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REFLECTIONS ON PADDY IRELAND ON COMPANIES

Abstract

The purpose of the paper is to engage in a searching analysis of Paddy Ireland's scholarship in the field of company law. Ireland works within a broad theoretical and methodological framework. His scholarship owes a debt to Marx. This article will judge how successfully he has woven Karl Marx into the fabric of his analytical framework. Key articles will be extracted from Ireland's body of work, and examined critically to determine the degree of success he has achieved in incorporating Marx into his critique of the modern company. Ireland will however take a back seat in parts of the narrative. In effect, some of his central ideas will be picked up and extended. The aim of this article is to pay respect to Ireland but note he operates in a sphere of contested ideas, and his treatment of some important issues needs sifting through a different lens. The arc of the modern company will be explored through a different conceptual structure to the one employed by Ireland. This process should be seen as supplementing rather than detracting from Ireland's indelible contribution to our knowledge of the modern company.

I Introduction

For a brief spell in the late decades of the 20th century, many academics in numerous fields regarded Karl Marx as an important intellectual ancestor. These academics followed in Marx's tracks by utilising a theoretical framework that looked at the underlying structures and contradictions of society to discover the essence of social relations. The collapse of the Soviet Union and triumph of post-modernism and neoliberalism spelt the end of the burst of influence of Marxism in the academy.[1]

The legal academy experienced a dip in the role and influence of Marxist theory. Only at the University of Kent did Marxism retain a core of supporters. Even at Kent Law School, it was one person who, more than any other thinker, drew on insights from the Marxist tradition. He was the flag-bearer for importing aspects of Marxist thinking into legal studies. When Marxism lost its fashionable edge, this legal scholar ploughed on through the decades producing high quality articles that picked

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1 Perry Anderson, *A Zone of Engagement* (Verso, 1992) 282; Perry Anderson, *The Origins of Postmodernity* (Verso, 1999) 29, 31.

up on aspects of Marx's theory to provide innovative ways of seeing company law from a historical materialist perspective. The influence of Marxist theory is threaded through Paddy Ireland's body of work.

This article will consider Ireland's impact on Marxist legal scholarship in the field of company law. The article is in three parts. The first part will engage in a critical analysis of Ireland's view of the forces underpinning the rise of the limited liability company. The second part will examine Ireland's theory of the company as applied to the separate legal entity doctrine. The third part will analyse Ireland's interpretation of those who predominate at the summit of the company. At each stage, Ireland's enriching of company law scholarship will be acknowledged, but the task will be to gauge whether his work adheres to the Marxist tradition on the nature of the company form. Ireland, however, will not always be central to the narrative. At times, this article will depart from analysis of Ireland. Ireland operates in a sphere of contested ideas and his animating principles will in places be countered by a different paradigm. The overarching aim is to throw into sharp relief the link between the economic structure and the incorporated company.

Marx was the catalyst for enabling Ireland to understand that company law is a product of capitalism. Ireland took from Marx the proposition that the form of organisation for production underpins the legal structure that emerged to facilitate the operation of the capitalist system. Any cogent evaluation of Ireland is posited on quantifying his success in aligning his output with Marx's history of the company. To what degree Ireland's framework of analysis accurately mirrors Marx's structuralist theory is of cardinal importance. Ireland's scholarship must be judged according to his fidelity to Marx's concept of the company. It was Marx who pioneered the excavation of the inner logic of capitalist relations and opened the window that enabled Ireland to develop his theoretical insights. Of course, it is not the case that Ireland is expected to be simply his master's voice. Any deepening and developing of Marx's concept of the company is an important exercise. The work of Perry Anderson and Geoffrey de Ste Croix on the ancient world is a good example of two Marxist scholars making an addition to the study of antiquity.[2] Drawing on the hallmarks of the theoretical tradition founded by Marx can, as Anderson and de Ste Croix show, facilitate new pathways of understanding the relations of production and power. Exploring whether Ireland drew successfully on Marx's company theory and expanded the frontiers of knowledge in his field of study is of prime importance. It will be argued he has had mixed success in this venture.

Marx wrote no extensive tract on the origins of the modern company. What he had to say on the topic was compressed and limited in detail. Yet, what he stated was rich with perceptive insights. In *Capital: Volume III*, Marx noted that, in the early stage of capitalism, the growth in the scale of production eventually clipped the wings of

2 Perry Anderson, *Passages from Antiquity to Feudalism* (NLB, 1977); Perry Anderson, *Lineages of the Absolutist State* (NLB, 1977); Geoffrey de Ste Croix, *The Class Struggle in the Ancient Greek World: From the Archaic Age to the Arab Conquests* (Duckworth, 1983).

individual entrepreneurship.[3] Individual capitalists became increasingly unable to fund projects requiring heavy capital investment. The company form was developed to marshal large capital investment funds. Competitive individualism had driven the growth in production. Competitive rivalry shifted to the company form. Henceforth, the acid of competition was unleashed within the shell of the corporate form and triggered an increase in the concentration of production.[4] Quite simply, the size of the plant and capital invested per worker increased and intense competition led to small businesses morphing into large companies. Marx presciently grasped that the future belonged to giant firms.[5] Following Marx's death and in his editorial notes in *Capital: Volume III,* Friedrich Engels noted that in England the chemical industry exhibited empirical evidence of Marx's thesis that free competition would in time be replaced by monopoly firms.[6] The unfolding of the market economy was creating the conditions for the concentration of production and centralisation of capital that would result in weaker competitors being put out of business, and a monopoly such as the one in the chemical industry emerging.[7] Engels grasped that small business was being squeezed, and Marx had bequeathed a compelling explanatory framework of how the relentless accumulation of capital would reconfigure business associations. Those who followed in Marx's tracks produced expansive treatises that highlighted how social reality had vindicated Marx's prophetic view of the company form. In the early 20th century, Nikolai Bukharin, Rudolf Hilferding and Vladimir Lenin produced theoretical works that captured an age dominated by industrialists carving out monopoly power. Their works further discussed industry and banks coalescing to produce a financial oligarchy spearheading the drive to turn national companies into multinational enterprises.[8] Marx noted that capitalism's competitive drive had led it to 'nestle everywhere, settle everywhere, establish connections everywhere'.[9] Bukharin, Hilferding and Lenin noted the outcome of this process was a globalised economy spearheaded by giant companies. The boardroom ruled the world.

All these thinkers stood on the shoulders of Marx and developed the frontiers of knowledge regarding the theory of the history of the company. In Ireland's case, the question is: how closely has his theory of the company followed the work of Marx and his illustrious successors? What, in sum, has been his contribution to understanding the laws of the company underpinning the operation of a capitalist

3 Karl Marx, *Capital: Volume III* (Penguin, 1981) 568.

4 Ibid 567. See also Karl Marx, *Capital: Volume I* (Electric Book, 2000) 897.

5 Marx, *Capital: Volume III* (n 3).

6 Marx, *Capital: Volume III* (n 3) 569. See also Friedrich Engels, *Anti-Dühring: Herr Eugen Dühring's Revolution in Science* (Progress Publishers, 1969) 317.

7 Marx, *Capital: Volume III* (n 3) 568–9; Samuel Hollander, *Friedrich Engels and Marxian Political Economy* (Cambridge University Press, 2011) 163–4.

8 Nikolai Bukharin, *Imperialism and World Economy* (Merlin Press, 1972) 71; Rudolf Hilferding, *Finance Capital: A Study of the Latest Phase of Capitalist Development* (Routledge & Kegan Paul, 1985) 191; Vladimir Lenin, *Imperialism: The Highest Stage of Capitalism* (Lawrence & Wishart, 1948) 51 ('*Imperialism*').

9 Karl Marx and Friedrich Engels, *The Communist Manifesto* (Oxford University Press, 1992) 6.

economy? Has he successfully utilised the classical tradition of Marxism to depict legal structures or add novel twists that enrich its conceptual categories? Or, has he operated with a theoretical framework that bears some resemblance to Marxism but, in the final analysis, is a departure from the history of the company pioneered by Marx and built upon by his successors? All these questions will be interrogated in the following sections.

II The Maverick Begins His Work

To chart the trajectory of Ireland's theoretical framework it is germane to begin with his earliest works. In the early 1980s, at the outset of his career, Ireland produced two articles on the same theme.[10] In these two articles, Ireland grappled with the issue of the process that led to the company becoming the dominant organisational unit of British industry. He notes that initially 19th century legislators intended the incorporated company and limited liability to be restricted to public joint stock companies, but its ambit was stretched to include not only private joint stock companies but also sole traders and small partnerships.[11] Following the *Joint Stock Companies Act 1856,* 19 & 20 Vict, c 47 ('*Companies Act 1856*') business associations of seven or more persons were permitted to incorporate and adopt the company legal form if they so desired.[12]

According to Ireland, the liberal provisions of the *Companies Act 1856* were taken advantage of by partnerships and individual business owners.[13] The ostensibly restrictive aims of the *Companies Act 1856* were outflanked by small fry keen to benefit from incorporation. The will of legislators was outwitted by entrepreneurs employing the dubious practice of using dummy shareholders to reach the seven persons required to tick the box for incorporated status.[14] Just how the British went from having one of the most conservative legal regimes for organising business in Europe to the most liberal through the mechanism of a legislative burst of activity is one of the great stories of corporate history. The upshot of the enacted legislation was the establishment of a permissive regulatory regime that allowed small private-based businesses to adopt the company legal form. This practice was judicially validated by the House of Lords in the well-known case *Salomon v Salomon & Co Ltd* ('*Salomon*') in 1897.[15]

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10 Paddy Ireland, 'The Triumph of the Company Legal Form, 1856–1914' in John Adams (ed), *Essays for Clive Schmitthoff* (Professional Books, 1983) 29 ('The Triumph of the Company Legal Form'); PW Ireland, 'The Rise of the Limited Liability Company' (1984) 12 *International Journal of the Sociology of Law* 239.

