

THE ENGLISH PRIVATE COMPANY

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Since 1908 the expression "Private Company" has been a term of art with a precise statutory definition. This definition, however, was merely the culmination of a long historical development and it is perhaps advisable to commence this short account of an immensely important branch of English Company Law by a brief summary of its historical background.¹

Until 1844 there were no arrangements in England for speedy and cheap incorporation. The boon of corporate entity could only be obtained by a special Act of Parliament or by obtaining a charter from the Crown and neither was readily procurable. Hence business men and their advisers had tried to mould the unincorporated partnership into a form which would provide most of the advantages of corporate personality without a formal grant of incorporation. Thanks to the ubiquitous trust concept their efforts met with considerable success and produced a form of joint stock company organized under a Deed of Settlement which vested the property of the concern in Trustees, divided it into transferable shares, and entrusted its management to directors who would normally be the same as the trustees.

The unincorporated Deed of Settlement Company was subject to three main disadvantages, all flowing from the fact that in the eyes of the law it was merely a partnership although often swollen to a size which destroyed any possibility of the mutual confidence between the members which was supposed to be at the root of partnership law: (1) The members were personally liable for the obligations of the firm without limitation of liability; (2) the gravest procedural difficulties arose when the company was suing or being sued or when execution was being levied on its property or that of its members; and (3) it was doubtful whether even express provision in the Deed of Settlement could effectively provide for complete freedom of transferability of shares. While the Bubble Act² remained in force, the better view was that some limitation on transfers was essential,³ and even after the Act was repealed in 1825⁴ doubts still remained.⁵ Hence share transfers were normally

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¹ The best accounts of the most important periods are A. B. DUBOIS, *THE ENGLISH BUSINESS COMPANY AFTER THE BUBBLE ACT, 1720-1800* (1938); B. C. HUNT, *THE DEVELOPMENT OF THE BUSINESS CORPORATION IN ENGLAND, 1800-1867* (1936). For a recent short account of the whole development, see C. A. COOKE, *CORPORATION, TRUST AND COMPANY* (1950).

² 6 GEO. I, c. 18 (1720).

³ This was the view taken by professional opinion immediately after the passing of the prolix and obscure Act (see DUBOIS, *op. cit. supra* note 1, at 3 *et seq.*) and is supported by the nineteenth century decisions of which there is a good account in HUNT, *op. cit. supra* note 1, at cc. II and III.

⁴ By 6 GEO. IV, c. 91.

⁵ They were only finally eradicated in 1843: *Garrard v. Hardey*, 5 Man. & G. 471, 134 Eng. Rep. 648 (C. P. 1843); and *Harrison v. Heathorn*, 6 Man. & G. 81, 134 Eng. Rep. 817 (C. P. 1843).

subject to express restriction and this, coupled with the fact that shares entailing unlimited liability were not readily marketable, tended at first to restrict the use of unincorporated Deed of Settlement Companies to groups of business men with common interests. Having regard to this, it is interesting to note that, already in the eighteenth century, the term "private company" was in use to distinguish such concerns from public companies incorporated by charter or statute.⁶

During the early nineteenth century, however, there was an enormous growth of company promotions, genuine and fraudulent,⁷ and methods of evading the members' legal liability were developed. The chaotic state of the law forced the legislature to intervene, at first hesitantly,⁸ but under the influence of Gladstone, then President of the Board of Trade, more boldly in the first great Companies Act of 1844.⁹ This Act enabled companies to become incorporated by registering their Deeds of Settlement with the Board of Trade¹⁰ and, for the first time, attempted to draw a clear-cut distinction between companies and partnerships by providing that associations of more than 25 persons (reduced to the present 20 in 1856) should be unlawful unless registered under the Act or formed under charter or statute. This Act, however, denied one of the most sought after consequences of incorporation—freedom from personal liability; its object was to regulate, not to encourage, speculation. Eleven years later, however, after lengthy and heated controversy in Parliament, Royal Commissions, Departmental Committees, the Press, and, indeed in every forum of public and commercial opinion, Parliament under pressure from the Government of the day passed the Limited Liability Act, 1855,¹¹ conferring limited liability on companies which completed registration under the 1844 Act. The method of limitation was the same as that adopted by statutory companies which already enjoyed that advantage; namely, the members were liable only to the extent of the unpaid liability on their shares which had to be given a fixed nominal value.¹²

