Unpublished manuscript 1995. Similar to:
Fourie, F.C.v.N. (1996): Separation of ownership and control: what is the problem? *South African Journal for Economic and Management Sciences*.

THE SEPARATION OF OWNERSHIP AND CONTROL: A FALSE PROBLEM?

Frederick CvN Fourie, *University of the Free State, Bloemfontein, South Africa*

The relation between the owners and the managers of a firm, and the matter of ownership and control in particular, has profound implications for the theory of the firm. It also concerns the role of modern corporations in society, e.g. the issues of the power, legitimacy and responsibility of management. These matters still are controversial.In addition it has bearing on the issues of nationalisation and privatisation, currently so important in Eastern Europe and Southern Africa.

At the centre of discussion - and disagreement - are property and property rights in the context of the firm. The basic tension is between the traditional view of ownership of the firm and the apparent separation of ownership and control during this century - an issue that can be traced back to the Berle & Means (1932) interpretation of ownership relations and changes therein.

In this paper it is argued that both the traditional view of ownership of the firm and a Berle & Means type of interpretation of observed developments - as well as much criticism of the latter view - are based on a misconception of the perceived problem which directs the debate into unfruitful channels and forecloses consensus. An analysis that resolves much of the friction surrounding the matter is presented. This analysis attempts to probe beyond the variety of positive, actually existing ownership forms to an underlying structure of relationships. It thus requires of the reader the willingness to abstract from positive, observable institutional forms. In effect the analysis offers a conceptual reinterpretation of existing relations and developments. Given such a rethink of the relevant relationships, important conclusions follow.

The intention is not to provide a critique of the entire Berle & Means approach, or of the extensive independent contributions of these two authors. The Berle & Means interpretation of changes in ownership relations merely serve as illustration and starting point for the discussion.

1. THE TRADITIONAL VIEW OF OWNERSHIP OF THE FIRM

The traditional view of ownership of the firm is rooted in the concept of individual or personal property:
"From earliest times the owner of property has been entitled to the full use or disposal of his property, and in these rights the owner has been protected by law. ... the owner of such property, in being entitled to its full use, has been entitled to all accretions to its value" (Berle & Means, 1932:294).
With regard to the firm this concept is applied directly: the firm is regarded as being owned, as the property of some individual(s) who is/are entitled to its full use, disposal and benefits. This is also how the traditional (colonial) firm is constituted: the "owner" of the firm (be it single or part-owner) is also its manager and receiver of any profits generated. This is in complete harmony with the original concept of property.

Upon the historical emergence of the corporate form of the firm this view of ownership is simply extended:

> "From earliest times, also, the stockholder in the corporation has posed both as owner of the corporation and the owner of its assets ... (C)ollectively the stockholders, through their participations were entitled to the whole of corporate assets and to the whole of any corporate profits which could be made. The corporation was theirs, to be operated for their benefit" (Berle & Means, 1932:294).

Even though shareholders themselves do not manage the firm - ownership is separated from managership - the powers of the appointed managers are seen as powers in trust to be applied for the benefit of the owners, and subject to their approval and control. This view of the corporate form of the firm is perfectly in line with the orthodox concept of private property: ownership implies control and benefit; ownership and control of the firm are united (and should remain so).

2. BERLE & MEANS' INTERPRETATION OF FACTUAL DEVELOPMENTS IN OWNERSHIP RELATIONS

It is a well known fact that this view of firm ownership, managership and control has been challenged by developments in the industrialized countries of the world, and in the United States of America in particular.The root cause, according to Berle & Means, is the multiplication of owners of firms - the dispersion of stock ownership. Individual stockholders own only a relatively insignificant share of the enterprise, and have a negligible vote and degree of control of the management of "their" firm. This leaves management in full control, effectively unchecked by shareholders.

This, Berle & Means continue, destroys the unity that is commonly called property, and divides ownership into nominal ownership and the power formerly joined to it. The owner of corporate shares virtually surrenders control over his property to the "princes of industry" in control of corporations. Berle & Means call this a revolutionary shift in the property relationship, since ownership has become passive. All the "owner" holds is a mere symbol of ownership, a piece of paper representing a set of rights and expectations with respect to an enterprise. This leaves the modern shareholder at the mercy of management, with his property rights subject to the "dictators of industry" whose power has ceased to be legitimised either by direct ownership or by owners' votes.(Berle & Means in fact liken this development to a communist mode of subjecting individual property rights to group interest (1932:245)).

The contrast of this interpretation of the position of the owner of the modern corporate firm to that in the traditional situation and view is, in the eyes of Berle & Means, vivid. Ownership has become entirely separated from control, radically changing the status of the owner - all seemingly as a result of the historical development of the corporate form.

