



## The Conceptual Foundations of Modern Company Law

Paddy Ireland; Ian Grigg-Spall; Dave Kelly

*Journal of Law and Society*, Vol. 14, No. 1, Critical Legal Studies. (Spring, 1987), pp. 149-165.

Stable URL:

<http://links.jstor.org/sici?sici=0263-323X%28198721%2914%3A1%3C149%3ATCFOMC%3E2.0.CO%3B2-N>

*Journal of Law and Society* is currently published by Cardiff University.

---

Your use of the JSTOR archive indicates your acceptance of JSTOR's Terms and Conditions of Use, available at <http://www.jstor.org/about/terms.html>. JSTOR's Terms and Conditions of Use provides, in part, that unless you have obtained prior permission, you may not download an entire issue of a journal or multiple copies of articles, and you may use content in the JSTOR archive only for your personal, non-commercial use.

Please contact the publisher regarding any further use of this work. Publisher contact information may be obtained at <http://www.jstor.org/journals/cardiff.html>.

Each copy of any part of a JSTOR transmission must contain the same copyright notice that appears on the screen or printed page of such transmission.

---

JSTOR is an independent not-for-profit organization dedicated to and preserving a digital archive of scholarly journals. For more information regarding JSTOR, please contact [support@jstor.org](mailto:support@jstor.org).

## The Conceptual Foundations of Modern Company Law

PADDY IRELAND,\* IAN GRIGG-SPALL\* and DAVE KELLY\*\*

Critical legal studies should be primarily concerned with exploring the ways in which law constitutes and reinforces relations of domination and subordination in society. It is, therefore, surprising that it has given so little attention to company law, given that incorporated companies – now the dominant legal organisational form of capital – are a major site of those relations. To date the only alternatives to traditional, expository approaches to company law have been broadly contextualist in nature.<sup>1</sup> These have undoubtedly widened our knowledge and understanding of the subject, providing useful analyses of its relevance and technical rules. But being essentially atheoretical, contextualism has accepted the company as a given legal object. It has consequently offered little, if anything, by way of analysis or explanation of the key concepts which constitute the basic structures of modern company law.

We hope that this paper will lay the foundations for a more critical approach to company law. Limitations of space force us to concentrate largely on the central concept of separate personality, but we believe that our analysis opens up further areas for study, both within company law itself and beyond. The crux of our argument is that company law, and in particular the joint stock company as an economic organisational form,<sup>2</sup> can be properly understood only in the context of an analysis of the various forms taken by capital. And, more specifically, that it is the emergence of the joint stock company share as a new form of fictitious capital that underlies the doctrine of separate personality and, therefore, the basic conceptual structure of contemporary company law.<sup>3</sup>

### THE DOCTRINE OF SEPARATE PERSONALITY

Few would dispute that the doctrine of separate corporate personality is one of the cornerstones of modern company law. As one leading treatise says, the distinction between the company and its members is “fundamental”, “[lying] at the root of many of the most perplexing questions that beset company law”.<sup>4</sup> In its modern version, the doctrine posits what L. C. B. Gower

\* *Department of Law, University of Kent, Canterbury, Kent CT2 7NY, England.*

\*\* *Department of Law, North Staffordshire Polytechnic, College Road, Stoke on Trent ST4 2DE, England.*

describes as “the complete separation of the company and its members”.<sup>5</sup> The incorporated company is usually conceptualised not merely as an entity with an independent legal existence from its shareholders, but as an object which is cleansed and emptied of them. It is this depersonalised conception of the company that enables it to be ‘completely separated’ from its members. The company is, so to speak, reified. Traditionally, this ‘complete separation’ is seen as flowing from the legal act of incorporation, a point which is usually illustrated by reference to *Salomon v Salomon & Co. Ltd.*<sup>6</sup> Correspondingly, a sharp line is drawn between incorporated companies, objects in themselves whose members stand in a completely external relationship to them, and *unincorporated* companies which are “mere collection[s] or aggregation[s] of individuals”, in which the members *are* the company.<sup>7</sup>

This view as to the origins of the ‘complete separation’ of companies and their members is untenable. An examination of eighteenth and early nineteenth century cases and texts makes it clear that incorporation did *not* at that time entail such a separation. Incorporation did create an entity, the incorporated company, which was legally distinguishable from the people composing it, but there was no suggestion that this entity was ‘completely separate’ from its members. On the contrary, up to the middle of the nineteenth century incorporated joint stock companies were consistently identified with their component members and were conceptualised not as depersonalised objects but as entities composed of those members merged into one legally distinguishable body. In other words, an incorporated company was its members, albeit those members “united so as to be but one person in law . . . .”<sup>8</sup>

The contrast between this conception of the incorporated company and that prevailing today – and a fairly precise idea of when the change in conception took place – can be grasped by considering a subtle difference in the wordings of the 1856 and 1862 Companies Acts. Section 3 of the 1856 Act stated that: “Seven or more persons . . . may . . . *form themselves* into an incorporated company”, clearly indicating that the people were the company; that it was made up *of* them. Perceived as such, the incorporated company could hardly be ‘completely separate’ from its members. However, the corresponding provision of the 1862 Act (s.6) omitted the words ‘themselves into’. People formed companies, they no longer formed ‘themselves into’ companies. A company was made *by* them but not of them. While the 1856 Act clearly identified the company with its members, the 1862 Act suggested that it had an existence *external* to them. Seen as a thing made by, but not of, people, the incorporated company was depersonalised and thus ‘completely separated’ from its members. The form of words adopted for the first time in the 1862 Act persists today.<sup>9</sup>

