“THE DECISION IN SALOMON V. SALOMON 1897 AC 22 IS CALAMITOUS”: A REVIEW OF OTTO KAHN FREUND. REVISTED.

BY

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1.0: Introduction:

A key feature of the company is that it is a legal person with a separate existence from the company's members (i.e. shareholders where the company has shares) or its directors. From this separate personality flow many consequences. Incorporation of a company by registration was introduced in 1844 and the doctrine of limited liability of a company followed in 1855. Subsequently in 1897 in Salomon v. Salomon & Company,[1] the House of Lords effected these enactments and cemented into English law the twin concepts of corporate entity and limited liability. In that case the apex Court laid down the principle that a company is a distinct legal person entirely different from the members of that company. This principle is referred to as the 'veil of incorporation'.

Seperate Legal Personality is the basic tenet on which company law is premised. Establishing the foundation of how a company exists and functions, it is perceived as, perhaps, the most profound and steady rule of corporate jurisprudence. Contrastingly, the rule of "SLP" has experienced much turbulence historically, and is one of the most litigated aspects within and across jurisdictions.[2] Nonetheless, this principle, established in the epic case of Salomon v Salomon,[3] is still much prevalent, and is conventionally celebrated as forming the core of, not only the English company law, but of the universal commercial law regime. The paper discusses the case of Salomon v. Salomon,[4] the facts of the case, its principle, and comments made by some detractors, especially Otto Khan-Freund, the concept of Seperate Legal Personality, and the concept of lifting the veil in English Common Law, Nigeria and India.

2.0: The Facts of the Case

Salomon transferred his business of boot making, initially run as a sole proprietorship, to a company (Salomon Ltd.), incorporated with members comprising of himself and his family. The price for such transfer was paid to Salomon by way of shares, and debentures having a floating charge (security against debt) on the assets of the company. Later, when the company's business failed and it went into liquidation, Salomon's right of recovery (secured through floating charge) against the debentures stood aprior to the claims of unsecured creditors, who would, thus, have recovered nothing from the liquidation proceeds.

To avoid such alleged unjust exclusion, the liquidator, on behalf of the unsecured creditors, alleged that the company was sham, was essentially an agent of Salomon, and therefore, Salomon being the principal, was personally liable for its debt. In other words, the liquidator sought to overlook the

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[1] 1897 AC 22.
[2] Max Radin, '*The Endless Problem of Corporate Personality*' 32 Colum. L. Rev. 1932, 643.
[3] *ibid* at footnote 1.
[4] *ibid.*

separate personality of Salomon Ltd., distinct from its member Salomon, so as to make Salomon personally liable for the company's debt as if he continued to conduct the business as a sole trader.

2.0.1: Issue:

The case concerned claims of certain unsecured creditors in the liquidation process of Salomon Ltd., a company in which Salomon was the majority shareholder, and accordingly, was sought to be made personally liable for the company's debt. Hence, the issue was whether, regardless of the separate legal identity of a company, a shareholder/controller could be held liable for its debt, over and above the capital contribution, so as to expose such member to unlimited personal liability.

2.0.2: Ruling:

At first instance, Vaughan Williams J agreed with the liquidator. He held that Salomon's sole purpose in forming the company was to use it as an agent to run his business for him.

The Court of Appeal reached the same conclusion but for different reasons. It took the view that the principle of limited liability was a privilege conferred by the Companies Acts only on genuinely independent shareholders and not on 'one substantial person and six mere dummies'. The British Court of Appeal considered the matter and Kay LJ stated that:

"The statue was intended to allow seven or more persons, bona fide associated for the purpose of trade to limit their liability, under certain conditions and to become a corporation. But shareholders of Salomon & Co Ltd. were not intended to legalize the pretended association for the purpose of enabling an individual to carry on his business within; limited liability in the name of joint stock company."

