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Notes on The Law of Capital

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(1) The everyday business life of a joint-stock company comprises transactions that fall into three categories. First are those with suppliers and customers, through which the firm acquires its means of production and sells its output. Second are the transactions with its workers, where the company features as a buyer of labour-power. Third, are those with its shareholders and creditors in which the company deals in money-capital. The first of these transactions involve *simple* commodities (products), and are conducted through the common law of contract. The second and third concern *complex* commodities (factors of production), and require attenuations of the law. These attenuations received negligible attention from Pashukanis, and modern Marxist studies of the law have either failed to notice them, or have misinterpreted them as ideological.

Since complex commodities, labour-power and money-capital, differ significantly from each other, two distinct bodies of law have been evolved — the law of labour and the law of capital. But these two bodies of law are consistent with each other and with the law of contract. The joint-stock company stands at the intersection of these three bodies of law, and this defines its legal character.

Once production developed to the point where a single enterprise required the concentrated capital of many owners, and extensive credit, the common law proved inadequate and reforms, such as those which established the joint-stock company with limited liability, became imperative. While the need for these reforms was precipitated by the growth of enterprise beyond the means of private individuals, the legal form of the joint-stock company was not determined exclusively by the requirements of multiple ownership, since the purchase of labour-power remained the decisive activity. The terms in which the corporation was legally defined in relation to 'capitalists' were predetermined by its relation to labour. Since the capitalist enterprise is simultaneously party to contracts with workers as well as capitalists, its legal status *vis-à-vis* the latter has to be consistent with its status *vis-à-vis* the former. The capitalist enterprise employed wage-labour before the institution of limited liability and incorporation. Since its rationale has always been to purchase and consume labour-power in order to produce a surplus value, its legal relation to the owners of capital must always take second place to that in

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members and modified the definition of the private company: its permitted membership was raised to 50 (7 Edw. VII, c. 50). Simultaneously, an Act was passed introducing the limited partnership legal form (7 Edw. VII, c. 24).

The Limited Partnership Act was, however, virtually redundant. In subsequent editions of his treatise on private companies, Palmer enumerated the many ways in which the position of a limited partner in a limited partnership contrasted unfavourably with that of a private company member. Only 557 limited partnerships were formed between 1908 and 1913, the number of annual registrations falling from 133 in 1908 to a mere 65 in 1913 (Palmer, 1915). In contrast, the private company had, in the words of Edward Manson, "entered upon a new phase". It would not, he argued, be true to say that a new type of company had emerged, for all its essential characteristics were as before, "but it has received for the first time statutory recognition; it has been distinctly differentiated from the other kinds of companies, and has been invested with new and valuable privileges and immunities" (1910, p. 14). The public-private company distinction came into operation in July 1908 following the Companies (Consolidation) Act of that year. By December, 18,554 companies had registered as private out of a total of 45,304 still believed to be carrying on business. As the number of annual company registrations began to increase, (the annual average of 4400 between 1895–1908 rose to 6700 between 1909–1914), so too did the number of private companies and the number of companies believed to be still carrying on business. The latter rose from 45,304 in 1908 to 64,692 in 1914. The number of private companies rose even more dramatically: 24,207 by 1910, 33,455 by 1912 and 48,492 by 1914. Some were newly formed firms, but many were existing firms which had adopted the private company form. Of 7321 new registrations in 1913, no fewer than 6328 were of private companies [21]. Increasingly, all firms, not just joint stock companies, were incorporating and the term 'company' was coming to have its modern meaning — denoting a firm of a particular *legal* status, with no conotations as to its *economic* nature. By 1914, Clapham says, "most of the great industrial units, and very many of the smaller, were limited companies". The company legal form had become "accepted as a fit method of organisation for both ... small and ... large units" (1938, p. 290–291). By 1925, of 95,055 companies still believed to be carrying on business, 86,065 were private. The triumph of the limited liability company was complete, as was the perversion of the Acts of 1856–1862.

Notes

1 The Limited Liability Act 1855 (18 and 19 Vict. c. 133); Hansard, vol. 134 (1855), cols. 310–333, 2033, 2038, 2047.
2 Hansard, vol. 150 (1856), cols: 110–147, 1477.
3 Hansard, vol. 150 (1856), cols. 642–646, 2201; Hansard, vol. 151 (1856), cols. 347–348, 801–809.
4 The Partnership Amendment Act 1865 (28 and 29 Vict. c. 86); *Syers v. Syers* (1876) 1 App. Cas. 174; *Pooley v. Driver* (1876) 5 Ch. D. 458; see Gower (1979), p. 50.
5 Shannon (1933), passim; Statistical Abstract for the U.K., B.P.P., 1889, LXXXII; Levi (1880) p. 346.
6 B.P.P. (1886), XXI, q. 667.
7 B.P.P. (1867) X. (Chaired by E.W. Watkins.)
8 B.P.P. (1877) VIII, qq. 317, 1303, 2225–2226, 2286–2303, 2347–2348.
9 B.P.P. (1886) XXI, q. 668.
10 B.P.P. (1886) XXII, qq. 3682, 5936–5941; B.P.P., 1886, XXIII, q. 8013; see Cottrell (1980) p. 65.
11 B.P.P. (1895) LXXXVIII, memorandum of J.S. Purcell; B.P.P., 1896, IX, q. 1397.
12 B.P.P. (1886) vols. XXII, XXIII.
13 B.P.P. (1896) IX, q. 1341.
14 *Broderip v. Salomon* [1895] 2 Ch. D. 323 *et seq.*
15 B.P.P. (1895) LXXXVIII, *passim.*
16 *Salomon v. Salomon and Co. Ltd,* [1897] A.C. 22 at 43–44.
17 B.P.P. (1897) X. q. 130 *et seq.* See also q. 195 *et seq.*
18 B.P.P. (1898) IX, q. 681 *et seq.*, q. 1661 *et seq.*
19 B.P.P. (1906) XCVII, memorandum of H.F. Bartlett; Perry (1908), pp. 502–503.
20 B.P.P. (1906) XCVII.
21 Statistical Abstract for the U.K., B.P.P. (1926) XXVIII; (Balfour) Committee on Industry and Trade, *Factors in Industrial and Commercial Efficiency* (1927), pp. 125–126.

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The Aftermath of Salomon: the Companies Acts 1900–1908 and the Triumph of The Company Legal Form

The House of Lords' decision did not end the Salomon saga. Approval was by no means universal. In February 1897, the Lords Select Committee, which included three of the judges involved in the *Salomon* appeal, was re-appointed to continue its consideration of the Companies Bill. Its first witness was Lord Lindley, who voiced extreme dissatisfaction with the state of the law after *Salomon*: to allow an individual with complete control over his business to trade with limited liability was "a dangerous idea" given his "enormous power" and very small risk [17].

