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RESEARCH ARTICLE

Insider rights as property rights: a historical analysis of the bindingness of the registered company constitution

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Abstract

This paper reassesses the genealogy of the registered company constitution, focusing on the enforceability against the company of individual shareholder rights in the articles of association. Orthodox accounts posit that the statutory covenant, now found in the Companies Act 2006, s 33(1), has since 1856 been the sole source of the constitution's bindingness as between the shareholders and the company. But adherents to the orthodox account have been unable to agree on the precise legal effect of the statutory covenant, especially in respect of which rights in the articles can be enforced by shareholders against the company. This paper proposes an alternative account, whereby the statutory covenant's only effect was deeming assignees and allottees of shares to have covenanted, upon joining the company, to observe the articles. Ordinary privity of contract rendered the articles binding between the original parties to the constitution – ie the company and the subscribers. Furthermore, ordinary privity of estate determined that allottees and assignees of shares could enforce insider rights, but not outsider rights, against the company. This recognition that the benefit of certain articles should be given proprietary status was crucial in shaping the proprietary nature of shares.

Keywords: company law; shares; property rights; articles of association

Introduction

This paper provides an account of the historical lineage of the registered company constitution, focusing on the enforceability of individual shareholder rights against the company. Orthodox accounts of the company constitution's bindingness tend to posit that the 'statutory covenant', which was first enacted in the Joint Stock Companies Act 1856 and is now found in section 33(1) of the Companies Act 2006, has, since its enactment, been the sole source of the constitution's bindingness as between shareholders and the company. Building on modern scholarship, contemporary commentaries, and relevant authorities, this paper proposes an alternative account. It argues that when the statutory covenant was enacted, the subscribers and the company were regarded as actual contractual parties to the constitution. The only legal effect of the statutory covenant was to make assignees and allottees of shares ('non-subscriber shareholders') parties by putting them in the position that they would have been in had they covenanted, at the time at which they joined the company, to observe the constitution.

†I am extremely grateful to the colleagues who have provided me with the benefit of their views on previous versions of this paper. I would also like to extend my thanks to the two anonymous reviewers. Any errors are, of course, mine alone. I owe the greatest debt of gratitude, however, to my friend and former colleague, the late Professor Roger Gregory. Our conversations on the statutory covenant in Wolverhampton, twenty-odd years ago, provided the main inspiration for my academic career. Although he might well not have agreed with my arguments in this paper, I hope that he would have enjoyed reading it.

It is further argued that when read in light of this alternative account, the authorities demonstrate that the enforceability of rights in the constitution by individual shareholders against the company was determined not by the statutory covenant, but by ordinary principles of private law. The courts in the second half of the nineteenth century treated 'insider rights' – rights that the articles of association confer upon members *qua* members – as property rights. This means that the ability to enforce insider rights was transmitted when shares were assigned or allotted, so that insider rights were enforceable by all shareholders, including non-subscriber shareholders, against the company. On the other hand, 'outsider rights' – rights that the articles purport to confer on individual shareholders in a capacity other than that of shareholder – were not treated as property rights, so they were not transmitted when shares were assigned or allotted, and they could not be enforced by non-subscriber shareholders against the company.

If these arguments are accepted, the significance is twofold. First, by unearthing the role of contract and property law in determining which shareholder rights in the articles can be enforced against the company, this paper proposes a solution to the long-lasting controversies surrounding the effect of insider and outsider rights. This solution has the advantages of applying to the modern law whilst also being consistent with the bindingness of the constitution as it was understood by the framers of the 1856 Act and the judiciary in the second half of the nineteenth century. Secondly, it uncovers a crucial step in the process by which a shareholder's proprietary interest in their shares came to be understood as consisting of a bundle of assignable rights deriving from the constitution, as opposed to an equitable interest in the company's assets. Previous scholarship has identified that by the mid-nineteenth century the courts had concluded that shares were a new kind of chose in action but had not determined their precise proprietary nature. It is proposed here that judicial recognition of insider rights as property rights after 1856 determined the nature of this new kind of property. This ability to insist upon performance of insider rights constituted, and still constitutes, the core of each shareholder's property interest in their shares.

The arguments proceed as follows. Section 1 examines the academic controversies regarding the statutory covenant's scope and the enforceability of insider and outsider rights. Section 2 considers some pre-1856 developments, arguing that by 1856, modern-style insider rights had emerged and a need had arisen for clarity on the proprietary nature of shares. This section also examines the pre-1856 covenant-based company constitution and the scarcity of authorities on its bindingness. Section 3 considers the Joint Stock Companies Act 1856, focusing on post-1856 insider rights and the constitution's bindingness as it was understood when the statutory covenant was first enacted. Section 4 analyses the cases on the enforceability of shareholder rights in the constitution, arguing that these authorities consistently support the preceding arguments. The paper ends with some conclusions.

1. Academic controversies on the statutory covenant and insider and outsider rights

Since the modern registered company's advent in 1856, UK companies legislation has contained a 'statutory covenant'. All versions of the statutory covenant enacted between 1856 and 1985[1] are, from a modern perspective, oddly worded. The provisions deemed the shareholders, *but not the company*, to have covenanted to observe all of the provisions in the memorandum and articles, but stated that the shareholders *and the company* were bound by the memorandum and articles. Orthodox accounts regard this omission of the company as a drafting oversight caused by 'entity blindness'[2] and assume that the courts have always treated the company as a deemed covenantor.[3] This apparent entity blindness has

[1]Joint Stock Companies Act 1856, ss 7 and 10; Companies Act 1862, ss 11 and 16; Companies Act 1929, s 20; Companies Act 1948, s 20; Companies Act 1985, s 14.

[2]D Kershaw *The Foundations of Anglo-American Corporate Fiduciary Law* (Cambridge: Cambridge University Press, 2018) p 292.

[3]See Lord Wedderburn's explanation at *Hansard* HL Deb, vol 678, col GC35 (30 January 2006); P Davies *Gower and Davies: Principles of Modern Company Law* (London: Sweet & Maxwell, 8th edn, 2008) p 66; GD Goldberg 'The enforcement of outsider rights under section 20(1) of the Companies Act 1948' (1972) 35 Modern Law Review 362.

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been explained as a product of a legislature not yet accustomed to the concept of widely available corporate personality.[4] According to this narrative, the statutory covenant has, since its inception, been, and still is, the sole source of the constitution's contractual force, creating privity of contract by deeming the company to have covenanted with each shareholder, and each shareholder to have covenanted with the company and all other shareholders. The key academic contributions on the constitution's bindingness all proceed on this basis.[5]

If one accepts the orthodox accounts, the historical law relating to the bindingness of the articles is puzzling. It seems far-fetched that the legislature, having specifically legislated in 1844 for companies to be registerable with corporate personality,[6] had by 1856 become so afflicted by entity blindness that the company's legal identity was forgotten about when the statutory covenant was drafted. Moreover, if the orthodox account is accurate, the authorities on the enforceability of the articles by shareholders are difficult to explain. There are many authorities that insider rights are enforceable against the company. The main academic contributions attribute this enforceability to the effect of the statutory covenant.[7] On the other hand, it is widely recognised that the authorities on outsider rights seem inconsistent,[8] with some cases seeming to suggest that shareholders can, by suing *qua* shareholders, enforce outsider rights,[9] and others suggesting that shareholders cannot enforce outsider rights.[10] A variety of explanations seeking to reconcile the authorities have been offered by academic commentators,[11] but none have found universal acceptance.[12] A related difficulty posed by the orthodox account is that if the statutory covenant creates privity of contract between the company and the shareholders in respect of all of the provisions of the articles, it is difficult to see why the enforceability of insider and outsider rights should be treated differently.[13]

Notably, section 33(1) of the Companies Act 2006 expressly included, for the first time, the company as a deemed covenantor. The reason for this change was to correct what was regarded as the accidental omission of the company from 1856 onwards.[14] But section 33(1) was not intended to change the law.[15] Moreover, the updated provision says nothing about which shareholder rights are enforceable against the company. Thus, according to Worthington and Agnew, despite section 33(1)'s updated wording, 'the same uncertainties seem destined to plague this area'.[16]

[4]R Gregory 'The section 20 contract' (1981) 44 Modern Law Review 526; Davies, ibid, p 66.

[5]KW Wedderburn 'Shareholders' rights and the rule in *Foss v Harbottle*' (1957) 15(2) Cambridge Law Journal 194; Gregory, ibid; Goldberg, above n 3; GN Prentice 'The enforcement of "outsider rights"' (1980) 1 Company Lawyer 179; G Goldberg 'The controversy on the section 20 contract revisited' (1985) 48 Modern Law Review 158; R Drury 'The relative nature of a shareholder's right to enforce the company contract' (1986) 45 Cambridge Law Journal 219; S Worthington and S Agnew *Sealy & Worthington's Text, Cases, and Materials in Company Law* (Oxford: Oxford University Press, 12th edn, 2022) p 260; R Pennington 'Can shares in companies be defined?' (1989) 10 Company Lawyer 140 at 142–143.