Thus, the focus of court of appeal was that the six family members never intended to take part in the business and only held the shares to fulfill the technicality required by the companies act.

The House of Lords unanimously reversed the Court of Appeal decision. Lord Halsbury L.C in *Salomon v A Salomon & Co Ltd*[5] said:

"I must pause here, to point out that the statute enacts nothing as to the extent or degree of interest which may be held by each of the seven [subscribers] or as to the proportion of influence possessed by one or the majority of the shareholders over the others. One share is enough. Still less is it possible to contend that the motive of becoming shareholders or of making them shareholders is a field of enquiry which the statute itself recognises as legitimate. If there are shareholders, they are shareholders for all purposes; and even if the statute was silent as to the recognition of trust, I should

[5] op.cit at footnote 1.

be prepared to hold that if six of them were the cestuis que trust of the seventh, whatever might be their rights *inter se*, the statute would have made them shareholders to all intents and purposes with their respective rights and liabilities, and dealing with them in their relation to the company, the only relations which I believe the law would sanction would be that they were corporators of the body corporate."[6]

Thus, the legal fiction of "corporate veil" between the company and its owners/controllers[7] was firmly created by the Salomon case. This, at least, was the theory. However, the principle in Salomon's case has not been without its detractors. One of which is Otto Khan-Freund.

3.0: Criticisms on the Decision in the case of Salomon v Salomon

Some other criticisms that has been made following the decision in the Salomon's case includes that of Joseph Marryat who pre-emptively warned the implications of the decision of the case on creditors as early as 1810 by saying that "if a company should at any time become insolvent, the individual members would still remain in affluence and be driven in their coaches by the persons ruined". When the judgment was handed down on 16 November 1896, Sir Frederick Pollock remarked that such a decision could not have been given 30 or even 20 years previously.[8]

Otto Kahn-Freund[9] was critical of the principle in the case. Professor Kahn-Freund went so far as to describe it as "calamitous" because he thought the decision was not adequately justified in the principle and policy. Salomon's case established the independent corporate existence of a registered company, a principle of the greatest importance in company law,[10] but if applied inflexibly, as was the case in Salomon, it can shield parties unreasonably, to the detriment of persons dealing with companies.[11] He says:

"However, owing to the ease with which companies can be formed in this country, and owing to the rigidity with which the courts applied the corporate entity concept ever since the calamitous decision in *Salomon v Salomon & Co Ltd*, a single trader or a group of traders are almost tempted by the law to conduct their business in the form of a limited company, even where no particular business risk is involved, and where no outside capital is required. This state of affairs would not necessarily call for

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[6] Lord Halsbury LC, See also, Gas Lighting Improvement Co. Ltd. v Commissioners of Inland Revenue, 1923 AC 723 (Lord Sumner).
[7] Jennings v Crown Prosecution Service, 2008 UKHL 29.
[8] Mendelsohn James, "*Still the unyielding rock: A critical assessment of the ongoing importance of Salomon V Salomon & Co LTD [1897] AC 22 in the light of selected English company law cases"*, Masters Thesis, University of Huddersfield, 2012. Available at: http://eprints.hud.ac.uk/id/eprint/23331/ - Quoted in Ben Pettet, "*Limited Liability – A Principle for the 21st Century?*" [1995] CLP 124, 146.
[9] Otto Kahn-Freund: '*Some Reflections on Company Law Reform*', (1944) MLR 54-66.
[10] Geoffrey Morse, Charlesworth & Morse: Company Law (14th ed, Sweet & Maxwell/Stevens, London, 1991), 26.
[11] H Leigh French, Guide to Corporations Act (4th ed, Butterworths, Sydney, 1994), 19.

reform, if it were not for the fact that the courts had failed to give that protection to the business creditors, which should be the corollary of the privilege of limited liability."

