A SOCIAL HISTORY OF COMPANY LAW
Great Britain and the Australian Colonies 1854–1920

ROB McQUEEN
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I would like to dedicate this book to

my late father Ian Hamilton McQueen (1911–2004) who was always supportive and encouraging of my work, even when he had his doubts,

and

to my partner Valentina Luckus, without whom this book would never have seen light of day.
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Chapter 1
Introduction

The limited liability corporation is an apparently indispensable aspect of modern commercial life. All varieties of commercial undertaking adopt limited liability form, from giant corporate groups to small family businesses. Even non-commercial enterprises often register as limited liability corporations. The principal legal benefits obtained when registering as a limited enterprise are perpetual succession, a separate legal identity from the incorporators and a limitation of the liability of the investors and/or members of the relevant undertaking. However, registration often also confers a series of less apparent benefits. For instance, certain categories of limited corporations do not have to provide annual audited financial returns, and others do not have to provide an annual directors’ report to the registering authority.

Despite these advantages bestowed by incorporation on those enterprises, the company form was not necessarily the obvious or preferred model of those considering new legal structures for enterprise in the early to mid-nineteenth century. As Ron Harris has recently noted, up until the end of the sixteenth century and even beyond, the preferred structure for private business organizations was the partnership, although business structures constituted themselves in a variety of other legal forms. The company form was in contrast during this period almost exclusively reserved for municipal and religious bodies and was rarely if ever utilized for business organizations. Therefore the fact that the joint-stock corporation became dominant in the modern world:

was not the result of a lack of alternative conceptions, features, and concrete forms for business undertakings. On the contrary, it is the convergence on the company form as the legal structure for business organizations, from the mid-nineteenth century onward, that is an unexpected and puzzling outcome in light of the diversity of alternative legal structures for businesses.\(^1\)

In the following, some of the key reasons for the success of this legal form for business enterprise over all other alternatives are explored. The factors for the shift in English attitudes in respect of the company as an appropriate form for business undertakings, from a position of virtual hostility in the eighteenth century, in which England had the most restrictive policy to such undertakings in Europe, to

a position in which England had the most permissive policy in providing access to the company form for business enterprises by the mid-nineteenth century, are considered.

The manner in which those investors in business organizations have been transformed from partners, with management responsibilities and personal liability for debts, into mere rentiers with no say in the management of the enterprise or personal liability for its debts is a key focus of the early chapters of the text. This transition was, it is suggested, neither smooth nor unambiguous in its trajectory. Indeed it has been stated by Timothy Alborn that in the period before the introduction of limited liability legislation in the mid-nineteenth century, shareholders often saw themselves not as mere rentiers in the enterprises in which they held shares, but rather as an active ‘polity’ in these undertakings.

Even during the period covered by Alborn’s analysis this internal ‘polity’ in companies arguably only manifested itself in specific types of enterprise; those which were ‘quasi public’ in nature, such as banks and railways. In other joint stock enterprises shareholder politics of the sort identified by Alborn were either absent altogether, or more muted than was the case in the railway and banking sectors. In most joint stock companies shareholders have always acted more as passive rentiers than active participants.

Whilst there is some evidence that in the early stage of the evolution of joint stock companies shareholders in some companies in particular industries played a more ‘activist’ role in company affairs, it was nevertheless the case that by the time limited liability legislation was introduced this form of activism was but a fading memory. Pearson notes in this regard:

Ultimately … the evidence … suggests that, even at its height, shareholder power was severely limited. The key to this power was access to information and the right of redress, including the right to elect and dismiss directors. Yet the daily management of an office and dealings in the boardroom were seldom made transparent … companies also developed more elaborate managerial structures, increasingly devolving strategic, financial and technical matters to

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2 See Alborn T L (1998) Conceiving Companies: Joint-stock Politics in Victorian England, (Oxford & New York: Routledge), page 18 in which he claims that the new joint-stock enterprises of the early nineteenth century were not simply seen by contemporaries as profit maximizing machines, but were also perceived as ‘political’ bodies with at least some degree of accountability to the broader public based on ‘democratic’ principles. These organizations were seen as quite unlike the older and larger chartered enterprises, such as the East India Company, which were considered by many to be autocratic organizations. According to Pearson, R (2002) Shareholder Democracies? English Stock Companies and the Politics of Corporate Governance during the Industrial Revolution, English Historical Review, vol. 117, pp. 840–866, p. 842, many of the new rail companies and banking enterprises established in this period not only were ‘local’ organizations, but were also constituted as ‘little republics’ not unlike the range of local voluntary associations being established during this period.
small sub-committees of directors, and, in the process, further reducing the transparency of their operations for shareholders. Obstacles were thus placed in the way of ‘publicity’, while the small numbers attending most normal shareholders’ meetings smoothed the path for company directors towards unfettered control. Few directors resigned as result of shareholder protests, although mismanagement and fraud were recurrent problems. In relative terms power lay with the boardrooms throughout this period, with little more than the occasional genuflexion towards their public.  

Indeed, Paddy Ireland has recently suggested that the Joint Stock Companies Act of 1844 was neither specifically aimed at encouraging the formation of joint stock companies, nor at encouraging shareholder ‘democracy’, but rather at protecting rentier shareholders from frauds being perpetrated by managers. The legislation sought to protect shareholders from fraud by requiring ‘publicity’ of a company’s affairs to intending investors, so that they might make more informed decisions with respect to their investments. This principle of ‘disclosure’ embodied in the 1844 Joint Stock Companies Act has been in constant conflict with companies desire to keep there internal affairs ‘private’ ever since. Hence the later legislative division between public companies, with a range of disclosure requirements imposed upon them, and ‘private’ or ‘proprietary’ companies, which are accorded privacy with respect to their financial affairs, but at the expense of not being able to solicit investments from the ‘public’.  

In the early to mid-nineteenth century the lack of moral responsibility appertaining to corporate entities was quite shocking to contemporaries. The prevailing view was that those involved in commercial activities, whether as active participants or passive investors, should be prepared to accept responsibility for the financial losses suffered by others if the enterprise in question failed. The nature of appropriate mechanisms for monitoring corporate behaviour by regulatory authorities, and the types of information required by investors with respect to making informed investment decisions have been core areas of controversy in respect of the role and purposes of company law since the middle of the nineteenth century. The perceived role of regulatory authorities in ensuring high standards in corporate governance has changed over time. In many ways it has now gone full circle from the initial belief of Robert Lowe, as architect of general limited liability legislation, that the State had no role in regulating corporate behaviour to the later view that Corporate Registrars should act as a ‘policemen’ and ‘enforcers’ of good corporate behaviour, to the prevailing view today that these authorities have a key role in ensuring that robust practices of corporate governance are in place to ensure appropriate self regulation occurs. This shift from an enforcement role to a more facilitative role with respect to

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ensuring good governance practice has been one of the main developments in corporate regulation over the past few decades.

Whilst this development has been lauded in many quarters, others have been highly critical of the long-term implications of these developments:

By the early 1990s, the principle of shareholder primacy had been restored with a vengeance. Corporate managers today are much more accountable than they were – to the *rentier* shareholders with whom they are now much more closely entwined. Hence the relentless pursuit of ‘shareholder value’ by whatever means and whatever the human, social and environmental costs. The consequences have been only too clear: a massive increase in speculative financial exchanges, regular financial crises, numerous corporate scandals, falling growth rates, a reduction in the rates of productivity growth and soaring executive remuneration. Despite this, more and more policymakers, with the loyal support of many academics, still insist upon the economic superiority of an unequivocally shareholder-oriented model of the corporation and are working hard to extend its global reach through the agencies of the World Bank and the OECD.5

The 2008 economic crisis is now seen, at least in some quarters, as a signal of the failure of such policies and the advocacy of the self-regulatory market, which underpin such systems of corporate law. Forms of corporate law that embrace self-regulation at the expense of government intervention rely upon a belief in the self-regulating powers of the market. However, recent events must severely question the sustainability of such assumptions and beliefs and a consequent return to a more interventionist form of corporate regulation. The prominent US social commentator, Naomi Klein, has stated in respect to the 2008 economic crisis that:

The economic chaos that we’re seeing right now on Wall Street and on Main Street and in Washington stems from many factors, of course, but among them is the ideas of Milton Friedman and many of his colleagues and students from this school. Ideas have consequences.

More than that, what we are seeing with the crash on Wall Street, I believe, should be for Friedmanism what the fall of the Berlin Wall was for authoritarian communism: an indictment of ideology … because what we have been living … is a policy of liberating the forces of greed to discard the idea of the government as regulator, of protecting citizens and consumers from the detrimental impact of greed… to a liberation movement, indeed the most successful liberation movement of our time, which is the movement by capital to liberate itself from all constraints on its accumulation.6

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5 Ireland, P (2008), 16.

6 http://www.democracynow.org/2008/10/6/naomi_klein.
Whilst there have already been a number of proposed revisions to corporate law as a consequence of the financial crisis of 2008 most of these have been, as one group of scholars\(^7\) has described them, directed at a ‘shallow level’ rather than at the underlying systemic failure which is at root arguably the cause of the current economic crisis. Much of the initial discussion around the governance failures in those enterprises whose collapse precipitated the current crisis has focused on the ‘failures’ of their CEOs, but has been silent on the role of boards in these companies, and on the possible systemic causes of the collapse of a number of major economies. The possible contribution of the corporate reforms over the past few decades in the collapse has been little discussed. Neither has there been any real analysis of the present economic failures in light of history, other than vague analogies being made to the 1987 crisis or the 1930s Great Depression. In particular there has been little discussion as to the possible implications of the deregulatory trend in corporate law over the decades preceding the collapse. The possible contribution that this shift away from government regulation in corporate law to a more self-regulatory regime has made to the current economic difficulties has rarely been discussed in the reporting of the ongoing financial crisis in the financial and business press.

Nevertheless, some of the testimony on the Causes and Effects of the Lehman Brothers Bankruptcy before the United States House of Representatives Committee on Oversight and Government Reform has indeed raised the matter of government agencies taking a much more activist role in corporate regulation in future:

At the outset there must be a regulatory environment that is realigned with the interests of investors rather than the recent alignment with corporate management. Transformation of the regulatory environment requires sustained funding of the applicable regulatory bodies in a manner that does not breed conflicts or promote policies adverse to investors. Sustained investor confidence requires a regulatory framework that allows investors an opportunity to be heard in a meaningful and timely way through access to the corporate proxy by investors, through say on pay for investors regarding executive compensation, and through an unwavering commitment to pursue corporations and individual executives who disregard the duty owed to the shareholders\(^8\).

A better appreciation of the historical evolution of company law is one means by which a number of the underlying factors in the recent economic crisis might

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perhaps be better understood. Indeed, given the significant impact of limited liability legislation on economic and social relations it would seem that a comprehensive historical examination of the factors surrounding the introduction and subsequent operation of the legislation both in England and in those other places where it was adopted would be a subject which would evoke some considerable interest. This, however, has not been the case. More than a century and a half after the introduction of the first Limited Liability Companies Act only a small number of detailed historical analyses of this organizational form exist. A number of these studies date from the 1930s or earlier. These detailed historical analyses have, over the years, been supplemented by a number of influential, but more populist, accounts of the history of corporation law. Nevertheless, in recent years there has been a spate of new historical writing on the history of the limited liability form, much of which is informed by a social or cultural history perspective. In particular the social and cultural history analysis of the rise of the corporate form by Timothy Alborn, and more recently that of James Taylor and his collaborators.

9 The principal studies examining the introduction and subsequent history of limited liability legislation in Great Britain are:


There are also some good scholarly studies of the history of corporation law in the USA. These include:


as well as the detailed analysis of railway capitalism by Rande Kostal and Ron Harris’s work on the inter-relationship of the rise of the joint stock company and industrialization have all engaged with previously un- or under-explored aspects of the emergence of the modern limited liability company.

The present study expands on some of the themes explored in these earlier studies and develops a number of new aspects in the study of the limited liability corporation as a form of business organization. The principal concern is to cast new light on some of the core features of the scheme of ‘modern’ company law which originated in England and which prevails today in Australia and a number of other former colonies and trading partners of England. It will be suggested that many of the central features of modern company law as originally conceived rested upon a determinate framework of objectives and techniques. These in turn implied a certain field of political forces. Once these were removed, as they were both in England itself and in the colonies, many of the core characteristics of ‘modern’ company law were unlikely to (and did not) operate as intended.

It must also be said that neither the objectives, techniques, discourses nor the political field from which ‘modern’ company law emerged can be read in any simple fashion off the legislation, policy documents or administrative practices which have grown up around this modern organizational form. The underlying ‘motives’ for introducing this new business structure in the middle of the nineteenth century are not as transparent as some writers have been prepared to assume. The introduction of this new commercial form was not directly referable to demands being made by those in key sectors of business. Nor, at the stage it was taken, was it a necessary step for ‘capital in general’, as is evidenced by the fact that over ninety per cent of English businesses in core industries continued to remain unincorporated until well into the twentieth century.

The decision to describe the present study as one directed ‘towards a social history of company law’ is not an arbitrary one. This description is intended to convey the sense that this study is not part of the ‘tradition’ of legal history or economic history, the two sub-disciplines that have dominated the historical description and analysis of the evolution of company law in the past. Nonetheless the present study does owe a considerable debt to a number of individual studies which have been conducted from the perspective of these disciplinary areas. Further, the description of the present study as one that is attempting to delineate the possible characteristics of a ‘social history’ of company law is used to emphasize the ‘social’ nature of the discourses surrounding the corporate form during the nineteenth century. A recognition of the manner in which particular forces condensed around certain concrete proposals in respect of company law during the middle of the nineteenth century, it is asserted, is necessary for a proper understanding of the contradictory and over-determined nature of the form of

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12 Harris, R (2000).
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‘company law’ which emerged from the debates as to the role of the state in the facilitation and regulation of corporations. An understanding of the incoherent and contradictory form which that law took is vital for a proper understanding of many of the controversies and contradictions which continue to plague corporation law today.

The debates concerning the introduction of general corporation legislation in England during the 1840s and 1850s provide considerable insight into the ways in which various interests conceived the nature of the corporate form, corporate regulation and the role of incorporation in the overall economic system. These competing views on the purpose of incorporation legislation constitute one of the points of departure for the present study.

Unlike some other institutional reforms of the nineteenth century, corporation law is an area of reform in which a precise event apparently delineates the ‘new’ from the ‘old’, the ‘modern’ from the ‘past’ – this event being the introduction of the Limited Liability Act of 1855 and the Joint Stock Companies Act of 1856. It is assumed by most legal commentators and historians that the introduction of this legislation defines a schism with a ‘past’, in which England lagged considerably behind other European countries with respect to corporation legislation, and a ‘present’ in which England boasted a far more advanced and sophisticated form of corporation legislation than that in any other country.

Perhaps one of the reasons for the strong adherence to this belief in a defining point in the Limited Liability Act of 1855 and the Joint Stock Companies Act of 1856 for ‘modern company law’ is the hyperbolic rhetoric with which the ‘architect’ of limited liability legislation, Robert Lowe, surrounded the event of their enactment. Lowe soundly criticized as ‘unworkable’ and ‘naive’ the earlier company legislation of 1844, which had been introduced as a result of the recommendations of the Gladstone Committee on Joint Stock Companies. Lowe severely criticized the notion that had been advanced by this Committee, that the state should take an active role in the regulation of joint stock enterprises. He characterized such ideas as ‘laughable’. As a consequence of Lowe’s acerbity in 1856, and his presence on all subsequent inquiries into the operation of company law until his death in the 1880s, no genuinely ‘regulatory’ reforms were again advanced until the Davey Committee in the 1890s.

The present study questions the teleology that has surrounded ‘modern’ company law. The prevailing notion that the shift from the regulatory regime of the 1844 company legislation to the laissez-faire idyll of the 1856 limited liability enactment was a shift from a ‘pre-modern’ to a ‘modern’ form of company law will be questioned. It is suggested in the following that the focus of many existing studies on legislative transformations is misplaced. Changes in practice are not necessarily synonymous with changes in legislation.

One of the central assertions of the text is that despite almost a century and a half of ‘modern’ company law we are, in many respects, still in the grip of pre-modern forms of business organization. As has been asserted by Margaret Rix and other commentators on the history of corporation law, by the time
reform was practicable it had become impossible due to the entrenched nature of interests cohering around the status quo. It will be suggested in the following that the emergence of the proprietary limited company and the ‘modern’ form of company law are co-extensive, rather than at odds with each other, as is commonly assumed.

In attempting to challenge a number of the preconceptions relating to the evolution of ‘modern’ company law, the present study engages with many of the existing ‘legal’ and ‘economic’ histories of the corporate form. The leading work in the field is arguably still J B Jeffreys’ monumental thesis ‘Trends in Business Organization in England 1856–1930’, which was completed in 1938, and which emerged from the then current interest among a group of staff and students at the University of London (in the section soon to become the LSE) in the historical evolution of forms of commercial organization. Other members of this loose grouping included H A Shannon, Margaret Rix and Henry Essex-Crosby. In light of the experience of England during the Depression this group was greatly interested in examining the issue of the degree to which the introduction of incorporation legislation had affected economic development. Had it been a bad or good ‘moral force’ in economic relations? To what degree was regulation or the lack of it complicit in the boom/bust cycle? To what extent was the introduction of ‘incorporations’ legislation related to the decline of England as world power? These were the sort of questions which interested this group of economic historians. In many ways Shannon was the leader of this group, providing inspiration and questioning the alleged positive contribution of modern company law to economic development. Shannon led off in the 1930s with a series of path-breaking studies which asserted the ‘failure’ of ‘modern’ company law. This formed a basis for much of the subsequent work, including the omnibus study of business organization in England undertaken by J B Jeffreys.

One of the key areas in which Jeffreys built upon the work of Shannon was in exhuming the reasons implicated in the introduction of a general system of limited liability incorporation in England in the mid-1850s. In examining this question Jeffreys was, in some respects, also following in the pioneering footsteps of Bishop Hunt, who in 1936 had published his thorough study of the history of incorporation legislation and the corporate form in England. The work of Shannon, Hunt and Jeffreys clearly rejects any simple relationship between the introduction of limited liability incorporation and economic necessity. Most key sectors of English capital, rather than demanding the new legislation, actively opposed it. Jeffreys’ thesis, as to the factors responsible for the introduction of the legislation, was that Home County investors had, in the mid-1850s, very few investment outlets which offered a moderate level of risk combined with the promise of significantly higher returns, other than those offered by the existing ‘blue chip’ investments such as Consols.

Rix and Essex-Crosby were both concerned, perhaps more so than Jeffreys, with the question of how companies which were formed under the legislation were regulated and to what degree (if at all) the state’s role in regulation of companies
could have been improved. Rix, in particular, identified a series of ‘structural’ impediments to effective regulation. She refuted the *laissez-faire* premise upon which the 1856 legislation was founded – that investors would ensure that ethical standards were preserved in the conduct of companies and that the state had little or no role to play in the regulation of companies. Rix asserted that the notion of regulation as a ‘private’ affair between investors and incorporators was wrong and that it is a ‘public’ matter as between the state and promoters and incorporators. Rix suggests that the state had abdicated its responsibility to remedy what had become glaring defects in the incorporation legislation by the latter part of the nineteenth century.

As a consequence corporate fraud was rife and often implicated in the ‘bust’ period of the boom and bust cycle. The implications of Rix’s research, however, are more profound insofar as they suggest that with the widespread adoption of corporate form by small undertakings from the 1880s onwards any real possibility of change was lost. In other words, regulatory deficiencies with respect to corporate behaviour were not merely superficial, but rather were systemic, deeply embedded in the nature of the ‘modern’ corporate form itself.

In addition to the emerging critique of the insufficiencies of company legislation in providing an adequate framework for regulation there were a number of other important issues concerning business organization and the corporate form tackled by members of the LSE ‘group’. One of the more pathbreaking of these analyses is that by Radhe Rungta dealing with the operation of the corporate form in a colonial setting. This work traverses, in the context of company law, many of the issues examined in other contexts by commentators on imperialism and the colonial relationship. In particular Rungta examines the question of whether the introduction of ‘modern’ English company law to colonies such as India (and Australia) was a positive contribution to those nations’ development (as is often claimed) or an impediment to their independent economic development (and thus an instance of ‘imperialism’).

Rungta’s conclusions are that English company law often, if not invariably, ran against local economic interests. The main purpose of introducing English company law to India was not to bring ‘modernity’ to India, or to replace inadequate or unworkable local forms of business organization. Rather it was to do with a far more mundane consideration – the facilitation of trade between the imperial power (England) and the colony of India. By having the same formal structures for the formation and administration of business organizations in both the ‘mother’ country and the colonies, trade was better facilitated, giving English businesses the capacity to draw on both capital at home and capital in the colonies and to be able to have as few barriers as possible to the operation of business entities originally formed in England.

Rungta points to how the satisfaction of these imperial needs acted against local interests. English company law often, as it did in India, displaced local forms of business organization that were more suited to local conditions. The ‘modern’ form of English company law that replaced these local structures was, in contrast,
ill suited to colonial conditions. The absence of administrative infrastructure, the unsuitability of ‘limited liability’ structures in a context in which it was already difficult for local creditors to follow up their debtors, and the complete failure of colonial bureaucracies to be able to enforce even the desultory regulatory regime applying under limited liability legislation meant that the legislation was often unworkable in these colonial settings.

In addition to the significant contributions of the ‘LSE group’ in respect of the history of the corporate form there has been a number of more recent analyses which add significantly to our understanding of the operation of the legislation in the nineteenth century. The first of these contributors is Professor Peter Payne who, in addition to his studies of the role of entrepreneurship in English economic development\textsuperscript{13}, also contributed some of the most detailed statistical analysis of nineteenth century companies. His work on Scottish companies has contributed greatly to our knowledge of the factors contributing to longevity and the economic viability of companies in the nineteenth century\textsuperscript{14}. P L Cottrell has also contributed significant work on the development, longevity of and investment patterns in nineteenth century English companies\textsuperscript{15}. Using statistical analysis, Cottrell has challenged Jeffreys’ thesis regarding the role of Home County investors in lobbying for the introduction of the 1856 legislation. While not denying the significance of an investor lobby, he suggests that it was far more geographically diffuse than Jeffreys would lead us to believe. On the question of regulation, Cottrell follows Rix in asserting that significant reform was not achieved in England as a result of the strength of the company director and company promoter lobby during much of the nineteenth century. By the time the influence of these groups was waning a whole complex of forces had condensed around the corporate form, most significantly those forces representing the small business lobby, which effectively prevented necessary reforms being implemented.

In addition to the mainstream economic history research there has also been an interest in the history of the corporate form on the part of Marxist and social historians. Among these groups of studies are those published by Paddy Ireland. In the first of these studies Ireland examines the rise of the limited liability corporation, attempting to demonstrate the manner in which the emergence of the proprietary (or private) company represented a significant departure from the intentions of the authors of the original limited liability legislation\textsuperscript{16}. Ireland indicates that the acceptance of the limited liability form as applicable to ‘private’

companies effectively corrupted the form and has subsequently acted as a significant impediment to appropriate and/or effective regulation of corporate entities.

In a later piece, written with a number of colleagues from the University of Kent, Ireland follows Rudolf Hildferding\(^{17}\) and analyses the nature of the ‘share’ and its role in the popularization of ‘rentier’ capitalism\(^{18}\). In contrast to conventional accounts of the manner in which the corporation came to be ‘separated’ from those who compose it, Ireland and his colleagues have asserted:

> These [conventional] explanations do not stand close scrutiny. The ‘complete separation’ of companies and their members emerged for the first time in the mid-nineteenth century. It was reflected in the changed consequences attributed to incorporation, but incorporation was not its source. Its origins are to be found in the changing economic and legal nature of the joint stock company share\(^{19}\).

(emphasis in original)

A number of other researchers have also examined social aspects of the introduction and evolution of limited liability company legislation. Amongst these researchers are Sugarman, Rubin and Cornish and de Clark. Sugarman has perhaps been the most adventurous of these scholars in attempting to understanding particular aspects of the evolution of the ‘modern’ company in terms of Michel Foucault’s later work on ‘governmentality’. In discussing the applicability of the critique of public/private dualism in the context of the analysis of modern company law, Sugarman notes that one of the unfortunate corollaries of such analyses is their tendency to treat ‘the law’ as a unified totality, exclusively the domain of the state. He suggests that the history of company law tends to contradict such an assertion. ‘Law’ does not operate on the company: company law is the creation of jurists, lawyers, judges and legislators. Sugarman, citing Nikolas Rose, then goes on to speculate on what might be the appropriate task(s) for a ‘history of the present’ in respect to the corporate form:

> The new bases for regulating companies were not simply a reflection of the power of the state or capital. They ‘...actually constituted new sectors of reality,

\(^{17}\) Rudolf Hildferding was first a leading political and economic theoretician of the SPD in Austria, and later in Germany, serving as German Finance Minister in 1923 during the Weimar Republic. His writings, in particular *Finance Capital*, influenced a wide range of subsequent ‘left’ theorists: see Hildferding, R (1981) *Finance Capital: A Study of the Latest Phase of Capitalist Development*, edited by Tom Bottomore and translated by Professor Morris Watnick and Sam Gordon (London: Routledge & Kegan Paul).


new problems and possibilities for personal investment as well as for [private and] public regulation ... [The rendering of the company natural, inevitable and essential] operates because it has managed to command considerable subjective commitment from citizens who have come to regulate their lives according to its terms. To analyse [the formation of collectivities and subjectivities in company and labour law just] in terms of … mystification or false consciousness is to avoid examining how this new system of regulation operates, the relations of power it installs, and indeed, how we might seek to transform it, if at all”. The subjective commitments of the individuals involved to the values, practices and rules of company law ... and their resistance to them need to be explained.20

Rubin, in his collaborative work with Professor Sugarman on the history of commercial law in the United Kingdom21 and more recently in his historical examination of the social context of the Salomon case22 has provided us with an insight into the social background of the changing practice and legislative reforms occurring in corporation law during the nineteenth century. Cornish and de Clark23, in their omnibus historical survey of ‘modern’ English law, have also provided us with a number of new insights into the evolution of corporation law, though their analysis suffers from having relied principally on secondary sources.

More recently there has been a number of new works on the history of corporation law in England and Scotland that set out to challenge some of the earlier work referred to above, or alternatively, by drawing on a different archive than their predecessors, to put a different perspective on the accepted historical narrative of events.

The present study builds on many of these earlier analyses, while aiming to provide a more rigorous examination of the social background of the evolution of corporation law. In opening a small aperture on still unexplored aspects of the arrival and evolution of the ‘modern’ company form and the attendant history of corporate regulation, it is suggested that further studies in this area will provide new insights into appropriate forms of business organization for different varieties of enterprise and greater knowledge of the means by which such business forms might be best ‘regulated’.

The adoption of ‘English’ company law in the colonies (not only the Australian colonies, but also the other imperial possessions of England) and the effect of the imposition of this legislation on these colonies, without any real reference to either the existing administrative infrastructure in those colonies or their economic needs, is also examined in the following. So too is the evolutionary trajectory of the legislation and its administration in these quite different social and economic environments than those existing in the United Kingdom.

This absence of comparative historical studies in respect to the operation of ‘modern’ corporations laws in a variety of colonial settings is a matter of concern given the manner in which the limited liability corporation has now become a virtually universal structure. While the ‘modern’ limited liability form of enterprise variously originated from debates in England, Continental Europe and the USA in the late eighteenth and early nineteenth centuries, when the partnership form of enterprise still reigned supreme, it is now the most common form of business structure the world over.

Almost none of the extant historical studies of the limited liability corporate form, however, deal with the operation of the legislation in the colonies or in those contexts where limited liability incorporation was adopted as a consequence of trading links with an imperial power. Only a small number of short, speculative studies exist for Canada, Australia and Japan. The only longer and more detailed study of the introduction and operation of limited liability legislation in a colonial possession of England is in respect of India.

The limited liability corporate form was adopted in places as culturally diverse and geographically remote from one another as Fiji and Newfoundland. One of the issues to be examined in the following is that of how the legislation was adapted to local needs (or in some cases why it was not adapted at all). Also examined will be the question of how the legislation was administered in these quite diverse environments. The ongoing process of the universalization of a particular form of corporation law, and the challenge this presents for emerging economies with

24 In respect of these issues see also my recent examination of the manner in which apparently small variations to the introduced English legislation might in practice result in profound differences in the day to day operation of the legislation in particular colonial settings: see McQueen, R (2008) The Flowers of Progress: Companies Law in the Colonies, Griffith Law Review, vol. 17, no.1, 383–412.


historically quite different cultural and political understandings of the nature of corporate enterprise and its regulation will be examined in the concluding chapter\textsuperscript{29}.

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Chapter 2
Social Attitudes to Company Law: 1720–1855

Introduction

One of the most difficult matters for a historian of English company law to explain is the oscillation in government policy with respect to corporations between the eighteenth and nineteenth centuries. Why did England shift from being the European nation with the most restrictive policy towards the formation of companies in the eighteenth century to the country with the most permissive policy in the nineteenth century? Many historians have characterized this transformation as discontinuous. Historical accounts counterpose the ‘pre-modern’ Bubble Act of the eighteenth century with the ‘modern’ limited liability legislation introduced in the nineteenth century. The latter is seen as a ‘break’ with the past. In this chapter such characterizations of the historical process are challenged.

It is suggested that the highly restrictive, but unenforced, provisions of the Bubble Act resulted in a high level of innovation by lawyers with respect to the operation in practice of English company law during the late eighteenth and early nineteenth century. Dubois’ suggestion that the century between the enactment of the Bubble Act in 1720 and its repeal in 1825 was an extremely fertile period for the later development of English company law is appraised. This heterodox suggestion is contrasted with more ‘orthodox’ historical accounts of the evolution of English company law, which characterize the period during which the Bubble Act was in force as the ‘dark age’ of the English company. Many legal contrivances, generally associated with ‘modern’ company law, were developed during this apparent ‘dark age’ for technical innovation. New means and varieties of shareholding and capital raising were developed during this period. Preference shares, debentures and deferred shares were all first introduced during this period of apparent inaction. This was also a period during which considerable refinement occurred in respect of the means by which the liability of shareholders might be limited.

It is, however, not simply the specific achievements of innovative business advisers during this period to which the current account wishes to draw attention. It is also suggested in this chapter that the unique solution to incorporation finally adopted in England was a result of the previous existence of the Bubble Act, rather

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than an initiative made in spite of previous English experience. The existence of
the Bubble Act, which encouraged informal solutions to the problems of capital
raising, meant that the English, when they finally did legislate for companies,
followed a unique path. Much of that path had, however, been already traversed in
the development and refinement of the deed of settlement ‘company’.

In addition to examining the role of the Bubble Act in the singular development
of English company law the chapter will also examine the change occurring at this
time with respect to what was meant by the concept of the ‘company’. Ireland and
his colleagues² have suggested that during this period there was a transformation
in what people meant when they referred to a ‘company’. These historians of
company law argue that in the eighteenth and early nineteenth centuries the idea
of a ‘company’ referred to an economic entity with no specific legal form (that is,
it could be an extended partnership, an enterprise set up under Royal Charter or an
entity established under private Act of Parliament). By the end of the nineteenth
century this had altered. The idea of the ‘company’ was now intimately tied to
a specific form of legal entity with no reference to the ‘economic’ form of the
undertaking (that is, the limited liability corporate form now embraced all economic
forms of enterprise, from one person businesses to giant conglomerates³).

A further focus of this chapter will be the debates of the early nineteenth century
in relation to the appropriate circumstances in which the ‘liability’ of investors might
be limited. Many accounts of the development of company law have characterized
the choice between limited and unlimited liability in company law as dichotomous.
The emergence of general limited liability is presented in such accounts as the only
possible alternative to unlimited liability. The availability of limited liability to all
incorporators, no matter the type of enterprise proposed or the circumstances of
incorporation, is regarded as a core aspect of modern company law. The ‘liberal’
availability of limited liability is characterized as essential to the needs of ‘modern’
capitalism, and thus inevitable. In contrast, commercial legislation which makes
the formation of a commercial entity contingent upon acceptance of unlimited
liability is considered by such accounts to be ‘pre-modern’ and thus destined to
gradual extinction with the inevitable evolution of capitalism.

Accounts that present such a dichotomous view of limited and unlimited
liability are, however, severely flawed. They fail to note the quite diverse range of
alternatives proposed by the participants in the debate around the desirability of
introducing some form of limitation of liability for the stakeholders in commercial
undertakings in the early and mid nineteenth century. It was acknowledged in
these debates that not all companies should necessarily be afforded the privilege


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of limited liability, nor that all shareholders should be automatically provided with such a benefit.

After examining the debate as to the appropriate form of ‘liability’ for stakeholders in commercial enterprises the chapter considers the nineteenth century debate on the related question of the appropriate level and form which ‘regulation’ of commercial undertakings should take. The debates conducted in the 1840s and 1850s as to the appropriate level of state intervention in commercial affairs will be considered. The manner in which questions both of extending the privilege of limited liability incorporation and of the appropriate extent of state regulation are addressed in relation to the debates being conducted in the early and mid nineteenth century around the economic concept of *laissez-faire*.

Limited liability incorporation and minimal levels of state regulation of commercial matters are generally considered to be important components of *laissez-faire* philosophy in action. In presenting the reforms contained in the limited liability legislation to Parliament, Robert Lowe claimed these reforms as yet another aspect of the ‘freedom’ seen as necessary for the proper functioning of a *laissez-faire* economic system. The acceptance of such a view however fails to recognize *laissez-faire* was itself subject to considerable contestation in the middle of the nineteenth century. The debate around the appropriate form of legislation for business organizations, the controversies in respect of limitation of liability and the arguments as to the regulatory role of the state were all part of a continuing polarity of views as to the nature and content of *laissez-faire* philosophy.

The Bubble Act – A Retarding or Progressive Force in the Development of English Company Law?

In his account of the historical foundations of modern company law Formoy claimed that ‘owing to the great setback produced by the Bubble Act, the development of company law [in Great Britain] was postponed at least a century’.

Both leading English legal historians, such as Holdsworth, and leading North American economic historians of the corporation, such as Heberton Evans, have also characterized the Bubble Act as a significant restriction on the ‘proper’ development of company law in England. For these authors the Bubble Act had a doleful effect on the development of new organizational forms for business in England. The presence of the Act tended to stifle debate on alternative legal frameworks, whilst English chauvinism closed minds to developments in other parts of the Continent. Writers such as Holdsworth claim a central role for the

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Bubble Act in the slow development of alternatives to the partnership and the chartered company. The symbolic force of the Act is blamed for the lack of progress in the acceptance of new organizational structures for business. It is suggested that it was this symbolic status of the Bubble Act, rather than the force of legal sanctions it contained, which prevented the development of the corporate form in England. This assertion is supported by these authors by reference to the fact that there were virtually no prosecutions under the Bubble Act during the century of its existence.

Whilst asserting the baneful effect of the Bubble Act on the ‘proper’ development of English company law these authors rarely advert to the enormous growth during this period in the numbers of deed of settlement companies. This is despite the fact that it was in this type of enterprise along with developments in some varieties of ‘legal’ corporations, such as the railway and canal companies, which constituted the framework for all later developments in English company law. The English solution to the organizational needs of business, one might therefore suggest, was not ‘delayed’ at all by the presence of the Bubble Act. Rather the unique and radical nature of the English solution was a direct result of the restrictions which had been placed by that Act on the range of possible solutions to the organizational requirements of English capital. The adoption by the legislature of a solution which variously suited the needs of large business undertakings with long amortization periods; which was adaptable to the requirements of other types of business undertaking; and which accommodated the wishes of middle class investors for opportunities to place their savings in securities holding the promise of both moderate to high returns and a minimum of risk was a significant achievement. This was particularly the case insofar as the solution finally arrived at was not imitative of arrangements prevailing in other countries with similar needs.

However, this achievement was neither inevitable nor the result of any single causal agent. Paradoxically enough it was made more possible by the restrictive English provisions relating to corporations in force throughout the eighteenth and early nineteenth centuries. This exposed more clearly than in other jurisdictions the fact that business organizations such as corporations largely drew their legitimacy from extra-legal rather than legal factors. The period in which the Bubble Act applied in England provided the basis for an enduring antagonism between the

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6 English historians of the corporate form rarely advert to the fact that in other European nations there was also considerable distrust towards the corporate form during the course of the eighteenth century. An example of this broader European mistrust of the corporate form is provided by one of the early declarations of the Revolutionary Assembly in France:

A State that is truly free ought not to suffer within its bosom any corporation, not even such as, being dedicated to public instruction, have merited well of the country.

legal system and the business community on matters of regulation. The only conditions under which the state could subsequently legislate for corporations, and in the process retain the confidence of the commercial community, was by including as few regulatory provisions as possible. Indeed the introduction of limited liability legislation in England has been characterized as ‘a blow for democratic commercial liberty against Tory financial oligarchy’. ‘Liberty’ in this context meant both freedom from regulation by the state and the impartial grant by the state of corporate status to all-comers, rather than it being a privilege granted to the few.

Despite the search by a number of legal historians for the ‘author’ of modern company law the legislation was not the product of the mind of a particular individual or specific and identifiable group. Rather it was the crystallization of a number of developments which had begun outside the legal system during the course of the late eighteenth and early nineteenth centuries. As James Taylor notes:

> Despite its seeming invulnerability to change, the long-standing consensus on how best to regulate joint-stock enterprise gradually collapsed from the early 1840s, and legislative interventions between 1844 and 1856 created a new legal framework transforming incorporation from a closely-guarded privilege into a freely available right. The reasons for this break with the past are unclear...

Regardless of the claims of various schools of thought in economic history to have found the economic actors instrumental in its adoption, modern company law was not the result of the pressures exerted by any one social grouping (interest group theory) or the irresistible pressures of certain economic forces (Marxism). A complex array of forces was distilled in the final solution settled upon by the legislature in respect of incorporation. No single factor or interest group can claim responsibility for the introduction of the legislation in the form finally settled upon. Corporate legislation was overdetermined. As will be suggested in the following chapters, by conceiving corporate law and corporate regulation as overdetermined institutions one can escape much of the essentialism characteristic of other forms

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of historical explanation. For instance, interpretations which conceive of corporate law and regulation as a direct result of economic forces leave no room for the possibility of reforms to corporate law contrary to those economic forces which corporate law is assumed to serve. On the other hand, if one conceives of corporate law and regulation as overdetermined institutions then it becomes clear that a diverse range of policies can be inscribed into the framework of corporate law. The range of possibilities is as diverse as the variety of forces which are implicated in the construction of the framework of corporate law and regulation: the national economy, the interests of creditors, the interests of investors, the interests of the community, and so on.10

If one is to consider the range of possible forms which company law may take it is also important to challenge Whiggish interpretations of the history of modern company law, as a progression from an ignorant past in which the prevailing forms of business organization held back economic development towards a present in which available forms of business organization are better attuned to the economic structure of society. Such Whiggish approaches to the history of company law are particularly apparent in the characterization of the period from 1720–1825, during which the Bubble Act was the only English legislation relating to companies, as an interruption in an otherwise ‘natural’ progression towards the general adoption of the ‘modern’ form of the company. This prevalent historical interpretation (repeated in many company law textbooks11) is open to significant challenge. It focuses far too much attention on developments in the legal system, and far too little on the role of business practice and custom in the evolution of organizational structures for business enterprise12. Such interpretation also confuses the formal interdiction


11 Perhaps at the extreme end of such teleological interpretations, but nevertheless illustrative is the following assertion from one Australian textbook, Ffrench, H L (1987) *Guide to Company Law*, 2nd edition, (Sydney: Butterworth), 1:

‘The legal rules, both statutory and common law (case law), in the company law field, are probably the greatest contribution lawyers have made to the commercial prosperity of western nations.’

In their historical overview of English law in the period W R Cornish and G de N. Clark (1989) *Law and Society in England 1750–1950*, (London: Sweet and Maxwell) at 249 have also commented on the ‘inevitability’ of modern corporations law, with the Bubble Act representing an impediment to an otherwise smooth developmental path:

The notion of joint stock in a corporation ... seemed to answer a range of legal difficulties that stood as barriers to commercial viability ... However, against the ready development of any such idea stood the spectre of the Bubble Act. The collapse of the South Sea Bubble ... was an event which would remain in the collective memory of the ruling class for generations, lending support, for instance, to Adam Smith’s views on the matter.

12 The role of a range of guidelines, rules and sanctions in the shaping of social behaviour has been asserted with considerable force by the group of legal researchers who contribute to and edit the *Journal of Legal Pluralism and Unofficial Law*. An excellent
on company formation contained in the Bubble Act with the substantive practices of the time.

A typically Whiggish approach to the historical evolution of English company law is that of William R Scott, who specifically ties the lack of a simple and generally available system of joint stock company formation to the retardation of the English economy during the eighteenth and early nineteenth centuries:

The legislation and consequent procedure in 1720 and 1721 might perhaps be described as the purely local treatment of a sore, instead of the healing of the malady that gave rise to it. The decision now reached arrested the development of the joint-stock system as long as the Bubble Act was rigorously enforced. It became both difficult and costly to obtain the necessary legal authorization for the setting up of a new enterprise needing a large capital. For upwards of a century industry was deprived of the advantages of a certain amount of capital, which otherwise would have been available13.

The difficulty with such an account is that the period during which the Bubble Act imposed an interdiction on company formations was precisely the period during which many of the achievements of the Industrial Revolution were consolidated, and in which most of the infrastructure necessary for further industrial expansion was developed. It is extremely debatable whether a greater availability of state sanctioned corporations would have led to a greater amount of capital being employed in ‘useful’ investment. Indeed, most contemporaries considered that corporations could only operate successfully in certain specifically defined circumstances. The prejudice in favour of individual enterprise over corporate endeavour in relation to most classes of industrial activity was an extremely tenacious dogma in the late eighteenth and early nineteenth centuries. A not uncommon sentiment of the age was that expressed in the Circular to Bankers of 17th August 1838:

The moral effect of all joint stock associations for mercantile objects which are properly within the compass of individual exertion is bad; they introduce in the

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place of patient labour and moderate expectations ambitious hopes and the habit of gambling in shares\textsuperscript{14}.

The problems encountered by incorporators in establishing themselves in new areas of endeavour, and the attendant problems encountered in overcoming the prejudices of the time, is confirmed in the following letter written in 1825 by the Secretary of the Metropolitan Fish Company, and circulated to ‘fishermen and others’:

The company are sorry to observe, that attempts have been made, and are still been made, by certain interested persons calculated to mislead the fishermen and those interested in fisheries, as to the intention of the company, and prejudice their minds, by providing false impressions, alike injurious to the company and themselves, it becomes, therefore, a duty of their part, to put them on guard against such attempts. The company never contemplated enriching themselves, or any set of men, at the expense of the poor fishermen; they are only anxious to encourage him to catch, with the certainty of being liberally paid.

The company wish it expressly to be understood, that they do not intend to become fishermen themselves, but to give an additional stimulus to industry, by employing all those disposed to work. The company hope they have said enough to satisfy all well-disposed persons that their intentions are to do good to a deserving class of persons, upon whose exertions the prosperity of the fisheries depends.\textsuperscript{15}

Nevertheless certain headway was made during the early nineteenth century. The possibilities held out by the extension of state sanctioned incorporation to a broad array of enterprises appealed to many. This was because of its potential to re-invigorate the English commercial sector by undermining privilege and reactivating genuine competitiveness. The corporate principle also appealed to many in the middle class and the labour aristocracy due to the possibilities it held for broadening out the available range of ‘cheaper’ investments. Indeed the promotion of canal and railway companies in the early nineteenth century permanently changed the attitudes of many sectors of the English people towards the joint stock company. Thereafter it was considered that such investments held out the possibility of decent returns for the savings of both professionals and skilled workers. It was also noted that the joint stock principle held out enormous prospects for the democratization of investment. On the other hand, it was recognized that joint stock company investment held out the possibility of economic loss and potential ruin.

\textsuperscript{14} Cited in Hunt, B C (1936), 85.
\textsuperscript{15} Marmaduke Robert Langdale Collection of Prospectuses of Joint Stock Companies, vol. 4, British Museum, 1881 b. 23.
One of the debates which emerged during the 1820s and 1830s was as to the merits of limitation of liability for *all* investors. To so provide would have represented a considerable departure from existing practice, which consisted of giving chartered and statutory companies limited liability, whilst not conceding such a privilege to deed of settlement companies. Another major development during this time was the growing agitation in some quarters for state regulation of companies and the imposition of accounting standards and disclosure requirements on entities which had been conceded the privilege of corporate status.

Despite the misgivings of some in respect of corporate entities, euphoria was often associated with the issue of shares in a new canal or railway development in the early nineteenth century, with members of those strata of society which had long been denied an opportunity to invest their savings profitably jostling to have their names placed upon subscription lists. One account of the opening of the subscription list for the Runcorn Railway Company in 1830 paints the following picture of near pandemonium:

... some of the eager applicants who could not get to sign their names soon enough crept cleverly under the table, and emerging between the knees of those who surrounded it thus secured the chance of having their names enrolled as proprietors in the lucky scheme 16. (emphasis in original)

Many of these canal and railway undertakings, despite their initial promise, failed without ever returning a dividend as a consequence of the rapid manner in which a number were put together, the inordinate fees extracted from the fledgling enterprises by dishonest promoters, and the primitive state of company accounting. These failures, whilst often resulting in temporary set-backs to the introduction of general companies’ legislation, nevertheless contributed in no small measure to the actual shape of corporate legislation when it finally arrived. The ensuing debates around the desirability of corporation legislation and/or limited partnerships, legislation legitimized the voice of many who earlier would have been assigned no role at all in discussions on the merits of the various possible schemes of corporate legislation and/or regulation.

Consequently, due to the delayed introduction of legislation relating to companies in England (compared to the rest of Europe), and experience of the corporate form gained in the interim by working people and members of the professional classes as co-operators, as investors and as advisers, the debates around the introduction of company legislation took on a very different flavour than would have been the case had there been no Bubble Act. In England, when the introduction of company legislation became a reality for the first time in the middle of the nineteenth century the debates around the Acts were:

[N]ot merely a matter for capitalists or a fait accompli, enforced by the level of development of the forces of production ... in the nineteenth century the political struggles concerned the rights of the investor to protection from fraud and bankruptcy. Questions of company law and organization now concerned the rights of ... working people.

Attitudes to Incorporation at the Turn of the Nineteenth Century

Attitudes to the corporate form up to the 1840s were composed of a mixture of hostility and cautious acceptance. It was widely recognized that many of the largest undertakings of the time, such as the development of canals and the building of railways, would not have occurred without a corporate structure within which to marshal investment. Nevertheless the lack of regulatory controls on corporations and the abuses perpetrated on the unsuspecting investing public by unscrupulous promoters and directors led to a widespread suspicion of ‘the corporation’ as an organizational framework within which to marshal capital and conduct undertakings. Many persons still believed, along with Adam Smith, that the corporate form was only suitable to particular types of enterprise, whilst others viewed corporate undertakings as a threat to their monopolistic control over particular industries.

Samuel Smiles later remarked it was not necessarily the corporate form itself which was suspected by contemporaries, but rather the manner in which the principle was applied in particular circumstances. Referring to the railway and canal developments of the early nineteenth century Smiles stated in his Lives of the Engineers:

As in the case of the railways at a subsequent period, works which might, without pressure upon the national resources, easily have been executed if spread over a longer period, were undertaken all at once; and the usual consequences followed of panic, depreciation and loss.

Smiles also commented in another volume of the Lives of the Engineers on the railway mania of the 1840s. He suggested that the losses suffered during this period were not the result of the corporate nature of the enterprises promoting the railways, but rather were the result of the readiness of Parliament from 1844 onwards to grant railway bills without reference to any guiding principle:

The course adopted by parliament in dealing with the multitude of railway bills applied for during the prevalence of the mania, was as irrational as it proved to be unfortunate. The want of foresight displayed by both Houses in obstructing the railway system so long as it was based on sound commercial principles, was only equalled by the fatal facility with which they now granted railway projects based only on the wildest speculation. Parliament interposed no check, laid down no principle, furnished no guidance, for the conduct of railway projectors; but left every company to select its own locality, determine its own line, and fix its own gauge. No regard was paid to the claims of existing companies, which had already expended so large an amount in the formation of useful railways; and speculators were left at full liberty to project and carry out lines almost parallel with theirs.

Despite the principal cause of the losses during the railway mania almost certainly laying with the government of the day for its policy (or more accurately its lack of policy) in regard to the granting of concessions to new undertakings, the freedom of investment offered by the corporate form was nevertheless ultimately held responsible for the losses of investors and the economic problems stemming from the collapse of the railway ‘bubbles’ floated during the period of the ‘mania’. Tighter regulation of companies and firmer requirements in respect of accounting procedures of corporate enterprises followed in the wake of this attribution of blame.

A range of factors, largely exogenous to the ‘need for capital’ of undertakings in the key sectors of English business, was beginning to influence state policy with regard to corporations towards the middle of the nineteenth century. These factors included the need of infrastructural undertakings such as railways and canals to delay paying returns to investors until the line or the canal was completed. This was something that had not been obvious to early incorporators of such undertakings, who had put many of them into liquidation as a consequence of their practice of paying dividends out of capital during the construction phase of the canal or railway. As one recent commentator has remarked ‘what motivated the promoters of utilities to utilize the corporate form was not the size of the capital but the prolonged period over which it would have to be amortized’.

Many existing capitalists, whilst conceding the necessity of corporate status for large undertakings with long amortization periods, could not accept the penetration of their own area of industry or trade by corporate competitors. Consequently they lobbied long and hard to prevent any form of general legislation being adopted. Evidence of the success of this campaign, at least up to the 1840s, is illustrated by a Board of Trade Minute issued in relating to the conferring of corporate status by way of a grant of Letters Patent. The Minute stated:

21 Hirst, P Q (1979), 152.
Facilities should not be afforded to joint stock partnerships which may interfere with private enterprises carried on under the existing partnership law.

Many Chambers of Commerce devoted considerable time and energy to lobbying their local members and influencing local opinion against the introduction of general limited liability companies legislation. In Manchester the members of the Chamber of Commerce ruminated unfavourably on the erosion of their prestige and position as a consequence of the emergence of a range of new competitors. They were particularly hostile to the introduction of limited liability legislation as it would further erode their position by allowing their incorporated competitors to draw upon the savings of the small scale investor and thus expand the scale of their operations.

However, whilst lamenting the effects of limited liability incorporation on their business prospects, these established traders were unprepared themselves to expand their capital base by converting and attracting these lower class of ‘small investors’ which allowed their corporate rivals to be so competitive. Subsequent to the enactment of the Limited Liability Act of 1856 it was almost half a century before significant numbers of ‘key’ industrial enterprises chose to incorporate. The bias of nineteenth century industrialists against the corporate form can be discerned in many commentaries of the period. In addition to factors such as the wish for privacy, tax planning and suspicion of the capacity of corporate organization to deal with difficult enterprise decisions, it appears that one of the most significant factors behind the resistance of established businessmen to converting their undertakings to corporations was the fact that Victorian businesses were often seen as family estates. There was a perception that this communitarian role of the business would be compromised by the entry of a large number of ‘outsiders’ as shareholders. Indeed, as William Reader has observed:

The idea of admitting anyone who was not a relation to a position of management or ownership did not, as a rule, readily commend itself unless there were no suitable candidates within the family or the business was in peril.

The entrenched suspicion of most established businesses to incorporation was not unique to England, although perhaps somewhat more entrenched than in many other contexts.


Thus, even in other cultures apparently far more favourable to the development and expansion of the corporate form than that prevailing in England, there was resistance amongst those in commerce to the expanded utilization of the corporate form for fear that the ‘family estate’ would be rent asunder. We can observe the same concerns as those being expressed by English businessmen also being expressed by their French counterparts. The historian of French company law, Charles Freedman, has noted the reluctance of large French iron and steel enterprises to adopt corporate status as sociétés anonyme early in the nineteenth century:

If the anonyme form was attractive to some this was certainly not the case amongst the older generation of ironmasters ... [who] considered transformation of their enterprises into anonymes virtually unthinkable: they preferred to do without needed capital rather than risk losing control or having to share control with others25.

The same sentiments as those expressed by Gouge on the opposite side of the Atlantic, and French ironmasters on the other side of the Channel can be heard echoed in the words of many an English commentator of the time. Thomas Tooke is an example. In his evidence to Bellenden Ker’s Select Committee on Partnership, conducted during the course of 1837, Tooke asserted:

If the object in view were to limit the responsibility of joint stock companies in undertakings which admit of being conducted by individuals or by ordinary partnerships, it would clearly be objectionable ... public companies are rarely, if ever, so carefully, economically and skilfully conducted as private establishments26.

In a similar vein, Swinton Boult claimed in his pamphlet Trade and Partnership: the Relative Duties and Proper Liabilities of the Merchant and the State that the introduction of limited liability companies legislation in England was unnecessary due to the self reliance of English commerce:

Commerce is the last thing to require from government a directing or protective hand. It is self sustaining, divergent, penetrating, vigourous (sic) and elastic27.

Consequently it was not the Bubble Act which prevented the expansion of the corporate form in England, particularly after the turn of the nineteenth century. By

25 ibid. 31.
26 Cited in Hunt, B C (1936), 81.

Swinton Boult (1809–1876) was secretary and a director of the Liverpool, London and Globe Insurance Company. He had commenced his business life as a local agent for insurance offices in Liverpool (Dictionary of National Biography).
the early nineteenth century it was instead the deep seated prejudices and quite well-grounded fears of established commercial enterprises and their human agents concerning the corporate form which slowed down the introduction of legislation to encourage its adoption. These prejudices were not confined to England, nor did they originate from the Bubble Act.

The Positive Role of the Bubble Act in the Adoption of Unique Solutions to the Problem of Corporation Legislation in England: The Dubois Thesis

In attempting to differentiate the English experience, whilst allowing for the prejudices of the time towards the corporate form, a number of commentators on the historical evolution of English company law have taken a somewhat different tack from that taken by Scott, Formoy and Holdsworth. Authorities on company law, such as Gower, have preferred a psychological, rather than a legal explanation for the lack of significant progress on a more systematic framework for company law during the century following the enactment of the Bubble Act. Gower suggests that ‘public confidence in joint stock companies and their securities was destroyed so effectively that it was three quarters of a century before there was a comparable boom’28. According to his analysis legislative innovation on incorporation would therefore only occur when there was some specific spur, such as an economic boom, to evoke interest29.

This picture, however, is somewhat misleading. Even though there was not another boom cycle comparable with that of the 1720s until early in the nineteenth century, there was nevertheless a continuing interest in investment in corporations (and in particular deed of settlement entities operating without official sanction) during the intervening period. Dubois has stated that the constraints placed on joint stock company formation by the Bubble Act left an indelible mark on later developments in company law in England30. However, unlike Formoy, Holdsworth, Scott and others, he sees the influence exerted by the Bubble Act on later development as having been positive in its effects, rather than negative in tenor, as assumed by the other writers. He suggests that by restricting access to direct means of forming corporations the Bubble Act forced English lawyers and company promoters to innovate. It meant in England that corporate forms would not simply emulate organizational models gleaned from elsewhere. Instead the English developed a range of unique solutions to the problem of suitable organizational forms for capitalist enterprise. Due to these experiments with alternative organizational and legal structures, conducted in order not to fall foul of the Bubble Act, English lawyers, and later, English legislators, were far more

29 ibid., 34.
radical in their solutions to the organizational problems of capital than was the case in most other jurisdictions, particularly those on the Continent and in North America\textsuperscript{31}.

Dubois proposes that the effect of the Bubble Act was to help ensure the continued importance in England of many of the attributes of the unincorporated joint stock company free from restrictive interventions by government.

According to this argument the precipitating factor in the enactment of limited liability companies legislation in mid-nineteenth century England was \textit{not} the desire to provide a legitimate framework within which ‘corporate’ enterprises could operate. Rather the legislation was an ancillary measure, designed to smooth the way for further development of devices such as preference shares and to simplify the position relating to the capacity of corporations to sue and be sued by others. According to Dubois the problem with most other accounts is their assumption that, in order to operate successfully as companies, enterprises needed the imprimatur of state approval. They did not. As long as entities were accepted by others in trade as legitimate bodies the issue of state approval or licensing of their corporate status was largely irrelevant.

He goes on to suggest that the recognition of this pluralist legality within which corporations are embedded is important because it allows an observer to note the continuity between pre- and post-legislation corporate entities, rather than to see the introduction of limited liability companies legislation in the mid-nineteenth century as representing a total rupture with the past. Indeed a break with the characteristics of the ‘illegitimate’ predecessors of the ‘modern company’ was not seen by most contemporaries as a necessary, or even desirable goal of companies legislation. Formal recognition had not been a problem for deed of settlement corporations, as they already had a significant degree of legitimacy, albeit without the law’s complicity. Rather, the move to legislate for a generally available system of limited liability incorporation had to do with the resolution of certain difficulties relating to the carrying on of large scale enterprise in unincorporated form – in particular the problem of working out who to sue when the undertaking had a large number of members\textsuperscript{32}.

\textsuperscript{31} Freedman, C E (1979), 132–134 comments on this phenomenon in respect of France that before the 1856 Limited Liability Act was passed in England many English companies incorporated under the more ‘liberal’ legislative regime applying in France. However, after the introduction of the 1855 Act the traffic was all the other way, with a number of French concerns incorporating in England. The introduction of the ‘liberal’ English legislation also:

‘…sped up liberalization in France ... there was a \textit{laissez-faire} emphasis in the new French legislation (Code de Commerce) introduced in 1867 based on the model of the English legislation of 1856 and 1862.’

\textsuperscript{32} Note also the comments of Ireland, P (1984), 242:

‘The first major Companies Act was passed in 1844 ... and was directly concerned with economic, joint stock companies. Their size and impersonality, and the free transferability of their shares enabled them to be fraudulently exploited and created considerable legal
Dubois also claims that the growing problems encountered by unincorporated enterprises in attracting investors, in competition with overseas limited liability concerns, was an important factor in the introduction of legislation. This was due to the fact that even when English companies were touted as offering ‘limited liability’ this promise was meaningless in circumstances where it really mattered, such as a liquidation, as it was unenforceable. Investors very quickly became aware of this and consequently preferred the Continental and North American companies which offered forms of limitation of liability which were enforceable. As one commentator has characterized the position at mid-century:

The main argument in favour of limited liability was that the 1844 Act was not succeeding as much as had been hoped in attracting investors into new businesses. Unlimited liability discouraged investment. The wealthier you were the more you would hesitate to invest in an unlimited company. Buying just one share in an unlimited company laid you open to a call to pay money sufficient to discharge all the company’s debts. Moreover, it was seen that this in itself involved injustice. However active the other shareholders were in running the business, the wealthy investor, however small his shareholding and however little the part he played in the affairs of the company, would end up footing the bill.33

The manner in which these Continental and American firms preyed on the fears and uncertainties of the English investor with respect to committing funds to an unlimited liability concern is apparent in many prospectuses circulated at the time. For instance, the prospectus of the Nouveau Monde Mining Company (early 1850s) recites certain advantages flowing to those investing in the concern over an investment in an English company:

The company is established in France under the French law of ‘commandité’ by which the liability of each shareholder is limited to the amount of his shares, and those shares, being paid up in full on allotment, and being to bearer (au Porteur) are not subject to any call or registration and no deed has to be signed.34

Similar claims were being made for the Keeweenan Point Copper and Silver Mining Company, which was being floated in the early eighteen fifties. The prospectus stated that this undertaking would:

problems for those that were unincorporated and subject to the law of partnership. The 1844 Act sought to remedy the legal difficulties by introducing an elaborate system of registration and publicity. That the Act was intended to cover only joint stock/companies and not ‘private’ partnerships was clear.’

34 Marmaduke Langdale Collection of Prospectuses, British Museum, op. cit.
…be incorporated by Charter, under the General Act of Incorporation of the State of Michigan, according to which all liability of shareholders is avoided on the capital being paid up\textsuperscript{35}.

In the 1840s those involved in the flotation of speculative enterprises in England, and those interested in investing, began to demand provisions conferring limited liability similar to those which applied in other jurisdictions. Limited liability began to be seen as a \textit{right} by investors and as a necessary incentive to investment by promoters. It was presented to legislators and government functionaries as an imperative measure by both these groups of constituents. The main thrust of the argument presented to the government from the end of the first quarter of the nineteenth century was one premised on the \textit{rights} of investors to be free from the potential liability for all the debts of the enterprise in the case of joint stock undertakings. This was in effect the key factor in the transformation of the corporation from an ‘economic’ entity with no necessary legal form towards it being conceived of as a ‘legal’ entity with no precise economic form\textsuperscript{36}.

It might be noted, however, that there were significant differences between entrepreneurs and investors in relation to certain crucial aspects of how a limited liability system of corporation might operate in practice. Company promoters and those in the City considered that such legislation should be purely facilitative. This would be conducive to those involved in the formation and promotion of enterprises to take risks and be more adventurous than would be the case under a regulatory regime. They pointed to the failure of the 1844 Act. The discouragement to investment and company flotation provided by that Act was held out as a model of how not to proceed.

On the other hand \textit{investors} wanted to be protected and argued for a more \textit{regulatory} form of legislation. Investors, and many of those professionally involved in aspects of company investment, argued for the inclusion, at the very least, of publicity provisions in any legislative scheme. Some also strongly asserted the role of the government, through one of its departments, in ensuring that companies operating with the benefit of limited liability acted honestly. Legislation such as that applying to Friendly Societies was held out as a model.

In asserting their case for freedom from government interference those in the City drew on the ‘traditions’ established during the period in which most English corporations operated as ‘illegal’ deed of settlement companies. They also pointed to the unsuitability of the courts for the settlement of corporate disputes. The merits of a body of corporate law with little basis for judicial intervention were strongly advanced by those in the City in the course of the debates around the

\textsuperscript{35} ibid.

introduction of companies legislation. Such arguments were, however, also used by those opposed to the introduction of the legislation. They suggested that such legislation would inevitably lead to business privacy being compromised. In so arguing against a regulatory regime those in the City were touching a raw nerve. Businessmen were, and remained throughout the nineteenth century, severely prejudiced against the legal system as an appropriate forum for the resolution of intra- and inter-corporate disputes, due to its delays, costs and unpredictability. They also abhorred any potential breach of the secrecy with which they were used to conducting their affairs. These characteristics of a regulatory system were considered largely irreconcilable with the contingencies of commerce.

Those involved in the commercial world of the early nineteenth century consequently regarded it as axiomatic that they be ‘free’ from judicial or State intervention in the conduct of their business affairs. One of the ironies of the history of company law is that both the most progressive and least progressive elements of the early nineteenth century were in agreement that businessmen should not be regarded as totally free from state interference in the conduct of their affairs. On the one side we have investors, political economists and the like asserting that whilst there should be a general system of limited liability legislation, it should be subject to state regulation. On the other side we have conservative elements in the state and in the judiciary contesting the right of businessmen to form companies. For instance, Lord Eldon went so far as to suggest in an obiter dictum in 1825 that corporations without sanction of charter or private act were illegal at common law\(^37\). Eldon considered that the State rather than business should be the arbiter of how commercial enterprises were set up and conducted. His admonitions from the bench were, however, mere empty rhetoric by the end of the first quarter of the nineteenth century. If anything, all they did was to convince those in commerce even more how out of touch the judiciary was with the realities of commerce. As Hurst has remarked:

> The perfected technique of the business association organized under a deed of settlement deprived of practical significance both Eldon’s dictum and the prohibition of the Bubble Act. Moreover, use of the deed-of-settlement technique accustomed businessman and lawyers alike to the idea that men should enjoy considerable contractual freedom in arranging business associations\(^38\).

State sanctioning was consequently not regarded as an important or even necessary element in the formation of a business association in the early nineteenth century. In the eyes of those in commerce, legitimacy of the business ‘corporation’ did not depend on either the legislature or the judiciary, but rather on commercial

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37 Kinder v. Taylor (1825) 3 L.J. Ch.68; See also the judgements in Duvergier v. Fellowes (1828) 5 Bingham 267 and Blundell v. Windsor (1835) 8 Sim 601.

practice. If those in commerce treated an association as if it were a ‘corporation’, it was such. Conversely, if those in business did not regard an enterprise as a legitimately constituted corporation then it would not be treated as such.

The importance of commercial attitudes in the acceptance and legitimacy of an enterprise as a corporation has also been remarked upon by Ireland and his collaborators. Ireland notes the lack of correspondence, in the discourse of early Victorians, between the economic and legal characteristics of business entities. No matter what the ‘legal’ characterization of a business association, it was only regarded as a ‘company’ if it displayed certain specific ‘economic’ characteristics:

For most of the 18th and 19th centuries ... the legal status of an enterprise (i.e. whether it was a ‘company’ or a ‘partnership’) made no difference to contemporary perceptions of its economic form; a joint stock company was a joint stock company whether it was incorporated or not. (emphasis in original)

Ireland thus supports the notion that the bulk of ‘companies’, up until as late as the 1840s or even the 1850s, derived their legitimacy either largely or solely from the economic realm of business practice rather than from the legal realm of legislation and/or the courts. It was only when enterprises wished to gain the imprimatur of the State in respect to certain exogenous matters, such as the grant of a concession to build a railway line or the investiture of the company with compulsory acquisition powers, that they required a Charter or an Act of Parliament. Even then, such instruments were often sought not so much to ‘legitimate’ the undertaking as to secure a monopoly over a particular trade, to gain exclusive access to a particular route for a railway line, or to gain powers of compulsory acquisition. Hurst has pointed out that this was certainly true for the United States where grants of incorporation almost invariably had little to do with incorporation per se and a lot to do with what attached to them.

According to Ireland the basis on which corporations acquired their ‘legitimacy’ changed quite dramatically during the course of the late nineteenth century. By late Victorian England the ‘economic’ character of an enterprise had become less important than its ‘legal’ definition in determining if it was a ‘company’ or otherwise. Both small and large undertakings, with little in common in relation

39 Ireland, P (1984) The Rise of the Limited Liability Company, International Journal of the Sociology of Law, vol.12, 240. It must, however, be acknowledged that there were contemporary usages which denoted whether an enterprise had received state sanctioning or not. To this end Ireland cites Dubois (1938), op. cit., 87: ‘While the term “corporation” was consistently applied only to bodies incorporated by state authority the term “company” was used indiscriminately to describe both the incorporated and the unincorporated unit ... ’.

to their economic function or characteristics, were regarded as ‘companies’ by the late nineteenth century. Such diverse enterprises, despite their huge practical differences, came to be regarded by the same referent, as if they were the same thing. Even today we hear and see references being made to ‘the corporate culture’ or ‘corporations’ as a generic species\(^\text{41}\). Often such material appears to be, on closer inspection, talking only of the large enterprises which constitute less than 5 per cent of all company registrations. The confusion between the ‘legal’ status of the company and its ‘economic’ attributes continues to plague discussion. No similar confusion appears to exist in respect to the source of ‘legitimacy’ for both large and small ‘corporate’ entities – it is simply assumed that this ‘legitimacy’ arises from the legal system.

Thus, in the space of half a century or less, the basis for the ‘legitimacy’ of the corporation apparently underwent a metamorphosis. It had shifted from the dynamic arena of commercial practice with its ‘economic’ definition of what constituted a ‘company’ to the more rarified confines of the courtroom with its body of ‘legal’ rules which defined the nature of the ‘corporate’ entity. As we will observe later in the book this shift in the source of corporate legitimacy carried with it, and continues to do so, significant implications for ‘company law’ and corporate regulation.

What then was the purpose of corporate legislation in the middle of the nineteenth century, if it was not principally to confer ‘legitimacy’ on those business associations seeking corporate status, but without benefit of Charter or Act of Parliament?

One of the principal purposes which that legislation served was to consolidate many of the ‘freedoms’ in respect of commercial activity which those in the City and in commerce had come to expect as a right. Such ‘freedoms’ included being able to float a corporation at will and to be unrestricted with respect to the proposed amount of capital for the entity and the nominal value of shares. The 1844 Joint Stock Companies Act had denied these ‘freedoms’. The most important freedom those in the City demanded was, however, freedom from State interference. These

\(^\text{41}\) It is worth noting, perhaps, that the common usage of the word ‘company’ to denote a ‘legal’ entity of a certain type with no particular implications as to its ‘economic’ nature has not percolated into dictionary definitions of the word:

The *Oxford English Dictionary* defines ‘company’ as ‘a body of persons combined for commercial or other end’, and *Webster’s Dictionary* defines it as meaning ‘an association of persons for carrying on a commercial or industrial enterprise’. This should, however, be compared with the definitions contained in both dictionaries of the word ‘corporation’.

In the *Oxford English Dictionary* ‘corporation’ is defined as:

‘… a body corporate legally authorized to act as a single individual; an artificial person created by royal charter, prescription, or act of the legislature, and having authority to preserve certain rights in perpetual succession.’

In *Webster’s Dictionary* ‘corporation’ is defined as:

‘… a group of persons or objects treated by the law as an individual or unity having rights or liabilities distinct from those of the persons or objects composing it.’
interests, particularly those actively involved in the promotion of companies, strongly asserted the necessity for the State to resile from the regulatory model of 1844. The growing clamour of investors for a system which imposed greater, rather than less, regulation had to be allayed at any price.

In pressing for the introduction of a general incorporation statute those in the City and their allies finally hit on the formula which proved to be the most effective compromise between those who wished to preserve freedom from government intervention and those who wanted greater regulation. This compromise was to confer on all investors the benefits of limited liability. However, it seems to have been understood that strong support for the concession of limited liability would only be forthcoming if investors and their Parliamentary representatives made some concessions in respect of their demands for legislation premised on a regulatory model.

Whilst it is difficult for us today to accept as other than `natural' the solution offered by the Limited Liability Act of 1856 to the question of the manner in which corporate identity should be granted by the State, this `obvious' solution was not readily apparent to many contemporaries. Numerous solutions pressed for acceptance. The conjunction of the joint stock principle, perpetual succession and limitation of liability, particularly in the form that admixture was finally adopted, was by no means the only apparent solution at the time. The balance of forces between those opposed to a general grant of limited liability by legislation, those pressing for a regulatory model and those pressing for a `liberal' approach was quite finely balanced.

The possible nature of other solutions is reflected in the scheme included as part of the 1825 legislation repealing the Bubble Act. This legislation proposed in one of its sections (section 2) a discretionary system for the grant of limited liability. The repeal Act stated that unlike the case prevailing in the past the Crown would in future, when granting charters, not have to choose between granting `total' limited liability or failing to grant limited liability at all. Instead the power now existed for the Crown to grant `mixed' limited liability. The potential such an approach presents for striking a satisfactory balance between the needs of enforcement agencies on the one hand and the requirements of commercial reality on the other has been noted in several recent commentaries on company law. One such commentary noted:

The power existed to create companies with `mixed’ liability, that is with different classes of members having different limits, or no limits at all on their liability. Moreover, theoretically, any limit of liability could be chosen; hence the limit could be below the amount of the member’s initial contribution (ultra-limited-liability) or above that amount, allowing for a decrease in limited liability as normally understood. It is perhaps a pity that this interesting experiment in flexibility was so short lived. Perhaps also now it would be worth experimenting
with such flexibility as a fine-tuneable aid in the current problem of creating incentives to managers, and to investors to monitor the efforts of managers\textsuperscript{42}.

However, the presumed need to provide incentives to managers and entrepreneurs to create new enterprises and thus spawn a variety of new vehicles for middle class investment was an important influence on the shape of the temporary limited liability legislation of 1855 and its successor legislation in 1856. Thus, in the very year (1855) in which a number of established joint stock enterprises failed, the most notable of which was the Royal British Bank, almost all of the regulatory components of incorporation legislation were removed by the legislature.

It was asserted by Robert Lowe (Figure 2.1) and other proponents of the new legislation that under such a system the need for regulation would largely be obviated, as investors would not stand to lose their whole savings and their reputation, as was the case under a system of unlimited liability. The removal of the reporting regime formerly imposed by the 1844 Joint Stock Companies Act was seen as a necessary concession on the part of investors if they were to secure permanently the protection of limited liability. Such regulatory provisions were seen as dangerous impediments to business. It was asserted by some of the witnesses to the 1854 Royal Commission on Mercantile Laws that the publicity provisions introduced by the 1844 Joint Stock Companies Act had been a disaster, disrupting the practices and understandings of over a century.

\begin{figure}[h]
\centering
\includegraphics[width=0.5\textwidth]{figure2_1.png}
\caption{Robert Lowe in the 1860s}
\end{figure}

It was also asserted by these witnesses that judicial attempts to restrict the availability of incorporation to only a narrow class of people were unacceptable to the commercial community. Indeed members of the judiciary such as Lord Eldon, who had attempted in the courts to proscribe all undertakings not specifically set up under a Charter or an Act of Parliament as ‘illegitimate companies’, were regarded as tantamount to dangerous lunatics by the commercial community. They perceived that the campaigns waged by such individuals posed a threat to the ‘freedom’ of those in commerce to order their affairs as they pleased. Those who sought to improve the morality of business by requiring annual financial reporting, such as Gladstone, were similarly regarded as meddlers. Commerce wished, by the middle of the nineteenth century, to consolidate those understandings which had grown up in relation to the ‘corporate’ entity during the period in which the deed of settlement company had developed in the shadow of the Bubble Act. They wished to shore up their ‘freedom’ in relation to the manner in which they associated and operated by placing many of the informal understandings of the previous century into legislative form.

The Repeal of the Bubble Act: Towards a Framework for Company Law 1825–1844

The repeal of the Bubble Act in 1825 occurred amongst rumblings from the Bench that joint stock companies were contrivances that were impermissible at common law. At an earlier time Lord Eldon’s dicta in Kinder v. Taylor (1825) 3 L.J. Ch.68 to the effect that ‘acting as a corporation without being such, is illegal at common law’ would have prevented the formation of a number of companies. However, by this time the pressure to allow a wider array of corporations than those sanctioned by Charter or Act of Parliament was becoming irresistible. These enterprises would exist and be recognized by those in commerce with or without legal sanction. The formal restrictions which had been imposed by the Bubble Act were no longer to be tolerated. Lord Eldon’s proclamations from the Bench were so completely out of touch with the mood of the early 1820s that they appear to have had no practical effect other than perhaps to increase the already grave suspicions of the commercial community as to the knowledge of the judiciary on commercial matters.

The damage done to the judiciary’s authority on commercial matters by Eldon’s intervention extended beyond the commercial community itself – English investors of all classes simply did not want to hear that the Bubble Act was merely declaratory of a common law prohibition on acting as a company at a time when they were in the midst of a speculative craze. The nature of the speculative boom of 1824–25 is described in a letter to The Times which expressed the view that
in those years ‘bubble schemes came out in shoals like herring from the Polar Seas’\textsuperscript{43}.

When the Bubble Act was enacted in response to the abuses of the first quarter of the eighteenth century it was not generally regarded as an overly restrictive piece of legislation. However by 1825 the Bubble Act was considered quite out of touch with the economic requirements of the times. Rather than a restrictive piece of legislation that reinforced existing monopolies it was instead considered that a more liberal legislative approach should be taken in respect of company formation. Holdsworth comments:

\begin{quote}
What was needed was an Act which made it easy for joint stock societies to adopt a corporate form and, at the same time, safeguarded both the shareholders in such societies and the public against frauds and negligence in their promotion and management\textsuperscript{44}.
\end{quote}

What occurred in 1825 however was not the enactment of either facilitative or regulatory legislation, or indeed any other legislation relating to incorporation. Instead, the repeal of the Bubble Act created a vacuum.

Even with the inevitable collapse of the speculative bubble in 1826 no action with respect to corporations was taken by the government of the day. Demands for an inquiry were successfully resisted on the basis that the contribution of joint stock companies to the wealth and commercial advantages enjoyed by England was so great that any impediment to their formation would be counter-productive\textsuperscript{45}.

Whereas the above sentiment expressed by Huskisson was no doubt a genuine expression of one body of opinion at the time, it was not the sole, or even the most significant, element in frustrating the enactment of substantive company legislation in England. The most important factor impeding the enactment of such legislation in the 1820s was the degree of conflict in English opinion as to the precise form such legislation might take. This division of opinion persisted throughout the period 1830–1855, and was even cited by the Royal Commission on Mercantile Laws in 1854 as a reason for not making a positive recommendation for the enactment of any specific form of corporate legislation.

Although most contemporaries would have agreed with Holdsworth’s view that England needed a framework which facilitated company formation, they would nevertheless have hedged that opinion around with various qualifications.

\begin{flushright}
\textsuperscript{43} \textit{The Times}, 20th April 1826.
\textsuperscript{45} William Huskisson in a speech to the Commons in 1826 cited in Hunt, B C (1936) \textit{op. cit.}, 49.
\end{flushright}
Adam Smith’s statements on the appropriate utilization of the corporate form in *The Wealth of Nations* still exerted an enormous influence on economic thinking in the early nineteenth century:

The only trades which it seems possible for a joint stock company to carry on successfully, without an exclusive privilege, are those, of which all the operations are capable of being reduced to what is called a Routine, or to which such a uniformity of method as admits of little or no variation. Of this kind is, first, the banking trade; secondly, the trade of insurance from fire, and from sea risk and capture in time of war; thirdly, the trade of making and maintaining a navigable cut or canal; fourthly, the similar trade of bringing water for the supply of a great city.

Opinion of most informed sectors of English society in 1825 was thus that the company form should be confined to a limited range of activities. As we have earlier observed there was still a strong prejudice in favour of the partnership as the proper framework within which most trade and industry should occur. This prejudice was particularly strong amongst those involved in key sectors of industry, such as iron and steel manufacturers.

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46 The *Circular to Bankers* for 17th August 1838 provides a nineteenth century example of a journal repeating the prejudices of Adam Smith against joint stock companies: ‘The moral effect of all joint stock associations for mercantile objects which are properly within the compass of individual exertion is bad; they introduce in the place of patient labour and moderate expectations, ambitious hopes and the habit of gambling in shares.’

The enduring nature of such prejudices is illustrated in the assertion by W H Marwick (1937) ‘The Limited Company in Scottish Development’, *Economic History*, 415–429: ‘The development of the limited liability company in the nineteenth century signalled the growing separation between ownership and control. However it also signalled the associated tendency, less generally appreciated, but momentous for future economic society, of the separation and disproportionate relationship thus fostered between effort and reward’ (at 429).


48 Professor Payne (1974) in *British Entrepreneurship in the Nineteenth Century*, (London: Macmillan) at 17–18 has commented on these prejudices and the basis upon which they could be sustained for so long:

‘Throughout the nineteenth century the fundamental business unit was the individual proprietorship or partnership. This was not just because of the Bubble Act but also the result of the fact that there was no pressing necessity to depart from the traditional organizational framework. By the unification of ownership and control the entrepreneur was able to reduce the real or imagined dangers inherent in trusting his business ... to a manager.’

It was only in relation to those undertakings requiring large aggregates of capital and involving both large risks and long amortization periods that the necessity of the corporate form was universally conceded. Even in these areas some degree of refinement of the corporate form and methods of arranging financing (for example, the development of the preference share in the canal developments of the first quarter of the nineteenth century) were needed before universal acceptance of the necessity of conducting such developments in corporate form was conceded.49

Smith’s plea that the corporate form of business organization be limited to only a restricted array of activities was still regarded as a dogma by many in the early nineteenth century. Even in as liberal and innovative an environment as the United States51 there was a tendency to regard the corporation as only of utility in certain settings and as productive of monopoly in others.52

This aspect of the late eighteenth and early nineteenth centuries’ prejudice against the corporate form continued to be important in the debates later in the nineteenth century over the introduction of a general scheme of limited liability incorporation. The antipathy to the corporate form, other than as suitable for the conduct of a business in a limited range of settings, was quite often tied to another prejudice – that concerning the potential of the corporation to create and consolidate monopolies. This latter bias against the corporate form derived from past experience with corporate entities, such as had occurred with the great chartered corporations of the seventeenth and early eighteenth centuries. The grant of corporate status to these enterprises was often, if not inevitably, combined with a grant of privileged status in respect to trade in certain regions. It was, therefore not surprising that the nineteenth century mind still associated corporate form with monopoly. A typical analysis of the period, commenting on the association between incorporation and monopoly stated:

... Such are the inherent defects of corporations that they can never succeed, except when the laws or circumstances give them a monopoly or advantages partaking of the nature of a monopoly. Sometimes they are protected by direct

50 Even in the early twentieth century some still regarded Smith’s strictures as dogma. For instance, in the course of his historical account of the emergence and development of the modern company form T B Napier (1901) in The History of Joint Stock and Limited Liability Companies, (London: Macmillan & Co) at 400 makes the following startling assertion: ‘It is tolerably certain that the management of joint-stock companies (excluding private companies) is not equal to that of individuals or partnerships, and many things therefore have doubtless been badly done by joint stock companies, which, if joint stock companies had not existed would have been well done by a firm or individual.’
inhibitions to individuals to engage in the same business. Sometimes they are protected by an exemption from liabilities to which individuals are subjected. Sometimes the extent of their capital or their credit gives them control of a market. They cannot, even then, work as cheap as the individual trader, but they can afford to throw away enough money in the contest to ruin the individual trader, and then have the market to themselves\(^53\).

The association of monopoly and incorporation and the consequent impact this would have on competition and initiative in trade was a theme embraced by many of the polemicists of the day who were implacably opposed to the adoption of any general system of incorporation in England. The views expressed in the *Monthly Review* in the mid-1820s were characteristic of the time:

The age of companies is passed. The application of capital in masses to some splendid object beyond the reach of individual enterprise will always distinguish Britain ... But the proper occasions for such associations are comparatively rare and the principle degenerates into a pestilential abuse when it is applied to an ignorant and impertinent interference with the smaller details of trade, endeavouring to crush the humbler industry of individuals by the overwhelming power of capital alone\(^54\).

Despite continuing prejudice towards the corporate form, some limited developments occurred in the 1830s. Legislation was passed in 1834 which allowed unincorporated trading enterprises to seek letters patent from the Crown so that they could sue and be sued in their business name. This legislation was the Trading Companies Act and it was introduced to overcome some of the significant problems which had arisen in respect to fixing unincorporated joint stock companies with liability for their debts. As Formoy puts it, ‘in its unadapted state it was practically impossible under the law of partnership for an unincorporated company to sue or be sued’\(^55\). However, despite the pressing need for legislation such as the Trading Companies Act, in practice it was little used due to the complex and expensive process which had to be gone through in order to satisfy its conditions and secure a grant of letters patent.

The next significant step in the moves towards the introduction of a new form of commercial enterprise, which would provide for a greater availability of limited liability, was the establishment of a Select Committee in 1837 under the


\(^{54}\) *Monthly Review* III (1826), 26–27.

chairmanship of C H Bellenden Ker\textsuperscript{56} to look into the desirability of introducing legislation allowing for the formation of \textit{commandité} partnerships\textsuperscript{57} in England.

The main issue before the Select Committee on Partnerships of 1837 was whether the English legislature should emulate Continental practice, allowing a form of limited partnership to be available to those engaged to trade on specific terms. Most witnesses examined by the Committee were unfavourable to the proposal. It was thought that, unlike the case in countries like France, there was no necessity in England to provide such incentives to encourage capital into trade\textsuperscript{58}. However, some important figures, such as Nassau Senior\textsuperscript{59}, expressed a contrary view. Senior saw such legislation, if introduced, as providing a better framework for the encouragement and development of small capitalists. Senior considered that the legislation would be beneficial in allowing a 'small capitalist to obtain a commercial profit without risking more than a definite sum'\textsuperscript{60}.

As we will see in the following the role of incorporation in achieving certain goals of social amelioration was to be a significant theme in debates relating to companies legislation for the next twenty years.

\textbf{The Joint Stock Companies Act 1844}

By the 1840s a further theme, that of regulation, began to bear significantly on developments in respect of the possibility of legislation relating to corporations. The failure of many speculative ‘bubbles’ and the economic effect of such collapses on sections of the public made the regulation of the activities of dishonest promoters a pressing matter for the government of the day. A Select Committee on Joint Stock Companies was established in 1841 to deal with the matter. After its appointment the committee did very little for some considerable time. This was

\textsuperscript{56} Charles Henry Bellenden Ker (1789?–1871) was: ‘a legal reformer, called to bar in Lincoln’s Inn 1814. Built a large practice as a conveyancer. Active in promoting parliamentary reform 1830 to 1832. 1833 appointed a Royal Commissioner to examine the expounding and digesting of criminal law and the consolidating of other areas of statute law.’ (\textit{Dictionary of National Biography}).

\textsuperscript{57} A \textit{commandite} partnership is a form of limited partnership in which the active members of the undertaking remain liable to an unlimited extent for the debts of the firm whilst the dormant partners are only fixed with liability up to a certain fixed amount (that is, the dormant partners have ‘limited liability’ in the case of the insolvency of the firm).

\textsuperscript{58} See, for example the evidence of Thomas Tooke to the \textit{Select Committee on Partnerships} (1837), British Parliamentary Papers, XLIV (1837–38).

\textsuperscript{59} Nassau William Senior (1790–1864) was an economist of the Ricardian school of economics and a follower of Malthus. He became the first professor of political economy at Oxford in 1825. He was critical of the approach taken by his contemporaries James Mill and John Ramsay McCulloch in interpreting the tenets of political economy. Member of the Poor Law Board (\textit{Dictionary of National Biography}).

