

Beyond Borders: Private International Company Law's Formative Era

Draft (please do not cite or circulate) Chapter 10 of a book in progress tentatively titled:

Empire Ltd.
Law and the Rise of Multinational Companies
in the First Era of Globalization (1844-1914)

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Conclusion

Top tax havens \$273.5 Billion



The Tax Havens Attracting the Most Foreign Profits

Countries with the most artificially shifted profits from high-tax countries in 2017



In current USD

Some notable tax havens such as British Virgin Islands are not included due to insufficient data.

Source: missingprofits.world



Which Companies Have The Most Tax Havens?

Fortune 500 companies by number of tax haven subsidiaries in 2017



@StatistaCharts Source: institute on Taxation and Economic Policy

Forbes statista

U.S. companies hoard billions of dollars offshore

Money held offshore by U.S. companies in 2015 (in billion U.S. dollars)



@StatistaCharts

Sources: Citizens for Tax Justice and the U.S. Public Interest Research Group Education Fund

thejournal.ie statista

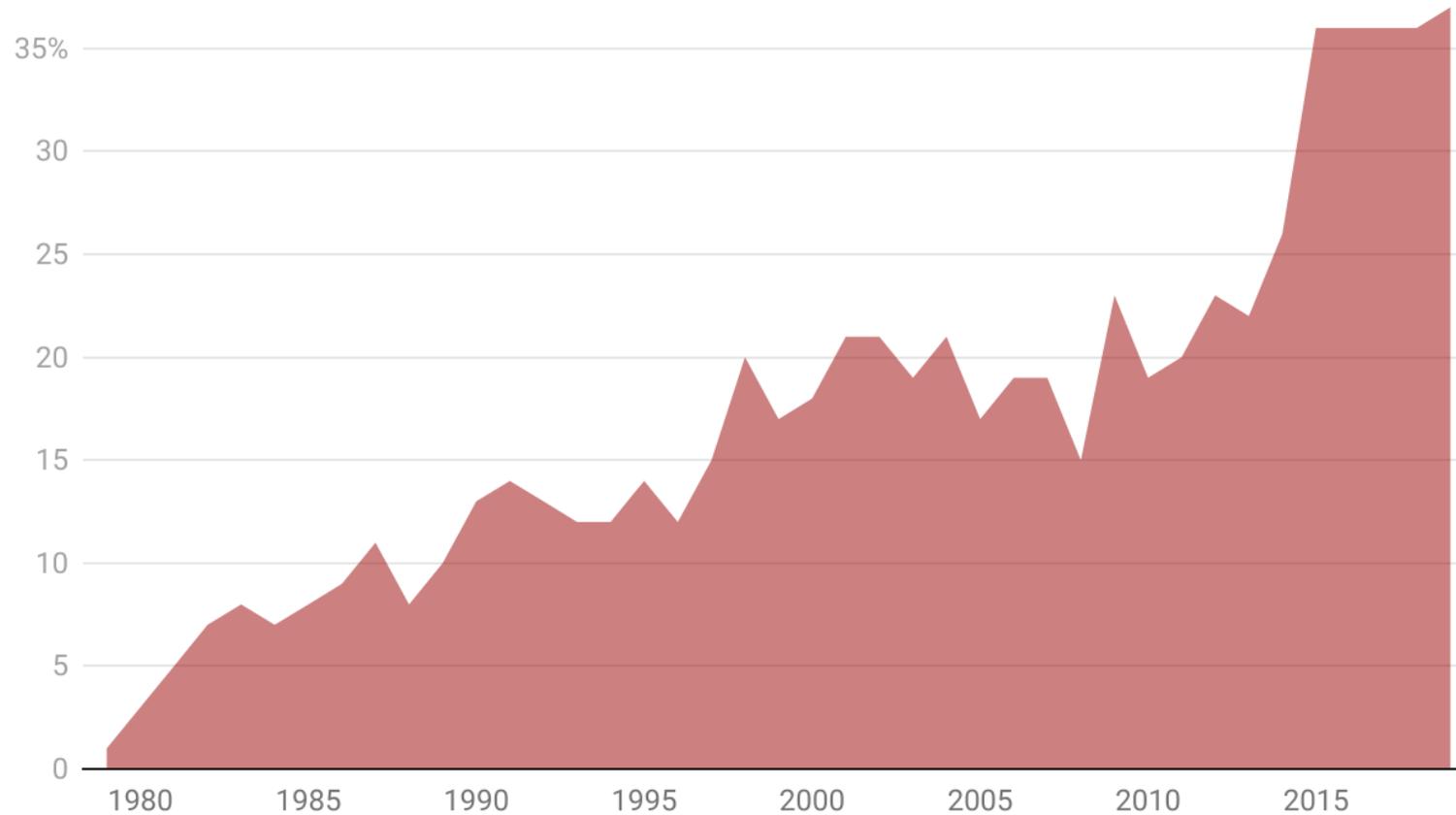
Lehman Brothers Subsidiaries

(not including SPVs)

Jurisdiction	Number of Companies
Delaware	60
UK	38
Cayman Islands	32
Australia	11
Hong Kong	9
Japan	9
New York, New Jersey, Netherlands, Ireland, Germany, Bermuda, Luxembourg, Mauritius, etc.	50
Total	209

Growing share of corporate profits out of reach

Multinational corporations have shifted a growing share of the profits they earn outside their home countries to tax havens in recent years, which means the governments where they operate lose out on potential tax revenue.



Graph shows the share of foreign income earned outside the headquarter country shifted to tax havens.

Chart: The Conversation, CC-BY-ND • Source: "Global Profit Shifting, 1975-2019," Wier & Zucman 2022 • Created with Datawrapper

Congratulations to
Gabriel Zucman



2023
John Bates Clark
Medalist

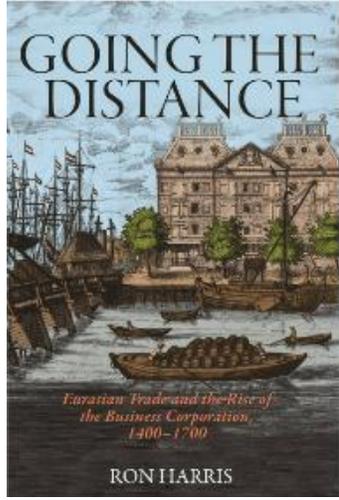


UC Berkeley Department of Economics

BENEFITS OF OFFSHORE ASSET PROTECTION

- **Increased Privacy** – Offshore jurisdictions offer a higher degree of privacy, which makes it difficult for third parties to identify and access your assets. This privacy can protect you from potential harassment and other issues.
- **Asset Protection** – Offshore asset protection can help protect your assets from lawsuits, creditor claims, and other legal issues. This can help safeguard your wealth and provide you with peace of mind.
- **Estate Planning** – Offshore asset protection can also be used as part of estate planning to ensure that your assets are distributed according to your wishes after your death. This can help prevent legal disputes and minimize the impact of inheritance taxes.
- **Tax Planning** – Offshore asset protection can offer significant tax benefits. Certain jurisdictions offer tax incentives, and by taking advantage of these, you can minimize your tax liability and maximize your financial returns.
- **Diversification** – Offshore asset protection can help diversify your investments and minimize the risks associated with any single jurisdiction or economy. By spreading your assets across different jurisdictions, you can reduce your exposure to local economic downturns or legal risks.
- **International Business** – Offshore asset protection can be beneficial for businesses that operate internationally. By establishing a presence in offshore jurisdictions, businesses can access new markets, diversify their revenue streams, and minimize their legal and financial risks.

First Semi-public corporations



Repeal of Bubble Act

First General Incorporation Acts in the Empire

World War I

1350

1553

1600

1720

1825

1844

1849

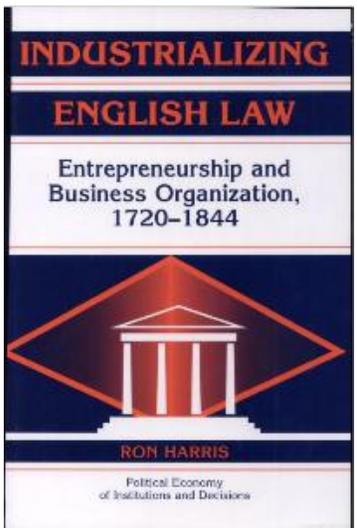
1855

1914

First Joint Stock Company (Russia Company)

East India Company

Bubble Act



First General Incorporation Act in Britain

Limited Liability Act

General Historical event
Legislative Event
Other Legal Event

1844-1914

in the historiography of company law

- Shift to Berle & Means type widely owned corporations
- Rise of big business
- Utilization of contractual freedom in Articles of Association
- Development of limited liability attribute
- Theories of legal personality
- Emergence of Private Companies
- Comparison of USA and Britain
- Globalization of Company Law