He went further to state that; "What can be done? How is it possible to check the one-man company and other abuses of company law for purposes which it was never meant to serve? Is it conceivable that Salomon's case can be abrogated by legislation? Could the interests of outside creditors be protected by a general clause under which persons owning a controlling interest in a company would be liable for its debts? Or could there be a provision according to which a company would be deemed to act as agent for the owners of controlling interests?"

Sir Otto laments that the courts had at that time failed to, "give protection to the business creditors which should be the corollary of the privilege of limited liability." He goes on to observe that, "the metaphysical separation between a man in his individual capacity and his capacity as a one-man company can be used to defraud his creditors who are exposed to grave injury owing to the timidity of the Courts and of the Companies Act."

More recently, Gary Scanlan has echoed Kahn Freund's concerns, arguing that "the law needs to go further in providing a means of protection for the unsecured creditor of private limited companies". Scanlan questions whether the controllers of private limited companies should automatically enjoy limited liability. He suggests that private companies should not be allowed to operate without a minimum issued and paid-up share capital, and that if the company's capital falls below this level, the company should be required to stop trading, or its controllers should face unlimited personal liability.[12] While these are criticisms of the decision in the Salomon case, there are also affirmations on the said decision.

4.0: Affirmations on the decision in the Salomon's case.

Some have also affirmed the decision in the case of Salomon v Salomon as encouraging enterprise. Pettet, though sharing the concerns of Crowe and McGaughey for tort creditors, argued against the abolition of limited liability for tort debts on the grounds that this would discourage enterprise.[13] Gower hailed the limited liability company – and, by implication, the Salomon decision – as unquestionably a major instrument in making possible the industrial and commercial developments which have occurred throughout the world.[14]

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[12] Mendelsohn James (2012) op.cit at footnote 8: Gary Scanlan, "The Salomon principle" (2004) 25(7) Co Law 196.
[13] Mendelsohn James (2012) op.cit at footnote 8: Quoted in Ben Pettet, "Limited Liability – A Principle for the 21st Century?" [1995] CLP 124, 146.
[14] Mendelsohn James (2012): Lord Cooke of Thorndon (n 3) 11, quoting from LBC Gower, Principles of Company Law (5th edn 1992) 70.

Lowry and Reisberg, whilst recognising the negative implications of Salomon for unsecured and tort creditors, nevertheless affirm that "the arguments in favour of limited liability for contract debts have won the day. Limited liability for contract debt is here to stay and there is no great movement for its abolition."[15] The courts, meanwhile, affirmed Salomon most clearly in Lee v Lee's Air Farming Ltd[16] and Macaura v Northern Assurance Co.[17]

5.0: Implications:

Commencing with the Salomon case, the rule of SLP has been followed as an uncompromising precedent[18] in several subsequent cases like Macaura v Northern Assurance Co.,[19] Lee v Lee's Air Farming Limited,[20] and the Farrar case.[21]

The legal fiction of corporate veil, thus established, enunciates that a company has a legal personality separate and independent from the identity of its shareholders.[22] Hence, any rights, obligations or liabilities of a company are discrete from those of its shareholders, where the latter are responsible only to the extent of their capital contributions, known as "limited liability".[23] This corporate fiction was devised to enable groups of individuals to pursue an economic purpose as a single unit, without exposure to risks or liabilities in one's personal capacity.[24] Accordingly, a company can own property, execute contracts, raise debt, make investments and assume other rights and obligations, independent of its members. Moreover, as companies can then sue and be sued on its own name, it facilitates legal course too.[25] Lastly, the most striking consequence of SLP is that a company survives the death of its members.[26]

This case thus established one of the basic articles of faith of British company law, indeed of company law of all common law systems, that a company is a legal person independent and distinct from its shareholders and its managers.