The questions which this development presents are these. Is the orthodox view of the ownership-management-control relationship still correct, and the modern corporation a deformed and distorted form, i.e. should the corporate revolution be reversed? Or, are Berle & Means mistaken in their interpretation - has there been no real separation of ownership and control so that the traditional view of the firm-as-property is still applicable to all forms of the firm?Or, as Berle & Means eventually suggest, is the modern corporation a new societal institution which cannot be accommodated in established concepts of property, i.e. do we need a new concept of property?

3. WHO OWNS WHAT? A RECONSIDERATION OF OWNERSHIP RELATIONS

The cardinal question that has to be resolved, is this: what is in principle the typical nature of the relationship between a so-called "owner" and the firm? Can one identify certain underlying characteristics of this relationship that transcend the different positive forms firms are found in and have been found in - both historically and in different legal and economic systems - implying that they are typical aspects of THE firm as such? To do this one has to abstract from and go beyond, for example, legal rights shareholders may have in a particular system, or rights which may be called property rights.

The fallacy of the concept of ownership of the firm

The first question is: what is "ownership" of a firm? A suggested response is a contra-question: can a firm be owned?

This matter is inexorably linked to the typical nature of the firm. In effect the question is whether the typical nature of the firm is reconcilable with it being owned by some person(s). Unfortunately economists are not agreed on the nature of the firm. Many would accept a description of the firm as an economic institution, as comprising a group of people forming an organisation within which, under the authority of management, they combine assets and inputs in order to produce goods or services. That is, the firm is viewed as an economically qualified organisation of people. On the other hand the individualist (Chicago-type) approach sees the firm as a "contractual team" or as a set of contracts between autonomous individuals engaged in market exchanges.

Either way the firm comprises people and not merely a collection of land, buildings, machines and other assets. From this it is a small step to the conclusion that neither such an contractual team or organisation of people should be regarded as anybody's property, as the object of a property right.

This suggests that the application of the concept of ownership or property to the firm as such is contrary to its typical nature and that the concept of ownership of the firm is spurious.In what follows it will be sought to establish the validity and tenability of this conclusion, also suggesting new interpretations of so-called ownership relations and changes therein. It will be argued that the problem is not that the traditional logic of property is or has become deficient or non-applicable, but that it was incorrect to apply the concept to the firm at all and, especially, to use it as basis for deciding what is the appropriate relationship between "owners" and managers.

Personal and firm-property distinguished

If the firm is not to be viewed as the property of its "owner(s)", what is the position of a shareholder? What about the assets of the firm? In short: who owns what?

The answer lies in a distinction between two kinds of ownership or property, namely personal property and institutional property. This distinguishes property rights vested in persons from property rights vested in societal institutions. Although the latter is usually acknowledged in the limited sense of the firm having legal title to certain assets, the notion of private property is often restricted to individual or personal property. Thus the individual shareholder is regarded as the real and ultimate owner of the firm's assets. A highly individualistic view of property tends to preclude the insight that a societal institution or establishment as a whole can also own property. Non-state institutions such as churches, clubs or firms all own private property. It is owned not by the individuals who are members of the organisation, but by the organisation as such.

These distinctions proffer the following understanding (reinterpretation) of the shareholder-firm relationship. Firstly, the firm as institution owns property - land, buildings, machines and other assets - and as owner has control over it (with the managers being in the positions of authority). Secondly, the firm's assets are not owned by the managers of the firm. Members of the firm, managers and non-managers alike, do not own any property in their capacities as members of the firm. When managers buy or sell firm property they do so as office bearers of the firm, handling firm property. It is not their personal belongings which are at stake.

The managers and other firm members do, however, also function outside the sphere of the firm, and there they can be seen to own personal property - a car, a house - and exercise full control over its use. The same applies to a shareholder. As with his car he personally owns his shares and has full control over their use or disposal. But although he has full personal ownership of his "shares", the argument above suggests that neither the firm nor its assets should be considered as his personal property: in no way should he be seen as "participating in ownership of the firm". Indeed, in this sense the term "share" is a misnomer. (A possible new meaning of this concept is presented in section 4.)

Given this distinction between personal and firm property the "old" logic of property - that an owner has and should have control over and benefit from the use of his property - presents no problem. The firm can be seen to own and control its property, the shareholder his. This implies that the relationship between shareholder and firm should not be approached from any notion of control arising from ownership of the firm, and that stock ownership as such implies no intrinsic property right of control over the firm.

Factually, of course, shareholders may and do have direct or indirect control over a firm. However, my argument is that whatever control a shareholder may (or should) have in a given situation should not be regarded, in principle, as the embodiment of property rights proper - even if it is called that, and even if positive law assumes that. The existence of such control or power has a different foundation (see section 4 below).

