

INDUSTRIALIZING ENGLISH LAW

ENTREPRENEURSHIP AND BUSINESS
ORGANIZATION, 1720–1844

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1

The Legal Framework

Much of the literature on the history of business organizations is the history of winners. It projects backward from the end of the story. The rise to dominance of the joint-stock limited corporation in the late nineteenth and early twentieth centuries led many historians to focus their attention mostly on this form of organization from as early as the sixteenth and seventeenth centuries. They neglected other forms of organization that did not win the day, assuming that the winning was in some sense inevitable from the outset. I argue that it is impossible to isolate the story of the business corporation from the stories of other forms of organization. Entrepreneurs employing these forms interacted and competed with one another in the commodities and financial markets. Lawyers, judges, and legislators shaping these forms copied features from others, and at times rejected features found to be problematic in relation to other forms. I further argue that the rise to dominance of the business corporation was not inevitable in any sense from the perspective of the year 1500 or even the year 1800. Its rise cannot be comprehended in a narrow context, by unfolding the story of the business corporation in a linear and deterministic manner.

This chapter surveys the legal framework of business organization in early modern England. It lays out the full range of possible forms of organization of enterprises available to business persons, from the sole proprietorship to the joint-stock corporation and beyond, and the legal constraints within which entrepreneurs and their lawyers functioned. The discussion, in the following chapters, on adherence to the framework, the attempts to bypass it, or pressures to alter it can be understood only in light of this framework. The purpose of this chapter is also partly introductory, to place readers of different disciplinary starting points – historians, economic historians, legal historians, and scholars of law and economics and of corporate law – on a common ground. Some of these disciplinary groups may well be familiar with parts of the material.

The discussion of the concrete forms of organization follows two preliminary steps. The first is a historical and analytical discussion of the three major legal conceptions applied to groups of individuals: the corporation, the partnership, and the trust. The second examines four features, related in different degrees to these abstract conceptions and attributed to concrete forms of business organizations: legal personality, transferability of interests, managerial structure, and limitation of liability.

In addition to the creation of a common denominator, I wish at this early stage to emphasize the historical burden, or path-dependence, of later developments. Understanding the medieval origins of the three legal conceptions – corporation, partnership, and trust – and the features attached to them at that formative stage is essential for analysis of later developments. Realization that some features, such as joint stock and limitation of liability, are of a later period and of different origin is also imperative. So is the comprehension that by the early eighteenth century, the starting point of this book, a wide spectrum of forms of business organization existed. The fact that the joint-stock corporation became dominant in the modern world is not the result of a lack of alternative conceptions, features, and concrete forms. On the contrary, it is the convergence, from the mid-nineteenth century onward, that is an unexpected and puzzling outcome in light of the diversity of the early eighteenth century.

To meet the above purposes, the time period covered by this chapter is longer than that of the following chapters. It goes back to Roman and medieval times, to the first appearance of the business corporation in the sixteenth century, and also deals with the later period of 1720–1800 which is the focus of the second part of this book. Geographically, as well, this chapter reaches beyond England to the continental origins of some of the conceptions and concrete forms.¹

LEGAL CONCEPTIONS OF GROUP ASSOCIATION

This section presents three legal conceptions which, by the late Middle Ages, applied in one way or another to groups of individuals: the partnership, the corporation, and the trust. Potentially, these conceptions can define the association of individuals into collective frameworks for business purposes. While initially only the partnership was employed in

¹One caveat to the structure of this chapter. It breaks the chronological sequence, to which the rest of the chapters generally conform, as it deals with forms that emerged in the sixteenth century, side-by-side with those that emerged some two hundred years later. Taking into account the hoped-for diversity of the readership and the nature of the argumentation, I believe that this is unavoidable.

business, the two others – the corporation and the trust – were adjusted for business purposes in the sixteenth and eighteenth centuries, respectively. I present the origins and basic legal characteristics of these forms here.

One of my main concerns throughout the book is why the corporation, and not the trust or the partnership, came to dominate business organization in England by the second half of the nineteenth century. It would not seem to have been the obvious winner from the perspective of the fourteenth or even the early sixteenth century. Until then, it was used mainly for religious and municipal purposes, whereas the partnership was used for business purposes. The corporation was controlled by the King, while the trust was developing dynamically out of his reach. Why then did the corporation adjust to business needs better than the other two conceptions? The present chapter broadly states the question. I hope that halfway through this book the answer surfaces and the connection between it and the autonomy/functionality paradigm, presented in the introduction, become evident.

The Corporation

Some historians trace the origins of the corporation back to the *universitas* of classical Roman texts, as codified in the sixth-century *corpus juris civilis*.² Others maintain that it was the fourteenth century commentators, with their liberal interpretative methods, who read into the Roman texts a well-defined concept of the corporation, foreign to the original authors.³ Some scholars trace the origins of the corporation to the realities of the middle ages, particularly to institutions such as the guild and the city.⁴ Others assert that the corporation owes its existence not to secular bodies but to Church institutions and canonist constitutional theory.⁵ Some members of the Germanist branch of the German historical school are convinced that it grew out of the communal fellowships and *Volksggeist* of medieval Germanic clans.⁶ I bypass the question of origins, and the other historical and jurisprudential issues related to it, and turn directly to sixteenth-century England. In this period, corporations of various sorts were widespread; the King himself, cities and

²P. W. Duff, *Personality in Roman Private Law* (Cambridge University Press, 1938; rpt., New Jersey, 1971).

