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## *Carlen v Drury* (1812): The Origins of the Internal Management Debate in Corporate Law

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### ABSTRACT

The origins of the internal management debate and business judgment rule in Anglo-American corporate law can be traced to the landmark case of *Carlen v Drury* (1812). Through the use of new manuscript sources and archival material, this article offers a deeper analysis of the case than has previously been available. It reveals a number of allegations omitted by the printed reports. By placing the case within its wider historical context, the article attributes Lord Chancellor Eldon's decision to dismiss the case to external circumstances rather than the particular merits of the shareholders' complaints. It shows that, although Eldon did not intervene in this instance, he was, in fact, willing to interfere in disputes which related to corporate governance issues. We argue that this case should be used with caution as early courts were not as hostile to the thought of exercising judicial power as the outcome in *Carlen v Drury* may suggest.

### I. Introduction

It is widely accepted among company lawyers that a court will not intervene in business management or matters of corporate governance unless there is fraudulent behaviour. This article traces the origins of this judicial deference back to *Carlen v Drury* (1812).<sup>1</sup> This case is now a landmark within the company law of the United Kingdom. It is also firmly embedded in the fibre of corporate law in other jurisdictions that were formerly territories in Great Britain's colonial empire, such as the United States, Canada and Australia.

The dispute in *Carlen v Drury* erupted in the Bankside Brewery between its management and the shareholders.<sup>2</sup> The decision became the first reported case to attempt to define a boundary between business organizations and

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<sup>1</sup>*Carlen v Drury* (1812), Ves. & Bea., 154; 35 ER 61. The rule is thought to be confirmed by later cases: *Foss v Harbottle* (1843) 2 Hare, 461 and *Mozley v Alston* (1847), 1 Ph. 790.

<sup>2</sup>A cautionary note about terminology: the owners of the Bankside Brewery were described as 'partners', 'shareholders' and 'subscribers' at various points. As such, this article follows the rather fluid, indiscriminate and inconsistent language used by contemporaries. It also retains any misspellings and does not attempt to correct the original sources.

the law. The case initiated what is now more commonly referred to as the ‘internal management debate’ or the ‘business judgment rule’. The court of chancery considered how far external legal forces – legislation, courts or judges – should interfere in the internal regulation of a firm’s management. Lord Chancellor Eldon’s judgment lies at the centre of this case, its legacy, and the birth of this debate. He was widely understood to be an advocate of non-intervention. Eldon’s stance, although now the orthodox position in corporate governance disputes, has not gone without challenge.

This article places this case within its historical context. It reveals new information about the origins of this case and the ongoing debate about the relationship between business management and judicial interference. We do not attempt to provide a critical retrospective analysis of Eldon’s views. It is accepted that ideas which may have been conventional or tolerable when formed may not be so centuries or even decades later. Thus we do not engage the debate about whether the court should have intervened or not. Our principal aim is to explain why the decision occurred and took the shape that it did in order to identify the path or paths not taken. In order to do so, this article employs archival material from the Lord Eldon manuscript collection held at Georgetown University Law Center as well as original case documents in the court of chancery from the National Archives, London.<sup>3</sup>

Our starting point is the history of the Bankside Brewery. This is followed by an assessment of the hostility toward the issue of wide share ownership. We then turn to the claims and allegations made in the court of chancery. In the next section, we discuss the principles and precedents which may have influenced the court’s decision. The final two sections pay particular attention to Lord Eldon’s judgment and the external pressure then surrounding chancery – pressure that undoubtedly influenced his views on interference.

## II. The promotion of the Bankside Brewery

In the absence of an archival collection, details of the business of the Bankside Brewery have remained a mystery.<sup>4</sup> Yet, as the business invited open

<sup>3</sup>Georgetown University Law Center, Special Collections (hereafter, GULC SC) and The National Archives: Public Record Office (hereafter, TNA PRO).

<sup>4</sup>The lack of an archival collection may simply be explained by the fact the firm appears not to have survived. A survey of archival collections is provided in L. Richmond and A. Turton, *The Brewing Industry: A Guide to Historical Records*, Manchester, 1990. In lieu of a company archive, we use the popular press to trace the firm’s history. Drury did leave some personal papers in the London Metropolitan Archives which we have consulted but they do not reveal details of the firm’s lifespan. His collection contained the deeds for both the companies he promoted (the Bankside Brewery and its precursor, the United Public Brewery) but no other documents which pertained to the running (or closing) of those companies. Articles in the popular press indicate that Robert Drury remained active as a brewer after 1812 but the name of his brewery was not the Bankside Brewery or the United Public Brewery, his first brewery. While the Bankside Brewery may not have ended in a formal or legalistic way, it is clear that it ceased trading.

investment, local newspapers published advertisements, announcements and reports.<sup>5</sup> Through these markers of progress and a number of archival documents scattered across London, we can re-create the story of the brewery's formation and the build-up to the litigation.

In the nineteenth century, beer became a staple commodity for the expanding urban working classes, notwithstanding eighteenth-century temperance movements preaching abstinence from alcohol. The Beer Licences Act 1830 relaxed the regulation of alcohol consumption and permitted beer to be produced on the payment of a licence fee.<sup>6</sup> Prior to this point, London held a position as the prime location for breweries with its large consumer base in the city and access to other markets through the Thames.<sup>7</sup>

The Bankside Brewery, like several other breweries, located itself in London. It began in 1805 as the United Public Brewery, then reformed in 1808 as the Bankside Brewery to invite new investors. Unlike other industries in this period, the equipment used by industrial breweries to make beer could not be produced cheaply.<sup>8</sup> The brewery required extra finance and so sought the investment from an influx of new partners. Robert Drury, John Channing and John Scott were principally involved in the firm's management and in orchestrating this transition.

In order to gain the investment needed, the brewery's promoters began to sell a new batch of shares in 1807 at £50 each.<sup>9</sup> The year 1807 seemed a particularly buoyant year for attempts at company promotion, with positive economic sentiment, and sufficient income to permit investment in future projects. Thomas Tooke and William Newmarch, influential nineteenth-century political economists, enclosed in their notes a newspaper cutting from 1808 which detailed the number of companies floated and shares available to purchase in the previous year. Together with the United Public Brewery (Bankside), thirty-one firms were formed, of which sixteen were associated with the production of alcohol, five traded in insurance and the remainder were in a variety of industries.<sup>10</sup>

<sup>5</sup>This was fairly common practice: see M. Freeman, R. Pearson, and J. Taylor, *Shareholder Democracies?: Corporate Governance in Britain and Ireland before 1850*, Chicago, 2011, 169.

<sup>6</sup>11 Geo 4. & 1 Will. 4, c. 64. For a history of the expansion and later contraction in the brewing industry after the 1830 Act, see T.R. Gourvish, R.G. Wilson, and F. Wood, *The British Brewing Industry, 1830–1980*, Cambridge, 2008.

<sup>7</sup>Outside the capital, beer was also produced in country homes. Sambrook shows that several country houses were designed with the intention to brew and contained facilities to do so. See P. Sambrook, *Country House Brewing in England, 1500–1900*, London, 2003.

<sup>8</sup>J. Sumner, 'Powering the Porter Brewery', 29 *Endeavour* (2005), 72.

<sup>9</sup>*The York Herald*, 28 March 1807.

<sup>10</sup>Along with the original list, the accompanying text stated that it contained '[a]ll the projects [which] have been laid before the public'. With such a large number of promotions, the compiler of the list believed that 'the greater part of them will cease to be publicly known before [1808] the end of the present year'. T. Tooke and W. Newmarch, *A History of Prices, and of the State of the Circulation, from 1793 to 1837: Preceded by a Brief Sketch of the State of Corn Trade in the Last Two Centuries*, London, 1838, 278. Other lists cited even more companies. See for instance, Anon., *The Spirit of the Public Journals for 1807*, London, 1808, 324–334.

With new entrants in the local market place, competition began and the rivalry between the new and the established breweries became fierce. Mathias, in his business history of the brewing industry, has argued that ‘porter brewers were not slow to act when the seriousness of this threat to their sales became apparent’. He notes an example in 1806, where one brewer felt strong enough to ‘refuse to serve any trade customer who received supplies from another brewery’. By 1807, old breweries defended themselves in public by supporting political and legal action.<sup>11</sup>

### III. The Bubble Act and its impact on the sale of shares

Until its repeal in 1826, the Bubble Act 1720 controlled the characteristics of business organizations. In his history of company law, Formoy argued that, with the passage of the Bubble Act 1720, ‘the development of Company Law was postponed for at least a century’.<sup>12</sup> The legislation stated that only those companies that had a charter constituted corporations, and only these could have limited liability and sell shares which were freely transferrable.