Despite these remarks it was clear that by now the legality of private companies was no longer in any real doubt, despite general agreement that they were a perversion of the 1856–1862 Acts. However, the triumph of the limited company as the legal organisational form of industry was still incomplete.

There remained the question of publicity. In March 1896 the government had introduced a Companies Bill based on the Davey Committee report. The principle of the Bill was "publicity in the interests of the shareholders and the creditors". Pointedly, the recommendation that balance sheets should not be required to be filed with the Registrar was ignored. The Bill ordered a copy to be filed for public inspection. These provisions threatened to expose *all* legal companies to a certain amount of publicity, a prospect which existing private companies found highly distasteful, and one which undoubtedly discouraged many prospective private companies from incorporating. By the late 1890s the question of the publication of the balance sheet dominated the debates surrounding the private company.

A diversity of opinion continued to be expressed on this issue. Before the Select Committee of 1898 Palmer and noted company lawyer H.B. Buckley both came down strongly against publication for private companies. Palmer argued that many small firms had incorporated only on the assurance that they would not have to disclose their balance sheets, and that they would strongly object to such disclosure. Buckley was equally opposed to the publication of the balance sheet: it would, he asserted, constitute "a death blow to limited liability" [18].

Eventually, in 1899, the Select Committee recommended an amended Bill, but the resulting Companies Act of 1900 (63 and 64 Vict. c. 48) was a pale shadow of the original Davey bill. All of the latter's provisions for the keeping of proper books of account and for the annual presentation and registration of balance sheets had gone, victims of the successful agitation of those with interests in private limited companies. The Act concentrated instead on 'public', joint stock, companies and the problems of frauds on shareholders by promoters. According to S.E. Perry, the Act's "stringent provisions distinctly discouraged joint stock enterprise" (1908, p. 502). On the other hand, most of the provisions dealing with company formation did not apply to companies which did not publicly issue a prospectus, so the private company, although not specifically defined, was recognised "in a half hearted sort of way" (Barlow, 1901), and its position strengthened. As Perry observed, the Act gave "an impetus to the formation of private companies" and their rate of formation was "distinctly accelerated" (1908, p. 503). thus, although total company registrations declined from an annual average of about 4820 between 1896 and 1900 to 3840 between 1901 and 1905, the private company flourished. The Registrar indicated that of 3132 companies registered in London in 1901, 2485 did not appeal to the public to subscribe for their shares. The corresponding figures for 1904 were 3068 of 3477, and for 1906 3971 of 4395. By no means all of those companies not issuing a prospectus were genuinely 'private', their shares soon being widely dispersed, but the increase in 'private' and decrease in 'public' company registrations was clear. The average nominal capital of newly registered companies fell dramatically from £46,000 in 1900 to £24,000 in 1904 [19].

However, despite the limited recognition and impetus given to the private company by *Salomon* and the 1900 Act, it was still haunted by the threat of compulsory publicity. This issue again loomed large in the deliberations of the Company Law Amendment (Loreburn) Committee appointed in February 1905. Opinion was still divided, little having changed in the decade since Davey, although there was perhaps greater acceptance that public companies should be subject to a certain amount of publicity as regards their accounts. The Committee reported in June 1906 and although it declared that it did not want to "unduly curtail" company formation and expressed concern at the decline in company registrations, its recommendations were not particularly favourable to private companies It considered that a balance sheet should be filed annually and the majority did *not* think private companies should be exempted, or that the minimum of seven members should be abandoned. They did, however, propose to exempt private companies from a number of their other proposals and offered a definition of them based on a membership of 30 or less, restrictions on share transfers and on public invitation to subscribe. They also proposed that the *en commandite* partnership should be introduced in a separate Bill [20].

The proposal to subject private companies to balance sheet publication drew a mixed response, most of it critical. It was, nevertheless, included in the Companies Bill introduced in March 1907. In the Lords an attempt to exempt them from this provision was abandoned following stern opposition from Lords Loreburn and Faber. However, by the time the Bill reached the Commons for its third reading it was late in the session and David Lloyd-George, then President of the Board of Trade, attempted to minimise opposition to it and to speed its progress by withdrawing the two most controversial clauses, including that compelling private companies to publish. Further amendments permitted private companies to be formed with only two

the lower court verdict. Lord Herschell later pointed out that *all* private companies might be pronounced, in the Court of Appeals terms, schemes to enable firms to carry on business as limited liability companies contrary to the intention of the Companies Act. All such companies might "be held to be trustees for the partners who transferred the business to them" and those partners might "be declared liable without limit to discharge the debts of the company". The Court of Appeal judges might not have contemplated this application of their decision but there was "no solid distinction" between these other cases and Salomon [16]. Similarly, in a casenote in July 1895 the *Law Quarterly Review* described as "unfortunate" the belated discoveries that one-man companies were an abuse of the Companies Acts and that seven 'bona fide' members were required: "Out of the thousands of private companies which have been formed in the last quarter of a century under the Companies Acts, it may be doubted if there are 10 per cent which will satisfy the new test". *Broderip v. Salomon*, it concluded, left these companies "with very questionable status" which was "to be regretted" (1895, pp. 212–213). Not surprisingly, Palmer was also upset by the decision. There was nothing in the Act, Palmer argued, to indicate that limited liability should be conditional on there being seven members 'beneficially' or 'substantially' interested in the company. Indeed, this view, he asserted somewhat speciously, was contrary to the view of the Act taken by "the most eminent counsel and most eminient solicitors" for the last thirty years. There were "many hundreds of the best class of companies" lacking seven beneficially interested members and it was rather late in the day to propound that they were an abuse of the Act. Palmer urged that "these dicta" be disregarded, objecting that they "had created great anxiety and doubt and some consternation, in the minds of those who were interested in private companies". (1896, *passim*). It was, as Edward Manson later remarked, "... a critical moment in the history and fortunes of the private company ..." (1910, p. 12).

