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**The limitation of liability in British joint-stock companies, 1720-1844<sup>1</sup>**

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Although the introduction of general limited liability in Britain in the 1850s is well documented, the legal framework regulating the formation and operation of joint-stock companies before this time remains imperfectly understood.<sup>2</sup> Like today's historians, many promoters of unincorporated companies in the period under investigation were uncertain about the legal status of their companies. Often unable to avail themselves of the advantages of incorporation, they sought to limit the responsibility of themselves and their shareholders by other means. Company constitutions tried in a number of ways to circumvent the unlimited liability of their shareholders in law: some, especially insurance companies, tried to use the law of contract, while others provided for automatic dissolution in the event of losses.

This paper offers a unique insight into how early joint-stock companies in the British Isles controlled and regulated shareholder liability. It derives from a major ESRC-funded project on the development of corporate governance in Britain, an important aspect of which is the examination of the constitutions of 514 English, Welsh, Scottish, and Irish companies established between 1720 and 1844. We argue that shareholder liability needs to be seen in the context of other constitutional provisions: other ways in which companies were governed had implications for shareholder liability. Roger Burt and Norikazu Kudo, in a study of the cost book system in mining, have demonstrated that a system evolved whereby shareholders could 'seek to *control* if not *limit* their liability'<sup>3</sup> – for example, by providing for the proportional (rather than unlimited) liability of shareholders, by restricting company borrowing, and by disposing of shares and withdrawing from risky ventures. This paper identifies similar tendencies among joint-stock companies by considering the range of methods by which liability could be controlled. It analyses the constitutions of all 514 companies in the project database. Of these companies, 290 were corporations, established by act of parliament or charter, and 224 were unincorporated, established by deed of settlement in England and Wales, or by contract of copartnership in Scotland or Ireland.<sup>4</sup> We first consider incorporated companies, before moving on to a more detailed look at unincorporated company constitutions.

**I**

Ron Harris has noted that, in the case of incorporated companies, there was some confusion about the extent of shareholder liability. In seventeenth-century England, when many of the major trading corporations were chartered, 'there was no coherent, well-defined conception of limited liability'.<sup>5</sup> Into the eighteenth century, the confusion continued, and we have found that the inclusion of a limited liability clause in incorporating acts was very rare. Of 56 incorporated companies in our sample established between 1720 and 1799, 52 made no mention of shareholder liability at all. This is evidence that, in the eighteenth century, as R. H. Campbell has suggested, limited liability was not the most important motive for seeking incorporation: the

‘great prize’ was the legal personality that incorporation afforded the company.<sup>6</sup> But by the late eighteenth century it was widely acknowledged that shareholders in such companies enjoyed this privilege, and it began to be more explicitly targeted by entrepreneurs. In 1786, when the British Fisheries Society was successful in gaining incorporation by act of parliament, limited liability was cited as a reason in the preamble to the act, although it was rather apologetically inserted into a more general plea for the recognition of the separate legal personality of the company, which was

apprehensive that difficulties may arise, as well in recovering debts which may grow due to the Joint Stock, as in defending suits or actions which may be commenced or brought against the subscribers for any matter or thing relative to the Joint Society, as by law, all the several subscribers and proprietors in the Joint Society must, in such cases, both sue and be sued, implead and be impleaded, by their several distinct names and descriptions, and to prevent the several subscribers from becoming liable to the payment of any sum or sums beyond their respective shares in such Capital Joint Stock; therefore, for the more easily carrying into execution the several undertakings herein-before mentioned, and for avoiding the difficulties aforesaid, the said Society are desirous of being incorporated...<sup>7</sup>

Soon, limited liability began to be cited as the prime motivation for incorporation. In 1802, for example, the promoters of the Kent Insurance Company ordered that ‘application should be made for an Act of Parliament or Charter or both if necessary to establish the Institution and especially to protect the property of the proprietors beyond the amount of their respective shares.’<sup>8</sup> By the 1820s, entrepreneurs were seeking limited liability with unprecedented regularity. The directors of the General Steam Navigation Company, established in 1825 with a regime of proportional shareholder liability, reported to a general meeting in 1827 that they had been investigating the possibility of getting an incorporating act ‘by which responsibility is limited to the actual Partners and to the extent of their Interests’.<sup>9</sup> Not only would limited liability directly benefit the shareholders, but the company would also incur indirect benefits in the future. When the incorporating act was passed in 1831, the directors congratulated themselves on this ‘concession ... so valuable’, referring to the ‘notorious fact that the Public have been apprehensive of embarking in a Concern where serious losses might be sustained and where each individual might be called upon in the first instance to make good such losses with a precarious and dilatory remedy against his Co[-]Proprietors’.<sup>10</sup> They continued:

It is not merely by tranquillizing the minds of the Proprietors as to their liabilities that the Court of Directors conceive that the interests of the Company will be benefited by the Act. They confidently expect a still greater advantage. Many Persons may now be expected to become desirous of holding shares who have been hitherto prevented from being so by apprehensions of responsibility ... In proportion as the Proprietary extends itself the business of the Company will naturally increase.<sup>11</sup>