The prevalence in the early nineteenth century of the view of the incorporated company as people merged into one body is further revealed, with particular clarity, linguistically. Nowadays an incorporated company is usually referred to in the singular, as an ‘it’, confirming its depersonalised, reified status. In the early nineteenth century, however, when they were

perceived as associations of people merged into one body, joint stock companies – incorporated and *unincorporated* – were frequently referred to in the plural, as ‘theys’. For example, in *Ex parte the Lancaster Canal Co.*, an 1828 case concerning an incorporated canal company, Sir Lancelot Shadwell remarked: “The company was formed for the purpose of making a canal; and for that purpose *they* were, as of necessity, *they* must be, empowered to purchase lands.”<sup>10</sup> And in *Myers v Perigal* (1851) Lord Truro observed: “It appears that the company carried on *their* concerns through the agency of *their* directors, and *were* empowered to invest *their* capital . . . .”<sup>11</sup> Similar examples can also be found when reference is being made to corporations rather than to companies. For instance, in *Bligh v Brent*, decided in 1837, Baron Alderson emphasised the separate personality of the incorporated company and its distinctiveness from its members, but still persistently referred to the corporation as a ‘they’: “. . . the corporation may do what *they* like with [the money], and may obtain their profit in any way *they* please from the employment of *their* capital stock . . . .”<sup>12</sup> In *Baxter v Newman* (1845) counsel is reported as arguing: “In *Bligh v Brent* the corporation *were* the legal owners, as well as the *persons* entitled to the profits.”<sup>13</sup> In fact, corporations of all kinds, and not just incorporated joint stock companies, were regarded as people merged into one legally distinct body and were thus identified with their members. In his 1793 treatise Stewart Kyd defined a corporation as “. . . a collection of many individuals united into one body . . . .”<sup>14</sup>

Those who adhere to the conventional view that ‘complete separation’ is a function of the legal act of incorporation sometimes recognise that up to the mid-nineteenth century incorporation did not have this effect. However, they dismiss this, attributing it to the confusing influence on the law of *unincorporated* joint stock companies, or to contemporary misapprehensions about the ‘true’ nature and effects of incorporation. According to the latter view, it was not until *Salomon* in 1897 that the “implications” of incorporation “were fully grasped even by the courts”, since which time “the complete separation of the company and its members has never been doubted”.<sup>15</sup> Neither of these explanations stands close scrutiny. Many of the rules identifying companies with their members were formulated in relation to incorporated, not *unincorporated*, companies. And far from being inadequately grasped by contemporary lawyers, the meanings attached to incorporation in the early nineteenth century were perfectly well understood, but different from those attached to it today. Company lawyers who fail to recognise this are guilty of a teleological reading of the past which, as Foucault and others have argued, turns it into “a confused and stuttering version of the present”.<sup>16</sup> The ‘complete separation’ of companies and their members, which emerged *for the first time* in the nineteenth century, was *reflected* in the changed consequences attributed to incorporation, but incorporation was not its source. This must be sought elsewhere, in the changing economic and legal nature of the joint stock company share.

## THE CHANGING LEGAL NATURE OF THE SHARE<sup>17</sup>

Throughout the eighteenth and early nineteenth centuries, the term 'share' was "used in its natural sense, namely as an appreciable part of [a] whole undertaking".<sup>18</sup> To possess a share in a joint stock company implied ownership of a share of the totality of the company's assets. Legally, shares in joint stock companies, incorporated and unincorporated, were viewed as equitable interests in the property of the company. "Shareholders", says D. G. Rice, "were regarded as owners in equity of the company's property."<sup>19</sup> In incorporated companies the legal interest in the property was vested in the corporation; in *unincorporated* companies, constituted through deeds of settlement, the legal title was vested in trustees. Both held the property on trust for the shareholders. Thus, in *Child v Hudson's Bay Co.*, decided in 1723, Lord Macclesfield declared that: "The legal interest of all the stock [assets] was in the company, who are trustees for the several members."<sup>20</sup> It followed that, as property, shares were directly related to and co-extensive with the assets of the company and that their legal nature depended on the nature of those assets. Shares could be either real or personal estate depending on whether or not the company owned land. When the courts had to decide whether shares (in both incorporated and *unincorporated* companies) were realty and, therefore, within the Statutes of Mortmain or Frauds, they uniformly held that the matter turned on the nature of the company's assets.<sup>21</sup> In the early 1830s it was still consistently being held that company shares were realty if "the corporation were seized of real estate".<sup>22</sup> Crucially, while the share was legally perceived as an equitable interest in the company's assets, shareholders – the equitable co-owners of those assets – were necessarily closely identified with their companies. They could not be 'completely separate'.

From the 1830s, however, the legal nature of shares began to be reconceptualised, and by the mid-nineteenth century the close link between shares and the assets of companies had been severed. The crucial case, *Bligh v Brent*, was decided in 1837 and concerned shares in an incorporated waterworks company. The issue before the court was whether the company's shares were realty and within Mortmain. In accordance with the prevailing view, counsel argued that the nature of the company's shares as property depended on the nature of the company's assets. In every joint stock company, he asserted, "the shareholder has an estate of the same nature as the company". Despite the overwhelming weight of the authorities, the court rejected this view. They argued that the case turned on "the nature of the interest which each shareholder is to have", and in their view shareholders in incorporated joint stock companies had interests only in the profits of companies and no interest whatsoever in their assets. The shares were personalty, irrespective of the nature of the company's property.<sup>23</sup>

*Bligh v Brent* was the turning point, although uncertainties remained for some years after, particularly in relation to the nature of shares in *unincorporated* companies and in companies whose business activities were closely connected to land. By the mid 1850s, however, these had largely

disappeared. In *Watson v Spratley*, decided in 1854, the court had to determine the nature of the shares of an *unincorporated* mining company. It held that the matter turned on “the essential nature and quality of a share in a joint stock company”, and declared its shares to be interests only in profits.<sup>24</sup> Henceforth, shareholders, even in *unincorporated* joint stock companies, had no direct interest in the physical assets of their companies. Shares were personalty irrespective not only of the nature of the company’s assets but also of its legal status. They were an entirely separate form of property: legal objects in their own right. They had been freed from their direct link to the property of joint stock companies. By 1861 Sir John Romilly was asserting that “shares in joint stock companies . . . are, in fact, in the nature of property”.<sup>25</sup> Critically, as the share became property in its own right, a legal space emerged between *incorporated* and *unincorporated* joint stock companies – owners of the assets – and their shareholders – owners of the shares.

