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# Legal Transplants, Law Books, and Anglo-American Corporate Fiduciary Duties

*Victoria Barnes\**

## I. INTRODUCTION

The internal management rule gives rise to the proposition that courts will not interfere in disputes between partners, shareholders, and managers.<sup>1</sup> This rule now provides the strongest reasoning that prevents the courts from intervening in corporate governance disputes. Courts that follow the internal management rule will leave issues of internal management and policy to be debated, discussed, and decided by members.<sup>2</sup> The shareholders, thus, play the role of regulator. They act as a check and balance on corporate management, regulate the corporation through voting at meetings, and those with the majority of votes hold control.<sup>3</sup> Strong evidence of fraud or misconduct must be shown to rebut the notion that directors and managers acted appropriately.<sup>4</sup> These principles are now the central tenants of corporate regulation in both the United States and United Kingdom. The set of ideas described here should sound familiar to an American ear, but its name, the internal management rule, will not be well known. It resembles what is better known in the United States as the business judgment rule. These rules which restrict judicial intervention are thought to push corporate

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1. See K. W. Wedderburn, *Shareholders' Rights and the Rule in Foss v. Harbottle*, 15 CAMB. L. J. 194, 194–215 (1957); H. Rajak, *The Oppression of Minority Shareholders*, 35 MOD. L. REV. 156, 156–70 (1972); A. J. BOYLE, *DIRECTORS' FIDUCIARY DUTIES: THE CONTINUING PROBLEM OF EFFECTIVE ENFORCEMENT* (1988); A. J. BOYLE, *MINORITY SHAREHOLDERS' REMEDIES* (2002).

2. LESLIE KOSMIN & CATHERINE ROBERTS, *COMPANY MEETINGS AND RESOLUTIONS: LAW, PRACTICE, AND PROCEDURE* (3d ed. 2020).

3. See also DAVID CHIVERS ET AL., *THE LAW OF MAJORITY SHAREHOLDER POWER: USE AND ABUSE* (2d ed. 2017).

4. *COMPANY DIRECTORS: DUTIES, LIABILITIES, AND REMEDIES*, (Simon Mortimore ed., 3d ed. 2017).

regulation in favor of the interests of directors and managers.<sup>5</sup>

Just as the internal management rule does not exist in the United States, the business judgment rule is not a feature of English law. Both are based upon common law decisions as opposed to statutory law. As English and American common law shared the same roots,<sup>6</sup> the rules about corporate fiduciary duties in the law of equity and trusts come from the English Court of Chancery. Justice Story explained in *Van Ness v. Pacard*, “[t]he common law of England is not to be taken in all respects to be that of America. Our ancestors brought it with them its general principles.”<sup>7</sup> Story was not alone in holding this view about a shared set of legal principles.<sup>8</sup> Soon after becoming Chief Justice of the Court of the King’s Bench in England in 1756, Lord Mansfield claimed mercantile law was “the same all over the World.”<sup>9</sup> Due to the process of British colonization, principles of English common law flowed out from the courts in London to the jurisdictions in the British Empire.

Despite the initial similarities between English and American corporate law, the two bodies of legal rules soon diverged. How, and when, did these rules in American law begin to develop differently? David Kershaw’s recent monograph provides an answer. The book pushes us further in understanding how and when these legal changes occurred. Kershaw shows that the Delaware variant of the business judgment rule as we understand it today emerged in the twentieth century.<sup>10</sup> In the nineteenth century, these rules practiced by the judiciary in the states along the east coast were linked strongly to the cases of England. Kershaw traces the case law surrounding

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5. Lucian A. Bebchuk, *The Myth of the Shareholder Franchise Essay*, 93 VA. L. REV. 675, 675–732 (2007). Several debate replies followed the publication of this article. See Martin Lipton & William Savitt, *The Many Myths of Lucian Bebchuk*, 93 VA. L. REV. 733, 733–58 (2007); Jonathan R. Macey, *Too Many Notes and Not Enough Votes: Lucian Bebchuk and Emperor Joseph II Kvetch about Contested Director Elections and Mozart’s “Seraglio”*, 93 VA. L. REV. 759, 759–72 (2007); Lynn A. Stout, *The Mythical Benefits of Shareholder Control*, 93 VA. L. REV. 789, 789–809 (2007); John F. Olson, *Professor Bebchuk’s Brave New World: A Reply to “The Myth of the Shareholder Franchise”*, 93 VA. L. REV. 773, 773–87 (2007); E. Norman Veasey, *The Stockholder Franchise Is Not a Myth: A Response to Professor Bebchuk*, 93 VA. L. REV. 811, 811–25 (2007).

6. Mary Bilder, *English Settlement and Local Governance*, in THE CAMBRIDGE HISTORY OF LAW IN AMERICA 63–103 (Michael Grossberg & Christopher Tomlins eds., 2008).

7. *Van Ness v. Pacard*, 27 U.S. 137, 144 (1829).

8. See also *Commonwealth v. Chapman*, 54 Mass. (13 Met.) 68, 69 (1847) (C. J. Shaw); 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 473–78 (1826) (for the discussion of the “principle publications of common law” and English texts only).

9. *Pelly v. Royal Exchange Assurance Co.*, 97 Eng. Rep. 342, 346 (1757); 1 BURR 341, 347 (1757); see also *Lindo v. Lord Rodney* 2 Doug KB 613, 619 (1782) (Lord Mansfield); 99 Eng. Rep. 385, 391; *R. v. Vaughan* 3 S.C.R. 691 (1991); 4 BURR 2494, 2500; 98 Eng. Rep. 308, 311 (1769).

10. See the seminal work of DAVID KERSHAW, THE FOUNDATIONS OF ANGLO-AMERICAN CORPORATE FIDUCIARY LAW 92–5 (2018).

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fiduciary duties back to the courts of England in the early 1700s.<sup>11</sup> This Article takes a different approach as it follows a development which can be seen in English law only. Lawyers in United States did not follow this shift in doctrine.

Rather than considering a legal transplant, this Article follows a legal rule that failed to transplant. Why was the internal management rule not received into American corporate law? This Article considers law books, both English and American legal treatises, as the principal agents of legal change and engines for the development of new law. The internal management rule was established as a doctrinal formula in 1860 with Lindley's treatise.<sup>12</sup> It was applied and gained judicial recognition and a firm purchase in English corporate law with the decision of *Burland v. Earle*.<sup>13</sup> While the internal management rule did not have a conceptual presence before the publication of Lindley's work, Lindley traced its origins to the case of *Carlen v. Drury* (hereinafter "*Carlen*").<sup>14</sup> The analysis undertaken here shows that Lindley's text was well received by American legal scholars, but it had little impact on the substance of American law. *Carlen* had a different meaning before 1860 and this Article's interpretation of the case had made inroads in American legal thought. This Article explains why Lindley's ideas made headway in the English system but did not travel to the United States. It further considers why his treatise did not alter the fiber of American corporate law.

Despite noting that there were differences in English and American legal thought, this Article provides evidence that indicates that the two groups were often working in similar ways with congruent themes. It demonstrates that in the nineteenth century, American and English legal scholars had a shared legal literature and common body of sources. Lawyers in America read English texts keenly. The question was not whether American lawyers were studying English law books, but from which books should ideas and legal principles be derived from. This Article shows that while lawyers in the United States kept abreast of simultaneous developments in English law, they did not take their legal rules from this contemporaneous scholarship. Two strands of legal thought emerged, and such legal change was not synchronized. Lawyers based in the United States did not see English law as having a concurrent or horizontal link with American law. Rather, this group saw themselves as practicing legal rules that were forged in the eighteenth and first part of the nineteenth century.

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11. *Id.* at 137–48.

12. NATHANIEL LINDLEY, A TREATISE ON THE LAW OF PARTNERSHIP: INCLUDING ITS APPLICATION TO JOINT-STOCK AND OTHER COMPANIES 596 (1860).

13. *Burland v. Earle*, AC 83 (1902) [hereinafter *Burland*].

14. *Carlen v. Drury, Ves & Bea.*, 154 (1812); 35 Eng. Rep. 61.

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During this period, Lord Chancellor Eldon formulated the equitable principles and fiduciary duties.<sup>15</sup> American lawyers sought to maintain continuity with the rules forged in this period and thereby developed a new set of doctrines. The legal ideas percolating in America did not follow the legal changes which had taken place in England since then.

The Article begins by discussing the landscape of English corporate law before Lindley's text was published in 1860. It pays particular attention to the first writers of corporate law books and the American editions of their work. Part II shows how Lindley's treatise revolutionized the law of fiduciary duties and created what would become known in English law as the internal management rule. Part III and IV examine the reception of Lindley's work in the United States, the extent to which it was developed for an American audience, and the way in which Americans altered, edited, and engaged with the substance. Part V discusses the rival American texts that might be read in the place of English treatises. The final section considers the competing influences on the law in action. It shows which body of legal literature—the first generation of treatise writers, Lindley's text or the American legal writers—influenced the letter of the law.

## II. ENGLISH LAW BEFORE THE INTERNAL MANAGEMENT RULE

The first sets of treatises written in the early nineteenth century acted in the same way that a law report did. These texts informed users of common law decisions and recorded the judicial reasoning laid out in such cases. Law reports and treatise writers during this period played a joint role with judges in creating legal precedent. Ben-Yishai wrote that the interplay between law reporter and judge “led to the former to believe and act as if they were taking part in the creating of law.”<sup>16</sup> As the reporter interpreted the meaning of the judge's words and retold the reasoning for their verdict to a wide audience, he was as important as the judge in establishing the notion of precedent. The only qualification needed for a case to be used as precedent was that the record was written by a barrister. Nevertheless, the meanings of cases were disputed as the counsel would offer their manuscript notes as a better

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15. Lord Chancellor Eldon was the leading judge in the Court of Chancery between 1801-1806 and 1807-1827. After 1813, Eldon assisted by a Vice Chancellor. Even so, due to the duration of his appointment, Eldon had a wide impact on the law which operated in this court. See ROSE MELIKAN, JOHN SCOTT, & LORD ELDON, 1751-1838: THE DUTY OF LOYALTY (1999); Amir N. Licht, *Lord Eldon Redux: Information Asymmetry, Accountability and Fiduciary Loyalty*, 37 OXF. J. LEG. STUD. 770, 770-97 (2017).

