C O M P A N Y L A W

LIFTING THE VEIL : IGNORING CORPORATE ENTITY

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BY

TITUS K. GITHIORA

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INTRODUCTION

Corporate personality is a very fundamental concept in Company law. It was, indeed, recognised as such even before the Salomon case (1). That case, however, an important landmark in the History of Company law, put the "official" seal, so to speak, to the concept of corporate personality. Great reluctance, therefore, has been shown, with varying degrees of success, to allow attempts to ignore the veil of incorporation of a company. For being equated to a natural person, it means that the company is an entity entirely separate from its members, with its own name under which it could sue and be sued and with assets totally distinct from those of its members. The corporation (or company) then, is a person; its business a mere object of rights held by itself. The "veil" of incorporation has been said to be "opaque" and "impassable as an iron curtain". (2) The veil ensures that so long as the company has acted intra vires, it will remain equal in law to a natural person and would not suffer the veil of incorporation being ignored. This doctrine of "lifting the veil" marks a change of the law in its creation of the juristic personality.

Unfortunately no guiding principle seems to have been set out yet to enable any daring reference to laid down principles on the doctrine to be made. At the moment, then, the law on the problem of liftying the veil is a collection of apparently disconnected instances where the veil of incorporation has been ignored. This paper is an attempt to explore and compile from case-law and learned writings those instances where the veil has been lifted. Whether the task of seeking guiding principles to the fast-developing doctrine should be pursued or given up is to remain an open question inviting open-minded debate.

I GENERAL SCOPE OF THE COTRINE.

Ignoring the corporate entity, or the doctrine of"lif
is taken to bear the meaning of those" circumstances
law disregards the corporate entity and pays regard i
economic realities behind the legal facade" (3a) It i
the attempt to set out such exceptions and exist to t
corporate personality. These exceptions are far from
generally they appear to crop up where both the legis
courts haphazardly refuse to apply logic where it is
opposed to justice, convenience or interests of the r
this happens the law either goes behind the corporate
individual members or it ignores the separate persona
Company in favour of the economic entity constituted
associated concerns. As a general rule the legislatu
made it a vital condition for the reconguition of cor
that a company be accorded the widest publicity. The
incorporation cannot therefore permit the affairs of
hidden completely from view. In general then, it sho
that the veil is completely opaque and can be raised
specific instances. For instance though the veil of
very much in place, it nevertheless cannot be denied
third parties have no right of resort against a compa
they are entitled to see who the members are; what sh
in the case of a quoted company to know what benefici
the share are held if they are substantial; to know w
officials are and what type of constitution the compa
company's capital is and how it has been obtained and
company is unlimited, to its balance sheet and loss a
this infromation concerning the company's affairs is
Company's Memorandum and Articles of Association. Th
documents. Therefore thoug a "curtain" be retained b
that its public file is concealed from the public, bu
requirements may necessitate the raising of the curta
<u>British Bank V. Turquand</u> (3B) to see who the true of
It also happens when an inspector is appointed to inv
company's affairs; he is blessed with high inquisitor
tears the coporate veil to shreds in the process.

As mentioned earlier no one source of rearch work see
admit that there is a coherent set of rules as to the
teh doctrine. Instead it has been submitted time and

the veil of incorporation. With the decision in the Salomon case came a period of its acceptance as the law. The rule that the veil of incorporation was impenetrable and unviolable was applied with a rigidity which soon produced undesirable results. A period of the relaxation of the rule set in and continues to this day. It must, however, be said at once that this developement towards a relaxation of therule cannot be presented in a rational form as it has essentially been both haphazard and irrational. This has been so primarily, but not exclusively, owing to an attitude of the courts - in connection with Kenya the common law courts - that they must wait and follow the lead of the Legislature.

Legislation in connection with the doctrine has been erratic. This has made the task difficult until recently for the courts and the legal profession to see the interconnection between the various situations in which the problem has arisen. It should not be said that cases which are of relevance to the doctrine have not been cited in later litigation involving the same problem of ignoring the veil of incorporation, for indeed they have. Rather it should be said that the doctrine has yet to reach the weaning stage. In other words, therefore, though there be an absence of judicial and legislative inroads into the concept of corporate personality in many cases where the doctrine of ignoring the corporate veil ,could be expected to provide them there is little cause for alarm. Examples of these inroads are growing in number. These nonetheless are to be spoken of generally andnot as consistent principles ad they could be summarised as follows:

The courts are precluded by the rule in the Salomon case from treating the company as an "alias", "agent" or "trustee" or "nominee" of its members except; first, where the corporate personality is being blatantly used as a cloak for fraud of improper conduct; second, where agency is established where a controlling shareholder is another company; third, to determine a company's residence either for tax purposes or sometimes to ascertain if acts of the company's agents have been effectively ratified. Fourth, the courts, though not consistently, seek to limit the application of the Salomon rule by ignoring it in cases where the facts are sufficiently different and consider themselves not bound by it in criminal or quasi-criminal cases or where trust relations are involved or where the issue before them becomes whether an agreement is void for infringing public policy. The position is complicated further when it is appreciated that the courts will with equal

zeal make a ruling in a case which may end either to the advantage of a party or at times to that party's disadvantage. It is of essence to appreciate that the party seeking satisfaction in court under the doctrine of ignoring the corporate veil must be prepared to take the advantages and disadvantages of the doctrine along with it.

The doctrine remains strong in both company law and commercial law However, the reality of group enterprises is being increasingly acknowledged and this in itself is an important consideration as far as Kenya is concerned. Kenya has a policy which has attracted multinational corporations with the inevitable result that the vast majority of foreign companies operate in Kenya through their subsidiaries. There then come the very many one-man companies as an important feature of thecommercial ~~xxxxxx~~ scene. A third common aspect is the cooperative union. All these have their own special problems affecting them and the relevance of the doctrine in their case will be examined in subsequent pages.

PART II

Incorporation: ADVANTAGES

The word /Company" implies an association of a number of people for a common object or objects. For the purpose of a company the term "objects". is reserved for economic purpose or carrying on business for gain. The Companies Act, Cap 486 contains most of Kenya's law of companies. S.2(1) of the Act defines "Company" as a "Company formed and registered under the act or an exisisting Company". S.16(1) states that upon registration of the memorandum of association, which contains the Company's objects, the "registrar shall certify under his hand that the Company is incorporated." and subsection (2) states;" from the date of incorporation, the subscriber to the memorandum together with such other persons as may from the to time become members of the Company, shall be a body corporated.. capable of exercising all the function of an incorporated company.. but with libility on the part of the members to contribute to the assets of the company in the event of its being would up.." Therefore upon issue of the certificate of incorporation, a company becomes a body corporate. Incorporation, ther fore must be understood before a full discussion on the lifting of the corporate veil may commence. The advantages of Incorporation have been much discussed and the corporation has been variously called a metaphysical entity or a fiction of law with legal but no physical existence. Lord Selborne in G.E. Ry V. Turner (4) called it "a mere abstraction of law. "The most fundamental attribute of incorporatation and from which all advantages of incorporation flow, however, is that a corporation is a separate legal entity; separate distinct from its members; it enjoys rights and is subject to duties not the same as those enjoyed by its members (5) This separation of the company from its members has been maintained to this day-if perhaps with less rigidity - since the prime concern is the protection of the company as a trading unit

That a Company should be held to be a separate entity from its members was not a principle first enunciated by Salmon V.Salomon & CO. Lindley L.J. in Farrar V. Farrar Ltd (6) said".. A sale by a person to a corporation of which he is a member is not either in form or in substance a sale by a person to himself. To hold that it is, would be to ignore the principle which lies at the root of the legal idea of a Corporate body, and that ide is that the corporate body is distinct from the persons composing it. A sale by a member of a corporation to the corporation itself is in every sense a sale valid in Equity as well as at law." Similarly when the sale of property of a company to one of its members and sanction by a general meeting was objected to it was held that it could not be invalidated on the ground that it was carried by the vote of the purchaser (7). Many more case came after the Salomon case to emphasise this intertion to keep both the company and the members as two independent legal entities.

Incorporation, then has many useful advantages. The staus of limited liability accorded a company in accordance with S.16 of the companies Act is very useful in that members will not be liable XXXXXXXXXXXXXXXXXXX execpt for as much as they have not paid on their shares if any. Liability then, is limited, the part a member might play in the management of a company's affairs notwithstading The property a company holds is distinguishable from that which members might hold; such property being jointly owned by the member in an unincorporated society. Being a legal entity the company can sue to enforce its legal rights and likewise can be sued for the failure to observe its obligations. No Officer or member of the company is competent to represent a company in court; only an Attorney may do so(8). The company, by being bornby a process of law can only be destroyed by a process of law anduntil so destroyed will continue so to exist. It therefore has perpetual succession. Any member wishing to assign his shares can do so freely. and such assignee steps into the shoes of the assignor as a member of the company. The floating charge enables a company to borrow much more easily. These are effected so easily firstly because the Chattels Transfer Act, Chapter 28 of the Laws of Kenya, exempts companies from compiling an inventory of theparticulars of such charges and secondly theBankruptcy Act, Chapter53 of theLaws of Kenya also exempts companies from theapplication of the notorious reputed ownership clause. Many of these advantages of incorporation particularly that concerning the floating charge, are available to thecompany only - not to the sole trader of the partnership.

THE DOCTRINE AND OTHER BUSINESS ASSOCIATIONS.