[6]Joint Stock Companies Act 1844.

[7]See sources cited, above n 5; see also P Davies et al *Gower: Principles of Modern Company Law* (London: Sweet & Maxwell, 11th edn, 2021) pp 589–590; G Acheson et al 'Common law and the origin of shareholder protection' Queen's University Centre for Economic History, Working Paper 2016-04 (2016) https://www.quceh.org.uk/uploads/1/0/5/5/10558478/wp16-04.pdf (accessed 2 September 2025).

[8]See sources cited above n 5.

[9]See the treatment of *Quin and Axtens v Salmon* [1909] AC 442 (HL) in the sources cited above n 5.

[10]See the treatment of *Eley v Positive Government Security Life Assurance Company* (1876) 1 Ex D 88 (CA), 89 in the sources cited above n 5.

[11]Eg Gregory, above n 4; Goldberg, above n 5; Prentice, above n 5.

[12]Worthington and Agnew, above n 5, pp 260 and 266.

[13]See Gregory, above n 4; Worthington and Agnew, above n 5, p 266; Davies et al, above n 7, p 589.

[14]*Hansard* HL Deb, vol 678, col GC35 (30 January 2006).

[15]Companies Act 2006, Explanatory Notes, para 109.

[16]Worthington and Agnew, above n 5.

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2. Some pre-1856 developments

(a) Insider rights and the legal nature of shares

At the turn of the nineteenth century, there were relatively few companies,[17] each with relatively few shareholders. Share denominations were high,[18] shareholders often had direct involvement in the company's affairs,[19] and trade in shares was generally conducted privately.[20] From the second quarter of the century onwards, in response to rapidly increasing needs for capital, especially in the railway sector,[21] vast numbers of shares were issued across wide geographical areas, many in small denominations.[22] So-called 'financial shareholders' – investors attracted by the potential for financial returns, and to this end prepared to forgo close involvement with the company's management[23] – became prevalent, and a sophisticated market for trading securities developed.[24] These changes catalysed important and interconnected legal developments, including a shift in the balance of power in companies from shareholders to the board, the evolution of the company as an entirely separate entity, and widely available limited liability.[25]

(i) The emergence of insider rights

Freeman et al provide evidence, in this period, of a general trend of constitutions reducing shareholders' direct management powers in favour of increased board powers and protection of shareholders' financial interests.[26] This trend saw the emergence of recognisably modern insider rights. As many shareholders' supervisory powers in these new-style constitutions were exercisable through the general meeting,[27] individual voting rights were important.[28] The right to a duly declared dividend became 'enshrined as the most important and best-protected'[29] shareholder benefit. Shareholder pre-emption rights on new share issues were also common.[30] Some previously common individual shareholder rights (eg rights of individual access to company accounts, and preferential access to aspects of the company's business) were gradually abandoned.[31]

There is also evidence of outsider rights appearing in constitutions, and of official disapproval of this practice. The 1844 report of the Select Committee on Joint Stock Companies, set up to investigate fraudulent practices within joint stock companies, expressed disapproval of the inclusion in constitutions of a classic kind of outsider right – life tenures for directors, as well as other 'provisions … of a similar nature'.[32] Moreover, in 1850, Francis Whitmarsh, Registrar of joint stock companies, complained of 'speculative promotors' who inserted into deeds of settlement clauses for remunerating themselves 'to a very large amount'.[33]

[17]P Ireland 'Capitalism without the capitalist: the joint stock company share and the emergence of the modern doctrine of separate corporate personality' (1996) 17 Journal of Legal History 41 at 67.

[18]M Freeman et al *Shareholder Democracies? Corporate Governance in Britain and Ireland before 1850* (Chicago: University of Chicago Press, 2011) ebook, p 74.

[19]Ibid, p 120.

[20]Ireland, above n 17, at 62–63.

[21]J Turner 'Three centuries of corporate governance in the United Kingdom' (2025) 78(1) Economic History Review 3 at 12.

[22]Freeman et al, above n 18, p 110.

[23]Ibid.

[24]Ireland, above n 17, at 63–64.

[25]Ibid.

[26]Freeman et al, above n 18, pp 119, 140, 223.

[27]Ibid, ch 5.

[28]Ibid, p 144.

[29]Ibid, p 225.

[30]B Cheffins and B Reddy 'Law and stock market development in the UK over time: an uneasy match' (2023) 43 Oxford Journal of Legal Studies 725.

[31]Freeman et al, above n 18, pp 198–199.

[32]Ibid, p 229.

[33]Ibid.

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(ii) The changing legal nature of shares

Shares were traditionally understood as equitable interests in the company's assets. With the advent of the financial shareholder, this view became economically unrealistic. Shares became 'marketable commodities, liquid assets, titles to revenue easily converted by their holders into money'.[34] Ireland has demonstrated that the courts gave legal effect to this new reality in a series of cases, most of which concerned bequests of shares that would be void if the shares were realty, but valid if they were personalty.[35] Most of the cases involved the Mortmain Act 1736, which prohibited bequests of land to charities.[36] In *Bligh v Brent*,[37] the shares would only pass under the terms of the testator's will if they were personalty. The traditional position was that whether shares were realty or personalty depended on whether the company's assets comprised realty or personalty. The new position, as exemplified by *Bligh*, was that shares were personalty, irrespective of the nature of the company's assets.[38]

Although these cases established that shares were personalty, they did not determine the precise nature of this new kind of chose in action. This is perhaps because, to decide these cases, the courts usually needed only to determine with certainty what the shares were *not* (ie not realty). In *Bligh*, for example, the court reasoned that the shareholder's interest was in profits arising from the company's activities, rather than in the company's realty, but did not explain the legal principles by which the shareholder acquired this interest, or which rights comprised the interest. As Talbot and Kokkinis put it, in the wake of the *Bligh* line of cases, there was a need for 'clarity as to what this new form of property consisted in'.[39] This issue is revisited below in Section 4, where it is argued that the cases on insider rights provided this clarity.

(b) The deed of settlement company

Deed of settlement companies were unincorporated companies, first devised in the wake of the Bubble Act 1720, that utilised private law mechanisms to mimic the advantages of incorporation.[40] They were founded and governed by a deed of settlement which created a trust.[41] This trust vested the company's assets in trustees[42] with a view to enabling the trustees to sue and be sued on the company's behalf,[43] and conferred upon the shareholders an assignable equitable interest in the company assets.[44] The deed of settlement was also a sophisticated partnership agreement, containing the company's 'articles',[45] ie its constitution.

Deed of settlement companies were effective business vehicles,[46] and their numbers 'surged' in the 1830s.[47] Fraudulently promoted deed of settlement companies were, however, widely blamed for a financial crash in 1836,[48] leading to the Joint Stock Companies Act 1844, which introduced widely

[34]Ireland, above n 17, at 68.
[35]Ibid.
[36]For examples, see Ireland, above n 17, at 49–60.
[37](1837) 2 Y & C Ex 258, 160 ER 397.
[38]Ireland, above n 17, at 50–60.
[39]L Talbot and A Kokkinis *Great Debates in Company Law* (Oxford: Hart Publishing, 2nd edn, 2024) p 32.
[40]On the difficulty of incorporating after the Bubble Act see A Televantos *Capitalism Before Corporations* (Oxford: Oxford University Press, 2021) p 36.
[41]Ibid, p 35.
[42]J Collyer *A Practical Treatise on the Law of Partnership* (London: Sweet, Stevens & Sons, and Maxwell, 1832) p 636.
[43]AB DuBois *The English Business Company after the Bubble Act* (New York: Octagon Books, 1971).
[44]Televantos, above n 40, p 37.
[45]C Wordsworth *The Law of Joint Stock Companies* (London: Saunders and Benning, 3rd edn, 1842) pp 11–12.
[46]See J Morley 'The common law corporation: the power of the trust in Anglo-American business history' (2016) 116 Columbia Law Review 2145.
[47]Televantos, above n 40, p 43.
[48]Ibid.

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available incorporation by registration[49] with a view to bringing deed of settlement companies under regulatory control.[50] The 1844 Act imposed onerous compliance requirements[51] and it was ineffective in combatting fraud.[52] It was soon replaced by the Joint Stock Companies Act 1856. There are, however, two features of the law relating to deed of settlement constitutions that are especially helpful for understanding certain post-1856 developments that are discussed in Section 3 below.