As incorporation required the passage of a parliamentary Act, a formidable barrier existed in gaining corporate status. The Bubble Act, therefore, left existing monopolies firmly in place and resulted in the growth of the partnership form.<sup>13</sup> Indeed, Ireland, Grigg-Spall and Kelly claim that as the eighteenth and nineteenth centuries progressed, the legal definitions of corporations and partnerships had less currency in society and became blurred since the company (in all its various legal forms) existed as an economic rather than legal entity.<sup>14</sup>

Yet in law at least, the legal distinctions mattered and the courts upheld the Bubble Act’s restrictions almost 100 years later in *R v Dodd*.<sup>15</sup> The issue at hand in this case was whether issuing transferrable shares which held out (false) claims (such as that the investor had limited liability) violated the Bubble Act. As joint-stock companies were generally thought to be disreputable,<sup>16</sup> and the Bubble Act prohibited the creation of companies with limited liability, how did the Bankside Brewery, a new venture, find and attract investors? Why did they invest in such a high-risk venture?

<sup>11</sup>P. Mathias, *The Brewing Industry in England 1700–1830*, Cambridge, 1959, 247.

<sup>12</sup>R.R. Formoy, *The Historical Foundations of Modern Company Law*, London, 1923, 3.

<sup>13</sup>See A.B. DuBois, *The English Business Company after the Bubble Act 1720–1800*, New York, 1938; R. Harris, ‘The Bubble Act: Its Passage and Its Effects on Business Organization’, 54 *Journal of Economic History* (1994), 610; M. Patterson and D. Reiffen, ‘The Effect of the Bubble Act on the Market for Joint Stock Shares’, 50 *Journal of Economic History* (1990), 163.

<sup>14</sup>P. Ireland, I. Grigg-Spall and D. Kelly, ‘The Conceptual Foundations of Modern Company Law’, 14 *Journal of Law and Society* (1987), 149.

<sup>15</sup>*R v Dodd* (1808) 9 East, 516. See also A. Santuari, ‘The Joint Stock Company in Nineteenth Century England and France: *King v. Dodd* and the Code de Commerce’, 14 *Journal of Legal History* (1993), 39.

<sup>16</sup>See J. Taylor, *Creating Capitalism: Joint-Stock Enterprise in British Politics and Culture, 1800–70*, Woodbridge, 2014.

First, the brewery's management had a successful track record even if it was not a particularly long one. When the United Public Brewery in Maid Lane first began trading in 1805, it announced that dividends would be given to its shareholders at twenty-five per cent, and the future seemed unexpectedly bright.<sup>17</sup> Indeed, the promoters brashly projected a return of twenty-five per cent in their initial advertisement for subscribers.<sup>18</sup> Investors, as Stebbings has argued, 'had no wish to invest in real property, with all the burdens that entailed, when they purchased company shares. They wanted a share of the profits of a going concern'.<sup>19</sup> Large profits and dividends – and the promise of them – were sure to entice even the most cautious investors, notwithstanding general opposition to the organizational form.

The brewery, along with many other joint-stock companies, did face severe hostility initially. At its first annual general meeting, several 'insidious attempts' had been 'made to injure the Concern in the public opinion'.<sup>20</sup> The report of the meeting attributed these 'industrious efforts' to 'envy, malice and combination'.<sup>21</sup> While not clearly stating who or what had made these negative remarks, it indicated that the objections were perhaps made by competitors or rivals. The firm's decision to address the comments directly showed that it thought that the objections were likely to be credible or harmful.

On the back of a turbulent but financially promising start, the firm planned to open a new establishment in Bankside.<sup>22</sup> In a report of the 1807 general meeting in *The Morning Chronicle*, the directors of the United Public Brewery announced that any unsold shares would increase in price by five guineas. The statement that share prices would soon rise acted as a pressure tactic which would push cautious investors to end their procrastination. Overall, the meeting adopted an apologetic tone and informed its membership that the range of beers was lower than expected. The report did not carry an explanation but ended on a more encouraging note as it appealed to the attention of 'Merchants and Persons who ship beer' in order to supply 'them on the most advantageous terms' to gain more custom.<sup>23</sup>

With associations with the wider business community, respectable social elites and other indications of social exclusivity, the brewery proved to be successful in finding investment and it accepted a large number of parties as partners in the firm. The deed of settlement was signed by between 200 and 300 individuals.<sup>24</sup>

<sup>17</sup>*The Morning Chronicle*, Wed. 30 April 1806.

<sup>18</sup>*The Times*, Sat. 1 June 1805.

<sup>19</sup>C. Stebbings, 'The Legal Nature of Shares in Landowning Joint Stock Companies in the Nineteenth Century', 8 *Journal of Legal History* (1987), 33.

<sup>20</sup>*The Morning Chronicle*, Wed. 30 April 1806.

<sup>21</sup>*Ibid.*

<sup>22</sup>*Ibid.*, Wed. 24 Dec. 1806.

<sup>23</sup>*Ibid.*, Sat. 24 Oct. 1807.

<sup>24</sup>*Carlen v Drury Ves. & Bea.*, 155.

The brewery located itself in London close by the London stock market. Proximity to the Exchange undoubtedly assisted in finding a large number of willing investors and in facilitating share trading.<sup>25</sup> Without a building for the stock exchange, trades took place in a variety of locations through a network of brokers. For instance, a Mr Munn advertised in the London newspapers that he had Bankside Brewery shares for sale at his premises and Garraway's Coffee-house near the Royal Exchange.<sup>26</sup> In spite of the distance between Yorkshire and London, the brewery also appeared to have a group of shareholders based in Yorkshire, as it placed an announcement in *The York Herald* for a forthcoming special meeting.<sup>27</sup>

The partnership contract stated a term of ninety-nine years. A copy of the original deed of settlement and articles of association appeared in documents supplied to the court of chancery and held in its archive.<sup>28</sup> The deed provided that three individuals, Robert Drury, John Channing and John Scott, acted as the salaried managers of the firm, while the other partners would contribute with investment rather than their labour. The contract also set out a number of rights for these less active partners. It included powers to attend meetings to discuss progress, a process to alter the firm's management and a procedure to select a number of partners to audit the books and advise the management. The exercise of these rights and powers resulted in discoveries about the behaviour of its management. We now turn to these issues and the origin of the litigation.

#### IV. The allegations in the court of chancery

Without a uniform or official method of case reporting, lawyers in the eighteenth and early nineteenth centuries tended to keep their own records of cases. As considerable differences might exist between reporters,<sup>29</sup> reliability became gauged by the particular individual's reputation. Francis Vesey Junior (1764–1845) and John Beames (1781–1853), reporters of chancery cases, recorded the details of *Carlen v Drury* in their printed volumes.<sup>30</sup> J.C. Fox, in his handbook of English law reports, believed that the general character of

<sup>25</sup>Stockbrokers were active in London as well as the provincial cities, see R. Michie, *The London Stock Exchange: A History*, Oxford, 2001; W.A. Thomas, *Provincial Stock Exchange*, London, 1973.

<sup>26</sup>*The Morning Chronicle*, Wed. 4 Nov. 1807; *The Times*, Fri. 16 Oct. 1807.

<sup>27</sup>*The York Herald*, Sat. 28 March 1807.

<sup>28</sup>TNA PRO C 13/1985/80.

<sup>29</sup>The well-known example here is the case of *Stylk v Myrick* (1809) 2 Camp., 317, 6 Esp.129. For the history of law reporting during the eighteenth century, see J. Oldham, *Case Notes of Sir Soulden Lawrence 1787–1800* (Selden Society 128), London, 2013, xiii–xxxix.

<sup>30</sup>Vesey junior and Beames did not provide comprehensive coverage of chancery during this period although Maddock and Huntington praised Vesey junior's selection of cases. Maddock commented that he 'cannot here deny myself the pleasure of remarking how greatly the profession is indebted to Mr Vesey, junior, for his Reports ... They are valuable for the judgment shown in the selection, and for the fidelity'. H. Maddock and T. Huntington, *A Treatise on the Principles and Practice of the High Court of Chancery*, 3rd ed., Hartford, 1827, xiii.

the Vesey and Beames reports was 'good'.<sup>31</sup> His view appeared to stem largely from Vesey's character and reputation as a reporter. Little, on the other hand, was said of Beames.<sup>32</sup> Prior to writing this series of reports with Beames, Vesey Junior established his own series of reports and his reputation with it.<sup>33</sup>

One of the criticisms of the reports of Eldon's judgments was that they were 'replete with attenuated discussion and loose suggestions of doubts and difficulties ... enough to task very severely the patience of the profession'.<sup>34</sup> Even so, this did not appear to be the fault of the reporter. Lord Campbell considered that if Eldon's reporters 'had felt themselves at liberty to methodize and condense – accurately preserving the substance of the original – they would have done more justice to him, and conferred a much greater benefit on the public'. Campbell explained that Eldon 'highly disapproved of any proposal for reporting him' in this way and that he was, in fact, 'best pleased when he saw himself in the transcript of a shorthand writer'. So here, Campbell explained that the problem lay with the speaker rather than the reporter. He believed that Eldon's 'manner was so diffuse, his arrangement so immethodical, and his style so repulsive', that he had searched 'in vain ... for specimens of his judgments which might be perused with pleasure'.<sup>35</sup>

While the Vesey Junior and Beames reports were by and large believed to provide a reliable account of the cases and Eldon's judgments, improvements and amendments were made with new editions. For the series of reports which Vesey Junior authored solely, Hovenden published a supplement to them. He explained in his preface that in order for Vesey Junior to publish his reports promptly, he did not examine authorities to the relevant cases. This prompted Hovenden to insert additional authorities where he saw fit, augmenting the text with links to cases and other relevant legal literature. In response, Vesey Junior published later editions with greater reference to and inclusion of legal authorities.<sup>36</sup> He followed this approach in subsequent

<sup>31</sup>J.C. Fox, *A Handbook of English Law Reports from the Last Quarter of the Eighteenth Century to the Year 1865, with Biographical Notes of Judges and Reporters: House of Lords, Privy Council, and Chancery Reports*, London, 1913, 38.