\textsuperscript{60} Evidence of Nassau Senior to the \textit{Select Committee on Partnerships} (1837).
a consequence of the fact that the mood of the times had changed. The desire for change had lessened as memories of the spectacular failures of certain railway companies faded into distant memory.

However, as a consequence of renewed public pressure in the wake of substantial losses to innocent investors occasioned by a series of scandalous company promotions in the early 1840s, the Committee was reconstituted in 1844 under the chairmanship of William Gladstone. The Committee stated in its Report that fraud could be minimized if a registration system was introduced and companies were required to report certain information to the registering authority and to their shareholders. Gladstone summed up the general thrust of the Committee’s approach when he expressed the view that ‘publicity is all that is necessary, show up roguery and it is harmless’ 61. One important contrivance of the Gladstone Committee on Joint Stock Companies was its proposal that prospectuses be registered and their contents be prescribed by law. The Gladstone Committee also advocated the publication of accounts:

> Periodic accounts, if honestly made and fairly audited, cannot fail to excite attention of the real state of a concern; and by means of improved remedies, parties to mismanagement may be made more amenable for acts of fraud and illegality 62.

Another matter debated before the Committee was the issue of limited liability. Despite the favourable evidence of a number of witnesses towards the introduction of limited liability 63, the Committee in the end came out against the measure, asserting that no such artificial contrivance was necessary in England to induce the formation of companies 64. Limited liability, the Committee asserted, was really nothing more than a lure to investors, and as such unnecessary in a nation where there was already an abundance of ‘free’ capital seeking investment outlets.

Some assessments of the legislation have suggested that its subsequent failure can, at least in part, be attributed to the unpreparedness of the Committee to recommend and the legislature to adopt limited liability:

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63  The main assertion of these witnesses was that if limitation of liability were not introduced it would be extremely difficult to find anyone of talent willing to accept a directorship in a joint stock company. One witness stated: ‘The law is so dangerous and unjust towards a man of substance, by putting his whole property at the mercy of other persons beyond his control, if he does join a joint stock company, that very few men of respectability can be found to occupy so perilous a position.’ *First Report of the Select Committee on Joint Stock Companies, 1844*, op. cit., Q.2072.
64  See the discussion of this rationale and the contemporary critique thereof in Hunt, B C (1936)* op. cit.*, 97.
The main complaint after the 1844 reforms was the absence of limited liability... public opinion began to harden in favour of the extension of limited liability, particularly when the slump of 1845–1848 drew poignant attention to the consequences of its absence.\(^6^5\)

A number of other recommendations, adopted in legislation, were designed to prevent undercapitalized or underprepared undertakings from going forward. In the first place the Joint Stock Companies Act of 1844 imposed a system of provisional registration on companies. They would have to meet certain criteria before full registration would be granted – such as a minimum level of capitalization.

Moreover, the 1844 Act imposed both minimum capital requirements on the company and minimum denomination requirements on shareholders. The idea behind the former requirement was to prevent under-resourced enterprises commencing business. The latter stipulation was intended to ensure that only the ‘better class’ of investor – that is, one who maintained an active and informed interest in the company’s affairs and who came from an upper strata of society – became members of registered corporate undertakings.

The recommendations of the Gladstone Committee were in large part adopted in the Joint Stock Companies Act of 1844. They set an important milestone in the development of the corporation in England. They also provided benchmarks regarding the type and quality of information which should be made available to the public in regard to corporations formed under general statutory provisions. The legislation introduced the notion that publicity might constitute an effective regulatory protection for investors. It also established as a principle that incorporation should be available to any group of intending incorporators so long as they satisfied the statutory requirements of the registration system. General availability of incorporation subsequently became a cornerstone of English company legislation.

Despite the numerous innovations introduced by the 1844 statute, by mid century this legislation was regarded as a failure. It was considered in many quarters that the legislation inhibited the formation of corporations, as a consequence of its many provisions requiring publicity of information. It was also considered that the object of the legislation to achieve ‘regulation through publicity’ was unworkable. A number of matters which were necessary preconditions for such a regime to work properly were completely absent from the legislation or were not structurally achievable. For instance the legislation did not specify the content of either the balance sheet or the prospectus, nor did it identify the duties of the auditor charged with certifying the balance sheet. Without the existence of such provisions the objectives of the legislation, to provide meaningful information to investors (and creditors) and to ‘regulate through publicity’ were unachievable.

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In retrospect it is unsurprising that such omissions occurred in the 1844 legislation. Standardized procedures for the preparation of a balance sheet, for instance, would be unworkable as accounting was at the time a scarcely developed practice. By the middle of the century few leading industrial enterprises had even reached the stage of having adopted double entry book-keeping. The collapse of George Hudson’s railway empire was accompanied by a growing realization of the importance of more sophisticated book-keeping of the accounts of large enterprises. The Joint Stock Company Act of 1844 was thus a reflection of the concerns of its day; it was in the forefront of the campaign for more thorough and reliable accounting practices. Yet, given the limited available expertise at that time, its provisions reflected more an ideal to be aimed at rather than a realistic or realizable program of reform with regard to the contemporary accounting practices of most enterprises.

An idea of the context in which the 1844 Act was introduced can be gleaned from the following comments of D Morier Evans in relation to the manner in which the books in some of Hudson’s railway companies were kept:

When he succeeded to the Chairmanship of the North Midland, he was reported to have scoffed at the systematic manner in which the accounts were kept. Good accounts are troublesome things to keep, and occasionally cause trouble to the parties of whose affairs they are registers ... One great company is reported ...

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66 Littleton, A C (1933) Accounting Evolution to 1900, (New York: American Institute Publishing Company), reprinted (1966, New York: Russell and Russell), 213. The ‘new’ accounting history has, however, questioned the view that double entry book-keeping, allowance for depreciation and other such ‘innovations’ were the result of experience with ‘malpractice’. These ‘new’ histories instead hypothesise that such techniques were well known before the railway ‘mania’ of the 1840s but were not utilized during this period so that ‘swindling’ of the investing public could better proceed. It is suggested in such histories that accounting is deeply complicit in the perpetration of frauds on the investing public and that it serves particular classes in facilitating such frauds. Cooper and Sherer (1984) ‘The Value of Corporate Accounting Reports: Arguments For a Political Economy of Accounting’, Accounting, Organizations and Society at 164 have suggested that in capitalism ‘accounting faces the danger of becoming a mere tool of powerful groups’. Bryer (1991) in ‘Accounting for the ‘Railway Mania’ of 1845 – A Great Railway Swindle’, Accounting, Organizations and Society has even gone further in recently suggesting at 483: ‘The accounts published by railway companies were deliberately manipulated as part of an orchestrated scheme perpetrated by the “London wealthy” on the manufacturing and middle classes, who were lured into investing in railways during the “mania” and were forced to sell out at a loss.’

67 David Morier Evans (1819–1874) was a financial journalist connected with many of the leading commercial and financial publications of the nineteenth century, among them The Bankers Magazine, the Bullionist and the Stock Exchange Gazette. He was also the author of five books, which chronicled the key economic crises of the third decade of the nineteenth century (Dictionary of National Biography).
to have used pencils for their figures, in preference to ink, which, we presume, must have been for the sake of convenience.\footnote{Morier Evans, D (1859) \textit{Facts, Failures and Frauds}, reprinted 1968 (Newton Abbott: David and Charles), 19.}

In fact, these practices were so much an accepted part of commercial life at the time that Hudson, when prosecuted for altering the books of the Eastern Counties Railway, told the court that he felt quite justified in changing the entries as he was merely thereby ‘shifting debt from one period to another’ in order to allow him to pay shareholders the dividend which they required. Instructively enough, if one is wishing to determine what the ‘norm’ was in relation to standards of financial reporting in the mid-nineteenth century, Hudson was not convicted by the courts of any criminal offence for perpetrating these flagrant distortions of the real financial state of the companies that constituted part of his railway empire. David Morier Evans states that, at the time:

\begin{quote}
A full, true, and explicit statement and balance sheet, detailing expenses, receipts, obligations and, profits, if any, was hardly, it was felt, to be expected.\footnote{ibid., 68.}
\end{quote}

Despite its ‘failure’ in many respects, particularly in stemming the flow of malfeasance and shoddy practices amongst corporate promoters, the 1844 Act nevertheless constituted a watershed in relation to many aspects of corporate behaviour. One area in which the Act was extremely important to later developments was with respect to accounting practices. One of England’s leading historians of the accounting profession, Edgar Jones, comments on this period:

\begin{quote}
If it is possible to argue that a particular decade was critical for the development of the English accountancy profession, then this was the 1840s. Both government legislation and the growth in the size and complexity of businesses at this time meant that the expanding numbers of accountants were drawn into strategic positions within the economy, and once there, consolidated their hold.\footnote{Jones, E, (1981) \textit{Accountancy and the British Economy}, (London: B.T. Batsford Ltd.), 28.}
\end{quote}

In an attempt to stave off some of the criticism surrounding the imprecision of the requirements of the 1844 Act in relation to the form of balance sheet required, the Act was amended in 1845. These amendments provided a greater degree of direction to those preparing accounts as to what they were required to provide to members and the registering authority. The Companies Consolidation Act (1845) required:
... [A]n exact balance sheet ... which shall exhibit a true statement of the capital stock, credits and property of every description belonging to the company, and the debts due by the company ... and a distinct view of the profit and loss which shall have arisen71.

Nevertheless, whilst representing a significant shift in English public and commercial opinion as to the desirable form in which accounts should be kept by large enterprises, the 1844 Act and the subsequent amendments in 1845 proved to be unworkable. Neither the expertise nor the will yet existed amongst company promoters and officers, nor amongst the bureaucrats charged with ‘enforcing’ the legislation, to make it work properly.

This combination of reluctance and inability to implement the key provisions of the legislation relating to financial reporting was made more defensible by the impracticality, at least from a commercial point of view, of a number of the other provisions of the 1844 legislation. The ponderous two-stage registration process adopted in the 1844 Act, along with the minimum capitalization requirements, made it almost certain that the legislation would fail in its regulatory objectives. It also, however, ensured that the legislation would attract significant criticism at first from the commercial community, and then later from the community at large.

After the first few years of its operation fewer and fewer companies chose to register under the Act at all (see Table 2.1). The companion legislation to the 1844 Companies Act, an act relating to banking, had a similar effect in discouraging joint stock enterprises. Between 1844, when the Gladstone legislation on Joint Stock Banking was passed, and 1857 when it was repealed, only five new joint stock companies were formed in England72.

The English legislation on joint stock companies rapidly developed a reputation as the harshest and most restrictive in all of Europe. From the late 1840s onwards considerable pressure began mounting to scrap the legislation and replace it with a scheme more amenable to ‘free enterprise’. The first manifestation of this was in 1847 when an Act was passed through Parliament which amended the 1844 legislation so as to remove the requirement that prospectuses be filed with the responsible authority (that is, the Board of Trade). The rationale given to Parliament for this amendment was that the prospectus filing requirement had proved ‘to be very bothersome to the promoter’73. As we will later consider in more detail, the 1856 Companies Act did away with most of the remaining disclosure provisions and the accounting and auditing requirements that had been so carefully inserted as a precautionary measure by the 1844 Act.

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71 Companies Consolidation Act, 1845. s.66.
72 See the comments on this in the classic contemporary text on the finance and securities industry: Bagehot, W (1915) Lombard Street, (London: Murray).
Table 2.1  Companies registered and abandoned 1844–68

(i) Companies Registered and Abandoned Under the Joint Stock Companies Act 1844

<table>
<thead>
<tr>
<th>Year</th>
<th>No. of Companies Provisionally Registered</th>
<th>Abandoned</th>
<th>No. of Companies Completely Registered</th>
<th>Per cent Abandoned</th>
</tr>
</thead>
<tbody>
<tr>
<td>1844</td>
<td>119</td>
<td>119</td>
<td>0</td>
<td>100</td>
</tr>
<tr>
<td>1845</td>
<td>1520</td>
<td>1463</td>
<td>57</td>
<td>96</td>
</tr>
<tr>
<td>1846</td>
<td>292</td>
<td>180</td>
<td>112</td>
<td>61</td>
</tr>
<tr>
<td>1847</td>
<td>215</td>
<td>117</td>
<td>98</td>
<td>54</td>
</tr>
<tr>
<td>1848</td>
<td>123</td>
<td>60</td>
<td>63</td>
<td>48</td>
</tr>
<tr>
<td>1849</td>
<td>165</td>
<td>97</td>
<td>68</td>
<td>58</td>
</tr>
<tr>
<td>1850</td>
<td>159</td>
<td>102</td>
<td>57</td>
<td>64</td>
</tr>
<tr>
<td>1851</td>
<td>211</td>
<td>148</td>
<td>63</td>
<td>70</td>
</tr>
<tr>
<td>1852</td>
<td>414</td>
<td>304</td>
<td>110</td>
<td>73</td>
</tr>
<tr>
<td>1853</td>
<td>339</td>
<td>215</td>
<td>124</td>
<td>63</td>
</tr>
<tr>
<td>1854</td>
<td>239</td>
<td>107</td>
<td>132</td>
<td>44</td>
</tr>
<tr>
<td>1855</td>
<td>253</td>
<td>172</td>
<td>81</td>
<td>67</td>
</tr>
<tr>
<td>TOTAL</td>
<td>4049</td>
<td>3084</td>
<td>965</td>
<td>76</td>
</tr>
</tbody>
</table>

(ii) Numbers of Companies Registered and Abandoned Under the Companies Acts 1856 & 1862

<table>
<thead>
<tr>
<th>Year</th>
<th>No. of Companies Registered</th>
<th>Number Abandoned</th>
<th>Number Remaining</th>
<th>Per cent Abandoned</th>
</tr>
</thead>
<tbody>
<tr>
<td>1856</td>
<td>227</td>
<td>61</td>
<td>166</td>
<td>26</td>
</tr>
<tr>
<td>1857</td>
<td>392</td>
<td>123</td>
<td>269</td>
<td>31</td>
</tr>
<tr>
<td>1858</td>
<td>301</td>
<td>111</td>
<td>190</td>
<td>37</td>
</tr>
<tr>
<td>1859</td>
<td>326</td>
<td>108</td>
<td>218</td>
<td>32</td>
</tr>
<tr>
<td>1860</td>
<td>409</td>
<td>104</td>
<td>305</td>
<td>25</td>
</tr>
<tr>
<td>1861</td>
<td>479</td>
<td>135</td>
<td>344</td>
<td>28</td>
</tr>
<tr>
<td>1862</td>
<td>502</td>
<td>112</td>
<td>390</td>
<td>22</td>
</tr>
<tr>
<td>1863</td>
<td>760</td>
<td>190</td>
<td>570</td>
<td>25</td>
</tr>
<tr>
<td>1864</td>
<td>975</td>
<td>193</td>
<td>782</td>
<td>20</td>
</tr>
<tr>
<td>1865</td>
<td>1014</td>
<td>77</td>
<td>937</td>
<td>7</td>
</tr>
<tr>
<td>1866</td>
<td>754</td>
<td>28</td>
<td>726</td>
<td>3</td>
</tr>
<tr>
<td>1867</td>
<td>469</td>
<td>1</td>
<td>463</td>
<td>0.02</td>
</tr>
<tr>
<td>1868</td>
<td>448</td>
<td>2</td>
<td>446</td>
<td>0.04</td>
</tr>
<tr>
<td>TOTAL</td>
<td>7056</td>
<td>1245</td>
<td>5811</td>
<td>18</td>
</tr>
</tbody>
</table>

The manner in which the 1844 Act was regarded in some circles, at least by the 1850s, is reflected in Robert Lowe’s speech introducing the 1856 Bill:

Then we come to the law of 1844 – the present Joint-stock Companies Act. That measure was the result of the Report of a Select Committee, which appears to have conducted its deliberations in a state of mental perturbation scarcely less violent than that which prevailed in the days of George 1 [i.e. when the Parliament hurriedly introduced the Bubble Act in the wake of the collapse of the South Sea Bubble]. For, when we look at their Report, I find the headings of the different sections of what one would generally expect to be a very demure and quiet sort of document running thus – “Form and Destination of the Plunder”, “Circumstances of the Victims”, “Impunity of the Offenders” and the like; so that a hurried glance at the contents might make a man fancy he was reading a novel instead of a blue book. This Act appears ... to have been introduced in the belief that it was in the power of the Legislature, by its enactments, to correct every evil relating to these bodies ... I wish to show the House how ill the performance has kept pace with the expectation held out, and how signally the machinery, which was supposed so very efficient, has broken down in the hands of those intrusted with its working.

One of the key elements in the failure of the 1844 Act, according to Lowe and other critics, was the total inability of the existing bureaucratic structure to properly regulate corporations. Indeed Lowe demonstrated that the Registrar of Companies division within the Board of Trade could not even ensure that the Register was kept up to date and that companies lodged their Annual Returns. Rather than increase expenditure on the Registrar of Companies division in the perhaps vain hope that this would ensure better regulation and greater compliance, Lowe asserted the view that the State should not even attempt to regulate joint stock companies. Along with others, he considered that company legislation should be purely facilitative. It should not contain any regulatory measures whatsoever. According to these advocates of laissez-faire philosophy, the bureaucratic machinery associated with company legislation should have no role other than that of accepting applications for registration from companies and receiving the relevant fees. The Registrar of Companies office should also record any subsequent changes effected by registered companies (such as changes to their Articles). The role of the Registrar of Companies was, in the laissez-faire view, purely ministerial in nature.

In answer to the charge that by removing the existing regulatory protections from company legislation the position of investors and creditors would be substantially worsened, Lowe and his allies stated that quite the contrary was true. By so legislating the law would be brought into line with what actually happened. As annual returns were not lodged and as the Registrar of Companies could not properly pre-vet documents, the 1844 Act merely created an illusion of protection.

74 Hansard, House of Commons, 1st February 1856, per Robert Lowe, 117–118.
for the inexperienced and/or the unwary. It would be more honest for the legislature to acknowledge its incapacity to protect investors and creditors and to leave them to devise their own systems of self-protection.

Lowe and others from the Board of Trade who supported the introduction of new legislation which removed the array of obligations imposed on companies, and the regulatory duties and responsibilities cast upon the Registrar under the 1844 Act, knew that such legislation would meet with little resistance as it would merely confirm what was already de facto the case. The realities of bureaucratic practice at the time meant that the Registrar was not and could not hope to be an effective regulator, even if that was, in the climate of the times, a desired objective. It was a not very well kept secret that whilst under the 1844 Act the Registrar had been given a considerable array of responsibilities, he had been able to perform few of these responsibilities effectively. Lowe drove this point home in a speech to the House of Commons in 1856:

I will take the liberty of reading a few brief extracts from the Report of the Committee. I find that the Registrar of Companies, Mr Whitmarsh, who was examined before that tribunal, states very compendiously that the returns which the Act requires, and which are enormously burdensome and expensive, are worth nothing – that the Act is very much evaded, companies being frequently formed with no other foundation than that supplied by men of straw … I cite this in support of the inference which I wish to deduce – viz. that it is quite impossible by any legislation that we can devise really to protect the public in matters in which they are fully able to protect themselves.\(^75\) (emphasis in original)

Lowe and others, both from the Board of Trade and from elsewhere\(^76\), asserted that the costs associated with maintaining and operating an effective regulatory apparatus were prohibitive. It was, they reasoned, undesirable and impracticable to maintain the pretence of a regulatory apparatus when one could not afford to make it effective. The long-term effects of the propositions advanced by Robert

\(^75\) ibid., 120–121.

\(^76\) The Manchester Chamber of Commerce reflected the view prevailing in some quarters that not only would the activities of limited liability companies be impossible to regulate but that their introduction would lead to an overall decline in commercial morals. In 1855 the Manchester Chamber of Commerce passed a motion protesting the proposed introduction of limited liability incorporation on the grounds that it was ‘so subversive of that high moral responsibility which has hitherto distinguished our partnership laws as to call for the strongest disapproval’ (Proceedings of the Manchester Chamber of Commerce, 13th June, 1855, cited in Redford, A (1956) Manchester Merchants and Foreign Trade, (Manchester: Manchester University Press), 215 and Cooke, C A (1950) Corporation, Trust and Company, (Manchester: Manchester University Press), 157.
Lowe and his supporters in the middle of the nineteenth century were noted by Grieser in 1940:

The principle ... expounded almost a century ago ... that it was a ‘natural right’ of men to form themselves into joint stock companies to conduct business and trade still applies to a great extent today, although it has been modified in practice ... the laissez-faire Victorian attitude that governments should interfere as little as possible ... still permeates the British attitude toward company regulation and restriction. The English [approach] has contributed to the disorganization and indefiniteness of the statutory laws ... company practice is [still today] regulated only to a minimum degree by law77.

In addition to asserting the costly nature of establishing an effective regulatory body, it was also argued by those opposed to publicity provisions such as existed under the 1844 Act that regulation of any form had a corrosive effect on commercial initiative. Requiring companies to report to a government official and/or shareholders would discourage those already in business from floating new companies, and those considering setting up new corporate enterprises would not do so for fear of being prosecuted for non compliance with some minor regulatory provision or other.

Others asserted that the pretence of regulation by the state in company legislation would be misleading to investors. It would give them the impression that the State was acting as a watchdog against fraud and malpractice, or alternatively as a guarantor against loss. Given the known deficiencies of the regulatory regime applying under the 1844 Act it was difficult to appreciate how the Registrar could be a truly effective watchdog. Given the experience of the Government in having to intervene in the case of some corporate collapses, such as that of the Rochdale Savings Bank78, the dangers and costs associated with the state assuming the mantle of guarantor were well known. Whoever might ultimately bear the loss, one consequence of the failure of most regulatory regimes to fulfill their promise is that they lull investors into a false security with regard to the safety of their investments.

As a result of the difficulties associated with the regulatory function, Lowe considered that the state should do the same in relation to company regulation

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78 For an account of the nature of and reasons for the Government’s intervention in the case of the collapse of the Rochdale Savings Bank see Saville, J (1956) ‘Sleeping Partnership and Limited Liability 1850–1856’, Economic History Review, 2nd series, vol. 8 (3), 418–433 at 429. Note also the ambivalence expressed by some as to the desirability of retaining the paternalist regime applying to Friendly Societies: in this respect note should be made of the evidence of witnesses to Select Committee on Friendly Societies, 1849 (458) vol. XIV, in particular the evidence of Mr M T Barlow at Q. 1454.
as he later proposed should be its role in regard to bankruptcy – ‘Nothing’ 79. He considered the best policy in both cases was for commercial practice to act as the regulator. In that way the State would avoid immersing itself in endless controversy and speculation. Whilst the results of an unregulated regime might at times appear harsh, it was considered merely an illustration of the heavy responsibility which fell on the individual in commercial matters. Personal vigilance was the only sure guide in the dangerous shoals of the commercial world.

**Summary and Implications**

By the middle of the nineteenth century, whilst most of the familiar elements of ‘modern’ company law were already known to contemporaries (limited liability, perpetual succession, proxy voting, and so on), there was still considerable debate as to appropriateness of the corporate form for the conduct of most types of commercial undertaking. Whilst it was conceded, following Adam Smith, that incorporation was necessary in the case of projects needing large aggregations of capital and/or long amortization periods (such as was the case with canal developments, railways, toll bridges, and so on) considerable distrust existed with regard to the utilization of the corporate form in other varieties of commercial undertaking. Considerable controversy also surrounded issues such as limitation of liability and the role of the State as a regulator of corporate behaviour.

In the century preceding these mid nineteenth century debates there had been little discussion in England with respect to the role of corporations in economic

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79 Martin, A Patchett (1893) *Life and Letters of Viscount Sherbrooke*, vol. 2, (London: Longmans, Green & Co.), 457–458. Despite protestations against bankruptcy law and against the use of law to regulate corporations this does not mean that Lowe considered no regulation would prevail in the market-place – it was only that the type of regulation which he considered most appropriate in commercial matters was infra-legal. The rules and sanctions prevailing in the marketplace were, to Lowe’s mind, a far more effective, flexible and adaptive mean by which to deal with malfeasance in commercial matters than the clumsy and ineffective mechanisms of the ‘law’.

That Lowe did not consider an absence of regulation desirable in all instances is apparent in his speech to the Commons on the failure of his attempt to abolish income tax: ‘The real evil of the income tax, in my judgement, is not that it is levied in a partial manner on land, or realized property, or profits of trade, but that from the necessity of the case, persons having such income, as that included in Schedule D (that is, income from businesses) are judges in their own cause and that in many instances holds out a temptation to those persons to give too favourable an interpretation of their liability. But to say there is an objection to income tax is only to say that this tax is a tax; for the ingenuity of the human mind never did and never will devise a tax to which there are not objections more than plausible and which would be absolutely convincing and irresistible if taxation were not a necessity.’ *Hansard*, 3rd series, vol. 161, 1869 cited in Sabine, B E V (1980) *A Short History of Income Tax*, (London: Butterworths), 100.
development. The enactment of the Bubble Act in 1720, which had prohibited the formation of any corporations other than those sanctioned by Royal Charter or private Act of Parliament, had meant that public discussion of issues relating to the role of incorporation was effectively truncated for over a century. The policy contained in the Bubble Act, which was hostile to grants of incorporation other than by the state in a narrow range of circumstances, was quite at odds with what was happening elsewhere on the Continent. This policy also arguably allowed established English entrepreneurs to entrench monopolies at the expense of newer rivals who, without the availability of capital, found it difficult or impossible to raise the necessary capital to be competitive with these established businesses.

Despite the official prohibition on corporate entities other than those formed by Royal Charter or Act of Parliament, it was nevertheless the case that many speculative undertakings were formed at this time as ‘deed of settlement’ companies; enterprises, which were effectively, extended partnerships operating on the margins of what was legally permissible. Within these enterprises of dubious legality many of the legal characteristics of the modern corporation were developed. The apparent legal netherworld occupied by these enterprises allowed some quite unique solutions to the characteristic problems presented by incorporated undertakings. Arguably developments in this legal netherworld ultimately lead to the quite unique solutions finally adopted in England to the difficulties presented in respect of legislating for the incorporation of commercial undertakings.

The first legislation introduced to England in this regard, subsequent to the repeal of the Bubble Act, was effectively a response to the problems encountered during the railway boom and subsequent crash of the early 1840s. Manipulation of the process of obtaining grants of incorporation, financial mismanagement of railway corporations, lack of regulation of these corporations by the state and large scale financial losses by those who had speculated in railway shares led to a re-evaluation of government policy in regard to incorporation. The Gladstone Committee on Joint Stock Companies suggested in 1844 a general system of corporate registration, which would avoid the favouritism which was perceived to apply to grants of Charters and the passage of private Acts of parliament. The Joint Stock Companies Act of 1844 adopted this suggestion and also included in its provisions a requirement that registered companies provide annual financial information, which would be publicly available. Intending investors could consequently make up their own minds as to the desirability of investing in the particular undertaking in question. The 1844 Act, however, did not adopt limitation of liability for shareholders as this was regarded as offering investors in joint stock enterprises an unfair advantage compared with those who invested in unincorporated undertakings. It was also thought in some quarters that limitation of liability was potentially corrosive of commercial morality, which had been built on the understanding that those who stood to gain by investing in commercial activities should also bear the full brunt of their failures, even to the extent of all their personal assets.
The 1844 Act proved to be a failure in practice, largely due to a lack of commitment on the part of the government to resource the administrative infrastructure necessary to oversee such a scheme, but also due to the technical complexities of the registration system under the scheme, which was too clumsy and unwieldy to be able to meet the needs of speculative entrepreneurs. The failure of the 1844 Act to adopt limited liability also made it less attractive to entrepreneurs than might otherwise have been the case. It was only with the economic resurgence of the early 1850s and the growing insistence on the part of the middle classes for investment outlets for their savings that interest in incorporations legislation became rekindled. The following chapters examine the debate which raged during the early to mid-1850s as to the appropriate form for incorporations legislation and the place of limited liability in such a system. These chapters also explore the role of the debates around working class co-operation and the perceived potential of limited liability investment in being able to bring capital and labour together in collective undertakings in leading to the final legislative solution adopted in 1856 by the English Parliament to the problem of incorporation.
Chapter 3

Christian Socialism and the Debate on Limited Liability

Introduction

This chapter examines the manner in which the debate about the introduction of limited liability incorporation became entangled with concerns relating to social amelioration in the early nineteenth century. This was particularly the case with respect to the extended Parliamentary and extra-Parliamentary debates regarding the introduction of the Industrial and Provident Societies Act. The Christian Socialists’ intervention in this debate, especially those by John Ludlow and Edward Vansittart Neale, and the support provided to them by a group of social reformers such as Robert Slaney, who had become concerned about the divisions in society exposed by the Chartist agitation, are also examined in the following sections of the chapter. The effect, if any, of this parallel debate regarding limited liability and working and middle class investment on the debate about the suitability of limited liability for ‘mainstream’ commercial undertakings will be explored. So too will the effects of these debates concerning the middle and working class on the evolving notions of the meaning of laissez-faire. The themes are examined in the context of the 1844 Select committee on incorporation chaired by William Gladstone and the 1850 and 1851 Select Committees on Partnership, chaired by Robert Slaney.


Factors Influencing the Campaign for the Availability of a Limited Liability Form of Enterprise to Accommodate the Needs of the Working and Middle Classes – 1848–1852

It was not solely the advocates of laissez-faire doctrines who found the 1844 Act and its regulatory strictures unpalatable. Prominent among advocates of reform were those who wished to advance the cause of working class co-operatives, and those who were interested in re-vitalizing small capital. In its attempt to ‘protect’ the public the 1844 Act embraced many provisions which were antipathetic to the interests of co-operatives and small capital wishing to adopt corporate status. The complex and expensive registration system prevailing under the 1844 Act made
that legislation unsuitable as a mechanism whereby small capitals or co-operatives might be able to secure corporate status. The requirements in the legislation as to minimum paid up capital and required minimum share denominations far exceeded the amounts which working class or middle class investors were willing or able to invest in such a venture.

Thus, it was not only the case that such provisions did not work in practice; they also had the co-incidental effect of preventing the working classes and small capitalists from being able to incorporate. They effectively put investment in joint stock companies out of reach for those in the middle classes with spare capital. For example, who could afford one hundred pound shares, particularly if the investment in question failed and the investor was subject to unlimited liability? As a number of commentators have stated, the problem in England during the early 1850s was not so much a lack of outlet for capital in general, but rather a lack of outlets for that spare capital possessed by the working and middle classes. For the first time these strata of English society had sufficient accumulated capital to invest their funds. Yet the English investment market was set up in such a way that it catered only for the wealthy. The specific needs of other classes were not provided for by the most common forms of investment then available.

It was not only with respect to investment, but also in relation to liability for loss in case of failure, that the prevailing English law regarding partnership, incorporation, bankruptcy and debt discriminated against small and medium sized businesses. The absence of provisions allowing incorporation with limited liability disadvantaged those with small capital, by not allowing them any buffer from the harsh effects of the economic cycle. Hence the 1850 and 1851 Select Committees were animated by the following concerns:

- that the industrious members of the working and middle classes who had accumulated savings be given the opportunity to invest their savings in joint stock companies without being subject, upon their failure, to the full rigours of unlimited liability, and;
- that the working and middle classes have available to them a device which would allow business ‘schemes’ which they wished to pursue to take on limited liability guise – whether as a commandité partnership or as a limited liability company.

1 J B Jeffreys (1938) notes this characteristic of the pressure for new outlets for investment in his thesis, Trends in Business Organization in Great Britain, at 30: ‘Supporters of limited liability also suggested that the limited array of outlets for investment had been conducive to “reckless speculation” on the part of the middle class and an extension of the system would give rise to a wider (and sounder) array of investment opportunities than those which were presently available.

2 The Select Committee of 1850 made this especially clear in its Report: ‘The difficulties which affected the law of partnership operate with increasing severity in proportion to the smallness of the sums subscribed and the number of persons included in
Studies of wealth-holding amongst the various strata of English society suggest that in the mid-nineteenth century there was, for the first time, some surplus capital in the form of savings being accumulated by the higher strata of the working classes and by the middle classes in England. Whilst the sums were relatively modest at an individual level, they were nevertheless cumulatively quite significant. The difficulties for those who held these savings were the very few outlets available for modest investments. This was compounded by the fact that those outlets which did exist offered very low returns. For instance, savings banks, in which the working classes were encouraged to place their savings, offered only between two and three per cent interest. After some collapses in the 1840s, they were also not regarded as totally secure. It was also the case that only quite small amounts of money could generally be invested with savings banks. Most savings banks serving working class communities placed a ceiling of between twenty and thirty pounds on the amount which could be placed by each individual customer.

Whilst there was a slightly greater choice of investment outlet available to members of the middle classes, with some apparently higher yielding and safer investments on offer, this group nevertheless often faced dilemmas very similar to those faced by working class investors. Promising outlets for savings such as Consols required a minimum initial investment of £1000, an amount in excess of the savings of many, if not most, investors in this category. Middle class investors, even if they could afford to place their savings in Consols, would also find that the returns were modest, varying from about 2.8 per cent to 3.4 per cent throughout the early nineteenth century.

What many middle and working class investors required were investments which promised higher returns than either savings banks or Consols, but which carried not much more risk than either of those forms of investment. Representatives of this group of investors quite legitimately asserted that they should be entitled to a somewhat higher return on their investments than 2–3 per cent when those who had their funds invested in industrial undertakings were receiving an annual return of 10–15 per cent on their capital.

One option pursued by this group of disgruntled investors had been to invest their savings in overseas enterprises. The advantage of such undertakings, formed in France, Tuscany, the United States and a variety of other locales, was that they offered limited liability. If they failed, investors would not therefore be exposed to the possibility of total destitution. The problem with such enterprises was, however, that they were often highly speculative in nature and produced none...
of the promised returns for their investors. Having their board and office located overseas also meant that investors had little capacity to monitor the managers of these enterprises. They were consequently often subject to the dishonest machinations of the promoters and/or managers of such companies.

Before the 1844 Act there had also been many undertakings formed in England which claimed to offer limitation of liability by the terms of their deed. Such undertakings were attractive to investors from the middle and working classes. Just as was later the case with overseas flotations, however, they lent themselves to dishonesty and malversion on the part of their promoters. The climate which prevailed in the 1840s was aptly described by Samuel Warren in his cautionary tale of the inner workings of the financial world, *Ten Thousand a Year*:

> The system of joint stock companies speculation, as described in the foregoing and subsequent pages of the text, as far from being an exaggeration, falls far short of a complete illustration of the stupendous scale of swindling which has, during the last ten or fifteen years, been tolerated in this great commercial country. At length, however, in the year 1844, the legislature has struck a blow calculated to demolish the whole fabric, or at all events, prevent any similar erection ... By the Act such restrictions are placed upon fraud and improvidence, as are calculated to paralyse much of their powers of practicing upon public credulity.4

Whilst the Act of 1844 stemmed the flow of dubious speculative flotations, it also resulted, unfortunately for the middle class investor, in a narrowing of the range of suitable investments. It is therefore not surprising that a large growth in capital outflow from England began to occur after the enactment of the 1844 legislation. The working and middle class investors of the day were effectively forced to exchange their high risk domestic investments for high risk overseas investments after 1844. The symptoms of the underlying problem, as personified in the many fraudulent and dishonest flotations occurring during the railway boom of the early 1840s, had been treated by the reforms ushered in by the 1844 Act. However the problem itself – the desire of this class of investor to have access to higher yielding investments – had not been dealt with at all. The failure of the 1844 Act to eliminate the desire of English investors for lower class, but higher yielding, securities than those on offer by the savings banks was commented upon by William Gladstone:

> I suspect that with regard to joint stock companies and speculation we are a nation of children who will not allow our nursery maids to govern us5.

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The main effect of the 1844 Act was therefore to substitute for a range of domestic flotations of dishonest and speculative schemes, a range of overseas flotations of a similar kind. The phenomenon of a new class of investor entering the market was not properly recognized until the Select Committee on the Savings of the Middle and Working Classes reported in 1851.

In addition to the mounting pressure to make available outlets of investment for the working and middle classes there was an additional concern beginning to be expressed in the late 1840s and early 1850s – that members of the working classes and petty bourgeoisie be given the opportunity to form their own enterprises with protection of limited liability. The catalyst by which these concerns came to be seriously considered was the threat presented to members of the upper strata of English society by the Chartist movement, and their consequent desire to alleviate some of the political tensions of the day by granting concessions to sections of the Chartists.

One concession intended to co-opt those in the labour aristocracy who had been active in the Chartist movement was to provide a means whereby honest and thrifty working men might have readier access to capital to form their own enterprises. The manner by which it was proposed this could be done was through the mediation either of a limited liability company or of a commandité partnership. Viscount Goderich commented on the concerns of the time in the course of a debate in Parliament:

> It was a great evil to retain upon the statute book any law that tended to keep the three elements [of skill, labour and capital] separate from one another [the binding together by the ties of common interest of these three elements was effectively prevented by the existing law]. Great capitalists won’t currently support the development of ingenious inventions made by men of small means ... the reason being that by doing so they would make themselves liable to an unlimited extent if the scheme failed.

A number of proposals from diverse sources began to be advanced regarding the desirability of encouraging members of the working class to form and run their own enterprises. As noted above such proposals were in large part a direct response to the political restiveness of the working class, which had been demonstrated in the great Chartist agitations of the time. Many representatives of the more privileged sectors of English society acknowledged that concessions would have to be made to sectors of the working class if the tide of Chartism was to be kept at bay. The various schemes and ideas related to the encouragement of working class enterprise initiatives, whatever their other differences, were also all agreed on one matter. The prevailing organizational forms for mounting business ventures were unsuitable for working class undertakings of the type envisaged.

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The existing law of partnership was considered unsuitable for a number of reasons. Not the least of these factors was that the liability of partners was unlimited. Consequently, in the case of a working class venture, every member would be liable if the venture failed, to the extent of their ‘last shilling and acre’. This was considered unsettling, not only to the working class ‘venturers’ actively involved, but also to those middle or upper class ‘promoters’ who might advance the capital for the undertaking. Despite their philanthropic temper, ‘promoters’ still desired some protection from the full rigours of the law, particularly when there was some risk of failure to the undertaking they were associated with. It was widely acknowledged at the time that many of the working class co-operative ventures being financed by members of the middle and upper classes were risky in the extreme, with little hope of long-term success. Understandably, those investing in such undertakings wished to protect themselves against unlimited liability for the debts of the undertaking in case of failure.

The existing law of partnership was also considered undesirable for co-operative undertakings due to the fact that it was not well suited to activities in which there were a large number of active participants. The larger the number of persons involved in an undertaking, the less viable was the partnership form. There would need to be simpler means by which new members could be readily admitted and old members could readily leave the undertaking. This constant traffic of members was not something for which partnership law was readily adaptable, designed as it was around the premise of a constant, rather than a fluctuating, membership.

Even if many of the above problems could have been overcome, further impediments stood in the way of co-operative ventures. Many such enterprises could not have constituted themselves as partnerships even if they so desired. The sheer numbers of their membership would compel many such undertakings to register as companies under the Joint Stock Companies Act of 1844. With all its attendant costs and the complex nature of the obligations under that legislation with respect to financial record keeping and reporting it was considered a highly unsuitable framework for operating a working men’s or women’s co-operative venture.

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7 The experience of Edward Vansittart Neale, who lost £40,000 over a number of years of underwriting failed working class co-operatives, whilst perhaps extraordinary in the magnitude of the losses, was nevertheless perhaps not atypical (see the Dictionary of National Biography entry for Edward Vansittart Neale).

8 Lord Palmerston stated as much in supporting the Limited Liability Bill in the House of Lords: ‘My own opinion is – and no one denies it – that these Bills are of the utmost interest and importance ... I will say in a few words that I consider the contest lies between the few and the many ... There is nothing, I am persuaded, that would tend more to the general advantage of the public than the setting free, as these Bills proposed to do, small capitals, that they may be turned to profitable employment. The present law prevents that from being done.’ Hansard, 3rd series, vol. 139, 1855, cols 1389–1390.
The other available mechanisms for obtaining corporate status, in this case with limitation of liability, were also considered unsatisfactory from the point of view of working class incorporators. Royal Charters and private Acts of Parliament were in large part unsuitable to working class needs both due to their excessive cost (up to £1,000 to secure a Charter or private Act of Parliament) and their principal purpose, which was to accommodate investment in large scale activities such as railways, canals or mines.

Given the inability of any of the existing legal mechanisms to be able to accommodate satisfactorily the organizational needs of working class co-operative ventures, the demand for appropriate legislation became an important component of the campaign to encourage ‘self help’ through co-operative businesses and mutual aid societies. It became axiomatic in some circles that legislation providing for a low cost method of securing limited liability corporate status was an essential concession which must be made available to the working classes to prevent continuing dissent such as had been experienced around the People’s Charter.

An article in the *Law Review* of 1848 advanced just such a proposition:

[To] meet the desire for socialism and communism [which would become] overwhelming unless means be taken to allow of fit arrangements of an intermediate character.⁹

In 1850 *The Economist* similarly canvassed the necessity for legislation to provide a form of limited liability enterprise suitable to the needs of working class co-operators. It noted the ‘ingrained dissatisfaction’ of the working classes with the remuneration for their labour. That ‘rooted dissatisfaction’ could only be overcome by the working classes experiencing for themselves the uncertainties of manufacturing and trade. Since association in co-operative ventures was believed by working men to be a workable alternative to their present condition, and as experience in such ventures would ‘disabuse the artisan mind’ of the idea that the capitalist class appropriated too large a share of the produce of labour, the extension of the right of limited liability being asked for by the Society of Promoters (a Christian Socialist group active in the campaign for the introduction of appropriate legislation) should be granted.¹⁰

The same sentiments were again expressed in 1852 in the *Edinburgh Review* by W R Greg¹¹ who asserted that:

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ⁱ⁰ *The Economist*, vol. VIII, 1850, 537.
¹¹ William Rathbowne Greg (1809–1881) was a Manchester born essayist, the son of Samuel Greg, a merchant. In 1842 W R Greg won a prize offered by the Anti-Corn Law League for an essay he wrote on ‘Agriculture and the Corn laws’. From 1864 to 1877 he was Comptroller of the Stationary Office. His second wife was the daughter of James Wilson, the editor of *The Economist*. ‘In Greg there was a mixture of ardent philanthropy and a disinterested love of the truth’ (*Dictionary of National Biography*).
…the bitter controversy between capital and labour as to the division of their joint earnings would receive the only satisfactory solution of which it was capable, by combining the two controversialists in one actual experiment together.\footnote{12 Cited in Boult, S (1865) Trade and Partnership: The Relative Duties and Proper Liabilities of the Merchant and the State (London: Effingham Wilson) 10.}

Significant public and intellectual figures of the day also offered their opinions on the matter of limited liability enterprise and working class co-operation. Amongst these was J S Mill who opined:

> There is no way by which the working classes can make so beneficial a use of their savings, both to themselves and to society, as by the formation of associations to carry on the business with which they are acquainted, and in which they are themselves engaged as work-people\footnote{13 J S Mill cited in Chambers Edinburgh Journal, vol. XIX, 1853, 343.}.

Many contemporaries were, however, highly pessimistic as to the commercial prospects of such working class ventures. The somewhat negative views of those outside working class ranks, and even those amongst them, regarding the possible success of such ventures from a commercial perspective was, however, tempered by a far more positive view of the potential value of such ventures as a ‘social experiment’. Both ‘social cranks’ actively involved in promoting working class co-operative ventures, and those less actively involved, expressed at various stages their ambivalent attitude towards working class co-operative ventures. The prevailing temper of mind was that they would be a glorious failure – unsuccessful as commercial undertakings, but successful in inculcating amongst the working classes greater understanding with respect to the difficulties of conducting a commercial undertaking\footnote{14 Jeffreys, J B op. cit., 33–34 has noted the enthusiasm expressed in the mid-nineteenth century as to the benefits to capital–labour relations seen as flowing from the introduction of limited liability legislation: ‘The highest hopes were held out for the principle of limited liability in the sphere of relations between capital and labour ... indeed the law of partnership was regarded by some as the cause for the antagonism between the two classes in English society ... some extraordinary claims were being made as to the effect on capital–labour relations by a motley collection of Christian Socialists, social reformers, economists and a few businessmen. One commentator in the Westminster Review claimed that limited liability would lead to an ‘improvement in knowledge, in manners and in habits of thought (which would be the first results) and would be quickly followed by elevation of character, dignified bearing and increased self-confidence and self-respect.’ Commentators such as W R Greg, whilst supporting the introduction of limited liability, also expressed the view that they doubted if it would much help the poorer classes economically as most of the co-operative businesses in which it would be used would be financially precipitous and thus almost certain to fail.}.

The Chartists were themselves extremely hostile to the idea of working class co-operation. They considered such undertakings as fanciful experiments which
could not lead to neither the long-term economic improvement in the condition of
the working classes nor as a means by which the working classes could be elevated
to political self reliance. In addition to criticizing co-operative ventures as energy
sapping diversions for the working class from their ‘mission’ to achieve political
equality, leading Chartists also commented on the potential adverse short-term
effects of co-operatives in co-opting sections of the working class who were in
support of the Charter. Many leading Chartists were critical of the co-operative
movement, characterizing it as a mere ploy for deflecting the working class from
the broader political issues which underlay its economic condition. Responding
in 1850 to the ideas being advanced by the Christian Socialists on the capacity
of co-operative ventures to raise the condition of the working class, Ernest Jones
stated that:

Political power must be obtained before social amelioration can be enjoyed; that
co-operation, however salutary and successful, that abstinence, morality and
toil, that all efforts of united industry and intelligence are ineffective to remove
the dead weight of misery, so long as the sharp sword of monopoly power is
wielded by one ‘dominating class’\textsuperscript{15}.

Yet support for a legislative framework in which co-operatives could operate
with both corporate identity and limited liability grew apace. An article on co-
operative trading in the \textit{Edinburgh Journal} in 1853 reveals the basis for the
enthusiastic support for legislation providing for co-operatives amongst the
middle and upper classes despite the common belief amongst these classes that
such ventures were not ‘practicable’:

The workman does not understand the position of the capitalist. The remedy is,
to put him in the way of learning by practical experience ... in many departments
of industry, of course, their small capitals would be of no use ... [Working men
in such ventures] will no doubt be often deceived; they will make mistakes,
and will suffer losses ... But what great good can be bought without a price? ...
Working-men, once enabled to act together as the owners of a joint capital, will
soon find their whole view of the relations between capital and labour undergo
a radical alteration. They will learn what anxiety and toil it costs even to hold
a small concern together in tolerable order ... the middle and operative classes
would derive great material and social good by the exercise of the joint-stock
principle\textsuperscript{16}.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{15} Cited in Saville, J (1956) \textit{Ernest Jones, Chartist}, (London: Lawrence and
Wishart).
\item \textsuperscript{16} \textit{ibid.}, 343–344, see also Lalor, J (1852) \textit{Money & Morals}, (London: John Chapman),
for a similar line of argumentation in which Lalor notes: ‘The main source of the danger
[from Chartism and socialism] lies in the fact that the workman does not understand the
position of the capitalist. The remedy is, to put him in the way of learning it by practical
\end{enumerate}
\end{footnotesize}
Ironically enough then, the prevailing scepticism amongst the upper strata of English society as to the chances of commercial success of these enterprises, was the very reason they often actively supported legislative measures which conceded some form of limited liability incorporation to small capitals.

It was not, however, solely the understanding of commerce which might be gained by the working classes of business in co-operatives which led members of the middle and upper classes to support the introduction of special legislation for working class ventures. It was also conceded in some quarters that the state should play some role in protecting working and middle class investments, and that it could do so by means of regulating those undertakings which were the principal outlets for working and middle class investment. This became an important issue due to the failure at this time of a number of working class savings banks, such as the Rochdale Savings Bank, and the distress these failures had caused to many amongst the ‘thrifty’ of the labouring classes. Such failures made nonsense of the tenets of ‘self-help’. If the most cautious and ‘admirable’ of the industrious classes should suffer such a fate, why should any member of those classes believe that they could better themselves through individual restraint and honest toil? In other words state intervention was necessary to prevent a crisis with regard to the ideology of ‘self help’, and the concession of limited liability corporate status would be one method by which that crisis could be averted.

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experience. A simplification of the law of partnership could not fail to have this effect, for the disposition of the working classes to invest their own savings in joint stock industrial enterprises is manifesting itself with increased strength from day to day.’ 202, see also 203.


18 In commenting on the effects of the collapse of the Royal British Bank, in particular on working and middle class investors, David Morier Evans (1859) states at 269–270: ‘The transactions of the bank were sufficiently extensive for its failure to inflict serious loss upon a very considerable body of customers, consisting unfortunately, of that class of proprietors who were the least able to bear it – small traders and private individuals of limited means; and absolute ruin upon a number of innocent shareholders, mostly in the same rank of life, who, deceived by the specious reports put forward by a doubtful body of directors, were induced to embark their capital in a concern in the general of which honour and honesty were apparently wholly ignored.’ Morier Evans at 385 then goes on to suggest that the lack of State enforcement of the law in the case of commercial fraud was a culprit in the then prevailing decline in business morality: ‘A laxity has been introduced into commercial dealings, not from any defect in the law, but from the law not being put into force; and practices have been adopted, without bringing a consciousness of shame, and I fear not without much loss of character among those with whom they associate. It is time to put a stop to such a system’.
Hence arguments marshalled to support the introduction of legislation providing for a form of corporate organization with limited liability that would be suitable to working-class ventures were:

- that it would allow the working class, or at least some of its members, to elevate themselves through ‘self help’;
- that it would contribute to a more ‘harmonious’ understanding between classes due to the greater knowledge the working class would come to of the problems involved in running a capitalist enterprise;
- it would facilitate a greater array of outlets for the small savings of the middle and working classes, particularly in respect of outlets which promised a higher rate of interest than that provided by the savings banks;
- it would permit industrious members of the working class to marry their skill to outside capital without the impediments that were presented to such a course of action by a system of unlimited liability.

There were others, such as the Christian Socialists, for whom co-operative enterprises were envisaged in much more idealistic terms. Certain members of the Christian Socialists believed that participation by individuals in co-operative ventures would serve to undermine the ethos of self-interest, then predominant in society. Encouragement would thereby be given to replace the prevailing values of self-interest and avarice with a revived collectivist ethos based on Christian values. These missionaries against the competitive system – the Christian Socialists – considered limited liability legislation as imperative to the viability of co-operative undertakings. The spiritual leaders who saw the revival of co-operativism as a way to defeat Mammon were also clear-sighted enough to envisage the danger of material, if not spiritual, failure of such enterprises.

The Christian Socialists and the Co-operative Movement – The Campaign for Limited Liability

The Christian Socialist campaign centred around the twin objectives of the removal of any of the existing legal impediments to the establishment of working class co-operatives, and to have these co-operatives, once constituted, conferred with limited liability. To this effect, in June 1850 the Christian Socialists officially formed themselves as the ‘Society for Promoting Working Men’s Associations’. The Council of this Society was charged with raising funds from ‘promoters’ to be able to support co-operative ventures, and to spread the idea of co-operation.

As many as fourteen enterprises in London and twenty-one in the provinces were established under the auspices of the Christian Socialists within a short period of time. The attitude of those promoting the schemes in these early days of a revived co-operative movement can be gauged from the reminiscences of Edward Owen Greening, an industrialist active in radical politics:
Societies in 1850 realised that their main object was to make men of their members, and regarded the making of profits, the production of wealth as only a means to this end.\footnote{Greening, E O (1880) Working Men’s Co-operators, Working Men’s College Journal, vol. xii, 65.}

The more often co-operatives failed, the more strident became the voice of those in the Christian Socialist camp calling for the introduction of a measure that would allow such undertakings to assume corporate status and the cloak of limited liability. The difficulties which these co-operatives experienced after the first euphoric flush of success led to the conclusion that not only moral fortitude needed to be learnt by the participants, but also that some protection was necessary for the funds which ‘promoters’ had invested in the schemes:

\[W\]hen times were thriving the members of the co-operatives ... called each other brothers, sang songs about ‘labour’s social chivalry’ and did wonders in the way of work and profit ... but the slack season came, for which we had not provided and brought with it those terrible evils, jealousy and disunion ... I believe all of us talked too much about rights, and thought too little about duties.\footnote{Cited in Christensen, T (1962) Origin and History of Christian Socialism 1848–1854, (Aarhus: Universitetsfor Laget), 63.}

The Working Men’s Associations, or trading co-operatives, that were established with the aid of the Christian Socialist’s ‘Society for Promoting Working Men’s Associations’, were consequently not viewed by most of those involved in the Christian Socialist Movement as viable business enterprises. They were rather seen by many of these middle class ‘promoters’, including the most prominent advocate of co-operative ventures within the Christian Socialist movement, John Malcolm Ludlow, as a form of moral training by which the working classes would recognize their place in the order of things. This meant that the sums of money tied up in the ventures, modest as they might be, needed to be protected in some way from total dissipation.

Sections of the Christian Socialist Movement therefore became interested in the introduction of special legislation to provide a facilitative framework within which experimentation with co-operatives could continue. The two Christian Socialists who were most prominent in these activities were John Malcolm Ludlow (Figure 3.1) and Edward Vansittart Neale (Figure 3.2). Ludlow had been inspired by the success of producers’ co-operatives in France, and favoured
this form of working class enterprise over the consumer co-operatives preferred by Neale.

Ludlow was one of those in the Christian Socialist Movement determined to stress the essentially Christian and spiritual nature of projects such as co-operative ventures over their purely secular and materialist implications. He considered that individual moral and religious conversion was an indispensable basis for the success of the co-operative principle, rather than the other way round – material success in co-operative activity leading to a conversion to the moral and spiritual values espoused by the Christian Socialists.21 However, unlike his less activist colleagues in the Christian Socialist movement, such as Frederick Maurice (Figure 3.3) and Charles Kingsley, Ludlow regarded the vulgar, materialist aspects of co-operative activity as an obstacle which could and should be overcome.

Rather than attributing the failure of co-operatives to the systemic effects of the sordid material aspects of their operation, Ludlow considered the failure of these bodies to be a consequence of the promoters not being sufficiently careful in selecting, on moral and Christian principles, those men (and in some cases women) who were to be the active partners in the Associations.

The ambivalence of many of the Christian Socialist promoters towards co-operative ventures and their concerns to protect their financial advances to such ventures is reflected in the 1851 Report of the Society of Promoters:

The Society has for some time past determined to discourage advances of money to bodies of working-men about to start in association unless they have first shown some signs of preparedness for the change from their old life ... Working men are not generally fit for association. They come into it with the idea that it is to fill their pockets and lighten their work at once, and that every man in an association is to be his own master. They find their mistake in the first

month or two and then set to work quarrelling with everybody connected with the association... Where the associations are successful the great danger which they and all who are interested in them have to guard against is exclusiveness. The associates find their own position greatly improved and fear to endanger it by taking in new members.  

One matter however, on which all Christian Socialists agreed, despite their other doctrinal differences, was the importance of legal reform if any programme of co-operation was to have the remotest possibility of long-lasting success. In particular it was considered imperative that both corporate identity and limitation of liability be cheaply and readily available to working class co-operators.

In this regard John Ludlow, one of the Christian Socialists most committed to the success of the co-operative movement, published a treatise on the Working Men’s Associations in 1852 in which he observed:

Given this attitude amongst many of the Christian Socialists as to the moral, rather than business, function of the Working Men’s Associations, and the considerable doubts amongst those few Christian Socialists who were committed to co-operatives as a potential means for elevating the working classes as to their ability to survive in a highly competitive market it is not surprising that the introduction of a means for limiting the liability of those involved in such enterprises was keenly sought. Many who otherwise opposed the introduction of limited liability enterprises were prepared to concede it in the case of these working class enterprises as they believed that such ventures ought be encouraged as they would enable, through their personal experience of the vagaries of business, members of the working class to come to a better understanding of the difficulties faced by capitalists in their business ventures.

In pursuit of his aim to consolidate the Christian Socialist co-operative movement, which he had helped establish, Ludlow used the 1850 Select Committee on the Investments of the Working and Middle Classes as a forum for Christian Socialist ideas. This was not difficult to achieve as the Committee Chairman, Robert Slaney, had been searching for witnesses before the Christian Socialists had come to him and requested that they be examined by the Committee. It is to the role of this Committee in the introduction of limited liability companies legislation in England that we will now turn.

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22 Cited in Christensen, T (1962), 63–64.
The 1850 Select Committee on the Investments of the Middle and Working Classes

The question of the need for a readier availability of means by which businesses could limit their liability, other than that provided by private Acts of Parliament, had already been a topic of discussion in England for some time by the middle of the nineteenth century. Certain ‘progressive’ circles in particular considered that limited liability incorporation could be of great utility in re-invigorating the English economy. One of these progressive ‘economic reformers’, the Member for Shrewsbury, Robert Slaney 24, had managed to secure the creation of a Parliamentary Select Committee to explore the need for the introduction of commandité partnerships into English economic life. Indeed, the subject of commandité partnerships was a ‘special hobby [of] … Mr Slaney’ 25. He was particularly interested in the potential of these types of enterprises as outlets for the savings of the middle and working classes. Despite Slaney’s commitment to, and enthusiasm for, the work of the Committee, it nevertheless appeared at first as if it was going to be an abject failure for want of witnesses and public support 26.

A leading group of Christian Socialists came to hear of the committee, and saw its potential as a vehicle for pushing their own campaign in respect of the application of the principle of limited liability to the conduct of working class co-operatives and friendly societies. As John Ludlow, one of the Christian Socialists appointed to the committee, later recalled of Slaney and the achievements of the Committee:

I saw a good deal of Mr Slaney then and afterwards; a very worthy, well-meaning man, but very hazy minded, so that while always fumbling after some good end or other he was seldom able either to see it clearly or to grasp the means for carrying it out ... As it was however, through coming into contact with us he was able to achieve a momentous good in the legalising of co-operation 27.

Ludlow recalled his irritation at Slaney’s transparent attempts to use the Committee to curry favour for the adoption of commandité partnerships in England. Whilst Ludlow and the Christian Socialists could see the benefits which limited liability would confer on co-operative enterprises of the working class, they were

24 Robert Slaney (1792–1862) was an: ‘advocate of rural–economic reform ... called to the bar at Lincolns Inn 1817. Practiced until 1826. Member for Shrewsbury 1826–1835; 1847–1862. Died in May 1862 at his residence from the effects of falling through a gap in the floor at the opening of the International Exhibition.’ (Dictionary of National Biography).
nevertheless critical of the proposal for a generalized adoption of the *commandité* principle being advocated by Slaney. Ludlow believed that Continental experience demonstrated that such an organizational principle was ‘only beneficial to small concerns’. Ludlow considered the mixing of limited and unlimited liability embodied in the *commandité* principle to be unsuitable in large enterprises because men of straw would be put in charge, and thereby the unlimited liability of managers in the *commandité* would become ‘a mere trap to outsiders’

Rather than following the model of limited liability enterprise utilized on the Continent, Ludlow advocated instead the far more ‘radical’ idea that a system of limited liability suitable for all classes of business should be adopted. In his autobiography Ludlow remarks that the adoption of such a system, along the lines embraced by the legislature in 1856 was, however, in 1850, a ‘moot question’

Whether Ludlow showed as much foresight as he later claimed with respect to the wider applications of the limited liability form of corporation is, however, a subject of some dispute. John Saville considers that the discussions in these forums were still premised on debating the appropriateness of Continental models to English conditions, such as the *commandité* form of partnership to England, rather than being a part of an overall development of opinion in favour of the unique solution of a general system of limited liability incorporation. He makes little mention of the advocacy by Ludlow of his unique solution. Rather he considers that the rupture in thinking with respect to the manner in which limited liability might be introduced into England, as between the *en commandité* form of partnership and the ‘modern’ limited liability company, occurred some time after the deliberations of the 1850 and 1851 Committees were complete. Saville states:

> There was one striking difference, however, between these discussions of the early 50s and the arguments which were to carry the day for limited liability in 1855. Down to about 1854 and including the ‘Report on Mercantile Law’ of that year, the desirability or otherwise of limited liability was discussed almost exclusively in terms of the *commandité* partnership.

Whilst the actual claim of Ludlow to have ‘invented’ the modern form of limited liability company is of limited interest from a historical point of view; what is more important is the circumstances in which contemporaries considered the limited liability concept to have some potential application. If Ludlow’s contentions are, at least in part, true then it was the case that many of the principles of modern company law were thrashed out against a backdrop of concerns which we would not normally associate with the formulation of these principles – that is, the most appropriate organizational form for all classes of business, from small through medium to large concerns.

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28 ibid., 195.
29 ibid.
30 Saville, J (1956), –422.
The fact that the modern company form may have been first advocated and developed in the context of debates about a suitable form of organizational structure for working class co-operatives is not likely to be accepted easily by those who see the modern company form as a necessary response to the needs of capital in the mid nineteenth century. It also throws some considerable doubt on those historical accounts which suggest that the later use of the corporate form by small undertakings was a ‘perversion’ of the ‘intended’ purposes of modern company legislation31.

In this respect it is worth noting the views of one of the barristers interrogated by the 1850 Committee, J.A. Stewart, who expressed his belief in the necessity of a system of limited liability enterprise in the following manner:

I think, without going into particulars, it may safely be stated that the large capitalists in this country have great advantages over the smaller capitalists. It may be that these are proper and natural advantages ... but at the present I think it is the cause of great dissatisfaction to the smaller capitalist that he cannot take the profits of trade, and cannot invest his money if he pleases in that way, without risking all his property. I think this is a source of great dissatisfaction and real hardship in the country32.

The point made by Stewart was again driven home by a number of the witnesses before both the 1851 Select Committee chaired by Slaney and those who gave evidence to the 1854 Royal Commission on Mercantile Laws.

The Report of the 1850 Committee, whilst not incorporated in legislation, had at least put the issue of limited liability on the agenda of reform. One of the weaknesses of the Committee was that it had tied the availability of limited liability to the issue of social amelioration. The comments in The Times after the Report of the Committee was made available illustrates the narrow manner in which the debate as to limited liability incorporation was being perceived: the problem of working class poverty and the social dissent which it gave rise to would not ever, the Report opined, be remedied by proposals for the introduction of other outlets for prudent investment33. Limited liability was not necessary to bring about social amelioration in England. The solution to the problem of bringing about some greater degree of social equity lay elsewhere.

Despite the indifferent success of the 1850 Committee, Slaney was able to secure in 1851 the appointment of a new Committee to look into the practicalities of introducing a form of commandité partnership to England. Introducing the

32 J A Stewart, to the Select Committee on the Savings of the Working and Middle Classes (1850), Q.333.
33 The Times, 7th March 1850.
motion to establish the new Committee, Slaney recited the problems the existing law presented for persons of small capital who wished to invest their capital, and then continued:

Unlimited liability prevented employment, kept down the wages of labour, and cheated all useful combinations amongst the working classes for their own improvement. The reasons advanced against the introduction of limited liability were that it would give rise to a speculative spirit ... But was there no speculation now? ... the existing law did not prevent speculation ... but drove away the cautious and inexperienced man who was not prepared to risk the whole of his capital on a single venture.³⁴

The witnesses called before the 1851 Committee were very much cut from the same cloth as those who had given evidence to the Select Committee of the previous year. Most were concerned to have a form of business organization with limited liability adopted so that the working classes and middle class philanthropists might be able to combine in co-operatives without fear of losing their small capital. The incentive that the introduction of limited liability would provide for such ventures was emphasized time and time again. One of the Bankruptcy Commissioners, R B Fane, advocated the adoption of limited liability for the following reasons:

There is a mass of ingenuity afloat, and the ingenious persons who invent those ingenious things are generally speaking persons entirely without capital; they are for the most part workmen ... it is to the highest degree desirable (if I may use a fanciful phrase) to marry that industry to capital. The present law has absolutely failed.³⁵

The process begun with the 1850 Committee was apparently concluded in 1852, with the enactment of the Industrial and Provident Societies Act, which gave co-operatives a specific corporate identity. The scepticism then prevailing as to the merits of limited liability is reflected in the fact that this Act, despite the strong advocacy of Ludlow and his colleagues in the Christian Socialist movement, did not contain a clause granting limitation of liability to such enterprises.

In addition to giving rise to the Industrial & Provident Societies Act of 1852, the 1850 and 1851 Committees had at least arguably begun the momentum for reform in respect of the availability of new organizational forms suitable for all categories of business. The interest generated by the 1850 and 1851 Committees initially in great part resided in Parliament and amongst a body of public servants within the Board of Trade. The issue of limited liability and the related arguments in favour of the general modernization of organizational forms for business in England found voice again in the Royal Commission on Mercantile Laws established in 1854.

³⁵ Evidence of R B Fane, Select Committee on Partnerships (1851), Q.526.
A lobby group, the Society for Promoting the Amendment of the Law, was then established to press for reform. As we will see in the next chapter the small and localized interest generated by the 1850 and 1851 Select Committees with respect to limited liability incorporation had broadened out considerably by 1856.

However, as we have already indicated, there is still considerable debate amongst historians as to why limited liability legislation in the form in which it was finally introduced in England was the solution settled on by the English legislature. Only two years before the introduction of limited liability incorporations legislation the Royal Commission on Mercantile Laws had demonstrated the division of opinion existing amongst those in commercial and public life in England.

Table 3.1 Summary replies, by occupation, of those resident English parties invited to comment on the introduction of a general company statute in England by the 1854 Royal Commission on Mercantile Law

<table>
<thead>
<tr>
<th>Occupation</th>
<th>Attitude To Legislation</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Support Fully</td>
</tr>
<tr>
<td>Bankers/Finance</td>
<td>3 (a)</td>
</tr>
<tr>
<td>Government Officials</td>
<td>2(b)</td>
</tr>
<tr>
<td>Lawyers</td>
<td>10</td>
</tr>
<tr>
<td>Chambers of Commerce</td>
<td>2</td>
</tr>
<tr>
<td>Merchants</td>
<td>11</td>
</tr>
<tr>
<td>Industrialists</td>
<td>-</td>
</tr>
<tr>
<td>Interested MP’s</td>
<td>2</td>
</tr>
<tr>
<td>Insurance</td>
<td>1</td>
</tr>
<tr>
<td>Academics</td>
<td>1</td>
</tr>
</tbody>
</table>

Notes:
(a) Those bankers who generally supported the introduction of the legislation were those in the employ of the Bank of England
(b) One of the ‘Government Officials’ here included because of their position as Counsel to the Speaker of the House of Commons, was also an ‘Academic’, being the Professor of Political Economy at Oxford University

It was also the case that some of the forces that had initially brought the issue of limited liability to prominence had abated by 1856. The ‘social ameliorationists’ had been appeased with the passing of the Industrial and Provident Societies

As to this contrariety of opinion see the accompanying breakdown of replies to the questionnaire sent out by the Royal Commissioners in 1854 in order to ascertain the relative support and opposition to limited liability amongst those in public life (see Table 3.1).
Act 1852. The middle classes were less pressing with respect to outlets for their savings as with the contraction in the economy their surplus resources had been considerably depleted. Even those in the City were less strident than usual, realizing the decreased opportunities for floating speculative enterprises after the failure of the Royal British Bank and in the economic conditions then prevailing. This leaves us with the puzzle of which group or groups were implicated in the enactment of the Limited Liability Act of 1855 and the Joint Stock Companies Act of 1856, what contemporary attitudes were towards that new enactment, and finally the manner in which the new possibilities provided by the legislation were taken up by English capitalists. As suggested above it will be contended that any satisfactory historical account must begin to see limited liability incorporation not in purely functional and instrumental terms, but rather as an over-determined institutional form. Far from being the ‘instrument’ of any one social group, the modern company form was the subject of a range of contending forces, each vying to appropriate that form to their own particular needs.
Chapter 4
The Reasons for the Enactment of, and the Form Taken by, English Limited Liability Legislation, 1855–1856

Introduction

It has become almost a commonplace to associate large accumulations of capital with a specific legal form – the limited liability company. Corporate law appears to have been tailored to suit the particular needs of large-scale capitalist enterprise. The limited company has achieved such dominance as the characteristic unit of capitalist organization that alternative methods of organization are difficult to imagine. It is not surprising, therefore, to find in many studies of the development of capitalism in England the assertion that modern company law is a legacy of the organizational and economic requirements of English capital in the middle years of the nineteenth century. One such study proposed the following historical explanation for the arrival of the limited liability system of incorporation in England:

The law seemed to ‘lag behind’ commercial developments, merely being revised when a spate of frauds highlighted inadequacies in the existing legislation. Although the State was initially able to exploit its power to grant Charters, economic forces eventually compelled it to concede to business an unconditional right to incorporate, and the State confined its role to safeguarding the mechanisms for corporate self-regulation. Thus the State finally tailored its laws to the interests of private capital.

A number of researchers have challenged such teleological accounts of the historical development of company law. They have pointed to the absence of any


2 Paul Q Hirst is probably the most explicit in his rejection of the ‘inevitability’ of modern company law, claiming that instead it is, and continues to be, a field of contestation for a variety of different interests. (See Hirst, P Q (1979) Law and Ideology, (London: Macmillan).) Paddy Ireland, writing from a somewhat different conceptual framework, has also asserted the contested nature of corporate law, though there is a certain Marxist
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evidence suggesting a campaign on the part of business interests to have limited liability incorporation adopted. Indeed the evidence which does exist points to an antagonism on the part of those involved in the key sectors of the English economy in the mid nineteenth century to any such legislation. Many of the ‘captains of industry’ viewed the introduction of such legislation with considerable hostility, and sought to characterize it as a dangerous, if not capricious, development. Whilst acknowledging that there might be a need for such legislative devices in circumstances where there was a want of capital for industrial undertakings (for example, in France), in England such logic could not prevail, as ‘under the existing system no insurmountable obstacle had hitherto presented itself to the employment of capital in any undertaking of public utility’. In fact, the opposition to the measure was so great amongst existing capitalists that many Chambers of Commerce in the key industrial regions presented petitions against the measure in 1856, amongst these being the Birmingham, Manchester, Liverpool and Glasgow Chambers of Commerce.

The Reasons for Opposition From the Leading Capitalists of the Age to Limited Liability Legislation

(i) The Background


3 Resolution of the Manchester Commercial Association Annual Meeting, reported in Manchester Guardian, 22nd January 1856.

4 Lord Overstone presented a series of petitions from commercial interests opposed to the introduction of limited liability legislation to the House of Lords in 1856. Included were petitions from the Manchester and Glasgow Chambers of Commerce, both of which opposed the legislation on the grounds that it was ‘subversive of the best interests of commerce’. A petition was also presented from the Trade Protection Society of Bristol which complained of: ‘The injustice of conferring upon bodies of more than seven individuals privileges which were withheld from trading bodies less in number; private parties engaged in trade on their own responsibility would be exposed to unfair competition with companies formed under the proposed enactment.’ Hansard, vol. 142, 1856, cols 1475–1482.
tenets of orthodox political economy; and the threat the new organizational form was perceived to represent to privacy in commercial matters.

The first of the above sources of opposition to limited liability legislation resulted from the largely unstated fear of large capitalists that by allowing the aggregation of many small capitals a permissive limited liability incorporation legislation would lower barriers to competition. Protected markets would be threatened and profits would decrease. In limited liability legislation the larger English capitalists saw a very real threat to their extremely privileged position and to the predominantly monopolistic or oligopolistic markets in which they operated.

The second source of the larger capitalists’ opposition to limited liability legislation, the manner in which they considered the corporate form to represent a derogation from the principles of political economy, depended on contemporary interpretation of certain passages in key economic texts, in particular some chapters of *The Wealth of Nations* which were dismissive of the corporate form. One of the dogmas of the age stemming from these passages was that corporations were only suitable for carrying on particular forms of trade. Any undertakings outside the narrow array of ‘routinised’ activities described by Adam Smith as suitable for corporate bodies to pursue were regarded as illegitimate or improper.

The partnership, in which each of the main participants took upon himself (or herself on rare occasions) the full risk of financial ruin should the enterprise fail, was regarded as a more ‘moral’ form in which to organize one’s business affairs than the corporation. The counterposition of the ‘old’ business world, held together by the cement of moral obligation, and the ‘new’ age of impersonal capital was highlighted in the debate on the 1855 legislation by the member for Kilmarnock, Mr Bouverie, when he stated:

[T]he bond of union in Joint-Stock companies was different from that which existed in private partnerships. In the latter the bond of union was personal knowledge and mutual confidence, so much so that a partnership ceased by the death or bankruptcy of one of its members, but in a Joint-Stock Company there was nothing of the kind; a man might be a partner today and not tomorrow, and there was no mutual personal knowledge of the members composing it.

A limited liability company in which one risked little was thus regarded by those in commerce and their supporters as a departure from sound principles of political economy and moral responsibility which had been instilled as orthodoxies in the two centuries before the introduction of limited liability legislation.

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6 *Hansard*, vol. 139, 29th June 1855, col.320.
The opposition of capitalists to the introduction of limited liability incorporation on the basis of it representing a derogation from the orthodoxies of sensible economic practice was thus quite often a ‘principled’ opposition based on the manner in which they saw limited liability incorporation as a travesty of some of their most genuinely and strongly held beliefs.

The third reason that many of the leading capitalists of the mid-nineteenth century were opposed to the introduction of limited liability incorporation was the perceived threat it held out in relation to the traditional ‘privacy’ enjoyed by English commercial enterprises. The controllers of most English businesses in the mid-nineteenth century jealously guarded the financial details of their operations from competitors, government departments and even from shareholders. They saw the introduction of limited liability legislation as signalling an end to these traditional ‘freedoms’ enjoyed by the English enterprise. The 1844 Joint Stock Companies Act, with its complex registration and reporting requirements, had confirmed most leading English capitalists in their belief that the new organizational form represented a real threat to privacy in commercial affairs which, if unopposed and unchecked, would eventually engulf all strata of English commerce.

More detailed reporting of the financial affairs of businesses would entail a far greater need to utilize the services of professional advisers in the conduct of business affairs. These professionals almost uniformly supported the introduction of the legislation. This support was often noted cynically by contemporaries, reflecting both the prevailing antipathy towards the encroachment of professionals into commercial life and the widely held perception that despite this antipathy amongst capitalists professionals were nevertheless succeeding in this respect. Jeffreys notes the connections made by contemporaries between legislative initiatives, such as incorporations legislation, and the expansion in demand for professional services:

Lawyers were one group prominent in their support for the measure, but this was said by contemporaries to be because of ‘their wish for more fees through setting up companies’.

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7 Whilst the professional classes were, in general, extremely enthusiastic advocates of corporation legislation, seeing in it the potential to consolidate as a group their wealth and standing in society, the business community was quite vitriolic in its expressed distaste for the further extension of the need for professional resolution of what they saw as commercial problems. One contemporary critic of the extension of the ‘law’ into commercial life, J H Elliot, stated:

‘Law, I fear, is like medicine, of small benefit to the buyers, but very profitable to the sellers’.

Elliot, J H (1845) *Credit, the Life of Commerce: Being a Defence of the British Merchant Against the Unjust and Demoralizing Tendency of the Present Alteration of the Laws of Debtor and Creditor*, (London), iii.

In the following we will examine these three aspects of opposition by leading industrialists to the introduction of limited liability legislation in more detail.

(ii) The Threat of Competition

The absence of enthusiasm on the part of leading capitalists for the enactment of a general system of limited liability incorporation was to a large degree a consequence of the largely unstated fear that the legislation would open up otherwise closed avenues of competition. By the middle of the nineteenth century the amount of investment necessary for a new competitor to enter one of the key industrial sectors invariably made such a proposition prohibitive for any but the wealthiest of individual entrepreneurs. Even new partnerships would face almost insurmountable obstacles in raising sufficient capital. Consequently, as long as the law remained in its unreformed state it was unlikely that existing industrialists would be challenged by newly emerging competitors. However, if a generalized system of limited liability incorporation were to be adopted, then it was quite possible that new corporate bodies might spring up with a sufficient capital base to challenge the existing enterprises.

The fear amongst larger capitalists that limited liability legislation might have an adverse effect on their profitability and even the manner in which they organized their businesses was well founded. Such was the stated intention of many of those involved in advancing the case for the introduction of limited liability legislation. A number of leading political and intellectual figures of the mid nineteenth century regarded the introduction of such amended companies legislation as imperative if a *laissez-faire* economy was to be preserved. They asserted that true competitiveness was in abeyance by the second quarter of the nineteenth century and that the moribundity of English commercial enterprises could only be overcome if a ‘new wave’ of competitors was encouraged.

It was suggested by intellectuals and politicians supporting the introduction of a permissive company legislation that unlimited liability merely operated to exclude a significant proportion of the population from trade. Unlimited liability, they asserted, operated adversely on those newly establishing a business. It effectively discouraged those who otherwise would have been prepared to take risks with new processes or branch out into untried fields of commerce, by subjecting them, if they failed, to the indignity of insolvency and possible incarceration for debt. Those with small to moderate amounts of capital and those with new inventions

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9 These concerns were expressed by an anonymous correspondent to the *Law Magazine and Review* in 1844 who stated: ‘No one can doubt the moral obligation on debtors to discharge all their debts, whether bound by law to do so or not, yet in a commercial country like this, where competition in all lines of business is so strong that one false calculation or erroneous step may involve industrious and honest men in insolvency, that is not an obligation which can be enforced by law.’ Anon., ‘The Law of Debtor and Creditor’, *Law Magazine and Review*, N.S. 1 (1844) 90.
or ideas but with little or no capital were prejudiced by the existing laws. Figures in the public eye, such as Charles Babbage\(^\text{10}\), contended that the vitality and inventiveness of English industry were being undermined by the ‘unfavourable’ provisions which imposed unlimited liability on those who embarked on an undertaking in trade. He asserted that the existing laws providing for unlimited liability ‘presented greater obstacles to the advance of the mechanical arts than even the defective state of the patent law’\(^\text{11}\). Lord Palmerston expressed much the same sentiment when he stated, in relation to the necessity of the introduction of limited liability incorporation:

[This provision] is of the utmost interest and importance ... the contest [over the introduction of such legislation] lies between the few and the many. It is just one of those instances in which, I won’t say the prejudices, in which the opinion of the few are to be set against the interests of the great bulk of the community. There is nothing, I am persuaded, that would be more to the general advantage of the great bulk of the public than the setting free ... of small capitals so that they may turned to profitable employment. The present law prevents that from being done ... it is a question of free trade against monopoly. I don’t say it offensively, but that is a real fact\(^\text{12}\).

This group advocating the introduction of limited liability incorporation included Robert Lowe, often described as the ‘architect’ of modern company law. Those favouring the introduction of limited liability incorporation asserted that freedom of contract meant that businessmen could and should decide to associate on whatever basis they deemed fit. The general availability of the limited liability corporate form was to them an essential prerequisite of a truly ‘free’ society. Prohibitions on incorporation, combined with a discretion in the hands of a government minister to grant exemptions thereto, was, so this group reasoned, antipathetic to ‘freedom’\(^\text{13}\). It provided enormous advantages to those who were given the benefit of the exemption, yet did so on no clear or consistent principle. Even the most industrious and ingenious of souls might be prevented from

\(^{10}\) Charles Babbage (1792–1871) was a mathematician and scientific mechanician, most famous for his invention of a computing machine. He occupied the chair of mathematics at Cambridge University for eleven years (1828–1839), but delivered no lectures. He twice, in 1832 and 1834, unsuccessfully contested the borough of Finsbury on liberal principles (Dictionary of National Biography).

\(^{11}\) Cited in Hunt, B C (1936), 124.

\(^{12}\) Hansard, 3rd series, vol. 139, cols. 1389–1390.

\(^{13}\) The enormous discretionary power vested in the hands of the President of the Board of Trade in respect to the granting of Charters and thus limited liability was commented upon adversely by Robert Lowe in his speech introducing the 1856 legislation. Formoy also comments that the limited liability legislation was ‘finally granted at the zenith of laissez-faire in the name of ‘perfect freedom’. (Formoy, R R (1923) The Historical Foundations of Modern Company Law, (London: Sweet and Maxwell) at 116.)
realizing their ambitions for want of the monies necessary to pay for a Charter or a private Act of Parliament (the cost was in excess of four hundred pounds and could on occasion be in excess of a thousand pounds). New capitalists were also at a disadvantage due to the fact that they would rarely have the ear of the relevant officials, whilst their established opponents would have the attention of both Members of Parliament and senior bureaucrats. A word in the right ear might result in a petition for a new charter being denied14.

This group of *laissez-faire* activists considered that the barriers to entry in most sectors of industrial activity had become so great by the early nineteenth century that it was ludicrous to talk of freedom in competition and to spout grand phrases about the vitality of the English business and commercial sector. In the view of these critics English commerce had come to be dominated by monopoly and privilege15. One of the characteristics of that system was the constraint placed

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14 Edwin Field, in arguing for the introduction of limited liability legislation in England, compared the ‘simple forms’ needed in Canada to set up a company under the general incorporation provisions there prevailing in some provinces and the cost and complexity of obtaining a Charter in England. He estimated that the cost of an ordinary Charter was £402,0s,4d and that of a banking Charter £555,3s,2d. (Field, E (1854) *Observations of a Solicitor on the Right of the Public to Form Limited Liability Partnerships*, (London)).

15 For example, Edwin Field, who advocated the introduction of limited liability incorporation, cited the case of a number of steam ship company promoters who sought Charters (which automatically had limited liability attached) for their proposed undertakings, which request was denied by the Board of Trade after one of their potential competitors, Mr Cunard of the Cunard Line, wrote a letter to the Board which contained unsubstantiated adverse comments relating to the ‘character’ of the promoters who were seeking the Charter. Field comments that ‘in other words capitalists use the current system to prevent competitive enterprises from being granted a Charter and “entering the fray”’. Field then continues by emphasizing the point that fairness would be more surely served by adopting a general system of limited liability incorporation, available to all upon the satisfaction of a number of administrative criteria (see the discussion of these matters in Field, E op. cit., chapter 3, pp.50ff). The ‘democratic’ nature of a general system of limited liability incorporation in making investment available to those who were previously denied profitable outlets for their savings was emphasized both before and after the introduction of the legislation. The elements of ‘privilege’ and ‘monopoly’ which were seen to adhere to the old system of unlimited liability were discussed by the *Shareholders Circular*, some seven years after the introduction of limited liability incorporation: ‘[E]very year adds to the large amount of floating capital constantly waiting for profitable investment. The old undertakings have long ago had all their capital subscribed, and can take in no more except at such an exorbitant rate of premium that the return is but a trifle over the interest paid in public funds ... dissatisfied with the meagre profits obtainable by joining old commercial enterprises, it is not surprising – indeed it is the most natural thing possible – that the owners of unemployed capital seek to strike out fresh paths, plans and projects for themselves. Thus during the last few years – i.e. during the period corresponding with the increased development of national prosperity – we have seen a large number of new associations formed for the promotion of various objects of more or less promising character. That this most simple and natural effect
on the entry of new enterprises to existing departments of industry or trade by
the imposition of unlimited liability and by the discretionary nature of grants of
incorporation under a charter or a Private Act of Parliament. Lowe and others of
like mind sought, through the introduction of a general system of limited liability
incorporation, to rid English commerce of privilege and to restore true competition
to trade. In short they sought to be the architects of a new era of economic freedom.
It was not simply a rhetorical flourish when Robert Lowe stated in his speech
introducing the Joint Stock Companies Bill (1856) that he was ‘arguing for human
freedom’ in introducing the legislation.

The replacement of existing legal structures was consequently seen in some
quarters as essential to revive competition in the key industrial sectors. The 1851
Select Committee on the Law of Partnership had stated in this respect:

[M]any combinations of moderate capitals, each limited to a certain declared
amount, might thus be brought into play, and into useful competition with
the practical monopoly now exercised by a comparatively small number of
overgrown capitalists16.

Reminiscing in 1864 as to the reasons behind the introduction of the limited
liabilities legislation, the editors of the Shareholders Circular stated that the
legislation was

[P]assed with the purpose of enabling working and practical men of small means
to unite their capital and compete with the leviathans of wealth, who have long
threatened to annihilate and reduce to serfdom their puny opponents17.

A slightly different position was put on the theme of the role of the new
legislation in re-invigorating competition by the Illustrated London News. This
journal advanced the view that it was a necessary measure of modernization if
England were to remain internationally competitive:

We quite agree with Mr Lindsay that “a mighty race of competition is going
on between ourselves, America, France, and other nations – all bidding for the
markets of the world” ... We shall not win in this mighty race if we be unduly
weighted; and our peculiar Law of Partnership, which subjects every man who
enters into trade to responsibility to the extent of his whole substance, has long
been deemed to be a most unnecessary encumbrance ... [this will also overcome

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16 Select Committee on Partnerships (1851), BPP, VII, 18.
17 Shareholders Circular, vol.1, no.13, 2nd May 1864.
the difficulty of marrying capital to ingenuity under the present law.\textsuperscript{18}

( emphasis in original )

With such sentiments in the air it is not surprising that established English capitalists closed ranks and formed a solid opposition to the introduction of limited liability legislation. It was consistently repeated by representatives of established business interests, both inside and outside Parliament, that there was no need to ‘encourage’ capital in England by means of ‘novelties’ such as limited liability incorporation, as was the case on the Continent and in the United States. There was already capital aplenty, so representatives of key sectors of English commerce asserted, to supply the needs of continuing industrial development undertakings in England.\textsuperscript{19} In their final Report the Royal Commissioners on Mercantile Law had in 1854 reached the conclusion that they were unable ‘to discover any evidence of the want of a sufficient amount of capital for the requirements of trade.’\textsuperscript{20}

Despite the considerable support they were able to muster in some quarters the leading capitalists of the day were nonetheless hampered in advancing their case due to the relatively transparent and self-serving nature of their opposition. Assertions as to the dangerous potential of allowing ‘competition’ to enter the markets in which these capitalists operated were seen by many contemporaries as nothing other than a self serving assertion on the part of these large capitalists of their assumed ‘rights’ to continue their oligopolistic or monopolistic position in those trades in which they dominated.