³Reuven S. Avi-Yonah, "The Development of Corporate Personality from Labeo to Bartolus," Seminar Paper, Harvard University, 1989.

⁴F. W. Maitland, *Township and Borough* (1898, rpt., Cambridge, 1964). Scott, *Constitution and Finance of Joint-Stock Companies*, vol. 1, pp. 3–6.

⁵Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass.: Harvard University Press, 1983).

⁶Gierke, *Political Theories, Natural Law, and Community in Historical Perspective*.

boroughs, guilds, universities and colleges, hospitals and other charitables, bishops, deans and chapters, abbots and convents, and other ecclesiastical bodies were organized into corporations. They were classified by Blackstone, in retrospect, into sole and aggregate, lay and ecclesiastical, eleemosynary and civic.⁷

Could corporations in sixteenth-century England be created voluntarily or only by the State and the law? Because this question is conveniently less controversial for the sixteenth century than for earlier periods, I take this period, on the eve of the appearance of the business corporation, as my starting point.

Blackstone and Kyd, writing in the second half of the eighteenth century, still found relics of two ancient modes of creating corporations: by common law (bishops, deans, and others) and by prescription (the City of London) which did not involve immediate State authorization.⁸ But even these forms were considered, generally or implicitly, to lie within the embrace of King's consent, and in any event, they referred to ancient corporations whose creation was concealed in the mist of immemorial past. For contemporaries, they were more of an *ex post* rationale for formally legalizing well-established corporations than a historical explanation of their origins, and had not been used for creating new corporations since medieval times.

Another indirect form of creating corporations, by delegation of power (e.g., from the King to the Pope for ecclesiastical purposes), was discontinued by the end of the Reformation.⁹ The decline of implicit and delegated incorporation was one of the outcomes of the strengthening of the centralized government and the royal court. By later Tudor times, the Church, the Universities, the City of London, and semiautonomous regions were giving way, not without resistance, to Crown authority.¹⁰ This was expressed in many fields, among them, in our case, the disappearance of other incorporating authorities and the creation of an effective Crown monopoly over incorporation.

Thus, by the sixteenth century, an explicit, *ex ante* and direct authorization by the King became the only mode of incorporation. This authorization was normally given in the form of charter (or letters patent), and, occasionally, by way of Act of Parliament bearing the King's explicit consent, or a combination of an act and a charter. By this time, it

⁷William Blackstone, *Commentaries on the Laws of England*, 4 vols. (London, 1765–1769; rpt., Chicago: University of Chicago, 1979), vol. 1.

⁸Blackstone, *Commentaries*, vol. 1, pp. 460–463; Stewart Kyd, *A Treatise on the Law of Corporations*, 2 vols. (1793–1794), vol. 1, pp. 39–41.

⁹Similarly, the creation of academic corporations by general delegation of powers by the King to the Chancellor of the University of Oxford became insignificant.

¹⁰Though the autonomy of boroughs from the rural surrounding was on the rise in this period, they were placed within the system of Crown-created corporations.

was considered that incorporation was an essential component of the King's exclusive and voluntary prerogative to create and grant dignities, jurisdictions, liberties, exemptions, and, in our case, franchises.¹¹ The law of corporations was classified by contemporaries as part of the law of the King, the core of the English Constitution. The employment of franchises in general, and specifically corporations, was subject to judicial review. This was done by way of the prerogative writs of *quo warranto* and *scire facias*, by which claimants were required to show by what authority they were exercising the franchise or the alleged corporation. Unauthorized corporations could be dissolved and abused charters could be forfeited by the court through these prerogative judicial writs.¹²

What were the consequences of incorporation? Incorporation involved the creation of a new personality, distinct from that of individual human beings. There is no evidence that sixteenth-century English legal theorists, insofar as there were such, were concerned with the debate on the basis of justification for that personality. The classical Roman law, the *corpus juris civilis* and the glossators' and commentators' interpretations of its dealings with corporate conceptions, and the canonist literature on these issues, did not offer solutions to practical problems within what was by then a crystallized common law system. The origins of the corporation within or without the law, and the timing and route of the importation of the corporation from the Continent into the common law, which has bothered legal historians since the nineteenth century, did not interest the practically oriented sixteenth-century English judges and lawyers. All they wanted was to solve, as they reached courts, the concrete daily disputes to which corporations were party. If one can nonetheless suggest a dominant abstract common-law conception of the corporate personality, without being charged with anachronism, it would be that of the State- or law-fabricated artificial person and not the spontaneously created natural person, or the contractually, voluntarily devised aggregate person. That must have been Hale's conception, when writing in the mid-seventeenth century that "every corporation must have a legal creation."¹³ The personality of the corporation was instituted through a concession by the King to some of his subjects, and had no other justification.

¹¹Matthew Hale, *The Prerogatives of the King* (London: Selden Society, 1976), vol. 92, chap. 19.

¹²John Bouvier, *Bouvier's Law Dictionary and Concise Encyclopedia*, 8th ed., 2 vols. (Kansas: Vernan Law Book, 1914), see "Quo Warranto" and "Scire Facias"; Holdsworth, *English Law*, vol. 9, pp. 65–67; J. H. Baker, *An Introduction to English Legal History*, 3d ed. (London: Butterworths, 1990), 166–167; Kyd, *Law of Corporations*, 395–439. The distinction between the two writs is discussed in the next two chapters.