6.0: The Concept of Corporate Personality

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[15] Mendelsohn James (2012), Still the unyielding rock: John Lowry & Arad Reisberg, Pettet"s Company Law: Company and Capital Markets Law (3rd edn, Pearson Longman 2009) 40.
[16] [1961] AC 12, PC.
[17] [1925] AC 619.
[18] Marc Moore, '*A Temple Built on Faulty Foundations: Piercing the Corporate Veil and the Legacy of Salomon v Salomon'* (2006) JBL 180.
[19] 1925 AC 619.
[20] 1961 AC 12.
[21] Farrar v Farrars Ltd., (1888) 40 ChD 395.
[22] Murray A. Pickering, *'The Company as a Separate Legal Entity'* (1968) 31 Mod. L. Rev. 481.
[23] P.W. Ireland, *'The Rise of the Limited Liability Company'* (1984) 12 International Journal of the Sociology of Law 239.
[24] Ayton Ltd. v Popely, 2005 EWHC 810 (Ch).
[25] Metropolitan Saloon Omnibus Co. Ltd. v Hawkins, (1859) 4 Hurl & N 87.
[26] Re Noel Tedman Holdings Pty Ltd., 1967 Qdr 561. See also, Mayson, French & Ryan, Company Law (29th edn, OUP 2012).

Corporate personality is the fact stated by the law that a company is recognized as a legal entity distinct from its members. Lord McNaughton adumbrated the legal personality of a company thus: When the memorandum is duly signed and registered, though there be only seven shares taken, the subscribers are a body corporate capable forthwith, to use the words of enactment, of exercising all the functions of an incorporated company, those are strong words. The company attains maturity on its birth. There is no period of minority - no internal incapacity. I cannot understand how a body corporate thus made capable by statute can lose individuality by issuing the bulk of its capital to one person, whether he be a subscriber to the memorandum and although it may be that after incorporation, the business is precisely the same as it was before, and the same persons are managers and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them, nor are the subscribers as members liable in any shape or form, except to the extent and in the manner provided by the Act. A company with such personality is an independent legal existence separate from its shareholders, directors, officers and creators.[27] This is famously known as the veil of incorporation.

Corporate Personality was established in Nigeria and evidence of this is given under the Companies and Allied Matters Act. Section 37 of CAMA states that:

"As from the date of incorporation mentioned in the certificate of incorporation, the subscriber of the memorandum together with such other persons as may, from time to time become members of the company, shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the powers and functions of an incorporated company including the power to hold hand, and having perpetual succession and a common seal, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as mentioned in this Act."

7.0: Meaning of Lifting or Piercing of the Corporate Veil

The human ingenuity however started using the veil of corporate personality blatantly as a cloak for fraud or improper conduct. Thus it became necessary for the Courts to break through or lift the corporate veil and look at the persons behind the company who are the real beneficiaries of the corporate fiction.

Lifting of the corporate veil means disregarding the corporate personality and looking behind the real person who are in the control of the company. In other words, where a fraudulent and dishonest use is made of the legal entity, the individuals concerned will not be allowed to take shelter behind the corporate personality. In this regards the court will break through the corporate shell and apply the principle of what is known as "lifting or piercing through the corporate veil." And while by fiction of

[27] Section 37 CAMA, 1990. Now Cap. C 20 vol. 3 LFN 2004.

law a corporation is a distinct entity, yet in reality it is an association of persons who are in fact the beneficial owners of all the corporate property. In United States V. Milwaukee Refrigerator Co.,[28] the position was summed up as follows:

"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."

In Littlewoods Mail Order Stores Ltd V. Inland Revenue Commrs,[29] Denning observed as follows:

"The doctrine laid down in Salomon v. Salomon and Salomon Co.Ltd, has to be watched very carefully. It has often been supposed to cast a veil over the personality of a limited liability company through which the Courts cannot see. But, that is not true. The Courts can and often do draw aside the veil. They can and often do, pull off the mask. They look to see what really lies behind".