(i) The use of covenants

The constitution's legal force derived from covenants.[53] At the company's inception, the subscribers covenanted 'with the trustees, and each of the trustees covenant[ed] with the rest of the [subscribing] shareholders, for the due performance of [the] articles'.[54] There was no direct rule requiring unincorporated companies to be created using sealed contracts (specialities), but it was inconceivable for lawyers to attempt to create them using unsealed contracts. Common law claims for breaches of sealed and unsealed contracts were governed by different rules, a consequence of their having since medieval times been subject to separate forms of action.[55] Several features of specialties made them more suitable than unsealed contracts for creating a secure and unambiguous constitutional document which, if necessary, could be litigated upon by the trustees.[56] Specialties had more 'force' than unsealed contracts.[57] In particular, it was difficult for parties to dispute the terms of specialties,[58] parties could only be released from obligations under specialties by 'a release under seal',[59] specialties could bind heirs,[60] and a generous limitation period applied to actions on specialities.[61]

Deeds also played a crucial role by ensuring that persons other than the subscribers might become shareholders. Requiring them to attach their seals to the deed of settlement, and to covenant to observe its stipulations, was the most expedient means of ensuring that the articles would bind these newcomers. It was therefore customary for company constitutions to require share transfers to be made by a three-part deed between the assignor, the assignee and the trustees.[62] This document would include a covenant by the assignee with the trustees whereby the assignee promised to comply with the company's articles. It was also standard practice for the deed of settlement to require incoming shareholders to sign and seal the deed of settlement itself.[63]

[49]It permitted existing unincorporated joint stock companies to be registered with legal personality, and required registration of new companies with more than 25 members.

[50]Televantos, above n 40, p 52.

[51]Morley, above n 46, at 2161.

[52]MS Rix 'Company law: 1844 and to-day' (1945) The Economic Journal 242 at 247–248.

[53]NB: pre-1844 corporations' members were bound by virtue of 'their corporate character, and not from contract…': J Collyer *A Law of Partnership* (London: Sweet and Stevens, 2nd edn, 1840) p 731.

[54]Ibid, pp 11–12.

[55]Debt and covenant for specialties, and assumpsit for simple contracts: W Anson *Principles of the English Law of Contract* (Oxford: Clarendon, 1879) p 324.

[56]Especially in respect of unpaid calls: Collyer, above n 42, p 649.

[57]CG Addison *A Treatise on the Law of Contracts and Rights and Liabilities ex Contract* (Philadelphia: Lea & Blanchard, 1847) p 1.

[58]J Chitty *A Treatise on the Laws of Commerce and Manufactures, and the Contracts Relating Thereto*, vol 3 (London: Strahan, 1824) pp 8–9.

[59]Ibid.

[60]Ibid.

[61]Initially there was no limitation period for actions on specialties: W Ballantine *A Treatise on the Statute of Limitations* (London: Butterworths, 1810) ch 4. The Civil Procedure Act 1833, s 3 introduced a limitation period of 20 years.

[62]See Wordsworth, above n 45, App 3, p 126. See also *Straffon's Executor's Case* (1852) 1 De G M & G 576, 42 ER 676; *R v Webb* (1811) 14 East 406, 104 ER 658.

[63]See Wordsworth (ibid) App 3, pp 104 and 115. See also *Harvey v Reynolds* (1829) 9 B & C 356, 109 ER 132; *Dodgson's Case* (1849) 3 De G & S 85, 64 ER 391, 88.

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(ii) The scarcity of shareholder claims

Pre-1844 deed of settlement companies existed 'on the fringes of legality'.[64] There was a risk that shareholder litigation could end up with the company falling foul of the Bubble Act[65] or the common law offence of 'acting as a corporation'.[66] Shareholders who did decide to litigate (and who were not constrained by arbitration clauses) faced the hostile atmosphere of the Court of Chancery,[67] where the rules on joinder required that all shareholders, however numerous, be made parties to claims.[68] This was a powerful deterrent for disgruntled shareholders, as compliance typically generated ruinous costs.[69] For example, Televantos highlights *Baldwin v Lawrence*[70] in which 'Lord Eldon refused to allow a bill for direction as to the meaning of a deed of settlement company's articles of association on the basis that it was not brought by *all* the shareholder-partners'.[71] In this climate, shareholder claims were rare, and there are no authorities on the enforceability of insider and outsider rights in unincorporated companies.[72]

3. The Joint Stock Companies Act 1856: articles of association and the enactment of the statutory covenant

The Joint Stock Companies Act 1856 Act introduced the modern-style registered company.[73] The deed of settlement, which had been retained under the 1844 Act, was replaced as the primary source of the company's constitution by the memorandum and articles of association. The 1856 Act was the product of an unlikely combination of political influences, including arch-liberals and socialists, whose ideas converged in their belief that deregulation would make business vehicles accessible to entrepreneurs from a relatively wide cross-section of society, thereby promoting fair competition.[74] The outcome was 'the most liberal and unregulated company law regime in Europe'[75] – a regime that, if not wholly underpinned by, was certainly in alignment with *laissez-faire* principles. Within this new regime, freedom of contract and self-regulation would provide the optimum environment for proper corporate governance standards.[76] The state should not do for shareholders what they 'can do for themselves' because this would leave them susceptible to fraud.[77] In this spirit, the 1856 Act contained few mandatory provisions relating to corporate governance. The articles were the primary source of shareholder protections.[78] Default model articles were provided, although companies were free to adopt whatever articles the promoters saw fit.

[64]Televantos, above n 40, p 52.

[65]Although the Bubble Act was rarely litigated upon, deed of settlement companies with transferrable shares were never unequivocally lawful whilst it remained in force. It was repealed in 1825.

[66]PS Atiyah *The Rise and Fall of Freedom of Contract* (Oxford: Oxford University Press, 1979) p 366.

[67]The Court of Chancery's dominant early nineteenth century figure was Lord Eldon, whose hostility to shareholders of settlement companies is well-documented. See Atiyah, ibid, p 366.

[68]Televantos, above n 40, p 43.

[69]See Collyer, above n 42, p 649.

[70](1826) 2 S & S 18, 57 ER 251.

[71]Televantos, above n 40, p 50.

[72]Ibid, pp 46–51.

[73]NB: it was replaced by the Companies Act 1862, a consolidation Act which made no changes that are material to this paper.

[74]See DC Smith 'The mid-Victorian reform of Britain's company laws and the moral economy of fair competition' (2021) 22 Enterprise and Society 1103.

[75]W Cornish et al *The Oxford History of the Laws of England: Volume XII: 1820–1914 Private Law* (Oxford: Oxford University Press, 2010) p 629.

[76]G Acheson et al 'Private contracting, law and finance' (2019) 32 The Review of Financial Studies 4156.

[77]BC Hunt *The Development of the Business Corporation in England 1800–1867* (Cambridge, MA: Harvard University Press 1936) p 134.

[78]Cheffins and Reddy, above n 30, at 734.

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(a) Insider and outsider rights in the articles

(i) Insider rights and their continuing importance

During the second half of the nineteenth century, the numbers of companies increased rapidly, shareholders continued to be drawn from an increasingly wider pool of society, and the reconceptualisation of shares as marketable commodities continued.[79] Insider rights were a key component of constitutions that were increasingly tailored towards attracting the new kind of shareholder.[80] The model articles,[81] which provided the state's view of an 'ideal' balance of shareholder and board rights,[82] contained default insider rights relating to entitlement to share certificates,[83] share transfers,[84] the respective rights of joint owners of shares,[85] pre-emption rights on new share issues,[86] voting rights,[87] dividends,[88] access to company accounts,[89] and printed copies of the company's annual balance sheet.[90] The model articles, however, including many of those concerning insider rights, were either partly or entirely rejected by the majority of companies[91] in favour of articles conferring increased board powers at the expense of the power of the general meeting.[92] It was particularly common for the staggered voting rights in the model articles to be abandoned in favour of insider rights conferring 'one vote per share'.[93]

Insider rights were thus crucial to the liberal corporate governance regime. But if shareholders were to help themselves, the state needed to 'give them powers to take matters into their own hands, especially if things went wrong'.[94] If the majority wished to enforce the articles, there was usually no need for litigation. In the event, however, of majority indifference to breaches of the articles, individual shareholders might wish to enforce their rights. For the new regime to work as envisaged, the articles needed to be enforceable in court.[95]

(ii) Outsider rights

Guinnane et al have shown that, towards the nineteenth century's end, certain outsider rights, such as articles purporting to entrench directors for certain tenures, were relatively common, and that they attracted hostility.[96] In 1894, the *Investor's and Shareholder's Guide* described outsider rights as 'most mischievous provisions' that 'lurk' in articles,[97] although the authors thought them 'not legally binding upon the company' unless adopted post-incorporation.[98]

[79]Ireland, above n 17, at 66.

[80]Acheson et al, above n 76, at 4156, 4158.

[81]Table B, Joint Stock Companies Act 1856; updated model articles appeared in Table A, Companies Act 1862, but these provisions do not differ materially from the 1856 version.

[82]T Guinnane et al 'Contractual freedom and corporate governance in Britain in the late nineteenth and early twentieth centuries' (2017) 91 Business History Review 227 at 234.