11 Ireland, 'The Rise of the Limited Liability Company' (n 10) 242.

12 Ireland, 'The Triumph of the Company Legal Form' (n 10) 33.

13 Ibid 31.

14 Ibid 49.

15 [1897] AC 22.

The first major piece of companies legislation was passed in 1844: the *Joint Stock Companies Act 1844,* 7 & 8 Vict, c 110 ('*Companies Act 1844*'). It was the pioneering general incorporation statute. The *Companies Act 1844* created the circumstances for allowing any business association of 25 or more persons to incorporate.[16] The principle of limited liability for shareholders in registered companies was adopted in 1855 in the *Limited Liability Act 1855*, 18 & 19 Vict, c 133 ('*Limited Liability Act*'). The *Companies Act 1856* permitted associations of seven or more persons to incorporate. That was a radical step forward and its origins still intrigue. In the two articles that set out to illuminate the issues involved in the triumph of the company legal form, it is puzzling, given his Marxist theoretical framework, that Ireland fails to explore at length the changes to the structure of property relations that led to the *Companies Act 1844*. Equally frustrating is Ireland's bypassing of important factors that culminated, in 1856, in limited liability being granted to small private-based businesses. After all, the company form was mooted as a vehicle of the future, designed to facilitate the development of large firms.[17] Ireland, in his early work, only manages to provide a partial insight into the origins of the limited liability company. In fairness to Ireland, the frenetic burst of statutory changes in the mid-19th century presented an imposing challenge to anyone seeking to analyse the genesis of the limited liability company. But the exacting nature of the theoretical challenges cannot exculpate Ireland from not shining a penetrating light on changing property relations underpinning legislative changes to the company form. It raises a flag in relation to the theoretical approach he adduces to guide his scholarship.

Ireland refers to the legislative desire in 1844 to bestow incorporated status on joint stock companies because their size and free transferability of shares left them open to speculators who engaged in fraud.[18] This standpoint was aired in the prelude to the introduction of the *Companies Act 1844*. William Gladstone chaired a company law reform committee ('Gladstone Committee') which reported that legislation should introduce a method of incorporation that would curb fraudulent activities.[19] Clearly, Ireland is not mistaken in calling attention to the parliamentary aim of minimising malpractices being a feature of the first general incorporation statute. But the foundations of the legislation went beyond protecting innocent investors from vulture capitalists. Ireland needed to probe deeper in order to bring to the surface the range of forces shaping legislative action. Instead there is a studied silence from him on the objective socio-economic relations shaping legal changes. Ireland sidesteps any thorough examination of the mid-19th century British production process, the corresponding class structure and the groups that spearheaded the incorporation drive. Furthermore, he provides a thin analysis of how the legal form was twisted by the *Companies Act 1856* to invest partnerships and sole traders with the capacity

16 Ireland, 'The Triumph of the Company Legal Form' (n 10) 33; Ireland, 'The Rise of the Limited Liability Company' (n 10) 242.

17 Marx, *Capital: Volume III* (n 3) 567.

18 Ireland, 'The Rise of the Limited Liability Company' (n 10) 241–2; Ireland, 'The Triumph of the Company Legal Form' (n 10) 32.

19 Tom Hadden, *Company Law and Capitalism* (Weidenfeld and Nicolson, 1972) 14.

to switch to an incorporated status allied with limited liability.[20] Ireland focuses attention on how, in the aftermath of the *Companies Act 1856*, the grant of limited liability only needed seven registered persons, and the unseemly legacy of this step. That is a plausible point, but his account of the *Companies Act 1856* is not linked to its 1844 predecessor, and this factor is largely responsible for the narrow basis of his analysis. There is no sense in Ireland of the dialectical unity between the *Companies Act 1844* and *Companies Act 1856*. In brief, he could have depicted how an array of forces operated between 1844 and 1856 to pressure the State to add limited liability to the 1844 achievement of general incorporation.

A more complex argument could have been used to pinpoint the major groups that drove both the 1844 legal changes and the additional changes that followed in 1855, and then the further genuflection to liberal individualism in 1856. The existence of a correspondence between the economic infrastructure and the factors forcing changes in the legal sphere is too often absent in Ireland's account. Ireland's earliest works are tarnished by economic thought being pitched at a muted level. The focal point is too often aimed at the level of a political narrative of embryonic incorporation disconnected from economic analysis. There is only the spectral shadow of Marx's influence on developing the conceptual foundations of the company. Ireland failed to call on Marx's economic theory with its corpus of concepts on the genesis of the joint stock company, and how this could have been utilised to throw light on how new forms of economic domination galvanised the shaping of state policy regarding legislation which liberalised the company form.

There is plenty of scope for exhuming the myriad factors at play in the victory of incorporation in 1844, and the reasons why, within several years, it was followed by the vesting of limited liability. But the guiding principle in any discussion is the combination of political and economic forces that promoted the advance of the company legal form and the causal chain responsible for its ascent to the apex of British business. At the same time, an excavation of the legislative moves can paint a broader picture than Ireland achieves for why partnerships and sole traders were able to jump on the bandwagon of the limited liability company.

If the purpose of theory is to delve below the surface structure and illuminate inner relations rather than outward appearances, then 19th century England offers rich evidence of deep structures at work shaping legal change. The expansion of capitalist production and the accumulation process were starting to outstrip the age of individual entrepreneurship.[21] Even as early as *Capital: Volume I*, Marx noted how the usurping of the individual capitalist by collective capitalists — pooling their capital together under the umbrella of the economic joint stock company form — was a crucial stage in the evolution of property relationships.[22] The appearance of collective capital

20 Ireland, 'The Triumph of the Company Legal Form' (n 10) 34.

21 AL Morton, *A People's History of England* (International Publishers, 1979) 398.

22 Michel De Vroey, 'Part I: The Corporation and the Labor Process: The Separation of Ownership and Control in Large Corporations' (1975) 7(2) *Radical Political Economics* 1, 2.

housed within the joint stock company was, as Marx recognised, the upshot of competitive individualism. It brought in its wake a thinning of the ranks of sole owners of property, as rising fixed costs and an increase in the scale of production opened up a new epoch in economic history.[23] England led the way in the 19th century, and its mechanised mills and factories gave it a competitive edge in output per unit of capital that lasted up to the end of the century.[24] However, England's hegemony was challenged at the very dawn of industrialisation. Eric Hobsbawm notes that England was the industrial country *par excellence*, but Belgium, France, Germany and the United States ('US') were recording impressive industrial growth figures.[25] Economic power segues into political supremacy. The passing of the *Representation of the People Act 1832*, 2 & 3 Wm 4, c 45 began the process of placing political power in the hands of industrial capitalists.[26] The State as the protector and guardian of the interests of the ruling elite played its role in assisting the expansion of the economic structure by devising a legal form to match the expanding English mode of production. Over time, the bourgeois state responding to a changing economic landscape began to invest certain businesses with the privilege of incorporation. A *Circular to British Bankers* on 14 February 1840 noted that incorporated status had been sanctioned by specific Acts of Parliament to cover canal building and railways, projects that required large pools of joint stock capital.[27] However, other branches of trade requiring increasing capital sums were not being granted the same legal basis.[28] The growing concentration and centralisation of capital was spurring the need to relax the law and permit general incorporation. It was the huge funds required to finance the railways that focused the minds of the political class on the necessity of creating new laws to regularise the activities of joint stock companies.[29]

Looked at through the long lens of history, a medley of forces combined to pressure Robert Peel's Conservative government to accede in 1844 to recognise the joint stock company as a valid instrument for organising capital. The inception of the modern corporation heralded the changing nature of production under capitalism.[30] The competitive struggle engendered by the necessity for each unit of capital to maximise profit fostered mechanisation and organisational innovation.[31] This was amplified by a growing sophisticated division of labour, and a strict hierarchical organisation

23 Marx, *Capital: Volume I* (n 4) 901.

24 Michel Beaud, *A History of Capitalism 1500–1980* (Macmillan Press, 1984) 84–5.

25 EJ Hobsbawm, *The Age of Capital 1848–1875* (Charles Scribner's Sons, 1975) 39–40.

26 Morton (n 21) 392.

27 Andrew Gamble and Gavin Kelly, 'The Politics of the Company' in John Parkinson, Andrew Gamble and Gavin Kelly (eds), *The Political Economy of the Company* (Hart Publishing, 2000) 21, 30–1.