The *Salomon* decision was appealed and proceeded slowly to the House of Lords. In their famous judgments of November 1896 the Law Lords emphatically reversed the two earlier decisions. All six judges were unanimous that the relevant sections of the 1862 Act should be interpreted literally. The Act required seven members holding at least one share each for a company to be formed; it said nothing about their being 'substantially or 'beneficially' interested, nor that they should not be trustees or should have 'a mind of their own'. Lord Herschell's comments were representative: "I know of no means of ascertaining what is the intent and meaning of the Companies Act except by examining its provisions and finding what regulations it has imposed as a condition of trading with limited liability. The memorandum must state the amount of the capital of the company and the number of shares into which it is divided, and no subscriber is to take less than one share. The shares may, however, be of as small a nominal value as those who form the company please; the statute proscribes no minimum; and though there must be seven shareholders, it is enough if each of them holds one share, however small its denomination. The Legislature, therefore, clearly sanctions a scheme by which all the shares except six are owned by a single individual, and those six are of a value little more than nominal ... . The statute contains no enactment that each of the seven persons subscribing to the memorandum must be beneficially entitled to the share or shares for which he subscribes". While companies such as Salomon and Co. may not, he said, have been contemplated by the legislature when the Act authorising limited liability was passed, it made no difference: "we have to interpret the law, not make it ...".

So far as one man and other private companies were concerned, the House of Lords decision was critical. Henceforth, their incorporation under the Companies Act constituted a legitimate use of the company legal form, and could be relied on, in the absence of fraud, to limit liability. The extension of the company legal form to individual proprietorships and economic partnerships had been validated. Palmer rejoiced and was fulsome in his praise of the House of Lords. Their reasoning, unlike the "obviously erroneous and unsound" reasoning of the Court of Appeal, was "sound and convincing". A one-man company was not an abuse of the Act, and, *a fortiori*, neither was a two, three, or four-man company (1901*a*, p. 73). The *Law Quarterly Review* also welcomed the decision, approving the sanctioning of individuals trading with limited liability (1897, pp. 5–6). With *Salomon* the private company had, as Manson later wrote, "narrowly escaped outlawry and extinction ...", to the satisfaction of many lawyers and great relief of many businessmen (1910, p. 12).

Today, of course, *Salomon* is generally cited as the case which finally established separate corporate personality. However, contemporaries saw its significance more in its effective legalisation of one-man companies in particular and private companies in general. In the early editions of his *Company Law*, first published in 1898, Palmer did cite *Salomon* to illustrate 'corporate existence and powers' and the 'company as a legal person'; that is, to illustrate separate personality (1910*c*, p. 39). But this principle had, in fact, long been established in relation to joint stock companies. *Salomon* merely confirmed its extension to incorporated partnerships and individual proprietorships. For contemporaries, as the comments of the *Law Quarterly Review* reveal, the "real significance" of the case was that it interpreted the policy of the Company Acts so as to sanction an individual trading with limited liability, a decision which would "have been impossible 30 or even 20 years ago". Similarly , Palmer when compiling and summarising some of the "leading cases" on company law in the closing chapter of his treatise, cited *Salomon* as deciding "that one-man companies are *legal*", nothing more (1901*c*, p. 292). This was the immediate importance of the case: *Salomon* legitimated the adoption of the company legal form by individual proprietorships and small economic partnerships, validating their acquisition of the privilege of limited liability. It paved the way for the triumph of the company legal form.

This might be true, he argued, but such companies were "clearly within the letter of the Act" and there was much to be said for their being "within the policy of the Act too". He accepted that unsecured creditors had a "genuine grievance" but was critical of Vaughan-Williams' proposed remedy. The "novel view" of this "experienced critic and censor of company operations", and his employment of the doctrine of agency, rendered every case a question of fact: "control of the company the most complete may exist and yet may not constitute agency". The "real mischief" was "not ... one man turning himself into a company and trading with limited liability, but ... the unlimited borrowing powers allowed to limited companies" (1895, pp. 185–188).

Meanwhile the Davey Committee was considering precisely the same questions. In addition to Lord Davey, the 13 man Committee boasted both Vaughan-Williams and F.B. Palmer. The increasing use being made of the limited company form by individual proprietorships and economic partnerships loomed large in the Committee's deliberations: should firms with fewer than seven 'genuine' members be prevented from incorporating? Some of those providing evidence answered in the affirmative. For example, the Associated Stock Exchanges favoured, though not unanimously, confining the company legal form (and limited liability) to "substantially bodies of such a number that the conduct of the business must be delegated to agents appointed by a majority of the body". Others, while supporting the introduction of some form of *en commandite* for small partnerships and sole traders, opposed allowing them to register as "public companies". On the other hand, some saw "no magic in the number seven". Opinion was similarly divided on the question of the compulsory registration of balance sheets, with a majority against publication, particularly in relation to private companies.

The Committee reported in June 1895. It noted the "growing practice" whereby individuals and small firms adopted the company legal form using "dummies", and observed that some such companies were formed in good faith. "But, in other cases", the Report ran, "individuals or firms, it may be on the eve of bankruptcy, form a company consisting of themselves and the requisite number of clerks or dummies, and then purport to sell their business to the company so formed usually at an inflated valuation ...". It recognised that debentures secured by floating charges were sometimes issued in part payment to thwart creditors, and proposed additions to the grounds on which winding-up orders could be granted to cover this and other fraudulent situations. The Committee did not, however, consider the absence of seven 'genuine' members sufficient reason for making members unlimitedly liable. There was, the Report argued, "no magic" in the number seven and although "substantial or real shareholders" could not be guaranteed, no alteration was proposed in this respect. The Committee also decided *not* to recommend that the annual balance sheet be filed at the Registrar's Office for public inspection, given the balance of opinion adverse to this proposal and the difficulties involved in distinguishing 'public' and 'private' companies.

This particular recommendation prompted Vaughan-Williams to produce a short dissenting addendum to the Report. He was not opposed to private companies in principle but felt publication was crucial, particularly in respect of private companies whose shares were not publicly quoted. In the interest of creditor protection, Vaughan-Williams argued, publicity for the accounts of private companies was essential [15].