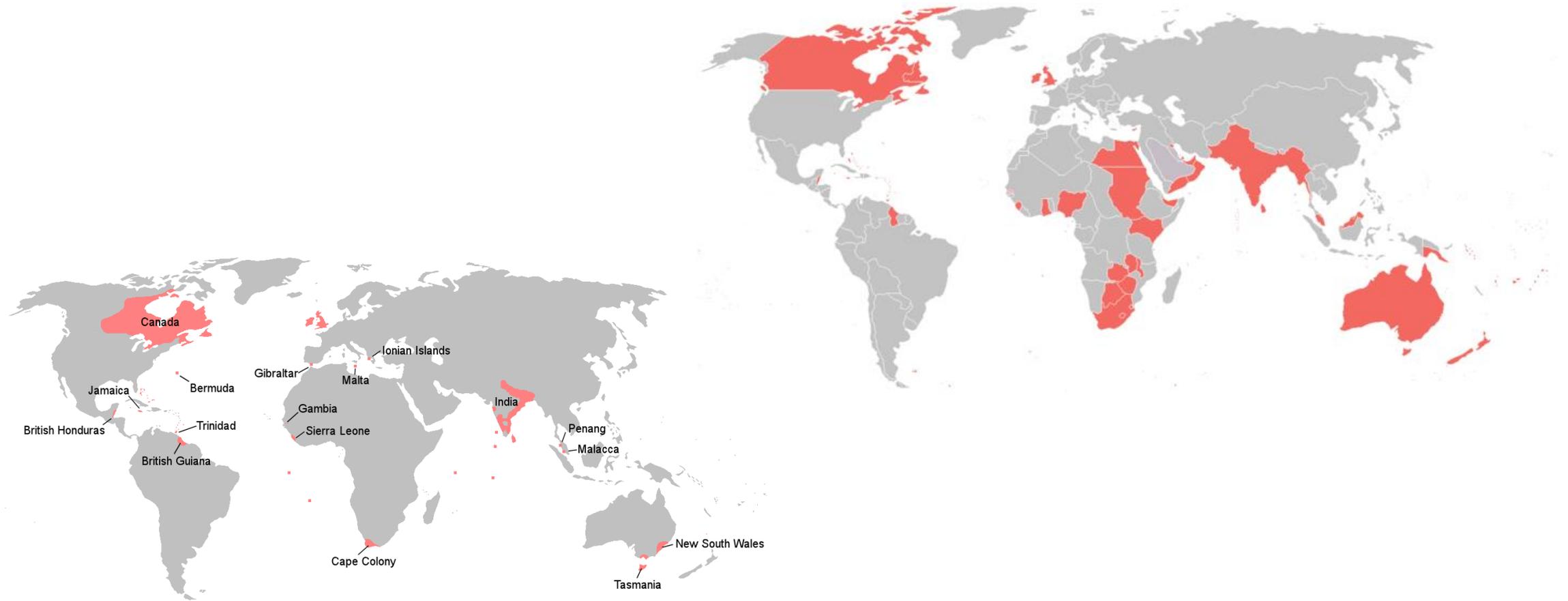
The Paradigm Shift from Charters to General Incorporation

- Standardization of the corporation by **general statutes**
- **Contractual freedom** to design companies
- shift to **private purposes and private law**
- Shift from limited access to **open access** order
- **Distinguishing feature: Incorporators granted a great deal of contractual freedom in writing their articles of association.**

New Theories of Juristic Personality

- Concession/grant theory (chartering Era)– **personality = legal fiction**
- Contractual/aggregate theory (post general incorporation) –**like partnerships, look through the entity to the natural persons**
- Real/natural person theory (von Gierke, Maitland) juristic persons are **like a human being**

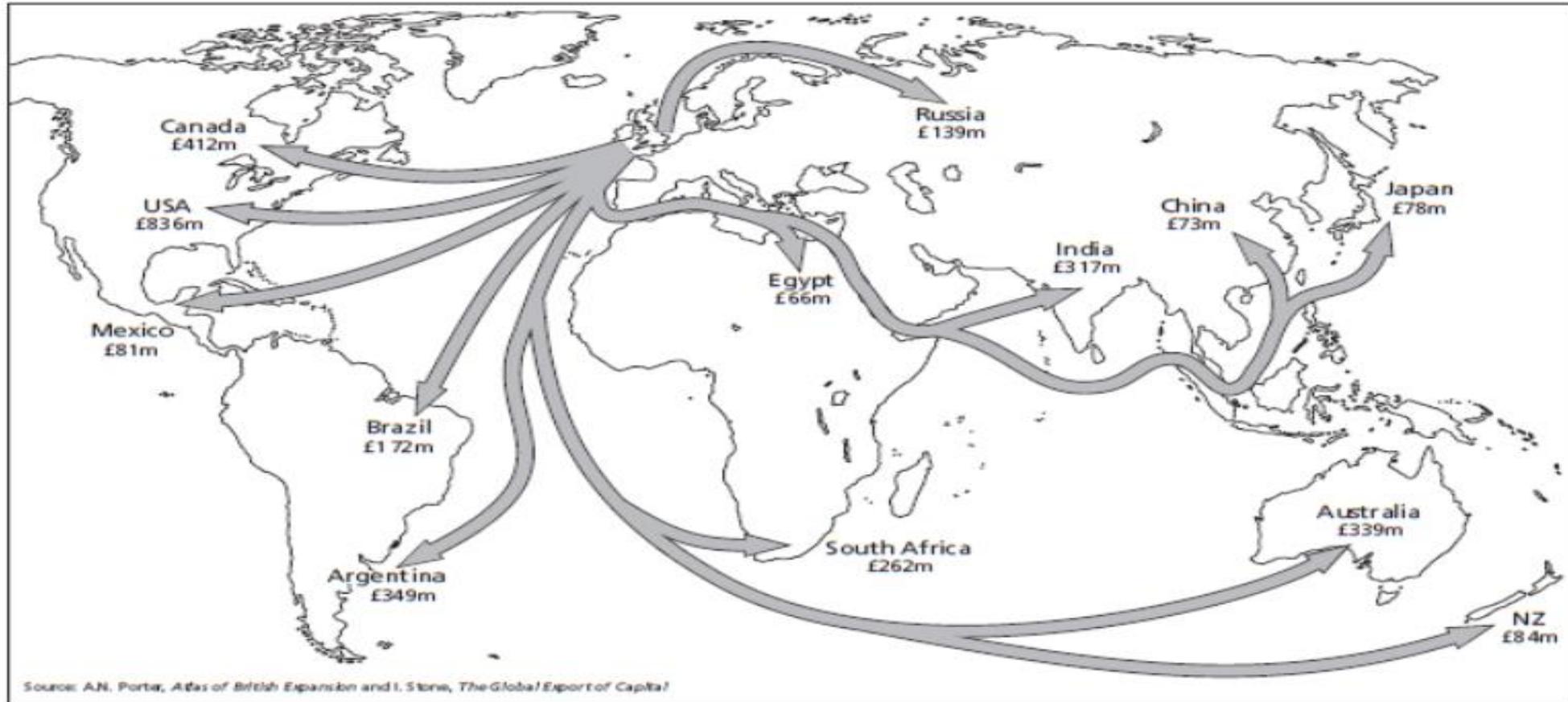
The Expansion of the British Empire 1815-1914



At its peak the British Empire (the empire on which the sun never sets) controlled nearly a **quarter** of the world **population** and a **quarter** of Earth's **land area**.

Capital Flow out of Britain 1850-1914

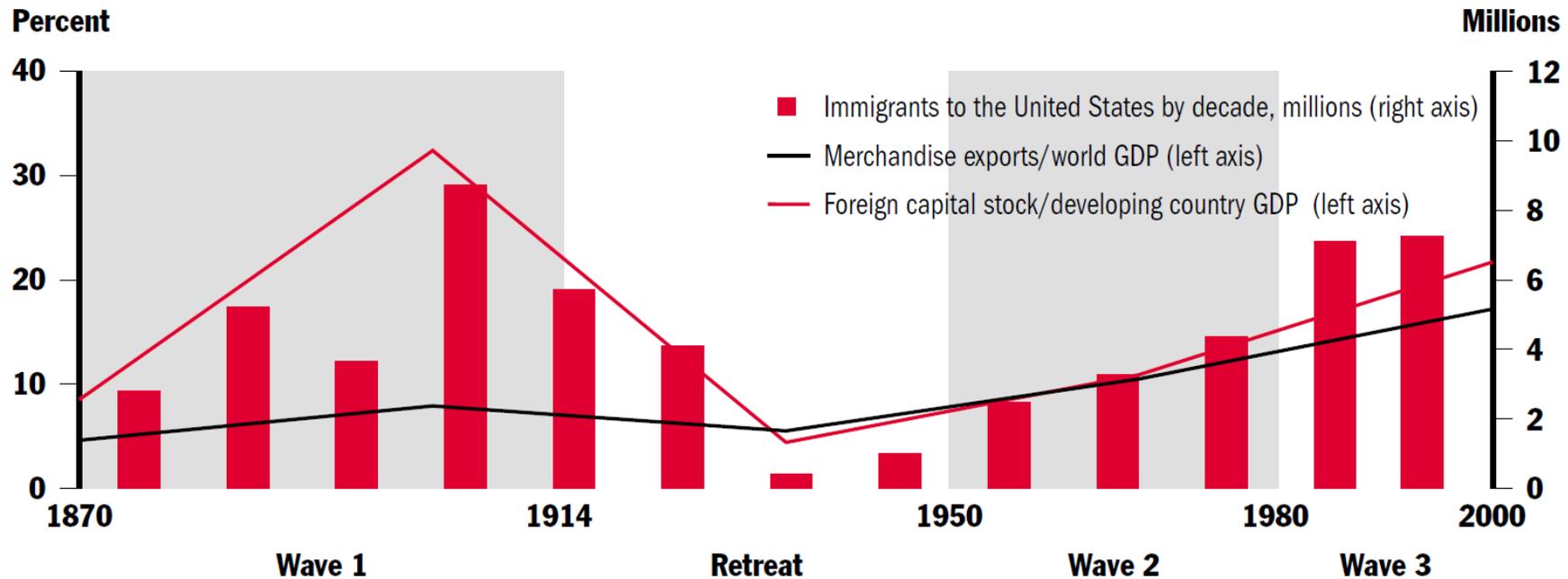
(largest globally ever in terms of Britain and the receiving economies)