The recognition of the share as a new form of property was not, however, without problems. The exact legal nature of this new form of property eluded and continues to elude company lawyers. As L. C. B. Gower openly admits, the question “What . . . is the exact juridical nature of the share?” is more easily asked than answered.<sup>26</sup> Lawyers know what a share is not – a direct interest in the company’s assets – but not what it is. For example, in defining the share, one leading company lawyer got into the following tangle:

A share is, therefore, a fractional part of the capital. It confers upon the holder a certain right to proportionate part of the assets of the corporation, whether by way of dividend or of distribution of assets in winding up. It forms, however, a separate right of property. The capital is the property of the corporation. The share, although it is a fraction of the capital, is the property of the corporator. The aggregate of all the fractions if collected in two or three hands does not constitute the corporators the owners of the capital – that remains the property of the corporation. But, nevertheless, the share is a property in a fractional part of the capital . . . .<sup>27</sup>

Although this passage is cited with approval by one contemporary company law treatise,<sup>28</sup> it is neither coherent nor helpful.

In short, what company lawyers seem to have had great difficulty accommodating is the major change, recognised by writers such as C. B. Macpherson, that has taken place over the last two hundred years in the preponderant nature of property. As Macpherson observes, property no longer predominantly takes the form of rights in specific material things – land, factories, machines and so on – but the form of rights to revenues.<sup>29</sup> Since the eighteenth century there has been an explosion in these new, abstract, intangible forms of property. Law not only enforces these rights of property – things such as government bonds, loan stocks, mortgages and other instruments of credit – law actually constitutes them as property on a par with property in actual material things. Of these new forms, the joint stock company share is one of the most important.

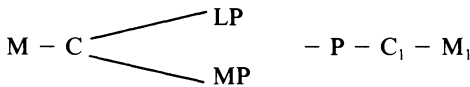
To understand the emergence of the modern doctrine of separate personality, with its reified conception of the company and ‘complete separation’ of company and members, we need to trace the historical processes whereby

the share and other similar titles to revenue emerge as legally recognised autonomous forms of property. We will, therefore, first consider the economic nature of these titles to revenue and then outline the conditions necessary for them to emerge as forms of property in their own right.

## RIGHTS TO REVENUE AS FORMS OF MONEY CAPITAL

The most appropriate starting point is Marx's analysis of these titles to revenue as forms of what he calls interest bearing or money capital. The ideal typical money capital transaction is a loan in which, in return for an increment in the form of interest, money is temporarily transferred from its legal owner to another person who uses it in the production process. Analytically, the transaction involves the transformation of money into money capital: a move from money as a means of facilitating exchange to money as a commodity in itself which commands a price. As Marx explains, this transformation can only take place under certain historical conditions – conditions in which labour power has become a commodity. It is the class relation between capitalist and wage-labourer which permits the transformation of mere money into capital. Interest, the return that accrues to money capital, is part of the surplus value produced by wage-labour.<sup>30</sup>

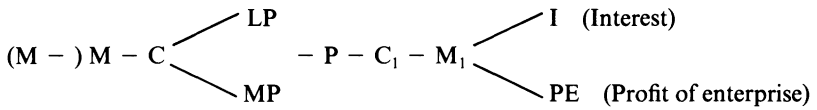
This transformation of money into money capital is not, however, apparent in the basic motion underlying the capitalist mode of production:



The capitalist spends money (M) to purchase certain commodities (C), means of production (MP) and labour power (LP). These are utilised in the production process (P) to produce other commodities (C<sub>1</sub>) whose value is greater than those used in their production. The latter commodities are then sold for a sum of money (M<sub>1</sub>) which is greater than the original money expended. The difference in magnitude between M and M<sub>1</sub> constitutes surplus value or profit and accrues to the capitalist. Money here is merely a means of facilitating exchange, although it operates as “capital in the production process”.<sup>31</sup>

For this movement to occur, however, capitalists must have sufficient money to start production. Even in the labour intensive, low technology production processes that predominated in Britain during early industrialisation, where the amount of money required was generally small, capitalists were often compelled to borrow money. When the technology involved was more advanced and the fixed costs higher – as in areas such as insurance, canals, public utilities and, later, railways – the sums needed were often much larger and borrowed money was absolutely indispensable.<sup>32</sup> From an early stage in the history of capitalism, therefore, the development of a credit system, in which money was transformed into money capital, was essential to

enable the centralisation of sufficient capital for production to commence. The 'normal' circuit of capital becomes:



In this process, the functions of contributing funds and of utilising those funds in the production process come to be performed by different people. 'money capitalists' contribute funds, 'industrial capitalists' utilise them. The former ensure that surplus value is produced, but as they borrow the capital they operate they have to surrender part of the surplus value created. The surplus value generated in production thereby comes to be divided into two qualitatively distinct parts: profit of enterprise which accrues to the industrial capitalist and interest which accrues to the money capitalist. Interest represents a relationship between two capitalists and, as such, necessarily entails antagonism between them as they contest the division of surplus value.<sup>33</sup>

Historically, then, the credit system and money capital in its many guises emerge as integral parts of the capitalist mode of production. Capitalists are forced by "the logic of the overall circulation of capital . . . to create new financial instruments and a sophisticated credit system which pushes money and interest bearing capital into a prominent role in relation to accumulation".<sup>34</sup>

### RIGHTS TO REVENUE AS PROPERTY; THE NATURE OF FICTITIOUS CAPITAL

Part of the process whereby a sophisticated credit system develops is the legal constitution and recognition of these 'new financial instruments' - these new forms of money capital - as autonomous forms of property. In this section we will be concerned with the 'logic of the overall circulation of capital' that generates this development. We will look first at the 'pure' phenomenal form of money capital, the loan, and return later to the share.