The Davey Committee, then, implicitly endorsed the spread of the private company. As it did so, however, the judicial threat to it was growing. In May 1895, shortly before the Committee reported, the Court of Appeal upheld the decision in *Broderip v. Salomon*. Delivering the leading judgement, Lindley L.J. recognised the importance of the appeal given the increasing number of one-man companies, but insisted that an attempt had been made "to use the machinery of the Companies Act, 1862, for a purpose for which it was never intended". Parliament had never contemplated an extension of limited liability to sole traders or to less than seven; indeed, he pointed out, it had sought in various ways to prevent it. Admittedly, there were seven members in the present case, but "it is manifest that six of them are members simply in order to enable the seventh himself to carry on business with limited liability". "The object of the whole arrangement", he said, "is to do the very thing which the legislature intended not to be done". It was a corporation "created for an illegitimate purpose", "to attain a result not permitted by law". In Lindley's view, the relationship between Salomon and the company was not that of principal and agent but that of trustee and *cestui que trust*. The creditors could not, therefore, sue Salomon directly, but had to reach him through the company. The decision, he asserted, would leave many small companies "quite unaffected", but "there may possibly be some [companies] which, like this, are mere devices to enable a man to carry on trade with limited liability, to incur debts in the name of a registered company, and to sweep off the company's assets by means of debentures which he has caused to be issued to himself in order to defeat the claims of those who have been incautious enough to trade with the company without perceiving the trap which he has laid for them". Until the legislature extended the principle of limited liability to sole traders with such safeguards as it thought necessary, Lindley considered that these attempts ought to be defeated "whenever they were brought to light", doing as they did "infinite mischief" to one of the "most useful statutes of modern times by perverting its legitimate use". Lopes and Kaye L.JJ. concurred using similar arguments.

The judgments were appended to the Davey Report, but the Committee did not fully appreciate their implications, for they lumped the decision together with that of the lower court, understanding them all to be to the effect that even where the Acts had been formally complied with, if the aim was to defraud creditors, the law would look behind 'the veil'. But, as other commentators observed, the implications of the Court of Appeal decision for one-man and other private companies were much more serious than those of

limited company legal form could not take place until "public opinion had (been) convinced that a company was as good as a private firm" (Jeffreys, 1938, pp. 111–113, 135). As the 1886 Commission revealed, there remained "some strange virtue surrounding the private firm which a company could not acquire", and the unlimited, 'private' partnership was defended against both the limited company legal form and the joint stock company economic form (Rix, 1936, p. 28). But, as the depression continued, the desire to limit liability grew, and ideas about the proper scope of the company legal form gradually changed. As we saw, by the late 1880s and early 1890s it was being adopted by increasing numbers of economic partnerships and individual proprietorships. With this the legitimacy of the private company was quickly established. Nonetheless, its progress was not free of obstacles.

The threat to the private company and to the further spread of the company legal form was double-pronged. First, there remained a minority who wished to confine the limited company form to enterprises of the joint stock type and to prevent its use by small partnerships and sole traders. Secondly, with the spread of the company legal form to economic partnerships and individual proprietorships came a new breed of company frauds. Hitherto, abuses of the company legal form, used only by joint stock companies, had usually involved shareholder fraud, hence the law reform concern with the regulation of company promotion. But as the company legal form came to be utilised by individual proprietorships and economic partnerships seeking limited liability, it was increasingly creditors who became the victims of fraud as firms in financial difficulty incorporated. The techniques of 'conversion' were simple: the owner or owners would 'sell' the firm to a newly formed company (legally a separate entity), accepting in payment a combination of cash, fully paid-up shares and debentures probably secured by a floating charge on the company's assets. If the company failed, the owner-vendors would crystallise their priority-taking debentures and sweep up the assets of the company, including perhaps goods supplied by unsecured creditors. Fraudulent conversion was illegal, but hard to prove, and traders transferring the businesses to limited companies when insolvency was likely, but proceedings not yet begun, were out of reach. By the late 1880s and 1890s as the number of private companies grew, such practices were becoming more common. In 1893 it was reported that frauds on investors (involving joint stock companies) were decreasing while frauds on creditors (involving 'converted' economic partnerships and individual proprietorships) were increasing. Critically, these new abuses strengthened the demand that *all* companies be made to publish an annual balance sheet and possibly even a profit-loss account to protect creditors. Because of the advantages such publicity might confer on *un*incorporated rivals and the trouble it might stir among employees, legislation to that effect would undoubtedly have been a serious disincentive to the adoption of the company legal form by small firms.

In 1894 matters came to a head. In November a Departmental Committee of the Board of Trade chaired by Lord Davey was appointed to consider company law reform just as the celebrated case of Aron Salomon and his company reached the Courts. The latter briefly threatened the protection offered by the company legal form to small partnerships and individual proprietorships and the progress of the private company.

Aron Salomon had been a wealthy Whitechapel leather merchant and boot manufacturer. In 1892 he decided to convert his business into a limited company with a nominal capital of £40,000 divided into 40,000 shares of £1 each. One share was allotted to each of Salomon's four sons, one each to his wife and daughter, and 20,000 shares to Salomon himself. No-one else ever had, or was intended to have, any shares in the company. The company agreed to pay Salomon about £39,000 for his business, though Salomon, as its promoter, dictated the terms. In part payment, he took £10,000 in debentures. Unfortunately, a trade depression, loss of Government contracts and strikes saw the company fall on hard times. Early in 1893, in an effort to revive the ailing business, Salomon borrowed £5000 from one Edmund Broderip which he lent to the company at 10 per cent interest. As security for this loan, the £10,000 worth of debentures were transferred to Broderip. Six months later, when the company defaulted on the interest due on the debentures, Broderip gave notice to call in on the principal. Soon after, an official receiver was appointed and an order made for the compulsory winding up of the company.

The liquidator met Broderip's claim with a counter-claim to which he made Salomon a defendant. In the Court of Chancery, however, Roland Vaughan-Williams J. argued that six of the shareholders were mere nominees and that Salomon's intention was to take the profits without running the risk of the debts and expenses, and so one had to "consider the position of the unsecured trading creditors, whose debts amounted to some £11,000". The company, he declared, was Salomon's agent, "a mere nominee", and as such had a right of indemnity against Salomon for the debts which had been "contracted at his bidding and for his benefit". There was no allegation of fraud, "but to allow a man who carried on business under another name to set up a debenture in priority to the claims of the creditors of the company would have the effect of defeating and delaying his creditors. There must be an implied agreement by (Salomon) to indemnify the company". Vaughan-Williams argued that the business was Salomon's, the company "a mere alias" and his agent, and that he was bound to indemnify it. The creditors of the company could have sued Salomon directly [14].

The potential impact of this decision on one-man companies in particular, and private companies in general, did not go unnoticed. In April 1895 Edward Manson wrote a short article on one man companies for the *Law Quarterly Review* which considered, *inter alia*, the decision in *Broderip v. Salomon*. Manson began by observing that Vaughan-Williams did not believe that the legislature had contemplated the use of the company legal form by such firms.

reasons for this. First, the company legal form seems to have been generally considered to be confined to concerns with at least seven 'genuine' members. As Palmer observed, it "took a good many years before the full significance of the change and the immense advantages offered by the Act of '62 were understood and appreciated". At first, the Act had been used only by "public companies with numerous shareholders, and the notion of utilising it for private concerns was scarcely formulated". Only "by degrees" was it "discovered that private companies ... could without difficulty or inconvenience, be formed and worked under similar conditions, that the Act had, in effect, struck off the fetters imposed on freedom of contract by the common law, and had emancipated the community from the tyranny of unlimited liability" (Palmer, 1901*a*, p. 6).