People, or a number of persons, may associate to carry on business for gain through various organs for carrying on business recognised by thelaw of Kenya. These include companies, partnerships, firms and co-operative societies. It is not too early to ask here; why should the company be said to be themost convenient or the best suited to Kenya circumstances? This question ought perhaps to be qualified by referring specifically to theform of companies carryin on business under the laws of the country. As mentioned earlier the one-man company andthe foreign-owned often multi-national corporatic are thetwo most common forms of trading companies in Kenya. When theissue of the doctrine of Lifting the veil of incorporation is raised in connection with these forms of trading companies, many issues present themselves for discussion. For instance, of what

se would the application of the dctrine be and to what advantage? s it not possible that the disadvantages of theresort to the applicati f the dctrine would outweigh the advatages thereby making nonsence of he doctrine? Would the doctrine, applied, aid in any way to promote evelopment in a fairer context or would it aid the moneyed section of enya's largely peasant agricultural rural society? An even more undamental question to be asked is as to whether government policy, iven the government sponsored National Development Plan, the governmen olicy of a laissez faire economy and political inclinations would not nfluence both Legislative (the National Parliament) andeven the courts n any issue arising concerning the doctrine of piercing the veil of ncorporation. Such influence, it need not be emphasised would invariab be geared towards avoiding interference with the company especially here it is foreign. There, no doubt, exist practical difficulties as ar as the application of the doctrine is concerned.

The most important forms of business associations other tha ompanies include the sole trader, partnerships, corporations or statut y bodies and co-operative unions. A corporation is body authorised to ake and grant andhaving a common seal; constituted either by letters atent or by Act of Parliament. If the latter, its powers are limited o those wich are expressly conferreed by the Act or which are by ecessary implication included in the express powers (9). The partnersh nder the Partnership Act is not registered and therefore is not incor- orated. These business associations do not enjoy those advantages the eil of incorporation gives the companywith the exception of the norma ly incorporated co-operative society. However,whether they serve bette o ensure social security of social insurance and whether they constitu better system of encouraging economic development than the incorporat ompany will be discussed later.

PART III

THE LEGISLATURE:

Both the Legislature andthe courts have been the most active in seeking to see whether the doctrin of piercig the cor- porate veil is applicable . Both have come forward with many instance - some prompted by theinterests of the Revenue and others by public policy and public convenience - when the doctrine has applied.

MEMBERSHIP.

The first instance the Kenya Companies Act, the child of the Legislatur gives when the veil of incorporation is lifted is in s.33. The provision therefore is that is the number of the members is reduced below two in a private company and below seven ina public company, and the company continues to carry on with its business for more that six months while the number is so reduced, then every person who is a membe during that time andis cognisant with the irregularity is severally bound and liable for the whole of anydebt contracted during that time

It must be noted first and foremost that the section does not operate to destroy the separated legal entity of the copany because nowhere does the Act prohibit a company having one member only and what is not expressly forbidded is permitted (10). Despite the provision, creditors' rights are severely limited firstly because, only members who remain after six months can be sued and not those whose withdrawal has led to the fall below minimum. In <u>Re Bowling &Welby's contract</u> (11), it was said that neither an executor of a deceased nor the representatives of the deceased nor the trustees in bankruptcy are members unless and until they subscribe as members and no resort can be had against these categories of people for debts contracted within the six months that membership has fallen below the prescribed minimum and business carried on irrespective. Finally, the Act seems to suggest that liability attaches in respect only of liquidated contractual obligations. It has been suggested that the courts will not give the restrictive interpretation that liability is only for "debts contracted" and not "debts contracted and liabilities incurred" and it could be said that they had in mind breach of contract whichshould ordinarily be blamed on the directors. However it is the members who are liable and not the directors as such.

<u>FRAUDULENT TRADING</u>

The second instance when the Legislature lifts the veil is found in s.323 of the Act. The provision is that where in the course of winding up of a companyit appears that some business has been carried on with the intent to defraud the creditors or "for any fraudulent purpose" upon the application of the Official Receiver or liquidator of creditor of any other contributory, the court may declare anyone party to the fraud personally liable without limitation of responsibility for all debts or liabilities of the compan This section goes farther than section 33 by expressly covering al liabilities, contractual or otherwise, and also imposes liability on the directors or other officers as well as on the members. However, the sectionis subject to the limitation that any creditor seeking to take advantage of it to get the veil of incorporation to be igored has to discharge the heavy burden of proving fraud. The term 'fraud' has been given a fairly wide interpretation by Maugham J. in <u>Re William C. Leitch Bros. Ltd.</u> (12) saying that where a company continues to carry on business and incur debts when the directors know that there is no reasonable prospect that the same will be paid, there is a proper inference that the company is carrying on business with intent to defraud and that the declaration of liability in that case was for a definite sum not necessarily limited to the amouts due to the creditor shown to have been defrauded. Maugham J. him self dissented from this vie in a later case stating: "Fraud connoted actual dishonesty involv according to current notions of fair trading among commercial men ... moral blame". This view the Australian High Court has follow

in Hardie v. Hanson (13).

Justice Eve in the Leitch case said that the monies recovered following the judgement in that case formed part ofthe general assets of the company available for all creditors; not merely for those whose debts were contracted during the time when the business was carried on fraudulently. The issue of monies forming part of the general assets of the company and therefore becoming available to all creditors came up again in Re Cyona Distributors Ltd. (14) The creditor there was held entitled to retainthe money paid to him before preceedings against the defaulting director, in discharge of the debt to him. Lord Denning was of the view that nothing seemed to require that monies recoverable must be made available for the general body of creditors, except in the case wher proceedings were commenced by the liquidators. S.323. therefore, is a potentweapon in the hands of creditors for use against over-sanguine directors. Where a creditor merely threatens proceedings against a particular company it is usual that the director will seek to make himself liable for part of the company's debts. This section, then is a serious attempt to protect creditors generally from the abuses arising from the corporate entity concept.

MISDESCRIBING THE COMPANY :

Where an officer of the company has chosen to act personally, he will thereby incur personal liability. Ordinary principles of agency will apply where he fails to disclose that he is acting asagent of the company. Where such officers contract expressly that they are the company's agents, the Act says in s.109 that they shall incur personal liability. An example where the veil is lifted and officers made liable for the company's mistakes is where a Bill of Exchange, promissory note, cheque or an order for goods or money are signed for and on behalf ofthe company and the company's name is not mentioned in legible writing. The officer responsible will be personally liable for either the fine or the amount due unless duly paid by the company. The ommission of the word 'limited' when signing a bill was said to make the writer liable for the outstanding sum to the receiver of the bill which the company refused to honor (15). In that same case Coleridge J. said of the need to include the word limited on the bill;

> "the object of the legislature obviously was to force notice ofthe limited liability to those dealing with the company; and the clause is in one sense penal, in another remedial..."

It does not matter that the third party has not been misled by the misdescription (16). Misdescription of a company is dealt with by s.109 of Kenya's Companies Act. In subsection 4 of that section it is provided that a fine of one thousand shillings or less shall be

imposed on any officer resposible for misdescribing the company and in addition he will be personally liable to "the holder of the bill of exchange, promissory note, cheque or order for money or goods" unless the company undertakes to honor any of them. The company, if it carries on business under a trade name, it will have registered under the registration of Business Names Act, Chapter 499 of the Laws of Kenya. Misdescribing a company therefore permits the application of the dctrine and results in either penal sanction or civil liability where it is practicable or both against the officer who so wrongly acted. One last point to mention in conectio with this sub-topic is that a person is not a party to carrying on of a company's business with intent to defraud creditors unless he actively participates in it s management (17). In Re Maidstone the officer merely failed to warn the company's directors that the company was insolvent and no more debts were to be incurred on its behalf. It was said that he could not be made liable for the debts under statutory provision even if he had been negligent in failing to give that advice. The company, though, could sue him for breach of duty as an officer of the company.

ENTERPRISE ENTITY OR CORPORATE ENTITY? GROUP ACCOUNTS:

The area of the doctrine of the lifting of the veil dealing with holding and subsidiary companies is wide and spills over from an assesment of the legislature's attempts to include it in its relevance to the doctrine into the domain of judicial instances of ignoring the corporate veil. However, while the legislature's effort to lay down rules concernig the doctrine would tend towards interpretation of what is a subsidiary in terms of accounting, shareholding and therefore control, the courts are less cocerned withe ensuring that the Revenue is not cheated but rather looks to other considerations like agency, trust, residence, fraud and public policy to ensure that the veil of incorporation is not used tothe detriment of those dealing with the company. Most of these overlap, especially when the consideration as to control is involved. It is therefore not at all surprising that coherent rules have not been laid down as to the application of the doctrine. The question of control is all important in any discussion in relation to a holding company and its subsidiaries.. The Companies Act firstdefines a subsidiary before it defines a holding company. Section 154(1) (a) states that a company is a subsidiary of another if "and only if: that other either (i) is a member of it and controls the composition of its board of directors; or (ii) holds more than half in nominal value of its equity share capital; or (b) the first mentioned company is a subsidiary of any company which is that other's subsidiary."

Subsection (4) of section 154 in its turn defines a holding

company as, for the purposes of the Act -

> "a company shall be another's holding company if, but only if, that other is its subsidiary."

Briefly, therefore, where the holding-subsidiary relationship exists the accounts of the parent com pany might give misleading information of the economic prosperity of the entire group. On the other hand a presentation of the accounts of the holding company alone will be valueless to the shareholder. To take care of this s. 150 of the Act was devised andit requires that where at the end of its financial year a company has subsidiaries, accounts dealing with the profits or loss of the company are to be laid before the company in general meeting when the company's own balance sheet and profit and loss accounts are so laid. Group accounts, then must be read before the company in general meeting. To explain fully and justify at the same time the demand by the legislature that the veil of incorporation must be lifted in holding-subsidiary relationships a step by step look will be takenat the formation of the relationship.