Capitalists opposing limited liability legislation countered such assertions of their self interest by suggesting that limited liability legislation would not result in ‘genuine’ competition but would instead merely encourage a range of ill-conceived and unproductive enterprises. In the debate on the introduction of the 1855 legislation Mr Muntz,\textsuperscript{21}, the member for Birmingham in the House of Commons, stated:

\textsuperscript{18} Illustrated London News, 26th April 1856.

\textsuperscript{19} One of the leading Parliamentary advocates of the views of the established business community was the M.P. for Birmingham, Mr George Frederick Muntz, who suggested in his criticisms of Lowe’s initiatives that people such as Lowe, who knew little of the practicalities of business, should not meddle in such matters (See the comments of G F Muntz in the Commons, Hansard, 3rd series, vol.139, (1855) 1379). Those involved in the finance sector were more often than not critics of the narrowness of the opposition advanced by established sectors of the commercial community to limited liability incorporations legislation. G W Norman, a director of the Bank of England and one of the Royal Commissioners on Mercantile Law in 1854, commented in this respect that the opponents of limited liability were ‘terrified by a set of phantoms, the creatures of their own imaginations’: G W Norman in the Report of the Royal Commission on Mercantile Laws, 1854, 169.

\textsuperscript{20} Report of the Royal Commission on Mercantile Law, 1854.

\textsuperscript{21} George Frederick Muntz (1794–1857) was a political reformer who was born in Birmingham. He managed the Muntz metal works which he inherited from his father. From
Who are the parties that call for the measure? There were few petitions in favour of it. And from whom did the Bill emanate? From the members of the Board of Trade, who were not at all conversant with trade. There was not a man who was practically concerned in any commercial undertaking who was not convinced that the measure, if passed, would not only be the most useless, but most mischievous provision ... the only effect of the Bill would be to induce ignorant persons to enter into the most delusive and disastrous undertakings.

The protective manner in which leading sectors of English business regarded their privileged position in the market is demonstrated in their occasional but intense opposition during the 1840s and early 1850s, to the grant of new Charters or the enactment of Private Acts of Parliament which would allow potential competitors to enter an established field of trade.

Indeed, one of the incidents which convinced Robert Lowe of the desirability of a less capricious system of incorporation, occurred whilst he was at the Board of Trade, but before he became Vice President of that administrative department. This incident consisted of Cunard strenuously opposing the grant of a Royal Charter to a new steamship company, ostensibly on the grounds of the unsuitably of those seeking the grant, but in reality based on the fact that Cunard wanted to exclude competition on the routes which their steamers plied. The then Vice President of the Board of Trade wilted under this pressure and refused to make the grant of the Charter to the potential competitor of Cunard. Lowe recalled this incident later when asserting the abuses which could occur when incorporation was the result of a discretionary grant on the part of an official at the Board of Trade (or any other Government department), rather than under some ‘general’ system of incorporation. It illustrated the manner in which the state of affairs in respect to the grant of incorporation in England was, before 1856, contrary to the principles of laissez-faire:

Of all the systems the very worst is surely to forbid limited liability, and then vest in a Minister holding his seat by a parliamentary majority the power of suspending the law in favour of such associations as he thinks fit. If the law be right it ought to be enforced; if wrong to be repealed. I should as soon think of allowing the Secretary of Treasury to grant dispositions for smuggling, or the Attorney-General licenses to commit murder.

his youth onwards Muntz interested himself in public affairs, adopting liberal opinions. He was an ardent disciple of the ‘Birmingham school’ on economic questions. He was elected M.P. for Birmingham in 1840 and held his seat until his death despite serious opposition. Although a radical and almost a republican, he gloried in being ‘independent’. (Dictionary of National Biography).

23 See the Evidence of Robert Lowe given to the Royal Commission on Mercantile Laws 1854, Appendix to the Report, and note also the comments of Robert Collier in the
(iii) ‘Principled’ Opposition to Limited Liability Legislation Based on Prevailing Economic Doctrines and Moral Beliefs

There was also a more disinterested, even ‘principled’ opposition to the legislation amongst sectors of established capital and their supporters, based on the economic doctrines to which they adhered. Following Adam Smith, many still believed that ‘companies were in all respects unsuited for the prosecution of ordinary industrial pursuits’\(^{24}\). They also felt there was something disreputable about carrying on a business funded in part or in whole by other peoples’ capital, and in respect of which the active participants in the enterprise contracted no responsibility in case of loss. It was felt that in instances where no economic loss or moral disgrace followed business failure there would be no guarantee that the affairs of the undertaking were managed carefully. Adam Smith had recited these deficiencies of joint stock enterprises in *The Wealth of Nations*. For many, little had changed in this respect by the middle of the nineteenth century. It was, they reasoned, still the case that:

> The trade of a joint stock company is always managed by a court of directors [and that this] court ... is frequently subject, in many respects, to the control of a general court of proprietors. But the greater part of these proprietors seldom pretend to understand any thing of the business of the company; and ... give themselves no trouble about it, but receive contentedly such half yearly or yearly dividend, as the directors think proper to make to them. This total exemption from trouble and risk, beyond a limited sum, encourages many people to become adventurers in joint stock companies, who would, upon no account, hazard their fortunes in any private copartnery ... The directors of such companies, however, being the managers rather of other people’s money than of their own, it cannot well be expected, that they should watch over it with the same anxious vigilance with which the partners in a copartnery frequently watch over their own ... Negligence and profusion, therefore, must always prevail, more or less in the management of the affairs of such a company\(^{25}\). 


A belief in the inefficiency and untrustworthiness of corporate entities was so entrenched that one can find it mentioned in sources as diverse as the *Manchester Guardian* and the *Leeds Mercury*. It can also be found in the evidence given by a wide variety of business representatives and public officials to the various Select Committees and the Royal Commission established in the 1850s to examine the possible introduction of limited liability incorporation to England.

Such opinion often did not allow for the exceptions which Smith himself would have allowed with respect to the corporate form. Many wrongly believed that Adam Smith had prescribed a blanket prohibition on the corporation as a suitable organizational form in which to carry on any large scale enterprise.

Inconsistencies arose in the arguments of those opposed to the introduction of limited liability incorporation as a consequence of the tensions which existed between ‘principled’ opposition and opposition based on the potentially baneful effects of such enterprises on ‘competition’. Jeffreys has commented on the confusion and contradiction which lay at the heart of existing manufacturers’ opposition to limited liability incorporation:

The manufacturers used a very confused argument on competition. They urged first that limited liability was unfair and would lead to unfair competition and over-production. Then they would contradict this and argue that limited liability would not work.26

The manner in which the issue was often presented in public forums by the groups opposed to the introduction of a general incorporations statute was that limited liability was ‘unEnglish’. The potential which the passing of such legislation would have for destroying a ‘way of life’ was iterated time and time again by polemicists speaking for those opposing the legislation. The Member for Birmingham, Mr Muntz, epitomized this ideology that limited liability incorporation was not ‘English’ and had no part in English economic life when he remarked:

[I]f a law of limited liability had existed, Watt would have come under the control of a few ignorant donkeys, who knew nothing about his works, and the end of it would have been, that all the inventions of that great man would have come to nothing.27

Feltes has even used a selection of nineteenth century prose writing to demonstrate the manner in which the partnership form of enterprise was related to deeply held beliefs in relation to personal responsibility towards the ‘community’

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26 Jeffreys, J B (1938), 43.
27 *Hansard*, 3rd series, vol.139, 26/7/1855, col.1381.
to which one belonged. The steady encroachment of the corporate form was seen by many nineteenth century English writers as an exemplar of the erosion of communitarian principles in English life during the course of the nineteenth century. The bleak concept of a totally alienated England, motivated solely by greed, is the moral fulcrum used by Trollope in *The Way We Live Now*. The establishment of a depersonalized business world in which the corporation reigns supreme is related to an England in moral decline.

The manner in which companies and the corporate world of debentures, stocks and dividends were regarded by many in the nineteenth century is also captured in the following passage from Laurence Oliphant’s fictional account of English finance, *Piccadilly*:

I have always treated debentures, stock, scrip, coupons, and all the jargon connected with such money making and money losing contrivances as pertaining to the abstract science of finance; nor do I desire to know anything of them practically, feeling assured that the information thus acquired is of a character calculated to exercise an injurious influence upon the moral nature.

A recognition of the core cultural beliefs of those engaged in commerce is essential to a proper understanding of the reasons for the failure of most English businesses to incorporate in the 1850s and 1860s. These beliefs included strongly held views on the ‘correct’ way to conduct one’s business affairs and the appropriate level of responsibility in the case of losses. They also included prejudices as to the propriety and appropriateness of the corporate form for the conduct of most varieties of trade.

Even when corporate form was, by any objective criteria, the most suitable means by which to organize one’s business affairs we still find those in English commercial life stoically refusing to transform their ailing and uncompetitive enterprises into companies for fear that it would be somehow improper or immoral to do so. Victor Batzel, in a perceptive analysis of the attitudes of nineteenth century businessmen to legislative initiatives in respect to bankruptcy law has made the observation that the ‘triumph’ of the entrepreneurial ideal may have been a much slower and laboured process than has been assumed by historians such as

28 Feltes, N N (1974) ‘Community and the Limits of Liability in Two Mid-Victorian Novels’, *Victorian Studies*, June, 355–369 at 364 cites in this respect the resolve of Arthur Clennam, one of the characters in Charles Dickens’ novel of the period, *Little Dorritt*, when he has lost the capital of his partnership with Daniel Doyle, the inventive mechanic: ‘My course must be taken at once. What wretched amends I can make must be made. I must clear my unfortunate partner’s reputation. I must retain nothing for myself. I must resign to our creditors the power of management I have so much abused, and I must work out as much of my fault – or crime – as is susceptible of being worked out, in the rest of my days.’

Harold Perkin. Batzel notes the persistence of elements of the ‘old regimes’ in what have been assumed to be modern capitalist economies. The conservatism of most entrepreneurs and the persistence of pre-capitalist notions of honour and responsibility in mid-nineteenth century England may explain the otherwise inexplicable and irrational resistance of established businessmen to limited liability incorporation. Some of this hostility to the limited liability enterprise may also be explained by the preference for infra-legal codes in the resolution of commercial disputes amongst those in commerce. Commenting on the distrust by those in business of legal regulation, Batzel states (in this case in relation to bankruptcy law):

Businessmen [went] outside the structure because they were busily engaged in what business was about – survival in a world in which the credit system occasionally broke down and needed immediate repair. When the shoe pinched, it was sometimes better to slit the uppers than to take it to the shoemaker … we must be aware and look for, evidences of a legal underground, the purpose of which was to provide alternative methods of system management to those proposed by the formal justice system. What we perceive is ... a continuing friction on specifically business issues – friction exacerbated by the autonomous nature of Parliament and the courts, and one suspects too, of bureaucratic agencies ... it may well be that the friction to which we are witness ... bespeaks not a permanent rift between Parliament and the business community ... but rather a slower and more hesitant accommodation than we previously believed.

Such was the suspicion in respect of both corporate form and bureaucratic regulation of business that prominent economists such as Alfred Marshall were still describing the corporate form in the 1890s as ‘improper’. Up to and including the Great Depression of the 1930s some prominent English economic commentators were still suggesting that the economic ills of the age were the result of the adoption of corporate form and the consequent abandonment of personal responsibility and unlimited liability as the benchmark of English industry.

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32 In commenting on the effects of the introduction of limited liability incorporation on the standards of commercial behaviour Shannon offers the following remarks in an article written during the Great Depression: ‘This survey [of the limited companies of 1866–1883] suggests one clear conclusion : that limited liability was no unmixed blessing, that it little deserves the panegyrics so often bestowed on it. No important improvement is discernible from the statistics; none, perhaps ought to be expected.’ (Shannon, H A (1932) ‘The Limited Companies of 1866–1883’, Economic History Review, vol.IV, 290–316 at 307) Shannon’s approach, however, represents a significant departure from earlier accounts which advocate ‘personal responsibility’ as he is thinking more of criminal responsibility being fixed upon
(iv) The Desire for Privacy in Business as a Basis for Opposition to Limited Liability Incorporation

In addition to suspicions of the corporate form on the grounds of the moral odium which attached to it, there were other factors which steered businessmen in key sectors of industry away from incorporating. One of the most important of these was their perception that incorporation would compromise the privacy of their affairs. The obsessive nature of the nineteenth century businessman’s concern with privacy is indicated by the following account of the internal arrangements in one concern, that of the paper manufacturer John Dickinson & Co. Ltd. In 1907 a Memorandum was issued to line managers in the enterprise which stated that ‘no hint of either the number of our hands, or quantity of work manufactured in our factory should be given to any outside people’33. The Managers were also sworn not to divulge in any way the class of machinery used in Dickinson’s factory. These impositions on staff were even more established in 1909. In that year the Managing Director sent the following letter to all employees:

The divulgence of any information relating to the company’s business to persons outside the company’s service, either by word of mouth or by writing, is forbidden. Making notes for any other purpose than use in the Company’s service of matters of any kind relating to the company’s business is not allowed. All notes, price lists, samples and general information acquired by or used in the conduct of the company’s business belong solely to the company, must be kept on the company’s premises, and delivered up on leaving the company’s service.

The penalty for a breach in observance of the above is instant dismissal34.

(emphasis in original)

What is difficult to fathom about the behaviour of nineteenth century entrepreneurs is not so much this obsession with privacy; rather it is their inability to grasp the possibilities held out by the corporate form, as adopted in England, for preserving existing arrangements in corporate guise, whilst having the added advantage of allowing access to outside funds. William Reader has noted the fact that the limited liability corporation in England, as a consequence of the almost

34 ibid., 169.
complete absence of reporting requirements, allowed those controlling corporations absolute secrecy in respect to the conduct of their affairs.\textsuperscript{35}

Despite the ingrained ‘cultural’ resistance to the corporate form by businessmen in key sectors the secrecy and bureaucratic simplicity attaching to a system of company law requiring a minimum of publicity was recognized quite early by trading members of the middle classes. This group, looking to new sources of capital in order to better guarantee their survival, took advantage from quite early in the history of modern English company law of the potential it offered for conversion of existing partnerships or sole traderships to companies. Most small to medium enterprises depended, even more than their larger competitors, on secrecy, yet they were more able and readier than their larger counterparts to seize upon the potential of the new limited liability corporate form. This suggests some interesting theses as to innovation in industry, particularly with respect to the adaptation, development and diffusion of new organizational forms. The question of the role of small to medium capital in the diffusion of the modern company form will be explored in more detail in a later chapter of the book.

\textit{(v) Financial Reporting Requirements and the Modern Company Form}

The proposers of the modern limited liability company form needed to make a number of concessions with regard to the privacy of those conducting companies so formed, if the legislation were to stand even a rudimentary chance of succeeding in the short or medium term. There was an additional pressing need for the legislators to rid the legislation of ‘publicity’ requirements, such as had existed under the 1844 Act. Not only were most enterprises in 1856 jealous of their privacy, they also had financial records which did not readily lend themselves to meeting the standards laid down by compulsory reporting requirements. Only a very small number of undertakings could have been expected to seek incorporation if corporate status were tied to compliance with certain minimum standards in respect to record-keeping. Experience with the 1844 Act had demonstrated that very few English companies could ever hope to satisfy, at least in the short term, high standards of proficiency in keeping and/or presenting their accounts.\textsuperscript{36}

A number of studies of the manner in which books of account were drawn up during the nineteenth century, even in the case of medium and large businesses, suggest that many enterprises were not utilizing double entry book-keeping even as late as the early twentieth century.\textsuperscript{37} Some enterprises were even so family oriented,
according to these studies, that it was impossible to establish with any certainty from their books a profit and loss account. Such matters ‘didn’t seem important’\textsuperscript{38}. The internal financial affairs of many substantial nineteenth concerns were chaotic. The lack of compulsion in reporting the financial affairs of enterprises, coupled with the obsessive secrecy of the nineteenth century businessman in respect of

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\textit{The confusion surrounding the financial affairs of a company often was related to the secrecy which surrounded the ‘real’ financial affairs of a firm or company in the nineteenth century. Whilst there were many businesses which kept only the most primitive of financial records it was also the case that when accountants started coming into enterprises to do audits they would only have been presented with one, of what were a number of different sets of books, for that enterprise. The keeping of a number of sets of books was relatively common and could be done to deceive public officialdom or alternatively to deceive the dormant shareholders as to matters such as the true profitability of the enterprise. The ‘real’ financial affairs of the business were often hotly disputed by different groups within the business and constituted on many occasions a cause of dissension amongst partners and/or members in closely held enterprises. For instance, in the Carron Company, a large nineteenth century iron producer, the family in active control of the enterprise, the Staintons, regularly altered the accounts so that the enterprise would appear less profitable than it actually was. This enabled them to buy up shares in the Company at a lower price than would have been the case if the true profitability had been revealed to the other shareholders. In a letter in the 1820s to his uncle, Joseph Stainton, the manager of the iron works, Joseph Dawson, stated that he had set the figure for profits for the year at £6,685,19s,1d. He then continued: ‘If you consider £6,685,19s,1d as too small, considering the great noise which has been made about the iron trade, we can increase it by adding 200 or 300 tons to the inventory of pig iron. Please to advise, at your earliest convenience, any alterations you wish to make, as I will not fix the day for the meeting until I hear from you.’ (Campbell, R H (1961) \textit{Carron Company}, (Edinburgh & London: Oliver & Boyd), 166). This practice went on for the next thirty years. It was only when Joseph Stainton, the recipient of the above letter, died that the other shareholders made their demand on Joseph Dawson that they be provided with a ‘copy of the balance sheet, not the abstract, but the full one showing the items of funds and debts’ (\textit{ibid.}, 181).

38 Edgar Jones (1981) states in this regard: ‘In a sense, this parlous state of business accounting is not surprising. Regular calculations of profit and statements of the value of assets were of little interest to the entrepreneur closely and continuously involved in his own business operations. Provided he was not accountable for part of his profit to others, little thought needed to be given to its precise & periodic calculation.’ (Jones, E (1981), 56).
\end{quote}
business affairs, meant that bad or inadequate accounting practices often became entrenched. In some instances the rudimentary nature of accounting in an enterprise might be held out as a virtue; indicating that an ‘older style’ of entrepreneurship had been preserved in the relevant undertaking. A case in point is D Napier & Son, in which the controlling spirit of the enterprise in the mid nineteenth century, J M Napier, refused for some considerable time to do anything to remedy the accounting muddle which lay at the heart of his business. The historians of his business comment:

[I]n spite of his Scottish background, he seems to have had no talent for finance and no exaggerated idea of the importance of money. He spent freely, both on himself … and on equipment for the works, but until 1860 the accounting side of the firm was in confusion and he himself confessed to an auditor that he had no idea whether or not he had put £300 into a venture in Spain, in which he and his friends had speculated.39

The financial affairs of the enterprise were in such disarray by the mid-nineteenth century that in the seven years up to 1860 no entries at all were made in the cash book. The clerk in charge merely made a few obscure notations in his diary. This was the extent of the book-keeping of the firm.

The accountant who was finally brought in to do something about the financial mess that had resulted from the exercise of J M Napier’s dubious entrepreneurial skill, a dour individual named W P Cardell, later remarked of his employer:

He put honesty, truth and perhaps pride, in front of all pecuniary questions. Such a man could not expect to make a colossal fortune.40

The prevailing beliefs as to the sacrosanctity of ‘privacy’ in business affairs meant that the financial affairs of many nineteenth century businesses were at best barely adequate and quite often a disastrous muddle. Consequently the imposition of strict standards of financial reporting on nineteenth century businesses would have been resisted, even without the concern relating to commercial privacy which prevailed during the nineteenth century. This opposition would have been on the basis of the difficulty and costs involved in complying with even minimal accounting standards for most businesses.

Robert Lowe, in introducing limited liability legislation, chose to require a bare minimum of information from those enterprises registering under the proposed Act. He knew that opposition to the legislation would be less if it were not perceived as a threat to ‘privacy’ in business affairs and as imposing too heavy

a burden on businesses bringing their internal financial systems up to standard in order to conform to the legislation\(^{41}\).

The importance to government of allaying fears amongst those engaged in commerce as to the nature of the new organizational form was a recurrent theme for most of the nineteenth century. The slow diffusion of incorporation and the continuing legislative accommodation to the ‘needs of commerce’ reflect the desire of successive governments to alleviate any fears that incorporation might compromise the ‘privacy’ of one’s business. The jealous attitude amongst nineteenth century businessmen towards their commercial secrets and the financial details of their enterprises is reflected in the continuing reluctance of legislators to introduce even minimal publicity standards.

Lord Cohen of Walmer, a former Law Lord, stated in an address celebrating the centenary of the 1856 legislation:

Until the coming into force of the 1908 Act all limited companies had to comply with the obligations imposed by law as to the making of returns which had to include certain statements of account. Heads of some family concerns thought that these statements might afford useful information to their trade rivals and for that reason hesitated to turn their businesses into limited companies, notwithstanding the advantages which such incorporation would confer. For some such reasons as these the constitution of a special class of company called a ‘private company’ was authorized in 1908 ... [which] was relieved of the obligation to include in its annual return copies of its balance sheet and directors’ reports \(^{42}\).

To put this reluctance of businessmen to incorporate in the period before the enactment of the 1908 Act into perspective, it must be realized that the ‘reports’ which were required of companies before that time were of the most cursory form. The financial statement required by the Registrar was not required to have been audited by a professional auditor, neither were many of even the most rudimentary details of the financial structure of the enterprise required by the registering authority. The antipathy to incorporation on the ground of preserving ‘privacy’ was often a prejudice not grounded on facts, but instead on a series of deep seated cultural beliefs. These beliefs were so strong and so persistent in England that even when it was no longer rational for businesses above a certain size to remain unincorporated nevertheless many continued to remain as unincorporated partnerships.

As a result of these hostile attitudes towards the corporate form the belief that regulation had no place in company law became ‘naturalized’. The only

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\(^{42}\) Lord Cohen of Walmer, (1957) *One Hundred Years of Limited Liability Companies in England*, (Jerusalem: Hebrew University of Jerusalem), 11–12.
manner whereby incorporation (and thus modernization of management and organizational structures) could be encouraged was by making the corporate form as attractive as possible to those in business. One of the chief mechanisms by which it was felt this should be done was by introducing as few ‘regulatory’ impediments into corporation legislation as possible. To encumber the legislation with regulations, such as those requiring annual financial reporting by companies, would be to undermine initiative amongst businesses already incorporated and to discourage other enterprises from incorporating. This lack of ‘regulatory’ impositions in company law, intended as an incentive to attract enterprises in key sectors of business to incorporate, had the contradictory effect of providing those in small and medium businesses with an attractive alternative to partnership and its attendant unlimited liability. The ‘colonization’ of companies legislation by smaller businesses in turn provided a further rationale for not introducing tighter financial reporting requirements into the legislation. It was now said that it would be impossible for such small undertakings to afford to have their accounts properly prepared by an accountant and professionally audited at the end of each year. It was alleged that as ‘expectations’ of many had been built around the existing regulatory regime (or lack of it) it would be unfair now to impose different standards on those who had incorporated their enterprises. The themes touched on here will be explored in more detail later in this work. In the following we will firstly examine the response of English capitalists to the limited liability corporation in the first decades of its availability.

Response to the Legislation Once Introduced – The ‘Capitalists’ Response and the Response of the Middle Classes

The lack of enthusiasm of large industrial capitalists for limited liability incorporation can be observed in their disinterest in the legislation once it was in place. Few capitalists in key industrial sectors took advantage of this new means by which to organize their businesses. As late as the mid-1880s partnership was overwhelmingly favoured as the preferred method of organization in British industry43. J B Jeffreys has estimated that by 1885 only between 5 and 10 per cent of important business organizations in England had adopted limited liability status; the remaining 90 to 95 per cent still operated their businesses as partnerships or as sole traders44.

If the ‘conventional’ teleological thesis for the introduction of limited liability legislation, that it was a response to the ‘needs of capital’, is incorrect, then a number of alternative explanations for the introduction of company legislation in England at mid century must be considered. Several alternative hypotheses

44 Jeffreys, J B (1938), 105.
have in fact been advanced. One suggestion is that limited liability legislation was introduced to satisfy the needs of an emerging ‘investor class’. This thesis was first advanced by J B Jeffreys in his pioneering work on business organization in nineteenth century England\textsuperscript{45}. He suggested that in the middle of the century an aggressive new ‘investor’ class agitated for the introduction of limited liability legislation in order to provide them with new avenues of investment. This was due to the drying up of new outlets for investment capital. There had been a decline in demand for capital by railways and other infrastructural enterprises. This was allied to an extremely low rate of return on traditional ‘blue-chip’ investments such as Consols. According to Jeffreys the attraction of limited liability legislation to such investors was that it would for the first time allow them to invest in high-risk domestic enterprises without becoming personally liable for the debts of such a venture should it fail\textsuperscript{46}.

The problem with this explanation lies, however, in identifying such an homogeneous ‘investor class’, which was sufficiently well organized to agitate for these reforms. Jeffreys suggested that this group was constituted by the capitalists of the Home Counties:

[W]ho were not directly engaged in trade, who were now seeking an outlet, with profit, for their accumulations ... they were willing to take the first opportunity which the necessities of the northern industrialists might give them for investing capital ... this class were the chief instigators of the limited liability legislation\textsuperscript{47}.

Certain factors, however, tend to suggest that this particular group of investors was not quite the force that Jeffreys suggests. Firstly, his assumption that this particular group of Home Counties investors were the main victims of a drying up of railway investment can only be sustained if they were, in the first place, a significant source of investment capital for the railways. If they were not such then, obviously, they would not have, as a class, suffered much by the declining demand for capital, and declining returns from the railways.

A number of studies of railway investment in the second quarter of the nineteenth century indeed fail to establish that this group invested to a significant extent in the railways\textsuperscript{48}. Home Counties capitalists were by no means the group of investors most affected by a declining demand for capital on the part of the railways\textsuperscript{49}. Investors from other regions of England, even those in the industrial

\textsuperscript{45} ibid.
\textsuperscript{46} For example see Shareholders Circular, 17th November 1863.
\textsuperscript{47} Jeffreys J B (1938), 9–10.
\textsuperscript{49} Cottrell, P L (1981), 45–46.
north, were as sorely affected by the decline in available railway investments as were their Home Counties counterparts.

Even if one were to accept the thesis as to the heavy involvement of Home Counties investors in railway projects it should nevertheless be observed that for most Home Counties investors low quality speculative flotations of limited liability companies did not necessarily constitute a substitute for railway investment. Relatively high risk, medium to high earning, investments, which were the most likely to emerge in limited liability guise, were not generally attractive to the cautious Home Counties capitalists. They wanted ‘moderate’ returns on their capital, by which they meant slightly better returns than were generally available in the mid-nineteenth century on ‘blue chip’ investments. If they supported limited liability legislation in the hope that it would yield such investment opportunities, particularly in respect to infrastructural flotations, there is little evidence to suggest that they were the instigators of a vigorous campaign to have the legislation adopted. At best they were passive supporters who had been dragged into an agitation which had originated in other quarters.

The removal of the publicity provisions in the Act constitutes another piece of evidence suggesting that it was not the hand of the Home Counties capitalists that shaped the legislation. These were removed at the last moment, a development hardly compatible with an explanation that posits the most cautious of investors as the driving force behind the introduction of the legislation. It is scarcely credible that a lobby group composed of Home Counties investors would allow the removal of the principal clauses aimed at protecting their interests in the very legislation for which they were supposed to be the principal advocates. Rather, it seems more credible to assume that other elements were the driving force behind the legislation and that the Home Counties capitalists were at best only minor contributors.

Jeffreys is therefore at best only partially correct in his explanation of the introduction of the limited liabilities legislation. This leaves the difficult task of constructing an explanation for the introduction of the legislation around the complex forces at play at this time over questions such as the meaning of laissez-faire economic principles and the types of macro-economic policies being pursued by the English government of the day. One avenue that has occasionally been explored by other researchers is that of the role of the government, or more particularly the Board of Trade, in advancing the legislation as a panacea to capital flight and as an incentive to competition.

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50 This reluctance to purchase the shares of joint stock enterprises due to the ‘risk’ associated with such investments was noted by David Morier Evans in his contemporary account of commercial practices and malpractices Facts, Failures and Frauds. In particular Morier Evans notes the ‘revulsion against the joint stock system’ after the collapse of the Royal British Bank in 1856 (Morier Evans, D (1859), at 261).
There are several factors which suggest that the Board of Trade was playing a more active role in advancing the case for limited liabilities incorporation legislation in the mid-1850s than it had earlier. The first factor that would indicate a shift in attitude is the change in personnel on the Board. With Robert Lowe’s assumption of the Vice Presidency, the Board adopted a much more ‘radical’ face with respect to matters affecting the conduct of trade in England.

Secondly, in addition to the new ‘ideology’ of absolute freedom to incorporate being propagated on the Board by Lowe, there was also mounting concern being expressed in relation to capital flight from England at this time. The 1850s was the first decade in English history in which capital movements of such magnitude had occurred. Much of the capital leaving England in the early 1850s was going into overseas investments, particularly into joint stock companies offering limited liability. The situation in respect of capital outflow became of such concern to the English government of the day that it introduced in 1854 certain restrictions on the export of bullion. There was also some discussion in Parliament as to other possible measures to stem the outward flow of capital. A certain level of urgency began to creep into these discussions as it was perceived that the departure of capital from England might be adversely affecting the Crimean War effort.

Many British investors had already diverted their funds from the sluggish English investment market to the far more volatile, but potentially more lucrative, field of foreign investment. Concern was mounting as to the long-term economic effects of such a haemorrhaging of funds from the English economy. It was quite clear that the principal reason that many such investments held out a certain attractiveness to the English investor was that limited liability attached to them. English investors exported their savings to become shareholders in virtually any enterprise which held out the promise of a reasonable return. Such investments ranged from Californian gold-washing companies to Haitian railways.

Overseas investments were particularly attractive for small to medium investors. It had become progressively more difficult for this group to invest in

51 Margaret Rix (1936) suggests: ‘There can be no mistaking the ideas underlying the 1856 Act, for it seems to have been passed as a result of the efforts of one man, Robert Lowe (then VP of the Board of Trade), who may have had fixed ideas on the subject of joint-stock companies but whose importance to company development both at this particular time and during the next twenty years cannot be overestimated.’ (An Economic Analysis of Existing English Legislation Concerning the Limited Liability Company, unpublished M.Sc (Econ) thesis, University of London, 3–4).

52 Lord Stanley of Alderly commented on the extent of capital flight from England when advocating the Limited Liability Bill to the House of Lords in 1856: ‘The present state of the law tended to drive capital abroad into other countries where similar obstacles did not exist.’ (Hansard, 3rd series, vol. 139, 1856, cols. 1919ff).

53 This comment was made by Robert Collier in the course of a House of Commons debate in 1854 on the law of partnership and the possible need to introduce a system of limited liability legislation to England (Hansard, 3rd series, vol 134, (1854), cols 756–757).
government bonds or other blue-chip investments. One contemporary investment manual aimed at providing advice on American securities stated the problem in the following manner:

Persons who are dependent on the interest of small sums of money, say 2,000 or 3,000 pounds find it a trying operation to maintain a family on the income which the investment of such sums in Consols will produce\(^\text{54}\).

In order to sustain a moderate level of subsistence on such a sum, returns of 5 to 6 per cent were necessary. The only domestic investments which held out the promise of such returns were high risk ventures which did not have the security of limitation of liability attached to them. They might lead not only to the total loss of capital invested, but also to the complete impoverishment of the investor through their unlimited liability for the debts of the venture. An inability to meet the demands of creditors could also lead to a period of incarceration for debt. This is indeed what occurs to Arthur Clennam, one of the central characters in Charles Dickens’ *Little Dorritt*. Not only does Clennam drive his thriving partnership with Doyce into debt, by reason of his injudicious investment of partnership funds in a number of high risk enterprises, but he is also imprisoned for debt in regard to liabilities arising out of the collapse of those enterprises in which he had invested. Investors like Clennam and Doyce, members of Victorian England’s middle classes who had become aware of the pitfalls of investment in enterprises with unlimited liability, were certainly amongst those responsible for the ever growing amounts of capital leaving England in the mid-nineteenth century. As Colin Gordon has stated in a somewhat different context, the concern of the period was to ‘take the risk out of risk’, and the middle class were in the forefront of those vying to shed the notion that one should personally bear all the costs, both economic and emotional, of failure\(^\text{55}\).

A concern both to stem the tide of departing capital, and to accommodate the burgeoning middle class at the same time, can be found expressed in contemporary treatises, newspapers and in evidence presented to the various Select Committees and Royal Commissions on mercantile matters which were being conducted at this time. For instance, at the 1854 Royal Commission on Mercantile Laws, the Commissioner in Bankruptcy, R C Fane, stated that he was:

\[\text{C}\text{onvinced that the English law (of unlimited liability) had done more to send English Capital to be lost in Pennsylvania and Mississippi bonds, South American, Spanish and Greek loans and an endless number of other foreign}\]

\(^{54}\) Cited in Cottrell P L (1981), 46.

delusions, than all other causes put together. The only attraction those bubbles held out was that every man knew the extent of possible loss beforehand56.

Those investors who were particularly tempted by such ‘foreign delusions’ were members of England’s middle classes. Rubinstein’s work on wealth distribution in England and the Australian colonies during the nineteenth century suggests that it was only at mid-century that the savings of those in the middle classes and the labour aristocracy reached levels which would permit investment in outlets such as company shares57.

Of course, this demarcation line is only broadly true as some of the wealthier members of the middle classes had certainly invested in railways in the 1840s. However, for most of the middle classes and for the upper echelons of the working class, investment of their savings in company shares only became a real possibility from the early 1850s. Even then their capacity to invest waxed and waned with prevailing economic conditions. The Law Times remarked just after the introduction of the limited liability legislation of 1855 that the legislation had not much been acted upon due to the small amounts of investment capital in the market at the time:

Undoubtedly [company formations] have not been so numerous as they might be with advantage to the country, or as was anticipated by the ardent supporters of the measure. But to this many accidental circumstances have contributed. The foremost is the scarcity of money. The public do not take shares, because they have no money to invest ... the drain of the war has ... swallowed up all surplus income of the population ... men think themselves fortunate if they can make ends meet58.

The growing importance of middle and working class investors by mid-century is also charted in the changing nature of investment manuals. From publications which assumed as a matter of course that an ‘investor’ would, by definition, be a ‘gentleman’ with an independent income and holdings in real property by mid-century these manuals began to classify their advice on the basis of the ‘class’ of the investor which they were addressing. A case in point is Axford Packers’ _How the Public are Plundered_. In this manual of advice he gives the following suggestions as to possible investments to his readers based on the social class to which they belonged:

56 Royal Commission on Mercantile Laws, 1854, 228.
1. Rich – Government funds (4 per cent), India stock, land mortgages (4–5 per cent), ground rent and railways and if not satisfied with the interest from these then Colonial Government bonds (5+ per cent)

2. Middle classes – lending upon mortgages (4.5–5 per cent), purchase house property (5 per cent), purchase business premises, colonial Government securities (5+ per cent), debenture stocks, preference shares of any great railway (3.5–4 per cent) or in gas or water companies (4–4.5 per cent) – do not meddle in partly paid shares of any sort.

3. Working and industrial classes – savings banks, shares in well conducted building societies (2.5 per cent)

Another insight into the investment habits of the various social classes in nineteenth century England is provided by the share registers of companies of the period. For instance in a recent analysis of the occupational background of shareholders in early south-west gas companies in England it was found that the most significant investors in shares in such enterprises were textile manufacturers, retailers, and lawyers and doctors. These investors also tended to come from the local region in which the gas company operated. Strikingly enough, members of the gentry, whilst representing a distinct and identifiable group of shareholders, did not represent one of the most significant groups of shareholders within these enterprises. From as early as the first quarter of the nineteenth century members of the middle classes, in particular members of the professions, were seeking to find outlets for their savings by taking shareholdings in new company formations.

The nature of shareholdings in companies could also be broken down on a somewhat different basis than simple raw percentages. Instead they could be disaggregated by the actual numbers of shareholders in each of the occupational categories. Such a breakdown, whilst laborious to construct, will give us a much clearer idea of the extent of middle class shareholding, as we would expect that such shareholders would generally take smaller parcels of shares than their co-investors from the manufacturing and aristocratic classes. The present author has disaggregated the share register of the Assets Realization and General Finance Company, a colonial finance company of the boom period of the late nineteenth century, to test whether this avenue may be worthy of further exploration in later studies as a means of determining the extent of shareholding amongst the middle class in the nineteenth century.

In this company all classes were represented amongst the shareholders but the number of shares which were held by each category varied widely. Tradesmen and shopkeepers tended to be small shareholders with 25 to 50 shares, whilst professionals such as solicitors and accountants tended to have middle sized


bundles of securities ranging from 50 to 250 shares. The large shareholders in the company, with shareholding upwards of 200, and sometimes in excess of 1,000, were predominantly merchants. The latter finding is not surprising as this group constituted the most significant wealthholders in colonial Australia\(^\text{61}\).

What is the most remarkable finding from an analysis of the share registers of this and other companies of the period is that the most significant group of shareholders in overall numbers (even if they did not, in percentage terms, hold the bulk of the shares) were those in the professions and in small to medium sized businesses – the middle classes. This tallies well with the suggestion that this group was amongst those most concerned to have limited liability incorporation introduced in the mid-nineteenth century.

R S Neale stated that this group of middle class investors could be identified politically at the time by a ‘privatized and achievement oriented consciousness’\(^\text{62}\). J S Mill said of them that they included ‘those rendered disqualified and radical by the restricted field of employment and the falling rate of profit’\(^\text{63}\). They had been amongst the principal victims of the savings bank collapses of the 1850s, and they had also suffered dearly in the railway company frauds of the 1840s.

In the early 1850s this group had no reason to put their trust in English investments. They well knew by this stage the potential dangers of investments without the protection of limited liability. As has already been observed they had turned towards the Continent and the Americas as outlets for their investment capital, as a consequence of the greater security against crippling losses offered by the limited liability status attaching to these investments. The new legislation proposed by Robert Lowe therefore provided this group of middle class investors with a welcome domestic alternative to these foreign schemes.

It was suggested in 1856 by some of the more cynical elements in Parliament that by passing the most liberal incorporation law in Europe the English Government was providing an encouragement to the creative energies of promoters to devise a range of speculative schemes to swallow up the savings of the middle classes. This group, and the wealthier members of the working classes, would be more willing to risk their capital now that they were assured that complete destitution would not follow the failure of an enterprise in which they had invested. Such feigned expressions of concern highlight the interest being expressed at mid-century by the working and middle classes in respect of remunerative investment outlets. It was perceived, even by these opponents of limited liabilities legislation, that the groups most likely to greet the introduction

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63 *ibid.*, 147.
of such legislation with enthusiasm were the disaffected investors of the affluent working and middle classes. Sections of the middle classes also found limited liability legislation to their liking from a number of other perspectives. First, for those in trade it promised a potential means for alleviating the constant threat they faced in their businesses, that of over-stretching their credit and as a result being imprisoned for debt or being declared bankrupt. By forming their businesses as limited liability companies these traders would, in cases of business failure, no longer have to bear personally the ignominy of imprisonment and disgrace. Second, for professional members of the middle classes the legislation held another attraction. It meant more business. On the one hand the reporting requirements (albeit rudimentary) imposed on corporations by the legislation meant more work and income for accountants. The necessity which the legislation created for professional accounting services led in turn to an enhancement of the professional standing of accountants.

For lawyers the new corporation legislation also meant the opening up of a range of new legal work. The interpretation of the provisions of the legislation in the courts and the refinement of aspects of its operation (such as reduction of capital, ultra vires, officers’ duties) in practice led to enormous expansion in the workload of most large practices. Just as with accountants, it entrenched the role of the solicitor in the modern commercial economy. No longer would the family attorney be largely confined to matters such as family settlements. The ordinary legal practitioner would now also be charged with providing a constant stream of advice on the daily management of the family estate, as constituted in corporate form.

Hence, while the limited liability legislation of 1856 held out a multi-faceted group of advantages to those in the affluent working classes, it was of even greater benefit to the middle classes. Another significant advantage of the corporate form was the protection which it afforded against the ignominy of personal failure. Indeed the intensity with which failure in business was felt by this group is indicated by

64 The common assertion was that such demands should be resisted as members of these classes did not know what was good for them and would suffer significant losses in futile investments if they were given the opportunity to speculate in shares. Lord Brougham was often quoted in this respect. Brougham had stated: ‘The moral effect of all joint stock associations for mercantile objects which are properly within the compass of individual exertion is bad; they will introduce in the place of patient labour and moderate expectations, ambitious hopes and the habit of gambling in shares.’ (cited with commentary in the Circular to Bankers for 17th August, 1844).

65 This characteristic was, however, seen by some as constituting a reason for not allowing such legislation. It was reasoned that the legislation would lower the overall morality of English commercial life and divert funds from productive into speculative undertakings. Edmond Phillips commenting in 1856 on the legislation stated: ‘This Limited Liability Bill ought therefore to be called ‘an act for the better enabling adventurers to interfere with and ruin Established Traders’. Phillips, E (1856) The Bank of England Charter; Currency, Limited Liability, & Free Trade, (London), 36.
a cursory reading through the records of letter books of businessmen, records of mental institutions, and the official records of inquests in the nineteenth century which reveal large numbers of psychological disorders, mental anguish and in extreme cases, suicides, attributable to the nineteenth-century businessman’s inability to cope with the moral implications of business failure.

For instance, one member of the nineteenth century middle classes, a Mr Shields, who was the bank manager of a large provincial branch of the National Bank of Australia, wrote to a business colleague in respect to his feelings and response to a disastrous commercial failure in which he had been involved:

In November last year I felt very seedy and went south to recuperate ... I got very bad and was in the Doctors hands for five weeks ... for a time I could not walk without assistance. Nothing particular the matter, just a bust up of the system for a time. When well enough to travel went ... to New Zealand ... and here I am again in my old chair the same as ever.

In another instance a businessman recounts the mental traumas attendant on the anxieties of trading with unlimited liability, traumas which even extended to taint the private domain of sexual relationship:

For the last fifteen years business difficulties and anxieties have been great ... and a large share of them fell upon my shoulders as the Countinghouse partner ... and circumstances over which I had little control have compelled me to work very late and amid great vexation, worry and anxieties. [Recently] I found myself quite unable to apply myself properly to business ... [I have experienced] a low nervous kind of fever about the system ... and a dull depressing headache ... which seems to extend from the back part of the head down the spine. I [also suffer from] a general irritability and excitableness of temperament ... weakness of the organs of generation, irritation of the bladder whenever the stomach is deranged to the slightest degree and an exceedingly inconvenient tendency to make water frequently ... sexual intercourse is followed by an amount of exhaustion the following day which is very depressing.

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67 Wilbraham Collection, Mitchell Library, A3948, Book 4, Letter from Mr Shields, Manager, National Bank of Australia, Rockhampton Branch to Col. A B Wilbraham, 1st April 1891.

68 Howden Collection, University of Melbourne Archives, Lyell and Gowan Accounts/Letter Book 1869–1882, Letter from Andrew Lyell, Accountant, Melbourne to Dr Flemming, Glasgow, 28th July 1869.
The ‘moral’ climate supposedly engendered by the principle of unlimited liability, and so warmly supported by the large capitalists of the day, had, therefore, a considerable human cost amongst smaller entrepreneurs. For many small and medium capitalists, whose businesses faced the ever-present threat of insolvency, unlimited liability was a constant menace. The middle-class traders of the nineteenth century demanded a new settlement, by which the prevailing imbalance between the position of debtor and creditor might be redressed in favour of the debtor. They asserted the importance of removing, as far as possible, matters relating to the payment of debts and the resolution of insolvency from the legal arena. They asserted that such matters should be returned to what they regarded their rightful arena – their resolution on commercial criteria as a matter between the concerned parties. The settlement of debts was regarded by such businessmen as a moral obligation to repay which should be enforceable as part of general commercial ethics.

In asserting the inefficacy of law in enforcing such moral obligations, and in lamenting the inappropriateness of the ‘legal’ assumption that bankruptcy was in some way tied to dishonesty, the Incorporated Law Society of Liverpool commented in the Law Magazine and Review that over the course of the nineteenth century bankruptcy law had become ‘increasingly Draconic in its severity’. The Society accused the authorities of meddling inappropriately in commercial matters when they dealt with bankruptcy due to their prevailing assumption that ‘the bankrupt was a fraudulent kind of person, like the man who sold oleo-margarine for butter’69. Another Liverpudlian commentator of the period stated more forthrightly that lawyers were ‘utterly unqualified to meddle with bankruptcy legislation’ as they could not ‘be supposed to know the affairs of merchants, manufacturers and shopkeepers’70. One commentator has remarked of the attitudes of those in commerce in the nineteenth century towards the ‘legal resolution’ of matters such as debt and insolvency:

Few issues were as contentious for nineteenth century businessmen as that of debt, whether in the form of personal insolvency, formal bankruptcy or the winding up ... of a company. The issues at stake were both moral and legal. And therein lay the problem; as a moral issue, it was believed that debt should be subject to the adjudication of customary practice designed to achieve substantive fairness and a rapid dispersal of assets ... Yet, recourse to law was necessary in order to determine what debts were to be discharged, to what extent, to whom and by whom. The very nature of the problem was such that no settlement satisfactory to both debtor and creditor could easily be found71.

70 A Registrar of a District Court of Bankruptcy, (1847) Observations on the Law and the Present Practice of Bankruptcy and Insolvency (Liverpool) 21.
One novel manner of resolving this dilemma was consequently through the introduction of limited liability incorporations legislation. This mechanism still involved the legal system in overseeing the winding up of a business. However, it also allowed debtors (in this case the principals of the business) and creditors to reach private arrangements in the form of guarantees if further security for a loan was deemed necessary. Such private arrangements would be outside the purview of the courts and generally enforceable only as ‘moral’ obligations between debtor and creditor.

The significance of this solution can be gauged from the vigour with which middle class traders pressed the need for insolvency to be dealt with outside the legal system, as a private matter between debtor and creditor. These traders considered the public ignominy associated with the matter being dealt with in the courts as anathema. They also trusted their peers to come to a more realistic settlement than that which might be imposed by the courts in which judges, ignorant of commercial realities, would adjudicate the matter. An article in the Law Magazine and Review in 1844 illustrates the ambivalence of those in the middle classes towards the prevailing legal regime of unlimited liability for one’s business debts:

No one can doubt the moral obligation on debtors to discharge all their debts, whether bound by law to do so or not; yet in a commercial country like this, where competition in all lines of business is so strong that one false calculation or erroneous step may involve industrious and honest men in insolvency, that is not an obligation which can be enforced by law.\(^72\)

The relationship between the antipathy felt by the business community (and particularly those in the middle classes) towards the ‘legal’ resolution of commercial debts and insolvencies and the introduction of limited liability incorporation is evident in many of the contemporary literary accounts of commercial life. Cultural representations of the scourge of debt and bankruptcy in a system premised on unlimited liability are counterposed with accounts of the antidote offered by limited liability. Such accounts are not, however, unmixed in their praise of the new organizational form. Often they allude to its potentially corrosive effects on ‘community’ solidarity.

The manner in which these literary accounts presented the pros and cons of different forms of business organization was usually through the theme, which was recurrent in Victorian literature, of the tragedy of the small businessman who, through no fault of his own, found himself in debt. Dickens, in a number of novels culminating in Little Dorritt, dealt with this issue. In this final treatment of the matter Dickens intertwines the themes of responsibility, limitation of liability, incorporation and debt. The original working title of Little Dorritt was Nobody’s Fault, a title which well captures the sentiment of the age, particularly amongst

\(^72\) The Law of Debtor and Creditor, Law Magazine and Review, N.S.1 (1844), 90.
the middle classes, that there should be less moral blame attached to failure in business or professional life. The middle classes asserted that it was time to move away from a social order based on personal moral responsibility to a new order based on an impersonal liability which was limited to a fixed amount agreed in advance.

The potential for the Limited Liability Act to bring about such a new order, particularly for those traders with small to medium sized businesses, was not lost on contemporaries. One of the manufacturers giving evidence before the 1854 Royal Commission on Mercantile Laws expressed the view that if liability were limited then ‘the stain which now attaches to bankruptcy would cease to exist’ 73.

The chief architect and advocate of the limited liability legislation, Robert Lowe, was well aware of the potential of limited liability incorporation to alleviate the moral taint attached to insolvency. Lowe, however, appeared to reject the application of limited liability legislation to the resolution of the particular problems of small and medium traders. As he said, one way of dealing with the difficult and vexed question of liability in the case of private partnerships would be:

[T]o carry the present law of limited liability into these partnerships, and to say that any number of persons, however small – even to one ... shall be entitled to be formed into a corporation, and to enjoy, as such, the privilege of limited liability. To that proposition I am not disposed to accede ... everything would always be said to have been done by the corporation and nothing by the individual, and a door to vexation, quibbling, and perjury would be opened which it is most desirable to keep closed74.

Regardless of the ostensible rejection by Robert Lowe of the concept of the ‘one man’ company, it is nevertheless worth noting that the legislation, in the form in which it was finally adopted, did nothing to prevent such businesses incorporating by means of the use of ‘dummy’ shareholders, who would hold shares on trust for the effective controller(s) of the business.

Despite the fact that Lowe and others were aware of this ‘loophole’ in the legislation no specific provision was devised to prevent such a contingency from occurring75. The ambiguity of the Act as passed, and Lowe’s awareness of this is

75 Ireland (1984), 243–244, however contends in his analysis of the legislation that both the parliamentary draftsman responsible for the legislation, Henry Thring, and Robert Lowe were opposed to the extension of the legislation to smaller enterprises: ‘Those responsible for the legislation continued to assert its restricted ambit. Henry Thring ... in 1856 published a guide to the Act which provided further insights into the official view of its scope ... Thring expressed regret at the failure of the Partnership Amendment Bills, because
displayed in the following exchange in the House of Commons at the committee stage of the debate on the legislation:

Mr Henley said that he could not understand why the advantage of limited liability should stop at the mystical number of seven, or why it should not be extended to six or even down to one.

Mr Lowe said that the object of the Bill was not to give limited liability, but to incorporate companies. When the Partnership was very small the Acts of Parliament were apt to become ambiguous.

Mr Alexander Hastie said he would point out a case to the attention of the Committee. Suppose the case of a person forming a company of seven, consisting of himself and six others – it might be his servants – to whom he gave a single share. He could not think it right to give limited liability to a company when the right was liable to such abuse.

Mr Lowe replied that the ‘same objection applied to the existing law. He could not agree to any change’ (my emphasis)76.

In fact, the entire tenor of the legislation was permissive. Lowe, in another part of his speech when introducing the legislation, went so far as to say that limited liability legislation should be thought of as a right, rather than as a privilege, and as such it was merely another aspect of the principle of:

\[\text{[F]reedom of contract, and the right of unlimited association – the right of people to make what contracts they please on behalf of themselves, whether those contracts may appear to the Legislature beneficial, or not, as long as they do not commit fraud, or act otherwise contrary to the general policy of the law}77.\]

... given the privileges bestowed by the 1856 Act, it seemed somewhat unreasonable ... to refuse to the ordinary trader the privilege of obtaining money from capitalists ... without at the same time incurring all the risks of unlimited liability’.

Ireland suggests that this clearly indicates that Thring considered that the Act did not apply to small partnerships and sole traders. With respect it may mean quite the opposite. This is evidenced by the expressed opinion of the other serious contemporary commentary on the Act, that authored by Edward Cox, a respected barrister specializing in commercial matters. Cox stated that the apparent injustice of the legislation in excluding small partnerships and sole traders from the privilege of incorporation was merely an illusion as by ‘dummying’ the six additional shareholdings, using friends, servants or relations, the sole trader could incorporate. There was nothing illegal or contrary to law in so proceeding, Cox assured his readers. Cox, E (1856) The New Law and Practice of Joint Stock Companies, i–xx; see also the serialisation of Cox’s Manual in the Law Times in 1856.

77 Hansard, 3rd series, vol. 140, 1st February 1856, col. 129.
Limited liability legislation was therefore a potential solution to two of the principal dilemmas faced by the middle classes in respect to their business affairs. Firstly, it solved the problem of the availability of suitable local investments for members of the middle classes. By providing for limitation of liability it offered to English investors the very same advantages which had attracted this group’s capital to overseas investment in the first place. Second, limited liability legislation was seen by members of the middle classes as a device by which they could alleviate their long-standing problems with respect to debt.

Whilst direct evidence of this connection between middle class business needs and the introduction of limited liability legislation is hard to come by there are a number of indirect indicators of its plausibility.

One is the adoption by a number of such business people of corporate identity. Analysis of the BT31 Company Registration Files of defunct companies held in the Public Record Office shows that 19.05 per cent of the companies which registered in 1856, just after the introduction of the limited liabilities legislation, were either conversions from existing partnerships or registrations of what today would be described as private companies. Whilst much attention has been focused on the later emergence of the ‘one man’ company, little attention has been paid to the incidence of other types of small enterprise utilizing companies legislation, formed perhaps to conduct a family business, in the early years of modern company legislation. These figures indicate, contrary to the accepted belief, that a number of business people from the middle classes recognized the attractiveness of the limited liability company from a very early stage.

Evidence led before various Select Committees and presented in other fora during the period immediately preceding the introduction of the 1856 Joint Stock Companies Act, demonstrates that the middle classes were not indifferent to the advantages which would accrue to them by operating in limited liability guise. Of particular interest in this regard are the 1850 and 1851 Select Committees on the Investments of the Middle and Working Classes (1850) and on Partnerships (1851), which were chaired by Robert Slaney. No less a figure than John Stuart Mill stated before the 1850 Select Committee that the existing law prevented ‘persons of capacity for business from obtaining credit and the use of capital which would

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78 BT31 Files of Defunct Companies, P.R.O., Kew. A 10 per cent sample of all registrations for the years 1857, 1867, 1877 and 1887 was taken. The criteria by which companies were evaluated as ‘private’ or ‘public’ were those which were adopted to distinguish the two forms of enterprise in the 1907 Companies Act – primarily numbers of shareholders, transferability of shares and whether the shares are publicly listed. A detailed breakdown of companies on the basis of whether they are private, public (new flotation) or conversion of a private partnership to a public company for each of the years for which a sample was taken can be found in the Appendix.
be advantageous to the public and to them”\textsuperscript{79}. Edwin Field\textsuperscript{80}, a prominent solicitor who was one of the witnesses before the 1851 Committee, was somewhat more explicit in his view of how the middle classes might benefit from limited liability legislation:

If every debtor who could not pay his debts were as of course to be imprisoned for life, a rich man would not venture into a speculation which might by any possibility result in a debt he could not pay, unless it promised him enormous profits, and an almost certainty of them. But the risk of the entire ruin is almost as terrible a risk as that of imprisonment for life ... a man, however rich, ... may have to bear the entire brunt of the failure of ... [a] ..joint stock company ... therefore he will not combine with others on terms of unlimited liability\textsuperscript{81}.

He went on to state that the (large) capitalists ‘use the current system to prevent competitive enterprises from ‘entering the fray’ ... a system of limited liability would be fairer’\textsuperscript{82}.

W R Greg\textsuperscript{83}, the author of an article in the *Edinburgh Review* on the investments of the working and middle classes, commented in 1855 that the principal beneficiaries of limited liability legislation would be ‘clerks, junior partners, inventors, poor relations, needy friends and dependents’\textsuperscript{84}.

In the debates in Parliament on the adoption of the principle of limited liability we again find scattered references concerning the desirability of the measure in the context of assertions that it would better allow the members of the middle classes involved in trade to compete with the ‘overbloated’ capitalists. In the course of


\textsuperscript{80} Edwin Wilkins Field (1804–1871) was a law reformer and amateur artist who was admitted as an attorney and solicitor in 1826. In 1844 Field was in contact with the Board of Trade on the subject of the winding up act for joint stock companies. The Act of 1848 substantially embodied the proposals contained in a draft bill laid before the legal adviser of the Board of Trade on 24th June 1846 by Field and his friend Rigge. Field was a Unitarian dissenter (*Dictionary of National Biography*).

\textsuperscript{81} Field, E (1854) *Observations of a Solicitor on the Right of the Public to Form Limited Liability Partnerships*, (London), 6.

\textsuperscript{82} ibid., 50.

\textsuperscript{83} Commenting on the influence of this article on the deliberations of the Select Committee on Partnerships, Thorben Christensen in his history of the Christian Socialist movement states: ‘Greg’s recently published articles ... were influential in showing the justification of the Bill (on Industrial and Provident Societies). Greg upheld the doctrines of Political Economy and did not believe in the economic theories of Socialism as expounded by the Christian Socialists. Nevertheless, he argued forcibly and convincingly that mere justice demanded that associations and Stores should have the protection of the law – and at the earliest possible moment.’ Christensen, T (1962) *op. cit.*, 277.

\textsuperscript{84} Cited in Boult, S (1855), 10.
an 1854 debate on limited liability incorporation, the Corn Law reformer Richard Cobden stated:

If they took another class, the class of young men who were engaged as clerks or shopmen in houses of business – of whom there were he believed, in London alone, no fewer than 100,000 – he doubted if they would not find in them a unanimous feeling in favour of the principle of limited liability, which was the principle that afforded them the best chance of entering into business on their own account, and of making their way in the world.85

Of course, limited liability was not simply seen by this ‘class’ as a novel device for shifting risk from themselves onto creditors, but also as a means by which they could more effectively compete with the large capitalists who then dominated the English economy. Corporate form with limited liability would allow them to overcome at least some of the barriers to competition which had been erected by their large rivals – the forbidding possibility of unlimited liability would no longer discourage potential investors in such ‘new’ or ‘expanding’ enterprises. Cobden went so far in one of his speeches on the legislation as to call limited liability legislation the ‘Corn Law of the capitalist’ which would overcome that great blot on the English economic landscape of the monopoly effectively enjoyed by those few in whose hands most accumulated capital was held; it would help bridge ‘the gulf which now divided different classes’.86 The inequities felt by the smaller capitalists of the middle classes, when compared with the advantages enjoyed by the larger capitalists, was a consistently recurring theme in the debate on the introduction of limited liability companies legislation. They were supported in this ‘campaign’ with regard to the introduction of a less iniquitous system by other members of the middle classes – particularly by members of the legal and accounting professions who, as we have observed above, themselves benefited from the legislation in respect of the amount of work available and the meaning that work had for the long term augmentation of their standing and importance in the commercial world. This group also would benefit from the legislation in their capacity as investors.

We can see this strong advocacy of the limited liability legislation by barristers and solicitors occurring in the Select Committees, the pamphlet literature and in professional journals. J A Stewart, Barrister, stated in the course of evidence before the 1851 Select Committee on the Investments of the Middle and Working Classes that amongst the ‘small’ capitalists there was widespread support for the introduction of some form of limited liability because:

I think, without going into particulars, it may be safely stated that the large capitalists in this country have great advantages over the smaller capitalists. It

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86 Hansard, 3rd. series vol. 134, 27th June 1854, col.784.
may be that these are proper and natural advantages ... but at present I think it is
the cause of great dissatisfaction to the smaller capitalist that he cannot take the
profits of trade, and invest his money ... without risking all his property. I think
that is a real source of dis-satisfaction and real hardship in the country.

In the evidence presented to the Select Committee on the Investments of the
Middle and Working Classes there is one instance of a witness from the legal
profession lamenting his own position as an investor, particularly in respect to
the limited range of remunerative investments available to a person of his class. He stated that he and others like him were amongst that group who had access
to a very limited range of low-risk investments, which also promised reasonable
returns.

To return to the theme of the desire of the middle classes as investors to have
some form of limited liability companies legislation introduced, we can see in
many contemporary reports that some elements amongst the privileged classes
saw this concession as necessary to appease the middle classes, and thus prevent
them from becoming (or remaining) part of the radical current begun with
Chartism. Notions of ‘social justice’ thus became intertwined with the idea of
limited liability from an early date. Concern was particularly expressed in regard
to the pitiable position of those from the middle orders with respect to investment.
Often distant from London, or lacking channels of reliable information from the
City, they were on most occasions the most hard-hit of the victims of the variety of
speculative ‘bubbles’ floated by unscrupulous operators. Their plight had indeed
been long recognized and was one of the important factors behind the introduction

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87 Evidence of J. Stewart, Barrister, to the *Select Committee on Partnerships*, 1851,
Q.333.
88 The exchange was as follows:
Q. Do you not think that such a law (i.e. the introduction of limited liability) would
enable parties so desirous to run a certain amount of risk, but not desirous to go to the risk
of their whole fortune, to advance moderate sums for the aid of enterprising men of good
character?
A. I have no doubt of it ... .The present law says, if there happens to be a lawyer,
one Mr Fane, who having begun life with little or nothing, has arrived at a certain degree
of prosperity, and who in consequence has surplus funds which he hardly knows what to do
with which he is not very much disposed to invest in the 3 per cents, because the interest
is small, and California may make it good for nothing, and he is in consequence disposed
to invest a few hundred pounds in carrying out an invention of some kind, the law steps in
and says to Mr Fane, You will not invest your money at moderate risk; if you want to invest
it at any risk, you must do so in conjunction with a large number of persons, who will all
become partners with you ... any one of which can involve you in liabilities of an unlimited
amount.

(Evidence of R G C Fane, Barrister to the *Select Committee on the Law of Partnership*,
of the 1844 Act, particularly regarding the publicity provisions it contained. *The Times* protested on their behalf:

The merchant, the humbler tradesman, the small shopkeeper, and the servant – these are the people whose little is sacrificed to the impudent impostures of our modern joint-stock companies ... the hoardings of years and the pittances of poverty [are] carried to the bourne from which they can never return.  

The *Report of the Select Committee on Partnerships* of 1851 reiterated the theme of the necessity of some method of limiting liability being generally available in order to secure ‘social justice’ for the middle and working classes, rather than remaining the privilege of the few who could afford a Royal Charter or a special Act of Parliament. It is again clear that the class who it is conceived of as most largely benefiting from the legislation is the middle class:

Limited liability would allow those of moderate means to take shares in investments with their richer neighbours. Thereby their self-respect is upheld, their intelligence encouraged and an additional motive given to preserve order and respect for the laws of property.

Another aspect of the company legislation which reflects a solicitude for the plight of the middle classes is the ‘democratic’ temper of the legislation in relation to the role of shareholders in the management of the enterprise. Unlike the circumstances which prevail today, in which most powers in respect to the management of a company are delegated to the management by the Articles and in which the election of office bearers merely means the assemblage of sufficient proxy votes, the role of shareholders in early limited liability companies was conceived as a much more active one. Until 1906 it was regarded by the courts that management was the servant of the company in general meeting and could be overridden by the general meeting if it so decided. Additionally, in early limited liability companies proxy voting was not the norm. Even though the proxy device had been known of and used for some time, by the middle of 1856 it tended only to be used in those companies such as railways with widely dispersed shareholdings. Companies with a more regional base generally prohibited proxy voting so as to encourage all shareholders to take an active part in the activities of ‘their company’. Consequently, whilst with the hindsight of over a century, we can now be cynical in respect to the value of ‘shareholder democracy’, at the time these provisions were incorporated in the limited liability legislation of 1855 as ‘rights’ were truly exceptional in their ‘democratic’ tenor.

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89 *The Times*, 22nd March 1844.
90 *Select Committee on the Law of Partnership*, 1851, B.P.P., VII, vi.
91 *Automatic Self-Cleansing Filter Syndicate v. Cuninghame* [1906] 2 Ch 34.
Robert Lowe, in his speech introducing the legislation to Parliament, referred to those companies which would be formed under the legislation as ‘little republics’.92 The adoption of such a ‘democratic’ structure for the modern company form can be seen as consistent with the theme being pursued in this chapter, that the middle class, in its dual roles as investor and trader was the single most important force behind the introduction of modern company legislation. This group was particularly enthusiastic in its support for ‘democratic’ structures since its failure to secure the right to vote for all the members of the class in the Reform Act.93

More often than not companies in which members of the middle classes might have had some previous experience as investors had autocratic structures. The entrenching of democratic participation in the limited liability enterprise as a ‘right’ of shareholders was intended as a concession to the many middle class investors pressing for the introduction of the legislation and it was understood as such.94

Despite the enthusiastic reception of shareholder democracy in some quarters, Robert Lowe’s assurances that representative democracy within an enterprise was a guarantee against misuse of company funds were almost immediately challenged by Herbert Spencer who asserted that a large corporation could not be democratically controlled and in fact, voting power was not necessarily a significant or all-sufficient safeguard.95

Criticism of the inadequacy of internal ‘democracy’ in protecting investors and providing a check on management has, however, often failed to recognize the powerful ‘ideological’ element attached to the adoption of ‘democratic’ structures in corporations. In the nineteenth century the adoption of a democratic model for limited liability corporations served the purpose of satisfying certain desires of the middle classes.

Whilst in hindsight it appears to us that the reliance upon shareholder ‘democracy’ to provide a safeguard against dishonest management was utopian in the extreme, it was not so regarded by the middle classes in the mid nineteenth century.96 The need for government paternalism in relation to the manner in which members of this group handled their investments was regarded as unnecessary.

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94 In this regard see the comments of Swinton Boul (1855) in Trade and Partnership: The Relative Duties and Proper Liabilities of the Merchant and the State, (London: Effingham Wilson), 33.
95 Hunt, B C (1936), 135–136.
96 In this respect the role of the co-operative movement in accelerating the debate regarding the introduction of limited liability legislation continued to cast a shadow over subsequent developments. Even in the 1880s certain liberal minded commentators were invoking co-operative principles to suggest that the ‘democratic’ structure of companies could provide a buffer against dishonesty. For instance, Catherine Haddon (1886) in Where
Whilst such paternalism was considered appropriate for working class members of the body politic in respect of their friendly societies and trade unions, it was not considered appropriate to those used to handling their own affairs. Members of the middle classes were often in the position of regarding the limited liability corporation from a number of perspectives – in their role as traders, their role as professional advisers and in their role as investors. The middle classes, due to their complex equivocal relationship to the legislation combined with their distrust of government ‘paternalism’, were vigorous advocates of shareholder democracy.

The potential pitfalls of shareholder democracy were not generally foreseen at the time, other than by a small group of critics. Indeed a reading of many of the contemporary reports of general meetings of companies alerts one to the seriousness with which shareholders regarded these occasions as a forum by which they could contribute to company affairs. The manner in which internal democracy was genuinely perceived to act as a brake on the worst excesses of mismanagement is reflected in documents such as the following letter from a ‘small proprietor’ in the London and Northwestern Railway to The Railway Times:

Every independent proprietor who has carefully perused your report in last Saturdays [edition], of the London and Northwestern dinner ... must, when judging from the tone of the speakers, perceive that directors and officials in England imagine ... that they hold with a firm grasp, to use and abuse at their option, the large railway capital of this kingdom ... without apprehension of any effective interruption to fraudulent management being made available to the body of suffering proprietors to check their scandalous proceedings ...

One official had the assurance to say, ‘He had often been surprised that men of standing in the country would submit to the unpleasantness of the half-yearly encounters with small shareholders, anxious for an opportunity to discharge their spleen whenever anything went contrary to their own isolated interests’.

Is such contemptible language as that above stated to be tolerated? [Must] the small shareholders ... who are plundered ... not complain of ... mismanagement?

Despite this very genuine concern that democracy be practised within the confines of the company, and that the financial and managerial concerns of ‘small proprietors’ be taken seriously, an examination of the reports of the annual general

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*Does Your Interest Come From?: A Word to Lady Investors*, (London: John Heywood) (British Library, 8282 de 24 (3)) states:

‘I am more and more astonished at the airy way in which women habitually ignore all responsibility attached to the source from which they draw their wealth. You invest your money in some company ... and think no more about it. Do you know that you have become virtually a partner in that company ... and it is also its acts, its crimes, its cruelties which are on your head.’ (at 4–6)

97 *The Railway Times*, 6th February 1869.
meetings of companies suggests another competing concern of investors. Their own experiences in their ‘other’ role as traders or professionals led them to believe that all matters concerned with finance, employment and other trade information should be kept within the confines of the company. Publicly available information should be kept to a bare minimum lest competitors learn too much of a sensitive nature. This aversion to publicity on the grounds that it might adversely affect the competitiveness of an enterprise and/or reveal too many trade secrets clearly was of considerable importance to those advocating the introduction of limited liabilities legislation. So much so that this aversion to publicity overrode the potential protection which could be offered by full possession of the ‘facts’ from the enterprise’s publicly available documents.

The Dilemma of Publicity Provisions

As we have seen earlier the notion that publicity of a company’s affairs was all that was necessary to show up roguery lay behind the ‘reforms’ of 1844. The imposition of reporting requirements on companies was regarded as an essential component of any regime of state sanctioned incorporation. The euphoria with which reporting provisions were regarded in some quarters is reflected in the following extract from a ‘financial industry’ novel, *Ten Thousand A Year*, published by William Blackwood in 1855 and written by a Fellow of the Royal Society, Samuel Warren:

> The system of joint-stock companies speculation as described on the foregoing and subsequent pages of the text, so far from being an exaggeration, falls far short of a complete illustration of the stupendous scale of swindling which has, during the last ten or fifteen years, been tolerated in this great commercial country. At length, however, in the year 1844, the legislature has struck a blow calculated to demolish the whole fabric, or, at all events, prevent any similar erection ... By the [Act] such restrictions are placed upon fraud and improvidence, as were calculated to paralyse much of their powers of practicing upon public credulity. Publicity and responsibility are two objects which are effectively attained by

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98 For instance, James Murdoch Napier, the driving force behind the engineering firm of D Napier & Sons from the 1860s to 1890s, had expressed his antipathy to public officials knowing anything of his private business affairs to his accountant: ‘His honesty only failed, as many peoples fails, at the door of the Commissioners of Inland Revenue. “His objection”’ his accountant said, “to government officials knowing a man’s profit was insurmountable. Consequently, he did not blame a person for making a spurious return of his income ... he shared to the full the refusal of his generation ... to tolerate having their private affairs meddled in by the State.”’ (Wilson, C & Reader, W (1958) *Men and Machines: A History of D. Napier & Son*, (London: Weidenfeld & Nicolson), 40–41).
the combined operation of these Acts, which are a masterpiece of commercial legislation.

This passage illustrates the ambiguous attitude of contemporaries towards publicity provisions. Whilst Robert Lowe was able to paint a ridiculous picture of the operation of the 1844 Act, it was nevertheless the case that when it was introduced it had been enthusiastically greeted by many members of the investing public. In many quarters a faith in the potential of publicity to prevent abuses had persisted into the 1850s. *Ten Thousand A Year* was published in 1855, only one year before the attack on the efficacy of publicity mounted by Robert Lowe in his speech to Parliament introducing the 1856 Joint Stock Companies Bill. These sentiments were also expressed by many of the witnesses before the Royal Commission on Mercantile Laws of 1854.

One contributing factor in the success of Lowe’s attack on the efficacy of publicity as form of protection for investors was the ambivalence of the middle classes towards such forms of protection. In particular they were dissatisfied with the 1844 Act, which they believed neither satisfied their needs as investors nor as traders. The equation made by the middle classes between publicity requirements and paternalism may have contributed to the absence of any substantial opposition from investors in respect of the removal from the 1856 Act of such provisions. It was also the case that many of the middle classes stood in an ambivalent relationship to the legislation – on the one side as investors and on the other as traders. In the latter capacity the removal of publicity requirements would have been welcomed, as such provisions would strengthen the protection offered by limited liability legislation to small to medium traders in relation to their creditors.

In the absence of any great outcry from that class of individuals who stood to gain most from the inclusion of publicity provisions in the new legislation (that is, middle class investors) such provisions were unlikely to be retained, particularly in light of the influence of those opposing such provisions. The most significant opponents of publicity provisions were:

- those in the City involved in the promotion of speculative ventures and/or railways and other such business ventures involving large amounts of capital and long amortization periods;
- senior officials of the Board of Trade, who felt reservations, both from a philosophical and a practical point of view, in respect of the desirability and effectiveness of government regulation of the activities of companies. It was felt by some that ‘vetting’ of company activities by the Board of Trade would tend to give the appearance that the government was giving its seal

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of approval to enterprises which had satisfied the ‘legal’ pre-requisites of the Act, yet which afterwards proved to be of dubious merit\textsuperscript{100}.

One group of City interests we have already identified as unfavourable to the inclusion of stringent publicity provisions, the ‘railway’ interests, carried considerable political weight due to the fact that many M.P.s were also members of the Boards of Directors of railway companies and maintained close connections with those in the City involved in their promotion. The connection had been so close during the railway boom of the 1840s that at one stage 157 M.P.s in the Commons were railway shareholders, many of them sitting on the Boards of those companies in which they held shares\textsuperscript{101}.

The claims of these companies to be free of any imposition which might affect their competitiveness in the highly volatile business environment of the time militated against the retention of publicity requirements in company legislation. The reasoning of the time was along the lines: ‘Who knows what secrets might be inadvertently given away to a competitor in a public document, if such was required by the legislation? Better not to have such requirements at all’. Shareholders in the railway concerns were also, no doubt indoctrinated to believe in the potentially damaging nature of disclosure requirements to the security of their investments. Those who would be the principal beneficiaries of disclosure provisions were thus induced to think that publicity requirements were not a blessing, but rather an evil which they should vigorously oppose\textsuperscript{102}.

\textsuperscript{100} This concern that a state imposed regulatory regime would in some way delude investors into believing that their investments were ‘guaranteed’ has proved to be a perennial in debates on the appropriate level of regulation of companies formed under limited liability legislation. The same ‘concerns’ which were expressed in England over the possible inclusion of publicity provisions in the Limited Liability Act of 1855 were again, in only slightly altered form, voiced in Canada during the 1920s in opposition to the introduction of ‘blue sky law’, which legislation would place companies under a tighter regulatory regime than that which hitherto had prevailed, but which would also make further demands on the administrative structures which were responsible for administering company law. The Canadian Manufacturers Association commented: ‘Experience has disclosed serious objections to such a form of regulatory law. It is difficult of administration, unduly costly, and in particular is open to the objection that Government approval is taken by investors to constitute a guarantee of the soundness of any security so approved, and therefore, to create a certain moral responsibility on the part of the Government.’ Minutes of the Canadian Manufacturers Association, 16th November 1927, Canadian National Archives, MG 28 I 230, vol. 250.

\textsuperscript{101} In the Parliamentary Return of Railway Shareholders for 1846 there were 900 lawyers, 364 bankers, 257 clergyman and 157 M.P.s listed.

\textsuperscript{102} The nature of the complicity of shareholders and management in the suppression of financial details relating to the company from public view can be noted in the following passage in the Annual Report of the Savoy Hotel Ltd for 1890. The report underlines the ambivalence of shareholders towards financial information, wanting it for themselves, but
The position within the Board of Trade was somewhat more ambivalent. However, what is certain is that the time of removal of publicity requirements from the legislation corresponded with a change in senior personnel in the Board of Trade\textsuperscript{103}. Whilst Robert Lowe strongly advocated the necessity of introducing a system of limited liability incorporation, he was also a vocal opponent of the imposition of any publicity requirements on businesses registered under the Companies Act. In giving evidence to the 1854 Royal Commission on Mercantile Laws, Lowe had stated that the ‘received principle in commercial legislation is to leave people to act for themselves’\textsuperscript{104}. Lowe’s philosophical position was confirmed by his practical experience, when first entering the Board of Trade, with a number of savings banks collapses. A number of petitions had flowed into the Board requesting Government compensation for losses sustained in these collapses on the basis that the Government had misled the public into considering it was ‘safe’ to invest in them by reason of giving Government approval to their operations. Lowe later stated that this experience had taught him that any Government involvement in the regulation of companies carried with it the dangerous potential of creating the impression that the Government was ‘credentialing’ the enterprises it so regulated. He considered that this was merely to mislead people as Government regulation was incapable of providing an effective check to malfeasance, given the then primitive state of the bureaucratic machinery which would be charged with enforcing the ‘regulatory’ components of companies legislation. In his speech to the House Lowe referred to these bureaucratic inadequacies to cast scorn on a

\textsuperscript{unprepared to allow it to circulate in the public domain: ‘It may be remembered that the Directors were of opinion last September that it was not desirable to publish the accounts of the Hotel and this view was adopted by the shareholders but in consequence of many requests made by shareholders in the country who are unable to come to London to attend meetings they have thought it well to circulate privately among the shareholders the Balance Sheet and Profit and Loss Account.’ (cited in Proceedings of the Autumnal Meeting of the Institute of Chartered Accountants in England and Wales, (1921), 63).

\textsuperscript{103} Cardwell, whilst Vice President of the Board of Trade, had maintained a careful approach to the question of the introduction of limited liability legislation and the possible removal of some or all of the publicity provisions which had been incorporated in the 1844 Act. The influence of Lowe on the character of the legislation introduced in 1856 was noted by a ‘Private Correspondent’ to the Manchester Guardian, who reported quite unfavourably on Lowe’s speech to the House of Commons introducing the Joint Stock Companies Bill of 1856: ‘Mr Lowe, the new Vice President of the Board of Trade, last night introduced two bills for amending the law of partnership and limited liability. The right honourable gentleman seems disposed to give the widest possible latitude to private enterprise and commercial speculation, and proposes to abolish the existing restrictions upon the value of shares of companies formed under the Limited Liability Act (1855)’ (Manchester Guardian, 4th February 1856).

\textsuperscript{104} Evidence of Robert Lowe, Royal Commission on Mercantile Laws, 1854, Appendix to the Report.
system of incorporation which was premised on the belief that the Registrar of Companies could ‘regulate’ the enterprises registered by his office:

As this matter is one of great importance, seeing that the whole foundation of the law I am about to propose to the Committee turns upon it, I will take the liberty of reading a few brief extracts from the report of the committee. I find the Registrar of Joint-stock Companies, Mr Whitmarsh ... states very compendiously that the returns which the Act [i.e. the 1844 Act], and which are enormously burdensome and expensive, are worth nothing – that the Act is very much evaded, companies being frequently formed with no other foundation than that supplied by men of straw105.

Similar concerns as to the viability of any reporting regime were expressed by others with experience of the operation of the 1844 Act. One such individual was Swinton Boult, the Secretary of the Liverpool and London Fire and Life Insurance Company:

Making accounts public is no protection as even experts cannot agree on the proper form in which accounts should be presented ... Publicity ... is pronounced the very foundation of security; those who know more about it regard it as capable of being rendered a mere delusion or a snare106.

The argument which perhaps weighed most heavily against the adoption of ‘strong’ publicity requirements in the ‘new’ limited liability legislation of 1856 was that as to the (in)efficacy of State regulation of commercial affairs. This assertion, made by Lowe and repeated by others, was based in fact. The 1844 Act, despite its potential, had never operated successfully and its publicity provisions had been honoured more by their breach than by the compliance of corporations with their requirements. Lowe and other opponents of Gladstone’s legislative scheme, which had been built around a faith in the efficacy of publicity to expose fraud, based their advocacy of the new limited liability legislation around the palpable failure of this earlier experiment with a statutory scheme for companies. The sentiments they were expressing were the sentiments of most involved in commercial activities. For instance, when a Bill had been introduced into Parliament in 1849 to enact a recommendation of a Select Committee that railway accounts should be subject to Government audit one of the principal reasons advanced for the rejection of the

105 Robert Lowe, Hansard, 3rd series, vol.139, House of Commons, 1st February 1856, 120.
measure was ‘the fear that Government audited accounts would be regarded by the
public as carrying a State guarantee of their accuracy’107.

The prejudice against publicity requirements, backed up by enforcement
mechanisms vested in the Board of Trade, or delegated to some official such as the
Registrar of Companies, proved to be particularly resilient. Despite the issue of
strengthening the publicity requirements being raised as an issue at almost every
Select Committee concerned with the Companies Acts throughout the rest of the
nineteenth century:

[Regular disclosure of accounts ... remained until 1928 within the discretion of
directors ... and [the provisions of the legislation in this area] are still seriously
inadequate in several respects108.

The reason for that reluctance to impose disclosure requirements on limited
liability companies can be discerned from Lowe’s response to a witness at the
1867 Select Committee on the Companies Act, who committed the cardinal sin of
strongly supporting the adoption of ‘strong’ publicity requirements. Lowe rather
tartly reminded the witness of the ‘public mischiefs’ which stemmed from the
provisional registration and publicity requirements of the 1844 Act, and went
on to state that he thought that no public officer should be held responsible for
checking the financial returns of companies, as this would tend to put to sleep
private vigilance. The witness responded to this with the comment that he did not
think this lack of vigilance ‘could be more so than at the present’109.

These concerns as to the introduction of proper publicity provisions were
expressed before the 1877 Committee. Lowe was again a Commissioner and
reiterated his certainty in the virtue of self regulation. He acknowledged that while
many company failures had occurred in the previous 20 years he continued to
believe:

[The only remedy against loss in these, as in all other matters of business, is
that a man before he parts with his money or pledges his credit should carefully
inquire into the nature of the undertaking, and the character and credit pecuniarily
and morally of those with whom he is to be associated110.

The persistence of notions militating against the adoption of publicity
requirements and Government regulation of fraudulent practices is evidenced by

Press), 568.
108 Hunt, B C (1936) fn.144, 139.
109 Evidence of George Latham Browne Esq., Barrister, to Select Committee on
Companies (1867), Q.1247–1279.
110 Minority report of Robert Lowe, Commissioner, Select Committee on Companies,
1877, 425.
the fact that, even though the majority on the 1877 Committee rejected Lowe’s extreme *laissez-faire* views, the legislation nevertheless remained unaltered. The Committee had stated in its Report that it was imperative for an intending shareholder to have:

A full disclosure of everything likely to influence [him/her] also [the Committee considers that] the frauds and losses which have been occasioned by companies render further regulation in the formation of companies under these Acts expedient

Despite these protestations of the Committee, reforms of the nature they were proposing were delayed another 50 years. The possible reasons for and the effects of that delay will form one of the themes of the next chapter.

**Conclusions**

This chapter demonstrates the inadequacy of a mon-causal explanation for a complex event such as the introduction of limited liabilities company legislation in England. Simple ‘instrumental’ or ‘economistic’ explanations of this alteration in the law cannot be countenanced as an explanatory framework. The modern corporate form was ‘overdetermined’. That is to say – the ‘causes’ for its emergence in 1856 are manifold and no attempt to unravel this complex bundle of factors will lead to an explanation which satisfactorily leads to a ‘simple’ explanation for the arrival of the legislation at that point of time. The changing nature of the personnel in the Board of Trade, the growing political restiveness of the middle classes, one of whose demands was a greater array of investment outlets for their savings, ideas of social amelioration, idealistic visions of a newly invigorated and competitive English industrial sector, and many other factors combined to catapult the English Parliament in 1856 into passing the most liberal company legislation in Europe.

Nevertheless, despite the complexity of the factors lying behind the introduction of limited liability incorporation legislation in 1856 we can still make a number of assertions with a modicum of confidence in respect to the adoption of limited liabilities company legislation.

First, large capitalists played little or no role in securing the passage of the legislation. Indeed they were generally opposed to its introduction on the grounds that it might allow for the establishment of new competitive enterprises in what had long been monopolistic or near monopolistic sectors of industry or trade. Some of the interests surrounding large capital also opposed the legislation on the basis that it violated the principles of political economy as adumbrated by Adam

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111 Report of the Select Committee on Companies, 1877, 425.
Smith, and that it could only lead to an increase in speculation, overtrading and lost capital.

Second, investors of all classes generally favoured the introduction of the legislation. However, one particular group of investors stood to benefit most. This group was the rising middle class, which had sufficient unproductive capital to want to invest, yet was excluded from many remunerative domestic outlets for that capital. They could only earn respectable returns on that capital if they were prepared to risk every last shilling and acre in a highly speculative domestic concern which was subject to the rigours of unlimited liability.

Contrary to Jeffreys’ view which postulates a geographical identity for the group of investors most closely interested in the passage of the 1855/56 company legislation, the view has been advanced here that one must look for an identity or identities of interest based on other factors (for example, class, quantity of savings, occupational affiliation, and so on) in order to ascertain the group of investors most deeply involved in ensuring the passage of the legislation.