If by the early nineteenth century the position of shareholders in corporations was less ambiguous, there was not a widespread move to capture this lack of ambiguity in acts of incorporation. Not until the 1840s did a majority of corporations (in our sample, 27 out of 33, or 81.8%) have a limitation of liability stipulated in their

constitutions; even in the 1830s, of 86 corporations in our sample, only 24 (27.9%) had a limited liability clause. Legislation in 1825 repealing the Bubble Act seems to have had little effect on the explicit liability provisions of incorporated companies: of companies established in the period 1720-1825, 80.7% did not mention liability, whereas for those established in the period 1826-44, the figure was still as high as 59.3%. Only in Scotland was there a noticeable shift in practice after 1825: whereas in the period 1720-1825, 8 Scottish corporations in our sample had limited liability clauses and 8 did not, from 1826 onwards every one of the 13 Scottish corporations had a limited liability clause. Apart from the British Fisheries Society in 1786, the first Scottish corporations to have a limited liability clause were the Company of Proprietors of the Glasgow Water Works, and the Company of Proprietors of the Glasgow Paisley and Ardrossan Canal, both in 1806. The apparent importance of 1825 as a watershed is illustrated by the acts of the Monkland and Kirkintilloch Railway Company (1824) and the Ballochney Railway Company (1826): the latter is an almost exact copy of the former, except that in 1826 a limited liability clause was added.

## II

Some historians have argued that there was a major difference between the legal framework regulating shareholder liability in Scotland and England. First advanced in the 1860s by the Scottish advocate F. W. Clark, and repeated in the 1910s by the jurist J. Robertson Christie and in the 1960s by the historian R. H. Campbell, this view states that Scottish common law for a time recognised the *en commandite* system of limited liability – a form common in France whereby only managing partners were held to be liable to an unlimited extent.<sup>12</sup> We have argued elsewhere that the evidence does not support such a view.<sup>13</sup> Indeed, the interpretation rests on a single decision of the Court of Session, in the case of *Stevenson vs. Macnair* in 1757. In this case the court ruled that Macnair and the other non-managing partners of the Arran Fishing Company were not liable, beyond the extent of their stock, for the company's debts; the idea of the *société en commandite* was explicitly mentioned in the pleadings of the company.<sup>14</sup> The court held that

There is an obvious difference between the present case, and a Company trading without relation to a stock. In the latter case, each partner must be liable *in solidum* to the Company's debts; for there is nothing here to limit the credit ... The very meaning of confining the trade to a joint stock, is, that each should be liable for what he subscribes, and no farther ... it is not expedient to make partners farther liable, because it would deter every one from entering into a trading Company.<sup>15</sup>

Christie and Campbell argued that this decision signalled a move towards the recognition of limited liability in unincorporated Scottish joint-stock companies, one element of a more generally favourable legal environment that existed in Scotland.<sup>16</sup> The economic historian H. A. Shannon was also in no doubt as to the superiority of Scottish arrangements.<sup>17</sup> In the case of limited liability, Christie and Campbell both argued that, although never reversed, the decision in the case of *Stevenson vs. Macnair* was 'forgotten' under the growing influence of English law. The decision was certainly 'forgotten' in that it was not mentioned in the Court of Session's ruling in the case of *Douglas, Heron and Company vs. Hair*, just 15 years later, when the

partners of the failed Ayr Bank were held to be liable in proportion for the debts of the bank, and ordered to pay a sum considerably in excess of their subscribed investment.<sup>18</sup> It seems unlikely that the pernicious influence of English law could have acted this quickly, and a more likely verdict on the 1757 judgement is that of the Scottish legal historian David M. Walker, that it was a ‘judicial aberration’.<sup>19</sup>

Although Scottish unincorporated companies did not enjoy limited liability, in two sectors of the British economy, shipping and metalliferous mining, shareholder liabilities were restricted by specific regulations. In shipping, the system of part-ownership – whereby one ship was owned by a number of proprietors – offered a measure of *de facto* limited liability for proprietors.<sup>20</sup> The system applied in Scotland as well as England, as the comments of the Session judges on the case of the Arran Fishing Company made clear: ‘joint proprietors of ships are never subjected beyond the value of the ship’.<sup>21</sup> In the nineteenth century, joint-stock shipping companies were beginning to take the place of the part-ownership system, but the latter remained in use well into the twentieth century at many ports.<sup>22</sup>

Mining was the other sector with a separate legal environment. Until the late nineteenth century, metalliferous mining in Cornwall and Devon was carried out mainly under the cost book system, regulated by the stannary courts. Cost book companies promoted themselves to potential investors as quasi-limited liability organisations. For example, at the Marke Valley Consolidated Mines, a company based in London and established in 1839 to mine copper, tin and lead near Liskeard in Cornwall, the liability of shareholders *inter se* was explicitly limited by the ‘rules and regulations’.<sup>23</sup> In this concise document, which functioned as a prospectus as much as a binding set of governance procedures, it was stated that ‘[t]he responsibility of the Shareholders [is] limited to the amount of their respective shares’.<sup>24</sup> The promoters presented what purported to be a legal opinion from a ‘professional adviser’ regarding ‘the liability of parties taking shares in the undertaking beyond the amount of their respective subscriptions’.<sup>25</sup>

The holder of a share in this undertaking ... will not be liable, as a partner, to any of the engagements of the mine, unless he shall elect to be registered as a shareholder in the share register of the undertaking, and shall otherwise interfere in the management thereof; at the same time he will have the power to call for the dividends; and, whenever he shall think proper, to take upon himself the rights and authorities of a shareholder.<sup>26</sup>