Any company could gradually expand and assume control of an industry by buying up the share capital of existing companies in the same field. What invariably follows is the creation of a pyramid of inter-related companies each of which is a separate entity but at the same time is in fact part of one concern represented by thegroup as a whole. This kind of "multi-purpose" company is attractive in several respects. Firstly, its may well be the most economical and convenient arrangement whenthe concern carries on a number of separate businesses. Secondly, it is convenient when it may become desirable to distinguish between the manufacturing and the marketing part of the enterprise or between trade in its various products while thirdly the arrangement may enable the advantages of size with a centralised financial policy to be attained without being saddled with the disadvantages of overcentralisation. It is not surprising, therefore, that many bussinessmen have opted for this type of organisation as the most desirable and it is not either surprising at all that arrangement is capable of abuse and company law has stepped in with s.150 as the weapon to check any malpractices. There were many loopholes. A public company could carry on business through a subsidiary operating private companies. This seemed to have been remedied by the Act which requires that copies of the holdig company's and subsidiary company's annual balance sheets and profit and loss accounts are to be filed with the Registrar of Companies. Despite this, nevertheless, the public holdig company could present its accounts in such a way as to be totally uninformative or misleading as to the

prosperity of the group. An example of this kind of situation is when holding company A operates through subsidiaries B and C. Company A's principal assets will consist of the shares in companies B and C and this will be shown in company A's books at cost, that is if these two are not private companies with no market quatation. Company A's income will consist of dividends, if any, paid on the shares in companies B and C. The situation arising here is that if company B makes a profit of, say, £1000 but company C suffers a loss of £10,000, company A's books of profit and loss accounts will show £1,000 as profit while in reality the group represented has made a loss of £9,000 . The balance sheet also could be misleading in that if company B has consistently made large profits and ploughed back part of them, its shares are worth many times their valuation as shown on the balance sheet and it is just as misleading if company C has sustained losses thereby making its shares valueless or even where holding company A has made loans to the subsidiaries or vice versa. This illustration shows what a difficult task thepotential investor or shareholder may have in having to laboriously search the company's Register to ispect the accounts of the subsidiaries as company A's accounts are valueless. The task of the potential investor or shareholder is made doubly difficult where the holding company has foreign subsidiaries. When the Companies Act 1948 was drafted in Britain a test had to be developed to determine when the holding-subsidiary relationship could be deemed to exist. The element of control was adopted as that test.

"Control" unfortunately proved difficult to define satisfactorily. If it were defined as majority holding of shares it is both too narrow and too wide; narrow because effective control can be exercised in many other ways besides that of a majority holding like voting rights; and too wide because a majority holding will not confer any effective control where the shares held are non-voting shares. The test therefore adopted by s.154 attempts to state what control implies: That a company is said to be a subsidiary of another if that other, the holdig company, is a member of it and controls the composition of its board of directors or if the company holds more than half its "equity" share capital. Therefore a sub-subsidiary is regarded as a subsidiary of the holding compay. It will be noted that the powers to appoint and remove a director are ignored if held by virtue of a provision in the debentures only and will also be ignored where they are held or are exercisable in a fiduciary capacity.

The Vocabulary "Equity Share Capital" was added by S.154 to the businessman's Vocabularly. Equity Share Capital is defined in S.154 (5) of the Act as

> ". . . . in relation to a Company, its issued Share capital excluding any part thereof which neither as respects divide/ carries any right to participate beyond a specified amount in distribution."

/nor as respects capital

Where there is a majority holding of the "Equity" there follows the presumption that there is automatic control conferred even if such control doesnot include voting control. If then, this is so, when there is a growth of non-voting ordinary shares, it is possible that there will be no voting control conferred. This is unfortunate because non-voting ordinary shares are growing in number these days and the Jenkins Committee has recommended the abolition of this branch of the defimition of Equity share capital and also where each of two companies hold fifty per cent of the equity share capital of another, that other will not be the subsidiary of either (18).Control therefore is very much a matter of degree ranging from complete Control for all purposes over a subsidiary wholly owned to 'de Facto" control. The Statutory definition would appear to place control on the Board, the head and brains of a Company although this board can exist without any legal power at all. It has been suggested that control lies within the hands of those that have the power to select the Board of Directors either by mobilising that legal right to choose them by controlling a majority of the votes directly or through Legal channels or by exerting pressure tending to influence theirchoice (19) Control can also be exercised where one hand holds a fairlysmall proportion of shares where membership is large and dispersed or where such hand is that of the existing management with Control over the proxy-voting machinery. Weighted voting therefore unless removed by motion, can exercise legal control and outvote all other voting shares (20). Other means of obtaining legal control include inter-locking directorships and voting agreements, or as in America, the voting trust. These two latter methods are not incorporated within the statute.

The requirements in S.150 and S.151 are that a subsidiariy's accounts must be presented in general meeting and must therefore be made public. S.151 requires that these accounts called group accounts shall-consist of a consolidated balance sheet for the holding company and its subsidiaries as well as a consolidated profit and loss account for both holding and subsidiary companies. Part 11 S. 15 (4) of the sixth schedule states that where group accounts are not submitted a statement will be required to explain why subsidiaries are not dealt with in group accounts and phall proceed to give details of the subsidiariy's profits, losses of previous and current financial years. This ensures that the affairs of a company's subsidiaries along with

those of the company are not hidden from the public, it is , however, interesting to note that in S.150 (2) (a) group accounts are not required where a company is a wholly-owned subsidiary of another body corporate incorporated in Kenya and reasons for this may be that the amounts of such subsidiary are so insignificant as not to warrant expense or delay involved in presenting its accounts or that such, submission may harm the business of the company and maybe misleading or that the business of the holding Company and thatof the Subsidiary may be so different that it could not be treated as a single undertaking. It is provided that the registrar's approval shall be sought where the company's group accounts will not include those of the subsidiary for the above reasons. While a punishment is laid down for failure to comply with the requirements it seems that if such director shows that he acted bonafide he will not be punishable under S.150 (3). This appears to be a weakness in an otherwise worthwhile provision. Great care must be taken, to present, throu the test of "control" to find out which holding company owns while subsidiaries a correct, wholesome, clean picture of the comapanies ' affairs. One last point on "control" as a test is the shortcoming that though by it a Holding-Subsidiary relationship may be found to exist it is recognised that companies may well be under one group but will not necessarily be legally under the same control.

A positive advantage in ignoring the corporate entity of a company in order to separate the subsidiaries from the holding company is that a holding company or a sub-sidiary will be liable to the creditors if such holding company puts into liquidation a sub-subsidiary if the latter becomes insolvent. It is only fair that creditors and others dealing with such company should not be windled out of their money. However it often happens that it is the creditors who suffer most from the unrestricted application of the rule in the 'Solomon case.' The income tax there sometimes occur "shortfall" distributions. This income of the company then may be treated as that of the members for surtax purposes. The practice in Income tax payment is that a Company's profits distributed by way of dividend are in reality taxed in the hands of the shareholders even if they had been taxed at source, when the company pays its own income tax, the practice of some companies was to plough back the profits of a company into the business, instead of getting them distributed as dividends. This serves to increase the capital value of the shares without increasing the shareholders liability to surtax. The revenue usually reacts by making a surtax direction on the company and where such a company is privately controlled by more than Five persons deals or treats the whole of the profits as the income of those persons and asses/tax accordingly./ Also in privately controlled companies estate duty is payable. The company is treated as trustee for its assets for its members and estate duty is payable not upon market value of shareholdings but upon valuation of the company's assets either as a going concern or on a break-up basis. In general therefor although taxing statutes frequently pierce the corporate veil and look

through the company to its shareholders the corporation tax legislation nonetheless adheres to that principle of separate legal entity and usually the result is that the parent company is not taxed along with its subsidiary as if they were one. However, where commercial reasons require a separation of the various aspects of a business to be split up among several companies tax considerations should not stand inthe way. Provisions for this sort of situatic as an example appear in the English financial Act of 1967 (which does not apply in Kenya). They include first, payment of dividends by the subsidiary to the parent company without deduction of income tax. These dividends are "group income" and, like all distributions, are free of corporation tax in the hands of the recipient company. Secondly they may be transferred within a group free of corporation tax on capital gains and thirdly it is permitted for losses and charges on income of one comapny to be used against the profits of another within its group. The concessions mean that the creation of group companies carefully managed from a tax viewpoint need not entail any increase in the total tax liability. This is "Enterprise Entity" rather than the purist legal theory of "Corporate entity", which latter the 'veil' covers jealously.

(11) JUDICIARY AND THE VEIL

Ever since the Salomon v. Salomon (21) decision, judges' efforts to lift the veil of incorporation have been constantly frust rated since that case laid down the origin rule that a company, in that instance a "one-man" Company, will not be treated as an 'alias' of or 'agent' for the primcipal shareholder. These are however examples of the refusal of counts to lift veil the most glaring of which is Lee v. Lee's Air Farming Ltd. (22) where the magic of corporate personality allowed Lee to be master and servant at the same time by virtue of holding the positions of chief pilot, and therefore a servant of the company, and also Governing Director and therefore an employer. It was held in the Privy Council that Lee could give himself orders; that Lee as member of the company and the company he controlled were two district Legal entities and that Lee could have the advantages of both - including limited liability. Third parties, then, run a big risk when they choose, of their own volition or by reason of being ill-advised, to regard a Company's members as the Company itself. Very soon the third party will find that he will fail to make the Company's members liable to himself and will also sometimes find he has incurred liability to the company (23). This position fortunately is not totally irreversible for cases and instances there are when the courts have felt able to ignore corporate entity and have treated individual shareholders as liable for the comapny's acts. Some other cases show the courts also ignoring the veil of incorporation and declaring that shareholders are entitled to the Company's property or as has earlier on been mentioned, regarded various Companies of a group as one entity.