16. AYELET BEN-YISHAI, COMMON PRECEDENTS: THE PRESENTNESS OF THE PAST IN VICTORIAN LAW AND FICTION 62-3 (2013).

alternative to the printed version.<sup>17</sup> However, in instances where the case was unreported, the manuscript source was a prized resource.<sup>18</sup>

Before Lindley published his treatise in 1860, it was widely believed that that courts would interfere in corporate governance disputes and even had an active role in protecting shareholders in disputes over managerial fraud and misconduct, which prevented the continued existence of the bond among members of the company. *Waters v. Taylor* (“*Waters*”) was a key case where members of a theater company complained to Lord Eldon about its management.<sup>19</sup> The members asked for the manager to be removed and replaced, but Lord Eldon said he could only dissolve the company.<sup>20</sup> He followed the members’ suggestion and ended the company’s existence.<sup>21</sup> Lord Eldon refused to interfere in that corporate governance dispute. In this case, Lord Eldon gave the line, “[the c]ourt is not to be required on every Occasion to take the Management of every Playhouse and Brewhouse in the Kingdom.”<sup>22</sup> There were a number of legal writers musing and providing explanations for why Eldon did not behave as he did in *Waters*. These cases might seem inconsistent at first glance, but there was a general and understandable principle of law at play here.

There were few texts in English on the law of partnership in the early nineteenth century. The first law book was written by Watson in 1794 before either case was heard.<sup>23</sup> Another popular law book was authored by Niel Gow. Gow was a barrister, a law reporter, and a legal scholar.<sup>24</sup> He published the *Law of Partnership* in 1823.<sup>25</sup> A second edition of the book was published in 1825.<sup>26</sup> In the second edition, Gow explained that the *Carlen* case meant that “[t]hose who have the management are, it is true, answerable to the whole extent of their engagements, but even as between them and the members of the society, each individual is liable to a contribution for what they may have paid.”<sup>27</sup> This particular insight did not appear in the book’s first edition. Simply put, litigants had sought to allocate debts to managers,

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17. James Oldham, *Detecting Non-Fiction: Sleuthing Among Manuscript Case Reports for What was Really Said*, in *LAW REPORTING IN BRITAIN: PROCEEDINGS OF THE ELEVENTH BRITISH LEGAL HISTORY CONFERENCE* (Chantal Stebbings ed., 1995).

18. James Oldham, *Eighteenth-Century Judges’ Notes: How They Explain, Correct and Enhance the Reports*, 31 *AM. J. LEG. HIST.* 9–42 (1987).

19. *Waters v. Taylor* 10 *Ves. Jun.* 13 (1808).

20. *Id.*

21. *Id.*

22. *Carlen v. Drury, Ves & Bea.*, 158 (1812); 35 *Eng. Rep.* 61.

23. WILLIAM WATSON, *A TREATISE OF THE LAW OF PARTNERSHIP* (1st ed. 1794).

24. See NIEL GOW, *REPORTS OF CASES ARGUED AND RULED AT NISI PRIUS, IN THE COURT OF COMMON PLEAS* (1828).

25. NIEL GOW, *A PRACTICAL TREATISE ON THE LAW OF PARTNERSHIP* (1st ed. 1823).

26. NIEL GOW, *A PRACTICAL TREATISE ON THE LAW OF PARTNERSHIP* (2d ed. 1825).

27. *Id.* at 19.

but Lord Eldon would not do so. All active partners, including sleeping partners, and foolish or gullible investors, he believed, were jointly liable.<sup>28</sup> Gow also believed that this legal precedent supported the idea that “a court of equity [will not] grant an account and dissolve the partnership, until the parties have resorted to the proceedings for terminating disputes for which provision is made in the articles of partnership.”<sup>29</sup> There were simple reasons for this. First, the Court of Chancery was overloaded with business and ruling in the complaining shareholders favor was not conducive to decreasing levels of litigation to make matters manageable.<sup>30</sup> The second explanation was put forward by Gow. If there had not been a vote, he stated, how did the shareholders know that all or a majority wished to dissolve the company?<sup>31</sup> In sum, Lord Eldon would interfere to dissolve partnerships, but he would not do so unless there was clear evidence that this was the only route left.

The second edition of Gow’s treatise was edited, revised and expanded for an American audience by Edward Duffield Ingraham.<sup>32</sup> Ingraham was born in Philadelphia in 1793 and he sat as one of the judges in the Court of Common Pleas of Philadelphia County.<sup>33</sup> He later became a Vice Provost for the Law Academy of Philadelphia. By the mid nineteenth century, the Courts of Common Pleas and Supreme Courts in the state of Pennsylvania had a growing equitable jurisdiction.<sup>34</sup> It is particularly significant that this state had a strong equitable jurisdiction, as in English law, meaning that the doctrines of the courts of equity and common law were split. The doctrines in equity were also applied in New England in this manner.<sup>35</sup> This was also the case in Pennsylvania where, if a remedy in law existed, the doctrines in equity would not intervene.<sup>36</sup> The courts had “general and unlimited” equitable jurisdiction.<sup>37</sup> Therefore, in a formative era of American law,

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28. *Id.*

29. GOW, *supra* note 26, at 119.

30. Victoria Barnes & James Oldham, *Carlen v Drury (1812): The Origins of the Internal Management Debate in Corporate Law*, 38 J. LEG. HIST. 1, 25 (2017).

31. GOW, *supra* note 25, at 112.

32. NIEL GOW, A PRACTICAL TREATISE ON THE LAW OF PARTNERSHIPS (Edward Duffield Ingraham ed., 2d ed. 1825).

33. EDWARD DUFFIELD INGRAHAM, SINGULAR SURNAMES COLLECTED BY THE LATE EDWARD D. INGRAHAM, ESQ 4 (William Duane ed., 1873).

34. See FREDERICK C. BRIGHTLY, A TREATISE ON THE EQUITABLE JURISDICTION OF THE COURTS OF PENNSYLVANIA: WITH NOTES OF PLEADING AND PRACTICE IN EQUITY AND AN APPENDIX OF PRACTICAL FORMS (1855).

35. GEORGE TUCKER BISPHAM, THE LAW OF CONTRACTS IN REM: AN ADDRESS DELIVERED BEFORE THE LAW ACADEMY OF PHILADELPHIA 38 (1874).

36. THOMAS ISAAC WHARTON, A DIGEST OF THE REPORTED CASES ADJUDGED IN THE SEVERAL COURTS HELD IN PENNSYLVANIA: TOGETHER WITH SOME MANUSCRIPT CASES 489 (4th ed. 1843); *Andrews v. Solomon*, 1 F.Cas. 899 (1816).

37. *Commonwealth v. Bank of Pennsylvania*, 1842 WL 4682 (1842); JOHN PURDON & FREDERICK CHARLES BRIGHTLY, A DIGEST OF THE LAWS OF PENNSYLVANIA, FROM THE YEAR ONE THOUSAND

lawyers looked to English company law for instructions and debated issues in the courts of equity in England, namely, the Court of Chancery or Exchequer. This particular body of law was used predominately in cases which dealt with business organizations.

Story's *Commentary's on the Law of Partnership* was published in 1841. In the preface to his text, Story wrote that "after all, the Law of Partnership owes its present comparative perfection and comprehensive character and enlightened liberality mainly to the learned labors of the English Bar and Bench."<sup>38</sup> He did not cite *Carlen*. Instead, Story cited Gow's text and included the section in the footnotes which explained these points in their entirety.<sup>39</sup> It was clear at this stage that Story had read considerable amounts of English legal literature and directed his readers to do so as well. If readers felt that Story's excerpts of Gow's text were interesting enough to warrant further examination, they could pick up the American editions of Gow's work, which were edited by Ingraham. The following section turns to examine the legal changes created by Lindley's treatise.

### III. LINDLEY AND THE INTERNAL MANAGEMENT RULE

In *A Treatise on the Law of Partnership*, Lindley expanded the heading and wrote "on the rule that the court will not interfere in matters of internal regulation."<sup>40</sup> Lindley explained that courts should reject pleas from shareholders because "it is no part of the duty of the court to settle all partnership squabbles."<sup>41</sup> The implication of this statement is that corporate governance disputes were of a minor or trivial nature and courts should be left to tackle more important matters. To provide evidence for such a rule, Lindley included the printed reports of *Carlen*,<sup>42</sup> *Foss v. Harbottle* ("Foss"),<sup>43</sup> and *Mozley v. Alston* ("Mozley"), either in part or full.<sup>44</sup> He made little in the way of changes from the original printed report and merely shortened the text. The facts and outcomes of the cases were, in Lindley's treatise, described in a number of sentences, with each case having around a

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SEVEN HUNDRED TO THE TWENTY-FIRST DAY OF MAY, ONE THOUSAND EIGHT HUNDRED AND SIXTY-ONE 400 (9th ed. 1862).

38. JOSEPH STORY, COMMENTARIES ON THE LAW OF PARTNERSHIP: AS A BRANCH OF COMMERCIAL AND MARITIME JURISPRUDENCE, WITH OCCASIONAL ILLUSTRATIONS FROM THE CIVIL AND FOREIGN LAW vii (1st ed. 1841).

39. *Id.* at 334–38.

40. LINDLEY, *supra* note 12, at 596.

41. *Id.* at 596.

42. *Carlen v. Drury, Ves & Bea.*, 154 (1812); 35 Eng. Rep. 61.

43. *Mozley v. Alston*, 1 Ph 790 (1847); 41 Eng. Rep. 833.

44. *Foss v. Harbottle*, 67 Eng. Rep. 189 (1843).

paragraph of description.<sup>45</sup> With this detail, Lindley fleshed out his ideas but did not have enough detail to place the cases within the context of the wider legal principles that originally surrounded them. The cases appeared as standalone and related cases which Lindley himself linked together.<sup>46</sup> He thus relied heavily upon the original reporters for their accuracy and reliability. Before each case appeared in the text, Lindley wrote a preface where he introduced the principles.<sup>47</sup> The cases were, therefore, used to support the general proposition that courts dismissed shareholder complaints.

Lindley wrote his treatise with an ambition to reorder company law. In his memoirs, he explained that he saw an opening for a new treatise in company law. The “existing works,” he believed, written “by Montagu, Gow, Collyer and Wordsworth,” could “be improved.”<sup>48</sup> Lindley considered that these texts lacked a discussion of legal principles, scientific study, and systematic order. He noted that when reading English legal texts, “a student is only too likely to be bewildered by the acquisition of particular facts which he is wholly unable to systematise.”<sup>49</sup> In his translation of Thibaut’s work, Lindley said that law was founded on two parts: a general part which concerned “great leading ideas” and a special part where each law is separately examined.<sup>50</sup> When Lindley wrote his treatise on company law, he emulated this two-part model, which explains why each subsection had an introductory text which described the theory, principle, and rule before the case law.