<sup>32</sup>Beames was remembered for his professional career rather than as a reporter. He established a reputation as a barrister of Lincoln's Inn and later became king's counsel in 1832. Beames also acted as a commissioner of lunatics and bankruptcy, *ibid*.

<sup>33</sup>He reported cases in the court of chancery between 1789 and 1816. The three-volume series published with Beames, in which *Carlen v Drury* appeared, was a stand-alone, separate set of case reports covering the years 1812–4.

<sup>34</sup>J. Kent, *Commentaries on American Law*, vol.1, New York, 1826, 462.

<sup>35</sup>J. Campbell, *Lives of the Lord Chancellors and Keepers of the Great Seal of England: From the Earliest Times till the Reign of King George IV*, 5th ed., vol.x, London, 1868, 241–242.

<sup>36</sup>In the preface to the second edition, published in 1827, Vesey conceded that his original edition listed too few authorities but that

The general plan of this Edition is to give the greatest scope of information in the most convenient and compendious form, by Notes; studiously avoiding the repetition of long lists of cases; and by the selection of such as [to] contain collections of Authorities supplying a chain of reference.



editions of the reports which he co-authored with Beames. Indeed, the main change from the first to the second report of *Carlen v Drury* was the addition of new references.

In Vesey and Beames' report of *Carlen v Drury*, it was claimed that each year twelve partners were appointed who formed a committee to audit the company's accounts, and to consult or advise the management. In 1811, this group noticed that the firm's capital had shrunk to an insubstantial amount, valued at just £11,000.<sup>37</sup> This prompted the committee to consider whether to recapitalize the firm or simply to cut their losses and dissolve the partnership. This decision, it seemed from the report, was not an easy one to make, or, given the number of partners, an easy one to organize. In order to dissolve the partnership, the firm's articles of association gave the committee powers to act if they became 'embarrassed' by the firm's management. It set out a process requiring that before the partnership could be dissolved, the dissolution had to be proposed and agreed upon at two general meetings.<sup>38</sup> Instead of following this process, members of the committee brought a suit in chancery against Drury and the others involved in the firm's management.

Yet, chancery's archival records reveal a fuller alternative and darker account. The traditional bread and butter of corporate governance disputes – issues of control and consent, the dividing line between honesty and deception or fraud – appeared at the forefront of this struggle. The original bill prepared by the plaintiffs' counsel claimed that the brewery had descended into its precarious position as a direct result of the management's attempt to 'defraud' the firm and by their 'misconduct' or 'mismanagement'.<sup>39</sup> We should begin by noting that one of the managers, Robert Drury, had removed all the books of account and other financial statements from the premises so that no other shareholder could see them. Much of the complaint was guess-work and in some ways a comment on or an attempt to work out basic

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<sup>37</sup>*Carlen v Drury* 1 Ves. & Bea., 156.

<sup>38</sup>The twenty-sixth clause stated

That no absolute dissolution should take place unless and until the same should be twice deliberately put and carried by a majority of  $\frac{3}{4}$  of the co-partnership present at a general meeting and until such determination should also be confirmed by a like majority of  $\frac{3}{4}$  of the co-partners present at a subsequent general meeting to be specially convened for the purpose of confirming or annulling the same.

TNA PRO C 13/1985/80; *Carlen v Drury* 1 Ves. & Bea., 154–155.

<sup>39</sup>The records are rolled together into a bundle generally of around twenty to forty bills. The task of filing and labelling the bundle and bill's contents has not been performed in a systematic or consistent fashion. As most of the records seem to have survived, the haphazard filing system is at present the hurdle for researchers looking to use the collection. Horwitz provides a useful general guide for those researching the chancery records. This article has benefited from the recent advances in cataloguing the chancery records which have taken place at The National Archives. H. Horwitz, *Chancery Equity Records and Proceedings, 1600–1800*, London, 1998.

information about the firm's finances. The shareholders did not seem to know what money had gone where.

The bill itself contained copious amounts of detail about the plaintiffs' case and the information was presented in what, to a modern lawyer, appears to be an unstructured and repetitive fashion. This bill consisted of six large sheets of parchment that were covered fully with numerous recitations of facts and allegations.<sup>40</sup> It made three key claims. First, that poor business decisions were made by the management and that they were made without the consent of the shareholders. While the company's boiler could be repaired at 'inconsiderable expense', the management, 'instead of procuring the said boiler to be mended as they ought to have done purchased a new one made of copper'. The new boiler cost around £700. In swaths of undigested detail, the bill tells a story of a mixture of issues and misunderstandings. A fundamental claim was that the shareholders were not consulted, and when they were informed *ex post facto*, they did not agree with all the business decisions that had been made. The shareholders believed they should have had more control, or at least, more consultation on matters of importance, such as the investment in a new boiler. Most notably, the firm's collective purpose was ill-defined and not clearly understood. An unclear distinction existed between individual or personal interests and the firm's interests. It became, in many ways, a story of 'us' and 'them' and a dispute between those with and without control.

Second, it was claimed that the management had misused the company's funds to benefit themselves rather than the company or its shareholders as a whole. For instance, the managers' 'house was furnished out of the Partnership funds ... [with] Morocco covered sophas and divers articles of great expence and improper and unsuitable for the dwelling of the resident factor of the said Partnership'. The bill also asserted that the employees had claimed expenses for personal business for times when they were not visiting on behalf of the partnership.

The final issue was a claim that the managers and some trustees and members of the auditing committee had behaved in a dishonest fashion. The bill did not label these actions 'an abuse' or a 'breach of trust'. The deed of partnership explicitly described John Channing, Charles Barker, John Bark, James Drury and Richard Rippon 'as trustees for the benefit of the said Copartnership' and stated that they 'should stand possessed of the Brewhouse and premises conveyed and to [be] conveyed to them in trust for the said co-partnership and as the personal estate of the said partners'. The relationship between the trustees and the managers was close: John Channing, one of the trustees, operated also as a manager with Robert Drury and John Scott. Another trustee, James Drury, would appear by his familial name to be a relation of Robert Drury. The deed said in the event one of the trustees 'should die or refuse or

<sup>40</sup>To put this into some context, bills were about three feet wide by four feet long.

neglect or become incapable to act or should in any manner act contrary to the trusts it should be lawful at a general meeting to appoint any other fit person as a trustee or trustees in the stead of such person or persons'. By contrast, it placed no stipulation on the conduct or behaviour of those managing or auditing the firm. While the bill did not push so far as to say that the trustees had acted in a manner that was 'contrary to the trust', there were questions over whether they were committed to benefitting the group as a whole.

The shareholders argued moreover that the managers had attempted to 'defraud' the collective group. As Robert Drury had taken the company's books, the partners had no way to obtain information about the firm's accounts – whether it truly was a losing concern or profit making machine – or to tell if fraud had been committed. One of the basic facts that the complainants wanted more knowledge of was the rent and profits for the premises that 'the said John Channing, Charles Barker, John Bark, James Drury and Richard Rippon, the trustees ... refuse to account for' despite receiving what the bill referred to as 'divers sums for rents and profits'. Implicitly, it suggested that they may have taken the proceeds for themselves.

Other infractions of the deed of co-partnership included the loss of title deeds which were supposed 'to be lodged in the Box belonging to the partnership in an iron safe'. For safekeeping, 'one of the keys ... was to be placed at the disposal of the managers another with the trustees and the 3rd with the committee [for auditing accounts]'. The deed stated 'that no such title deeds should be given up by them without an order signed at least by 3 or more of the committee'. It appeared that this instruction had not been carried out: Robert Drury had been given the keys. With the keys and securities, it was alleged that Drury 'hath sold and disposed of divers of the securities belonging to the said Partnership and received the monies produced therefrom' to be 'applied ... [for] his own use'.