28 Ibid 31.

29 Ibid.

30 Marx, *Capital: Volume I* (n 4) 900.

31 John Eaton, *Political Economy* (International Publishers, 1977) 91–2.

of the production process.[32] The company form of organisation unleashed the full powers of technology, and allowed economies of scale to thrive.[33] Railways drew attention to the daunting sums required in the mid-19th century for large scale capital investments. Rande W Kostal writes that '"[N]o individual, not even a Rothschild," the *Railway Examiner* observed, "could undertake a great railroad"'.[34] Marx stated:

> The world would still be without railways if it had had to wait until accumulation had got a few individual capitals far enough to be adequate for the construction of a railway. Centralisation, on the contrary, accomplished this in the twinkling of an eye, by means of joint-stock companies.[35]

David Harvey avers that centralisation of capital 'plays a vital role in regulating the changing organization of production under capitalism'.[36] It hastens accumulation, and this boils down to an advance in technology, and a boost to the size of business entities.[37] In simple terms, the rate of reinvestment of capital dictates the tempo of economic growth. Joint stock companies embodied the compulsion to pool finance to achieve the higher rates of investment that were necessary for capitalist development. This economic transformation exerted a deep influence on the enactment of the *Companies Act 1844*, which established a regulatory regime that allowed business entities to adopt the company legal form. In the years 1834 to 1836 a staggering £70 million was raised to fund railway construction.[38] As railways began to blanket Britain, they acted as an economic accelerator. The mid-19th century 'was the age of the railway which trebled the production of coal and iron in twenty years and virtually created a steel industry'.[39] The pressure for the emergence of joint stock companies and general incorporation began to grow in the wool industry as the demand for fresh capital to build new mills rocketed.[40] Ironically, as the modern factory began to dominate the landscape, small industry inserted itself into the interstices of the economy and sections of it benefited from the economic uplift.[41] Large firms constantly threatened to obliterate or merge with smaller entities, but small capital clung on and it had political supporters. The political resilience of small industry was to be exhibited in its capacity to achieve entry into the ranks of those cloaked with the company legal form.

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32 David Harvey, *The Limits to Capital* (Basil Blackwell, 1982) 139; Marx, *Capital: Volume I* (n 3) 549.

33 Harvey (n 32) 276.

34 RW Kostal, *Law and English Railway Capitalism 1825–1875* (Clarendon Press, 1994) 14.

35 Marx, *Capital: Volume I* (n 4) 901.

36 Harvey (n 32) 139.

37 Ibid.

38 Morton (n 21) 398.

39 Eric Hobsbawm, *Industry and Empire* (Penguin, 1975) 71.

40 Ron Harris, *Industrializing English Law: Entrepreneurship and Business Organization, 1720–1844* (Cambridge University Press, 2000) 175.

41 Chris Harman, *A People's History of the World* (Bookmarks, 1999) 319.

Casino capitalism was part of the backdrop to the triumph of general incorporation. A joint stock mania in 1835 and 1836, promoted by lawyers setting up sham companies, produced severe losses for persons 'of small property'.[42] This depredation of members of the share buying public was something tangible for politicians to grasp, and it gave an added impetus for general incorporation. The assumption was general incorporation would dampen the market chicanery experienced during the periodic boom and bust business cycle.[43] Fraudulent speculators of the sort driving the growth of sham companies in the 1830s were at best bit actors in the move to the inception of the company legal form. The origins of the rise of general incorporation went much deeper than a populist response to opportunist lawyers seeking fast returns. In sum, Ireland gives too much emphasis to fraud being the catalyst for the *Companies Act 1844* bestowing incorporated status on joint stock companies. In taking this tack, Ireland sidesteps examination of the mid-19th century British production process, the role of the centralisation of capital and the changing ratio of wealth and power within the ranks of capital as the key indicia spearheading the incorporation drive. The role of the State was also crucial. It provided the rules and regulatory mechanisms embodied in general incorporation to reflect the changing structure of production relations that was the hallmark of mid-19th century Britain. The major legacy of Marx was an economic theory that illuminated the operation of a capitalist mode of production. Ireland sidestepped tapping into this economic analysis and the result was a restricted vision of the origins of the *Companies Act 1844*. The lack of scrutiny of the economic structure of capitalism was the Achilles heel of Ireland's earliest works on the company form. It is mystifying that Ireland provides scant attention to economic forces and their role in legal change. It is a gap that implies a departure from Marxist modes of thinking on the company form.

Strangely, Ireland has little to say about the origins of the *Companies Act 1856*, which brought into being a radical individualist model of limited liability. In both of his early works, Ireland comments on how the parliamentary architects of limited liability rejected the view that those engaged in partnerships and sole traders would be able to switch smoothly to the company legal form with limited liability.[44] Contrary to the public proclamations of a segment of politicians, opponents of limited liability pointed out that partnerships and sole traders would be able to abuse the intent of the 1856 legislators and legally create limited companies. The sceptics proved right. The *Companies Act 1856* enabled associations of seven persons to incorporate.[45] The sceptics understood that there was no reason stopping an individual from giving a single share to six others and thus achieving the required seven to form a limited liability company.[46] The legislative intent of the *Companies Act 1856* was

42 Kostal (n 34) 21.

43 Harris (n 40) 287.

44 Ireland, 'The Rise of the Limited Liability Company' (n 10) 242; Ireland, 'The Triumph of the Company Legal Form' (n 10) 34.

45 Ireland, 'The Rise of the Limited Liability Company' (n 10) 242; Ireland, 'The Triumph of the Company Legal Form' (n 10) 35–8.

46 Ireland, 'The Rise of the Limited Liability Company' (n 10) 243; Ireland, 'The Triumph of the Company Legal Form' (n 10) 35.

circumvented as the limited company form came to be used by all business forms including joint stock companies and sole traders and partnerships.[47] What Ireland has to say about the *Companies Act 1856* is of limited value. His political Marxism concentrates on surface phenomena and is silent on the seismic socio-economic forces that underpinned the triumph of the charge for limited liability.

The struggle for the unqualified victory of limited liability was capped with success in 1856. The liberalisation of the *Companies Act 1844* in 1855, pushed further in 1856, was played out against a backdrop of conflicting ideas. The Gladstone Committee in 1844 was set up in the wake of an outbreak of frauds and malpractices being perpetrated on investors and it argued limited liability was superfluous as there was no shortage of investment capital outlets.[48] The great liberal John Stuart Mill believed that many undertakings required capital sums beyond the pockets of all but the wealthiest individuals, and the principle of limited liability would facilitate the conduct of business.[49] In his account of the 1844 triumph of free incorporation, Ireland failed to pick up on modifications to the relations of production as the catalyst of legislative change. With the 1856 campaign for untrammelled limited liability, Ireland's lack of economic analysis again weakens his exploration of the mainsprings of legislative action. A fierce intra-class battle on the topic of limited liability occupied the ruling elite of England between 1844 and 1856.[50] Tensions came to the fore in the battle between large and small capital. A state of hostility exists between these fractions of capital. Marx enunciated the omnipresence of rivalry within the realm of capital. The law of the markets exacerbates friction, for it dictates each unit of capital constantly must seek to expand the productive forces or fall by the wayside, and this phenomenon results in a situation that 'gives capital no rest and continually whispers in its ear: "Go On! Go On!"'[51] This dynamic produces an internecine struggle for survival, within the ranks of capital. Modern history has been on the side of large capital in this battle, but small capital clings on in the face of a burgeoning concentration of capital. To avoid intra-capital conflict destabilising the social system state intervention is required.

The stabilising role of the State was graphically on display during the prelude to the 1856 inception of limited liability. The State had to mediate between large concerns that wanted to stifle small business obtaining incorporated status and limited liability.[52] The desire to stifle competition resulted in bigger businesses seeking to

47 Ireland, 'The Rise of the Limited Liability Company' (n 10) 243; Ireland, 'The Triumph of the Company Legal Form' (n 10) 37.

48 Rob McQueen, *A Social History of Company Law: Great Britain and the Australian Colonies 1854–1920* (Ashgate, 2009) 45.

49 Gamble and Kelly (n 27) 33.

50 PL Cottrell, *Industrial Finance 1830–1914* (Methuen, 1980) 50. See also John Saville 'Sleeping Partnership and Limited Liability, 1850–1856' (1956) 8 (3) *The Economic History Review* 432, 433.

51 Robert Tucker, *The Marx-Engels Reader* (WW Norton, 1972) 186.

52 McQueen (n 48) 123.

confine general incorporation to the existing figure of 25 members.[53] By sticking to the figure of 25, many small concerns would be excluded from progressing to limited liability. A blowback against the campaign to fetter small business developed. A small business lobby group comprising intellectuals and politicians talked up the benefit of a permissive company legal form as a method of rejuvenating entrepreneurialism.[54] Lord Palmerston and Robert Lowe (a key figure at the Board of Trade responsible for company law oversight) advocated 'setting free small capitals' by vesting them with limited liability status.[55] Small scale and local manufacturing capital was still a significant force in mid-19th century Britain.[56] It was under intense pressure from large concerns benefitting from ever lower unit costs of production, but it was a sector that was to show it was not bereft of political clout.[57] The multiplicity of small firms was the factor that prepared the ground for partnerships and sole traders to batten on to the company legal form and limited liability in the 1850s. They were the backbone forging the introduction of the *Companies Act 1856* that set seven members as the benchmark for obtaining general incorporation and limited liability.[58]

Small firms remained one of the pillars of British industry well into the 19th century and beyond.[59] Their political power was not negligible. The mid-19th century was a transition stage when the 'basis of wealth changed from merchant and agricultural capitalism to industrial capitalism'.[60] The class structure was a shifting mosaic that made it difficult to gauge. Classes were rising and falling but small business had far more political heft than was to be the case as the 20th century wore on. In sum, classes tended to merge into one another in the mid-19th century. Even in large factories, mills and coal pits, there were clusters of small-scale self-employed workers.[61] They were involved in sub-contracting work.[62] Britain was at a turning point in the mid-19th century with blurred class lines. When Ireland turns to note the role of small business, he restricts himself to noting it adopted the company legal form to allay insecurities about suffering losses and bankruptcy.[63] This is a narrow interpretation. Contrary to Ireland, small capital was brimming with agency. Its owners had political friends in high places protecting their interests, and the

53 Ibid 81.

54 Ibid.

55 Ibid 82.

56 PJ Cain and AG Hopkins, *British Imperialism: Innovation and Expansion 1688–1914* (Longman Group, 1993) 40 ('*British Imperialism: Innovation and Expansion*').