Map 6 British foreign investment to 1914

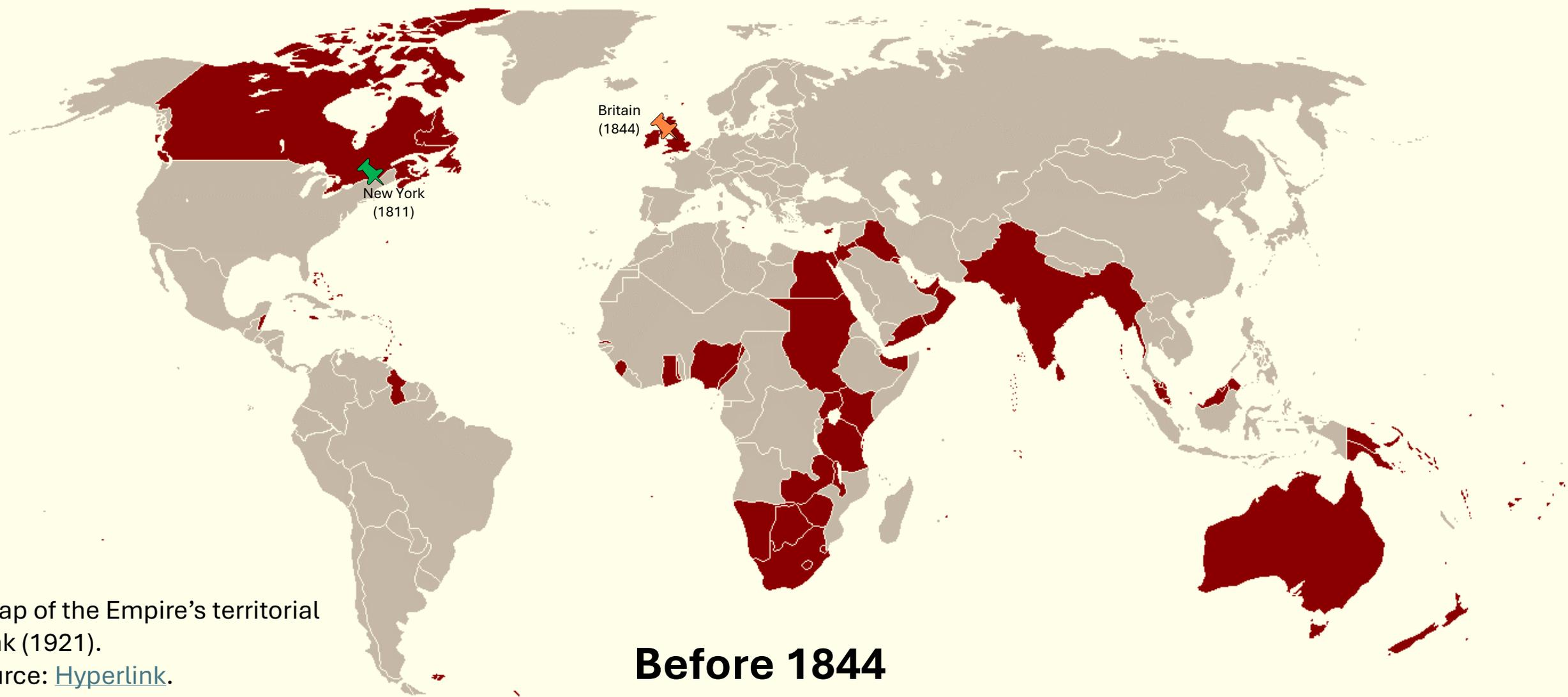
The First Globalization

Figure 1.1 Three waves of globalization



Source: Foreign capital stock/developing country GDP: Maddison (2001), table 3.3; Merchandise exports/world GDP: Maddison (2001), table F-5; Migration: Immigration and Naturalization Service (1998).

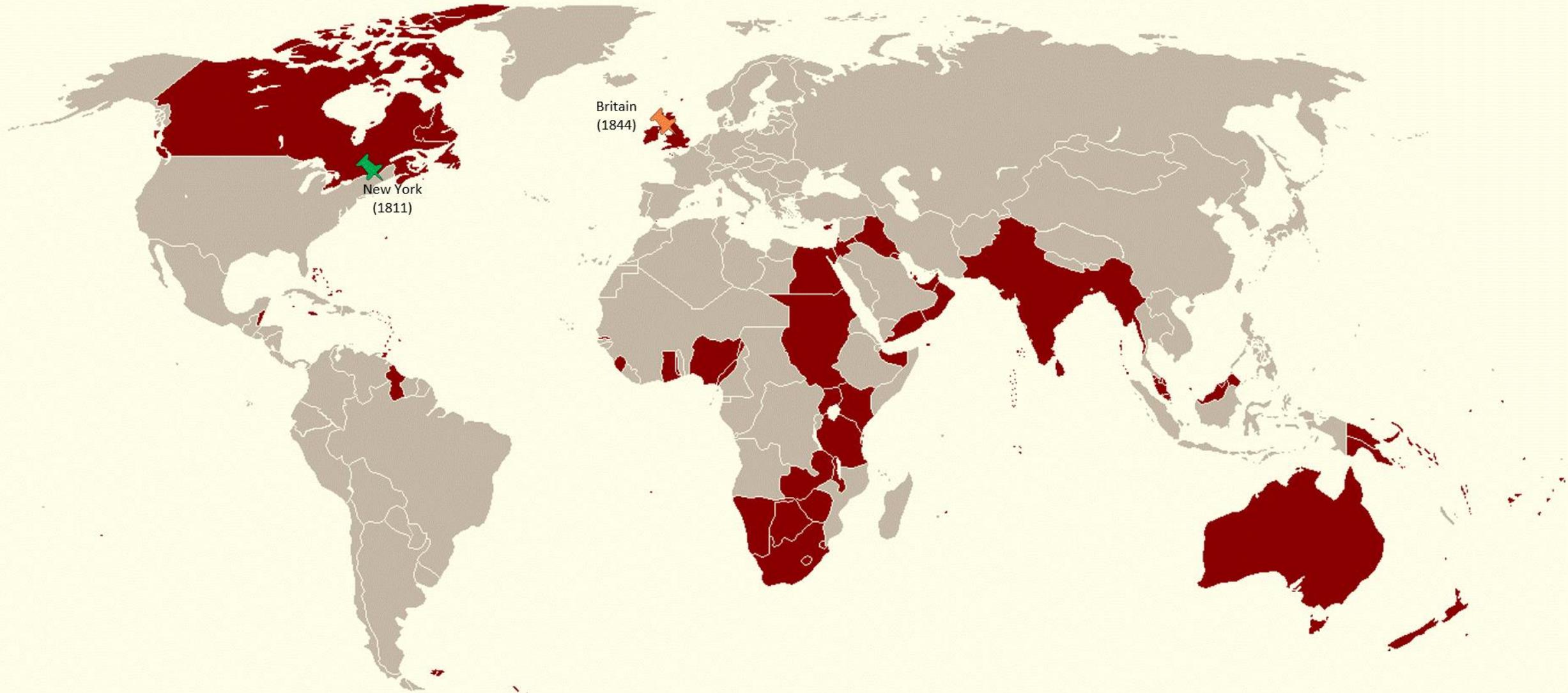
British Empire* – First Legislation Mapping



* Map of the Empire's territorial peak (1921).

Source: [Hyperlink](#).