Another claim was that the shareholders believed that the managers had disseminated false information to deceive investors and manipulate the share market. In the bill, the plaintiffs 'further shew that in the year 1810 new shares in the said Partnership of £300 each were created'. Just as the previous advertisements had promised a dividend, this one followed suit, promising an eight per cent return instead of twenty-five per cent. The complaint, however, focused on information about the firm's financial position rather than the valuation of this batch of shares.<sup>41</sup>

By 1811, the partnership entered difficulties rather suddenly and unexpectedly. The managers had, according to those shareholders who inspected the books, overvalued the inventory of beer and effectively falsified the accounts 'with a view to defraud the said Partnership' and had provided deliberately

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<sup>41</sup>The management had the ability to value the company in any way or issue shares at any price at the initial public offering. Afterwards, these shares could be sold second-hand at the market value.

'erroneous' financial statements. Here, the shareholders' explanation of why the management had concealed the firm's poor performance and disseminated misinformation was that either they did not know how to value the stock correctly, or it was an act of fraud.

The consequence of the shareholders' awareness of the true value of the firm's stock of beer was that the possibility of failure had become real. Inventory levels were not only assets but also a sign of the firm's health. The bill claimed, moreover, that the firm's management and their friends bought the new £300 shares on the second-hand share market at a much reduced price. A number of new creditors appeared in the books as the new shareholders demanded that their dividends be paid.

The bill did not simply request dissolution. Instead, the shareholders totalled the debts that they believed that management and others owed when they transacted for themselves as individuals rather than the partnership as a whole. With a claim that decisions had been made without the shareholders' consent and other claims that would be understood today as self-dealing, the bill attributed blame, separated interests, and allocated some debts personally to individuals. Yet it did so provisionally, as without the books, it could not provide a clear statement of the firm's assets or liabilities, let alone who acted as partners or engaged in the suspicious sale of shares. The accusations of what might now be termed insider trading remained speculative.

The shareholders, looking to move forward, understood that they required more information if they were to dissolve the partnership. In the interim, they requested short-term goals: that the court order the management to cease their involvement and their remuneration; also that all of those involved in the dubious share transfers provide testimony before the court. The shareholders sued the management, as well as a range of others including the trustees and those who had been party to the recent sale of shares, in order to discover more about the transactions.

In court, the defendants' counsel were Anthony Hart, John Wear, John Leach, Lancelot Shadwell, Jr. and Sir Arthur Piggot. Their defence, according to Vesey and Beames, was founded on two legal points. First, they argued that the plaintiffs already had an acceptable means of dissolving the partnership. They pointed to the clauses in the deed of settlement and the path set out by the partnership contract. Second, they said that the partnership itself was illegal under the Bubble Act,<sup>42</sup> invoking the king's bench cases of *R v Dodd* and *R v Webb*.<sup>43</sup> Like *R v Dodd*, as described above, the partnership in *R v Webb* had not been granted corporate powers, but it nevertheless issued 20,000 shares. The court found that these shares were not freely transferable, nor did they make the firm a corporation.

<sup>42</sup>Bubble Act (1720), 6 Geo 1, c.18 s.18.

<sup>43</sup>*R v Dodd* 14 East, 406; *R v Webb* 9 East, 516.

Thus, these cases could well apply to the Bankside Brewery. The language used to describe the Bankside firm was consistent – it remained clear that the firm existed as a partnership. It did not purport to have corporate rights, such as limited liability. The bill, in fact, described the firm as a partnership rather than corporation.<sup>44</sup> Despite this, the firm bore some of the characteristics of a joint-stock company, for example, the large number of partners who acquired their shares through a network of stockbrokers. Further, the advertisements placed in London newspapers sold ‘shares’ in the brewery.<sup>45</sup> If owners could transfer their ‘shares’ freely, this surely resembled corporate form, even though the bill insisted that the brewery was a partnership, and was founded on principles of partnership.

In response to these claims, Samuel Romilly and John Bell on behalf of the plaintiffs sought to distinguish the case from both *R v Dodd* and *R v Webb*. They claimed that *R v Dodd* was irrelevant and decided a different issue entirely, but that *R v Webb* could be related. Romilly maintained that the shares were not in fact freely transferrable but only so on certain conditions.<sup>46</sup>

In urging the court to interfere and grant the dissolution, Romilly and Bell did not respond to the claim that a remedy already existed, or even ridicule the process set out in the articles of association. Dissolving the partnership in chancery appeared to be, from Romilly’s argument at least, entirely appropriate. Instead of addressing who had voting rights or the spread of shares, Romilly stressed the need to move quickly, and that delay risked ‘immediate ruin’.<sup>47</sup> This corresponded partially with the details given in the chancery bill, but, according to the printed report, there was no reference to ‘misconduct’ or allegation of fraud. Romilly, therefore, presented judicial interference as a swifter alternative than the internal process. He did not stress the need to move quickly to prevent further injustice or dishonesty.

The case, nevertheless, hung on two legal issues – first, the validity of the partnership under the Bubble Act and the nature of its shares, and second, the remedy the plaintiffs requested, that the court dissolve the partnership. It was left for the court to decide whether the matter was sufficiently extraordinary to warrant judicial interference.

## V. Principles of equity

Until 1813 Lord Chancellor Eldon sat, effectively, as the sole judge in the court of chancery.<sup>48</sup> Our analysis of Eldon’s judgment should begin with some

<sup>44</sup>TNA PRO C 13/1985/80.

<sup>45</sup>Even the historian Sumner in describing the advertisement, referred to the firm as a joint-stock company. J. Sumner, *Brewing Science, Technology and Print, 1700–1880*, London, 2015, 114, 241.

<sup>46</sup>*Carlen v Drury* 1 Ves. & Bea., 156.

<sup>47</sup>*Ibid.*

<sup>48</sup>A subordinate officer, the master of the rolls, assisted the lord chancellor, but only sat when the chancellor was absent. See note 80, below.

discussion of the principles and rules which were in play in 1812 in order to understand his doctrinal influences. Like the Bankside Brewery, most partnership agreements stood for a term rather than in perpetuity but there were mechanisms that could dissolve partnerships before they expired naturally. Watson commented in the first edition of his treatise that '[i]t is customary in regular partnerships to insert a clause in the articles, by which the partners covenant to submit to arbitration any matter or thing which may become the subject of controversy or dispute between them'. This, he said, was a common way to dissolve partnerships.<sup>49</sup>

As courts of equity dealt with matters of fraud and trust,<sup>50</sup> the natural place for the Bankside litigation to take place was the court of chancery.<sup>51</sup> Comyn explained that 'one partner has no remedy at *law* against his co-partner for anything relating to the partnership concern, except upon an express contract ... the only remedy being in a court of *equity*' (emphasis in the original).<sup>52</sup> By the second edition of Watson's treatise in 1807, the section that explained the rules for dissolution had become more developed, although Watson reminded the reader that the legal rules were less than clear here. Watson stated that '[i]f one partner grossly misconducts himself, and seems disposed to involve his co-partner in ruin, a court of equity will interfere, and dissolve the partnership before it has come to its natural termination'. The law here remained underdeveloped. Watson commented that he could not find 'what are the sufficient grounds for [dissolution]' and judicial intervention. Where one partner had become insane, Watson again recommended in the same uncertain manner

<sup>49</sup>See a number of cases therein, such as *Wellington v Mackintosh* 2 Atk., 570; W. Watson, *A Treatise of the Law of Partnership*, London, 1794, 402.

<sup>50</sup>Alastair Hudson argues that company law developed out of the law of trust and this separation took place after *Salomon* in 1896 when the court held that the company had its own legal personality which was distinct from its membership. Hudson believes that, as a result of this landmark case, 'It is now usual to talk of the company as part of the law of persons and as something distinct from the law of trusts or of equity'. Yet,

Under the joint stock company structure the company was quite literally that: a company of people, in the same way that a dinner party guest list may be described as a 'company'. The word derives from the Latin words 'come' (together) and 'panio' (bread): literally, a companion is someone with whom you break bread and a company is a group of people breaking bread together. A company was therefore an association of persons who invested in common – they were members (still the technical term for shareholders in company law) of a company.

A. Hudson, *Equity and Trusts*, 2nd ed., London, 2001, 686. *Salomon v A Salomon & Co Ltd* [1897] AC 22.

<sup>51</sup>Certainly, this was what the plaintiffs believed as their bill stated that:

All which actings pretences and refusals are contrary to Equity and good conscience and tend to the manifest wrong and injury of your Orators. In tender consideration whereof and for as much as your Orators are without remedy in the premises at the common law and cannot have adequate relief therein save only on a court of Equity. Wherein matters of this nature are properly cognizable and relievable.

This comment appeared directly after the allegations levied at the trustees.