[83]Art 1.

[84]See Arts 8–22.

[85]Arts 6, 40, 86.

[86]Art 27.

[87]Arts 44–51.

[88]Arts 72–77.

[89]Art 78.

[90]Art 82.

[91]Acheson et al, above n 76, at 4163.

[92]Guinnane et al, above n 82, at 240.

[93]Ibid, at 240–242.

[94]J Foreman-Peck and L Hannah 'UK corporate law and corporate governance before 1914: a re-interpretation' (2015) EHES Working Papers in Economic History, No 72, p 10.

[95]Ibid.

[96]Guinnane et al, above n 82.

[97]Ibid, at 257, citing JD Walker & Watson *Investor's and Shareholder's Guide* (Edinburgh: E & S Livingstone, 2nd edn, 1894) p 101.

[98]Ibid.

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(b) The statutory covenant and the original parties to the constitution

For this paper's purposes, the 1856 Act's most significant provisions are sections 7 and 10, which introduced the statutory covenant by providing that the memorandum and articles respectively:

> shall, when registered bind the Company and the Shareholders therein to the same Extent as if each shareholder had subscribed his Name, and affixed his Seal thereto or otherwise duly executed the same, and there were in such Memorandum [read 'Articles' for s 10] contained … a Covenant to conform to all the Regulations of such Memorandum [read 'Articles' for s 10], subject to the Provisions of this Act.

This choice of words was heavily influenced by the constitutional framework of deed of settlement companies.[99]

The orthodox view that the omission of the company as a deemed covenantor is attributable to improvident draughtsmanship hinges on two presuppositions, both of which can be countered. The first is that Parliament intended the contractual effect of the constitution, as between the company and the shareholders, to derive solely from the statutory covenant. The second is that the legislature, when formulating the statutory covenant, overlooked the company's separate legal personality. But evidence indicates that the purpose of the statutory covenant was *not* to serve as the sole source of the shareholders' and the company's rights and obligations in the articles. Rather, the statutory covenant appears to have been conceived simply as a means by which to streamline the new registration process. Section 3 of the 1856 Act prescribed a minimum of seven, but no maximum number of, subscribers to the memorandum. According to Sir Henry Thring, the statute's lead draughtsman:

> The procuring of more than seven signatures to the memorandum of registration is a needless expense, as section 7 provides that every person on becoming a shareholder is bound by the memorandum to the same extent as if he had subscribed his name and affixed his seal thereto, and had thereby covenanted to conform to all its regulations.[100]

Section 10 served the same purpose for the articles.[101] Thring's characterisation of the statutory covenant as a cost-saving provision, with no indication that it served any function other than to obviate the need for numerous shareholders to sign the constitution, suggests that the only intended legal effect of sections 7 and 10 was to render non-subscriber shareholders bound by the constitution.

This construction makes sense if it is appreciated that, at the time of the statutory covenant's enactment, the company and the subscribers were understood to be actual parties to the constitution. The subscribers, having executed the constitutional documents,[102] were original parties, so it was unnecessary for them to be deemed covenantors. Similarly, it was unnecessary for the company to be a deemed covenantor. Like the subscribers, it was an original party. When Sir Robert Lowe, Vice-President of the Board of Trade, introduced the Bill to the Commons, he announced that '*every company* affected by the Act is *to sign a document* which … which we propose to call a "memorandum of association"'.[103] This suggests that Lowe regarded the subscribers' cumulative endorsement of the memorandum as making the company a party from the moment of registration.[104] As Ireland points out, prior to the emergence of modern separate

[99]Talbot and Kokkinis, above n 39, p 46; Hunt, above n 77; Pennington, above n 5, at 142.

[100]Talbot and Kokkinis, above n 39, p 37.

[101]See s 9 on the requirement that the subscribers sign the articles (or that, in default, the model articles would have an identical effect to properly signed and registered articles).

[102]See Joint Stock Companies Act 1856, s 11 for the requirements for valid execution.

[103]*Hansard* HC Deb, vol 140, col 133 (1 February 1856) (emphasis added).

[104]It can be difficult to pin down the meaning intended by use of the word 'company' during Lowe's time. It was sometimes used to refer to an association of persons (as in a large joint stock partnership), and sometimes such companies were referred to in the singular, and sometimes in the plural. For a summary of the term's historical background, see P Withington 'Company and sociability' (2007) 32 Social History 291. The word was also used, from the 1844 Act onwards, to refer to a registered

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personality, a process not finalised until the *Salomon* decision,[105] companies 'were regularly conceptualised as their members *merged* into a legally distinct entity'.[106]

The courts consistently construed the statutory covenant in this manner. Lord Selborne LC explained in *Oakbank Oil Company v Crum*[107] that the company was bound by its articles because:

> Each party must be taken to have made himself acquainted with the terms of the written contract contained in the articles of association … [the company] must also in law be taken … to have understood the terms … of the contract which [it] has made.[108]

Moreover, Astbury J later observed: '[m]uch of the difficulty is removed if the company be regarded, as the framers of the section may very well have so regarded it, as being treated in law as a party to its own memorandum and articles'.[109] The cases considered in Section 4 below reinforce this construction. For now, it should be emphasised that this construction is consistent with fact that the statutory covenant stated that 'the Company and the Shareholders' were bound by the articles, whilst only deeming shareholders to have covenanted – it *referred to* the full extent of the contractual force of the constitution as between the company and the shareholders, but only *generated* the contractual relations which subjected non-subscriber shareholders to the burden of the obligations in the articles.

(c) There was (and still is) ambiguity in the statutory covenant

Although the company's omission as a deemed covenantor was no error, there *was* an ambiguity in the provision's wording. It did not specify *when* the shareholder's covenant was deemed to have been executed. To modern readers, the stipulation that the constitution was binding 'as if each Shareholder had subscribed his Name and affixed his Seal thereto or otherwise duly executed the same' might be interpreted as meaning that newcomers were deemed to have done this at the time of the company's formation. On this basis, all shareholders would be deemed to have become parties when the company became a party, so all shareholders would be covenantees of the company's covenant to observe its articles.

But Victorian judges read the statutory covenant differently. Subscribing a name and affixing a seal was interpreted as referring to the aforementioned practice of requiring incoming shareholders of deed of settlement companies to sign and execute the deed of settlement upon joining the company. Furthermore, the phrase 'or otherwise duly executed the same' was understood to derive from the practice of requiring incoming shareholders of pre-1844 companies to covenant to observe the articles. This interpretation would likely have come especially naturally to judges who had dealt professionally with deed of settlement companies.[110] According to this interpretation, each non-subscriber shareholder was deemed to have covenanted at the time at which they joined the company. As Jessel MR explained, the statutory covenant's effect was that 'the articles of association, when registered, shall bind the

incorporated company. Confusingly, the singular and the plural were also used in reference to the company in this sense. Lowe seems to have used the word in both senses in various parts of his 1 February speech. But he did distinguish between 'a company' and 'its shareholders' (eg *Hansard* HC Deb, vol 140, col 130), which suggests that he considered the company as an entity distinct from (if also comprised of) its subscribers.

[105] *Salomon v A Salomon & Co Ltd* [1897] AC 22.

[106] Ireland, above n 17, at 45.

[107] (1882) 8 App Cas 65 (HL).

[108] Ibid, at 70–71. The parts in square brackets originally both said 'he', but Lord Selborne was clearly referring to the company's obligations.

[109] *Hickman v Kent or Romney Marsh Sheepbreeders Association* [1915] 1 Ch 881, 897.

[110] The average English judge between 1832 and 1906 had served 'over 30 years at the bar' upon appointment to judicial office: H Laski 'The technique of judicial appointment' (1926) 24 Michigan Law Review 529 at 536–537.

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company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto; but that means at *the time of becoming a member*'.[111]

According to this construction (the authorities on which are discussed below in Section 4), the subscribers and the company were parties to the constitution at the time of incorporation, so the subscribers were original covenantees of the company's covenant to observe its articles. But non-subscriber shareholders, not being covenantees (deemed or otherwise) of the company's covenant, could not rely on privity of contract to claim the benefit of the company's obligations in the articles. Attempts by non-subscriber shareholders to enforce the articles against the company fell outside of the scope of the statutory covenant, and were a matter to be determined by ordinary principles of private law.

This construction is still applicable under section 33(1) of the 2006 Act. The new provision adds the company as a deemed covenantor, but it does not state when the covenants are deemed to have been executed. If the company's covenant is deemed to have been executed when the company was incorporated, whilst the covenant of each non-subscriber shareholder is deemed to have been executed when they joined the company, then the same considerations regarding privity of contract apply – the statutory covenant will not confer upon non-subscriber shareholders the benefit of the company's covenants.

