies dates from 1532 and concerns the types of companies mentioned by Gower.[24] Except for references to guilds, the general statement of Gower mentioned at the outset is therefore correct.

Initially, companies for merchants existed mainly to establish exclusive rights for the members of the company.[25] Each member traded with his own stock and for his own account, however.[26] These so-called regulated

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20 Girvin 1992 *J Leg Hist* 63.

21 Oxford English Dictionary 2023 https://doi.org/10.1093/OED/6383443507. See "company" in Encyclopedia Britannica date unknown https://www.gutenberg.org/ebooks/31950.

22 Rowley *Modern Law of Partnership* 6-8; De Roover *Rise and Decline of the Medici Bank* 78; Hansmann, Kraakman and Squire 2006 *Harv L Rev* 1372ff and especially fn 89; Sandor 2017 *Journal on European History of Law* 36-37, 44 and fn 26; Micklethwait and Wooldridge *The Company* 8-10. See Boerner and Ritschl 2009 *JITE* on the origin of the liability of these partnerships in family and town liability. See Holdsworth *History of English Law* vol XVIII 194-195, where reference is made to *companhia* or early partnership-like relationships in French documentation. He states that the term is often used with the word *societas* to distinguish these associations from *commenda*; see similarly Hillman 1997 *Wash & Lee L Rev* 624-625. For cases that refer to the meaning of the word *compagnia* in this context, see Davoudi, McKenna and Olegario 2018 *Journal of the British Academy* 28; Micklethwait and Wooldridge *The Company* 8; Sandor 2017 *Journal on European History of Law* fn 26.

23 Oxford English Dictionary 2023 https://doi.org/10.1093/OED/2429260071. On the use of the term *companhia* in France and England. also see Holdsworth 1916 *Jur Rev* 308, especially fn (a).

24 Oxford English Dictionary 2023 https://doi.org/10.1093/OED/2429260071. Also see Holdsworth *History of English Law* vol XVIII 200 n 6 where reference is made to the charter of the Russia Company 1555. Online Etymology Dictionary date unknown https://www.etymonline.com/word/company refers to the use of the term "company" in this context in the 1550s. It probably refers to this charter.

25 See Holdsworth 1916 *Jur Rev* 317, which states that the regulatory aspects of grants were initially more important than the fact of incorporation.

26 Also see Holdsworth *History of English Law* vol XVIII 199-202; Schmitthoff 1939 *UTLJ* 83-84. Hahlo *Company Law* 6 claims that the "Mayor, Constables and Fellows

companies were a natural extension of the guilds. However, in the 16th century, companies also started to conduct joint commercial activities, most commonly for foreign trade.[27] These companies were referred to as joint stock companies because they traded as one person with stock contributed by members, whereas members of regulated companies traded with their own stock, subject to the rules of the company.[28] Earlier on, these joint activities were conducted alongside traditional separate activities. Moreover, joint stock was held merely on a temporary basis. However, some of these companies also started holding joint stock on a broader and more permanent basis.[29]

The companies that emerged in the 17th and 18th centuries in England reflected concepts of juristic personality that were derived from medieval interpretations of Roman law.[30] However, no clear notion of separate juristic

of the Merchants of the Staple of England" were formed to regulate the wool trade on a national basis. It had its privileges confirmed in a charter in 1353 (27 Edw II st 2 c 1). Moreover, he states that "Fellowship of the Merchant Adventurers of England" (previously known as The Fraternity of St Thomas A Becket) consisted of English merchants trading in the Netherlands. It was formed early in the 15th century, received a charter from Henry VII in 1505, and corporate privileges were granted to it by Queen Elizabeth I in 1564. See Boardman-Weston *Rise and Fall of the Chartered Corporation* 18-20, but also see 16, 18. According to Boardman-Weston, these organisations were not incorporated. Holdsworth 1916 *Jur Rev* 314-315 mentions grants to companies of merchants trading abroad that by implication were incorporated and notes that this was later expressly stated, e.g. in the Charter of the Levant Company 1601.

27 Hansmann, Kraakman and Squire 2006 *Harv L Rev* 1376-1377 observe that these joint stock companies were first devised in Genoa, from where they spread to England and the Netherlands; also see Holdsworth *History of English Law* vol XVIII 207-209. Fallis *Evolution of British Business Forms* 8 argues that the concept first appeared in France and Sweden.

28 Holdsworth *History of English Law* vol XVIII 206; Holdsworth 1916 *Jur Rev* 323, and see 325-326, which finds the origin of joint stock in maritime partnerships and loans by banks to the state; Davoudi, McKenna and Olegario 2018 *Journal of the British Academy* 30: the expression joint stock originated in naval voyages. There were several of these companies, but the East India Company, created in 1600, became the most famous. See Micklethwait and Wooldridge *The Company* 18-19, 21-28. Fallis *Evolution of British Business Forms* 8 argues that joint stock initially referred to the joint benefits of a venture that had to be distributed among participants.

29 Holdsworth 1916 *Jur Rev* 323-324, 327-330; Gower *Principles* 21; Schmitthoff 1939 *UTLJ* 88-92, also see 93ff on the idea that this influenced the creation of joint stock companies on the continent; Davoudi, McKenna and Olegario 2018 *Journal of the British Academy* 30. Also see Boardman-Weston *Rise and Fall of the Chartered Corporation* 20ff and especially Table 22, which shows how corporations changed from one type to the other; Arner 2002 *Southern Methodist Law Review* 26-27. Also see Stevens *External Relations of Company Groups* 24.

30 Blumberg 1986 *J Corp L* 578 with reference to Williston 1888-1889 *Harv L Rev* Part II 164; Handlin and Handlin 1945 *J Econ Hist* 10 fn 52; Schulte 1994 *Bond LR* 66-68. See Pollman 2021 *Tex L Rev* 1426, which states: "[t]he legal and social technology of chartering has existed for over a millennium, with roots in the ancient Roman state, and with practices evolving through 'reciprocal modelling' between government and corporate charters over many centuries"; Blair and Pollman 2015

personality or the limited liability of members for corporate debts had developed in Roman law.[31] Many of the benefits of incorporation, such as the ability to sue and be sued more easily, perpetual succession and tradeable shares, eventually became evident in joint stock companies.[32] There is no absolute clarity on whether the notion that shareholders were not liable for the debts of the corporation had developed by the end of the 18th century.[33] Indeed, the concept of limited liability developed after the recognition of juristic persons as separate entities.[34] Some charters specifically provided for the personal liability of shareholders, but many determined that they were not liable for company debts. Limits on the liability of shareholders became a motivation for doing business through corporations.[35] It had by that time become generally accepted that shareholders of a corporation were not directly liable for its debts, unless the charter of the company expressly provided for it (which few charters in fact did).[36] Furthermore, corporations were initially able to levy assessments or leviations upon shareholders, in terms of which those shareholders could be required

Wm & Mary L Rev 1697. See Davoudi, McKenna and Olegario 2018 *Journal of the British Academy* 25 on the medieval developments that built on Roman ideas of the corporation.

31 Blumberg 1986 *J Corp L* 578 refers to reliance that was placed on a text of Scott *Digest* 3.4.7.1 (Ulpian) although he accepts that this text is open to different interpretations. Also see Handlin and Handlin 1945 *J Econ Hist* 10 fn 52; Hillman 1997 *Wash & Lee L Rev* 616-618 especially fn 1. On the historical development of corporations, see Hahlo *Company Law* 5. See Davoudi, McKenna and Olegario 2018 *Journal of the British Academy* 22-24 on the early historical development of corporations.

32 Holdsworth 1916 *Jur Rev* 317-318, 322.

33 Browning 1978 *Man LJ* 361.

34 Initially limited liability was not seen as a natural outcome of juristic personality in the same way as it is today. It was not mentioned as a main feature of juristic personality in England. See Handlin and Handlin 1945 *J Econ Hist* 12; Blumberg 1986 *J Corp L* 577, 579-580; Harris 2020 *Journal of Institutional Economics* part 2.3 with reference to the requirements identified in Sir Edward Coke's judgment in *Sutton's Hospital* (1612) 77 ER 960, 970-971; Coke *Institutes of the Laws of England* Co Litt III, 6.41; Blackstone *Commentaries on the Laws of England* 474-475. On the traditional aspects of juristic personality, also see Williston 1888-1889 *Harv L Rev* Part I 113ff; Arner 2002 *Southern Methodist Law Review* 29-31. See the historical analysis of the concept "juristic personality" in Holdsworth *History of English Law* vol III 484-489.

35 Blumberg 1986 *J Corp L* 580, especially fn 16; DuBois *English Business Company* 142; Gower *Principles* 32; Harris 2020 *Journal of Institutional Economics* part 3.2; Todd 1932 *Economic History Review* 49, especially fn 4.

36 Holdsworth 1916 *Jur Rev* 320; Blumberg 1986 *J Corp L* 579-580; Todd 1932 *Economic History Review* 52-53; DuBois *English Business Company* 94-97; Handlin and Handlin 1945 *J Econ Hist* 11-12; Hunt *Development of the Business Corporation* 116; Gower *Principles* 22-23 writing on the development of company law up to 1825 somewhat reluctantly concluded that "not without some doubt, it was eventually recognised at the end of this period in the case of trading corporations". Also see Holdsworth *History of English Law* vol III 484, where the date of this development is set somewhat earlier. For a contrary view, also see: Handlin and Handlin 1945 *J Econ Hist* 12; DuBois *English Business Company* fn 94.

to contribute to the corporation beyond their initial investments. These claims by the company were mostly based on charter provisions but there are indications that the claims were available unless charters specifically prohibited them.[37] Although once again there is no absolute clarity on this, creditors apparently were also able to bring these claims on behalf of the corporation, if their claims against the corporation could not be satisfied.[38] Nevertheless, agreements were often concluded between shareholders and companies that limited their liability, and these agreements were also effective against creditors.[39]

2.2 The Dutch East India Company

Analogous developments took place in the Netherlands. The Dutch East India Company (DEIC), a Dutch company that was chartered by the Estates General in the Netherlands in 1602 on the basis of similar developments there, founded the first European settlement in South Africa.[40]

In the 16th century, Antwerp was the commercial capital of the Habsburg Empire of Charles V. Merchants travelled from there to far-flung destinations such as West Africa, Russia and the Americas. These endeavours were undertaken in limited partnerships (*maatschappen).* The Protestant Netherlands revolted against Charles's successor in the Netherlands, the Spanish King Philip II. Antwerp was taken by Spain in 1585, and as the Dutch rebels maintained control over the river Scheldt, it was cut off from the ocean. Many merchants emigrated further north,[41] where they contributed to the commercial rise of the Dutch Republic that was created at the end of the 16th century. Several of its cities undertook voyages to Asia. They did so through partnerships that were separately created for each voyage. They became known as pre-companies (*voorcompagnieën*).[42] Although these undertakings were terminated after every voyage, the shareholders and managers often continued to participate in a succession of voyages and undertakings. The pre-companies were cajoled into merging their activities within the DEIC to

37 See Harris 2020 *Journal of Institutional Economics* 651 on the fact that charters in the "chartering era" did not provide for it.

38 *Salmon v Hamborough* Co 22 Eng Rep 763 (1671); Williston 1888-1889 *Harv L Rev* Part II 160-162; Handlin and Handlin 1945 *J Econ Hist* 11-13; Blumberg 1986 *J Corp L* 580-581. See the careful wording of Gower *Principles* 23. But see the restrictive approaches of Dodd *American Business Corporations* 85-86, 369; Jenkins 1978 *CLJ* 312-321; Schulte 1994 *Bond LR* 67-68.

39 Holdsworth *History of English Law* vol XVIII 205; Holdsworth 1916 *Jur Rev* 320-321; Gower *Principles* 23. See Blumberg 1986 *J Corp L* 581, which states that charters limited liability, but the authority that he relies on does not support him.

40 De la Rey 1986 *Codicillus* Part 1 6.

41 Dari-Mattiacci *et al* 2017 *J L Econ & Org* 205.

42 Punt *Het Vennootschapsrecht* 102-106; De Jongh *Tussen Societas en Universitas* 11-12, 17-24.

prevent competition between them and to create an institution that could attack the overseas empires of Spain and Portugal.[43]

The DEIC's charter and monopoly over trade to the east of the Cape of Good Hope was originally granted for 21 years, but capital had to be returned after 10 years in a compulsory liquidation, unless shareholders elected to reinvest.[44] In 1612, the finances of the company were in such a parlous state that the Estates General allowed it to flout the compulsory liquidation requirement, and its capital became permanent.[45] The DEIC operated through several semi-autonomous chambers that were represented in the central management of the company, which was called the Heren XVII. Shareholders had no say in the management of the company, but it was likely that they were not liable for its debts.[46] However, the position of managing participants (*bewindhebbers*) was complicated. Clause 42 of the charter of the DEIC was not a model of clarity. It apparently was initially interpreted to mean that it excluded their liability for certain debts only, but that they could still be held liable for most business debts of the company. Although the new charter granted from 1 January 1623 did not formally change the liability of managers, the manner in which managers now issued bonds meant that they would no longer be liable for those debts. It became generally accepted that these managers were not liable for corporate debts. A theoretical foundation for the absence of liability was found in the Roman concept of the *universitas* and Dutch commercial agency relationships at the time. Apparently, it was felt that there was no further need to specifically deal with the limited liability of managers in the

43 De Jong, Jonker and Röell 2013 *Maandblad voor Accountancy en Bedrijfseconomie* 219-220.

44 Gelderblom, De Jong and Jonker 2013 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2116137 6. On the creation of the DEIC, see De Jongh *Tussen Societas en Universitas* 60ff.

45 Gelderblom, De Jong and Jonker 2013 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2116137 16; De Jong, Jonker and Röell 2013 *Maandblad voor Accountancy en Bedrijfseconomie* 220-221; Dari-Mattiacci *et al* 2017 *J L Econ & Org* 210-212. See Hansmann, Kraakman and Squire 2006 *Harv L Rev* 1376-1377, which states that the inefficiency of such frequent asset liquidations led the Dutch Estates General in 1623 to grant the Dutch East India Company "perpetual existence". This statement is perhaps too broad and vague.

46 Dari-Mattiacci *et al* 2017 *J L Econ & Org* 209; De la Rey 1986 *Codicillus* Part 1 7. This was under the influence of the law regarding *Universitates*. On the concept of the *Universitas*, see Voet *Commentarius* 3.4.1, to some extent 1.8.28; Grotius *Inleidinge* II.1.16 and II.1.24; Van Bijnkershoek *Quaestionum Juris Publici* 2.XIII; De Jongh *Tussen Societas en Universitas* 46-47; the views of Van der Heijden *De Ontwikkeling van de Naamlooze Vennootschap* 49-52, especially with reference to Voet *Commentarius* 14.1.5 and 17.2.13, who relied on partnership and shipping charters law, although the views of both authors are open to criticism; see De Jongh *Tussen Societas en Universitas* fn 48.

charter.[47] At this point, the DEIC became a corporation with all the main features of a corporation that are now recognised.[48]

2.3 England: From the Bubble Act to general incorporation legislation

In the second decade of 18th century England, the South Sea Company, a joint stock company which obtained a monopoly to trade to South America, commenced with a scheme to take over all government debt. This led to feverish and speculative trading in shares of this and other companies.[49] The *Bubble Act* was enacted in 1720 to address the speculation (and protect the South Sea Company). In broad terms it prohibited an unincorporated business association from acting or presuming to act as a corporate body; creating or facilitating transferable stock, if not authorised by an act of parliament or charter; acting under a charter for purposes not expressed in the charter; or acting under a forfeited charter.[50] This statute and the precipitous financial crash that followed its enactment limited the creation of further companies in the United Kingdom after 1720.[51] Although the Act is mostly regarded as a failure, it nevertheless was revoked only in 1825.[52] The Act of repeal specifically contained a provision that empowered the Crown to grant charters that would provide for the liability of shareholders. It was thought that this would make officials more willing to grant them and

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47 Gelderblom, De Jong and Jonker 2013 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2116137 15-16, 26-27; De Jong, Jonker and Röell 2013 *Maandblad voor Accountancy en Bedrijfseconomie* 222; De Jongh *Tussen Societas en Universitas* 68-71; Dari-Mattiacci *et al* 2017 *J L Econ & Org* 212-214; Punt *Het Vennootschapsrecht* 108-110. Voet *Commentarius* 1.8 28 with reference to Scott *Digest* 3.4.7.1 (see above 2.1, fn 31 for further discussion of this text) accepted that managers were not liable because rights were against the company as *Universitas*; see the comments of De Jongh *Tussen Societas en Universitas* 70-71; Van der Heijden *De Ontwikkeling van de Naamlooze Vennootschap* 54-56, who merely takes the view that managers would not be liable for corporate debts. See the comments in De Jongh *Tussen Societas en Universitas* 69. On other companies created in the 17th century and how they differed from those discussed here, also see De Jongh *Tussen Societas en Universitas* 70, 155ff. On the rise and fall of the West Indian Company and the further fate of the DEIC, also see De Jong, Jonker and Röell 2013 *Maandblad voor Accountancy en Bedrijfseconomie* 222-224, 226-227; De Jongh *Tussen Societas en Universitas* 177.

48 Dari-Mattiacci *et al* 2017 *J L Econ & Org* 213.

49 Holdsworth 1916 *Jur Rev* 331-333, 339-340; Micklethwait and Wooldridge *The Company* 31-33.

50 More formally, the *Royal Exchange and London Assurance Corporation Act* of 1720, 6 Geo 1 c 18 (henceforth the *Bubble Act*). See *Kinder v Taylor* (1825) 3 LJ Ch 68. For the meaning and impact of this Act, see Shannon 1931 *Economic History* 269-270; Holdsworth *History of English Law* vol XVIII 219-221; Holdsworth 1916 *Jur Rev* 340-343.