The 1855 Act remained in existence only a few months when it and the 1844 Act, together with various intervening, amending and winding-up Acts, were repealed and consolidated in the Joint Stock Companies Act, 1856.¹³ This swept

⁶ Cf. the Statute of 1767 (7 GEO. III, c. 48) in which "public company" is used in the latter sense.

⁷ A popular account of the *modus operandi* is Dickens' description of the "Anglo-Bengalee Disinterested Loan and Life Assurance Company" in MARTIN CHUZZLEWIT (1848).

⁸ The Trading Companies Act, 1834 (4 & 5 WM. IV, c. 94) and the Chartered Companies Act, 1837 (1 VICT., c. 73) enabled the Crown by letters patent to confer any of the privileges of incorporation without a formal charter of incorporation. Little use was made of this power since the law officers and the Board of Trade were still imbued with the feeling of reluctance officially to recognize joint stock companies which had prevailed ever since the South Sea bubble in 1720.

⁹ 7 & 8 VICT., c. 110.

¹⁰ The Government Department which is responsible for company legislation, registration, and supervision. It fulfills some of the functions exercised in America by the Securities and Exchange Commission but with far less extensive powers. In England, in this, as in a surprisingly large number of other spheres, there is far less state control than in the United States of America.

¹¹ 18 & 19 VICT., c. 133.

¹² English law still does not recognize no-par-value shares. A bill to legalize them failed to obtain a second reading (the first stage of debate) when introduced by a private member in 1952. In the same year a Departmental Committee was set up to consider the matter; it has not yet reported.

¹³ 19 & 20 VICT., c. 47. This Act for the first time extended registration to Scotland and included

away most of the safeguards which the 1855 Act had provided,¹⁴ retaining only the fundamental principle on which the 1844 Act had been based—the principle of publicity. If the liability of the members was to be limited the word “Limited” had to appear as the last word of the company’s name, acting as a red flag warning the public of the dangers they ran if they dealt with the organization.^{14a} This and the possibility of ascertaining details of the company’s structure from inspection of the public register were thought to afford the public all the protection they deserved. *Laissez faire* had triumphed.¹⁵

After this date there were two main legal forms for commercial enterprise in England: the registered company, incorporated and with limited liability, and the unincorporated partnership or sole trader whose business was not personified by incorporation and whose liability was necessarily unlimited. If over 20 persons were interested in the business an unincorporated partnership was illegal; if the number of members was over 6¹⁶ but not more than 20, incorporation was an optional alternative to partnership, but, if the number was less than 7 a partnership was the only possibility and limited liability was unobtainable.

Hence, or so it was thought, the one demand which had not been met was for a method of limiting the liability of the members of a small family concern. Registration was thought of primarily as a method of enabling the entrepreneur to obtain capital from the public. Not, of course, that there was any compulsion on the company or its promoter to make any general public invitation: the value of registration to smaller and more closely knit concerns was clearly recognized and the name “private company” became associated with them.¹⁷ But the 1856 Act had prescribed a minimum of 7 members for a registered company, thus apparently ruling out the one-man business or the small family partnership.

The consequence was agitation for the introduction of limited partnerships on the lines of the Continental *société en commandite*, a form of partnership with both general and limited partners derived from the *commenda* of Roman law. This had never taken root in England. Indeed, anything approaching it was ruled out by the

provisions for winding up which previously has been dealt with separately. Banks and insurance companies were excluded until 1858 (20 & 21 VICT., c. 49 and 21 & 22 VICT., c. 91) and 1862 (25 & 26 VICT., c. 78) respectively.

¹⁴ The 1855 Act had required a minimum issued and paid up capital, personal liability of the directors if they paid a dividend knowing the company to be insolvent, Board of Trade approval of auditors, and obligatory winding up if three-fourths of the capital was lost.