Third, in addition to the role of the middle class as investors in pressing for the adoption of the legislation, that group also had a number of other reasons for being strong advocates for its adoption. Amongst the professional members of the class a considerable range of new remunerative work might be expected to arise from the legislation. For accountants there might be expected to be a great expansion in employment in the areas of audit, the preparation of accounts, and in the winding up of companies. For lawyers a whole new range of activities would emerge in addition to a huge expansion on the existing legal work generated by chartered companies and those formed under private acts of parliament. Amongst the members of the middle class involved in trade the introduction of limited liability company legislation would also be seen as a blessing. It would allow these small to medium business people to at least compete with the leviathans of English industry without having to fear that if they failed they would face the ignominy of personal bankruptcy or imprisonment for debt. Whilst it has been suggested by a number of commentators that the rapid rise in utilization of limited liability legislation by small undertakings was an ‘unexpected’ outgrowth of the Companies Acts it is not at all clear from the debates surrounding the introduction of the legislation that such developments were entirely ‘unexpected’. Lowe himself had acknowledged the possibility of such a development, as had the early commentary on the legislation contained in the Law Times. Indeed amongst the first registrants under the legislation there were a number of what we would call today ‘proprietary’ concerns. The combination of unfavourable economic conditions with a reluctance amongst professional advisers to suggest incorporation to such traders may have delayed the widespread use of limited liability incorporation. However this does not mean that this development, when it finally occurred, was entirely unexpected.

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Fourth, a significant actor in the introduction and form of the legislation was the Board of Trade. Robert Lowe’s appointment to the Vice-Presidency of the Board no doubt accelerated the process of adoption of modern company legislation. Before Lowe’s appointment Cardwell and other officials in the Board of Trade had been amongst the vocal opponents to the measure.

Robert Lowe became the leading advocate of the deletion of the publicity provisions from the company legislation. It seems that in doing so he was not merely pushing the ideological barrow of small government and minimal intervention in business affairs. He was also concerned that if the Board of Trade took on the responsibility of regulating companies it would constantly be at the centre of some controversy or other in respect of company failures or other malfeasances. To leave people to their own devices seemed to Lowe a much safer course from a purely pragmatic point of view. Included in this assessment was a certain degree of pessimism regarding the capabilities of any government department being able to effectively regulate the activities of business people.

Finally, even within government circles outside the Board of Trade there was, during the middle of the nineteenth century, a turnabout in thinking on the question of limited liability incorporation. The reason for a shift towards a much more receptive atmosphere can be traced to mounting concern about capital flight from England. For the first time in English history large sums of investment capital started to leave the country. Concern was particularly great with respect to what was regarded as ‘lost’ capital – that is capital invested in highly speculative overseas concerns which was effectively lost to the English economy when the businesses concerned failed.

Tied to the issue of capital flight was a feeling that many enterprising and skilful business people were being denied an outlet for their creative energies in England. With the monopolization of English key industries by a small number of large capitalists, and with entry points to particular industries being an insurmountable hurdle, it was felt that English capitalism was losing its edge, was becoming ossified, and would ultimately be overtaken by overseas capitalists if something was not done to revive the competitiveness which had characterized the eighteenth century. In other words, the maintenance of English industrial leadership was being associated by certain sectors of the government with the introduction of limited liabilities company legislation. The association of the company legislation with the revival of competition was related to the middle class ideal of success through enterprise which was promoted in writings such as those of Samuel Smiles, a success which was denied whilst monopoly of trade persisted and the established capitalists refused to wed their capitals to the ingenuity of the rising middle classes114.

114 For example, the position of Daniel Doyce, another of the characters in Dickens’ *Little Dorritt*, who in order to have his patent adopted has to go overseas to a nation where the impediments to enterprise which existed in England are not in evidence.
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Chapter 5
The First Fifteen Years of Limited Liability Company Legislation in England 1855–1870

Introduction

One of the most important functions of any serious historical analysis of a particular law or legal domain is to draw a clear delineation between the text of that particular law or set of laws (that is, its ‘idealized’ state) and the manner in which that law or set of laws is applied in practice (that is, the state of the law ‘in action’). Of course in some instances the idealized version of the law and its application in the real world may converge. However this is often not the case. With respect to company law the introduction of limited liability legislation alone was not sufficient to lead to a flood of applications for registration. Neither did the enactment of the legislation guarantee that adequate resources would be committed by the state for the fulfilment of even the basic administrative functions associated with the legislation, let alone for those functions which have come to be grouped under the broad rubric of ‘corporate regulation’.

The following is an attempt to explain the manner in which limited liability legislation was utilized in the course of its first decade of operation. In the course of this examination particular note will be paid to the following features of the corporate law ‘in action’ during this first decade:

a. the rate of diffusion of the corporate form;
b. the industries in which incorporations took place;
c. the form which the companies promoted in this period took – the denomination of shares, the ratio of uncalled to called capital, the respective use of loan and equity capital to finance the operations of companies, and so on;
d. the characteristics of those individuals who invested in these early limited liability enterprises (occupation, geographic location, and so on.); and
e. the extent of the use of the legislation, if at all, by small to medium enterprises as a means of lessening the risk of bankruptcy and providing an alternative source of capital to that generated within the family circle.
General Trends in the Utilization of Company Form 1855–1870

As we have already noted, the 1855 Limited Liability Act, which introduced a general system of limited liability incorporation to England, was but a transitional measure. Many of the requirements contained in that legislation, which had been inherited from the 1844 Companies Act, were abandoned as excess baggage in the ‘permanent’ legislation of 1856. Particularly noteworthy casualties of this abandonment of past principles were provisions that provided for publicity of a company’s affairs.

In his speech introducing the 1856 Bill, Robert Lowe spent some time criticizing what he regarded as the naive assumptions behind the 1844 Act. Publicity, he said, provided none of the protections that it claimed, and at the same time undermined the utility of the legislation for business people by making matters which should have properly been of a confidential nature open to the scrutiny of competitors. As we have observed in the last chapter Lowe was here responding to one of the most consistent demands of the business sector in the middle of the nineteenth century: that privacy be preserved in the transaction of business arrangements.

Support was nevertheless mixed for the departure from previous practice which the 1856 Joint Stock Companies Act represented. There was acclaim in most quarters for the deletion in the 1856 Act of the system of provisional registration inherited from the transitional measures of 1855. There were also some favourable comments from sections of the press with respect to the abandonment of a paternalistic model for corporate regulation.

Despite such support for the new legislation there was opposition from many quarters in relation to the deletion of the publicity provisions that had formed the core of the regulatory structure of the 1844 Act. Under the 1856 Act there was no compulsion on companies to provide investors or creditors with an accurate and up-to-date balance sheet based upon standard accounting practices. The following comments from the *Law Times* are typical of the adverse reception that this particular departure from the legislative model of 1844 received at the time:

> The new Joint Stock Companies Act not merely introduces a novelty into morals and commerce – it is as strange in form as it is monstrous in conception ... Every protection which the former law had provided against fraud, folly and abuse has been swept away. The very balance sheet is not to be published, although it is part of the information necessary to the protections of creditors, and for that purpose is to be kept in prescribed form. By the old law, directors were punishable for ‘cooking’ accounts, by this defective new law, that punishment is abolished.

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1 Robert Lowe, *Hansard*, 3rd series, vol. 139, House of Commons, 1st February 1856, col. 120.
2 *The Law Times*, 26th July 1856, 205.
Notably silent in the debate as to the merits of deleting publicity provisions from companies legislation were the middle classes. The main source of opposition to the strategy pursued by Lowe was from those who were also opposed to the introduction of limitation of liability. An unholy alliance of established manufacturers and their representatives and true conservatives, who noted the role of the growth of ‘impersonalities’ in the disintegration of ‘community’, thundered against the abandonment of the scheme of the 1844 Act, and the introduction of limited liability³.

On the one hand there were declarations of the need to improve shareholders’ and creditors’ access to financial information. On the other hand there was the assertion that there was a need to protect ‘trade secrets’ contained in balance sheets from the prying eyes of competitors. Matters such as costs of raw materials, wages, profitability and so on, were all regarded as ‘confidential’ information in the nineteenth century. This extreme polarization of views presented a dilemma for those proposing to reform company law. The nature of that dilemma and its possible solutions was the subject of correspondence from ‘A Solicitor’ to The Times on the question of availability to shareholders of financial information on the company in which they were concerned:

I should like to see the proprietors in public companies invested with much larger powers of inspection and fuller means of information than they now possess ... But it would in practise be both inconvenient and injurious that such ample powers as I would give should be placed in the hands of individual shareholders, though I think they might with advantage collectively have the power of appointing an officer who should have a seat at the Board, without a vote, to whom every book and every transaction of the company should be open ... his special duty should be to report to the ... shareholders all irregular transactions⁴.

Another aspect of Lowe’s disdain for the utility of company balance sheets was the lack of any standard accounting practice amongst mid-nineteenth century business enterprises. As one commentator put it:

³ Lord Overstone represented this current of opinion in remarks he made whilst presenting petitions against the Joint Stock Companies Bill of 1856 from the Manchester and Glasgow Chambers of Commerce and the Trade Protection Society of Bristol: ‘This Bill, if passed into legislation, would be subversive of the best interests of commerce. These petitions point out the injustice of conferring on bodies of more than seven individuals privileges which were withheld from trading bodies less in number; and they stated that private parties engaged in trade on their own responsibility would be exposed to unfair competition with companies formed under the proposed enactment.’ Hansard, 3rd series, 1856 (House of Lords), cols. 1475–1476.
⁴ The Times, 9th July 1857.
Making accounts public is no protection as even experts cannot agree on the proper form in which accounts should be presented ... it is very capable of being rendered a mere delusion and a snare ... the degree of satisfaction that would result from [the appointment of public auditors] is evidenced in the want of agreement as to the first principles upon which such an audit should proceed\(^5\).

Nevertheless, as a number of critics of Lowe’s approach were to point out, the company legislation could have contained provisions specifying that the balance sheet of a company be prepared in accordance with standard accounting practices. Prescription by the legislature in 1856 of a standard method for the preparation of company accounts would have perhaps led to a lower degree of fraud being perpetrated in corporate guise throughout the 1860s. It also may have led to a more rapid adoption amongst English businesses of double entry book-keeping. Specific requirements in respect of accounts would have made matters more difficult for the unscrupulous. It would also perhaps have led to a more temperate approach to financial management on the part of those ‘genuine’ concerns that crashed during the mid-1860s. Stricter provisions in respect to book-keeping and audits in the Joint Stock Companies Act might also have led to a more rapid adoption of appropriate accounting procedures amongst English business houses. Instead, many English businesses continued to have rudimentary accounting procedures throughout the 1880s, and in some sectors well into the 1890s. Edgar Jones has suggested that for much of the nineteenth century ‘businessmen invented [their] own methods [of accountancy] to suit [their] trade or particular transactions rather than call in a specialist’\(^6\).

The backwardness of English enterprises in their financial record-keeping may indeed have been one of the contributory factors in the decline of English capital during the latter half of the nineteenth century. Unlike the United States or the Continental legislation, English company legislation contains no prescriptions as to how accounts should be prepared. Company legislation in England consequently failed to provide any guidance regarding appropriate accounting standards. Instead it chose as its reference point the lowest common denominator. Only belatedly did English commerce recognize its backwardness in accounting matters and the implications of this. When it did so late in the nineteenth century many English businesses quickly adopted clearer and more acceptable methods of preparing and presenting company accounts. It should be noted that even then many businesses continued to utilize primitive accounting systems. It was largely amongst the leading business houses that the change took place due to the growing awareness amongst managements of these businesses that they were well behind their overseas competitors in matters such as financial management.

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The growing complexity of the financial aspects of large commercial enterprises finally forced English businesses in all sectors to review their accounting practices. In this regard it was remarked by the author of *The Depreciation of Factories and Their Valuation* (1884) that the reason for the then growing sophistication in the accounting systems used by English business was:

the increasing extent of factories, the sub-division of capital by means of joint stock companies, and the conflicting interests that arise in regard to preference shares and borrowed capital [which] enhance greatly the importance of correct systems of account.

There was a significant ideological dimension to the abandonment of publicity requirements from company legislation. Robert Lowe had a personal interest in ensuring that the publicity requirements and the related regulatory functions for the Board of Trade be dropped from the legislation. As an ideologue of *laissez-faire* he considered that the state had no role in the regulation of essentially private business arrangements between consenting adults. In this belief he was by no means alone. Furthermore he considered that the state would do harm by assuming responsibility for a regulatory function which it could not adequately discharge. False expectations would be created in the unwary if the state constituted itself a ‘policeman’ of corporate activities, as such a duty could only be discharged by employing a large corps of professional staff, something the state was not prepared to do. One witness before the Royal Commission on Mercantile Law summed up the position of advocates of ‘small government’, such as Lowe, when he stated ‘Commerce is the last thing to require from Government a directory or protective hand. It is self-sustaining, divergent, penetrating, vigorous and elastic’.

Lowe’s uncompromising rejection of government paternalism as a means of protecting investors and/or creditors met with a mixed reception. Even within his own government department there was considerable dissent from his views. One of the advisers to the Board of Trade on the 1856 legislation, R P Harding, remarked on how, within the Board of Trade, Lowe’s view that paternalistic safeguards be

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8 In his evidence before the Royal Commission on Mercantile Law, 1854, Robert Lowe was quite explicit on this point: ‘It is no part of a legislator’s business to take care of persons too ignorant and reckless to take care of themselves.’ *Royal Commission on Mercantile Law, 1854*, Appendix to the Report, 85. However, this comment might be contrasted with the views he elsewhere expressed to the Royal Commission on the manner in which the interests of creditors might be best protected within a system of limited liability: ‘I think that the state ought to offer its aid to authenticate the amount of capital, and audit and certify their annual balance sheet; and as the evading this authentication would be a sign of fraud, I see no objection to making it compulsory’. *ibid.*, 84.
9 Evidence of R Slaney, *ibid.*, 33.
removed from the legislation and that investors and creditors be left to their own
devices was regarded with suspicion. Harding stated that in reply to criticism of
his views by other members of the Board of Trade Robert Lowe would reply: ‘This
is not a paternal government; people who choose to embark in these things must
take care of themselves’10.

One of the principal legacies of Lowe’s non-interventionist policy in respect
to corporate activities was to bequeath to later administrations a weak regulatory
structure for dealing with corporate malfeasance. The role of the Registrar of
Companies in Lowe’s scheme of things was purely clerical in nature. The Registrar
was, according to Lowe, merely there to process applications for registration and
receive and file annual returns. Breaches of the Joint Stock Companies Act were
not the concern of the Registrar of Companies. He had no power to prosecute
offenders and no clear responsibilities to notify any government officer if he
suspected that a breach of the legislation had occurred. One witness before the
1867 Select Committee on the operation of the limited liability legislation aptly
referred to the Registrar of Companies as nothing more than a ‘living Act of
Parliament’11.

The Registrar outlined his own conception of his role to the same Committee.
Upon being asked his interpretation of the role he was to play in respect to breaches
of the Joint Stock Companies Act the following exchange occurred:

Q. What action do you take when the Act is not complied with?
A. None at all.
Q. But that rather assists the company sometimes if they wish to suppress
information, does it not?
A. Unless a shareholder wishes to proceed against them.
Q. Do you know of any cases where the penalty has been enforced.
A. Very few ... 12.

10 Evidence of R P Harding, Royal Commission on the Depression in Trade, 1884–
1886, First Report, Q.505;544.
Robert Palmer Harding was one of the leading accountants of his day and was the
liquidator of both the Royal British Bank in 1856 and Overend Gurney and Company
in 1866 (in the latter case jointly with William Turquand). He was one of the founding
members of the Chartered Institute of Accountants and also was the chief receiver within
the bankruptcy department of the Board of Trade from 1883 to 1890. He was knighted in
Frank Cass & Co Ltd).

11 Evidence of Mr Charles Wordsworth, Q.C., Select Committee on the Operation of
the Limited Liability Acts, 1867, Q.373.

12 Evidence of Hon. Edward Cecil Curzon, Registrar of Companies, ibid., Q.223–
228.
The Reluctant Response to Limited Liability Incorporation

Despite the initial reluctance of England’s leading businessmen to support the introduction of a general company statute, one might expect, given the congenial framework of the 1856 legislation, that a number of the objections raised by these captains of industry would dissolve as they became more familiar with the new organizational form and found it amenable to many of their own needs. The first fifteen years of general company legislation might thus be expected to have been a transitional period in which the older organizational form, the partnership, would start to lose ground as the preferred form of organizational structure to the newer limited liability company form. This view fits snugly with those theories of law that account for changes in the law by way of economic factors. It also accords neatly with that view of capitalism which sees capitalists as a ‘progressive’ class open to new ideas and innovation.

Unfortunately for such interpretative frameworks, the limited company form did not carry all before it in the nineteenth century. Indeed, the first few years of the operation of companies legislation in England were described by contemporaries as a ‘dead letter’. Few key businesses in the major sectors of the English economy registered under the limited liability legislation during the first fifteen years of its operation.

Professor Payne has speculated upon the reasons for the persistence of the partnership as the favoured organizational structure for English businesses throughout the nineteenth century:

[In the United Kingdom] by the time the essential pre-requisites for the massive growth of the firm were present the industrial structure of the [nation] had become so well established that further change was rendered extremely difficult. Industrial organisation – characterised by the family firm – had partially ossified at a relatively low level of development, and the structure remained relatively undisturbed even when the legal obstacles to firm growth were finally resolved in the mid-fifties.

It is also important to note that when corporate form was adopted by English businesses it was often for exogenous purposes (for example, tax reasons). Businesses so adopting corporate form sought, as much as was possible, to preserve their existing arrangements within the new organizational structure.

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13 For instance The Shareholders Guardian, looking back on this period made the following comments in 1864:

‘For a somewhat long-tried period limited liability was, so to speak, a dead letter ... it was difficult to get a metropolitan proprietary to organize undertakings which should give it a proper and impartial trial.’ Shareholders Guardian, vol. 1, no.9, 7th March 1864.

Well into the twentieth century many English businesses that were formally incorporated as limited liability companies continued to operate as if they were still partnerships. The new organizational structure made available to businesses by company legislation was often irrelevant to the manner in which enterprises actually carried on their business in practice. A representative of the London Chamber of Commerce giving evidence before a Select Committee accurately represented the prevailing nineteenth century sentiment when he stated that ‘companies, to be successful, must to a great extent, and, as far as possible, conduct their business on the same lines as private traders’\(^\text{15}\). Management structures and practices of English enterprises therefore remained virtually untouched by their new-found corporate status. This was so even at times when it was irrational to persist with such structures in the circumstances of a changing economic climate. Thomas Vickers reflected the relatively cynical attitude of the nineteenth century businessman towards incorporation when he stated:

> It has been an advantage to my business to be a limited liability company because I have always had as much power as a director of this company as I had as a partner and the resources of the company are greater than the resources of the old partnership\(^\text{16}\).

A consequence of the reluctance of businesses in key sectors of the economy to incorporate, or to publicly issue shares in the enterprise, was that most of the limited liability enterprises which offered shares to the public in the first twenty years of the operation of the legislation were purely speculative in nature. Others which offered shares to the public were, like Overend Gurney, conversions of failing firms which adopted corporate form to avoid the full effect of the financial obligations pertaining to unlimited liability.

Hence the prevailing reputation of the corporate form was far from respectable. The climate of opinion with respect to corporate entities in these early years of operation of the ‘new’ limited liability legislation can be gauged from the following comment:

> The principle of joint stock enterprise is universally admitted to be correct. The number of failures in its application is, however, most appalling ... Nor has the great principle of limited liability been yet permitted to prove its exactness, or to exemplify the advantages it is capable of conferring on a trading community. An opportunity for its so doing is not likely to be afforded until honesty and

\(^{15}\) Evidence of Mr Harold Brown, solicitor, to the *Companies Act (Amendment) Committee* (The Davey Committee), B.P.P., 1895, LXXXVIII, 249.

talent have secured their proper position in the conduct of concerns to which the healthy principle might be applied\(^{17}\).

The rather dubious group of corporate entities that constituted the bulk of the early registrations under the limited liability legislation were occasionally complemented by the flotation of a ‘genuine’ concern. These flotations tended to be dominated by that group of industries which Adam Smith had regarded as the only suitable candidates for incorporation – transport, utilities, insurance and banking. It can be seen from Table 5.1\(^{18}\) that approximately thirty per cent of the registrations in 1856 were of gas and other utility enterprises\(^{19}\). The non-representation of banks and insurance companies in registrations under the general company legislation in these early years can be explained by the fact that such enterprises were not permitted to register under the terms of the legislation until somewhat later in the decade.

One reason advanced at the time for the ‘failure’ of the corporate form to gain wider acceptance in the years immediately following the introduction of limited liability legislation was the lack of funds available for investment because of the drain on the economy caused by the Crimean War. It was claimed that increased costs of commodities had swallowed up the savings of those groups most likely to take advantage of the new investment opportunities opened up by limited liability companies\(^{20}\).

Whilst the effects of the Crimean War may in part explain the reluctance of promoters to embark on new ventures at this time it was not the sole, nor even the most important factor, in discouraging corporate flotations in the early years of the new legislation. One of the other developments affecting the popularity of corporate entities at the time was the dramatic failure in 1856 of the Royal British Bank, a chartered corporation which had been formed ‘for transacting every description of banking business on the Scottish system’\(^{21}\) with limited liability.

\(^{17}\) *The Railway Times*, 3rd July 1858.

\(^{18}\) See Table 5.1.

\(^{19}\) This can be compared with the disaggregation by industry given by Richmond & Stockford for the ‘core’ 674 companies in their survey of the first 1000 registered companies still surviving in 1980. Their figure for services and utilities companies registered during the span of the sample, 1856–1889, and still surviving in 1980 is 14.2 per cent. Also, unlike much of the rest of their sample which is dominated by registrations in the 1870s and 1880s many of the service and utility companies were in existence by the late 1860s, suggesting not only greater likelihood of them taking on joint stock company guise, but also a far greater likelihood of longevity amongst such enterprises than corporations in other industries. See Richmond, L and Stockford, B (1986) *Company Archives: The Survey of the Records of 1000 of the First Registered Companies in England and Wales*, (London: Gower), xii–xiii.

\(^{20}\) *The Law Times*, 29th September 1855, 20–21.

\(^{21}\) Prospectus of The Royal British Bank, 1855. The Bank had perhaps ominously moved its offices in 1855 from Tokenhouse yard to the very building in Threadneedle St. which had been occupied over a century before by the ill-fated South Sea Company: see
## Table 5.1 Company registrations by industry for the years 1856, 1866, 1876 and 1886

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<th>Industry Category</th>
<th>1856 No</th>
<th>1856 %</th>
<th>1866 No</th>
<th>1866 %</th>
<th>1876 No</th>
<th>1876 %</th>
<th>1886 No</th>
<th>1886 %</th>
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<td>4.3</td>
<td>6.97</td>
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<td>15. Clubs/ Societies Etc.</td>
<td>2</td>
<td>2.7</td>
<td>2</td>
<td>2.7</td>
<td>3</td>
<td>2.8</td>
<td>12</td>
<td>7.4</td>
<td>4.57</td>
<td>19</td>
</tr>
<tr>
<td>Total Registration Nos.</td>
<td>75</td>
<td>73</td>
<td>106</td>
<td>162</td>
<td>416</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

News of the failure of this enterprise broke just as the limited liability legislation was passing through Parliament. David Morier Evans notes that one of the leading bankruptcy lawyers of the day had wryly remarked that whilst formerly

bankruptcies during those years had all been attributed to the Crimean War, they were all now apparently traceable to the collapse of the Royal British Bank\textsuperscript{22}.

Despite these setbacks it can be observed in Graph 5.1 that there was a gradual but steady growth in the number of company registrations between 1860 and 1865. One of the spurs to this growth in the numbers of company registrations may have been the consolidation of the legislation relating to corporations under one statute in 1862\textsuperscript{23}. Whilst only 2,265 English companies were registered under the 1856 Act there were 4,021 companies registered under the Companies Act of 1862 in its first six years of operation. By the middle of the 1860s relatively significant numbers of enterprises were adopting corporate identity. This growth in the numbers of incorporations was so astonishing to contemporaries that

\underline{NUMBERS OF PROVISIONAL AND FULL REGISTRATIONS OF COMPANIES 1844–1855 (ENGLAND)}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{numbers_of_provisional_and_full_registrations_of_companies_1844-1855_england}
\caption{Numbers of provisional and full registrations of companies 1844–1855 (England)}
\end{figure}

\begin{itemize}
\item \textsuperscript{22} Morier Evans, D, (1968) \textit{op. cit.}, 279.
\item \textsuperscript{23} Harold Shannon, the leading English economic historian of his day, was however quite sceptical about this claim: ‘A text-book myth would give place of honour to the Companies Act of 1862 ... The Act of 1862 was a consolidating and extending Act which brought in no new important principles, and although an outburst of company promoting took place in the cheap money market which happened to follow it, its superiority over the Act of 1856 was more legal than economic ... Neither \textit{The Economist} nor the \textit{Bankers' Magazine} gave it editorial comment, and \textit{Herepath's Railway Journal} gave it only a few lines.’ Shannon, H A (1932) The First Five Thousand Companies, \textit{Economic History}, vol. 2 (3), 396–424 at 399.
\end{itemize}
The Times was given to remark in 1865 that the country was rapidly becoming ‘one vast mass of impersonalities’\textsuperscript{24}.

Nonetheless the appendage of the word ‘limited’ to a business name gave it an odour of immorality that was difficult to remove. Limited liability enterprises were implicated by contemporaries in what was characterized as a moral decline in the national spirit. In particular the integrity and honesty that was considered to have characterized England’s rise to industrial and commercial supremacy was seen to be on the wane. Samuel Smiles charted various symptoms of this moral decline in his famous guidebook to character, conduct and perseverance, Self Help:

\begin{quote}
It must be admitted, that Trade tries character perhaps more severely than any other pursuit in life. It puts to the severest tests honesty, self-denial, justice, and truthfulness ... Although common honesty is still happily in the ascendant amongst common people, and the general business community in England is still sound at heart ... there are unhappily ... but too many instances of flagrant dishonesty and fraud, exhibited by the unscrupulous, the over-speculative, and the intensely selfish, in their haste to be rich ... The Sadliers, Dean Pauls, and Redpaths, for the most part, come to a sad end even in this world; and though the successful swindles of others may not be ‘found out’ and the gains of their roguery may remain with them, it will be as a curse and not as a blessing ... It is possible that the scrupulously honest man may not grow rich so fast as the unscrupulous and dishonest one; but that success will be of a truer kind, earned without fraud or injustice. And even though a man should for a time be unsuccessful, still he must be honest; better lose all and save character\textsuperscript{25}.
\end{quote}

Irrespective of Smiles’ ultimate confidence in English character he was quite well aware of the fact that many English businessman were, by the 1860s, attempting to gain ‘all’, even at the expense of that character. The limited liability corporation was considered by him and by many of his contemporaries as yet another temptation for a commercial class already in moral decline. As one Manchester merchant was to reflect at the end of the century:

unrestricted limited liability by registration is in some respects a danger to the whole trading community, from its tendency to alter the character and objects of mercantile transactions generally.\textsuperscript{26}

\begin{footnotes}
\textsuperscript{26} Evidence of Samuel Ogden to Companies Act (Amendment) Committee (The Davey Committee), B.P.P., 1895, LXXXVIII, 239.
\end{footnotes}
In regard to the effects on commercial morals of limited liability incorporation one prominent legal journal commented in 1858:

When we styled the Limited Liability Act ‘The Rogues Charter’ we certainly did not anticipate that it would so speedily approve its claim to the title. It is little more than two years old, and already what a mass of villainy it has engendered! Scarcely a week has elapsed in which we had not to record the revelation of some new rascality, perpetrated under the protection of a law which sets at defiance every rule of right and every principle of morality. It is the nature of such a law to corrupt all who come within its influence. It would appear as if the immunity it provides for dishonesty, by exempting men from liability to pay their debts and perform their contracts and make reparation for their wrongs, taints the moral character of those who adopt it ... The very name of limited liability company has become a by-word for whatever is bad and base; men shrink from owning connection with a thing of such doubtful reputation; men who have character will not hazard it by appearing as directors and men who have money will not lose it by becoming shareholders ... Limited liability has had a fair trial and has proved to be an egregious failure for all good purposes, and fertile only of ill ... Bad as it was in theory it has proved in practice to be worse, and the attention of the new President of the Board of Trade, who is an Englishman bred as well as born, and whose notions are not Australian [a reference to Robert Lowe who spent some time in the 1840s in Australia] cannot be too soon directed to the propriety of repealing or materially modifying the law which disgraces the Statute book and dishonours the country – that law, we repeat it, which enacts that a man shall not pay his debts, perform his contracts or make reparation for his wrongs27.

Despite the declarations by contemporaries of the general ‘failure’ of ‘modern’ companies legislation during its first decade of operation to encourage the incorporation of ‘genuine’ business undertakings, a number of later commentators have continued to insist that such assessments were misguided and that the new limited liability legislation was a boon to English capitalists. For instance, Lord Wedderburn has claimed that limited liability incorporation ‘quickly took hold in England’ and that in the early years of operation of the limited liability legislation ‘company registrations boomed’28. This is clearly incorrect as can be established from even a cursory examination of Graph 5.129.

Writing in the 1930s J B Jeffreys was far more circumspect in his assessment of the early years of the legislation. He rejected on the one hand the view that the Act in this period was a ‘dead letter’, but at the same time acknowledged that

\[27 \text{ The Law Times, 25th March 1858, 14.}
\[29 \text{ See p. 137 in this chapter.}
until the 1880s most English business dealing was transacted by partnerships. In analysing the growth in the use of the legislation Jeffreys also points to the uneven distribution of the growth in adoption of corporate form across different industries during the first thirty years of operation of the limited liability legislation.

**The Characteristics of Incorporations in the First Fifteen Years of Limited Liability Legislation**

Some of the developments that were later to become important in the diffusion of corporate entities in England were already present in embryo form during the 1860s. One of the most important of these later developments, the use of limited liability legislation by small enterprises – or what were later to be formally recognized as private companies – was already beginning to occur in the 1860s, only to fall into abeyance for a decade or more after the Overend Gurney crash in 1866.

Most accounts of the manner in which the company legislation was used in the nineteenth century assert that the ‘private’ company was an invention of the late nineteenth century, and a perversion of the original intent of the instigators of English limited liability legislation. Robert Lowe’s assertion that the limited liability incorporation was to be the sole preserve of large undertakings is taken at face value. Ireland asserts in this respect:

> Despite its permissiveness, it is evident that the proponents of the 1856 Act did not intend to make the newly constituted company legal form available to ‘private’ partnerships or to sole traders ... Lowe stressed that the Joint Stock Companies Bill was meant to amend the law relating to joint stock companies only, explicitly rejecting as undesirable the extension of limited liability to partnerships and sole traders through the widening of its scope to associations of fewer than seven.

As observed earlier, Lowe made this assertion only after a number of Members of Parliament had pointed out in Committee stage that seven was a relatively

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30 Jeffreys, J B (1938), *op. cit.*, 104.


arbitrary number, apparently allowing some small enterprises to register under the limited liability legislation and others to be excluded. It was also suggested at this committee stage that even enterprises with less than seven participating members could register by the simple expedient on the part of the ‘real’ members of getting their servants or non-active family members to hold shares on their behalf. Such arrangements were not uncommon in other contexts at the time, such as with railway shares. Quite often nervous investors had impecunious dupes hold railway shares on their behalf so as to avoid financial responsibility if the enterprise failed. This practice was later repeated in colonial Australia in respect to shareholdings in mining companies.

In assessing the real expectations of Lowe and other contemporaries in respect to the possibility of small enterprises incorporating with limited liability it is important to note certain significant differences between the 1855 and the 1856 legislation that reveal prevailing attitudes. The 1855 Limited Liability Act restricted its application to enterprises of 25 or more members, contained a provision which required enterprises to furnish publicly an annual balance sheet and set a minimum share value of ten pounds. All these provisions pointed away from an intention that small enterprises would be able to register as limited liability enterprises or were intended to be beneficiaries of the legislation. While it was probably not a great deal more difficult to find twenty four dupes than to find six it would complicate matters to such an extent that the small businessperson would be discouraged from registering. Even more discouraging for the small operator would be the onus of producing an annual balance sheet. If later descriptions of the accounting practices applying in firms of the Victorian era are to be believed the requirement of a balance sheet would not only compromise the privacy of small businessman, but would constitute an impossible standard given that the manner in which the books were kept in most undertakings during the nineteenth century would prevent the compilation of even the most basic balance sheet for external consumption. Lastly the large share denominations set by the 1855 Act were an attempt to ensure that shareholders had a real stake in the fortunes of the enterprise, not just a nominal investment. Again this was not a position that would be particularly palatable to persons attempting to avoid, rather than extend, their obligations.

The ramifications of these changes were not lost on contemporaries. For instance, Mr Alexander Hastie was particularly bothersome to Robert Lowe in the committee stage of the 1856 legislation in suggesting that the implications of the alterations introduced by Lowe were to allow small enterprises to incorporate with the benefits of limited liability. Lowe conceded this point, but did not alter the legislation, suggesting that this would be too great a sacrifice to the principle of liberty, which he was proposing.

The potential advantages of limited liability legislation for small traders was particularly great at a time when such traders were being sorely pressed by the financial effects of the Crimean War, whilst still liable to the rigours of imprisonment for debt if they failed to pay their creditors. One of the first detailed analyses of the 1856 Joint Stock Companies Act to be published was a series of articles in the Law
Times entitled ‘The New Law and Practice of Joint Stock Companies’ and written by Edward Cox, a practising barrister who specialized in commercial matters. One of the themes taken up by Cox was the apparent injustice of not allowing the principle of limited liability to extend to small trading partnerships. He suggested, however, that this apparent discrimination in favour of large traders did not in fact exist, due to the broad liberalism of the 1856 legislation. Cox repeated Hastie’s argument that there was nothing to prevent the use of relations, servants or other dupes from holding shares on behalf of the active participants in a registering firm. Undertakings with as few as one active ‘partner’ might thereby register under the 1856 Act and claim all the advantages of limited liability.

The contemporary recognition of the broad array of undertakings that could take advantage of the new legislation is reflected in the registration figures when disaggregated by type of enterprise. In my own sample of registrations, companies have been disaggregated as ‘new’ public companies, ‘conversions’ of existing enterprises which appealed to the public for capital upon assuming corporate status, and ‘private’ companies, whether conversions or otherwise, which made no appeal to the public, had a restricted group of shareholders, and apparently contained in their Articles limitations on the transferability of shares. As can be seen in Table 5.2 a small, but significant, number of enterprises, which would be today described as private, registered as companies from the earliest days of the introduction of limited liability.

Table 5.2 Company registrations by type of company and year of registration for the years 1856, 1866, 1876 and 1886

<table>
<thead>
<tr>
<th>Year</th>
<th>Public</th>
<th>Private</th>
<th>Conversion</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1856</td>
<td>63</td>
<td>2</td>
<td>10</td>
<td>75</td>
</tr>
<tr>
<td>1866</td>
<td>59</td>
<td>7</td>
<td>7</td>
<td>73</td>
</tr>
<tr>
<td>1876</td>
<td>59</td>
<td>11</td>
<td>36</td>
<td>106</td>
</tr>
<tr>
<td>1886</td>
<td>105</td>
<td>10</td>
<td>47</td>
<td>162</td>
</tr>
<tr>
<td>Total</td>
<td>286</td>
<td>30</td>
<td>100</td>
<td>416</td>
</tr>
</tbody>
</table>

Turning to Richmond and Stockford’s figures we can observe the trends in private company registrations during the 1860s and 1870s. Small numbers of such enterprises were registered throughout the period 1856–1863, followed by a large increase in registrations of such enterprises during 1864. This increase in registrations of private companies was maintained during the first half of 1865. Many of these

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enterprises were conversions of existing family businesses. Conversions were quite often an attempt to revitalize a family firm that had exhausted family financial reserves or managerial talent. Such enterprises sought a compromise solution to their particular problems, one which would allow them to draw on a wider pool of capital or talent but which would not necessitate them ‘going public’. As we have also seen, a small but nevertheless significant number of these ‘conversions’ were of enterprises on the decline. The managers of such undertakings were either hoping that an injection of new capital would save the enterprise, or alternatively that by ‘going public’ they would be able to avoid the humiliation and acrimony associated with bankruptcy. In 1866 *The Annual Register* commented on the growing numbers of conversions figuring amongst company registrations:

> The limited principle has developed in a somewhat novel direction. Instead of being applied to new undertakings, it is in many cases directed to the conversion of old private firms into companies [by] absorption of the original house with the infusion of new blood into the management and an extension of capital.

With the dramatic failure of the large merchant banking house, Overend Gurney and Company, in 1866, a conversion which had ‘gone public’, the numbers of private company conversions appear to drop in line with the overall decrease in company registrations. However, even through these blackest periods the private company form never disappeared altogether. From 1872–1874 an increase in private company registrations again occurred. This rise in numbers was interrupted briefly in 1875, only to recover in 1876 and then maintain a steady rate of growth from that time through to the end of the period covered by Richmond and Stockford’s sample (1889). The sample used by Richmond and Stockford is unusual in that it is constituted by the first 1,000 registered companies which were still active in 1980. The fact that it only includes surviving companies, when most companies have, despite the existence of perpetual succession, only a short life span, means that there is possibly something unusual or exceptional about the companies in the sample. Even though the sample is not therefore characteristic of all companies it does suggest that throughout the 1860s small enterprises utilized the limited liability legislation, a finding that is contrary to the prevailing orthodoxy which suggests that such entities were a ‘perversion’ of the intention of the legislation, and only came into vogue in the 1880s. Perhaps even more surprising is that the survival rate of these companies is somewhat greater than that for larger public companies (Table 5.3).

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35 *The Annual Register*, (1866), 187.
38 See Table 5.3 and compare with the Chart of survival rates for Scottish companies derived from the Appendix of Payne, P (1980) *The Early Scottish Limited Liability Com-
### Table 5.3 Survival rates of companies by type of company for the years 1856, 1866, 1876 and 1886

<table>
<thead>
<tr>
<th>No. of Years</th>
<th>Public</th>
<th>Private</th>
<th>Conversion</th>
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</thead>
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<td>65</td>
<td>1</td>
<td>16</td>
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<tr>
<td>1</td>
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<td>4</td>
</tr>
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<tr>
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</tr>
<tr>
<td>Unknown*</td>
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<td>0</td>
</tr>
<tr>
<td>TOTAL</td>
<td>286</td>
<td>30</td>
<td>100</td>
</tr>
</tbody>
</table>

* This unknown has not been included in computing means

Another tentative conclusion which might be made on the basis of Richmond and Stockford’s analysis, and which also runs against prevailing orthodoxy, is that small, private companies tended to have a greater longevity than their larger public counterparts. The only other possible explanation for the apparent ‘over-representation’ of private companies amongst Richmond and Stockford’s sample of survivors is that registrations of such enterprises were taking place at such a rate from early in the history of modern company law that, by reason of their sheer numbers, they outweigh public companies in the sample of survivors. This, however, is unsustainable as it was not until the 1890s that the number of private company registrations approached the number of registrations of public companies. Thus the over-representation of private companies in Richmond and Stockford’s sample is even more significant as such enterprises would have been significantly under-represented as a category in total registrations until late in the nineteenth century.

The finding that there were both considerable numbers of private companies amongst the 1,000 first registered surviving enterprises and that they appeared to have been more stable over time than their public company counterpart is significant. Rather than representing an impediment to the overall development of company law it was possibly within the small company that many of the characteristics of modern company law were developed and refined. We will later return to this question of the significance of the private company in the overall development of modern company law. First, however, we will examine a number of other studies of the extent of private company registrations throughout the third quarter of the nineteenth century and their role in the diffusion of the corporate form in England.

One study which identifies significant numbers of private company registrations during the 1860s and 1870s is Professor Payne’s analysis of Scottish company registrations. Unfortunately it is difficult to compare Payne’s figures in this regard with my own, or with those of Richmond and Stockford, as he has not disaggregated his quantitative sample by private and public venture. Nevertheless, he suggests that relatively large numbers of private undertakings being registered as limited liability companies from an early date might explain the low average capitalization of Scottish companies. Payne’s figures also indicate a greater longevity amongst Scottish companies than amongst their English counterparts. If indeed there were a higher proportion of private enterprises amongst the Scottish registrations than was the case in England this would be consistent with Richmond and Stockford’s suggestion that private companies tend to have greater longevity than their public counterparts.

The conclusion that private companies during the nineteenth century tended to be better and more successful corporate citizens than their larger rivals is also borne out by Shannon’s study of corporate registrations between 1866 and 1883. He found that the proportion of private companies to public companies was

39 Payne, P op. cit.
'unexpectedly high' from the earliest date in the study and that 'on the whole [the] behaviour [of these private companies] was better than that of the public companies'\textsuperscript{40}.

The extent to which the limited liability legislation was used from its very inception by private concerns is apparent from evidence presented to the 1866 Select Committee appointed to inquire into the legislation. Warning of the potential for fraud, Mr Edmond Boyle Church, Chief Clerk of the Rolls Court, stated to the Committee:

... [T]he Committee must be good enough to remember that the principle of Limited Liability is now being extended to a vast number of small concerns, with which men of influence and position would have very little to do. I have no doubt that the Committee has the information before it, but there are small companies with capitals as low as £500 to carry on the business of brewers, bankers, farmers, agricultural steam-engine proprietors and the like.

Q. Have you found more frauds amongst these small companies than amongst the larger ones?
A. I think that, as a general rule, there has been more fraud in small than in large companies.

Q. Do you think that persons carrying on the business of an unlimited company, sometimes form it into a limited company in order to get rid of their debts and obligations?
A. No such case occurs to me; but I think that there are cases of partnerships where a company has been formed for the purpose of getting rid of the personal liability of the members of the Partnership.

Q. Do you think it would be possible for a person to get rid of his debts by transferring his business to a Limited Liability company?
A. Undoubtedly it is possible\textsuperscript{41}.

A number of conclusions are suggested by the distinct possibility that private companies were a significant force in the period preceding the 1880s. The first is that the conventional view of company legislation as a device to facilitate large-scale enterprise, only later to be perverted by the appropriation of the form by large numbers of small enterprises, is seriously flawed. If from the very inception of limited liability legislation that legislation was utilized by small enterprises, then the notion that the adoption by private enterprises of limited liability corporate

\textsuperscript{40} Shannon, H A (1932) The Limited Companies of 1866–1883, IV Economic History Review, 1st series, 290–316 at 302.

\textsuperscript{41} Evidence of Mr Church, Select Committee on Limited Liability Acts, 1867, Q.1555–1558.
form is some sort of ‘fall from grace’ from the otherwise ‘pure’ intentions of the framers of the legislation cannot hold water. It might be suggested that the nature of the legislation, its form as it unfolded during the nineteenth century, owes much to these small enterprises and the experimentation with the corporate form by small entrepreneurs. This group was perhaps far more progressive than their larger competitors in seeing the real advantages limitation of liability might confer on their enterprises, without compromising the privacy that had previously been secured by the partnership form.

The deletion of balance sheet requirements from the 1856 Act, and the subsequent inability of various pressure groups to have such provisions reinstated, may also be better understood once it is recognized that there was relatively widespread use of the limited liability legislation by small private companies from the inception of the legislation. This group had a vested interest in resisting the introduction of such provisions, for limited liability incorporation would cease to be a desirable option if the trade off was to make their balance sheets available to their competitors and the taxation authorities. Edgar Jones has commented on the reasons for such apparent financial ineptitude amongst the English family businesses of the nineteenth century:

[T]his parlous state of business accounting is not surprising. Regular calculations of profit and statements of the value of assets were of little interest to the entrepreneur closely and continuously involved in his own business operations. Provided he was not accountable for part of his profit to others, little thought needed to be given to its precise and periodic calculation ... It was only with the advent of shareholders or (in lesser degree) the advent of partners outside the family circle and the need to calculate their dividends or share of the profits while providing an outward measure of the viability of the operations, that public accountants tended to be called in to examine and report on a company’s or firm’s accounts.42

As suggested earlier, fear of competitors finding out details of one’s business secrets or the internal revenue office discovering the true levels of profitability of one’s undertaking constituted the overriding reasons for most small entrepreneurs resisting the introduction of compulsory balance sheets.

It was also the case that those small entrepreneurs who saw limited liability incorporation as a potential route by which to avoid personal responsibility for their debts would not want their financial affairs made public. This group of entrepreneurs, who have been dubbed by Professor Michael Levi as ‘slippery


slopers\textsuperscript{43}, would naturally be opposed to the introduction of public balance sheets as the only available financial escape route which they possessed would be shut off if they had to give advance notice to the public of the impending collapse of their businesses.

Successful small entrepreneurs, however, might be just as uneasy about public exposure of their affairs. The reason for this can be understood in light of Professor Payne’s discovery that private companies, at least in Scotland during the second and third quarter of the nineteenth century, could be extremely profitable, returning dividends of over 15 per cent, at a time when 5 per cent was considered a good return on capital\textsuperscript{44}. The period of this profitability corresponded with the first serious attempts to enforce the taxation provisions applying to businesses. The attitude of most English businessmen to such encroachments by the State in what they regarded as their private affairs is reflected in the attitude of J M Napier, the managing director of D Napier and Sons, in respect of the preparation of profit and loss accounts for public consumption by Government officials:

His honesty only failed ... at the door of the Commissioners of Inland Revenue. ‘His objection’, his accountant said, ‘to government officials knowing a man’s profit was insurmountable. Consequently, he did not blame a person for making a spurious return of his ‘income’ ... he shared to the full the refusal of his generation ... to tolerate having their private affairs meddled in by the State\textsuperscript{45}.

\textbf{The Nature of Investors in Public Companies in the First Ten Years of Limited Liability Incorporation}

(a) The Social Composition of Shareholders

In a previous chapter the debate regarding the characteristics of those investors pressing for the introduction of limited liability incorporation was discussed. Jeffreys suggested that those most desirous of new legislation were wealthier Home Counties investors who were cut off from investment opportunities in the North, and who by the middle of the 1850s were faced with diminishing returns on railway investments and a relatively low rate of return on Consols. P L Cottrell has recently challenged Jeffreys’ thesis in regard to the importance of the wealthy Home Counties investor in the agitation for the introduction of limited liability legislation\textsuperscript{46}.

In order to better evaluate the competing hypotheses as to the nature of those investors who were crucially interested in the enactment of limited liability incorporation legislation it is useful to determine the actual composition of investors in early limited liability companies. In addition to providing further insight into those investors who were most likely to be attracted to limited liability investment, such an investigation also provides us with evidence of the nature of the forces which might have influenced the subsequent development of limited liability incorporation and its administration.

As discussed earlier the assumption that limited liability incorporation would open up a variety of higher yielding outlets for investment by members of the middle class was one of the most influential factors in the introduction of such legislation in the 1850s. As one middle class witness before the 1851 Select Committee on the Law of Partnership put it:

[Limited liability] will not just open up investment possibilities for the humbler classes, but also for the comparatively richer classes [like myself]. I ... have a certain amount of capital which I do not choose to take to the Funds (that is, Consols), because of the small interest I get. Why might I not invest in a commercial firm without risking all my capital to the last penny and acre? 47

One of the most important factors encouraging members of the middle classes, with perhaps £50 to £500 to invest, to support the introduction of limited liability enterprises, was their sense of grievance over the lack of suitable investment channels. This was discussed by a number of witnesses to the 1854 Royal Commission on Mercantile Law. One witness, Robert Slaney, who had chaired the 1850 and 1851 Select Committees on Partnership, stated in this regard:

The check on the freedom of investment (constituted by the non-availability of limited liability corporate investments) is more and more felt as ... the possibility of purchasing into the public funds (Consols) at a moderate price is gradually lessened. Each year a greater proportion of the limited amount of stock becomes tied up in the hands of trustees and great capitalists. This difficulty of finding investments for moderate sums will much increase as the field for railway

47 Evidence of James Stewart, Esq., Barrister, Select Committee on the Law of Partnership, 1851, Q.321. The Report of the Select Committee stated at 3: ‘Your Committee think it would be a subject of regret if cautious persons of moderate capital, and esteemed for their intelligence and probity in their several neighbourhoods, should now be deterred from taking part in ... undertakings by the heavy risk of unlimited liability. Your Committee think that it would be desirable to remove any obstacles which might now prevent the middle and even the more thriving of the working classes from taking shares in such investments, under the sanction of and conjointly with their richer neighbours: as thereby their self-respect is upheld, their industry and intelligence encouraged, and an additional motive is given to them to preserve order and respect for the laws of property.’
investment is reduced. This hardship is peculiarly felt in the middle and humbler ranks possessing small capitals which there is great difficulty in employing\textsuperscript{48}.

The dissatisfaction of the middle classes with investment opportunities did not, however, necessarily translate into shareholding in the enterprises formed under the Companies Acts of 1856 and 1862. This can only be properly determined by a detailed analysis of the Share Registers of large numbers of companies of the era. Unfortunately no such analysis has yet been undertaken. Instead the usual method by which writers on the history of company law have sought to impute the social class of investors in various industries and in different periods of joint stock company evolution has been to use share denominations as an index of the social class of shareholders. The assumption is that the higher the average denominations of shares the less likely lower classes of investors will participate. Hence most commentators have pointed to the relatively large denominations of the shares in companies registered during the first ten years of the Companies Acts to refute any suggestion that there were appreciable numbers of investors from the ‘humbler or middle classes’\textsuperscript{49}.

Jeffreys was the first to suggest on the basis of a sample of early company registrations that there appeared to be a predominance of high share denominations amongst the early limited companies. He found that ‘of 2040 companies formed between 1856 and 1863 inclusive, just over 50% had shares of ten pounds and over’\textsuperscript{50}. A share denomination in excess of ten pounds if fully called up would have constituted a prohibitive figure for members of the middle classes during the middle of the nineteenth century, if they wished to hold more than just a few shares on a purely speculative basis. However, even if Jeffreys’ figure for median share denominations were correct it cannot be sensibly used as an index of the social composition of investors unless we also know the proportion called up on each share and the median number of shares held by an investor in a mid-nineteenth century enterprise. If, for instance, less than £5 were called up on each share and the median shareholding of an investor in an enterprise was say between one and five shares then the involvement of humbler and certainly middle class investors becomes far more plausible.

Jeffreys, after reciting his finding in respect to median share denominations amongst early limited liability enterprises goes on to state that in the period

\textsuperscript{48} Appendix to \textit{Royal Commission on Mercantile Law}, 1854, Reply of Robert Slaney, Esq., 33.

\textsuperscript{49} Considerable doubt has been cast on the thesis that share denominations in early companies were disproportionately high when compared to later company formations. Even if they were relatively high this would not have deterred middle class investors as it was common practice that only a small amount would be called up on such shares at the time of allotment. (see Cottrell, P L (1980), 84).

between 1856 and 1866 of ‘1252 companies formed between these years and still in existence in 1866 43% had unpaid shares in one degree or another’\(^{51}\). Jeffreys then suggests that this characteristic of shares in early limited liability companies is principally a result of the nature of those investors whom these flotations were aiming to attract. This ‘target’ group for flotations, Jeffreys suggests, was presumed to ‘be wealthy … to confine his investments to two or three companies and was (actively) interested … in the running of these companies’\(^{52}\). Jeffreys nevertheless concedes that there were other categories of investors in the market who were not deterred from investing in companies with moderate share denominations of £5 or £10. This group of investors was constituted by ‘the middle classes, professional and trading, who were interested in the regular dividends and marketability’\(^{53}\).

Cottrell has re-examined the question of share denominations and the proportion of capital which was paid up in early registrations under the limited liability legislation. On the basis of Cottrell’s figures (see Chart 5.1) it appears that on average only about one quarter of capital was called up in the companies registered during the first ten years of the limited liability company legislation.\(^{54}\) This would mean that a ten pound share would only generally require two pounds and ten shillings to be initially paid up, an amount which would certainly allow persons with small to moderate savings to invest in such enterprises. It must also be recognized in this regard that it was common for prospectuses to contain promises that no further amounts would be called up on shares, even though such promises were not legally enforceable. Such assertions would encourage investors to purchase shares with a nominal value well in excess of their capacity to pay. Cottrell has noted in this regard:

> Throughout the period being considered (1856–1882), given that most companies issued shares of £10 or less, the size of shares would not appear to have been a major barrier preventing any person with some means from investing in a joint stock company. However, denomination alone does not provide a sufficient indicator of type of investor, instead it has to be considered in conjunction with the amount called up on a share. Small calls would mean that there was no barrier at all to investment but the subscriber, unwittingly or not, in such a situation would incur a large degree of potential liability as a result of the extent of unpaid capital\(^{55}\).

Cottrell has further demonstrated that Jeffreys overstated the median share denomination of these early limited liability enterprises. The reason for Jeffreys inflating the median share denomination of these early companies was, according

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\(^{51}\) ibid., 161.  
\(^{52}\) ibid., 172–173.  
\(^{53}\) ibid.  
\(^{55}\) ibid., 84.
to Cottrell, due to him using an unrepresentative sample of enterprises in his calculations. The over-representation of banking and financial enterprises in Jeffreys’ sample, according to Cottrell, led to an inflation in share denomination, as a result of the propensity of such enterprises to adopt large share denominations to provide an appearance of solidity to their creditors and their depositors ⁵⁶.

The mean share denominations for the years 1856–1866 inclusive, on the basis of Cottrell’s sample, are listed in Table 5.4 ⁵⁷. These figures provide a further, if unreliable, indication of the possibility that significant numbers of investors in early limited enterprises were from other than the wealthier classes.

### Table 5.4 Mean and modal share denominations by type of company for the years 1856, 1866, 1876 and 1886

<table>
<thead>
<tr>
<th>£ Share Value</th>
<th>Public</th>
<th>Private</th>
<th>Conversion</th>
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<td>9</td>
<td>3</td>
</tr>
<tr>
<td>1</td>
<td>68</td>
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<td>19</td>
</tr>
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<td>4</td>
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<td>4</td>
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<tr>
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<td>0</td>
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</tr>
<tr>
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<td>74</td>
<td>4</td>
<td>23</td>
</tr>
<tr>
<td>6</td>
<td>3</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>10</td>
<td>88</td>
<td>5</td>
<td>24</td>
</tr>
<tr>
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<td>2</td>
<td>0</td>
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<td>0</td>
<td>1</td>
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<td>25</td>
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<td>0</td>
<td>1</td>
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<tr>
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<td>4</td>
<td>2</td>
<td>5</td>
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</tr>
<tr>
<td></td>
<td>286</td>
<td>30</td>
<td>100</td>
</tr>
</tbody>
</table>

Modal frequencies have been highlighted
Public companies: Mean = 13.1; n = 280
Private companies: Mean = 45.43; n = 21
Conversion companies: Mean = 25.80; n = 97

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⁵⁶ ibid.
⁵⁷ For the figures upon which Table 5.4 is based see ibid., 83.
The reliability of Cottrell’s data has been tested by the current author. On the basis of a ten per cent sample of all registrations for the years 1856 & 1866 it was found that the median share denomination for both years was £10. It should be noted that for both years there was a preponderance of companies with share denominations of £10 or less. For the former year 73.7 per cent of companies in the sample had share denominations of £10 or less and for the latter year 68.9 per cent had a share denomination in that range. These figures tend to accord with Cottrell’s calculations. They also tend to suggest that the social composition of shareholders in the fifties and sixties was broadly representative of all classes with savings rather than being more exclusively composed of the wealthy, as suggested by Jeffreys.

In an attempt to ascertain more accurately the composition of shareholders in limited liability companies during the nineteenth century, Cottrell has disaggregated a sample of share registers by social class and by geographical location for a small sample of companies registered in 1860 and 1885. Whilst there are significant methodological problems associated with such analyses (relating principally to the reliability of the occupational description of shareholders contained in share registers, and the reliability of the sample given the extremely segmented nature of the prevailing investment markets in mid nineteenth century England) this approach nevertheless gives a broad impression of the prevailing trends (see Charts 5.1 and 5.2). In descending order the most prominent investors (by way of total percentage of aggregate capital contributed by each social grouping) in the 1860 sample of companies were persons who described themselves as not being gainfully employed (‘gentlemen’) (30.50 per cent of aggregate capital), persons engaged in commerce (merchants, middlemen and agents, retailers) (21.82 per cent of aggregate capital), and members of the professions (solicitors, bankers, accountants, stockbrokers) (17.49 per cent of aggregate capital). Using specific occupations the ranking was unoccupied males (27.46 per cent), merchants (10.17 per cent) and solicitors (7.08 per cent). It is also interesting to note that in this period (and not for 1885) 4.62 per cent of total aggregate capital in the sample was described as being subscribed by industrial skilled and semi-skilled workers.

Whilst Cottrell does not give a breakdown of his figures by numbers of investors in each of the social groupings it may be the case that when we examine the percentage of shareholders from each of the social groupings as a proportion of the aggregate number of shareholders, rather than capital subscribed, that the bulk of shareholders came from the middle classes, each perhaps holding from one to ten shares as a security for the future. This point can only be properly clarified by a careful sifting of nineteenth century company registers, a prodigious task well beyond the scope of the present enquiry. However, from an impressionistic interpretation of my own sample of English company registrations for the years 1856, 1866, 1876 and 1886 it appears that significant numbers of the English middle
Chart 5.1  Social composition of shareholders in limited liability companies 1860

Chart 5.2  Social composition of shareholders in limited liability companies 1885
classes invested in limited liability public companies throughout the nineteenth century, even though the proportion of aggregate capital they contributed continued to drop over the period 1860–1885.

A further indication of the social composition of shareholders in the early years of limited liability incorporation is provided from the various government reports and newspaper accounts of the progress and perils of the new legislation. The first such account was contemporaneous with the introduction of the 1856 Act. The collapse of the Royal British Bank occurred just one month after the introduction of the 1856 Act. It was acknowledged in contemporary reports of the demise of the Royal British Bank that the losses largely fell on shareholders who were constituted by ‘small traders and individuals of limited means’.58 Earlier the same year it had been stated by Lord Monteagle in the House of Lords debate on the introduction of the limited liability legislation that ‘the measure has been argued by its proponents with great pains as to lead the middle and humbler classes to believe that the measure would extend to them advantages which had hitherto been confined to the wealthy’59. Robert Lowe, who was the great catalyst for the extremely permissive form which the limited liability legislation of 1856 finally took, has been described by Asa Briggs as a great defender of the interests of the ten pound householders, a group of English citizens whom Lowe believed had ‘discharged their duty in a manner which almost defies criticism’. Briggs continues: ‘he was always active in supporting those parliamentary measures which assisted middle class interests ... he introduced in the Commons the Limited Liability Bill of 1856’60.

The possibility that a significant proportion of total investment in joint stock companies was by members of the middle classes is further evidenced by the statements of some of the witnesses to the 1867 Select committee on the Limited Liability Acts. A number of witnesses stressed the importance of introducing publicity provisions in order better to protect members of the ‘humbler’ classes who chose to invest in such undertakings. The evidence of George Latham Browne Esq., a barrister, shareholder, director and liquidator, with extensive experience of the legislation in operation is a case in point. In response to a question asking whether the different ‘class’ of investors in friendly societies explained the more stringent publicity provisions applying to such entities when compared to limited liability companies Browne replied:

No doubt there is a considerable difference; but I would suggest that the object, as I take it, of the Act of 1862 was to invite capital, not of great capitalists, who are perfectly capable of taking care of themselves, but of small capitalists, who

59 Lord Monteagle, Hansard (House of Lords), vol. 142, 1856, 1485.
are not capable of taking care of themselves, and certainly not so capable of understanding long legal documents.\textsuperscript{61}

The significant role played by middle class investors in patronising the creations of the Joint Stock Companies Act of 1856 is further indicated by the manner in which the investment market during the second and third quarters of the nineteenth century was segmented. Even though at first sight the extremely high share denominations would seem to restrict investment to all but the wealthy, this was not the case. As a consequence of the low proportion called up on most shares during the middle of the nineteenth century, investment in shares of £10 or more was possible for members of most social classes. Nevertheless, flotations of companies were often prepared with a particular section of the investing public in mind. One contemporary analyst of company promotions commented on this phenomenon:

[When floating a company likely to attract the interest of the `industrial classes’ promoters will use a name such as] “The Philanthropic Mutual Aid Co-operative Industrial Life Assurance, Annuity Granting and Funeral Providing Society” ... the title will be very long, to daze and deceive them, while the value of the shares would be placed at a pound, to give them the opportunity of losing their hard earned savings for the benefit of their more cunning but unscrupulous fellow men. On the other hand, should the prospectus be that of “The Jeremy Diddler Weal Consols Gold Mining Company” or “The Central African Navigation Company” formed for the purpose of conveying ships from Cape Colony to Budda-juddo by land, to save the expense of unshipping the freight, then the shares will probably be twenty or fifty pounds each to entice the credulous part of the monied community.\textsuperscript{62}

Catering flotations to particular markets became a more established practice as experience of limited liability incorporation accumulated. By the middle of the 1860s the vogue for a large proportion of the nominal value of shares remaining uncalled became less pronounced. The shift towards fully paid shares becoming the norm was, however, resisted by a number of corporate promoters and others involved in capital raising. The reason for this resistance was that it was common amongst nineteenth century companies to use their uncalled capital as security against borrowings.\textsuperscript{63} Consequently, if fully paid shares became the norm, managers

\textsuperscript{61} Evidence of George Latham Browne Esq., 1867 Select Committee on Limited Liability Companies, Q.1125.

\textsuperscript{62} Packer, A (1878) How the Public Are Plundered, London, 18–19.

\textsuperscript{63} In a comment on a colonial company, the Queensland Investment and Land Mortgage Ltd, the Morning Post of 24th July 1879 made the following observations on how loans were secured by corporations during the latter half of the nineteenth century: ‘It is absolutely indispensable to make efficient arrangements for supplying the large and
and promoters would potentially be faced with a lower degree of flexibility in their capital raisings.

Nevertheless, amongst investors the partly paid share became less and less popular as the nineteenth century wore on. Accumulating experience of corporate failures in which members of the ‘humbler’ classes were plunged into serious debt as a consequence of their holdings of partly paid shares resulted in the part-paid share becoming an unpopular form of security amongst investors from these classes. Even in the case of banking corporations, where a substantial reserve of capital upon which to draw might seem desirable this form of issuing shares became anathema after the collapse of the City of Glasgow Bank in the 1870s.

As the nineteenth century progressed, company promotions were more and more aimed at particular groups of investors, and share denominations became a more reliable indicator of the social class of investors. This observation, however, must carry with it the rider that as the nineteenth century progressed not only did share denominations more accurately reflect social composition of shareholders than in the earliest years of the limited liability legislation, but they were also more closely related to the nature of the industry in which a flotation occurred. Industries such as cotton developed the practice of almost universally utilizing the one pound share64. Whether the actual investors in an enterprise were of a particular social class can only be determined by a careful sifting of share registers. Nevertheless it would be true to say that cotton, along with other industries commonly issuing low denomination shares, had a greater proportion of shareholders from lower socio-economic groups than industries such as iron and steel, in which flotations were usually based on the issue of shares with a denomination of ten pounds or more65.
In his monumental 1938 study of British business organization J B Jeffreys suggested that investors who would most benefit from the introduction of limited liability legislation were those located in the Home Counties. This assertion is based on the premise that such investors were denied access to more lucrative industrial investments in the north and were being pressed by a contraction of returns on railway and other utility investments available in the metropolis. We have argued that Jeffreys’ very much underestimated the significance of the humbler investor, particularly those from the middle classes. This alternative thesis as to the class origins of the investors pressing for reform could nevertheless also be consistent with the hypothesis that a greater degree of support for the introduction of limited liability incorporation came from the Home Counties rather than from the north or from London. This would depend upon where (if at all) there were concentrations of those involved in middle class occupations.

Jeffreys based his assessment of a lack of support for the new legislation from the northern counties on the replies sent to the Royal Commission on Mercantile Law in 1854. Such responses, however, would seriously misrepresent the desire of the middle classes in these areas for new avenues of investment. This was due to the fact that the inquiries were in respect of investment in shares on the London Stock Exchange, which only listed an extremely small proportion of enterprises. The investments of members of the middle classes in the northern counties were, unlike those of Home Counties investors, largely placed through mechanisms other than the London Stock Exchange. Regional exchanges, bankers, solicitors, accountants and share hawkers were all responsible for placing shares with investors in the north and amongst the less wealthy Home Counties investors. The shares in companies so placed were often not listed at all and, when they were, generally only on a provincial stock exchange.

For a variety of reasons it was unlikely that members of the middle classes with modest savings would directly invest in an established industrial concern. Premiums on investment in established concerns were steep, initial investments were high, and most pertinently, once the premium had been taken into account returns were probably not significantly higher than those on Consols or railway shares. Members of the middle classes in the industrial districts, such as those in the Home Counties, were desirous of new outlets for their savings, which promised higher returns, even at the expense of security. These were more likely in newer, provincial limited liability enterprises which were either unlisted or, less commonly, listed on a provincial stock exchange. Shares in such enterprises were, of course, riskier than other investments.

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66 This, in fact forms the basis of Cottrell’s criticism of Jeffreys for relying too heavily on an analysis of listed companies, which he suggests leads to a misrepresentation
The fact that the demand for investment outlets was not confined to the Home Counties is evidenced by the rapid growth in provincial flotations after the introduction of the Limited Liability Act. The manner in which shares were placed in the earliest period of the new legislation has probably tended to obscure the extent to which investment took place in the northern counties. If one chooses to look to the location of stock exchanges and the numbers of stockbrokers in different geographical areas as an index of the location of English investors it is clear that a disproportionate amount of business was transacted by the London Stock Exchange and that the majority of English stockbrokers, at least during the first ten years of limited liability enterprise, were located in the capital. The clear implication, in these years before the telegraph, is that the majority of investors in limited liability companies were in the Home Counties. This, however, understates the role of channels other than the Stock Exchange for the placement of shares in the period before the development of modern communication technologies. Placements by travelling representatives, solicitors, bankers, agricultural agents and directly by companies themselves were the rule, rather than the exception, for most of the nineteenth century.

Whilst the English investment market during the 1850s and 1860s was predominantly centred around London it was also the case that provincial exchanges and other forms of placement played a central role in making available to poorer investors a range of ‘lower grade’ securities. Jeffreys has noted that ‘up to the eighties [stockbrokers] influence was greater in London than outside’.

Stockbrokers, however, only tended to deal in the ‘higher’ class of securities at this time. Only prestigious stock tended to get a listing on the London Stock Exchange, catering to the investment requirements of the wealthier members of the investing public. Cottrell has commented on the limited importance of the London Stock Exchange in the placing of the shares in most English limited liability companies during the first decade or more of the operation of the legislation:

In the metropolis by the 1870s there was a well-established capital market but it was geared to handling primarily large issues, generally government bonds and railway securities; each issue being large in volume compared with that generated by most domestic stock flotations of the 1860s and 1870s. Home securities were traded on the London Stock Exchange but they consisted mainly of the National debt ... and railway securities ... Apart from bank shares, other domestic securities traded on the market were lumped together under a single heading ‘miscellaneous’.

as to the characteristics of limited liability corporations during the 1860s and 1870s. See Cottrell, P L (1980) *op. cit.*
68 ibid., 329.
The inability of the London Stock Exchange to cater to the requirements of small and modest issues meant that smaller investors tended to look elsewhere for suitable outlets for their savings. Middle class investors, whether located in the provinces or in London, turned to their banker or solicitor for investment advice, rather than seeking out a stockbroker. As was observed by one firm of stockbrokers at the time:

Large capitalists find no difficulty in investing money, but thrifty tradesmen and others whose incomes are comparatively small ... do not like to enter a stockbroker’s office.\(^\text{70}\)

The fact that most limited liability company shares were not listed on the London Stock Exchange ‘reinforced the provincial and parochial nature of domestic industrial capital formation before the 1890s\(^\text{71}\).

One of the earliest significant waves of provincial investment in limited liability companies was that in cotton companies in the late 1850s and early 1860s. The manner in which investment mania engulfed Oldham at this time was described in the *Co-operative News*:

The working class are getting rich in this prosperous state of things, and correspondingly independent in their manners. There is a hush upon politics, once so fiercely rife in the town. The three grand things – ecclesiastical, political and social combined – are now divis, premiums and shares ... The other day a new company was opened at Shaw near Oldham, and the day after the announcement was made nearly one hundred people from Oldham went by train to the scene ... They rushed out of the train, knocked the ticket collector to one side, and threw their tickets on the ground. They then marched the street at double quick, but finding this pedestrian competition too slow, they set off ‘in a run’ through the village, and besieged the secretary in his own house. The crowd was too great to be supplied at once, and application forms were soon selling at sixpence and one shilling each ... Of course the shares are now selling at a premium ... Nearly one hundred companies have been formed in as many months and the town is rapidly becoming one huge joint stock concern.\(^\text{72}\)

In sheer numbers cotton companies constituted a relatively significant component of the early limited liability company registrations. One hundred and sixty two cotton companies were formed in England between the years 1856 and 1867. Over sixty per cent of these registrations occurred in the years 1860

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\(^{70}\) Bartlett and Chapman, (1869) *A Handy Book For Investors*, 1.

\(^{71}\) Cottrell, P L (1980) *op. cit.*, 151.

and 1861\textsuperscript{73}. Almost all of these companies relied on local subscriptions. These subscriptions, at least in the first wave of corporate formations, came from members of the humbler classes living in the local area.

When the shares in such companies were listed it was on a provincial exchange, rather than in London. The prospectuses, if advertised at all, would be contained in the local press. None of these cotton companies, or like-minded enterprises, placed advertisements in the London financial press, as their capital needs were quite adequately served by the surplus capital of local investors. The relative success of provincial flotations in the early years of limited liability company legislation, when compared with metropolitan flotations, was remarked upon by \textit{The Shareholders Guardian} in 1864:

For a somewhat long-tried period limited liability was, so to speak, a dead letter, and notwithstanding provincial experience was rather more favourable to the development of the principle, it was difficult to get a metropolitan proprietary to organize undertakings which should give it a proper and impartial trial\textsuperscript{74}.

Jeffreys has suggested that one characteristic which distinguished the provincial investor from his or her cosmopolitan counterpart was the tendency to purchase shares to hold, not purely for speculation. However, this assertion seems to be belied by another observation made by Jeffreys, that pressure from small investors had resulted in seven of the twelve provincial stock exchanges issuing daily lists by the 1880s. A comparison of the share registers of provincial companies over a period of time discloses that there was a healthy trade in shares in such companies. Indeed, in the case of the Oldham cotton companies the trade in shares was so brisk that the share registers reveal that a decade after a number of such companies were floated they no longer had significant numbers of working class shareholders. This group had ‘sold out’, often for a profit, and their shares had been acquired by members of the ‘professional classes’.

With respect to domestic enterprises, the provincial stock exchanges and provincial investors were of considerable importance throughout the nineteenth century. One late nineteenth century investment manual went so far as to suggest that throughout the decades following the introduction of limited liability enterprise in England the ‘provincial stock exchanges were of almost greater importance in relation to home securities than London’ (my emphasis)\textsuperscript{75}. Whether this assertion is literally true or not, it was certainly not just the Home Counties investor who was seeking new outlets for his (or her) savings during this period. Provincial investors, particularly those with only moderate amounts to invest, figured prominently in many of the early flotations under the limited liability legislation. The Oldham limited liability companies were only the most dramatic instance of

\textsuperscript{73} Cottrell, P L (1980) \textit{op. cit.}, 107.
\textsuperscript{74} \textit{Shareholders Guardian}, vol. 1, no.9, 7th March 1864.
\textsuperscript{75} Phillips Investors Annual, 1887, 339.
a widespread interest amongst provincial members of the middle and humbler classes in securing decent returns on their hard earned savings.

The Overend Gurney Crash of 1866 and the Select Committee on the Limited Liability Act, 1867 – A Lost Opportunity for Change

The second decade of the operation of the limited liability legislation began with the dramatic collapse of the recently converted financial house, Overend Gurney and Company. This was the first instance in which the courts, Parliament and the public were required to come to terms with the possibility that the limited liability form could quite deliberately be used to avoid debts, even if they were colossal, as was indeed the case with Overend Gurney. It was the first time the full implications of a totally unregulated right to register as a limited liability company without scrutiny by any state department, and without any attendant publicity concerning the financial aspects of the concern being floated, were brought out in the open and subjected to public debate. It also provided a major impetus for the re-examination of many aspects of company flotation that had become ritualized during the first decade of operation of the Act.

One of the characteristics of flotations aimed at the wealthier sections of the investment market during the first decade of limited liability incorporation had been to issue shares of large denomination with relatively small amounts called up. In the case of Overend Gurney the nominal value of the shares was £100, of which only £25 had been called up. Most investors had purchased these shares at a premium of £45. As The Railway Times put it, the necessity ‘to call up the whole of the remainder of the £100 upon each share [will] bring entire ruin on hundreds of the unfortunate shareholders’. It cast considerable doubt on the wisdom of issuing shares with large amounts of capital uncalled upon them. After the 1866 crash precipitated by the collapse of Overend Gurney, ‘to many shareholders the emergency call-up of unpaid share portions meant that “limited liability” had become “unlimited in fact” and it was suggested that the true operation of limited liability had not been understood’. Bishop Hunt has remarked that it was recognized as a consequence of the Overend Gurney collapse:

That one of the special evils of the period was the margin allowed between paid-up capital and subscribed capital. The Times commented that ‘companies fixed either their capital too high or their first calls too low’ ... the consequence of such practices was, of course, that shareholders were without the protection that limited liability should have provided.

76 The Railway Times, 2nd January 1869, 14.
78 Hunt, B C (1936) op. cit., 155.
This and other specific matters, such as the need to include in companies legislation a provision giving established enterprises the capacity to reduce their nominal capital, formed the basis of discussion in the Select Committee on the Operation of the Limited Liability Act of 1867. The evidence of many witnesses before this Committee, however, went much further than a simple acknowledgment of the need for a power to reduce capital or a condemnation of the practice of issuing large denomination shares upon which only small amounts had been called up. Instead, many witnesses condemned the lack of state regulation of corporations. These criticisms were so trenchant that they could be said to constitute an indictment of the principle advocated by Robert Lowe in 1856 of no state interference in the affairs of corporations. The rejection of this principle by many of the witnesses before the 1867 Select Committee is significant as the notion of non-interference had constituted one of the core principles of the Companies Acts of 1856 and 1862.

For many witnesses the defects of the legislation exposed by the crash of 1866 were not remediable by minor amendments to the statutes, but rather would only be overcome by means of the wholesale rejection of the model which had formed the basis of the 1856 Act. Some witnesses argued for a return to the fundamentals of the 1844 legislation\(^79\), others suggested an adoption of the continental system whereby directors were fixed with unlimited responsibility\(^80\), and some suggested that the regulatory model that operated in respect to Friendly Societies could also be applied to limited liability companies\(^81\). Lord Romilly was particularly critical of the model actuating the limited liability legislation of 1856 and 1862. He suggested that the liability of directors in joint stock companies should be unlimited, just as was the case with *gerants* in continental joint stock enterprises. Romilly, on being further quizzed by the Committee as to his general views on the legislation, asked the rhetorical question: ‘What I wish to know is ... what are the benefits produced by the Act’, and then continued ‘the evil [produced by the Act] is really harrowing. The amount of calamity it causes is quite extraordinary’\(^82\).

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\(^{79}\) Retorting to Lowe’s claim when he introduced the 1856 legislation that individual vigilance was the only sure method of regulation the Master of the Rolls, Lord Romilly, and the Vice Chancellor, Page Wood, stated to the 1867 Select Committee that ‘it is not sufficient to say that because a man is a foolish person, therefore he must be allowed to ruin himself in his own way’. *Select Committee on the Operation of the Limited Liability Act*, B.P.P. 1867 (329) X, Q.1394.

\(^{80}\) Note the discussion in Hunt, B C (1936) *op. cit.* of the 1867 Select Committees deliberations in this regard, 153–159.

\(^{81}\) See particularly the evidence of George Latham Browne, Esq., *Select Committee on the Operation of the Limited Liability Act 1867*.

The common factors animating the views of many witnesses were:

- that the Registrar of Companies and/or the Board of Trade should play a far greater role in vetting applications for registration under the limited liability legislation and in ensuring that companies, once registered, complied with the Act;
- that far greater publicity of the financial aspects of a company’s activities was required. In particular an annual balance sheet in common form should be available to creditors and shareholders.

In respect to the first of the above matters, one of the clearest statements in support of the need for the Registrar to play a much more pro-active role in the pre-vetting of applications for registration was made by Swinton Boult, a lawyer involved in finance and insurance in Liverpool. Boult considered that the immense degree of fraud occurring under the Acts could only be overcome by having the Registrar of Companies conduct a preliminary enquiry into every company applying for registration. Boult continued:

My impression is, that a great many objects for which companies are formed now, are not at all fit objects for companies to undertake, and would not be undertaken with a bona fide intention, and that those are the very companies which lead unsuspecting people, and people of small means, and ignorant people, into trouble, and that so long as the law exists in its present state, some means should be found to give these people a protection which they are utterly unable to find for themselves.

Q. I presume that you have in your mind the protection which is given under the Friendly Societies Act to the formation of friendly societies?
A. Yes ... 83.

In 1844 Gladstone had declared that in order to show up roguery all that was required was publicity84. This idea had been derided by Robert Lowe in 1856 as hollow rhetoric85. Now, in the wake of a major crisis of public confidence in

83 Evidence of Swinton Boult, Select Committee on the Operation of the Limited Liability Act, 1867, Q.1693; 1707;1711–1712.
84 William Gladstone, in introducing the 1844 legislation stated to the House of Commons: ‘Publicity is all that is necessary. Show up roguery and it is harmless.’ (Hansard, 3rd series vol.75 (1844) col.277.
85 Lowe remarked in regard to the capacity of the restrictive provisions of the 1844 Act providing effective protections for the public that ‘it is quite impossible by any legislation that we can devise really to protect the public in matters which they are fully able to protect themselves’. Hansard, 3rd series, vol.139, 1st February 1856, col.121. He remarked, however, later in his speech that the only way in which the legislature could
the limited liability principle, Robert Lowe’s position was beginning to appear indefensible. Nevertheless Lowe continued to defend that position. As a member of the 1867 Select Committee he grilled witnesses who suggested that publicity and greater state responsibility for regulation would result in a better class of corporate entities and provide greater protection for the creditor and investor. George Latham Browne was a particular target of Lowe’s impatience with those who regarded publicity as a workable principle. Browne had suggested that publicity of a company’s affairs was a means of protecting the ignorant. Requiring enterprises to provide a public balance sheet was not an illegitimate interference with their freedom to trade. Browne continued: ‘you must remember you are giving them a privilege (limited liability) ... and because you are giving them that privilege you have a right to put them under special restriction’\(^86\). Lowe then tersely asked Browne:

Q. (Lowe) Do you think you could enforce that law?
A. (Browne) You could make it compulsory.
Q. (Lowe) Yes: but do you think that you could enforce it?\(^87\)

Later in evidence Lowe again returned to the attack in response to Browne’s further heresy in advocating that officials in the Board of Trade should be responsible for checking various aspects of the affairs of newly registering companies before they be granted a registration certificate:

Q. (Lowe) Don’t you think that by requiring public officers to do all the checking in respect to the bona fides of an enterprise you would thereby put to sleep all private vigilance?
A. (Browne) I do not think that it could do so more than at present \(^88\).

Despite the expressed desire of many witnesses for a return to the system of 1844, or some other system built on the twin principles of publicity and state regulation, the tangible results of the 1867 Committee’s deliberations were slender. The main legislative result was the introduction of provisions which allowed companies to reduce their capital. Without such reductions many companies were unable to pay their shareholders dividends due to the substantial losses of capital

\(^86\) Evidence of George Latham Browne, Esq., Select Committee the Operation of the Limited Liability Act, 1867, Q.1233.
\(^87\) Evidence of George Latham Browne, Esq., Select Committee on the Operation of the Limited Liability Act, 1867, Q.1233; 1264–1265.
\(^88\) Ibid., Q.1279–1281.
they had suffered in the 1866 crash. They also had difficulty raising borrowings due to their apparently extremely low earning rates\textsuperscript{89}.

The amended Act, however, did not include any new publicity provisions, nor did it augment the administrative responsibilities of that ‘living Act of Parliament’, the Registrar of Companies. As has been noted in one commentary on the Select Committee of 1867 there was little relationship between the bulk of the evidence given by the witnesses to the Committee and the recommendations that were made by the Committee\textsuperscript{90}. Cottrell has noted in a similar vein:

Little of the factual evidence of the substantial incidence of abuse and near-fraud during the 1860s financial boom made any impact upon members of the Select Committee ... The committee merely supported the proposals of Chadwick’s pressure group regarding the ability to reduce nominal capital, to subdivide shares, and to issue bearer shares ... The reason for such an outcome is not difficult to establish. The Committee contained a large ‘City’ contingent amongst its membership, some of which, in particular Goschen and G G Glyn, either knew personally or had business connections with Drake, Newmarch and Chadwick\textsuperscript{91}.

Enshrined in the recommendations of the 1867 Select Committee was the argument made at the time to explain the need to exercise caution in relation to the introduction of publicity provisions – that too drastic a reform of company legislation would erode initiative amongst the business community. This rationale for not taking too pro-active a stance in relation to corporate regulation has ever since regularly recurred in reports on corporate law and business regulation as the philosophical basis for doing nothing to strengthen the powers of the state \textit{vis a vis} corporations. In this regard it has been suggested in one recent account of the history of business regulation in England that ‘the overriding principle on which the regulation of “fraud” has been based has been that at all costs, “free enterprise”

\begin{itemize}
  \item \textsuperscript{90} Rix, M (1936) \textit{An Economic Analysis of Existing English Legislation Concerning the Limited Liability Company}, unpublished M.Sc (Econ) thesis, University of London, 10. However, compare Rix’s assertion with the position advanced by Todd, G (1932) Some Aspects of Joint Stock Companies 1844–1900, \textit{Economic History Review}, vol. 4 (1), 1st series, 46–71 at 63–64 who states that a number of witnesses before the Select Committee considered the effects of the Acts were almost wholly good. Even though Todd acknowledges that a number of other witnesses regarded the growing incidence of fraud in commerce as related to the introduction of limited liability incorporation he considers this as of marginal interest as:
  
  [T]he problem of fraud cured itself in the next ten years. when the limitation of liability became effective ... a better and more efficient classes of entrepreneurs grew up. As a result the standard of commercial morality was raised and fraud decreased (at 64).
  \item \textsuperscript{91} Cottrell, P (1980) \textit{op. cit.}, 61.
\end{itemize}
must not be discouraged by fear of prosecution. Or, as Lord Romilly put it in his evidence before the 1867 Select Committee, ‘it is very difficult to know how one can introduce fetters upon the evil without introducing also impediments to the good.

Company Regulation in the Wake of Overend Gurney: A Heightened Moral Crisis

Despite the incorporation of the recommendations of the 1867 Select Committee in a new Limited Liability Act, public opinion was not satisfied. The collapse of Overend Gurney continued to constitute a source of concern amongst the public in relation to the moral condition of English commerce. One focus for this public concern in commercial morality was provided in the period following the collapse of the company when a criminal action for fraud was brought by a clergyman/shareholder against the directors of Overend Gurney (the reason for this was that actions for breach of the Companies Act had to be brought as a private prosecution, the Registrar of Companies having no power to initiate a prosecution). This action maintained public interest in the supposed decline in English business morality. Speculation was rife as to the reasons for such a decline in standards of conduct – was the introduction of limited liability legislation implicated? Was there a different class of individuals moving into business which might explain the decline in standards?

One correspondent to The Railway Times voiced the prevailing anxieties:

While in England thousands mourn the calamities that have overtaken them since 1866, and hundreds bitterly rue the confidence they placed in the great names associated with this individual enterprise, while a highly intelligent public meeting has been held in the City of London to protest against its management, while censure well merited has been ineffectually hurled on its administrators, in another part of Her Majesty’s dominions a festival has been held to celebrate the victory of wrong over right and eulogize the mendacity that has triumphed over the credulous weakness it has impoverished and betrayed ... In this inebriate ecstasy of triumph was there no flourishment of the finger on the wall? Do the proceedings at this moment in this modern Babylon convey no moral lesson?

93 Evidence of John Lord Romilly, Select Committee on the Operation of the Limited Liability Act, 1867, Q.1325.
94 Almost daily transcripts of the case are to be found in The Railway Times in 1869; a more abbreviated version can be found in the Annual Register for 1869.
95 The Railway Times, 6th February 1869, 135.
These views seemed to be shared by many. One of the leading businessman of his day, William Foster recorded in his diary on ‘Black Friday’, the day of the Overend Gurney collapse that ‘there was never anything like this, sick of everything’ and just a few months later when the bankers Agra and Masterman failed he felt ‘a great sinking nervousness, both in mind in body’. For Foster, the whole moral fabric of the commercial world which he knew and relied upon was being torn apart. He recorded in 1865 that ‘there was nothing but robbing and swindling going on’. He concluded that the only way to operate a commercial undertaking in such a decadent climate was to ‘trust no one’.