4. The authorities supporting this construction

(a) The approach of Victorian courts to corporate law

It is worth noting that there are several traits of the Victorian English judiciary which have been identified by scholars as characteristic of the manner in which the courts adjudicated on corporate law disputes, and which are relevant to understanding the cases on the enforcement of individual shareholder rights in the articles. First, the courts took a 'formalistic approach' towards corporate law legislation which involved 'restrict[ing] themselves to interpreting the letter of the statute',[112] *Salomon v Salomon*[113] being a classic example of this approach. The judicial interpretation of the statutory covenant as referring to the full contractual effect of the constitution, but only deeming non-subscriber shareholders to be bound, is consistent with this formalistic approach.

Although there is some debate as to the extent to which *laissez-faire* ideology influenced Victorian judicial decision-making,[114] the courts' fundamental approach to shareholder protection was consistent with *laissez-faire.* As a general rule, the courts were reluctant to interfere in companies' internal affairs,[115] and judicial protections for shareholders were weak.[116] But the courts' doctrinal commitment to 'the liberty of the individual, the freedom of contract, and the sacredness of property' was so intense that Lord Devlin likened it to a 'Victorian Bill of Rights'.[117] As Atiyah put it, judges developed the notion that there was a '"natural" background of law … in which property rights were secured, and contracts were enforced'. Giving effect to these contract and property rules was 'not conceive[d] of as interference at all'.[118]

[111]*Re Malaga Lead Company* (1875) LR 20 Eq 524, 526 (emphasis added).

[112]R Harris and N Lamoreaux 'Opening the black box of the common-law legal regime: contrasts in the development of corporate law in Britain and the United States in the late nineteenth and early twentieth centuries (2019) 61 Business History 1199 at 1201.

[113]Above n 105.

[114]W Cornish et al *The Oxford History of the Laws of England: Volume XI: 1820–1914 English Legal System* (Oxford: Oxford University Press, 2010) p 239.

[115]Acheson et al, above n 76, at 4162.

[116]G Campbell and J Turner 'Substitutes for legal protection: corporate governance and dividends in Victorian Britain (2011) 64 Economic History Review 571 at 574.

[117]Lord Devlin *The Judge*, quoted in FRA Bennion *Understanding Common Law Legislation: Drafting and Interpretation* (Oxford: Oxford University Press, 2009) p 92.

[118]Atiyah, above n 66, p 389.

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This was the heyday of legal formalism in contract law.[119] Victorian judges understood a 'concept of contract which could dismiss all differences of time and place, of circumstances and people, [and] had no need for trivial distinctions between sale and hire-purchase, mortgages and leases, commercial and consumer contracts'.[120] The courts' role was simply to give effect to the 'will of the parties'[121] as expressed in a contract. This formalism permeated corporate law, wherein the courts 'were enforcers of contracts such as articles of association',[122] and upheld all contractual provisions that were 'not directly contrary to law'.[123] This approach can be observed in the cases considered below on the enforcement of insider and outsider rights when there was privity of contract. Moreover, the aforementioned judicial reverence for the 'sanctity of property'[124] also pervaded corporate law in the second half of the nineteenth century, wherein litigants could take 'private action backed by strong courts, which were renowned for protecting private property rights'.[125] This approach is evident in the cases, also considered below, in which the benefit of insider rights was treated as property.

(b) Claims that fell within the scope of the statutory contract

(i) The company enforcing the articles against shareholders

The statutory covenant caused each shareholder to assume the burden of the shareholders' obligations in the articles, and the company the corresponding benefit. The proposition that the statutory covenant is the source of the company's ability to enforce articles against shareholders has been affirmed many times by the courts,[126] and need not be considered further.

(ii) The constitution's inter se *bindingness*

The statutory covenant deemed each shareholder to have covenanted, upon joining the company, with the other shareholders. The ability of individual shareholders to invoke this *inter se* bindingness against other shareholders appears to have been little-discussed by nineteenth century courts.[127] It seems to have been taken as given that such claims would be restricted to breaches of individual shareholder rights that had been committed by the other shareholders, as opposed to by the company.[128] This left little room for infringements that could be the subject of *inter se* claims by individual shareholders, and this issue apparently was not dealt with judicially until *Rayfield v Hands*,[129] decades after the other issues in this paper became settled. Here, an outgoing shareholder was able to enforce a right to compel the other shareholders to purchase his shares as per a provision in the articles. According to the construction presented in this paper, every shareholder's deemed covenant would be effective from the moment at which they joined the company. This would mean that no individual shareholder would be able to rely on privity of contract to claim the benefit of the covenants of any shareholders who joined before they did. Consistently with this construction, Vaisy J held that the plaintiff could rely on privity of estate, as laid down in *Smith & Snipes Hall Farm Ltd v River Douglas*

[119]Ibid.

[120]PS Atiyah *Essays on Contract* (Oxford: Clarendon, 1986) p 17.

[121]J Gordley *The Philosophical Origins of Modern Contract Doctrine* (Oxford: Clarendon, 1991) p 162.

[122]Acheson et al, above n 7, p 21.

[123]Harris and Lamoreaux, above n 112.

[124]M Taggart *Private Property and Abuse of Rights in Victorian England: The Story of Edward Pickles and the Bradford Water Supply* (Oxford: Oxford University Press, 2002) p 102.

[125]Acheson et al, above n 7, p 3.

[126]*Bradford Banking Co v Briggs* (1886) 12 App Cas 29; *McKewan's Case* (1877) 37 LT 93; *Hickman*, above n 109; *Peninsular Co v Fleming* (1872) 27 LT 93.

[127]*Rayfield v Hands* [1960] Ch 1 at 4 per Vaisey J.

[128]When a shareholder challenged the validity of an act of the board on the grounds that it infringed their shareholder right, then the proper defendant would be the company (as in *Oakbank*, above n 107).

[129]Above n 127.

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Catchment Board[130] on the running of the benefit of freehold covenants which touch and concern the land, to claim the benefit of the disputed right. Privity of estate, as it relates to shareholder claims against the company, is revisited in more detail in section (d) of this section of the paper.

There is, however, an important line of cases in which a resolution of the general meeting was held invalid because the statutory covenant created contractual relations between the members *inter se* which prevented the majority from binding the minority by passing resolutions which were inconsistent with the articles and thus in breach of the obligations owed by all members to other members. These cases are important because they are usually treated as authorities that the statutory covenant rendered the company contractually bound by shareholder rights in the articles.[131] In *Wood v Odessa Waterworks Company*,[132] the articles provided that properly declared dividends should be paid in cash. The shareholders passed a resolution to pay a dividend in bonds. The plaintiff, a shareholder, obtained an injunction restraining the board from acting on the shareholders' resolution because the latter was invalid.[133] Sterling J expressly cited the statutory covenant,[134] declaring that:

> the question is, whether this is a matter as to which the *majority of the shareholders can bind those shareholders who dissent*. The articles of association constitute a contract not merely between the shareholders and the company, *but between each individual shareholder and every other*.[135]

Therefore, although it is often cited as such, *Wood* is not an authority that the statutory covenant is the source of the enforceability of insider rights by shareholders against the company.

Both *Imperial Hydropathic Hotel Company v Hampson*[136] and *Quin & Axtens v Salmon*[137] have been cited as authorities that shareholders can, by suing *qua* members, invoke the statutory covenant to enforce outsider rights against the company.[138] In *Imperial*, the articles conferred a certain tenure upon the directors. Hampson, a director and shareholder, successfully claimed that a special resolution to dismiss him was void because the articles conferred no such power on the general meeting.[139] Cotton LJ said that the articles 'under the Act are a contract between all the shareholders to comply with the regulations within'.[140] Accordingly, the case depended on the *inter se* enforceability of the articles, ie 'whether a majority at a general meeting can bind those who are not there, and take no part in it … whether in the present case the *contract between these shareholders* has been followed'.[141]

Automatic Self-Cleansing Filter Syndicate Company Ltd v Cuninghame[142] was decided on the same reasoning. An ordinary resolution was passed directing the board to sell the company's undertaking. The resolution was held void because, on proper construction of the articles, only a special resolution could interfere with the general power of management conferred upon the board by the articles. Cozens-Hardy LJ explained that:

> [T]he articles of association are a contract between the *members of the company inter se*. That was settled finally by the case of *Browne v La Trinidad*, if it was not settled before. We must

[130][1949] 2 KB 500.
[131]See Gregory, above n 4; Wedderburn, above n 5; Drury, above n 5; Worthington and Agnew, above n 5.
[132](1889) 42 Ch D 636.
[133]NB *Wood* differs from *Oakbank*, above n 107, where the plaintiff successfully invoked the actual contract in the constitution against the company to challenge the validity of *the board's recommendation* to pay a dividend.
[134]*Wood*, above n 132, at 641.
[135]Ibid, at 641–642 (emphasis added).
[136](1882) 23 Ch D 1.
[137]Above n 9.
[138]Above n 132.
[139]At this time, the general meeting had no statutory power to dismiss directors.
[140]*Imperial Hydropathic*, above n 136, at 10; Bowen LJ (at 12) concurred.
[141]Ibid, at 10–11 (emphasis added).
[142][1906] 2 Ch 34.