Secondly and relatedly, the limited company form was generally thought to be suitable only for enterprises of the joint stock type. Its increasing utilisation by economic partnerships and individual proprietorships evinced considerable criticism from some quarters. Commercial lawyer Leone Levi, in plotting the progress of the joint stock company between 1869 and 1884, noted the proliferation of private companies and argued that it was "much to be desired that some check (be) placed on their formation". What were they, he asked, "but an evasion of the law of Partnership?" (1886, p. 248). Even Lord Bramwell, a staunch supporter of limited liability, had reservations about the private company, observing in 1888 that "as the law at present stands ... a man may form a company with half a dozen of his clerks and children, each one taking a £1 share". It would, he said, "not be a bad thing if that were got rid of" (1888, p. 381). Some critics opposed the granting of limited liability to anything other than joint stock companies. More commonly, it was argued that while limited liability was applicable to small as well as large undertakings, it "should never be extended to the managing partners" (Levi, 1886, p. 248).

Finally, and perhaps most importantly, while the unlimited liability of the partnership legal form had always been a danger, the risks involved with it appreciably increased in the last decades of the century. Ultimately, it was probably the economic difficulties of the so-called 'Great Depression' of 1873–1896 that were primarily responsible for the rise of the company legal form and the gradual change in attitude towards it.

The state and performance of the economy during this period have been the source of considerable controversy and whether there really was an economic depression in late Victorian Britain has been disputed by some economic historians. Thus, S.B. Saul's review of the debate on the subject is deliberately entitled "The *Myth* of the Great Depression" and concludes that the term should be banished from use (1969, p. 55). The reality of the depression, however, is accepted by many historians: whatever the objective performance of the British economy during this period, they argue, there is no doubt that many capitalists subjectively experienced serious economic problems and believed the country to be suffering from a 'Great Depression', hence the contemporary plethora of speeches, books, reports and pamphlets. "Whatever their nature and causes", William Hynes remarks, "the economic problems of the last quarter of the 19th century led to a serious decline in the confidence of British businessmen" (1979, p. 8).

The primary source of business concern during the three slumps and two intervening recoveries that constituted the 'Great Depression' was falling profitability (Beales 1934, p. 409). Indeed, that there was a "meagreness of profits" during this period seems generally accepted. The Royal Commission set up in 1885 to investigate the depression collected considerable evidence of contracting profit margins, attributing them to falling prices (the average 40 per cent fall between 1873–1896 traditionally defines the period), protectionism abroad and 'overproduction' [12]. The research of C.H. Feinstein confirms that there was a gradual and significant fall in the real rate of return on industrial capital between 1865 and 1909 (Feinstein, 1960). But by no means everyone was affected by these problems. The depression was a phenomenon, says L.C.B. Seaman, "from which the articulate middle classes suffered much more than their workers, whose real incomes went up fairly steadily" (1973, pp. 269–70). This probably accounts in part for the reservations about the label.

Real depression or not, the problems had a profound impact on company law, for the 'Great Depression' generated greater acceptance of the limited liability company as an appropriate legal oganisational form for firms of *all* economic types. Some contemporaries were very precise about the turning point. 'The Statist' argued in 1885 that the spectacular failure of the unlimited City of Glasgow Bank in 1878 had struck a 'death blow" to unlimited liability (Jeffreys 1938, pp. 99–102). Shareholders in the bank had to pay about £2750 on each £100 share that they held, prompting Lord Bramwell to remark that "many a pitched battle (had) caused less misery than did the stoppage of the Glasgow Bank to its unfortunate shareholders" (1888, p. 378). Its collapse, Jeffreys suggests, marked the beginning of a change in public and business opinion "from an attitude of doubt or even hostility toward limited companies to one of support and acceptance" (1938, p. 121). The attractions of the company legal form offering limited liability were obvious. As a witness before the 1896 Select Committee on the Companies Bill put it, while a private individual or partner worked in the shadow of bankruptcy and the poor house, "with a company it was altogether different. Failure meant a brief sojourn in that now national institution, 'Winding Up', and out again with only a little financial loss and hardly a stain on the character" [13].

Salomon v. Salomon and Co. Ltd, and the Challenge to the 'Private Company'

Despite the economic depression, divergence from the ideals of 1856 had not progressed very far by 1885. Whatever its advantages, a major shift to the

the object of a private company was "to constitute what may best be described as an incorporated partnership" (1910, p. 13).

In his analysis of the early registered companies, H.A. Shannon discerns "the faint start" of private companies in the early 1860s, but argues that any sustained and strong movement towards them was checked by the general discredit into which the limited company form fell after the financial crisis of 1863–1865 (1932, p. 408). In the late 1860s, therefore, the company legal form was still being used almost exclusively by joint stock companies, and as nearly all joint stock companies were now legal companies, the term 'company' came to have both economic (joint stock) and legal (incorporated, limited liability) connotations. The 1867 Select Committee on the Companies Acts treated it as axiomatic that company law reform meant reform of the law applicable to joint stock companies [7]. The 1877 Select Committee on Company Law, chaired by Robert Lowe, also dealt primarily with 'public', joint stock companies. A number of committee members and witnesses indicated a belief that the company legal form was not available to 'private' partnerships because of the minimum statutory requirement of seven members. It is clear, however, from the references to "non-public companies", "family companies" and "small companies nearly on a par with private firms" that there were a considerable number of private companies in existence by this time. As Sir George Jessel, Master of the Rolls, observed, in order to limit liability, some private partnerships had incorporated, but, he argued, they were only "nominally companies" — companies in the legal sense of the word. They were "not really" companies. Asked whether he thought that the formation of such concerns was an abuse of the 1862 Act, he replied that it depended on the view you took of the Act [8].