In creating a new vision of corporate law that comprised of a set of general principles, Lindley gave new explanations of the law by altering it. These modifications were a conscious decision rather than an oversight or mistake. The case law demonstrates that courts were willing to interfere in corporate governance disputes.<sup>51</sup> Indeed, there were also cases which plainly contradicted Lindley’s statement of the law, such as *Waters* and *Carlen*. In *Waters*, Lord Eldon dissolved the company at the shareholders’ request, but in *Carlen*, he declined to do so. Regarding *Waters*, Lindley wrote that “[a]s was said by Lord Eldon, the Court will not . . . take upon itself the management of every trade in the Kingdom”, unless there was a request “for

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45. LINDLEY, *supra* note 12, at 596–600.

46. *Id.*

47. *Id.* at 596.

48. Middle Temple Archive, Lord Lindley memoirs, GD.42.

49. NATHANIEL LINDLEY, AN INTRODUCTION TO THE STUDY OF JURISPRUDENCE, BEING A TRANSLATION OF THE GENERAL PART OF THIBAUT’S SYSTEM DES PANDEKTEN RECHTS iv (William Maxwell ed., 1855).

50. *Id.* at 2.

51. Victoria Barnes, *Judicial Intervention in Early Corporate Governance Disputes: Vice-Chancellor Shadwell’s Lost Judgment in Mozley v Alston (1847)*, 58 AM. J. LEG. HIST. 394–413 (2018).

dissolution.”<sup>52</sup> Yet, the first part of this quote was taken from *Carlen*, the case Lindley cited as a precedent for the proposition that courts would not interfere with dissolution decisions.<sup>53</sup> The quote closely resembles Lord Eldon’s line that the “[c]ourt is not to be required on every Occasion to take the Management of every Playhouse and Brewhouse in the Kingdom.”<sup>54</sup>

In Lindley’s section called “the internal management rule,” he portrayed a one-sided view of the case law. He chose not to give voice to the instances where the court intervened and responded positively to requests for judicial interference. In *Carlen*, the case from which this misattributed line originates, Eldon also stated that a court has a positive obligation to interfere. Lord Eldon considered that “[h]ere, however, I observe that there is a Principle of a Court of Equity paramount [in] these Agreements, in respect of which this Court will interfere; but not in the first Instance.”<sup>55</sup> Eldon decided that in *Carlen*, he “will not interfere, before the Parties have tried that Jurisdiction, which the Articles have themselves provided.”<sup>56</sup> The differences between the case itself and Lindley’s interpretation of the rules are substantial. Particularly, Gow did not share Lindley’s view and proffered a nuanced version with more uncertainty.<sup>57</sup> By focusing exclusively on Eldon’s unwillingness to intervene to enforce fiduciary duties, Lindley created a line of legal reasoning that did not exist. The areas where the court would interfere, such as to allow a dissolution of the partnership, were relegated by a separate section.<sup>58</sup> This chapter in his treatise was removed from the discussions of the internal management rule, fiduciary duties, and other related doctrines.<sup>59</sup> It was headed with the name: “Of the rule not to interfere except with a view to Dissolve the Partnership.”<sup>60</sup> This chapter was merely a note. The discussion was a short paragraph, while the section on the internal management rule was a labored point lasting five pages.

By reducing the mention of legal authorities, such as *Waters*, and moving instances of positive intervention and to a different section in another book, Lindley ensured that his interpretation of the state of the law was clear. In total, *Waters* was cited eight times, but not in the section on dissolution where this case would logically sit.<sup>61</sup> Lindley also refused to acknowledge the arguments of earlier treatise writers who contradicted his interpretation

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52. LINDLEY, *supra* note 12, at 664.

53. *Id.*

54. *Carlen v. Drury, Ves & Bea.*, 158 (1812); 35 Eng. Rep. 61.

55. *Id.*

56. *Id.*

57. GOW, *supra* note 26, at 19.

58. LINDLEY, *supra* note 12, at Book 1, Ch. 8.

59. *Id.*

60. *Id.* at 595.

61. *Id.* at 191, 193, 477, 568, 596, 597, 660, and 671.

of the law.<sup>62</sup> However, Lindley accurately summarized that there were several contradictory approaches which a court might follow.<sup>63</sup> Yet, with a one-sided examination of when courts did not interfere, Lindley suggested that his legal argument was stronger—and the way he wrote made it appear as if this was indeed the case. A few caveats were added to refine Lindley’s general rule that courts would not interfere in corporate governance disputes. For example, a court, Lindley believed, would intervene in incidents of fraud.<sup>64</sup> However, as the printed reports of cases that Lindley included has shown, such evidence of fraud would have to be very strong.<sup>65</sup> The next section turns to explore the reception of Lindley’s treatise in the United States.

#### IV. LINDLEY’S TREATISE IN THE UNITED STATES

Lindley and his treatise gained recognition around the world. An American review wrote that “as soon as [his work] was published, [it] assumed almost instantly the position of a standard authority.”<sup>66</sup> This is perhaps an overstatement. It certainly gained greater traction—more recognition, more reviews, and more edited editions—after Lindley made the transition from barrister to judge.<sup>67</sup> Indeed, this particular review was written in 1888 when Lindley held a judicial appointment in the Court of Appeal. It is worth noting that Lindley’s text was not picked up by American lawyers for editing until its fifth edition, which was published in 1888. Lindley was, at this point, a judge in the Court of Appeal. In 1890, he would become the senior Lord Justice in the Court of Appeal and in 1900, a Law Lord.<sup>68</sup> David Sugarman, encapsulated the idea of judicial deference

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62. LINDLEY, *supra* note 12, at Book 1, Ch. 8.

63. *Id.*

64. *Id.* at 781–93.

65. Some have argued that company fraud was rife, and debated whether this legal threshold was too high. See Timothy L. Alborn, *The Moral of the Failed Bank: Professional Plots in the Victorian Money Market*, 38 VIC. STUD. 199, 199–226 (1995); GEOFFREY RUSSELL SEARLE, MORALITY AND THE MARKET IN VICTORIAN BRITAIN (1998); GEORGE ROBB, WHITE-COLLAR CRIME IN MODERN ENGLAND: FINANCIAL FRAUD AND BUSINESS MORALITY, 1845-1929 (2002); PAUL JOHNSON, MAKING THE MARKET: VICTORIAN ORIGINS OF CORPORATE CAPITALISM (2010); JAMES TAYLOR, BOARDROOM SCANDAL: THE CRIMINALIZATION OF COMPANY FRAUD IN NINETEENTH-CENTURY BRITAIN (2013); SARAH WILSON, THE ORIGINS OF MODERN FINANCIAL CRIME: HISTORICAL FOUNDATIONS AND CURRENT PROBLEMS IN BRITAIN (2014).

66. Anon., *Book Reviews*, 2 COLUM. L. TIMES 87, 87–88 (1888).

67. See Gareth H. Jones & Vivienne Jones, *Lindley, Nathaniel, Baron Lindley (1828–1921)*, OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (2006), <http://dx.doi.org/10.1093/ref:odnb/34535>.

68. Waddams has noted that the jurist database shows that judicial references to the works of Lindley and other judges all increased in frequency after those authors had been appointed to the bench. Given that judges were disinclined to cite treatises, as they were not legal authorities, translated or edited editions might be a better measure of the success of a treatise. Sales figures are rarely available. Stephen

effectively, when he said that “[d]espite the variety of producers and consumers of legal discourse, it is what the judges say and the supposed need of the legal profession as narrowly defined that have had the greatest magnetic pull over the nature and form of legal education and scholarship.”<sup>69</sup> The success of Lindley’s treatise was, in part, due to Lindley’s personal successes, such as being a barrister of Middle Temple and later a judge in a particular court.<sup>70</sup> Advertisements for law books commonly noted the author’s professional status and those for Lindley’s treatise did not neglect to detail his judicial position.

In the United States as well as England, legal writers did not believe that treatises would be considered legal authority and a source that the court would readily cite.<sup>71</sup> They were considered to be law books and academic texts, a guide for students and legal professionals that gave insight into a field of law rather than law itself.<sup>72</sup> Journals and newspapers were used for information, but were not traditionally considered good sources of law.<sup>73</sup> No correspondence from Lindley to academic writers in the United States exists. His memoir lists all the places he visited and the United States was not listed.<sup>74</sup> Lindley did not appear to have personal links to those in this jurisdiction. Even without, it appears, direct contact with those in America, Lindley’s work was able to move across the Atlantic and be picked up in the United States. The treatise transferred to the United States because it resonated with a general dissatisfaction with legal literature there.

An article published in 1844 in the American publication the *Law Students’ Magazine* echoed Lindley’s criticism of the state of English legal literature.<sup>75</sup> Without a fully developed body of scholarship of their own, lawyers in the United States looked across the Atlantic to English works for inspiration. The article argued that English treatises, like digests, were

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Waddams, *The Authority of Treatises in English Law (1800-1936)*, in *LAW AND AUTHORITY IN BRITISH LEGAL HISTORY, 1200-1900*, 283 (Mark Godfrey ed., 2016).

69. David Sugarman, *Legal Theory, the Common Law Mind and the Making of the Textbook Tradition*, in *LEGAL THEORY AND COMMON LAW*, 27 (William Twining ed., 1986).

70. See, e.g., the advert for the third edition of Lindley’s treatise in JOHN WESTLAKE, *A TREATISE ON PRIVATE INTERNATIONAL LAW: OR THE CONFLICT OF LAWS, WITH PRINCIPAL REFERENCE TO ITS PRACTICE IN THE ENGLISH AND OTHER COGNATE SYSTEMS OF JURISPRUDENCE* 410 (1858); SIR PETER BENSON MAXWELL, *ON THE INTERPRETATION OF STATUTES* 460 (1875).

71. See the debate between treatise writer, Theophilus Parsons, and the anonymous writer of *On the Nature of Authority in the Law Note*, 2 WEST JURIST 197, 197–214 (1868).

72. William Twining et al., *The Role of Academics in the Legal System*, in *THE OXFORD HANDBOOK OF LEGAL STUDIES* (Mark Tushnet & Peter Cane eds., 2005); Alexandra Braun, *Burying the Living? The Citation of Legal Writings in English Courts*, 58 AM. J. COMP. LAW 27–52 (2010).