8.0: The Position of English Common Law

In England, there has been very rapid developments in company law and lots of changes in the legislations over the years. The Companies Act of 1857 was reviewed periodically by a Committee that was set up for the sole purpose to review and amend the Companies Act. A landmark legislation in England was the Companies Act 1985 which incorporated all the EEC directives and modernized company law. This was followed by the Companies Act 1989. The current comprehensive legislation in England is the Companies Act 2006.[30]

8.1: Circumstances Under which the Veil of Incorporation is Lifted under English Law

Under the English doctrine there are a number of exceptions to the separate legal personality principle; i.e. where the courts are prepared to lift the mask or veil of incorporation and look at what has really been going on behind the scenes in the company. The veil of incorporation can be pierced either by statutes or the courts to avert fraud and injustice on the person of the company.

8.1.0: Lifting the Veil by Statutes:

It has always been recognized that "the legislature can forge a sledge hammer capableof cracking open the corporate shell" per Delvin J.[31] There are several statutory provisions that have the effect of ignoring the separate legal personality of the company by attaching responsibility for the company's obligations to company officers, or others. Some of them include the following:

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[28] 142 Fed. 247 (E.D. Wis. 1905).
[29] (1969) 1 WLR 1241.
[30] Kunle Aina, "Company Law 1: Lifting the Veil of Incorporation 2 – by Legislature", Module 3, Unit 4, 95.
[31] Bank VoorHandelenScheepvaat N. V Slatford (1953) 1 QB 248 at 278.

8.1.1: Taxation: The taxation authorities have been very much aware of the potential for group structures to avoid taxation by moving assests and liabilities around the group. The Companies Act also recognize that group structures need to be treated differently for disclosure and financial reporting purposes in order to get a proper overview of the group financial position. Section 399 of The Company Act[32] provides that parent companies have a duty to produce group accounts. Section 409 also requires the parent to provide details of the subsidiaries' names, country of activity and the shares it holds in the subsidiary.[33]

8.1.2: Fraudulent Purposes: One of the reaction of Parliament to the Salomon's decision was to introduce an offence of fraudulent trading. This offence was continued in the Companies Act of 1948 which contained both criminal and civil sanctions for fraudulent trading. Although, Companies Act of 2006 still contains a criminal offence under Section 993 for fraudulent trading, the civil provisions are now contained in Section 213-215 of the Insolvency Act, 1986.[34]

Wrongful trading is dealt with in Section 214 of the insolvency act and has similar provisions to Section 213. However this section operates only in cases of insolvent liquidation and the declaration can be made only against a person who at some time before the commencement of winding up, was a director of the company and knew or ought to have concluded at that time that there was no reasonable prospect that the company would avoid going into liquidation. No such declaration will take place is the court is satisfied that the person took all the possible steps to minimize the losses. These sections have been considered to be opposed to the Solomon principle.[35]

8.1.3: Premature Trading: Another example of personal liability is mentioned in Section 117 (8) of The English Companies Act.[36] Under this section a public limited company newly incorporated as such must not “do business or exercise any borrowing power” until it has obtained from the registrar of companies a certificate that has complied with the provisions of the act relating to the raising of the prescribed share capital or until it has re-registered as a private company. If it enters into any transaction contrary to this provision not only are the company and it’s officers in default , liable to pay fines but if the company fails to comply with its obligations in that connection within 21 days of being called upon to do so, the directors of the company are jointly and severally liable to indemnify the other party in respect of any loss or damage suffered by reason of the company’s failure.

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[32] U. K. Companies Act 2006.
[33] *ibid*.
[34] Lifting the Veil, Chapter 3. Accessed at https://www.google.com/url?sa=t&source=web&rct=j&url=https://blackwells.co.uk/extracts/9780199232871_dignam.pdf&ved=2ahUKEwiUo4Gx4fDkAhXIh1wKHZ8VA6MQFjAPegQICBAB&usg=AOvVaw0yYwg3XvlbmazrR_se11kj 32.
[35] Harshit Saxenna, Corporate Law – Lifting of Corporate Veil, 13.
[36] Section 117(8) of the English Companies Act, 1985.