(a) AGENCY:

There is no good reason why a company cannot act as agent for its shareholders. Sometimes, this aim is achieved by means of an express agreement. A caution must, nevertheless, be sounded in this connection, that the presence of such express provisions that a Company Act as agent for the members is indeed a rare occurence. Two instances therefore are; first where there is express provision aswhere upon the conversion of a business into a private Company it was said in the Sale agreement that the Company should fulfi existing Contracts as the agent of the seller (24) or where there was an agreement that the newly formed Company should take possession of Land as Agent for its Vendor promoters (25). The Second instance is where the Courts are asked to infer the agency relationship. This Agency by implication is difficult to infer in view of the strictness of the rule in the Solomon case. A line of cases, however, shows that the rule in the Salomon case is not insuperable. A set of Cases called "the Brewery Cases " (26) perhaps more in line, with a discussion on liability of Companies for Tax or profits, showed that although the business of brewing may have been carried on in America while nearly all the shares in all three cases were in English hands and manangement and Company's books including the holding of meetings were centred in England, those American Companies were kept in being as agents of the English companies and were assessable for tax upon the whole of the profits whether remitted in England or not. This holding seems to have branded the American Companies British Companies in reality. This is not so. The American Companies were a mere form purely to satisfy American law to enable English Companies to carry on business in America an in such a situation it was clear that an agent-Principal relationship existed. There have however been suggestions , with authorities to back them that possession by one party of a controlling interest stomatically makes the controlled party to act as agent. Cozens-Hardy M.R. has rightly stated:-

> " The fact that an individual by himself or his nominees holds practically all the shares in a Company may give him the control of the Company in the sense that it may enable him by exercising his voting powers to turn out the directors and to enforce his own views as to policy, but it does not in any way diminish the righs or powers of the directors or make the property or assets of the Company his as distinct from the corporations"(27).

No matter how many shares a controlling shareholder acquires the business of the Company does not become his. However as a matter of fact, the consequence that a person in the category the Master of the Rolls was referring to may enter into an arrangement between himself andthe Company will suffice to make the Company his agent for purposes of carrying on the business. Similarly in <u>Kodak v. Clark</u> (28) it was said that though the English Company held 98% of the shares of the American Company, the American Subsidiary did not carry on

Company liable for tax on the subsidiary's profits. These latter examples showed that the courts refused, unlike the Brewery cases to lift the veil of incorporation to infer agency and rather let it remain untouched to protect the shareholder.

So important is the implication of an agency relationship, sometimes for the benefit of the outside creditors (third parties) and sometimes for that of the members that Justice Atkinson sought to lay down a test to act as guide whenever an inference of an agency relationship was sought (29). Starting by stating that it was a question of fact in each case whether the subsidiary Company was carrying on the parent company's business or its own, he followed by saying that the tests for this were 6; first were the profits treated as those of the parent Company?, second were those conducting the business appointed by the parent Company? third was the parent company the head and brain of the trading venture? fourth did that parent company govern the adventure and decide what should be done and what capital should be embarked on it? fifth were the profits made by its skill and direction? sixth was the parent company in effectual and constant control? In that particular case all the above were answered in the affirmative and it was held that the parent Company, which through itself and its nominees held all the subsidiary company's shares, was entitled to compensation for the removal and disturbance upon the compulsory acquistion of the land of its subsidiary. The weakness of the tests can nonetheless be seen at once; all but the first test would almost inevitably get an affirmative answer in every case where the controlling shareholder is also the managing director. The tests therefore are rarely applicable and this is especially so where the facts of the particular case may be sufficiently different from the <u>Birmingham Corporation Case</u>(30). A good example is <u>Roberts v. Coventry Corporation</u>(31) where the main difference among others was that the person claiming was an independent shareholder owning less then half the Company's hares. Upon the Compulsory acquisition of her land which the company occupied she claimed for the loss the Company would suffer and for that reason she argued that her share would depreciate in value by the Company having to move elsehwere, She was said not to be entitled to the loss she claimed for.

Agency has been invoked by the courts so as to prevent the use of Corporate personality for the evasion of statutory regulations as where an American director and his American Company owned 90% of the shares in the British Registered film making Company and financed the Company in making a film they sought to get approved by the Board of Trade as a British film to the extent of regarding any or all participation in making the film by

British Company so mild as to be negligible (32) Under the Cinematograph films Act 1938 for a film to be deemed a British film and to be approved by the Board of Trade the film makers had to show that they had substantially undertaken the arrangements necessary for the making of the film, the applica were Held to have acted merely as nominees or agents of the American Company and had failed to qualify as the act required. An attempt by the British Compa to claim that it was the American Director and his Company who had acted as their agents or nominees in making the film was dismissed as a mere travesty of the facts.

Firestone Tyre and Rubber Company v. Llewellin (33) is a case which may well be said to be able to satisfy the six tests laid down in Smith Stone v Knight v. Birmingham Coroporation (34)a for in the 'firestone' case sales were a means by which an American parent company carried on its European business through an English subsidiary-which also happened tobe wholly-owned. It was held that the arrangement was that the American Company traded in England through the agency of its subsidiary.

Charateristic of the seasaw game engaged in by the courts in the fight to decide when then the Salomon rule should be relaxed and the veil of incorporation be lifted, the agency relationship has not been implied so easily. There are due striking examples of this refusal by the courts one of which is that of Ebbw Vale U.D.C. v. South Wales Traffic Area Licencing Authority (34)b. The court the refused to agree that a service provided by a company all of whose shares had vested in the British Transport Commission under the Transport Act 1947 could rightly be regarded as an Act by the Commission or by any person acting as agent for the Commission. Cohen L.J. at page 370 said,

> "...Under the ordinary rules of law, a parent company and a subsidiary Company, even a 100% subsidiary Company are district legal entities and in the absence of an agency contract between the two companies, one cannot be said to be the agent of the other."

Lord Justice Cohen seems to suggest that an express agency contract is needed although none of the earlier authorities seem to have been cited (35). It also seems from the wording of the British Transport Act 1947 that the Legislature wished to suggest that the Salomon rule could in all probability be excluded when the legislature wished to do so. The provision read;

~~"where a body corporate is directly or~~ NOT

~~rightly claim that the landlords wanted to keep the premises themselves. From these cases it is clear that the court could easily be persuaded by third parties or by members themselves in exceptional cases, that the company is acting as agent for its members. A veil is thereby lifted. Cohen L.J. however denied that this veil could be lifted "except where the~~

> "Where a body corporate is directly or indirectly controlled by the commission, anything done by that body shall be deemed to be done by the commission and the undertaking of the body shall be deemed to form part of theundertaking of the commissio

is an interesting part to this aspect of the implication of
agency relationship which involves landlords and tenants. Most
ie examples involved thecourt refusing to imply the agency
ionship. Where, for instance, the plaintiff was a tenant under
ise comprising living accommodation and a shop and the shop's
iess was carried on by a company in which the tenant and his
held majority shares and he was also the Managing Director and
being given notice to quit the tenant himself applied for a
lease, the court held that the tenant was not the occupier of
shop; that thebusiness of the company was not that of the
it and he therefore was not entitled to the grant of a new lease
r the relevant Act(36). In another case with facts similar to
e in the above case, the court held that where a tenant had allowe
mpany in which he was managing Director to carry on business and
her company was formed which took over the Managing Director's
any, no interest in the demised premises passed to either of the
companies from the tenant him self and he had not parted with
ession of the premises (37). In <u>Willis and Another v. Association</u>
niversities of the British Commonwealth (38) the Council formed by
landlords for their own purposes, though a body unincorporate, was
to be a separate entity from the laddlords and could share the
ises with the landlords. The teants could therefore not rightly
m that the landlords wanted to keep the premises themselves. From
e cases it is clear that thecourt could easily be persuaded by
d parties or by members themselves, in exceptional cases, that the
any is acting as agent for its members, The veil is therefore
ed. Umerod L.J. however denied that this veil coild be lifted
ept where the company was a facade concealing the true facts(39).

in that case the court held that a landlord could not successfully oppose the grant of a new tenancy on the ground that she required it for the purpose of a business to be carried on for her. It was found as a fact that she Beneficially owned all the shares in that company, but the court was not prepared to ignore the veil of incorporation and infer agency.

From the foregoing it should be noteworthy that the court will not lift the veil of incorporation by implying that the company was acting as agent for its shareholders except when the strict application of the prinčiple of separate personality would result in an anomaly or an injustice. It has been suggested these cases, where the subsidiary could be regarded as agent of the holding company depend, very much on the degree of intergation between the subsidiary and the parent company. This, the debate goes, is a way, when a subsidiary is described as an agent for the holding company, of indicating that subsidiary's complete subjection to the holding company and fails to give the impression of their legal relationship at all. Moreover, words like "agent" "employee","simulacrum" used with reference to the subsidiary are intended for the Metaphorical rather than legal sense. Whether this impression is given or not seems to be a matter of opinion because when the court is implying agency - and the same can be said of trusteeship, - it very carefully seeks out the indicia of the real agency relationship using such criteria as control by the holding company over the management of the subsidiary's business and or management of the subsidiary's property together with that of the holding company. It has been suggested that an agency relationship should not be implied where as in the 'Firestone' case (40) it is implied by merely the extent of the holding company's shareholding in the subsidiary if there is nothing else at all to indicate the existence of an agency.

TRUSTEESHIP:

Attempts to rely on trust rather than agency to get the court to pierce the corporate veil and state that the company acted as trustee for its members have been less sucessful. It has been established that while it is true that where a company is authorised by its memorandum of association it may act as a trustee for the members, the general proposition that the Company holds its property on trust for its members can nevertheless not be successfully argued. There is an unwillingness to bend the rule further than absolutely necessary that a company's members have no proprietary interest in the Company's assets (41) including insurable interest. Shareholders are not in the eyes of the law part owners of the undertaking as the undertaking is something different from the totality of the shareholdings (42). This view has however been challenged by Lee v. Sheard (43) in which case a Director and Shareholder of a private company upon sustaining injuries through the defendant's negligence

was held entitled to recover as damages a sum in respect of the diminution of the distributions received by him from the company when he was prevented from working. He was shown to have an interest in the company's property and that interest was proprietary. In spite of this it has been held where the question was whether, for the purposes of a Treaty of Peace Order, property of a Dutch Company could be regarded as belonging to its shareholders or as 'held'or'managed' by the company " on behalf of" its shareholders (44). Devlin J. did not hesitate to hold that the company could not be said to act on behalf of the shareholders as suggested. It is interesting to note that neither the Brewery cases (45) nor the Smith Stone & Knight v Birmingham Corporation case (46) were cited. There are, however instances where trust has been implied by the courts and used to lift the veil of incorporation. Where a company was formed to run a school the members took steps to convert it into a non-profit-making charity by vesting all shares in trustees on charitable trusts and by altering the articles to provide that the school was to be run by the trustees the Company was refused exemption from payment of development charge on its land and on the matter going to court Dankwerts J. held that the company was, entitled to the certificate of exemption saying that the court was entitled to go behind the veil of incorporation to see who was in fact in control. He found that it was the trustees who were in control and it was a charitable organisation exempt from the charge.(47) therefore, a company may be regarded as holding its property on charitable trusts if all its shares are so held and its governing body are trustees the decision in this case is welcome. It has cut through red tape and has lifted the veil despite first the well established rule that a company does not hold its property on trust for its members and second the Statutory rule contained in S.119 of Kenya's companies Act: "No notice of any trust expressed or implied or

Constructive shall be entered on the register or be receivable by the registrar".