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> therefore consider what is the relevant contract which these shareholders have entered into …[143]

In *Quin*,[144] the articles empowered the managing directors, including Salmon, to veto board decisions to lease company property. The majority of directors wanted a lease to be granted. Salmon invoked the veto. Ordinary resolutions were passed, at the instigation of directors who controlled the general meeting, requiring the company to grant the lease. Salmon, who was also a shareholder, obtained an injunction restraining the company from acting upon the resolutions. Farwell LJ regarded Salmon's claim as 'entirely governed'[145] by *Automatic*. The resolutions were void because they were inconsistent with the articles, and thus contravened the *inter se* contractual relations that the statutory covenant generated between the shareholders who voted in favour of the resolutions and the other shareholders. This left the board, which, owing to the veto, opposed the lease, as the only organ of governance competent to determine whether the lease should be granted.[146] The House of Lords agreed – the case rested on '[t]he bargain made *between the shareholders*'[147] in the articles. In *Browne v La Trinidad*,[148] the source of the reasoning in *Automatic*, the Court of Appeal refused to permit a shareholder to enforce an outsider right against the company. That *Quin* rests on reasoning derived from *Browne* reinforces the argument that *Quin* is not an authority that the statutory covenant empowers shareholders to enforce outsider rights against the company.

(c) Claims governed by actual privity of contract between the company and the subscribers

If the formalist Victorian approach to contract law is recalled, there is no reason to think that ordinary privity of contract would not have applied to the original parties to the constitution of registered companies. So, in addition to the company being able to enforce rights in the articles against the subscribers, the latter should have been able to enforce all such rights, including outsider rights, against the company. One might wonder why the courts would develop rules applicable only to subscribers. But from the perspective of Victorian contact-related formalism, determining the contractual relationship between subscribers and the company did not involve creating special rules for subscribers. It simply involved applying the rules that always applied to original parties to contracts.[149]

Cases on the enforcement of the articles between the company and the subscribers are fairly scarce. Nevertheless, when pieced together, they support the argument that the company and the subscribers were original parties to the constitution, and that these contractual relations arose independently of the statutory covenant. Recall that the statutory covenant's purpose, as articulated by Thring, was to spare *non-subscriber shareholders* the trouble of making themselves parties to the constitution. Thring did not think that the subscribers fell within the scope of the statutory covenant. Recall also the statements by Lowe, Lord Selborne and Astbury J to the effect that the company was a signatory to its own constitution. There is also a House of Lords authority, *Venezuela Central Railway Co v Kisch*,[150] which shows that subscribers, unlike other shareholders, were parties to the articles independently of the statutory covenant. The plaintiff, who was induced to contract to purchase shares in a company by misrepresentations that appeared in its prospectus, sued to have the contract rescinded. The articles qualified what was said in the prospectus, to the extent that notice of the contents of the articles would have been fatal to

[143]Ibid, at 44 (emphasis added).
[144]Above n 9.
[145]Ibid, at 319.
[146]The general meeting could alter the articles by special resolution, but those in opposition to Salmon could not command a special majority.
[147]Above n 9, at 443–444 (Lord Loreburn) (emphasis added).
[148](1887) 37 Ch D 1.
[149]It is also notable that some late nineteenth century companies had considerably more than seven subscribers: Guinnane et al, above n 82.
[150](1867) LR 2 HL 99.

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the misrepresentation claim. The defendants argued, inter alia, that the plaintiff was a member, so that, by virtue of the statutory covenant, he should be treated as if he had signed and sealed the articles and thus had notice of their contents. Lord Cranworth, explaining the court's decision that the plaintiff had not become a member because his share purchase had been induced by fraud, contrasted the plaintiff's position with that of subscribers:

> [the statutory covenant] provides … that the articles of association shall bind every member of the company as if he had subscribed and sealed the same, and had covenanted to conform to all the articles thereof. *If the Respondent had actually subscribed and sealed these articles*, he certainly could not have alleged want of notice as to the [contents thereof]. But he never did subscribe or seal them; and in order to make them binding on the Respondent, under the provisions of the [statutory covenant], it is necessary to shew that he had become a member of the company.[151]

In *Re Appletreewick Lead Mining Company*[152] an outsider right was held enforceable by a subscriber against the company. The articles stated that, in consideration of an assignment of their interests in a mine to the company, the subscribers, including the defendant, were to take their shares fully paid.[153] The company's liquidator later claimed that the defendant was liable as a contributory who had received the shares unpaid. The defendant, however, convinced the court that the relevant article constituted a valid contract between himself and the company for the shares to be issued to him fully paid.[154] Malins VC emphasised that the defendant was a party to the contract because he was a subscriber. Also note here that the report of *Browne*, in which the Court of Appeal refused to permit a non-subscriber shareholder to enforce an outsider right, emphasises that '[t]he plaintiff was not one of the subscribers …'.[155]

(d) Insider rights as property rights

According to the construction proposed in Section 3(c), above, the statutory covenant created no privity of contract upon which non-subscriber shareholders could rely to enforce individual shareholder rights in the articles against the company. It will now be argued that, to determine which individual shareholder rights could be enforced by non-subscriber shareholders against the company, the courts deployed a doctrine akin to privity of estate. The ability to enforce rights that were integral to a shareholder's status as shareholder – ie insider rights – was given proprietary effect, so the right to enforce them was transmitted to non-subscriber shareholders when they became shareholders.[156] Outsider rights, on the other hand, were not given proprietary status, so could not be enforced by non-subscriber shareholders against the company.

[151]Ibid, at 123 (emphasis added).

[152](1874) LR 18 Eq 95.

[153]This is an outsider right. It affected the subscribers in their capacity as vendors of property to the company, not as shareholders. The right would not have applied to allottees of new shares (on the power to allot, see Companies Act 1862, s 12), so was not an insider right. D French *Mayson, French & Ryan on Company Law* (Oxford: Oxford University Press, 38th edn, 2023) p 81 treats *Appletreewick* as a case on an outsider right.

[154]The defendant was also able to satisfy s 25 of the Companies Act 1867, which required contracts allotting fully or partly paid shares to be registered with the Registrar of Companies. In the similar *Pritchard's Case* (1873) LR 8 Ch App 956, the defence failed because the shares that the defendant claimed had been allotted to him fully paid had 'not been allotted pursuant to the relevant article' (Gregory, above n 4, at 535–536), so there was no contract that could satisfy s 25. The defendant in *Pritchard* was not a subscriber.

[155]Above n 148, at 2.

[156]NB: this does not necessarily mean that the contractual right itself is capable of conferring a proprietary interest. Eg a tenant's covenant to pay rent is undoubtedly a property-related right, the benefit of which runs to assignees of the reversion, but it does not confer upon the landlord any proprietary interest in unpaid rent.

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(i) Privity of estate in land law: giving proprietary effect to the benefit of contractual provisions

Prior to considering the cases on insider rights, it should be emphasised that whether and when contractual rights could become annexed to property were not novel legal questions. There were various situations, well-known to the Victorian judiciary, in which the question would arise as to when an assignee of property should take the benefit of covenants that were ancillary to that property right. The ancient doctrine of privity of estate was developed to deal with precisely this kind of scenario.

The grant of a lease and the issue of shares conferred assignable property upon the recipient, whilst in both cases the grantor (ie the landlord or the company) retained interest and influence in relation to the property. The mutual rights and obligations of landlords and tenants, like those of companies and shareholders, are laid down in relational contracts. Lease agreements can include covenants that have nothing to do with the parties' capacity as landlord or tenant; parallels can be drawn here with outsider rights in articles of association. The common law long ago[157] reached the conclusion that the benefit and burden of leasehold covenants which touched and concerned the demised property[158] were transmitted to assignees upon assignment of the lease and/or the reversion, ie they were enforceable when there was privity of estate between the parties. The right to enforce property-related leasehold covenants (ie the right to insist on performance of the contractual rights that attached to the land) formed a key dimension of the leasehold estate obtained by the assignee. Similarly, the right to performance of articles conferring insider rights is best understood as a property right obtained by every non-subscriber shareholder upon acquiring shares in the company.