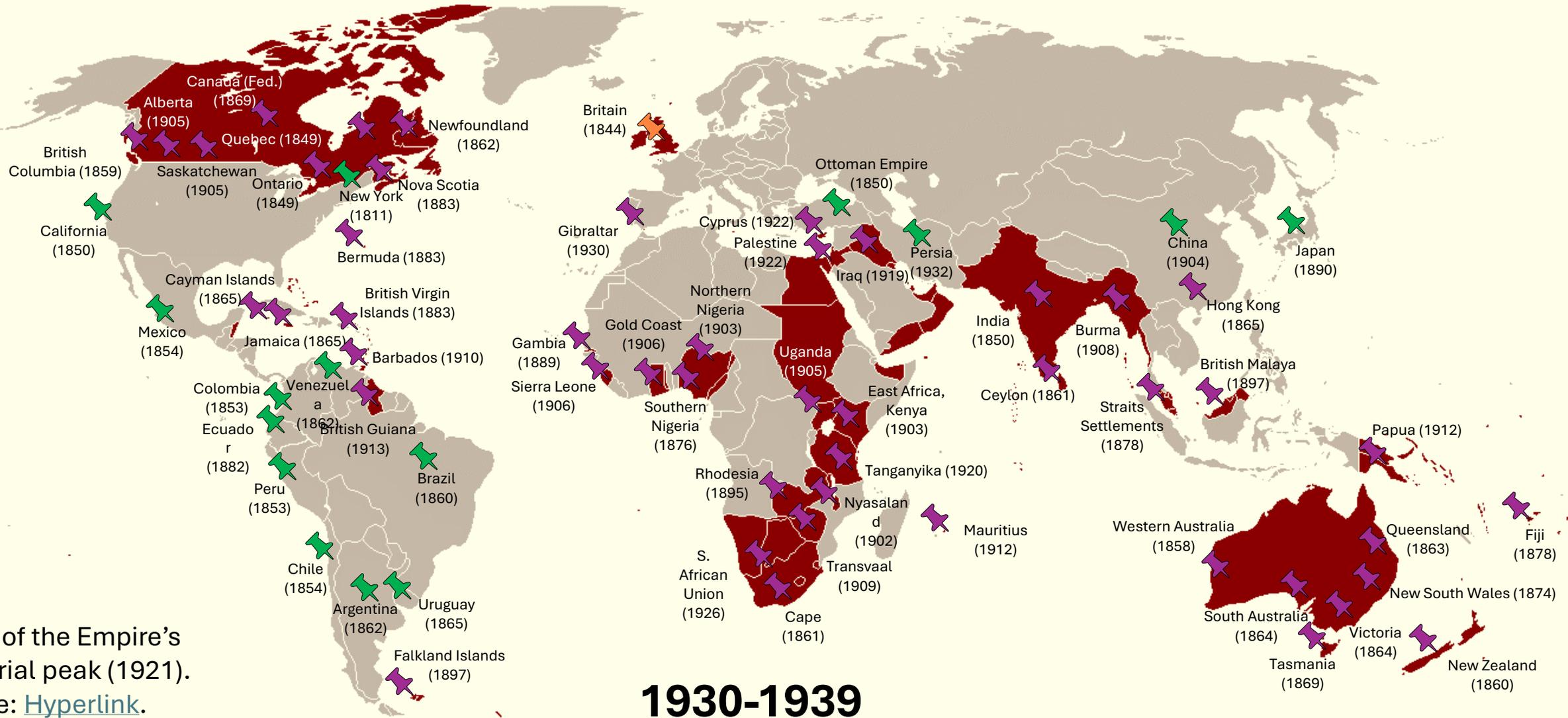
British Empire* – First Legislation Mapping



Before 1844

* Map of the Empire's territorial peak (1921).
Source: [Hyperlink](#).

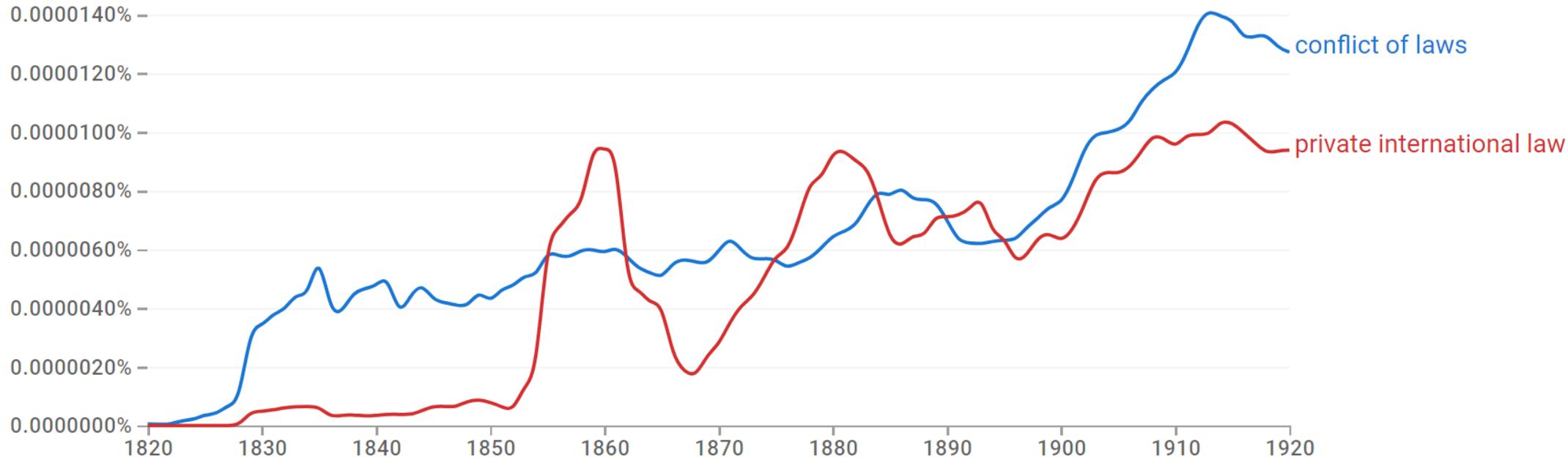
British Empire* – First Legislation Mapping



1930-1939

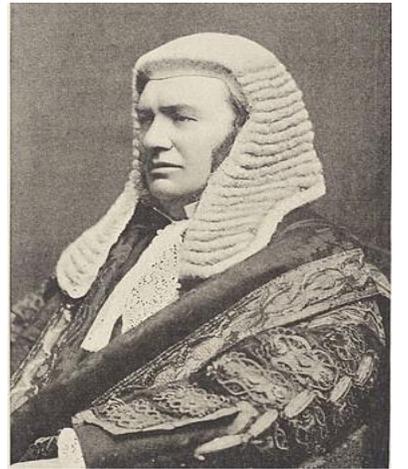
* Map of the Empire's territorial peak (1921). Source: [Hyperlink](#).

Figure X.1 – Google Ngram Viewer analysis of conflict of laws v. private international law



Conflicts of law in company law

Nathaniel Lindley, (1828-1921) Barrister and Justice of the Privy Council and House of Lords



- A Treatise on the Law of Partnership, including its application to joint-stock and other companies. 1st ed., 1860/63
- (2nd ed., 1867). (3rd Ed., 1873). (4th ed., 1878)
- A Treatise on the Law of Partnership. 5th ed., 1888
- A Treatise on the Law of Companies considered as a branch of the Law of Partnership. 5th ed., 1889/91
 - Appendix **“Foreign Companies”**
- A Treatise on the Law of the Companies ... 6th edition, 1902.

1. Expansion of transnational companies
2. Disputes relating to transnational companies
3. Judge made case law on aspects of private international company law
4. **Jurist written treatises**

What are the issues determined by choice of law in company law?

- Validity of the formation of the corporation
- The "internal affairs" of a corporation
 - conflicts between shareholders
 - conflicts between shareholders and management (board of directors and corporate officers).
 - voting rights of shareholders,
 - distributions of dividends and corporate property,
 - the fiduciary obligations of management
- Corporate winding-up, dissolution, bankruptcy, limited liability
- Non-corporate issues
 - Antitrust
 - Trading with the enemy
 - Taxation

Would foreign incorporated corporations be recognized as juristic persons in Britain?