73. Stefan Vogenauer, *Law Journals in Nineteenth-Century England*, 12 EDINB. LAW REV. 26–50 (2008); James Oldham, *The Law of Negligence as Reported in The Times, 1785-1820*, 36 LAW HIST. REV. 383–419 (2018).

74. Middle Temple Archive, Lord Lindley memoirs, GD.42.

75. Anon., *The Principles of the Law*, 1 LAW STUD. MAG. 182, 182–3 (1844).

“destitute of principles, being for the most part made up of a collection of marginal notes,” commenting that “even the lawyers of the United States, who at one time looked upon an English Law Book as the *ne plus ultra* of a learned treatise . . . prefer those by their own more scientific writers.”<sup>76</sup> It added that those in Continental Europe would look upon English lawyers as “transcribers.”<sup>77</sup> The English treatises, which aimed to inform readers about the many important cases forgotten in the printed reports, had lost their value. Accordingly, the ideas contained within Lindley’s treatise spread and took root largely due to the mechanisms and style through which he conveyed his arguments.

By the late nineteenth century in England and the United States, the process of legal research had become more cumbersome and time consuming. While American lawyers had searched high and low for useable cases fifty years earlier, an explosion had taken place in the numbers of law reporters since.<sup>78</sup> With higher volumes of case law, readers needed to be able to navigate through cases quickly, efficiently, and without confusion. The wider body of printed case law meant that legal research had become an unhappy exercise in sifting through large bodies of material. In 1888, Justice Samuel Miller reminded University of Pennsylvania law students that “[m]ost of these modern treatises, as they profess to call themselves, are but digests of the decisions of the courts.”<sup>79</sup> While “professing to be classified and arranged in reference to certain principles discussed in the book,” Miller thought that they were in truth “ill-considered extracts from the decisions of the courts.”<sup>80</sup> Lawyers did not wish to wade through digests or swathes of raw material to find the meaning of a case.

Lindley’s treatise was considered to be part of this shift towards a discussion of general principles, a scientific method, and more efficient style of research. These trends were also establishing themselves in American legal literature. The Virginia State Bar Association, in an 1893 report, called upon writers to improve the literature by stating that “[w]e may well be thankful when text-books cease to be digests and become treatises, citing a

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76. *Id.* [emphasis in original].

77. *Id.*

78. See WILLIAM THOMAS SHAVE DANIEL, *THE HISTORY AND ORIGIN OF THE LAW REPORTS* 8 (1969); JOHN WILLIAM WALLACE & FRANKLIN FISKE HEARD, *THE REPORTERS: ARRANGED AND CHARACTERIZED WITH INCIDENTAL REMARKS* 584–85 (1882). For a discussion of reporting in the earlier period, see Michael Macnair, *The Nature and Function of Early Chancery Reports*, in *LAW REPORTING IN BRITAIN: PROCEEDINGS OF THE ELEVENTH BRITISH LEGAL HISTORY CONFERENCE* (Chantal Stebbings ed., 1995).

79. Samuel F. Miller, *The Use and Value of Authorities Note*, 23 *AM. LAW REV.* 165, 165–66 (1889).

80. *Id.*

few leading cases, instead of a mass of contradictory decisions.”<sup>81</sup> Those at the meeting voted in favor of this as a resolution.<sup>82</sup> Those in the *American Law Review*, who noticed the report, responded in a humorous manner. Their reply read:

With due respect to the learned cavilers who signed this report and to the learned body which adopted it, we submit that it will not bear any analysis at all. To the question, “What shall we do with the deluge of books?” we simply answer, do nothing. If you don’t want the reports, let them alone. They will not crawl into your offices and climb upon yourselves like mice, unless you render them some assistance to get there. Publishers print these books and sell them in order to make money . . . if the lawyers did not buy them the publishers would not print them.<sup>83</sup>

The debate about how to manage the growing levels of legal literature and conduct research efficiently continued.

Changes took place in legal education as well. Christopher Langdell took over the teaching of business law and equity and trusts in Harvard in 1870.<sup>84</sup> Langdell pioneered the case method in his teachings.<sup>85</sup> He used primary sources rather than treatises or textbooks.<sup>86</sup> Textbooks were “thrown aside, and the young disciple of Blackstone” was “plunged into the midst of legal cases to dig for himself,” one observer remarked.<sup>87</sup> Langdell published *Cases on the Law of Contracts* in 1871.<sup>88</sup> Langdell, like Lindley, also saw the study of law as a science.<sup>89</sup> As Richard Danner, a specialist in the diffusion of legal information, has pointed out, some contemporaries lamented Langdell’s efforts as a regression and a return to the old methods of legal writing where

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81. Anon., *Transactions of the Fifth Annual Meeting of the Virginia State Bar Association*, 1 AM. LAWYER 30, 37 (1893).

82. *Id.*

83. Anon., *Notes*, 28 AM. LAW REV. 408, 435 (1894).

84. For an account of Langdell’s teaching methods as written by a student, see William Schofield, *Christopher Columbus Langdell*, 55 AM. LAW REGIST. 273, 278 (1907).

85. See W. Burlette Carter, *Reconstructing Langdell*, 32 GA. LAW REV. 1 (1997). (describing the legal biography of Christopher Langdell).

86. For more on this technique, see JOSEF REDLICH, *THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS: A REPORT TO THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING* (1914); BRUCE A. KIMBALL, *THE EMERGENCE OF CASE METHOD TEACHING, 1870S-1990S: A SEARCH FOR LEGITIMATE PEDAGOGY* (1995).

87. Anon., *Methods of Legal Study Current Legal Thought*, 1 NATL. LAW REV. 75, 75–76 (1888).

88. Kimball traces its influence to Bruce A. Kimball, *Langdell on Contracts and Legal Reasoning: Correcting the Holmesian Caricature*, 25 LAW HIST. REV. 345, 345–400 (2007).

89. Christopher C. Langdell, *Teaching Law as a Science*, in *THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES: COMMENTARIES AND PRIMARY SOURCES* (Steve Sheppard ed., 2007).

principles were absent.<sup>90</sup>

Others, such as R. McPhail Smith, a United States attorney in Nashville,<sup>91</sup> argued that reading cases was essential in order to find legal principles. He considered that “*principles are best learned by reading cases*. The judge makes a fuller exposition of the principle than the text-writer. The facts elucidate it. The style of the opinion is more familiar—more like that of a good newspaper editorial—the *best* of style for such matter.”<sup>92</sup> Wetmore, a Harvard graduate, attorney, and President of the New York Bar and American Bar Association,<sup>93</sup> agreed. He stated that “principles are derived from cases and the cases are the record of the application of those principles.”<sup>94</sup> Yet, Wetmore noted that the case method “overlooks the natural operation of the mind in apprehending and mastering for the first time, an applied science.”<sup>95</sup> He advocated delivering it first in a “systematic form.”<sup>96</sup> Lindley, and his English reviewers, believed that his treatise did just this, because he divided his subjects systematically by principle and added printed reports in the text to support his propositions.<sup>97</sup> Therefore, Lindley’s treatise fell on fertile ground for some legal thinkers in the United States.

In spite of Lindley’s experience overseas, he did not entertain the use of American legal authorities or make an explicit attempt to compare the substance of English law with that of other jurisdictions. This job was, therefore, left to other scholars. Lindley’s treatise needed updating and editing to make it more palatable to an audience who predominately wished to use citations of cases heard in the United States. A number of lawyers based in America chose Lindley’s treatise to Americanize.<sup>98</sup> They tried to update it for the American market with varying degrees of success. Marshall D. Ewell edited Lindley’s text in Chicago for the state of Illinois.<sup>99</sup> The *American Law Review* was especially critical of Ewell’s efforts. In the eyes of the reviewer,

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90. Richard A. Danner, *Cases and Case Lawyers*, 35 LEG. REF. SERV. Q. 147, 147–78 (2016).

91. ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866-1876*, 59 (2005).

92. This was written as an open Letter to Dr. Austin Abbott, who had given the address at the first session on legal education at the American Bar Association in 1893. Robert McPhail Smith, *Legal Education: Method of Teaching Law*, 1 UNIV. LAW REV. 198, 198–201 (1893) [emphasis in original].

93. Edmund Wetmore, *Noted Lawyer Dies*, N.Y. TIMES (July 9, 1918), <https://timesmachine.nytimes.com/timesmachine/1918/07/09/102717660.pdf>.

94. Edmund Wetmore, *Some of the Limitations and Requirements of Legal Education in the United States*, 17 ANNU. REP. A.B.A. 461 (1894).

95. *Id.*

96. *Id.*

97. *See supra* notes 52-61.

98. Another editor was named Charles Young Audenried. *See* NATHANIEL LINDLEY, *A TREATISE ON THE LAW OF PARTNERSHIP* (Charles Young Audenried, et al. eds., 5th ed. 1891).

99. NATHANIEL LINDLEY, *A TREATISE ON THE LAW OF PARTNERSHIP* (Marshall D. Ewell, Walter B. Lindley & William C. Gull eds., 5th ed. 1888).

Ewell had copied American decisions verbatim and lacked analysis and his approach rendered the work, it said, to have a “comparative inutility.”<sup>100</sup> Other reviews of Ewell’s work simply praised Lindley’s method rather than Ewell’s contribution to it.<sup>101</sup>

Another copy of Lindley’s treatise was edited and amended by Stewart Rapalje in New York.<sup>102</sup> Rapalje was born in New York and descended from French Huguenots.<sup>103</sup> He was initially a student at Yale, but left due to the impending Civil War only to return at Columbia, before later joining the New York and California bar.<sup>104</sup> While Rapalje may have been distant from, and unconnected to, the formation of English law, he saw it as being inextricably linked to the development of American law. In the *Dictionary of American and English Law* that he co-authored with Robert L. Lawrence, English and American law was seen as inseparable.<sup>105</sup> Rapalje worked mainly on turning English equity cases and related texts into American versions, including the development of criminal law. On his deathbed, the *American Law Review* labelled Rapalje a “bookseller’s hack,” noting his extensive publications.<sup>106</sup>

A Harvard graduate, Alonzo B. Wentworth,<sup>107</sup> updated and edited Lindley’s work for the Massachusetts market.<sup>108</sup> Business law was taught at Harvard since about the mid-1860s and it contained elements of corporate law, agency law and partnership law. The course was an especially strong recruiter and drew a considerable number of students, including Wentworth.<sup>109</sup> Wentworth learned of business law in this climate, under the

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100. Anon., *Book Notices*, 15 AM. L. REV. 740 (1881).