At common law these titles to revenue were initially classified as 'choses in action'. This category - which by the eighteenth century covered instruments such as bills, notes, cheques, government stock and joint stock company shares - was used to describe all personal rights of property enforceable only by action and not by taking physical possession.<sup>35</sup> Titles to revenue were, therefore, conceptualised as rights personal to the parties bound by the obligation. As such, they were non-assignable and incapable of being independent forms of alienable property. At common law choses in action could not even be stolen and legislation was needed to take them out of this rule.<sup>36</sup> Similarly, in early incorporated companies, the instrument of incorporation had to specifically provide for the transferability of shares, which were otherwise considered to be non-assignable.<sup>37</sup> Gradually, however, as

Sir William Holdsworth observes, “some of the choses in action . . . changed their original character and [became] very much less like merely personal rights of action and very much more like rights of property”.<sup>38</sup> Marx outlined the conditions in which this happened in his analysis of what he called ‘fictitious capital’, when he showed that in certain circumstances titles to revenue develop a capital value of their own separate from the value of the productive assets from which their value is derived.<sup>39</sup>

The key to understanding this development is the barriers that inhibit the circulation of money capital and the need to overcome them. When capital exists as money it is exchangeable, liquid and mobile. Once ‘loaned’ against future surplus value production, however, it becomes tied to specific assets, and problems arise if lenders are not willing to give up control of their money for sufficient time for borrowers to finance their operations. Historically, the most important solution to these problems was the establishment of developed markets for titles to revenue, permitting money capital to preserve its flexibility and liquidity. It is under these conditions that these titles develop a capital value of their own and become a form of capital in themselves. They emerge as ‘fictitious capital’ and come to be legally recognised as new autonomous forms of property.

The separate capital value of these titles is established in the market through the process we call the ‘capitalisation of revenues’. A periodic income is capitalised by calculating it, on the basis of the prevailing rate of interest, as an income which would be realised by a capital loaned at this rate of interest. So, for example, if one had an annual income of £50 and the prevailing rate of interest was ten per cent, that income would represent the annual interest on £500. That £500 would be the fictitious capital value of the legal title to the annual £50.<sup>40</sup>

Money capital comes to be invested in many different titles to future surplus values and money capitalists become indifferent to the ultimate source of their revenue. They invest in government debt, stocks, shares and so on. As markets develop in these titles, they emerge as autonomous forms of property. Marx noted that as this happens, “capital more and more acquires a material form, is [increasingly] transformed from a relationship into a thing”. This thing, “which embodies . . . the social relationship . . . acquire[s] a fictitious life and independent existence”.<sup>41</sup> It is in this form that the social relationship comes to exist in our consciousness. Moreover, as this occurs, “the conception of [such] capital as a self-reproducing and self expanding value, lasting and growing eternally by virtue of its innate properties, is thereby established”.<sup>42</sup> In short, the circuit of money-capital appears as  $M - M_1$ , money-capital seeming to possess the inherent ability to command interest. Interest seems to accrue merely as a result of legal agreement between two individuals and the circuit of money-capital assumes a phenomenal form that appears quite separate from, and external to, the circuit of productive capital.

One of the major purposes of Marx’s analysis of fictitious capital was to expose the ‘fetishisation of money’ that underlies the legal recognition of these titles to revenue as new forms of property, as self-expanding ‘things’. In the

eighteenth and early nineteenth centuries, when titles to revenue were still usually regarded as choses in action rather than as property in themselves, revenues were generally seen as connected to specific social relations, as reflected in classical political economy. The reification and fetishisation of these titles broke the direct link between revenues and productive activity, and was the basis for the development of new forms of economic, political and social consciousness. These new forms of consciousness abandoned the notion of labour as the source of value and declared capital – a thing – to be equally productive. The fetishisation of money capital through the legal constitution of its phenomenal forms as property in themselves led inexorably, therefore, to the dominance of exchange and market ideologies from the mid-nineteenth century.<sup>43</sup>

### THE SHARE AS FICTITIOUS CAPITAL

The share form of money capital cannot become fictitious capital in exactly the same way as, say, government bonds or loan stock, for there is a much closer relationship between the value of shares and the functioning industrial capital of companies. Nevertheless, the periodic income which shareholders receive in the form of dividends is capitalised in the same way as that for government bonds. The capitalised value of the share is the sum of money which would command at the prevailing rate of interest a return equivalent to the income actually accruing to the share. So, for example, given a prevailing rate of interest of ten per cent, a share whose nominal value was £100 and which paid £20 per annum, would have a market value of £200 because when capitalised at 10 per cent it would represent a fictitious capital of £200. On the other hand, a £100 nominal value share paying only £5 per annum would represent a fictitious capital of only £50. Thus, fictitious share capital exists as a capitalised claim on the surplus value generated by a company's productive capital. The price of shares, therefore, is determined not by the value of the company's assets, but by the volume of profit generated by those assets and by the prevailing rate of interest.<sup>44</sup> As Paul Sweezy notes: "One difference always remains, namely, that the shareholder runs a greater risk of loss than the pure lender and hence the yield on shares can be expected to exceed interest on money by a variable risk premium."<sup>45</sup>