The use of the term 'private company' to describe incorporated small partnerships and sole traders was soon institutionalised. In 1877 Francis B. Palmer wrote a small book entitled *Private Companies: their formation and advantages*, a "concise popular statement of the mode of converting a business into a private company, and the benefit of so doing". In it Palmer argued that *any* business — regardless of its economic form — could 'convert' and adopt the company legal form. No one knew, Palmer said, "why the number seven was fixed by the [Companies] Act as the smallest number capable of forming a company", but it was of little consequence and was easily overcome. As the law stood, he argued, if one wanted to convert "a business belonging to an individual, or a firm consisting of less than seven members" into a private company, one merely had to obtain the aid of a few frieds to meet statutory requirements: relations or clerks would do (1877, passim). In the years following, the book made a significant contribution to the progress made by the private company, going through 29 editions by 1915. By 1881 what Palmer referred to as the "popular division" between private and public companies had even permeated judicial consciousness, being recognised by Lord Justice Cotton in *Re. British Seamless Paper Box Co. Ltd* (17 Ch. Div. 467).

The rise of the private company in the 1880s was probably one of the main reasons behind the increase in company registrations. According to Shannon, private companies, rather broadly defined, accounted for one-seventh of new registrations (1391 out of 9551), and one-fifth of companies actually formed between 1875 and 1883 (1933, pp. 391–2). And the Registrar of Companies, giving evidence before the 1886 Royal Commission on the Depression in Trade and Industry, estimated that in the five year period to the end of 1884, "during which the practice (of 'private' firms availing themselves of the Acts) has principally prevailed", some 560 had been registered, about 400 of which were believed to be still carrying on business [9]. Overall though, the Commission demonstrated the relative unimportance of companies, legal or economic, at this time [10].

By the late 1880s, however, both the number of annual company registrations and the number of companies believed to be still carrying on business were beginning to increase substantially. The latter increased almost threefold between 1884 (8692) and 1897 (23,728). In 1896, the Registrar stated that: "The registrations of recent years have been largely increased by the great number of private businesses that have been converted into joint stock companies (sic.) ..., sometimes spoken of as private companies ..." The previous year he had reported that of 1328 companies registered in London during the first six months of 1890, about one-third (415) were "more or less of a private character". In 87 per cent of these companies the bulk of the shares were originally held by ten shareholders or less; in 45 per cent by four shareholders or less [11]. By the 1890s, the limited company was becoming more common primarily because of the rise of the private company. What lay behind this development?

The primary motivation to incorporation was not the desire or need of firms to raise capital from the public, but rather their desire to limit liability and to avoid the dangers of the "barbaric law of partnership" (Jeffreys, 1938, pp. 100, 141). From the mid-1880s many firms incorporated, but "not in order to break the tie between internal savings levels and new investments ... (T)he predominant reason why concerns adopted the limited company form of organisation was to obtain the legal privilege of limited liability so as to insure against possible future losses and ultimately bankruptcy" (Cottrell, 1980, p. 265). Thus, while Palmer noted a number of inducements to incorporation, he had "no doubt that in most cases the principle inducement to conversion is that by means of a private company the great benefit of limited liability can be obtained" (1895, p. 445). The value of this privilege, he said, could "only be adequately appreciated by contrasting it with the hazardous position of those who engage in business without availing themselves of the Act of 1862" (1901*a*, p. 4).

But unlimited liability had always involved risks, so why had it not previously prompted widespread resort to the limited company legal form by small partnerships and sole traders? There appear to have been a number of

failure of the Partnership Amendment Bills, because of "the gap" it left in the law. 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 by the inducement of sharing in the profits of his business without at the same time incurring all the risks of unlimited liability". Clearly, Thring did not believe the Act could be used by small partnerships and sole traders. (1856, pp. 11, 24–27).

Despite the possibilities perceived by some, it was, therefore, neither intended, nor anticipated, that the 1856 Act or the company legal form would be used by 'private' partnerships or sole traders. Rather, it was thought that they were prevented from using it by the specification of a minimum of seven members: the company legal form was believed to be confined to enterprises organised on a joint stock basis. Events proved this belief wrong. A Partnership Amendment Act, known as Bovill's Act, was eventually passed in 1865, offering limited liability to pure money capitalists. At first it was thought to have created a sort of limited partnership legal form, but it was undermined by judical decisions to the effect that if a lender became in any way involved in the running of the business he was fully and unlimitedly liable as a partner. Despite the contemporary dominance of the partnership as an economic form of association, the impact of this Act was minimal [4]. The 1856 Joint Stock Companies Act, on the other hand, soon precipitated a dramatic change in the legal organisational forms of British industry.

The Extended Use of The Company Legal Form: the 'Great Depression' and the Rise of the 'Private Company'.

The initial impact of the 1856–62 Companies Acts was slight and by the early 1860s some were describing them as a 'dead letter'. Between 1856 and 1865 only 4859 limited companies were registered in London, 5321 in the United Kingdom, an average of only 500 per annum . In the next two decades, "the limited system extended with increasing rapidity". Between 1866 and 1874 6111 limited companies registered in London, 7156 in the United Kingdom, an annual average of about 700; between 1875 and 1883 9551 registered in London, 10,619 in the United Kingdom, an annual average of over 1000 [5]. But as about one-third of these registrations were 'abortive', and many more of the companies did not survive infancy, the overall importance of the company as a legal organisational form by the mid-1880s should not be overstated. It was still very much subordinate to the partnership. In 1886, the Registrar of Joint Stock Companies told the Royal Commission on the Depression in Industry and Trade that of 26,000 limited companies registered since 1856, only 9300 were still making returns at the end of 1884 and reckoned to be 'still carrying on business' [6]. Although the number of functioning companies was very likely greater in reality, as many probably did not bother to make the requisite returns, it is clear that it compared very unfavourably with the number of legal partnerships and individual proprietorships. J.B. Jeffreys estimates that, "taking about 100,000 as the number of important partnerships in this country in 1885, we see that limited liability companies accounted for at most at that date between 5 per cent and 10 per cent of the total number of important business organisations excluding one-man concerns and public utilities" (1938 p. 105).

Yet, by the mid-1880s, the number of limited company registrations was steadily and significantly increasing. An average of about 1500 limited companies registered annually between 1880 and 1886, 2500 between 1887 and 1894, 4400 between 1895 and 1908, and 6700 between 1909 and 1914. Correspondingly, the number of companies "believed to be still carrying on business" increased dramatically: 9344 in 1885, 11,968 in 1889, 17,555 in 1893, 23,728 in 1897. The figure exceeded 30,000 by 1901, 40,000 by 1906 and 50,000 by 1910. By April 1914 it stood at 64,692. The three decades before the First World War had seen the "triumph of the company in almost all spheres of economic life" (Jeffreys, 1938, p. 142).