Despite the general agreement that English business had suffered a heavy blow to its ethical reputation with the demise of Overend Gurney, opinion was divided as to whether the re-establishment of moral order was properly the responsibility of the government or whether business morality was exclusively a ‘private’ matter between those involved in commercial activities. Further, the extent to which limited liability enterprise was implicated in the decline of business morality was a matter of dispute between various social groups, both within and outside business circles.

The initial problem presented by the public outcry attendant upon the Overend Gurney crash was to what extent moral confidence in business affairs could be restored without unduly affecting the traditional freedom from governmental interference which had been enjoyed by English business. The desire to keep regulation of business in the hands of the commercial community was actuated by a variety of factors. The principal one was a genuine fear that Parliament would be unable to devise a workable regulatory structure which did not impede initiative in commerce and economic expansion. The parameters within which ‘reform’ could occur as a result of the disaster of the Overend Gurney crash were consequently relatively confined.

The real nub of the problem was the fact that, as unpleasant as fraud might be, to create an overly harsh regime to deal with it would be extremely unpopular as it would adversely affect legitimate business interests, and not just miscreant corporations. This is a consequence of the often thin line dividing what is regarded as fraudulent and what is not. Due to the potential for harsh regimes of fraud prevention to discourage business initiative, governments are loath to take decisive actions in this area. This is a consequence of the fact that, as Michael Levi has commented in his study of the regulation of fraud, ‘fraud prevention has never been treated as super-ordinate to economic growth’.


97 Levi, M (1987) Regulating Fraud: White Collar Crime and the Criminal Process, (London: Tavistock), 78. Levi also notes that the dilemma in respect to the desirable balance between measures of regulation of fraudulent activities in business and the encouragement of economic initiative was exacerbated by the introduction of limited liability legislation due to the fact that subsequent to the introduction of that measure ‘the regulation of fraud
Nevertheless, the events of 1865 provided the most fruitful opportunity for reorienting the company legislation which was to occur for half a century or more. The Companies Act of 1862 was still relatively new and the sectors of the community which had been affected by the collapse were quite diverse. Within the parameters we have discussed above the discourse that took place in 1867 on corporate regulation demonstrates that the result finally settled upon was by no means the only possible solution being advanced at the time. There was no inevitability that modern company law would take the route which was finally settled upon.

We have, however, also observed that despite the force of opinion demanding change there was still a significant body of thought that wished to retain the status quo. In the controversy over the necessity for change there were on the one side small investors and those segments of the business community who had been ruined either by the failure of Overend Gurney or one of the consequent corporate collapses. These groups were in favour of greater government intervention in the affairs of joint stock companies. Segments of the specialist commercial and legal press were also forceful proponents of increased governmental regulation of joint stock companies.

On the other side of the regulatory fence was the bulk of the business community, who opposed government intervention in the affairs of joint stock companies, lest this set a precedent for greater government intervention in all business activities. Also, as suggested earlier, Robert Lowe (now Viscount Sherbrooke) remained unshaken in his belief that minimal intervention in commercial activities was the only appropriate manner in which to foster commercial initiative. As the architect of modern company legislation Lowe’s views continued to be accorded particular respect in official circles.

The Law Times was a particularly strong advocate of reform, dismissing arguments for the retention of the legislative status quo as the self serving

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98 The dissatisfaction of these segments of the investing public is reflected in the following letter from ‘A Shareholder’ published in The Standard of 29th January 1866:

‘As an unfortunate shareholder, beguiled by a plausible but false prospectus, I was induced to take some shares in a joint-stock company, which the promoters and directors have worked for their own profit and that of their friends, by absorbing the capital subscribed and reducing the company almost to a state of collapse. Many persons, such as clergymen and others who desire to put out their small savings to the best advantage, are no doubt in like circumstances, and could have no means of knowing whether the statements in prospectuses were true or false, until too late ... It seems to be high time that these games of “speculators, debtors, and swindlers” should be brought to a close ... The amendment of the Act itself is most needed, and it is to be hoped that the public press will lend its powerful aid in promoting such amendments as may be deemed necessary in the coming Session of Parliament ... ’
assertions of ‘the patrons of roguedom’\textsuperscript{99}. It mocked assertions that the investing public should look to themselves rather than the government for protection against the unscrupulous as about as rational as repealing the ‘laws that protect us from theft and murder, on the plea that the public ought to rely upon revolvers and bolts, and not upon statutes’\textsuperscript{100}.

Despite the great division of opinion prevailing in England as to what ought to be done in the aftermath of the Overend Gurney collapse no one doubted that something had to be done. The extent of the crisis in commercial circles is reflected in the contemporary reports of the normally sober money-market columnist for \textit{The Times}, who described the panic of 1865 as the worst he could remember: at least for some time ‘the mania of terror ... seems likely to proceed unchecked’\textsuperscript{101}.

A significant factor in the retention of the status quo in company regulation in the ‘new’ Act of 1867 was the distrust at the time in the efficacy of legislative solutions to commercial problems. One recent investigation of the attitudes of nineteenth century English businessmen to legislation regulating commercial activities has suggested that ‘the sense of discontent generated within the business community by its inability to obtain from parliament acceptable legal answers to long standing commercial problems was so pervasive as to justify the term alienation’\textsuperscript{102}. Chambers of Commerce also reflected in the course of their deliberations the preference amongst the business community for resolving disputes amongst themselves. The machinery of the legal system was regarded as inappropriate and ineffective in the resolution of such matters. A member of a deputation from the Leeds Chamber of Commerce expressed this in no uncertain terms when he and his colleagues met with the Lord Chancellor:

\begin{quote}
The present Law Courts are not fit tribunals for the satisfactory disposal of commercial cases, especially where they involve disputed facts and usage requiring special technical knowledge. Substantial, cheap and speedy justice [cannot] be obtained [in such matters before the Law Courts]\textsuperscript{103}.
\end{quote}

This level of disenchantment with the legislature and the courts\textsuperscript{104} in matters of commerce was reflected in the pages of a number of the contemporary journals

\begin{itemize}
\item \textsuperscript{99} \textit{The Law Times}, 3rd February 1866,196.
\item \textsuperscript{100} \textit{ibid}. 196–197.
\item \textsuperscript{101} \textit{The Times}, 9th May 1865.
\item \textsuperscript{103} Beresford, M W (1951) \textit{The Leeds Chambers of Commerce: A History}, (Leeds: Leeds Incorporated Chamber of Commerce), 47.
\item \textsuperscript{104} R B Ferguson has documented the preference of the English business community to solving commercial disputes by arbitration, rather than in the courts in Ferguson, R B (1977) ‘Legal Ideology and Commercial Interests: The Social Origins of the Commercial Law Codes’, \textit{British Journal of Law and Society}, vol.4, no.1, 18–38.
\end{itemize}
directed at the investing classes. One journal went so far as to suggest that no faith should be placed in the legislature to remedy the circumstances that had led to the corporate collapses of 1864–1866 as the legislature was ‘the culprit to which the whole of these enormities and these losses must be ascribed in the first instance’\textsuperscript{105}. The cynicism with which contemporaries regarded the capacity of legal or Parliamentary mechanisms to punish those truly responsible for the decline in commercial morality is evident in the comments of the English artist W R Frith on his series of paintings on the perils of speculation, \textit{The Race For Wealth}:

So ends my tale ... Both those who, in their eagerness to become rich, rush into rash speculation, and the man who cheats them, should all be punished. In the comic paper, Fun, the admirable artist of the journal, Mr Sullivan, laid hold of my puppets and made them play a different game. He represented the clergyman [who in Frith’s painting had engaged in rash speculation in companies] as ruined ... but he had declined to punish the swindler, who rolls along in his carriage ... without the least display of sympathy for the poor parson, who is reduced to sweeping a crossing over which the carriage has just passed. I will not dispute the truth of my friend Sullivan’s version, for I know instances of it: but naturally I prefer my own\textsuperscript{106}.

The upshot of this lack of confidence amongst the business community in the ability of Parliament to formulate legal measures to deal with the problems of commercial dishonesty was that no effective regulatory structure emerged. The Registrar of Companies denied responsibility for the enforcement of the penal provisions of the legislation and the courts were reluctant to convict for fraud lest they should discourage ‘honest’ businessmen from taking risks.

The unpreparedness of the courts to remedy the deficiencies of Parliament and themselves take a strong stand in respect to commercial malpractice was reflected in the acquittal of the directors of Overend Gurney of fraud charges, despite what appeared to be a convincing case against them. The Bench took the view that the directors of the company who were charged with fraud could only be convicted by the jury if the members of the jury were satisfied that the misrepresentation of the liquidity of the firm contained in the prospectus of the public company was both known as such by the defendants, and that they had an intention to defraud when they issued the prospectus. The Chief Justice, in advising the jury stated that the ‘great question’ was ‘what were the motives and intentions with which the defendants acted’. He continued that the jury members would, in determining

\begin{flushleft}
\textsuperscript{105} The Railway Times, 3rd July 1869, 651.
\textsuperscript{106} Frith, W (1887) \textit{My Autobiography}, vol. 2, (London: Richard Bentley & Son), 144.
\end{flushleft}
the answer to this question, have to ‘look at the position of the parties and all the probabilities of their having contemplated such a gigantic fraud’\textsuperscript{107}.

In addition to raising questions as to the ability and/or preparedness of English courts to regulate dishonest business practices this action also raised considerable questions as to the continuing reliance of the English judicial system on private prosecutions in such matters. The cost and inconvenience of mounting such actions, combined with the difficulty of securing a conviction, meant that all but the most determined of private prosecutors would be deterred from prosecuting those who are known to us today as ‘white collar’ criminals. As a result of the Overend Gurney litigation it was considered that there was a good case for the appointment of a public prosecutor. Such an appointment seemed desirable in light of the apparent decline in standards of conduct in the business community. *The Railway Times*, a weekly journal of some repute directed at the railway investor, was perhaps the most ardent advocate of the necessity of a system of public prosecution. It commented ironically on the ruling of the court in the Overend Gurney case that the private prosecutor would have to meet his own costs:

England is a free country, and men may ruin themselves in a way most consonant with their individual liking. England, to its boast, is not in possession of a paternal government. There is no such functionary as a public prosecutor, although it has been known and felt for years that to his absence must be ascribed the faults, the follies, the frauds, the snares, by which industry has been paralysed, provident habits plundered of their savings, and the vilest jobbers in public credulity rewarded without the lowest honours in the State\textsuperscript{108}.

*The Shareholders Guardian*, one of the first specialist general investment journals in England, also ran a series of articles deploring the absence of a public prosecutor to carry forward actions against the less scrupulous elements of the business community. The *Shareholders Guardian* asserted that one of the principal reasons for the proliferation of dishonest schemes during the 1860s was the absence of any public official to bring to court those who had deceived unwary investors:

[At present] no matter how barefaced the fraud, there is little or no redress for poor fleeced victims of a dishonest board of directors. If they talk of suing the board at law they are reminded that they are ‘partners’ ... if one of them proposes to invoke the criminal law he is told the prosecution will cost at least £100 for every £30 he will get allowed on ‘taxation’ notwithstanding the maxims that ‘offences against public morals shall be punished at the public expense’ and that ‘ justice is not sold’ ... Thus it is made pecuniarily the interest of both prosecutor and witnesses to let the delinquents alone. The ‘sharps’ know this quite as well as

\textsuperscript{107} The transcript of the Chief Justices summing up to the jury in the Overend Gurney case is reported on Xmas day 1869 in *The Railway Times*, 25th December 1869, 1259.

\textsuperscript{108} *The Railway Times*, 25th December 1869, 1256.
the ‘flats’, and what is not surprising, they act upon it, to the injury and scandal of the community\textsuperscript{109}.

Despite the compelling arguments for the appointment of a public official to act as a prosecutor in cases where a breach of the Companies Act had occurred or the management of an enterprise had apparently defrauded its members or creditors, no such appointment took place in the 1860s. Unless a creditor or shareholder stood to obtain a pecuniary advantage by suing company officers it was unlikely, no matter how grave the transgression of the directors or managers, that they would be dealt with through the formal legal system. The license this gave the more dishonest operators in the commercial community was enormous. Yet it was considered in government circles to lead to an infinite regression of demands if such an appointment were made, or perhaps that if an over-zealous prosecutor were appointed even the more savoury elements in the commercial world might find themselves in court for the breach of certain provisions of the Companies Act.

Despite the reluctance of parliament to provide for a public prosecutor in respect to breaches of the company legislation and to bring actions for criminal fraud on the part of company officials before the courts there was a continuing public campaign for the provision of such an officer throughout the 1860s and 1870s. In the 1870s the pressure on the government of the day became intense, with a number of witnesses before the 1877 Select committee on Company Law pointing to the absurdity of having strict penalties without empowering any public official to bring actions against the culpable. The \textit{Law Times} reported:

\begin{quote}
Sir George Jessel (Master of the Rolls) ... lays his finger on the whole matter when he maintains it is not the Acts themselves but in the means of working them that the defect exists. The ordinary law of fraud is amply sufficient for the majority of abuses under the Companies’ Acts; but in the case of these, as of so many other Acts of Parliament, there is no one whose business it is to enforce them. ‘We have no Public Prosecutor, and no one willing to incur the enormous expense and trouble of instituting prosecutions under these Acts as a rule, without expecting to derive any pecuniary advantage from it’\textsuperscript{110}.
\end{quote}

The need of a public official to bring actions against offending corporate officers was even more crucial in light of the English judiciary’s apparent reluctance to convict even the most unscrupulous members of the business community. No private individual could afford to risk the time and expense of a prosecution without a greater certainty of success than that promised by the English courts.

The difficulty the courts experienced in establishing dishonesty amounting to fraud in business dealings, and their general reluctance to convict company

\textsuperscript{109} \textit{The Shareholders Guardian}, vol. 1, no.3, 1864, 36.

\textsuperscript{110} \textit{The Law Times}, 27/10/1877.
officers is revealed in the judgement of Lord Justice Brett in the case of *Wilson v. Church*:

I must confess to such an abhorrence of fraud in business that I am most unwilling to come to a conclusion that a fraud has been committed ... it seems to me that no recklessness of speculation, however great, and that no extortion, however enormous, is fraud. It seems to me that no man ought to be found guilty of fraud unless you can say he had a fraudulent mind and intention to deceive.\(^{111}\)

**Conclusions**

The 1860s must be regarded as crucial years for the later evolution of English company law. Dissatisfaction with the permissive model of company legislation adopted by the English legislature in 1856, mingled with criticism of the failure of successive governments to provide for the public prosecution of corporate malpractice, created a climate in which a far harsher regulatory framework for companies might have been established. The 1862 legislation, which was to constitute the model for subsequent versions of the Companies Act, was subjected to severe attack, both in the press and by witnesses to the Select Committee of 1867. It was suggested by many of the leading experts of the day that the model embodied in the 1862 company legislation be abandoned and that it be replaced by a return to the more paternalistic structure of the 1844 Act. Cottrell has consequently characterized the 1867 Select Committee as a ‘lost opportunity’ in the development of English company law:

\[G\]eneral reform would have been relatively easy in 1867, with the 1862 Act having been operative for barely four years ... reform was both required and possible in 1867: a very persuasive case had been made out, backed by a substantial body of evidence. However, the committee did not take the initiative, and subsequently judicial decisions firmly established the law, which made reform more and more difficult.\(^{112}\)

As we will consider at greater length in a later chapter, the failure of the 1867 Select Committee to address the evidence presented to it of the adverse effects of the *laissez-faire* model (upon which the 1856 and 1862 Companies Acts were based) enshrined in English law a model of regulatory abstinence which ran against long-

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term community interests. This reflection is important as the overall scheme of the Companies Act of 1862 was not only retained in all later drafts of the company legislation in England but was also exported as a model statute to most of the English colonies. The influence of the 1862 Act did not even rest there. Due to the powerful position held by England in international trade, a number of foreign nations keen to foster trade with England fashioned their company legislation on the English model so as to best facilitate the entry of English companies to their shores and to allow branches of their indigenous enterprises to operate in England without the need for major organizational adjustments.

The legislative model of 1862 continues to have important ramifications in the present day. Whilst many of the details of the original legislation have been elaborated upon to such an extent that they would be scarcely recognizable to nineteenth century practitioners, the core features of the legislation have nevertheless remained unaltered. This is particularly the case in respect to the core belief embedded in Robert Lowe’s company legislation of 1856 that corporations are economic entities which owe their sole responsibility to their shareholders, even if by so acting the company may be acting contrary to broader social interests.

The responsibility of a company to pursue the interests of its shareholders at any cost, enshrined in the corporate legislation of 1856 and reinforced in the legislation of 1862, created an ‘asocial’ framework within which the modern corporation operates. The responsibility of the controllers of a corporation towards their shareholders is always asserted to run far deeper than that corporation’s responsibility to comply with ‘social’ legislation enacted by the state and which may restrict the company’s capacity to discharge fully its charter to its shareholders (for example, health and safety legislation, anti-pollution legislation, regulations in respect to the testing of drugs before their public release and so on.). If one were to look for the embodiment of the corporate psyche one would find it in the prescription to pursue profit and the shareholders’ interests at all costs, which has been inherited from the 1862 legislation.

113 Whist many colonial legislatures adapted the English legislation to local needs departures from the English model were generally restricted as a result of the colonies’ need to be able to integrate their business structures with those of the Home country. As perhaps an exaggerated example of the longevity of the influence of the 1862 legislation it might be noted that Ghanaian companies continued to be formed and regulated under an unamended colonial facsimile of the 1862 English legislation until 1961! For an extended commentary by the author on the ‘imperialist’ nature of much of the companies law applying in the British colonies in the nineteenth century see: McQueen, R (2008) The Flowers of Progress: Companies Law in the Colonies, Griffith Law Review, vol. 17, no.1, pp. 383–412.

The preservation of limited liability legislation in its current form, a relic of the heady days of *laissez-faire*, continues to have considerable relevance with regard to the effective implementation of economic policy. It might be asserted with some justification that economic stability is always in jeopardy when key players are provided with few disincentives in the form of effective sanctions from stepping over the boundaries of sound business practice. Alfred Marshall long ago commented that if the legislature and the courts could be ‘induced to treat more severely fraud wherever it is found in the high ranks of business, particularly amongst the promoters of companies’ then higher levels of economic stability would almost certainly follow.\(^{115}\) This observation continues to be relevant.

The 1870s and Early 1880s:
The Growing Acceptability of Limited Liability Incorporation

Introduction

The appropriate level of government intervention in corporate affairs remained an issue of considerable importance throughout the 1870s. So too did the issue of the degree of disclosure to which shareholders were entitled in relation to the financial affairs of the enterprise in which they were investing. These questions animated the deliberations of the Select Committee into the Operation of the Companies Act of 1877, which was presided over by an ageing Robert Lowe, now a peer with the title of Viscount Sherbrooke.

Despite the fact that the matters examined by the 1877 Committee were ostensibly the same as those animating the Committee of 1867, it would be a mistake to assume that very little had changed in the intervening decade. Indeed much had occurred to transform the English corporate landscape in the interim. For one, the nature of the enterprises that were incorporating had altered dramatically. Many more businesses in the key industrial sectors of the economy were taking on limited liability guise. As the numbers of these key enterprises adopting limited liability form increased, so too did the overall numbers of corporate entities in England. In addition the nature of the market in shares had altered significantly in the decade between the late 1860s and the late 1870s. Substantial improvements had occurred in the lines of communication between the various regions of England. New developments such as the telegraph had contributed to a reduction in the time it took to communicate between different parts of the country. This meant that what had been before a series of largely disconnected provincial markets in securities was, by the late 1870s, becoming more like a truly national market in shares and other securities. The result was that the available securities, subject as they were to greater scrutiny, were far less risky and of a higher standard than had hitherto been the case. However, whilst there was a higher quality of investments becoming available with the development of a national market there was also a further distance (both geographical and metaphorical) emerging between the enterprises in which shareholders invested and the corporations of which they were members.

One of the corollaries of the changing nature and complexity of the market in shares was that the character of investors and patterns of investment began
to change. First, there was a broadening of the range of available investments on the market. This led to a greater degree of specialization in investments, with flotations being aimed more specifically at particular varieties of investor. In this period there was also a significant growth in institutional investment. Such forms of indirect investment were particularly attractive to the middle classes who, through previous experience, were often unprepared to take the risk of investing their savings in an increasingly unpredictable and complex market-place in shares. This shift amongst the middle classes from direct to indirect forms of investment in joint stock companies is reflected in Cottrell’s breakdown of a sample of companies by occupation of shareholders for 1860 and 1885. It might be noted that whilst there is in this sample a decline of 2.2 per cent in the shareholdings of members of the professional classes there is at the same time an increase of 2.45 per cent in institutional shareholdings. (See Charts 5.2 and 5.3). These figures tend to support the hypothesis that there was a slow but steady drift from direct shareholding towards indirect shareholding amongst the middle classes from the 1870s onwards.

The 1870s, whilst representing a period of decline in the shareholdings of the middle classes, was a time in which there was a significant increase in the shareholdings of the industrial and commercial classes. Again relying upon Cottrell’s figures we observe that between 1860 and 1886 there was an increase of 7.5 per cent in the shareholdings of those involved in commerce (and within the groups in this category a significant increase of 15 per cent in the shareholdings of merchants, making them the most significant group of shareholders). There was also in this period an increase in the shareholdings of those in manufacturing and secondary industry of 4 per cent and of those in the service industries of almost 6 per cent. Part of the increase in shareholdings amongst these groups is explained by the conversion of many undertakings to limited liability form in the 1880s. However, at least a significant proportion of the increase is represented by a shift of these groups savings from the more ‘steady and secure’ forms of investment, such as Consols, to the more lucrative outlet constituted by shares in joint stock companies. These groups of shareholders were particularly attracted to investment in preference shares, which started to be used extensively by corporations during the 1870s. As more ‘secure’ forms of joint stock company investments became available, many in commerce and industry chose to put a certain percentage of their surplus wealth into shares of other enterprises, rather than invest in low yielding ‘blue chip’ investments or to reinvest all their surpluses in their own businesses.

2 Jeffreys, J B (1938) Trends in Business Organization in Great Britain Since 1856, Unpublished Ph.D. thesis, University of London, comments: ‘At this time the desire of the middle and upper classes for a remunerative outlet for their savings was more frequently stated ... [indeed] until the decade of the 1880s this desire for investments at a high rate of interest irrespective of the real demand for capital continued to be a feature in some degree of each successive “burst” of company flotation.’ (at 57–58).
Despite the overall increase in the numbers of shareholders during this period the market in shares was quite segmented. ‘New’ corporate entities did not always seek equity capital from the wider public. The more select enterprises sought to place their shares rather than open the floodgates to all and sundry. David Chadwick stated to the 1877 Select Committee on the Companies Act that in most of the large enterprises which he converted to limited liability companies in the 1860s and early 1870s the shares were offered to his firms’ friends, usually through a privately circulated prospectus or circular. Nevertheless, a sizeable proportion of the existing businesses which chose to convert to corporate form during the 1870s issued their shares at such modest denominations that they constituted investment opportunities for all but the humbler classes. However, many of these apparently attractive investments were businesses on the decline. In his evidence before the 1877 Select Committee, Chadwick, the greatest company promoter of his age, estimated that 39 of every 40 conversions were businesses on the downgrade. An investment manual of the late nineteenth century captured the prevailing view of conversions when it stated to its readers:

Look with suspicion upon companies, and especially upon private firms converted into public companies. The majority are over-capitalized, or are converted because latterly they have become unprofitable, the machinery has become antiquated, or fashions have changed. The conversion also usually takes place at a time of general inflation in prices, and it is afterwards found that the concern has been taken over at a price far above its value...

Another important development of the 1870s was the emergence in significant numbers of institutional investors. One of the reasons for this development was the growing mistrust of middle and working class investors in lower grade investments. Indirect investment through the placement of their savings in institutions allowed them to spread their investments and thus lessen the risk of losses occurring. As a consequence of this development many of the principal investors in the larger undertakings converting from private status to limited liability during the 1870s

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3 Evidence of David Chadwick, Select Committee on the Companies Acts 1862 and 1867, B.P.P., 1877, VIII, Q.2041.

4 Evidence of David Chadwick, ibid., Q.1536. Shannon (1932) ‘The Limited Companies of 1866–1883’, The Economic History Review, vol. 4, 1st series, at 303 comments on this assertion of Chadwick’s: ‘The arithmetic is perhaps specious, but its lesson is clear. Partnerships which saw little chance of passing on their liabilities to the public would be tempted to make the transfer to their creditors, especially as judicious use of debentures could enable them to sweep back into their own pockets assets that should have gone to their creditors. Where creditors continued to trade with the same people, once partners, now shareholders, they could only look to the limited company for payment ...’.

5 Anon., (1892) Counsel to Ladies and Easy-Going Men on Their Business Investments and Cautions Against the Lures of Wily Financiers and Unprincipled Promoters, (London: Leadenhall Press), 41–42.
were institutional rather than private investors. Banks, insurance companies, trusts, public bodies and so on, all began to place substantial funds in limited liability companies during this period.6

In noting this development it must be recognized that these bodies not only invested in shares of joint stock companies, but also invested significantly in debentures. They also, at least initially, favoured investment in larger infrastructural enterprises such as railways. The Railway Almanack remarked in 1869 in this regard that ‘if railway companies are as a body, the largest borrowers of the age, the life assurance offices as a body are the largest lenders’.7

Also noteworthy is the fact that the companies formed in the 1870s began again to rely on a number of legal devices intended to restrict shareholder participation in corporate decision-making. A number of the practices being employed at this time had in many cases not been seen since the heady days of railway investment in the 1840s. These devices were largely aimed at restricting the capacity of members to play a meaningful role in the management of the enterprise by constricting their voting power. The use of different classes of shares with unequal voting rights and the re-emergence of proxy voting meant the possibility of companies functioning as ‘little republics’ was becoming a remote and utopian ideal.

The Boards of Directors of companies probably relished these developments – it meant that they would no longer have to go through the bothersome process of being required to justify their actions to hostile general meetings of members principally composed of restive small shareholders. This bi-annual event was apparently so trying an experience for members of the boards of companies that, as one director of a railway company was moved to remark in the late 1850s:

He had often been surprised that men of standing in the country would submit to the unpleasantness of the half-yearly encounters with small shareholders, anxious for an opportunity to discharge their spleen whenever anything went contrary to their own isolated interests.8

The pretence that the limited liability company functioned as a democracy was well and truly on the wane by the 1870s. Usually the decline in shareholder participation is attributed to the fact that shareholders were largely rentiers, with little interest in the company to which they belonged, at least as long as they were receiving a steady and secure return on their investment. This, however, is belied by the experience of the early years of limited liability incorporation. As we have seen, many shareholders regarded their role in the companies to which they belonged as important and many participated actively in the deliberations

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6 Jeffreys, J B (1938), 376.
7 The Railway, Banking, Money and Insurance Almanack, (1869), 48.
8 The Railway Times, 6th November 1858.
of the company at general meetings. The gradual disappearance of shareholder involvement in enterprises has to be attributed, therefore, to something more than simple indifference. It would appear that the decline occurring in the 1870s in shareholder participation was contingent on a number of factors. Amongst these was a variety of subtle alterations in voting procedure occurring within companies at the time, the growing use of different voting rights being attached to different classes of shares, the escalating use of proxy voting and the growing significance of institutional shareholding.

The process of the separation of shareholders and the companies to which they belonged occurring in the 1870s has been commented upon by Ireland, Grigg-Spall and Kelly. These authors see the redefinition by the courts of the share as property in its own right, which was occurring in the 1870s in cases such as *Ex parte Union Bank of Manchester*, as a decisive moment in the severing of shareholders and the corporation, and the consequent inevitable evolution of the shareholder into nothing more than a mere rentier. They contend:

Most important of all for the future development of company law, with the legal constitution of this new form of property a gulf emerged between shareholders and their shares. Companies owned the productive capital, the actual assets; shareholders owned the fictitious share capital, the shares which they could now sell at will. Shareholders were now ‘completely separate’ from their companies.

Also implicated in the demise of corporate democracy was the continuing lack of access for the common shareholder to any of the key information necessary to play a meaningful role in managing the corporate entity or acting as a watchdog over the behaviour of the directors and managers who had delegated power to act on the companies behalf. As a result of these developments the boards of

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9 The members of companies were however considerably restricted in their efforts to exercise a role in management due to the minimal information, particularly on financial matters, made available to them by the directors of the enterprises in which they held shares. George Latham Browne commented in this regard to the Select Committee on Companies, 1867: ‘I think there is a want of machinery in the Act to insure publicity which, I believe, it was the object of the Act to insure ... the balance sheet should be made available as it is a very good warning to the shareholders as to the real state of the company’ (Q.1112 1143).

10 See Hunt, B C (1936), 135–136. The techniques associated with proxy voting as they developed in the 1860s had first been experimented with on a large scale in the railway promotions of the 1840s.

11 *Ex parte Union Bank of Manchester*, 187, 12 Eq. 354.


13 There is a discussion of the various extant jurisprudential theories as to the role of the shareholder in Stokes, M (1986) ‘Company Law and Legal Theory’, in Twining, W
most corporations became, as William Reader has suggested, ‘self-electing, self-perpetuating oligarchies, partaking very much the nature of private clubs, not obliged to admit new members unconsenting to those already there’\textsuperscript{14}.

At the same time as corporate managements were entrenching themselves there was a steady increase in the professionalization and bureaucratization of various aspects of corporate activities. This was particularly so in the area of the management of corporate accounting. By the 1870s enterprises were increasingly beginning to employ professional accountants and auditors. One accounting historian has aptly described the 1862 Companies Act as the ‘accountant’s friend’\textsuperscript{15}. Along with a growth in the need of companies to deploy the services of accountants, the 1870s also saw an increasing number of enterprises relying upon a constant stream of advice from their solicitors on a range of matters that touched almost all aspects of their operation. Sir George Stephen described this transformation in the role of the attorney as that from an age in which ‘the bulk of legal practice ... was to be found in petty personal disputes and delinquencies – in small controversy between small people ... [to an age in which] there is scarcely any important transaction in which a merchant can engage that does not more or less require the counsel of his solicitor.’\textsuperscript{16}

In addition to the increasing importance of the accountant and solicitor as advisers to the world of commerce, a process which was considerably accelerated in the 1870s by the growing utilization of limited liability corporate form, there was also a major growth in the significance of other types of professional adviser at the time. For instance with the growth in a national market in shares the Stock

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\textsuperscript{15} Brown, R (1905) \textit{History of Accounting and Accountants}, (London), cited in \textit{Proceedings of the Autumnal Meeting} Institute of Chartered Accountants in England & Wales,13. The full quote reads: ‘The Companies Act 1862 may be termed the accountant’s friend, for it provides him with an occupation (and incidentally with remuneration) at the inception, during the progress and in the liquidation of public companies.’ The role of the limited liability legislation in establishing the accounting profession on a much steadier footing than had previously been the case has also been remarked upon by Woolf, A H (1912) in \textit{A Short History of Accountants and Accountancy}, London, reprinted 1974, (Osaka: Nihon Shoseki Ltd), at 176: ‘The Companies Act of 1862 offered new fields of lucrative employment for accountants, and no doubt did much to attract ambitious young men to seek their fortunes in the profession. As is well known, it was section 92 of that Act which created the Official Liquidator ... and in most cases a professional accountant was appointed as liquidator. When one reflects that during the twenty-two years following the passage of the Act ... no fewer than 13,820 companies disappeared from the register, it is easy to understand why the Companies Act is spoken of as “the accountant’s friend”.’

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Exchange became a much enhanced marketplace for shares. With this development the professional stockbroker became a much more crucial figure in corporate flotations and the general business of fundraising.

In the remainder of the chapter the implications of some of the refinements and developments of the joint stock company form pioneered by the accounting and legal professions during the 1870s and 1880s are explored. So too are the origins and nature of growing demands for reform to company law at this time and the countervailing forces lobbying for a retention of the status quo in respect to corporate law and its administration. The next section of the chapter specifically deals with the 1876 Companies Bill proposed by David Chadwick and his associates and the subsequent fate of those proposals before the Select Committee on Companies Law of 1877. The possible effect of the growing numbers of private company registrations during the 1880s in slowing the reform process is examined. In addition the implications for the subsequent development of company law of the importing into company law of a number of concepts from partnership law during this period is considered. Finally the chapter turns to an examination of refinement of forms of security during this period which had the effect of further diminishing the influence on corporate policy of those holding interests in companies. The complex process leading to the separation of ownership and control in the modern corporation and role of developments in the 1870s and 1880s in finally constituting the holders of interests in the modern corporation as rentiers is briefly examined in the latter sections of this chapter.

The 1876 Companies Bill and the 1877 Select Committee and Companies Act

The Select Committee established in 1877 to inquire into the operation of the Companies Acts of 1862 and 1867 was preceded by a Bill to amend the Companies Acts in 1876. This proposed legislation was sponsored by David Chadwick and was supported by most of the English Chambers of Commerce. The principal characteristic of the 1876 Bill was its attempt to legislate for a greater degree of financial disclosure by corporate managements to their shareholders. The Association of Chambers of Commerce had debated, from the beginning of the 1870s, the necessity of a new Companies Act:

[T]o remedy known and acknowledged defects, to prevent fraud and to prevent men, either as agents or brokers, receiving any remuneration or commission without the knowledge of every subscriber; to secure a uniform balance sheet and profit and loss statement17.

Despite wide support amongst the business community for the new Bill it stalled in the House of Lords as a consequence of the opposition of the Lord Chancellor who considered there was insufficient time left in the session to properly discuss such an important measure.

In addition to the related questions of fraud and disclosure the 1876 Bill was concerned, as was the case with the Bill of 1867, with the issue of reduction of capital. Whilst, as we have seen, the 1867 Act explicitly provided for reductions of capital, this legislative accommodation to the requirements of commercial interests had been subsequently subverted by the courts in the *Ebbw Vale Iron Company* case. In this case the Master of the Rolls Sir George Jessel reached the conclusion that a company was only permitted by the 1867 provision to reduce the uncalled component of its nominal capital. Jessel had reached this extraordinary decision in an apparent attempt to protect the interests of creditors. The ideological component to Jessel’s decision in the *Ebbw Vale* case became even more apparent when Chadwick’s amending legislation was advanced in 1876.

Of the members of the Select Committee appointed in 1877 to look into the desirability of the reforms contained in Chadwick’s Bill, a number were commercial friends of Chadwick. A number of other members of the Committee, whilst not ‘friends’ of Chadwick, were known to be sympathetic to the proposed reform of the Companies Act.

There was, however, little unanimity on the Committee on the question of regulation. The Committee was chaired yet again by the aged Viscount Sherbrooke (that is, Robert Lowe), who still clung dearly to his original legislative model for company regulation. With his powers failing and with a substantial re-evaluation of the tenets of *laissez-faire* economics in train Lowe was not able to dominate the proceedings in the same way as he had with the 1867 Committee. The division of the Committee on the question of the regulatory function of the government was particularly marked. With regard to the necessity for greater government intervention in regulation of corporate entities, the Committee finally concluded that ‘the frauds and losses which have been occasioned by companies (limited) render further regulation in the formation of these companies under the Acts expedient’. However, in reaching this conclusion the Committee had split 9–6:

[On the one side there was] the Chairman, Robert Lowe, [who] moved a Resolution which ... recited the success of limited liability incorporation overall but noted the number of failures which had occurred. It however stated that ‘the only remedy against loss in these, as in all matters of business, is that a man before he parts with his money or pledges his credit should inquire carefully into the nature of the undertaking, and the character and credit pecuniarily and morally of those with whom he is to be associated.’ [On the other side] there were some other members of the Committee [who] took quite a different view to the resolution of the problem of fraud and abuse. [For instance] Mr Gregory proposed a resolution which stated that though the Act on the whole had been beneficial ‘the operation of these Acts is susceptible of much abuse; although
certain provisions are contained in such Acts for meeting or correcting such abuse, those provisions are practically inoperative.\(^{18}\)

Despite the fact that many members of the Committee were sympathetic to Chadwick’s proposals for reform, the Committee in its final Report nevertheless suggested that Chadwick’s Bill of 1876 be abandoned and a number of less dramatic reforms be undertaken.

One of the most dramatic departures from Lowe’s original model suggested by the Committee was the proposed adoption of the two-part registration process, which had been one of the key aspects of the 1844 Act previously criticized by Lowe as unworkable. The Committee also recommended that the principle of disclosure be revived. This was another of the key aspects of the 1844 legislation which had been rejected as impractical in 1856. These retreats from the laissez-faire principles of company regulation expounded by Robert Lowe may at least be partially explicable in terms of the growing realization in the commercial community that prudence and gentlemanly conduct could no longer be relied upon to ensure morality amongst the commercial community. The establishment of a national market in shares and the broadening out in the areas of economic activity meant that much of the past agreement on such questions between those involved in commerce was disappearing, or had already disappeared, by the last quarter of the nineteenth century.\(^{19}\)

There was also a dawning recognition that the commercial world was no longer so honourable (if indeed it ever had been) that it could be completely trusted to regulate its own affairs. The decline of commercial morality was commented on in many different settings, not least of which was the courts. For instance, Mr Justice Field commented in 1887 on the moral sickness inhabiting the commercial world in *Harrington v. Victoria Graving Dock Co.* citing it as but an instance of a wider problem. He stated that ‘the present case affords an example of how sadly loose commercial practice has become’.\(^{20}\) His views were relatively widespread, indeed so widespread that many asserted that, just like the Roman Empire, English commerce had entered a decline from which it would in all probability never recover. Novels such as Anthony Trollope’s *The Way We Live Now*, published in this period, are primarily chronicles of the moral decline of the ‘English way of life’.\(^{21}\)

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\(^{19}\) Jeffreys, J B (1938), 102.


This mounting pressure in England for a more interventionist model of company regulation was, however, counterposed by the disdain of a significant section of the commercial community for any governmental intervention in their affairs. In particular there was a group of traders and representatives of financial interests in the City who opposed change to the regulatory provisions of the Companies Act. This group consistently asserted that disclosure would carry with it disastrous implications for competitiveness. Intervention by the Registrar of Companies or by the courts would only add to the overall costs of carrying on business22. This group also expressed the view that interventions of this nature would almost certainly be accompanied by inappropriate determinations by such bodies in respect to commercial affairs, due to their lack of technical expertise in such matters. Judges and officials in the Board of Trade were, so they asserted, amateurs in matters of commerce23.

Against these assertions of the necessity to maintain the status quo in respect to corporate regulation and keep government intervention to a bare minimum, an assortment of ‘parsons, grumblers, honest solicitors, and other ... representatives of the nascent professional bodies’ of the 1870s carried on a campaign for the

22 William Newmarch is an example. In the Evidence he gave to the Select Committee on Companies of 1867 he expressed the following opinion as to the appropriateness of Government intervention in the regulation of limited liability companies:

Q. (Mr Kirkan Hodges): I understand you to state that the less the Legislature interferes with these companies, and their Articles of Association and their dealings, the better?

A. Certainly. The moment the Legislature takes upon itself the function of finding common sense for mankind it does a great deal of mischief (Q.1065).

23 This is implicit in the Evidence of Mr Thomas Webster, a Q.C. specializing in company law, to the 1867 Committee:

Q. You stated did you not that the public did not generally inquire into the constitution of a Joint Stock company?

A. I think not; I think that all experience shows, and the last witness stated, that people come in and sign Articles of Association like sheep, without reading them.

Q. In any alteration of the law, would you adopt the principle that it is desirable to protect the public?

A. No; I think the public must be left to take care of themselves ... I should wish to state that I think that I consider there is a great delusion with regard to penalties. I believe penalties to be practically useless because they are either too small to be worth suing for, or too large to be enforced, and therefore another method must be adopted of compelling directors to do their duty (Q.765–767).

The concern of businessmen as to the domination of debate on appropriate levels of regulation of companies by lawyers and politicians is reflected in the following comments of the President of the Brisbane Chamber of Commerce in his Annual Report for 1891 as to need to augment the input of the Chamber in the formulation of mercantile legislation: ‘It is a standing disgrace to this Chamber that so few of our members are found in the legislature. We leave most important mercantile legislation to a House in which we are scarcely represented at all; while the legal profession, which should not be represented as largely as the mercantile community, has almost a preponderating influence.’
institution of measures for the external regulation of corporate behaviour. This odd assortment of social cranks, representatives of the investing classes and members of the professions, whilst not having an unbounded faith in external regulation, nevertheless felt that the symbolic value alone of the threat of imprisonment or a heavy fine would be effective in reining in the pervasive ‘moral sickness’ amongst the commercial classes. Sir Edmund Beckett, in commenting on self regulation, represented the views of many English professionals of his age when he stated:

> Resolutions of merely private voluntary societies can do practically nothing. They cannot effectively try even their own members and those who are not members and prefer bribery will laugh and say ‘Well, all the better for us who are not members of your absurdly scrupulous body’. Convictions would be difficult, even under an Act of parliament, but they would occur now and again and a public conviction and punishment would be a very different thing from the infinitely small risk of expulsion from a private society.

The 1877 Report, by the slim majority noted above, decided to recommend the adoption of a much more interventionist role for government agencies in the regulation of companies. Nevertheless the prevailing balance of forces in the debate on regulation is reflected in the ultimate fate of the Report. As Cottrell has noted, ‘the Committee’s Report was ignored in the most pointed way: none of its recommendations was embodied in the 1877 Companies Act which consisted of only six clauses, which merely enabled any type of share capital to be reduced.

Nevertheless, while reform was rejected in 1877, much as had been the case in 1867, there was a number of significant alterations in opinion between the two periods. First, it appears that whilst in 1867 there had been unanimity amongst the commercial community in opposing any legislative provisions requiring greater levels of financial disclosure by corporations, this was no longer the case in 1877. Certain sectors of the commercial community were beginning to consider that a total absence of government regulation encouraged the least desirable elements in the commercial community to be parasitic on their more honourable brethren. Commercial sanctions were not always effective against the unscrupulous, particularly when it was becoming more and more difficult to identify them from behind the corporate veil. Systematic frauds committed in corporate guise, such as ‘long firm fraud’, convinced many members of the industrial and trading

25 The Times, 8th January 1877.
26 Cottrell, P L (1980–), 64.
27 ‘Long firm fraud’ is the practice of either fraudulently or negligently using the existing credit of a company to accumulate debts far beyond what it can afford to repay and then going into liquidation as and when these large debts fall due. Depending on the circumstances and those involved long firm fraud can either be quite crude in the manner of
communities that outside regulation was necessary if such practices were to be effectively eradicated.28

The growing concern within the commercial community that systematic frauds committed in corporate guise be eradicated is reflected in the fact that Chadwick’s Bill was sponsored by the Association of Chambers of Commerce, which was representative of over 120 Chambers of Commerce in the United Kingdom. The Association remained unwavering in its support for drastic reform throughout the period 1876–1877. In the minutes of its proceedings the failure of Chadwick’s reform bill was lamented, as the ‘bill commended itself to the mind of every commercial man connected with the Association’29. One of the delegates to the Association, Mr Sampson S Lloyd, declared to his fellows that if individuals wished to carry on their business affairs through the agency of a limited liability company ‘it was but fair that they should let the public know who and what they were, and how they were going on’.30

Consequently the failure to legislate for the fuller disclosure provisions suggested by the 1877 Select Committee cannot be simply explained in terms of the opposition of capitalists. In any explanation of the forces retarding change some account must be given of the role of officials in the Board of Trade, the importance of Robert Lowe’s continuing opposition to a more proscriptive system, and the significance of possible differences between industrial and financial capitalists over the question of appropriate mechanisms of regulation.

Was there a certain inertia in government and departmental circles by the last quarter of the nineteenth century? A body of literature exists which suggests that the culture of regulatory agencies is set at an early date and is subsequently extremely difficult to change.31 In the case of the office of the Registrar of Companies, the ‘regulatory culture’ which was firmly established by the late 1870s was, of course, that the office had no role in regulation. The inertia of the bureaucracy would in this instance have been supported by the government of the day, no matter what its political complexion. This was due to the fact that by the late nineteenth century the registration of companies had become a lucrative money earning activity for the consolidated revenue. With no regulatory responsibilities attaching to the activities of the Registrar’s Office the cost of running such activities was relatively low. On the other side of the ledger the income of the office was relatively high with

28 Michael Levi (1980) in The Phantom Capitalists, op. cit., charts the rise in systematic frauds in the late nineteenth century and the difficulties this presented for the commercial community of the time.
29 Ilersic, A R (1960) 79.
30 ibid.
fees for corporate registration increasing exponentially with time. No government would, except *in extremis*, wish to disrupt such a comfortable state of affairs.

In addition to opposition to change in government circles there were also groups of capitalists who opposed the proposed reforms. Despite strong support for the measures proposed in the 1877 Report from sections of finance capital led by Chadwick and his associates and from sections of industrial and merchant capital led by the Associated Chambers of Commerce, there was nevertheless significant resistance to the proposed reforms amongst other factions of capital. For instance, those company promoters dealing in lower classes of flotations than Chadwick and his associates handled were not supportive of increased regulation and augmented disclosure requirements. Amongst those involved in trade there was only mixed support for the proposals. Smaller capitalists who were just starting to convert their family undertakings into corporations in the late 1870s were opposed to enlarged disclosure requirements. They considered that such requirements would severely compromise their privacy. They also, quite correctly, considered that such provisions would significantly increase the costs associated with incorporation for small undertakings. These anticipated increases in the cost of incorporation would, so it was suggested, mean in practice that corporate identity would again only be available to larger industrial and commercial undertakings.

The debate around the imposition of greater regulation on corporate behaviour was, at least by the late 1870s, extremely complex and is not reducible to any simple explanatory formula such as the ‘interests of capital’ versus ‘the interests of the people’. The deliberations of the 1877 Select Committee on Company Law can be seen as a crucial point in what had been a continuing debate in England from 1844 onwards as to the appropriate levels of disclosure and paternalism in the regulation of companies. On the one hand there were ideologues like Robert Lowe who strongly believed financial disclosure should not be prescribed by legislation. He and his followers also strongly rejected the notion that the government should take a paternal role in corporate regulation, due to the problems it would foster in creating a false impression of the government as a ‘guarantor’ of corporate investment. However, by the 1870s Lowe and others of his ilk were losing ground to those who believed that certain minimum levels of disclosure should be prescribed. The dividing line between those advocating reform and those arguing for the maintenance of the status quo was not radical, but rather a matter of degree. Those groups advocating greater levels of regulation and disclosure still adhered in large part to the principles of *caveat investor* and *caveat creditor*. However, unlike their adversaries, they considered that investors and creditors must be entitled to a certain level of information in order to be able to protect their investment or loan. Having been given this information it was then up to investors and creditors to protect their own interests. One subsequent government report put

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32 Cottrell, P L (1980), 63–64.
33 See the Evidence of William Newmarch and Thomas Webster to the Select Committee on Company Law, 1867, fn.20.
the point neatly: ‘if people will not avail themselves of the means of information when given, it is not the law which is in fault’.

By late in the century, one point of commonality between the advocates and the opponents of greater disclosure in respect of corporate affairs was that both groups still saw a minor regulatory role for whichever government department happened to be responsible for the administration of corporations. It was conceded by both groups that in a scheme of regulation relying to a great extent upon individual vigilance the only role of the state was to ensure that the appropriate information was disclosed to interested parties. Beyond that it had no role. The government body charged with overseeing corporations should, so it was agreed, consequently play no role in inquiring into the soundness of companies on its register for to do such would be ‘to throw what ought to be the responsibility of the individual on the shoulders of the State’.

Whilst those in the commercial world, no matter on which side of the fence they stood in relation to disclosure, had this common belief in the need to minimize government intervention in corporate affairs, there were other groups which were beginning to question entrenched opinion in favour of non-intervention. In particular certain investor interests around the investing classes had begun, by the late 1870s, to advocate a much more active role for government in business regulation.

Despite the campaign led by investors for greater controls on the behaviour of company promoters and directors, no one engaging in the debate on appropriate levels of regulation and disclosure went so far as to advocate a model of governmental ‘paternalism’ for commercial undertakings. This might at first seem surprising given the apparent analogies existing between corporate regulation and the experience of ‘paternal’ regulation in respect to other forms of corporate entity, such as Friendly Societies, Industrial and Provident Societies and Building Societies. These latter enterprises were formed under legislation that regulated their affairs by direct government intervention. This model of control was generally thought to have worked well in this sector in maintaining prudential standards and minimizing defaults. The question then arises: why were the practices in respect to assessing the *bona fides* and soundness of friendly societies and similar bodies not considered suitable in the case of limited liability undertakings?

Ferguson and Page have attempted to explain these differences in regulatory approach between friendly societies and related bodies on the one hand and ‘commercial’ undertakings the other hand on the basis of the characteristics of the investors in each type of enterprise. They assert that paternalism could hold sway

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34 Report of The Davey Committee on Company Law (1895), para. 6.
35 *ibid.*, para. 42.
36 David Chadwick provides an example of such opinion. In his Evidence to the 1867 Select Committee Chadwick stated that the powers of the Registrar of Companies should be much expanded, to become more like those exercised by the Registrar of Friendly Societies under the Friendly Societies Act of 1850 (Q.870–871).
in those contexts where ‘specific protection for the savings of those of lowly station could be rationalized as a means of fostering thrift and providence, and hence self-reliance, with the ultimate prospect of reducing pauperism on the parish’\(^{37}\). Despite support for the paternalist model of regulation in the context of ‘working class’ investment it was considered anathema in respect of private corporations. In the latter case it was considered that investors should be able to look after their own interests and if they could not then they deserved to bear the full brunt of the consequences of their want of due care. No major social grouping, at least in the 1870s, supported tight paternal regulation of limited liability companies. As Daunton has remarked, voluntarism was a crucial component of the nineteenth century state which reflected prevailing bourgeois notions of self-sufficiency and independence\(^{38}\).

This perspective nevertheless obscures the quite different notions of voluntarism that were held by different segments of the bourgeoisie. The debates of 1876 and 1877 over the appropriate level of disclosure on the part of companies can be seen as part of an ongoing debate as to the manner in which ‘self regulation’ should be conducted. The attempt on the part of Chadwick and his supporters to have the state adopt a system of voluntary regulation based on the public availability of key information relating to registered companies was a significant departure from the original notion of the 1856 Companies Act that participants in the marketplace should individually ascertain key information by way of private inquiry. The position advocated by Chadwick and his group was a return, at least in part, to the principles of the 1844 Joint Stock Companies Act, which had based voluntary regulation upon the alliance of private vigilance with full disclosure. Chadwick and his supporters suggested that the model propagated by the 1856 Act could no longer properly function with the effective demise of shareholder democracy and the growing impersonality of shareholding.

Amongst the strongest supporters of Chadwick’s proposal were those from the burgeoning ranks of the professions. This group often went further than Chadwick and his supporters by advocating, in addition to augmented disclosure requirements, an expanded role for governmental agencies in the regulation of corporations. Accountants, solicitors and engineers all had considerable familiarity with corporations, both in their professional capacity and as investors. They consequently knew most of the pitfalls of a system of corporate regulation which did not require full disclosure. Their particular version of voluntarism was conditioned by practical experience of the Joint Stock Companies Act of 1856 and the successor legislation of 1862 and 1867.

Whilst the professions and the Chambers of Commerce supported the type of reforms in company regulation being proposed by Chadwick in 1876 it seems that


the Board of Trade and certain interests in the City opposed those proposals. The opposition by elements of those in the City to a more onerous regime of disclosure is reflected in Mr Edward Stanhope’s response to the reform proposals put before the 1877 Select Committee:

Most of the safeguards which have been proposed would be easily evaded by the dishonest and would have a deterrent effect upon the honest promoters of companies. Grieser has also commented on the antipathy to any form of regulation amongst those involved in the world of finance in the City. He attributes the gentlemanly notions of voluntarism there prevailing to the common public school and university background of its members. Grieser suggests that the effect of this common ‘cultural capital’ amongst those in the City was to engender a misplaced faith in gentlemanly ethics as a sufficient means to ensuring that honourable behaviour would occur in commercial dealings:

The belief in the ethics and high standard of conduct in the City has led to a self complacency, and has blocked the path of legal reform, particularly with regard to company legislation ... As one critic has pointed out, that because the City of London as a whole is honourable it does not follow that all men therein are honourable men.

As suggested earlier the Board of Trade appears to have been opposed to the proposed changes on largely pragmatic grounds. An increased range of responsibilities for the Company Registrar’s office would probably not attract additional governmental funds to the Board. Rather, monies dedicated to some other aspect of the Board’s responsibilities would probably have to be diverted into company regulation. The status quo, in contrast, provided that the Board be responsible for an office which was very cheap to run, was uncontroversial whilst only invested with ministerial powers and was a high revenue earner. It is thus perhaps not surprising to find that even in 1886, when the tide had well and truly turned in favour of a more stringent regime of disclosure, that one of the only three witnesses before the Royal Commission on the Depression in Trade to continue to oppose reform of the Companies Act was the former Secretary of the Board of Trade, Sir Thomas Farrar.

The Corporation as Quasi-Partnership

The 1870s and early 1880s were decisive years in the development of the corporate form and were marked by a growing level of sophistication in the utilization of the Companies Act. These years were also marked by the beginnings, at least in a number of industries, of adoption of corporate identity by a growing number of established firms. In iron and steel, shipping and cotton significant numbers of businesses now had ‘company limited’ appended to their name. The reasons for these conversions to corporate identity tended to vary from industry to industry. Nonetheless there were some common factors. Perhaps the most important was the need to raise capital outside the previously narrow family circle in order to keep pace with the rate of technological innovation. In the race to maintain their competitiveness with overseas competitors, such enterprises quickly outran the resources of the family circle and their friends.

Another factor which was common in many industries in bringing about an adoption of corporate identity was the retirement of key participants in an existing enterprise. The retirement of a patriarch who had run the family firm for the past quarter century or more often signalled the departure of the family from the business. In a number of instances the family patriarch left no logical successor to manage the family business. Typical of such a conversion to limited liability form was the floating of the old Glasgow iron manufacturing firm of Mercy and Cunningham in 1872. The prospectus recited:

Mr Cunningham died in 1865 ... the present contract of co-partnership expires in 1879 and Mr Cunningham’s Trustees who are bound to realise his estate as speedily as possible must withdraw his capital from the business at the earliest opportunity. Mr Mercy does not feel disposed to add to the large interest which he already holds in the undertaking and as neither of his sons desires to engage in commercial pursuits he prefers gradually to withdraw from active business. It would be almost impossible to find private capitalists to contribute the capital necessary for such an enterprise and it has therefore been resolved to place the present proposal before the public42.

Whilst Weiner has suggested in his study of the decline of English capitalism that failure of the second and third generations in a family to participate in the affairs of the family business was instrumental in the decline of English capitalism, Jeffreys concluded that the need for additional fixed capital was by far the more important factor of the two in precipitating the incorporation of a family firm:

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42 Prospectus of Mercy and Cunningham Ltd (1872) cited in Jeffreys, J B (1938), 81.
The major part of the development of limited liability in England up to 1885 was due ... to the increase in the amount of fixed capital needed in individual units of some industries and the inability of the private partnership system to supply the additional capital.

Jeffreys also notes that amongst the iron and steel industries, in which the greatest opposition to the introduction of limited liability incorporation had originally occurred, there was now a busy trade in converting enterprises into companies. Jeffreys suggests that this development indicated not so much of a change of heart amongst these industrialists with respect to the belief in the need to maintain privacy in business affairs, but rather a realization that conversion to corporate status did not involve any loss of privacy or control by the former ‘owners’ of an enterprise. As Professor Payne has observed, late nineteenth century capitalists were initially reluctant to incorporate their businesses because of the perception that the process of raising capital from the ‘outside’ would ‘weaken their control over ... the family firm’.

William Reader has also commented on the historical trajectory of the limited liability company as a shift from an initial hostility amongst those in commerce towards incorporation to an acceptance late in the nineteenth century of the corporation as the normal organisational form for one’s business.

Reader has attempted to demonstrate how objections to incorporation and outside investment were gradually overcome by means of a range of legal devices that assimilated the incorporated enterprise to its predecessor, the unincorporated partnership. He also notes that those who converted their enterprises to companies were able, by way of increasingly sophisticated legal devices, to continue to manage their ‘new’ company much in the manner in which they had previously managed their ‘old’ unincorporated firm. The limited liability corporate form came to be ‘colonised’ from the 1870s onwards by family firms, without the necessity on their part of any substantial change in their organizational practices or structure:

From the late 1870s onwards [Victorian entrepreneurs] began in growing numbers to convert their family businesses from private, unlimited partnerships into private, limited companies and sometimes into public limited companies. Usually they were chiefly concerned to attract more capital than they or their close relations and friends could conveniently provide, while still keeping control of the business where it had always been: in the family. The trick could be done by offering preference shares to investors who were not expected to interfere in any way with the running of the business so long as their dividends were paid, and keeping the ordinary capital in the hands of the former partners.

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43 Jeffreys, J B (1938) 112.
who blossomed into directors but altered their autocratic ways and their sense of ownership not one whit.\textsuperscript{45}

The diffusion of the company form in England may have been contingent, therefore, not so much upon the gradual adoption of a new organizational form, but rather upon the development of a variety of technical means by which preceding organizational structures and practices were enabled to persist within the shell of the apparently ‘new’ organizational form of the limited liability company. The broadly permissive nature of the limited liability company legislation provided a fertile framework within which many of the practices established in the previous ‘golden age’ of the family firm could be perpetuated in the nominally different organizational structure of the limited liability company. In a later chapter we shall examine the possible role this perpetuation of previous practice played in the decline of English capitalism in the late nineteenth and early twentieth century.

The Demise of Shareholder Democracy

One of the earliest casualties of the conversion mania of the late 1860s and early 1870s was the original intention of the framers of the limited liability acts that enterprises formed under the legislation constitute ‘little republics’ with full shareholder participation in decision-making.

It has already been observed that Robert Lowe emphasized in 1856 that enterprises formed under the legislation would constitute ‘little republics’. While at our remove we may see this as no more than a rhetorical flourish on the part of Lowe, it must be recognized that in the nineteenth century the notion of the corporation as a ‘little republic’ carried with it significant import. The phrase originates from Blackstone, who considered that corporations were not solely private economic undertakings, but were also entities embodying a special civil status. For many in the eighteenth and nineteenth century the corporation was not simply an economic or legal form, but in addition constituted a particular political identity and function.

The true import of the nineteenth century idea of the corporation as a ‘little republic’ has been explored by Andrew Fraser. He emphasizes the manner in which the common law conception of the corporation was of an association of persons vested by the policy of law with ‘certain powers deemed necessary to the successful prosecution of some design of general utility and public benefit’\textsuperscript{46}.


\textsuperscript{46} Fraser, A (1983) ‘The Corporation As A Body Politic’, \textit{Telos} no.57,10. See also Fraser, A, (1990) \textit{The Spirit of the Laws: Republicanism and the Unfinished Project of Modernity}, (Toronto: University of Toronto Press).
Private business enterprises were considered by the common law to have responsibilities to heed the ‘public interest’ in the conduct of their affairs\textsuperscript{47}. The concept of the corporation as a ‘little republic’, with all members participating in decision-making, was considered a bulwark against such associations failing to discharge their civic responsibilities. For such reasons proxy voting and voting by share were prohibited in early nineteenth century companies. One United States Court stated in this respect that voting by share or proxy was at variance ‘with the fundamental principles of our civil and political institutions’\textsuperscript{48}, and that:

The interest of the company, the good of the public, would be better promoted and more effectually secured by the personal attendance of, and mutual interchange of opinions amongst the members, than by the action of proxies ... If one member may appear and vote by proxy at elections, and on other matters of vital importance to the institution they all may, and so the welfare and interest of the company and of the public will be utterly neglected\textsuperscript{49}.

The eradication of the social responsibilities of the corporation, the introduction of proxy voting and the general erosion of shareholder democracy through devices such as the preference share all constituted a derogation from Robert Lowe’s original conception of enterprises formed on the limited liability principle as ‘little republics’. The decisive turning point in the demise of the ‘republican’ conception of limited liability enterprises appears to have been the 1860s. J B Jeffreys notes that in the 1850s and early 1860s specific legislation on company democracy was felt unnecessary as ‘with heavy investment and unpaid liability it would naturally come into being as it had done in partnerships\textsuperscript{50}.

The end of the idea of limited liability enterprises as ‘little republics’ came about in the late 1860s with the widespread adoption in company constitutions of provisions allowing for proxy voting. This mechanism reinforced emerging notions that shareholders were mere rentiers and undermined the concept of the shareholder having a direct responsibility for the enterprise in which they invested. This was a new development. Even though the railway flotations of the 1840s had

\textsuperscript{47} One of the principal objections to the establishment of a general system of limited liability in England was the potentially disastrous effects that this would have on the discharge by corporations of their civic responsibilities. At its annual meeting in 1856 the Manchester Commercial Association resolved to oppose the introduction of a general system of limited liability incorporation on the basis that ‘under the existing system no insurmountable obstacle had presented itself to the employment of capital in any undertaking of public utility, and ... that the indiscriminate extension of the principle of limited liability might be attended with injury to the public at large’. Manchester Guardian, 22nd January 1856.


\textsuperscript{49} ibid.

\textsuperscript{50} Jeffreys, J B (1938), 50–51.
made extensive use of proxy voting, virtually no other category of joint stock company had used the proxy system before the late 1860s. This period, perhaps not accidentally, coincided with the first spate of conversions of established firms into limited liability enterprises.

Whilst the actual levels of shareholder participation in the companies floated in the 1850s and early 1860s varied considerably with the nature of the investment and the size and location of the company concerned, it was certainly true that before the practice of proxy voting became generalized there was still a relatively high degree of direct involvement by shareholders in decision making. No real impediments existed for those members of a company who wished to play a meaningful role in the affairs of their company to do so. Indeed a number of investors saw it as their responsibility to expose the machinations of dishonest managers and directors and to prosecute them for breaches of the law. Some, like the fictional Sir Peter Jinks, may have even regarded it as their duty to do so:

Sir Peter was a vindictively honest man. Not content with the observance of the strictest integrity in his own transactions, he held it to be a public duty to make a crusade against frauds of all kinds, especially when they took a commercial shape. His activity in this direction was notorious. It was wonderful how he ferreted out fraudulent joint stock companies... 51.

While most shareholders lacked the zealousness of the fictional Sir Peter many still took an active interest in the affairs of the companies in which they held shares in the mid 1860s. Their motive for doing so, however, was generally not the altruism of Sir Peter, but rather a pragmatic concern to protect their own investment. Due to the prevailing distrust of paid managers most shareholders felt it was essential that they keep a close eye on the way in which the enterprise in which they had invested was being conducted by their agents – the directors and paid managers. Also, investors were ceaselessly being told by their professional advisers and by the financial press to keep a close watch on the management of enterprises in which they had invested. To this effect one contemporary essayist on company law advised his readers that ‘the [Companies Act] itself will afford very little security to Members of a Company ... this [security] will (as heretofore) consist in their ascertaining that the Directors and Officers managing its affairs are honest and able men’ 52. The Economist was also offering advice of this nature. In 1866 it had advised shareholders to protect their interests by going once every three months to the registered office of their company and checking the register of shares. This was in order to ascertain that the directors had not fled the company or transferred their shares as ‘so long as the directors stay in the company, its

affairs if not prosperous are at least honourable". The Shareholders Circular and Guardian gave even more detailed advice to its readers when it stated that in order to protect their interests shareholders should:

Go ... to the offices of the company; get an interview with the manager; see the reports to the board; have a peep at the minute book and the books of account; and in fact everything which shows the action of the directorate ... It is true that this may not always be an agreeable mission, but you must not heed the black looks or the sardonic smile of the usually bland secretary. If a point blank refusal to show you the company’s books meet your application, write to the Shareholders Circular and Guardian and we will point out a remedy.

As Jeffreys has asserted, up to the 1870s the number of shareholders in individual companies was still quite small. Most incorporated enterprises had somewhere between two hundred and three hundred shareholders, many of whom were from the immediate geographic area in which the enterprise operated (London based companies were of course exceptional). This meant that the perception of a shareholder was that they were still in some way a ‘proprietor’ in the undertaking in which they had invested. The close interest which investors took in the enterprise they had put their money into (and up to the 1870s it was usually one, and at most two or three enterprises in which they invested) is reflected in various reports and asides of contemporaries. For instance, in his evidence to the 1867 Select Committee on the Companies Act, the Registrar of Companies, Mr Edward Cecil Curzon, in response to a question on the extent to which the public made use of the information on file in the Registrar of Companies Office, stated that ‘they were searching all day long’. He then remarked that he inferred that the public regarded access to information in respect to the companies in which they had invested as important ‘by the number of people who search, and there are people there all day long searching for some information or other’.

Shareholder interest in the affairs of the enterprises they invested in was indicated by the volume of inquiries at Registrar of Companies Office. The Registrar of Companies, Mr J S Purcell remarked in his evidence to the Davey Committee on Company Law:

In administering the present Acts, I am brought into contact with two distinct classes of people, viz. the persons who form or represent the company, and those members of the general public who have dealings with it. The former are often desirous of dispensing, as far as they can, with the present limited requirements

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53 The Economist, 1866, 820.
55 Jeffreys, J B (1938), 102.
of the Acts; whilst the latter express disappointment that the returns filed here are insufficient, or do not give them the information which they are in search of. As a rule these last expect to find on the file of a company, prospectuses, copies of all balance sheets, and complete lists of the names of directors.

Even though they were not always able to attend the annual meeting of the company in which they had invested there is considerable evidence that shareholders were nevertheless often attentive to the companies’ affairs. In addition to visiting the Registrar of Companies Office to glean what little information they could many nineteenth century investors were also avid readers of the financial press. Whilst there were few specialist investment journals before the 1860s, there was a dramatic growth in the numbers of financial and investment journals from the middle of the 1860s onwards. These journals purported to supplement the information available publicly to shareholders and to render comprehensible the financial information tendered to the Annual Meeting. In its first issue the *Investors and Stock Exchange Magazine* stated that it was exclusively dedicated to the interests of investors and dealers in stocks and shares. It continued:

> Every shareholder knows, although interested perhaps in merely two or three companies, that much time and labour are required to wade through their half-yearly or yearly accounts, and which in some instances are so complicated as to be intelligible only to experienced accountants. This being the case, they are entirely debarred from ascertaining anything about the status of the hundreds of other securities in existence, many of which may be better investments than those they hold. To obviate this disadvantage to the capitalist, *The Investors and Stock Exchange Magazine* will give the accounts, directors’ reports, and the reports of the meetings in so condensed a form as to enable its readers to obtain the essence of all necessary information of every undertaking of importance.

Whilst the advice given in most of these journals was often unreliable their popularity indicated dissatisfaction with the standard of financial reporting in the investment columns of the daily press. The ‘Financial Intelligence’ pages of the newspapers contained only minimal financial reportage which avoided criticism of any but the most obviously fraudulent flotations. The reason for this was a combination of genuine conservatism and a fear that such criticism might alienate

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57 Companies Acts (Amendment) Committee (The Davey Committee), 1895, B.P.P. LXXXVIII, 223.

58 *The Investors and Stock Exchange Magazine*, no.1, January, 1863, British Library PP1423.gq. This journal only ran for one issue and was then replaced by *The Investment Journal: Money, Land and Share Market Chronicle*, the ‘ultimate design’ of which was, according to the editor, to be ‘a dictionary’ of available investments, *The Investment Journal*, March 1863, vol.1, no.1.

59 Grieser, N J (1940), 93–94.
corporations who provided a steady income to the newspaper in advertising fees. The desire amongst investors for more detailed information on investments than that provided by the established press was often recognized and preyed upon by the new financial journals in their quest for a broader readership. Even established financial papers, such as *The Statist*, heavily criticized the failure of the traditional press to cater to the need of investors for detailed information and commentary on the enterprises in which they had invested or were intending to invest:

*The Times* in the past has not dared to examine at all closely the (share) issues advertised in its columns. Either there has been a bare mention that such and such a loan or company is offered for subscription, without any warning to the public as regards its character, or the comment when offered is of the most milk and water kind.\(^{60}\)

Further evidence of the close involvement of shareholders in the enterprises in which they invested can be obtained from the diaries and personal letters of those who held shares in corporations in the latter part of the nineteenth century. Outside the general meeting, shareholders continued to remain concerned to monitor and influence the policies being pursued by the directors and managers of the enterprises in which they held shares. Large shareholders, in particular, often tried to use their power to influence particular policies. Despite the disadvantages attaching to overseas investments and shareholdings in remotely located domestic companies it was not always the case that geographic distance was a bar to an active involvement in the affairs of the company. Substantial investors would generally employ agents to provide them with information on the state of affairs of the company in which they had invested. It was also common practice for such investors to send weekly letters and telegrams to the directors (or others in the know) to ascertain what was happening and to tender advice to management. For instance, in a letter to his Australian banker, who was also a director in the Mount Morgan Mining Co. Ltd., Colonel A B Wilabraham wrote from the Carlton Club in London:

I still hold over 4500 [Mt. Morgan] shares. I hear the dividends are to improve but they haven’t begun yet – if they do go as you say to 1/6, I hope most sincerely that the Directors will be wise and cautious – I should like to see those dividends increased either monthly or bimonthly, not from 9d. to 1/6 direct – Take my word for it that a gradual steady increase of dividend such as I propose would have far more effect in restoring confidence and in steadying and permanently increasing the capital value of the shares than would a sudden jump from 9d to 1/6 – Do like a good fellow, urge this on your brother directors – I am certain it would have a good effect in England.\(^{61}\)

\(^{60}\) *The Statist*, 6th January 1894.

\(^{61}\) Wilabraham Collection, Book 4, Letter of 5th June 1891 from A B Wilabraham to Shields, Mitchell Library, A 3948.
The 1870s and Early 1880s

Such letters, however, are more a testimony to the failure of shareholder democracy than evidence of its survival. During the 1870s a process of differentiating shareholder participation and access to ‘inside’ knowledge by size of investment and type of shares held was well underway. With the erosion in the importance of the annual meeting as a genuine forum for shareholder input in corporate management the limited liability company became more a site of interest group politics than a genuine democracy. Large shareholders who had the ear of the directorate were able to influence policy, whilst small shareholders were effectively disenfranchised. As one commentator on the debate regarding the separation of ownership and control in the limited liability company has stated:

With the legal recognition of the corporate form there is a dissolution of ... traditional property rights ... since those who supply the capital of a joint stock company need not be identical with those who determine the uses to which it is put ... The legal form of the joint stock company [however] has not resulted in the dispossession of all shareholders. The major shareholding interests still have effective possession of corporate capital and are able to determine corporate strategy.

This decay of shareholder democracy can be charted by way of particular signposts. As Paddy Ireland and his collaborators have pointed out, the 1856 Joint Stock Companies Act had stated that ‘seven or more persons may form themselves into an incorporated company’. The company was its members. In the 1862 Companies Act the wording was altered to read ‘seven persons may form an incorporated company’. Ireland and his associates insist that this change in wording was deliberate and carried with it a new conception of the company as a body which had an existence external to its members. The company would now be ‘seen as a thing made by, but not of, people, the incorporated company was depersonalized and thus “completely separated” from its members’.

Whilst it is almost certainly true that shareholder democracy was in many companies on the decline by the early 1870s, this is not the same thing as suggesting that all the shareholders were thereby disempowered. In the 1870s it was only those shareholders who had small stakes in enterprises with widely dispersed shareholdings who were totally disenfranchised. However, large stakeholders who were not able to or not interested in pressing their own particular views on management as long as the company provided an adequate return, (true rentier capitalists and institutional investors are examples of this), were also effectively disenfranchised. In this case it was through their own choice.

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Significant pockets of shareholder democracy remained well into the 1870s. To date the demise of shareholder democracy from the early 1860s, as Ireland and his co-authors do, is to underestimate the enduring nature of shareholder involvement in the affairs of companies in which they had invested\textsuperscript{64}. One of the most striking aspects to modern sensibilities, when reading the minutes of annual general meetings of nineteenth century companies is the assertiveness and restiveness of shareholders on many occasions. Perhaps this level of involvement and disquiet only occurred when the enterprise in question was in severe financial trouble. But again the facts belie such an assumption. It was often the case in perfectly healthy nineteenth century companies that shareholders felt the need to assert themselves \textit{vis-à-vis} management\textsuperscript{65}. Such attempts on the part of shareholders to play an active role in ‘their company’ were so persistent and so common that one can only regard them as a normal aspect of those companies rather than as a series of extraordinary incidents. Jeffreys has stated:

The position of management and control of limited liabilities up to the decade of the ‘eighties was that while the law had laid down few definite provisions for democracy in the company, the number of investors per company, the type of investors and directors, and the size of the company, except in a minority of cases, raised no obstacles to such a ‘democracy’ taking place. The next twenty-five years of company development saw little change in the law towards legalising democracy, but a big change in company practice making ‘democracy’ in the most important business units an impossibility\textsuperscript{66}.

\textsuperscript{64} ibid.
\textsuperscript{65} Jeffreys (1937) has however noted that the level of involvement of shareholders in the affairs of the companies to which they were attached depended on a number of quite specific factors: ‘The two main types of shareholders in the early limited companies were the successful capitalists connected with the basic and heavy industries and the wealthy traders and traders concentrated in the large commercial centres ... Both of these groups of investors took an active part in the management of the companies in which they invested. (Jeffreys, J B (1937) ‘The Denomination and Character of Shares 1855–1885’, \textit{Economic History Review}, VIII, 50–51). Jeffreys also states that once purely speculative investment displaced these groups the active participation of shareholders in the affairs of the enterprises in which they held shares markedly decreased. This diminution of active interest in the affairs of companies in which investment was occurring was also a corollary of the increasing incidence of institutional investment in the 1880s and 1890s.


The constitutional framework makes the shareholders responsible for monitoring and supervising the directors of the company. Its efficacy in providing adequate controls over the directors therefore depends on the shareholders performing this task. Yet the reality is that it is only in companies where each shareholder has a sufficiently substantial stake
The Rise of the Preference Share and the Debenture

We have suggested above that one of the mechanisms whereby shareholder democracy began to be eroded was in the use of new categories of shares. The most important development in this regard during the 1870s was a substantial growth in the use of the preference share. This was accompanied by a parallel increase in the use of the debenture as a means of attracting capital to enterprises. The preferred form of investment by institutional investors was the debenture. For investors the advantage of debentures was that, unlike shares, they continued to earn a steady amount of interest no matter what the prevailing market conditions. Unlike shares they were also secured against particular assets of the company. On the other hand, the debenture held the attraction for the company seeking capital that unlike ordinary share capital it carried with it no voting rights.

The dramatic shift during the late 1870s and early 1880s away from ordinary shares as the principal means by which investment took place in limited liability enterprises has been noted by Cottrell. He comments that by the mid-1880s debentures and preference shares were the normal means used to raise ‘outside’ capital, in particular the capital of ‘rentiers’: during the same period ‘issues of ordinary shares were ... infrequent’. Cottrell considers that the reason for this development ‘was to ensure for public and private companies that control was retained by the holders of the ordinary shares, usually the vendors and their associates’67. Preference shares and debentures were an ideal vehicle for preserving control. This was due to the fact that debentures never had voting rights attached, and only in rare instances did preference shares have such rights attached.

(a) Preference Shares

The preference share had first been used by the canal and railway companies in the early years of the nineteenth century to deal with a number of problems which

in the company to make it worth his or her while performing the tasks of monitoring and supervising the behaviour of the directors that this constitutional framework can hope to provide an adequate control on the behaviour of directors ... the legal model of the company which separates ownership and management but still asserts that ultimate control resides with the owners of the company no longer corresponds to the realities of the modern large public company ... Indeed the obstinacy with which company law has clung to the traditional legal model of the division of power in the company between the managers and shareholders has sometimes had the effect of concealing from us the fact that company law regulates a variety of different sorts of companies. It is only by looking outside legal doctrine itself that we are made aware that neither the small closely held corporation (where there is no separation of ownership and management) nor the large public company (where there is a separation of ownership and control) conform to the legal model.

were then being encountered in respect of further capital raising. Heberton Evans has commented on the ‘inevitability’ of the emergence of the preference share:

As the procurement of new capital became more difficult and as new issues of shares became imperative because of the parliamentary rules for borrowing, companies which were in financial difficulties had to promise new subscribers preferential dividend treatment. The preference share was thus the outgrowth of a demand for shares yielding a certain return, the acceptance of the practice of paying interest out of capital, and the habituation to some differentiation of shares. With the prevalence of such ideas and a set of conditions which rendered the payment of dividends or interest on all shares impossible and which at the same time made new share subscriptions essential, the preference share would seem to have been inevitable.  

Preference shares offered a range of attractions to investors in circumstances where profitability in the relevant company had been low or non-existent and the existing shares in the company were being quoted on the Exchange at a price below their nominal value. These attractions consisted principally of a preferential right to a dividend and the right, at least in some instances, of being able to accumulate dividends. Morgan and Thomas have detailed the progressive refinement of the preference share during the course of the nineteenth century in their history of the London Stock Exchange:

By the middle of the nineteenth century, the preference share was beginning to assume something like its modern form, but in the early days there had been wide variations in practice. Sometimes preference shareholders had privileges, such as participation in profits, the right to subscribe to new issues, and voting rights which are now the prerogative of ordinary shareholders. Sometimes the preferential dividend was given for only a limited period, but, by 1850, it was generally perpetual. The first issue of cumulative preference shares was made by the Edinburgh and Glasgow Union Canal in 1826 and, in the middle of the century, there was some doubt as to whether preference dividends were cumulative or not; in 1857 a court ruled that they were cumulative unless it was specifically stated that they were not but, in 1863, the Company Clauses Act reversed this position.

According to J B Jeffreys when preference shares were coming into general use in all classes of limited liability company in the 1880s they were often distinguished from ordinary shares by the fact that they were fully paid and that

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they also tended to be of a lower denomination than ordinary shares\textsuperscript{70}. These characteristics of preference shares were not as pronounced in the 1870s. Indeed, Jeffreys argues that preference shares in the 1870s tended to be of a quite different character, generally of a higher denomination than was later to be the case and to be partly rather than fully paid.

Jeffreys’ views are at best only partially supported by my own analysis of company registrations for the years 1876 and 1886\textsuperscript{71}. Very few of the enterprises in my sample which registered in the former year had begun to make use of preference shares at all. Smith’s Vacuum Brake (Foreign Patents) Co., which did issue preference shares, was an exception\textsuperscript{72}. Even in that case, the preference shares were five pound shares issued fully paid, hardly strong support for Jeffreys’ assertion that the 1870s were characterized by preference issues in which the shares were of a high denomination and only partly paid. It is also to be noted that in those companies which did issue preference shares these securities varied considerably in respect to their share denomination and, to a lesser extent, the amount paid up thereupon. For example, in the Rhea Manufacturing Company Ltd both preference and ordinary shares were issued. In both cases these were five pound shares, with only 40 per cent being paid up thereupon\textsuperscript{73}. Similarly, the Dry Docks Corporation of London Ltd issued both preference and ordinary shares. The preference shares were again the same denomination as the ordinary shares in the company, in this case ten pounds, and were only 60 per cent paid up\textsuperscript{74}. Of the sample only The Metal Edged Box Company Ltd. seems to fit Jeffreys’ summation of what he regards as the trends occurring in the 1880s. In this flotation of 100,000 shares 66,667 were one pound fully paid preference shares. The remaining 33,333 shares were, however, not issued as ordinary shares, but rather as deferred shares issued fully paid to the vendors of the predecessor business\textsuperscript{75}.

The trend which Jeffreys claimed was occurring in the early 1880s towards small denomination, fully paid, preference shares was really only in its infancy at that time. This development in the nature of capital raising only really began to occur in earnest from the middle of the 1880s onwards. By that stage a formula had been reached in relation to the manner in which capital would be raised for a new undertaking. It was suggested in 1898 by one of the witnesses before the Select Committee of the House of Lords on the Companies Bills that it was

\textsuperscript{70} See the discussion of preference shares in Jeffreys, J B (1938) at 212–232 and cf. the discussion in Cottrell, P L (1980), ch.6.
\textsuperscript{71} See Chart 5.1 and Table 5.4.
\textsuperscript{72} PRO, BT31,2185/10223.
\textsuperscript{73} PRO, BT31,3585/22018.
\textsuperscript{74} PRO, BT31,3585/22012.
\textsuperscript{75} PRO, BT31,3784/23656.
common practice in the flotation of a new company to issue ‘a third of the capital in ordinary shares, one third in preference shares and one third in debentures’\textsuperscript{76}.

Jeffreys surmises that the development of such a formula may have reflected yet another alteration in the role of the preference share in company finance. He claims that this development may have been the result of a change in the use of preference shares in company finance from a means to attract additional capital in troubled times to a device used to attract capital from a class of investors different from that which invested in ordinary shares\textsuperscript{77}.

Cottrell has suggested that by the 1880s investors in ordinary shares were rarely ‘outsiders’, whilst preference shareholders often were rentier capitalists with no other interest in the company than the annual return on their investment. According to Cottrell\textsuperscript{78} preference shares were often utilized to preserve the control of the existing management of an enterprise whilst providing access to considerable amounts of ‘outside’ capital\textsuperscript{79}. The rise to prominence of the preference share in all types of limited liability company almost exactly parallels the decline in the use of vendor and deferred shares. To understand the significance of this development a little should be said about the role and purpose of vendor’s and deferred shares.

Vendor and deferred shares were in vogue during the spate of conversions of iron and steel companies during the 1870s. These shares were characterized by an agreement on the part of the vendor of the existing business that, in part exchange for his property, he would take a certain number of shares which would not rank for dividend until a certain percentage had been paid on the ordinary shares which were subscribed by the public. As a result of these payments in shares for the business they were disposing of, vendors often became major stakeholders in the new limited liability company. In relation to a sample of conversions handled by David Chadwick it has been calculated that the mean shareholding of vendors in the corporate concerns which replaced their existing businesses was 22.88 per cent\textsuperscript{80}. At first this was regarded as a virtue in that it guaranteed a degree of continuity in the management of the enterprise. However, as it became more apparent that this continuity led to a marginalization of other groups in relation to the management of enterprises it began to be regarded with disfavour. The growing discontent with the practice was further reinforced when it was understood that vendors could, through a judicious overvaluation of the original assets, reap rewards out of all proportion to the value of the assets they had transferred to the company. Due to these factors, and the disproportionate control vendor shares quite often allowed

\textsuperscript{76} Report of the Select Committee of the House of Lords on the Companies Bills, B.P.P. IX, 1898, Q.789.
\textsuperscript{77} Jeffreys, J B (1938), 221.
\textsuperscript{78} Cottrell, P L (1980), 129.
\textsuperscript{79} Jeffreys J B (1938) has also commented to the same effect see at 228–229.
\textsuperscript{80} Cottrell, P L (1980), 131.
the owners of the pre-corporate enterprise to exercise in the successor limited liability company, the use of such shares gradually fell into disrepute.

By the 1890s publications for intending investors were denouncing vendor shares as ‘one of the most objectionable devices of modern finance’\(^8\). This decline in the popularity of the vendor share is reflected in samples of company registrations for the years 1876 and 1886. Whilst a substantial proportion of the large public flotations in the former year involved the issue of vendor shares only two such flotations in the latter period involved the issue of vendor shares. Nevertheless, in a number of other enterprises the practice remained the same as it had in the 1870s, only the nomenclature had altered. For instance, in the flotation of the Kidnelly R. Dinas Fire Brick Company (formed 1886), in which the nominal capital was £20,000, 712 £1 ordinary shares were issued fully paid to the vendor of the business as part payment for the undertaking and 10,000 £1 7.5 per cent preference shares were offered to the public. The remainder of the nominal capital remained unissued. It was further resolved, at a meeting of the company in 1887, that a further £10,000 be raised by way of debentures secured by a floating charge and paying interest of 6 per cent\(^8\).

It must be noted, however, that vendor shares continued to have a substantial currency throughout the closing years of the nineteenth century in the growing number of private companies being formed in that period. For example, in the case of H R Briggs & Co. (formed 1886 with a nominal capital of £50,000), a business operating as an oil merchant, of 1507 £10 shares issued, 1500 went to the vendor of the preceding unincorporated business fully paid and the remaining seven were issued to the other seven subscribers to the memorandum, presumably to satisfy the formal requirements of the Companies Act\(^8\). In such ‘one man’ businesses the specific attributes of the vendor share, of course, ceased to have any meaning, as the other shareholders were only nominal stakeholders in the business, who almost certainly held their shares in trust for the vendor, rather than in their own right.

The developments with respect to the role and use of the preference share were not matched with a similarly rapid development of the law relating to such shares. As Jefferys observes:

> The developments occurring during the 1870s and 1880s [in regard to preference and vendor’s shares] were not to any real degree anticipated by the legislation of the fifties and sixties, and growing as they did out of company practice without legislative control, both tended to develop certain obviously unattractive features. With the preference shares the chief trouble was their very weak position in relation to maintaining their rights; with the founder’s shares,

\(^8\) PRO, BT31,3713/23105.
\(^8\) PRO, BT31,3591/22061.
it became clear that dividends on these were out of all proportion to the work
done by the owners…84.