These rules have been largely followed where for instance beneficiaries under a trust sought to compel the trustees who were the company's directors to produce for their inspection some company documents the court ruled that they could not do so since the documents were not available even to the members as such. Sometimes, it has been said, the evidence implying trusteeship (or agency) seems to be merely a convenient legal fiction used by the court to arrive at "just" decisions (48). In the Trebanog (49) case a club which served to provide recreational facilities for its members, was prosecuted for selling liquor without a justice's license and it had formed a committee to manage the club which purchaed liquor in its name. The club was acquitted on the ground that there had been no sale of liquor as members were redly owners of the liquor when it was purchased on their behald by the committee. It had been argued . Co

that since legal title of the liquor was vested in the club as it had been purchased in the club's name then transfer of this title when a member brought liquor looked like a true sale. This difficulty was overcome by the court by holding that the club held liquor as trustee for its members so that beneficial owmership was all along vested in them and the transfer of legal title when a member bought liquor was no sale at all. As has been mentioned earlier it appears difficult to justify this decision and the big temptation is to say that the court had to reason as it did, rightly or wrongly, purely to arrive at a "fair" or "just" decision and the implication of trusteeship to enable the judiciary to lift the veil here represents a dubious but nonetheless one of the important but few such instances.

RESIDENCE:

In order to determine a company's residence, the courts will look behind the veil of incorporation. The various reasons why the court would want to determine a company's residence include; for purposes of taxation, service of process, to determine the company's character as an overseas trader and for pruposes also of identifying it as an enemy. A test laid down for this purpose was, "the place of its central management and control" or "in which its business is managed and controlled." This place could be either, where the Boad of Directors function or the place of business of the managing director. Even where there was a Board of Directors for a wholly owned subsidiary but where they took no decisions but left them and the control and management of the subsidiaries to the parent company in the United Kingdom it was held that the residence of the company was the United Kingdom (50). It has been proposed that the test of locating control and hence residence is entirely factual and is in fact "to be determined not according to a scrutiny of this or that regulation of by-law, but upon a scrutiny of the course of business or trading" (51) and it does not matter whether control was "irregular or unauthorised or unlawful" (52).

An american company was unable to enforce a judgment of a New York court on a British company for the reason that the British company whose director merely travelled around in the United states buying samples and had no offices in America, could not be said to be resident in the United States and consequently within the jurisdiction of the American Court (53). It was said in that same case that to consitute Residence to render a foreign company subject to the jurisdiction of the host country the foreign company must to some extent carry on business in that state at a definite and reasonably permanentplace. A company may have dual Residence although it seems now that dual residence was possible but could exist only where the central control and management of a company were divided between two countries (54). Such division of central management

and control is a matter of fact and degree in each case andis not denied by the circumstance that the "supreme Comand," The power of final arbitrament may be found to be, orbe predominantly, in one place."(55) It is no doubt a breach of the Salomon Rule to look at the corporators to determine the character of the corporation in order to decide, for instance, whether a corporation is an enemy of Kenya or an alien. However, corporate entity must not mean that the law must know nothing about the natural persons who constitute and control the company so that in questions of property, for example, as in Bank voor Handel v Slatford (56) incorporation will be breached in order to decide whether property is enemy property. Other purposes for lifting the veil include, questions whether a company has breached a law against trading with enemy by virtue of all shares being owned by enemy aliens (57), whether there was capacity for acts done, rights acquired or liabilityes assumed. Professor Gower suggests (58) that it is no more a breach of the 'Salomon' principle to look at the corporators to determine the character of the corporation as an enemy than it is to look at the members to determine whether the company is a subsidiary. Where a vendor who sold a house owned by a company of which he was the sole shareholder and director was held entitled to specific performance of the contract when the purchaser sought to repudiate it as the vendor was in a position to compel the company to convey to the purchaser (59) without refusing separation of the company and the shareholder, it was held that the veil of incorporation did not prevent the court from looking behind it to see whether the vendor could compel the legal owner, the company, to act as he directed.

RATIFICATION OF CORPORATE ACTS

The Question requiring an answer here is; will the veil be lifted so as to equate a decision of the members with a decision of the company itself? the law insists that only a resolution duly passed at a meeting of the company can be regarded as the act of the company itself. Individual assents relating to ratification by members of Acts done on the company's behalf, if given separately, (60) preclude those giving them from compaining of what they have sanctioned. But for the prupose of binding a company in its 'corporate' capacity individual assents given separately are strictly not equivalent to the assent of a meeting. Where five directors who were also the only shareholders sold to their company property they owned contrary to the memorandum of Association of their company that no director could vote in respect of a contract in which he was interested, their unanimous agreement to do so was held to be intra vires and could not be impugned (61). The decision in Re Oxted Motor Company (62) seems to have given birth to S. 133 (3) of the companies Act that holders of Ninety-five

per cent in value of the shares carrying the right to vote at the meeting is all that is required to ignore the requirement of twenty one days' notice before the meeting. Subsection (3)(a) of that section draws a difference with reference to the Annual general meeting; there must be unaimous consent of all the members to waive the twenty-one days' notice. It is on authority that first the company is bound in a matter intra vires the company by the unanimous agreement of all its corporators and secondly it is not necessary for members to hold a meeting in one room to express that assent simultaneously when they assent an intra vires transaction which was nonetheless ultra vires the Boad (63). Sometimes, the courts no doubt with the Ghost of Lord Davey and what he said in the Salomon case; "the company is bound in a matter intra vires by the unanimous agreement of its members" hovering over them have tended to insist that nothing short of one hundred per cent agreement of the voting members will suffice. (64).

The question of acquiescence on corporate irregularities has raised several difficulties. Early ultra vires cases laid down that acquiescence could be established without having to prove actual knowledge by each individu member (65) and based on this a later case (66) held that mere tacit acquiesce over a long period may regularise the absence of a resolution including a special resolution. It has been suggested that where there has been an implie representation to the public at large, the ostensible member becomes bound to the company. This is undoubtedly an unusual type of estoppel where the addresee of the representation is not the same as the beneficiary of it. The Companies Act of Kenya has fully recognised the possibility of provision expressly that methods other than a formal meeting may constitute an act of the company. This is the formal written Resolution as referred to in Part 11 of Table A article 5 and accepted infecentially by S. 143 (4) of the Act. These, it must be warned, cover only a formal written resolution but not an informal retification of a company's acts as in <u>Park & Cooper v. Reading CASE</u> and the <u>E.B.M. v. Dominion Bank case</u> (67. The question whether these provisions are effective in all types of resolutions requires a discussion outside the scope of this paper. In any event, there appears to be from the foregoing comments a chance that consistent lines of authorities can be drawn up to show that there could be a binding effect on the corporate person of decisions taken outside the corporation and its normal procedure. The feat, however seems to be far from having been accomplished.

<u>FRAUD OR IMPROPER CONDUCT</u>

> "If a company is formed for the express purpose of doing a wrongful act, or ir, when formed, those in control expressly direct that a wrongful thing be done, the individuals as well as the company are responsible for the consequences. . . . . . ." (68)

The courts have felt free to disregard corporate entity where

where there can be proved to have been "fraud or improper conduct" (69)
This branch of the Doctrine of ignoring the corporate entity is small an
consists of instances only without putting forward a consistent principl
the matter. Where, for instance, two directors, wishing to conceal the
profits they were making, formed another company and sold to a purchasin
company through this "promoter" company they had formed for the purpose,
court treated that 'promoter company as merely an 'alias' of the two dir
it was a dummy company (69b). This decision was consistent with the gene
principle that the court will insist that disclusure of profits must be
made not to a Board of dummies but to the members, actual and intended.
Sometimes the majority shareholders may choose to call upon S. 209 of th
Act which deals with application as under S. 207 of the Act for a court
Sanctioning a compromise or arrangement proposed between a company and t
members. While it would be quite in order to do so, there nevertheless
is a great danger that the holders of ninety per cent of the shares of a
Company may expropriate the ten per cent minority. The formation of suc
company by holders of ninety per cent of the company's shares has been c
a "hollow Sham" or "nothing but a little but build round the majority
shareholders" (70) and the court would not sanction their scheme, where
also a person forms a company to get around a covenant not to solicit hi
former employer's customers the court issued an injuction restraining th
company as well as him from soliciting his former employer's customers (71
The company was labeled variously a sham stratagem and a cloak and the i
could issue against it even though it was not party to the covenant.
The company in instances like there is treated as merely its ~~creditor's~~
creator's alter ego. So as to avoid completing a sale of his house a
person conveyed ownership of the house to a company he formed solely for
that prupose (72). In that case Russell J. ordered the defendant to
specifically perform the contract will the plaintiff and said of the cor
it was "the creature of the defendant,

> a device, a sham, a mask which he holds
> before his face in an attempt to avoid recogniti
> by the eye of equity."