57 Ibid.

58 Gamble and Kelly (n 27) 33; McQueen (n 48) 83–4.

59 Maurice Dobb, *Studies in the Development of Capitalism* (Routledge & Kegan Paul, 1963) 264–5.

60 Tony Lane, *The Unions Make Us Strong: The British Working Class, Its Trade Unionism and Politics* (Arrow Books, 1974) 38.

61 Ibid 40.

62 Ibid.

63 Ireland, 'The Rise of the Limited Liability Company' (n 10) 247; Ireland, 'The Triumph of the Company Legal Form' (n 10) 44.

Companies Act 1856 is testimony to their political and legal strength. The political elite was wedged. It made soothing noises that limited liability would be outside the ambit of partnerships and sole traders but in practice, as Lord Palmerston and Lowe exemplified, legislators refused to turn a deaf ear to small business lobbying to achieve the company form and limited liability.[64] By steering between the claims of large and small capital, the political elite strove to mitigate tensions within the various fractions of capital.

Intensifying economic rivalry with the US and continental powers such as France was enlisted as another factor by those calling for the barrier to the company form and limited liability to be lowered.[65] British industry right up to World War I was held in a state of suspended animation by the stultifying role of small firms in the national economy. The rise of Germany and the US and their expansionary colonial policy coincided with their social formations moving towards an updated capitalism symbolised by the adoption of merging banking and industrial capital to usher in the age of large-scale conglomerates.[66] The age of economic imperialism was dawning. The struggle for world markets was intensifying, and the response of spokespersons for small capital within Britain was to seek the adoption of limited liability for all types of business.[67] It was asserted that liberalising the granting of limited liability would give a fillip to modernisation, and make Britain more internationally competitive.[68] It was a bizarre argument, but it helped tilt the scales towards small business gaining limited liability in 1856. The influence of the small firm in Britain and its hijacking of the company legal form with limited liability proved pernicious. The ease of incorporation and limited liability that was won in the course of the tumultuous years between 1844 and 1856 enabled small firms to cling on to their existence.[69] However, at this time, the expropriation of their businesses would have quickened the pace of triumph of the large firm, and enabled British industry to match the technological advances and productivity of German and US corporate behemoths.[70] The rate of economic development of the rising imperial powers was outstripping Britain, and the emergence of giant firms within their boundaries handed them a competitive advantage that began, as Lenin noted, to be expressed in a realignment of the international economy.[71] The power of an empire founded in an earlier epoch was in decline. Its inter-imperialist rivals were anxious to expand their spheres of

64 McQueen (n 48) 82–4.

65 Ibid 84.

66 Michael Barratt Brown, *After Imperialism* (William Heinemann, rev ed, 1970) 83–4; John Foster, 'British Imperialism and the Labour Aristocracy' in Jeffrey Skelley (ed), *The General Strike, 1926* (Lawrence & Wishart, 1976) 7; Hobsbawm, *Industry and Empire* (n 39) 214; Hilferding (n 8) 225.

67 McQueen (n 48) 84.

68 Ibid.

69 Cain and Hopkins, *British Imperialism: Innovation and Expansion* (n 56) 112.

70 Ibid.

71 Lenin, *Imperialism* (n 8) 95–6.

influence.[72] Uneven economic development with its imperial peers put Britain at a disadvantage, and it became a tempting target for more robust competitors. Britain's position as a fading colossus was an important aspect that promoted a legal revamp of business entities, but it was a strategy that failed to halt the march to World War I that repartitioned world markets.[73] Ireland took no account of the global changes in the capitalist mode of production in the course of the 19th century, and the economic studies of thinkers like Lenin, and this omission narrowed the ambit of his history of the evolution of the company legal form. In *Capital: Volume III*, in another innovative step, Marx went below the surface of property relationships and depicted the hidden abode of production as the factor differentiating appearance from the true essence.[74] In his evaluation of the *Company Act 1844*, *Limited Liability Act* and *Company Act 1856*, Ireland focuses on surface appearance. By eschewing examining the structural economic forces responsible for the enactment of a series of legislative steps Ireland departs from the Marxist tradition. His framework of analysis is interesting, but it is outside the ambit of the political economy model of Marxism.

III The Foundations of the Company

In this section, the spotlight will be on Ireland documenting the economic phenomena responsible for the emergence of the separate legal personality doctrine. In brief, at a later stage of his career, Ireland returned to the topic of the victory of incorporation in 1844. Earlier, he provided a thin analysis of this aspect of company history. Ireland then returned to the issue and proposed that the legal reconfiguration of shares opened the way to a general incorporation regime that suited the needs of those he terms rentier investors. In his revisionist pursuit of the reason for the origin of the separate legal entity doctrine, Ireland explored how the share was legally transformed to accommodate owners wishing to break their daily connection to their assets and become passive shareholders, leaving control of their enterprises to managers. How effectively Ireland details the revamping of the juridical form to benefit rentiers and a managerial elite is a central motif of this part of the article. In effect, Ireland, in adopting this theoretical framework, retreated from his earlier viewpoint. He developed a novel approach to explain why the 1844 campaign for legal personhood was capped with success. Ireland's intellectual progress on this topic highlights the fact there was an epistemological rupture between his early and later work.

All Ireland's future work was built on the theoretical foundations that were laid down in a 1987 article he co-authored with two colleagues, Ian Grigg-Spall and Dave Kelly.[75] This piece represented a qualitative breakthrough. Ireland was at the height

72 Ibid 104.

73 Ibid 4.

74 Marx, *Capital: Volume III* (n 3) 927.

75 Paddy Ireland, Ian Grigg-Spall and Dave Kelly, 'The Conceptual Foundations of Modern Company Law' in Peter Fitzpatrick and Alan Hunt (eds), *Critical Legal Studies* (Basil Blackwell, 1987) 149.

of his intellectual powers. In future, he would take incremental steps forward but fundamentally, his subsequent work stood on the conceptual foundations developed in the 1987 piece. Although co-authored, Ireland's hand is clear to see in the theoretical analysis utilised. The categories employed in this article were to become the guiding principles of Ireland's theory of companies. His 1987 effort shows Ireland examining the taproot of the doctrine of separate legal personality with fresh eyes.

At the outset Ireland states that the joint stock company can 'be properly understood only in the context of an analysis of the various forms taken by capital'.[76] By positing the joint stock company as an economic form, Ireland separates that component part from the legal form embodying incorporation. Note is made that since *Salomon* in 1897, incorporation has been summed up as signifying 'the complete separation of the company and its members'.[77] Ireland stresses that the conventional view is that the concept of the complete separation of the company and its members is a 'function of the legal act of incorporation'.[78] For Ireland this misleading interpretation fails to anatomise the deeper forces responsible for the concept of the company entity. In Ireland's revisionist view, the circumstances that led to shares being treated as a separate form of property distinct from any direct link to the assets of joint stock companies was the pathway that led to the triumph of the separate legal entity concept.[79] Ireland notes that before the mid-19th century, the business and shareholder were bound together.[80] Ownership and control was an indissoluble bond. Ireland argues the company entity was forged in the mid-19th century and, given its definitive expression in *Salomon*, has to be viewed through the prism of 'the changing economic and legal nature of the joint stock company share'.[81] In effect, Ireland provides a distinctly singular explanation for the emergence of legal personhood. His interpretation is an advance on his earlier analytical standpoint, but it is at odds with the classic Marxist view that pinpoints the growing mid-19th century concentration and centralisation of capital as the phenomenon responsible for relaxing the law and permitting general incorporation. In this scenario the joint stock company was an expression of the growth of collective capitalist forms of property, as enterprises began to cease being independently owned and passed into collective capitalist control. Ireland's mistake is to focus on the phenomenal form of shares driving the advent of the company entity. His framework of analysis departs from a structuralist analysis. For Marx, capital was not a thing embodied in instruments like shares, but a social relationship.[82] A change in economic relations expressed in the centralisation of production sparked the inception of the joint stock company. The business and shareholder were separated by the transformation of property relationships, and it was this step that was responsible for any change to

76 Ibid.

77 Ibid 150, citing LCB Gower, *Modern Company Law* (Stevens & Sons, 1963) 100.

78 Ireland, Grigg-Spall and Kelly (n 75) 151.

79 Ibid.

80 Ibid 150.

81 Ibid 151.

82 Marx, *Capital: Volume I* (n 4) 1096.

the nature of shares in the mid-19th century. The change in the internal organisation of those controlling businesses sparked the physical assets passing to the company form, and this process did allow shares to be treated as a separate form of property. But Ireland puts the horse before the cart. First, property relations changed within the shell of the company form, and second, the nature of the share changed to reflect the economic landscape being reconfigured.