<sup>52</sup>S. Comyn, *A Treatise of the Law Relative to Contracts and Agreements Not Under Seal: With Cases and Decisions Thereon in the Action of Assumpsit. In Four Parts*, London, 1807, 328.

that '[a]t least it is certain that a court of equity will entertain a bill for such a purpose'.<sup>53</sup>

One of the fundamental features of the separation of law and equity was the availability of equitable remedies that could not be supplied by the common law courts.<sup>54</sup> This was relevant to the nature of Carlen's bill in chancery, as contrasted with the contract between partners that outlined a specific process needed for dissolution. Maddock explained that '[t]he construction of covenants is the same in Equity as at Law, but the performance of them is considered very different ... At Law, a covenant must be strictly and literally performed: in Equity, it is sufficient if it be really and substantially performed according to the true intent and meaning of the parties (emphasis in the original).<sup>55</sup> This meant that Eldon, as a judge in a court of equity, was not strictly bound by the terms of the deed of partnership.

Earlier cases, such as *Waters v Taylor* (1808) would be helpful as precedents.<sup>56</sup> *Waters v Taylor* closely resembled the facts of *Carlen v Drury* except that the allegations only included negligence, mismanagement and breach of covenant – not fraud.<sup>57</sup> In *Waters*, Lord Eldon did intervene. The dispute in that case centred upon a request from the partners that Taylor be removed from the management, and that he be restrained from interfering and receiving profits. Eldon opened his judgment by stating his belief that there was 'absolute necessity that these parties should go to arbitration' rather than to the courts.<sup>58</sup> He did not rule out judicial intervention but reminded the plaintiffs 'that this Court does not interfere for the management of a joint concern, except as incidental to the object of the suit, to wind up the concern and divide the produce'.<sup>59</sup>

As the bill did not call for the partnership to be dissolved, Eldon explained that the court could not deliver a verdict for the plaintiff. Even so, the case – and the investigation – did not end there and then. The court of chancery

<sup>53</sup>Watson, *Treatise*, 381–382.

<sup>54</sup>Fusion did not take place until the late nineteenth century. See P. Polden, 'Mingling the Waters', 61 *Cambridge Law Journal* (2002), 575.

<sup>55</sup>H. Maddock, *A Treatise on the Principles and Practice of the High Court of Chancery*, London, 1817, 26.

<sup>56</sup>This case was also reported by Vesey Junior and similar considerations can be made about the reliability of the reports.

<sup>57</sup>Eldon noted that

In this instance all the parties have not an equal right to the management: this is not the ordinary case of a partnership; where each partner has as much right to interfere as any other: but here one individual is by express contract placed in the situation of manager.

The deed of partnership expressed certain expectations about the manager's conduct and time spent at the theatre. Eldon explained that his purpose initially was to explore 'the nature of judicial relief against the effect of the express contract'. The manager, Eldon thought, could not 'be displaced, unless the Court is prepared to decide that he is not entitled to the benefit of the contract; as he is not; if he cannot perform the duty; or if he acts against'. *Waters v Taylor* (1808) 10 Ves. Jun. 13.

<sup>58</sup>Although Eldon saw value in arbitration due to the arbitrator's expertise, agreements to arbitrate did not prevent the court from acting. See *Street v Rigby* (1802) 6 Ves., 822.

<sup>59</sup>*Waters v Taylor* (1808) 10 Ves. Jun. 13.

delved further into the adequacy of Taylor's management of the firm and his attendance. Eldon heard *Waters v Taylor* over a number of dates (19 and 20 November in 1807, 12 February, 5 and 21 March 1808) before eventually issuing an order for dissolution. Eldon repeated his initial remark again at the close: 'my opinion is that this Court has no jurisdiction to manage this concern merely for the purpose of carrying it on'.<sup>60</sup> He ordered it to be sold or foreclosed.

Eldon's private judicial notebooks indicate that prior to 1812 he heard several other cases involving disputes among partners. One example was *Handley v Welby* in 1804.<sup>61</sup> This suit was not reported by Vesey Junior or elsewhere. It involved a bank owned by six partners who were divided into three classes, each comprised of two partners. Each pair, bound by familial ties or other close connections, had collectively put a sum of £7000 of capital into the firm.<sup>62</sup> One of the first points Eldon noted was that according to the deed of co-partnership, a majority vote was needed to pass a resolution 'except [for] further capital' where three votes could suffice as long as they were 'one of each class'.

The partners litigated over a decision to move from Sleaford into a new area in Newark. It appeared that William Farnworth Handley and another did not wish to move but the other four members did. It did not appear that more capital was needed and as the majority had voted to expand, this may seem a straightforward exercise. Yet, over the course of four years, Eldon enquired, deliberated and sought further evidence. Changes in partners had complicated the proceedings,<sup>63</sup> but even Eldon seemed surprised by the slowness of his proceedings. He asked himself 'how can this be a case ... from March 1803 to this day they have been proceeding ... without Injunction'. Ultimately, Eldon felt unable to overthrow the clause in the deed of co-partnership and followed the decision of the majority. Eldon explained that 'a Court has no jurisdiction to make a decree', as the deed of partnership did not permit a different decision. He added that when a 'party agrees to execute a deed, a deed of co-partnership, [underlining in original] [the] court will enforce it' although 'it must know what it is' as '[a]rticles of co-partnership vary'. As Eldon compared the deed to 'leases – known forms', it meant that it was imperative that the court 'see what all the forms are'. At the close, Eldon wrote, 'I dismissed the bill', almost with some sense of triumph.<sup>64</sup>

In both of the above cases, Eldon offered a clear statement of his decision in the very first instance, yet he persisted and continued to hear the complaint

<sup>60</sup>Ibid., 28.

<sup>61</sup>GULC SC, *Lord Eldon Collection, Judicial Notebooks VII, 1807–9*, 24 May 1808; TNA PRO C 13/55/23.

<sup>62</sup>In Eldon's notebooks, he stated this but commented that the overall capital was £21,500. Presumably this was an error in calculation or the £500 came from another source, such as bank accounts and deposits.

<sup>63</sup>Eldon sought further evidence from those who had recently entered the partnership.

<sup>64</sup>GULC SC, *Lord Eldon Collection, Judicial Notebooks VII, 1807–9*, 24 May 1808.



further. Eldon's procrastination and delay of decision-making became infamous, even though, as Romilly noted, once Eldon announced his initial thoughts, he rarely changed his mind afterwards.<sup>65</sup> The reluctance to decide or determine the outcome can be attributed to Eldon's anxiety about the correctness of his judgments. On the first page of each of his judicial notebooks, Eldon inscribed the following precaution: 'Thou shall do no unrighteousness in judgement'.<sup>66</sup> Eldon insisted on thorough investigation and fact-finding so that he could reach a just decision: an approach that would prove to be inherently slow.

Prior to *Carlen v Drury*, Eldon had intervened and dissolved partnerships before they ended naturally, although his style of intervention appeared to be more procedural than substantive in nature. In an attempt to ensure that equity prevailed, Eldon prolonged complaints involving corporate governance disputes. He often took meticulous and precise, though overwhelmingly cautious, actions that would provide the best or most suitable remedy to the litigants concerned. The substance of equitable doctrine did not permit judges to ignore express clauses in a deed, or to interfere or take over the management of a firm. Courts did not have the resources to do so nor did they have the business expertise to supervise others. Eldon did, however, have the power to end partnership agreements and dissolve firms. It was a power that he was prepared to use – and did use – but with hesitation. He thought that 'if they [owners] will not settle their own interests, it is immaterial, whether the consequences shall be produced by their own acts or by mine'.<sup>67</sup> Dissolution did not seem, to him, an unrealistic request.

## VI. The court's judgment

Unlike the cases mentioned above, Eldon reached a decision and gave a judgment in *Carlen v Drury* in relatively good time. While the others had taken months and even years, this case took only two days in late December. Eldon gave his final decision without delay or procrastination. He did not request that further evidence be supplied or that the defendants reply to the bill in an answer. As reported by Vesey Junior and Beames, Eldon gave little thought to a number of issues, most especially the question of the brewery's validity under the Bubble Act of 1720.

Sufficient case law existed to provide broad guiding principles and to test the brewery's legality under the 1720 Act.<sup>68</sup> Eldon could have dismissed the

<sup>65</sup>W.S. Holdsworth, *A History of English Law*, vol.1, London, 1903, 227.

<sup>66</sup>GULC SC, *Lord Eldon Collection, Judicial Notes, 1801 to 1821*, 11 vols.

<sup>67</sup>*Waters v Taylor* (1808) 10 Ves. Jun. 28.

<sup>68</sup>The statute had such firm purchase in the common law that judges looked to those cases even after the Act's repeal. See *Garrard v Hardey* (1843) 5 M. & G. 471 and *Harrison v Heathorn* (1843) 6 M. & G. 81. Eldon also believed that the common law stemming from the Act had developed to an extent that those principles had separated from the application of the Act itself. See his comments in *Kinder v Taylor* (1825) 3 L.J. Ch. 68.

case on this issue alone or even on the practical issues raised by suits between members of joint-stock companies, e.g. how many partners were needed to sue on behalf of the hundreds of members in the group?<sup>69</sup> Although Romilly had claimed that the company's shares were only dismissible on certain conditions and so would not have fallen foul of the Bubble Act, this point is not borne out by the deed of partnership which was copied into the bill. It contained no restrictions on share transfer.<sup>70</sup> Even so, Eldon did not, according to the printed report, even consult or rehearse the key issues.