^{14a} The arbitrary exclusion of freedom from liability despite incorporation which had prevailed in the preceding 12 years made this necessary and accounts for the fact that English companies are still distinguished by “Ltd.” instead of the more logical “Inc.” used in the United States.

¹⁵ Parliament had, in effect, accepted the view of Lord Bramwell in the *Report of the Mercantile Law Commission*, 27 BRITISH PARLIAMENTARY PAPERS 445 (1854), that “if ever there was a rule established by reason, authority and experience, it is that the interest of a community is best consulted by leaving to its members, as far as possible, the unrestricted and unfettered exercise of their own talents and industry,” and that this golden rule demanded the recognition of limited liability provided only that those seeking to take advantage of it openly announced this in the name under which they traded.

¹⁶ The Act prescribed a minimum of 7 members.

¹⁷ For an early use of this term by the judiciary, see *In re British Seamless Paper Box Co.*, 17 Ch. D. 467, 478 (1881), per Cotton, L. J. Palmer first published his *Private Companies* in 1877.

prevailing idea that any sharing of net profits was conclusive evidence of partnership,¹⁸ an idea which was not finally proved unsound until 1860.¹⁹ In the meantime many efforts had been made to do something about it,²⁰ but nothing materialized until 1865 when the Mercantile Law (Amendment) Act²¹ (commonly known as Bovill's Act) provided that lenders, or sellers of goodwill, receiving a share of profits should not be conclusively presumed to be partners but that they should be deferred creditors in the event of bankruptcy. At the time it was thought that this had effected a substantial advance, but in truth it only protected the creditor where he was not associated in the running of the business,²² and where, indeed, he had recently secured protection at common law.

When this was realized there was a renewed outbreak of attempts to legalize full-fledged limited partnerships on the Continental model and it was from one such abortive attempt that the Partnership Act, 1890,²³ resulted, although this, in its final form, merely codified the existing law. In reality, however, the agitation was misconceived, for the existing companies' legislation enabled all the advantages of limited partnerships, and more besides, to be obtained at very little price. This first became plain in the epoch-making case of *Salomon v. Salomon*²⁴ which reached the House of Lords in 1897. In 1892 Salomon, being then fully solvent, had promoted a company to acquire his business which he sold to the company for a large sum satisfied mainly in shares and debentures. He held all the shares except six, each of which was registered in the name of a member of his family apparently as a nominee for him. Within a year the company fell a victim of a trade recession and its assets were merely sufficient to discharge the debentures,²⁵ nothing being left for the unsecured creditors. In these circumstances Vaughan Williams, J., and a strong Court of Appeal held that the company was a mere sham—an alias, agent, trustee, or nominee—for Salomon who remained the real proprietor of the business and who was accordingly liable to indemnify the company against its debts. But the House of Lords unanimously overruled this decision. They held that the company had been validly formed, since the Companies Acts merely required seven members holding at least one share each and said nothing about their being independent, or that they should take a substantial interest in the undertaking, or that they should have a mind and will of their own, or that there should be anything

¹⁸ *Grace v. Smith*, 2 Wm. Bl. 998, 96 Eng. Rep. 587 (K.B. 1775).

¹⁹ By the leading case of *Cox v. Hickman*, 8 H. L. Cas. 268, 11 Eng. Rep. 413 (H. L. 1860).

²⁰ Limited partnerships had been advocated by John Austin as early as 1825 (see *PARLIAMENTARY HISTORY AND REVIEW* 711 (1825)) and the Board of Trade obtained a report thereon from Bellenden Ker in 1837. 44 *BRITISH PARLIAMENTARY PAPERS* 399 (1837).

²¹ 28 & 29 VICT., c. 86. This was an amended version of the bill originally introduced at the same time as the Limited Liability Act, 1855.

²² *Syers v. Syers*, 1 App. Cas. 174 (1876); *Pooley v. Driver*, 5 Ch. D. 458 (1876).

²³ See the account by its draftsman, Sir Frederick Pollock, in the preface to the twelfth edition of his *Law of Partnership* (this preface is reprinted in the current fifteenth edition).