Similar issues arose in cases concerning freehold covenants. Of particular interest is the doctrine of 'building schemes'.[159] When a developer (roughly analogous here to the company) sold plots of land to purchasers (roughly analogous to the subscribers) subject to identical restrictive covenants intended to benefit all properties within the scheme of development, the benefit of these covenants, so long as they were not personal covenants, would pass to later assignees of land within the scheme (roughly analogous to non-subscriber shareholders).[160]

The reasons for enforcing insider rights as property rights were arguably stronger than were the reasons for enforcing covenants that touched and concerned land. An original tenant's assignee, for example, could hypothetically derive some benefit from possession of the land even without being entitled to enforce any leasehold covenants. But what utility would shares be to a shareholder who could not enforce insider rights? Very little, because such a shareholder would have no ability to enforce the rights that are fundamental to their ability to enjoy any benefits of share ownership (eg rights to duly declared dividends, rights relating to the assignability of their shares, voting rights, or rights to surplus on dissolution).

(ii) Authorities on insider rights as property rights

Several authorities emphatically confirm that insider rights are property-related rights, and that this is why they were enforceable. In *Pender v Lushington*,[161] the court held that nominees to whom shares had been transferred by Pender, in order that he could avoid a cap on votes per share, were entitled to exercise their voting rights, even though they were voting in accordance with Pender's instructions. Jessel MR drew a direct analogy with leasehold covenants:

> those who have the rights of property are entitled to exercise them, whatever their motives may be for such exercise … I [endorse], as a crucial test, whether, if a landlord had six tenants whose rent was in arrear, and three of them voted in a way he approved of for a member of Parliament, and

[157]See *Spencer's Case* (1583) 5 Co Rep 16a, 77 ER 72.

[158]See *P & A Swift Investments v Combined English Stores Group* [1989] AC 632.

[159]See *Child v Douglas* (1854) Kay 560, 69 ER 237; *Renals v Cowlishaw* (1879) 11 Ch D 866; *Spicer v Martin* (1888) 14 App Cas 12; *Nottingham Patent Brick & Tile Co v Butler* (1886) 16 QBD 778.

[160]See *Renals v Cowlishaw* (1878) 9 Ch D 125, at 129.

[161](1877) 6 Ch D 70.

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> three did not, the Court could restrain the landlord from distraining on the three who did not, because he did not at the same time distrain on the three who did. He admitted at once that whatever the motive might be, even if it could be proved that the landlord had distrained on them for that reason, that I could not prevent him from distraining because they had not paid their rent. I cannot deprive him of his property …[162]

Several decades later, in *Carruth v Imperial Chemical Industries Ltd*,[163] Lord Maugham articulated the same point: 'the shareholder's right to vote is a property right, and *prima facie* may be exercised by a shareholder as he thinks fit in his own interest'. In *Johnson v Lyttle's Iron Agency*,[164] the company attempted to forfeit a shareholder's shares without following the procedure laid down in the articles. The shareholder was able to resist the forfeiture because, as James LJ explained, it:

> did not comply strictly with the provisions of the contract between the company and the shareholders which is contained in the regulations of Table A. It was the established [general common law] rule … that no forfeiture of property could be made unless every condition precedent had been strictly and literally complied with.[165]

Re Stranton Iron and Steel Company[166] and *Moffatt v Farquar*[167] are both cases in which a large shareholder transferred shares to nominees and the directors refused to register the transfers. In both cases, the courts upheld the shareholder's right, derived from the articles, to transfer their shares and to have the transfers duly registered. In *Stranton*, Bacon VC explained that:

> [t]he applicants are the owners of shares – a class of property of which one of the incidents is a right to transfer it – a right to make a present and complete transfer of it. It is the duty of the directors to receive and register that transfer … or to furnish some reason for refusing to transfer.[168]

In *Moffatt*, Malins VC expressed very similar sentiments:

> [t]his right of transfer is a right of property; and if the directors have an arbitrary power, from any fancy they choose to take up, to say there shall be no transfer, that is an annihilation of property … Such are the views which have been taken in all the cases that have occurred. It is always treated as a matter of property; and where a matter of property is concerned it must not be lightly interfered with.[169]

Malins VC then reiterated his 'very strong views … of the right of every shareholder in a joint stock company, as a matter of property, to protect that property from being interfered with'.[170]

(iii) Authorities that the statutory covenant had nothing to do with insider rights

The authorities also demonstrate that the statutory covenant had nothing to do with the enforceability of insider rights. In *none* of the above-mentioned cases was the statutory covenant mentioned as the source of the right's enforceability. Furthermore, in *Oakbank Oil Company v Crum*,[171] the House of Lords unanimously held, without mention of the statutory covenant, that a shareholder could enforce against

[162]Ibid, at 75.
[163][1937] AC 707 at 765.
[164](1877) 5 Ch D 687.
[165]Ibid, at 693–694.
[166](1873) LR 16 Eq 559.
[167](1877) 7 Ch D 591.
[168]*Stranton*, above n 166, at 562.
[169]*Moffatt*, above n 167, at 605–606.
[170]Ibid, at 614.
[171]Above n 107.

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the company a provision in the articles requiring the latter to pay duly declared dividends in proportion to shareholders' shareholdings.[172] But in a near-contemporary case concerning the right of the company to enforce its articles against a shareholder, the leading judgment, delivered by Lord Blackburn (who also sat in *Oakbank*) did rest on the statutory covenant.[173] Most tellingly, Wedderburn, in his celebrated article on shareholder rights, cited *14* other cases in which insider rights were enforced against the company.[174] Although Wedderburn called them rights which 'spring from the "contract under section 20"',[175] in *none of these cases* was the enforceability of the insider right attributed by the court to the statutory covenant.

(e) Non-subscriber shareholders could not enforce outsider rights

The courts consistently refused to permit non-subscriber shareholders to enforce outsider rights against the company, invariably on the ground that they were not actual parties to the articles and so did not take the benefit of the outsider rights. Because outsider rights are personal rights, the property-related considerations which justified the enforcement of insider rights were inapplicable. This was confirmed in two famous Court of Appeal decisions. In *Eley v Positive Government Security Life Assurance Company*[176] a non-subscriber shareholder attempted unsuccessfully to enforce a right in the articles to a life tenure as the company's solicitor. Lord Cairns LC[177] said that the article was a 'covenant between the parties to it', and that the plaintiff was 'no party to it'.[178] Lord Cairns also exhibited hostility to outsider rights, tersely saying that 'a contract of the kind suggested to exist in this case ought not to receive any particular favour from the Court'.[179] Similarly, in *Browne v La Trinidad*,[180] a non-subscriber shareholder sought to enforce against the company a certain tenure as a company director. Cotton LJ stated that 'though a person in whose favour a stipulation is made in the articles may afterwards have shares allotted to him, he does not by that means become in the same position as if he had entered into a contract with the company'.[181] Recall here that the reporter in *Browne* emphasised that the plaintiff was a non-subscriber shareholder.[182] In neither case was any suggestion made that the claims would have succeeded had the plaintiffs sued *qua* members.

Notably, there do not seem to be any clear nineteenth century authorities that a non-subscriber shareholder could invoke the statutory covenant to enforce an outsider right against the company. Gregory,[183] whose survey of the authorities is the most comprehensive, cited what he regarded as five such cases. But, of these, *Quin* and *Imperial*, as explained above, were decided on the *inter se* enforceability of the statutory covenant. Of the other three, in *Pulbrook v Richmond Consolidated*

[172]Rather than proportionally to the paid-up portion of their shareholding.

[173]*Bradford*, above n 126.

[174]Wedderburn, above n 5, cites *Moffatt*, above n 167; *Marks v Financial News* (1919) 35 TLR 681 (Ch); *Cannon v Trask* (1875) 20 Eq 669 (Ct of Chancery); *Staples v Eastman Photographic Co* [1896] 2 Ch 303 (CA); *Greenhalgh v Arderne Cinemas* [1946] 1 All ER 512 (CA); *James v Buena Ventura Ltd* [1896] 1 Ch 456 (CA); *Moodie v Shepherd (Bookbinders) Ltd* [1949] 2 All ER 1044 (HL); *Burdett v Standard Exploration Co* (1899) 16 TLR 112 (Ch); *Godfrey Phillips Ltd v Investment Trust, Ltd* [1953] Ch 449 (Ch); *Wall v London & Provincial Trust Ltd (No 2)* [1920] 2 Ch 582 (Ch); *Foster v Coles and Foster, Ltd* (1906) 22 TLR 555 (Ch); *Evling v Israel and Oppenheimer, Ltd* [1918] 1 Ch 101 (Ch); *Sweny v Smith* (1869) LR 7 Eq 324 (Ct of Chancery); *Goulton v London Architectural Brick and Tile Co* (1877) WN 141 (Ch). See also *Re Alma Spinning Company* (1880) 16 Ch D 681 (Ch).

[175]Wedderburn, above n 5, at 209.

[176]Above n 10.

[177]With whom Lord Coleridge CJ and Mellish LJ agreed.

[178]Above n 10, at 90.

[179]Ibid, at 89.

[180]Above n 148.

[181]Ibid, at 13–14. NB: although Lindley LJ stated (at 14–15) that the statutory covenant makes an article 'binding between the company and [the plaintiff], he evidently thought it did not confer upon the plaintiff the *benefit* of rights, for the plaintiff had 'no contract with the company that he can enforce'.