The doctrine of separate corporate personality is a linchpin of company law. It operates as a shield insulating shareholders from being held 'personally responsible for any obligations incurred by the corporation'.[83] To elucidate the forces responsible for the rise of the modern doctrine of separate personality is thus clearly important. The core of Ireland's thesis is that the share, by changing its legal status, became an autonomous form of property. This outcome snapped the bonds that had connected the shareholder legally to their economic property in joint stock companies.[84] And to understand the separate personality doctrine, with its complete separation of company and members, account has to be taken, avers Ireland, of 'the historical processes whereby the share and other similar titles to revenue emerge as legally recognised autonomous forms of property'.[85] In the 18th and early 19th centuries, Ireland notes that shares in joint stock companies 'were viewed as equitable interests in the property of the company'.[86] And while a share was regarded as an equitable stake in the company's assets, shareholders were closely identified with the company entity.[87] This arrangement began to splinter from the 1830s as the judicial interpretation of shares was revamped.[88] By the mid-19th century the link between shares and assets of companies was cut and the company form was recognised in law as an independent entity, separate from shareholders.[89] The turning point was *Bligh v Brent* ('*Bligh*'),[90] in which it was decided that 'shareholders in incorporated joint stock companies had interests only in the profits of companies and no interest whatsoever in their assets'.[91] Henceforth, following the *Companies Act 1844*, company law legislatively facilitated shareholders seeking to eschew any role in management, and instead set them free to focus on siphoning profits from their shares and bonds.[92] The judicial arm of the English State apparatus gave its blessing in *Bligh* to the severing of any link with the management side of the business, and for shareholders to henceforth treat their shares as an autonomous form of property. Shares became legal objects that guaranteed the profits flowed into the pockets of those that had

83 Harry Glasbeek, *Wealth by Stealth: Corporate Crime, Corporate Law, and the Perversion of Democracy* (Between the Lines, 2002) 10.

84 Ireland, Grigg-Spall and Kelly (n 75) 153.

85 Ibid 153–4.

86 Ibid 152.

87 Ibid.

88 Ibid.

89 Ibid.

90 (1837) 2 Y & C Ex 268; (1836) 160 ER 397.

91 Ireland, Grigg-Spall and Kelly (n 75) 152.

92 Ibid 158–9.

become disconnected from the production process. Ireland's standpoint is influenced by Crawford Macpherson, who argued that the change in viewing property as a right to revenue and income, rather than rights in material things such as physical plant and raw materials, was part and parcel of a maturing capitalist economy.[93] Granted, the importance of the role of property as a right to revenue increased with the rise of the joint stock company. But to extend that point to claiming the changing legal interpretation of shares produced the company entity is mistaken. Marx was closer to the mark when he noted that the emergence of the joint stock company liberated the owners of wealth from the administrative affairs of business.[94] This development, Marx added, was coupled with hired servants rather than owners of money capital running the company whilst the shareholders reaped the benefit of their investments.[95] Henceforth, money capitalists garnered the profits whilst being freed of legal responsibilities. But Marx viewed changes in property relationships as the mainspring for the separation of ownership from the day to day administrative control of companies.[96] That is a different epistemological argument to the one posited by Ireland.

After this 1987 article Ireland never again went into such complex theoretical territory when excavating the company structure. Ireland came away from this article satisfied that he had cast light on the forces responsible for shareholders becoming disempowered absentee figures on the company landscape. For Ireland, there was a continuum that stretched from general incorporation to the achievement of limited liability. It was all part of the process of rentier investors clamouring to prioritise their pursuit of revenue and income, and their actions being rubber stamped by the State. What Ireland learnt from exploring the roots of the modern separate legal entity doctrine would form the basis of his future work. Having highlighted how shares became legal objects in their own right, Ireland could weave this key development into throwing light on the progression of general incorporation and limited liability.[97] In his eyes it was just a small step from rentiers cutting the link between shares and assets via incorporation to a juridical form being implemented in 1856 that placed a shield between the company and investors and granted so many benefits including eschewing company debts. Also, Ireland had an intellectual rationale for explaining the rise of joint stock companies, and how they became characterised by a separation between the owners and administrators of capital.[98]

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93 Crawford Macpherson, 'Capitalism and the Changing Concept of Property' in Eugene Kamenka and Ronald Neale (eds), *Feudalism, Capitalism and Beyond* (Australian National University, 1975) 114.

94 Marx, *Capital: Volume III* (n 3) 567–8.

95 Ibid.

96 Ibid.

97 Paddy Ireland, 'Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility' (2010) 34(5) *Cambridge Journal of Economics* 837, 842 ('Limited Liability').

98 Ibid.

Even as late as 2018, at a fully mature stage of development in his thinking, Ireland presses the case for the *Companies Act 1844* being required to protect rentiers.[99] There is a glimmer of reality in Ireland's argument that the transformation of the share would enable money capitalists to exclude themselves from playing any managerial role in the corporation. He refers to these capitalists — whose function is simply to watch their capital gains and dividends grow — as rentiers.[100] Ireland states the hallmark of rentiers is that they 'played little active part in management and treated their shares as mere rights to revenue'.[101] He is, though, incorrigible on rentier investors being at the forefront of every push to revamp company law in the 19th century. In 2010, when Ireland again raised the topic of the emergence of easily available legal personality in 1844, he lapsed into the past and stated its advent was a product of government seeking to protect rentiers from fraud perpetrated by share swindlers.[102] Once again Ireland prioritised parliamentary conduct and vulture capitalists as critical agencies of change rather than focusing on objective economic relations shaping legal changes. Ireland has persisted in perceiving rentiers as the engine house of legal changes to the company form and limited liability. For someone committed to the historical materialist tradition, he sails very close to obscuring the key tenets that constitute the core of Marxist analysis. In remorselessly accentuating the role of rentiers, Ireland misses the point that the joint stock form and legal changes impacting on its evolution all came from the birth of a new age of collective property relations that arose from the dynamics of the concentration and centralisation of capital. These developments did not abolish the nexus between ownership and control. There was no dissolution of the grip of capital on productive forces. Private property and the power that flows from it were not superseded. Reflecting correctly on 19th century developments, Lenin forthrightly noted: 'scattered capitalists are transformed into a single collective capitalist'.[103] In brief, a new stage of capitalism was beginning to unfold in the 19th century and Ireland's work was not capturing fresh developments in the history of the company.

The *Company Act 1844* and *Company Act 1856* benefited an embryonic fraction of the capitalist class who were on the way to the summit of the social structure and were far from being only interested in dividend yields. Ireland's interpretation of legislative changes is to some degree inspired by Marx, but it lacks his credo that economic life in the form of a mode of production and property are the nucleus of history. The consecration of new legal forms in the mid-19th century had its economic origins in changing patterns of property ownership.

99 Paddy Ireland, 'Efficiency or Power? The Rise of the Shareholder-Oriented Joint Stock Corporation' (2018) 25(1) *Indiana Journal of Global Legal Studies* 291 ('Efficiency or Power?').

100 Ireland, Grigg-Spall and Kelly (n 75) 158.

101 Ibid.

102 Ireland, 'Limited Liability' (n 97) 843.

103 Vladimir Lenin, 'Imperialism: The Highest Stage of Capitalism' in Vladimir Lenin (ed), *Collected Works* (Progress Publishers, 1964) vol 22, 214.

A shareholder losing the appetite for controlling their capital is the quintessence of Ireland's description of rentiers. This miscalculation results in Ireland supporting the thesis of managerial capitalism. His studies result in the adoption of a political standpoint antithetical to Marxism. Ireland's argument provides support for the view that passive shareholders, solely interested in the size of their dividends, became insulated from managers who stepped in to occupy the commanding heights of the company. The logic of Ireland's concept of the separate legal entity doctrine is that those with shares became disconnected from any control over their property. He eliminates from consideration that the separate legal entity doctrine was a product of historical necessity underpinned by a farrago of factors driven by changes to the structure of economic property. Moreover, just because the assets pass to the company, it is not a signal that owners of wealth are displaced from controlling enterprises.

Ireland's work fails to consider how, at the time, when shares were being legally reinterpreted, the capitalist class was split by economic interests. Various shades of capital were engaged in a fierce contest to climb to the apex of society. A promethean set of socio-economic factors combined to shape the mid-19th century shifts in the company legal form. It was not the case that all shareholders relinquished their power to managers and focused on counting their money. For example, Clive Beed notes that there was a separation of ownership and control but it was supportive of those accumulating large blocks of shares.[104] These magnates of capital were content to let managers govern the company, whilst using economic power to exert their rule over directors.[105] For example, a strategic bloc of one to five per cent of shares in a company vested shareholders with the voting rights necessary to determine the composition of company boards.[106] Managers were subordinate to wealthy investors. Elite shareholders were not passive investors under the thrall of the separation of assets and shares in limited liability companies. Hilferding spelt out that, through devices like holding companies, elite shareholders exerted control over a vast litany of enterprises coordinated by limited strategic shareholdings.[107] The separate legal entity doctrine suited the capital accumulation needs of ultra-rich shareholders intent on owning and controlling empires of capital. This situation is far removed from Ireland's vision of parasitical rentiers only interested in private enrichment and content to benefit from legal changes that passed control of their assets to managers. Rentiers were not the dominant fraction of capital, and this became even clearer as the 19th century unfolded. Towards the end of the 19th century, the role of rentiers and small manufacturers declined sharply. As Hobsbawm notes, a seismic shift in property relations was underway in all the developed capitalist states.[108] The realignment of property relations was to combine the power and prestige of banking and industrial capital. The age of finance capital dawned as the intertwining of banking

104 Clive Saunders Beed, 'The Separation of Ownership from Control' in Michael Gilbert (ed), *The Modern Business Enterprise* (Penguin, 1972) 141.