The extent to which such claims would stand up in court has been doubted by historians: in law, all cost book adventurers were liable to third parties to an unlimited extent, just as in any ordinary partnership.<sup>27</sup> However, as Burt and Kudo have argued, there was an assortment of ways in which partners in such bodies could ‘seek to *control* if not *limit* their liability’.<sup>28</sup> For example, the rules of cost book companies often limited the amount that could be called against each share: while this did not restrict the shareholders’ liabilities to third parties, it did restrict them *inter se*. There were limitations on the borrowing that could be contracted by pursers and managers; major contracts required the approval of a general meeting; bank loans were ‘almost entirely prohibited’; and shares could be relinquished at any time. Moreover, short accounting periods of three to six months enabled cost book adventurers to keep a close eye on their investments.<sup>29</sup>

We have found that many of these kinds of controlling mechanisms were also adopted by unincorporated joint-stock companies in other sectors. These provisions

need to be seen in the context of a constitutional balance of power between the shareholders, directors and trustees of companies, and of the wider issues of corporate governance that were emerging from the activities of the expanding joint-stock economy. The limited liability system enjoyed by corporations gave the public a relatively secure avenue of investment, and to attract investment, it was necessary for entrepreneurs in the unincorporated sector to offer other kinds of protection to shareholders. We now explore some of the devices that were adopted.

### III

First, and most obviously, it was possible to attempt to mimic corporations and write a limited liability clause into a deed of settlement. Our sample indicates that this was a relatively common practice. Table 1 shows the distribution of liability regimes in the constitutions of unincorporated companies. 29.5% of all unincorporated companies attempted to limit the liability of shareholders in this way. This practice varied considerably by sector, as demonstrated by table 2: all 3 unincorporated harbour companies in the sample had limited liability clauses; of the 30 unincorporated manufacturing and trading companies, 8 (26.7%) had such clauses (although 3 also referred specifically to the *unlimited* liability of shareholders). Among gas companies, only 4 of our 32 unincorporated companies (12.5%) had limited liability clauses, and as Wilson has pointed out, the legality of these clauses, where not reinforced by contracts, was doubtful.<sup>30</sup> Indeed, their legality was put to the test in 1832, when Lord Brougham ruled that the limited liability clause in the constitution of a joint-stock mining company did not have any standing in law.<sup>31</sup> Nevertheless, the practice remained popular: we have examples from every year from 1825 to 1844 with the exceptions of 1828, 1831 and 1835.

The practice was most common in the insurance sector, where 42 out of 61 unincorporated companies (68.9%) tried to limit liability to the extent of the unpaid portion of their shares. This was done by writing a liability clause into the deed of settlement, and reinforcing this with another requiring that all contracts entered into by the company – especially policies of insurance – should refer to this limitation. Harris has cast doubt on the effectiveness of such clauses, arguing that policyholders could use them as an excuse to negotiate lower premiums; however, in one large study of insurance companies in the period 1700-1850, no evidence from company records has been found to substantiate this assertion.<sup>32</sup> More important, according to Harris, the limitation of liability could not be incorporated into the ‘numerous lesser deals, oral or implicit, made in the course of everyday business’.<sup>33</sup> Whether or not this was so, a majority of insurance companies made this stipulation in their contracts, and when advertising their companies to potential investors, promoters were keen to emphasise this constitutional benefit. For example, when an abstract of the deed of settlement of the new Farmers’ and General Fire and Life Insurance and Loan and Annuity Company was prepared in 1840, although many clauses were barely summarised, the clause limiting shareholders’ liability was reprinted in full, ‘in respect of its importance to the shareholders’.<sup>34</sup> A subsequent clause reminded readers: ‘[a] clause to be inserted in every policy, that no director or other shareholder shall be liable beyond the unpaid part of his shares.’<sup>35</sup>

However, as the tables indicate, it was much more common for company constitutions to make shareholders, between themselves, liable only in proportion to the shares they held. Burt and Kudo have argued that this was also typical of the cost book system, and that the protection given, though less useful than limitation of

liability to third parties, was at least worth having.<sup>36</sup> Over half (53.6%) of our 224 unincorporated companies did this, including companies in seven of the nine sectors covered by our unincorporated sample. The proportional liability system was most common in gas, shipping, and especially banking, where it was nearly universal. The County of Gloucester Bank (1836) was typical, stipulating that ‘each of the Proprietors shall as between themselves be entitled to and interested in the profits, and liable to the losses of the Company, in proportion only to his share or shares in the capital or joint stock thereof’.<sup>37</sup> Indeed, this form of limited liability was particularly prevalent in Scotland. Whereas Scottish companies were less likely to provide for the full limited liability of shareholders – 20.7% as opposed to 32.9% – no less than 75.9% of all Scottish companies explicitly provided for the proportional liability of shareholders, where only 48.25% of English and Welsh companies did so. Among the whole sample, only 35 unincorporated companies (15.6%) had no mention of liability in their constitutions, and just 3 (1.3%) made their shareholders explicitly liable *in solidum* for all the company’s debts.

That the limitation of liability was a particularly sacrosanct part of many company constitutions is emphasised by the restrictions on amending such clauses. Most unincorporated companies allowed the constitution to be altered by the shareholders: 176 of the 224 in our sample (78.6%). In the insurance sector, 49 of 61 companies (80.3%) allowed constitutional amendments.<sup>38</sup> However, in all sectors many companies disallowed certain kinds of constitutional amendments. Of the 176 unincorporated companies that allowed amendments, 76 (43.2%) disallowed amendments to the liability of shareholders; the figure rose to 60% for companies where there was a limited liability clause. Of the 49 insurance companies that allowed amendments, 21 (42.9%) disallowed amendments to the liability clauses; this rose to exactly 50% where the liability was, constitutionally, limited. Clauses like this were clearly hoped to protect shareholders from an unwanted alteration to the liabilities to which they were exposed, even if this might not always stand up in court.