Eldon adopted a similar position of noting the case law but not applying the principles when the Bubble Act came up in another unreported case, *Bond v Campbell*, where in Eldon's notebooks he simply noted the Bubble Act but said nothing else about how it related to the facts of the case.<sup>71</sup> As in *Carlen v Drury*, Eldon brushed aside the argument that the firm should be held to be illegal under the Bubble Act. If the Bubble Act had been raised, further discussion would not have assisted the parties to reach an outcome. Eldon dealt consistently with the issues raised by the bill and the shareholders' complaint and avoided secondary questions about the Bubble Act. The question that was at the heart of the plaintiffs' petition was whether the court should or should not intervene to grant the dissolution and divide the debts among partners.

Eldon's views on interference by the court in business management and internal disputes were fairly complex. His statement that the 'Court is not to be required on every Occasion to take the Management of every Playhouse and Brewhouse in the Kingdom'<sup>72</sup> is now famous and oft-cited, though perhaps in misleading ways. It suggested that Eldon felt some sense of frustration at the plaintiffs or shareholders who requested that the court play an active role. Yet subsequent comments convey little notion of annoyance. Instead, it appeared that Eldon was ready to assist and even interfere, but only in limited circumstances. He explained when the court would have a positive obligation to intervene as follows:

Here, 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;

<sup>69</sup>Eldon was acutely aware of this point. In his notebooks, he asked this very question when just three people sued a debtor on behalf of three hundred partners. Eldon's hesitation about the mechanics of the law suit did not seem to overshadow the commercial question which prompted the litigation. See *Bond v Campbell*, GULC SC, *Lord Eldon Collection, Judicial Notebooks IX and X, 1810–2, 1812–21*, 25 July 1812. These issues appear at the forefront of *Foss v Harbottle* 2 Hare, 461. See also D. Kershaw, 'The Rule in *Foss v Harbottle* Is Dead; Long Live the Rule in *Foss v Harbottle*', 3 *Journal of Business Law* (2013), 274.

<sup>70</sup>TNA PRO C 13/1985/80.

<sup>71</sup>*Ibid.*, C 13/138/7; GULC SC, *Lord Eldon Collection, Judicial Notebooks IX and X, 1810–2, 1812–21*, 25 July 1812. Campbell had purchased a large quantity of beer from the British Ale Brewery which was owned by several hundred people. He sought to avoid the debt by claiming that the firm was illegal under the Bubble Act. Nothing on the record showed that the partnership was illegal.

<sup>72</sup>*Carlen v Drury* 1 Ves. & Bea., 158.

but not in the first Instance. In order to obtain that Interference a Case of Breach of Engagement, or Abuse of Trust, must be established to the perfect Satisfaction of the Court; that Persons will not according to their Duty attend to the Interest of the Concern.<sup>73</sup>

Thus Eldon did not believe that his judgment applied to all litigation arising from disputes about business management. In an attempt to contain the case's influence, he provided some vague examples of when his rule would not apply and cited a small number of occasions when intervention would be appropriate, such as breach of engagement and abuse of trust.<sup>74</sup>

Neither the suit at bar nor the bill claimed that contractual obligations as set out by the deed of settlement had been breached, but rather, that the management had behaved in a way that was deceitful and fraudulent. Why did this not constitute, in Eldon's words, an 'abuse of trust'? If entering false statements in the books and then hiding them did not constitute an 'abuse of trust', then what did? Why did Eldon refuse to act in light of the allegations of fraud or fail to even pursue them further?

To be clear, Eldon seemed well aware of the complaints of fraud and even misrepresentation that were asserted in the bill but omitted in Vesey and Beames' printed report. Eldon made reference to the management's freedom to increase the capital – this related to the issue of the new £300 share.<sup>75</sup> Rather than pick up issues related to the dissemination of misleading information, Eldon characterized the case as one where the shareholders 'come here then, on the Ground, not that the [deed] furnishes no Redress, but that there is bad Management'.<sup>76</sup> By characterizing the management as 'bad', Eldon separated management as a process from the individuals who were managers. With that, he asserted a view that was close to the business judgment rule – a doctrine that was never formally recognized in English company law but became prominent in the United States. The assumption here was that management as a process had in some way failed. Decisions that were misguided and poor were nonetheless made in good faith. This meant that fault did not seem to lie with the individuals who called themselves managers and ran the company – they were not 'bad apples' looking to make losses or consistently misbehave. Although Eldon accepted that the group had made 'bad' decisions that ultimately did not lead to success, he felt that the managers should not be personally liable for poor or mistaken business decisions. He, therefore, rejected the claim that the firm's debts could be divided and allocated to specific individuals.

Eldon provided little guidance about when an 'abuse of trust' warranted intervention. Even so, he did, at a later point, reinforce the necessity for judicial interference when he explained that:

<sup>73</sup>Ibid.

<sup>74</sup>This point mirrored Watson's views in the second edition of his treatise.

<sup>75</sup>*Carlen v Drury* 1 Ves. & Bea., 158.

<sup>76</sup>Ibid.

If, however, a Case of Delinquency should be clearly made out, I do not hesitate to declare, the Court would act: but there must be a positive Necessity for the Interference of the Court, arising from the Refusal or Neglect of the Committee to act. That may raise a Case for prompt and immediate Interference; which I cannot say exists.<sup>77</sup>

Thus a court, Eldon said, could – and should – intervene in cases where it was necessary to do so. This point, however, appeared to respond directly to the arguments posed by the defence counsel rather than as a declaration of a more general set of rules. Indeed, he utilized their very argument – that the plaintiffs did not need a court to achieve their aims – when he ascertained the most appropriate remedy. After all, the purpose of keeping books and allowing partners to examine them was surely to investigate and hold the management to account; to act if they found problems. All of which, the committee had done with the exception of executing the clause in the deed to hold the final two meetings needed for a dissolution. When Eldon confined his thinking to the specific motion before him, he said:

I think I cannot now interfere: the Plaintiffs having a Remedy in their own Hands, to which they have not resorted: desiring to be understood, not to repudiate the Jurisdiction; but that I will not interfere, before the Parties have tried that Jurisdiction, which the Articles have themselves provided.<sup>78</sup>

The problem, therefore, was not that Eldon believed that the court had no place in determining the firm's fate but, that the firm had its own remedy and process to resolve its disputes. Litigants in chancery could always lodge a bill of revivor to restart the suit. So Eldon did not rule out future intervention, but instead instructed the plaintiffs to follow their own remedial rules and process before seeking external help from chancery.

## VII. Proposals for reform

A further set of circumstances helps explain why Eldon refused to act when fraud was alleged. Quite apart from the chronological history of the case and the brewery, contemporaneous developments in chancery and in Lord Eldon's life were undoubtedly influential. Throughout the early nineteenth century, the court of chancery, and Lord Chancellor Eldon in particular, faced a barrage of criticism. Legal and political commentators laid persistent allegations that chancery officers were delaying proceedings for their own personal gain.<sup>79</sup>

<sup>77</sup>*Ibid.*

<sup>78</sup>*Ibid.*, 159.

<sup>79</sup>For an excellent summary of the debate, see M. Lobban, 'Preparing for Fusion: Reforming the Nineteenth-century Court of Chancery, Part I', 22 *Law and History Review* (2004), 389; M. Lobban, 'The Chancellor, the Chancery, and the History of Law Reform', 22 *Law and History Review* (2004), 615; M. Lobban, 'Preparing for Fusion: Reforming the Nineteenth-century Court of Chancery, Part II', 22 *Law and History*

As the head of a court of equity rather than law, the chancellor was the sole judge in the central courts who was responsible for the delivery of equitable justice.<sup>80</sup> Eldon's juggle between political and judicial life had proved complicated; the political demands on him were vast and included 'affairs of state, administrative matters, and the business of the House of Lords'.<sup>81</sup> On 1 December 1812, during the 1812–3 parliamentary session, one of the bills presented to the House of Lords aimed to create a new office of vice-chancellor to support Lord Chancellor Eldon.<sup>82</sup> The new vice-chancellor would relieve some of the chancellor's judicial duties. The move to lessen Eldon's caseload did not proceed without opposition. Samuel Romilly, an MP and barrister in the *Carlen* case, was no stranger to the growing problems in chancery. Romilly was said to be in 'almost every cause' and 'obliged very frequently to close the flood-gates of his office for months together, till he have reduced the pile of unanswered cases, which lies on his table'.<sup>83</sup>

Even so, Romilly objected to the new vice-chancellorship. He explained his concerns during the parliamentary debate but also sought to influence others outside parliament. Romilly believed that appointing a vice-chancellor would mean that the office of lord chancellor would become predominantly a political position (emphasis in the original).<sup>84</sup> He published a pamphlet detailing his objections anonymously, even sending a copy to Lord Eldon.<sup>85</sup> Others engaged with Romilly's arguments directly. A pamphlet debate soon followed between Romilly and John Freeman-Mitford (Lord Redesdale), who had proposed the vice-chancellor bill and previously served as England's attorney general and Ireland's lord chancellor.<sup>86</sup>

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*Review* (2004), 565; J. Getzler, 'Chancery Reform and Law Reform', 22 *Law and History Review* (2004), 601; J. Oldham, 'A Profusion of Chancery Reform', 22 *Law and History Review* (2004), 609.