The share-market, then, apparently doubles the capital of companies. On the one hand, there is the concrete, productive capital. In law this is the sole property of the reified 'company', now a phenomenal form of industrial capital. On the other hand, there is also the fictitious share capital, a new phenomenal form of money capital and the property of the shareholders. The same sum of money thus comes to function as capital for two people. Industrial capitalists use it as capital *in* the production process and money capitalists use it as capital *outside* the production process. As Hilferding says, "the second capital is an illusion". Only the industrial capital and its profit 'really' exists, "but this does not prevent the fictitious [share] capital from existing in an accounting [and, we might add, legal] sense", although "in

reality it is not capital, but only the price of a revenue". Critically, shareholders can now recover their capital in money form at any time by simply selling their titles to revenue. The share market thus "endows [shares], which the individual can now always realise, completely with the character of money capital". Dividends crystallise out as just another form of 'interest'.<sup>46</sup>

As with other forms of money capital, the basic condition for joint stock company shares to emerge as separate forms of property with capital value in themselves is the development of a generalised market in them. We now turn to the historical development of this market.

### THE HISTORICAL EMERGENCE OF THE JOINT STOCK COMPANY SHARE AS A NEW FORM OF FICTITIOUS CAPITAL<sup>47</sup>

The first British joint stock companies began to emerge in the sixteenth century. They were *not*, however, "public in the full modern sense of the term", but were "more in the nature of 'extended partnerships'".<sup>48</sup> The relatively few joint stock companies in existence were divided into very few large denomination shares, and clauses restricting and regulating their transfer were common. Although from the outset shares were sold outside personal acquaintances, there was no basis for a developed public market in them. In the eighteenth century, when the stock exchange grew rapidly, the basis of its growth was increasing government debt, trade in company shares forming a negligible part of its business. The number of companies quoted in Castaing's *Course of Exchange* actually fell from seven in 1753 to six in 1775 and to five in 1800.<sup>49</sup>

The numerous joint stock canal, insurance and other companies formed in the late eighteenth and early nineteenth centuries generated few changes in this respect. Studies of canal companies reveal limited numbers of relatively large denomination shares, few shareholders and considerable stability of shareholding.<sup>50</sup> The prices of canal, dock, insurance and water works shares were included in the official list for the first time in 1811, followed later by those of other miscellaneous companies, but "there was no really widespread interest in them as an outlet for savings . . . [T]here are no statistics on daily share turnover, [but] indirect evidence suggests that it was very limited."<sup>51</sup> Exchange business continued to be concerned almost exclusively with government stock. So far as the legal nature of the share was concerned, the undeveloped state of the market was crucial.

By this time the great majority of shareholders were simple *rentiers* who played little active part in management and treated their shares as mere rights to revenue. However, in the absence of a public share market, shares could not develop as fictitious capital with a value in themselves. As a consequence, they inevitably retained a direct link to a company's productive assets and were legally conceptualised not as property in their own right but as equitable interests in those assets, realty or personalty. In short, while the share incorporated a title to revenue, it was considered to be so inextricably connected to the assets of companies that it could not yet be constituted as a

separate form of property. It was a rather peculiar legal amalgam of money and industrial capital, which had not yet been juridically separated within the joint stock company. Such a legal distinction had already been drawn in respect of other titles to revenue, such as loans.<sup>52</sup> In these circumstances shareholders could not be 'completely separated' from their companies. This was reflected in the contemporary view of joint stock companies, incorporated and *unincorporated*, as entities composed of shareholders merged into one body; as aggregates of people; as 'theys'. People still 'formed themselves' into companies.

In the period after 1825 the nature of the share was transformed. The principal cause was the rapid development of the railway system.<sup>53</sup> Railways involved massive outlays on fixed capital, requiring the aggregation of large amounts of money capital. The smaller denomination, freely transferable share was the chosen form of centralisation. The railways brought, therefore, a dramatic increase both in the number of shareholders and in the number of shares available for trading. Dealings in railway shares involved an "extraordinary volume of transactions by previous standards".<sup>54</sup> By the second railway boom of the 1840s the stock exchange had been "perfectly revolutionised",<sup>55</sup> and was "geared . . . to handle a growing range of company securities".<sup>56</sup> Stock exchanges even emerged in provincial centres, and gradually a national investment press developed. Joint stock company shares had become much more widely held: ". . . a class of property had been, if not created, then vastly expanded".<sup>57</sup>

The effects of these developments on shares, however, were qualitative as well as quantitative. Shares were not only much more numerous, they were now marketable commodities, liquid assets, easily converted by their holders into money. They were titles to revenue capable of being capitalised; a form of fictitious capital, separate from the productive capital of the company. Legally, they were judicially redefined as objects of property in themselves. Shares, said Bacon C.J. in 1871, "are not things in action at all but are as much part of [a] bankrupt's estate as if they had been freehold property".<sup>58</sup> 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 companies and their shareholders and 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.<sup>59</sup> They no longer formed 'themselves into' companies, but formed companies, objects external to them. A company was no longer a plural entity, a 'they', people merged into one body; it was now a singular entity, an 'it', an object emptied of people. Both the company and the share had been reified.

The conditions now existed for the emergence of the modern version of the principle of separate personality, and gradually the meaning attached to incorporation changed. In the 1870s Seward Brice, reflecting on Kyd's 1793 definition of a corporation as "a collection of many individuals united into one body", commented: '[It is] fairly accurate . . . but sufficient stress is not

laid upon that which is its real characteristic in the eye of the law, viz. its existence separate and distinct from the individual or individuals composing it.”<sup>60</sup> Modern company law was emerging.