¹³Hale, *Prerogatives*, 240.

The separate legal personality of the corporation had several implications. Its legal personality did not terminate with the death of any human individual; it was potentially immortal and subject to dissolution only in a strictly defined manner. A corporation could own (in the feudal sense) and convey land, at times with restrictions. Its perpetual existence conflicted with the feudal arrangements which held that the death of a landlord generated dues to the Crown. As a result, the Crown was opposed to land-holding by immortal legal persons such as corporations. Only by receiving a special license from the Crown in the charter of incorporation, or in a statute, to hold land in *mortmain*, could the corporation enjoy the privilege of perpetual ownership and exemption from dues.¹⁴ The corporation did not have to litigate under its members' names, but could sue and be sued, for better or for worse, in its separate personality, in the same manner as individuals. A corporation had to have a common seal, a unique feature of incorporation, and could make bylaws to govern its internal affairs.¹⁵ As a legal entity, a corporation could receive additional franchises, liberties, and exemptions from the State, usually in the incorporating charter or act itself.

The Partnership

The employment of partnerships for business purposes has its origins in antiquity and the early middle ages. From this early period, the partnership was closely linked to business purposes. Since classical times, the partnership had been viewed as a legally enforced contract, one of several categories of agreements recognized by Roman law and medieval law merchant. By the late middle ages, several forms of business partnership agreements, or organizations, could be distinguished in the North Italian cities. They were loosely related to the Roman *societas*¹⁶ but each acquired its own distinct attributes based on medieval economic realities, more than on classical texts and their scholarly interpretations. Some historians identify three or more distinct prototypes. Here I introduce the origins and characteristics of the two basic, more generally accepted forms: the general partnership and the limited partnership.

The continental unlimited business partnership, *société generale* or general partnership, descended from the Italian *compagnia*. In its origins, the *compagnia* was a closed family partnership. Family members were

¹⁴See Bernard Rudden, *The New River: A Legal History* (Oxford: Clarendon Press, 1985), 230–236, for a discussion of the *mortmain*. As we see in the next section, trusts were also devised to circumvent the same feudal dues in different manner.

¹⁵*The Case of Sutton's Hospital*, 10 Co. Rep. 23a, 30b (1610); Edward Coke, *Commentary upon Littleton*, 19th ed., 2 vols. (1832), vol. 2, p. 250a; William Shephard, *Of Corporations, Fraternities and Guilds* (1659); Kyd, *Law of Corporations*, 69–70; Blackstone, *Commentaries*, vol. 1, pp. 462–467.

¹⁶*The Institutes of Justinian*, 3, 25.

its partners for all purposes. They invested capital and labor, based on ability; shared profits, based on needs and customs; and took part in its management according to a generational hierarchy. In fact, the early *compagnia* was less a formal partnership in internal affairs than a legal organization in its relationship with third parties. These had to know both that not all family members could always bind it and that all its assets were liable for its debts. In time, the internal affairs of the *compagnia* also became more formally fixed.

Another type of partnership, the *commenda* (also known as the *societas maris*) was developed in maritime Italian cities with the revival of trade in the eleventh century. It was used as a partnership between merchants and ship masters for the purpose of conducting a specific voyage to an overseas destination. This type of partnership was characterized, due to its unique use, as the cooperation among a small number of partners for a specific and short-term purpose. It was an asymmetric partnership, in which one partner contributed capital while the other contributed labor, which meant there were two types of partners with potentially different duties and liabilities. The model of the *commenda* was adopted in following centuries, under different names, in north German ports and other parts of continental Europe. This line of development from the maritime partnership eventually led to the limited partnership, which was recognized in 1673 in France by Colbert's Ordinance as the *société en commandite*.¹⁷

The general partnership arrived in England from the Continent via the internationally accepted and relatively universal law merchant. It was gradually absorbed from the various commercial and local tribunals and courts into the center of the English legal system, the royal common-law courts.¹⁸ The unlimited partnership, which was recognized throughout the Continent, was not adopted by English law. By the time the general partnership was absorbed, the common law had already been formalized and rejected the limited partnership. The concept of a partner immune to claims conflicted with basic common-law forms of action and with tort, contract, and agency doctrines, and was therefore blocked by the common law from entering England. It was recognized in English law by statute only in 1907.

¹⁷Olivia F. Robinson, T. David Fergus and William M. Gordon, *European Legal History: Sources and Institutions*, 2d ed. (London: Butterworths, 1994), 100–105; Carlo M. Cipolla, *European Society and Economy before the Industrial Revolution: 1000–1700*, 3d ed. (London: Routledge, 1993), 194–196; Charles E. Freedeman, *Joint-Stock Enterprise in France 1807–1869: From Privileged Company to Modern Corporation* (University of North Carolina Press, 1979), 3–5; Michael Postan, “Partnership in English Mediaeval Commerce,” in *Mediaeval Trade and Finance* (Cambridge University Press, 1973), 65–91.

¹⁸This process is discussed further in Chapter 6.