51 Holdsworth 1916 *Jur Rev* 343-344; Gower *Principles* 24-30; Harris 1997 *Economic History Review* 675.

52 Holdsworth *History of English Law* vol XVIII 221-222; Micklethwait and Wooldridge *The Company* 47.

motivate parties to apply for them.[53] Hovenkamp mentions that this merely confirmed the common law, which meant that limited liability was created by default,[54] while Harris notes that "[w]e also learn in retrospect, from the fact that in 1825, a specific legislative arrangement had to be made to legalize the granting of charters without full limited liability, that limitation of liability had not been considered an attribute dealt-with by charters until then".[55]

After the enactment of the *Bubble Act*, chartered companies were, for commercial purposes, mostly replaced by deed of settlement companies in England,[56] although the chartered corporation formed the basis for future development of corporate law in the United States, after that country's independence.[57] As the name suggests, deed of settlement companies were created by agreements which established joint stock divided into shares, delegated management to directors, and determined that the property of the company would vest in trustees.[58] These business entities were originally regarded as partnerships, but they also acquired some unique features. Nevertheless, they did not obtain full limited liability. It was accepted that a provision in a deed which limited the liability of shareholders to the amounts of their stock interests could not apply against a creditor even if the creditor had notice of it.[59] These provisions excluded liability only between shareholders *inter se*.[60] Limited liability to third-party creditors could only be approximated by agreements that limited liability with those creditors, but this required formal agreements with each of them.[61] Nevertheless, uncertainties and complexities regarding litigation against the business entities in practice prevented claims against shareholders.[62]

The Crown always had the power to grant charters for corporations. Initially, exclusive rights were also so granted, but in the 17th century, this power

53 In terms of the *Bubble Companies etc. Act* of 1825, 6 Geo 4 c 91. See Harris 2020 *Journal of Institutional Economics* 652.

54 Hovenkamp 1988 *Geo LJ* 1651.

55 Harris 2020 *Journal of Institutional Economics* 652.

56 Handlin and Handlin 1945 *J Econ Hist* 2-3. However, on the use of corporations, see Todd 1932 *Economic History Review* 50; Shannon 1931 *Economic History* 277-278.

57 Gower *Principles* 19 fn 2.

58 Gower *Principles* 30-33; Lobban 1996 *Anglo-Am LR* 404.

59 Gower *Principles* 32-33; Blumberg 1986 *J Corp L* 581-582; Harris 2020 *Journal of Institutional Economics* part 3.1; Lobban 1996 *Anglo-Am LR* 417.

60 Blumberg 1986 *J Corp L* 581-582. This was only settled in *In re Athenaeum Life Assurance Society* 70 Eng Rep 216 (1858), 70 Eng Rep 347 (1859).

61 Gower *Principles* 32. These agreements were upheld in *Hallet v Dowdall* (1852) 21 LJQB 98; Lobban 1996 *Anglo-Am LR* 417. See Blumberg 1986 *J Corp L* fn 35 for further cases on this. Also see the discussion in Mackie 2017 *JCLS* 35-36; Schulte 1994 *Bond LR* 69. It has been contended that these arrangements contributed to statutory acceptance of limited liability; see Mackie 2017 *JCLS* 35 with reference to Butler 1986 *Int'l Rev L & Econ* 182.

62 Blumberg 1986 *J Corp L* 582; Gower *Principles* 33; Todd 1932 *Economic History Review* 61-62; Lobban 1996 *Anglo-Am LR* 404.

came to be reserved for Parliament.[63] Parliament then also started incorporating companies in the 18th century, although it was never doubted that incorporation could be granted by statute.[64] Due to the negative sentiment created by the *Bubble Act* and the events surrounding it,[65] few companies were created in this way until the end of the 18th century, when this power came to be used to create companies for canal building and (later) railways.[66] Apparently, limited liability in these companies depended on whether it was specifically granted by their incorporating statutes. Many did not, but from 1764, some of them provided for limited liability.[67] In the late 18th century, limited liability became a declared motive for applying for this form of incorporation.[68] However, limited liability was sparingly granted.[69]

In 1834 the *Trading Companies Act* was enacted to increase the availability of incorporation by allowing the Crown to confer any of the benefits of juristic personality by letters patent and without granting a charter.[70] The *Chartered Companies Act* of 1837 allowed for the granting by letters patent — that is without a charter grant, of the benefits of incorporation such as liability limited to the amount paid for shares.[71] Limited liability became politically disputed and when the first statute that provided for general incorporation by registration, the *Joint Stock Companies Act* of 1844, was enacted, it provided for the liability of members for the debts of the company.[72] The Act determined that creditors of the company first had to satisfy their claims against the assets of the company, but it ultimately still exposed the personal assets of shareholders to creditor claims.[73] It was only changed in England by the *Limited Liability Act* of 1855.[74] This Act was repealed and

63 Gower *Principles* 23. It was apparently initially accepted that the *Case of Monopolies* (1602) 11 Co Rep 84b and the *Statute of Monopolies* 1623, 21 Jas 1 c 3, which constrained the powers of the Crown, operated only domestically. See *East India Co v Sandys* 1684 10 St Tr 371. However, it was accepted after the revolution of 1688 that this power generally rested with Parliament.

64 Gower *Principles* 19 fn 2.

65 Micklethwait and Wooldridge *The Company* 39.

66 Gower *Principles* 32; Fallis *Evolution of British Business Forms* 13.

67 See the careful analysis by Harris 2020 *Journal of Institutional Economics* part 3.2; Blumberg 1986 *J Corp L* fn 16, although he does not properly distinguish between statutory and chartered companies.

68 Harris 2020 *Journal of Institutional Economics* 652.

69 Mackie 2017 *JCLS* fn 48.

70 *Trading Companies Act* of 1834, 4 & 5 Will 4 c 94; Girvin 1992 *J Leg Hist* 67.

71 *Chartered Companies Act* of 1837, 7 Will 4 & 1 Vict c 73; Lobban 1996 *Anglo-Am LR* 397; Girvin 1992 *J Leg Hist* 67.

72 Gower *Principles* 39-40; Blumberg 1986 *J Corp L* 583-585; Shannon 1931 *Economic History* 278-282; Schulte 1994 *Bond LR* 69; Ireland 2010 *Camb J Econ*, especially fn 1; Micklethwait and Wooldridge *The Company* 49-50.

73 Stevens *External Relations of Company Groups* 29.

74 The *Limited Liability Act* of 1855, 18 & 19 Vict c 133 confirmed shortly afterwards in the *Joint Stock Companies Act* of 1856, 19 & 20 Vict c 47; Gower *Principles* 45-46; Shannon 1931 *Economic History* 282-291; Davoudi, McKenna and Olegario 2018 *Journal of the British Academy* 33; Micklethwait and Wooldridge *The Company* 51.

incorporated into the *Joint Stock Companies Act* of 1856.[75] This and further developments that need not detain us culminated in the first real modern company law statute, named a "Companies Act" in 1862.[76]

Deed of settlement companies were also established in South Africa in the 19th century.[77] From the 1830s onwards, some corporations were furthermore created at the Cape in terms of ordinances.[78] The first company law enacted at the Cape, the *Joint Stock Companies Limited Liability Act* 23 of 1861, was based on the British statutes of 1844 and 1855, albeit that they were already outdated in the United Kingdom at this time.[79] The Cape legislation strongly influenced the first colonial company laws in the other southern parts of the continent that eventually became South Africa.[80]

2.4 From speculation to general incorporation in the Netherlands and France

The wave of speculation that gave rise to the *Bubble Act* was not an isolated or uniquely British event, although it is often viewed as such in the English-speaking world. It was part of a frenzy that gripped France, the Netherlands, Portugal and Hamburg.[81] In France, John Law, through the *Compagnie d'Occident* or the Mississippi Company, engaged in a scheme that was similar to the one proposed by the South Sea Company in England.[82] In the Netherlands, 1720 became known as the year of gambling — the *dobbeljaar*. It saw attempts to promote investment in several unviable companies, although it did not also involve the taking over of state debts, as in England and France.[83] The crash that ensued in the Netherlands created

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See especially the discussion in Lobban 1996 *Anglo-Am LR* 422-433. See also Fallis *Evolution of British Business Forms* 17, who states that this was done to allow the United Kingdom to catch up with the continent.

75 *Joint Stock Companies Act* of 1856, 19 & 20 Vict c 47; Girvin 1992 *J Leg Hist* 68; Micklethwait and Wooldridge *The Company* 51-53.

76 *Companies Act* of 1862, 25 & 26 Vict c 89 (henceforth *Companies Act* 1862).

77 De la Rey 1986 *Codicillus* Part 1 13.

78 De la Rey 1986 *Codicillus* Part 1 11-13.

79 Girvin 1992 *J Leg Hist* 67; De la Rey 1986 *Codicillus* Part 1 13-15.

80 De la Rey 1986 *Codicillus* Part 1 14ff; De la Rey 1986 *Codicillus* Part 2.

81 De Jongh *Tussen Societas en Universitas* 133, but see fn 1. It was stopped in its tracks in Hamburg when the creation of an insurance company and trade in securities were prohibited.

82 De Jongh *Tussen Societas en Universitas* 137-139; Holdsworth 1916 *Jur Rev* 331; Micklethwait and Wooldridge *The Company* 28-30.

83 This has been carefully explained in the *Het Groote Tafereel der Dwaasheid* (the Great Tableau of Foolishness). Due to political fragmentation, these companies were created by local authorities in Holland and Zeeland and by provincial authorities in the other provinces. See De Jong, Jonker and Röell 2013 *Maandblad voor Accountancy en Bedrijfseconomie* 225. Also see Punt *Het Vennootschapsrecht* 110-113.

a reluctance to apply for or charter new companies.[84] The law was not completely static during the period after 1720. Partnerships that had transferable shares were developed to accommodate the fragmentation of ownership over time,[85] but companies in the true sense were created again only in the latter part of the 18th century.[86] The first juristic person that was incorporated for business purposes, the Bank van Leening, was similarly created by legislation at the Cape in 1793.[87]

It has been proposed that the first corporation with the features of a joint stock company was the French *Société des Moulins de Bazacle* in Toulouse.[88] France had also recognised chartered companies (*compagnie priviligiée*) such as the Mississippi Company.[89] Moreover, France became the first country to provide for the creation of companies in general commercial legislation. In 1807, it provided for stock corporations, the *sociétés anonymes*, in the *Code de Commerce,*[90] whence it spread to other countries.[91] The *Code de Commerce* clearly distinguished different commercial associations. The *société en nom collectif* and *société en commandite* were *société de personne* or personal partnerships. With these partnerships creditors had to look to the partners to satisfy their claims. However, in the *en commandite* partnership, the partners that were *commanditaires* had limited liability while those that were *gérants* were liable for all debts of the partnership. The partnership had to have at least one *gérant*. In contrast, the *sociétés anonymes* were *sociétés capitaux*, meaning that creditors had to rely on the capital of the company to satisfy their claims and not on the corporators. However, *sociétés anonymes* were not very popular as they had to comply with strict requirements. In particular, they required government authorisation in the form of approval by the *Conseil d'Etat*.[92] Before the creation of *sociétés anonymes*, *sociétés en commandite* were sometimes created with transferable shares to conduct

84 De Jongh *Tussen Societas en Universitas* 133-147; De Jong, Jonker and Röell 2013 *Maandblad voor Accountancy en Bedrijfseconomie* 224-225.

85 De Jongh *Tussen Societas en Universitas* 148, 159-160, 164 with reference to the Middelburgse Zaagmolencompagnie and the Amsterdamse Moutmolen de Hooiberg.

86 De Jongh *Tussen Societas en Universitas* 148-160, 162-164.

87 De la Rey 1986 *Codicillus* Part 1 8 in terms of the *Plakkaat* of 15 March 1793, Kaapse Plakkaatboek VI (1951) 284-294.

88 Dari-Mattiacci *et al* 2017 *J L Econ & Org* 203; Nisen 2022 https://qz.com/219270/bazacle and the sources mentioned there.

89 France also chartered a corporation to trade with the East in the form of the *Compagnie des Indes Orientales* (CIO), incorporated in 1664. This corporation had many of the traits of the DEIC and the East India Company. See De Jongh *Tussen Societas en Universitas* 119ff; see 167-171 for the relationship between these and other business forms before the *Code de Commerce*.

90 *Code de Commerce* 1807 art 33.

91 Handlin and Handlin 1945 *J Econ Hist* 4; Blumberg 1986 *J Corp L* 596.

92 Lobban 1996 *Anglo-Am LR* 406-410.

business as joint stock companies, referred to as *sociétés en commandite par actions*.[93] In these situations only one partner had to remain liable for the debts of the partnership.[94] With the creation of *sociétés anonymes* it was debated whether these *sociétés en commandite* should still exist, but they were ultimately allowed to continue.[95] In comparison, the *en commandite* partnership was established in England only in 1907.[96] In terms of the Law of 23 May 1863 a private company the *société à responsabilité limitée* (SARL) was created that could be incorporated in terms of a general incorporation statute.[97] Furthermore, the law was amended in 1867 to allow for *sociétés anonymes* to be incorporated in terms of general incorporation legislation, without specific governmental consent.[98]

In the Netherlands, the *Code de Commerce*, with its scheme for companies and partnerships, became applicable in 1811.[99] In 1838 the Netherlands enacted its own Commercial Code (*Wetboek van Koophandel*), in which the law regarding business organisations was still based on the French approach, except that the *sociétés en commandite par action* was not imported into it.[100] The requirement of government approval (*preventief toezicht*) also applied in Dutch law, although the Dutch Commercial Code allowed refusal only if the articles of association contravened the law.[101] The Commercial Code was only updated in 1929[102] and private companies (*besloten vennootschappen*) were created in Dutch law only in 1971.[103] The rules on companies were absorbed in Book 2 of the *Dutch Civil Code* that was enacted in 1976.

2.5 The United States

It is not easy to briefly summarise the development of corporations with limited liability in the United States. Hovenkamp declares that "[t]he

93 Micklethwait and Wooldridge *The Company* 47.
94 Lobban 1996 *Anglo-Am LR* 412-415
95 Lobban 1996 *Anglo-Am LR* 412. Although stricter rules were imposed on these entities by the law of 17 July 1856, see Lobban 1996 *Anglo-Am LR* 418-422.
96 Holdsworth 1916 *Jur Rev* 310-311; Gower *Principles* 20; Hahlo *Company Law* 5; Lobban 1996 *Anglo-Am LR* 410-413, 423-424, 426, 431-433, 440; Hillman 1997 *Wash & Lee L Rev* 627; Davoudi, McKenna and Olegario 2018 *Journal of the British Academy* 33-34; Girvin 1992 *J Leg Hist* 68. Limited partnerships only became available in terms of the *Limited Partnership Act* of 1907, 7 Edw 7 c 24. For the position in the United States, see Hovenkamp 1988 *Geo LJ* 1595-1596.
97 Lobban 1996 *Anglo-Am LR* 433-435; Micklethwait and Wooldridge *The Company* 53.
98 Lobban 1996 *Anglo-Am LR* 436-438; De Jongh *Tussen Societas en Universitas* 208-209, regarding the influence of English developments on these reforms.
99 De Jongh *Tussen Societas en Universitas* 179-180.
100 De Jongh *Tussen Societas en Universitas* 184ff.
101 Van Vliet 2014 *Journal of Civil Law Studies* 275-276. It was abolished only in 2011, when it was replaced by a new supervision system.
102 *Wet op de Naamlooze Vennootschappen* van 2 Juli 1928, Stb 216.
103 The Act of 3 May 1971, Stb 286 came into effect on 29 June 1971.

voluminous writings on the history of American corporate law have not adequately explained either the evolution of limited liability in the nineteenth century or its meaning."[104] After independence in 1776, states through their legislatures had the power to grant charters for corporations.[105] These chartered corporations formed the basis for future developments. The *Bubble Act* no longer applied,[106] and although there was still some reluctance[107] to charter corporations, many were created, albeit subject to generally strict requirements.[108] Initially, many charters still imposed liability on shareholders, although several also did not.[109] However, the courts generally accepted that there would be no direct personal liability unless the charter specifically provided for it.[110] Assessment and indirect liability were also available in the United States, although it was recognised from 1809 onwards that this would be so only if the charter provided for it, while direct remedies for creditors did not exist in all states.[111] From the early 19th century, states enacted legislation which allowed for the general incorporation of (mostly manufacturing) corporations with limited liability.[112]

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104 Hovenkamp 1988 *Geo LJ* 1651.

105 Blumberg 1986 *J Corp L* 587. On the granting of charters before independence and shortly after it, see Arner 2002 *Southern Methodist Law Review* 44-45; Pollman 2021 *Tex L Rev* 1431ff who shows that before that date, they were granted by the executive as well; Maier 1993 *William and Mary Quarterly*. Also see Williston 1888-1889 *Harv L Rev* Part II 165-166. Only one business corporation was created before independence (in Pennsylvania): Seymour 2021 *BYU J Pub L* 121-127. On early corporations, also see Micklethwait and Wooldridge *The Company*-45.

106 On the application of the *Bubble Act* in the United States, see Arsht 1976 *Del J Corp L* 2; Handlin and Handlin 1945 *J Econ Hist* 5.

107 *Louis K Liggett Co v Lee* 288 US 517 (1933) 548-550 (henceforth the *Louis K Liggett Co* case), where the court refers to a list of fears that existed.

108 *Louis K Liggett Co* case 548-549. Pollman 2016 *Vand L Rev* fn 38 states: "[m]any states continued to issue special charters for certain types of corporations such as railroads and banks until the 1930s when federal regulation emerged to regulate these industries".