²⁴ [1896] A. C. 22.

²⁵ In fairness to the much maligned Mr. Salomon it should be said that he was no longer the holder (he having sold the debentures and used the money to try to support the tottering company) but the result would have been the same if he had been.

like a true balance of power in the constitution of the company. Hence the business belonged to the company and not to Salomon, and Salomon was its agent not *vice versa*. As the transfer to the company had not been in fraud of creditors it could not be set aside and Salomon was fully protected from liability for the company's debts.

This decision opened up new vistas to company lawyers and the world of commerce. It established the legality of the "one man" company and showed that incorporation was as readily available to the small private partnership and sole trader as to the large public company. It also revealed that it was possible for a trader not merely to limit his liability to the money which he put into the enterprise but even to avoid any serious risk to the major part of that by taking debentures and thus becoming a secured creditor. *Laissez faire* had triumphed to an extent which might have shocked its arch-apostle, Lord Bramwell.²⁶ Indeed, the decision did more, for it established the "corporate entity" principle in a particularly rigorous form and largely stultified all efforts by the courts to "lift the veil"—so much so that *lifting the veil*, that popular subject of academic discussion in the United States, is almost totally ignored in the English literature, and where the veil has been rent it is generally the result of express statutory enactment, for normally it is only the legislature which "can forge a sledge-hammer capable of cracking open the corporate shell."²⁷ This however is another story; to one aspect of it, germane to our present subject, we shall have to revert later.

By the beginning of the present century, therefore, the wheel had turned full circle. In the eighteenth and early nineteenth centuries joint stock enterprises had pressed into service the legal forms of partnership; now the compliment had been returned and the joint stock forms had come to annex the proper functions of the law of partnership.²⁸ Far from discouraging this development the legislature proceeded to relieve the incorporated partnership from some of the normal requirements of the Companies Acts. The Act of 1900,²⁹ in introducing various new formalities, exempted from a number of them "a company which does not issue any invitation to the public."³⁰ But it was by the 1907 Act,³¹ embodied in the new Companies (Consolidation) Act, 1908,³² that private companies were first given a statutory definition and clearly distinguished from others.³³

²⁶ See note 15, *supra*. But as late as 1888 Bramwell was boasting of his part in introducing the legislation which made it possible; see his speech, *The Law of Limited Liability*, 9 J. INSTITUTE OF BANKERS 373 *et seq.* (1888).

²⁷ Per Devlin, J., in *Bank Voor Handel en Scheepvaart v. Slatford*, [1951] 2 All E. R. 779, 799.

²⁸ Cf. O. Kahn-Freund in his notes to RENNER, *THE INSTITUTIONS OF PRIVATE LAW* 331-332 (1945). Indeed, a similar development had taken place in the law of trusts, for the corporate trustee had come to its aid thus repaying the debt which earlier company law owed to trusts.

²⁹ 63 & 64 VICT., c. 48.

³⁰ See §§2 and 6 (and note the use of the expression "private company" in the marginal note to the latter).

³¹ 7 EDW. 7, c. 50.

³² 8 EDW. 7, c. 69.

³³ These others are commonly designated "public companies" but for this there is no statutory justification, apart from a casual reference in §181(5)(c); indeed that expression is rarely applied to a company limited by guarantee.

Section 121 of the 1908 Act (now Section 28 of the Companies Act, 1948³⁴) defined a private company as one which by its articles:

- (a) restricts the right to transfer its shares;³⁵ and
- (b) limits the number of its members to 50;³⁶ and
- (c) prohibits any invitation to the public to subscribe for any shares or debentures of the company.