101. As previously noted, reviewers looked fondly on Lindley’s ability to discuss principles, noting his “perspicuity in the deduction of principles from cases.” Anon., *Book Reviews*, 7 S. L. REV. 721 (1881).

102. NATHANIEL LINDLEY, A TREATISE ON THE LAW OF PARTNERSHIP (Stewart Rapalje, Walter B. Lindley, & William C. Gull eds., 1888).

103. His obituary appeared in: Anon., *Stewart Rapalje*, 1 LAW NOTES 1–12, 6–7 (1897).

104. ANON., CATALOGUE OF THE OFFICERS AND STUDENTS IN YALE COLLEGE 9 (1862); ANON., TRIENNIAL MEETING OF THE CLASS OF 1864, YALE COLLEGE: WITH THE BIOGRAPHICAL RECORD AND STATISTICS 84 (1868).

105. STEWART RAPALJE & ROBERT L. LAWRENCE, A DICTIONARY OF AMERICAN AND ENGLISH LAW (1888).

106. Anon., *Obituary of the Profession*, 31 AM. LAW REV. 420, 420–50, 446–47 (1897).

107. CHARLES WARREN, HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA 334, 543 (1908).

108. NATHANIEL LINDLEY, A TREATISE ON THE LAW OF PARTNERSHIP (Alonzo B. Wentworth, Walter B. Lindley & William C. Gull eds., 5th ed. 1888).

109. Parsons noted in his review of Kent’s *Commentaries* that the subjects of business law were sought after as “[a]ready, in many of our law schools, provision is made for those who enter them, not to become lawyers, but to study commercial law.” Anon., *Review of Commentaries on American Law. Seventh edition. By James Kent.*, 74 NORTH AM. REV. 108, 108–20 (1852). The review was later revealed to have been written by Theophilus Parsons. For more on the construction of Kent’s *Commentaries*, the context in which they were written, and their influence, see John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 547–94 (1993); Carl F. Stychin, *The Commentaries of Chancellor James Kent and the Development of an American Common Law*, 37 AM. J. LEG. HIST. 440,

guidance and influence of Theophilus Parsons, who was then the Dane Professor of Law at Harvard. We now turn to discuss rival texts by other American writers, including Parsons's text on corporate law.

## V. THE RIVAL AMERICAN TEXT

The first American edition of Lindley's treatise in 1888 was timely. It was particularly well suited to the movements in the teaching of law. While English treatises initially entered the American market as law books, with the high-profile English versions being rewritten by American authors, they also competed with texts written by American authors. Friedman estimated conservatively that 1,000 treatises were published in the last half of the nineteenth century.<sup>110</sup> He noted that the vast amount of treatises were overwhelmingly American, rather than American editions of British treatises.<sup>111</sup> Lindley's main rival in the United States was from Parsons and his array of law books.

Theophilus Parsons was the son of the Chief Justice of the Supreme Court of Massachusetts and he too had his own treatises on the *Law of Partnership*, the *Laws of Business*, and the *Law of Contracts*.<sup>112</sup> These American texts were in competition with Lindley's simply because they covered the same area of law. Students, lawyers, academics, looking to learn more about corporate law, could either purchase the books either written by Lindley or Parsons. It is noteworthy that Parsons authored his own texts in private law rather than choosing to edit English versions for an American legal audience, but he did not do this for all areas of law. When Parsons taught the law of equity and trusts, he used American editions of English texts.<sup>113</sup> His treatises on the *Law of Partnership*, *Law of Contracts*, and *Laws of Business* were popular texts. Parsons noted that one of his "law books has a larger sale than any other law book in the English language."<sup>114</sup> He was

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440–63 (1993); Daniel J. Hulsebosch, *Empire of Law: Chancellor Kent and the Revolution in Books in the Early Republic*, 60 ALA. LAW REV. 377, 377–24 (2008).

110. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 477 (3d ed. 2005).

111. *Id.*

112. THEOPHILUS PARSONS, A TREATISE ON THE LAW OF PARTNERSHIP (1st ed. 1867); THEOPHILUS PARSONS, THE LAWS OF BUSINESS FOR BUSINESS MEN, IN ALL THE STATES OF THE UNION: WITH FORMS FOR MERCANTILE INSTRUMENTS, DEEDS, LEASES, WILLS, &C (1st ed. 1869); THEOPHILUS PARSONS, THE LAW OF CONTRACTS (1st ed. 1853).

113. J. WARNER JOHNSON, THOMAS P. PARRY & WILLIAM S. JOHNSON, T. & J. W. JOHNSON & CO.'S LAW CATALOGUE 15 (1857). Parsons used JOHN ADAMS & HENRY WHARTON, THE DOCTRINE OF EQUITY: A COMMENTARY ON THE LAW AS ADMINISTERED BY THE COURT OF CHANCERY (James Reily, Ludlow & John MacMinn Collins eds., 3d ed. 1855).

114. Letter from Parsons to S.S. Stratton & Co., Theophilus Parsons papers (Nov. 16, 1868) (on file with the Harvard University Houghton Library, MS Am 779).

approached by other publishers,<sup>115</sup> and also encouraged to translate one of his treatises into German, provided that it could be done so in a “intelligible” manner.<sup>116</sup> The books were marketed in the United States by booksellers and in Canada through agents.<sup>117</sup> A Canadian advert for Parsons’s *Laws of Business* treaty said that it was “A NEW BOOK FOR EVERYBODY . . . ESSENTIAL TO *Every Farmer, Mechanic, Manufacturer, Public Officer, Landlord, Tenant, Executor, Administrator, Guardian, Minor, Heir-at-Law, Legatee, Apprentice, Mariner, Auctioneer, Broker, Notary, Bank Officer, Justice of the Peace Sheriff, Under Sheriff, Commissioner, Reader, Property-holder.*”<sup>118</sup> With an advert, which made the text appear so broadly useful, it is no wonder that the book was in demand. The remainder of his treatises were aimed at lawyers and were, in Parsons’ words, “tools of the trade.”<sup>119</sup>

While the legal treatises certainly gave Parsons a name and reputation for his expertise as an academic in private law, he was unhappy with these publications, but more specifically, with his commission. In 1867, Parsons wrote to his publisher to say that he had received the same commission for many years but noticed that with the most recent edition of *Law of Contracts* the price “varied very much, on the ground.”<sup>120</sup> He asked, “why I alone should have no increase? All of the labor in the community was paid more and why should my labor alone should have no increase?”<sup>121</sup> This seemed to be a perennial disagreement with Parsons, who wrote a similar note to himself about the negotiations the following year.<sup>122</sup> In the second half of 1870, Parsons text, the *Laws of Business*, sold 12,922 copies and he received \$3,230.50 from it.<sup>123</sup> Still, he was disappointed by the sales figures. In correspondence with his publishers, he replied by noting that in the first six

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115. Letter from Mr. Rigby to Parsons, Theophilus Parsons papers (undated) (on file with the Harvard University Houghton Library, MS Am 799); letter from J.B. Lippincott & Co. to Parsons (May 9, 1870) (on file with the Harvard University Houghton Library, MS Am 799).

116. Letter from S.S. Scranton to Parsons, Theophilus Parsons papers (Sept. 2, 1869) (on file with the Harvard University Houghton Library, MS Am 799).

117. Advert for agents to sell *Law of Business* titled “Wanted - Agents!”, Theophilus Parsons papers (on file with the Harvard University Houghton Library, MS Am 799) [emphasis in original].

118. Advert for agents to sell *Law of Business* titled “Wanted - Agents!”, Theophilus Parsons papers (on file with the Harvard University Houghton Library, MS Am 799) [emphasis in original].

119. Letter from Parsons to J.L.B. Lippincott & Co., Theophilus Parsons papers (May 11, 1870) (on file with the Harvard University Houghton Library, MS Am 799).

120. Note by Parsons, Theophilus Parsons papers (Sept. 28, 1867) (on file with the Harvard University Houghton Library, MS Am 799).

121. Note by Parsons, Theophilus Parsons papers (Sept. 28, 1867) (on file with the Harvard University Houghton Library, MS Am 799).

122. Note by Parsons, Theophilus Parsons papers, (Dec. 28, 1868) (on file with the Harvard University Houghton Library, MS Am 799).

123. Letter from S.S. Scranton to Parsons, Theophilus Parsons papers (Nov. 21, 1870) (on file with the Harvard University Houghton Library, MS Am 799).

months, 27,327 copies were sold.<sup>124</sup> With the excitement and buoyancy concerning Parsons and his new text, agents capitalized on this by selling older copies of his works instead of his new one.<sup>125</sup> This may have caused some “embarrassment” on Parsons behalf,<sup>126</sup> or dissatisfaction with his publisher, because by the second half of 1872, only 5,628 copies of the *Laws of Business* were sold.<sup>127</sup>

Despite Parsons’s likely frustration, his publishers took an active role in assisting him with the text. Notably, they advised Parsons on the structure of the *Laws of Business*. In a letter to Parsons, his publishers said that “[w]e think it would be well to divide the text by placing the texts and forms of each topic by themselves. For example, under the title, ‘agreement’ let the forms immediately follow the text. [And do] So of ‘Deeds & Promissory Notes etc.’” This structure, the publishers thought, “would facilitate references by the uninitiated and help to obviate a great difficulty encountered by the common people in the use of such a book.”<sup>128</sup> As with Lindley’s treatise, structure was key to helping others navigate the many pages of Parsons’ text.<sup>129</sup> Parsons believed—just as Lindley had—that his treatise dealt with principles. In a letter, where he summarized the purpose of the *Laws of Business* text, Parsons wrote that “[i]t is, to offer to the people of this country, a Law Book adapted to their use. . . A very eminent English lawyer has said, that it was surprising within how small a space all the principles of mercantile law may be compacted.”<sup>130</sup> Even with his many years of experience writing law books and teaching law, it was difficult for Parsons to keep up with the changes in commercial law both in the many states in the United States and the provinces of Canada.<sup>131</sup>

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124. Letter from Parsons to S.S. Scranton, Theophilus Parsons papers (May 10, 1870) (on file with the Harvard University Houghton Library, MS Am 799).

125. Letter from S.S. Scranton to Parsons, Theophilus Parsons papers (Sept. 11, 1869) (on file with the Harvard University Houghton Library, MS Am 799).

126. Letter from S.S. Scranton to Parsons, Theophilus Parsons papers (Sept. 11, 1869) (on file with the Harvard University Houghton Library, MS Am 799).

127. Letter from S.S. Scranton to Parsons, Theophilus Parsons papers (Nov. 20, 1872) (on file with the Harvard University Houghton Library, MS Am 799).