## RECONSIDERING COMPANY LAW

We have shown that, contrary to the orthodox view, the source of the modern principle of separate personality is not incorporation but the historical processes whereby the joint stock company share emerges as a form of fictitious money capital. In so doing we offer a methodology for the study of company law which involves an excavation of the specifically historical conditions and social relations which lead to the emergence of joint stock companies as a phenomenal form of industrial capital and the share as one of the phenomenal forms of money capital. This method “reasons from the forms in which economic phenomena present themselves on the surface of society to the material network of essential relations peculiar to the mode of production in question which explain why the phenomena should take such forms”.<sup>61</sup> Such a ‘transcendental analytic’ enables us not only to grasp that exploitation and class struggle between wage-labour and capital and between fractions of capital (industrial and money) are the essential relations underlying the joint stock company and the share, but also to explain how the latter serve to obscure those relations. It casts considerable light on many aspects of company law, of which we would like to briefly consider a few.

First, it enables us to understand the reasons for the difficulties that jurists have encountered in legally conceptualising the share. The joint stock company share is a form of property whose basis lies in the statutory contract between the shareholder and the company, the terms of which are contained in the company’s Memorandum and Articles. These normally provide for, *inter alia*, some provision as to repayment of capital on a solvent winding-up and a title to dividend. Although this title is readily saleable and easily capitalised – constituting the share as a form of property in its own right – it is contingent upon, and varies according to, profitability. As a result, shares inevitably retain a much closer link to productive capital than loan capital. It is the contingent and variable nature of the return that prevents the share from being a ‘pure’ money capital form like the loan.

Secondly, it illuminates the sources and purposes of the doctrine of *ultra vires*, whose emergence can now be seen as a part of the process whereby legal protection was afforded the joint stock company share. The doctrine, by restricting a company to the objects of its memorandum and declaring that even the unanimous shareholders cannot ratify an *ultra vires* transaction, constituted the share as a *specific* form of freely transferable property: a railway share, an insurance share and so on. In thereby stabilising the share the doctrine sought to enable more ‘rational’ decisions to be taken in the market by investors. It also reflected and reinforced the increasing reification of the company.<sup>62</sup>

Thirdly, we can make sense of the difficulties that company lawyers have with the concept of capital – described by Farrar as “ambiguous and confusing”<sup>63</sup> – and with that “baffling branch of the law”<sup>64</sup> dealing with dividends and capital maintenance. As originally formulated, the doctrine of capital maintenance essentially entailed the protection of a company’s productive capital, and failed to grasp the difference between this and fictitious share capital. Later revisions were based on a recognition of the share as fictitious capital and a desire to protect its integrity as such, as represented by its value on the stock exchange. The crucial distinction between the value of a company’s productive capital and the value of its fictitious share capital also helps us to comprehend the legally neglected and, to lawyers, rather mysterious notion of ‘goodwill’ which surfaces when businesses are valued.

More generally, we can comprehend the essential basis of the legal distinctions drawn between public listed companies and private companies, and the problems that arise from their both having the same basic legal form and status. In brief, only joint stock company shares can properly become forms of fictitious capital, property in themselves; only joint stock company shareholders can become ‘pure’ money capitalists. Whatever the established legal consequences of incorporation, the shareholders of private companies can never ‘completely separate’ themselves from their companies in the same way as shareholders in public, joint stock companies.<sup>65</sup>

It also becomes apparent that the overriding contextualist concern with the so-called separation of ownership and control within modern joint stock companies is premised upon, but fails to properly understand, changes in the phenomenal forms of capital. The development of the share and other forms of credit enables capitalists to withdraw from the production process, which comes to be supervised by managers. Contextualists fail to theorise the resulting reification of the company and ‘externalisation’ of shareholders, and this leads them to the mistaken claim that the ‘separation of ownership and control’ has fundamentally altered the nature of the joint stock company. For the same reasons, claims that worker participation can ‘democratise’ companies are misconceived.<sup>66</sup>

Finally, in demonstrating the centrality of law to the development of the circuits of money capital, our analysis has some important implications for critical legal studies in general. Recently, a number of critical legal theorists have correctly emphasised the ways in which law, as well as being constituted by capitalist social relations, is actually constitutive of them. For example, Karl Klare, in forwarding such a “constitutive theory of law”, suggests that the legal process is “one of the primary forms of social practice through which actual relationships embodying class power [are] created and articulated”.<sup>67</sup> Having made this important point, however, they tend to focus specifically on people: on the legal dimensions of their personal relationships and on their legal constitution as individual legal subjects. In so doing, they fail to recognise that capitalist social relations come to be reified and depersonalised; that is, that class relations under developed capitalism cease to be personal but

come, to a significant extent, to be embodied in things, some of which – like the joint stock company share – are constituted *in law* as autonomous forms of property. To oversimplify, a pre-condition of the full development of the notion of the individual legal subject existing in apparent isolation – the premise of fully developed bourgeois theory – is the disconnection of revenues from social relations. Crucial to this process is the legal reification and mystification of titles to revenue; that is, their constitution as things in themselves, as self-expanding, autonomous forms of property.

## CONCLUSION

The historical process whereby the share and the joint stock company are contemporaneously reified is but a part of the general historical process which occurs with the development of capitalism, whereby persons cease to relate to persons except through the ownership and exchange of things. Things come to relate to other things. This reification of social relations is an inseparable aspect of developed capitalism. Its root lies in the commodification of labour power, wherein living, creative energy is treated as just another thing to be bought and sold at a price. It is this reification of living labour which is the initial basis for the complete reification and mystification of all social relations.