The meteoric rise of the company legal form during this period can be partially attributed to the simultaneous advances made by the joint stock company economic form. As A.E. Musson says, there are reasons for regarding 1850–1914 as the period in which the "industrial revolution" really occurred on a massive scale (1978, pp. 150–151). In an increasing number of industries the minimum capital outlay required for production came to exceed the capacity of economic partnerships with the result that more and more joint stock companies emerged (Jeffreys, 1983, pp. 54–154). Moreover, in the great amalgamations dating from the late 1880s the joint stock also began to emerge in a new role as a mechanism for centralizing capital and monopolizing markets (see Ireland, 1981; Hannah, 1974; Utton, 1972). Critically, of course, wherever joint stock enterprise emerged it was accompanied by the company legal form.

In spite of this, in 1914 the joint stock company was still subordinate to the partnership as an *economic* form of business association. Of 62,762 limited companies on the register, only 14,270 were 'public' — and presumably, therefore, joint stock — companies. The remaining 48,492 were 'private companies' and, by definition, probably not organised on a joint stock basis (Jeffreys, 1938, p. 130). The rise of the company legal form had far outstripped the rise of the joint stock company as an economic form.

Although the precise circumstances surrounding the widening use of the company legal form in this period are somewhat obscure, that it began to be used extensively by economic partnerships and individual proprietorships, as well as by joint stock companies, is apparent from the gradual emergence and recognition of the so-called 'private company'. By definition, private companies — characterised by a limited number of members, no public appeal for funds and restrictions on the transfer of shares — were not joint stock companies. In the words of leading company lawyer Edward Manson,

be fraudulently exploited and created considerable legal problems for those that were *un*incorporated and subject to the law of partnership. The 1844 Act sought to remedy the legal difficulties by compelling all joint stock companies to incorporate, and the problem of fraud 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. Entitled "An Act for the Registration of Joint Stock Companies", it encompassed all associations with transferable shares and all associations of 25 or more whether their shares were transferable or not.

The *economic* differentiation of companies and partnerships pervaded the lively debates on limited liability in the early 1850s. When legislation was eventually introduced in 1855 it comprised two separate Bills, the Partnership Amendment Bill and the Limited Liability Bill. As E.V. Bouverie, the Vice-President of the Board of Trade, indicated, the Bills, although closely related, dealt with "different branches of the subject": one concerned private partnerships, the other joint stock companies. The Limited Liability Bill — a graft onto the 1844 Act — was not intended to extend to 'private' partnerships and was expressly confined to concerns with a minimum of 25 members. That Bill passed into law, while the Partnership Amendment Bill perished at the end of the session [1].

As matters stood at the end of 1855, then, incorporation with limited liability — the company legal form — was effectively confined to joint stock companies by the provision restricting the application of the 1855 Act to associations of 25 or more. Within a year, however, the 1856 Joint Stock Companies Act had both transformed the company legal form and greatly extended its ambit. It not only dispensed with the minimum capital requirements, minimum share denominations and distasteful publicity stipulations of the old law, but enabled associations of only seven persons to incorporate. The significance of the Act was readily apparent, but few contemporaries realised how far it would enlarge the scope of the company legal form.

Despite its permissiveness, it is evident that the proponents of the 1856 Act did not intend it to make the newly constituted company legal form available to 'private' partnerships or to sole traders. When introduced to the Commons by Robert Lowe in February 1856, the Joint Stock Companies Bill was accompanied — like Bouverie's Bill of 1855 — by another Bill aimed specifically at introducing something akin to the continental *en commandite* form to private partnerships. 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. He objected, not to granting such enterprises limited liability, but to incorporating them, arguing that it would render their acts open to "constant ambiguity". Lowe did not believe that the company legal form as reconstituted by the Joint Stock Companies Bill should embrace small partnerships or sole traders, nor that it would: seven meant seven. He argued, therefore, that without the Partnership Amendment Bill private partnerships and sole traders would be denied limited liability [2].

However, some people detected a wider ambit for the company legal form as it would be amended by the Joint Stock Companies Bill. Alexander Hastie, a staunch opponent of limited liability, contended that the Bill, even as it stood, could be used, or "abused", by associations fewer than seven. An individual, he said, merely had to give a single share to six others — "it might be his servants" — to achieve the required seven. Lowe still opposed any extension of the Bill arguing that the same objection could be levelled at the existing law. Robert Collier concurred: the Joint Stock Companies Bill was not intended to apply to ordinary partnerships. Lowe's belief in the restricted scope of the reconstituted company legal form was confirmed when the Partnership Amendment Bill ran into trouble. Following technical drafting problems it was withdrawn and another Bill, the Partnership Amendment (no. 2) Bill, swiftly introduced. But this also floundered, and despite Lowe's pleas that its failure would leave private partnerships without limited liability and at an unfair disadvantage, it was subjected to debilitating amendments and withdrawn. Meanwhile the Joint Stock Companies Bill proceeded largely unhindered and passed into law [3].

Nevertheless, whatever its proponents' view of its scope, some thought the new Joint Stock Companies Act potentially very broad in its application. Outside Parliament Hastie's contentions were forcefully taken up by barrister Edward Cox in a legal guide to the Act. Cox was very critical of the 1856 Act, arguing that it had made some improvements to the law, but "at the price of enormous evils". First, it extended a principle (limited liability) "immoral in itself", effectively permitting a trader to speculate for unlimited gain without being liable for more than a small definite loss. Secondly it was highly partial. Those not trading under the Act were seriously disadvantaged: "if seven persons may rightfully limit their own liability to pay their debts, perform their contracts, and make compensation for wrongs, wherefore should not individual traders, or partnerships of a lesser number, be privileged to do the like?" The principle of the Act might be irredeemable, Cox argued, but the injustice to small partnerships and individual traders could be overcome. Because of the liberalism of the new law, they too could secure the privilege of limited liability, by using relations, friends or servants to make up the required seven. The reconstituted company legal form could be used by *all* firms (1856, i–xx).