105 Ibid 148.

106 Ibid 140–1.

107 Hilferding (n 8) 225.

108 Hobsbawm, *Industry and Empire* (n 39) 130–1.

and industrial capital created large scale enterprises that combined economic and political power.

Rentiers had many of the characteristics of a petty bourgeois class. Certainly, Ireland oversimplifies their role in economic and legal history. Hobsbawm makes the telling point that in mid-19th century Britain there were '170,000 persons of rank and property without visible occupation'.[109] He identifies this group as a class of rentiers and says they were mainly women, and 'a surprising number of them unmarried ladies'.[110] Their wealth, in the form of stocks and shares, was a product of past generations of accumulated capital. The women — either because they could not or no longer needed to be 'associated with the management of property or enterprise' — lived off their dividend earnings and the capital gains from rising stock prices.[111] They were classic rentiers, and were reliant on money managers controlling their investments. Rentiers remind one of the character Betsey Trotwood in Charles Dickens' novel *David Copperfield*.[112] This scattered body is given an elevated position by Ireland well beyond their power and ability to influence the State to structure legal rules on their behalf.

Marx's treatment of the separation of ownership and control thesis placed the emphasis on shifts in the production process.[113] Marx illuminated that the growing socialisation of production, spurred by the expanded scale of factory capitalism, created the conditions for the stratification of the leading personnel at the peak of the company.[114] The task of contributing investment funds provided scope for financiers to flourish, whilst the factory capitalist commanded the production process.[115] The financiers were rewarded by accruing dividends from their share capital and loans, whilst the factory owner obtained their income from their control over the plant and equipment and supervising production.[116] The economic surplus was shared by two fractions of capital. In time banks and industry merged, capping events that began unfolding in the mid-19th century. A financial oligarchy expanded under the umbrella of the banking sector. Family controlled merchant banks — such as Rothschild & Co and Barings Bank — distributed loan capital, and handled their own share portfolios, whilst being linked with a network of wealthy investors.[117] As growing amounts of capital were required the factory capitalist yielded individual economic ownership and blended their wealth with that of financiers in order to fund the updated machinery required to wage the competitive war.[118] Ireland is so keen to capture

109 Ibid 119.

110 Ibid.

111 Ibid.

112 Charles Dickens, *David Copperfield* (Bradbury & Evans, 1850).

113 Marx, *Capital: Volume III* (n 3) 493, 498.

114 Ibid 567–8.

115 Ibid.

116 Ibid 498.

117 Niall Ferguson, *The House of Rothschild: The World's Banker* (Penguin, 2000) xxiv.

118 Marx, *Capital: Volume III* (n 3) 567.

the role of rentiers driving legal reform through the need to protect themselves from fraud, or sketching the changing nature of shares to transform the legal structure, that he misses the rise of large firms and a corresponding financial oligarchy being the true benefactors of the rise of the limited liability company. Rentier investors were part of the economic wave that led to mid-19th century company law reforms, but they were small fry regarding the birth of incorporated status and limited liability.

Ireland's focus on the role of rentier investors in the triumph of the company legal form misses the changing patterns in the economy, the rich character of the relations between different fractions of capital and the inter-imperialist angle in the battle for the historical emergence of general limited liability in the mid-19th century. The intertwining fractions of capital making up the British ruling elite in the mid-19th century is absent from Ireland's economic and legal history. The lack of precision on the changing structure of economic relationships results in a static model of capitalism. The hidden abode of production is elided as the structural force driving legal change. His theoretical framework is dominated by his habit of conflating social phenomena to prioritise rentiers, and leaves him unable to articulate the farrago of forces at the British apex of power in the mid-19th century, when the shape of company law was being defined. In making rentiers the axis of legal changes, Ireland is undertaking a form of analysis far removed from the Marxist tradition on the history of the company form. Thus, it can be argued, his account of landmark legal changes lacks a rich and accurate historical context. His failure to get the balance right on the forces underpinning the triumph of the limited liability company was to have a detrimental impact on his analysis of the structure of the 20th century capitalist power bloc that was situated at the commanding heights of the economy.

IV The Summit of the Corporation

It can be argued that Ireland's partial insight into the nature of capitalism poses intractable problems for his work. The flawed analysis evident in his earlier work haunts his post-1987 work. Decades passed and Ireland ploughed on, perpetuating a mistaken view regarding those who sit at the commanding heights of the modern company. The economic logic of the market, and its chameleon nature, failed to be taken as the focal point of interest and that resulted in a less than compelling analysis of every stage of capitalism that he explored. Shortcomings in Ireland's theory of the company become manifest when assessing power within the contemporary company. The 20th century witnessed, in advanced capitalist countries, the fusion of industrial and banking capital. Ireland's static model of the company failed to address this phenomenon that emerged in embryonic form in the 19th century. He compounds his errors by articulating the view that, in the 21st century, rentiers retained their hegemonic role, and that moves to promote the organisational structure of the company were bent on serving their interests.[119]

119 Ireland, 'Efficiency or Power?' (n 99) 295.

Questions about Ireland's affinity to the Marxist standpoint regarding issues central to the operation of business enterprises cast a shadow over his work. Given his status, it is necessary to explore how Ireland has applied his class analysis of the company form in the latter stages of his career and judge its efficacy. In sum, even in the autumn of his scholarship, apart from rentiers no other fraction of capital receives any space in Ireland's concept of what constitutes power at the apex of the modern company. Ireland projects the hegemonic image of a parasitic group of investors who have voluntarily handed over their rights to managers who occupy the cockpit of the company. Frozen history best describes the transhistorical perspective of Ireland. For Ireland, ever since the company reforms of the mid-19th century, rentiers and managers have been the major bloc in company life. He is so intent on describing the rentiers as a passive entity that he ends up excluding them from having either the capacity or intent to have an input in company policy. Strategies are implemented to bolster rentiers but they themselves have no agency in company machinations. In effect, Ireland brushes out of contemporary history a comprehensive depiction of the capitalist class, for the rentiers are the only capital-owning members that he investigates.

In a 1999 article, Ireland speaks of professional managers who are paid to run enterprises whilst shareholders are functionless rentiers.[120] He describes how shareholders were money capitalists standing outside the company and the production process.[121] So insistent is Ireland on this theme that he reiterates his theory of what is the economic state of the company when he asserts that

> shareholders are money capitalists, external to companies and to the production process itself. Disinterested and uninvolved in management, and, in any case, largely stripped (in law as well as in economic reality) of genuine corporate ownership rights, the shareholder is, as Berle and Means pointed out, 'not dissimilar in kind from the bondholder or lender of money'.[122]

In 2000, Ireland reiterates his distribution of power thesis regarding the modern company when he argues the fact that rentiers were

> passive owners of titles to revenue, external to companies as productive units, was further reflected in the gradual transfer of power within joint stock companies from general meetings and shareholders to boards of directors and managers …[123]

120 Paddy Ireland, 'Company Law and the Myth of Shareholder Ownership' (1999) 62(1) *Modern Law Review* 32, 42 ('Company Law').

121 Ibid.

122 Ibid 47, citing AA Berle and GC Means, *The Modern Corporation and Private Property* (Harcourt Brace, rev ed, 1967) 45.

123 Paddy Ireland, 'Defending the *Rentier*: Corporate Theory and the Reprivatisation of the Public Company' in John Parkinson, Andrew Gamble and Gavin Kelly (eds), *The Political Economy of the Company* (Hart Publishing, 2000) 141, 147.

By 2010 Ireland was promoting the view that rentiers were driving the globalisation of the Anglo-American company form. He noted:

> [T]he triumph of the corporate legal form was more the product of the growing political power and needs of *rentier* investors than it was of economic imperatives, an argument that might easily be extended to the current attempts to universalise corporate law in its resolutely shareholder-oriented Anglo-American form.[124]

In a 2018 article, Ireland announced that rentiers were driving governance practices across the globe.[125] They were pursuing a trans-border policy to universalise the company legal form gained in 19th century Britain. The problem is that, apart from lofty predictions, Ireland provides no detail on the measures being taken by contemporary rentiers or their representatives to institute the vision of a shareholder-oriented Anglo-American juridical form on a global scale. We get no sketch of the mechanisms rentiers are utilising to transform their business interests into legal policy. There is evidence of legal imperialism. For example, China has a company law framework resembling the Anglo-American form, and governance mechanisms have been introduced to assuage foreign shareholders.[126] But it is multinational companies seeking to use China as an export platform that have crafted a legal regime benefiting foreign investors.[127] In league with the World Trade Organisation, multinational companies spearheaded a host of laws beneficial to foreign investors.[128] Passive rentier investors played no role in formulating the Chinese business legal regime. Behind the façade of their imposing headquarters based in metropolitan states, multinational companies are controlled by elite shareholders. This group owns strategic shareholdings in a web of global companies, and they watch over their empire of capital. Warren Buffett is no sleeping rentier; he is a shareholder activist with an eye-watering portfolio of investments. Ireland's focus on rentiers driving legal imperialism is misplaced. Buffett brings to mind the finance capitalists that Hilferding described when he averred that strategic share stakes in powerful companies enable magnates of capital to shape the policy landscape.[129]

For Ireland, different company theories circle around Adolf Berle and Gardiner Means' managerialist interpretation of the separation of ownership and control, and the pursuit of a global Anglo-American shareholder primacy model.[130] Managers in

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124 Ireland, 'Limited Liability' (n 97) 838.