- Based on common law rulings since 1730 (Dutch West India Company)
- Based on the universal principle of comity
- Based on bilateral treaties (with France 1862, Belgium 1862, Italy, etc.)
- Based on model law recommended by the International Law Association – 1903/06
- Based on British legislation - Companies Act 1907
- **Is recognition good for the British:**
 - **Businesspersons**
 - **Lawyers**

Choice of Law in Company Law – Internal Affairs

- Internal Affairs = Shareholders – Directors, Majority/controlling Shareholders – Minority Shareholders, voting rights, dividend distribution, stock issuing, mergers
- But not anything to do with 3rd parties (employees, suppliers, consumers, tortfeasors, injured parties, the State)
- What about creditors? Creditors during life, Creditors in insolvency, liquidation?
- **Two approaches:**
- ‘Incorporation’ Doctrine/ Place of Registration Doctrine
 - Britain and its Empire, all 50 states in the United States, The Netherlands, Denmark, Italy
 - Jurisdiction Shopping by incorporators
- ‘Real Seat’ Doctrine/ Domicile Doctrine/ Effective Control Doctrine
 - Continental Europe France, Germany and civil law jurisdictions
 - Incorporators are constrained in selecting company law by the real seat

New Theories of Juristic Personality

- Concession/grant theory (chartering Era)– place of registration doctrine: **like in the chartering era**
- Contractual/aggregate theory (post general incorporation) – identity of shareholders - **like partnerships**, piercing corporate veil, look-through entities
- Real/natural person theory (von Gierke, Maitland) domicile doctrine: juristic persons are **like human being**

Cross-Border Insolvency – Global vs Local

- On the intersection of private international **contract** and **company** law
- This situation highlighted **THREE** areas of uncertainty –
 - choice of law
 - choice of jurisdiction
 - enforcement of rulings
- **Universal Approach** – handling of all claims and assets would be resolved in the **debtor's country**, under the laws of that jurisdiction and that all courts would act under commonly agreed international laws.
- **Territorial Approach** would see courts in **each jurisdiction** seize and distribute assets that happened to be under their control, in accordance with local laws.
- Recent Hybrid approaches: **Modified Universalism** and **Cooperative Territorialism**

Daimler Co. Ltd. v Continental Tyre and Rubber Co. (GB) Ltd.

[1916] 2 A.C. 307

House of Lords



The House of Lords unanimously reversed the order of the Court of Appeal, saying secretary was not authorized to commence the action. The action dismissed.

The majority opinion of Lord Parker, Lord Atkinson, Viscount Mersey, Lord Kinnear, Earl of Halsbury and Lord Sumner :

Lord Shaw and Lord Parmoor concurred in the result, but held that :

Classified a company's character according to its incorporators and where it is operating.

A company's acts are those of its servants and agents acting within the scope of their authority.

A company registered in the United Kingdom but carrying on business in an enemy country is to be regarded as an enemy.

Earl of Halsbury held that the indirectness of the means by which it is to be obtained will not get rid of the unlawfulness. the unlawfulness of trading with the enemy could not be excused by the ingenuity of the means adopted.

There is no debate about the ruling in Salomon v. Salomon & Co., however it's irrelevant to the character of the company. It is necessary to determine the character of the company according to its shareholders, the company can only derive its character from its shareholders and directors.

Agreed with the Court of appeal that companies incorporated under the Companies Acts continue to exist regardless of the shareholders registered, yet the action should be dismissed because the secretary was't authorized to commence the action.

There is no necessary correlation between the nationality of a company and the nationality of its majority shareholders.

A British company's right to sue or its liability to be sued does not go away because of the enemy character of its shareholders.

Mentioned Salomon v. Salomon & Co. as one of two cases decided in House of Lords that support the lower court's decision, with which they agreed.

Multinational corporation taxation

Calcutta Jute Mill Company Ltd



United Kingdom - London

- Incorporation in 1872
- Registered office but no actual office
- 5 Directors
- Some shareholders in London
- Meetings of BoD and GM in an office lent by director
- No jute operation

India - Calcutta

- Spinning and Manufacturing Jute
- Buying raw material, manufacturing and Selling **exclusively** in India
- **1 Director** in India
- **Majority** of shareholders
- Company's **Books, Accounts, Papers and Money**

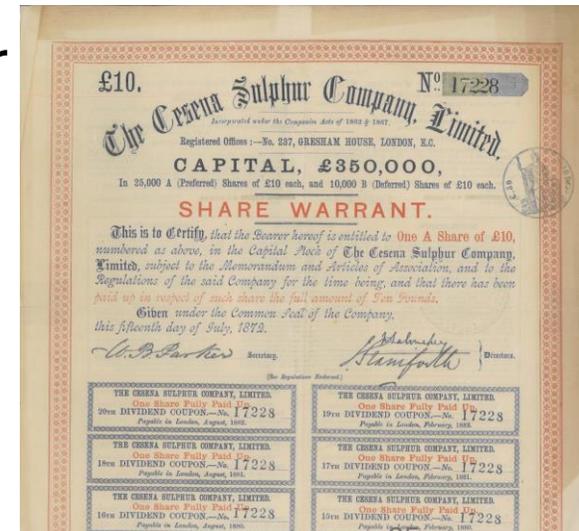
Cesena Sulphur Company Ltd.

UK

- Incorporated in the UK in 1871
- Did not have operations in UK
- Meetings of BoD and GM
- Declaration of dividends

Italy

- Registration also in Italy
- Mining and sale
- Majority of shareholders
- Managing Director



Calcutta Jute Mills v. Nicholson and the Cesena Sulphur Co. v. Nicholson, 1876

- The two cases were argued and decided jointly at the Exchequer Division
- The Inland Revenue Act: "for and in respect of the annual profits or gains arising or accruing to any **person residing** in the United Kingdom from **any kind of property whatever, whether situated in the United Kingdom or elsewhere**".
- It was taken for granted that registered joint-stock companies were taxable entities and not tax-through entities. They were taxable and not the shareholders.

Baron Huddleston

- The use of the word "residence" is founded upon the habits of a natural man, and is therefore inapplicable to the artificial and legal person whom we call a corporation. But for the purpose of giving effect to the words of the legislature an artificial residence must be assigned to this artificial person, and one formed on the analogy of natural persons.
- There is not much difficulty in defining the residence of an individual; it is where he sleeps and lives.
- There is a German expression applicable to it which is well known to foreign jurists—*der Mittelpunkt der Geschäften* and the French term is "*le centre de l'entreprise*," the central point of the business.
- Registration, like the birth of an individual, is a fact which must be taken into consideration in determining the question of residence. It maybe a strong circumstance, but it is only a circumstance. It would be idle to say that in the case of an individual the birth was conclusive of the residence. So drawing an analogy between a natural and an artificial person, you may say that in the case of a corporation the place of its registration is the place of its birth, and is a fact to be considered with all the others.
- "the central point of the business" is determinative. The central point considers where the board of directors and the general meeting of the shareholders are meeting. However, other indications of the central point of the business can also be considered.
- Just as natural persons can be born in one place and have residency in another, so can juristic persons be detached from their place of incorporation.
- Huddleston does not endorse the American authorities that hold that "a corporation resides only in the country under whose laws it was created and constituted.

Chief Baron Kelly

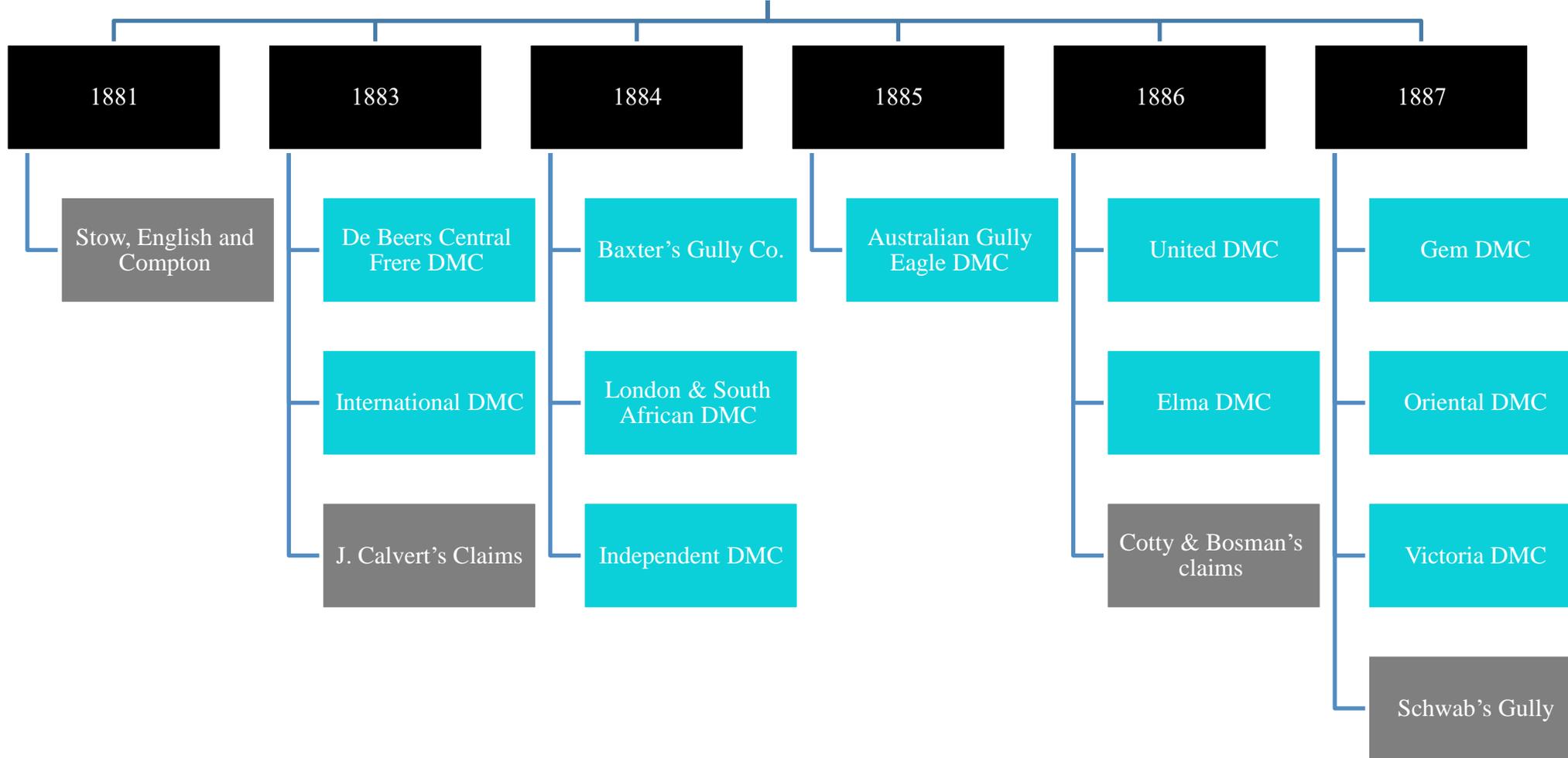
- Kelly views the place of registration for incorporation as an important factor in determining a company's residency.
- In addition to the place of incorporation, Kelly views the place in which the registered office of a company is located as a place of meeting of directors and shareowners.
- As the registered office has to be in the part of the UK in which the company is registered, this factor is identical to a place of incorporation.
- For Kelly, the location of the business activity of the company, mines, mills, employees, storage, and sales, is not determinative. Irrelevant is also the place in which shareholders or directors reside.