The intention of the definition was to embrace small family concerns, but to exclude others; and on private companies as thus defined, this and later Acts have successively conferred a growing number of privileges and immunities.³⁷ The most important of these are:

(a) A private company need have only two members instead of a minimum of seven,³⁸ and one director instead of a minimum of two.³⁹

(b) It can be formed more simply and therefore more cheaply, for it does not have to file a prospectus or statement in lieu of prospectus,⁴⁰ and its directors need not file in the public register written consents to act, or take up qualification shares prior to appointment.⁴¹

(c) It can commence business immediately on registration and does not have to obtain a "Trading Certificate" granted to a public company only after the Registrar is satisfied that the various statutory requirements regarding the flotation of its capital have been complied with.⁴² Nor does it have to make a detailed report (the "Statutory Report") to the members on the flotation and to convene a General Meeting (the "Statutory Meeting") shortly after the date when the Trading Certificate entitles it to commence business.⁴³

(d) It does not have to file in the public register copies of its accounts and thus make public its financial position.⁴⁴

(e) Loans may be made by the company to its directors—a practice forbidden in the case of other companies.⁴⁵

As the result of these provisions the expense of forming a private company may be astonishingly small,⁴⁶ and the amount of publicity comparatively slight. Hence

³⁴ 11 & 12 GEO. 6, c. 38.

³⁵ There is no statutory provision as to the nature of the restriction. In practice it is usual to give the directors an unfettered discretion to refuse transfer and this is sometimes coupled with a right of pre-emption by the existing shareholders.

³⁶ Joint holders are treated as one for this purpose (§28(2)), and the employees and former employees who became members while they were employed may be added to the 50 (§28(1)(b)). Unless otherwise stated, references hereafter to sections are to those of the Companies Act, 1948.

³⁷ It is unfortunate that the Companies Act nowhere sets out in one place which of its rules do not apply to private companies; this has to be culled laboriously from the Act as a whole. There are certain other differences in addition to the immunities mentioned in the text; for example a proxy can speak, as well as vote, at a meeting of a private company (§136).

³⁸ Sec. 1.

³⁹ Sec. 176. The directors can also be appointed more informally (§183(1)). And provisions relating to retirement on attaining the age of 70 do not normally apply (§185), but as a public company can contract out of these provisions, this is unimportant.

⁴⁰ Sec. 48.

⁴¹ Sec. 181.

⁴² Sec. 109.

⁴³ Sec. 130.

⁴⁴ Sec. 129. But see *infra*.

⁴⁵ Sec. 190. But see *infra*.

⁴⁶ It is possible to form a company with a capital of £1000 for as little as £25 (say \$65). Annual

Limited Partnerships, which were eventually introduced in 1907,⁴⁷ did not take root in English business life; the need for them had passed. By using the incorporated private company the liability of all the members can be limited and the members can play a part in the management without forfeiting this limitation. Limited partnerships, therefore, have been little used, and hardly at all, except in the case of certain professions where incorporation is forbidden by law or convention.⁴⁸

All these advantages are valuable and the last two are particularly prized. No trader likes to have to make public the state of his financial affairs, and, even as regards public companies, it is only as a result of the latest Act that anything approaching full and frank disclosure has been ensured. But since 1908 the publication of a balance sheet has, on principle, been required⁴⁹ and the Act contains elaborate provisions designed to ensure that the balance sheet and profit and loss account give "a true and fair view" of the company's position.⁵⁰ A private company must, of course, prepare such accounts, but if it need not reveal them to the outside world its members will feel much happier. Similarly, the members of the "one-man" or other small company like to take advantage of the veil of incorporation when it shields them from liability, but in other respects to continue to regard the business as "theirs." In particular, they will probably be highly indignant if they cannot borrow money from the business when it suits them to do so. In so far as a private company is really just an incorporated partnership, it is perhaps not unreasonable that it should be privileged in this respect.

Private companies have therefore proved immensely popular and, at the end of 1952, some 260,800 were on the register with a total paid-up capital of some £2,330 millions. In contrast there were only about 11,600 public companies, although their total capital was greater, namely £3,970 million approximately.⁵¹ Not all of these so-called private companies, however, are in fact fulfilling the economic role for which the machinery was designed. The statutory definition was based on a recognition that the legal form of joint stock company could perform two distinct roles;⁵² first that of enabling masses of capital to be put to profitable use by others, and secondly that of enabling a small private concern to be personified so as to distinguish its legal rights and liabilities from those of its proprietors. The privileges of private companies were intended to be conferred only on incorporations for the latter purpose, but in fact public companies performing the former role have made use of

expenses will in practice be little heavier than without incorporation. Winding up is apt to be more expensive but a formal liquidation may often be avoided by persuading the registrar to strike the company off the register under §353.