8.2: Lifting the Veil by Courts

As noted by Lord Denning in Littlewoods Mail Order Stores Ltd. v. IRC,[37] incorporation does not fully "cast a veil over the personality of a limited company through which the courts cannot see. The courts can, and often do, pull off the mask. They look to see what really lies behind."

8.2.1: Fraud: The courts have been more that prepared to pierce the corporate veil when it feels that fraud is or could be perpetrated behind the veil. The courts will not allow the Solomon principal to be used as an engine of fraud. The two classic cases of the fraud exception are Gilford Motor Company Ltd v. Horne[38] and Jones v. Lipman.[39] In the first case, Mr. Horne was an ex-employee of The Gilford motor company and his employment contract provided that he could not solicit the customers of the company. In order to defeat this, he incorporated a limited company in his wife's name and solicited the customers of the company. The company brought an action against him. The Court of appeal was of the view that "the company was formed as a device, a stratagem, in order to mask the effective carrying on of business of Mr. Horne" in this case it was clear that the main purpose of incorporating the new company was to perpetrate fraud. Thus the Court of appeal regarded it as a mere sham to cloak his wrongdoings.

In the second case of Jones v. Lipman, a man contracted to sell his land and thereafter changed his mind in order to avoid an order of specific performance he transferred his property to a company. Russel judge specifically referred to the judgments in Gilford v. Horne and held that the company here was "a mask which (Mr. Lipman) holds before his face in an attempt to avoid recognition by the eye of equity". Therefore he awarded specific performance both against Mr.Lipman and the company. Under no circumstances will the court allow the any form of abuse of the corporate form and when such abuse occurs the courts will step in. The three aspects of fraud, which needs to be looked at before the corporate veil can be, lifted which are: (a) what are the motives of the fraudulent person relevant? (b) is the character of the legal obligation being evaded relevant? (c) is the timing of the incorporation of the device company relevant?

8.2.2: Enemy Character: A company may assume an enemy character when persons in de facto control of its affairs are residents in an enemy country. In such a case, the Court may examine the character of persons in real control of the company, and declare the company to be an enemy company. In Daimler Co.Ltd V. Continental Tyre And Rubber Co.Ltd,[40] A company was incorporated in England for the purpose of selling in England, tyres made in Germany by a German company which

[37] (1969) 1 W.L.R. 1241, 1254.
[38] (1933) Ch. 935 (C. A).
[39] (1962) 1 WLR 832.
[40] (1916) 2 AC 307.

held the bulk of shares in the English company. The holders of the remaining shares, except one, and all the directors were Germans, residing in Germany. During the First World War, the English company commenced action for recovery of a trade debt. Held, the company was an alien company and the payment of debt to it would amount to trading with the enemy, and therefore, the company was not allowed to proceed with the action.

8.2.3: Single Economic Entity: Sometimes in the case of group of enterprises the Salomon princip may not be adhered to and the Court may lift the veil in order to look at the economic realities of the group itself. In the case of D.H.N.food products Ltd. V. Tower Hamlets,[41] it has been said that the Courts may disregard Salomon's case whenever it is just and equitable to do so. In the above-mentioned case the Court of appeal thought that the present case was one which was suitable for lifting the corporate veil. Here the three subsidiary companies were treated as a part of the same economic entity or group and were entitled to compensation.

8.2.4: Agency or Trust: Where a company is acting as agent for its shareholder, the shareholders will be liable for the acts of the company. It is a question of fact in each case whether the company is acting as an agent for its shareholders. There may be an Express agreement to this effect or an agreement may be implied from the circumstances of each particular case. In the case of F.G.Films ltd,[42] An American company financed the production of a film in India in the name of a British company. The president of the American company held 90 per cent of the capital of the British company. The Board of trade of Great Britain refused to register the film as a British film. Held, the decision was valid in view of the fact that British company acted merely as he nominee of the American Company.