The holding in *Calcutta Jute Mills v. Nicholson and the Cesena Sulphur Co. v. Nicholson* (1876)

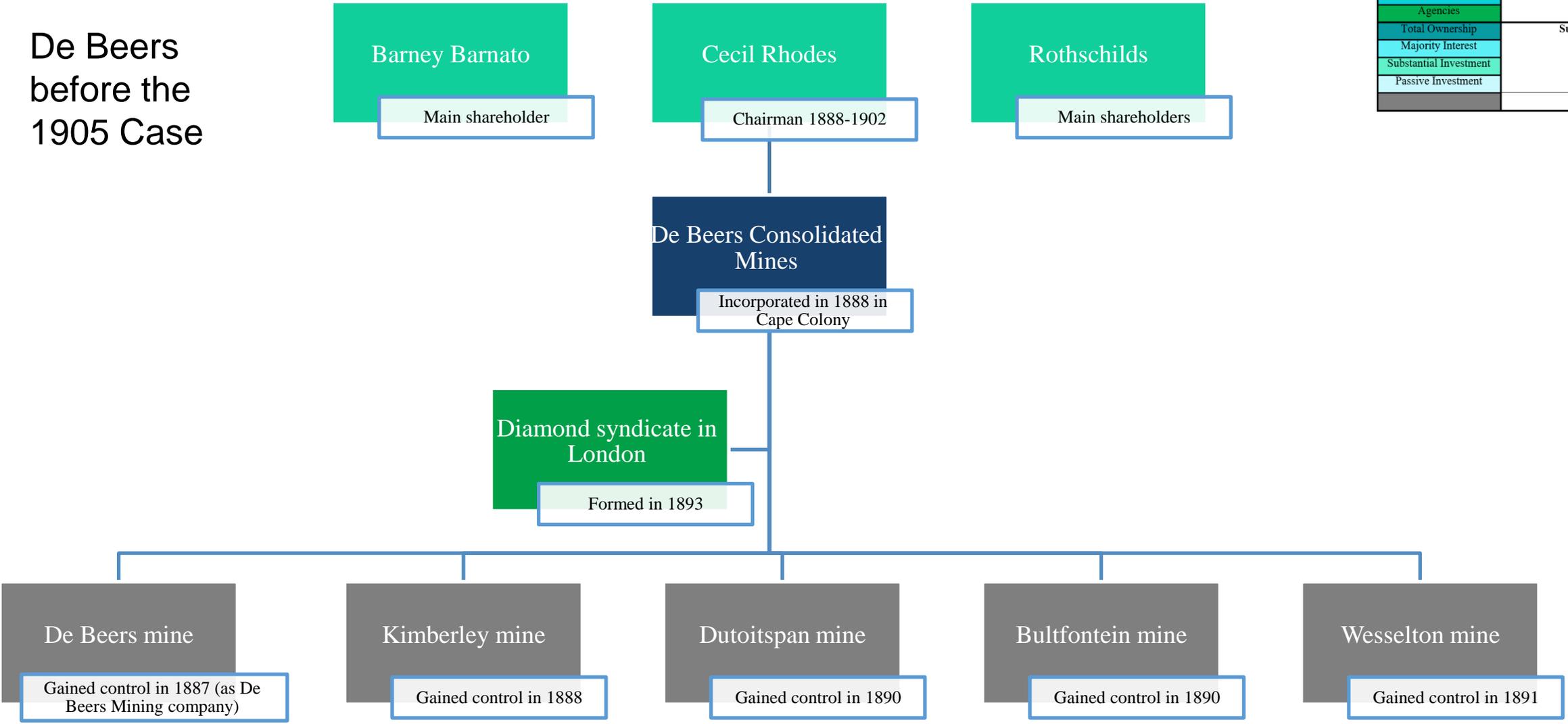
- Both justices did not distinguish conceptually between place of incorporation and real seat
- They considered factors from both
- Kelly gave more weight to the place of incorporation while Huddleston gave more weight to the place of management
- Both reached the same bottom line = both companies resided in Britain for income tax purposes
- The implication of its bottom line is that a corporation that was incorporated in Britain and was running its corporate affairs from Britain was subject to British taxation.
- A corporation that did either of the two was likely to be subjected to British taxation.
- However, there was an uncertainty that was created by the ambiguities of the tests offered by each of the Justices and the disagreements between them.

De Beers Consolidated Mines Ltd

De Beers Mining
Company



De Beers before the 1905 Case



	Key Players
	Primary Company
Partnerships	Regional Branches
Corporations	
Agencies	
Total Ownership	Subsidiaries
Majority Interest	
Substantial Investment	
Passive Investment	
	Other



Multinational corporation taxing

- **De Beers Consolidated Mines Ltd v Howe (Surveyor of Taxes) 1906**

- **Background:** A company was incorporated in 1888 in the **Cape Colony** under the local Companies Act. It owned extensive diamond mines in **South Africa**. Its essential business was the Mining operations in **South Africa** and the sale of the diamonds in **London** . The company appealed against Commissioners' **income** tax assessment, arguing It isn't a UK resident and should not pay tax.

- **The Question:** Whether the company resides in the UK? Is the **Effective control** of the company in the

Kimberley	London
Head office & General meetings	Office
Weekly Quasi-board meetings	Weekly Quasi-board meetings 4 committees, 2 deal with most important operations
Important matters submitted to London & Kimberley.	London board decisions where never overruled at Kimberley High expenditure must be approved by London's board
Chairman of board in Kimberley	But attended Important meetings in London
1 Governor 7 Directors	2 Governors 9 Directors

- **Outcome:** **A foreign corporation** may be resident in the UK for the purposes of income tax.

- The majority of the directors resided in London,
- important decisions were taken by the London side of the Board)
- profits were generated by selling diamonds to a syndicate in London,
- contracts were concluded in London,
- dividends were declared jointly with London,
- the company's seal was kept in London and so on.
- Only the mining side of the company took place in Kimberley.

De Beers Consolidated Mines Ltd V Howe *(Surveyor of Taxes)*

- Its counsel appealed in 1905, arguing that it was a resident of the Cape Colony because it was incorporated there. It had all its mining business there.
- They argued that the company was not a person in the UK.
- They relied on a famous maxim: “A company incorporated by the laws of a foreign country has no legal existence in this country. It owes its existence to the laws of the foreign country”.
- They relied for this principle on the well-known American case *Bank of Augusta v. Earle*.

Holding

LORD LOREBURN L.C.

We ought, I think, to proceed as nearly as we can upon **the analogy of an individual**. A company cannot eat or sleep, but it can keep house and do business. **We ought, therefore, to see where it really keeps house and does business. An individual may be of foreign nationality, and yet reside in the United Kingdom. So may a company.**

- The judges concluded, with minor variations among them, that “**the seat of authority over the affairs of the company was in England**”.
- This is as close as one can get as to say that **for tax purposes the real seat test** rather than the place of incorporation test determines the residency of the company.