Partnerships of both types, unlike the corporation, had no legal personality distinct from that of its members. The partners were the holders of the property; they were the party in contracts, and they had to be named in litigation. Lacking a separate personality, the partnership did not have an immortal or even a perpetual existence. The death, retirement, or change of personal status (insanity, bankruptcy, and the like) of even one of its members signaled the end of the partnership. The remaining partners, if all wished to and were able to reach a new agreement, had to reorganize in a new partnership. A partnership, unlike a corporation, could be created voluntarily, by way of agreement between the would-be partners, and did not require permission of the State. Unlike the corporation, which had constitutional law bearings, the partnership was a private law and a commercial law conception, mainly involving elements of contract and agency law. Another significant difference which should be reiterated is that until the sixteenth century, the corporation had been employed for public and semipublic purposes, whereas only the partnership served as a viable form of business organization.

The Trust

Unlike the partnership and the corporation, the trust was not imported from the Continent. It is a unique English conception whose roots are not to be found in Roman law, canon law, merchant law, or the tribal and customary laws of medieval Europe. It deals with a continuous, not totally predetermined, relationship between individuals based on confidence.

The trust grew out of the “use” that stemmed from the realities and constraints of the English feudal system. In crude modern terms, common-law proprietors held the formal title over the land for the use of beneficiaries who had an equitable interest in that same land. The creation of uses was mainly motivated by the prohibition in some religious orders from holding property, the difficulties of absentee landowners such as the Crusaders to perform their feudal role, and, in time, mainly the evasion of feudal dues at death.

The common-law system was unable to deal with the use that created equitable rights to land that did not coincide with the legal rights to that same land. For this reason, the arrangements regarding the use, and later the trust, were generally not recognized and not enforceable in courts of common law. As early as the fourteenth or early fifteenth century, the Lord Chancellor acquired judicial supervision over disputes concerning such arrangements. By the late fifteenth century, the use became a relatively coherent equitable doctrine. Cases regarding uses and trusts com-

prised a considerable share of the total litigation within the expanding jurisdiction of Chancery.

The trust is of interest to us because it had an element of perpetuity and of joint holding, potentially on the part of both the trustees and the beneficiaries, and because it offered a separation between two levels of control over the trust's assets. It was a much more complex concept than mere joint-ownership in land. The trust (and earlier the use) was a fast-growing legal conception with some aggregate elements. It was constructed casually and voluntarily by way of explicit or implicit agreement between individuals. By the sixteenth century, it had already developed considerably and had the potential for further employment, and possibly also for business purposes.

One of the enigmas to be confronted in this book, then, is why the more flexible, expanding, and less-regulated concepts, the trust and the partnership, did not win the day. This enigma makes it essential, in my view, to follow the history of all three conceptions in search of an explanation for the rise to domination of the concept of the corporation. This will be done in the following chapters.

FEATURES OF BUSINESS ORGANIZATIONS

The authors of most corporate-law textbooks in recent decades focused on four basic features in analyzing the differences between the various forms of business organizations. These are the nature and lifespan of the legal personality, the transferability of interests, the organization and function of managerial hierarchy, and the limitation of investors' liability. These writers usually argued that modern business corporations differ from partnerships in all four features. Corporations have the advantage of a separate legal personality, free transferability of interests, limitation of shareholders' liability, and hierarchical managerial structure, whereas partnerships in most cases lack all four features. Hence, the argument goes, the corporation is legally, and possibly also economically, more efficient than the partnership and other "inferior" forms of organization.¹⁹ These four features explain, so the argument says, the

¹⁹See, for example: Clark, *Corporate Law*; L.C.B. Gower et al., *Gower's Principles of Modern Company Law*, 5th ed. (London: Sweet and Maxwell, 1992). This legal discourse is distinct from the economic discourse, which focuses on elements which affect the boundary between hierarchical activity within the firm, whatever its legal structure, and contractual activity in the open market; and from the law and economics discourse, which focuses on analyzing the business corporation within the setting of the separation of ownership from control and a relatively efficient share market. These discourses analyze agency and monitoring problems, information, risk bearing, contracting costs, and transaction costs in general. All of these are highly relevant for the study of the history of the corporation in the late twentieth century, and are

rise of the corporate form of organization to dominance in late industrial societies. Their discovery, in the wilderness of archaic medieval legal concepts, or their invention by progressive and enlightened jurists, are of phenomenal importance for the rise of modern industrial capitalism. It would not be a gross overstatement to compare the discovery, or invention, of these features, which led to the corporate economy, to the discovery of America or the invention of the steam engine.

Were these features discovered by turning to classical and medieval legal texts, or invented in the modern era? Were they linked together as a cluster, or did each have its own separate history? Were they considered by contemporaries to be superior, in terms of efficiency, as a group or individually, or was there an element of efficiency in not having certain features or in having different combinations of organizational features? Were they inseparable from the corporate legal conception, or could they alternately be attached to the partnership, the trust, or other legal conceptions? I return to all four elements later, particularly in Chapters 5 and 6, and examine their interplay with several concrete forms of business organization, in the changing intellectual and material realities. At that point I argue that the second alternative in each of the above four questions is no less viable than the first.