109 Blumberg 1986 *J Corp L* 588-589; Hovenkamp 1988 *Geo LJ* 1651, especially fn 388; Butler 1985 *LS* 139.

110 *Nichols v Thomas* 4 Mass 232 (1808) 233-235; *Spear v Grant* 16 Mass 9 (1819) 12; *Wood v Dummer* 30 F Cas 435 (CCD Me 1824) 436; *Myers v Irwin* 2 Serg & Rawle 368 (Pa 1816) 371.

111 *Franklin Glass Co v White* 14 Mass 286 (1817) 288; *Commonwealth v Blue-Hill Turnpike Corp* 5 Mass 420 (1809) 422; *Marlborough Manufacturing Co v Smith* 2 Conn 579 (1818) 583-584. Cf *Hume v Winyaw & Wando Canal Co* 1 Carolina LJ 217 (1830); Handlin and Handlin 1945 *J Econ Hist* 13-14.

112 It started with the *New York Act* of 22 March 1811 ch. 67 s 7 (see Hovenkamp 1988 *Geo LJ* 1653-1658, but see the limits at 1656). Similar legislation was enacted in New Jersey in 1816; Maine in 1823; Massachusetts in 1830 (although special incorporation was required here; see Hovenkamp 1988 *Geo LJ* 1652-1653 generally on the initial hostile approach of Massachusetts); New Hampshire in 1837 (although charters with limited liability were granted from 1816); Connecticut in 1837, which became the first state to extend general incorporation to any business (see Davoudi, McKenna and Olegario 2018 *Journal of the British Academy* 34; McBride 2011 *LCP* 3); and Rhode Island in 1847. The legislation in New York and New Jersey provided for liability that was limited to the value of shares beyond payment for shares, so it

General incorporation was a response to abuses of the political process that occurred because legislators could give special rights to corporations.[113] By 1850 general laws allowing incorporation for limited liability purposes were common, and after 1875 they were gradually extended to most lawful businesses.[114] Although the recognition of the concept of limited liability in this sense occurred fairly early on, the final road to general limited liability was rocky. Limited instances of restricted and even general liability of shareholders for corporate debts survived into the 20th century.[115]

3 Restrictions on corporate shareholding and the development of groups in England

Early group-like entities already existed in Italy in the 14th century. After 1350 *compagnie* such as the Medici bank refined their business models by setting up branches as separate partnerships.[116] Later the holding partnerships even at times obtained limited liability as limited partners.[117]

actually provided for double liability. See Howard 1938 *J Pol Econ*. Pennsylvania initially proved to be an outlier: Miller 1940 *Q J Econ* 153. Few charters were granted and statutes for the incorporation of limited forms of manufacturing were passed in 1840 and 1849. A general incorporation statute was enacted in 1874. See Freedland 1955 *Fordham L Rev* fn 4 on the development of registration in New York in the 19th century. See generally incorporation and limited liability: Blair 2003 *UCLA L Rev* 428-430; Harris 2020 *Journal of Institutional Economics* part 3.3; Blumberg 1986 *J Corp L* 593.

113 Butler 1985 *LS* 140ff; Hovenkamp 1988 *Geo LJ* part IV; Millon 1990 *Duke LJ* 208; Pollman 2021 *Tex L Rev* 1435ff; Micklethwait and Wooldridge *The Company* 45-46. *Louis K Liggett Co* case fn 4, where the court stated that "the dread of special privilege were largely responsible for the general incorporation laws is indicated by the fact that many states included in their constitutions a prohibition of the grant of special charters", and 549 where equality is seen as an important reason for the change. The court in fn 4 listed all the state constitutions that provided for this, starting with the *New York Constitution* of 1846 art 8 s 1.

114 *Louis K Liggett Co* case fn 28, again commencing with a law from New York, *New York Laws* 1866 c 838 1896. See the comprehensive analysis in Yablon 2007 *J Corp L* 331-332. Also see the discussion in Keasbey 1899 *Harv L Rev* Part I 205-206; Pollman 2016 *Vand L Rev* 647-648; Pollman 2021 *Tex L Rev* 1437-1438. See Hovenkamp 1988 *Geo LJ* 1636, which speaks of the rise of general incorporation statutes in 1840 and 1850.

115 Blumberg 1986 *J Corp L* 594, 597ff. Hovenkamp 1988 *Geo LJ* 1651-1652 refers to Horwitz *Transformation of American Law* 63-108, which concludes that strict limited liability was settled only in the late 19th century, but Hovenkamp concludes that this concept became widely accepted long before that, although it developed sporadically.

116 De Roover *Rise and Decline of the Medici Bank* 77-84. On the *compagnia* see 2.1 above, text next to fn 21.

117 De Roover *Rise and Decline of the Medici Bank* 89-90, 83-84 merely mentions that the holding partnerships obtained limited liability; Davoudi, McKenna and Olegario 2018 *Journal of the British Academy* 28. On limited liability in this context, also see Hillman 1997 *Wash & Lee L Rev* 626-627.

In England the general question whether corporate groups should be allowed arose only in the 19th century. The first important question that had to be answered was whether restrictions on corporate shareholding existed and would constrain the development of groups. Mackie mentions that Grant[118] in 1854 and Lindley[119] in the 1860s had already asserted that corporations could hold shares in companies. The issue was not settled in the case law, and Lindley had merely cited Grant as the authority for this conclusion. Conversely Brice[120] in 1874 contended that it was "until recently" doubted whether it was possible and that the preponderance of authority was against it. He relied on *Great Western Railway Company v Metropolitan Railway Company*.[121] However, in this case the company, Great Western, was empowered by its private Parliamentary Act to take shares, and it held shares through a trustee. The court a quo had indeed concluded that it did not have the power to take up further shares, but the Court of Appeal left the issue open.[122]

Mackie further mentions that it could be argued that chartered companies, as opposed to those incorporated by Parliament in terms of specific or general legislation, always had the power to hold shares, unless specifically prohibited, because "[t]hey were deemed to have the rights and capacities of natural persons".[123] Although he does not give authority for this particular point, it appears to be correct.[124] However, restrictions could be imposed in charters and contravention of restrictions could lead to proceedings for the forfeiture of a charter.[125] The question whether they could specifically hold shares was apparently not really properly considered.

Mackie then shows that companies that were created by specific Parliamentary Acts could hold shares if their statutes explicitly provided for

118 Grant *Practical Treatise on the Law of Corporations* [5].

119 Lindley *Treatise on the Law of Partnership* 119.

120 Brice *Treatise on the Doctrine of Ultra Vires* 92-93.

121 *Great Western Railway Company v Metropolitan Railway Company* (1863) 32 LJ Ch 382.

122 Mackie 2017 *JCLS* 7.

123 Mackie 2017 *JCLS* 8, especially fn 38. Also see the wording used in Swift *Evolution of the Business Corporation* 37-38.

124 See generally on the non-application of the *ultra vires* doctrine to these companies: *British South Africa Co v De Beers* [1910] 1 Ch 354; *Bonanza Creek Gold Mining Co v R* [1916] 1 AC 566, 583-584 relying on *Sutton's Hospital* (1612) 77 ER 960; *Jenkins v Pharmaceutical Society* [1921] 1 Ch 392; *Pharmaceutical Society v Dickson* [1970] AC 403; Gower *Principles* 166; Browning 1978 *Man LJ* 362ff, but see the description of a contrary view at 364.

125 See the wording in *Bonanza Creek Gold Mining Co v R* [1916] 1 AC 566 583-584; Gower *Principles* 166. On restrictions in charters, also see Arner 2002 *Southern Methodist Law Review* 32-33; Holdsworth 1916 *Jur Rev* 336-337. On purpose clauses in charters, see Pollman 2021 *Tex L Rev* 1428ff. On possible remedies, also see Holdsworth 1916 *Jur Rev* 344. See below, 3.1 text next to fn 138, on the ability of corporate entities to be shareholders in these companies.

it, but that these powers were seldom granted and narrowly interpreted even where they existed.[126] There is some indication that provisions of this kind were fairly restrictively interpreted. Where a company, at creation, held certain shares and was authorised by statute to do so, this was not interpreted to mean that further shares could be acquired by it.[127] The narrow interpretation of powers to hold shares certainly could be justified for these companies. Here the *ultra vires* rules also governed the relationship between the company and the state, while these companies were often created to serve particular public interests.[128]

3.1 Corporate shareholding in companies incorporated in terms of general incorporation legislation

It is also clear that a narrow interpretation of the capacity of companies to hold shares was followed where companies were incorporated in terms of general incorporation legislation. In *Joint Stock Discount Company v Brown*[129] the company was incorporated on 21 February 1863 with a memorandum and articles of association. The object of the company, *inter alia*, was to carry on the "business of a bill-broker and scrivener; the drawing, accepting, endorsing, discounting, and re-discounting bills of exchange and promissory notes; the making advances, and procuring loans on, and the investing in, securities".[130] The directors of the company subscribed for shares in Barned's Banking Co Ltd, which was incorporated on 27 June 1865, to acquire the business of two established banking firms. Leaving aside some of the complexities, the question in this case was whether this acquisition was *ultra vires*. It was argued for the directors that "investing in securities" had to be given a distinct and larger meaning. The directors justified the transaction on the basis that it would benefit the company by "increasing its connections". The shares were acquired as a permanent investment in order to promote the discount business. However, the court interpreted this phrase narrowly. It would only include "going into the market, and buying railway shares, for a temporary investment, to be sold again afterwards".[131] Although the limits on shareholding in this case

126 Mackie 2017 *JCLS* 8-9, 11.

127 *Salomons v Laing* (1850) 12 Beavan 339. Mackie 2017 *JCLS* 10-11 equated *Maunsell v Midland Great Western (Ireland) Railway Company* 57 (1863) 71 ER 58 72 with this case, but it appears to be on a different footing. The initial statutes specifically restricted holding shares to specific amounts. A company agreed to subscribe for further shares, and it was authorised by statute only at a later stage. The court acknowledged that this agreement was *ultra vires* and was not ratified by statute.

128 Mackie 2017 *JCLS* 11-12.

129 *Joint Stock Discount Company v Brown* (1866–67) LR 3 Eq 139.

130 Clause 3 of the memorandum of association quoted; *Joint Stock Discount Company v Brown* (1866–67) LR 3 Eq 139,140.

131 Also see the United States case of *Robotham v Prudential Insurance Co* 53 A 842 (1903) 847, 848 (henceforth the *Robotham* case).

were not set out in statute, the narrow interpretation can perhaps be justified on the basis that the *ultra vires* doctrine in both companies that were so created and companies created in terms of general legislation, was aimed at protecting investors against the risk of speculative further investment by the companies in which they had invested.[132]

In the next year, the holding of shares by a company was nevertheless upheld for the first time. *In re Barned's Banking Co*[133] arose out of the failure of the bank mentioned previously. The Contract Corporation Ltd (C) had taken up shares in Barned's Bank (B) through a nominee and they had then been transferred to C. The liquidator of C appealed against the decision to add C to the list of contributories of B on the basis of its shareholding.

Cairns LJ, for the first time, considered whether the holding of shares by a company was generally prohibited.[134] In this case, C was incorporated in terms of the *Companies Act* of 1862. It was argued that this Act precluded corporate shareholding. The judge expressed the following opinion: "Now, if that argument is to prevail, it must be upon the words of the Act of Parliament of 1862, because there is no apparent or *prima facie* objection to a corporation so joining with another corporation in trade."[135] The judge's point of departure was that, *prima facie*, there is no objection to allowing this form of shareholding on the basis that a corporation could enter into a trade or partnership with an individual.[136] The judge also further accepted that there was no reason in the common law why this form of shareholding generally should not be allowed.[137] Moreover, Cairns LJ referred to other legislation relating to companies, which apparently assumed that shares could be held by companies.[138] These arguments are somewhat weak.

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132 Mackie 2017 *JCLS* 13-14.

133 *In re Barned's Banking Co* (1867) 3 Ch 105 (CA) (henceforth the *Barned's Banking* case).

134 *Barned's Banking* case 113-115. Selwyn LJ in *In re Asiatic Banking Corporation* (1868-69) LR 4 Ch App 252 257 (henceforth the *Asiatic Bank* case) stated: "it is sufficient for me to say that I entirely agree with the judgment of Lord Cairns in the case of *Barned's Banking Company*".

135 *Barned's Banking* case 113.

136 *Asiatic Bank* case 257: "looking at the question as a mere abstract question, in my judgment there is nothing to prevent a corporation from being a shareholder in another trading corporation".

137 See similarly *Asiatic Bank* case 257.

138 *Chartered Companies Act* of 1837, 7 Will 4 & 1 Vict c 73, which, according to the court, allows for corporate bodies to be shareholders. Although no specific reference is made to provisions, it probably is a reference to X and XI, where it is stated that certain information about shareholders would be required except where they are "bodies politic". Also see the comments of Mackie 2017 *JCLS* 16. Further reference is made to the *Companies Clause Consolidation Act* of 1845, 8 & 9 Vict c 16, where a shareholder is defined as "Shareholder, Proprietor, or Member of the Company; and in referring to any such Shareholder Expressions properly applicable to a Person shall be held to apply to a Corporation". Also see the further legislation mentioned below in the text next to fn 142.

Mackie correctly points out that the partnership argument is not very persuasive, considering that partnerships do not have limited liability. Moreover, he correctly observes that the court failed to refer to several pieces of legislation where this issue at least was not addressed.[139] However, this underlines the conclusion that the court was generally favourably disposed towards corporate shareholding.

The court then turned to the *Companies Act* of 1862 itself. It apparently accepted the submission of counsel for C that the Act referred to shareholders (or more accurately members) as persons and that there were references to the heirs, executors or administrators of these shareholders, which would indicate that shareholders were meant to be natural persons.[140] However, it concluded that there are stronger indications in the Act that pointed in the opposite direction. The court referred to the model articles in Schedule 1 Table A and Table B, Form B and the forms in a schedule to the Act, which accommodated shareholder proxies given by bodies corporate.[141] This of course would again be a tenuous basis for concluding that the statute allowed companies to be shareholders. The judge therefore further observed that the *Companies Act* of 1862 was a consolidation.[142] Some preceding legislation namely the *Joint Stock Companies Act* of 1844[143] and the *Joint Stock Companies Winding-up Act*[144] that was consolidated in 1862 included juristic persons in their definitions of shareholder. The *Companies Act* 1862 did not contain an interpretation clause. Therefore these definitions would remain relevant for the 1862 Act. Moreover, the companies incorporated under the *Joint Stock Companies Act* 1844[145] could be registered in terms of the 1862 Act[146] and had to be wound up in terms of it.[147] The Court therefore concluded that the provisions of the *Companies Act* 1862 should generally be read to include juristic persons.[148] Again these arguments are not entirely satisfactory. Mackie

139 Mackie 2017 *JCLS* 16-17.

140 *Barned's Banking* case 113. This argument has been loosely restated because it is not carefully formulated. The court was probably thinking of ss 11 and 16 of the *Companies Act* 1862.

141 *Barned's Banking* case 113-114, where it is also stated that the Act specifically refers to proxies in ss 50-51.

142 *Barned's Banking* case 114-115.

143 *Joint Stock Companies Act* of 1844, 7 & 8 Vict c 110.

144 *Joint Stock Companies Winding-up Act* of 1848, 11 & 12 Vict c 45, although this Act was not essential to the court's argument.

145 *Joint Stock Companies Act* of 1844, 7 & 8 Vict c 110.

146 *Companies Act* 1862 s 180ff.

147 *Companies Act* 1862 s 199ff.

148 Also see *Asiatic Bank* case 257: "although in the statute of 1862 the words 'person or persons' continually occur, still I think it must be taken to include corporations". The Royal Bank of India, the relevant company in this case, was incorporated in terms of Indian legislation, which was similar to the United Kingdom Act of 1856. Also see the summary of the arguments in the cases in Mackie 2017 *JCLS* 17-18.

mentions that they probably can be justified on the basis that the prior existence of shareholding by corporations militated against a blanket prohibition of the practice.[149] This certainly contributed to the conclusion, but it will also become apparent later that the judgment reflected the general logic and policy underlying company law at the time.

In contrast, Cairns LJ accepted that the corporate shareholding of a company would be *ultra vires* unless the memorandum determined differently. Apparently, he believed that the *ultra vires* doctrine provided a more nuanced mechanism for preventing harm done by corporate shareholding, than outright statutory prohibitions.[150] But it was also clear that the memorandum in this case covered both the purchasing of and investing in shares, and hence that the corporate shareholding in the particular case was not *ultra vires*.[151] In *In re Asiatic Banking Corporation*[152] the court again found that a bank had the power to register shares in its name if it was required to properly allow the bank to hold them as security. Giffard LJ in this case held that "the justice of the case is entirely in this instance with what the law most clearly is".[153]

The direct impact of these judgments was an extension of liability. They prevented shareholders from escaping their obligations to contribute the amounts on shares that were not fully paid up.[154] Therefore, broader questions regarding the extension of limited liability were not considered. Companies were allowed to hold shares in other companies without explicitly considering that this would give shareholders of corporate shareholders further tiers of protection against creditors of companies in which those shares were held.[155]

Nevertheless, Blumberg[156] mentions one English case where the limits on the liability of corporate shareholders was taken into account, namely *In re European Society Arbitration Accounts*.[157] It concerned two insurance associations, the British Nation Life Assurance Association (BN) and British Commercial Insurance Company (BC). Both were established by deed of

149 Mackie 2017 *JCLS* 23-24.

150 Also see *European Society Arbitration Accounts* (1878) LR 8 Ch D 679 (henceforth the *European Society* case) 707ff, where an association with a quasi-corporate nature was found not to be able to hold shares where it would lead to unrestricted liability, if its deed of settlement allowed it to contract only if the contracts restricted it. See below text next to fn 157.