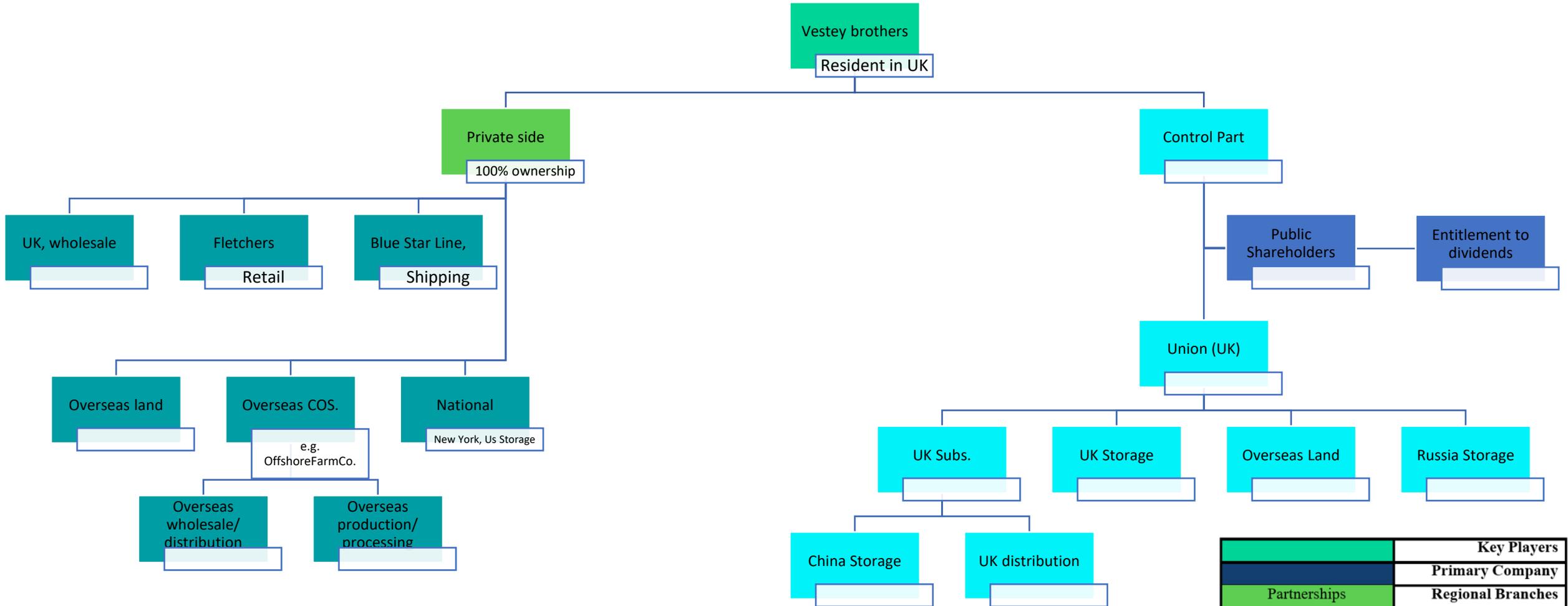
- De Beers Holding is **a good guidebook** on what not to do to avoid paying taxes in the UK.
- Incorporating abroad is always not good enough. One had to be more careful and skilled to avoid British taxation

The House of Lords

- The court was required to **distinguish between the two tests**, place of incorporation and real seat.
- It could not maintain the ambiguity that was possible in the *Cesana and Calcutta Jute Mill* cases in which both pointed at the same direction.
- A company that was fully managed from Egypt was not resident of England for income tax purposes.
- Just as an **individual British subject** might for the **purpose of tax** be a **non-resident** person **so too a company registered in the UK**.
- The test is a matter-of-fact and is based on where the central management and control actually abode - a registered office does not constitute a "British residency."
- **This was a clear guide to companies and their accountants and lawyers what to do in order to avoid British taxation.**

Vestey group

Figure 1: Vestey group structure pre-1915

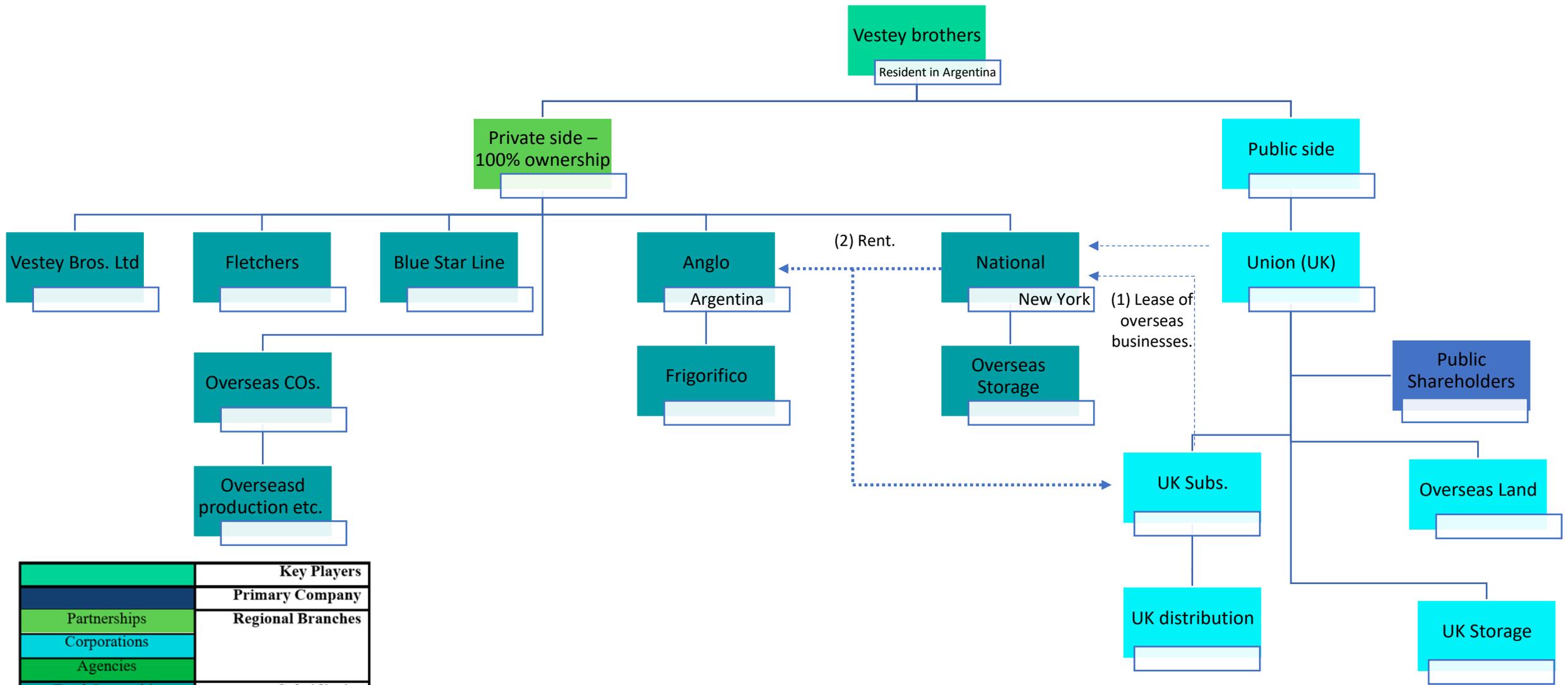


	Key Players
	Primary Company
Partnerships	Regional Branches
Corporations	
Agencies	
Total Ownership	Subsidiaries
Majority Interest	
Substantial Investment	
Passive Investment	
	Other

Minimizing Tax Payments in Britain

- As we have seen, in the De Beers holding of 1905, a company registered abroad could still be considered a UK resident for income tax purposes if controlled from Britain. The Vestey family made sure that their offshore companies will have a nominal board of directors abroad. All important decisions were made in the London headquarters but were recorded in the formal corporate documents of the subsidiaries as though they were nominally made abroad. The tax authorities have not questioned the genuineness of this arrangement for many years.
- Once the group had companies that were not residents of the UK it made sure that most profits will accumulate in them using transfer prices.
- the English companies would have only as much profit as needed for paying interest on the bonds and minimum dividend on the preferred shares. The rest of the profits accumulated abroad.
- they could be used for investment in expansion abroad and could be given on loan to British companies or the brothers personally. Loans were not income and were not subject to income tax.
- James Hollis, "Union Cold Storage and the Birth of Multinational Tax Planning, 1897-1922," *Global History of Capitalism Project Case Study No. 9* (editor: Prof. Christopher McKenna, University of Oxford) (2019).