Legal Personality, Managerial Hierarchy, and Limitation of Liability

The legal personality and the managerial hierarchy were already briefly introduced in the first part of this chapter, because they were features of the corporation (ecclesiastical, municipal, academic, or guild) even before it was first employed for pure business purposes in the sixteenth century. These corporations enjoyed a considerable degree of separation of their legal personality from that of their human members. Most had a hierarchical structure, which included heads, officials, members, and assemblies (or at least some of these organs), and a formal decision-making process including the power to make bylaws, to hold internal tribunals, and the like. I elaborate on these at a later stage.²⁰ Limited

probably of some relevance for the historical research of periods since the fundamental transformation associated with the rise of big business in the late nineteenth century. I find them less relevant to the earlier setting and the more basic questions in which I am interested.

²⁰This book deals with the formal institutional structure of managerial structure. It deals only briefly with the structure of share holding: the nominal price of individual shares, minimum and maximum limitations on holding of shares by individuals, voting rights attached to shares, and the actual spreading of shareholding in various types of associations. All of these are worthy subjects of study for those wishing to understand the control and management mechanisms of business associations. They undoubtedly deserve fuller treatment elsewhere.

liability was absent, at least as a coherent conception, from the English legal framework until the late eighteenth century. It did not play a significant role in business organization before that relatively late era. Thus I do not discuss it in this chapter, except to briefly mention the limited partnership, in which it functions differently than in the limited corporation. I return to it in Chapter 5. For now, I turn to the fourth of these features: the evolution and meaning of transferability of interests, which is closely related to the financial conception of joint-stock capital.

Transferable Joint-Stock Capital

Joint-stock capital was a novel financial feature. It borrowed older elements from the business partnership, particularly the marine partnership, added new elements in the sixteenth and seventeenth centuries, and was eventually associated with the conception of the corporation, to form the joint-stock business corporation. This association took place at a relatively late stage in the history of the corporation. Only in the sixteenth century, when the corporation was first used for business purposes, did the preconditions for the emergence of this new feature occur. Efforts were made to integrate the feature of joint stock with the partnership and the trust, but as I shall argue later, this integration proved, at least in England, not to be a feasible alternative to the joint-stock business corporation.

The notion of joint stock only appeared in 1553. It took another century or so for it to crystallize and become widespread. Thus, one cannot speak of integration of the old legal conception with the new financial feature until the mid-seventeenth century. The development of the conception of joint stock and its integration into the corporation cannot be discussed in general and abstract terms, as it took place within the specific context of a small number of mostly merchant corporations, and within a well-defined time frame.

The Russia Company, chartered in 1553, was the first corporation to trade in joint stock, as discussed in the next chapter. The Levant Company, incorporated in 1581, also traded in joint stock in the first two decades of its existence. However, much of the development of the concept of joint-stock capital took place within the East India Company, chartered in 1600. Experiments were made using both ad hoc capital and capital for a term of years, and at times, the first was more profitable than the second. Additional capital was sometimes raised by issuing new shares to new members, at other times by calling on existing shares, and in some cases by raising loans rather than additional equity capital. In some circumstances, the entire capital, if not lost, was divided at the end of a voyage; in others, capital was divided up to the amount of the initial

investments while profits were reinvested for future use; and yet in others, only the profits were divided while the initial investment was retained by the company until the end of the joint-stock term. One can even find several models coexisting simultaneously within the East India Company.²¹ Yet toward the middle of the seventeenth century, a general pattern of development can be identified within the dominant East India Company: from ad hoc per voyage capital (1–3 years, invested in specific ships), to capital for limited duration (8–15 years), and finally to permanent and continuous capital. Thus from the mid-sixteenth to the mid-seventeenth century, a mechanism was developed for raising money in return for shares, for dividing profits among shareholders, for transferring shares among members and to outsiders, and for keeping accounts of joint-stock concerns for long durations.

This new mechanism did not develop as a legal conception, neither an abstract scholarly conception nor a case-based common-law one. It was a pragmatic, entrepreneur-made conception inspired partially by the modes of marine-partnership finance, and later employed within the framework of the corporation. Eventually the concept of joint stock was separated from that of the corporation, as it was utilized by other forms of organization, including the unincorporated company.

Court Jurisdiction

The application of a given court jurisdiction is not a positive feature of a concrete form of business organization. It is rather a by-product of the legal building blocks used in its formation. Different forms of organization were litigated in different courts, and this factor had at times far-reaching consequences for the prospects of these forms. I now provide a nutshell survey of the court and jurisdiction structure of the English legal system in our period.

At the heart of the English judicial system were the courts of the common law. There were three common-law courts: Common Pleas, King's Bench, and Exchequer. They were institutionalized as distinct courts in the formative period of the common law (mid-twelfth to early fourteenth centuries). During that period, they both complemented each other (each having its own field of specialization) and competed with each other over litigants. By the early eighteenth century, the competition

²¹For example, in 1611, capital was raised for four separate voyages. A second joint stock was raised in 1617 and the first was dissolved only four years later. Capital was separately raised in 1628, 1629, and 1630 for three Persian voyages, when the second joint stock still remained. K. N. Chaudhuri, *The English East India Company: The Study of an Early Joint-Stock Company 1600–1640* (London: Frank Cass, 1965), 209.

eased, and in the main, for our purposes, we can view the three as one departmentalized institution. Most of the litigation concerning the conception of the corporation and its various concrete forms of organization, and some aspects of disputes concerning the partnership conception and its offspring, were subject to the jurisdiction of the common-law courts.