125 Ireland, 'Efficiency or Power?' (n 99) 295.

126 Nicholas Calcina Howson and Vikramaditya S Khanna, 'The Development of Modern Corporate Governance in China and India' in M Sornarajah and J Wang (eds), *China, India and the International Economic Order* (Cambridge University Press, 2010) 513, 544, 546.

127 Leo Panitch and Sam Gindin, *The Making of Global Capitalism: The Political Economy of American Empire* (Verso, 2012) 293, 296–7.

128 Ibid 293–4.

129 Hilferding (n 8) 119–20.

130 Berle and Means (n 122).

Ireland's scenario are morphing into a globalised managerial class bent on pursuing rentier aims. Ireland's company governance paradigm is of interest to Marxists, but his take on the export of the Anglo-American company model bearing the imprint of rentiers is a mistaken assumption. The Anglo-American model Ireland speaks of will also face a sustained challenge in an age when Paul Kennedy's thesis about the rise and fall of empires is particularly pertinent to the decline of the US.[131] Future global crises will take their toll and spell problems for those intent on transplanting the Anglo-American model.

A puzzling feature of Ireland's work is the way he was swayed by Berle and Means' liberal theory that capital has surrendered its power to managers.[132] His theoretical standpoint can result in contradictory perspectives. This quirk is evident in an article Ireland wrote in 2005.[133] In this article, Ireland presents an array of wealth data drawn from UK and US sources that pinpoint the reality of a narrow elite in both countries owning the bulk of shares. Ireland states his aim in this article is to 'lift this particular veil and to elucidate the make-up of the shareholder class'.[134] This is a definitive advance in Ireland's scholarship and opens up the prospect of him shining an empirical light on the dominant fraction of the capitalist class in modern society. However, as an article that promises to expose the composition of the shareholder class, it fails to deliver. Time and again in the article, Ireland presents impressive economic data that reveals the stratospheric scale of share inequality in the UK and US. Yet he sheds almost no light on the groups that constitute the economic elite. Ireland has nothing to say on the non-institutional owners of the biggest parcels of shares in the UK and US. He quite rightly points to the equities share owned by institutional investors, but on private individuals or groups he is silent.[135] We get tantalising glimpses of the state of affairs, such as when Ireland notes the US concentration of wealth boils down to 'the top one per cent of families owning 38 per cent of total marketable wealth and the top 20 per cent of families 83 per cent'.[136] He adds that the 'wealthiest one per cent of Americans still held (directly and indirectly) over a third of corporate equity … In contrast, the bottom half of the population accounted for only 1.4 per cent'.[137] At the end of the article, speaking about the contemporary period of share ownership, all that Ireland can summon up is the assertion that government policies operate in favour of 'creditor and rentier interests'.[138] That key figures among the US inner circle owning large tracts of shares are not rentiers, but the modern equivalent of the titans of the Robber Baron age, is left unexplored.

131 Paul Kennedy, *The Rise and Fall of the Great Powers: Economic Change and Military Conflict From 1500 to 2000* (Fontana Press, 1990).

132 Ireland, 'Limited Liability' (n 97) 851.

133 Paddy Ireland, 'Shareholder Primacy and the Distribution of Wealth' (2005) 68(1) *Modern Law Review* 49 ('Shareholder Primacy').

134 Ibid 52.

135 Ibid 57.

136 Ibid 59, citing EN Wolff, *Top Heavy* (New Press, 2002) 1–3.

137 Ireland, 'Shareholder Primary' (n 133) 61.

138 Ibid 78, quoting P Gowan, *The Global Gamble* (Verso, 1999) 8–18.

The primacy of John D Rockefeller, John Morgan, Solomon Guggenheim and Cornelius Vanderbilt has been replaced by Jeff Bezos, Bill Gates, Warren Buffett, Lawrence Ellison, Mark Zuckerberg and others at the apex of the current American pyramid of power. These titans are far removed from the rentiers that Ireland likes to talk about. To describe them as disinterested and uninvolved in management and bereft of ownership prerogatives is implausible. Bezos, for example, controls Amazon and has a personal fortune of USD189 billion.[139] He is as far removed from being a rentier as Rockefeller or Morgan were in their heyday.

Time has stripped away whatever influence rentiers once exerted. The role of rentiers was profoundly impacted upon by the Great Depression of 1873–96. Ireland avers that a keynote of this long economic depression was overproduction and falling profitability.[140] Within Britain 'there was a gradual and significant fall in the real rate of return on industrial capital'.[141] Ireland's commentary on the economic impact of this crisis is perceptive, but the tragedy is that he only provides a miniaturist view. He fails to extend his analysis to the impact of the Great Depression on the ranks of the British ruling elite, and how the slump triggered changes within the leading personnel of capital.

The result of the profitability crisis and overproduction was the ushering in of a new stage of capitalism, and with it, a changing of the guard within the top stratum of the capitalist class. The advent of finance capital signalled a change in the social relations of property in Britain.[142] Ireland's image of rentiers being tied to managers in an ownership and control duet that has lasted up to the contemporary age loses any analytical power when consideration of the impact of the post Great Depression years is taken into account. Prior to the Great Depression, rentiers were minor players. After the crisis years, rentiers slipped even further in the ranks of capital. The age of the giant firm dawned. Key mergers in the industrial sector were sparked by the Great Depression. Lever Brothers, J & P Coats Ltd and Vickers Limited were just a few of the firms to grow by amalgamation.[143] Following in the wake of developments in Germany and the US, banking capital and industrial capital in Britain began to merge. In 1914 there were 130 railway companies in Britain. After 1924, there were four.[144] Banks went from being the humble middlemen they were at an earlier phase of capitalism to powerful monopolies that had the bulk of the money capital held by

139 Rupert Neate, 'Family Fortunes of Wealthy Increase as Super-Rich Ride Coronavirus Storm', *Guardian* (online, 16 July 2020) <https://www.theguardian.com/news/2020/jul/16/family-fortunes-of-wealthy-increase-as-super-rich-ride-coronavirus-storm>.

140 Ireland, 'The Rise of the Limited Liability Company' (n 10) 249.

141 Ibid.

142 On the nature of finance capital see Bukharin, *Imperialism and World Economy* (n 8); Hilferding (n 8); Lenin, *Imperialism* (n 8).

143 Barratt Brown (n 66) 83.

144 Hobsbawm, *Industry and Empire* (n 39) 215.

capitalists under their command.[145] The first decade of the 20th century witnessed significant mergers in the banking sector.[146] Five banks came to dominate the field. By 1924, the Big Five banks (Midland Bank Plc, National Provincial Bank, Lloyds Bank, Barclays and National Westminster Bank) ruled the British High Street.[147] In 1914, Britain was the least concentrated of the great industrial powers, but by 1939 it was one of the most concentrated.[148] As banks and industry drew closer, financiers promoted the scrapping of excess capacity and rationalisation in enterprises that built up overdrafts.[149] Banks became underwriters for flotations in major businesses.[150] The advent of finance capital was responsible for creating a power bloc within the capitalist class. The primary groupings of finance capital comprised the top stratum of the capitalist class.[151] This new ruling elite comprising the merger of industrial capital with banks became the focus of economic and political power.[152] Interlocking directorates, where individuals sat on banking and industrial companies, forged the bonds of this new elite.[153] Rentiers were just sideline observers of this great socio-economic transformation.

In contrast to a new phase of capitalism emerging during the deep economic crisis and producing radical changes within the economic elite, Ireland posits the disappearance of the ruling class. Key indicia of private property relationships vanish into a social vacuum in Ireland's work. Ireland avers that

> the modern depersonified corporation represents not merely a dilution of shareholder corporate property rights but the demise of the means of production as private property to which notions of 'ownership', with their connotations of exclusivity and exclusion, are applicable.[154]

On this issue, Ireland has confused changes in the structure of property ownership with the alleged abolition of capital as private property. To achieve clarity on this crucial issue one turns to Charles Bettelheim and not Ireland. Bettelheim notes how the agents of possession or company managers who have the ability to put the means

145 Albert Szymanski, *The Logic of Imperialism* (Praeger, 1981) 36, citing Vladimir Lenin, 'Imperialism: The Highest Stage of Capitalism' in Vladimir Lenin (ed), *Selected Works* (Foreign Languages Publishing House, 1960) vol 1, 732–3, 736.