8.2.5: Tort: Usually the English courts have not lifted the veil on the ground of tort it is a phenomenon not witnessed in most common law jurisdictions apart from Canada.[43]

8.2.6: When the Company is a Sham: The courts also lift the veil where a company is a mere cloak or sham (hoax).

9.0: The Position of Nigerian Law

As a set-off position, it is necessary to point out that the concept of separate legal personality would only apply where a company acts with its own name.[44] As noted earlier, the company does not act on its own but acts through its directors and shareholders who have been delegated to act on its behalf. Thus, where a person acting on such delegated authority enters into contracts in its own name, the

[41] (1976) 1 WLR 852.
[42] (1953) 1 WLR 483.
[43] Harshit Saxenna, op.cit at footnote 35.
[44] The Doctrine of Lifting the Veil and its implication on Corporate Governance in Nigeria, Final copy 2, 2.

assets or liabilities under such a contract would be borne by the individual. In Sotimunu v. Ocean Steamship (Nigeria) Ltd,[45] a lawyer instituted an action on behalf of the company without the company authorising the action. It was held that the court had the power to strike out the action.

9.1: Lifting the Veil Under Companies and Allied Matters Act

9.1.0: Fraudulent or Wrongful Trading: Section 506 of CAMA[46] states that if it appears that during the winding-up of a company, the business of the company has been recklessly conducted or fraudulently conducted; those responsible may be held personally liable without limitation of liability for any of the company's debts or liabilities in line with the provisions thereof.

9.1.1: Misdescription: If the company's name is not mentioned in Bills of Exchanges and other negotiable instruments (promissory notes, cheques, etc.) as required by Section 631(1)(c) of CAMA,[47] the officer or any person issuing such instrument on behalf of the company will be personally liable for the amount thereof.

9.1.2: Holding and Subsidiary Companies: Section 336 of CAMA[48] requires the group accounting and the separate profit and loss accounts of the holding company and its subsidiaries to be placed simultaneously before the general body. The effect of which is to show the relative financial dependence of the two companies, detracting from the concept of separate legal personality of each.

9.1.3: Reduction in Number of Members: Section 93 of CAMA[49] provides that the corporate veil of a Company can be lifted if after its membership was reduced below the statutory minimum, a company continues to carry on business for more than six months, every person who is a member (director or officer) during that time that business was so carried on after six months, and who knows that it is carrying on business with less than the required minimum number of members will be jointly and severally liable with the company for the debts contracted during that time.

9.1.4: Power of Inspection: Section 316 of the Nigerian Companies and Allied Matters Act,[50] states that where an investigator is appointed by the Corporate Affairs Commission or by the court to investigate into the affairs of any company, the investigator shall investigate into the affairs of any company which at any relevant time has been its holding or subsidiary company.

9.1.5: Miscellaneous Statutory Examples: Many statutes made provisions when the corporate veil may be lifted if without doing so, the promoters or directors may avoid the provisions of the act, by

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[45] (1992) NWLR (Pt. 239) 1.
[46] C.A.M.A., 1990. Now Cap. C 20 vol. 3 LFN 2004.
[47] *ibid*.
[48] *ibid*.
[49] *ibid*.
[50] *ibid*.

the use of corporate personality principle, where for instance, corporate entity is used for the avoidance of tax. See Company Income Tax Act 1967, Income Tax Management Act 1961. In order to determine whether the Enterprises Promotion Act is complied with, with reference to sections 4,5,10 and 12 or whether Nigerians are being used to defeat the purpose of the Act, it would be necessary to look into the company to find out the real membership of the companies.[51]

10.0: The Indian Law Position

10.1: Judicial Provisions or Grounds for Lifting the Veil by The Courts

10.1.0: For Benefit or Revenue: The Court has the power to disregard corporate entity if it is used for tax evasion or to circumvent tax obligations. A clear illustration is Dinshaw Maneckjee Petit, Re;[52] The assesse was a wealthy man enjoying huge dividend and interest income. He formed four private companies and agreed with each to hold a block of investment as an agent for it. Income received was credited in the accounts of the company but the company handed back the amount to him as a pretended loan. This way he divided his income into four parts in a bid to reduce his tax liability.