Chancery was initially a secretarial and administrative department which assisted the Lord Chancellor. In the late fourteenth and early fifteenth century, it gradually acquired judicial functions institutionalized within a one-judge court, the Court of Chancery. The Lord Chancellor was the sole judge of this court until well into the industrial revolution. The jurisdiction of Chancery was not predetermined but evolved historically in response to the formalistic rigidity of the common law and the growing demand of litigants petitioning Chancery. Because of this, the Court of Chancery became a strong competitor of the three common-law courts. The competition between them reached its climax in the seventeenth century, and was not totally eased in our period. Chancery as an institution developed a set of judicial norms and doctrines, at times competing with and at times supplementing those of the common law. These norms, called “equity,” were at first more particularistic, and flexible enough to allow a just solution for each singular dispute. In time, they became more general, formal, and predictable. The conception of the trust was created, recognized, and regulated only in the jurisdiction of Chancery and the norms of equity, and was nonexistent in common-law courts. Several aspects of the partnership were also litigated only in Chancery. So were aspects of the unincorporated company, which combined elements of the trust and of the partnership. The duality of the English legal system, which was in fact composed of the competing systems, common law and Chancery – equity, each having its own jurisprudence, doctrines, and institutions, and each having its own life cycle of formation and decay, is a key to understanding the history of business organization in England.

The central royal courts, those of the common law, and later joined by Chancery, competed successfully with older courts. By our period, these courts (local, feudal, and tribal) together with other non-royal courts (ecclesiastical and merchants courts) were swallowed by the royal courts, and became extinct or were marginalized. Two exceptions are worth mentioning because they remained relevant for our needs. One was stannary courts. These were local courts in tin-mining regions that survived the expansion of the common-law courts, and applied regional mining customs. The other was the High Court of Admiralty. This was a central court originating in the fourteenth century which was a specialized court, dealing with maritime and mercantile litigation, and did

not apply the common law but rather an internationally recognized merchant law. The quasi-joint-stock partnerships – the mining cost book partnership and the shipping part-ownership – were each within one of these jurisdictions, stannary and Admiralty, respectively. We come across these forms of organization and their jurisdictions in the next section and in more detail in Chapter 7.

FORMS OF BUSINESS ORGANIZATION

In this section, I present a wider range of concrete forms of business organizations. Each of these forms is based on one or more of the legal conceptions introduced in the first section: the partnership, the corporation, and the trust. Each form embodied, or lacked, some or all of the four features of organization: separate personality, managerial structure, transferability of interests, and limitation of liability. The following analysis provides an initial comparison of the various forms of business organization and serves as a point of reference, as we turn to the actual world, in the next chapter. It surveys a wide range of forms, ending with the more aggregate, profit-oriented, and complex ones. The aggregate forms receive more attention in this section, not because they were more popular in our period (which they were not), but because they are the focus of this book.

The Sole Proprietorship

The legal framework in which the sole proprietor conducted his or her business did not distinguish between business activities and activities in any other sphere of life. Business assets were owned, conveyed, and managed by an individual, under the same rules of law and usually with no separation from other personal and family assets. The sole proprietorship did not employ any of the three collective legal conceptions, raised no problems of common ownership, transferability of interests, or separation between ownership and control. The sole proprietorship was an important form of business ownership in this period, but since it does not raise questions associated with the more complex forms of ownership and of business organization, it does not fit the general course of the present work and is not discussed further.

The Closed Family Firm

The family firm was based on kinship and mutual faith. Normally, it did not rely on any of the three legal conceptions discussed above, nor on

other external laws, but rather on family values and traditions.²² Management was based on the generational hierarchy within the family. All family members contributed the whole of their labor capability to the firm and enjoyed the use of the family capital. Profits were distributed according to need and tradition, or plowed back into the firm. Interest in the firm was transferred from one generation to the next by way of succession, according to family and inheritance laws, and regional and class customs. Disputes between family members were expected to be resolved informally within the family. In most cases, the closed family firm did not resort to external legal frameworks, such as the conception of the partnership.

Even though the closed family firm was a major form of business organization in pre- and early-industrial England, it, like the sole proprietorship, lies outside the scope of the present work. When a family firm became more formal in the legal relationship among its members, and more prone to external intervention in its structure, it fell into the category of the *compagnia* on the Continent, and the general partnership in England, and as such is discussed here.

The General Partnership

The English general partnership, or the co-partnership as it was more often called by contemporaries, was rooted in the continental *compagnia* and *société*, a variant of the legal conception of partnership. By the seventeenth and eighteenth centuries, these roots blended into the chaotic mixture of the common law.