Sometimes a subsidiery may be formed for a frandulent purpose (73) as wh
a company which dispatched goods by rail was convicted of receiving ill
rebates on the charges made by the railway company when those rebates w
paid to a subsidiary company formed by the consignor for that prupose.

There are times when the courts have chosen to regard cer
behaviour as using the devise of incorporation 'to defeat incorporation
such a case, the veil will be lifted as readily as if it were an instan

of using incorporation to perpertrate a fraud. An example of this situation is one which arose where a parent company with a 'C' licence allowing it to carry its own goods only proposed to transfer these vehicles with a 'C' licence to its subsidiary which held an 'A' licence allowing it to carry customers' goods only (74) the subsidiary then sought to extend the rights of the "A" licence to the parent comapany's 'C' licenced vehicles. This extension of licence to the parent company was refused since it would have resulted in the parent company obtaining both 'A' and 'C' licences, equivalent to a 'B' licence which it would not have obtained otherwise. The present company was using the subsidiary to obtain something contrary to the interest of the Act which it was not entitled to get. Sanborn J. seems to have summed up the issue properly in U.S. v. Milwaukee Refrigerator Transit Co.(75)

> ". . . . . a corporation will be looked upon as a legal entity as a general rule, but when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons . and the veil of incorporation will be ignored.

PARAMOUNT PUBLIC INTEREST:

The separate legal entity of a company has been ignored for an investigation of the personal qualitites of the company's shareholders or persons in control of it, if there was an overriding public interest in so doing. The House of Lords held that where a company was associated with Enemy aliens and thereby breaching the trading with the enemy legislation (76) it could not sue in Britain unless licenced by the Crown when all its shares except one were held by enemy aliens and all Directors were enemy aliens. It was disregarded that the Company had British nationality by reason of being incorporated in England. In effect therefore regard was had, rather to where control of the company's business and where assets lay in determining the company's status. It was in the public interest to do so.

QUASI-CRIMINAL CASES:

Where there have been breaches by companies amounting to quasi-criminal cases the court . . . . . .". . . .seeks to

> deal with thesubstance of a transaction rather than with the legal from in which it may be clothed." (77).

In two identical cases which are difficult to reconcile the procedure followed by the courts in these instances was laid out. In Wurzel v. Houghton main House Service Ltd. (1937) K.B. 380 the court drew a difference between two mutual Benefit societies which had infringed the terms of their. . . .Con

vehicle licences by "carrying goods for hire or reward when they delivered coal to their members. In the case of one of the societies which was unincorporated the court said that the terms of the licence had not been broken since the members of the unincorporated society were merely deliverin coal to themselves in ~~the~~ vehicles they owned. This is substantially what was held in Graff v. Evans (78) which Case held that a members'/ In the Wuxzel case, the second society was incorporated and had thence broken the terms of its licence. It was a 'legal entity apart from its members'. Trebanog Working Men's Club & Institute LN v. Morcdonald (79) is the second case where the court's position in dealing with quari-criminal cases was set out. That case differed from Wurze V. Houghton Manittome Service LN (80 IN THAT NO DIFFERENCE WAS DRAWN between the Mutual Benefit Societies which w identical with those in the Wurzel case. It was held there that the fact that the club property was vested in a corporate body did not, as implied in the 'Wurzel' case, prevent the club from being a mebers' club. This was a confirmation of an earlier decision (81). Where, then, a club was a members club no justice's licence was required for the sale of liquor. The liquor w in fact said to be held by the club in trust for the members and there was therefore no 'sale' of the liquor to them when they purchased it the members retained the interest in the liquor, As mentioned earlier, the desire to arrive at 'just' decisions by using the idea of making realities to prevail to look to the actual nature of the club and not the legal framework, seems to draw the courts into the temptation to allow legal formalism to induce it to draw a "subtle and totally unreal distinction" (82).

club did not require a licence to sell liquor to club members

GROUP ENTERPRISE:

Court have begun and are continuing to recognise the essential unity of group enterprise rather than the legal entity of each company within the group. It must be added that the separate identity of the parent company and the subsidiary still remains and this is exemplified by the fact that the employee of a parent company cannot be required to work for the subsidiary in the absence of clear words in a contract of service(83). The courts want to recognise "enterprise entity" andhave held a parent Company liable on a bill of lading signed on behalf of its wholly-owned subsidiary was a 'separate' entity, in name alone and probably for the purposes of taxation. This case, and others, shows that if, as earlier discussed and concluded that the court will treat a company as agent of its controlling shareholder then it could also be concluded that the courts are perhaps readier to so treat a company as ~~agent~~. . . . . Cont..

agent of its controlling shareholder where the shares are held by another company. A point was raised in Merchandise Transport Ltd. v. British Commission(85) that the licensing authority, in exercise of its discretion had been entitled to have regard to the fact that a parent and a subsidiary company, though technically separate legal persons, in fact constituted a single commercial unit for pruposes of holding transport licences in that case. This important result the courts have arrived at by seizing upon some technicality to evade the effect of the technicality of corporate entity - such an instance is where an indorsement of a cheque to "Thus cook & Son Ltd" meant for "Thos. cook & son (Bankers) Ltd" an allied by separate company (86) and the court regarded the indorsement as a mere misdescription to be ignored under the principle; "Falsa Demonstratio non nocet". A similar refusal by the court to stick to the technicality of corporate entity was when it disagreed that Caddies (87) could complain that the company had breached the contract with him by confirming his activities to one subsidiary instead of dealing with the affairs of the parent company. The argument that/him to a subsidiary/ ta a separate legal entity with a Board of Directors of its own changed the terms of contract drastically was held to be too technical. The court said that the realities were that the parent company had full full control of the internal arrangement of its subsidiaries and the contract of Employment had not been breached. Danckwerts J.(88) went os far as the say that a subsidiary was a 'responsible' assignee in the sense that its holding company would not in practice stand by while it got its back against the wall and that the separate legal entity idea could indeed be dismissed " as a point which might be taken by a pedantic chartered accountant" (89). The mood of the courts and in fact their thinking has changed from their reluctance, until recently to recognise thecontinuing unit of a business enterprise when upon reorganisation a new company takes over from the old or where a company takes over from an unincorporated firm (90). The E.B.M.V. Dominion Bank(91) case is an example of the efforts by the Privy Council to correct a heresy it had been responsible for its spread when it refused the tax commissioner permission to disregard the separate existence of the company or inquire as to who its shareholders were and its relation to its predecessors for tax assessement (92). This decision quashed that of the Canadian Supreme court which, like the courts in the United States, were readier to ignore the veil of incorporation. Not even, apparently will a charge in legal structure interfere with a third party's rights under a trust. Where an industrial and provident Society converted itself into a company ... (93) and the pension fund which it had previously ..C

established for its staff and in relation to which it executed a trust deed vesting that fund, in trustee and declaring trusts for the benefit of th Society's employees was said to have ceased to exist when the Society wa converted into a company, the trust were held to apply to the persons no the staff of the company. The court there held that the legal structure had only supaficially changed becaused in substance the society and the Company were exactly the same thing with a different structure and a different machinery - "the same thing in a different constume" (94). This continuity of the functions of a company was referred to in Willis v Association of Universities of the British Commonwealth (95) where the landlords, a limited company being wound up passed on the business withou break to the new chartered company they had created - they could therfor claim, in accordance with the relevant Act that they opposed an applicati for a new tenancy by the plantiffs since they themselves required the premises for purposes of a business to be carried on by them and could remain in occupation until wound up. The Landlords were an 'alter ego' o the New Chartered company as successors of the landlords in their old guise of the limited company. In form, then the landlords were a limited company being wound up. In substance, however there was continuity in th change to the new chartered corporatio. The court looked to the substanc rather than the form.

Lately also the courts have been liberal when confronted by a party resisting liability by the device of incorporation by a new compan taking over the liabilities of either a firm or other body though not prima facie for the Fraudelent purposes. This is a different attitude adopted when a few years ago, roughly about 1960 a plaintiff brought a suit (96) claiming damages for injuries sustained while an employee of the defendants in 1956. It appeared that the defendants had converted their Business from a firm into a company in 1955, and the plaintiff had continued in their employement regardless, the writ had been served to th "Firm" but the word Limted was later added. It was held on appeal that the original misdescription was not a mere misnomer and the court had no power to allow substitution of a new party (97). In a later case with a similar claim under similar circumstances (98) where the claim was against "W.J. Daniels of Co. (a firm)" instead of "W.J. Daniel & Co. Ltd the court allowed the latter ammendement to the writ which enabled the p tiff to avoid a plea by the defendant company of the claim being statut barred. The court said that there could not be reasonable doubt as to the idenity of the proposed defendant and it was a case of a mere mishon not the substitution of a new defendant. It was also added that the mer

ommission of the word "limited" in a writ did not mean that no person was described and that there was no defendant.(99) The more recent case of Chatworth Investments LN.v. Cussins(Contractors) Ltd(100) showed even more clearly the court's willingness to hold that there is continuity where one company which entered 'into a Contract with the plaintiffs to build a superstructure and later before the work was completed, it assigned its liabilities including contract. The assignee company resisted an action against them for faults which appeared later in the superstructure. It was argued that no action was maintainable in 1967 on the 1960 building contract. The plaintiffs, however succeeed when they argued that the assignment from company A to company B in 1963 novated the 1960 contractand the action was not only not statute-barred but also that the plaintiffs could ammend the writ so as to bring the claim against the assignee company in connection with its 1963 agreement between assignee and assignor. The ammendement was held to be reasonable even if it deprived the defendants of a defence and remedies as against other parties. It is clear then that the courts will do all they can so long as it is reasanably justifiable and within the law to disallow those that have continued to carry on the same business through a new company with the same name to take advantage of the confusion that this is likely to cause to those dealing with them.

Also among these somewhat miscellaneous examples of the application of the doctrine of lifting the veil or where the courts look to the substance and not to the form is the rule, now in the companies Act that in deciding whether it is just and equitable that a company should be wound up, the court will look behind the fact of incorporation (101). For this purpose, in fact the courts have cosen to treat companies, especially in the case of small domestic concerns, as quasi-part nerships(102) and are enabled to look to the members in order to pick out the differences between them and issue a winding up order.