151 *Barned's Banking* case 112-113.

152 *Asiatic Bank* case 257ff.

153 *Asiatic Bank* case 263.

154 Mackie 2017 *JCLS* 6, 20, 24, 36-37. See, however, the *European Society* case below, text next to fn 157, where the *ratio* of the case allowed for such avoidance of liability.

155 Blumberg 1986 *J Corp L* 608; Mackie 2017 *JCLS* 4, 33, 37.

156 Blumberg 1986 *J Corp L* 608-609.

157 The *European Society* case.

settlement. BN was completely registered in the terms of the *Companies Act* 1844 and it was later registered under the *Companies Act* 1862. However, according to the court, it had a quasi-corporate character; it apparently did not have statutory limited liability.[158] BC was not registered and was therefore covered by Part VIII of the *Companies Act* 1862.[159] The deed of settlement of BN provided that every "instrument whereby a liability to pay any sum or sums exceeding in the whole the sum of £5" would be incurred had to determine that claims could be satisfied only from the capital stock of the company and that directors, proprietors or members could not be held liable on such claims.[160] BN therefore established limited liability by contract.[161] BN acquired the shares in BC. The BC shares were initially acquired by BN through nominees. A deed was then concluded to have the shares vested directly in and registered in the name of BN. The question was whether BN should be listed as a contributor in terms of section 199 of the *Companies Act* 1862.

It was found that this second transaction was *ultra vires* as BN's liability as shareholder would not be limited in the manner required by the deed of settlement and that BN could not be so listed.[162] The first transaction was contrasted with the second on the basis that BN did not acquire unlimited liability as a shareholder as long it was not registered as a shareholder. The acquisition of the shares itself was allowed in terms of the deed of settlement as long as it did not lead to unlimited liability.[163] BN had in the first transaction agreed to indemnify BC and its nominees but this again was limited to the extent of BN's funds.[164] The court therefore accepted that the purchase itself was not prohibited and that indirect shareholding by BN would not be *ultra vires*, as it would lead to limited liability for all contractual liabilities of both associations.[165]

Nevertheless, too much cannot be made of this case. It concerned an acquisition of shares in another company that was structured in a manner which eventually was found to be *ultra vires* rather than valid. It dealt with the contractual limited liability of a holding company in a situation where the

158 *European Society* case 702, 708.

159 *European Society* case 680.

160 *European Society* case 681-682, 705-706.

161 See above 2.3, text next to fn 61.

162 See the discussion of the case above in fn 150.

163 *European Society* case 706-707, apparently in terms of clauses 44, 45 and 119. See Mackie 2017 *JCLS* 34, and the discussion of the holding of shares through nominees at 23-24. Blumberg 1986 *J Corp L* 608-609 with reference to the *European Society* case 705-708 apparently thought that this case merely concerned calls to contribute the balance of subscription prices. Although the case is difficult to follow, this view does not appear to be correct.

164 *European Society* case 706.

165 *European Society* case 706: "The transaction as it was carried out was reasonable enough." See Mackie 2017 *JCLS* 33-37.

subsidiary did not have limited liability. It did not apply to companies in the strict sense and general limited liability (that would include protection from liability in tort)[166] of the holding company and subsidiary in the context of direct shareholding. Yet the case shows that courts did not stumble blindly into allowing holding companies without taking account of the consequences of their limited liability.[167]

English law left corporate shareholding to private ordering and this facilitated the development of groups where related companies continued to have separate juristic personality and limited liability.[168] English company law was particularly strongly influenced by the deed of settlement company. This meant that considerable freedom was given to incorporators to determine the limits of what companies could do. Incorporators were allowed to determine whether they would allow corporate shareholding or whether holding those shares would be allowed. The law in general certainly showed some reluctance to allow corporate shareholding. Companies would have the capacity to hold shares only if their memoranda expressly provided for it, and provisions that dealt with this issue were interpreted restrictively. However, companies that wanted to hold shares in other companies or establish groups soon learned how to draft memorandum provisions that would allow them to avoid the *ultra vires* pitfall.[169] Companies learned to structure around these limitations and corporate shareholding and groups became a common phenomenon without any further attempt to generally prevent it.

The normal principles regarding separate juristic personality, developed with regard to companies with natural persons as shareholders, were generally applied also to corporate shareholders and to companies in groups. Corporate shareholding which facilitated the development of groups was endorsed at a time when the basics of separate juristic personality and limited liability had already developed. Indeed the first cases on this issue preceded the confirmation and the settling of the principle that a company would remain separate from its shareholders even if it were dominated by one shareholder.[170] But once this became entrenched it was also extended

166 On non-contractual liability, also see Mackie 2017 *JCLS* 35-36.

167 The fact that this case was linked to the other cases regarding corporate shareholding is illustrated by the references in the arguments of counsel in the *European Society* case 693 and 696 to *Barned's Banking* case.

168 On the relationship between private and public ordering in this context, see Mackie 2017 *JCLS* 19, 21-23. Also *see In re William Thomas & Co* [1915] 1 Ch 325 329-330, where a wide interpretation was given of the memorandum to allow for a sale of business in exchange for shares. Also see the description of the law in Locke 2010 *Stell LR* fn 4.

169 Blumberg 1986 *J Corp L* 608.

170 The principle was settled in *Salomon v Salomon Ltd* [1897] AC 22 30, 34. See Micklethwait and Wooldridge *The Company* 52. On the consequences of the case for groups ,see Botha 1982 *De Jure* 108-109. *Salomon* was followed in South Africa

to corporate shareholders.[171] Companies controlled or dominated by other shareholders would remain separate entities, all else being equal.[172]

The initial cases for the most part did not specifically concern the consequences of separate juristic personality in general or limited liability in particular. Mackie therefore states that the instrumentalist approach followed here brought about double limited liability in groups as an unintended consequence.[173] It is perhaps arguable that this is for the most part correct for the original cases that did not consider or concern limited liability at a time when the concept of separate juristic personality was not fully developed. But it is difficult to argue that this form of limited liability really has just continued to exist as an unintended accident of history.[174] By the time it was decided in the *Salomon* case that separate juristic personality should be strictly maintained even where a company is dominated by one individual, it probably could not have escaped judges that this principle could also be extended to corporate shareholders in a similar position. But corporate shareholding had already become entrenched by then. There is also nothing unusual about the early cases. They simply reflect the operation of a precedent-based legal system. It is clear that liberal company law as it developed in the 19th century did not really have the tools to restrict corporate shareholding or its consequences and the *ultra vires* doctrine could not become an effective mechanism for doing so. Later courts that did consider the full impact of corporate shareholding within groups, did not feel the urge to limit corporate shareholding and limited liability, although it

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by *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 550-551, 556-557. Blumberg 1986 *J Corp L* 576 states that limited liability was "firmly established" by the time that groups became possible. But this is only partly true with regard to England. See Anderson 2009 *MULR* 334.

171 *Bartholomay Brewing Company Ltd v Wyatt* [1893] 2 QB 499, although this case was decided before *Salomon* in the High Court, and it did not concern the liability of the holding company. See Mackie 2017 *JCLS* 4.

172 On the relevance of this aspect outside of England, see Sannes *Rechtsverhouding van Moeder- en Dochtermaatschappij* 63-70, which concludes that single or controlling shareholding by companies should not destroy separate juristic personality in the Netherlands and related legal systems. Opposite views, nevertheless, are also discussed.

173 Mackie 2017 *JCLS* 4, where this development was called piecemeal; 4, 5, 6, 23, 28, 36, 37, where the unintended consequences of allowing corporate shareholding are discussed; and 6, 24, 26, 27, where the impact of instrumentality is discussed. Also see Stevens *External Relations of Company Groups* 50-61, 62-63, 100, 371, 30-31, relying on Muscat *Liability of the Holding Company* 157. Also see Blumberg 1986 *J Corp L* 609, who calls this an "unreflective application of the entity doctrine". Also see 4.5; Ireland 2010 *Camb J Econ* 848, who relies on Blumberg for the view that limited liability in groups is an accident of history, although he strangely suggests that this occurred when groups emerged in the inter-war period. He also notes that the *Salomon* principle was "formalistically extended". He refers to Kahn-Freund 1944 *MLR* 54, who accepts the general rules on the incorporation of companies but calls the consequences of *Salomon* "calamitous".

174 See 4.5.

sometimes produced negative outcomes.[175] In *The Albazero*[176] the precept that every company in a group is a separate entity with separate rights and duties was described as a settled albeit "relatively modern concept".

There is also nothing to indicate that corporate groups in the more technical sense could not exist in South Africa by the end of the 19th century, despite some of the critical views expressed about nominee directors in the context of groups.[177] South African companies were allowed to hold shares and become holding companies on the same terms as in England.[178]

Although the development of groups in the United States will be discussed in some detail, attention will not be paid to the historical development of groups in Europe outside the United Kingdom. However, it can briefly be mentioned that juristic personality also culminated in the conclusion in the Netherlands, Germany and France that companies, like individuals, could hold shares in other companies and could even hold controlling shares in those companies.[179] In the Netherlands the question whether a company could hold shares in another was not contested in court and it appears to have been regarded as obvious that corporate shareholding was possible.[180]

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175 But see 5.1.

176 *The Albazero* [1977] AC 774 807. Also see the *Adams* case 532 and especially 536, where it was stated that "[o]ur law, for better or worse, recognises the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities".

177 See above 1, text next to fn 3, and below 6, text next to fn 310. On the use of mining trusts in South Africa, see Sannes *Rechtsverhouding van Moeder- en Dochtermaatschappij* 36-37. It would appear as if some corporate shareholding existed in nineteenth-century South African companies. See the reference to company investors in Maphosa *et al* 2021 *Economic History of Developing Regions* 157, 159; Maphosa *Historical Analysis of Joint Stock Companies* 107-109, 112, 115, 121, 135, 220.

178 Botha *Groups in South African Company Law* 8 notes that the *Companies Act* 1973 in Schedule 2 specifically determined that one of the general powers of a company would be to acquire shares in any way. Also see s 34 of the *Companies Act* 1973 for the status of the schedule. In terms of s 19(1)(b) of the current *Companies Act*, the capacity of a company would be unrestricted unless it is specifically limited in the memorandum of incorporation of the company.

179 Sannes *Rechtsverhouding van Moeder- en Dochtermaatschappij* 45-51 states that groups also rose to prominence in Europe at the same time, but that it gained momentum only during and after the First World War.

180 Sannes *Rechtsverhouding van Moeder- en Dochtermaatschappij* 62 fn 1, where reference is also made to a French case that accepted this principle: *Cassation* 10 Dec 1878 Dalloz 79.1.5.

3.2 Early legislative intervention to regulate groups: United Kingdom and South Africa

The courts and legislator later intervened to address harms that were caused by the use of groups. Statutory intervention commenced in the United Kingdom when section 127 of the *Companies Act* of 1929[181] defined holding and subsidiary companies in order to expand financial reporting regarding group activities.[182] This definition of a holding company and subsidiary was expanded by section 154 of the *Companies Act* of 1948[183] and several provisions to regulate groups were added to the legislation.[184] The regulation of groups in the further legislation became so expansive that it cannot be summarised here. But the basic principle that companies could hold shares in other companies and that limited liability would mostly be maintained in this context prevailed.

Earlier South African legislation closely followed English developments. The *Lansdown Commission* in 1936 noted that holding companies were a "recent phenomenon" and were not a "marked characteristic of company

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181 *Companies Act* of 1929, 19 & 20 Geo 5 c 23; Edwards and Webb 1984 *Accounting Historians Journal* on the development of groups and group accounts, see especially 34 on the impact of the *Greene Committee Report* (Greene *et al Greene Committee Report)*. See Pargendler 2023 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4412997 13, 17 on the development of this requirement in the United States and elsewhere, and 28-29 on the position in the United Kingdom.

182 As proposed in Greene *et al Greene Committee Report* paras 71, 72VII.

183 *Companies Act* of 1948, 11 & 12 Geo 6 c 38. See Gower 1956 *Harv L Rev* 1379, where the special rules in s 129 regarding the exemption of private companies from disclosure are given, while it is said that subsidiaries are often used to avoid proper regulation. This provision was added to counter the abuse. It is explicitly stated that this rule was not followed in South Africa in the South African *Companies Amendment Act* 46 of 1952 s 18(f). See Millin *et al Millin Commission Report* (henceforth the *Millin Commission Report*) paras 34-39.

184 In accordance with proposals made in the *Cohen Committee Report* (Cohen *et al Cohen Committee Report*). See s 27 of the *Companies Act* of 1948, which prohibited shareholding by a subsidiary in a holding company, s 54 which extended financial assistance for the purchase of shares in a holding company, ss 150-153 regarding financial reporting, s 161(3) regarding persons who may not be auditors, s 166 dealing with an extension of the powers of inspectors in groups, s 185(8), which sets out age limits on directors extended to private companies that are subsidiaries, and s 190, which extends the prohibition of making loans to directors of holding companies. For further provisions that extend the disclosure duties of directors, see ss 193(1)(b), 195, 196(2), 196(3)(b), 197 and 200. See the references in the part on arrangements and reconstructions that refer to subsidiaries, s 209. See Kahn-Freund 1946 *MLR* 238-240, especially 238, where it is noted that "the Committee have, in some respects, boldly ignored the fiction of corporate personality" in the context of groups, and 240, where it is suggested that English law at the time approximated German *Konzernrecht*, where the separate personality of companies is sometimes ignored in groups. Also see 50 on loans to directors and the disclosure of interests. See the general discussion in Pargendler 2023 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4412997 30.

practice" in South Africa.[185] The first legislative provision in South Africa that defined holding and subsidiary companies was added to the *Companies Act* 46 of 1926 by the *Companies Amendment Act* 23 of 1939 on the recommendation of the Commission.[186] It provided a definition mainly for the purposes of the regulation of financial reporting in the context of groups.[187] However, the amendment act also prohibited financial assistance for the purchase of shares in a holding company,[188] the purchase of shares by a subsidiary in a holding company,[189] loans on the security of holding company shares[190] and loans to holding companies.[191] The *Companies Act* 46 of 1926 was then again amended by the *Companies Amendment Act* 46 of 1952, which provided for the definition of holding and subsidiary companies in section 90*nov*.[192] The Act now provided for group financial accounts[193] and regulated various other aspects of group relationships.[194]

185 The *Lansdown Commission Report* para 216. Also see the distinction that is drawn with regard to the mining group system, discussed above in 1, fn 3.

186 As part of s 229 of the *Companies Act* 46 of 1926 (henceforth the *Companies Act* 1926).

187 S 90*quin* of the *Companies Act* 1926. Also see s 90*bis*(3) on the coordination of financial years, 99(1), which allowed for auditor access to the accounts of subsidiaries. This was proposed in the *Lansdown Commission Report* paras 216-220. It was strongly influenced by preceding British developments, although the South African rules were more expansive than the equivalent English provisions in light of subsequent developments

188 S 86*bis*(2) of the *Companies Act* 1926.

189 S 86*bis*(1)(a) of the *Companies Act* 1926.

190 S 86*bis*(1)(b) of the *Companies Act* 1926.

191 S 86*bis*(1)(c) of the *Companies Act* 1926. On these provisions, see the *Lansdown Commission Report* paras 115-117.

192 In accordance with the *Millin Commission Report* paras 192-194 the definition of the *Cohen Commission Report* was closely followed. See Botha 1977 *De Rebus* 375.

193 Ss 90*quat*, 90*ter*(5)(b) and 90*quin* of the *Companies Act* 1926; *Millin Commission Report* para 190ff. Also see s 90*oct* on the disclosure of remuneration to a director from a subsidiary; *Millin Commission Report* paras 145-150. The previously mentioned s 90*bis*(3) became s 90*bis*(5) while s 90*bis*(3)(a) became a provision that concerned the disclosure of changes in the board of a subsidiary in the directors' report.

194 S 86*bis*(1)(a) of the *Companies Act* 1926 was replaced by s 24*bis*, which merely prohibited a subsidiary from being a member of a holding company; s 86*bis*(1)(b) was removed and s 86*bis*(1)(c) was amended and became s 86*bis*(1); s 62(1)(d) contained specific provisions regarding the quorum in shareholder meetings of subsidiaries; s 70*oct* prohibited loans to directors of the holding company; s 70*nov* required a register of securities held by a director in a company, its holding companies or subsidiary companies; s 95*ter* allowed inspectors to also do inspections in holding and subsidiary companies of the company investigated; s 99*bis*(2) extended the access of auditors to financial information of subsidiaries; and s 101 specifically regulated the minimum number of members of subsidiaries. See *Millin Commission Report* paras 44-47, 135-136, 140, 141-142, 180 and 230, which was strongly influenced by the *Cohen Commission Report*.

4 Restrictions on corporate shareholding and the development of groups in the United States

In *Louis K Liggett Co v Lee,* the Supreme Court in the United States stated that "[t]he power to hold stock in other corporations was not conferred or implied" in the 19th century and that "the holding company was impossible".[195] Corporate shareholding was mostly *ultra vires*. Many restrictions were placed on corporations that were specifically chartered by legislators;[196] the capacities of corporations that were incorporated were initially strictly regulated. In most cases, it was accepted that corporations did not have the inherent capacity to hold shares. These corporations had to be specifically authorised to hold shares.[197] A similar basic point of departure was followed with regard to companies incorporated in terms of general incorporation statutes. These corporations would not have general powers to hold shares, unless express provision was made for it in their charters.[198] Purpose clauses were narrowly interpreted even if they

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195 *Louis K Liggett Co* case 555-556, especially the sources mentioned in fn 32; *Milbank v New York, Lake Erie & Western Railroad* 64 How Pr 20 (NY Sup Ct 1882) 23-25; Blumberg 1986 *J Corp L* and the cases mentioned fn 218. They will be listed where relevant in the text below.