<sup>80</sup>The chancellor was assisted by the master of the rolls, an office that had been in existence since 1729. From 1801 until 1818, the position was held by Sir William Grant, who, though well-respected, 'remained the junior official', and 'only sat when the Chancellor was not sitting'; Lobban, 'Preparing for Fusion, Part I', 392–393.

<sup>81</sup>See J.H. Baker, *An Introduction to English Legal History*, 4th ed., London, 2002, 110.

<sup>82</sup>*Parliamentary Debates*, series 1, vol.24, cols. 114, 1 Dec. 1812 (House of Lords).

<sup>83</sup>L. Hunt ed., *The Reflector: A Quarterly Magazine, on Subjects of Philosophy, Politics, and the Liberal Arts*, vol.II March–Dec., London, 1811, 120.

<sup>84</sup>Some years later, the vice-chancellor's court was portrayed as a failure, even in rhyme, viz:

That grand *improvement* – the Vice Chancellor's court;  
A pretty post, devised, like many more,  
Of urgent business to reduce the store;  
But which (Oh! doubly painful to endure),  
Increases the disease 'twas meant to cure.

Anon., *The Bar, with Sketches of Eminent Judges, Barristers, &c. &c.*, *A Poem with Notes*, 2nd ed., London, 1826, 66.

<sup>85</sup>GULC SC, *Lord Eldon Pamphlet Collection*; Sir S. Romilly, *The Life of Sir Samuel Romilly*, London, 1842, 288.

<sup>86</sup>J. Freeman-Mitford, *Observations Occasioned by a Pamphlet: Entitled, 'Objections to the Project of Creating a Vice-Chancellor of England'*, London, 1813; S. Romilly, *Objections to the Project of Creating a Vice-Chancellor of England*, 2nd ed., London, 1813.

While proposed reforms were intended to reduce the lord chancellor's judicial burden and speed up the process of litigation, much of the groundswell of criticism seemed to point directly to Eldon, though not everyone appeared to blame Eldon personally. One MP and barrister, Michael Angelo Taylor, said that 'he had known [Eldon] for many years' and that 'it was in his opinion impossible, however desirous ... it might be ... to the public, to get' litigation through quickly.<sup>87</sup> The problem, he suggested, that prevented speedy justice was not Eldon himself or his style but was due to the heavy caseload and complex procedures – conditions that naturally produced a difficult and slow process. Others, however, accused Eldon of greed and corruption.<sup>88</sup> In private correspondence, Jeremy Bentham nicknamed Lord Eldon 'Lord Endless', for he 'never settles any thing' and 'never ends any thing'.<sup>89</sup> While MPs such as Taylor may have been paying lip service to Eldon in the formal parliamentary setting, the underlying premise was that there was a problem in chancery which needed solving.

Not bound by contemporary loyalties, historians have appeared sympathetic toward Eldon and the problems in chancery. Lemmings, in his history of the legal profession, simply thought that meticulousness and timeliness did not mix well. He said that 'Eldon's personal thoroughness and conservatism – themselves qualities which typified a profession accustomed to dealing with a limited supply of work – therefore only precipitated a crisis which had been developing for several generations, and revealed the full scope of the problem'.<sup>90</sup> Holdsworth recommended that '[t]hough we may rightly think that he might have lent the weight of his name to reforming a system which was antiquated, we should remember that he did his best with the system as it was'. He added that '[n]o man in the kingdom worked harder than Lord Eldon'.<sup>91</sup>

<sup>87</sup>Romilly was also fairly active in the debate and made a number of comments in support of Eldon and his judicial activity. See *Parliamentary Debates*, series 1, vol.24, cols. 519–552, 15 Feb. 1813 (House of Commons). *Parliamentary Debates*, series 1, vol.19, cols. 262, 7 March 1811 (House of Commons).

<sup>88</sup>See J. Bentham, *Indications Respecting Lord Eldon: Including History of the Pending Judges' Salary-Raising Measure*, London, 1825; Anon., *The Black Book or Corruption Unmasked, Being an Account of Places, Pensions and Sinicures, the Revenues of the Clergy and Landed Aristocracy, the Salaries and Emoluments in Courts of Justice and the Police Department etc.*, London, 1820, 37.

<sup>89</sup>Bentham to John Fraunceis Gwyn, July 1818, Correspondence (CW), IX. 230, 231 cited in J.E. Crimmins and C. Fuller, *Church-of-Englandism and Its Catechism Examined*, Oxford, 2011, 500. Lord Eldon's dilatoriness was notorious, even in verse:

He listens patiently, but ne'er decides!  
Points, on which all opinions are agreed,  
and cases clear, which they who run may read,  
He hears – re-hears – from time to time postpones –  
While, on the rack, exhausted patience groans.

Anon., *The Bar*, 70.

<sup>90</sup>D. Lemmings, *Professors of the Law: Barristers and English Legal Culture in the Eighteenth Century*, Oxford, 2000, 186.

<sup>91</sup>Holdsworth, *A History of English Law*, 226.

It is well known that major reform efforts targeted the court of chancery in the 1820s. As stated by Patrick Polden, ‘Attacks begun in 1810, which had led to the creation of a vice-chancellor to ease the chancellor’s burdens, were renewed by that most persistent critic, the Whig barrister M.A. Taylor, and scarcely abated during the rest of Eldon’s tenure’.<sup>92</sup> These continuing pressures undoubtedly weighed heavily upon Lord Eldon, yet it was clear that the causes of delay in decision-making were manifold,<sup>93</sup> and they were not fully addressed by parliament until after Eldon resigned in 1827.

It seems equally clear that the heaviest psychological impact on Lord Eldon attributable to criticism of his delays in decision-making occurred in the 1810s, when public attention was first directed to the problem. As stated by a recent biographer, ‘Eldon saw all parliamentary motions on chancery reform as personal attacks on himself; a rather emotional man, he became very depressed by them and was often on the verge of resignation’.<sup>94</sup> Eldon’s principal biographer, Horace Twiss, provided ample details in his year-by-year chronology of Lord Eldon’s life. According to Twiss, the problem of arrears in the court of chancery had, by early 1811, become so pronounced that a select committee was appointed to consider ‘the best way to expedite the appellate business in the House of Lords’.<sup>95</sup> Then on 7 March, two days after the committee in the House of Lords had been appointed, Mr Michael Angelo Taylor proposed that a like committee be formed in the House of Commons, recognizing that delay had become a major issue due primarily to an increasing caseload in the court of chancery. Twiss characterized Mr Taylor as ‘a well-meaning little man, with an important manner and a sonorous voice’ – one who, combining ‘much good humour with his pomposity’, continued to be the Greek chorus of chancery reform for many years.<sup>96</sup>

Taylor’s motion for the creation of the House of Commons committee was debated during the spring of 1811, and on 5 June, the committee was approved and members were appointed. A report was issued on 18 June, but the committee’s work then ceased until revived in February 1812. Lord Eldon was very close to Prime Minister Perceval, and in a letter to him in April or May 1812, Eldon mentioned the appointment and revival of the

<sup>92</sup>P. Polden, ‘Part Three: The Court of Chancery, 1820–75’, in W. Cornish, J.S. Anderson, R. Cocks, M. Lobban, P. Polden, and K. Smith, eds., *The Oxford History of the Laws of England: Volume XI: 1820–1914 the Legal System*, Oxford, 2010, 646.

<sup>93</sup>See *ibid.*, 528.

<sup>94</sup>E.A. Smith, ‘Scott, John, First Earl of Eldon (1751–1838)’, *Oxford Dictionary of National Biography*. Available online at: <http://dx.doi.org/10.1093/ref:odnb/24897> (accessed 1 Nov. 2016).

<sup>95</sup>H. Twiss, *The Public and Private Life of Lord Chancellor Eldon, with Selections from His Correspondence*, 2 vols., 1844, vol.1, 360.

<sup>96</sup>Lord Eldon in his *Anecdote Book* described Mr Taylor as a political friend ‘who had many extremely good Qualities’, and early in his career as a barrister, he acquired a nickname he never lost – ‘Chicken’. A.L.J. Lincoln and R.L. McEwen, eds., *Lord Eldon’s Anecdote Book*, London, 1960, anecdote 140, 80.