128. Letter from S.S. Scranton to Parsons, Theophilus Parsons papers (Dec. 17, 1868) (on file with the Harvard University Houghton Library, MS Am 799).

129. The publishers also advised Parsons to change the title from the *Laws of Business for Business Men* to the *Laws of Business*. They noted that “[t]hree fourths of the people to whom an agent will apply to sell the *Laws of Business for Business Men* will reply they are not business men. The woman who is interested in her deceased husband’s estate . . . We cannot of course give you a title but only our idea”. Letter from S.S. Scranton to Parsons, Theophilus Parsons papers (Dec. 17, 1868) (on file with the Harvard University Houghton Library, MS Am 799) [underlining in original].

130. Letter from Parsons to S.S. Scranton, Theophilus Parsons papers (Feb. 17, 1869) (on file with the Harvard University Houghton Library, MS Am 799) [underlining in original].

131. Parsons’ agent often advised him where these texts were in need of updating and/or incorrect. See Letter from S.S. Scranton to Parsons, Theophilus Parsons papers (Aug. 31, 1869) (on file with the

Changes in American economic and legal conditions before the Civil War resulted in what Konefsky described as “a subtle move toward specialization” where “specific areas of law began to emerge; they were technical, complex, and narrow.”<sup>132</sup> It was then that a group of lawyers with specializations and legal experience in bankruptcy, partnership, and other commercial transactions emerged.<sup>133</sup> Specialist training and literature soon followed. Companies and individuals often wrote to Parsons requesting his advice on business law or an updated edition of his work.<sup>134</sup> After graduating, Parsons’ students (and non-students) wrote to him frequently for advice on their careers and cases.<sup>135</sup> Together, this indicates that business and finance were complex areas of law and one that lawyers often believed that they needed more guidance on from a figure in American society. The presence of these letters also suggests that Parsons was well connected in the American legal community, as well as being an approachable teacher and mentor. The

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Harvard University Houghton Library, MS Am 799); letter from S.S. Scranton to Parsons, Theophilus Parsons papers (July 8, 1869) (on file with the Harvard University Houghton Library, MS Am 799); letter from S.S. Scranton to Parsons, Theophilus Parsons papers (Jan. 13, 1871) (on file with the Harvard University Houghton Library, MS Am 799); letter from S.S. Scranton to Parsons, Theophilus Parsons papers (June 27, 1872) (on file with the Harvard University Houghton Library, MS Am 799); letter from S.S. Scranton to Parsons, Theophilus Parsons papers (July 8, 1869) (on file with the Harvard University Houghton Library, MS Am 799); letter from S.S. Scranton to Parsons, Theophilus Parsons papers (May 29, 1876) (on file with the Harvard University Houghton Library, MS Am 799).

132. Alfred S. Konefsky, *The Legal Profession: From the Revolution to the Civil War*, in *THE CAMBRIDGE HISTORY OF LAW IN AMERICA*, 90–91 (Michael Grossberg & Christopher Tomlins eds., 2011).

133. JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 297–8 (1950).

134. See Letter from New England Mutual Life Insurance Co. to Parsons, Theophilus Parsons papers (Jan. 10 18-- (year not dated)) (on file with the Harvard University Houghton Library, MS Am 799); Letter from Kenny B. Brown to Parsons, Theophilus Parsons papers (Jan. 14, 1864) (on file with the Harvard University Houghton Library, MS Am 799); letter from T.M. Gill, to Parsons, Theophilus Parsons papers (Apr. 11, 1870) (on file with the Harvard University Houghton Library, MS Am 799); letter from T.C. Callicot, Albany Evening Times, to Parsons, Theophilus Parsons papers (Aug. 5, 1873) (on file with the Harvard University Houghton Library, MS Am 799).

135. Letter from J.T. Kilbreth to Parsons, Theophilus Parsons papers (Oct. 1, 1866) (on file with the Harvard University Houghton Library, MS Am 799); letter from L.R.B. Gove to Parsons, Theophilus Parsons papers, (Feb. 7, 1866) (on file with the Harvard University Houghton Library, MS Am 799); letter from Charles W. Spooner to Parsons, Theophilus Parsons papers (Mar. 11, 1870) (on file with the Harvard University Houghton Library, MS Am 799); letter from A. J. Weaver to Parsons, Theophilus Parsons papers (Feb. 1, 1870) (on file with the Harvard University Houghton Library, MS Am 799); letter from Solomon Lombard to Parsons, Theophilus Parsons papers (Feb. 1, 1870) (on file with the Harvard University Houghton Library, MS Am 799); letter from Charles A. Merrill to Parsons, Theophilus Parsons papers (July 1, 1871) (on file with the Harvard University Houghton Library, MS Am 799); letter from George Rivers Walker to Parsons, Theophilus Parsons papers (Sept. 29, 1871) (on file with the Harvard University Houghton Library, MS Am 799); letter from E.R.W. Getuck to Parsons, Theophilus Parsons papers (Aug. 8, 1871) (on file with the Harvard University Houghton Library, MS Am 799). Parsons’ biography also suggests that he was well liked by his students. It described him as the “favorite professor.” ANON., *THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL, 1817-1917*, 252 (1918). On his retirement from Harvard, Parsons received a number of letters from former pupils.

following section turns to examine Parsons' interpretation of *Carlen*, as well as Lindley's and Gow's understanding of the case, and the influence of these individual texts on American law.

## VI. LAW IN ACTION

English law attracted American scholars in the early nineteenth century because its rules had a longer heritage; they were fuller, articulated in greater detail, and more developed. However, by the late nineteenth century, American law was no longer in its infancy. Lawyers were no longer forced to look elsewhere for inspiration. Corporate law, which took the form of statute law, had always been somewhat different in England and within each of its colonies.<sup>136</sup> Yet, by this point, it was widely acknowledged that the corporate law of the United States and England was not the same.<sup>137</sup> Even so, English law still had its appeal in America. Wallace and Heard spoke in 1882 of the pull that English law had over American scholars, as they believed that “[t]o England alone, Americans would naturally look for the fullest and best essays on such a subject.”<sup>138</sup>

English law, despite failing to have formal authority over domestic law, was still viewed as being an important and influential variety of law in American legal literature.<sup>139</sup> Academic lawyers in the United States thus stayed abreast of new changes in English law. While they read Lindley's treatise, American academics were more influenced by the letter of English law than of United States law at the time of the foundation of the latter in the late eighteenth century.<sup>140</sup> This observation is even more striking when we look at the courtroom. Judges in the United States at this time were not following contemporaneous developments in English law which happened after Lord Eldon's reign in the Court of Chancery.

The substance of English law after about 1850 did not interest the American audiences. Langdell, in his book on equity pleadings, explained that:

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136. Corporate law did not become uniform or federalized in the United States until the late twentieth century. See Sarbanes-Oxley Act 2002, the Dodd-Frank Wall Street Reform, and Consumer Protection Act 2010. See also Gordon G. Young, *Federal Corporate Law, Federalism, and the Federal Courts*, 41 LAW CONTEMP. PROBL. 146, 146-81 (1977); Stephen M. Bainbridge, *The Creeping Federalization of Corporate Law Securities & Exchange*, 26 REGULATION 26, 26-31 (2003). By contrast, a movement to standardize corporate law in the British Empire took place in the early twentieth century.

137. English law had moved on. See ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 128 (1932) (“American law inherited the corporation from English jurisprudence in the form in which it stood at the close of the Eighteenth Century.”).

138. WALLACE AND HEARD, *supra* note 78, at 2.

139. FRIEDMAN, *supra* note 110, at 477.

140. See the discussion of the American versions of Lindley's treatise *supra* notes 98-102.

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The reader is requested to bear in mind that it is the object of these sheets to aid the student of the equity system *as such*; and with that view the writer confines himself to the system as it existed in England from the earliest time to the end of Lord Eldon's chancellorship.<sup>141</sup>

Langdell considered that to detail the modifications made either side of the Atlantic that had been made since, “would interfere with the main design, without any compensating advantages.”<sup>142</sup> It followed that English equity doctrines, rules, and pleadings from the early nineteenth century and before were of specific interest. These were the equitable rules as described by Gow and this early generation of treatise writers.

In England, Gow's interpretation of the case law was replaced by Lindley's.<sup>143</sup> Yet, in New England, Gow's contention—that courts would interfere in corporate governance disputes—was not widely held after Lindley's publication either. It was also not dispelled completely, as the following points will show. *Carlen* could be used to both support judicial intervention and to deny it. This change or confusion in law had little to do with Lindley's treatise or any innovative and distinctive legal ideas in English law. The cases of *Foss*<sup>144</sup> and *Mozley*,<sup>145</sup> while revolutionary in English law, were not used by those in the United States.

Theophilus Parsons provides an excellent explanation as to why this shift away from Gow's text occurred. In Parsons' *Treatise on the Law of Partnership*, he stated that Gow's interpretation of *Carlen* “seems to be very far from establishing the proposition for which they are cited.”<sup>146</sup> In New England, the old explanation of the case law was simply less persuasive. Lindley's reinterpretation had little to do with it. With only Vesey and Beames' printed report on hand, or Lindley's treatise containing excerpts of the report,<sup>147</sup> Parsons's comment rang true: *Carlen* did not support the proposition that debts cannot be attributed to individual members at all. If Gow and the others of his generation of legal writers had been clearer in their methodology and aims to disseminate information from unreported cases, this case may well have a different legacy.

Despite the failing influence of Gow's treatise, his work and

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141. CHRISTOPHER COLUMBUS LANGDELL, A SUMMARY OF EQUITY PLEADING 52 (2d ed. 1877) [emphasis in original].

142. *Id.*

143. This was confirmed by the decision in *Burland*. See *infra* note 183.

144. *Mozley v. Alston*, 1 Ph 790 (1847); 41 Eng. Rep. 833.

145. *Foss v. Harbottle*, 67 Eng. Rep. 189 (1843).

146. THEOPHILUS PARSONS, A TREATISE ON THE LAW OF PARTNERSHIP 298 (2d ed. 1870).

147. *Carlen v. Drury, Ves & Bea.*, 154 (1812); 35 Eng. Rep. 61.

interpretation of the case law was not extinguished completely. *Carlen* had a larger influence over the broader category of the law of equity, trusts, and corporate law.<sup>148</sup> Neither Parsons nor the American courts used new terms or doctrinal names, which later became popular, such as the business judgment rule to describe the rules surrounding duties, conduct, and the power of the majority.<sup>149</sup> The American judges who cited *Carlen* used the specific wording of the case report as well as Gow's text.<sup>150</sup> They discussed questions of judicial interference, attributing specific debts to specific individual members, and exhausting all internal remedies. We now begin exploring the case law in more detail.