#### IV

Limited liability clauses were just one way in which unincorporated companies could seek to make investment safer. Most constitutions restricted the amount that could be called on shares, and 27 unincorporated companies (12.1% of the total) gave general meetings sole authority over all or some calls that could be made on shares. Although this would not affect shareholders’ or the company’s relationships with third parties, it represented another means of proprietorial oversight. Shares in unincorporated companies were not as easily transferable as shares in corporations: most unincorporated company constitutions (77.7%) gave directors the power to control access to their company’s shares. Sellers could therefore be thwarted if the board rejected potential buyers. However, it was common for constitutions to permit directors to purchase vendors’ shares in such cases, enabling shareholders to leave a company in which they no longer wished to hold shares.

Borrowing was another area in which shareholders’ liabilities could be controlled. Whereas in cost book companies, borrowing was highly regulated, and effectively impossible without shareholder approval, the constitutions of unincorporated joint-stock companies were usually silent on borrowing rights, a silence which could be interpreted as permissive or restrictive.<sup>39</sup> Borrowing was only explicitly permitted in 29 cases, and of these shareholder approval was required in only 9. However, of these 29 companies, 16 imposed a cap on the amount that could

be borrowed. At the same time, only 10 unincorporated company constitutions explicitly disallowed all borrowing: 2 of these were mining companies, probably influenced by the cost book customs; 9 were established in Scotland or Ireland. In practice, major borrowing decisions seem to have been normally reserved to general meetings.<sup>40</sup> When borrowing was undertaken without shareholder approval, considerable disquiet was raised among shareholders as to the extent of their liability for this borrowing. At the Ayr Bank, following its failure in 1772, a committee of shareholders protested strongly that all the shareholders were being held proportionally liable for debts arising from an issue of annuities approved by a general meeting, the attendance at which consisted mainly of shareholders who were already in debt to the company.<sup>41</sup>

To try to discourage unauthorised borrowing by directors, some companies – especially small companies in the gas sector – made specific provisions curbing the liabilities of shareholders in this area. For example, the directors of the Falkirk Gas Work Company (1829), who enjoyed in most respects the protection of a standard indemnity clause,<sup>42</sup> were, notwithstanding this, forbidden to borrow money on ‘behalf’ of the company, or to contract any debts greater than the capital stock. If they did, then they would be ‘jointly and severally liable to relieve the Company of such debts or money borrowed; and the Partners of the Company shall not collectively or individually, be liable in payment of any part thereof’.<sup>43</sup> A similar provision was made at the unincorporated Preston Gas Light Company, established in 1815 – ‘[t]he Trustees shall not contract any debt to a greater amount than the funds in their hands will be sufficient to satisfy, and if they contract any such debts, they shall be themselves alone personally liable for the debt’<sup>44</sup> – and when incorporated in 1839, the act explicitly gave the shareholders limited liability.<sup>45</sup> Other kinds of limitation reflected the specific circumstances of companies’ establishment: for example, the contract of copartnership of the London Leith Edinburgh and Glasgow Shipping Company (1820), which was an amalgamation of two earlier companies, limited the responsibility of shareholders from each of the previous companies for the debts of the other.<sup>46</sup>

The ability of shareholders to dissolve companies can also be seen as a constitutional mechanism for limiting their liability. In the modern context, this was recognised in the Insolvency Act (1986), which made *directors* ‘liable for the debts a company incurred after the point when they might reasonably be expected to have closed it down’.<sup>47</sup> Allowing for the dissolution of a company by shareholders permitted a form of controlled liability for investors, although of course this relied on their possessing accurate knowledge of the state of their company’s affairs, which was not always the case. Here, the contrast between incorporated and unincorporated companies was crucial. Corporations were usually established in perpetuity: acts of incorporation rarely if ever set out procedures for dissolution, although some companies were established for a limited period. Eight corporations in our sample (seven bridge companies and one harbour company) were designed to be converted into trusts after achieving their objects; one, the Victoria Park Company (Manchester, 1837), was a tontine with transferable shares, and so was expected to come eventually to an end. Six corporations were established for a fixed term of years,<sup>48</sup> and two corporations established by charter had procedures for dissolution.<sup>49</sup> In total, 273 of the 290 corporations in our sample, or 94.1%, were established for an infinite duration and with no provision for the shareholders to dissolve. As the shareholders in most of these corporations enjoyed limited liability, there was arguably less need to provide them with this additional protection for their investments.

By contrast, among unincorporated companies, the right of shareholders to dissolve the company, either in the normal course of events, or in particular circumstances, or both, was general. Very few companies were established without any prospect of dissolution. Of the 224 unincorporated companies in our sample, 193 (86.2%) were established either for a specific period of time,<sup>50</sup> or with rights of dissolution enshrined in their constitution. In total, 182 (81.3%) gave the shareholders some right of dissolution.