The preference share, even though it had been used to some effect in the
railway and canal flotations of the 1840s, was not specifically provided for in the
limited liability legislation. This was a consequence of the prevailing belief that
such issues of shares were principally a device to be utilized in transportation and
other utility companies with long amortization periods. No discussion took place
as to the desirability of extending their use to other forms of enterprise before
the introduction of the 1856 companies legislation. They were consequently
little employed in the early limited liability companies. The reason for the lack
of preference share issues in limited liability companies before the mid-1860s is
discussed by Heberton Evans:

The legal status of the preference share was undetermined for some time. There
was uncertainty as to whether the preferred dividend was payable out of capital
or was simply a charge on profits. In the absence of express provision, the voting
rights of the preferred shareholder were in doubt and his right to participate in
new security issues was uncertain. Moreover, the first important case concerning
the shareholder’s right to cumulative dividends was not decided until 1857.
Whether or not companies had the right to issue preference shares in the absence
of express power was also at first not perfectly clear … preference share issues
not specifically authorized by parliament were illegal even as late as 186385.

Jeffreys has also commented on the legal netherworld in which the preference
share existed in enterprises other than in the transport industry and utilities for
much of the nineteenth century. He suggests that whilst the lack of provision for
such shares in the case of limited liability companies may appear odd to modern
eyes it was an attribute of the very different manner in which nineteenth-century
legislators, business people and professionals viewed the railway and other utility
companies compared with the newly emergent limited liability enterprises:

By the 1850s the use of the [preference share] was in great favour in railway
companies … [But] there was not a word about preference shares either in the
Companies Acts or in the innumerable books, pamphlets or journals which were
discussing the application of the very same principle that obtained in railways
to general trading, commercial and manufacturing concerns … The reason for
this omission was not solely the spirit of laissez faire. [Both supporters and
opponents of the limited liability legislation] agreed in considering the experience

84 Jeffreys, J B (1938), 240.
of railways, canals, water and gas companies as something entirely apart from ordinary commercial practice and history. \(^{86}\)

Even by the late 1870s little or no reference was being made by investment writers to the growing availability of preference shares in enterprises to which it had not originally been conceived they would apply. In tendering investment advice to his readers in 1878, Axford Packer suggested that the middle classes might look to ‘debenture stocks or preference shares in any of the great railways, or in gas or water companies’ but not to ‘meddle with partly paid shares of any sort’. \(^{87}\) In giving this advice he did not allude to the desirability or otherwise of investing in preference shares in other varieties of enterprise. Presumably, even at this relatively late date, preference shares in ordinary manufacturing undertakings were still an unknown quantity.

Thus, whilst there was a substantial rise in the use of preference shares during the 1870s and early 1880s such shares did not come into common use in flotations of industrial and other commercial enterprises until the last fifteen years of the nineteenth century. In neglecting to mention the availability of such investment opportunities Packer may have merely been reflecting the practices of the late 1870s. Jeffreys has analysed the use of preference issues in those companies listed in *Burdett’s* for 1885. He found that of over £114 million in share and loan capital invested in the 661 listed companies only 8.8 per cent was raised through preference shares and that over one third of the companies issuing preference shares had been formed in the five years previous to 1885. \(^{88}\) The real growth in the use of preference shares occurred in the three decades following 1885. Again analysing the companies listed in *Burdett’s* Jeffreys has shown that whilst by 1915, 29.7 per cent of the total share capital of the 2,367 companies had been raised by preference shares, in the period between 1885 and 1915 the percentage of capital raised by ordinary shares had fallen from 74.4 per cent to 47.6 per cent. Debentures had also increased in importance in the same period rising from 16.8 per cent of total capital raised in 1885 to 22.7 per cent in 1915. \(^{89}\)

\((b)\) Debentures

Issues of debentures and debenture stock began to figure in the raising of capital for both new enterprises and conversions in all industries, well before the preference share rose to popularity amongst the promoters and controllers of enterprises other than the utilities. As can be clearly seen from the figures cited in Jeffreys and referred to above, whilst preference shares only represented 8.8 per cent of capital

\(^{86}\) Jeffreys, J B (1938), 213–214.
\(^{87}\) Packer, A (1878), 141–142.
\(^{88}\) Jeffreys, J B (1938), 217.
\(^{89}\) *ibid.*, 222.
in the enterprises listed in *Burdett’s* in 1885, debentures already accounted for 16.8 per cent of capital in the same year.

In many respects the history of the use of debentures to raise capital follows a different trajectory than that for preference shares. It is nevertheless true that, as was the case with preference shares, the previous experience with debentures as a form of capital raising in railways and utilities ushered in their utilization in other industries. Similarly, because the utilization of such methods of capital raising had not been anticipated by the framers of the Companies Acts, the legal position of debentures in these other industries was unclear for quite some time.

The trend during the 1880s was away from debentures *per se* towards debenture stock. The principal difference between these two methods of raising capital was in respect to the amount and thus the marketability of the particular instrument evidencing the loan (that is, the debenture or debenture stock). Debentures tended to be in denominations of one hundred pounds upwards and were not subdivisible. Debenture stock, in contrast, was subdivided into small denomination certificates, usually one pound, five pounds or ten pounds. The attractiveness for the investor of debenture stock over the debenture therefore lay in its readier marketability. A correspondent to *Herepath’s Journal* detailed the reasons for the demise of debentures and the rise in popularity of debenture stock in the following manner:

> A chief reason for the very high rates paid by railway companies for the renewal of their debentures is that the greater part of these bonds are issued in sums of £500, £1000, and upwards and are therefore not readily marketable. The security of the debenture stocks of the large companies ... is little if at all inferior to Government funds and they have the great advantage of being readily saleable or purchasable in large or small quantities.\(^90\)

Even if aimed at different categories of investors both debentures and debenture stock combined the two features investors most desired – security combined with a reasonable rate of return. As a consequence of these attributes railway debenture stock had become, according to Goschen, the favourite investment of:

> ... couples about to marry; the last resort of trustees distracted on the one hand by their own anxiety to avoid responsibility and on the other by the importunities of their wards not to be sacrificed to Consols.\(^91\)

The reason for the growth in popularity of debenture stock in all varieties of company during the 1880s was a result of the generally deflationary climate, whilst in the mid-1890s preference shares became more popular due to the onset of an inflationary cycle.\(^92\)

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The growth in the utilization of debentures and debenture stock during the late 1870s and early 1880s was encouraged as a consequence of the clarification at this time by the courts of various legal aspects of debenture issues. Perhaps the most important of these decisions was that of the Court of Appeal which confirmed the validity of floating charges. F B Palmer, the great nineteenth-century authority on company law, noted the importance of the floating charge in the economic viability of many joint stock concerns in the course of his evidence to the 1898 House of Lords Select Committee on Companies:

A floating charge enables hundreds of concerns that could not otherwise raise funds when they want them urgently, to raise money promptly and easily and with very satisfactory security.

In addition to the clarification of the status of the floating charge the courts of the late nineteenth century also resolved certain questions appertaining to the status of particular varieties of fixed charge. One of the most common ‘assets’ used to secure a debenture issue was the uncalled capital on shares. This form of security, in addition to the fact that it perpetuated the questionable practice of issuing shares with only small amounts called up, also had created a range of complex legal problems. The type of legal difficulty this practice might engender is best illustrated by way of example.

The Australian Drug Company, which was formed in 1886, made use of a combination of ordinary shares, preference shares, debentures and bank accommodation (by way of an overdraft) to finance its operations. The nominal capital of the company was £250,000 divided into one pound shares. In the first instance only 45,000 of these shares were issued as ‘ordinary’ shares with ten shillings called up on each share. The company also issued further preference shares in 1894 to a Mr George Whiting. These comprised 9,000 fully paid one pound preference ‘A’ shares carrying a preferential dividend of 2.5 per cent per annum and preferential rights to repayment of capital on a winding up. These

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93 A floating charge is an equitable charge over all or a specifically designated group of assets belonging to a company. This charge does not adhere to any specific property unless or until there is a breach of the terms of the loan in respect to which the charge relates (the breach might, for instance be constituted by non payment of an instalment of the loan, the granting of a charge over property to which a negative pledge applies, or failure to discharge the loan at the end of the loan period). If there is a breach then the charge is said to ‘crystallize’. The advantage of such an arrangement is profound in cases where the enterprise in question has little in the way of fixed but turns over quite considerable amounts of circulating assets. The nature of and benefits of a floating charge are discussed by L C B Gower (1979), one of the leading modern authorities on company law, in one of the earlier editions of his authoritative textbook, *Principles of Modern Company Law*, 4th edition, (London: Sweet and Maxwell), at 107–109.

94 Report of the House of Lords Select Committee on the Companies Bills, 1898, Q.650.
shares however were stated to have these preferential rights attached to them only for a period of eight years; they would then revert back to ‘ordinary’ shares. The first allotment of debentures by the company occurred in 1888. This first issue of debentures comprised £20,000 of 6 per cent £100 debentures, maturing five years after date of issue. They were secured against the uncalled component of the ‘ordinary’ share issue. The legal dispute as to the effect of this on the capacity of the company to call up that uncalled amount arose as a consequence of the National Bank, which had extended the overdraft to the company, advising that it would not provide the company with any further financial accommodation until it had made use of its capacity to call up 10s on each of the ordinary shares. The records of The Australian Drug Company contain the following comments in respect to this request from the company’s solicitors, Norton Smith & Co.:

Dear Sir,

re Debenture Loan

We are surprised to learn from yourself and Mr Tobin that the solicitors for the National Bank have advised the bank that notwithstanding the debenture charge created by your company in favour of trustees for the debenture holders over its uncalled capital the company still has the power to call up and use its uncalled capital in the course of carrying on its business ... the uncalled capital has now ceased to belong to the company and if it were called up it could only be received and a receipt for the same given by the assignees thereof under the Registered Mortgage ... Under these circumstances you will see that if a call were made by the company it would be the duty of the trustees to collect the call and when collected they would hold it upon the trust declared in the Trust deed ... if the trustees for the debenture holders collected these calls and applied them otherwise than in payment of the Debentures they would be committing a breach of trust and a criminal offence for which they would be liable under the Criminal Law Consolidation Act inasmuch as the trustees have declared a trust in writing with respect to such moneys

Whilst there was a decline in the use of uncalled capital as security for debenture issues towards the end of the nineteenth century this mechanism was still very much in vogue in the 1880s. Indeed in those companies which lacked a broad array of tangible assets, such as was the case for financial corporations, the use of uncalled capital as the principal security for an issue of debentures retained its hold into the twentieth century. Jeffreys has remarked that these practices often led to a reliance in practice on the funds raised by debenture issues rather than on equity capital. Debentures, rather than shares, were thus often the real foundation

95 Norton Smith Collection, Documents Relating to The Australian Drug Company, Mitchell Library, A 5318, Box 1, Item #18.
of nineteenth century enterprises, particularly those engaged in the provision of financial services and like activities. Despite their importance to the enterprise debenture holders had no right to intervene in company affairs. They were far less troublesome than shareholders, who had to be confronted at the annual general meeting at least once a year.

The unregulated nature of debentures, combined with a number of questionable practices which had sprung up around them during the 1870s and 1880s, led to a concerted campaign to outlaw them in the mid 1880s. A range of parties including Chambers of Commerce, groups of ordinary creditors and the Anti-Usury League joined in common voice in demanding the abolition of debenture financing. Debentures and in particular debenture stock had become too necessary a part of corporate financing for them to be abandoned. Nevertheless the campaign against them continued, reaching its zenith in a Bill introduced into the Commons in 1896 which would, had it passed, have reduced debentures to an ‘exceptional or emergency’ method of raising capital. This measure however failed. The business members of the Parliamentary committee appointed to examine the need for such a measure were bemused by the proposal due to the fact that the fine legal distinction the Bill attempted to make between shares and loans was already alien to company practice. As has been noted in one analysis of the failure of the 1896 Bill:

[The businessmen considering the proposed legislation] were completely blind to the real point of the Bill, which was to make a ‘fine’ legal distinction between shares and debts. The businessmen saw no difference; to them both were methods of raising the necessary capital for the company.

An adverse response by businessmen to the proposed restriction in the availability of debentures would have been just as likely in the mid 1880s as the 1890s. The popularity of debentures as a part of the capital structure of corporate undertakings was related to the multiplicity of advantages they enjoyed over other varieties of security. They could, unlike shares, be issued at a discount. This allowed them to be underwritten, something which was still impermissible in the case of shares. Debenture issues were also far cheaper and offered more security to an enterprise than advances from a bank. Lastly they were more flexible as a security than mortgages, particularly once it had become common practice to secure debentures against a floating charge, rather than against specific fixed assets or uncalled capital.

Despite a lack of general support amongst the business community for the abolition of debentures or their restriction to ‘special’ instances, there was

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96 See the comments on this in Jeffreys, J B (1938) 258.
97 ibid., 270.
98 ibid., 272.
99 Cottrell, P L (1980), 165.
nevertheless a desire amongst many elements in the commercial community for more specific legal direction in regard to their utilization and the instigation of a system of registration for charges. In the mid-1880s limited liability legislation did not contain any provisions restricting corporate borrowing, nor was there any requirement that charges against corporate property or uncalled capital be registered. The right of a company to borrow was unconditional and unrestricted and *caveat creditor* applied. The ratio of loan to equity capital was a matter left entirely up to the company concerned, to be provided for in the Memorandum of Association. Interestingly enough the same level of discretion did not apply in the case of railway companies, which had provided the model for debenture issues in trading enterprises. The wisdom of allowing trading corporations complete freedom in relation to their borrowing practices was beginning to be severely questioned by the mid eighties. Illustrative of the mounting concern is the cross examination by members of the Royal Commission on the Depression in Trade (1886) of a witness from the iron manufacturing districts, Sir Lowthian Bell, as to the appropriateness of introducing borrowing restrictions on trading corporations:

Q. (Mr Houldsworth) You are aware, I presume, that under the Limited Liability Act the power of borrowing is unlimited?
A. Yes, I understand such is the case.

Q. You are aware that in some industries the amount of capital is very small, and that the amount borrowed is very large?
A. I have no such case in my mind, but I am prepared to believe that it is so ... I think such a state of things might involve considerable risk to the lenders.

Q. (Mr Ecroyd) You are aware, are you not, that railway companies are strictly limited in their power of borrowing, that it must not exceed a certain proportion of their paid up capital?
A. Yes.

Q. Do you think it would be advantageous if that provision were applied to limited liability companies engaged in manufacturing processes?
A. I am not prepared to say that it would not, at the same time I fancy that the lending part of the world would see that they are not advancing larger sums than prudence would indicate as proper.

Despite the concerns being expressed by certain members of the Royal Commission the principle of *caveat creditor* continued to apply well into the twentieth century. Even when more sophisticated provisions in respect to debentures were adopted in the limited liability statute of 1900, matters such as

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the ratio of debt to equity capital continued to be left in the hands of corporations themselves. On the other hand the Act of 1900 did set up a system of registration for charges on the company property. In addition to the concerns being expressed in regard to the largely unregulated availability of loan capital to public companies there was also a significant campaign during the 1880s and 1890s from bodies such as the Associated Chambers of Commerce calling for tighter regulation of the use of debentures by ‘private’ companies. In commenting on this problem to an audience of businessmen, the then President of the Associated Chambers of Commerce, Sir Albert Rollins expressed particular concern for creditors, who might have their claims defeated by the creation of debentures or other charges in favour of the vendor of a business to a ‘private’ company:

[C]reditors may still be defrauded, and that legally, by the secret creation of debentures and mortgages of limited companies as well as by unregistered mortgages of machinery and assignments of book debts, or by fictitious firm names; the scandalous condition of Company Law and Practice (hear, hear) is indicated by the recent Report of the Board of Trade on Winding Up which disclosed 1,042 liquidations with £12.5 million of liabilities ... some very liquid assets (laughter), much fictitious capital and many delusive estimates.

The Chambers of Commerce Journal voiced precisely the same concerns in 1894 when it stated that it had received ‘frequent complaints of traders as to the injustice which is perpetrated through the conversion of private trading concerns into limited liability companies with debentures’. The long running campaign by the Associated Chambers of Commerce to restrict the availability of debenture capital to public companies was yet another example of this representative of ‘business interests’ being unable to translate policy into legislation when such policy cut across the interests of other sectors of the commercial community. This inability was even more pronounced in instances where the State would have been required to take a far more interventionist role in regulation than the relatively passive role it had traditionally exercised. The prevailing ideology was still very much in favour of the business community regulating itself. As late as the 1906 Report on the Limited Liability Acts the common view was that prudence was the only effective protection in business dealings and consequently it was not up to the State to intervene to protect creditors. Indeed persons involved in business were considered far better equipped to make enquiries in respect to the credit-worthiness of those they were dealing with than was a government department or official.

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101 See the comments on these changes in Jeffreys, J B (1938), 269–270.
102 Ilersic, A R (1960), 80.
103 Chamber of Commerce Journal, (1894), 15.
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Chapter 7
The Consolidation of Company Law
1886–1914

Introduction: The Corporate Form at the Time of the 1880s Depression

Both J B Jeffreys and Paddy Ireland have remarked that little changed between the introduction of the 1856 legislation and the deliberations of the Royal Commission on the Depression in Trade in 1886. According to both commentators, the partnership remained the main form of business organization at the conclusion of the first thirty years of existence of the limited liability company.

Another unchanged characteristic, despite the intervention of three decades, was the reality that most incorporated businesses continued to be floated in the region in which they operated. There was, as late as 1886, little involvement by professional promoters in the flotation of most new English companies. Also, despite the substantial developments occurring in communications, there was not, until sometime after the 1880s, a substantial national market in shares. Most securities in the late 1880s, if traded on a stock exchange at all, tended to be negotiated on the provincial exchanges rather than in London.

Whilst a truly national investment market was still in its infancy at this stage, so too were bureaucratic structures specifically devoted to the ‘regulation’ of corporations. The Office of the Registrar of Companies considered its functions to be strictly confined to the performance of routine administrative functions. The Board of Trade was no more in the business of regulating companies in 1886 than it had been in 1856.

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2 See the Evidence of the Registrar of Companies, Mr J S Purcell in the Third Report of the Royal Commission into the Depression in Trade in which, after stating that many companies failed to lodge their annual returns, he responded to a question as to the penalties applying to such a failure on the part of a company that there was no power residing in the Registrar to enforce the provisions requiring lodgement, that the only way those provisions could be enforced was by a ‘common informer [who] could proceed before a justice of the peace or magistrate’ (Q.693). Purcell then concluded his evidence to the Royal Commission with the observation that his ‘duties were merely ministerial as registrar of joint stock companies. I can only file what is handed in to me, it is not my business to question’ (see Qq.676 & 712).
Jeffreys suggests that the only commercial activities in which the limited liability company had made substantial inroads by 1885 were those in which technological innovation, overseas competition, long amortization periods or the scale of undertaking meant that additional fixed capital was required which could not be supplied by the private partnership system. He asserts that, in general, the view continued to be held in the 1880s that limited liability incorporation should only apply in exceptional circumstances. Further, most members of the commercial community continued to believe that a company should not be formed in circumstances where there was private enterprise in the field. Companies were considered as a potential threat to business morality in such circumstances due to the practices that might need to be adopted by private entrepreneurs in order to deal with the competition offered by their new corporate rivals. Indeed, according to Jeffreys, throughout the nineteenth century those entrepreneurs who operated their businesses as partnerships were often extremely hostile to limited liability as an organizational form. They considered enterprises formed on the basis of limited liability and public investment not only to be immoral but also to constitute unfair competition in their chosen area of business activity.

A number of other historians of nineteenth-century English commercial life have remarked on the fact that throughout the late nineteenth century many involved in industry and commerce continued to express antagonism to the limited liability form. Ireland, citing Jeffreys for support, asserts that ‘despite the economic depression, divergence from the ideals of 1856 had not progressed very far by 1885’. He continues by suggesting that a ‘major shift’ in the limited liability company form could not take place until ‘public opinion had (been) convinced that a company was as good as a private firm’. According to Ireland this did not occur until after the decision in the case of Salomon v. Salomon in 1897.

The assertion that social attitudes to the corporate form had not changed appreciably by the mid-1880s must be seriously questioned. This is particularly so

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4 Evidence to support these contention of Jeffreys is provided by the statements of many of the commercial witnesses to the *Royal Commission on the Depression in Trade* in 1886. For instance, one of the partners in the firm Tootal Broadhurst Lee stated to the Commissioners that he considered the growth of limited liability companies was detrimental and should be restricted as ‘the competition of limited liability companies is unfair to private firms’. The difference between views expressed to a Royal Commission and commercial reality is however reflected in the fact that this arch oppositionist to the corporate organizational form and his partners converted their firm into a company just two years after the 1886 Royal Commission. Tootal Broadhurst Lee became Tootal Broadhurst Lee Company Limited in 1888.

5 Jeffreys, J B (1938), 113.

6 Ireland, P (1984), 249.

7 *ibid.*, 250.

8 *ibid.*, 250–255.
with respect to the attitudes of small and medium entrepreneurs. The breakdown of the numbers of public, private and conversion companies by year of registration in Table 5.2, based on a 10 per cent sample of all English companies registrations for the years 1856, 1866, 1876 and 1886, indicates that the adoption of corporate form by partnerships began to occur in the mid-1870s, not the late 1880s. Whilst for 1856 and 1866 there are virtually no companies registered which diverge from the model attributed to the framers of the 1856 legislation – that is, there are virtually no private corporations – for 1876 we find there are already significant numbers of private corporations being formed. These are predominantly conversions from partnerships. If we examine Table 7.1 we can also observe that most of these private companies are in fact in industries that were previously the preserve of partnerships. General manufacturing concerns constituted the main area of growth of the private company in the 1870s. In the 1880s this trend was maintained, however, with the addition of a significant number of both public and private company registrations in the new service industries such as the gas supply enterprises then opening up. There was also a sizeable increase in public company registrations engaged in overseas mining.

The dating of the rise of the private company to the mid-1870s is also supported by Jones’ breakdown of the fee income during the nineteenth century of a large accounting firm, Whinney, Smith and Whinney. In 1870, 93.6 per cent of the income of that firm was attributable to insolvency work, mainly tasks associated with the collapse of large public companies. In the same period only 2.4 per cent and 2.2 per cent of the fee income of the firm were respectively attributable to general accounting and auditing business. In fact during the 1860s, company liquidations become so frequent and so lucrative for accounting firms that Frederick Newmarch was given to comment to a Select Committee that ‘the constitution of the country consists of four parts: the Queen, Lords, Commons, and the liquidators of public companies’. Another contemporary commentator referred to the limited liability legislation as the ‘accountant’s friend’.

By 1880, however, the insolvency business of Whinney, Smith and Whinney had dropped to 72.3 per cent of their total fee income. At the same time general accounting business had climbed to 11.2 per cent and auditing to 10.9 per cent of fee income. Jones has commented that these increases in general accounting and

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9 see p. 142.
13 See the comments of Edgar Jones (1981) at 28 and 48–50 as to the integral relationship between the growth in numbers and complexity of corporate enterprises and the emergence of the modern profession of accountancy.
Auditing income can largely be attributed to ‘the cumulative effect of the 1862 Companies Act’\textsuperscript{14}. He continued:

What, then, were the reasons for the growing importance of audit work? Undoubtedly the major factor was the company legislation of the 1850s and 1860s ... [At this time there was still no statutory obligation] for these companies to take their accounts to a public accountant for audit. [Table A however provided some guidance as to how it was conceived accounts should be kept] ... The 1862 Act ... required that a profit and loss statement and balance sheet be presented at the annual general meeting\textsuperscript{15}.

Given, however, that the most significant growth in audit work occurred in the late 1870s, well after the introduction of the 1862 Act, it is reasonable to infer that a whole new cross-section of companies was seeking professional guidance in the preparation of their accounts at this time. This is consistent with the dating of

\begin{table}
\centering
\caption{Crosstabulation of numbers of companies registering by type and industry}
\begin{tabular}{|l|c|c|c|c|c|c|c|c|c|c|c|c|c|}
\hline
\textbf{Category} & \textbf{1856} & & & \textbf{1866} & & & \textbf{1876} & & & \textbf{1886} & & & \textbf{Total} \\
\hline
\textbf{Collieries} & 4 & 0 & 1 & & & 6 & 0 & 0 & & & 5 & 0 & 6 & & 3 & 0 & 4 & & & 29 &\
\hline
\textbf{Metals Mining} & 1 & 0 & 0 & & & 3 & 9 & 0 & & & 5 & 0 & 0 & & 7 & 0 & 0 & & 16 &\
\hline
\textbf{O/seas Mining} & 4 & 0 & 1 & & & 1 & 0 & 0 & & & 3 & 0 & 0 & & 13 & 0 & 0 & & 22 &\
\hline
\textbf{Textile Manuf.} & 3 & 1 & 0 & & & 0 & 0 & 0 & & & 3 & 1 & 3 & & 3 & 1 & 1 & & 17 &\
\hline
\textbf{Manufacturing} & 10 & 0 & 5 & & & 9 & 3 & 2 & & & 9 & 1 & 13 & & 9 & 2 & 15 & & 81 &\
\hline
\textbf{Shipping} & 2 & 0 & 0 & & & 0 & 0 & 0 & & & 2 & 0 & 0 & & 3 & 0 & 0 & & 10 &\
\hline
\textbf{Other transport} & 1 & 0 & 1 & & & 2 & 0 & 0 & & & 3 & 0 & 1 & & 7 & 0 & 2 & & 17 &\
\hline
\textbf{Finance/invest} & 12 & 1 & 1 & & & 12 & 2 & 1 & & & 21 & 1 & 8 & & 28 & 0 & 4 & & 91 &\
\hline
\textbf{Banking} & 0 & 0 & 0 & & & 4 & 0 & 1 & & & 2 & 0 & 0 & & 0 & 0 & 0 & & 7 &\
\hline
\textbf{Insurance} & 0 & 0 & 0 & & & 3 & 0 & 0 & & & 0 & 7 & 0 & & 3 & 1 & 0 & & 14 &\
\hline
\textbf{Retail trade} & 2 & 0 & 0 & & & 0 & 0 & 0 & & & 0 & 0 & 0 & & 4 & 0 & 3 & & 9 &\
\hline
\textbf{Gas} & 12 & 0 & 0 & & & 6 & 0 & 0 & & & 1 & 0 & 0 & & 1 & 0 & 0 & & 20 &\
\hline
\textbf{Other services} & 10 & 0 & 0 & & & 12 & 0 & 1 & & & 4 & 1 & 2 & & 16 & 5 & 12 & & 63 &\
\hline
\textbf{Building/prop} & 0 & 0 & 0 & & & 1 & 0 & 0 & & & 0 & 0 & 0 & & 0 & 0 & 0 & & 1 &\
\hline
\textbf{Clubs & socs} & 2 & 0 & 0 & & & 1 & 1 & 0 & & & 1 & 0 & 2 & & 8 & 1 & 3 & & 19 &\
\hline
\textbf{Total Type Of Co} & 63 & 2 & 10 & & & 60 & 6 & 7 & & & 59 & 11 & 36 & & 105 & 10 & 47 & & 416 &\
\hline
\textbf{Total Year} & 75 & 73 & & & 106 & & & & & & & & & & 162 & & & & &\
\hline
\end{tabular}
\end{table}

\textsuperscript{14} Jones, E (1981), 43.
\textsuperscript{15} Jones, E (1981), 52.
the growth of the private company to the mid to late 1870s, rather than in the late 1880s, as suggested by Jeffreys and Ireland.

Thus it might be implied that attitudes as to the accepted uses of the corporate form were already beginning to change by the time of the 1886 Royal Commission on the Depression in Trade. It was suggested in the preceding chapter that petty bourgeois entrepreneurs, often acting at the suggestion of their professional advisers, began to utilize the limited liability form in significant numbers from the late 1870s onwards. It was also suggested that this shift to the corporate form was probably inspired by the desire to seek strategies that would preserve the viability of small business in a marketplace increasingly dominated by monopolistic practices. The British Association of Chambers of Commerce put it somewhat more circumspectly in a memorandum to the Board of Trade in 1899 in which it talked of private companies ‘that took advantage of limited liability to preserve continuity and to prevent weakness’.

This reference to the role of incorporation in preventing ‘weakness’ is but a veiled comment on the important role incorporation was playing in preserving the financial viability of small businesses in difficult times. The predominant reason why so many small businessmen began to incorporate their businesses from the late 1870s onward, despite the legal doubts that surrounded such practices, was almost certainly the prospects which corporate status held out to those involved in such businesses in lessening the financial and private humiliation of business failure, when and if it arrived.

Table 5.3 compares the survival rates of public companies, private companies which had no preceding history as partnerships and those companies which were the result of conversions of existing partnerships to private company form. These figures tend to support the view that the petty bourgeois were already using the corporate form as a means of lessening the blow of bankruptcy in the mid-1870s. The mean duration of the conversion companies is not only below that of private companies, but is also considerably below that of public companies. This suggests that a number of small to medium partnerships were converting to corporate form from the mid-1870s onwards in order then to go broke with dignity. If one examines the percentages of companies in the three different categories which failed in their first three years of operation the implication is again that many marginal businesses were using the Companies Act as a convenient mechanism to lessen the perils of business failure. Only 13.3 per cent of newly established private companies failed within the first three years of operation whilst 42.1 per cent of public companies and a staggering 49 per cent of conversion companies did so.

Thus, whilst the judiciary was still principally concerned with arcane technical questions of company legislation, small businesses were quietly, but busily, entrenching themselves in the interstices of company law. The legislation contained


17 See p. 144.
no explicit prohibition on the incorporation of such undertakings, neither did it require a statement that the requisite seven shareholders all held shares in their own right. Therefore numerous small- and medium-sized enterprises began to take advantage of corporate identity. This development was recognized by a number of witnesses before the Select Committees and Royal Commissions conducted at the time. Chadwick’s statements to the 1877 Select Committee on Company Law are particularly revealing. He stated that, especially in the iron and steel industry, conversions had occurred as a consequence of the desire of the vendors to either rid themselves of a firm in decline or to limit their responsibility in difficult economic times.18

Despite the apparently unchanging nature of the corporate legislation and the manner of its administration during the thirty years leading up to 1886, there were nevertheless significant changes in social attitudes towards the corporate form in that period. These changes in attitudes were to have a major impact on English commercial life in the period immediately preceding the 1886 Royal Commission on the Depression in Trade.

The most significant effect of this greater receptivity to the corporate form was on the structure of English commerce. The growing acceptance of the corporation as a suitable vehicle for small and medium businesses meant that new life was injected into this sector of the economy. The popularity of the corporation as a means by which smaller operators could insulate themselves from the vicissitudes of the marketplace is reflected in the enormous growth in the numbers of small, quasi-partnerships operating as private companies.19 With the de facto recognition of the legitimacy of incorporation for small businesses, changes occurred in the relationship of such businesses to lenders and to business creditors. With the advent of the small private company in great numbers the prevailing ethic in business became not so much caveat emptor as caveat venditor.

In the early years of limited liability incorporation the ‘better’ class of corporation tended to engage in one of the narrow areas of activity nominated in the previous century by Adam Smith as suitable for joint stock activity (for example banking and infrastructural undertakings such as canals and railways). Other companies tended to be highly speculative in nature and to have relatively short life spans. These characteristics of early limited liability registrations tended to reinforce opinion as to the impropriety of the corporate form and the wisdom of Adam Smith. However, when large numbers of small and medium sized enterprises started to incorporate in the last quarter of the nineteenth century it became somewhat more difficult to maintain these old prejudices towards the corporate

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18 Evidence of David Chadwick, Select Committee into the Operation of the Companies Acts 1862 & 1867, 1877, op. cit.

19 See for confirmation of this growth the evidence of witnesses such as Joshua Rawlinson, Sir J C Lee and the Registrar of Companies, J S Purcell, given to the Royal Commission on the Depression in Trade in 1886. This development is also reflected in the disaggregation of registrations for 1886 presented in Table 5.2.
form. Whilst a certain percentage of small and medium operators converted their businesses in order to go broke, many small businessmen converted their firms merely as an ‘insurance policy’, not in direct anticipation of business failure. As Jonathan Simon has remarked, the limited liability company is, in essence, another form of insurance, spreading risks and losses in a more equitable manner than would otherwise be the case.

Whilst the relatively benign veneer of the corporation spread risk more efficiently it also opened up a range of new possibilities for fraud and malfeasance. The less scrupulous seized upon these possibilities and turned the corporate device to their own advantage. The lack of regulation of the corporate area by government considerably aided those with such motives. As the numbers of fraudulent schemes involving corporations multiplied a new discussion emerged – one centered on white-collar crime and how best to deal with it. As the corporate form was invariably linked to commercial malfeasance a new rhetoric of regulation began to emerge. The next section examines the uneven and at time contradictory nature of the debate around commercial malpractice in the late nineteenth and early twentieth centuries.

The Corporation, White Collar Crime and Attitudes to Commercial Malfeasance in Late Victorian England

Whilst there had been a number of major corporate collapses earlier in the century, it was not until the late nineteenth century that the malfeasances of directors and others involved in corporate administration systematically began to be seen as deserving of criminal sanctions. The ‘class’ element in this cannot be ignored. Before the 1890s corporate management was generally conducted by members of the bourgeoisie, or alternatively by members of the gentry. There were also a few corporate rogues from the humbler classes, whose malfeasances were almost invariably dealt with harshly. The pages of David Morier Evans’ *Facts, Failures and Frauds* are redolent with such class distinctions. Fraudsters from the humbler classes were given a moral lecture by judges and transported to the colonies whilst offending members of the gentry were lightly dealt with and characterized as having been led astray by others, rather than being morally culpable for the losses they had occasioned.

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21 The class contradictions of the time in regard to commercial crimes is illustrated in the fact that in the Overend Gurney case those (upper class) directors who were convicted and sentenced to transportation all had their sentences commuted whilst ‘common’ commercial fraudsters such as Leopold Redpath, who defrauded the Great Northern Railway of thousands whilst an accounts clerk, were subjected to the full brunt of the law. The homilies of judges in such cases also reflected the attitudes of the times. In Redpath’s trial Mr Justice
A transformation in corporate management, however, occurred between the 1850s and 1860s and the end of the century. By the turn of the century many smaller commercial establishments, which would previously have been conducted as partnerships or sole traderships, were now being conducted as proprietary limited companies. Members of the petty bourgeoisie, a class not traditionally associated with corporate management, invariably ran these undertakings. This occasioned a revolution in the manner in which the judiciary and social commentators began to view corporate malfeasances. The rapid growth in the numbers of corporations and in the numbers of corporate failures, led at this time to the discovery of ‘white collar’ crime.

Whilst writers such as David Morier Evans had at an earlier stage begun the process of charting the extent of commercial malfeasance, it was not until the 1880s that commentators began to talk systematically of different varieties of ‘commercial’ and ‘corporate’ crime. The charting of a taxonomy of commercial crime and the beginnings of a discourse around the question of corporate regulation was only just commencing late in the nineteenth century.

The ‘discovery’ of corporate and ‘white collar’ crime also coincided with the availability of the first relatively accurate information as to the extent of commercial malfeasance. This information was the result of the labours of various trade protection societies and other similar bodies. The growing awareness of particular varieties of financial malfeasance was also a product of the rapid professionalization of accounting late in the nineteenth century. The developing sophistication in the analysis of corporate activities and the layers of malpractice which such analyses revealed finally led, late in the nineteenth century, to calls for action on the part of government. *Laissez-faire* dogma began to be re-examined and the heretical suggestion was advanced that the state should be more interventionist in this area.

Despite this developing rhetoric it is, however, important to recognize the parameters within which the discourse on corporate regulation was conducted at this time. The commercial press, witnesses before government inquiries into aspects of commercial life and sectors of the government bureaucracy often asserted that commercial morality had declined markedly in the last decade of the nineteenth century. This trend was also almost invariably associated with the large increase in private companies. Those in established commercial circles used

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Willes used his summing up not just to condemn Redpath but also to comment on the ‘moral’ dimensions of corporate activity: ‘Frauds such as this kind appear to be greatly on the increase ... these large companies servants are not brought into contact with their masters; they form no attachment for them: and they are not prevented, therefore, by any feeling of that kind from committing deprivations.’ Mr Justice Willes nevertheless handed down a stiff sentence as ‘such individuals are equally bound with others to render honest service to those who employ them.’ Redpath’s sentence, unlike those in the Overend Gurney case, was not commuted (Morier Evans, D, (1859) *Facts, Failures and Frauds*, (London), reprint 1968 (Newton Abbot: David and Charles), 483).
their power and influence to attempt to outlaw the proprietary or private company. It was asserted by the representatives of ‘respectable’ business opinion, such as Chambers of Commerce and trade associations, that government intervention and regulation should occur in respect to such associations. However, it was also stated that governments should avoid intervening in such a way as to stifle commercial initiative on the part of ‘honest’ businesses.

Whilst the moral tone adopted by Morier Evans in the 1850s and 1860s was relatively muted in comparison with that of some financial commentators in the 1890s, the stridency of these later commentators was largely reserved for the small proprietary company. The greater confidence in tone of these critics in their exposé of ‘immorality’ was largely due to the changing ‘class’ location of the focus of their invective.

Public scepticism with regard to a number of business practices which had previously been regarded as ‘legitimate’, began to develop. Again, however, this critique largely revolved around the (mal)practices of smaller private companies. For instance, one practice in respect of which concern began to be expressed was that of conversions of previously unincorporated bodies followed shortly afterwards by a winding up of the enterprise, now with the protection of limited liability\textsuperscript{22}. This scenario had previously only attracted attention in the 1860s with the catastrophic collapse of the major merchant bank, Overend Gurney. Even in that case it was not universally considered that the directors had acted dishonestly in so converting and thereby avoiding their creditors. Some considerable ambiguity continued to apply through to the 1890s regarding the \textit{bona fides} of the controllers of undertakings who converted their firms just before financial collapse.

The reluctance to attribute dishonesty or ‘\textit{mala fides}’ to those engaged in commerce was apparent in the contemporary discussions of \textit{Salomon v. Salomon} and in the judgments of the various courts in that famous case of a converted business going broke shortly after its incorporation\textsuperscript{23}. However, after the \textit{Salomon} case was resolved, public perceptions began to harden against businesses in such circumstances. Popular entertainments such as Gilbert and Sullivan’s \textit{Utopia Limited} savagely lampooned the ‘\textit{bona fides}’ of those involved in such schemes and the financial press referred to the \textit{Salomon} case in scathing terms. Again, the principal target of these criticisms was the smaller private company. The forms of malfeasance engaged in by larger businesses were either opaque or, relatively speaking, so sophisticated that they were not put in the public spotlight. On the other hand, the crude forms of malfeasance engaged in by the incorporators of small businesses were subject to the public gaze.

\textsuperscript{22} The anonymous book of investment advice, Anon. (1878) \textit{Counsel to Ladies and Easy Going Men on Their Business Investments}, (London: Leadenhall Press) comments on this development: see Chapter 6 fn 5.

The question of assigning criminality to such commercial behaviour was for the first time beginning to be discussed in some circles late in the nineteenth century. One group which consistently resisted the criminalization of such behaviour, however, was the commercial establishment itself. The objectives of the established sectors of the commercial community in their campaign regarding insolvent trading were clear – to outlaw the incorporation of small partnerships and sole traderships. The incarceration of thousands of small business people for minor infractions was hardly likely to be an achievable or popular policy. It was only shortly beforehand that the imprisonment for debt of this group had largely ceased. The criminalization of certain types of behaviour, such as insolvent trading, was also not favoured by larger businesses because of the danger such a prohibition might hold for certain aspects of their own operations.

Professional bodies such as Chambers of Commerce were, however, aided and abetted by the legal and accounting professions in resisting the extension of corporate privileges to all classes of business. On the one hand these bodies deplored the decline in commercial morals but on the other hand they vigorously opposed criminalization of commercial malfeasances such as insolvent trading.

Many in business considered insolvency as an obstacle in the way of continued trading rather than as a ‘crime’. This was in spite of the fact that many businessmen of the age were often victims themselves of dishonest traders who used the corporate veil to hide behind. Despite this understanding of the potential of limited liability enterprise as an element in dishonest schemes, the commercial community of the time also knew the fine line which often separated legitimate from illegitimate trading activities.

The ambivalence of business people toward illiquid trading and other commercial malfeasances explains why, despite considerable public misgivings regarding such practices, no major legislative changes which would lead to the outlawing of such behaviour occurred in the nineteenth century.

The small business community constituted a significant lobby group in its own right by late in the century. Not surprisingly it went further than its more established rivals in resisting any change to the status quo. It was opposed to any changes to commercial legislation that would undermine business initiative and remove, at least for some classes of citizen one of the principal freedoms conceded to business people during the height of the laissez-faire period – the right to incorporate. In advancing its position the small business community asserted that the association made between a decline in business morality and the growth in the numbers of small corporations made by others was misplaced. The two were not related. The growth in commercial malfeasance was, so it claimed, largely attributable to the poor management of a number of large enterprises. Small businesses, when they failed, did little harm to anyone except their principals and perhaps creditors if they had not taken the precaution of securing personal guarantees from directors.

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Small business interests also asserted that to remove the privilege of incorporation from particular classes of traders – namely themselves – would be discriminatory and have the effect of upsetting many established business relationships.

Those who opposed the Court of Appeal decision in the Salomon case 26 argued that the corporation was an important incentive to trade: outlawing its availability to certain categories of individuals would undermine commercial initiative. Using the legal form of the corporation to prevent the ignominy of personal bankruptcy was regarded as a perfectly permissible stratagem, as too was limiting ones liability and thus defeating the claims of certain creditors.

Thus, in the emerging debate surrounding the role of the corporation in the prevailing levels of commercial malfeasance two quite contrary positions were being developed. On the one hand, the corporation was cast in the role of a malevolent force, which had disturbed the otherwise irreproachable ‘Garden of Eden’ of the late Victorian commercial world. On the other hand, the corporation was promoted by its supporters (of whom there were many in commercial circles) as the saviour of English commerce.

None of the above views were, however, necessarily articulated in such a black and white form during the late nineteenth century. Indeed many individuals would hold both views simultaneously without acknowledging the apparent inconsistency of their position. A number of the witnesses before the Davey Committee in the 1890s held such contradictory opinions. In particular, businessmen of the era often held the apparently inconsistent position of on the one hand regarding illiquid trading as a ‘normal’ commercial event, and on the other characterizing the corporation as an unfortunate interloper in commercial life. Many in commerce genuflected in the direction of the ‘good old days’ in which individual traders dealt with other individual traders in an Elysian field of moral righteousness. At the same time advances of funds or goods obtained by a business person whilst illiquid were considered by contemporaries as a consequence of ‘good business practice’, rather than as morally unacceptable or even criminal in nature.

It was widely considered that if one was ‘clever’ enough to obtain credit whilst staring commercial failure in the face this was commercially admirable. It demonstrated the sort of skill which was thought to characterize the good

26 One arena in which vigorous criticism of the Court of Appeal decision was made was in the pages of the Law Quarterly Review which described it as ‘unfortunate’ that the Court of Appeal had so belatedly discovered the fact that one person companies were an ‘abuse of the Companies Acts’: ‘Out of the thousands of private companies which have been formed in the last quarter of a century under the Companies Acts, it might be doubted if there are 10 per cent which will satisfy the test laid down in Broderip v. Salomon ... the fact that these companies are now left with a very questionable status is much to be regretted. (Law Quarterly Review, 1895). The author of the leading company law text book of the time, F B Palmer, urged that ‘these dicta be disregarded as they have created great anxiety and doubt and some consternation, in the mind of those who were interested in private companies’ (Palmer, F B (1896) Private Companies Or How to Convert Your Business Into a Private Company and the Benefit of So Doing, (London: Stevens and Sons), 20–21).
entrepreneur – ruthlessness, cunning and personal acumen when dealing with lenders and suppliers. As one businessman remarked in the course of a study of ‘long firm fraud’, a variety of commercial crime:

The notion that trading whilst insolvent is a crime is totally absurd. I doubt if there is a businessman in the country who does substantial buying and selling on credit who could always rely on paying all his debts when they fell due on every occasion throughout his business life27.

There is nothing in this statement with which a nineteenth century businessman would disagree. As one commentator opined ‘the popular image of Victorians as righteous and reliable, if rather dull and phlegmatic, is upset by a study of the welter of nineteenth century frauds and failures’28. This assertion tends to be validated by the fact that one of the largest sections in the most popular nineteenth century business manuals was that on fraud. As one such manual, Lisle’s Encyclopedia of Accounting put it, ‘the subject is one which is always more or less claiming the attention of professional and commercial men’29.

What is, however, perhaps more interesting than the perception of an increase in fraud at the time was the developing opinion, referred to above, that the bulk of this growth in commercial fraud might be attributed to the growing numbers of small and medium sized undertakings registering as companies. At best, however, this perception of a greater disdain for established commercial morals amongst smaller operators may have been only partially true. Such assertions may have had more to do with a growing concern amongst larger operators regarding the resilience of their smaller competitors, and thus a wish to give them a bad name, than they had to do with a strict adherence to the facts.

The evidence of a number of the witnesses before the Davey committee in the 1890s reflected the view of many in established commercial circles that much of the deterioration in moral values at the time was as a consequence of small proprietors assuming corporate identity.

There was yet another factor instrumental in the discovery of a burgeoning incidence of white collar criminality at the time. This was the growing accuracy of financial and other commercial records, with a consequent increase in the ability of investors, government agencies and trade protection societies to detect fraud at an early stage. The increasing accuracy of business records was itself, of course, largely the result of another important development of the period, the growing utilization by those in business of professional accountants and auditors. Routine frauds of a financial nature were often not detected earlier in the nineteenth century as a consequence of the lack of professional scrutiny of company books. In the 1840s matters were rumoured to have been so bad in some of the railway

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29 Lisle’s Encyclopedia of Accounting, (1892) (London).
companies that the books were kept in pencil, rather than pen, so that they could be altered at short notice to satisfy prying shareholders or disgruntled creditors. As the advertising of the accounting firm of Hemingway and Robertson proclaimed, the accountant had become, by the end of the century, indispensable in any large scale enterprise:

[Whilst] it is only occasionally that even the largest business house requires the knowledge and help of the Solicitor; the knowledge and skill of the Accountant on the other hand is in demand at all times – weekly, daily, and even hourly. The scope of Accountancy is almost unlimited, and the demand for qualified men is growing continuously.\(^\text{30}\)

Whatever the reasons, there was a mounting perception in the late nineteenth century that fraud and other lesser malfeasances were becoming more common amongst the business community. Late Victorians were concerned about this perceived change for the worse in business morals. They attributed this deterioration in commercial morality to the spread of incorporation to all classes of business. This purported connection between the corporate form and the supposed deterioration in commercial ethics was not new. However, the level of concern being expressed had only previously been paralleled by the fears that were raised at the time of the introduction of the limited liability legislation in 1855–1856.

At the same time a significant difference in cultural attitudes between the two periods was that by the late nineteenth century there had been a general retreat from the *laissez-faire* notions which had originally inspired the introduction of limited liability legislation in the mid-1850s. Robert Lowe’s argument that ready availability of incorporation was part of the ‘freedoms’ to which Englishmen were entitled was beginning to be regarded with increasing scepticism by late Victorians. Creditors, in particular, were beginning to forcibly assert their ‘rights’. The dedication of the limited liability corporation to the interests of investors was for the first time coming under severe scrutiny.\(^\text{31}\)

\(^{30}\) Advertisement for Hemingway & Robertson, 1913, National Archives of Business & Labour, ANU, Canberra.

\(^{31}\) The greater preparedness for change later in the nineteenth century was, however, matched by a much greater range of established practices and expectations which would be affected by any major alteration to the existing legislation. This has been commented upon by Margaret Rix: ‘Whether or not the policy of the two earlier company law committees (the 1867 and 1877 Select Committees into Company Law) had been right, the attitude shown was hardly characteristic of an impartial enquiry. It is impossible to estimate now what damage the private philosophies of such men as Robert Lowe and William Newmarch may have done, but it is certain that if any radical improvement had been wanted, the first thirty years of the Companies Acts would have been the time to introduce it. Later on, when the limited company had become a typical form of organization, changes could be rejected on the grounds that the interests affected would have been too vast to interfere with extensively.’ (Rix, M (1936), 43–44).
Many ‘cultural’ works of the late Victorian period were devoted to an exploration of the reasons behind and remedies for this apparent collapse of moral values in English society. Much of Anthony Trollope’s *The Way We Live Now* is devoted to an examination of the deterioration of moral values in late Victorian society. Trollope implicates the penetration of the corporate form and speculation into all aspects of English life as a major cause of this moral crisis. Limitation of responsibility is one of the key themes of the novel. All the major characters in the novel, Felix Carbury, Paul Montague, Roger Carbury, and Lord Nidderdale, address the question of how far one can limit one’s responsibility to another for one’s own secret purposes32. Trollope considers that the compromised morals of late Victorian society are part of a general atomisation of ‘community’. The repeated failure by each of the central characters in *The Way We Live Now* to take moral responsibility for each other is Trollope’s indictment of what he considered an impoverishment of communitarian values in late Victorian England. The central character, the company promoter Melmotte, is characterized as a debauched foreigner who has insinuated himself into English society. Trollope suggests that moral parasites such as Melmotte are able to spread their contagion more easily in this ‘new’ world of ‘limited’ responsibility. Melmotte is presented, as the personification of the moral sickness that Trollope perceived was associated with the assumption of corporate status.

A range of lesser writers than Trollope also took up their pens to express outrage at the corrupting effect of limited liability incorporation on English moral values. Popular contemporary titles that dealt with corporate investment and corporate malpractice included *The Autobiography of A Joint Stock Company, Limited*, which was published in *Blackwood’s Magazine* in 187633, and Robert Bells’ melodrama of high finance, *The Ladder of Gold*34. Even in the early Edwardian period such depictions continued to have a popular audience. One of the popular plays of the early twentieth century, Harvey Granville Barker’s *The Voysey Inheritance*35, had

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33 The hostile atmosphere during the late Victorian period towards white collar crime has been taken up by George Robb (1992) in his excellent study of period, *White Collar Crime in Modern England: Financial Fraud and Business Morality 1845–1929*, (Cambridge: Cambridge University Press). In commenting on the *Autobiography* Robb states: ‘In 1876 Blackwoods’ published the short story, ‘The Autobiography of a Joint Stock Company, Limited’ that was modelled on Grant’s speculations [here Robb is referring to the Victorian fraudster Albert Grant]. Imaginatively told from the company’s point of view, the story began: “I was conceived in sin and shapen in iniquity” ... The story went on to detail all the abuses of company promoters: fraudulent prospectuses, dummy directors, share rigs and false accounts’ (at 102).
34 Bell, R (1850) *The Ladder of Gold*, (London: Richard Bentley), (republished several times during the 1860s and 1870s).
35 George Robb (1992) asserts that this play is characteristic of the later Victorian and early Edwardian concern with ‘trust’ in matters of commerce (at 93).
a similar theme. All of these fictional accounts of the world of high finance warned businessmen and potential investors alike of the moral contagion that lay at the heart of limited liability enterprise.

Popular journals also carried regular articles and correspondence on the evils of limited liability association. The flavour of such articles is evident in the following passage from the journal, Nineteenth Century:

The carrying out of objects which would be more or less fraudulent, and would be impossible in the case of a private individual or partnership, is rendered easy by means of the Companies Acts.

The idea that the corporation was responsible for social decay was however not solely propagated in the novel and the popular press. These concerns began to be expressed in a variety of artistic forms and popular entertainments. Gilbert and Sullivan, for instance, wrote a popular operetta at the time almost exclusively concerned with the question of the corrupting influence of the extension of limited liability incorporation to all classes and groups in society. In Utopia Limited the principle of limitation of responsibility is adopted by all members of the community, even young babes are made limited liability corporations. In this mythical ‘utopia’ no one ever pays his or her bills. Instead they claim the benefit of limited liability and go into that ‘English institution’, winding up. Behind its satirical exterior Utopia Ltd was motivated by the same serious concerns as Trollope’s The Way We Live Now; principally a questioning of the role of the limited liability company in the destruction of communitarian values. One commentator has speculated on Gilbert’s intentions when writing the libretto to Utopia Limited:

The corporate idea to Gilbert was faulty in that it shielded the incompetent and the irresponsible man from the consequences of his own failure ... The most interesting aspect of Gilbert’s criticism of the corporation ... lies in his suggestion that the privileges of incorporation, public corporate financing, and limited liability are undeserved unless accompanied by high standards of responsibility on the part of corporate management.

In a much narrower vein Utopia Limited is also a polemic in favor of creditors’ rights. The extension of limited liability to all classes of business, so the operetta suggests, is absurd. All this facilitates is the defeat of the legitimate claims of creditors.

Again, in the plastic arts, one of the themes of late Victorian painters was the corruption of social values by the corporate entity. In this context the moral


dilemma is the lure of wealth through speculative investment and the ruin that almost invariably follows. The most famous late Victorian paintings on this theme are those in W R Frith’s *The Race for Wealth* series. This series of canvases are Hogarthian in their execution. In this instance however, instead of drink, sexual promiscuity and gambling constituting the corrupting influence, it is the limited liability company and the lure of speculation in shares which are the moral focus of the paintings.

One way in which this cultural criticism of the corporate form and commercial behavior might be interpreted is as a reflection of a moral panic at the time in respect to commercial malfeasance. The growth in numbers of corporations, the exposure of previously undetectable commercial crimes due to the growing sophistication of business record-keeping, and the boom and bust cycle of the 1880s and 1890s may all have made it appear as if there was a commercial crime-wave occurring in the late nineteenth century.

In this light, negative views about the corporation, limited liability and commercial morality might be seen as passing phenomena. With a growing acculturation to the positive organizational benefits of the corporate form, a stabilization in methods of business record-keeping and a less volatile economic climate it might be expected that public opinion would swing back in support of commercial endeavor. Economic prosperity would again be perceived as crucially dependent on the vitality of English commerce and industry. Captains of industry would again be lauded as heroes rather than reviled as villains.

These predictions turned out to be only partially true. Whilst the numbers of companies continued to grow and the process of marginalization of other organizational forms proceeded apace a suspicion remained as to the propriety of the corporate form. Many continued to regard it as a rather vulgar, if necessary, adjunct to commercial life.

However, this mixed reception for the corporation should not be solely dismissed as attributable to blind prejudice. There were also tangible reasons for a continuing suspicion amongst investors and the general public towards the corporation. Recent evidence suggests that the public perception in late Victorian England of a commercial sector riddled by immorality and dishonesty was not too far from the truth. As early as 1854 Herbert Spencer observed that the temptations in the direction of dishonesty were great in the corporate sector due to the lack of adequate controls:

> Bearing in mind the comparative laxity of the corporate conscience; the diffusion and remoteness of the evils which malpractices produce; and the composite origin of these malpractices; it becomes possible to understand how, in railway affairs, gigantic dishonesties can be perpetrated by men, who, on the average, are little if at all below the generality in moral characters.38

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More recently Rob Sindall, in the course of a study of middle class criminality during the nineteenth century, has noted that particularly after the 1870s there was an enormous growth in crimes committed by the middle classes. These crimes were often of a commercial character. Sindall also notes the manner in which the corporate form was implicated in the perpetration of many of these misdemeanors:

The commission of many crimes by the middle classes during the course of their occupations was aided by the lack of strict controls of the work involved ... Alfred Embden, in 1894, believed that the law actually encouraged dishonesty and wrote, ‘The carrying out of objects which would be more or less fraudulent, and would be impossible in the case of a private individual or a partnership is rendered easy by means of the Companies Acts’ Embden later noted the failure of company legislation to alter in order to accommodate new developments in business practice ... Fraud and embezzlement were both facilitated by the poor accounting methods used during the period39.

Whilst we have recently been going through a period in which deregulation is fashionable, in the late Victorian period the antithesis was occurring. Arguments for stronger regulation of private interests, particularly the corporate sector, were gaining ground. In response to this assault on laissez-faire values many English industrialists of the late nineteenth and early twentieth century reacted with hostility. They were generally suspicious of change, reluctant to innovate and energetic only in maintaining the status quo. In respect to the latter the one application of laissez-faire values, which they opposed, was the extension of limited liability incorporation to small and medium size businesses.40.

**The Growth of the Private Company and its Effect on Proposals for Reform**

As already noted a significant development occurring in the late Victorian era was the colonization of corporate law by notions and practices drawn from partnership law. This was related to the enormous growth at this time in the numbers of small private undertakings assuming corporate status. As part of this process the public nature of the responsibilities of corporations came to be more and more

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40 Ilersic, A R (1960), 77, notes in this regard: ‘The well established partnership viewed the new limited companies ... with suspicion. In the words of one delegate from Yorkshire (to the Association of Chambers of Commerce) “if gentlemen with money wanted to get the great interest they thought was to be gained by trade, let them go at it honestly and run the risks of trade”.’ See also the discussion in Cottrell, P L (1981) at 50–51.
downplayed and their private nature more and more emphasized. As Morris Finer has stated, the operation of business in corporate form came to be considered as a private affair ‘between consenting adults’. This view was, according to Finer, contrary to the legal reality that corporations were in essence nothing more than an ‘artifice sanctioned by the community, deriving as a privilege from them, and subject accordingly, to the paramount rule of their welfare’. Due to the distortion of the true nature of the corporation the introduction of provisions requiring public disclosure of certain aspects of corporate activity, such as the lodging of annual balance sheets in common form, became even more remote than they had been before the growth in private company registrations. It was argued at the time that the requirement of such information being placed on the public record would be a burden on small companies and compromise their privacy. As a later anonymous commentator put it, legislators were in a quandary by the 1890s with regard to the reconciliation of two conflicting ideals:

The one to give the utmost publicity to the affairs of a company; and the other, to protect and encourage the family business, which might suffer unduly from undue publicity of its affairs, and in the event of the death of a principal, might be embarrassed seriously if unincorporated\textsuperscript{41}.

With the growing numbers of incorporations of purely private undertakings it became more difficult to bring about necessary reforms – particularly reform in a direction which gave investors and creditors greater access to reliable financial information on the undertaking in which they were investing or to whom they were lending. Proposals for making public the balance sheets of companies were very swiftly scotched by those who claimed it would put incorporated private undertakings at a fearful disadvantage as compared with their unincorporated rivals. Margaret Rix has identified the two main sources of opposition to the introduction of a provision requiring publication of annual balance sheets by\textit{ all} companies:

Behind all the objections was the assumption, somewhat less strong at the present day [i.e. 1936] but still held with considerable strength, that secrecy is a cardinal business principle, to which our commercial supremacy at the end of the last century, was said for some reason or another, to be due ... it was also felt that to reveal the real level of profits of an enterprise would open employers to criticism from employees ... that it would give rise unnecessarily to labour difficulties ... There was likewise at the other end of the scale an anxiety to conceal losses\textsuperscript{42}.

Leading the campaigns to preserve secrecy in company affairs were those small businessmen and their professional representatives who favoured corporate

\textsuperscript{41} Law Institute Journal, 1st February 1931, 51.
\textsuperscript{42} Rix, M (1936), 65–67.
identity for all classes of enterprise. They asserted that secrecy was particularly necessary to smaller undertakings that could only remain competitive by gaining certain advantages over their competitors in matters such as wages or cost of raw materials. To disclose such special arrangements would destroy their ability to compete in the marketplace.

This vigorous advocacy of the rights of small business was the more strident due to the lack of support obtained from larger industrial and commercial interests in opposing the disclosure provisions. Most large enterprises already voluntarily practiced what the proposed legislation would make compulsory. By the end of the century, almost all major listed enterprises supplied annual balance sheets to shareholders on a voluntary basis. The managements of many such large enterprises indeed welcomed the proposals for greater disclosure due to the fact that they saw that the implementation of such measures would impose burdens on their smaller competitors, which would possibly make them less competitive.

The main advocates of reform in the direction of greater disclosure were, however, creditors, in particular the creditors of small corporate undertakings. Justice Vaughan Williams expressed the view before the Davey Committee (1895) that the introduction of a measure requiring publication of balance sheets by companies was desirable in that it would allow the creditors of private companies to have access to some form of public and objective information on such enterprises. Thus the principal reason for advocating greater publicity to the financial affairs of companies in the late nineteenth century was not as is sometimes asserted43, to provide greater protection for investors in public companies. Rather the proposals for reform in the late nineteenth century came largely from those concerned to ensure that creditors of small companies had access to publicly available information on the financial status of the undertaking(s) to which they were lending.

An acknowledgment that the principal impetus for greater disclosure on the part of companies came from those concerned with the lack of objective criteria by which to judge whether to lend to or supply such entities contradicts the assertion that private companies should be placed in a special category with respect to financial disclosure. Indeed, at least in its origins, public disclosure of financial information was a proposal specifically aimed at making the liquidity of private undertakings more visible to suppliers and potential creditors. Disclosure was a proposal aimed at making small undertakings more accountable and from which their claim for exclusion could only be regarded as tendentious and self-serving.

Opposition from amongst the representatives of small businesses to the imposition of greater disclosure requirements meant that debate focused on the issue of disclosure rather than on the more important question of the type of organizational structure most appropriate to small business needs. The limited liability corporation had gradually become the most common legal structure for small businesses. By the 1890s this was regarded as a fait accompli. Little or no debate took place as to what might be the most suitable legal form for small businesses.

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43 Rix, M (1936), 63.
business (that is, partnership, commandité, limited liability company). Rather, it was clear from the deliberations of government enquiries in the late nineteenth century that any future changes to company legislation would be dictated by the ‘lowest common denominator’, which was constituted by the large and growing numbers of small, private enterprises choosing to incorporate.

Rather than acting as a modernizing influence, the specific attributes of the corporate form had become more and more irrelevant by the 1880s to the manner in which business was actually conducted. Many of the characteristic features of the corporate form as outlined by Robert Lowe in 1856 – such as the republican notion of shareholder democracy – appeared quite absurd when applied to small family firms operating as corporations.

The practice of enterprises converting from partnership to corporate form in order to continue to operate their business largely unchanged became normalized at this time. This was not just the case with small enterprises which converted. Even in the case of relatively large enterprises little changed in the capital structure of the enterprise. Often the conversion involved no alteration in the capital structure of the business whatsoever. Neither shares nor debentures were issued to the public. Both small and large undertakings were converting for reasons that had little to do with fund raising. The fact that little or no change in managerial practices occurred after such conversions is therefore hardly surprising. The lack of any outside investors meant that no pressure existed to operate in ways different to what had previously been the case. This was exacerbated by the fact that there was also very little if any regulation of such undertakings by the state. Company legislation was seen as facilitative rather than regulatory. Thus the corporate form constituted a shell within which incorporators could largely operate according to their whims.

The commonplace nature of conversions failing to augment their capital by means of public issues of shares or debentures has been commented on by Professor Peter Payne. Payne has noted that the same reluctance to call on the public existed amongst Scottish companies formed during the 1870s and 1880s:

Conversion resulted in a legal change – the ownership of the firm had been altered – but in itself, it had little or no immediate economic significance.

Payne has asserted that as a consequence of the predominance of factors unrelated to capital raising in the conversion of enterprises to corporate form, the economic importance of incorporation to domestic capital formation was not as great as many commentators have suggested. He conjectures that in the last quarter of the nineteenth century mining and manufacturing companies and public utilities financed appreciably less than ten per cent of real investment at home through new issues on British stock exchanges.

The non-public nature of many company formations has long been remarked. This was the case even when they were not small one-person businesses, but rather were medium or large concerns that had previously been family firms. For instance Frederick Lavington, author of *The English Capital Market*, commented in 1921 that during the first decade of the nineteenth century most of the joint stock companies coming into being each year in England ‘were already in possession of their capital’ at the time of their formation or alternatively obtained their capital ‘by way of private negotiation’\(^{45}\). Some fifteen years after Lavington’s comments, another expert historian of the corporation in England expressed the view that the introduction of the limited liability company in England may have done little to stimulate new enterprise:

> The actual connection between new companies and new enterprises is not well established ... so far as public companies are concerned, the really new enterprise is that which is least likely to make a public issue, except for obvious speculations like mining companies. Many, and indeed most, new registrations indicate the proposed extension of existing businesses\(^{46}\).

By the late 1870s the corporate form was performing a quite different function for its supporters than those that had been intended for it by its advocates in the 1850s. Rather than attracting new equity investment to industry, by way of the inducement of the benefits of limited liability, it was instead predominantly being used by established entrepreneurs to better protect themselves against possible losses in case of bankruptcy and to confer on their businesses the benefits of perpetual succession. It was also used as a means by which advances of loan capital might be extended as a consequence of the development of new forms of security which would not have been possible in the case of sole traderships or partnerships – such as the floating charge.

The adoption of corporate form also allowed many businesses to obtain loan capital more easily from the banks and other financiers. Due to the fact that the assets of the enterprise belonged to the corporate entity rather than to the individuals that constituted the business, as in the case of a partnership or sole tradership, loans could be secured against circulating capital. Loan arrangements with bankers and other (non-public) financiers were consequently now possible on a much more favourable basis from a business point of view. As a consequence of the refinement of the floating charge, businesses that incorporated could readily secure loans over their circulating capital as well as over their fixed capital. Partnerships, however, as a consequence of their unincorporated status, were still restricted to securing business loans over the fixed capital of the firm.

The developments described in this section indicate two quite contrary influences on policy relating to companies at this time. On the one hand there was


\(^{46}\) Rix, M, (1936), 26.
a growing impetus in favour of a stricter disclosure regime for corporations by the end of the 1870s. Many of the leading businesses which had already converted to corporate status by the early 1880s voluntarily adhered to a disclosure regime far in excess of that required by law. The importance of financial information to investors was becoming more and more apparent by the late 1870s, when people from all classes began to invest in shares and stocks in greater numbers. Also, as institutional investment rapidly expanded in the late 1870s and early 1880s, powerful interests began to demand a far stricter disclosure regime for corporations registered under the Companies Act.

On the other hand, there was at the same time an exponential growth in the numbers of small ‘one person’ businesses registering as companies. The reasons for this growth in private companies during the late 1870s and early 1880s were various, the most important factors being the protection afforded by limited liability and the wider range of alternatives with respect to borrowing available to corporations over those available to other forms of business organization. However, whatever the reasons for their incorporation, small businessmen who chose to follow this route were uniformly hostile to an expanded disclosure regime. Most had very crude accounting systems in place, and argued that there was little need for them to make fuller disclosure given that there were no external shareholders to whom they owed obligations. It was consequently asserted by the forces opposed to the introduction of a more rigorous disclosure regime that such a regime should not be hastily introduced, as it would prejudice small business at the expense of larger undertakings. Without an adequate definition in the Companies Act which might open the way for separate legal regimes to apply to private and public companies, no changes to the status quo in respect to disclosure could occur. At the time it was considered that to embody the distinction between private and public companies in a simple definition was difficult, if not impossible. Thus it was decided to retain the existing disclosure regime until the problem presented by the growth in the numbers of private companies could be separately addressed.

The Professions and the Development of Corporate Law and Practice

Most accounts of the development of company law identify either capital or government as the most significant forces shaping policy in this area. Accountants and lawyers are generally presented as subsidiary players, acting in accordance with the wishes of their employers in government or amongst private capital. The role of professionals is presented as largely reactive in nature. Some accounts of the professions have, however, asserted that this conception of the function of professional advisers as largely passive is wrong and that instead they played a crucial role in shaping legislation and policy in core areas of modern capitalist
Commenting on the generally accepted dogmas regarding the role of the professions in the development of areas of law such as corporations and trade practices, Robert Gordon has asserted:

Historians ... treat law – its institutions, doctrines, processes, norms – as a kind of problem solving technology, developed as a functional response to certain social needs. From this perspective, corporate law is seen as a response to the need to mobilize capital in larger amounts than family-based partnerships permit ... In this mode of legal history, the ‘social needs’ themselves are usually rather vaguely conceived as unproblematic social universals (stability, the organization of claims to scarce resources) or as inherent elements in some process of large-scale historical change (Western capitalism, economic development, the extension of the market, secularisation). Otherwise historians who try to relate legal thought to practice tend to treat law simply as the product of interest-group politics, the outcome of a struggle fought to victory or compromise among various social factions ... In other words our histories have tended to see legal ideas either as the client (or social planner) sees them, or as strategic instruments amongst an arsenal of others to achieve specific ends for a group or client ... [in contrast this study] recognizes that every legal practice ... makes a contribution to building a general ideological scheme or political language.

The lack of attention by historians to the possible role of professional advisers in crucial changes in the application of company law is perhaps not all that surprising given that at the midpoint of the nineteenth century very few professionals were involved in the establishment and the ongoing activities of joint stock companies. Even early corporate giants such as the railways did not always employ professionals to draft their legal documents or prepare their accounts. Consequently at mid-century there was a shortage of both lawyers and accountants with any expertise in corporate matters.

It was also the case that many professionals did not regard commercial work, particularly that associated with corporate activities, as wholly respectable. We can observe this rather reactionary attitude in the expressed opinions of key legal

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47 An example of such a re-evaluation of the role of the professionals is Zunz, O (1990) Making America Corporate 1870–1920, (Chicago: University of Chicago Press).
functionaries at the time of the introduction of the limited liability legislation. Lord Overstone and Lord Monteagle led one group opposing the legislation and were permitted to use the *Law Times* as a forum for their opinions. Rather than perceiving the legislation as a means by which the range of professional activities of those engaged in legal occupations might be enhanced, they characterized the legislation as a license to engage in roguery. No doubt they considered that acting in such matters could do nothing to enhance the standing of lawyers in the community.

When limited liability legislation was introduced in 1856 one of the chief lobby groups for the preservation of the *status quo* appears to have been the legal profession. This appearance may, however, be deceptive. While certain elements in the legal profession favoured the preservation of the *status quo*, others were pressing for the adoption of the limited liability corporate form. This division of opinion between two different groups within the legal profession can be observed in the evidence presented to the *Royal Commission on Mercantile Law* in 1854 and in the periodical literature of the period.

After the introduction of the legislation by Robert Lowe in 1856 the role of legal professionals in this expansion and adaptation is worthy of note. Lawyers, in the service of clients, began to develop and elaborate upon the relatively scanty framework of company law provided by the 1856 limited liability legislation. Perhaps even more important than this purely instrumental role of lawyers in drawing up company documents, arranging the technical aspects of share flotations and other similar tasks was their role in popularizing and legitimizing the limited liability corporation as an organizational form. They often recommended the adoption of corporate identity to entrepreneurs who were hostile to the idea.

In all probability, however, the most important role of lawyers in the development of the corporate form was not the advice given by elite members of the profession to their large commercial clients. Rather it was the advice being given by humbler members of the profession to their small business clients on how to convert their businesses to corporate form.

It is perhaps significant that most accounts of the history of company law find little of interest in the developments of legislation and in judicial cases decided between 1856 and the *Salomon* case in 1897. Most refinements that occurred during this period (the development of the floating charge, rules relating to reductions of capital, the development and decline of vendors shares, and so on) generally arose in practice to deal with an immediate problem and without precise legal authority.

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50 Jeffreys, J B (1938), 21, notes that lawyers were considered to be one group of witnesses before the 1854 *Royal Commission* who were generally in favour of the introduction of limited liability incorporation. However it was considered by contemporaries that this support was largely pragmatic in nature due to the ‘wish of lawyers for more fees through the setting up of companies’ (*ibid*). On the other side, considerable opposition from the profession can be gleaned from a scrutiny of the pages of the *Law Times* in the period 1854–1860, which journal regularly ran articles hostile to limited liability legislation.
Elite practitioners were often more involved in ascertaining legal precedents for existing practice rather than innovating in their own right. In Robert Gordon’s terms elite lawyers were employed as ‘tacticians’ rather than ‘principals’. It is probably just as true for England as it was for the United States that ‘in all ... major phases of ... the organization of enterprise – competition, combination by alliance, and consolidation by integration – the contribution of counsel was chiefly tactical’\(^{51}\). So too would the following comments of Robert Gordon be legitimate to describe the relationship of English entrepreneurs and corporate lawyers in the nineteenth century:

Sometimes, of course, what were ordinarily secondary issues became primary and tactics dictated strategy. In some situations ... the lawyer did become a critical figure in decision-making: (a) when the company was engaged in litigation crucial to its existence (b) when it was in the process of formation (c) when it was on the verge of receivership (d) when some important new legislative or administrative scheme to regulate was in prospect (e) when it required a special franchise – public land, traction route, utilities service monopoly – from some governmental authority\(^{52}\).

However, the picture is somewhat different in respect of the role of humbler practitioners who were involved in advising small business clients. Perhaps the single most significant development attributable to the legal profession during the nineteenth century in respect of the subsequent development of company law is the commencement of the practice amongst humbler members of the legal profession of advising smaller business clients to incorporate. This change in the type of advice being given by the profession to small businesses began to occur during the late 1870s and the 1880s. What at first began as a trickle of enterprises accepting professional advice to incorporate, despite doubts as to whether the company legislation permitted this, became a deluge by the time of the depression in trade in the mid 1880s. This ability to influence the opinions of the normally conservative members of the small business community was an illustration of the proactive role that the legal profession could perform in certain circumstances. Lord Bryce referred to this aspect of the professions contribution when he stated that the most significant role performed by the legal profession in the nineteenth century was “to educate opinion from the technical side, and to put things in a telling way before the people”\(^{53}\).

The principal historians of the corporate form have had little to say of this ‘educative’ role of the profession, perhaps as a consequence of the fact that they have generally focused on the elite sections of both the profession and of the commercial world, rather than the more mundane members of both groups.

\(^{51}\) Gordon, R G (1987), 78.
\(^{52}\) ibid., 79.
\(^{53}\) cited in ibid., 81–82.
Commentators such as Edgar Jones and J B Jeffreys have nevertheless remarked on the fact that the profession was a direct beneficiary of the large increase in the numbers of small businesses incorporating during the later years of the nineteenth century. The largest area of growth for most small to medium sized legal practices in the latter part of the nineteenth century was in matters associated with corporate affairs, principally corporate registrations, the filing of annual returns and related legal work. The legal work generated by failed corporations was also considerable. One delegate to the Association of Chambers of Commerce in the 1880s commented that many companies were formed solely to make money for the promoters and the lawyers upon winding up\textsuperscript{54}. Sir Jacob Behrens made the same point more subtly in a speech he delivered to the Association of Chambers of Commerce in 1887. He stated:

\begin{quote}
No commercial law ever passed in this country has contributed so much to the extension of commerce as the 1862 Companies Act, but at the same time no Act ever passed has given rise to so many law suits (my emphasis)\textsuperscript{55}.
\end{quote}

His comments were greeted with a hearty ‘hear, hear’ by his audience. Presumably most of the assembled members of the Chambers of Commerce had themselves experienced the difficulties of litigating a failing corporation or had become entrapped in the drawn out process of that nineteenth century institution – winding up. The exactions of the legal profession cannot have been unfamiliar to many in such an audience. The meetings of the Leeds Chamber of Commerce were, throughout the seventies and eighties, dotted with complaints by delegates of the amount of legal fees, particularly in matters such as the winding up of companies\textsuperscript{56}. The historian of the Leeds Chamber of Commerce captures the prevailing attitude amongst nineteenth century businessmen towards lawyers:

\begin{quote}
The lawyers were drawn from a social group different from that of the new industrialists, and it would have been easy for a business man to see a lawyer as at once a creature of hereditary privilege and, at the same time, a parasite taking unnecessary fees from such business men who were careless enough to let their disputes come as far as litigation. It is only in these terms that the antagonism to the law courts and lawyers can fully be appreciated\textsuperscript{57}.
\end{quote}

Despite the significant role performed by both accountants and lawyers in the adoption by small businesses of corporate form, the two professions nevertheless

\begin{footnotes}
\textsuperscript{54} Ilersic, A R (1960), 77.
\textsuperscript{55} Annual Address of Sir JacobBehrens, President, Association of Chambers of Commerce 1887 cited in Ilersic, A R (1960), 79.
\textsuperscript{57} Beresford, M W (1951), 47.
\end{footnotes}
differed over certain aspects of this development. Their most notable difference was over the desirability of financial disclosure for such enterprises. These differences in attitude were, at least in part, influenced by pragmatic concerns. Lawyers, through their professional organizations, did not support the suggested reforms, particularly the imposition of compulsory balance sheet requirements. They considered such requirements would prevent any further expansion in the numbers of small firms converting to corporate status. The reasoning was that small firms were hardly likely to convert to private corporate status if they had to reveal their financial affairs in any detail to the Registrar. In such circumstances they were more likely to remain as a sole tradership or partnership. From the point of view of the legal profession (or at least certain sections of it) this would undermine a growing ‘bread and butter’ area of practice – company registrations.

The accounting profession took a different view of the proposed introduction of compulsory financial reporting. Whilst accountants, as advisers, had been as important as lawyers in bringing about the popularity of small business conversions to corporate status they also had an ancillary concern that such businesses provided ‘bread and butter’ support to the profession in respect of their accounting requirements. Unlike the legal profession, they had a vested interest in the introduction of compulsory balance sheets. Shannon commented upon their role in the shaping of modern company law, alongside the legal profession, in his study of the first five thousand limited companies. He observed that lawyers and accountants were both well represented in the various Committees and Royal Commissions on Company Law throughout the 1860s, 1870s and 1880s due to their intimate involvement in the formation and liquidation of corporate entities. With regard to the potentially conservative role these two professions might have had on the reform of company law, Shannon comments:

58 In the course of his evidence to the Davey Committee, Mr Harold Brown, a solicitor specializing in company law, expressed the view held by many practitioners in respect to the desirability of making balance sheets publicly available: ‘The desirability of compulsory disclosure of balance sheets to the public by registration at Somerset House or elsewhere is, in my opinion, open to much question ... It is fraught with danger in many cases ... The notion that the public have any interest in the balance sheets of companies is, to a great extent, a fallacy. The only persons who have any real interest are the shareholders and the creditors. As regards the shareholders, they can acquire information from the directors in general meeting and in private, and in my experience, they do so. Trading companies cannot give detailed information in general meeting, or even in private, with safety, except to large creditors. Shares are sometime acquired with the express purpose of getting information for rivals, or harassing the management.’ (Davey Committee, 1895, B.P.P., LXXXVIII, at 248–249).

59 Margaret Rix, however, has suggested that the accounting profession was not unequivocal in its support for the introduction of compulsory financial reporting, perhaps realizing that the public circulation of such information might lead to public liability of accountants and auditors when they were negligent in the preparation of the relevant data. See Rix, M (1936), 59–69.
As promotion and liquidation are lucrative fields of practice for them, they are likely to overestimate the deterrent effect (and consequent social loss) that a tightening up in that law might have.60

The Role of the Corporate Form in the Depression in Trade – The View of the 1886 Royal Commission

One group of corporate enterprises that were beginning to be considered with considerable suspicion by the mid-1880s was those ‘apparently successful’ private concerns that had converted to public companies. The manner in which such conversions led to losses and economic instability was a matter much debated in the public domain. One investment manual of the early 1890s commented that such enterprises should be a source of concern for the inexperienced.61

Before the Royal Commission on the Depression in Trade and Industry in 1886 one of the witnesses, Mr R P Harding,62 whilst unwilling to generally implicate limited liability enterprises as one of the causes of the depression, nevertheless considered conversions of private firms to public companies a practice which might be more tightly regulated. He viewed ‘with suspicion ... any concern that had been in existence for some time being turned into [a] limited liability company ... because I have seen very few instances on the part of traders to give to the community at large 30s for a sovereign’.63 The same sort of advice in relation to conversion companies continued to be tendered to investors throughout the late 1880s and early 1890s by their professional advisers and by ‘financial advisers’. Despite such adverse comments in regard to the bona fides of many ‘conversion’ companies the general view of witnesses before the Royal Commission of 1886 was that limited liability companies were not implicated to any great degree in the onset of the then prevailing depression in trade. The main thrust of the comments on limited liability companies was that the principle itself was good but that the want of close supervision of such enterprises was a breeding ground for unethical and fraudulent practice. Many also thought that the English system of company

61 Anon., (1892) Counsel to Ladies and Easy-going Men on Their Business Investments and Cautions Against the Lures of Wily Financiers and Unprincipled Promoters (London: Leadenhall Press), 41.
62 Robert Palmer Harding (1821–1893) was one of the leading liquidators of his day and a founding member of the Institute of Chartered Accountants. He had been a consistent critic of Robert Lowe’s approach to publicity. He had given evidence before the 1867 Select Committee on Joint Stock Companies which was critical of many aspects of the Companies Acts of 1856 and 1862.
legislation leaned too heavily in favour of the investor at the expense of the creditor. Even the Registrar of Companies expressed the opinion that ‘the Companies Acts provide, not perhaps as fully as they might, for the protection of the creditor’\textsuperscript{64}. This theme was also taken up by another witness, the secretary of the Employers’ Association, Mr Joshua Rawlinson, who suggested that companies be required to make their accounts publicly available. On being asked if he felt such accounts would help small investors he replied:

I do not think that class of investors would care enquire very much about it. I made the suggestion rather for the information and protection of creditors who would be far more likely to enquire into the stability and working of a concern than the person you term the ignorant small investor\textsuperscript{65}.

Upon further examination Rawlinson’s real concern became evident: the unscrupulous use of limited liability incorporation as but a means of defrauding creditors. Also evident was the fact that he had no particular distaste for the corporate device, merely considering it should be treated as a privilege granted by the state with certain conditions attached, which might ensure that it was not used fraudulently or dishonestly to defraud creditors or investors.

The broader issue examined by the Royal Commission was the recent phenomenon of significant numbers of small businesses registering as private corporations in the process of economic downturn. As Cottrell notes, although there had been since the enactment of the Joint Stock Companies Act of 1856 small numbers of annual registrations of private companies, it was only in the 1880s that their existence was beginning to attract attention. The Registrar of Companies reported to the Commission that in excess of 560 private companies had registered in the five years terminating on the 31st December 1884. Whether this accelerating trend amongst smaller businesses to adopt corporate status was one of the results or a cause of the economic downturn of the late 1880s was a subject of speculation by many of the witnesses called before the Royal Commission. Most witnesses, whilst expressing concern about this new development, did not ultimately consider that it was implicated as one of the causes of the depression in trade\textsuperscript{66}.

Whilst absolved from responsibility for the depression in trade the increasing numbers of private companies, however, provided the Royal Commission with the opportunity to conduct a public dialogue on the question of whether such enterprises should be subject to the same regulations as public companies. Some witnesses suggested that private companies should not be treated any differently than public companies as they had surreptitiously claimed the considerable

\textsuperscript{64} Evidence of the Registrar of Companies, Mr J S Purcell, \textit{Third Report of the Royal Commission on the Depression of Trade and Industry}, 1886, BPP, XXIII, Q. 665.


\textsuperscript{66} Cottrell, P L (1980), 65.
privileges attendant on corporate status. One particular issue on which there was lively debate as to how private companies should be regarded was with respect to the publication of balance sheets. One textile manufacturer, Sir J C Lee, opined that it would be undesirable to require private companies to publish their accounts as it would compromise their position with their competitors and potentially lead to ‘labour troubles’. A representative of the iron trade, Sir Lowthian Bell, also expressed the opinion that it would be unreasonable to expect private companies to reveal their financial position through their balance sheets.

Cottrell has suggested that a number of organized groups began to lobby for the private corporate interest around the middle of the nineteenth century and that the development of such a lobby was implicated to a large degree in the failure of many of the proposed reforms to company law. This lobby was particularly prominent in the debate around the desirability of introducing a requirement that balance sheets and borrowing powers of companies be made public. As we have earlier observed this proposed reform was strenuously opposed by those who spoke for the private company interests. Their arguments were expressed in terms of ‘freedom of commerce’ and the ‘cardinal principle of secrecy’ required by commercial enterprises.

The private company lobby became particularly active around the time of the Royal Commission in defending the rights of private incorporators. They were not, at least at this stage, primarily concerned with the question of recognition of such enterprises, but rather the issue discussed above, the proposals advanced in the late nineteenth century for greater public disclosure by all classes of corporation. According to Rix, the private company issue only became a matter of concern after the proposals for greater disclosure were mooted:

The mere fact that private companies existed – and without being challenged – long before they were recognized by law is sufficient indication that the legal recognition of private companies was not a pressing need ... The separate recognition of private companies was not then due to any dire necessity; such companies already existed in large numbers, when threatened legislation intended to apply to all companies registering under the Acts, called forth such a protest from businesses considering they had a right to act secretly, that the definition and exemption of private companies was asked for so as to escape the liabilities proposed by the new legislation.

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70 Rix, M (1936), 65.
71 Rix, M (1936), 61–62.
Whilst these assertions as to the influence of the small business lobby in blocking reform are quite persuasive it is important also to look wider afield in order to establish the full range of interests representing an impediment to change to company law and its administration in the middle to late 1880s. In particular, those in the City involved in speculative flotations and a range of other financial interests were strongly opposed to substantial changes to the legislation.

Joshua Rawlinson, the Secretary of the Employer’s Association, conceded to the Commissioners that his suggestion that annual balance sheets should be required of limited liability companies meant not only that investors and creditors would have access to such information but that such information would thereby be placed in the public domain. The Commissioners suggested that this might compromise private traders. In reply Rawlinson stated that he ‘would not let any one shelter himself under the law of limited liability except upon the condition that he exposed the state of his affairs to the inspection of his creditors’\(^{72}\). Most representatives of larger commercial interests were, like Rawlinson, not necessarily committed to general public disclosure but were nevertheless concerned that the financial status of smaller enterprises be available to suppliers and lenders.