196 On the development of restrictions, see Pollman 2021 *Tex L Rev* 1431-1436. See *Louis K Liggett Co* case 548-550, where reference was made to a number of fears that restricted incorporations, including the fear of monopoly; see 4.3. See Freedland 1955 *Fordham L Rev* 371, who states that before 1811, only one charter gave a corporation the power to hold shares.

197 There are many cases where corporate shareholding was not upheld. For corporations chartered in terms of national banking legislation: *California Bank v Kennedy* 167 US 362 (1897) 366-370; *Franklin Bank of Cincinnati v The Commercial Bank of Cincinnati* 36 Ohio St 350 (1881) 355; *First National Bank v National Exchange Bank* 92 US 122 (1875) 127-128. For a savings bank, although the emphasis in this case was on the fact that a bank could not acquire shares in a manufacturing company, while wider statements regarding the use of bank assets were also made, *Franklin Co v Lewiston Institution for Savings* 68 Me 43 (1877) 46. For cases concerning the railways, see *Hazelhurst v Savannah, Griffin & North Alabama Railroad Co* 43 Ga 13 (1871) 57-58; *Hill v Nisbet* 100 Ind 341 (1884) (henceforth the *Hill* case) 349; *Louisville & Nashville Railroad Co v Kentucky* 161 US 677 (1896) 698; *Central Railroad v Collins* 40 Ga 582 (1869) 627ff; *Elkins v Camden and Atlantic Railroad* 36 NJ Eq 5 (1882) (henceforth the *Elkins* case). Also see *People ex relatione Peabody v Chicago Gas Trust Co* 130 Ill 268 (1889) (henceforth the *Peabody* case) 285, where specially and generally chartered corporations are equated. In South Africa this was also accepted by Locke 2010 *Stell LR* fn 4 with reference to the *Peabody* case above.

198 *Howe v Boston Carpet Co* 82 Mass 493 (1860) (henceforth the *Howe* case) 494; *De La Vergne Refrigerating Machine Co v German Savings Institution* 175 US 40 (1899) (henceforth the *De La Vergne* case) 55; *Buckeye Marble & Freestone Co v Harvey* 92 Tenn 115, 20 S W 427 (1892) (henceforth the *Buckeye Marble* case) 428; *Anglo-American Land, Mortgage & Agency Co v Lombard* 132 Fed 721 (CCA 8th 1904) 736. Although the law is not discussed in any detail, see the conclusion in *The Mechanics and Working Men's Mutual Savings Bank and Building Association of New Haven v The Meriden Agency Company* 24 Conn 159 (1855).

provided for corporate shareholding.[199] It was generally accepted that State Attorneys had the power to seek the dissolution of corporations that did not act within their powers.[200]

The high-water mark is represented by the authorities which accepted that corporate shareholding could be authorised only in legislation.[201] Some states such as New York specifically prohibited the holding of shares by corporations and in *De La Vergne Refrigerating Machine Co v German Savings Institution* this prohibition was considered alongside the conclusion that it was also *ultra vires* for the corporation to hold shares. The court stated that "it is not within the general powers of a corporation to purchase the stock of other corporations for the purpose of controlling their management"[202] and that this was not only correct as a general rule but that it was confirmed by a statutory provision.[203]

4.1 General limits on the ultra vires *nature of corporate shareholding*

Nevertheless, there have always been cases where corporate shareholding was accepted to be in accordance with the law. Some railway and other transport-related corporations as well as some banks were already allowed, in terms of the legislation that incorporated them, to hold shares, from 1832

199 *Peabody* case 282-288, where a second purpose of a corporation created in terms of general legislation determined "to purchase and hold or sell the capital stock". It was even found that this provision was unlawful as it undermined competition and the basic structure of corporations, see *Peabody* case 289ff. On strict interpretation, see *Robotham* case 847-848; *State ex relatio Attorney General v Hocking Valley Railway Co* 31 Ohio CC 175 (1909) (henceforth the *Hocking Valley Railway Co* case) 181. See Anon 1931 *Colum L Rev* 288; Compton 1940 *Geo Wash L Rev* 130-131.

200 These were known as *quo warranto* actions: McCurdy 1979 *Business History Review* 317-318. These powers were seldom exercised by states, but see the enforcement from 1890 discussed at 321ff. Also see Pollman 2016 *Vand L Rev* 648-649. Hovenkamp 1988 *Geo LJ* 1662-1667 describes how, by the end of the 19th century, *quo warranto* became more restricted, although it was still available if an *ultra vires* act created an illegal monopoly; see 1669-1672. On *quo warranto* proceedings, see Millon 1990 *Duke LJ* 208-209, although many of the cases he relies on did not concern shareholding. See the discussion of *quo warranto* below in 4.2, fn 213; Keasbey 1899 *Harv L Rev* Part II 269; Collins 2013 *Fordham L Rev* 2322 fn 203; Seymour 2021 *BYU J Pub L* 119-120, 133-137.

201 See the cases mentioned in *Robotham* case 851. See Freedland 1955 *Fordham L Rev* 369: "It is the well settled rule in virtually every jurisdiction that the power of intercorporate stockholding is derived exclusively from an express or implied legislative grant." He relies on the *Elkins* case, but this case of course concerned a corporation created by statute. Also see *Peabody* case 286.

202 *De La Vergne* case 55-56, 58, with reference to the relevant *New York Act (An Act to Authorize the Formation of Corporations for Manufacturing, Mining, Mechanical, or Chemical Purposes)* of 1848 (Laws 1848, chap 40) s 8. See *Louis K Liggett Co* case fn 32.

203 Also see *Milbank v New York, Lake Erie & Western Railroad* 64 How Pr 20 (NY Sup Ct 1882) 27-28, which concerned railway corporation legislation. On statutes that prohibit corporate shareholding, see Anon 1931 *Colum L Rev* 282-284; Compton 1940 *Geo Wash L Rev* 132.

onwards. Provisions that allowed corporate shareholding were also found in the charters of manufacturing corporations, although not as frequently as in railway charters.[204] Maryland and Iowa allowed inter-corporate shareholding unless it was specifically prohibited. The former courts were apparently motivated by a misunderstanding of the English case law.[205] A purchase of shares in another corporation that was involved in an unrelated business to what the corporation was empowered to perform would for that reason be *ultra vires*.[206] Conversely, acquisitions of shares by corporations were sometimes accepted if they were made in the course of the ordinary business of the corporation,[207] although Freedland mentioned that the power to hold shares in these circumstances was construed to exist within narrow parameters.[208] In conclusion, "[t]he powers exercised by courts under the *ultra vires* doctrine were by no means regulatory. Courts were not

204 Blumberg 1986 *J Corp L* 605-606. For a full analysis of charters that gave corporations the power to acquire shares, see Compton 1940 *Geo Wash L Rev* and see 128, where a somewhat different view to Blumberg's is taken with regard to manufacturing corporations: "holding of stock by manufacturing companies is found to be almost as widespread as in the railroads". Also see *Louis K Liggett Co* case fn 32, where it is stated that grants in Pennsylvania had led to corporate failures which contributed to a constitutional amendment that prohibited special charters. On the Pennsylvania Railroads, see Pollman 2021 *Tex L Rev* 1440-1441. On statutory powers to hold stock, see Compton 1940 *Geo Wash L Rev* 132.

205 *Booth v Robinson* 55 Md 419 (1880) 433-434; *Davis v United States Electric Power & Light Co of Baltimore City* 77 Md 35 (1893) 39; *Calumet Paper Co v Stotts Investment Co* 96 Iowa 147, 152-153, 64 NW 782, 783-784 (1895). See Blumberg 1986 *J Corp L* fn 218. See the more careful approach to the *Bank of India* (more accurately *Asiatic Bank*) case, discussed above in 3.1, fn 134 and 148, in *California Bank v Kennedy* 167 US 362 (1897) 366-370. Mackie 2017 *JCLS* 4 mentions that Brice *Treatise on the Doctrine of Ultra Vires* 92-96 interpreted the English case law to grant this power to a company by default. It appears that the latter author also influenced the court in *Davis v United States Electric Power & Light* above. See the rejection of Brice in Anon 1931 *Colum L Rev* fn 29.

206 See *Robotham* case 851, where a statutory provision that granted the power to hold shares was interpreted to apply only with regard to *intra vires* acts; *Hazelhurst v Savannah, Griffin & North Alabama Railroad Co* 43 Ga 13 (1871) 57-58; *Franklin Bank of Cincinnati v The Commercial Bank of Cincinnati* 36 Ohio St 350 (1881) 355; *Franklin Co v Lewiston Institution for Savings* 68 Me 43 (1877) 46; *Hill* case 349; *Howe* case 494-495 and the cases mentioned. See *Sumner v Marcy* 23 Fed Cas 384 (CCD Me 1847) 385-386, where it was found that a timber company could not acquire shares in a bank. Compton 1940 *Geo Wash L Rev* 131: "if a corporation, chartered for one purpose, were granted stock-owning privileges, it would soon be carrying on a business entirely foreign to its charter rights".

207 Anon 1931 *Colum L Rev* 288-289. See *Robotham* case 851, where the court notes that the taking of shares as security that accords with the corporate object is lawful; *Hill* case 349ff; *Howe* case 494-495, where the court drew a distinction between corporations chartered in terms of general and specific legislation.

208 Freedland 1955 *Fordham L Rev* 369 states: "implied power to holdings acquired in the ordinary course of business as outright payment for debts owing or as collateral for the payment of debts and have required an express grant for holdings acquired by way of purchase or exchange of stock"; *Peabody* case, especially 284-285 and the sources mentioned.

active and intrusive but passive and receptive".[209] It was difficult to use the *ultra vires* doctrine to enforce broader policy that did not just concern private relationships, although it was initially more difficult to escape the doctrine in the United States than in England.

4.2 The impact of general incorporation statutes on ultra vires *corporate shareholding*

The incremental expansion of general incorporation statutes in the course of the 19th century meant that the edifice that held out corporate shareholding by causing it to be *ultra vires* started to crumble. Initially, general incorporation was available for corporations only in particular industries, while several constraints were imposed on these entities to limit their size. Courts still insisted that limitations had to be placed on the capacity and powers of companies,[210] and this would, in many cases, have made it difficult for incorporators to extend the capacity of the company to corporate shareholding.[211] Compton even states that "[t]hese general incorporation laws were less liberal than the former charters, and stock ownership was always limited to certain specific classes of corporations".[212] Millon adds: "[t]he states also used general incorporation acts to restrict the economic power of corporations … Of particular importance were prohibitions on ownership of stock of other corporations — restrictions that directly addressed concerns about corporate consolidation and concentration of wealth. As a result, holding companies and parent-subsidiary acquisitions were precluded".[213] Similarly, Collins concludes that: "The emerging general corporation laws, however, did not satisfy the needs of most large multistate business combinations. The original idea of a

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209 McCurdy 1979 *Business History Review* 321.

210 *Robotham* case 851. See *Louis K Liggett Co* case 549, where it is also mentioned that severe limits were placed on the scope and size of the corporations. Also see Anon 1931 *Colum L Rev* 285 on restrictions that were placed on the manner in which the capacity of a company could be determined. Also see the *Louis K Liggett Co* case 555-556, where the limits before the rise of general incorporation clauses and the rise of these clauses are discussed. See Rutledge 1937 *Wash U LQ* 306-307.

211 See, however, the still restrictive approach in the *Peabody* case 283-286 where "lawful purpose" was interpreted as excluding a secondary purpose of holding shares.

212 Compton 1940 *Geo Wash L Rev* 131.

213 Millon 1990 *Duke LJ* 208-209, although he does not explain how this was done. He says that "[s]ome states continued to insist that corporate charters include specific limitations on corporate purposes and powers" and that corporations were often required to have a single purpose. Also see Anon 1931 *Colum L Rev.* The cases that he refers to in fn 37 do not provide clear support for the general statements made here: *State v Nebraska Distilling Co* 29 Neb 700, 46 NW 155 (1890) did not concern the holding of shares by a corporation but rather the participation in a monopolistic trust. At most the cases show that *quo warranto* proceedings could also be brought against corporations incorporated in terms of general incorporation legislation. The only case that gives some support is the *Peabody* case 283-286, further discussed above in fn 211.

general corporation was limited: general corporations were conceived not as massive business enterprises but rather as local 'incorporated partnerships'."[214]

Despite the early adoption of general incorporation statutes, corporate law in the United States was strongly influenced by the law regarding specifically chartered corporations. It was not anchored in the contractual deed of settlement companies, as was the case in England.[215] Blumberg states:[216]

> [T]he development in the English law differed from the American experience because of the different English legal framework for the issuance of charters. Unlike the United States where general corporation statutes, not articles of incorporation, largely specified the powers of a corporation, the Companies Act 1862 provided for in-corporation via the registration of companies with the company powers specified not only in the statute, but also in the company's memorandum of association. There was no comparable doctrine existing in the United States at that time. Rather, the American courts strictly limited the corporate powers in the charter to those authorized, expressly or impliedly by the statute.

However, statutes that are much more permissive and allowed for general incorporation for "any lawful business" became more common after 1875.[217] This meant that broader charter provisions could be used to drastically limit the acts that would be *ultra vires*.[218] At that stage charters could not simply provide that a corporation would be incorporated for "any lawful business", but incorporators now had wide scope to draft broad objectives that could include the holding of shares.[219] Hovenkamp remarks that corporate theory "both narrowed and privatized *ultra vires*".[220] In this sense the United States ultimately moved in the same direction as England through the drafting of charters.[221]

4.3 Further grounds for not upholding corporate shareholding

It was also at times accepted that corporate shareholding was against public policy and this was sometimes combined with the conclusion that it was *ultra*

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214 Collins 2013 *Fordham L Rev* 2312.

215 Gower 1956 *Harv L Rev* 1373.

216 Blumberg 1986 *J Corp L* 608.

217 *Louis K Liggett Co* case 556, further discussed above in fn 210. Also see Rutledge 1937 *Wash U LQ* 310-311.

218 *Robotham* case 851.

219 Mocsary 2016 *BYU L Rev* 1365. See Hovenkamp 1988 *Geo LJ* 1663-1664 on the development of *ultra vires* in the late 19th century, especially on the wider approach to corporations incorporated in terms of general incorporation legislation. Also see Millon 1990 *Duke LJ* 209-210 on the generally more lenient approach of this period; Rutledge 1937 *Wash U LQ* fn 54.

220 Hovenkamp 1988 *Geo LJ* 1663.

221 See 3.2. See, for instance, Anon 1931 *Colum L Rev* 282, who states that "charter restrictions upon a corporation's powers are naturally lessened by the modern drift of corporate charters towards rubberoid elasticity and Dionysiac unrestraint".

vires.[222] One of the main differences between corporate shareholding in the United Kingdom and the United States was that corporate laws were purposefully used to control corporate power in the United States.[223] That these forms of shareholding were against public policy, especially as they could create monopolies, was mentioned as a reason for not allowing them.[224]

Moreover, further motivations for prohibiting corporate shareholding, whether on the basis that it is *ultra vires* or more broadly against public policy, were also given.[225] It was proposed that the management of the purchaser corporation would usurp the management powers of the board of the other corporation[226] and that one of the corporations could be used for the benefit of the other and to its own detriment.[227] As many of these arguments would become relevant where the corporate shareholder gained control of another corporation, it was stated that explicit charter provisions that allowed corporate shareholding would be required, where shareholding would establish control.[228]

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222 *Robotham* case 852: "there is also authority for the proposition that a rule of law based on public policy or on the doctrine of *ultra vires*, or on both, prohibits a corporation from acquiring the stock of another corporation, where the business of one or both corporations has certain characteristics"; *Oelbermann v Railroad Co* 77 Hun 332, 29 NY Supp 545 (1894).

223 Rutledge 1937 *Wash U LQ* 306; *Louis K Liggett Co* case 548-550 and the discussion of the fears of corporate power.

224 *Peabody* case 290ff. See Collins 2013 *Fordham L Rev* 2315; *Louisville & Nashville Railroad Co v Kentucky* 161 US 677 (1896) 698; *Elkins* case; *Dunbar v American Telephone & Telegraph Co* 238 Ill 456 (1909) 471ff, where the main question was whether this conduct was against public policy and precious little was said about the question whether it was within the power of the company (see 486); *Buckeye Marble* case 428; *De La Vergne* case 40, 56; *Central Railroad v Collins* 40 Ga 582 (1869) 628; *Hocking Valley Railway Co* case 182, 186ff. Also see Thomson 1893 *Am L Rev* 341, where it is accepted that a purchase of shares in a competitor would be illegal even if not *ultra vires.* See the reference in Hovenkamp 1988 *Geo LJ* fn 507, and see 1670-1671 on related practices such as purchases of assets and the conclusion of partnerships by corporations. See Anon 1931 *Colum L Rev* 288-289, where it is emphasised that the question whether shares could be acquired would also depend on whether it would establish control. Cf Keasbey 1899 *Harv L Rev* Part II 269ff with reference to *Attorney-General v American Tobacco Co* 55 NJ Eq 352 (1897).

225 See generally Anon 1931 *Colum L Rev* 281ff, which refers to both.

226 *Anglo-American Land, Mortgage & Agency Co v Lombard* 132 Fed 721 (CCA 8th 1904) 736; *Peabody* case 284; *State v Atlantic City & Shore Railroad Co* 77 NJL 455, 72 Atl 111 (1909) 118-119; *Buckeye Marble* case 428. Also see Anon 1931 *Colum L Rev* 282, where it is stated that it may mean that funds of the purchasing corporation will no longer be controlled by its board. Also see on this issue: Hovenkamp 1988 *Geo LJ* 1671; Collins 2013 *Fordham L Rev* 2322.