Procedures for dissolution can be divided into two kinds. First, there were general rights of dissolution, whereby shareholders could dissolve the company at any time. This would involve a vote in favour of dissolution at a general meeting; in many companies, the confirmation of a second general meeting was necessary, and often a large vote in favour, commonly two-thirds or three-quarters of the vote, with a large quorum, was required. In eight cases, the threshold was 80% or more of the votes, and at one company – the Agricultural and Commercial Bank of Ireland (1836) – the consent of every single shareholder was required in order to dissolve in normal circumstances. General rights of dissolution were available to shareholders in 161 unincorporated companies, 71.88% of our sample, although in 50 of these cases (31.1%) the consent of the directors was also required. General rights of dissolution became increasingly common in the nineteenth century: among the 146 unincorporated companies established in the period 1826-44, no fewer than 117 (80.1%) conceded these rights, although in 44 cases (37.6%) the directors' consent was also required. Although there is no direct link between the general procedures for dissolution and the limitation of shareholder liability, the provision for dissolution was certainly part of a wider package whereby shareholders were able to protect their investments, although they needed to work closely together to achieve this protection.

The link between the protection of shareholders and the dissolution of companies is seen more clearly in procedures regulating dissolution in special circumstances. In some cases, the constitution stipulated that the company would automatically stand dissolved if losses reached a certain specified amount.<sup>51</sup> More commonly, as in the case of the ill-fated Northern and Central Bank of England (1834), if losses reached a certain amount (in this instance the whole of the reserve fund plus a quarter of the paid-up capital), the directors were obliged to summon a special general meeting, at which it was in the power of one shareholder, or sometimes a group of shareholders, to insist upon dissolution. Nevertheless, at the meeting it was lawful, if desired by the majority of shareholders, to vote to continue the concern, provided they bought out the shares of the dissentients.<sup>52</sup> Among all unincorporated companies, 83 (37.1% of our sample) allowed special rights of dissolution. It was a feature of nearly all unincorporated banking constitutions (92.1%), but also occurred in insurance (19.7%), shipping (28.6%), manufacturing (20.0%) and in one gas company (Stroud Gas Light and Coke Company, 1833). These clauses were explicitly designed to act as a *de facto* limitation of liability. The constitution of the Glasgow and Stranraer Steam Packet Company (1843), for example, stated that the intention of the automatic dissolution clause was 'to prevent the Subscribers from ever being called on for a larger sum, than their original subscriptions'.<sup>53</sup> They were not an infallible means of protection, however, if directors chose not to reveal losses to shareholders, and shareholders did not detect them. The shareholders of the Ayr Bank in 1772, the Western Bank of Scotland in 1857, and the City of Glasgow Bank in 1878 all found themselves liable for considerable extra payments after the dissolution of their companies.

That special rights of dissolution were regarded as an alternative to formal limitation of liability becomes clear if we examine these clauses in conjunction with liability provision. Table 3A cross-tabulates limited liability provision and rights of dissolution in all unincorporated companies in our sample. It shows that, among companies with a limited liability provision, only 7 (10.6%) had special rights of dissolution, whereas shareholders who did not enjoy limited liability had special rights of dissolution in 76, or 48.1%, of companies. The importance of these clauses is underlined by restrictions on constitutional amendments. Many company constitutions, while allowing constitutional amendments, disallowed amendments to the procedure for dissolution, as table 3B shows. Among companies with special rights of dissolution and unlimited liability, 55.3% prohibited amendments to the procedure for dissolution, whereas only one of the 59 companies with limited liability and *no* special rights of dissolution disallowed such amendments. By contrast, 60% of unincorporated companies with limited liability that allowed constitutional amendments prohibited amendments to the limited liability clause.

## V

Questions of liability and dissolution were bound up with more general issues of monitoring and governance. Charles Hickson and John Turner have recently suggested that unlimited liability could lead to better standards of corporate governance because shareholders had an obvious incentive to be vigilant and ensure that their companies were being run efficiently and honestly.<sup>54</sup> Indeed, in unincorporated companies, the large liability of shareholders could be used as a moral argument for securing greater transparency from the board. The 1840 annual general meeting of the Ashton, Stalybride, Hyde and Glossop Bank heard that bad debts hung over the bank, and one shareholder suggested that a ‘public accountant’ be appointed to scrutinise the affairs of the company. This shareholder, a Mr Earnshaw, ‘said that the meeting might think he was taking a deal upon himself in broaching these matters, but he thought that when the whole of a person’s property was at stake, and what he knew of individuals in the room who had toiled hard for forty or fifty years to acquire what property they possessed, he thought he was fully warranted in making these observations’.<sup>55</sup> He attempted, without success, to force the directors to produce a more detailed report of the assets and liabilities of the company. Although Earnshaw was unsuccessful in this attempt, matters came to a head three years later, when another shareholder proposed the appointment of a committee of inspection to make an accurate estimate of the losses made by the company and to ‘judge of the propriety of having its affairs wound up’. This meeting referred to the company’s deed of settlement, and found that the shareholders had no power to dissolve the company at that time: only if the reserve fund and a quarter of the paid-up capital had been lost could a special general meeting dissolve the company without the directors’ prior approval.<sup>56</sup> However, a group of shareholders managed to force a special general meeting on the issue.<sup>57</sup> At this meeting, a vote was taken by show of hands on the question of dissolution. The meeting voted by 49 to 26 not to dissolve, but some of the dissentients found another way out. Six shareholders possessing a total of about 1,500 shares between them sold their shares to the directors, ending their liability for any of the bank’s bad debts.<sup>58</sup>