But those responsible for the Act continued to assert its restricted ambit. Henry Thring, a barrister and accomplished legislative draftsman, had prepared the original Bill for the Board of Trade. In 1856 he published a guide to the Act which provided further insights into the official view of its scope. Towards the end of his introductory remarks, Thring expressed regret at the

from 'partnerships', but the distinction drawn beween them during this period was *economic*, not legal, in nature. In this context, the term 'partnership' denoted an association of a particular economic type — one based on a few specifically defined and closely related people, most of whom were likely to be significantly involved in management — rather than one of a particular legal status. Joint stock companies were ultimately distinguishable from large economic partnerships because their members "could dispose of a part or the whole of (their) share in the undertaking without receiving the consent of the others concerned" (Scott, 1910, p. 442). Thus, throughout the 18th century, when an enterprise included 20 persons or more, "while the descriptive term 'partnership' may be used ... 'society' or 'company' was more frequently found" (DuBois, 1938, p. 242). Critically, the *legal* status of an enterprise 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. As A.B. DuBois says: "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 unincorporated unit" (1938, p. 87). This is borne out by early partnership law treatises. In the first such text, published in 1794, William Watson argued that while to civil law writers "... partnership or fellowship, and company, or society, ... mean(t) much the same thing ... the custom in England (had) made a difference between them; partnership being understood of two or three dealers, or not many more; and company usually of a greater number ..." (1794, p. 63). In the second edition of the book, published in 1807, he drew the distinction with even greater clarity: "The first great division of partnership with us [the English] is into public and private. The former are usually called companies or societies; they generally consist of many members, and are instituted to carry on some important undertaking, for which the capital and exertions of a few individuals would be insufficient. Of these some are incorporated by letters patent, or act of parliament ... others are not ...". However, while Watson argued that incorporation or its absence made no difference to the *economic* nature of an association, he placed heavy emphasis on its *legal* importance: "Not any of the public trading companies incorporated by royal charter or act of parliament in this country", he wrote, "are to be considered as partnerships within any of the legal principles applicable to partnerships formed by the voluntary agreement of individuals". But the laws respecting joint stock companies "*not* confirmed by public authority" were "the same as common partnerships". In law, Watson indicated, *un*incorporated joint stock companies and partnerships were distinguishable only by the fact that "the articles of agreement between the parties are usually very different" (1807, pp. 3–4).

The first treatise specifically on 'company law', written by Charles Wordsworth in 1836, was, in fact, organised around the economic, joint stock company, dealing with the various legal forms available to it. The book included sections on railway companies which were usually incorporated, and sections on insurance and mining companies which were not. The sixth edition, published in 1851, began with the revealing sentence: "Joint stock companies are *un*incorporate and corporate" (1851, p. 1).

The meaning attached to the term "company" has, therefore, been transformed in the last century. From denoting an association of a particular *economic* nature with no connotations as to legal form, it has come to signify an association of a particular *legal* status with no connotations as to *economic* form. The distinction between the company in its 18th and early 19th century sense — the (joint stock) company as an *economic* form — and the company in its present sense — the (limited liability) company as a *legal* form — is central to this paper. The 'fit' between the company economic and legal forms is evident, as, indeed, is that between the partnership as an economic form and the law of partnership. As Gower observes, partnership law based on the law of agency "affords a suitable framework for an association of a small body of persons having mutual trust in each other," while "a more complicated form of association requires a more elaborate organisation which ideally should confer separate personality on the association" (1979, p. 3). But the corresponding forms have not always co-existed, nor do they now. Prior to the Companies Acts of 1844–62, many joint stock companies, unable to obtain corporate status, operated as *un*incorporated concerns — that is, as legal partnerships. On the other hand, nowadays the company legal form is used by economic partnerships and individual proprietorships, although, as we shall see, it was originally intended for the use of, and only for the use of, joint stock companies. Today nearly all significant enterprises adopt the limited company legal form, hence the frequent everyday use of the term 'company' as a synonym for 'firm', referring to any business concern, and also its contemporary, exclusively legal, connotations. In tracing the rise of the limited liability company — of the company *legal* form — this paper will examine the process whereby it came to be adopted by firms of *all* economic types.

The Intended Ambit of the Company Legal Form: The Companies Acts, 1844–62

The utilisation of the company legal form by economic partnerships and individual proprietorships was made possible by the liberal provisions of the Joint Stock Companies Act of 1856 (19 and 20 Vict. c. 47). It is clear, however, that those responsible for the Act did not intend the company legal form to be used by such enterprises. On the contrary, they intended it to be used only by joint stock companies.

The first major Companies Act was passed in 1844 (7 and 8 Vict. c. 110), and was directly concerned with *economic*, joint stock, companies. Their size and impersonality, and the free transferability of their shares enabled them to

it is the specific forms of law which permit and legitimise such use. Structure and action are intertwined.

Finally, this focus calls for less reification of the law. Indeed perhaps the instrumental metaphor of law and capital should be refined a little. Law is less a tool than a raw material to be worked upon. The tools are legal form and legal ideology, the artisan is the legal profession, the dominant client, capital.

Notes

1 For a good contemporary overview see Carson (1974).
2 For an original approach to this see Mott and Kay in this issue.
3 See Cain (1979).
4 See Picciotto (1979); McBarnet (1981, 1983) Ch. 8.
5 See Ferguson and Page in this issue on self regulation and Hadden on autonomous management structures.
6 *I.R.C.* v. *Barclays Bank* (1951) AC 421, p. 439.
7 McBarnet (1981, 1983).
8 *Furniss* v. *Dawson* AC 9th February 1984.
9 See Plett and Gessner in this issue for the fate of employees in bankruptcy cases.

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The Rise of the Limited Liability Company

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Limited Liability Companies, Joint Stock Companies and Partnerships

In the mid-1880s the limited liability company was still overshadowed by the partnership as a legal form of organisation in British industry. By 1914, however, their positions had been reversed, with the company legal form completely dominant. This paper seeks to trace its dramatic and rapid rise.

As the meaning attached to the term 'company' has undergone considerable change in the last century, we must begin by specifying the nature of the company as a *legal* form. Today the term 'company' is essentially a diminution of 'limited liability company', denoting an enterprise of a particular *legal* status — one which has incorporated and become subject to the rules of company law. Both large multinational concerns and small corner shops can, therefore, be 'companies'. On this basis, 'companies' are usually contrasted with 'partnerships', *un*incorporated associations subject to a different body of legal rules, relating to separate personality, limited liability, agency and so on. (Gower, 1979, pp. 79–111).

For most of the 18th and 19th centuries, however, the meanings attached to the terms company and partnership were rather different. In some contexts 'partnership' carried much the same meaning that it does today, referring to an enterprise of a particular *legal* status, to an *un*incorporated firm. But the contrast drawn in this legal setting was not, as it is now, between 'partnerships' and 'companies', but between 'partnerships' and 'corporations'. At this time, the term 'company' had no legal meaning, rather it was an abridgement of 'joint stock company' and denoted a firm of a particular *economic* type. A joint stock company was an enterprise based on an accumulated capital fund; a firm involving many people, not usually closely related, whose membership took the highly impersonal form of a freely transferable share and whose participation in management was minimal. The terms 'joint stock company' and 'company' conveyed nothing about a firm's legal status. It is true that 'companies' were differentiated, as they are today,

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