PART IV : A

LIFTING THE VEIL OUTSIDE THE COMMON LAW

Although it is commonly believed that common law courts, more specifically English Courts have followed the lead of the Legislature where the doctirne of ignoring corporate entity is concerned, their unwillingness lies more specifically in the fact that they do not want to lay down hard and fast rules before the legislature does so. They have, however, as it appears in the paper stepped in more and more readily as the years go by to "lift the veil". The American courts, however have a longer history of liberality in applying the doctrine andparticularly where incorporation is being used to facilitate breach of the general law (103) American law which was derived from common law is flexible and far from conservative. In East Africa whether this flexibility is possible and whether our courtsand . . . .Cont..

legislature will review their hinging on British courts and their decisions and the enactments of the British Parliament before proposing changes in relation to this branch of Company Law remains to be seen.

The Europeans on the "continent" have recognised the importance of the doctrine and while some of them are quickly formulating principles to guide the law as to when the doctrine applies others wish to restrict its growth and maintain the "Sanctity" of the veil of incorporation .(104).

In Germany the doctrine is referred to as 'Breaching the wall of the corporation' and the first instance when it is applied is where the sharehold fails to distinguish between the assets and affairs of the corporation on the one hand and his own private assets and affairs on the other. He incurrs personal liability for the dets of the company. A statute, Article 101 of the Joint Stock corporations statute, states that anyone obtaining an advanta other than that naturally arising from his participation in a company and thereby damages a company will compensate the company and is responsible, for his frandulent act, for the company's debts left unpaid following the dam The German courts have shown a reluctance to accept that a company may be liable for debts of its sole or controlling shareholder. This proposition pieces the veil more effectively than does the possibility that the sharehold may be liable for the company's debts.

The rule of Good Faith is held in such high esteem that breach of it in certain situations affords a ground to ignore veil of incorporation in most Continental European jurisdictions. An example of this is where a contract in Restraint of Trade having been entered into, party seeks to circumrent it by the formation of a separate Juridical entity like creating another company. The doctrine, then, in Germany means " a realistic treatmen of the concept of juristic personality." the company is, therefore, not only identified with its controlling personalities but also with the business it conducts or the property it owns.

The Swiss have the curious situation that the most common form of company is the one man company or companies with very few shareholders and the courts there have tended to regard these companies, where it is necessary to lift the veil, as partnerships. Like in German law, a controlling shareholder who doe not distinguish between his assets and those of the company will be personally liable for the debts of the company. In cases also where companies are formed to evade the terms of a contract in restraint of trade the person responsible will be personally liable. The Swiss Code of Obligati has the interesting proviso that claims for damages resulting from criminal offences are not barred by limitation so long as there is no time bar to the punishment of the offender and so long as the plaintiff sues the director

Cont. . . . .

personally. Under Swiss law where the management of a corporation is exclusively or mainly dependent, in a manner discernible to outsiders, upon the intentions of a single individual, acts and omissions on the part of the company may be treated as if they were those of the latter and before a controllingx shareholder induced the board of management of a company to commit a bankruptsy offence the court decided to punish him instead: thereby ignoring incorporation and reached to the members responsible. The veil is also lifted to prevent the excercise of voting rights resulting from shares held by a wholly-owned subsidiary on its own behalf because such votes might well subject the general meeting to domination by the company's borad.

The French have started off with a statuttory provision that those who control the company are responsible for the company's debts. This however applies only when the company goes bankruptcy. The officers falling under this axe can escape only by proving to the tribumal that they had performed their obligations diligently and competently. This inquisitorial power of the tribunal is the tool the French use there to pierce the veil of incorporation. Consequently as in German and Swiss law, failure of a controlling shareholder to separate his assets from those of the corporatic made him personally responsible for the company's debts. Neither will the Frandulent act of using a company as a cover by a controlling shareholder for his own personal business be allowed by the court. The veil must go up to reveal the fraud. French laws dislikes 'one-man' companies and where one person appoints nominees to avoid infringing the requirement against 'one-man' companies the courts willcall upon the doctrine to seek the truth. Breach of an agreement in restraint of trade by the device of forming another company also cases the veil to be lifted.

Italian law has fought against lifting the veil and it has been held that subsidiaries are to be regarded as sattelite companies and are to be treated as independent from the parent companies andthe latter cannot be answerable for the subsididary to a creditor of the subsidiary. In taxation while a company's prifits are taxable at sorrce, that part of them going to the shareholders are not taxed since they are taxed in the hands of the shareholders.

The doctirne is here to stay although its impact is different on various states. It doe not represent an isolated legal ideda but is in fact one of themovements which brought about the 'twilight of the concept of legal personality'. the trend is one of keeping to a more realistic appreciation and use of legal concepts- and concepts of law may in the end have to give way to the realities of life where ethical and economic considerations no longer justify their application.

RELEVANCE OF THE DOCTRINE IN KENYA SOCIETY:

It was mentioned earlier that a discussion on an aspect of company l should not be allowed to end without reference being made to the possible of that aspect of company law-in this case the doctrine of ignoring corporate entity-on other forms of business association including partnership and cooperative societies. The question, then to be asked is what use will the doctrine be in relation to one-man companies partnerships, cooperatives or multinational corporations?

To start with a company, anywhere, should have social responsibilit in law. For this role, the company has to follow a particular policy. Control of this policy; indeed its formulation-vests in the shareholdeers. in Kenya the commonest types of companies are one-man or small-unit family companies and multi-national corporations working through their subsidiaries. There is a danger in the one-man company that he may have formed the comapny for some fraudulent purpose or other illegal purpose. If the company has several shareholders, they may fail to be effective policy-makers or decision-takers than the working director-who may invariably be the controlling shareholder. The rare General meeting may be cumbersome and is made more so by difficulties in means of communicatio and also the amount of technicality involved it its conduct. In the case of the multi-national corporation, decision making is usually ouside Kenya especially if the subsidiary is wholly-owned and control and management and shareholding all foreign-based. Decisions are likely to be if not to the detriment of the country's Economic growth, then not very beneficia Their aim is profit - maximisation after all. Suppose the shareholding was local; what then? the answer seems to be that following the rule in th Salomon case and <u>Lee v Lee's Air farming Ltd.</u>(105); shareholders have no propretary rights to the company's assets and cannot therefore force the company into line with National policy. Besides this if the directors sanction something of Benefit for the local community but which does not benefit the company their act is ultra vires and they willbe hald personally liable to compensat the company for any loss of its assets (106 One of the more popular instances as far as the court are concerned in East Africa, given the various forms of business associations existing in this part of thw world, in applying the doctrine is taxation. Problems have arisen between the commissioner of income Tax and the foreign compani over tax assessment. A dispute arose (107) over tax assement when the commissioner of Income Tax insisted on assessing for tax the 7½% and 4% of a foreign company's annual profits given as remuneration to that Compan directors in addition to their salaries. This was not profit sharing since it was a cut from the net profits. Since the management and control

the Commissioner of Income tax could not be heard to say that the profits acrued from Tanganyika. In fact the sum paid to the Directors - most of whom were not resident in Tanganyika anyway came largely from Sources in Europe. This action by the court was an example of looking to the realities instead of simply the form of incorporation. Sometimes this type of decision can result in injustice being done to the country hosting the foreign company by denying it vital income Tax returns. It need not be mentioned that the payment of dividends, whose tax a tion is not very high in Kenya particularly, to shareholders outside Kenya, or East Africa for that matter, takes away a lot of vital revenue. The structure of a company enables foreign capital to fear into the country but unwatched, it enables foreign capital to flow out of the country. If the one-man company, largely a family business and intended to be a source of revenue for the few members in it, lacks the heritage of Social responsibility- it does not normally undertake to employ any large number of people outside the family or skilled labor-what of cooperatives and partnerships?

Private enterprise, except in Tanzania where most of it has been nationalised, has elsehwere (in Kenya and Uganda) a lot of political influence largely because Government official s have joined the battle and entered into private enterprise. This political influence ending from interest on the part of the country's policy-makers is a hazard to attempts to bring about responsible company management, alert to communual duties through the supervision of the court and planned legislative control. The motto of 'take all give nothing' should not be tolerated especially since the welfare state has not arrived in East Africa to properly cater for the mass of the people. The application of the doctrine is doubtlessly necessary given the situation above. The formation of many small companies sometimes by one family in order to evade tax by not giving proper accounts or the formation of innumerable subsidiaries whose figures for profit and loss can be so manipulated as to give wrong returns to the Commissioner of Income tax, among other practices lilee fraud, can be checked by the application of the doctrine. There, however, are difficulties in the application of the doctrine particularly to the small youngArican one-man company. Some (108) have in fact urged that this type of small busimess ought to avoid incorpotion until the business is healthy enough to enable the ploughing back of profits. Despite his limited liability status the one-man company member may often be required, as the majority shareholder, to give personal guarantees to the banks or otherlending agencies before being advanced a loan. The company as a legal entity is distructed as incapable of paying back the loan. Likethe cooperatives it is Government's policy

to encourage their operation to bring, in the case of cooperatives, the rural inhabitant and in the case of the one-man company and indeed the partnership the african, into the modern commercial sector and in particular to cut out the non-African rural trader. This cannot be done properly by clamping on the penalties for failure to repay loans or applying other remedies immediately the business lags in one respect or another. There is a trend, however reluctantly followed, to regard this 'confiscation' as bad politics. Rather, attemps are made to help 'reorganise' the small comapany, the, society, or the partnership to enable it to keep going. Cooperative Societies are those in the greatest need of this kind of sympathy since they are peculiarly suited to act as lending agencies to peasant farmers. They also serve, in their capacities as either producition cooperatives or service cooperatives to market and process crops, channel credit to farmers and also to stimulate the farmer into political awareness. Though separate legal entities like companies with limited or unlimited liability cooperative societies have the additional quality thatmembership doesnot end at mere monetary investment, the shareholder is active in supplying and marketing the produce of the Society. The Kenya company's shareholders (on the other hand) very often are not exactly active participants, especially in large companies, in the management and formulation of policy. He is therefore prone to maneuvering by the more skilled and knowledgeable management and if at all he attends the general meeting, he is merely a rubber stamp. Not so the shareholder in a cooperative society. S.14 of the cooperatives societies Act. 1966 says that members are those persons resident in or occupiers of the land within the Society's Area of operation. They are therefore active members. The Society is also protected from domination by one person being a majority shareholder. S.15 of the same Act. prohibits a member other than a registered society, to hold more than a fifth of the issued and paid-up share capital of any registered cooperative society. The majority shareholder do allowed being another society with other members whose interests it will be promoting can hardly be said to want to expropriate the minority in the society in respect of which shares are held. The cooperative society, given the right management and advice is a better tool for the advancement of the interests of the rural peasant whose agricultural produce will be enabled to earn him reasonable income. The government always seeks to help there societies to avoid their becoming bankrupt by allowing them loans on very flexible terms. In partnership, however matters are very much in the hards of the partners. Liability is joint. The court interferes with them in matters of agency. This agency is said to exist always ....