But it was held that, "the company was formed by the assessee purely and simply as a means of avoiding super tax and the company was nothing more than the assessee himself. It did no business, but was created simply as a legal entity to ostensibly receive the dividends and interests and to hand them over to the assessee as pretended loans".

10.1.1: Company avoiding Legal Obligations: Where the use of an incorporated company is being made to avoid legal obligations, the Court may disregard the legal personality of the company and proceed on the assumption as if no company existed.

10.2: Statutory Provisions for Lifting the Veil

10.2.1: Reduction of Number of Members: Under Section 45 of The Indian Companies Act, If a company carries on business for more than six months after the number of its members has been reduced to seven in case of a public company and two in case of a private company, every person who knows this fact and is a member during the time that the company so carries on business after the six months, becomes liable jointly and severally with the company for the payment of debts contracted after six months. It is only that member who remains after six months who can be sued.[53]

10.2.2: Fraudulent Trading: Under Section 542 of The Indian Companies Act,[54] If any business of a company is carried on with the intent to defraud creditors of the company or creditors of any other

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[51] Kunle Aina, "*Company Law 1: Lifting the Veil of Incorporation 2 – by Legislature*", Module 3, Unit 4, 95.
[52] (1927) Bom. 371.
[53] Section 45 of the Indian Companies Act, 1956.
[54] Section 542 of the Indian Companies Act, 1956.

person or for any fraudulent purpose, who was knowingly a party to the carrying on of the business in that manner is liable to imprisonment or fine or both. This applies whether or not the company has been or is in the course of being wound up. This was upheld in Delhi Development Authority v. Skipper Constructions Co. Ltd.[55]

10.2.3: Misdiscription of the Company: Section 147 (4) of The Indian Companies Act,[56]provides that if any officer of the company or other person acting on its behalf signs or authorizes to be signed on behalf of the company any bill of exchange, promissory note, endorsement, cheque or order for money or goods in which the companies name is not mentioned in legible letters, he is liable to fine and he is personally liable to the holder of the instrument unless the company has already paid the amount.

10.2.4: Failure to refund Application money: According to Section 69(5) of The Indian Companies Act,[57] he directors of a company are jointly and severally liable to repay the application money with interest if the company fails to refund the money within 130 days of the date of issue of prospectus.

11.0: Conclusion:

The principle of corporate personality is a very important principle in company law. It is at the bedrock of all other doctrines and in the basis of limited liability of companies. The principle simply is that the company is a separate legal entity from the members capable of holding property in its name, can sue and can be shed, and having a common seal. The Salomon ruling remains predominant and continues to underpin English company law. In my opinion, the decision of the House of Lords in the famous case of Salomon's was unfair to the creditors, even though it is what the law is, and I agree with Otto Kahn-Freund that the case is calamitous, and the decision made in that case was wrong, and urge that the Lifting the Company Veil should be put to practice more.

It may, therefore, be concluded in the light of above discussion that though it is firmly established ever since *Solomon's* case that a company is an independent and legal personality distinct from the individuals who are its members, it has since been held that the corporate veil may be lifted, the corporate personality may be ignored and the individual members recognized for who they are in certain exceptional circumstances. Generally, and broadly speaking the corporate veil may be lifted where the statute itself contemplates lifting the veil or fraud, or improper conduct is intended to be prevented.

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[55] (1966) SC 2005.
[56] Section 147(4) of the Indian Companies Act, 1956.
[57] Section 69(5) op.cit at footnote 36.