[182]Ibid, at 2.

[183]Above n 4.

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Mining Co,[184] a director/shareholder was able to obtain an injunction restraining his exclusion from board meetings on the basis that he had been validly appointed in accordance with a share qualification clause in the articles.[185] Jessel MR, however, made no mention of the statutory covenant. Moreover, he suggested that the right to attend board meetings affected the plaintiff's 'individual interest as a shareholder'.[186] In *Orton v Cleveland Fire Brick*,[187] it was held that a director who had performed his duties was entitled to be remunerated in accordance with the articles. The statutory covenant was cited, but as authority that Parliament intended the company to be bound by its articles, not that the statutory covenant confers upon shareholders the benefit of the company covenants.[188] Indeed, there is no suggestion anywhere in the report that the director was a shareholder.[189] Furthermore, in *Re Kemp*, Wright J treated *Orton* as 'no longer law' – by then, it had been established that 'the courts … treated directors' service contracts as being separately made, but incorporating the articles'.[190] Finally, in *Re Dale and Plant*,[191] the company's liquidator unsuccessfully argued that damages owed to the managing director were owed to him in his capacity as shareholder, not managing director. Although the articles purported to appoint the managing director, they did so pursuant to an agreement between him and the company, and Kay J did not mention the statutory covenant, let alone hold that it or the articles were the source of the managing director's contractual rights. Thus, none of these five cases would seem to provide convincing support for the enforcement of outsider rights by non-subscriber shareholders, and they certainly do not displace the strong authorities of *Eley* and *Browne*,[192] especially given that, in *Browne*, Lindley LJ stated that there were cases 'subsequent' to *Eley* which showed that, by 1887, the law in this respect 'must be taken as settled'.[193]

(f) Clarity on shares as bundles of rights

Recall that by the mid-nineteenth century, the *Bligh* line of cases had determined that shares were a new kind of personalty, but there was a gap in the law because this line of cases had not determined the precise nature of this property. By 1901, Farwell J was able to assert confidently that a share is 'an interest … made up of various rights contained in the contract [in the articles], including the right to a sum of a money or more or less amount'.[194] But Farwell J did not explain how to determine *which* rights in the articles comprise the share,[195] and the main academic contributions on the legal reconceptionalisation of shares cite no cases on this point either.[196] Pennington came the closest, but he argued that the statutory covenant generates 'the contractual rights and obligations of each member',[197] without drawing any distinction between insider and outsider rights.

[184](1878) 9 Ch D 601.

[185]The board argued that, since he was not the beneficial owner of shares registered in his name, he did not satisfy the share qualification. Jessel MR held that the article did not require *beneficial* ownership.

[186]*Pulbrook v Richmond Consolidated Mining Co*, above n 184, at 612.

[187](1865) 3 Hurl & C 868.

[188]Which is not inconsistent with the argument that the company was an original party, because the statutory covenant did mention this.

[189]*Melhado v The Porto Alegre, New Hamburgh, and Brazilian Railway* (1874) LR 9 CP 503 is a strong authority that non-shareholder outsiders are not parties to the articles.

[190]Gregory, above n 4, at 532. See *Isaac's Case* (1892) 2 Ch 158.

[191](1889) 43 Ch D 255.

[192]NB: Cotton LJ sat in *Browne* and *Imperial* and apparently saw no contraction between them.

[193]Above n 148.

[194]*Borland's Trustee v Steel Brothers & Co Ltd* [1901] 1 Ch 279.

[195]Pennington, above n 5, at 143, states that there are no other authorities on this point.

[196]Ireland, above n 17; C Stebbins 'The legal nature of shares in landowning joint stock companies in the nineteenth century' (1987) 8 Journal of Legal History 25; J Jeffreys 'The denomination and character of shares, 1855–1885 (1946) 16 Economic History Review 45 at 54.

[197]Pennington, above n 5, at 144.

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According to the construction presented in this article, the nature of the rights that comprise the share was determined by the cases in which the benefit of insider rights, but not outsider rights, was given proprietary effect. These cases explain why all shareholders obtain the benefit of all rights in the articles that affect them *qua* shareholder. Indeed, this explanation is still applicable today – a modern share is generally understood as comprising 'the bundle of rights attached to each share, as determined by the legislation and articles of association'.[198] This view was recently confirmed by Lord Reed, who described a share as consisting of 'a right of participation in the company on the terms of the articles of association … including a right to vote on resolutions at general meetings, a right to participate in the distributions which the company makes out of its profits, and a right to share in its surplus assets in the event of its winding up'.[199]

Conclusion

This paper, by examining the historical lineage of the company constitution, has challenged orthodox accounts of its bindingness by arguing that the enforceability against the company of individual shareholder rights in the articles was, from 1856 onwards, governed not by the statutory covenant, but by ordinary private law principles. Subscribers could rely on privity of contract to enforce all shareholder rights against the company, whilst non-subscriber shareholders could rely on privity of estate to enforce insider rights, but not outsider rights, against the company. This construction, which has overwhelming support from the authorities, relies on two key insights that have hitherto not been recognised by modern scholars, but which can be gleaned from contemporary sources.

First, the statutory covenant's wording was not a product of entity blindness. The subscribers and the company were, as a matter of ordinary contract law, original parties to the constitution. The statutory covenant's only intended function was to deem non-subscriber shareholders to have covenanted to observe the constitution. Secondly, each non-subscriber shareholder's covenant was deemed to have been executed at the time at which they joined the company. The statutory covenant did not, therefore, confer upon non-subscriber shareholders the benefit of the company's obligations. This meant that it was left to the courts to apply ordinary principles of property law to determine which shareholder rights could and could not be enforced by non-subscriber shareholders against the company.

By highlighting the role of ordinary contract and property law principles, and the consistency with which these principles were applied by the courts in cases concerning shareholder rights, the construction proposed here presents a novel and comprehensive solution to the long-standing academic controversy surrounding insider and outsider rights. The proposed construction also has implications for the modern law. The updated statutory covenant in section 33(1) of the 2006 Act deems the company to be a covenantor, so the company is no longer an actual contractual party. But if the company's covenant is deemed to have been executed at the time of incorporation, and each shareholder's covenant is deemed to have been executed at the time at which they joined the company, the ability of non-subscriber shareholders to enforce rights in the articles will continue to hinge on privity of estate. This interpretation of section 33(1), by determining which rights in the articles can be enforced by shareholders against the company, provides clarity on the contractual effect of the company constitution. It also has practical application because suing to enforce insider rights continues to provide an avenue for minority shareholders to invoke the articles against the company.[200] It might, however, be advised that future companies legislation should close the loophole that enables subscribers to enforce outsider rights. This would foreclose the possibility of unscrupulous subscribers inserting into the articles outsider rights

[198]Talbot and Kokkinis, above n 39, p 36. NB: some shareholder rights (eg pre-emption rights on share issues in public companies) are now provided for by mandatory statutory provisions. See also Pennington, above n 5.

[199]*Marex Financial Ltd v Sevilleja* [2020] UKSC 31, [2021] AC 39 at [31] Lord Reed PSC (with whom Lady Black and Lord Lloyd-Jones JJSC agreed).

[200]For recent case in which a shareholder enforced an insider right against the company see *Cosmetic Warriors v Gerrie* [2017] EWCA Civ 324.

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that they could later enforce, an eventuality that cannot be entirely discounted, especially now that, with the advent of rapid electronic company registration, many subscribers of newly formed companies are likely to envisage retaining an ongoing interest in the company.[201]

The arguments presented in this paper also have wider significance for accounts of the evolution of registered companies. This is because the cases on insider and outsider rights, when understood as they were understood by the judges who determined them, uncover a crucial step in the nineteenth century transformation of the share from an equitable interest in company assets into a novel kind of personalty. The judicial treatment of insider rights as property rights determined how and why the share came to be perceived as comprising a bundle of transferrable contractual rights deriving from the articles. This in itself was a very important part of the wider progress of corporate law towards recognising the reified company that is familiar today. Moreover, as the Supreme Court has recently confirmed, shares are still widely considered to consist of a bundle of transferrable rights deriving primarily from the articles. This paper's findings, if applied to the modern law, provide a reasoned explanation – and, it is submitted, the explanation with the most convincing support from the case law – as to which of these rights comprise this bundle and why this is so. In short, the cases on the enforcement of shareholder rights against the company, when read in light of the analysis in this paper, reveal the property law principles that underpin the concept of the transferrable registered company share.

[201]Until recently, the majority of newly registered companies were 'off-the-shelf companies', whereby company formation agents were the subscribers. They would sell their shares to persons wishing to promote a new company. Electronic registration has accelerated the registration process, so the use of off-the-shelf companies is no longer necessary. See Davies et al, above n 7, pp 293–294.

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