In *De Pusey v. Du Pont*, a case from the Delaware Court of Chancery, one of the parties wished to dissolve the partnership before it expired naturally.<sup>151</sup> Chancellor Ridgely, who was heavily influenced by *Carlen*, rejected the plaintiff's request by stating that "Lord Eldon refused to interpose, till the parties had tried the redress provided by the articles; but he declared that if the means of redress were not sufficient, the Court might interfere. Now, what are the means of redress provided for here?"<sup>152</sup> He added "[t]hat on the expiration of the partnership an inventory shall be made by persons named by the parties. That is the whole amount of their duty. There is not a single point in controversy which falls within the range."<sup>153</sup> This point was made persuasively first by Rodgers, the defendant's lawyer. He argued that "the parties having agreed upon a mode of settling differences, the Court will require them to try that mode first and will interfere only upon its proving ineffectual. Lord Eldon in *Waters*, lays down that principle. In *Carlen*, V. & B. 153, he expressly applies it."<sup>154</sup> Rogers knew the case and the principle it provided well. He articulated this clearly by stating that *Carlen* meant that judges must "refus[e] to interfere in a case of partnership, by injunction and the appointment of a receiver, until after the parties should have tried a method of redress provided for in the articles."<sup>155</sup> Chancellor Ridgely, it appeared, accepted his arguments.

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148. WILLIAM WILLIAMSON KERR, A TREATISE ON THE LAW AND PRACTICE OF INJUNCTIONS IN EQUITY 566 (1st ed. 1867); 1 WILLIAM JOYCE, THE LAW AND PRACTICE OF INJUNCTIONS IN EQUITY AND AT COMMON LAW 528 (1872).

149. PARSONS, *supra* note 146.

150. GOW, *supra* note 26, at 19, 119. ("Those who have the management are, it is true, answerable to the whole extent of their engagements, but even as between them and the members of the society, each individual is liable to a contribution for what they may have paid." A "court of equity [will not] grant an account and dissolve the partnership, until the parties have resorted to the proceedings for terminating disputes for which provision is made in the articles of partnership.")

151. *De Pusey v. Du Pont*, 1 Del. Ch. 87 (1819).

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

In the Supreme Court of Vermont, in *Cutler v. Estate of Thomas*, partners attempted to split the liability for their firm's debts and allocate specific transactions to specific individuals. Justice Bennett commented that:

I suppose the law to be settled, that the members of a joint stock company, are liable, *in solido*, for the debts contracted by the company. In *Carlen v. Drury*, 1 Ves. & B. 157, Lord Eldon says, "I hold it clear, that each individual is, at law, answerable for the amount of the whole of the debts of the concern." And in that very case, the articles provided, that one thousand persons might eventually become interested in the concern.<sup>156</sup>

How had Justice Bennett come to learn of this case? How did he know that it gave this principle? The holding stated that *Carlen* was a precedent that prevented courts from allocating specific debts. Justice Bennett drew this principle from the case report but the counsel, who argued the case, used Collyer and Story on *Partnership* as evidence of this proposition.<sup>157</sup> To have given this page reference of Collyer's work, Bennett must have been using the American edition edited by Jonathan Cogswell Perkins. Perkins edited several other English treatises, including Chitty's.<sup>158</sup> Collyer and Story's text were not new texts on corporate law and were not unconnected to Gow's work.<sup>159</sup> Gow's treatise was likely the secondary source that both writers used when writing their own. Gow predated both Collyer and Story by almost two decades. The two later writers relied on Gow's text to help inform and shape their own work. Indeed, Story acknowledged the influence of Gow explicitly with heavy and liberal use of Gow's text.<sup>160</sup> Collyer, on the other hand, was not as open in this sense. His first edition only used Gow's work as evidence for a handful of unreported cases,<sup>161</sup> but these unreported cases were significant in that they influenced Collyer's interpretation of the substantive law.

In *White v. Brownell*, in the Common Pleas Court of New York, the plaintiff, a stockbroker, was suspended from the Open Board of Stockbrokers by Brownell.<sup>162</sup> In a previous decision, an injunction was

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156. *Cutler v. Estate of Thomas*, 25 Vt. 73, 78 (1852).

157. *Id.*

158. JOSEPH CHITTY & J. C. PERKINS, A PRACTICAL TREATISE ON THE LAW OF CONTRACTS, NOT UNDER SEAL: AND UPON THE USUAL DEFENCES TO ACTIONS THEREON (1839).

159. JOHN COLLYER, A PRACTICAL TREATISE ON THE LAW OF PARTNERSHIP: WITH AN APPENDIX OF FORMS 873 (Jonathan Cogswell Perkins ed., 2d ed. 1848).

160. See STORY, *supra* note 38 (containing over 100 citations to Gow).

161. JOHN COLLYER, A PRACTICAL TREATISE ON THE LAW OF PARTNERSHIP: WITH AN APPENDIX OF FORMS 7, 113, 218, 422, 597 (1st ed. 1832).

162. *White v. Brownell*, 4 Abb. Pr. N. S. 162, 163 (N.Y. Com. Pl. 1868).

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granted which prevented further action by White in association with the Board.<sup>163</sup> White appealed and sought to dissolve the injunction.<sup>164</sup> *Carlen* was discussed frequently in *White* and it was considered to be a binding legal precedent. The lawyers acting for Brownell described appeal as a request to interfere in matters of governance. William Martin said “[t]hat the courts will not interfere in the internal management of any association, —least of all, of those which have no legal existence.”<sup>165</sup> He argued that the court should not review the decision to remove or suspend White. The courts, Brownell’s lawyer’s claimed, “will not relieve against an arbitrary expulsion, where it has been made according to the rules. That they will look after rights of property, but not after personal or social rights, nor compel the performance of personal services.”<sup>166</sup> The lawyers here borrowed Lindley’s language and concepts of the internal management rules.

Justice Daly wrote the opinion, while Justice Brady agreed with his judgment. Justice Barrett recused himself because he acted as counsel in the earlier case. Justice Daly did not like those arguing the case cite Lindley’s treatise but he spoke the same words as would be found in Lindley’s treatise.<sup>167</sup> This said, Justice Daly did not ignore the interpretation of *Carlen* as appeared in Gow’s text. For instance, he commented that:

The by-law having provided a mode for reviewing and correcting any error or injustice on the part of the committee on membership in reporting to the president that the plaintiff was in default, he was bound to avail himself of the remedy provided by the constitution and by-laws of the body of which he had become a member, before he can ask a court of equity to investigate a proceeding not necessarily final in the body itself, but which was there subject to review, and might be annulled by the action of a committee expressly clothed with authority to investigate it (*Carlen v. Drury*, 1 Ves. & B., 154).<sup>168</sup>

Indeed, *Carlen* was the authority in equity on cases of partnership and corporate governance. Justice Daly believed that Lord Eldon, as the Lord Chancellor around the time of the founding of the United States, guided his judgment. Justice Daly further considered that he:

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163. *White v. Brownell*, 3 Abb. Pr. N. S. 318 (N.Y. Com. Pl. 1867).

164. *White v. Brownell*, 4 Abb. Pr. N. S. 162, 163 (N.Y. Com. Pl. 1868).

165. *Id.* at 188.

166. *Id.* at 188.

167. *Id.* at 201 (“nothing has been shown that would authorize this court to interfere”).

168. *Id.* at 199.

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[M]ust, in consonance with the rule upon which Lord Eldon acted in the case above cited, resort to the remedy which is provided by the constitution and by-laws of the association itself, before he asks a court of equity to interfere—unless by evasion, intentional delays, or other unjust procedure, he is practically deprived of the benefit of that remedy—which in this case is substantially denied by the answer.<sup>169</sup>

The decision in *White v. Brownell* repeated the points made in *Carlen*. This later case gained importance, but it did not overshadow the original English case, even in the courts of New York.

*Lafond v. Deems* was heard by the Court of Appeals in New York.<sup>170</sup> The organization in this case was a mutual benefit association and the dispute arose because some of its members claimed that the organization's money had been earned by outside or external transactions.<sup>171</sup> Justice Miller did not see sufficient evidence to warrant a court's involvement. He commented that "[c]ourts should not, as a general rule, interfere with the contentions and quarrels of voluntary associations, so long as the government is fairly and honestly administered; and those who have grievances should be required in the first instance to resort to the remedies for redress provided by their rules and regulations."<sup>172</sup> Justice Miller plainly articulated the rule that parties must exhaust all internal remedies first before approaching the court. He complained that the members had not done enough to complain or press their interests using the internal mechanisms by stating that "the members who are claimed by the plaintiffs to have been chargeable with a violation of the rules of the association were not called upon to answer."<sup>173</sup> Justice Miller proceeded to say "so as to correct the evils complained of, and as the power to remedy the same was ample and complete, the plaintiffs are not in a position to seek the interposition of a court of equity."<sup>174</sup> It was clear here that Justice Miller believed that he could intervene but, in these circumstances, the plaintiffs needed to do more on their own account before engaging in litigation. These ideas came from the *Carlen* case and Gow's text—Lindley's was evidently not used.

It was not only East Coast lawyers that looked to English law and used English legal precedents, such as *Carlen* and the early nineteenth century treatise literature. The Supreme Court of California heard *Robinson v.*

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169. *Id.* at 199.

170. *Lafond v. Deems*, 8 Abb. N. Cas. 344 (1880).

171. *Id.* at 350–1.

172. *Id.* at 349.

173. *Id.* at 349.

174. *Id.* at 349.

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*Templar Lodge* in 1892.<sup>175</sup> There, the plaintiff lodged a complaint to recover sick benefits but when this was denied, he sued the organization. His counsel used *Carlen* to support the claim that “[a] member of a beneficial society who invokes the remedies of the society without avail may apply to a court of law for redress.”<sup>176</sup> This, again, was Gow’s view. The counsel further argued that “it is not competent for the society to deprive him of that right, as it is against the policy of the law to oust the courts of their jurisdiction.”<sup>177</sup> The court refused to entertain Robinson’s complaint and declined to act, but this argument was persuasive in another case in the same court almost twenty years later.