The Registrar of Companies also informed the Commissioners of the rate of failure amongst new flotations. He was responding to a query made by one of the Commissioners in respect to a letter to *The Times* that suggested that 90 to 95 per cent of new companies did not succeed. J S Purcell, the Registrar of Companies, noted that this figure was much exaggerated. On his assessment of the rate of failure he suggested at first glance it might seem that approximately 64 per cent of company flotations failed. However, he continued, ‘but, inasmuch as many defunct companies have been re-registered, or have fulfilled the object for which they were formed, and cannot therefore be deemed unsuccessful, I think the real proportion would approximate more closely to 50 per cent’\(^{73}\).

The two suggestions in relation to the operation of limited liability companies most often advanced to the Royal Commission were:

- to require limited liability companies to make annual balance sheets available to the public or a designated representative thereof (for example, the Registrar of Companies);
- to impose unlimited liability on directors of limited liability companies. It was asserted that this would lessen the prevailing irresponsibility amongst certain sectors of the business community.

The first suggestion was not acted upon. The predominant reason for this inaction appears to have been the concern of the Commissioners as to the effect of such a legislative requirement on small private companies. The commissioners

\(^{72}\) ibid.

suggested that this predicament might, however, be overcome by amending the Act to recognize the differences between public and private companies. The only real objection the Commissioners could see to such a solution was the considerable difficulty associated with framing an adequate working definition of the two types of company.

The Commission appears to have relied on the evidence of a number of witnesses in its rejection of a requirement for the tendering of public balance sheets. Some, such as Sir J C Lee, had forthrightly expressed their opinion to the Commission that the uncontrolled growth in the registration of private companies was an important reason for not imposing financial reporting requirements. He stated that such a predicament was:

... the fault of the Act [but] as there [are] now certain vested interests ... it would not now be desirable to [require annual balance sheets of private companies].

This rather tautologous reasoning was merely an extension of the generally accepted view amongst legislators and those in commerce that corporate law reform should never significantly interfere with existing commercial understandings. The premise lying behind this view was that the ramifications of any such reform would be so great as to make that reform, no matter how socially desirable, unworkable. The extension of this reasoning to the issue of the possible effects of a more stringent financial disclosure regime on small businesses was quite tendentious, but nevertheless extremely influential in Parliamentary and Committee debates on the matter. The suggestion of the Royal Commission, that definitions be inserted in the Act differentiating private from public companies, was not taken up at the time on the grounds that it was too difficult to formulate such a definition.

A further matter under consideration by the royal commission, that of the merit of imposing unlimited liability on directors in certain circumstances, also met with significant criticism from a number of quarters. Some witnesses giving evidence to the royal commission stated that the effect of any such legislative innovation would be to drive ‘quality directors’ away from industry. No sensible man of business or figure of standing in the community would be willing to take on the onerous responsibilities of a directorship if he felt that might expose him to the rigours of unlimited liability if the enterprise failed. Only the disreputable, who had neither capital nor reputation to lose, would take on directorships under such conditions.

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74 Evidence of Sir J C Lee, *ibid.*, Qq.8052–8053.
75 Evidence of Sir J C Lee, *ibid.*, Q.8057.
76 A number of leading members of the legal profession, including some of the most prominent company law practitioners, publicly expressed these concerns in a letter in 1888 at the time of the first suggestion that provisions, such as those finally contained in the Directors Liability Act 1890, would be enacted: ‘An attempt under threats of criminal liability to compel disclosure of all material particulars or arrangements in connection with
The Companies Bill of 1888

After the Royal Commissioners released their report in 1886 the pressure for reform continued, despite the apparent success of the private company lobby in staving off reforms in the direction of greater public disclosure. The issue of corporate law had, however, become a matter of such public interest by 1888 that the question of reform was adverted to in the Queen’s Speech of that year. Legislation was introduced in that year but did not go through all the necessary stages by the end of the Parliamentary session. One of the key reforms proposed in the Companies Bill of 1888 was the requirement that audited accounts of a company be published. This provision made no discrimination as between public and private corporations.

The other innovation introduced to the debate on company law by the Companies Bill of 1888 was with respect to the personal liability of directors. The Bill boldly attempted to entrench the liability of directors by requiring them, in order to qualify for appointment, to hold collectively at least 20 per cent of all the shares that had been allotted by the company. It was also required that the share qualification of each director be set out in the prospectus along with a statement of how each director had acquired their shares. The Bill also recited that the same proportions of shareholding by directors would have to be maintained in any subsequent issues of shares by the company.

The influence of the private company lobby is apparent in the debates on the 1888 Bill. Considerable opposition to many of the proposed reforms occurred in the Lords, but the brunt of the attack on the proposed legislation was in relation to its potential effect on private companies. The leaders of the onslaught in the Lords were Baron Bramwell and Lord Herschell, both of whom were Law Lords. Bramwell criticized the Bill for its lack of attention to the position of private corporations and expressed particular concern about the publicity requirements, which would become law if the legislation were passed. Bramwell stated to the Lords that a requirement that balance sheets be made public would be fatal to many, if not most, private companies as it would give secrets away to competitors. The sacrosanctity of secrecy in commercial matters again held sway, as the measure requiring publicity of accounts did not pass into legislation at the time.

The provisions relating to directors’ duties had a somewhat more chequered reception. While many in both Houses of Parliament were sympathetic towards some reform in this area the measure proposed by the 1888 Bill was considered

the formation of limited companies will have no effect whatsoever except to drive away business from this country and to force into the hands of the professional director of the worst type all remaining business connected with limited companies’. (The Economist, 24th November 1888). The accompanying report in this issue of The Economist on the Directors Liability Bill was quite critical of this ‘irresponsible’ intervention by solicitors close to company interests.

77 See the comments of Rix, M (1936), 37–39.
too extreme a departure from past practice. It was also felt that if the duties of
directors were increased to too great an extent then no person of ‘quality’ would be
prepared to take on such onerous responsibilities. Lord Herschell crystallized the
thinking of many in the Lords on this question when he observed that the proposed
new range of directors’ duties was so sweeping that only those ‘with nothing to
lose’ would be prepared to accept the position of director.  

The upshot of the failure of the 1888 Bill was a new group of Bills which
were placed before Parliament in 1890. These three Bills, the Companies
(Memorandum of Association) Bill, the Companies (Winding Up) Bill and the
Companies (Directors’ Liabilities) Bill, were far more modest in the reforms they
adumbrated than the 1888 Bill had been. The first was a minor piece of legislative
reform that would allow companies to alter their Memoranda of Association, but
only after a successful application to the High Court. The second of the 1890 Bills
was primarily concerned with reducing the then astronomical costs of winding up
by putting it on the same footing as bankruptcy and by allowing an inferior court
to deal with winding up applications.

The third Bill, that dealing with directors’ liabilities, was the only one of the
proposed measures that did not originate with the Government. It was put forward
as a Private Members’ Bill. The proponents of this measure were far more modest
in their approach to the issue of directors’ duties and liabilities than had been the
drafters of the 1888 Bill. Their principal concern was to reverse the effect of the
decision in Derry v. Peek (1889) which had held that directors were not liable in
respect of untrue statements contained in a prospectus unless they not only knew
the statements to be untrue but also had a dishonest intent in publishing those
statements. The Companies (Directors’ Liability) Bill of 1890 proposed that those
responsible for the issue of a prospectus be bound by all statements made in that
document, but none of these measures was passed.

The Directors’ Liability Act 1890

Reform of English company law, particularly insofar as it sought to impose stricter
reporting requirements on companies and stiffer penalties and increased civil
liability for the malfeasances of promoters and directors, thus proceeded slowly.
The first legislative response to the recommendations of the Royal Commissioners
in 1886 was the enactment of the Directors’ Liability Act in 1890. This Act had
the effect of making directors, promoters and other officers liable to make good
any loss or damage suffered by a subscriber to a prospectus when that document
contained untrue statements. Liability attached in such circumstances, even in the
absence of fraud. At least in part this legislation was a response to the criticisms of
the behavior of many company promoters by witnesses to the Royal Commission

78 For the speeches of Bramwell and Herschell see Hansard, 28th June 1888, vol.327,
col.1514 and vol.328, 17th July 1888, col.1502 respectively.
on the Depression in Trade four years before. However the legislation was largely motivated by the worsening of the position of the aggrieved investor in the intervening period, consequent upon the unsatisfactory decision of the House of Lords in *Derry v. Peek*.

As a treatment of the broad issue of directors’ duties the legislation was characteristically English in its timidity. It had many loopholes. It also did not impose liability for untrue statements made other than in the prospectus and it sought only to impose civil liability on malefactors. It was a regulatory measure which was still underpinned by the *laissez-faire* attitude that most matters relating to companies were best left to those involved to sort out themselves. Grieser has commented upon the character of regulatory measures such as the Directors’ Liability Act:

> The English partiality towards case law has contributed to the disorganisation and indefiniteness of the statutory laws. The Victorian attitude that business is best left in the hands of business men has resulted in the present position. Company practice is regulated only to a minimum degree by law ... . The British investor ... puts his faith in men rather than legal provisions and balance sheet statistics ... the system is in sharp contrast to the regulation of American finance.

The nature of the Directors’ Liability Act of 1890 was not simply an unproblematic legislative manifestation of a character trait of the Victorian era. It was the product of a tussle between contending views as to the appropriate responsibilities of directors of limited liability companies. On the one side, as has been previously noted, there was some quite vigorous advocacy of the need for greater directorial responsibility by interests representing certain classes of investors and creditors. However these proposals were not translated into legislation, except in an extremely truncated form. This failure to achieve significant reform was due to the equally energetic advocacy by interests close to corporate interests of the case for maintaining the *status quo* in regard to directors’ duties and liabilities. One of the key supporters of the *status quo* was Mr Harold Brown, a solicitor who represented the London Chamber of Commerce. As Margaret Rix has noted, Mr Brown’s case was so often and so skillfully presented that he ‘almost succeeded in making directors appear in the role of a persecuted race’.

Consequently the Directors’ Liability Act of 1890 was a paper tiger. Whilst it contained severe penalties on directors in the case of certain types of malfeasance it nevertheless also contained many loopholes for the devious or dishonest minded. By the mid-1890s the legislation was a dead letter. However it must be noted that it had some symbolic force, as Margaret Rix has observed:

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79 Rix, M (1936), 49–50.
81 Rix, M (1936), 46.
The Directors’ Liability Act was looked upon variously as a dead letter and as a heavy weight upon the minds of company directors. Directors apparently had long conferences on the subject with their legal advisers; they were said to be surprised to find how serious their nominal liabilities were – and equally surprised to find how easily these liabilities could be escaped.\(^\text{82}\)

**The Davey Committee (1895)**

**(i) Introduction**

Whilst the response of the legislature in 1890 may have been relatively tame, the clamour for reform continued. The reason was that companies were both being promoted on a more regular basis and on a larger scale than before. Also, for the first time, these promotions were occurring on a national basis and also, for the first time, being directed at *all* classes of investor. The systematic nature of the lies and deceptions used to lure investors into unfortunate investments was common knowledge amongst a diverse range of investors and the demand for a more reliable source of information relating to potential investments was becoming widespread. Jeffreys comments:

> From 1885 to about 1900 ‘the high art of prospectus making’ came into its own. The fairly sober documents with offers of local concessions had given place to brilliant pieces of writing in which all kinds of tricks like big and small type, red ink, headings of private and confidential were fully developed ... In the nineties the deception practiced in the prospectus made the slogan of ‘clean up the prospectus’ a major platform of company reform.\(^\text{83}\)

The themes of greater publicity in financial matters and increased liabilities for promoters and directors therefore continued to reappear in debates and legislative proposals during the closing years of the nineteenth century. New legislation was again proposed in 1894, leading in turn to the appointment of a Select Committee under the chairmanship of Lord Davey. The Davey Committee (1895) was appointed:

> [T]o inquire what amendments are necessary in the Acts relating to Joint Stock Companies incorporated with Limited Liability, especially with a view to the better prevention of fraud in relation to the formation and management of companies and to consider the clauses of a draft bill.\(^\text{84}\)

\(^{82}\) *ibid.*, 50.

\(^{83}\) Jeffreys, J B (1938), 351–352.

\(^{84}\) *Report of the Companies Acts (Amendment) Committee* (The Davey Committee), 1895, BPP LXXXVIII, 155.
The three principal issues addressed by the Committee were:

1. the means by which frauds committed by promoters upon investors, such as inflating the purchase price of assets sold to the company and pocketing the resulting profits themselves at the expense of the company, might be better prevented;
2. the necessity for the introduction of financial disclosure requirements and also, if such measures were introduced, whether they should apply to all classes of company or only to public companies;
3. the measures which might need to be taken to protect creditors against the practice of partnerships/sole traderships converting to private company status and in the process securing the assets of the enterprise against first ranking debentures issued to the vendor of the original business.

(ii) Investor Protection: The Recommendations of the Davey Committee as to Mandatory Disclosures in Prospectuses

In respect to protecting investors against unscrupulous promoters both the Davey Committee in 1895 and a subsequent Report of the Inspector-General of Bankruptcy in 1897 recommended the mandatory imposition of disclosure requirements on public companies as to the nature and status of contracts relating to the purchase of assets by, or the provision of professional services to, fledgling corporations. Full disclosure of the nature of such arrangements should, so both Reports urged, be required in the prospectuses issued by new corporations and by established corporations making new issues of shares.

The reasons behind the proposals for stricter disclosure requirements was discussed in an article in *The Statist* of 9th February, 1895:

> We believe, and have always believed, that it would pay to be honest in company promotion. The present seems, at any rate, a favourable time for making the experiment. Company promotion as now conducted is utterly discredited. The state of affairs could not be worse than it is. It is taken for granted that the statements in a company prospectus are misleading, and as nearly false as the compiler dares to make them. It is quite understood that the certificates of profits or values of even high classed accountants and valuers must be carefully weighed, and that many firms merely certify what they are paid to certify, their fees being increased in proportion to the divergence of their certificates from facts ... So utterly rotten in the public estimation has the whole business of company promotion become, that it is now almost useless to offer for subscription an issue of ordinary shares in an industrial enterprise. If a few more issues of preference shares and debentures such as some of those that have lately been brought out are offered, the public will soon become disgusted with them also.\(^{85}\)

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\(^{85}\) *The Statist*, 9th February 1895.
The belief amongst sections within the commercial community at this time was that the behaviour of some company promoters represented a threat to the interests of capital in general. Their reasoning was that if the general confidence of investors in commercial investments was undermined then the flow of investor capital into flotations of shares would be substantially reduced. Some means had to be found which would not affect the flotation of legitimate businesses, but which would nevertheless discourage, if not totally prevent, the flotation of fraudulent undertakings.

The device of mandatory disclosure of certain information in a prospectus was proposed as the solution to these problems. The Davey Committee accordingly recommended that every prospectus relating to the public issue of shares or debentures should contain the names and addresses of directors, the shareholding of directors and the address of the company’s auditors. The Davey Committee also recommended that there should be a statement of the actual purchase price paid to the true vendor of property sold to a company, along with a statement of promoters’ fees, amounts paid to intermediate purchasers of property and the size of any underwriting commissions paid out by a company in respect to an issue of shares. As we will examine further below, these recommendations met with a varied response.

In suggesting that the prospectus disclosure provisions of the Companies Act be expanded to better protect investors against dishonest promoters the Davey Committee was taking a less radical step than that which had been put forward by a number of witnesses before the Committee.

For example, one current of opinion in the late nineteenth century was that fraud might be prevented by the Registrar of Companies taking a much more proactive role, and inquiring into the *bona fides* of each new company proposing to be registered. This concept was drawn from the practice applying to Friendly Societies, each new proposal having to be considered by the Registrar of Friendly Societies before registration could take place. The Davey Committee (1895) rejected this approach as unworkable in the case of joint stock companies:

> To make any such investigation into the position of every new company complete or effectual would demand a very numerous staff of trained officers, and lead to great delay and expense, whilst an incomplete or perfunctory investigation would be worse than none.86

**(iii) Requiring Financial Disclosure of Corporations – The Davey Committee’s Compromise.**

As we have noted earlier, one of the dilemmas presented by proposals regarding the introduction of compulsory requirements in respect to the disclosure of

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86 *Report of the Companies Acts (Amendment) Committee (The Davey Committee), 1895*, BPP LXXXVIII, 164.
financial information by corporations was whether such provisions should apply to all companies or only to public companies. The Davey Committee extensively debated this issue and proponents of both perspectives gave evidence. One advocate of the necessity for change was the Registrar of Companies, J S Purcell, who offered the opinion that some modification in respect to the content of annual returns needed to be made. He continued:

Complaints are frequently made by the public, of whom upwards of 100 come to search the files at my office daily, that they do not get the particulars they are in search of. They expect to find the names of the directors and some kind of balance sheet in addition to the names of shareholders. There would, no doubt, be considerable objections to filing profit and loss accounts; but I see no reason why the directors’ names should not be given, and also an assets and liabilities account.

Despite these representations one of the questions troubling the Davey Committee was whether such a burden should be placed on private as well as public companies. On the one side it was asserted by creditor interests that the requirement as to balance sheets should in particular apply to private companies, as it was extremely difficult to determine, without such information, the credit rating of such undertakings. On the other side, witnesses such as Sir Robert Lee asserted that, as ‘commercial understandings’ had been built up around the ‘privacy’ of financial information, private companies should not now be required to make their balance sheet publicly available.

The mounting interest in the introduction of compulsory annual balance sheets seems to have originated from groups representing creditors. The assembly of creditor interests felt that it would be only reasonable to allow creditors access to some objective information about the companies to whom they were lending. Margaret Rix notes the interest of creditors in achieving some reform in this direction and the fact that the call for greater public access to financial information primarily related to the operations of private not public companies:

The tendency for the conversion of small businesses into impersonal companies presented a difficulty to potential creditors who could only rely upon some sort of published information in deciding whether or not to give credit. The Registrar in 1886 had told the commission that it was common for creditors to search a company’s file before deciding to give credit.

In the case of some witnesses the discussion of the need for publicly available financial information from companies spilled over into a general discussion of the merits of allowing private undertakings to register under the Companies Act.

87 ibid., 224.
88 Rix, M (1936), 63.
A Social History of Company Law

Some witnesses were appalled at the growth in the numbers of small undertakings registering as companies with limited liability. Samuel Ogden, a J.P. and the President of the Trade Protection Societies of the United Kingdom, feared the corrosive effect on business morality involved in the extension of limited liability to small undertakings. He saw the extension of limited liability to all classes of enterprise as resulting in the ‘demoralisation of trade ... and the discouragement of honest enterprise’.

Despite such assertions made by elements of business opinion the Davey Committee was largely sympathetic to the continuing existence of such private corporations. At any rate they felt that such enterprises had become so much a fact of life that to move in the direction of prohibiting their existence would be untenable. They accepted evidence from the Registrar of Companies that there was a ‘goodly proportion of companies’ that fitted into this category. Mr J S Purcell, the Registrar, stated that of the 1,328 companies registered in London in the first six months of 1890, 415 were ‘more or less of a private character’.

The Davey Committee indicated its *de facto* approval of the private company in its recommendation that prospectuses not be required in cases of private subscription, thus effectively excluding private companies from one of the new regulatory provisions suggested in the Report of the Committee. However, despite this implicit acceptance of the private company, some members of the Committee were not prepared to recommend an explicit definition for it. The Final Report of the Committee indicated that there was some considerable dissent amongst the committee members as to the desirability of separately identifying public and private companies in the Act:

> An opinion has been expressed by many members of the Committee in favour of dividing joint stock companies into two classes, consisting of so-called ‘private’ companies and public companies. Undoubtedly it would be convenient for the purpose of legislation if such a division could be made. But the difficulty is to draw the line and to state any satisfactory definition of so-called ‘private’ companies.

The upshot of the failure of the committee to establish any such definition was that compulsory financial reporting by companies was not introduced. The issue of compulsory lodging of balance sheets, which had in the first place been urged so that creditors and their representatives, such as trade protection societies, could more easily gain access to information on private companies was now rejected on the basis of the need to preserve private company rights to privacy. The failure of the Davey Committee to define private companies thus meant that financial

89 *Report of the Companies Acts (Amendment) Committee* (The Davey Committee), 1895, BPP LXXXVIII, 240.
90 *ibid.*, 228.
91 *ibid.*, 169.
reporting was not recommended for any class of corporation. The caution of the Committee in this area is reflected in its report which suggests that as public opinion (in particular the Chambers of Commerce) was against such a requirement it therefore should not be imposed. The Davey Committee did accept, however, that companies should keep 'proper books of account' and that they should also provide an annual balance sheet to their shareholders.

This, of course, left it open as to how creditors might gain access to the information which they desired. Some witnesses conceded that creditors, along with shareholders, should be entitled at least once a year to accurate and reliable financial information on the companies to which they lent funds or supplied goods or services. Even the chief advocate of directors' ‘rights’ before the Committee, Mr Harold Brown, conceded that, whilst compulsory balance sheets ‘were fraught with danger in many cases’, nevertheless those persons who had a ‘real interest’ in the information contained in the balance sheet, the shareholders and creditors, should be entitled to this information. However he provided the rider that small shareholders and creditors should not have the same rights as their more considerable counterparts: ‘trading companies cannot give detailed information in general meeting, or even in private, with safety’ except to large shareholders and creditors. This, he asserted, was due to the misuse such information might be put to by ‘trade rivals’92.

(iv) Protecting Creditors Against the Practice of Issuing First Ranking Debentures to the Vendors of Businesses in Case of Conversion

The main proposal before the Committee in regard to providing better protection for creditors against the practice of defeating their claims by means of the issue of first ranking debentures in favour of the vendor of a pre-existing business (or their assignee) was to require the registration of all mortgages of company property. The Committee recommended that all charges on unpaid capital and any charges secured by way of a floating charge on the property of the company should be required to be registered. In this case the agitation for reform appears, at least initially, to have originated from the Association of Chambers of Commerce. As early as 1881 the Association had passed a motion at its Annual Meeting to the following effect:

That the Joint Stock Companies Acts require amendment to make it illegal to defraud their ordinary creditors for the benefit of debenture holders as they may now do by mortgaging their future property and book debts93.

The lack of urgency with which the recommendations of the Davey Committee were considered by the legislature is reflected in the fact that the implementation

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92  *ibid.*, 249.
of even as uncontentious a proposal as the introduction of a registration system for debentures was not implemented until five years after the issue of the Report of that Committee. The 1900 Companies Act adopted the principle of registration for debentures.

(v) Miscellaneous Matters before the Davey Committee: Directors’ Duties Revisited

Another matter that occupied the attention of the Davey Committee was that of directors’ duties. It had already been discerned by this stage that the Directors’ Liability Act (1890) had not been a success in reducing malfeasance amongst company directors. One method by which it was proposed that dishonest directors might be dissuaded from engaging in malpractices was by making criminal penalties apply more uniformly in the case of deviant and dishonest behaviour on the part of controllers of companies. The Davey Committee, however, was unmoved by the entreaties of a number of witnesses in this respect. They were particularly concerned that by increasing the criminal penalties applying to directors, ‘good men’ would be discouraged from accepting such posts, whilst the dishonest would be relatively unconcerned about the attendant loss of character arising from a conviction as they would have no reputation to lose in the first place. The overly cautious approach of the Committee towards white collar crimes committed by directors is indicated in the following passage from their Report:

Your Committee think that the broad distinction between crime and civil liability should be observed. The requirements of new legislation in connexion with commercial matters are somewhat difficult of interpretation, and to visit non-compliance with such requirements with criminal liability, or to treat errors of judgement as criminal, is in the opinion of the Committee to be deprecated.

Despite this reluctance on the part of the Committee to recommend that criminal law be employed against dishonest and/or incompetent directors it was nevertheless perceived that something had to be done. This was due to the rather low standards of practice of a number of company directors at the time. Essex-Crosby has analyzed the causes of failure of public companies in 1895 and arrived at the conclusion that more than 90 per cent of these failures were ‘connected with the promotion or management factors’ which he alleges should have been susceptible of control.

The perception that the quality of the promoters and/or management of a company was a crucial factor in its success or failure was not solely a matter

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of hindsight – by the time of the Davey Committee the Board of Trade had a reasonable idea that this was the case. The Board of Trade was consequently one of the bodies prominent in pushing for tighter regulation of both promoter and directors. The representatives of the Association of Chambers of Commerce, however, emphasized the need to deal with dishonest promotions whilst exercising caution in regulating directors lest honest men be discouraged from taking office in the leading enterprises of the day. On the one side Sir Albert Rollitt, the President of the Association and himself a member of the Davey Committee, emphasized the pernicious effect of dishonest promoters and fraudulent prospectuses on the investing public. He stated in an address to the Association in 1900 that the chief concern of the Davey Committee had been with ‘the evil of prospectuses, the preparation of which had become a high art’. However, it is also clear that the Association did not want the question of directors’ duties and liabilities to become a major focus of the Davey Committee. A memorial from the Association to the Board of Trade in 1899 emphasized the potentially negative effects of enacting even the mild reforms suggested in the Report of the Davey Committee. The memorial repeated the Association’s claim that ‘the position of director should not be made so onerous as to deter good men from serving on the boards of companies’.

Despite these representations from commercial interests, the feeling that some reform in respect to directors’ liabilities should occur was quite pronounced. One basis of this concern for reform was the strength of public opinion. One source of growing public sophistication in financial matters, and thus a greater concern with reforms concerning the conduct of trade was the development of a more informative financial press in the last decade of the nineteenth century. Late in the nineteenth and early in the twentieth century there was a quite rapid shift away from, on the one hand ‘milk and water’ commentaries on financial matters (such as was the practice of The Times until the early twentieth century), and on the other hand opinion which had been ‘bought and paid for’ (such as was the practice amongst the less respectable financial dailies and weeklies). With this greater flow of information on the financial machinations of entrepreneurs, and the growth of a national market in shares, a new attitude towards the directors and mangers of joint stock companies emerged.

96 Note, however, the comments of Todd, G (1932) ‘Some Aspects of Joint Stock Companies 1844–1900’, Economic History Review, vol. 4 (1), 1st series, 40–71 at 70–71, who states: ‘By 1890 the skill in economic analysis of the Board of Trade officials had increased, and it was suggested that company failures were due, not so much to general inefficiency, as to inefficiency in starting up the company ... the causes of such insolvency were not general mismanagement, which takes time to ripen into insolvency, but an inability to make efficient company promotions – due to the fact that the companies were formed to take over unprofitable businesses, to acquire concessions that were practically worthless, to purchase bona-fide businesses at extravagant prices, or on account of the fact that they were formed for the purpose of financial speculation or with an inadequate capital.’

97 Ilersic, A R (1960), 81.

98 Grieser, N J (1940), 95–100.
Alongside the growth in the late nineteenth century of a financial press that now was more critical of commercial dealings than had earlier been the case, was a greater public scepticism of the trustworthiness of those in the financial community, particularly promoters, managers and directors. There was also at this time a new spate of melodramatic ‘financial’ novels, which further undermined public confidence in the *bona fides* of many in the commercial community. We have earlier observed how both Dickens and Trollope had influenced public opinion towards the limited liability corporation and those that formed and ran such enterprises in the 1850s and 1870s respectively. In the 1890s it was the turn of novelists such as George Gissing to foment distrust of corporations, and more particularly of promoters and directors. The interconnections and contradictions of ‘industry and speculation’ on the one hand and ‘personal success’ (and failure) and domesticity on the other are explored in Gissing’s 1897 novel *The Whirlpool*.

The temptations presented by the commercial world for deceit, betrayal and manipulation are featured prominently in Gissing’s adventure, which has been described as ‘an updated version of *The Way We Live Now*’99. However, Gissing is somewhat more sympathetic in his treatment of the director than was Trollope in his anti-Semitic picture of the unscrupulous Melmotte. According to Gissing ‘dishonesty’ in entrepreneurship is not the work of a few alien ‘bad apples’ such as Melmotte, but rather is a question of the nature of entrepreneurship itself. The reverse side of ‘bold risk taking’ is for Gissing ‘savagery’ of one kind or another. This ‘savagery’ might manifest itself in the form of a director of a corporation taking advantage of his or her position and defrauding the company’s shareholders and/or creditors. In this respect Gissing has one of his characters, Bennett Frothingham, float the Britannia Loan Assurance Investment and Banking Company Limited, only to have it come crashing to ground with consequent losses to investors and the disgrace and suicide of Frothingham in the wake of the collapse. Gissing also has bold risk-taking manifest itself in another form of unethical conduct, the rampant savagery of imperialism, an issue which will taken up below in the discussion of the ‘free-standing corporation’ in late Victorian England.

To return to the deliberations of the Davey Committee, we can now see the nature of the difficulties that body was presented with regarding laying down a recommendation in relation to directors’ duties. On one side it would wish to mollify commercial opinion and not make the lot of the director ‘too onerous’. On the other, the Committee would wish to make some acknowledgment of public opinion as to the need to augment what were regarded as inadequate controls on directors.

The Committee was extremely cautious in its recommendations in respect to directors. It rejected increasing the range of criminal penalties in respect to defalcations by directors. It was thought that this would merely engender confusion and perhaps also discourage ‘honest’ directors from taking office. The latter,

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so it was argued, would result from the growing ambiguity and risk becoming associated with the discharge of the office of director. The committee cited the evidence of one of the French witnesses, a Monsieur Culet, who had commented on the ineffectiveness of the more stringent French laws in relation to the duties of directors in preventing malfeasance.

Despite rejecting increased criminal penalties, the Committee indicated that it nevertheless felt that in certain circumstances such drastic measures might be warranted. Fraud was, of course, regarded as an exception to the general rule that civil, rather than criminal, action should be taken against culpable directors. The Davey Committee also, however, indicated that it felt that criminal prosecution would be appropriate in instances of ‘culpable negligence and willful disregard of statutory provisions made for the protection of others’ 100.

Despite the body of opinion in favour of increasing directors’ duties the report of the Davey Committee refused to recommend any such reform. Whilst the report did not directly advert to public opinion a number of witnesses had done so. Most were hostile to the reform of directors’ duties indicating that they felt that such views were out of touch with commercial realities. Some of these commentators were themselves out of touch with the changing attitudes of investors towards the desirability of corporate disclosure. The evidence of those favouring a preservation of the status quo (that is, no disclosure) quite often displayed not only a conservative economic philosophy, but also a discriminatory attitude towards the small investor. One such staunch advocate of corporate secrecy was Mr Harold Brown. He sent a memorandum to the Davey Committee stating that:

Disclosure of balance sheets to the public is ... fraught with danger. The notion that the public have any interest in the balance sheets of companies is, to a great extent, a fallacy. Trading companies cannot give detailed information in general meeting, or even in private, with safety, except to large shareholders ... Shares are sometimes acquired with the express purpose of getting information for rivals, or harassing management 101.

Brown also stated that the clamour in the press and amongst the public for greater publicity in respect to the affairs of companies was misplaced. The proper mechanism for a shareholder to apprise the state of affairs in the enterprise in which he/she had invested was get the relevant information from the directors ‘privately’ 102.

The real ‘trouble-makers’ in companies were, according to Brown, ‘small shareholders’ who did not trust their directors. He rejected the notion that directors themselves might at times be the problem. The demand for greater penalties for

100 Report of the Companies Acts (Amendment) Committee (The Davey Committee), 1895, BPP LXXXVIII, 156–157.
101 cited in Rix, M (1936), 48–49.
102 ibid.
directors who failed to properly discharge their duties was yet another irresponsible demand of small shareholders and their cohorts. If implemented it would ‘render the position of a director so dangerous ... that the best class of individual would hesitate to accept a directorship’\textsuperscript{103}.  

Whilst the Davey Committee was unprepared to take the punitive approach towards directors that was being urged upon it, this did not mean that it would necessarily be adverse to increased ‘regulation’ in one form or another. Another option available to the Committee was to provide for a required minimum qualification before a person might act as a director. Some officials experienced in company matters supported such a change. Indeed when questioned before a Royal Commission as to whether he expected to find directors competent in everything, the Official Receiver had remarked ‘No sir, but I frequently find that they are expert in nothing at all’\textsuperscript{104}. The implication is that incompetent directors were in abundance during the late nineteenth century and that such amateurs ought not to have been allowed to remain responsible for what were often considerable amounts of invested funds. Just as was the case with other professionals, certain standards should apply to the discharge of the tasks of a director. It was asserted in reply to this argument that the enormous growth in the numbers of private companies in the late nineteenth century meant that the imposition of stricter standards on directors would unfairly prejudice the position of the director/proprietors of such one person and family companies. These individuals were unlikely to satisfy ‘professional’ standards, whilst those in charge of large enterprises would have little difficulty in satisfying such requirements.

The Davey Committee, whilst mindful of the concerns of small proprietors, nevertheless made a recommendation that directors should at least conform to the standard of ‘reasonable care and prudence’. In doing so it was felt by Committee members that they were merely codifying existing practice. However it was also asserted that even if such a requirement went beyond any of the extant judicial decisions on directors’ duties it was nevertheless ‘right in principle’ and largely consistent with the tenor, if not the exact words, of existing judicial opinion.

Despite the relatively conservative approach of the Davey Committee to reform, its recommendation in respect of directors having to conform to a standard of ‘care and prudence’ raised a storm of controversy. A number of influential commentators expressed some surprise at the Davey Committee’s interpretation of existing case law with respect to the duties of directors. It was asserted that requiring directors to conform to a legislative standard of care and prudence would make the lot of such officers unbearable. Lord Davey attempted to mollify this hostile opinion by inserting the word ‘diligence’ as a substitute for ‘prudence’, but this did not deflect

\textsuperscript{103} Evidence of Mr Harold Brown, solicitor, \textit{Report of the Companies Acts (Amendment) Committee} (The Davey Committee), 1895, BPP LXXXVIII at 247.

\textsuperscript{104} Evidence of the Official Receiver to the \textit{Royal Commission on the Depression in Trade}, 1886.
the wrath of the critics. In commenting on these proposed duties of directors, one of the Committee members, Lord Kimberley stated:

That at present a large number of directors are not very clear as to what the law is, and if you put in black and white in a statute precisely your opinion ... of what the law is you would terrify directors, and you would prevent prudent men from accepting that office.  

The voices of commercial opinion opposed to these new impositions on directors were louder and lasted longer than ‘public opinion’ on the matter. This ensured a slow passage of such measures into legislation. Even then the proposals were watered down by reason of a number of exceptions and qualifications made to the general rule as to the requisite standard against directors were expected to be judged.

The Companies Acts of 1900 and 1907

(i) The Companies Act (1900)

The 1900 Companies Act implemented a number of the proposals made by the Davey Committee. However, the hostile reception that the draft Bill proposed by that Committee had encountered ensured that the final form of the legislation was a considerably ‘watered down’ version of the original proposals.

The 1900 Act nevertheless followed many of the Davey Committee’s proposals as to the necessity for greater and more reliable disclosure in prospectuses of matters of interest to prospective investors. The Companies Act (1900) required that every prospectus be dated and signed by all directors of the company and then filed with the Registrar before it was issued to the public. The Registrar would vet the prospectus before its issue to determine whether it contained the information specified in the 1900 Act. This information included a statement of the directors’ share qualifications, the proposed remuneration of the board and an indication of the minimum share subscription required before the company would proceed to allotment. The names of vendors of property to the company along with details of how much they were being paid would also need to be provided in the prospectus. Details of other matters of interest to prospective investors such as the nature of any material contracts, the number of debentures and shares issued for other than cash consideration and to whom they had been issued, the amounts of promoters’ fees, preliminary expenses and any underwriting commissions were all required by the new legislation. Lastly, the name of the company auditor would have to be specified in the prospectus.

105 Select Committee of the House of Lords on the Companies Bill (1896), Evidence of J H Tritton, Q.932.
The above provisions have proved to be so resilient that they have been retained (with minor modifications) in almost every subsequent draft of the Companies Act in England, and were also adopted and retained in the company legislation of a number of English colonies and former colonies. Whether they have been effective in preventing ‘puffing’ in prospectuses is a different question. The effectiveness of the vetting procedure originally introduced in the 1900 Companies Act has come under increasing criticism with the passage of the years\(^{106}\). The vetting procedure exercised by the Registrar (or other relevant authority) has, so it is suggested, tended to become highly routinized and wasteful of human resources within the responsible administrative authority. The inadequacy of the vetting procedure to provide protection to investors and its inefficiency as a regulatory mechanism have become particularly pronounced with the enormous growth in the numbers of companies issuing shares or debentures to the public since the nineteenth century\(^{107}\).

Despite these criticisms in hindsight, the prospectus provisions introduced in the 1900 Companies Act, following the Davey Committee, represented an enormous advance over the pre-existing, largely *laissez-faire* approach to prospectuses. These new provisions introduced by the 1900 Act added considerably to the protections afforded to creditors and intending investors by the company legislation. Previously it had been largely left up to intending shareholders or debenture holders to ascertain for themselves the veracity and import of statements contained in prospectuses. Now at least some of the relevant information was provided in readily digestible form.

These new prospectus provisions of the legislation, however, had numerous loopholes that were exploited shamelessly by dishonest promoters acting on the advice of legal experts. As one corporate solicitor of the late Victorian era would later recollect:

> Until the coming into force of the 1929 Act it was possible for the promoters and directors of a company to evade the prospectus provisions of the Acts by making no public issue. The shares were allotted to an issuing house who paid for them in full and proceeded themselves to make an offer for sale to the public. This procedure ... was open to abuse\(^{108}\).

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\(^{106}\) Major reforms to Australian corporation law during the late 1980s were consequently, amongst other things, aimed at displacing pre-vetting with a rigorous post-issue enforcement of the law relating to the contents of prospectuses, see the Corporations Act, no 189 of 1989, Commonwealth and subsequent amending legislation.


Despite these loopholes the prospectus provisions of the 1900 Companies Act were at first regarded as extremely onerous by intending promoters. The fall in the number of annual company registrations in England in the early years of the twentieth century, from 4,444 in 1899 to 3,421 in 1904, was attributed by contemporaries to the discouragement that the new legislation constituted to those intending to form a new company\textsuperscript{109}.

In addition to adopting the Davey Committee proposals regarding the contents of prospectuses\textsuperscript{110}, the 1900 Companies Act also adopted suggestions made by the Davey Committee with respect to the registration of mortgages and floating charges over company assets\textsuperscript{111}. As J B Jeffreys has noted, the floating charge had come into almost universal use in corporate England in the 1890s. At first the growth in the use of debentures, particularly amongst small ‘one person’ companies, had given rise to a considerable outcry. As Jeffreys observes, the attack on debentures came from members of almost every class and every interest group concerned with financial matters. It was, states Jeffreys:

\begin{quote}
A united front ranging from private traders and ordinary creditors at one end to the Anti-Usury Association at the other. Every type of argument was used, from quoting the Bible to holding up the railways as examples of ‘just trading’. But they had little or no success\textsuperscript{112}.
\end{quote}

The last statement might need to be qualified. Whilst this disparate group was certainly not successful in having debentures prohibited, it was nevertheless one of the parties instrumental in ensuring that the proposed measures as to registration of mortgages and floating charges were passed into legislation. These measures overcame at least some of the objections to the utilization of debentures in the 1890s. In particular they provided a solution for the difficulty presented to lenders and investors by the then common practice of securing debentures against third or fourth charges on the property of the company. This presented a problem in that before the introduction of registration requirements there was no mechanism by which even the most prudent of investors could determine the existence of such competing claims. A system of registration also went some way towards protecting the interests of unsecured creditors, who were now able to determine, before they lent money or supplied goods or services, the actual financial state of the trader with whom they were dealing.

Outside the new provisions in respect to disclosure and those relating to the registration of mortgages and floating charges over company property, the Companies Act (1900) introduced few innovations of note. Many of the then

\begin{footnotes}
\item[110] See \textit{Companies Act}, 1900, 63 & 64 Vic, c. 48, s.10.
\item[111] see \textit{ibid.}, ss 14–18.
\item[112] Jeffreys, J B (1938), 258.
\end{footnotes}
pressing questions of company law were either not addressed by the legislation at all, or alternatively were dealt with in the most cursory fashion in the legislation.

Amongst the concerns ignored by the legislation was the pressing question of the recognition of private companies. As the reporting obligations imposed on companies multiplied, the matter of recognizing private companies as a discrete form of entity, in order to exempt them from the more onerous of such requirements, became a more urgent matter. Despite the mounting urgency of this question the 1900 legislation failed to provide any explicit direction on the manner in which such entities should be treated. No definition of such entities was contained in the Act, neither was there any explicit reference to private companies made in any of its other sections. Nevertheless, despite this lack of explicit legislative reference to their existence, such bodies were implicitly recognized by the legislature in 1900. It was clearly iterated in the legislation that those provisions of the new legislation relating to the types of information that should be made available to intending investors upon the formation of new companies only applied to those organizations which issued prospectuses to the public. Private companies, which did not issue prospectuses to the public, were thus effectively exempted from having to comply with these new provisions.\textsuperscript{113}

Another issue that was of some concern at the time and that had been raised before the Davey Committee, but which was dealt with cursorily by the 1900 Act, was that of underwriting of share issues. The 1900 Act legalized share underwriting for the first time, but at the same time created a number of unnecessary gaps in the law. One such gap was in respect of the amount of the underwriting commission extracted by the underwriters. Whilst the prospectus provisions contained in the 1900 Act required disclosure of such commissions, no guidance was given as to what might be regarded as an acceptable upper limit to such impositions. This was only finally remedied in the 1929 legislation, which set a maximum of 10 per cent on the underwriting commission extracted from the fledgling company.

The 1900 Act was a considerably ‘watered down’ version of the Davey Committee recommendations. In particular the provisions relating to the duties and liabilities of directors and promoters were emasculated in the legislation as finally adopted. Suggestions such as those respecting the imposition of a standard of ‘reasonable and prudent’ behaviour on directors were excised from the Act. These excisions were the result of the extensive lobbying which had occurred after the publication of the Davey Committee recommendations, particularly from those groups close to City interests.\textsuperscript{114} Considerable pressure was exerted upon members of the Commons not to legislate in this regard, with predictions of dire

\begin{itemize}
\item \textsuperscript{113} Cottrell, P L (1980), 74.
\item \textsuperscript{114} In commenting on this emasculation of the Davey Committee recommendations relating to directors duties Rix, M (1936) at 200 states: ‘Any suggestion that it should be obligatory on all directors of a company to use skill and prudence in their conduct of affairs has been met by the argument that directors do not and cannot undertake to be competent in all things. “No sir, but I frequently find they are expert in nothing at all” is the appropriate
consequences to English commerce if measures imposing standards of conduct upon directors and promoters were adopted. The enduring fear that ‘men of quality’ would be discouraged from taking up their seats on boards as a consequence of the likelihood of personal liability attaching to them in case of business failure was again trotted out to convince the legislature and the public that the existing provisions relating to directors should be ‘left alone’.

Instead of containing a more comprehensive statement of the duties of directors, the Companies Act of 1900 simply incorporated a few of the more marginal suggestions relating to directors which had emerged from the deliberations of the Davey Committee. These related to the question of consent to act as a director and the share qualifications of directors. Such provisions were merely a formalization of good commercial practice and consequently had little impact on existing customs. They were certainly not the type of measure likely to affect the worst excesses of corporate criminals or result in greater caution being exercised by the more reckless members of company boards. The bulk of the provisions relating to directors and promoters advanced by the Davey Committee which might have been regarded as genuine reforms were swept aside in the storms of protest which erupted around the original recommendations. Of the original 49 sections of the Bill resulting from the recommendations of the Davey Committee, only 36 remained at the time it passed into legislation. The Companies Act of 1900 suffered from the same watering down process which most of its predecessors had suffered, particularly on those issues which would have led to greater public disclosure of corporate affairs and/or more onerous legal obligations being cast upon directors and promoters.

Irrespective of the manner in which we might today view the meek reforms introduced by the Companies Act of 1900, they were at the time considered to be onerous in the extreme and discouraging to those considering the promotion of new undertakings. Indeed, the concern in relation to the effect of the provisions of the Companies Act of 1900 on corporate promotion was so great that a new Select Committee was appointed in 1906 to report on the state of company law. This new committee was convened under the chairpersonship of Lord Loreburn. Its recommendations led to the enactment of the Companies Act (1907) and the consolidating Act of the following year, the Companies Act (1908).

reply to this, once made by the official receiver when asked if he expected to find directors expert in everything.’

115 Lord Kimberly distilled in a brief paragraph the essence of opinion on this matter which was put before the Davey Committee and which continued unabated in the five subsequent years before the enactment of the Companies Act of 1900. Lord Kimberly stated: ‘At present a large number of directors are not very clear as to what the law is, and if you put in black and white in a statute precisely your opinion, the statutory opinion I mean, of what the law is you would terrify directors, and consequently you would prevent prudent men from accepting that office.’ (cited in Cottrell, P (1980), 71–72).
(ii) The Companies Act (1907)

One of the principal recommendations of the Loreburn Committee (1906) was to make provision for explicit legislative recognition of the private company. It was felt that one of the reasons for the fall in company registrations was the continuing ambiguous status of such enterprises. Whilst they had, in effect, become part of the corporate landscape, particularly since the House of Lords decision in Salomon v. Salomon, there was nevertheless a lingering doubt as to their status whilst the legislature failed to make any specific statutory provision for them. Some at least might be discouraged from incorporating due to the fear that future legislation would impose such onerous reporting requirements on companies that the conducting of private concerns as corporations would become impracticable. With such matters in mind the Loreburn Committee recommended the adoption of an explicit definition of private companies and an exclusion of such enterprises from most of the reporting and disclosure requirements of the company legislation.  \(^{116}\)

The second major recommendation of the Loreburn Committee was with regard to those public companies that did not issue a prospectus. Such undertakings were required to file with the Registrar statements containing the information, which would have been demanded by the legislation if a prospectus were issued. No shares or debentures could now be issued by such a public company unless such a statement had been filed with the Registrar.  \(^{117}\)

The final recommendation of note made by the Loreburn Committee was in relation to the public filing of an audited balance sheet. Whilst the recommendation

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> 116 The Loreburn Committee was officially known as the Company Law Amendment Committee 1906 and its report and the evidence presented to it can be found in B.P.P., 1906, XCVIII. In respect of the statutory result of the recommendations made by the Committee see the Companies Act 1907, 7 Edw. VII c 50. Margaret Rix astutely notes that the recognition of private companies was not the result of any ‘dire necessity’ but rather was the consequence of the need to clarify, at least after the 1900 Act, that class of companies to which the ‘reporting’ provisions applied: ‘The mere fact that private companies existed – and without being challenged – long before they were recognized by law is sufficient indication that the legal recognition of private companies was not a pressing need (what may have been wanted, however, and what was never granted was legislation expressly designed to adapt the principle of limited liability to small business) ... The separate recognition of private companies was not then due to any dire necessity; such companies already existed in large numbers, when threatened legislation intended to apply to all companies registering under the Acts, called forth such a protest from businesses considering that they had a right to act secretly, that the definition and exemption of private companies was asked for so as to escape the liabilities proposed by the new legislation ... The motive for wanting a definition of a private company was given quite openly in at least one instance. The representative of the Institute of Secretaries approved of the proposed distinction “so as to avoid the chief provisions of the Bill”. (Rix, M (1936), 60–61).

> 117 This recommendation was enacted in the Companies Act 1907, 7 Edw. VII c. 50, s.1.
did not go as far as prescribing the exact form in which such a balance sheet should be presented, it was nevertheless a significant reiteration of the principle that financial information relating to corporations should be available for the scrutiny of all investors and lenders.\footnote{118}

The above recommendations were adopted by the legislature in 1907. Whilst no changes of the scope envisaged by the Davey Committee in the late 1890s were implemented, the Loreburn Committee did not, at least, recommend a return to the principles of \textit{laissez-faire}. This had been a slight possibility given the declining numbers of company registrations in the early years of the new century and the claims by some that this was the result of the abandonment of the \textit{laissez-faire} economic practices of the nineteenth century. The Companies Act 1907 had now recognized private companies. A slow but incremental shift in opinion had occurred in favour of greater public access to corporate financial information. Public opinion also had shifted from an acceptance of the contrivances of prospectus writers in the 1860s and 1870s towards a far more prescribed content in such documents and a belief that they should contain information of real use for investors, rather than a series of puffs.

However, despite these apparent advances for investors, creditors and those engaged in small business, twentieth century English company law was still infested to some extent with attitudes and ideas from the high point of \textit{laissez-faire} philosophy. This sometimes affected the ability of the law in this area to grapple with the realities of commerce and investment in the early twentieth century. Directors were still largely exempt from liability to investors, except in the most blatant cases of dishonesty or the most extreme instances of negligence. Very little financial information needed to be provided by companies to the Registrar or shareholders. The legislation prescribed the bare minima of disclosure. Private companies now had legislative approval for making none of the financial or other information publicly available. With respect to the nature of the corporate organizations and the law which regulated them emerging from the succession of Committees and Royal Commissions of the second half of the nineteenth century and the early years of the twentieth, William Reader has commented that it was a system which facilitated ‘secrecy’. It was secrecy of such a degree that in large public companies very few outside a small circle of directors often knew much about either the running or the financial affairs of the enterprise. He continues:

Secrecy is always what every autocrat desires and it was very much part of the tradition of late Victorian management in the United Kingdom ... Like other Victorian traditions, it outlived the Queen by many years.\footnote{119}

\footnote{118}{This recommendation was also adopted in the Companies Act 1907, s. 21.}
This secrecy and the largely *laissez-faire* attitudes embodied in company legislation towards malfeasance were preserved in the Companies Acts of 1900 and 1907 and in the consolidating legislation of 1908. The interests vested in the maintenance of the *status quo* in company administration and regulation were so great by the turn of the century that the opportunity for other than incremental change was unlikely. This is exactly what occurred in 1900, despite a series of sweeping recommendations which had been advanced by the Davey Committee. By 1906 the die had been cast. Select Committees and Royal Commissions in future would at best be able to achieve minor structural changes that improved the functioning of company law. However, recommendations that might fundamentally alter the existing *status quo* would, in future, be eschewed by official inquiries and parliamentary reviews of the legislation.

**Conclusions**

The first fifty years of modern company legislation in England had seen the gradual acceptance of corporate form as the pre-eminent structure within which to carry on any serious business venture. It had also seen the ‘colonization’ of the legislation, which was originally intended to accommodate the needs of large commercial ventures seeking investment and loans from the public, by a myriad of small enterprises seeking the protection of limited liability. Despite these sweeping changes in the extent and manner of utilization of limited liability company legislation in England during the first half century of its existence, many of the features of the original legislation had withstood a range of attacks from affected parties. The principal feature of the original legislation, which had most clearly withstood the vicissitudes of time, was the *laissez-faire* assumptions lying at the heart of the provisions concerning corporate administration and regulation. In 1907, just as in 1856, the state eschewed any responsibility for validating or checking information relating to companies on the register. It was also still the case in 1907, as it had been half a century before, that the state denied any regulatory responsibility in relation to those companies which it ‘administered’ as a consequence of their entry on the Register of Companies.

A number of commentators have suggested that the only period during the nineteenth century when genuine reform of a structural nature could possibly have occurred in corporate law was when the vested interests relating to the legislation were still few in number and of relative insignificance. Until the early 1880s few major undertakings (other than infrastructural projects with long amortization periods) were registering as corporations, nor were there significant numbers of small, private companies. In the light of the limited economic importance of limited liability company law and the few vested interests cohering around the legislation before the early 1880s, it was a period in which dramatic legislative change was still possible. Like others, Cottrell characterizes this period as a ‘lost opportunity’:
Government ... stepped back and left the permissive company law, consolidated in 1862, untouched in its essentials until the 1890s. Pressure for reform grew within four years of the liberalization of the law but made no headway in the face of indifference on the part of the state and open hostility from the judiciary. The state’s inaction in the 1860s and 1870s may be explained by the relatively small size of the problem as the volume of company registrations did not become sizeable until the late 1870s and early 1880s. It would appear that the government only became convinced of the need for reforming legislation following the report of the Royal Commission on the Depression in Trade and Industry. However, by then, strong interest groups had developed, mainly centering on the private company, which wished to maintain the liberal 1862 code120.

One of the reasons why reform had been so difficult to achieve in both the Select Committee of 1867 and its successor in 1877 was the presence on both of the aging architect of the limited liability legislation. The shadow that Robert Lowe cast over proceedings in both instances is apparent to anyone who reads the minutes of evidence. Lowe wished to preserve the integrity of the original legislation and he was at pains to reiterate this view on the Select Committees of 1867 and 1877.

It would be overstating matters to suggest that Robert Lowe was the decisive factor in preventing reform. Nevertheless there was no single voice during the nineteenth century opposing his single-minded vision of the role and purpose of corporate law and his proscriptions on government involvement in the regulation of corporations. Rather there was a cacophony of voices, each iterating a different quibble with the manner of operation of the existing legislation. The only time at which a single-minded opposition to any of the developments occurring in corporate practice was voiced was in respect of the spectacular growth in the numbers of private companies in the late 1880s.

The net effect of the failure to amend company law in any significant way between 1862 and the turn of century was a dramatic shift during this period in the debtor–creditor relationship. At the beginning of the period, creditors had an array of mechanisms at their disposal, including imprisonment for debt, which they could take against the *corpus* of the individual or individuals who owed them money. At the end of the period this was no longer possible. The creditor would, in particular after the decision in the *Salomon* case, in all likelihood no longer have any personal remedies against his or her debtor. The only *corpus* against which a remedy might exist for the debt in question would be the rather less substantial shell constituted by a limited liability company. Cornish and Clark have commented on this shift in the debtor–creditor relationship occasioned by the widespread adoption of the limited liability corporation by all classes of business in the late nineteenth century:

120 Cottrell, P L (1989), 75; and also note the comments of Rix, M (1936), 34–44.
A complex readjustment was being completed by which, in large measure, the trading entity was to be distinguished from the private individual (as in early bankruptcy law). The new distinction depended upon the entrepreneur taking steps in good time to form a company and so procure in advance limited liability and other advantages ... protective laws about borrowing would not be allowed to cramp the style of companies. Instead sanctity of contract in dealings with them was subject to a new risk spreading device. Those who dealt with the company on credit terms ran the danger, in the competition among creditors, that, thanks to limited liability, there might be nothing worth competing for ... A good segment of financial, legal and political opinion had come, perhaps wearily, to consider such a discipline upon creditors to be by no means unhealthy. It was more acceptable for the state to mark the limits of its support for credit by this machinery than for it to police any more completely the moral virtue of meeting debts in full\textsuperscript{121}.

Despite the appearance of little significant legislative change occurring during the period between 1886 and 1907 it was nevertheless a time in which discourse in relation to the corporate form took on a totally new complexion. For the first time since the inception of the modern legislation in 1856 discussion shifted away from first principles – that is, whether the tenets of political economy permitted corporate entities with limited liability. It was now accepted that the corporate form was a part of the economic landscape. What was more important to commentators in the latter years of the nineteenth century were questions relating to how to prevent fraud occurring in the operation of limited liability companies, what was the correct mix of information which should and should not be made publicly available and to what degree personal responsibility of those who ran a corporation should be re-established as a principle of business. Greater sophistication in accounting principles and changing attitudes towards business immorality influenced many of the debates surrounding corporate legislation in the latter years of the nineteenth century\textsuperscript{122}.

Discourse concerning corporate legislation was also irremediably altered by the growing numbers of private companies registering in the final years of the nineteenth century. Perhaps even more important was the growing public perception and ultimate acceptance of this phenomenon.

On the one hand there was the public perception, as popularized in cultural forms such as Gilbert and Sullivan’s \textit{Utopia Limited}, that the private company was a mask by which individual traders could avoid responsibility for their debts.


On the other hand were those involved in commerce, in particular small and medium sized traders, who considered that the limited protection which corporate identity provided them merely skewed the stakes slightly in their favour. They asserted that if they too were not provided with the benefits of limited liability then they would be quickly squeezed out of business due to the additional benefits that would thereby be bestowed on their larger competitors. It was suggested that limited liability was merely a legislative recognition of the dangers of trade and the absurdity of debt laws which made traders personally liable for accidental events such as their business going broke due to a downturn in trade which was completely out of their hands.

In addition to the moral questions surrounding the adoption by large numbers of small businesses of corporate identity, another shift in the prevailing discourse on commercial law occurred as a result of the enormous growth in the numbers of private companies. This was in respect of reporting requirements. Before the 1880s larger enterprises had successfully resisted the introduction of more rigorous reporting standards for limited liability corporations. The basis of this resistance in the 1860s was that by making certain information available to the public the competitiveness of enterprises would be threatened. Competitors of corporate enterprises would be able to calculate the costs of the various factors of production of their corporate counterparts and thus mount their assault on the market fully appraised of how much their counterpart paid for wages, the cost to that competitor of raw materials and so on. Corpses asserted that having to make information publicly available would sorely disadvantage them and thus should not be countenanced. When this argument was beginning to look rather tenuous in the 1880s the discourse with respect to disclosure shifted. It was now asserted that, by requiring disclosure of full financial information, many of the small private companies would be put out of business. They had neither the resources nor the capabilities to provide audited balance sheets. In the 1880s the unfairness of imposing disclosure requirements on private companies was successfully utilized as a reason for not introducing disclosure requirements at all. In reply to assertions that the simple answer to this conundrum was to define private corporations separately, the reply was that such an exercise in definition was impossible due to the widely variant forms and sizes of so-called private companies.

The question of the separate recognition of private companies, or even as some argued the necessity for separate legislation for such enterprises, was not really debated in full until the overlapping coincidence of the deliberations of the Davey Committee and the consideration of the matter by the Courts in Salomon v. Salomon in the mid-1890s. That the House of Lords and the Committee reached different conclusions on the matter merely reflects the serious divisions of opinion on the matter at the time. Nevertheless the argument based on ‘existing expectations’ again emerged in different guise to carry the day for small incorporators. Despite the extremely positivist manner in which the Salomon case was decided by the House of Lords, the underlying policy factor favouring the approval of ‘one man’
companies was the fact that two thirds of all existing company registrations were of this type. Commercial chaos would reign if the small private company were to be outlawed. Not only would many commercial expectations be disrupted but also the state would have to give up at least a significant portion of what was already a considerable income resulting from the administration of corporate law.

Mature company law, whilst looking much like its predecessors, thus came to serve a different purpose to that which had been outlined for its parent legislation in 1856. Robert Lowe, when introducing that legislation, had envisaged it as serving to provide new outlets for investment capital and as a framework within which new infrastructural undertakings could be facilitated. He did not, of course, rule out absolutely the possibility of small undertakings taking advantage of the legislation, but these businesses were certainly not envisaged by him as becoming the main users of the freedom to incorporate granted by the legislation. Some fifty years later, in 1907, they were by far the pre-eminent consumers of the corporate form and as such had left an indelible mark on the law ‘in action’ in this area. Rather than the most common forms of corporation becoming less and less like partnerships as the new form was refined, exactly the opposite occurred. The average company in 1907 was composed of few shareholders, most of whom were family members, and maintained a veil of secrecy over its financial affairs, much like a partnership of some fifty years before. The shares in this average corporate entity could not be readily transferred to outsiders and quite often the limitation of liability of the corporation was only notional due to the fact that the directors were required by their principal creditors to provide personal guarantees in respect of the corporate debt.

In addition to partnership law saturating the new company law, the new law, even in its mature state, was dogged by the past. Whilst the tidal wave of laissez-faire initiative upon which the company legislation of 1856 had been swept into the statute books had receded by the early twentieth century, many of the principles of that earlier period were preserved, like fossilized remains, as part of the company legislation that followed. The importance of these ‘remains’ for the later development of company law will be explored in more depth in the conclusions. It is simply sufficient here to point to the tenuous modernity of ‘modern’ company law. This period of consolidation for limited liability company legislation may have led to a greater understanding and a greater coherence to the legislation, but it was also a period of ossification, a period of ‘lost opportunities’, all of which have gone to shape contemporary corporate legislation.
Chapter 8

Limited Liability Company Legislation in the Colonies: The Australian Experience
1864–1920

Introduction

One aspect of the history of ‘modern’ company law that has largely been ignored has been the question of the effects of the introduction of English limited liability legislation into a wide diversity of colonies with very different economic and cultural traditions. The manner in which the legislation was introduced and administered in these diverse colonies is rarely, if ever, discussed. Textbook writers have uncritically accepted the view that the introduction of English company legislation to the colonies was ‘a good thing’. The adoption of English ‘best practice’ has been characterized as a positive contribution to the development of commerce in the colonies. Problems experienced in respect of the operation of English company law in the colonies are attributed to the failure of colonial administrators to keep abreast of the latest innovations rather than to any inherent defect in the legislation itself. The possibility that pre-existing local commercial traditions or existing organizational forms might be better adapted to local circumstances is never countenanced. Neither is the possibility that metropolitan models might be ill adapted to the conditions of commerce prevailing in the colonies. The imperial model is unquestioningly accepted as being the most modern and sophisticated available.

As a consequence of such a belief in the pre-eminence of the metropolitan model, local legislative and administrative variations on that model were discouraged during the nineteenth century. Those innovations that did occur in the colonies were generally criticised as shortsighted departures from the example set by the English legislature. Leading textbook writers scathingly described colonial innovations as ‘backward’ departures from English practice. Almost every English colony, from Africa to Australia, was subject to the same regime of company legislation. The 1862 Companies Act became the definitive blueprint for commercial organization in almost all English colonies. Yet, despite this purportedly sophisticated model provided by the metropolis, in most colonies few businesses outside the mining sector chose to incorporate.

Despite evidence from the metropolis itself that the choice to incorporate (at least before the 1880s) was largely related to the scale of undertakings, it was nevertheless generally asserted that disinterest in incorporation in the colonies was
a consequence of the lack of sophistication of colonial entrepreneurs. The fact that the extremely low rate of diffusion of the corporate form in the colonies might be due to the unsuitability of the imperial model of incorporation imposed by the colonizing power was rarely, if ever, discussed. Consequently few experiments were conducted in establishing a regime more suitable to the scale and nature of commerce in those remote locales. The only apparent exceptions to this were in a number of the Canadian provinces, particularly Ontario, in which the corporate regime was vastly different to that applying in the metropolis. Local needs were generally dismissed as irrelevant.

Whilst close adherence to the English model of corporate law was generally presented as part of the ‘civilizing’ mission of the imperial power, the ‘real’ reason for this imposition of uniformity between colonial and English legislation was occasionally discussed. It was sometimes stated that such uniformity was necessary so as to provide a facilitative framework in which English companies could operate in a wide range of overseas locales with as few legal inhibitions as possible. In the Australian colonies the close adherence to the English model of company law allowed English companies to easily register under local provisions as foreign companies and establish local boards of directors. ‘Modern’ companies

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1 De Lissa, A (1894) *Companies’ Work and Mining Law in New South Wales and Victoria*, (London: George Robertson and Company) at 4 states the following in regard to familiarity with the corporate form in the Australian colonies: ‘It is not too much to say, that the common knowledge which should exist respecting the nature, character and conduct of the joint stock company is generally wanting’.

2 An illustrative example of the facilitative role of incorporations legislation in the colonies is provided by *The Partnership Consolidation and Limited Liability Ordinance, no.III* of 1878, Fiji, which stated the following in s.183 with respect to the local operation of corporations formed in England or Australia: ‘Joint Stock Companies Limited or public companies lawfully incorporated by the law of England or of the Australian colonies may carry on business in Fiji by registering a memorandum of the name of the company with the capital and the number of the shares the names of the directors and office-bearers the place of business in England or the colonies and the place or places in which they propose to carry on business in this Colony with the name of the local directors or office-bearers and depositing to be filed as relative thereto the articles of association or charter of the said companies and when so registered the company may sue and be sued in its incorporated name and enjoy all of the privileges of a Joint Stock Company Limited projected formed and incorporated in the Colony.’

By the 1890s some of the arguments as to the need to nurture as facilitative an environment as possible for ‘foreign’ companies operating in the colonies was beginning to wear more than a bit thin as a consequence of the manner in which the existing provisions had been abused by sharp operators who found they could operate fraudulent schemes under the aegis of ‘foreign’ corporation with little or no chance of ever being prosecuted. The concerns being raised by the 1890s in regard to the foreign company provisions contained in colonial legislation is reflected in the following memorandum from the then South Australian Registrar of Companies, Alex Buchanan:
legislation introduced to the colonies consequently had a very specific ‘imperial’ purpose in addition to its much-lauded ‘civilizing’ function.

English authorities actively discouraged variations from the model of company law provided by the metropolis. Such variations from the imperial model, so it was argued, would discourage English investment in the relevant colony. Another way of putting this would be to suggest that innovation was discouraged on the grounds that it would undermine the imperial function of English company legislation. The possibility that there might have been a genuine need to develop unique structures more suitable to conducting business in a colonial setting was ignored. So too was the possibility that the imposition of English company legislation had a retarding, not a facilitating, effect on commerce in the colonies.

The characterization of English company law as a positive benefit to the colonies into which it was introduced has tended over time to become accepted as the truth. Little reflection has occurred on the question of the imperialist role of English company legislation and the meaning in the colonies of having what was quite often an inappropriate model of commercial organization forced upon those engaged in commerce in the colonies. Edward Said has commented, both in *Orientalism* and in *Culture and Imperialism* on the manner in which certain aspects of imperial domination were naturalized during the nineteenth century and came to be identified as contributions made to the colonized nation(s) in question.

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CSO 384/94
J & W Henderson
Foreign Shipping Comps Act – suggesting amendment of
Forward to the Registrar of Companies for Report
AG 4/5/1894

Returned to the Hon Atty Gen I have respectfully to report that I see no sufficient reason for the exemption of foreign shipping and railway companies from the observance of the provisions of part VIII of the Companies Act 1892.

The provisions referred to are no more ‘obnoxious’ or ‘unfair’ in these cases than in others to which also the argument based upon the benefits of competition appears to be equally applicable.

It is true that many foreign companies have been put to considerable trouble in complying with the provisions of the Act but the trouble has almost invariably arisen from the fact that the companies or their advisers when preparing their documents have disregarded the plain and precise words of the Act.

Alex Buchanan
Registrar
11/5/1894

*Master of Supreme Court/Registrar of Companies (South Australia) Minute Book 1890–1924*, South Australian State Record Office, GRS 2317/1

rather than as forms of domination in their own right. Understanding how these more subtle instruments of imperial domination have continued to exercise an influence in the post-colonial present is one of the issues that has given rise to enormous debate since the publication of \textit{Orientalism}. Said comments on this continuing discourse:

A whole range of people in the so-called Western or metropolitan world, as well as their counterparts in the Third or formerly colonized world, share a sense that the era of high or classical imperialism, which came to a climax in what historian Eric Hobsbawn has so interestingly described as ‘the age of empire’ and more or less formally ended with the dismantling of the great colonial structures after World War Two, has in one way or another continued to exert considerable cultural influence in the present. For all sorts of reasons, they feel a new urgency about understanding the pastness or not of the past, and this urgency is carried over into perceptions of the present and the future.\footnote{Said, E (1993) \textit{Culture and Imperialism}, (London: Chatto and Windus), 6.}

The above question is no less urgent in respect of company law and its administrative penumbra in the former English colonies than it is for culture or other mechanisms of imperial domination. In respect of company law the question of how much current practice and problems of company law are the result of a residue of influences from the colonial past, and to what extent they are to do with unique experiences in the present, are questions that should be addressed.

One issue that has been taken up by some historians of company law has been the peculiar reasons dictating either a close adherence to the English model (as was the case in the Australian colonies and in many of the Southern African colonies) or in other cases a complete departure from that model (as was the case in the Canadian provinces)\footnote{See, for example, McQueen, R (1991) Limited Liability Company Legislation – The Australian Experience 1864–1920, \textit{Australian Journal of Corporate Law}, vol.1, no.1, 22–56 and Rungta, R S (1970) \textit{The Rise of the Business Corporations in India 1851–1900}, (Cambridge: Cambridge University Press).}

Another question which has also been of some interest to historians of incorporations legislation, has been the various ways that colonial administrations coped (or did not cope) with the peculiar difficulties presented by having to administer legislation designed for the metropolis in the vastly different environment of a colony\footnote{See for instance the discussion of this question in Risk, R C B (1973) ‘The Nineteenth Century Foundations of the Business Corporation in Ontario’, \textit{University of Toronto Law Journal}, vol. 23, 281–282.}. The difficulties presented by geographical distance, lack of transport infrastructure and communication networks were only some of the problems which presented peculiar difficulties for those in the colonies when attempting to administer company legislation. Also, where there was a federal
structure in place or a number of different colonies on the same continent there was the additional problem of determining the appropriate level of diversity or uniformity between the different administrative units and the relevant legislation.

Despite the complexity and importance of the issues involved the only detailed analysis yet conducted of the peculiar problems presented by the operation of company legislation in an English colony has been the path-breaking study undertaken by Radhe Shyam Rungta of the operation of English company law in India. In commenting on the suitability of the company legislation introduced to India to local conditions, Rungta states:

The Acts provide examples of a complete disregard and an utter failure on the part of the legislators to take into account the peculiarities of conditions in India. If there is any underlying theme running through the company legislation of a full half century in India ... it is a steadfast adherence to the policy that what was good for Britain must also be good for India.

The introduction of English company legislation to the Australian colonies could be described in similar terms. Little reference was made in introducing the legislation to the peculiarities of the conditions applying in the Australian colonies as compared with the situation applying in the metropolis. What was good for England was thought to be good for colonies in the Antipodes.

This rigid adherence to metropolitan models must nevertheless be understood in the context of the forces compelling introduction of the legislation in the first place. In terms of the thesis advanced above, of particular interest is the question of whether the introduction of such legislation to the Australian colonies was occasioned by local or imperial needs. If the latter was the case, the further question arises of how well suited legislation ostensibly designed for English economic conditions was to the requirements of industrial development in the colonies. If there was a mismatch between local requirements and the legislative structures adopted, then the further question arises as to the long-term effects of such a mismatch on economic development and corporate administration in the colonies.

Another matter dealt with below is that of the rate of diffusion of the limited liability company form after its adoption in the Australian colonies. The receptiveness of local businesses to the new organizational structures made available by the limited liability legislation will be examined. So too will be the nature of the activities engaged in by both those businesses which did and those which did not adopt corporate form. In particular this data will be utilized to determine the nature of those factors which led some industrial sectors to prefer the corporate form and others to elect to continue to operate under older organizational structures such

8 ibid., 214.
as the partnership. The economic and other factors which might be implicated in the acceptance of or resistance to the new organizational form constituted by the limited liability company will also be considered in light of the rate of growth of corporate registrations during the nineteenth century. Lastly, the manner in which the corporate form was regarded by those who did adopt it will be examined to determine to what extent those converting their businesses into companies in the latter years of the nineteenth century were truly wedded to the corporation as an organizational form. We will explore in this section the question of the extent to which those forming companies attempted to preserve elements of earlier organizational forms within the new corporate structures of their businesses.

In this chapter the factors influencing legislative innovation, when it did occur, will be examined. So too will be the attitudes of key groups to the administration of company legislation by colonial authorities. The question of whether the legislation was considered to be facilitative or regulatory in nature and how the balance between these two attitudinal axes may have changed over time will be examined. The debates surrounding the problem of whether, once federation was a reality, a national or state based system of company law and administration was preferable, will be considered. In dealing with the above issues the attitudes of key groups such as businessmen, public servants and lawyers will be examined.

**The Introduction of Limited Liability Company Legislation to the Australian Colonies**

In the Australian colonies the English Companies Act of 1862 was adopted essentially unaltered by local legislatures during the mid-1860s. When this occurred, there was little, if any, debate as to the relevance of the legislation to local needs. Nor was any attention given to the question of how the Act might be administered within the existing colonial civil service establishments.

The lack of consideration given by contemporaries to the question of the suitability of English company legislation to colonial needs and administrative capacities is not surprising. This was due to the fact that the legislation was seen at the time of its introduction as principally referable to the needs of English businesses operating in Australia, rather than those of purely colonial businesses. The adoption of the legislation was considered important to the maintenance of investment by English companies in the Australian colonies. The duplication of English legislation in the Australian colonies made possible the formation and operation of limited liability companies with Boards in both England and the colonies. Integration of English and colonial company legislation would also allow companies to secure listing more easily on both English and Australian share markets, thus facilitating the negotiability of their shares. Colonial company legislation was largely conceived in the 1860s as being at the service of English
rather than Australian interests. Little thought was given at the time to the role of the legislation in promoting purely Australian business interests⁹.

This absence of local solutions with respect to appropriate forms of business organization was, as has been suggested above, a consequence of the desire of English imperial administrators to ensure that a facilitative framework existed for English companies in that country’s overseas possessions. Consequently company legislation was uniformly based on the 1862 Companies Act in most English colonies. The Australian colonies were no exception. An exception to this general rule existed in a number of the border provinces in Canada. In those cases the divergence from the English model was arguably due to the presence of competing regional models of corporate legislation coupled with strong trading ties between certain of the Canadian provinces (for example, Ontario) and States across the American border (for example, New York)¹⁰.

In the Australian colonies there was one additional factor that reinforced the local adherence to the English model. In Australia, unlike the case in other colonial settings, there was little involvement of local capital in the development of railways and other infrastructure. This consequently meant that there was no body of local shareholders calling for the introduction of limited liability or lobbying colonial legislatures to make company legislation appropriate to local requirements¹¹.

In addition to the mimicking of English legislation by colonial legislatures there was also a total lack of thought in the nineteenth century to fitting the type of structures responsible for administering the limited liability legislation to local conditions. Unlike the situation in England, the various Australian colonies did not have any established government departments such as the Board of Trade to administer and enforce the legislation. In most colonies the responsibility for administering the legislation was grafted on to the tasks already performed by a particular senior official or existing administrative structure. In South Australia and Queensland the administrative tasks associated with the companies legislation were added to the already considerable responsibilities of the Master of the Supreme Court. In NSW the enforcement of the provisions of the Act was

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⁹ Alex Castles (1982) in *An Australian Legal History*, (Sydney: Law Book Company), 485–486 draws attention to the essentially imitative nature of Australian colonial company legislation. However, in contrasting the ‘strong reliance’ in this area on English models with divergences from home country practice in other areas of law, Castles omits mention of the strong economic incentives which lay at the heart of imitative practices in the commercial area.

¹⁰ Risk, R C B (1973) ‘The Nineteenth Century Foundations of the Business Corporation in Ontario’, *University of Toronto Law Journal*, vol. 23, 281–282 discusses the manner in which in Ontario the general incorporation statute of 1860 followed the terms of the 1850 New York Statute. He also mentions that this emulation of an American model was approved by the Colonial Office.

assigned to the Registrar-General’s Department and in Victoria, for a period in the
nineteenth century, the administration of the Companies Act was the responsibility
of the Titles Office.

As might be gleaned from the above, the administration of the limited liability
legislation in the various Australian colonies was, throughout the nineteenth
century, a relatively ad hoc affair. In most colonies the authorities saw their
principal responsibilities as facilitating company formations and ensuring that
documents lodged with them were in proper form. Regulation was not considered
to be one of their tasks.

In the early years of limited liability incorporation in the colonies the absence
of regulatory structures did not have any immediate implications. This was
because there was little call for incorporation amongst local businesses and those
English enterprises operating offices in Australia were generally regulated under
the English limited liability legislation by the Board of Trade.

The principal reason for the small numbers of local enterprises registering under
the colonial Acts seems to have been the small scale of most colonial businesses
during the nineteenth century:

... Large-scale industrial enterprises in the towns were few. As far as can be
judged from the available statistics, most establishments were quite small with
less than ten employees and these contained the bulk of employees ... in Sydney
and Melbourne the economy was organized along the lines of small-scale
capitalism12.

Nevertheless, there were some areas of local industry in which corporate form
was thought appropriate from an early stage. One such area was banking and
finance. Nevertheless, most banking and finance enterprises, whilst incorporated,
were not registered under the general incorporation statute as limited liability
enterprises. Instead they were generally established under either a Private Act
of Parliament or by Royal Charter. As a consequence they were regulated along
different lines to limited liability companies13.


13 Certain proposals by the Victorian Government in 1887 to bring the provisions
applying to the Chartered Banks into line with those applying to Limited Liability Banks
became a source of concern for the managements of the Chartered Banks. In a letter to
the Victorian Attorney-General, Sir Bryan O’Loghlen Bart., the solicitors for the Bank of
NSW and the National Bank stated: ‘The Bill introduced by the Government to amend the
Companies Statute and which has been read a first time, will be of no utility to either of
the Banks on whose behalf we have the honor to address you. It is not practicable that the
[Bank of NSW] should come under the provisions of a local Victorian Statute namely the
Companies Statute 1864 whose provisions are quite inapplicable to it. Nor does the Bank
desire to alter its liability in any way which would be the case if it were registered under the
companies statute, the liability being limited to the amount unpaid on the shares, whereas
Mining was another area of local enterprise in which it was thought that incorporation was appropriate. Indeed, many of the earliest companies established under colonial limited liability legislation were mining ventures. Unlike the banking and financial sector, which was largely underwritten by English capital, a number of the larger colonial mining ventures were far more dependent upon local capital. They either combined local and metropolitan capital or depended exclusively on locally raised capital. Mining enterprises were, in fact, the most common form of speculative investment invested in by local wealth holders throughout the nineteenth century. It is consequently not surprising that, when describing the hurly-burly world of Australian investment in the nineteenth century in *The Fortunes of Richard Mahoney*, Henry Handel Richardson predominantly concentrates on speculation in mining shares.

Prior to the introduction of colonial limited liability legislation, mining enterprises either operated under Private Acts of Parliament or as unregistered joint stock partnerships. In many instances unlimited liability applied, a factor which tended to discourage investment. The introduction of limited liability legislation in the Australian colonies thus represented a real boon for mining company promoters and the shareholders in such undertakings. Mining ventures could now be more easily and more cheaply floated than had previously been the case.

As the first major local industry to extensively utilize the colonial limited liability legislation, the mining industry provides us with a good measure of the appropriateness of that legislation to colonial conditions. In some respects the legislation was well received, particularly with regard to the fact that on the one hand it provided a more secure framework for investment than unlimited partnerships and on the other it did away with the necessity of securing a Private Act of Parliament in order to attract the benefits of incorporation. However, despite these advantages there was nevertheless some disquiet about particular aspects of the legislation in practice. Whilst the limited liability legislation arguably provided an excellent framework for investment it also, when unregulated, provided a smokescreen behind which a whole range of fraud and deception could occur.

One of the most common malpractices occurring in the colonies was that of ‘dummying’ of shares. This involved persons holding shares under false names. If the investment proved good they could reap the rewards, but if it proved bad they could avoid their obligations to pay calls by hiding behind their ‘dummy’. This practice led a number of the colonial legislatures to depart from the model of the shareholders in the Bank of NSW are limited to double the amount of their shares.’


the English limited liability legislation in the case of mining companies. As one contemporary observer remarked ‘... [I]n Victoria it was found almost impossible to continue to work mining companies under the ordinary Companies Act. A Bill [for No Liability Mining Company legislation] was brought in dealing with the matter’.

The principal factor in this ‘failure’ of limited liability legislation in the Australian colonies was the absence of any effective regulatory structures to prevent malpractices such as dummying. In the case of the mining industry this meant that shareholders who contracted for their shares under a false name and then defaulted on their obligations to pay calls were not prosecuted. The authorities were powerless, as the regulatory structures set up under the colonial company legislation had no enforcement arm whatsoever, and thus could not be expected to deal effectively with such malpractice. What had occurred in the colonies was that whilst English limited liability legislation had been slavishly followed, there was no accompanying mimicking of administrative structures modeled on the Board of Trade. The absence of such structures inevitably led to regulatory failure.

Consequently, legislative modifications to English company law in the Australian colonies were primarily the result of the failure to properly regulate miscreant corporations and/or shareholders within the meagre resources of colonial bureaucracy. One innovation which was a direct result of the inability of the local enforcement mechanisms to ensure compliance with company legislation was the ‘no liability’ company. In contrast to the continuing liability applying to shareholders in a limited liability company, even after a failure to pay calls, the ‘no liability’ company allowed shareholders to refuse to pay calls, but at the expense of forfeiting their shares. This device effectively shifted enforcement from the public to the private sphere. It was now up to the company to take action against defaulting shareholders. By allowing companies to forfeit the shares of non contributors this device also ensured a continuity of investment, as such shares could be resold at a discount by the company to new investors.

In concluding this section we might underline the following observations with regard to the introduction of limited liability legislation to the Australian colonies. Firstly, the Companies Act of 1862 (or in some cases the 1856 Act – Western Australia is a case in point) was adopted essentially unaltered by the legislatures of the various Australian colonies during the 1860s. This slavish adoption of the English model was the consequence of a desire on the part of the imperial power that its overseas possessions adopted legislation which would best facilitate trade and investment between the mother country and the colonies. In other words the adoption of the English model had a specific imperial purpose, rather than

15 Mr Hunter, *Queensland Parliamentary Debates* (Legislative Assembly), 16/7/1889, 663–664.

16 The best available account as to the reasons for the introduction of the no liability legislation can be found in A R Hall, (1968) *The Stock Exchange of Melbourne and the Victorian Economy 1852–1900*, (Canberra: ANU Press), 75–77.
its adoption being simply an unthinking adoption by colonial authorities of ‘best practice’. This was no benign gift to colonial administrators, but rather a mechanism by which the trade and investment strategies of England could be best advanced, quite often at the expense of local entrepreneurs and investors.

In addition to the often unsuitable legislative framework adopted at the bidding of the imperial power colonial administrators were often faced with the peculiar problems of operating a modern system of company law in a vastly different administrative context than that in which the legislation operated in the ‘home’ country. In the colonies the bureaucratic structures charged with the enforcement of the limited liability legislation was often rudimentary and in some instances non-existent. This lack of a regulatory framework for the legislation combined with a vast geographic area from which investors came meant that certain malpractices flourished in the colonies. The most common of these was ‘dummying’ in shares. By taking up their shares in false names investors were enabled to take all of the benefits of investing in speculative undertakings whilst eschewing any of the risks. When calls were made on shares a legion of ‘dummy’ investors defaulted and left no trace as to their whereabouts in the vastness of the Australian continent.

In its first major test in the Antipodes the legislation proved to be flawed. The failure of this legislation in colonial conditions was due largely to the incapacity of the rudimentary structures charged with the enforcement of the legislation. The colonial solution to this regulatory failure of limited liability legislation was to deregulate. Regulation was removed from the public domain and relocated in the private arena.

**The Diffusion of the Corporate Form in the Australian Colonies**

The introduction of legislation is no guarantee that it will result in any significant effect on social life. Neither is there any certainty that a law, once introduced, will have the effects intended by its makers. Too often studies of company legislation have assumed that, once introduced, it led both to a relatively fast rate of diffusion of limited liability incorporation amongst business enterprises and a consequent acceleration in the rate of economic development.\(^\text{17}\)

\(^{17}\) For example Sutton, A and Wild, R (1980) ‘Companies, the Law and the Professions’ in Tomasic, R (ed.) *Legislation and Society in Australia*, (Sydney: Allen and Unwin), at 217 state: ‘The law seemed to “lag behind” commercial developments, merely being revised when a spate of frauds highlighted inadequacies in the existing legislation. Although the state was initially able to exploit its power to grant charters, economic forces eventually compelled it to concede to business an unconditional right to incorporate, and the state confines its role merely to safeguarding the mechanisms for corporate self regulation. Thus the state finally tailored its laws to the interests of private capital.’
Organizational theorists have long recognized the importance of studying the first of the above matters, the rate of diffusion of a new organizational structure such as the limited liability company:

One of the central processes of industrialization is the organizational transformation of society: the emergence of special purpose formal organizations to take over activities previously performed by other forms of social organization and to perform new tasks ... However, there has been relatively little empirical investigation of the processes of organizational proliferation during industrialization or of the variables affecting the rates at which such processes occur\textsuperscript{18}.

In a study of the diffusion of the corporate form amongst Japanese businesses during the nineteenth century one researcher found that ‘existing organizations were slow to change to the new corporate structure’\textsuperscript{19}. We have earlier observed that this reluctance existed amongst English business organizations during the nineteenth century. J B Jeffreys has calculated that as late as 1880, 95 per cent of major English businesses were still operating as partnerships\textsuperscript{20}.

Disinterest in the limited liability corporate form was even more pronounced in the Australian colonies during the nineteenth century. Tables 8.1 to 8.6 indicate how slowly incorporation took root in business consciousness as the preferred method of organizing one’s business in the colonies. In all the colonies for which registration figures have been compiled by the author the same slow rate of diffusion was observed. Registrations only really began to increase with the economic expansion that took place during the boom years of the late 1880s. The manner, in which incorporation was regarded, particularly in respect to the type of venture for which it was considered most suitable, becomes clearer when we disaggregate nineteenth century colonial incorporations by industry. For much of the nineteenth century mining registrations accounted for the bulk of companies formed under the corporations legislation. This domination of mining undertakings is underlined dramatically by the fact that in South Australia during the 1870s such companies represented between ninety and ninety five per cent of all company registrations\textsuperscript{21}. As has been observed above this group of mining enterprises which represented the bulk of registrations was not generally under the limited liability


\textsuperscript{19} \textit{ibid.}, 147.