⁴⁷ 7 EDW. 7, c. 24.

⁴⁸ The registrations of limited partnerships in England total about 2000, and of these a considerable proportion are probably obsolete for the Act contains no provisions for the removal of registrations.

⁴⁹ See, now, §127.

⁵⁰ Sec. 149, 8th Schedule.

⁵¹ BOARD OF TRADE; COMPANIES ANNUAL REPORT FOR 1952. These are the figures for the whole of Great Britain, including Scotland.

⁵² Registered companies in fact perform yet a third role, that of providing a substitute for the charitable or "purpose" trust. For this the "company limited by guarantee" is especially suitable but it is hardly a joint stock company in the true sense.

private companies for their own purposes. A holding company in which the public is interested to the fullest extent may operate through subsidiary companies which can, and normally will, form as private companies since their shares will be wholly owned by the parent company and no public offer will be made of their securities. Nevertheless it is obvious that the public are vitally interested in them—albeit at second-hand—and that there can be no justification for granting them all the immunities intended to be enjoyed only by genuine private concerns.

Hence the latest Act makes a further attempt at a satisfactory definition by subdividing private companies into two classes—"exempt" and others. For this purpose it proceeds on rather different lines from those followed in 1908. Whether a company is a private one or not, depends not on whether it has fewer than 50 members and does not *in fact* make an invitation to the public but upon whether its articles limit the number of members and prohibit invitations.⁵³ But whether it has the status of an *exempt* private company depends on what in fact has happened to its members, directors, and securities. And the draftsman tried to lay down conditions which could be fulfilled, but could only be fulfilled, by a genuinely private concern. This he found difficult, and the resulting definition takes up a lengthy section⁵⁴ and a whole schedule⁵⁵ of the latest Act, and is highly complicated—perhaps unnecessarily so. But the basic principles are clear enough; the company's shares or debentures must not be held by a body corporate unless that is itself an exempt private company, its securities must not be held by nominees other than personal representatives or trustees of a family trust, the number of debenture-holders must not be more than 50,⁵⁶ and another company must not be a director of it. These conditions must be fulfilled as from the date of the commencement of the Act, or from the original formation of the company if formed later, but the Board of Trade may allow a company to qualify for the future notwithstanding past breaches of the conditions. If a company qualifies as exempt it continues to enjoy all the advantages of a private company as outlined above.⁵⁷ If it does not, it still enjoys most of these privileges, since these are regarded as immunities from requirements, essential only in the case of companies which themselves may make a public issue, but it loses the rights to withhold its balance sheet and profit and loss account from the public gaze and to make loans to its directors, *i.e.*, it is robbed of the rights which are most sought after.

As a result, it can hardly be doubted that the legislature has succeeded in restricting the full privileges of a private company to private concerns in the strict sense. Whether the resulting tripartite classification is necessary or desirable is more doubtful, and, if it is, it may be that the line has been drawn too strictly and

⁵³ So much so, that originally it did not forfeit its privileges even though the conditions were not in fact fulfilled, *Park v. Royalties Syndicate, Ltd.*, [1912] 1 K. B. 330. Now by §29 it loses most of the privileges although it does not actually cease to be a private company.

⁵⁴ Sec. 129.

⁵⁵ Seventh Schedule.

⁵⁶ Its shareholders must, of course, already be restricted to 50 if it is to be a private company at all.