146 Chris Harman, *Explaining the Crisis* (Bookmarks, 1984) 53–4.

147 Hobsbawm, *Industry and Empire* (n 39) 215.

148 Ibid 214.

149 Peter Cain and Antony Hopkins, *British Imperialism: Crisis and Deconstruction 1914–1990* (Longman Group, 1993) 14–15.

150 Ibid 16.

151 Sam Aaronovitch, *The Ruling Class: A Study of British Finance Capital* (Greenwood Press, 1979) 75.

152 Ibid.

153 Ibid 40–1.

154 Ireland, 'Company Law' (n 120) 55.

of production into operation are to be distinguished from the agents of property.[155] The agents of possession are subordinated to the agents of property, or, in the case of the company, the managers are a secondary force to shareholders. Quite simply, a shareholder's property is an economic relation that empowers the shareholder to dispose of the products obtained with the help of the means of production.[156] Bettelheim's framework of analysis is particularly germane in the case of shareholders with sizeable blocks of shares. Large shareholders appropriate more of the value produced in the production process. Appropriating large scale profits from production facilitates the growth of the top stratum of the business elite. This elite combines banking and industrial wealth.

John Scott has put successive generations of the business dynasties of north east England under a spotlight to elucidate the contours of the top stratum of the capitalist class. These budding magnates began modestly enough. Their original capital base in the 18th century was located within coal, glass, iron and lead industries.[157] These early ventures were financed by local merchants and landowners.[158] In the 19th century the successful north east England family groups diversified into the expanding engineering and shipbuilding industries and showed a fledgling interest in becoming financiers.[159] They then became dominant forces in local railway, water and gas companies.[160] Overseas imperial ventures in mining, rubber and metals added to their fortunes.[161] The Cookson and Pease families had a variety of businesses and then segued into banking.[162] Together with the Ridley, Joicey, Priestman, Clayton and Straker families, the Cookson and Pease firms 'formed the core of a network of local dynasties'.[163] The families were linked together by 'interweaving shareholdings and interlocking directorships'.[164] These family dynasties moved onto the national scene and took advantage of the rise of finance capital. Finance capital embodies the fusion of banking and industrial capital. Members of the family dynasties sat on the boards of both industrial and banking concerns.[165] The Pease and Ridley families were represented on the board of Lloyds Bank.[166] The Pease and Clayton families were on the Barclays board, whilst the Ridleys were on the board of National Provincial

155 Charles Bettelheim, *Economic Calculation and Forms of Property*, tr John Taylor (Routledge & Kegan Paul, 1976) 69.

156 Ibid.

157 John Scott, *Who Rules Britain?* (Polity Press, 1991) 73.

158 Ibid.

159 Ibid.

160 Ibid.

161 Ibid.

162 Ibid 74.

163 Ibid.

164 Ibid.

165 Ibid 75.

166 Ibid 75–6.

Bank.[167] Shareholder primacy takes on a whole new meaning when consideration is taken of the financial oligarchy that rules through strategic holdings in industry and banks. Rentiers have no place in Scott's analysis of the anatomy of power of British society. They figure nowhere in his dissection of the dynamics of power within the ruling class, and the accumulation patterns over generations that led to the triumph of business dynasties.

Ireland's failure to discern the emergence of a new economic stage of capitalism following the crisis of 1873–96, and the reorganisation of capital it sparked, has had ramifications for his depiction of the company legal landscape. It led Ireland to focus on the theme that the contemporary company scene is one in which functionless rentiers have overseen the transfer of power within joint stock companies from general meetings and shareholders to boards of directors and managers.[168] Professional managers have taken on duties eschewed by rentiers. Ireland acknowledges that rentier investors have held on to the right to vote in general meetings and fiduciary duties are still based on acting for the best interests of shareholders: but that exhausts the rights of capital owners.[169] Characterising all shareholders as largely impotent within the modern company is the touchstone responsible for Ireland working within a mistaken theoretical framework.

In contrast to Ireland, Harry Glasbeek scrutinises the internal operation of modern companies and finds the shareholders are not a powerless legal body. The primacy of shareholders is evident across a range of vital issues. In brief, the legal weaponry provided to shareholders is multifarious. It includes the right to vote for the appointment and dismissal of directors and, whilst shareholders have given up the power to control and direct daily operations,

> they have the right to exercise veto power over major decisions that would affect the very nature of the corporation in which they have invested — they have the right to vote on the sale of the substantial assets of the corporation, of a take-over of the corporation or a merger or a scheme of arrangement that would see the corporation change its essence …[170]

The shareholders are the single group that is provided with membership of the company, and this is reflected by all profits being directed towards them. If the shareholders are unhappy with the direction or future of the company they can make a quick exit.[171] Legal responsibilities stop at the door of the company. Limited liability, combined with the separate legal entity concept, ensures the company is 'held responsible for any obligations, debts and administrative or criminal sanctions incurred as

167 Ibid 76.

168 Ireland, 'Company Law' (n 120) 43.

169 Ibid 48.

170 Harry Glasbeek, 'Piercing on Steroids' (2014) 29(3) *Australian Journal of Corporate Law* 233, 235.

171 Ibid.

a consequence of its pursuit of profits'.[172] In effect, shareholders are legally immune from company misbehaviour and, if scandals occur and new standards are called for, the regulators respond by saddling directors and senior officers with new duties.[173] The directors take the rap and more regulatory requirements whilst shareholders get off scot-free and bank their profits.[174] Such is the reality of the separation between managers and those with economic property. This facilitative legal landscape is ideal for a profitmaking system controlled by the finance capitalists that rule the company roost. They benefit from loose regulation whilst ruling directors.

In his 2010 article, Ireland shows he understands the lack of legal restraints on shareholders but he sticks rigidly to the viewpoint that they have been stripped of power.[175] He argues that the joint stock company shareholder

> now no longer entails liabilities, and also increasingly no longer carries obligations or responsibilities, for managing power was increasingly vested by companies (through the provisions of the standard statutory articles) in boards of directors.[176]

Ireland skips looking at substance and instead he focuses on legal niceties. Ireland refuses to examine links between directors and controlling shareholders. Directors are often proxies for those who have the reins of economic power firmly in their hands. And with his relentless focus on rentiers, it escapes Ireland's notice that the advent of finance capital has entailed a new power bloc to emerge and that this elite is now the top stratum of the capitalist class. It must be stated Ireland makes a telling point in his 2018 article. He notes the move towards financial property being warehoused in financial institutions such as hedge funds. He states this has 're-empowered financial property owners, including shareholders, as a class'.[177] He makes no reference to hedge funds and other financial institutions being vehicles offering private services to an economically powerful elite. Hedge funds are a creature of modern finance capital; they are an ancillary of finance capital. If Ireland were to excavate the role of hedge funds in the future it would be a positive step, for it offers the potential for him to drop his emphasis on rentiers and examine the make-up of the capitalist class at a more forensic level than he has done up to this point.

172 Ibid.

173 Ibid 246.

174 Ibid.

175 Ireland, 'Limited Liability' (n 97) 846.

176 Ibid.

177 Paddy Ireland, 'From Lonrho to BHS: The Changing Character of Corporate Governance in Contemporary Capitalism' (2018) 29(1) *King's Law Journal* 3, 21.

V Conclusion

This article has been both a tribute to and critique of the company scholarship of Paddy Ireland. At the outset, the article spelt out how Marxism suffered a fall in influence within the legal academy. Ireland's work incontrovertibly highlights that this was a loss and articulates that Marxism is an invaluable method for dissecting the history and legal structure of the company. Across the years, and ignoring the waxing and waning of academic fashion, Ireland has produced a body of work that, despite its theoretical shortcomings, has given space to Marx's method and in the process illuminated the conceptual foundations of modern company law. Despite its qualities, the fundamental issue remains one of whether Ireland's work has employed the full range of Marx's theoretical analysis of the history of the company. In brief, has Ireland's work probed deeply enough to unravel whether the company legal form truly expresses the economic content of the social relations of property ownership embodied within the modern company?

It has been argued that Ireland's work falls short on this score. It is an exaggeration to claim that rentiers were the Gordian knot linking the legal form with economic property. Far more promethean forces than that conjured up by Ireland were responsible for general incorporation and limited liability. The legal superstructure responded to the concentration and centralisation of capital, and this process threw up the hegemony of new fractions of capital. Rentiers were a component part of the capitalist class but Ireland exaggerates their role. Banks and industrial capitalists were the first violinists. Rentiers were minor members of the orchestra. When banks and industry combined their forces, rentiers fell even further in the pecking order. Ireland's conceptual flaws have resulted in overestimating the role of rentiers in achieving the limited liability company, and this has led to misconceptions of the contemporary ruling class that controls companies. It is a matter of regret that Ireland failed to capitalise on the deepening and developing of Marx's conception of the company by thinkers like Bukharin, Hilferding and Lenin. They updated Marx's theoretical analysis of the history of the company and provided the tools for anatomising the ruling elite and the juridical nature of the limited liability enterprise. The major argument in this article has been directed at highlighting that Ireland, in his body of work, has fallen short in theorising the linkage between the company legal form and the economic structure of capitalism. The economic and legal arena are not separate spheres and whether it be the rise of the limited liability company, the economic factors driving the separate legal entity doctrine or the power structure within the ranks of contemporary capital, Ireland's theoretical analysis has failed to capture fully the dynamics that shape core characteristics of the company entity.