227 Anon 1931 *Colum L Rev* 281 and the cases mentioned in fn 5; Compton 1940 *Geo Wash L Rev* 131.

228 *Peabody* case 284; Anon 1931 *Colum L Rev* 288-291, where later developments more favourable to changes of control are discussed. On the importance of control,

The rise of corporate groups that could do business all over the United States was further hampered by the fragmented nature of corporate law in the United States, where each state has its own corporate law. It would not have made sense to allow states to place restrictions on corporations in order to protect public interest, if "tramp corporations" from other states that did not meet those requirements could simply enter the state and conduct business there or hold controlling interests in companies that did so.[229] States often restricted corporations that they chartered, to operations within the state.[230] Moreover, the Supreme Court in the early 19th century consistently held that they could regulate and even exclude from their territories corporations chartered in other states (foreign corporations).[231] According to the Supreme Court, corporations were competent merely to operate in the territories where they were created and they were able to operate outside of those territories only with the permission of other states which, in this sense, were foreign jurisdiction.[232] Corporations did not have to be treated like citizens for the purposes of the constitutional Privileges and Immunities Clause, which did not allow states to discriminate against citizens from other states with regard to rights and privileges.[233] Moreover, the Commerce Clause in the *Constitution of the United States,*[234] which indirectly limits the ability of states to restrict inter-state commerce, was interpreted to cover transactions concluded by corporations to do business in other states. The ability of states to restrict these transactions was therefore limited. However, it was still accepted that states had the power

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also see *Robotham* case 848; Stevens *External Relations of Company Groups* 36-37.

229 McCurdy 1979 *Business History Review* 316 with reference to *Paul v Virginia* 8 Wall 168 (US 1869) (henceforth the *Paul* case). See Hovenkamp 1988 *Geo LJ* 1669 on the role that these aspects played in attempts to control monopolies.

230 Keasbey 1899 *Harv L Rev* Part II 265; Collins 2013 *Fordham L Rev* 2313.

231 Wickersham 1909 *Yale LJ* 1-7; Hovenkamp 1988 *Geo LJ* 1647, 1649; McCurdy 1979 *Business History Review* 314, where restrictions on shareholding are mentioned and 316 with reference to *Cooper Manufacturing Co v Ferguson* 113 US 727 (1885). Also see the broad statements of McCurdy 1979 *Business History Review* 335-336. See Pollman 2016 *Vand L Rev* 648, who declares that states had the power to "regulate" foreign corporations.

232 *Bank of Augusta v Earle* 13 Pet 519 (US 1839) 588; *Paul* case 181-182; Wickersham 1909 *Yale LJ* 1, where it is stated that this *dictum* was *obiter*, and 3: especially the statement that limitations imposed in the home state would also apply to the corporations when outside of it and 5: the summary of the law made with reference to the *Paul* case above; McCurdy 1979 *Business History Review* 314-316, but see fn 39; Hovenkamp 1988 *Geo LJ* 1647, 1649; Blair and Pollman 2015 *Wm & Mary L Rev* 1683-1685, 1687; Butler 1985 *LS* 155.

233 Privileges and Immunities Clause (*Constitution of the United States* art IV s 2 cl 1); Wickersham 1909 *Yale LJ* 8; Blumberg 1986 *J Corp L* 305-308 with reference to *Bank of Augusta v Earle* 13 Pet 519 (US 1839) 586-587; *Paul* case 177; Pollman 2011 *Utah L Rev* 1636-1638; Pollman 2016 *Vand L Rev* 658; Hovenkamp 1988 *Geo LJ* 1649-1650.

234 *Constitution of the United States* art 1, s 8, cl 3.

to exclude foreign corporations from entry by acquiring property including shares, performing activities from or maintaining offices in their jurisdictions. This included the power to allow such entry subject to conditions. In the words of McCurdy the mobility of foreign goods could not be restricted but the mobility of corporations could.[235] Throughout the later part of the 19th and early 20th century increasing constraints were placed on these state powers to restrict foreign corporations.[236] It was decided that the Fourteenth Amendment of 1868, in so far as it concerned equal protection under the law and due process, also applied to corporations.[237] Foreign corporations already active in a state could be further regulated only as long as they were treated equally to domestic corporations.[238] Gradually, corporations were receiving recognition as separate persons in the strong sense, which also required constitutional protection.[239] However, Wickersham in 1909 stated: "[i]t may be safely asserted that the only limitation upon the powers of the States to exclude foreign corporations... [include], first, that the regulations

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235 McCurdy 1979 *Business History Review* 309, especially fn 39, contrasting *Welton v Missouri* 91 US 275 (1876) and the cases that followed it with *Cooper Manufacturing Co v Ferguson* 113 US 727 (1885) 736-737. See further McCurdy 1979 *Business History Review* 314-317, especially the discussion of the *Paul* case 181 from 315ff. See Pollman 2011 *Utah L Rev* fn 50; Wickersham 1909 *Yale LJ* 8, 14ff; Collins 2013 *Fordham L Rev* 2331-2332.

236 See Hovenkamp 1988 *Geo LJ* 1650 with reference to the cases on arbitrary expulsion. He mentions the inter-state commerce cases: *Western Union Telegraph Co v Kansas* 216 US 1 (1910) 21; *Ludwig v Western Union Telegraph* Co 216 US 146 (1910) 159-160 although he does not distinguish them from cases that did not concern this issue discussed hereafter. He stresses that a "right of corporations to work in multistate markets" became recognised. This is probably based on *Western Union Telegraph Co v Kansas* 216 US 1 (1910) 21 where it was said that: "To carry on interstate commerce is not a franchise or a privilege granted by the state; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right." Cf Millon 1990 *Duke LJ* 213 which takes the view that these cases rejected the previous doctrine and Rutledge 1937 *Wash U LQ* 311-312, especially fn 19, which describes later cases that, according to him, severely curtailed the powers of states to constrain the activities of foreign corporations.

237 See comment from the bench in *Santa Clara County v Southern Pacific Railroad Co* 118 US 394 (1886); *Pembina Consolidated Silver Mining & Milling Co v Pennsylvania* 125 US 181 (1888) 189; *Southern Railway v Greene* 216 US 400 (1910) 412; Blumberg 1986 *J Corp L* 308-312; Pollman 2011 *Utah L Rev* fn 50, 1642-1646; Pollman 2016 *Vand L Rev* 658-660; Hovenkamp 1988 *Geo LJ* 1642-1645, especially 1649-1650 as well as 1601-1603 on substantive due process; Collins 2013 *Fordham L Rev* 2332; Blair and Pollman 2015 *Wm & Mary L Rev* 1688-1697.

238 Hovenkamp 1988 *Geo LJ* 1650 with reference to the cases on arbitrary expulsion, especially *Southern Railway v Greene* 216 US 400 (1910) 412-417. The other cases mentioned by Hovenkamp on this score concerned inter-state trade, although he did not distinguish the different lines of reasoning.

239 See below 4.5, text next to fn 270, on constitutional protection of corporations.

so prescribed shall not deprive the foreign corporations of property without due process of law, or deny to them the equal protection of the laws".[240]

Although states in the late 19th century continued to have considerable power over foreign corporations, they became reluctant to exercise their powers to restrict foreign corporations from 1869-1890, and their powers to do so were in fact seldom exercised.[241]

4.4 Liberalisation led by New Jersey

At the end of the 19th and beginning of the 20th century, states almost completely abandoned using corporate law to limit the size and power of corporations. This then became the province of antitrust laws that also operated on a federal level.[242]

From 1888-1896 New Jersey, the so-called traitor state,[243] enacted legislation that liberalised corporate law in general and specifically provided for corporate shareholding by and in domestic and foreign corporations.[244]

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240 See the summary in Wickersham 1909 *Yale LJ* 10.

241 McCurdy 1979 *Business History Review* 317; Collins 2013 *Fordham L Rev* 2330.

242 McCurdy 1979 *Business History Review* 305-306, 307-308; Rutledge 1937 *Wash U LQ* 305-308. On the development of state and federal antitrust law, see Collins 2013 *Fordham L Rev* 2335-2342.

243 The name apparently comes from Steffens 1905 *McClure's Magazine* Part I and Steffens 1905 *McClure's Magazine* Part I.

244 *Louis K Liggett Co* case 557-564, especially fn 32, where it is stated that unconditional power to hold shares was fully granted only in 1893. It refers to three statutes that ultimately culminated in this outcome, although four statutes are generally referred to for this purpose: *New Jersey Laws* 1888 c 269 at 385 (enacted on 4 April 1888); *New Jersey Laws* 1888 c 295 at 445 (enacted on 17 April 1888); *New Jersey Laws* 1889 c 265 § 4 at 414 (enacted 9 May 1889); *New Jersey Laws* 1893 c 171 § 1 at 301 (enacted 14 March 1893). A revised statute was enacted which repealed these statutes: *New Jersey Laws* 1896 c 185 s 51 at 294 (enacted 21 April 1896). These provisions culminated in a very general provision that provided for general shareholding. It has been argued that New York had implemented laws to provide corporate shareholding earlier on: Freedland 1955 *Fordham L Rev*. See the discussion of the position in New York in the *Louis K Liggett Co* case 560-564. It is not necessary to enter the complex elements of this debate as there is no doubt that New Jersey and not New York became the state where companies that wanted to hold shares incorporated. It is for this reason that New Jersey is generally referred to as the state that triggered the major change. At least one reason why New Jersey became the traitor state was also that it no longer enforced shareholding restriction in the period prior to 1893. See Freedland 1955 *Fordham L Rev* fn 173; Keasbey 1899 *Harv L Rev* Part I 207, 208. Also see Rutledge 1937 *Wash U LQ* 307.The New Jersey legislation was still interpreted narrowly in the *Robotham* case 850-851 and *State v Atlantic City & Shore Railroad Co* 77 NJL 455, 72 Atl 111 (1909). See also the interpretation of enabling legislation in *Hocking Valley Railway Co* case 184. Also see, generally, McCurdy 1979 *Business History Review* 322-323, especially fn 65; Millon 1990 *Duke LJ* 212. See Eldar and Rauterberg 2022 https://repository.law.umich.edu/law_econ_current/230 24 for some of the reasons why New Jersey succeeded. See the detailed analysis of the history in Yablon 2007 *J Corp L* 332ff, who sets out the varied reasons for the success of New Jersey;

Of course this did not occur out of the blue but was the culmination of a gradual liberalisation of corporate law. Compton states "[t]he surprise does not lie in the fact that it happened, but in the fact that it did not happen sooner".[245] Moreover, the changes made by New Jersey would not have sufficed to completely undermine the restrictions on corporate shareholding and the forming of groups throughout the United States. Other states could have simply applied their own strict laws and excluded New Jersey corporations.[246] However, some states also liberalised their laws in an attempt to persuade corporations to incorporate in their jurisdictions, while it became generally accepted that the tools available to states to address corporate shareholding and limit the activities of foreign corporations would be difficult and expensive to implement and could do more harm than good. It would be difficult to replace the goods and services provided by these large corporations locally.[247] It appears simply that there was an understanding that "the old types of corporation statute … though in general suited to their day, have become antiquated and inadequate to the needs of modern high-powered business organized, on a mass-production scale".[248]

To avoid restrictions on inter-state business by companies and corporate shareholding and therefore the formation of groups, especially in the context of attempts to monopolise different sectors, businessmen started to use trusts as holding structures, even before the New Jersey laws came into effect.[249] Attempts to set aside these arrangements were often successful,[250] but the changes to the law of New Jersey meant that many

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Collins 2013 *Fordham L Rev* 2329-2330; Seymour 2021 *BYU J Pub L* 138-139; Blair and Pollman 2015 *Wm & Mary L Rev* 1707.

245 Compton 1940 *Geo Wash L Rev* 132.

246 Also see McCurdy 1979 *Business History Review* 331 on limits to the ability of companies in other states to exchange their shares for those of the New Jersey holding company, although this apparently was overlooked in some of the case law. Also see *McCutcheon v Merz Capsule Co* 71 Fed 787 (1896). See above 4.5, text next to fn 241, on the reluctance of states to control foreign corporations.

247 McCurdy 1979 *Business History Review* 336, with reference to Adams 1903 *Pol Sci Q*. See further McCurdy 1979 *Business History Review* 336-342. Some attempts were made to achieve the cooperation that could counter the measures taken by New Jersey, but all these attempts failed. Also see *Louis K Liggett Co* case 561-564, especially fn 34-36 for a description of states that also liberalised their laws. See similarly Yablon 2007 *J Corp L* 327, 354, 358ff; Rutledge 1937 *Wash U LQ* 307-308. On the responses of other states, also see Keasbey 1899 *Harv L Rev* Part I 202 and Keasbey 1899 *Harv L Rev* 266; Collins 2013 *Fordham L Rev* 2330; Dodd 1936 *Harv L Rev* 34ff.

248 Rutledge 1937 *Wash U LQ* 312. See 308, where the author uses the metaphor of a "horse-and-buggy" and a "thoroughly-up-to-date model" motor vehicle. Also see Rutledge 1937 *Wash U LQ* 320-323 on the further development of the powers of corporations to hold shares.

249 Dodd 1936 *Harv L Rev* 30; Micklethwait and Wooldridge *The Company* 66-68.

250 Robinson 1910 *Yale Review* 391-400, with specific reference to *People v North River Sugar Refinery Co* 121 NY 582, 24 NE 834 (1890) and *State ex relatio Attorney-*

of them were recreated with New Jersey corporations replacing trusts.[251] All that was left of the meteoric but brief rise of the trusts was that combinations of businesses for anti-competitive purposes broadly became known as trusts[252] and they gave the name antitrust law to the United States version of competition law.[253] Ironically it was left to antitrust law to deal with the corporate schemes created after the enactment of the New Jersey laws.[254]

Ultimately New Jersey also did not remain the major state for incorporations. It started to lose ground in the early 20th century. Under the democratic governor, soon-to-be President Woodrow Wilson, it enacted the so-called Seven Sister laws in 1913, that again severely restricted companies, and it was replaced by other states as the main state for incorporations.[255] Delaware ultimately became the favoured state for incorporations, which it has remained to this day.[256]

4.5 The recognition of groups as a considered consequence of corporate liberalisation

This liberalisation of corporate law in the United States has been described as the "dissociation of incorporation and regulation".[257] The idea that corporate law could be used to impede corporate power was eviscerated at

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General v Standard Oil Co 49 Ohio St 137, 30 NE 279 (1892); Seymour 2021 *BYU J Pub L* 133-135; Collins 2013 *Fordham L Rev* 2315-2328, especially 2321ff on the *quo warranto* proceedings that were brought against corporations involved in trusts; Micklethwait and Wooldridge *The Company* 68.

251 Keasbey 1899 *Harv L Rev* Part II 266; Micklethwait and Wooldridge *The Company* 68-69; Collins 2013 *Fordham L Rev* 2333-2334, who states that consolidation initially occurred through asset purchases. See the above text next to fn 243 and the below text next to fn 259 on the impact of changes to New Jersey corporate law. Also see above 4.2, fn 213 on the role of trusts in this context.

252 Collins 2013 *Fordham L Rev* 2292-2293. Although the term "trust" was often used to refer to a holding company also outside of the United States in countries such as the Netherlands and France; Sannes *Rechtsverhouding van Moeder- en Dochtermaatschappij* 19-20.

253 Hovenkamp 1988 *Geo LJ* 1669-1670; Keasbey 1899 *Harv L Rev* Part I 268.

254 Although antitrust still had to develop to do that adequately. See Keasbey 1899 *Harv L Rev* Part I 268ff. Holding companies became subject to antitrust law in terms of *Northern Securities Co v United States* 193 US 197 (1904), especially 338, which accepts that the *Sherman Act* can override state law. Later legislation dealt more directly with mergers.

255 *New Jersey Laws* 1913 c 13-19 at 25-33 (enacted 19 February 1913) in turn repealed *New Jersey Laws* 1917 c 195 at 566 (enacted 28 March 1917).

256 Eldar and Rauterberg 2022 https://repository.law.umich.edu/law_econ_current/23025ff; Pollman 2016 *Vand L Rev* 649-650; Grandy 1989 *J Econ Hist*. This did not happen overnight but over time. See Yablon 2007 *J Corp L*, especially fn 10, 354, 359-361; Seymour 2021 *BYU J Pub L* 113. See Arsht 1976 *Del J Corp L* 1 for a description of the history of corporate law in this jurisdiction; Rutledge 1937 *Wash U LQ* 309; Collins 2013 *Fordham L Rev* fn 265; Dodd 1936 *Harv L Rev* 43, especially fn 67.