The processes of production – the means of human life – come to be controlled by abstract relationships between things, relationships expressed in the economic terms of price, profit, interest, rent and wages. Modern political economy merely formulates the laws of alienated labour. Thus, it is not a person but a thing, capital (often in the form of ‘the company’), which possesses the power to set the production process in motion. Or more contemporarily, it is the failure of this thing to yield adequate profit which occasions the dismissal of masses of workers and the increased exploitation of others worldwide. Similarly, it is the relationship of the share (and of loan stock) to the joint stock company – of object to object – which defines the basic relationship between finance and production and which thereby regulates productive activity and with it our means of existence. People come to be mere adjuncts or agents of these objects, either as their temporary owners or as directors, employees or customers of the reified entity, the company. And they relate to these objects, of course, only as buyers or sellers of other things, including themselves. People become mere personifications of things over which they have lost control. They are “alienated from their real conditions of existence”<sup>68</sup> and their lives come to be governed by the relationship of fetishised object to fetishised object. Participants in capitalist production live in a bewitched world in which their own relationships appear to them as properties of things.

So it is with stock, shares, mortgages and overdrafts – all of which confront us as forms of self-expanding autonomous property. Things whose demands over our lives lead, at best, to intensified incorporation and exploitation, and, at worst, to catastrophe and crisis. These forms of property – of ‘interest-

bearing' capital – and their necessary adjunct wage-labour – come to be crucial aspects of what Fromm calls “the insanity of our normality”.<sup>69</sup> An insanity which declares that money must have its price in our energy, our lives, our very conditions of existence. These claims of money capital, whether as demands at work or demands at home, come to be accepted as natural and inevitable features of our everyday lives. And the destruction of whole peoples – of whole cultures – by such demands come to be merely part of the necessary working of the international monetary system.

Marx's critique shows that “capital's seemingly natural and eternal forms rest on relations that are social and historical”, relations constructed by human beings and capable of being changed by other human beings. In so doing it has the capacity, both in theory and in practice, to “blow that world apart”.<sup>70</sup>

## NOTES AND REFERENCES

- <sup>1</sup> See, for example, T. Hadden, *Company Law and Capitalism* (2nd ed. 1977). Also D. Kelly, Book Review, (1986) 20 *Law Teacher*.
- <sup>2</sup> The distinction between the joint stock company as an *economic* form and the incorporated company as a *legal* form is crucial to this paper; see P. Ireland, “The Rise of the Limited Liability Company” (1984) 12 *Int. J. Sociology of Law* p. 239. Our analysis is essentially concerned with joint stock companies (very roughly, public companies) and their shares. Originally, company law was specifically formulated to regulate such companies.
- <sup>3</sup> This essay is an abridged summary of the work we are doing on company law, capital fetishism and the reification of social relations. We have footnoted some of the detailed papers on which this essay is based, and would be happy to provide copies and further references to those interested.
- <sup>4</sup> F. B. Palmer, *Company Law* (21st ed. 1968; ed. Schmitthoff and Thompson) p. 134.
- <sup>5</sup> L. C. B. Gower, *Modern Company Law* (4th ed. 1979) p. 100.
- <sup>6</sup> (1897) A.C. 22.
- <sup>7</sup> F. B. Palmer, *op. cit.*, p. 124.
- <sup>8</sup> J. W. Smith, *Mercantile Law* (3rd ed. 1843) p. 81.
- <sup>9</sup> Joint Stock Companies Act 1856 s.3, 19 & 20 Vict. c.40; Companies Act 1862 s.6, 25 & 26 Vict. c.89.
- <sup>10</sup> Mont. & Bligh 94; 1 Deac. & Chitty 411.
- <sup>11</sup> 2 De G. M. & G. 599.
- <sup>12</sup> 2 Y. & C. Ex. 268.
- <sup>13</sup> 14 L.J.C.P. 193.
- <sup>14</sup> S. Kyd, *On Corporations* (1793) Vol. I, p. 13.
- <sup>15</sup> L. C. B. Gower, *op. cit.*, pp. 97, 100.
- <sup>16</sup> M. Cousins and A. Hussain, *Michel Foucault* (1984) p. 37.
- <sup>17</sup> For a detailed discussion see P. Ireland, I. Grigg-Spall and D. Kelly, “The Legal Reconceptualisation of the Share” (unpublished). Throughout this paper we will be focusing on ordinary shares.
- <sup>18</sup> W. R. Scott, *The Constitution and Finance of English and Irish Joint Stock Companies to 1720* (3 Vols. 1909-12) Vol. I, p. 45.
- <sup>19</sup> D. G. Rice, “The Legal Nature of the Share” (1955, unpublished dissertation) p. 2.
- <sup>20</sup> P. Wms. 207.
- <sup>21</sup> See *Howse v Chapman* (1799) 4 Ves. 542; *Buckridge v Ingram* (1795) 2 Ves. Jun 652.
- <sup>22</sup> Sir John Leach in *Ex parte The Vauxhall Bridge Co.* (1821) 1 Glyn. & Jac. 101.
- <sup>23</sup> *Supra*, n. 12.
- <sup>24</sup> 10 Ex. 222.