⁵⁷ And, indeed, is accorded two others; resolutions requiring filing at the Registry need not be printed (§143) and its auditor need not possess all the qualifications required in other cases (§161).

in a manner which causes unnecessary confusion. Certainly many genuinely private concerns may now find themselves on the wrong side of the line, while others may be quite uncertain on which side of it they fall. By failing to ban nominee shareholdings,⁵⁸ but nevertheless making the non-existence of such holdings a condition of exemption, the legislature has placed the management of some companies in an embarrassing position, for unless all the shares are held by the directors the latter may be quite unable to tell whether the company is exempt or not. Their annual returns will be accepted without the accounts if they certify that to the best of their knowledge and belief the conditions are, and always have been satisfied.⁵⁹ But if their belief is wrong, the company was not in law exempt and both it and the directors may incur liability accordingly.⁶⁰ About 73.5 per cent of the private companies on the register have claimed exemption.⁶¹

There is, however, one abuse that the latest Act has not prevented; indeed it is only in the last few years that it has become common practice. As already stated, on the formation of a private company many of the formalities necessary in the case of a public company are dispensed with. And under Section 30 a private company can be converted into a public one by making the necessary alterations to its articles and by merely filing a prospectus or statement in lieu of prospectus. It is not necessary for the directors to file consents to act⁶² or for a Statutory Report to be made and a Statutory Meeting held,⁶³ or for a "Trading Certificate" to be obtained, before the company can commence business.⁶⁴ Hence it has become the almost invariable practice initially to form a private company even if it is intended immediately to convert it into a public one and to make a public issue. This reduces the law to an absurdity. If the requirements in question still fulfill any useful purpose (which is doubtful) it clearly should not be possible to evade them in this way; if in fact they are useless anyway, then they should be abolished outright.

Finally, it may be useful to attempt to indicate the principal reasons for the immense growth of private companies. The obvious reasons are the advantages which necessarily flow from corporate personality; separation of the property, rights, and liabilities of the company from those of its members, limited liability, facilitation of legal proceedings, and perpetual succession. It would, however, be misleading to suggest that these are today the main inducements leading to the formation of companies. To a far greater extent the advantages sought are greater facilities for borrowing and possible reduction of liability to income tax and death duties.

On the face of it, a company with limited liability will be in a weaker position than a partnership or individual trader in attempting to borrow. In fact, however,

⁵⁸ See REPORT OF THE COMPANY LAW AMENDMENT COMMITTEE (THE COHEN REPORT), CMD. NO. 6659 (1945), which recommended compulsory disclosure by shareholders of whether they were beneficial owners or not, but this was rejected as unworkable.

⁵⁹ Sec. 129(1)(b).

⁶⁰ But a prosecution cannot be instituted under §127 except with the consent of the Board of Trade (§129(3)).

⁶¹ BOARD OF TRADE: COMPANIES ANNUAL REPORT FOR 1952.

⁶² Under §181.

⁶³ Under §130.

⁶⁴ Under §109.

this is not so because of the severe restrictions placed by the Bills of Sale Acts, 1878-1882,⁶⁵ and the Bankruptcy Act, 1914,⁶⁶ on chattel mortgages by unincorporated concerns. Under the former Acts, a valid security on chattels cannot be granted, unless possession passes, except by a publicly registered Bill of Sale in the statutory form. Registration of a Bill of Sale is regarded as calamitous from the point of view of a trader's credit, and, in any case, the statutory form requires that the goods be detailed in a schedule, thus effectively preventing a floating charge over the stock-in-trade in whatever form it happens to be from time to time. Furthermore, on bankruptcy there vest in the trustee in bankruptcy, for the benefit of the creditors generally, all goods "in the possession order or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof."⁶⁷ Hence a floating charge over the stock-in-trade is impracticable. But the provisions in the Bills of Sale Acts relating to mortgages do not apply to registered companies,⁶⁸ and neither does the "reputed ownership" clause in the company's liquidation.⁶⁹

Hence it is not uncommon for a business, which carries a valuable stock-in-trade but has no assets which can be specifically mortgaged, to be converted into a private company solely for the purpose of being able to borrow on debentures conferring a floating charge. If the personal undertaking of the members is also required they can, of course, be made to guarantee repayment. Although the debentures must be publicly registered,⁷⁰ this has in practice no very serious effect on the company's credit—presumably because the practice has become so common.