Most of the mechanisms developed to regulate shareholder liability in unincorporated companies depended upon a degree of shareholder activism, or at least awareness. However, as we have made clear elsewhere, the culture of secrecy that

operated in many sectors of the joint-stock economy made the monitoring by shareholders of the affairs of their companies, and by extension of their liabilities, much more difficult.<sup>59</sup> In cost book companies, shareholders could inspect the books of the company at any time. This was also generally true in joint-stock corporations, as shown by table 4. Of the 290 corporations in our sample, 165 allowed inspection of accounts by shareholders at any time, 32 within a given period of time either side of the ordinary general meeting, and only 4 explicitly disallowed it. When we turn to unincorporated companies, the picture is quite different. 80 of our 224 unincorporated companies disallowed inspection of account books by individual shareholders, and only 44 explicitly permitted it (14 of these within a specified period only). Part of this difference can be explained by sectoral variations: banking companies, for example, were unlikely to permit inspection of accounts because of the confidentiality they assured to their customers. Forty-seven of our 63 unincorporated banks disallowed individual inspection, and none explicitly permitted it. In shipping, a sector traditionally characterised by relative openness, 9 out of 21 unincorporated companies allowed inspection of accounts by individual shareholders, and only 4 explicitly disallowed it; while among gas companies, 14 of 32 allowed and 7 disallowed it. Insurance companies were unlikely to permit inspection: of 61 companies, 9 did, and 18 did not. Moreover, a broad shift away from transparency and shareholder participation in joint-stock companies, across a range of sectors, seems to have occurred in this period. Consequently, while it is possible to argue that, in the stannary jurisdiction, ‘the average cost book adventurer had at least the opportunity of knowing the extent of his liability and of expressing a direct voice in any decisions markedly to increase that liability by undertaking major new expansion or investment plans’, this was much less true for the shareholder in unincorporated joint-stock companies.<sup>60</sup>

In the joint-stock economy as a whole, no trade-off existed whereby investors were assured of limited losses in return for surrendering rights of inspection of accounts and general oversight of the company. Quite the reverse: with regard to access to accounts at any rate, shareholder rights were strongest in incorporated companies, where limited liability was already enjoyed. However, unincorporated companies were keen to market themselves to investors as safe havens for their capital, and to achieve this, entrepreneurs devised a raft of constitutional measures designed to regulate and control shareholder liabilities, over and above the limited liability enjoyed by shareholders in corporations: proportional liability, rights over calls and borrowing, protection from the consequences of unauthorised borrowing, restrictions on constitutional amendments, and finally, the safety net of dissolution. The inclusion of some or all of these benefits in company constitutions was an important feature of promotional strategies. But there were limits to their effectiveness. Certainly, they did not save the shareholders in many of the banking companies that failed before the widespread adoption of limited liability in the sector in the early 1880s. Nor did they prevent the collapse in the 1847 commercial crisis of many unlimited companies which had borrowed recklessly.<sup>61</sup> Such scandals indicated that directors could not always be trusted to ensure the smooth operation of mechanisms for controlling shareholder liability, and boards with something to hide were undoubtedly aided by the limits imposed in many unincorporated companies on shareholder access to accounts. Indeed, some shareholders probably lacked even a basic understanding of their rights and liabilities: in 16 companies (all in banking or insurance), they were not even permitted to see the company constitution.<sup>62</sup> Unlimited liability was sufficiently discredited by the 1850s for the state to concede general

limited liability. Nevertheless, on the evidence considered here, unlimited liability was undermined not so much by its intrinsic shortcomings or its unsuitability in an age of rapid economic growth, as by the governance failures which permitted directors to conduct their business in a greater degree of secrecy than was generally possible in companies incorporated by the state.

TABLE 1: Constitutional liability provisions for shareholders, in unincorporated companies, 1720-1844

Source: Corporate governance database

	ALL UNINCORPORATED COMPANIES		England and Wales		Ireland		Scotland	
	Number	%	Number	%	Number	%	Number	%
Limited liability	66	29.5	47	32.9	5	27.8	12	20.7
Proportional liability	120	53.6	69	48.3	6	33.3	44	75.9
Unlimited liability	3	1.3	3	2.1				
No mention of liability	35	15.6	24	16.8	7	38.9	2	3.5
TOTAL	224	100.0	143	100.0	18	100.0	58	100.0

TABLE 2: Constitutional liability provisions for shareholders, in unincorporated companies, by sector, 1720-1844

Source: Corporate governance database

Total 224 companies

	Banking	Bridges	Colonial	Gas	Harbours	Insurance	Manufacturing/ trade	Property	Shipping
Limited liability	1		2	4	3	42	8	2	4
Proportional liability	55		1	25		15	9	1	14
Unlimited liability							3		
No mention of liability	7	1	2	3		4	10	5	3
TOTAL	63	1	5	32	3	61	30	8	21

TABLE 3A: Shareholders' rights to dissolve unincorporated companies, 1720-1884

Source: Corporate governance database

	All unincorporated companies		Companies with limited liability provision		Companies without limited liability provision	
	Number	%	Number	%	Number	%
General rights	161	71.9	43	65.2	118	74.7
Special rights	83	37.1	7	10.6	76	48.1
No mention of dissolution	42	18.8	21	31.8	21	13.3
Total number of companies	224		66		158	

Note: Percentages do not add up to 100, as many companies had both general and special rights of dissolution.