except where the partner acted beyond his actual powers in which event the partners are sued in the firm's name. In the eyes of law, a partners remains a group of indivudals with individual liability-it is not a legal entity.

It is therefore clear that the doctrine of corporate entity can be disregarded in East Africa in the case of companies and perhaps cooperative societies. This can be said to apply more specifically to companies since it can save to protect potential creditors who might be deceived by inaccurate prospectuses especially where they are fraudulent as well as protect them from buying worthless shares at inflated prices. The shareholder himself willbe protected from exploitation by the management since he cannot be said to always be able to participate in the day-to-day running of the comapany's business. Also the minority shareholder will be protected from unfair treatment by the majority while in relation to public interest it will help bring about financial stability and the encouragement of trade and industry. Tanzania's case is unique in that under the policy of natiOnalisation there will certainly be actions of looking to the membership of a company in orders to asses the sum of money proper for compensation. It has been suggested apparently as an afterthought that in a private company whose maximum membership stands at fifty, a limited company may also be one of those members. This means that there is in fact no limit to the number of individuals wh may directly or indirectly, and emphasis is on the latter, be shareholder in a private company. The veil of incorporation couldbe lifted in such a case as matter of Policy to check such irrugularities as may arise from such a set up; such as expropriation, of the minority by the majority. It may also be necessary to treat the company as a partnership, where a member cannot contract with the firm and willbe personnaly liable for such debts as he incurs. Doing this amy operate to prevent a majority shareholder causing the bankruptcy of the company so that he can petition for a winding up order thereby cheating other creditors of a company. The most important thing however is to educate people in business management so that no unfairness may arise when through ignorance the advantage of incorporation, prove disadvantages through the application of the doctrine of lifting the veil.

CONCLUSION:

> " To say that a company sustains a separate persona and yet in the same breath to argue that in substance the person holding the shares is the company is an attempt to gave it both ways which cannot be allowed." (109)

Those that seek the advantages of incorporation must also accept the

corresponding burdens. The courts have decided that the veil of incoporation can be lifted in various situations to look rather to the substance than the form of a particular transaction or state of affairs. One must allow oneself the view that until very recently the courts have resisted attempts to relax the rigid rule in Salomon's case that the veil of incorporation is opaque and cannot be pierced to make members liable for the Comapny's actions. The courts, then will so treat the compqany where corporate personality is being blantantly used as a cloak for fraud or improper conduct, where agency can be established either in respect of particular transactions or as regards the whole of the company's business. Courts will be readier to hobd that agency is established where the dontrolling shareholder is another company. The tendency gereral1y is to ignore the separate legal entities of various comapanies within a group and to look,rather, at the economic entity of the whole group. The Legislature is leading the courts in this connection. To determine residence, the charater of a company (i.e. if it has enemy status) the veil of corporate entity is raised. Where facts are sufficiently differe-nt from the Salomon case as in some criminal or quasi-criminal cases where trust relations are involved, where the issue before the court is if an agreement is void for infringing public policy or where a liberal construction of words enables them to evade it, the Salomon principle is ignored. The veil of incorporation seems to go up faster where members of an incorporated organisation are to be made responsible for the debts of the organisation than where the organisation is to be made liable for the debts of the members. This is because it is easier to pick out the responsibility of certain members in certain situtations than where a company's capital, specially devoted to a particular purpose is to be applied in payment of a particular members debts. The Revenue and other creditors, however seem to have failed to pesuade the courts that the business of a subsidiary is that of its parent company (110). The legislature seems, on its part to wish to follow the lead of the legislature. They have so far said the veil will be lifted where members number falls below the legal minimum, S.33 of the Companies Act; where there has been fraudulent trading, S.323 of the Act; where company has been misdescribed, S.109 and in relation to the requirements of submitting group accounts, SS.150-154. This latter is almost in a mess as taxation and the interests of the revenue, in their desire to be paid income tax, have formulated many rules to cover the holding company's and it sub-sidiaries' accounts. The courts, however, realise the importance, indeed as a matter of public policy of enforcing these rules on taxation with the heep of lifting the veil to probe into the realities of incorporation and thereby benefit the country. It is also clear that most of the

its subsidiaries falls under public policy considerations requiring application of the doctrine of lifting the veil .

In East Africa the doctrine seems to be necessary largely on the policy grounds. The field of business is littered with entrepreneurs and largely ill-informed shareholders who certainly need protection from the occasional fraudulent activity and expropriation by themajority shareholders. Also, because a lot of foreign companies operate here through their subsidiaries the principle of implying agency mentioned earlier should apply so that the subsidiary may be said to act as agent for its foreign-based parent company or indeed as trustee for its shareholders. The task of making the majority shareholders is a one-man company liable personally for the company's debts in East Africa faces an uphill climb since both the courts and the legislature as a matter of policy wish to encourage, at least in Kenya, private enterprise unfettered by this fear of personal liabilities. The sole trader, true enough must take the advantages of incorporation along with the disadvantages but the choice of incorporation is more attractive than the pertnership in promoting small African business. Loans are easier to raise and protection against creditors is better since personal liability is ruled out in a company unlike in a partnership. Figures on the growth of the private Sector in Kenya showed in 1966, 7.2 per cent. This however includes the largely foreign private enterprise with relatively few Africans participating fully in bringing about the high growth rate. Little by little African participation is increasing and the field of agricultural output and marketing is not far behind with cooperatives, strongly backed by the government, putting this African participation to the forefront.

The development of this doctrine of ignoring the corporate veil looked at in an East-African context, does not look very encouraging. This is so due to differing policies concerning trade and business and the differences in political outlook among the three countries. The result has been different levels of development particularly in the private Sector-and the company . Tanzania its importance has been downgraded through Nationalisation. Athe the moment therefore the courts and the legislature should be on the alert for new principles which may come up preferably through their own efforts. There is a lot mainly in Public policy to stimulate the operation of this branch of the law. Our courts must remember that following British company legislation too closely where at times legislation is advanced and complex is to channel future growth and restrict it taking new forms more suitable to local conditions.

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(74) Merchandise Transit Ltd. v. B.T.C. [1961] 3 W.L.R. 1358

(75) Supra; P. 255

(76) Daimler Co. Ltd. v. Continental Tyre & Rubber Co. (gr.Britain)Ltd.

(77) Per Lord Hewart in Trebanog Working Men's Club & Institute Ltd. v. MacDonald. Supra P. 19.

(78) (1882) 8 Q.B.D. 373.

(79) Supra P. 19

(80) Supra P. 24.

(81) Newell v. Hemingway (1888)58 L.J.M.C. 46

(82) Principles of Modern Company Law by L.C.B. Gower at P. 213

(83) Holdsworth v. Caddies [1955] 1 All ER 352

(84) The Roberta '1937' 88 LI. L. Rep. 159

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(86) Bird & Co. v. Thos. Cook & Son [1937] 2 All ER 227

(87) Holdsworth & Co. v. Caddies. Ibid.

(88) Re Greater London Properties Lease [1959] 1 WLR. 503

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(90) Davies v. Elsby Bros. Ltd. [1961] 1 W.L.R. 170

(91) Supra P.21.

(92) Pioneer Laundry v. Minister of Nat. Revenue [1940] A.C. 127

(93) In Re London Housing Society's Trust deeds '1940' ch. 777

(94) Per Farwell J. at P. 783-784 Supra

(95) '1965' 1 Q.B. 140

(96) Davies v. Elsby Bros. Ltd. Supra

(97) CF. Bird & Co. v. Thos. Cook & Son. Supra P. 26

(98) Whittam v. W.J. Daniel & Co. Ltd. [1962] 1 Q.B. 271

(99) C.F. S. 109 Companies Act Cap 486. Laws of Kenya which imposes a does not invalidate the document

(100) '1969' 1 W.L.R. 1

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(102) Re German Date Coffee Co. (1882) 20 ch. D. ~~12~~ 169 Lock v. Blackw (John) Ltd. [1924] 2 A.C. 983

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(106) From "Private Enterprise and the East Africa Company" By P.A. Thomas.

(107) Commissioner of Income Tax v. Amboni Estates Ltd. [1955] 22 E.A.C.A 66

(108) J.F. Spry: "Company Legislation"; from Private Enterprise and the East Africa Company. Supra

(109) Per Villiers C,J. in Ochberg v. C.I.R. [1931] A.D. 215 at Page 232

110)(a) SMITH STONE & KNIGHT v. Birmingham Corporation. Supra

(b) Trebanog Working Men's Club v. MacDonald. Supra

(c) Re; London Housing Society. Supra

(d) The Abbey Malvern Wells v. Minister of Local Government. Supra