As mentioned above, forming a partnership in England at this time, unlike the case of corporation, did not require State sanction. No specific

²²For an interesting work on the relationship between family and enterprise, with reference to organizational forms, see Leonore Davidoff and Catherine Hall, *Family Fortunes: Men and Women of the English Middle Class, 1780–1850* (London: Hutchinson, 1987), esp. chap. 4. For the renewed interest in the family firm in business history, in industrializing Britain and in general, see Peter Payne, “Family Business in Britain: An Historical and Analytical Survey,” in Akio Okochi and Shigeaki Yasuoka, eds., *Family Business in the Era of Industrial Growth: Its Ownership and Management* (University of Tokyo Press, 1984), 171–206; Roy Church, “The Family Firm in Industrial Capitalism: International Perspectives on Hypotheses and History,” *Business History* 35, no. 4 (1993), 17–43; Mary B. Rose, ed., *Family Business* (Aldershot: Edward Elgar, 1995). Though they do not directly deal with the family firm, the arguments of the present work have bearing on its role in the Industrial Revolution. If indeed joint-stock enterprise played a larger role than hitherto believed, could it be that the family firm also played a larger and more dynamic role, as some new literature argues? The two forms are not mutually exclusive, but an attempt to reconcile the two arguments will not be easy.

procedure or written documents were required. All that was necessary and sufficient for forming a partnership was the consent of the partners to a communion of profits. Statutory exceptions to the general common-law principle of free and voluntary formation of partnerships existed in three sectors of the economy: banking, marine insurance, and the coal trade. The act that renewed the charter of the Bank of England in 1707²³ precluded partnerships of more than six partners from engaging in short-term note-issuing banking. The Bubble Act of 1720²⁴ precluded partnerships from engaging in marine insurance. An act of 1787 excluded partnerships of more than five members from the coal trade.²⁵

Legally speaking, it made no difference whether all partners contributed finance, labor, or other resources or whether all intended to take part in the management, to bear losses if such occurred, or to receive only a small share of the profits. The common-law framework of the partnership applied to all partners in any undertaking in which sharing of profits existed. This framework was shaped by the dominant concept that a partnership, unlike the corporation, was not a legal entity. Based on this concept and on the actual disputes that were brought before it, the courts provided the law regulating the relationship among the partners, and of partners toward incoming and outgoing partners and third parties; the regulation of the formation, management, and dissolution of partnerships; and procedures and remedies in court. The status of the partnership was determined by the status of its individual members. The death or bankruptcy of a member terminated the partnership. Transfer of interest, in the form of retirement or replacement of a partner, required the consent of all partners and reorganization of the partnership. All partners had to join court litigations, and these could not be conducted using a common name. The liability of each of the partners for the debts of the partnership was not limited; each could be liable for the entire debt of the partnership to his last shilling.

The Limited Partnership

The limited partnership is distinct from the general partnership by virtue of the existence of two classes of partners. In addition to the active, or general, partners, who share management and liabilities in the concern, another class, usually called the passive, or sleeping, partners, share investments and profits with the general partners, but do not share in management or have unlimited liability. Thus, the limited partnership

²³6 Anne c.22 (1707).

²⁴6 Geo. I c.18 (1720).

²⁵28 Geo. III c.53 (1787).

enables wealthy individuals to invest in business without being fully involved in its day-to-day management or being exposed to economic risk and the social stigma of the business.

By the late eighteenth century, the limited partnership, descendant of the *commenda* variant of the partnership conception, was recognized by the legal systems of continental Europe. Widely used on the Continent, it served as an important tool for channeling aristocratic capital into commerce and industry. It was well known in England as well, and appreciated by many English lawyers and businessmen. From time to time, its introduction into England was discussed. After the enactment of the Irish Anonymous Partnership Act of 1782²⁶ and Napoleon's widely publicized Code de Commerce of 1807, it made its way to the state of New York in 1822, and from there to other states in the United States. However, the limited partnership was not recognized by common law, either directly or via the mercantile law, and made no inroads into the English legal system itself until the early twentieth century. It was finally introduced into the English system by statute in the Limited Partnership Act (7 Edw. VII c.24) of 1907.

English lawyers attempted to form general partnerships with de facto limited liabilities, utilizing various legal structures, in an attempt to circumvent the general common-law rejection of the idea of having two classes of partners, one of which had limited liability. The lawyers used two major structures for this purpose.

In the first structure, sleeping partners were known only to their active partners and were concealed from third parties. Thus, they could not be joined in any action against the partnership, and debts could not be collected from them. The problem in this structure was that sleeping partners had no standing in court or in any other external arena against their active partners or third parties, and had no real guarantee that their names would not be revealed at a most inconvenient moment, subjecting them to full liability.

According to the second structure, dormant partners were presented as lenders who received interest on their investments and were not liable to losses. The problem with this structure was that the essence of the transaction was not one of a loan repaid with fixed interest, but rather one of profit sharing. Since the dormant partners wanted to receive a return on their investment according to the prospects of the undertaking in which they had invested, they were exposed to the usury laws (which did not apply to partners, but did apply to lenders) if the undertaking was profitable and they received more than the legal interest rate of 5 percent. On the other hand, this was considered to be sharing profits,

²⁶21 & 22 Geo. III (Irish) c.46, (1782).

which, according to partnership law, was the ultimate test for perceiving them to be partners in the undertaking and, as such, was subject to unlimited liability for the partnership's debts. In conclusion, both the common-law doctrine and accepted practice in England did not enable the limited partnership to play any significant role in the organization of business in the eighteenth and nineteenth centuries.

The Quasi-Joint-Stock Partnership

Partnerships with some elements of joint stock or transferable interests appeared on the Continent only in the nineteenth century, starting with Napoleon's Code. They were not recognized by the English common law. However, in England itself, at a much earlier period, forms that could be labeled quasi-joint-stock partnerships emerged outside the realm of common law, in the areas of shipping and mining. Because of their peculiar path of historical development and their distinct economic circumstances, shipping and mining had a unique legal framework for business organization: the part-ownership in ships and the cost-book partnership system in mining. The first developed within the realm of the Admiralty court and the second within stannary jurisdiction. Both of these forms are discussed in detail in Chapter 7; for now, suffice it to say that though they rested on different legal bases, the two forms had an element of joint stock and of transferable interests.