\textsuperscript{21} These figures are calculated from the Register of Companies, South Australia, Corporate Affairs Commission Office, Adelaide.
Limited Liability Company Legislation in the Colonies

Table 8.1 Company Registrations (Victoria) 1874–1893

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of New Company Registrations</th>
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<td>1892</td>
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</tr>
<tr>
<td>1893</td>
<td>76</td>
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</tbody>
</table>

*Source: Register of Companies, Victoria, Victorian Public Records Office*

legislation at all, but rather were registered and ‘regulated’ under the terms of that colonial innovation, no liability companies legislation.

In order to obtain an idea of the relative numbers of companies and partnerships being formed during the period under study the author calculated the total number of businesses entered on the Register of Firms for NSW for 1903 (the earliest year upon which reliable data exists) and the number of NSW company registrations for that year. Whilst there was in excess of 9,000 registrations of firms in 1903 there were only 157 companies formed. In other words more than 98 per cent of businesses formed in NSW in 1903 chose a partnership over the limited liability company as their preferred organizational structure.\(^{22}\)

Despite the apparent similarities between the slow rates of diffusion of the corporate form in England and in the Australian colonies we must be careful to note the quite different factors contributing to the sluggishness in the acceptance of the corporate form in each context. As suggested earlier the predominant factor mitigating a rapid growth of incorporation amongst colonial businesses was the

\(^{22}\) The figures are from the Register of Companies, NSW, 11/11782 & 11/11783 and the Register of Firms, NSW, 1903, 2/8526, 2/8527, 2/8528, 2/8529, NSW State Archives.
Table 8.2  Company Registrations (N.S.W.) 1875–1903

<table>
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<th>Year</th>
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<td>1902</td>
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<tr>
<td>1903</td>
<td>157</td>
</tr>
</tbody>
</table>

Source: Register of Companies, N.S.W., N.S.W State Archives, 11/11782-11/11783

small-scale nature of these undertakings. It was not until the late 1870s to 1880s, when for the first time it began to be thought possible that the incorporation of such private enterprises was legally permissible, that we see for the first time appreciable numbers of small and medium sized businesses taking on corporate identity. The concentration of colonial company registrations in the mining industry was merely a reflection of lack of other sizeable undertakings funded with private capital in the colonies. The financing of most large undertakings was out of the public purse, such as with colonial railway development.
Table 8.3  

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of New Company Registrations</th>
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<tbody>
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</table>

Source: Register of Companies, Queensland, Queensland State Archives

The slow rate of acceptance of the corporate form in England was tied to a greater array of factors than those influencing developments in the colonies. In the latter case, they largely revolved around the absence of a demand for such structures in an economy dominated by extremely small enterprises. This was compounded by the prevailing cultural belief that incorporation under the limited liability legislation should be only available to large enterprises. This belief, and the advice given to those in business by their professional advisers, only began to change late in the nineteenth century.

However, despite the different alignment of factors influencing the slow rate at which incorporation took hold in England and the Australian colonies, there were nevertheless also considerable similarities between the two settings. Despite the massive size of some English undertakings in the nineteenth century most of English business continued to be conducted by small-scale enterprises throughout the century. The typical English industrial venture therefore would have faced the same difficulties as its Antipodean equivalent in being regarded as a suitable vehicle for incorporation.

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23 In the Australian context a reflection of the changing nature of professional advice in respect to incorporation in the period preceding the celebrated House of Lords decision in Salomon v Salomon is contained in the pages of De Lissa, A (1894) Companies’ Work and Mining Law in New South Wales and Victoria: A Treatise For The Guidance of Solicitors, Directors, Investors, and Others, (London, Melbourne & Sydney: George Robertson & Co.).
### Table 8.4  Company Registrations (Sth. Aust.) 1865–1906

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*Source: Register of Companies, South Australia, State Records Office, South Australia*
Table 8.5  Company Registrations (West Aust.) 1893–1902

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<th>Year</th>
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<td>1895</td>
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<td>1901</td>
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</tr>
<tr>
<td>1902</td>
<td>117</td>
</tr>
</tbody>
</table>

Source: Register of Companies, Western Australia, State Archives of Western Australia

The following letter, written in 1889 by the biscuit manufacturer T B Guest to his son, provides a colonial example of the prejudice and distrust prevailing amongst ‘respectable’ business people towards the corporate form:

I enclose you a prospectus of IAW & Sons concern to be floated into a company. Mr Craig says it will go off but I have my doubts tho there are plenty of lunatics not locked up yet ... Byron Moore and I H Were have waited on me and promised to float this business in one hour for anything I like to ask but I am not yet persuaded that it will be the correct thing to do ... you know how companies are run not so much to do a legitimate business & as to do plenty of it & during the time this is going on the chances are there would be no profits to anyone ... The fact is almost anything goes off now & I think before long there will be a big crash.24

Due to the risks they entailed, speculative ventures were considered, even when respectable businessmen were involved in their flotation, as appropriate circumstances to invoke limitation of liability. The type of venture in which this would occur is illustrated by the following nineteenth century business saga involving Morris Michaelis of Michaelis Hallenstein & Co., a respected manufacturer of leathergoods with offices in Sydney and Melbourne and international connections. Morris Michaelis had his attention drawn by another businessman to a number of inventions developed by a ‘mechanic’ named Fairfax. These inventions included a special type of sewing machine and a machine for turning rancid into fresh butter. Morris Michaelis wished to patent these inventions.

and market them internationally, being convinced of their potential. The means for effecting this plan which suggested itself to him was ‘... to form a limited liability company’ but when he asked Michaelis Hallenstein’s solicitor ‘to make it into a limited liability company [under the appropriate colonial legislation] he advised us not, as it would be useless in England and other colonies, unless it was formed in England into a limited liability company [in which case] it would do for all the world’.

Morris Michelealis continued:

... [however in the short term before the company could be formed some other arrangement had to be made] ... I did not like to enter a partnership, but under the circumstances it could not be avoided and I guarded ourselves as much as possible by keeping the power of the purse in our hands ... [When the company is formed] our shares must be fully paid shares as I will not run the least risk ... we have maintained the strictest secrecy regards these matters ... as the smallest hint might bring other inventive minds on the track of the inventions and perhaps forestall us or prevent us from getting patents for one or other invention.

For enterprises in the mainstream of commercial life, however, partnership remained the preferred option. This was not solely due to the prevailing tenets of commercial morality. It was also a consequence of the evaluation made by those in the commercial community of the effectiveness of various forms of penalties in the regulation of commercial misconduct. Even though the Companies Act of 1862 contained a number of punitive provisions, the breach of which entailed the imposition of a fine or imprisonment, the realities of the enforcement mechanisms in the colonies meant that the likelihood of a prosecution occurring in any but the most extreme case was very remote. However, in the case of a partnership, the penalty of bankruptcy and commercial discredit hung over the head of anyone who strayed from the norms of behaviour in their financial dealings with others in the business community. Without effective state regulatory mechanisms the only alternative was to continue to depend on self-regulation through the device of unlimited liability and the threat of commercial disgrace.

Despite the many factors discouraging the spread of the corporate form in the Australian colonies it is nevertheless undeniable that it became a more acceptable option by the latter years of the nineteenth century. In reviewing the numbers of corporate registrations occurring in Victoria, NSW, South Australia and Queensland during the late nineteenth and early twentieth centuries it is observable that company registrations began to increase appreciably in all colonies around 1885–1886 and that they reached their nineteenth century peak in 1888, only to drop

25 Michaelis Hallenstein Collection, National Archives of Business & Labour, ANU, Item 36/10/1, Morris Michelealis Letterbook, Letter from Morris Michelealis to his Nephew, 2/4/1890.
26 ibid.
off again in the early 1890s\textsuperscript{27}. The nature of this rise and decline in the corporate population becomes somewhat clearer when these company registrations are disaggregated by industry. Butlin has done so for Victoria.\textsuperscript{28} It will be noted from the accompanying table and graph, which draw on Butlin’s figures, (see Table 8.6 and Graph 8.1 on the following pages) that by far the greatest proportion of the increase in company formations in the late 1880s is accounted for by the dramatic rise in number of registrations of manufacturing enterprises (which were largely conversions of existing businesses) and the even more rapid rise in the number of land and property companies, which were largely speculative in nature.

### Table 8.6 Registrations by Industry 1874–1893 (Victoria)

<table>
<thead>
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<th>Year</th>
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<th>Pastrl</th>
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Whilst the increase in numbers of land and property enterprises was short lived, falling off as quickly as they had risen after 1889, the same was not true for manufacturing enterprises. As more and more businessmen suffered reverses in

\textsuperscript{27} See Tables 8.1 to 8.5 earlier in this chapter.

\textsuperscript{28} Butlin, N G (1964), 413.
their personal fortunes due to ill considered investments in the land boom they had to turn to the public for the capital necessary to keep their businesses afloat. What is striking about many of the conversions of manufacturing enterprises to corporate form is how little difference this made to the manner in which the controllers of the undertaking carried on their affairs. Incorporation did not generally transform the organizational framework of business. As has been noted earlier, whilst the limited liability company was arguably designed as a means for attracting investment, it has also ‘turned out to be a form of organization well adapted to the exercise of autocratic power’. Consequently it served the needs of many late Victorian businessmen who wished to attract capital from outside their immediate circle whilst ‘still keeping control of the business where it had always been: in the family’. It has been suggested that particular aspects of the regulatory environment relating to corporations allowed autocracy and, in certain circumstances, dishonesty, to flourish within these organizations. The most important of these factors was the lack of external controls over the manner in which published accounts were presented to the public and the way in which the corporation law of the time virtually encouraged directors to have privileged

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Graph 8.1  Percentage of paid-up to nominal capital 1856–1882 (England)

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29 This was the reason for the public flotation of Swallow and Ariell in the late 1880s. See Swallow and Ariell Collection, University of Melbourne Archives.


access to that information upon which vital decisions within the corporation were made.\textsuperscript{32}

The assertion that little changed in the organization of many enterprises converting to limited liability is as true for Australian as for English businesses. Whilst many colonial manufacturing enterprises converted to limited liability form in the latter part of the 1880s, in terms of the actual control and internal operation of these enterprises very few, if any, changes took place. By means of a variety of devices minority shareholders were marginalized and the same small group of individuals which had always controlled the enterprise continued to do so. Minority interests were treated with disdain. The contempt of corporate managements for their minority shareholder interests is illustrated in the reply of the chairperson of one colonial company to a shareholder’s question as to the opaque nature of the accounts as presented, that the cryptic nature of the accounts was deliberate ‘as it would not be wise to divulge too much information in that matter’\textsuperscript{33}. Another shareholder in the same company, upon questioning why there had not been a review of directors’ salaries as a consequence of the decline in profitability in the company, was told by the chairman that the directors who were receiving in excess of six hundred pounds per annum earned their money as ‘they did many things’ and that a review of their salaries was consequently unnecessary. Beyond this assertion the chairman refused to reveal to the shareholder the hours of attendance of the directors or the precise tasks which they performed\textsuperscript{34}.

Such arrogance towards the concerns of minority interests was common. The lack of information available to ordinary investors had become a sore point by the latter years of the nineteenth century. A late nineteenth century colonial investment manual asserted in this regard:

\begin{quote}
... Those who have attended meetings have been bewildered by conflicting statements as to figures, and the purport of balance-sheets, which they have been unable to grasp, and could not make the subject of comment ... the common knowledge which should exist respecting the nature, character, and conduct of the joint stock company is generally wanting\textsuperscript{35}.
\end{quote}

Consequently the growing rate of adoption of corporate identity by colonial enterprises during the latter part of the 1880s should not be seen as a turning point in organizational practices amongst Australian businesses. Indeed these businesses did all they could to preserve existing practices within the new organizational structures they embraced at this time. Management practices did not significantly change as a consequence of the adoption of corporate identity. In fact the contrary

\textsuperscript{32} ibid., 194.
\textsuperscript{33} Swallow and Ariell Collection, Melbourne University Archives, Swallow & Ariell Ltd., Minutes of 4th. Annual General Meeting, 1892., Box 1/3/1.
\textsuperscript{34} ibid., Minutes of 2nd. Annual General Meeting 1890, Box 1/3/1.
\textsuperscript{35} De Lissa, A (1894), 2–3.
occurred – the new organizational form of the corporation was adapted by commercial interests to suit existing managerial and organizational practices.

In concluding this section a number of key points related to the diffusion of the corporate form in the Australian colonies should be reiterated. First, the rate of diffusion of the corporate form on the Australian continent was extremely slow. Whilst in England it was the case that the corporate form was not readily adopted by capitalist enterprises, the lack of interest in this new structure was even more pronounced amongst colonial undertakings. The only colonial industries in which there was a ready adoption of corporate form were those in the banking and finance area and those in the mining sector. In the case of the former incorporation was generally not undertaken under the limited liability legislation. Rather, such undertakings were either formed under a Private Act of Parliament or established by way of a Royal Charter. This difference in the manner in which they were constituted consequently sets banks and finance undertakings somewhat outside our frame of reference.

Mining undertakings, however, were at first generally incorporated under the limited liability legislation. Rather than confirming the utility of the legislation in the colonies, this experiment largely illustrated the inappropriateness of forms developed in England to colonial conditions. There was significant opposition in the colonies to the limited liability legislation, particularly from creditors of mining companies. They argued that the legislation, at least as it functioned in the colonies, allowed shareholders to hide behind ‘dummy’ names with impunity. This practice meant that when calls were made on shares the ‘holders’ of such shares could easily evade their responsibilities to pay the required amounts. This practice meant that significant losses were incurred by the creditors of such undertakings, who found they had no assets against which to claim for their debts. This practice of ‘dummying’ shares also meant that many mining ventures were discouraged or prevented. The large capital investment required, along with the long period of amortization, meant that, in a context in which investors reneged on their responsibilities at the first opportunity, these schemes simply did not go ahead.

As a consequence of the anger expressed by creditors and the perception that limited liability incorporation was unsuited to colonial circumstances, the ‘no liability’ form of corporate undertaking was introduced. This was unique to the Australian colonies. It solved the problem of ‘dummying’ by allowing shareholders to renege on the payment of calls and ‘legally’ forfeit their shares in an undertaking. Whilst this scheme solved many of the problems alluded to above it also created a whole raft of new problems which were to continue for some considerable time after the boom years of the latter half of the nineteenth century.

In most other industries local entrepreneurs ignored the limited liability legislation. The key factor impeding adoption of corporate form in the colonies was the small scale of most local enterprises and the fact that those undertakings which were on a larger scale were financed out of public, rather than private, capital. In addition, diffusion of the corporate form in the Australian colonies was retarded by the business culture inherited from England, which was, as we have
seen, antagonistic to the idea of incorporation other than for a defined group of industries with special characteristics.

A marked increase in company formations took place in the late 1880s in all the Australian colonies. A large number of these new enterprises were, however, purely speculative. These corporate undertakings were largely constituted by land and property enterprises. Most key sectors of the economy remained unincorporated. Widespread diffusion of the corporate form in all sectors of the economy was still a long way off. Nevertheless a number of manufacturing enterprises converted to limited liability companies during the late 1880s and early 1890s.

### Innovation in Australian Colonial Company Legislation During the Nineteenth Century

*(i) Introductory Remarks*

Three colonial departures from English company legislation are generally mentioned by textbook writers as representing significant innovations. These are:

i. the colonial introduction of ‘no liability’ mining legislation,

ii. the introduction of a standard form of financial reporting for limited liability companies, and

iii. recognition of proprietary companies.

All these departures from English practice were first introduced in Victoria, and then spread to the other colonies. One of the leading Australian authorities on company law, Professor Harold Ford, comments in respect of these developments:

There were some notable innovations in Victoria. A new form of mining company, the no-liability company was provided for in 1871 and in 1896 compulsory audit and annual presentation of financial statements were legislated for at the prompting of the Victorian Attorney-General, Isaac Isaacs ... The new requirements of Victorian law applied only to public companies and it was necessary to define the companies which were exempted. These were called proprietary companies. In this way Victorian law recognized the private company 11 years before similar recognition was accorded in Britain.

Despite the apparent agreement amongst Australian textbook writers that these innovations were indicative of the progressive nature of colonial society, little serious analysis has occurred with respect to the appropriateness of such

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innovations, once in place, to deal with the instances of regulatory failure they had been designed to overcome. The question of whether these legislative responses to moral panics may have been referable to a more widespread defect – that of the unsuitability of English company legislation to Australian colonial conditions – is a matter which has also never been properly addressed.

(ii) No Liability Mining Company Legislation

We have already suggested how in many ways the company legislation introduced in the Australian colonies during the 1860s was unsuitable to Australian conditions. As noted this unsuitability was particularly marked in the case of mining company flotations. There was little doubt in the minds of contemporaries that this was the reason for the introduction of no liability mining company legislation\(^{37}\).

By permitting an investor to withdraw from a mining company at any stage simply by failing to pay calls on his or her shares, the no liability mining legislation\(^{38}\) undermined the rationale for dummying shares – to avoid liability when a venture was failing. In doing so it also removed an impossible regulatory burden from the shoulders of the ramshackle bureaucratic structures charged with enforcing the provisions of the Company Acts in the various colonies. There was no way in which these rudimentary structures could ensure the veracity of share registers during the nineteenth century.

Most accounts of the introduction of no liability legislation speak of it in congratulatory terms\(^{39}\). It was stated throughout the nineteenth century that the legislation had successfully led to an increase in investment in the mining industry and thus had contributed generally to economic development. Without no liability legislation members of the moneyed classes had been ‘deterred from investing their capital ... in speculations’\(^{40}\). Most modern commentators have accepted the utility of the no liability company and have uncritically assumed that it was a necessary and appropriate innovation in the context of Australian colonial conditions. However, if nineteenth century commentaries on the operation of the no liability legislation are to be taken seriously then this colonial innovation must be regarded as less than an unqualified success.

No liability companies legislation was essentially an adaptation of the stock book system operating on the tin mining fields in Cornwall and Devon. These enterprises differed in two respects from the Australian variant:

\(^{37}\) For example see the comments of Mr Hunter, *Queensland Parliamentary Debates* (Legislative Assembly), 16th July 1889, 663–664.

\(^{38}\) Mining Companies Act 1871 (Vic.). See also Hall, A R (1968), 75–77.

\(^{39}\) However, note the recent re-examination of the factors behind the introduction and later evolution of no liability companies legislation in Victoria in Waugh, J (1987) ‘No Liability Companies in Victoria’, *AMPLA Yearbook*, 30ff.

\(^{40}\) Mr R Walsh, *VPD*, vol. XII, 17/8/1871, 915.
i. the members of cost book companies were fixed with unlimited liability in respect to outsiders and

ii. the cost book companies generally involved only relatively small numbers of members.

Indeed, to some, no liability legislation was only ever intended to apply to the sort of small mining enterprise which had traditionally come within the purview of the cost book system in England. One of the participants in the debate over the introduction of the legislation in Victoria in 1871 voiced this sentiment quite clearly:

[If] he understood the object of the bill, it [was] to enable small parties of miners to organize themselves into small corporations, and to borrow money so as to enable them to develop their mines.\footnote{Mr Stephen, \textit{VPD}, vol XII, 19/5/1871, 283.}

This view was again reiterated in 1880–81 in the debates regarding the introduction of no liability legislation to NSW. It was there suggested that such legislation would be inappropriate in NSW due to the different scale of mining operations in that colony. This might lead to an extension of the principle of the Act to mining enterprises of a size and type different from those for which it was originally intended. It was strongly asserted that large mining companies should continue to be governed by the terms of the limited liability legislation\footnote{Mr Ryrie, \textit{NSWPD}, 1880–1881 Session, 21st January 1881, 163.}.

However, despite these forebodings, large mining undertakings did take advantage of the provisions of the No Liability Act at least as often as did small tribute mining enterprises operating in the mining districts. This extension of the principle behind the No Liability Act continued to trouble contemporaries, as did the apparent regulatory vacuum in which such undertakings operated. Rather than being seen as an ‘autochthonous (sic) expedient ... developed to defeat fraudulent practices arising out of the mining boom’\footnote{Redmond, P (1988) \textit{Companies and Securities Law: Commentary and Materials}, (Sydney: Law Book Co.), 31.} the no liability company was seen by some as creating a range of new opportunities for devious practice:

If the statute book of any English-speaking country were searched, it would in all probability not disclose so shoddy an act of legislation as the [No Liability Mining Act]. Some of the main provisions are obscure, and therefore necessarily doubtful in their construction; there is hardly one which is not to be condemned as a clumsy means of carrying out the objects proposed, and the Act is wholly insufficient for the proper formation or working of a company ... The system may be fairly applicable to the working of alluvial deposits, or mining claims not requiring the investment of a large amount of capital; or where the capital
invested is by the miners themselves, working in a particular district: but it is not suited to a company in which a substantial amount becomes invested in the mining property acquired. Bainbridge remarks that the cost-book system arose in the natural desire to carry on small concerns by numerous proprietors with as much economy and as little partnership as possible. A frequent drawback to the development of mining properties in the colonies is want of steady application of capital and labour. The speculative element often contemplates more the sale of shares at a profit, than the actual results of a mining venture.\(^{44}\)

Whilst in many ways a solution to both the absence of mechanisms to properly enforce the provisions of limited liability companies legislation and the inability to maintain the integrity of share registers, the introduction of no liability mining company legislation was itself a flawed solution. It did not really solve the problem for creditors of having assets against which to retrieve their debts. Also, it only ensured that there was a continuity of investment in a particular project as long as that project continued to hold out the prospect of turning a profit. If the undertaking appeared hopeless no investors would step into the breach left by those who had chosen not to pay their calls.

Instead of leading to a healthy injection of finance into genuine mining ventures it is arguable that no liability companies legislation instead encouraged wasteful and unproductive speculations. The net effect of no liability mining company legislation on colonial economic development cannot properly be assessed. However some revision is necessary with regard to the previously uncritical acceptance of this legislation as an efficacious and original colonial contribution to company legislation.

As a consequence of taking most colonial company registrations outside the purview of the limited liability legislation (given that most registrations before the late 1880s were of mining companies) the introduction of no liability legislation arguably delayed any serious examination of the appropriateness of the limited liability legislation to the needs of the colonies. With such small numbers of undertakings registering under the legislation it was not considered worthwhile (at least before the 1890s economic disaster) to examine the operation of the legislation in the colonial environment. Even when such an examination did occur it was conducted in such a way as to prevent (or at least restrict) local input. Reforms suggested by the Davey Committee in England were seen as the last word in revising the legislation. Little or no consideration was given to the question of how best to tailor the provisions of company law to the available administrative resources in the colonies.

\(^{44}\) De Lissa, A (1894), 192–193.
(iii) The 1896 Reforms to Victorian Company Legislation

The reforms to Victorian company law which took place in 1896 were a direct result of the disastrous economic crash which had preceded them. The laxity of company regulation, the absence of compulsory financial reporting and the disdain with which directors and managers treated shareholders were all implicated in the collapse of large numbers of companies in Victoria during the early 1890s. When the matter of a new Limited Liability Act first came before the Legislative Assembly in 1895 no fewer than 173 new provisions were proposed. Most of these were aimed at increasing the responsibility of corporate controllers for financial mismanagement or in making fraudulent practices criminal offences.

However, the spirit of reform displayed by the Legislative Assembly was not shared by the unelected Upper House. The Legislative Council attempted to emasculate the proposed new provisions. *The Age* explained the reason for this obstructiveness:

> The Council’s action in the Companies Bill is one dictated by the most direct of personal interests. It is a House of company directors, and it is determined to minimize the responsibility of directors towards shareholders ...

Those members of the Legislative Council who represented the interests of the ‘company director’ lobby were not successful in preventing all of the proposed changes to company legislation. Nevertheless they were quite proficient in taking much of the force out of the more extreme of the proposed reforms.

Most of the new ideas incorporated in the 1896 Victorian Limited Liability Act were taken from the recommendations of the English Davey Committee. Just as the Australian colonies, and in particular Victoria, were going through a radical reassessment of the regulatory provisions of the Companies Act, this process was also occurring in England. Despite the more developed English bureaucratic and regulatory structures it was the case in England, as in the colonies, that the predominantly facilitative nature of limited liability legislation was permitting unsavoury businessmen to defraud the public with impunity. This was good for nobody except the businessmen perpetuating the frauds – the public, as investors, suffered; genuine businesses suffered in their role as creditors; and the State suffered by being called to account for these apparent regulatory failures.

The Davey Committee had made in its recommendations a number of suggestions with regard to improving the regulation of limited liability companies. In England these recommendations were only accepted piecemeal. Even then

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they were introduced over a twenty five year period. The need to implement these reforms in the colonies was, however, considered to be more urgent as a consequence of the public clamour in the wake of the disastrous collapse of many businesses during the 1890s.

However, whilst the reforms implemented in Victoria may at first sight appear more ‘progressive’ than the response to the Davey Committee Report in England, this has to be placed in the context of their enactment. First, they were not the most appropriate reforms in the colonial context. Second, it is easy to confuse ‘symbolic’ legislation with measures that are intended to have a true effectiveness. At the time the new legislation was introduced, the Registrar of Companies was unable to ensure that companies submitted their Annual Returns as required by the Act, let alone be able to enforce the new provisions requiring the submission of compulsory annual financial statements. The failure of colonial companies to comply with the provisions of the Act was so common that one Member of the South Australian Parliament was given to remark that:

He did not believe that any one of the companies under the (Companies) Act had complied with the conditions regarding limited liability. It might be a solace to shareholders to say that their liability extended to only a certain amount, but as he thought that no Company has complied with the conditions he could not see how they could shelter themselves under the plea of limited liability47.

After the introduction of the 1896 Act the level of compliance with the legislation did not markedly increase. The resources of the various colonial administrative bodies responsible for enforcing the legislation did not improve appreciably. In fact the capacity of these bodies to perform an enforcement role was weakened, rather than strengthened, as a consequence of the increasing burden of administrative responsibility cast upon them by the substantial growth in proprietary company registrations at this time. Consequently, the adoption in Victoria of many of the Davey Committee recommendations, whilst apparently creating a more formidable regulatory climate than that prevailing in England, in reality made little difference to regulation or enforcement practices in that colony. It was yet another instance of colonial companies legislation following imported models without any assessment taking place of the means available to ensure that the provisions of the legislation could be properly implemented or enforced. A realistic appraisal of the administrative structures responsible for enforcement of company legislation in the colonies would have led to quite different solutions than those which were offered during the moral panic regarding commercial practices in the mid-1890s.

47 Sir Henry Ayres cited in The South Australian Register, 8th August 1878.
Regulation or Facilitation?: The Enforcement of the Limited Liability Acts in the Colonies 1864–1920

Legal historians have not generally considered the history of administrative agencies charged with the enforcement of legislation such as that relating to companies in any detail. These historians have instead largely concentrated in the past on matters such as the evolution of legislative provisions or on judicial pronouncements relating to specific facets of the law. This failure to examine the administrative history of legislative provisions is unfortunate, as it has tended to prop up the common tendency towards teleology amongst legal historians. Legislation is seen as being replaced by later enactments that are ‘better’ by reason of the more informed basis upon which they are drafted. Courts are seen as reactionary or progressive forces in this teleology. Either they undermine the ‘proper’ intentions of the framers of particular legislation, or they carry the intentions of the legislation forward, adapting it to new social and economic conditions. In this process the role of the agencies charged with administering legislation is glossed over. These agencies are assumed to be relatively neutral in development of the law. Due to the pioneering efforts of a number of researchers this past marginalization of the role of bureaucracies in the unravelling of legislation is now beginning to be reassessed.

In respect of company legislation, little work has yet been done. No literature yet exists on the bureaucratic structures charged with administering company legislation during the nineteenth century. This may be a consequence of the indifferent sources available. The following account is somewhat fragmentary for that reason.

As suggested above no consistent pattern emerged in the various colonies with respect to the administrative mechanisms employed to deal with registration under and enforcement of the limited liability legislation. NSW appears to have had the most efficient of the colonial bureaucracies responsible for the Act; the location of the responsibilities for the administration of the Act in the Registrar General’s Department, rather than in a new special purpose Department, appears to have been propitious. One reason why the introduction of no liability mining company legislation was not regarded as pressing in NSW seems to have been the much lower incidence of ‘dummying’ of shares in that colony as a consequence of the stricter enforcement of the provisions of the company legislation by the Registrar General’s Department. In contrast, administrative procedures were so lax in Victoria in the late 1880s that one public servant employed by the Registrar of Companies office was able, over a period of a number of years, to abscond undetected with the registration documents of a substantial number of companies, steam off the duty stamps on the documents, sell these duty stamps to finance
investments in the land boom and destroy the original documents of the companies concerned.

In Queensland the fear of fraudulent practices on the part of public servants prompted the following Memorandum from the Attorney-General to the Registrar of Companies/Master of the Supreme Court:

Sir, I have the honor to request that you will be good enough to direct the attention of the officers of your Department to the Notice that appeared in the Gazette of 13th ult., in which it is intimated that no officer in the Government service is to be allowed to hold office in any Public company or society whatever and I have to request that you will make it clearly understood that any officer who disregards this notice, or in any way acts contrary to its true intent and meaning will subject himself to the penalty of dismissal from the public service.

In no colony did the administrative officers charged with the Act seem to regard their duties as being principally of a regulatory nature. The various departments and government officials responsible for the legislation saw their role as being facilitative: providing advice in respect of registrations, ensuring paperwork submitted to them was in proper form and that the register was maintained. The prevailing attitude towards the nature of the administrative duties owed by the responsible colonial department in respect of the Act is reflected in the following interchange between the South Australian Attorney-General and the Registrar of Companies in 1889. The Attorney-General had been questioned in Parliament regarding a number of frauds committed by a particular company and had referred these matters to the Registrar of Companies ‘whose duty it is to see the Act is complied with’. The Registrar, Alex Buchanan, replied:

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48 This and other irregularities in company administration were the subject of an investigation by a board appointed by Parliament, which reported in 1889. This report revealed that the corporate register and related aspects of corporate administration were in hopeless disarray. The report also noted that the memoranda of association of 74 companies had disappeared, presumably destroyed after the attached duty stamps were steamed off: see Votes and Proceedings, Legislative Assembly (1889) vol. 2, no. 6, 365–615 at vii–viii; 189–191. Action was subsequently taken within the Registrar-General’s department, which was then responsible for companies administration, to remedy many of the administrative defects identified by the report and the Victorian Parliament enacted a special Act to allow for the replacement of the missing documentation: see Companies Documents Act 1895 (Vic). There is a discussion of these matters in Waugh, J (1992), 370–371. These matters are also noted by Cannon, M (1972) at 104.

49 Correspondence, Supreme Court, Queensland State Archives, SCT A/12, Letter from Attorney-General to Registrar of Companies/Master of Supreme Court, Mr John Branston, 12/8/1872.

50 Letter 190/1893, Minute Book, Master of Supreme Court, South Australia, 1890–1924, Corporate Affairs Commission Office, Adelaide.
... The Act does not appear to throw the duty upon anyone other than the Companies themselves and their agents, of seeing that the provisions of the Act are complied with; nor does there appear to be any machinery provided for that purpose beyond the penalty under the Act which may be applied by the Justices imposing the same on or towards the informant. I may state that if it should come to my notice as Registrar of Companies that a Company was neglecting to comply with the Act I should deem it my duty just to communicate with the company and if that proved ineffectual then to report the matter to the Minister.\footnote{AGO 190/93, Minute Book, Master of Supreme Court, South Australia, 1890–1924, South Australian State Record Office, GRS 2317/1.}

In some colonies there was even reluctance on the part of the body responsible for administering the legislation to answer routine enquiries regarding the operation of the relevant company legislation. For instance, one Warwick business house wrote to the Registrar of Companies in Queensland to establish if it was (i) their duty to file a copy of their annual balance sheet with the Registrar of Companies and (ii) if they were so required which section of the act required them to do so. The Registrar replied:

\[\text{I have to refer you to ss. 25–33, 39, 53, & 87 of the Companies Act 1863 for information as to returns, etc. to be forwarded to this office and to inform you that in future when similar information is required it will be necessary for you to consult your legal adviser, as it is no part of the Registrar’s duty to advise companies as to their duties.}\footnote{Correspondence, Supreme Court, Queensland State Archives, SCT/ A 30, Letter from Barnes, Archibald & Co. Ltd., Merchants & Milkers, Warwick, 14/2/1890 to Registrar of Companies and reply from Registrar 17/2/1890.}

The fact that in many areas of Queensland no legal adviser might have been available\footnote{The Mining Registrar and Acting Local Registrar of Joint Stock Companies for Ravenswood complained of the ‘quality’ of men advising others on company matters in a letter to the Queensland Registrar of Companies in 1890: ‘Such men undertake duties, they do not know anything of, and are “quite out of sorts” as to the Rules and requirements of the Supreme Court in “winding up” affairs. We have one solicitor here (Mr McCullen) who is not always engaged in such affairs. Why, I do not know beyond such is the fact. Hoping the accompanying paper is something near what you demand as necessary to make the matter perfect.’ W G Kelly Cusack. Supreme Court Correspondence, Queensland State Archives, SCT A/31, Letter #669, 1890, 21/7/1890.} or that copies of the Companies Act might have been impossible to
obtain\textsuperscript{54} seems not to have deterred the Registrar from maintaining a narrow interpretation of his departments’ tasks. If we are to assume that the opinions expressed by the South Australian and Queensland Registrars of Companies were commonly held, then it appears that the Departments responsible for administering the Companies Acts did not regard enforcement of the penal provisions of the Act or the provision of routine advice in regard to the Act as part of their responsibility. This left only routine administrative tasks, such as the processing of applications to register a company and the acceptance of other documents required to be filed with the Registrar as those things which the Registrar, or other responsible Department, did regard as within their allocated functions. All other aspects of enforcement or management of the Companies Act were seen to be the private responsibility of the individuals involved. Even in respect of these routine administrative matters the relevant administrative bodies were not always particularly efficient. In all colonies the backlog of companies which had not submitted their annual returns was always quite substantial, as too was the number of defunct companies littering the register.

These inefficiencies in respect of routine administrative matters, the inconsistencies between the provisions of the various colonial Companies Acts, the differences in administrative practices between the various departments charged with overseeing the Act and the different interpretation the courts in each colony had placed on the Act all led to considerable inconvenience for the business community\textsuperscript{55}. These factors were also perceived to be implicated in encouraging

\textsuperscript{54} In a letter to the Queensland Registrar of Companies the Secretary of one Company registered the following complaint after been told that his company had not complied with the Act:

‘Sir,

... It is difficult to know what the provisions of the Companies Act are as repeated applications have been made at the Government Printing Office, Brisbane for copies of the Act, but without success.

As far as we know they will be complied with.

Yours sincerely,

J Call

Secretary,

Yoolboonda Copper Mining Company’

Supreme Court Correspondence, Queensland State Archives, SCT A/12, Letter of 20/7/1872.

\textsuperscript{55} The need to achieve some level of uniformity so that enterprises which operated in more than one colony could avoid additional costs was the basis upon which the Brisbane Chamber of Commerce, along with bodies representing commercial interests in other colonies, passed a number of motions in favour of uniformity in the early 1890s.

It appears that the solution adopted in Canada, with parallel state and federal legislation, was never seriously canvassed in Australia in the late nineteenth century (during the federation debates) or in the early twentieth century.
the less savoury elements in the commercial community into perpetrating frauds by playing one system off against another.

Such consequences of colonial parochialism led to lobbying by the business sector to have a national, or at the very least, a uniform system of company law after Federation. A number of meetings and exchanges in the early years of the Commonwealth formulated plans respecting the implementation of such proposals. Interestingly enough one can observe in correspondence relating to these meetings a mounting fear on the part of the legal community that company law had been ‘taken over’ by the bureaucrats. In a letter written by the Secretary of the Law Institute of Victoria in 1907 to his counterparts in NSW, Tasmania, South Australia and Queensland he stated:

As doubtless you are aware a conference is being held in Melbourne at the present time on the subject of Federal Company legislation. This conference is composed of what are called ‘experts’ from the states. It appears however that these experts are gentlemen from the Registrar-General’s Offices whose duties are almost wholly of an official and administrative character relating mainly to the filing of documents and papers in connection with the formation and management of companies.

In the opinion of Council expert opinion on company legislation cannot be obtained in this way. Practising Solicitors with experience of company formation, managers and auditors with company experience, it is considered alone will furnish advice likely to be a safe guide to legislation.

The Queensland Attorney-General expressed the prevailing sentiment in 1913:

For 15 or 16 years there has been a movement afoot in Australia with a view to providing a comprehensive Commonwealth law relating to companies: various conferences have been held in connection with this matter, and plans have been agreed upon from time to time by various Premiers.

By the time this statement was made the chances of any such federal scheme being implemented had diminished significantly as a consequence of the decision of the High Court of Australia in the Huddart Parker case. In that case the High Court had given a narrow interpretation to the ‘corporations’ power in the

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56 Law Institute of Victoria, General Correspondence 1897–1908, Law Institute Collection (Second Accession), University of Melbourne Archives, Item 2/32.
57 Hon. N F Macgroarty, QPD, 3rd September 1913, 671. I am indebted to Professor Myles Mc Gregor-Lowndes, Department of Business, Queensland University of Technology, for drawing my attention to this reference.
58 Huddart, Parker & Co. Pty Ltd v. Moorehead, 1909, 8 CLR 330.
Commonwealth Constitution (section 51 (xx)). This interpretation was so restrictive that it was widely believed to prevent any possibility of federal intervention in this area. Nevertheless despite this negative contribution of the High Court in respect of the possibility of truly national legislation, the hope of achieving the more modest goal of a level of uniformity in legislation and administrative practice remained alive. These hopes were expressed in a letter from the South Australian Registrar of Companies, J N Stuart, to the State Attorney-General in 1923:

I have no doubt there is a strong desire on the part of the commercial community to obtain uniformity in Company law ... the South Australian Acts differ in important particulars from those in other parts of the Commonwealth and it may be of great service to the commercial world if our Act was brought into line with those of Victoria or Tasmania which are the replicas of the most modern legislation on the subject. South Australia would thus be assisting towards uniformity, which trades consider essential for the encouragement of trading but this is a matter of policy and it is only thrown out as a suggestion.

The business community envisaged that a uniform Australian Companies Act would be a replica of the latest English Act so that commerce with the mother country could best be facilitated. It was at no time conceived in this quarter that an Australian Uniform Companies Act would substantially diverge from the English model. Evidence of this can be found in the minutes and correspondence of various interested bodies during the first quarter of the twentieth century. For instance, we find the President of the Sydney Chamber of Commerce writing in 1907 to the Under Secretary of the Federal Department of the Attorney General and of Justice in the following terms:

[The Council of the Chamber of Commerce] submit for the consideration of the Acting Prime Minister of the Commonwealth, should the Honourable the Attorney General be good enough to submit them, the following suggestions of a general nature:

2. That uniformity of Bankruptcy and Company Law be best obtained by legislation by agreement in identical terms by the Parliaments of the individual States.

3. That in view of the great distances between places in the Commonwealth, it is not expedient to have Federal legislation on these subjects unless such legislation can be adapted to the circumstances as to avoid difficulties in dealing with real property and in business transactions.

59 Supreme Court Minute Book, South Australia, Memorandum of 20/2/1923 re amendments to the Companies Act. See also Anon. (1927) South Australian Companies Legislation, *Australian Law Journal*, vol. 1, 89–90.
4. That it is desirable that on both subjects, legislation should follow the lines of the latest English legislation.

5. That any attempt to centralize the administration of either of these branches of the law must result in grave interference with business interests throughout the Commonwealth.  

The Minutes of the Adelaide Chamber of Commerce for 1924–1925 are also replete with references to the reform of company law. On the 28th November 1924 the Parliamentary and Industrial Committee of the Adelaide Chamber of Commerce considered a letter from the Melbourne Chamber of Commerce that suggested not just a uniform system of company law, but also a reconsideration of the question of formulating a national system of regulation:

Letter (referred to the Committee by Council) from Melbourne Chamber of Commerce, 16/9/1924, was read, advising preliminary meeting of those members of Uniform Company Law Committee of the Associated Chambers of Commerce available in Melbourne had been held on 19th August 1924, when it was suggested that the Chambers of Commerce might take steps to ascertain from leaders of all parties in the State Parliaments their ideas on the subject of referring to the Commonwealth Parliament under Section 51 of the Constitution, sub-sec XXXVII – the power to legislate in the direction indicated. It was asked that this Chamber would advise its opinion as to whether the reference of the required powers to the Commonwealth was advisable.

After carefully considering the matter, it was resolved that this Committee is of opinion that while uniform company law under conditions satisfactory to traders might be desirable, there is no such pressing necessity or urgency as would justify conferring jurisdiction upon the Parliament of the Commonwealth and abandoning the possibility of the State Parliaments adopting a Uniform Bill.

Despite this continuing concern to establish uniformity in company law, it was not until 1961–1962 that agreement was reached amongst the States for a uniform Act in all jurisdictions. A federal system of company law with a national body responsible for its administration is something only latterly introduced, some

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60 Law Institute of Victoria, General Correspondence, 1897–1908, Law Institute Collection (Second Accession), University of Melbourne Archives, Item 2/32.
61 Adelaide Chamber Of Commerce, Minute Books, P/16, National Archives of Business & Labour, ANU.
62 Some of the difficulties involved in establishing uniformity in companies legislation are discussed in Ford, H A J (1986), 14.
eighty five years after it was first mooted. The new legislation, at least initially, diverged little from the preceding co-operative scheme.

A number of important points have emerged from the above discussion. First, it needs to be stressed that the administrative agencies charged with overseeing the operation of company legislation in the Australian colonies did not see their function as a regulatory one. Rather, they saw their role as purely bureaucratic in nature – processing applications for registration, striking defunct companies off the register and ensuring the documentation submitted to them was in proper order. A bureaucratic department which historically did not see its role as regulatory would have considerable difficulty in altering its culture to accommodate this task at some later stage:

[R]egulatory agencies can often be seen as being victims of the forces at work during their formation. The ambiguity of their goals, their unstable popular base and their continued relationships with the regulated all serve to undermine and neutralise their sense of purpose.

The lack of uniformity in company legislation in Australia was seen as a continuing impediment to effective regulation. No better illustration of the incapacity of vested interests to transform their views into law could be asked for. The business communities, through chambers of commerce, were vocal in their call for uniformity of legislation over a long period of time, yet were unable to achieve this goal. One should, however, not confuse these demands for uniform regulation with effective or appropriate regulation. This is reflected in the continued demand that Australian legislation be kept the same as the most recent English legislation. Whilst this was a quite sensible demand from a business perspective by allowing

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63 An excellent account of the judicial history of the ‘corporations power’ contained in section 51 (xx) of the Australian Constitution and the slow progress towards the establishment of a national system incorporations legislation and administration can be found in Corcoran, S (1994) Corporate Law and the Australian Constitution: A History of Section 51 (xx) of the Australian Constitution, The Journal of Legal History, vol. 15, no.2, 131–162.

64 In his Second Reading Speech to the Corporations Bill, Hansard, House of Representatives, 25th May 1988, the then Attorney General, Lionel Bowen, explained the reasons for the lack of innovation in the new national legislation:

‘Because the highest priority attaches to the establishment of a national regime for the regulation of companies and the securities and futures industry, the corporations Bill, for the most part, re-enacts the existing legal requirements. I do not consider it appropriate to introduce extensive reforms to much of the existing law without consultation with interested sectors of the community. Nor do I consider it desirable for the introduction of the national legislation to be accompanied by a plethora of changes that would unnecessarily disrupt the business community.’

for integration of Australian and English business structures, it was potentially disastrous from a regulatory perspective in that the means by which the legislation was to be administered in the Australian colonies were quite different from that in the ‘home country’.

**Summary and Implications**

Further study of nineteenth and early twentieth century company regulation is required. Many of the contemporary problems relating to regulatory failure might be better understood if more was known of the historical evolution of the corporate form and the administrative structures charged with its regulation. In the Australian context we have observed that, historically, one of the key factors which contributed to the recurring regulatory crises in the colonies was the failure to adapt English legislation to the extant colonial administrative structures. The mismatch between legislative enactment and administrative capacity led to a prevailing ethos antipathetic to the discharge of regulatory functions among the colonial agencies charged with overseeing the operation of the Companies Acts. Enforcement of the regulatory provisions of company legislation was seen to be a matter for private initiative rather than a question of state intervention. 

Intermittent moral panics in respect to the efficacy of company legislation did little to remedy this deficiency, as regulatory failures were perceived by legislatures as matters to be remedied by means of amendments to the relevant legislation. Revisions to the administrative structures charged with enforcement of the legislation were not generally perceived as integral to the solution of regulatory deficiencies. Neither, quite often, were they politically feasible.

When the possibility arose to initiate a more effective regulatory structure after Federation, State parochialism stood in the way of establishing a national body charged with the regulation of corporations. The High Court reinforced this prevailing sentiment when it gave a narrow interpretation to the ‘corporations power’ in the *Huddart Parker* case\(^66\). The enduring influence of ‘state’s rights’ sentiments was reflected in the continuing failure to achieve even uniformity of company legislation. This was despite a strong desire on the part of the business community to realize this goal.

A combination of factors meant that the administrative structures, which over time were to become the State Corporate Affairs Commissions, were incapable of discharging their regulatory functions. These bodies were truly victims of the forces operating at the time of their inception. To overcome the crippling weight of the historical legacy which these bodies had inherited and to establish truly effective regulatory mechanisms it was necessary to begin afresh.

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\(^{66}\) *Huddart, Parker & Co Pty Ltd v. Moorehead*, 1909, 8 CLR 330.
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Chapter 9
Conclusions

The modern limited liability corporate form when first introduced was the subject of considerable controversy. The enactment of limited liability companies legislation in 1855/1856 represented a substantial shift from the previous obdurate refusal of the English state to countenance any other system of liability than that which made those investing in business ventures responsible to their ‘last shilling and acre’. Not only did the ‘modern’ company legislation of 1856 change the distribution of risk in the world of business but this legislation, following its predecessor of 1844, also represented a massive change in state policy with respect to incorporation itself – from the narrow, hierarchical view that incorporation should be only conferred by the state as privilege on a select few who could marshal the resources to obtain a Royal Charter or Private Act of Parliament to the more democratic perspective that incorporation should be available as a right to all who applied.

This change in state policy was only achieved after significant debate and in the face of considerable opposition. As one latter day commentary has noted:

Even in the birthplace of industrialisation and the traditional home of legal and social pragmatism, the modern registered corporation had a tortured and uncertain birth. While championed by a few prestigious economists, it was vilified by many. Even extreme reformers were torn between what seemed an opportunity to benefit the poor or middle classes and condemnations of limited liability corporations as impractical and unjust. Even after parliament had committed itself, in 1844 and again in 1856, nearly half a century was required in order to reach a well functioning body of statutory law. The notion that the corporation was ‘historically necessary’ thus appears to be a paradigm of short-sighted hindsight.

With the ‘naturalization’ of the corporate form during the twentieth century the nature of the disquiet on the part of many prominent intellectuals in Victorian England to aspects of limited liability incorporation has been either ignored or glossed over in discussions of the modern corporation. Whilst some of those opposed to limited liability legislation at the time of its introduction might simply be dismissed as ultra-conservatives, the criticism levelled by others is not so easily trivialized. Some of these critiques took the form of serious and extended

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discussions as to the meaning of *laissez-faire* in the context of commercial activity. There was an extended polemic over whether the introduction of a general scheme of limited liability companies registration indeed constituted a *laissez-faire* measure. This was despite Robert Lowe’s strong assertion at the time of the introduction of legislation that this measure was a question of ‘human freedom’. In addition to this discussion of the scope and meaning of *laissez-faire* practice there were also thoughtful examinations by Victorian intellectuals of the social and cultural meaning of limited liability legislation and serious examinations by the leading economists of the day on the economic effects of the introduction of limited liability companies into the market place. The significance of these commentaries and the concomitant social and cultural reception of limited liability incorporation has been one of the underlying concerns of this book. The social meaning we assign to corporations and corporation law today and the nature and form of our contemporary cultural attitudes to corporations and their regulation are, it has been suggested, intimately tied to these past debates and to the social and cultural attitudes to corporations as they evolved during the Victorian era.

Despite the dramatic change of heart on the part of the legislature in 1856 in respect of the basis upon which incorporation should be granted and the manner in which risk should be distributed amongst investors and lenders, cultural attitudes towards incorporation were far slower to adapt. In the first decade of the operation of the limited liability incorporation legislation very few business enterprises took advantage of the new organizational form for business enterprise which that legislation embodied. Opposition continued to be voiced to limited liability incorporation in the newspapers, professional journals and the periodical literature of the day. Within the business community itself, attitudes towards the legislation were mixed. Many successful captains of industry believed that an essential part of commercial life was a wholesale commitment to one’s business. An essential feature of the spirit of capitalism to these businessmen was the principle that those engaged in enterprises of a commercial nature should be prepared to accept ‘the honourable burden of unlimited liability’. It was envisaged that limited liability would encourage speculation and fraud and substantially undermine individual enterprise.

In 1869, with the memory of the Overend Gurney crisis still fresh in most people’s minds, Thomas Baring, the doyen of nineteenth century banking, declared in Parliament that the limited liability legislation had been the source of many of the commercial ills of England during the preceding decades in that it had given rise to a sort of commercial gambling which was ruinous to the country. Rather than being regarded as an essential component of mercantile practice the limited liability company was instead reviled as a blot on the commercial landscape.

Thomas Carlyle, one of the barometers of the moral climate of Victorian England, characterized the limited liability company as a harbinger of evil. He saw

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this legislative solution to the demands of the middle classes of the day as simply another example of the descent of English industry into moral decadence:

Overend-Gurney Bankruptcies, Clapham-and-Dover Railway Financierings
– Railway promoters generally ... all of these are diabolic short cuts towards wages; clutchings at money without just work done; all these are Cheap and Nasty in another form³.

In the Victorian era many shared these views. Along with Thomas Carlyle most leading intellectuals of the day considered limited liability incorporation as an embodiment of the moral and spiritual decline of British industry and commerce. Prominent figures such as Samuel Smiles (author of Self Help, the largest selling book of the era) and David Morier Evans (editor of the most influential commercial magazine of the period, The Economist) provided accounts of the times which recounted the corrosive effects of corporate enterprise on moral character. Novels and popular literature at the time were also brimming with invective against the adverse moral and social effects of the corporate form. Even from the 1890s onward, when it appeared that limited liability incorporation was at last accepted in business circles, suspicion and distrust of the limitation of liability and the principle of separate legal identity continued to exist. At the time of the 1890s economic depression and again during the Great Depression of the 1930s, academic and popular commentators persisted in equating the decline of British commerce to the arrival of the modern company form. Some went even further and attributed the ‘slow decay of the great social organization of England’ to the crumbling wreckage of a once great commercial civilization that had deteriorated to the point where commerce was now held together by little more than a ‘large, swelling, thinning bubble of assurances’⁴. The apparent reference in these apocalyptic accounts of late Victorian England to Gibbons’ great work on the decline of the Roman Empire is intended. Limited liability incorporation is presented as a major factor in the decline of English commerce and social organization during the nineteenth century. It was often used as a representative instance of the displacement of the personal values and responsibilities by valueless commitments on the part of impersonal organizations. In contrast to the pre-existing notion that one was personally responsible for the fate of one’s business and those who had a stake in its future, it was now considered that it was either ‘bad luck’ or ‘nobody’s fault’ if a business should fail, with consequent loss to investors and creditors⁵.

⁴ The quotations are from possibly the most apocalyptic of these novelistic visions of corporate capitalism, H G Well’s (1931) novel, Tono-Bungay.
⁵ As noted earlier in the text Nobody’s Fault was Charles Dickens’ working title for the novel which eventually became Little Dorrit. The title was meant to convey the sense of the moral decadence of the emergent ‘new’ society in which commercial arrangements
How should we reconcile these bleak accounts of the relationship between English commerce and limited liability legislation with more recent accounts which portray limited liability legislation as an ‘inevitable’ adjunct to capitalist development and as a ‘triumphant’ example of modernity in the commercial life of the Victorian era? The tension existing between these apparently highly ambivalent social and cultural attitudes in respect to the modern corporation and the supposed ‘historical necessity’ of limited liability incorporation legislation to economic development has been one of the principal themes of this study. It has been suggested, both explicitly and implicitly, that the markings of this tension are indelibly inscribed on the shape and form of contemporary corporation law. The operation of corporation law can only be properly understood in the context of its broader social and cultural setting and the contradictions which it embodies. In discussing the question of the inter-relationship of the ‘market’ and ‘culture’ one recent study commented:

The relation between culture and economic activity is, we assume, one not of mutual exclusiveness but, rather, of reciprocal influence and interpenetration, sometimes harmonious, sometimes conflictual. Economic practices are imbedded in culture, aspects of culture. As such, markets can be seen as the effects of certain cultural configurations and the causes of others. In the absence of certain values and practices a market economy cannot come into existence. Once a market economy does exist, its very presence seems to encourage some ways of life and discourage others6.

Rather than reform of limited liability legislation being dictated by its success, it was instead determined by its relative failure. In the first few decades of the operation of the legislation cultural resistance to limited liability enterprise as in some way unsavoury and ungentlemanly meant that few important enterprises chose to adopt the new business form afforded by registration under the Companies Act. Much of the literature of the mid to late Victorian era displayed an enduring sense of discomfort at the changes in notions of responsibility brought about by the enactment of limited liability legislation:

were dealt with through companies in which the liability of the principals was limited and failure was ‘nobody’s fault’. In the novel the contrast between a society built on personal responsibility and one in which fraud and failure are ‘nobody’s fault’ is embodied in the contrast between Merdle (the name resonates with the connotation of ‘merde’ or ‘shit’) who establishes a joint stock company to attract the capital of the unsuspecting public and who accepts no personal responsibility for the debts of the company and Clennam (or ‘clean man’) whose business with Doyce is run as a partnership with unlimited liability and in which the principals bear the total risk of failure to the ‘last shilling and acre’ of their assets.

The later Victorian novels were a harrowing portrait in their own time of an age of transition in which the old certainties were still fiercely valued even as they were inexorably losing their force. In a sense our modern era may be said to have begun with the crisis created by the Victorian recognition that industrial capitalism had transformed the collective social life beyond the power of the individual to control his own fate or to affect the destiny of the community, and the recognition, still unhappily with us, that our lives must necessarily be shaped by forces against which there are no appeals ... The Victorian novels of bankruptcy remain with us as a testimony to an age not unlike our own in which transition and mutability seem to have become the permanent condition of human life7.

One little noted result of this ambivalence to the limited liability legislation was that for most of the 1860s and 1870s the limited liability corporation, rather than being at the centre of economic life, instead resided at the margins of social and economic activity. Few businesses in key sectors of English commercial life incorporated and little serious discussion of the corporate form occurred. Given the importance of the limited liability company to modern commerce we might expect the commercial journals of the Victorian age to abound with discussions of the corporate form. Not so. The main discussions in respect to the meaning of the corporate form to ‘modern’ life were not in the economic and commercial journals of the era, but instead in the pages of the popular literature of the period. These discussed the emotional, social and moral effects of the limited liability company rather than legal and economic aspects of its introduction. The marginal importance of the corporate form to mainstream commercial life to a certain extent permitted Robert Lowe and other advocates of his version of laissez-faire capitalism to forestall major changes being effected to the legislation during the nineteenth century. Despite periodic corporate collapses and the apparent need by the 1870s for a tightening of the accounting provisions in the Companies Act and an increased role for the state in regulating corporations, this did not come about due to the fact that the governments of the day did not see such reform as a particularly high priority. The failure to make major changes to the legislation was also a consequence of the absence of any consistent body of opinion in favour of one reform or another. Criticism of the legislation for most of the Victorian era was characterized by contradiction and ambivalence.

It was only after the collapse of the City of Glasgow Bank in 1878 (a year after the Select Committee of 1877 had yet again examined the operation of the legislation and rejected the need for major reforms) that cultural attitudes in the business community began to alter significantly in respect to the ‘morality’ of limitation of liability, and the limited liability company form started to make substantial progress as the single most important form of business organization.

One of the more important factors in bringing about this change was the changing nature of advice being given to clients by their professional advisers as to the desirability of incorporating. The legal and the accounting professions both played a vital role in normalizing many of the characteristic features of modern corporation law. One of the most significant developments in this respect was the role of the professions in suggesting to their small business clients that they could incorporate under the limited liability legislation. This led to an enormous growth in company registrations during the 1870s and 1880s. Most of this increase was accounted for by small, one person businesses, with the numbers of these ‘quasi-corporations’ soon overtaking the numbers of public companies registered under the Companies Act. At the same time as they were bringing about this significant change in the meaning of incorporation, the professions were also contributing to the facilitation of institutional investment in large public companies by developing a range of methods by which share capital and loan capital might be raised by corporations. As a consequence the numbers of institutional investors in corporations increased markedly during the 1880s and 1890s. At the same time there was a significant decline in direct investment and involvement in joint stock companies of the middle classes.

When the desirability of certain reforms to the legislation was again discussed in 1895 it was considered too late to effect major change. The view was expressed in the Davey Committee that the fantastic growth in small family businesses registering under the Companies Act made it extremely difficult, if not impossible, to introduce compulsory financial reporting provisions. This was due to the perceived ‘unfairness’ of such provisions to small family enterprises (which now composed the bulk of company registrations):

The evidence given to the Davey Committee, and the Committee’s report, indicate that opinion was becoming increasingly favourable towards placing on directors the specific obligation to prepare annual accounts. The evidence shows, on the other hand, that opinion was still divided on the question of public registration of balance sheets. This was probably due in part to the growing importance of what was becoming known as the private company: the compulsory filing of accounts with the Registrar of Companies would have made generally available a good deal of information about what were often essentially family businesses trading for convenience in corporate form.

Whilst every student of company law knows the Salomon case, few appreciate the full impact of the legal endorsement of the small private company in this case on the subsequent evolution of company law and its administration in England and its former colonies. Neither has the long term effect of the contamination of the principles of company law with those of partnership at the time of the growth

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of the private company been fully appreciated. These developments, however, undoubtedly contributed to the consolidation of a view that private interests should generally prevail over community interests. These developments also fortified the notion that the privacy of corporate decision making should be protected at all costs, even when the decisions in question conflicted with the public interest.

The changes brought about by the introduction of the modern limited liability company were not only of importance in the metropolis, but also in the various colonial settings in which the legislation was introduced. Whilst in most of these colonies the legislation itself was fundamentally no different than that which applied in England, its meaning varied considerably from colony to colony. In some colonies this new business structure cut across existing, often well established, indigenous forms of business organization. In others it prevented the development of local organizational structures more suited to the demographics of the relevant colony and the capabilities of the local administrative infrastructure. In almost all colonies the legislation was subservient to imperial needs. Rather than being an extraordinary benefit bestowed by the metropolis on the colonies, the limited liability legislation was often an impediment to local economic development and an aid to imperial exploitation of the colonial economy. Further investigation needs to take place regarding the long-term effects of the embeddedness of imperial objectives in the legislation that, in most former English colonies, still prevails in respect to corporations. Do the former purposes of legislation introduced by a colonising nation continue to have an effect on the manner in which development proceeds well after the former colonial relation has ceased? Or are the precise origins of the legislation irrelevant after the formerly servile relationship to the metropolis comes to an end?

In concluding this study a few points should be reiterated. First, contemporary policy-making with respect to corporations needs to be historically informed. This, unfortunately, has not generally been the case. Much of what passes as social commentary and policy analysis of corporation law is ahistorical or ill-informed with respect to the historical development of the corporate form. Many of the dysfunctions of the modern corporate form are, however difficult to understand without some grasp of its history. Despite the mounting concern over the last few decades to deal with the perceived inefficiencies and dysfunctions of company law, little attention has been given to the history of that legislation and the enforcement agencies which it has spawned. Theoretical discussions have consequently often taken place in an historical vacuum. Whilst not suggesting that greater historical literacy would necessarily solve all the failings and deficiencies of contemporary analyses of the corporate form and regulation of corporate behaviour, it is nevertheless the case that more attention to historical questions would add a significant dimension to social and political debates relating to the role and purpose of corporations, the manner in which the state should regulate such bodies and on what terms. The present study has been an attempt to begin the process of thinking historically when addressing matters concerning the functioning and regulation of the modern corporation. As has been suggested in one study the ‘experiences
and feelings brought about by the historical development of market societies have been, and still remain, open to a broad range of interpretations”. Similarly, the historical study of particular techniques of organizing capital, such as the limited liability company, and the evolving cultural meanings attached to those techniques invites a variety of interpretations rather than a simple answer to the possible purpose and effect of such legislative innovations. We should use this multiplicity of possible interpretations to test and challenge our entrenched assumptions, rather than distort this historical data in order to confirm our preconceptions.

Appendix I

Companies in the Random Sample of 10 per cent of all Registrations for the Years 1856, 1866, 1876 and 1886

File No.       Company name

1856

BT 31/2/12  British Equitable Investment Ltd.
2/14        London Printing and Publishing Ltd.
2/15        General Pawnbrokerage Ltd.
2/16        Company of Proprietors of Royal Consolidated Copper Mines Ltd.
3/17        London, Manchester and Foreign Warehouse Ltd.
3/20        Huttsdorf Mills Ceylon Ltd.
3/21        Esgar Llee Mine Co. Ltd.
3/22        Llwynnales Mine Co. Ltd.
3/23        General Cooperage Co. Ltd.
3/24        St. James Hall Co. Ltd.
15/72       Mansfield Patent Gunpowder Ltd.
15/73       West of England Soap Co. Ltd.
15/74       British and Colonial Agency Ltd.
21/98       Manchester and Ffestiniog Slate and Slab Co. Ltd.
21/100      Patent Mattress and Cork Fabric Co. Ltd.
21/102      Hansors Olefiant Gas Co. Ltd.
21/103      New Brunswick Mining Co. Ltd.
21/104      Great Yarmouth Gas Light and Coke Co. Ltd.
28/134      Peu Y Rhien Colliery Ltd.
28/136      Hailsham Gas Ltd.
28/137      Belle Vue Cemetery (Unlimited Co.)
28/141      Bridlington Quay Public Rooms Ltd.
28/149      Norwich Crape Ltd.
28/150      Australasian Land and Emigration Ltd.
28/151      Paris Chocolate Co. Ltd.
28/153      Adelphi Loan and Discount Ltd.
28/179      Todmorden Commercial Spinning and Manufacturing Co. Ltd.
31/146      Bridgnorth Public Building and Markets Ltd.
Northern Loan Association Ltd.
Church Stretton Water Co. Ltd.
Shotley Bridge Gas Co. Ltd.
Crowland Gas and Coke Co. Ltd.
Seaham Harbour Waterworks Co. Ltd.
Durham Water Co. Ltd.
North Cornwall Farmers Manure Ltd.
Coventry Corn Exchange and Public Room Co. Ltd.
Rugby Flour and Bread Co. Ltd.
Haslingden Commercial Co. Ltd.
The Holyhead Gas Co. Ltd.
Sowerby Bridge Gas Co. Ltd.
Barnsley Corn Exchange and Market House Co. Ltd.
Combined Vapour Engine Co. Ltd.
Cheesewring Granite Co. Ltd.
Indurated Stone Ltd.
Wallasey Gas Ltd.
United General Bread and Flour Co. Ltd.
British Sugar Refining Co. Ltd.
Harrington and Workington Shipbuilding and Ropemaking Co. Ltd.
South Shields Gas Co. Ltd.
Haggate Joint Stock Commercial Co. Ltd.
Ashford Waterworks Co. Ltd.
Ford’s Patent Waterproofing Co. Ltd.
Grantham Waterworks Co. Ltd.
Iberian Mining Co. Ltd.
Peninsular Mining Co. Ltd.
Alfreton Gas Light and Coke Co. Ltd.
Chester Le Street Gas Co. Ltd.
Howley Gas Co. Ltd.
Keswick Waterworks Co. Ltd.
Castilian Mining Co. Ltd.
Flythe and Southampton Steam Ferry Co. Ltd.
Spinal General Orthopedic Association Ltd.
Buckingham Castle Iron Works Co. Ltd.
Ship Leakage Indicator Co. Ltd.
Great Yarmouth Star of the East Coal Co. Ltd.
Patent Vitreo Enamel Co. Ltd.
British Deep Sea Fisheries Co. Ltd.
Mineral Asphalts Metallic Lava Bitumen Co. Ltd.
Patent Bottle Envelope Co. Ltd.
Normandys Patent Marine Aerated Freshwater Co. Ltd.
Oude Railway Co. Ltd.
Appendix I

217/674 Geelong and Ballarat Railway Co. Ltd.
217/675 Carmathen Gas Co. Ltd.
217/676 Leicester Spinning Co. Ltd.

1866

Bt 31/1206/2734 Swaisland’s Printing Co. Ltd.
1206/2735 London and Merthyr Steam Coal Co. Ltd.
1206/2735 New Zealand Iron and Steel Co. Ltd.
1206/2737 English Bank of Rio De Janeiro
1206/2738 Stafford and Eccleshall Coal Co. Ltd.
1206/2739 Galatz Candle Co. Ltd.
1206/2740 Tetbury Mutual Cattle Association Co. Ltd.
1214/2778 Imperial Land Co. of Marseilles Ltd.
1218/2792 Croydon Labourers Dwellings Improvement Society Ltd.
1218/2793 Florence Land and Public Works Co. Ltd.
1218/2794 West Surrey Gas Products Conversion Co. Ltd.
1218/2795 South London Coal Co. Ltd.
1218/2796 London and County General Agency Ltd.
1218/2797 Weymouth Gas Consumers Co. Ltd.
1218/2798 Ipswich Temperance Hotel Co. Ltd.
1225/2838 West London Commercial Bank Co. Ltd.
1225/2839 London Lac Dye and Shell Lac Co. Ltd.
1225/2840 Exchange and Discount Bank Co. Ltd.
1225/2841 Fairfield and Buxton Waterworks Co. Ltd.
1225/2842 Puddled Bar Iron Bar Co. Ltd.
1229/2859 Gravesend Alexandra Hotel Co. Ltd.
1229/2860 Manchester Finance Co. Ltd.
1229/2861 National Meat Consumers Co. Ltd.
1229/2862 Midland Counties Iron Ore Co. Ltd.
1229/2863 Frazers Roberts and Co. Ltd.
1229/2864 Northfleet Portland Cement Co. Ltd.
1229/2865 South Metropolitan Co-Op Coal Co. Ltd.
1247/2972 Isle of Wight Oyster Fishery Co. Ltd.
1247/2973 B R Huntley and Co. Ltd.
1247/2974 Birds Patent Deodorizing and Utilizing Sewage Co. Ltd.
1247/2975 Aberystwith Land and Building Co. Ltd.
1247/2976 Mineral Rights Association Ltd.
1247/2977 Young, Carrington and Co. Ltd.
1247/2978 Canadian Land and Mineral Co. Ltd.
1262/3079 North Ormesby Gas Co. Ltd.
1262/3080 Great Northern of Europe Gas Light and Coke Co. Ltd.
1262/3081 City of Dublin Tramway Co. Ltd.
1269/3119  Lambeth Iron Works Co. Ltd.
1269/3120  Zacatecas Silver Mining Co. Ltd.
1269/3121  Croesor United Slate Co. Ltd.
1269/3122  Louisiana Plantation Co. At Goa Ltd.
1269/3123  Mackay Gun and Projectile Co. Ltd.
1269/3124  Belgian Public Works Co. Ltd.
1269/3125  Chinese and India Tea Co. Ltd.
1275/3158  Northern Patriotic Life Assurance and Sick Benefit Co. Ltd.
1275/3159  Provisional Eyam Boot and Shoe Manufacturing Co. Ltd.
1275/3160  Atmospheric Churn Co. Ltd.
1275/3161  South Devon Lime Stone and Trading Co. Ltd.
1275/3162  General Banking Co. Ltd.
1275/3163  British Wax Co. Ltd.
1280/3196  London Depository Co. Ltd.
1280/3197  Southwick Workmans Institute Co. Ltd.
1280/3198  Poole Harbour Oyster Culture Co. Ltd.
1280/3199  Times Coal Co. Ltd.
1283/3214  London and County Coal
1283/3215  James Law Schofield and Co. Ltd.
1283/3216  Cottenham Gas Co. Ltd.
1283/3217  Industrial Partnership of Clothiers Ltd.
1284/3218  Credit Foncier of England Co. Ltd.
1296/3295  Anglo-Italian Bank Co. Ltd.
1296/3296  Prestatyn Colliery Co. Ltd.
1296/3297  Taff Vale Coal and Coke Co. Ltd.
1296/3298  Lucy Phillips Gold and Silver Mining Co. Ltd.
1296/3299  United Kingdom Basket Making Co. Ltd.
1297/3300  Hoysthorpe Gas Co. Ltd.
1297/3301  Landshipping Colliery Co. Ltd.
1297/3302  Salop Brewery Co. Ltd.
1297/3303  Wesleyan Times Co. Ltd.
1297/3304  Hancock Burbrook and Co. Ltd.
1297/3305  Industrial Assurance Co. Ltd.
1297/3307  Ashford Swimming Bath Co. Ltd.
1306/3347  Agra Bank Co. Ltd.

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Bt31/2176/10163  Financial Opinion Co. Ltd.
2176/10164  Standard Mutual Society of London Co. Ltd.
2176/10166  Condes Co. of Chili Ltd.
2176/10167  Chippenham Gas Co. Ltd.
2185/10222  Worthing Skating Rink Co. Ltd.
<table>
<thead>
<tr>
<th>Number</th>
<th>Description</th>
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<tr>
<td>2185/102223</td>
<td>Smith’s Vacuum Brake (Foreign Patents) Co. Ltd.</td>
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<td>2185/10224</td>
<td>Perry and Co. Ltd.</td>
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<td>2200/10324</td>
<td>Northern Home Trade Steamship Insurance Association (Unlimited)</td>
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<td>2200/10325</td>
<td>Tyne and Blyth Insurance Association (Unlimited)</td>
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<td>North British Insurance Association (Unlimited)</td>
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<td>2200/10327</td>
<td>Northern Steamship Freight Insurance (Unlimited)</td>
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<td>2200/10328</td>
<td>Ocean Iron Sailing Ship Insurance Association (Unlimited)</td>
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<td>2207/10386</td>
<td>Cheque Bank Ltd.</td>
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<td>2207/10387</td>
<td>Farmworth Land and Property Co. Ltd.</td>
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<td>East Kent Newspaper and Printing Co. Ltd.</td>
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<td>Home and Colonial Wool Co. Ltd.</td>
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<td>2210/10405</td>
<td>Donna Thereza Christina Railway Co. Ltd.</td>
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<td>Blackburn Central Skating Rink Co. Ltd.</td>
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<td>2210/10408</td>
<td>Waterloo Iron and Tinplate Co. Ltd.</td>
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<td>Bell Abbey and Falcon Cliff Mines Co. Ltd.</td>
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<td>Parana (Brazilian) Railway Co. Ltd.</td>
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<td>Great Grimsby Conquest Building Co. Ltd.</td>
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<td>Ilex Mil Co. Ltd.</td>
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<td>Borax Co. Ltd.</td>
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<td>The Yorkshire Hydraulic Forging Co. Ltd.</td>
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<td>2233/10588</td>
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<td>2233/10589</td>
<td>Phoenix Vitrified Brick Paving and Clay Works Co. Ltd.</td>
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<td>2240/10636</td>
<td>The Hanley Plain and Encaustic Tile Co. Ltd.</td>
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<td>2240/10637</td>
<td>Herculean Economic Treasury and Safe Co. Ltd.</td>
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<td>2240/10647</td>
<td>National Farm Labourers Union Co.-Op Land Co. Ltd.</td>
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<td>Hexhamshire Mining Co. Ltd.</td>
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<td>2246/10689</td>
<td>The English Chemical Factory Co. Ltd.</td>
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<td>2246/10691</td>
<td>Oola Hills Silver Lead Mining Co. Ltd.</td>
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<td>2246/10692</td>
<td>Lacey and Co. Ltd.</td>
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<td>2246/10693</td>
<td>Hackney and District Conservative Newspaper and General Publishing Co. Ltd.</td>
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<tr>
<td>2246/10694</td>
<td>Bishop Auckland Masonic Hall Co. Ltd.</td>
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2246/10695 Bowdon Skating Rink Co. Ltd.
2246/10696 Heywood Carriage Co. Ltd.
2246/10697 John Grindrod and Co. Ltd.
2253/10746 Field Mills Manufacturing Co. Ltd.
2253/10749 Southport Glaciarium and Ice Manufacturing Co. Ltd.
2253/10751 Cheetham and Co. Ltd.
2253/10752 Home Investment Society Ltd.
2253/10753 Ynysfaig Slate Quarries Co. Ltd.
2253/10754 Seed and Nut Oil Works Co. Ltd.
2253/10755 Low Mill Bleaching and Printing Co. Ltd.
2257/10781 New Co-Operative Coal Co. Ltd.
2257/10782 East Derbyshire Horse Improvement Co. Ltd.
2257/10783 Commercial Bank of Alexandria Co. Ltd.
2262/10813 General Machinery Purchase Hire Co. Ltd.
2262/10814 Withington and Didsbury Skating Rink and Winter Gardens Co. Ltd.
2262/10815 New Tyllwyd Silver and Lead Mining Co. Ltd.
2262/10816 The London Glaciarium Co. Ltd.
2262/10817 O’hara, Lees and Co. Ltd.
2262/10818 The Kingsley Ltd.
2262/10819 Union Spinning Co., Hindley Ltd.
2262/10837 Robert Hudson and Co. Ltd.
2266/10838 Walkden Aerated Waters Co. Ltd.
2266/10839 Combination Sewing Machine Co. Ltd.
2266/10840 The Cheltenham Imperial Winter Garden and Skating Rink Co. Ltd.
2266/10842 Nant-Y-Gamer Fire Clay Co. Ltd.
2266/10843 Chollerford (Roman Wall) Hydropathic Establishment Co. Ltd.
2266/10844 Somerset Lime and Cement Co. Ltd.
2266/10845 Waterloo Building Co. Ltd.
2271/10879 Mersey Hemp and Wire Rope Manufacturing Co. Ltd.
2271/10880 Alliance Cigar Association Co. Ltd.
2271/10881 Richard Hayworth and Sons Co. Ltd.
2271/10882 British South American Co. Ltd.
2271/10883 Grimsby Abbey Walk Building Co. Ltd.
2271/10884 John Rastall and Co. Ltd.
2271/10886 Leadhills Silver Lead Mining and Smelting Co. Ltd.
2273/10898 Bishop’s Cluster Co. Ltd.
2273/10899 The Harbury Portland Cement Works
2273/10900 Clee Tradesman Building Co. Ltd.
2273/10901 Argus Printing and Stationery Co. Ltd.
2273/10902 Ashwood Dale Lime and Stone Co., Buxton Ltd.
2273/10903 The Tiltil Gold Mines Ltd.
Appendix I

2273/10904  E Robinson and Co. Ltd.
2273/10905  The Protector Fluid Co. Ltd.
2280/10956  Grimsby and London Trading Co. Ltd.
2280/10957  The Rock Ferry Skating Rink Co. Ltd.
2280/10958  The Automatic Machinery Co. Ltd.
2280/10959  Clarke’s Crank Co. Ltd.
2280/11011  Greenhithe Chalk Co. Ltd.
2287/11012  Reversion Mortgage Co. Ltd.
2287/11013  Fylde Brewery Co. Ltd.
2287/11014  Llangenech Tinplate Co. Ltd.
2287/11015  The School of Submarine and Military Telegraphy and Technical Instruction Co. Ltd.
2287/11017  Coffee Tavern Co. Ltd.
2295/11067  Blackrod Coal Co. Ltd.
2295/11068  Wearmouth Mutual Protecting Society Ltd.
2295/11069  Holmbush Ltd.
2295/11070  George Knowles and Sons Co. Ltd.
2295/11071  General Sanitary Works Co. Ltd.

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Bt31/3578/21939  Buenos Aires and Bellerand Tramways Co. Ltd.
3578/21940  Shanklin Esplanadepier Co. Ltd.
3578/21941  Powell Aberbeeg Colliery Co. Ltd.
3578/21942  Tower Furnishing and Finance Co. Ltd.
3578/21943  The Pontypriod Soap and Chemical Co. Ltd.
3578/21944  London Highgate and Finchley Tramways Co. Ltd.
3578/21945  The British and Mississippi Valley Freehold Land and Mortgage Co. Ltd.
3578/21946  T Magivall and Co. Ltd.
3578/21947  The British Pepton Pressed Yeast Co. Ltd.
3583/21996  The Pinos Altos Bullion Co. Ltd.
3583/21997  Robert Briercliffe Ltd.
3583/21998  Twibell and Co. Ltd.
3583/21999  J Lewis Mills and Co. Ltd.
3585/22012  Dry Docks Corporation of London Ltd.
3585/22013  The Jewellers Supply Co. Ltd.
3585/22015  The Syndicate Ltd.
3585/22018  The Rhea Manufacturing Co. Ltd.
3585/22019  Franklin Co. Ltd.
3585/22021  Morley West End Colliery Co. Ltd.
3585/22022  The Farmers Co-Op Caked Meat Co. Ltd.
3591/22058  Bognor Freehold Land Co. Ltd.
3591/22059 The Star Cab Co. Ltd.
3591/22060 The Clydesdale Oil Co. Ltd.
3591/22061 H R Briggs and Co. Ltd.
3591/22062 Life Insurance Agents Journal Co. Ltd.
3591/22064 Bristol Channel Steam Towing and Trawling Co. Ltd.
3597/22108 Balaghat-Mysore Gold Mining Co. Ltd.
3597/22109 Bertha Silver Miner Co. Ltd.
3597/22110 The San Pedro Ranche Co. Ltd.
3597/22111 Brunswick Club Ltd.
3597/22113 The County Supply Co. Ltd.
3597/22115 Charles Tebbitt and Co. Ltd.
3611/22237 Abbot's Langley Waterworks Co. Ltd.
3611/22238 Founders Share Co. Ltd.
3611/22239 The Princes Hotel and Estate Co. Ltd.
3611/22240 Ecclesall Club Ltd.
3611/22241 Stratford Ilford and Romford Tramways Co. Ltd.
3611/22242 E S and A G Goodes Ltd.
3628/22359 Chocolate Co. Ltd.
3628/22360 The Galician Milling and Industrial Co. Ltd.
3628/22361 Herts Steam Laundry Co. Ltd.
3628/22362 General Produce Farm Co. Ltd.
3628/22364 The North Kensington Lawn Tennis Co. Ltd.
3628/22366 The City Rice Mills Co. Ltd.
3628/22367 The Kinderminster Liberal Club Furnishing Co. Ltd.
3628/22368 Hotel Du Nord (Cologne) Ltd.
3629/22369 The Festniog Flour Mill Co. Ltd.
3629/22370 Treeton Trading Co. Ltd.
3629/22371 The Weighing Machine Co. Ltd.
3629/22373 The Gloucester and Sharpness Lighterage Co. Ltd.
3629/22376 Isaacs and Co. Ltd.
3629/22377 Majors Barn Colliery Co. Ltd.
3629/22378 John Spencer and Co. Ltd.
3629/22379 Jones Lloyd Ltd.
3629/22380 Retriever Steamship Co. Ltd.
3640/22466 T Carr and Son Ltd.
3640/22467 Self Acting Air Suction Fuel Economiser Syndicate Ltd.
3640/22469 Apollo Water Co. Ltd.
3640/22472 Plymouth Horse Co. Ltd.
3640/22474 The Birkenhead Joint Stock Discount Co. Ltd.
3640/22475 Limmer’s Suffolk Bread Co. Ltd.
3640/22476 London and Lancashire Paper Mills Co. Ltd.
3640/22477 Patents Purchase Co. Ltd.
3640/22478 Newlay Bridge Co. Ltd.
3640/22479 William G Stoneham and Co. Ltd.
3645/22509 The ‘Old Calabar’ Biscuit Co. Ltd.
3645/22510 Limpfield and Oxted Water Co. Ltd.
3645/22511 Cawley and Co. Ltd.
3645/22513 Swiss Cottage Hotel Co. Ltd.
3645/22515 Newport (Mon) Workmen’s Cottage Co. Ltd.
3545/22516 New Bickton Silver-Lead Mining Co. Ltd.
3664/22704 New Zealand Gold Dredging Co. Ltd.
3664/22706 London Corporation Syndicate Ltd.
3664/22707 Patent Paving and Construction Co. Ltd.
3664/22708 Assets Company of Wales Ltd.
3664/22710 Berkshire Discount and Advance Co. Ltd.
3665/22711 The Beehive Refuse Destructor Ltd.
3665/22712 Industries Development Co. Ltd.
3665/22713 The Neilgherry Co. Ltd.
3665/22714 The North West Argentine Railway Co. Ltd.
3684/22885 Primitiva Nitrate Co. Ltd.
3684/22886 Rock Oils Syndicate Ltd.
3684/22887 Hotel De Saxe (Dresden) Ltd.
3684/22888 Gilan Gold Placers Ltd.
3684/22889 The London Engraved and Etched Glass Co. Ltd.
3684/22891 Redding Public Halls Co. Ltd.
3684/22892 Imperial and Colonial Marine Insurance Co. Ltd.
3688/22927 Charles Dickens Mining Co. Ltd.
3688/22928 Waverley Commercial and Family Hotel Co. Ltd.
3688/22929 Pear and Co. Ltd.
3688/22931 Boiler and Accident Insurance Co. Ltd.
3688/22932 Smoke Consuming and Fuel Saving Appliances Co. Ltd.
3688/22933 Thomas Carr and Son Ltd.
3688/22935 The Brighton and Stove Cab and Carriage Co. Ltd.
3705/23045 British and Continental Piano Forge and Music Publishing Co. Ltd.
3705/23046 Manchester and District Commercial Cafe Co. Ltd.
3705/23047 The Messina Provincial Roads Railway Co. Ltd.
3705/23048 Moel Hebog Copper Mining Co. Ltd.
3705/23049 Hurst and Blackett Ltd.
3705/23050 The Black Sea Shipping Co. Ltd.
3705/23051 Cellerier’s Syndicate Ltd.
3705/23052 Queen Hotel Money Club (Unlimited)
3705/23053 Constitutional News Association Ltd.
3713/23102 Kidnelly R Dinas Fire Brick Co. Ltd.
3713/23104 City Steam Laundry Dyeing and Carpet Beating Co. Ltd.
3713/23105 John Clegg and Sons Ltd.
3713/23106 Isle of Man Liverpool and Manchester Steamship Co. Ltd.
3720/23133 The Cotes-Du-Nord Silver Lead Mines Co. Ltd.
The Newtown Aerated Waters and Bottled Beer and Porter Co. Ltd.
The Garrick Club Liverpool Ltd.
Emigrants Self-Supporting Emigration Society Ltd.
Nash and Co. Ltd.
The Palmer Co. Ltd.
The Kagundi Syndicate Ltd.
Scottish Mercantile Gas Co. Ltd.
Market Tenants Cafe Co. Ltd.
Rio Del Oro Gold Mines Co. Ltd.
The Lactina and Restorine Manufacturing Co. Ltd.
The Norwood Chemical Works Co. Ltd.
Cardigan United Mines Co. Ltd.
San Pedro Gold and Silver Mines Co. Ltd.
C D Jolly Victoria and Co.
New Zealand Red Hill Gold Mining Co. Ltd.
Sell’s Advertising Agency Co. Ltd.
City of Genoa Waterworks Co. Ltd.
Cobden Street Manufacturing Co. Ltd.
Millbrook Conservative Club Ltd.
South Australian Gold Mining Co. Ltd.
South Wales Steam Laundry Co. Ltd.
T J Howell Ltd.
Caldean Marine Insurance Co. Ltd.
Wandsworth Repository Ltd.
Friends of Freedom Club Ltd.
South Staffordshire Brewery Co. Ltd.
St. Helens Trading Co. Ltd.
Harrison’s Synchronous Clocks Co. Ltd.
Roath Working Men’s Club Co. Ltd.
Tobogganing Syndicate Ltd.
North East Warwickshire Newspaper and Printing Co. Ltd.
The Mocha Ltd.
Grimsby Cod Smack Mutual Aid Society Ltd.
Northern Trading Co. Ltd.
Brighton Music Hall Co. Ltd.
Betws-Y-Lord Slab Slate and Cistern Quarry Co. Ltd.
Henry Jecks Dixon and Sons Co. Ltd.
Palma Trading Co. Ltd.
Gloucester Chemical Co. Ltd.
Rex Bituminous Coal Co. Ltd.
The Taunton Electric Lighting Co. Ltd.
J M Copeland and Co. Ltd.
Junction Hotel Money Club (Unlimited)
3784/23657 The Dusselldorf Iron Brass and Steel Works and Foundries Co. Ltd.
3790/23705 Remedios (Colombia) United Gold Mines Ltd.
3790/23706 Western Suburban and General Property Trust Ltd.
3790/23707 Pelican Works Manufacturing Co. Ltd.
3790/23708 Wallsend Pontoon Co. Ltd.
3790/23709 Electric Battery Brush Co. Ltd.
3790/23710 Morton and Co. Ltd.
3790/23711 Great Western Club Co. Ltd. (Ltd. By Guarantee)
3790/23713 Claviger Cycle Co. Ltd.
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