257 *Louis K Liggett Co* case fn 37; Crane "Dissociation of Incorporation and Regulation" 109.

the end of the 19th century. Corporate laws that restricted the activities of corporations through limited shareholding no longer served as anti-monopoly mechanisms.[258]

As previously mentioned, it became the province of antitrust law to constrain the power of corporations. Although the main antitrust law, the *Sherman Act* of 1890, was not limited to or even explicitly aimed at corporations there "is little room for doubt that the basic motivation for its passage was fear of the growth of corporate combinations to gigantic size".[259] Initially, it was believed that this statute could be applied with restrictive corporate laws[260] but corporate law was no longer regarded as an appropriate regulatory tool for this purpose. McCurdy concluded that in "the complex national economy of the 1890s, the formal juridical principles forged in a simpler era proved to be a rope of sand".[261]

It is clear that the move towards corporate shareholding and the formation of groups was hotly contested in the United States. Nevertheless, it can be argued that this new arrangement did not adequately address the harms that could arise from separate juristic personality and limited liability. Blumberg declares that limited liability in the United States developed before corporate shareholding became recognised[262] and that its impact in the context of groups could not have been contemplated. He then further observes that groups became legally recognised without judicial appreciation or consideration of the consequences of limiting the liability of corporate shareholders. He calls the recognition of limited liability in groups, which became an important cornerstone of modern economic societies, an "accident of history", as limited liability arose before its implication for groups could be foreseen.[263]

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258 However, see Yablon 2007 *J Corp L* 372 on the relationship between antitrust and New Jersey corporate law; Rutledge 1937 *Wash U LQ* 305: "[m]ore accurately stated, the Federal Government mounted one horse and galloped away in one direction, while the state governments climbed upon the back of another and headed him toward exactly the opposite point of the compass", 308: "[c]ertainly few recognized in 1890 that New Jersey had forged a tool with which business could weaken, if not destroy, the original fundamental policy of the Sherman Act".

259 Rutledge 1937 *Wash U LQ*; Collins 2013 *Fordham L Rev* 3243; Micklethwait and Wooldridge *The Company* 73.

260 McCurdy 1979 *Business History Review* 308 329ff, which convincingly argued that the Supreme Court in one of its first *Sherman Act* cases, *United States v EC Knight* 156 US 1 (1895) rejected the application of that Act to mergers on the basis that states had to deal with this on the basis of corporate law.

261 McCurdy 1979 *Business History Review* 342.

262 Blumberg 1986 *J Corp L* 573 fn 2.

263 Blumberg 1986 *J Corp L*, especially 605, 626. Also see 575, 608-609 fn 2, where it is stated that limited liability was unthinkingly accepted in the context of groups. See Blumberg 1986 *J Corp L* 576, where it is stated that limited liability in groups "followed automatically" on the recognition of groups. At 630 it is said that the acceptance of limited liability in this context "followed almost automatically, without

Blumberg appears to be broadly correct in so far as he asserts that limited liability already existed when groups became prominent, and that limited liability was not carefully considered in the contest that brought about the recognition of groups. Although the courts considered that corporate shareholding could be harmful because these corporations could be forced to act against their own interest,[264] broader concerns such as the harms that could be caused by large monopolistic groups dominated debates. However, as in the case of England,[265] this again does not appear to justify the further conclusion that it was an unintended consequence of the recognition of groups. Groups and the separate juristic personality of the companies that formed a group developed in a broad climate that clearly favoured free enterprise and the private ordering of business affairs. The initial acceptance of separate juristic personality and limited liability in groups reflected the *mores* at the time. It was rather a consequence of what Hovenkamp refers to as classical corporate law.[266] Underlying this approach was the notion that corporate law was a matter of private ordering and concomitantly that state regulation of their activities should be restricted.[267] The strong recognition of separate juristic personality and limited liability,[268] the demise of the idea that corporate status was a privilege granted by the state for public purposes and the rise of general incorporation or that it granted special privileges to corporations,[269] the constitutional recognition of corporations and the limits that it placed on the power of states to impose constraints on corporations, compelled the conclusion that companies could hold shares in others and that they therefore could form groups.[270] Some resistance to the rise of groups remained and it is difficult to imagine that objections on this basis would not have been raised, if they had any chance of succeeding. But it is probable that they were not clearly put forward because they were doomed to fail.

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any apparent consideration of the soundness or the desirability" and that "[b]oth as an academic and a political matter, the application of limited liability to corporate groups has never undergone the scrutiny and debate that such a fundamental extension of the doctrine deserves". See below 5.2, fn 306, where Blumberg's views are further discussed.

264 See 2.5 above on the rise of limited liability, and on the consideration of this aspect of public policy, 4.3 above, text next to fn 226.

265 See 3.1 above, text next to fn 173.

266 Hovenkamp 1988 *Geo LJ*, especially 1597 where it is stated that this approach matured in the 1880s and 1890s; also 1609, 1627, 1629.

267 Hovenkamp 1988 *Geo LJ*, especially 1597, 1658-1659, 1660, 1663.

268 Hovenkamp 1988 *Geo LJ* 1598 refers to this as the "personal" or "entity" approach. Also see 1642.

269 See, especially, Hovenkamp 1988 *Geo LJ* 1596-1597, 1625, 1634-1640, 1641, 659-1660, 1663.

270 Hovenkamp 1988 *Geo LJ* 1597, see the summary.

Blumberg[271] contends that "a re-examination [of separate juristic personality and limited liability in groups] is not only desirable, but inevitable". It is fair to argue that the political and economic approach to groups has changed and that it therefore requires reconsideration of limited liability in the context of groups. Nevertheless, it is doubtful that this argument can be justified merely on the basis that separate juristic personality in groups is a consequence of mere inattention. Moreover, it would seem instead that an important lesson that can be learned from the early history of groups in the United States is that the problems that may arise because of groups can and should often be resolved outside of corporate law or in terms of corporate law rules that still recognise the basic notion that companies in a group are distinct entities with limited liability. In any reconsideration of juristic personality and limited liability in groups, the broad regulation of groups in and outside of corporate law must be taken into account.

5 Later reconsideration of the separate juristic personality of companies in a group in England and South Africa

In the 1970s and 1980s the argument in favour of the special recognition of company groups in general company law, because of the difficulties created by them, gained considerable traction in South Africa and England.[272]

5.1 The rise of the economic entity approach in South Africa and England

In South Africa in *Ritz Hotel Ltd v Charles of the Ritz Ltd*[273] it was proposed that a generally "more relaxed" approach to separate juristic personality was required in the context of wholly owned subsidiaries in a group. Reliance was placed on the English author Gower's statement in *Principles of Modern Company Law*[274] that: "Modern commerce is hampered and not helped by too rigid an adherence to the basic principle ... Where the group is in truth the party interested and injured, the law should not be too astute not to recognise the realities of the position". The author therefore contested the notion that it is "long established and now unchallengeable by judicial decision ... that each company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate legal rights and liabilities so that the rights of one company in a group cannot be exercised by another company in that group even though the ultimate benefit of the

271 Blumberg 1986 *J Corp L*, especially 631.

272 Also see the proposal for reform in *Qintex Australia Finance Ltd v Schroeders Australia Ltd* (1990) 3 ACSR 267 SC(NSW) 269. However, see *Equiticorp Finance Ltd v Bank of New Zealand* (1993) 11 ACSR 642 CA(NSW) 684.

273 *Ritz Hotel* case 314-316. Also see *Intramed (Pty) Ltd (in liquidation) v Standard Bank of SA Ltd* [2005] 1 All SA 460 (W) 481-483.

274 Gower *Principles of Modern Company Law* 4th ed 128-129.

exercise of those rights would accrue beneficially to the same person or corporate body".[275]

The court in the *Ritz Hotel* case also referred to Gower's support for the statement in *The Albazero* that "[i]t is perhaps permissible under modern commercial conditions to regret the existence" of the traditional principle that each company in a group has a separate juristic personality.[276] Moreover, the court in the *Ritz Hotel* case relied on two further English cases. In the now famous case of *DHN Food Distributors Ltd v Tower Hamlets London Borough Council*, Lord Denning MR quoted Gower where he stated: "there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group"[277] while in *Revlon Inc v Cripps and Lee Ltd*[278] Dillon J noted with reference to the *DHN* case, that "narrow emphasis on the individuality of companies in a group is not in accordance with recent authorities".

The *DHN* case was the most important case that promoted the notion that groups could be treated as entities. The court apparently thought that disregarding the separate juristic personality of companies in groups in favour of looking at economic entities, constituted the lifting of the corporate veil.[279] Apart from the previously mentioned statement of Gower,[280] Lord Denning relied on the requirement that groups had to compile group financial statements. Finally, the companies that were wholly owned by a holding company were equated to a partnership. Goff LJ, in his concurring judgment, specifically stated that this case concerned the piercing of the corporate veil, although he was at pains to show that piercing of this nature would not be available for every company group, but that it was possible because of the specific facts in this case, as none of the companies in the group were conducting separate business.[281]

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275 Gower *Principles of Modern Company Law* 4th ed 128.

276 *The Albazero* [1977] AC 774, 807.

277 *DHN Food Distributors Ltd v Tower Hamlets London Borough Council* [1976] 1 WLR 852 (CA) 860B; [1976] 3 All ER 462 (henceforth the *DHN* case) 467b-c with reference to Gower *Principles of Modern Company Law* 3rd ed 216. The approach in this case was approved in *Amalgamated Investment Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1982] QB 84, 119 [1981] 3 All ER 577 and *Lewis Trusts v Bambers Stores* [1983] FSR 54.

278 *Revlon Inc v Cripps and Lee Ltd* 1980 FSR 85 (Ch) 95.

279 *DHN* case 860B, 467b-c.

280 Gower *Principles of Modern Company Law* 4th ed 128-129 discussed above in the text next to fn 276.

281 *DHN* case 468.

5.2 Rejection of the economic entity approach in England and South Africa

The generally broader approach to the separate juristic personality of companies in a group has since been abandoned both in England and South Africa. English cases that followed the *DHN* case rejected the notion that the piercing or lifting of the corporate veil could occur on the basis of the existence of a group, even if the group had the special features alluded to by Goff LJ.

In *Woolfson v Strathclyde Regional Council* the *DHN* case was distinguished on the factual ground that the subsidiary in this case, unlike that in *DHN,* was not wholly owned. However, Lord Keith also stated that "I have some doubts whether in this respect the Court of Appeal [in DHN] properly applied the principle that it is appropriate to pierce the corporate veil only where special circumstances exist indicating that it is a mere façade concealing the true facts".[282] It has been stated that this is not a valid criticism in the sense that the Court of Appeal in *DHN* did not intend to lift or pierce the veil on the basis that a façade concealing the true facts was created and that the corporate veil can also be lifted or pierced on other grounds.[283] However, the reluctance to disregard separate juristic personality in groups gained momentum after this case.

In *Adams v Cape Industries plc*[284] the court accepted that the specific recognition of broader economic entities had taken and could only take place on the basis of specific statutory provision and that there was no separate legal rule that allowed for it in the circumstances of the particular case.[285] The *DHN* case accordingly was explained on the basis that a special statute justified the recognition of the economic entity in that case, although it was acknowledged that these parts of the judgment "were somewhat broadly expressed".[286] Reliance was placed on Goff LJ in *Bank of Tokyo Ltd v Karoon,*[287] where he stated that:

> [counsel] suggested beguilingly that it would be technical for us to distinguish between parent and subsidiary company in this context; economically, he said, they were one. But we are concerned not with economics but with law. The distinction between the two is, in law, fundamental and cannot here be bridged.

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282 *Woolfson v Strathclyde Regional Council* 1978 SC 90 (HL) 96. Also see *National Dock Labour Board v Pinn & Wheeler Ltd* (1989) 5 BCC 75 78.

283 Gower *Principles* 128.

284 The *Adams* case.

285 *In re Polly Peck International plc (in administration) (No 3)* [1996] 2 All ER 433 447-448, where this argument was supported and where it was accepted that the economic entity could not be recognised on the basis of public policy.

286 *Adams* case 535-538.

287 *Bank of Tokyo Ltd v Karoon* [1987] AC 45 64.

In *Adams* the disregarding of separate juristic personality in favour of the recognition of the economic entity was not treated as a form of the lifting or piercing of the veil. However, the court also referred to the doubts expressed in *Woolfson* as a reason for not applying the single economic entity principle.[288] The piercing or lifting of the corporate veil was separately discussed. The court apparently did not think that the court could follow a more flexible approach to the piercing or lifting of the corporate veil in the group context. Like the court in *Woolfson*, it applied a strict test for the lifting of the veil — namely, whether a façade concealing the true facts had been created.[289]

In *Ord v Belhaven Pubs Ltd*, the court referred to this case law and concluded that separate corporate personality could be disregarded on any of the two grounds mentioned only within "extremely narrow" confines. Simply giving effect to the economic entity and not the separate companies that form part of it, according to the court, would be "radically at odds with the whole concept of corporate personality and limited liability".[290] The court again entertained the possibility that the corporate veil could be lifted only where some impropriety existed, although it remarked that the specific test applied in the *Adams* case, namely that the impropriety had to indicate "that it is a mere facade concealing the true facts", was perhaps overly restrictive.[291]

Despite the initial support for the more flexible approach in the *DHN* case, it would also appear that in South Africa the distinct corporate personality of companies in a group can no longer be disregarded on the basis that they constitute an economic entity. In *Wambach v Maizecor Industries (Edms) Bpk*[292] the Appeal Court showed considerable sympathy for the approach followed in the *Adams* case. In *Macadamia Finance BK v De Wet*[293] it was found that the more interventionist approach to economic entities was not

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288 *Adams* case 536.

289 *Adams* case 539-544. Reference was made at 543 to "broad dicta" of Lord Denning in *Wallersteiner v Moir* [1974] 1 WLR 991 1013 and in *Littlewoods Mail Order Stores Ltd v Inland Revenue Commissioners* [1969] 1 WLR 1241 1254, where he argued that the veil could be more easily drawn aside in the case of subsidiaries. But the court argued that the other judges in these cases did not follow this approach. In *Wallersteiner v Moir* [1974] 1 WLR 991 Buckley LJ at 1027 and Scarman LJ at 1032, and in *Littlewoods Mail Order Stores Ltd v Inland Revenue Commissioners* [1969] 1 WLR 1241 Sachs LJ 1255 rejected it, while Karminski LJ in the latter case did not associate himself with these comments.

290 *Ord v Belhaven Pubs Ltd* [1998] BCC 607 615.

291 Also see the Australian cases: *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549 577 referred to *Moussa v Camden Council (No 3)* (2022) 162 ACSR 586 para 40; *Pioneer Concrete Services Ltd v Yelnah Pty Ltd* 1986 (11) ACLR 108 SC(NSW) 118-120; *State Bank of Victoria v Parry* (1990) 2 ACSR 15 SC(WA) 32-33.

292 *Wambach v Maizecor Industries (Edms) Bpk* 1993 2 SA 669 (A) 675.

293 *Macadamia Finance BK v De Wet* 1993 2 SA 743 (A) 748.

applicable on the facts, but it again referred with apparent approval to the more conservative approach in the *Adams* case.[294] In a careful discussion of the legal position in respect of juristic personality in company groups, the court in *Al-Kharafi & Sons v Pema*[295] strongly favoured the sources that were sceptical of the *DHN* approach. It seemed to prefer the approach followed by Blackman in *LAWSA*[296] that the *DHN* case can be justified only on the basis that it did not concern ignoring separate juristic personality for the purpose of imposing liability on companies which would not otherwise bear those liabilities, but that it dealt with so-called reverse piercing: the company itself and not its creditors requested the piercing of the veil.[297] Nevertheless, the *Al-Kharafi* case was ultimately distinguished from cases such as *DHN* on the facts. It was found that there was no holding company and subsidiary relationship because the purported holding company did not hold shares in the purported subsidiary.[298] In *Ex parte application of Gore*[299] Binns-Ward J argued strongly for a generally more liberal approach to the lifting of the veil. He referred to the contrasting approaches in England to disregarding juristic personality in the context of groups[300] and to Australian authority where it was asserted that piercing could occur in order to recognise a group enterprise.[301] But he acknowledged that "the more recent conservative trend by the English courts evidenced in *Adams* has been endorsed in subsequent South African judgments".[302]

In South Africa, in a case that concerned the statutory provision that now allows for piercing, section 20(9), the court seemed to endorse the broader approach that was followed in the *Ritz* case with reference to *DHN*. However, the test that was ultimately applied to determine whether the veil could be pierced was still strict and orthodox. It merely asked whether

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294 *Shipping Corporation of India Ltd v Evdomon Corporation* 1994 1 SA 550 (A) 566C-F quoted in *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 4 SA 790 (A) 803E-F, where it is stated that the basic rules on piercing will apply even where the shareholder is a "single entity". It finally concluded "[a]nd in this regard it should not make any difference whether the shares be held by a holding company".

295 *Al-Kharafi & Sons v Pema* 2010 2 SA 360 (W) (henceforth the *Al-Kharafi* case) paras 29-35. The court also referred to Mayson, French and Ryan *Company Law* 134-136, where it was stated that this did not deal with the core issue of separate liability, namely the liability of one company for the debts of another.

296 Blackman "Company Law" para 47 fn 7.

297 *Al-Kharafi* case para 35 fn 67. Although it is now generally accepted that reverse piercing would take place in terms of the ordinary principles of piercing of the veil: *The Butcher Shop and Grill CC v The Trustees for the time being of the Bymyam Trust* (038/2022) [2023] ZASCA 57 (21 April 2023); *Rohani v Rohani* (2005) 247 DLR 17 (BCCA) 26.

298 *Al-Kharafi* case para 38.

299 *Ex parte Application of Gore* (18127/2012) [2013] ZAWCHC 9 (13 February 2013) (henceforth the *Gore* case).

300 *Gore* case para 21, with reference to the cases mentioned.

301 *Gore* case para 26 with reference to Ramsay and Noakes 2001 *C&SLJ*.

302 *Gore* case para 27. Also see the comments in para 12.

separate juristic personality had been abused in a fraudulent or improper manner.[303]

Locke argues that the purpose clause in the current South African *Companies Act* states that it must "promote the development of the South African economy by encouraging entrepreneurship and enterprise efficiency".[304] Although she admits that the word "enterprise" is not defined, she proposes that this could be an indication "that a non-recognition of the enterprise reality within corporate groups will be contrary to the purpose of enterprise efficiency".[305] However, this argument reads too much into this term, which is probably used just to refer to the efficient conduct of business activities. This is clearly indicated by its juxtaposition with entrepreneurship. The purpose clause in this sense would be relevant only if the recognition of a group would promote greater business efficiency. It does not appear as if this argument of Locke justifies a revival of the economic entity concept.