Figure 2: The “flight abroad”, 1915

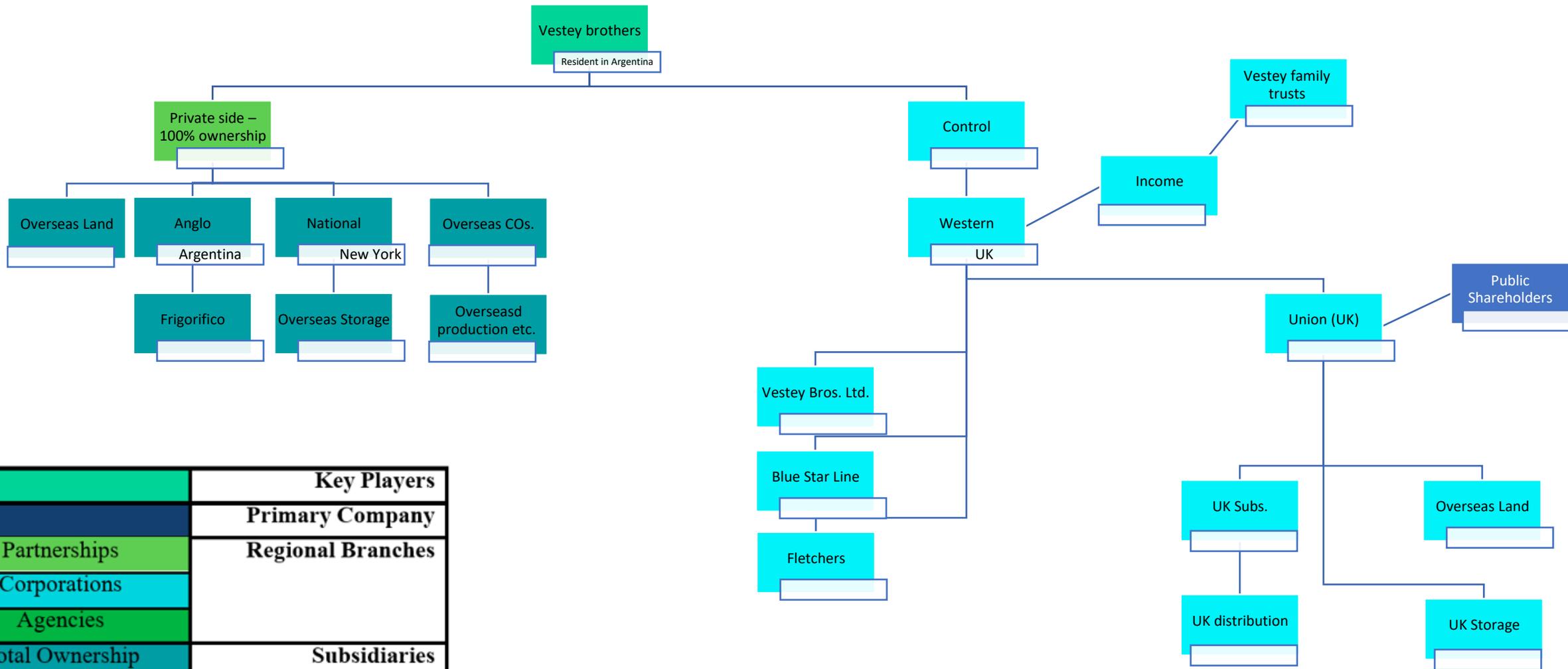


Key Players	
	Primary Company
Partnerships	Regional Branches
Corporations	
Agencies	
Total Ownership	Subsidiaries
Majority Interest	
Substantial Investment	
Passive Investment	Other

The "flight abroad", 1915

- In 1915, the brothers decided to move their personal residency to Buenos Aires, Argentina, as a response to the tax increase to finance the War.
- The partners' domicile determines a partnership's domicile, so once they migrate, it migrates with them.
- Subsidiaries could also distribute dividends to their parent partnership and themselves from their subsidiaries abroad without paying any taxes in the UK.
- The Vestey brothers bypassed Britain by transacting between the British Union and the American National companies, which channeled the profits from overseas subsidiaries to the American company rather than the British company.
- Vestey Brothers in fact, avoided any tax on all of their group's global profits except those generated in Britain by companies registered and managed in Britain.

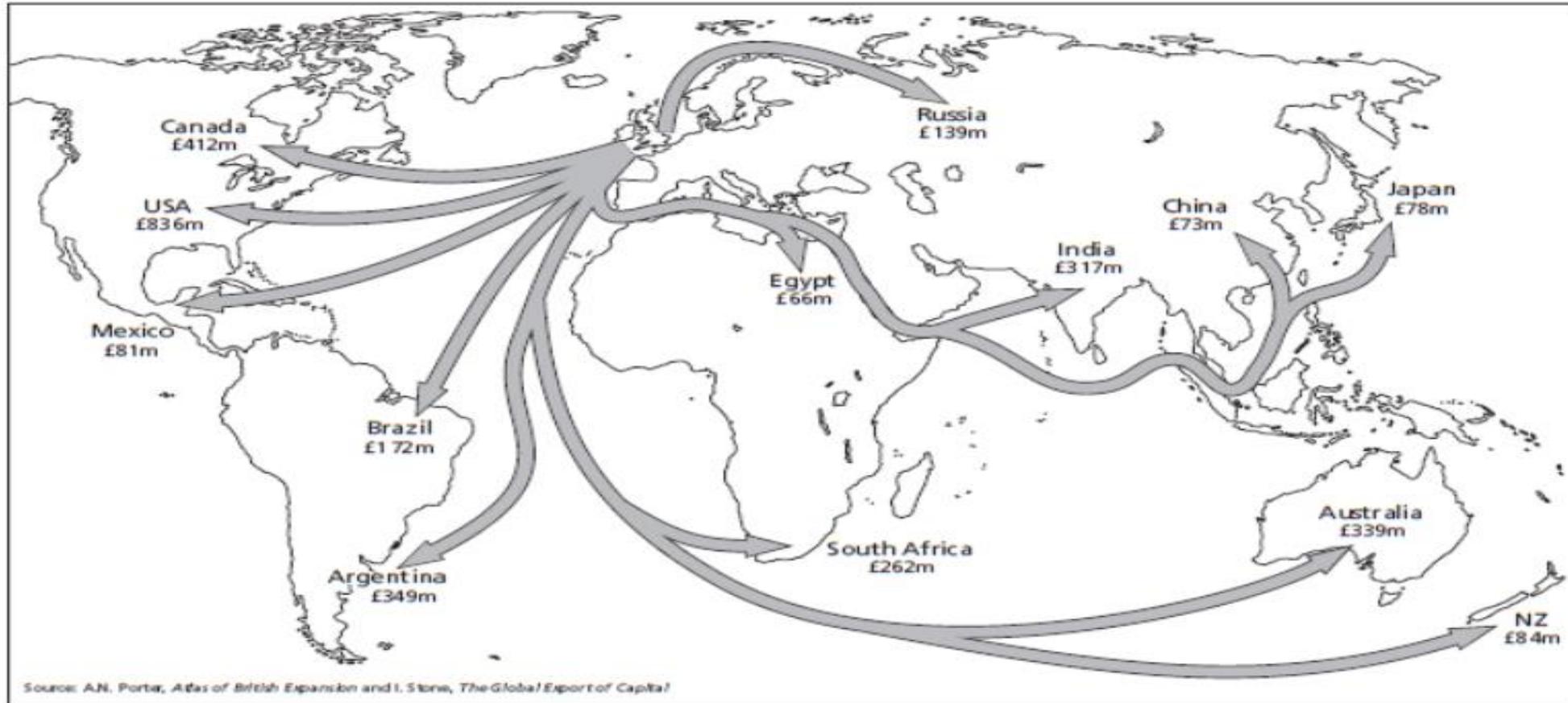
Figure 3: New holding company, 1918



	Key Players
	Primary Company
Partnerships	Regional Branches
Corporations	
Agencies	
Total Ownership	Subsidiaries
Majority Interest	
Substantial Investment	
Passive Investment	
	Other

Capital Flow out of Britain 1850-1914

(largest globally ever in terms of Britain and the receiving economies)



Map 6 British foreign investment to 1914

New Theories of Juristic Personality

- Concession/grant theory (chartering Era)– **personality = legal fiction**
- Contractual/aggregate theory (post general incorporation) –**like partnerships, look through the entity to the natural persons**
- Real/natural person theory (von Gierke, Maitland) juristic persons are **like a human being**

The building blocks of the global corporate economy

- Recognition of **foreign corporate personalities**
- Respect for **foreign limitation of liability**
- **Place of Registration** doctrine for choice of corporate law
- Ability of corporation to **own shares** in corporations **in other jurisdictions** and form corporate groups
- Ability to escape high tax jurisdictions to **tax havens** for tax purposes
- Ability to **shift profits** between companies
- Ability to bypass some **regulations**

The Building Blocks for offshore Tax Havens

- Company legislation throughout the Empire and the globe
- Ability to choose where to incorporate
- Ability to form corporate groups and subsidiaries
- Sufficient predictability as the corporate residency for tax purposes
- Ability to decouple tax aspects from corporate aspects and regulatory aspects and capital flow aspects
- Sophisticated lawyers and accountants in the City of London
- The formative period for the formation of offshore tax havens was before 1914