TABLE 3B: Unincorporated companies restricting constitutional amendments to the procedures for dissolution, 1720-1844

Source: Corporate governance database

	All unincorporated companies		Companies with limited liability provision		Companies without limited liability provision	
	Number	%	Number	%	Number	%
Special rights (N=83)	44	53.01	2	28.57	42	55.26
No special rights (N=141)	3	2.13	1	1.69	2	2.44

TABLE 4: Shareholders' access to accounts in all companies, 1720-1844

Source: Corporate governance database

	Incorporated companies		Unincorporated companies	
	Number	%	Number	%
Shareholders can inspect accounts at all times	165	56.90	30	13.39
Shareholders can inspect accounts at specified times	32	11.03	14	4.83
Shareholders explicitly barred from inspecting accounts	4	1.38	80	35.71

Note: Percentages do not add up to 100, as some companies did not specify rights, and others made provision for different forms of access.

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<sup>1</sup> This paper derives from ongoing research into the corporate governance of British stock companies, 1720-1844, supported by a grant from the Economic and Social Research Council (UK), award number RES000230096.

<sup>2</sup> Recent work has begun to address the gap: see Timothy L. Alborn, *Conceiving companies: joint-stock politics in Victorian England* (London and New York: Routledge, 1998); Ron Harris, *Industrializing English law: entrepreneurship and business organization 1720-1844* (Cambridge: Cambridge University Press, 2000); James Taylor, *Creating capitalism: joint-stock enterprise in British politics and culture, 1800-1870* (Woodbridge: Boydell Press/Royal Historical Society, forthcoming, 2006).

<sup>3</sup> Roger Burt and Norikazu Kudo, 'The adaptability of the Cornish cost book system', *Business History*, 25 (1983), p. 34. Original emphases.

<sup>4</sup> It should be noted that some unincorporated companies in the database were established by act of parliament.

<sup>5</sup> Harris, *Industrializing English law*, p. 129.

<sup>6</sup> R. H. Campbell, 'The law and the joint-stock company in Scotland', in Peter L. Payne (ed.), *Studies in Scottish business history* (London: Frank Cass, 1967), p. 140.

<sup>7</sup> 26 George 3, c. 106 (1786): copy in British Library, bound with speech of Henry Beaufoy to General Court (1788), p. 90.

<sup>8</sup> Deed for establishing the Kent Insurance Company, 1802: Centre for Kentish Studies, U2593/B1.

<sup>9</sup> General Steam Navigation Company, GM minutes, 28 February 1827: National Maritime Museum, GSN/7/1.

<sup>10</sup> *Ibid.*, 31 August 1831.

<sup>11</sup> *Ibid.*

<sup>12</sup> F. W. Clark, *A treatise on the law of partnership and joint-stock companies according to the law of Scotland* (Edinburgh: T. and T. Clark, 1856); J. Robertson Christie, 'Joint stock enterprise in Scotland before the Companies Acts', *Juridical Review*, 21 (1909-10), pp. 128-47; Campbell, 'Law and the joint-stock company'.

<sup>13</sup> Mark Freeman, Robin Pearson and James Taylor, 'Different and better? Scottish joint-stock companies and the law, c. 1720-1845', *English Historical Review* (forthcoming, 2006).

<sup>14</sup> Campbell, 'Law and the joint-stock company', p. 145.

<sup>15</sup> W. M. Morison (ed.), *The decisions of the Court of Session* (Edinburgh: Bell and Bradfute, 1801-15), p. 14,667.

<sup>16</sup> In 1980, a textbook on Scottish company law commented: 'This early case indicates how Scots company law might have developed under continental influence. English influence, however, proved stronger, and the case does not represent the law which would now apply to any common law company still in existence'. Enid A. Marshall, *Scottish cases on partnerships and companies (excluding winding up and reconstruction)* (Edinburgh: W. H. Green & Son, 1980), p. 41.

<sup>17</sup> H. A. Shannon, 'The coming of general limited liability', *Economic History*, ii (1931), p. 267 n. 2.

<sup>18</sup> Morison, *Decisions*, pp. 14,605-6.

<sup>19</sup> Walker, *Legal history of Scotland*, vol. 6, p. 717.

<sup>20</sup> Ralph Davis, *The rise of the English shipping industry in the seventeenth and eighteenth centuries* (Newton Abbot: David and Charles, 1962), p. 102; Carol Hill, 'The Kircudbright Shipping Company 1811-1817', *International Journal of Maritime History*, 9 (1997), p. 71; Carol Hill, 'Galloway shipping and regional development', *Scottish Economic and Social History*, 19 (1999), pp. 106-7; David M. Walker, *A legal history of Scotland* (Edinburgh: Green LexisNexis UK, 1988-2003), vol. 5, pp. 681-2.

<sup>21</sup> Morison, *Decisions*, p. 14,667.

<sup>22</sup> For more on the governance of joint-stock shipping companies, see Mark Freeman, Robin Pearson and James Taylor, 'Technological change and the governance of joint-stock enterprise in the early nineteenth century: the case of Scottish coastal shipping', unpublished paper, London School of Economics, Business History Unit, seminar series, November 2005.

<sup>23</sup> Marke Valley Consolidated Mines, description and rules and regulations, printed W. Dawson, London, 1839, p. 6: National Library of Scotland, 3.1117(4).

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*, pp. 19-20.

<sup>26</sup> *Ibid.*, pp. 20-1.

<sup>27</sup> Burt and Kudo, 'Adaptability', pp. 34-7.

<sup>28</sup> *Ibid.*, p. 34. Original emphases.