In *Schou v. Sotoyome Tribe*, Schou attempted to recover sickness benefits from his tribe.<sup>178</sup> When the case was ultimately appealed to the Supreme Court of the State of California, the court decided that the tribe members must observe the internal rules, follow its regulations, and exhaust a remedy within the rules of the order before turning to the courts. Justice Henshaw gave the only judgment in the case.<sup>179</sup> He said that “[b]efore an order can hold a member to strict observance of its rules regulating procedure on appeal it must show that in all matters touching his substantial rights it has itself observed these regulations, and this the defendant did not do.”<sup>180</sup> *Carlen* was one of the key authorities used to support this ruling. This rule can be traced directly back to the wording of Gow’s treatise and the American editions which Ingraham published in 1830.<sup>181</sup> *Schou* did not cite the case in the way that Lindley had argued that it should be used to prevent courts from acting,<sup>182</sup> however. There were still circumstances, in Justice Henshaw’s mind, that permitted him and the courts to interfere in the disputes. It was at this point that *Carlen* lost some of its currency. As opposed to taking center stage, it was cited last. The first case cited was *White v. Brownell*. It was then that American law begun to take precedence over English case law, but this did not last for long.

At around the same time in England at the beginning of the twentieth century, *Burland v. Earle* was heard by the Judicial Committee of the Privy Council.<sup>183</sup> The litigation in the Judicial Committee of the Privy Council in 1902 arose over a corporate governance dispute between shareholders and managers of a Canadian company called the British American Bank Note

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175. Robinson v. Templar Lodge, 97 Cal. 62 (1892).

176. *Id.*

177. Robinson v. Templar Lodge, 97 Cal. 62, 62 (1892).

178. Schou v. Sotoyome Tribe, 140 Cal. 254, 255 (1903).

179. *Id.*

180. *Id.*

181. GOW, *supra* note 32.

182. Schou v. Sotoyome Tribe, 140 Cal. 254, 259 (1903).

183. Burland v. Earle, A.C. 83, 93 (1902).

Company.<sup>184</sup> This case was appealed from Canada to the Judicial Committee of the Privy Council in London. Despite not being a court in the English system, decisions in this court were persuasive in the English system but binding in the British Empire. The main claim in the legal dispute related to a reserve fund.<sup>185</sup> In the Judicial Committee of the Privy Council, Lord Davey gave the written judgment. He considered that “[i]t is an elementary principle of the law relating to joint stock companies that the Court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so.”<sup>186</sup> The shareholders’ complaint was, therefore, rejected.

In the years and decades that followed, two more cases were litigated in New York that touched upon the rule given by *Carlen*.<sup>187</sup> Neither mentioned recent developments in English law, namely the case of *Burland*. As with the other American cases before them, these two did not recognize or even discuss *Foss*<sup>188</sup> or *Mozley*<sup>189</sup> as the Judicial Committee of the Privy Council had previously done. *White v. Brownell*,<sup>190</sup> while once important and tied to the rule in *Carlen*, was also forgotten. American case law retreated, while English legal precedents once again became dominant sources used by legal academics and practitioners. Thus, *Carlen* was at the forefront of American corporate law. American lawyers looked backwards to history, and their law was guided by principles in the laws of equity and trusts in England around the time of the formation of the United States. We can see this in the way that the cases of *Lord v. Hull* (“*Hull*”) and *McDonald v. Marra* (“*McDonald*”) were argued and decided.<sup>191</sup>

In *Hull*, two individuals had formed a partnership but the business had not gone well.<sup>192</sup> Lord asked the Court of Appeals in New York to step in to provide him with the accounts and an adjudication of the rights and obligations.<sup>193</sup> Justice Vann gave the only judgment and saw *Carlen* as an authority, which limited his ability to interfere in the dispute. He stated:

If the members of a firm cannot agree as to the method of conducting their business, the courts will not attempt to conduct it for them. Aside from the inconvenience of constant interference,

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184. *Id.*

185. *Id.*

186. *Id.* at 83, 93.

187. *Lord v. Hull*, 178 N.Y. 9 (1904), *McDonald v. Marra*, 75 N.Y.S. 2d 370 (1947).

188. *Mozley v. Alston*, 1 Ph 790 (1847); 41 Eng. Rep. 833.

189. *Foss v. Harbottle*, 67 Eng. Rep. 189 (1843).

190. *White v. Brownell*, 4 Abb. Pr. N. S. 162 (N.Y. Com. Pl. 1868).

191. *Lord v. Hull*, 178 N.Y. 9 (1904), *McDonald v. Marra*, 75 N.Y.S. 2d 370 (1947).

192. *Lord v. Hull*, 178 N.Y. 9, 9 (1904).

193. *Id.*

as litigation is apt to breed hard feelings, easy appeals to the courts to settle the differences of a going concern would tend to do away with mutual forbearance, foment discord and lead to dissolution. It is to the interest of the law of partnership that frequent resort to the courts by copartners should not be encouraged and they should realize that, as a rule, they must settle their own differences or go out of business.<sup>194</sup>

Despite his instinct not to intervene, Justice Vann noted that no relief was in fact requested by Lord.<sup>195</sup> This was idle litigation, he thought. An adjudication of the rights and obligations was not in itself a remedy. Shareholders should not, Justice Vann believed, be encouraged to litigate over issues of clarification or for information.<sup>196</sup> “As a learned writer has said,” Justice Vann quoted, “[a] partner, who is driven to a court of equity as the only means by which he can get an accounting from his copartners, may be supposed to be in a position which will be benefited by a dissolution; in other, such a partnership as that ought to be dissolved.”<sup>197</sup> Justice Vann’s “learned writer” was Theophilus Parsons.<sup>198</sup> Although American legal texts were used, such as Parsons’ and Story’s,<sup>199</sup> so were English law books, notably Gow’s.<sup>200</sup>

To construct his judgment, Justice Vann had researched the state of the law considerably. He used law books, but he was not content with citing the law as recorded by Parsons and other legal academics.<sup>201</sup> Justice Vann sought to articulate the rules as he saw them in his own words. He explained that:

When one party seizes or absorbs the entire business, or usurps rights of his copartner which are essential to his safety or the safety of the firm, or persists in misconduct so gross as to threaten destruction to the interests of all, the court may intervene to restore the rights of the innocent party or to rescue a paying business from ruin. Extreme necessity only, however, will justify interference without a dissolution.<sup>202</sup>

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194. *Id.* at 13.

195. *Id.* at 13–14.

196. *Id.* at 14.

197. *Id.* at 13–14.

198. *Id.* at 14.

199. PARSONS, *supra* note 146; STORY, *supra* note 38.

200. GOW, *supra* note 26.

201. Lord v. Hull, 178 N.Y. 9, 19 (1904) (“These cases illustrate, if they do not exhaust, the instances where the courts of England have interfered, or refused to interfere, when a dissolution of the firm was not asked.”).

202. *Id.* at 19–20.

With an additional layer of legal interpretation, these ideas were no longer simply law in books. It took on the force of law in action. It followed that *Hull* became an important case in itself. Justice Vann's expertly constructed opinion informed *McDonald*.

In *McDonald*, the litigants ran a shoe store in Queens County.<sup>203</sup> The lawsuit came before the Supreme Court of New York. Justice Stoddart used Justice Vann's judgment verbatim in places as the rationale for his refusal to interfere. He conducted no further research and added nothing else. Stoddart did acknowledge the case of *Hull* but only as a source from which he had gained insights into the works of Story and other primary legal sources.<sup>204</sup>

In America, there was considerable judicial interaction with both the case law during Lord Eldon's time as Lord Chancellor of the Court of Chancery and Gow's treatise as the only law book of this time—but little engagement with the legal change that had taken place thereafter. Some of the legal ideas given in these early treatises stayed firmly in place in United States and were embedded within the wider legal system of equity and trusts. The legal historian M. H. Hoeflich believed that “[i]n the period from the founding of the new republic to the beginning of the Civil War . . . [there was] extensive legal syncretism of American and English law. English law was neither wholly rejected nor wholly accepted.”<sup>205</sup> The “syncretism” in this period, as Hoeflich describes it, had long-term effects on American law.<sup>206</sup> The English law apparent in the Anglo-American treatise literature in the early nineteenth century literature had taken root in American law; it also became deeply embedded so that it could not be displaced or altered so easily at a later date.

## VII. CONCLUSION

Law books and legal treatises were important in terms of explaining the law and in theorizing or rationalizing legal principles. For corporate lawyers in America, there were a number of such legal texts which could be read alongside the case law. Lindley wrote the principal text for English lawmakers. It was hugely influential and created a number of new doctrines, including the internal management rule. Lindley wrote at a time when those

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203. *McDonald v. Marra*, 75 N.Y.S. 2d 370 (1947).

204. *Id.* at 372.

205. M. H. HOEFLICH, *LEGAL PUBLISHING IN ANTEBELLUM AMERICA* 6 (2010). For a contrasting view, see Francis R. Aumann, *American Law Reports: Yesterday and Today*, 4 OHIO STATE UNIV. LAW J. 331, 331–46 (1938).

206. M. H. Hoeflich, *Legal History and the History of the Book: Variations on a Theme Lecture*, 46 UNIV. KANS. LAW REV. 415–432 (1997); M. H. Hoeflich, *Translation & the Reception of Foreign Law in the Antebellum United States*, 50 AM. J. COMP. LAW 753–775 (2002).

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in the United States were experiencing a deluge in the number of legal texts and treatises.<sup>207</sup> Even so, Lindley's treatise was read, edited, and updated for the American market by several American lawyers throughout the years.

Lindley's work faced steep competition from treatise writers based in the United States and older English treatise writers. Earlier treatise writers in England, such as Gow, made note of conflicting decisions where the law was uncertain or different approaches existed. The writers had taken their time to inform the reader of obscure precedents. The readership in the United States no longer wanted a complex, cumbersome, or attentive style of research.<sup>208</sup> Lindley's text, with its clear approach and streamlined arguments, had the potential to make a considerable impact. Yet, it did not.

This Article notes that the transfer of legal knowledge from England to the United States was not concurrent. There was a legal transplant—American corporate law took its principles from English counterparts. Yet, there was a delay and staggered reception. Theophilus Parsons and Christopher Langdell's scholarship rivalled Lindley's work. They were the intellectual leaders at the time in the United States. These legal thinkers were fixated on retaining English law from certain historical periods and developing it. They continued receiving this knowledge long after English lawyers had disregarded it and moved on to new legal texts. Indeed, English treatise writers from the time of the foundation of the United States were prioritized and they proved to have a more powerful influence in American legal thought than in England.

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207. FRIEDMAN, *supra* note 110, at 477.

208. Danner, *supra* note 90.