Blumberg also proposes that the impact of limited liability on groups has never been properly evaluated.[306] But the conclusion that the development of separate juristic personality and especially limited liability in the context of groups was an incongruous accident of history that would not survive serious scrutiny is further gainsaid by the failure of later attempts to import a broader entity approach into South Africa and England.

6 Conclusion

Contrary to the opinion of several authorities, it is proposed that company groups, which consist of separate companies, did not develop accidentally but that their recognition reflected the permissive approach to private ordering as well as the strong approach to separate juristic personality and limited liability that existed at the time when groups emerged. It is therefore untenable to argue that groups should not be allowed or that separate juristic personality in groups should not be accepted because their initial recognition was not properly justified or that the consequences of allowing groups were not properly envisioned.

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303 *City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper* 2018 4 SA 71 (SCA) paras 29-30. Also see the observations in *Barak Fund SPC Ltd v Insure Group Managers* [2022] JOL 54568 (GJ) paras 79-84 regarding statutory piercing in groups. More generally on the application of s 20(9) of the current *Companies Act* and the emphasis on the requirement that there must be fraud or improper conduct, see *Department of Agriculture, Forestry and Fisheries v B Xulu and Partners Incorporated* 2022 1 All SA 434 (WCC) para 12ff; *Kolisang v Alegrand General Dealers and Auctioneers* (31301/2020) [2022] ZAGPJHC 431 (28 June 2022) para 13ff.

304 S 7(b)(i) of the current *Companies Act.*

305 Locke 2010 *Stell LR* 489.

306 Blumberg 1986 *J Corp L* 630 discussed above in 4.5, fn 262.

This of course does not mean that there is no need to change the law in the light of current policy principles. Indeed the so-called classical approach that prevailed when groups were first accepted in the United States was replaced in the 20th century by what Hovenkamp calls the post-classical approach. The harms that corporations could inflict on society became apparent and attempts were made to extend their regulation both inside and outside of corporate law.[307] In most jurisdictions company law has expanded to address the harms that can be done by companies both internally and externally. A proper understanding of the circumstances that prevailed at the time when groups were first accommodated could provide a sensible platform for further reform of this area of law.

Despite some attempts in England and South Africa to recognise groups as separate entities and disregard the separate juristic personality of constituent companies, it has generally been retained. There are probably good reasons for this. The general maintenance of separate juristic personality creates predictability in business, which is essential. The undermining of such a foundational element of company law may do more harm than good. Although there is a need to regulate company groups there are more exact and less invasive instruments for curtailing particular harms that may arise from the separate juristic personality of companies in groups.

The failure of attempts to develop a new approach to the entities that make up a group does not mean that groups fit easily within company law or that there is no need to exercise specific control over them. Special statutory and common law rules as well as contractual provisions also may allow for separate juristic personality in groups to be disregarded in specific circumstances.[308] This will often be more important in promoting the acceptable use of company groups. It is proposed that the history of company law shows that these special rules are often more effective than tinkering with the general rules regarding the separate existence of companies that form part of groups.

It is not and should not be possible to pierce or lift the corporate veil between companies in a group simply because they form an economic entity. Nevertheless, the piercing or lifting of the veil may still occur on the basis of the ordinary requirements for the piercing or lifting of the veil. Although the requirements for doing so will not be discussed in detail here, one brief point about the basis for piercing will be made. Piercing in South Africa occurs most often when separate juristic personality has been abused in a fraudulent or improper manner. However, the more appropriate basis for piercing in the context of groups will frequently be that the separateness of

307 Hovenkamp 1988 *Geo LJ* 1682-1689.

308 *Al-Kharafi* case fn 67 with reference to Millett *Gore-Browne on Companies* para [9A] at 7-12.

companies in a group has not been maintained in the sense that subsidiary companies are simply treated as the *alter ego* or instrumentality of the holding company.[309]

Several of the more specific rules of company law are able to address the problems of groups at least to a workable extent. In the first cases to refer to the group concept in South Africa, courts were particularly concerned with nominee directors who were appointed by controllers merely to act in their interest and not in the interest of the companies which they managed.[310] Directors do not have fiduciary duties to groups but only to the companies in which they are directors. However, in determining whether a director has exercised his fiduciary duty in the best interest of the company, it will be taken into account that the interests of a company may be different when it forms part of a group.[311]

309 See generally Blackman *et al Commentary* RS 6, 2009 ch 4 140-2ff, especially the criticism of *Rhino Hotel & Resort (Pty) Ltd v Forbes* 2000 1 SA 1180 (W) 1183H; *Board of Executors Ltd v McCafferty* 2000 1 SA 848 (SCA); *Banco de Mocambique v Inter Science Research and Development Services (Pty) Ltd* 1982 3 SA 330 (T) 344-345; *Bellini v Paulsen* 2013 2 All SA 26 (WCC) para 19.23; Stoop "Companies (Part I)" paras 65 and 66, where it is accepted that the *alter ego* test will apply although support for this is found only in *Smith, Stone & Knight Ltd v Birmingham Corp* [1939] 4 All ER 116. See especially Stoop "Companies (Part I)" para 66 fn 19, where the *DHN* case is explained on this basis. Also see *Department of Agriculture, Forestry and Fisheries v B Xulu and Partners Incorporated* 2022 1 All SA 434 (WCC) para 15, where it is stated that piercing can occur where business is conducted with "scant regard for the separate legal personalities of the entities" and para 23 where the instrumentality test is utilised in the application of s 20(9) of the current *Companies Act,* which deals with the piercing of the veil. The *alter ego* test is sometimes mentioned without clearly separating it from other tests: *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 4 SA 790 (A) 804. Also see *Die Dros (Pty) Ltd v Telefon Beverages CC* 2003 4 SA 207 (C) para 26 with reference to Blackman "Company Law" para 46; *Airport Cold Storage (Pty) Ltd v Ebrahim* 2008 2 SA 303 (C) para 12. On this issue, also see the discussion of the position in the United States: Stevens *External Relations of Company Groups* 235; Anderson 2009 *MULR* 333.

310 *Hull* case 77: "from a legal point of view that is a very anomalous and a very undesirable position"; *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 196-197, where the court spoke of the "the anomalous and undesirable positions which arise in the working of the group system". Also see the concerns expressed in *S v Heller (2)* 1964 1 SA 524 (W) 535. Also see *Pepkor Holdings Ltd v AJVH Holdings (Pty) Ltd* 2021 5 SA 115 (SCA) para 44.

311 See, for instance, the Australian case of *Equiticorp Finance Ltd v Bank of New Zealand* (1993) 11 ACSR 642 CA(NSW) 683-684, 721-728; *Linter Group Ltd v Goldberg* (1992) 7 ACSR 580 SC (Vic) 620-623; *Australia's Residential Builder Pty Ltd (in liq) v Wiederstein* [2018] VSC 37 (2018) para 45. For South Africa, see Botha 1983 *De Jure*; Botha 1984 *De Jure* 172ff. See the general analysis in Pargendler 2023 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4412997 50-52.

Most importantly, the current *Companies Act* contains rules that regulate groups. Many of these rules recognise the separate existence of companies in a group but attempt to address concerns created by this.[312]

- The rules on disclosure of remuneration are extended within groups.[313]

- In determining the independence of an auditor, the group context must be considered.[314]

- The concepts "primary offering" and "rights offer" in the context of prospectuses include an offer of shares of another company in a group.[315]

- The shareholders of holding companies will be required to approve transactions that concern disposals of the major parts of the assets of subsidiaries.[316]

- The rules on distributions are often extended to specifically regulate fund transfers within groups.[317]

- The concept "related party" in the current *Companies Act* is used to extend the application of rules to group companies.[318] Broadly speaking, companies will be related if one controls the other or if they have a common controller.[319] The concept is used, for example, to limit the movement of funds within groups[320] and to ensure that interests in groups are taken into account in determining the interests of directors.[321] Section 165(2)(a) allows for the shareholders of related companies and section 165(2)(b) for the directors of such companies to bring derivative actions on behalf of the company. In South Africa, as in many other jurisdictions, the shareholders

312 See Botha 1982 *De Jure* 110, where a similar point about the abuse of control provisions under the *Companies Act* 1973 was made.

313 S 30(5) of the current *Companies Act.*

314 S 94(8) of the current *Companies Act*.

315 S 95(1)(i) and 95(1)(l) of the current *Companies Act.*

316 S115(2)(b) of the current *Companies Act*. See Pargendler 2023 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4412997 20-23 on the importance of this principle in the United States.

317 Definition of "group" in s 1 of the current *Companies Act.*

318 See the definition in s 1 of the current *Companies Act* and s 2, especially ss 2(1)(c) and 2(2). See the application generally in ss 30(4)(d), 30(6)(e)-30(6)(g), 41(1)(b), 41(4)(b)(ii), 42(2)(b), 43(5)(a), 78(3) and 78(3A), 78(8), 90(2)(b)(vi), 94(4)(b) and (c), 94(7)(d), 96(1)(c)(ii) and (e), 115(4), 117(1)(h), 117(2), 118(1)(c), 122(2)(b), 123(2)(a)(ii), 124(1) and 124(4), 125, 128(1)(g), 128(2), 137(2)(c), 138(1)(f), 140(2)(b), 163(1), 165(2)(a) and (b), 165(7)(c)(ii), 165(8)(a).

319 S 2(1)(c) and 2(2) of the current *Companies Act.*

320 See ss 44 and 45 of the current *Companies Act.* On the purchase of shares in a group, also see s 48. But see the *Companies Amendment Act* 16 of 2024 s 45(2A) which now excludes financial assistance to subsidiaries from its reach.

321 Ss 75 and 76(4) of the current *Companies Act.*

of a holding company are therefore allowed to bring derivative actions to address wrongs done to subsidiaries.[322]

- As previously mentioned, groups are generally required to have group accounts.[323]

Broader rules of law will be important in ensuring that company law rules operate properly. It is also clear from the historical analysis that company law should not attempt to exhaustively regulate problems that may arise from groups if other areas of law can do so more effectively:[324]

- Delictual liability may be imposed on holding companies where they exercise control over subsidiaries and the controlled activities cause harm to third parties, if all the other requirements for a delict are met.[325] This is likely to be an area of growth in the near future.

- In some exceptional cases particular companies in groups may be treated as agents of others, although there is no presumption that a subsidiary is an agent of a principal.[326]

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322 See Pargendler 2023 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4412997 20-21 on the position in the United States.

323 See 3.2 above, text next to fn 194 on group financial statements. The *Companies Act* 1973 s 288 specifically required consolidation. Currently, the *Companies Act* s 30, and the *Companies Regulations*, 2011 (GN R351 in GG 34239 of 26 April 2011) regs 27 and 28 (issued in terms of s 29(4)) require the application of reporting standards that will ensure the consolidation of accounts. See s 30(3)(b) on directors' reports and the requirements that information must be provided about groups. Although this has correctly been rejected as a basis for a more flexible requirement for piercing in groups: *Dithaba Platinum (Pty) Ltd v Econovaal Ltd* 1985 4 SA 615 (T) 625; Blackman *et al Commentary* RS 6, 2009 ch 4 142-1 with reference to the *Adams* case 536. Also see the discussion in Botha 1982 *De Jure* 110.

324 See generally Pargendler 2023 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4412997 62-64.

325 See *Okpabi v Royal Dutch Shell Plc* [2021] UKSC 3 in the United Kingdom and *James Hardie Industries plc v White* [2018] NZCA 580 in New Zealand. See the *Gore* case para 24 with reference to *VTB Capital plc v Nutritek International* [2012] EWCA Civ 808 para 139. See Stevens *External Relations of Company Groups* 221ff, which argues that limited liability should not apply to delicts in the group context, 306ff. Also see Pargendler 2023 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4412997 64-65.

326 *Adams* case 537, 545ff; *In Re Polly Peck International plc (in administration) (No 3)* [1996] 2 All ER 433, 445-446; Botha 1982 *De Jure* 118-122. See Stoop "Companies (Part I)" para 64 on the meaning of agency in this context and the distinction between the piercing of the veil and the application of agency principles. Also see Stoop "Companies (Part I)" para 66, especially fn 19, where the *DHN* case is explained on this basis. On the relationship between piercing and the agency approach, also see further Blackman *et al Commentary* RS 6, 2009 ch 4 140-2 to 140-3. Also see *Al-Kharafi* case fn 67 with reference to Millett *Gore-Browne on Companies* para [9A] at 7-12. The question whether a company is an agent of a shareholder had already arisen in *Salomon v Salomon Ltd* [1897] AC 22, especially 56.

- Companies in a group can at times be treated like partnerships.[327]

- Many of the statutory provisions that will prevent the abuse of company groups will be located outside of company law in areas such as competition and labour law. In other areas of law statutory provisions will be interpreted in a manner that will allow for groups to operate effectively. This is particularly true of insolvency law, although there may still be room for improving the rules of insolvency law that apply to groups.[328]

It is therefore dangerous to problematise the separate entity approach in groups without providing a detailed picture of the more specific rules inside and outside company law that give effect to groups and recognise or address their negative consequences. Some of these rules, such as the rules on the fiduciary duties of directors of subsidiaries, do not operate effectively and may require expansion. Others, such as some of the rules that concern related and inter-related companies, possibly overshoot the mark and prevent conduct that does not appear to be harmful. These aspects are not addressed here but it is merely maintained that reconsideration of the rules regarding groups should be considered within their broader historical and legal context.

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327 Blackman *et al Commentary* RS 6, 2009 ch 4 140-3; *Adams* case 538 rejected the notion that a group could be treated as a single economic entity simply because it operated like a partnership, but the situation may be different where companies indeed meet the requirements for a partnership. This must be distinguished from the situation where, on normal rules regarding the piercing of the veil, companies are treated like partnerships. See Stoop "Companies (Part I)" para 65. Also see *Pioneer Concrete Services Ltd v Yelnah Pty Ltd* 1986 (11) ACLR 108 SC(NSW) 119, also quoted in the *Al-Kharafi* case para 35. In the *DHN* case 467, the economic entity approach is justified on the basis that the companies are akin to a partnership. This approach has been generally rejected unless the companies actually meet the requirements for a partnership.

328 See generally Stevens *External Relations of Company Groups* 172ff and especially on insolvency law, 289ff; Vadelka *Some Problem Areas Relating to Insolvency of Company Groups*. See for instance the manner in which the rules on dispositions without value in terms of the *Insolvency Act* 36 of 1942 s 26 were interpreted in the context of groups: *Goode, Durrant & Murray (SA) Ltd v Hewitt & Cornell* 1961 4 SA 286 (N) 292; *Langeberg Koöperasie Bpk v Inverdoorn Farming and Trading Co Ltd* 1965 2 SA 597 (A) 603-607; Botha 1984 *De Jure* 173-174; *Swanee's Boerdery (Edms) Bpk v Trust Bank of Africa Ltd* 1986 2 SA 850 (A) 860; *De Jongh Ontwikkelings (Pty) Ltd v Kilotech Investments (Pty) Ltd* 2021 4 SA 492 (GP) para 6.3.6. On the application of s 33 of the *Insolvency Act*, also see *Consolidated News Agencies v Mobile Telephone Networks* (510/08) [2009] ZASCA 130 (29 September 2009) and the contrast between the minority (para 55) and the majority (para 87), discussed by Locke 2010 *Stell LR*. Also see *Ford & Carter Ltd v Midland Bank Ltd* (1979) 129 NLJ 543 544: "[w]hen creditors become involved, as they do in the present case, the separate legal existence of the constituent companies of the group has to be respected".

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List of Abbreviations

Am L Rev	American Law Review
Anglo-Am LR	Anglo-American Law Review
BC	British Commercial Insurance Company
BN	British Nation Life Assurance Association
Bond LR	Bond Law Review
BYU L Rev	Brigham Young University Law Review
BYU J Pub L	Brigham Young University Journal of Public Law
C&SLJ	Company and Securities Law Journal
Camb J Econ	Cambridge Journal of Economics
CLJ	Cambridge Law Journal
Colum L Rev	Columbia Law Review
DEIC	Dutch East India Company
Del J Corp L	Delaware Journal of Corporate Law
Duke LJ	Duke Law Journal
Fordham L Rev	Fordham Law Review
Geo LJ	Georgetown Law Journal
Geo Wash L Rev	George Washington Law Review
Harv L Rev	Harvard Law Review
Int'l Rev L & Econ	International Review of Law and Economics
J Corp L	Journal of Corporation Law
J Econ Hist	Journal of Economic History
J L Econ & Org	Journal of Law, Economics and Organization
J Leg Hist	Journal of Legal History
J Pol Econ	Journal of Political Economy
JCLS	Journal of Corporate Law Studies
JITE	Journal of Institutional and Theoretical Economics
Jur Rev	Juridical Review
LCP	Law and Contemporary Problems
LS	Legal Studies
Man LJ	Manitoba Law Journal

MLR	Modern Law Review
MULR	Melbourne University Law Review
Pol Sci Q	Political Science Quarterly
Q J Econ	Quarterly Journal of Economics
Stell LR	Stellenbosch Law Review
Tex L Rev	Texas Law Review
UCLA L Rev	University of California at Los Angeles Law Review
UTLJ	University of Toronto Law Journal
Vand L Rev	Vanderbilt Law Review
Utah L Rev	Utah Law Review
Wash & Lee L Rev	Washington and Lee Law Review
Wash U LQ	Washington University Law Quarterly
Wm & Mary L Rev	William and Mary Law Review
Yale LJ	Yale Law Journal