<sup>29</sup> *Ibid.*, pp. 34-7.

<sup>30</sup> John F. Wilson, *Lighting the town: a study of management in the north west gas industry 1805-1880* (London: Paul Chapman, 1991), pp. 73-5; Robin Pearson, 'Shareholder democracies? English stock companies and the politics of corporate governance during the industrial revolution', *English Historical Review*, 117 (2002), p. 849.

<sup>31</sup> Robert Henderson, *Notes on the law of Scotland, in regard to joint stock companies, with Illustrations from the law of England* (Edinburgh: Bell and Bradfute, 1846), p. 2.

<sup>32</sup> Harris, *Industrializing English law*, pp. 143-4; Pearson, 'Shareholder Democracies?', p. 849.

<sup>33</sup> Harris, *Industrializing English law*, p. 143.

<sup>34</sup> Farmers' and General Fire and Life Insurance and Loan and Annuity Company, abstract of deed of settlement, printed by Joseph Rogerson, London, 1840, article 72: Guildhall Library.

<sup>35</sup> *Ibid.*, article 85.

<sup>36</sup> Burt and Kudo, 'Adaptability', pp. 34-5.

<sup>37</sup> County of Gloucester Bank, deed of settlement, printed by C. F. Cliffe, 1836, article 13: British Library, BL 1609.4377.

<sup>38</sup> Of the companies which allowed the shareholders to amend the constitution, 17 also required the directors' approval; 7 of the 42 insurance companies did so.

<sup>39</sup> Rules regulating borrowing were more commonly included in the constitutions of incorporated companies.

<sup>40</sup> See for example Rochester and Chatham Gas Light Company Minute Book, special general meeting, 21 June 1824: Centre for Kentish Studies, SEG/AM26/1.

<sup>41</sup> See *The precipitation and fall of Mess. Douglas, Heron and Company* (1778), in Robin Pearson (ed.; James Taylor and Mark Freeman, contributing eds), *The history of the company* (London: Pickering and Chatto, 2006), vol. 4, pp. 101-20.

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- <sup>42</sup> Falkirk Gas Work Company, contract of copartnery, printed by Thomas Gibson, Falkirk, 1829, article 12: National Library of Scotland, 1976.164(8).
- <sup>43</sup> *Ibid.*, article 4.
- <sup>44</sup> Quoted in Wilson, *Lighting the town*, p. 74.
- <sup>45</sup> 2 Victoria, c. 3, 19 April 1839, article 19.
- <sup>46</sup> The Edinburgh and Leith Shipping Company and the Edinburgh, Glasgow and Leith Shipping Company: London, Leith, Edinburgh and Glasgow Shipping Company, contract of copartnery, 1 May 1820, article 8: National Library of Scotland, 3.2776(2).
- <sup>47</sup> John Micklethwait and Adrian Wooldridge, *The company: a short history of a revolutionary idea* (London: Phoenix, 2003), pp. 147-8.
- <sup>48</sup> These ranged from 19 to 46 years.
- <sup>49</sup> The Victoria Park Company also had general and special rights of dissolution, as well as a finite duration.
- <sup>50</sup> Some of these specific periods, however, were very long: 999 or 1,000 years in 5 cases, and 99 years in 3 others. Of the 5 companies with a 999- or 1,000-year duration, 3, all Irish, had no provision for dissolution at all (the Irish Insurance Company for Ships, Merchandize and Lives (1786), the Belfast General Insurance Company (1801) and the Patriotic Assurance Company of Ireland (1824)).
- <sup>51</sup> Clydesdale Banking Company, contract of copartnery, 1838, printed by James Lumsden and Son, Glasgow, 1838, article 45: Glasgow University Library, Special Collections, Robertson Bf69-f.37.
- <sup>52</sup> Northern and Central Bank of England, deed of settlement, 13 January 1834, printed by Henry Smith, Manchester, 1835, articles 25-6: British Library 8220 bb.18.
- <sup>53</sup> Glasgow and Stranraer Steam Packet Company, draft contract of copartnery, 1843 article 10: National Archives of Scotland, GD154/343.
- <sup>54</sup> Charles R. Hickson and John D. Turner, 'The genesis of corporate governance: nineteenth-century Irish joint-stock banks', *Business History*, 47 (2005).
- <sup>55</sup> Ashton, Stalybridge, Hyde and Glossop Bank, minute book, 31 July 1840: Royal Bank of Scotland Archive, ASH/8/1.
- <sup>56</sup> Ashton, Stalybridge, Hyde and Glossop Bank, deed of settlement, 1 July 1836, articles 105-6: Royal Bank of Scotland Archive, ASH/7.
- <sup>57</sup> Ashton, Stalybridge, Hyde and Glossop Bank, minute book, 28 July 1840.
- <sup>58</sup> *Ibid.*, 18 August 1843.
- <sup>59</sup> Mark Freeman, Robin Pearson and James Taylor, 'Transparency and accountability in the governance of British stock companies, 1740-1845', unpublished paper, Economic History Society annual conference, University of Leicester, April 2005.
- <sup>60</sup> Burt and Kudo, 'Adaptability', p. 35.
- <sup>61</sup> For more on the crisis and its effects on attitudes to limited liability, see Taylor, *Creating capitalism*, ch. 4.
- <sup>62</sup> This is calculated from field 78A in the corporate governance database. 47 unincorporated companies prohibited any unauthorised shareholder access to all the documents of the company, but 31 of these excepted the constitutional document.