The Unincorporated Joint-Stock Company

The unincorporated company was not distinguished as a separate form of business organization until in the late eighteenth century it was expressly adopted by businessmen, and in the early nineteenth century, lawyers began to discuss it. No unanimous definition of an unincorporated company existed in this period. The unincorporated company included elements of the partnership, trust, and corporation conceptions and was intended to have all four features that characterized the joint-stock corporation: transferable interests, limited liability, managerial hierarchy, and a degree of separate personality. In practice, as I show in Chapter 6, these features were acquired only partially, and not to a sufficient extent for most entrepreneurs.

The question of the nature of the unincorporated company arose in two instances. In the first, partnerships were initially formed with, or gradually grew to include, a large number of partners authorized to transfer their interests in the undertaking relatively freely. In the second, if a charter or act of incorporation was sought by the promoters, but for one reason or another the incorporation was not achieved, the promoted

joint-stock scheme nevertheless continued. In both cases an intermediary form of organization, between the general partnership and the joint-stock corporation, appeared. The legal status of this form, the unincorporated company, is thoroughly examined in Chapter 6.

The Regulated Corporation

The regulated corporation, which emerged in England in the sixteenth century, as we shall observe in the next chapter, was built on the old legal conception of the corporation. From a formalistic legal perspective, the business corporation, whether regulated or joint-stock, was an aggregate (not sole), lay (not ecclesiastical), and civil (not eleemosynary) corporation. This categorization held not only for business corporations (regulated or joint-stock) but also for municipal and district corporations, the corporate bodies of Oxford and Cambridge, the Royal Society, the Society of Antiquaries, and the guild-like companies of the City of London. All of these corporations, and to a considerable degree other sorts of corporations as well, could be incorporated in the same patterns, enjoyed the same powers, capacities, and privileges, and were subject to the same remedies.

The regulated corporation, like the joint-stock corporation, and unlike earlier corporations, was formed purely for business purposes and aimed at profit maximization. In this period it could be incorporated only by the State. It had features of a separate legal entity with hierarchically structured managerial powers. The liability of its members, like that of the members of the joint-stock corporation, was not materially limited in early stages, as I shall discuss in Chapter 5. It had transferable joint stock only in a confined sense. Members of the regulated corporation traded in their own stock, taking risks and liabilities individually. Regulated companies collected entrance fees, annual payments, and duties on imported and exported goods. Money collected in this way was used to provide facilities for members, such as factories, embassies and consulates, and convoys. Thus, while each member performed routine trading separately, on his own account, much of the infrastructure was common, or in the form of joint stock. Members shared the investment in this infrastructure. They shared the expected increased profit due to better trading facilities and to a more stable political environment, as well as the possible loss of the investment if the infrastructure were damaged or captured. In fact, the difference between the regulated and the joint-stock corporation in terms of the joint-stock feature is one of degree rather than kind. The regulated corporation still had some elements in common with the older guild: It regulated and disciplined the business activities of its members. However its nature was less social,

religious, or ritualistic, and more purely profit-oriented than that of the guild.

Regulated corporations played a major role in the development of English overseas trade in the late sixteenth and seventeenth centuries. However, by the end of the eighteenth century, they were almost passé. Wars, foreign competitors, changes in market conditions, interlopers, and the rise of joint-stock corporations, notably the East India Company, all led to the demise of the regulated corporations. The rise and decline of the regulated corporation is discussed in Chapter 2.

The Joint-Stock Corporation

The early joint-stock business corporation was not distinguishable in its legal framework from any other corporation of that era.²⁷ However, it combined the well-known legal conception of the corporation with the novel financial feature of joint stock. The joint-stock corporation, like the regulated corporation and unlike other corporations, aimed at profit maximization. Unlike the regulated corporation, the joint-stock corporation traded in only one account. That meant that members shared not only overhead but all business activities of the corporation, that is, all profits and losses. In this, the joint-stock corporation was somewhat similar to the general partnership. But while interests in the joint-stock corporation were relatively freely transferable, in the partnership they were not. In addition to the feature of transferability of interests, the joint-stock corporation, like other corporations and unlike partnerships, was also characterized by separate legal personality and concentration of management. Limitation of liability became an inherent feature of the joint-stock corporation only relatively late, in the eighteenth century. Even without limited liability, the joint-stock corporation was fundamentally different from the partnership and substantially different in degree, if not in kind, from the regulated corporation. This form of organization is addressed in many of the following chapters.

The Mutual Association

The mutuals differed from joint-stock corporations in the nature of their economic activities, though not necessarily in terms of the legal framework to which they were subject. Mutuals could be organized under various schemes: as corporations or as unincorporated firms, with or

²⁷Business corporations were mentioned only briefly in the major eighteenth-century treatise on corporations, written in 1793–1794: Kyd, *Law of Corporations*. They are also only briefly noted in the chapter on corporations in Blackstone, *Commentaries*, vol. 1, pp. 458–459, 462–464.