Commons' committee to inquire into the chancery delays and then shared his hurt feelings:

I have now sat in my court for above twelve months, an accused culprit, tried by the hostile part of my own bar, upon testimony wrung from my own officers, and without the common civility of even one question put by the committee to myself.<sup>97</sup>

By mid-summer 1812, according to Twiss, Lord Eldon 'was by no means insensible to the growing magnitude of the mischief', and he supported a bill introduced by his friend Lord Redesdale (John Mitford) for the creation of the position of vice-chancellor, a judge who would relieve Eldon of a portion of his business as lord chancellor.<sup>98</sup>

Nevertheless, Lord Eldon's many responsibilities and the constant drum-beat about the problem of arrears were clearly taking a toll. In a letter to his good friend Dr Samuel Swire on 22 September 1812, Eldon concluded his letter with the following:

And now, dear Sam, I come to a close. Retained in office, with no wish to remain in it, I am praying for some fair opportunity, some honourable reason for quitting. I grow old; business increases; my ability to discharge it does not improve. These, so help me God, are the reflections which have occupied my anxious thoughts during the last winter, and yet, in this malignant world, whilst the regent knows my wishes perfectly, I am supposed to be clinging to office, and intriguing for others, who are anxious for it, God forgive them!<sup>99</sup>

Two weeks later, on 9 October, Eldon wrote to his brother, Sir William Scott (later Lord Stowell) complaining about his lack of support by the government, declaring

I have been, in my judicial capacity, the object of the House of Commons' persecution two years, without a lawyer there to say a truth for me; and though I have pressed, for years past, the importance of being supported there by some individuals in my own department of the profession, not the slightest notice of this has been taken in their arrangements; I have been left unprotected as before – and so unprotected I cannot and will not remain.<sup>100</sup>

Yet Lord Eldon did remain, and on 1 December 1812, Lord Redesdale introduced in the House of Lords his bill for the appointment of a vice-chancellor. The bill was committed on 7 December and went through the House of Lords, reaching a second reading on 11 February 1813 and approval on 23

<sup>97</sup>Twiss, *The Public and Private Life of Lord Chancellor Eldon*, 377. Some few days later, Perceval was assassinated, and added ministerial duties fell upon Eldon, *ibid.*, 379–380.

<sup>98</sup>*ibid.*, 388.

<sup>99</sup>*ibid.*, 389.

<sup>100</sup>*ibid.*, 390.



March.<sup>101</sup> Meanwhile, in late December 1812 the case of *Carlen v Drury* came on for hearing. In his dispirited and weary state, Lord Eldon simply may not have had the fortitude to give the case his usual meticulous and extended attention. Perhaps it was significant as well that the two-day hearing was held at the peak of the holiday season, starting on 23 December and ending on Christmas Eve, 24 December 1812.

With such a disputed reputation in late 1812, the court of chancery teetered on the edge of change, and so did Eldon's behaviour as lord chancellor. It should perhaps go without saying that Eldon, as a member of the legislature, would be well aware of the personal criticisms levied against him.<sup>102</sup> Yet, a less well-known fact is the extent to which these debates had a clear and identifiable impact on Eldon's personality and his routines.

Lord Eldon took copious notes of cases during his years in practice as a barrister, and this studious habit continued when he became lord chancellor for more than a decade. It ensured that Eldon had sufficient knowledge and records of every complaint and its facts without needing to rely upon the statements of counsel. Some contemporaries joked that he took his reports home with him to mull over the cases.<sup>103</sup> Eldon's judicial notebooks were even indexed so that he could revisit his thinking on particular cases and achieve consistency in thought. But by late 1812, his entries were minimal and infrequent.<sup>104</sup>

What did this major change of habit signify? One explanation for the fewer entries was that in the later period of his career, Eldon simply heard fewer cases. Yet the appointment of a vice-chancellor in 1813 does little to explain why Eldon stopped making entries in his notebook in 1812. The earlier date ties in more consistently with the beginning of the vice-chancellor debate in parliament rather than the vice-chancellor's eventual appointment. For the whole month of December 1812, when the debate began and when *Carlen v Drury* was heard, Eldon recorded nothing in his notebooks. After 1812, he resumed taking notes, but there were fewer entries, and he appears to have ceased collating his rough original notes and copying them or having them copied neatly into notebooks, as he had done earlier in his career. Indeed, the later notebooks make reference to other loose papers on which Eldon wrote notes that do not

<sup>101</sup>*Ibid.*, 397. See 53 Geo. 3 c.24.

<sup>102</sup>In a footnote to the anonymous verse about Lord Eldon's incessant deliberation, the author wrote the following:

In the case of ODDIE v. the BISHOP of NORWICH, which came before him in 1821, he dropped the following observation: 'I am now approaching the period when my natural existence will be brought to a close, and I confess, that, during my judicial life, my mind has often been hampered with doubts, in cases in which men with stronger minds would, perhaps, have had no doubt at all'.

Anon., *The Bar*, 70.

<sup>103</sup>See *ibid.*, also the lyrics in R.J. Blewitt, *The Court of Chancery: Satirical Poem*, London, 1827, 27–28.

<sup>104</sup>While ten volumes cover the period, 1801–12, the remainder of his judicial note taking for the period 1812–21 can be found within one volume. GULC SC, *Lord Eldon Collection, Judicial Notes, 1801 to 1821*, 11 vols.

appear in the notebooks themselves. The change in the quantity of entries into Eldon's judicial notebooks may simply have been a new-found reluctance to maintain a central repository of information, plus a diminished interest in revisiting facts of each case. Also, once the vice-chancellor was appointed in 1813, Lord Eldon stopped hearing original causes.<sup>105</sup>

Returning to *Carlen v Drury*, Eldon's failure to respond to the allegations of fraud could be attributed to one of two reasons. First, that as Eldon no longer poured himself into his judicial activity and ceased endless fact-finding, he simply forgot these all-important claims. This is extremely unlikely. Eldon was far from his dotage – he served as lord chancellor for another fourteen years. Also, even though the fraud claims were omitted in the initial 'fact' section in Vesey and Beames' report, Eldon's judgment spoke with clarity and knowledge of the circumstances that surrounded the allegations. The second explanation – much more probable – is that, under pressure to reduce chancery's caseload and limit the likelihood of litigation in corporate governance disputes, Eldon declined to assist the plaintiffs when they had a workable remedy at hand. He opted for quick justice and to reduce the number of cases on the books. After all, he implicitly affirmed that he would not refuse to help at a later stage when or if the first remedy had not worked out.

## VIII. Conclusion

This article has provided a fuller story of *Carlen v Drury* than has appeared hitherto. It has shown that not all was as it seemed in the printed report. While the Bankside Brewery's managers had been successful in their past business ventures, by 1812 they found themselves surrounded by allegations of managerial negligence, misconduct and fraud. Today these allegations would be articulated as self-dealing and insider trading. The discovery of these claims – claims that did not appear in the Vesey and Beames report – appears to make Eldon's swift decision not to intervene difficult to understand.

During 1810–12, Eldon was under considerable pressure from external sources. The facts of the case were smothered by ongoing administrative and political arguments that chancery (and Eldon) had been too slow and had too much to do. Feeling dejected and in an effort to move quicker, Eldon did not investigate further or pursue the claims of fraud and misconduct since the shareholders' internal procedure to dissolve the partnership remained untried and untested. He concluded that until the internal remedy was exhausted, the shareholders' case had little merit.

In similar disputes heard before the political agitation in 1811–12, Eldon pursued those cases with surprising levels of interest and the court remained engaged even when the outcome was fairly predictable. In these earlier cases

<sup>105</sup>Lobban, 'Preparing for Fusion', Part I, 393.

Eldon did not, as in *Carlen v Drury*, send away the complaining shareholders at once and instruct them to follow the internal processes and use the rights given in the deed of partnership. The difference here was a matter of timing. The year of 1812 marked a watershed change in Eldon's style of law-making. Had the case been heard a year or so earlier when the political gaze focused elsewhere, this landmark case may have looked very different. Eldon would have in all likelihood followed his usual pattern of requesting further evidence and delayed deliberation.

Lord Eldon did not reject the *Carlen* case with ease or treat the shareholders' request with disdain. He took the complaint seriously and weighed the merits of intervention. To that end, Eldon conceded that a court of equity should intervene in business to permit dissolution when there was evidence of an abuse of trust, indeed it had a duty to do so. While Eldon did not intervene on the facts before him, the case was only partially finished; it was a matter to which the court might return, but only after the shareholders had followed their own mechanisms to dissolve the firm. The origins of the internal management debate were much more tentative than has been supposed. The court of chancery was open to the idea of judicial intervention. The question in *Carlen v Drury* was not 'should the court intervene' but, rather, 'when was it appropriate to intervene'.

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