The question of taxation is too large a problem to be more than mentioned here. All that can be said is that real or imagined taxation advantages have in the last thirty years been the most common motive of all for incorporation, and that these thirty years have seen a battle between taxpayers, seeking to take advantage of the veil of incorporation to evade taxes which would otherwise be payable, and the Revenue, which has stopped up the gaps in its defenses by tearing the veil aside until it is now in shreds. As regards taxes on income, the principal advantage of incorporation is that it may save surtax—the additional impost charged on individuals but not generally on companies. Today, however, savings in this respect, in the case of companies controlled by fewer than 5 people, are dependent on a "direction" not being made apportioning the undistributed income among the proprietors resulting in the tax being recoverable either from them or from the company itself.⁷¹ In the case of such companies, too, it is now highly unlikely that there will be any saving of duties on the deaths of the proprietors, and here again

⁶⁵ 41 & 42 VICT., c. 31 and 45 & 46 VICT., c. 43.

⁶⁶ 4 & 5 GEO. V, c. 59.

⁶⁷ Bankruptcy Act, 1914, §38, 4 & 5 GEO. 5, c. 59.

⁶⁸ Bills of Sale Act, 1882, §17.

⁶⁹ *Gorringe v. Irwell India Rubber and Gutta Percha Works*, 34 Ch. D. 128 (1886).

⁷⁰ Under Part III of the Companies Act, 1948.

⁷¹ Income Tax Act, 1952 (15 & 16 GEO. & 1 ELIZ. 2, c. 10) §§245-264, re-enacting provisions dating from 1922.

the company itself may be made liable to pay.⁷² Furthermore, certain additional duties—Profits Tax and Excess Profits Levy—may now be imposed on companies although they are not payable by individuals or partnerships. In the light of these factors, incorporation as a private company may often prove detrimental rather than beneficial.

There can be little doubt that it is the burden of taxation which is the most serious problem facing private companies today. During the last century an increasingly large part of the economy of this country has been in the hands of private companies, and from private companies many of the most important public companies have sprung. The view is now widely held that over-taxation is having a stultifying effect upon their development and growth, and the National Union of Manufacturers have recently urged the Chancellor of the Exchequer to set up an impartial committee of inquiry.⁷³

If this problem can be solved there is little doubt that private companies will continue to play an increasingly important role in that (the larger) sector of the economy which is left to private enterprise. The legal rules afford a remarkably suitable and readily available framework; indeed, the main criticism of them is that they may be too easily available and too cheap. Until a hundred years ago incorporation and limited liability were only obtainable at too high a price; now we seem to have gone to the other extreme. There is one private company on the register with an authorized capital of ½d divided into two ¼d shares. Yet this company is enabled to trade with all the advantages of corporate personality! It may well be that there is a case for insisting on a minimum capital to be paid up in cash.⁷⁴ This might not be a great protection to the public (for the capital may be lost), but it would at least mean that promoters would have to pay a reasonable price for the license to use that potentially dangerous weapon, the limited liability company. Today it almost seems to have been forgotten that the word "Limited" was intended as a red danger flag—indeed it is often regarded as an indication of size and stability. That this should be so is a tribute to the morality of the English commercial community and indicates the very small extent to which they have abused the privileges of incorporation. Nevertheless, the possibilities of abuse are plain and abuses do occur. In this respect freedom may have amounted to license—and a remarkably cheap license at that.

⁷² Finance Act, 1940 (3 & 4 GEO. 6, c. 29), §§46 *et seq.* as amended by later Acts.

⁷³ They supported their plea by a report from the Economist intelligence unit: see the London Times, Dec. 22, 1952. The Chancellor agreed to review death duty anomalies.

⁷⁴ Or a deposit with the Board of Trade. The COHEN REPORT, *op. cit. supra* note 58, rejected such suggestions on the ground that they would discriminate unfairly against persons of small means. This seems unrealistic. It is precisely people of small means who need protection against loss in the event of failure of companies with which they have had dealings. One might as well argue that it discriminates against the poor to refuse to allow firms to carry on the business of insurance without putting up a deposit or to own an automobile without paying premiums on a third party insurance.