- <sup>25</sup> *Poole v Middleton* 29 Beav. 646.
- <sup>26</sup> L. C. B. Gower, *op. cit.*, p. 397.
- <sup>27</sup> Lord Wrenbury in *Bradbury v English Sewing Cotton Co. Ltd.* (1923) A.C. 744 at 767 (H.L.).
- <sup>28</sup> J. Farrar, *Company Law* (1985) p. 134.
- <sup>29</sup> C. B. Macpherson, "Capitalism and the Changing Concept of Property" in *Feudalism, Capitalism and Beyond* (1975; eds. Kamenka and Neale) p. 104.
- <sup>30</sup> See K. Marx, *Capital*, Vol. II, chap. 1; and *Capital* Vol. III, chap. 21.
- <sup>31</sup> K. Marx, *op. cit.*, Vol. III, p. 375.
- <sup>32</sup> See D. Landes, "The Structure of Enterprise in the Nineteenth Century" in *The Rise of Capitalism* (1960; ed. D. Landes); also P. Ireland, "The Rise of the Joint Stock Company" (unpublished).
- <sup>33</sup> K. Marx, *op. cit.*, Vol. III, chaps. 21 and 23.
- <sup>34</sup> D. Harvey, *The Limits to Capital* (1982) p. 254.
- <sup>35</sup> See W. Holdsworth, *A History of English Law* (2nd ed. 1937) Vol. VII, p. 516.
- <sup>36</sup> For example, 2 George II c.25, dealing with, *inter alia*, South Sea bonds, bank notes and East India bonds.
- <sup>37</sup> W. Holdsworth, *op. cit.*, Vol. VII, pp. 531-32; see also A. B. Dubois, *The English Business Corporation after the Bubble Act 1720-1800* (1938).
- <sup>38</sup> W. Holdsworth, *op. cit.*, Vol. VII, p. 543.
- <sup>39</sup> K. Marx, *op. cit.*, Vol. III, chaps 25 and 29; Harvey, *op. cit.*, pp. 266-70.
- <sup>40</sup> See K. Marx, *op. cit.*, Vol. III, chaps. 25 and 29. The idea is best illustrated by government stock.
- <sup>41</sup> K. Marx, *Theories of Surplus Value* Book III, (Progress ed. 1972) p. 483.
- <sup>42</sup> K. Marx, *op. cit.*, n. 30, Vol. III, p. 394.
- <sup>43</sup> See S. Clarke, *Marx, Marginalism and Modern Sociology* (1982).
- <sup>44</sup> See R. Hilferding, *Finance Capital* (R.K.P. ed. 1981) pp. 107-116; see *Short v Treasury Commissioners* [1948] A.C. 534.
- <sup>45</sup> P. Sweezy, *Theory of Capitalist Development* (1968 ed.) p. 238.
- <sup>46</sup> R. Hilferding, *op. cit.*, pp. 109-10.
- <sup>47</sup> For detailed coverage see P. Ireland, I. Grigg-Spall and D. Kelly, "The Legal Reconceptualisation of the Share" (unpublished).
- <sup>48</sup> W. R. Scott, *op. cit.*, Vol. I, pp. 45-46; K. G. Davies, "Joint Stock Investment in the Later Seventeenth Century" in *Essays in Economic History* (1954; ed. Carus-Wilson) Vol. II, p. 273.
- <sup>49</sup> See W. R. Scott, *op. cit.*; E. Morgan and W. A. Thomas, *The Stock Exchange* (1962); P. G. M. Dickson, *The Financial Revolution in England* (1967).
- <sup>50</sup> G. H. Evans, *British Corporation Finance* (1936).
- <sup>51</sup> A. D. Gayer, W. W. Rostow and A. J. Schwarz, *The Growth and Fluctuation of the British Economy 1790-1850* (1953) p. 376.
- <sup>52</sup> In contemporary partnership law loans varying with profits were held to constitute the lender a partner. See P. Ireland, I. Grigg-Spall and D. Kelly, "Usury and Transitional Forms of Money Capital" (unpublished).
- <sup>53</sup> M. C. Reed, "Railways and the Growth of the Capital Market" in *Railways in the Victorian Economy* (1969; ed. Reed) p. 167.
- <sup>54</sup> A. D. Gayer, W. W. Rostow and A. J. Schwarz, *op. cit.*, p. 409.
- <sup>55</sup> D. Morier Evans, *The City, or the Physiology of London* (1845).
- <sup>56</sup> M. C. Reed, *op. cit.*, p. 163; see also M. C. Reed, *Investment in Railways in Britain 1820-1844* (1975).
- <sup>57</sup> B. R. Mitchell, "The Coming of the Railway and U.K. Economic Growth" (1964) 24 *J. Economic History* p. 331.
- <sup>58</sup> *Ex parte Union Bank of Manchester* 12 Eq. 354.
- <sup>59</sup> The emergence of the share as a fully independent form of property and the concomitant separation of the share from shareholders was not completed until the introduction of general limited liability and the market dominance of fully paid-up shares.

- <sup>60</sup> S. Brice, *Ultra Vires* (1st ed. 1875) pp. 1-2.
- <sup>61</sup> D. Sayer, *Marx's Method* (2nd ed. 1983) p. 17; since the 1930s in Britain the 'group' or holding company-subsidary form has become more dominant than the single joint stock company form. See P. Ireland and I. Grigg-Spall, "Managerial and Legal Forms of Industrial Capital" (unpublished).
- <sup>62</sup> See D. Kelly, "Rethinking Ultra Vires" (unpublished).
- <sup>63</sup> J. Farrar, *op. cit.*, p. 125.
- <sup>64</sup> L. C. B. Gower, *Modern Company Law* (3rd ed. 1969) p. 115.
- <sup>65</sup> See P. Ireland, *op. cit.*, n. 2.
- <sup>66</sup> See I. Grigg-Spall, "Worker Directors and the Joint Stock Company" (unpublished).
- <sup>67</sup> K. Klare, "Law Making as Praxis" (1979) 40 *Telos* pp. 128-30.
- <sup>68</sup> L. Althusser, *Lenin and Philosophy* (1971) p. 163.
- <sup>69</sup> E. Fromm, *The Sane Society* (1955).
- <sup>70</sup> D. Sayer, *op. cit.*, p. 149.