The "separation of ownership and control" once again

The implications of this argument for the ownership-control issue follows directly. Any absence of control by so-called "owners" over the firm is not equivalent to and should not be interpreted as an absence or abrogation of property rights as such. Property rights is not the real matter at hand. In addition, absence of control is not contrary to the nature of either the firm or the shareholder-firm relationship. Given the reinterpretation above, a description ofthe historical changes in this relationship as the "separation of ownership and control" is a misconception, and any "problem" so perceived is a false problem (although it may be technically correct in terms of actual legal views and rights in a particular legal system at a particular time). Conversely any presence of control should not in principle be ascribed to an ownership claim over the firm, as noted above.

This produces the thesis that both the orthodox view of firm ownership and Berle & Means' interpretation of factual developments are based on a false conception of the nature of these relationships - a misconception revealed most pregnantly in the concept of a "share". Accordingly Berle & Means type of conclusions in this regard can be seen to be conceptually misconceived: there has been no real separation of ownership and control - each owner still controls his own property; also no dissolution of the "atom of ownership" into its component parts, i.e. control and benefits - each owner controls and benefits from his property.

It may be argued that the interpretation of the change is of no consequence, that factually there has been a substantial loss of shareholder control, with Berle & Means' main conclusion intact. This argument misses the point which is whether this loss of control is an aberration in the development of the firm which should be remedied. The matter not merely concerns control, but control as a property right, since the latter - and its implications for the legitimacy and obligations of management - has been fundamental in both the orthodox view of the firm and the established economic and legal order.

Both of these, I suggest, have been based on a false premise of ownership of the firm. Factual developments have not made the concept outdated, as Berle & Means argue. It was false from the start. This does not deny that at the time factual ownership and control relations closely resembled ownership proper (see below). The error was, firstly, to regard it as ownership and to consider the control of the manager in simpler forms of the firm as founded in property rights and, secondly, to deduce that in the corporate form the shareholder should have a similarly founded right to control the firm. Accordingly any factual changes should not be evaluated in terms of property rights and should not be seen as a revolutionary shift in such rights.

In general one can conclude that it is not useful to analyse such changes and their consequences from the perspective of property relations. Moreover, attempts to define new concepts of property are likely to further confuse rather than clarify.

From these basically negative conclusions a next step is to suggest, on the basis of the alternative understanding of the shareholder-firm relationship developed above, a constructive reconsideration and reinterpretation of the factual developments observed by Berle & Means.

The separation of overlapping ownerships?

(a) A historical digression: firm and family

Consider the historical relationship between two different societal structures, the firm and the family. Concurrent with the firm's historical development per se - the basis of the work of Berle & Means and e.g. Chandler (1978) - one can identify a substantial change in this relationship that has significant bearing on the ownership issue.

At one extreme, say the subsistence family farm, one finds a very close relationship between family and business enterprise. The head of the family (in traditional society the father) is the head of the farm "business". The members of the father's family are the workers in his business (i.e. "under" the same person, but now in his capacity as businessman). The land on which they live as family serves as the land used as input and main asset in the farm business. Production is primarily transferred ("sold") to family members.

In this extreme case there is an interwovenness so complete that it is difficult to distinguish two structures - the farm business is all but submerged in and dominated by the family institution. It is important, however, not to overlook the presence, if only seminal, of a business enterprise with typical (if relatively "primitive") firm activities.

Between this extreme and the other, the modern "managerial" corporation, are a spectrum of forms of the firm. Concurrent is a spectrum of relationships between firm and family. In terms of a developmental order (not necessarily chronological) one perceives a gradual loosening of the interlacement between firm and family. This occurs on all levels: the increasing involvement of non-family artisans, apprentices and other labourers; the increasing involvement of non-family persons as (salaried) managers, and the separation of the land, buildings and assets of the family from that of the business enterprise.

The latter process is most important, and here the progressive legal forms of the enterprise have been instrumental. Upon the emergence of the partnership as legal form, two or more associates (usually within the wider kinship-family) pool their capital resources, and both also manage the firm. In the expanded partnership a "sleeping partner" contributes to the capital but has no managing responsibilities - an important development.

When even more capital is required, the corporate form appears. Initially shares are held by a small number of families, managing being done by one or more managers (usually prominent family members and shareholders). This is the entrepreneurial (family) corporation. Later full time salaried managers attain a major role, but with the original entrepreneurs in top management and family influence still strong. The trend concludes in the modern corporation where ownership is scattered to such an extent that a family rarely holds significant portions of voting stock and salaried career managers are employed with little or no stock and with little personal acquaintance (let alone kinship) with either founder families or the by now scattered stock owners. Occupancy of offices is related not to family membership but to professional ability. Stock ownership and managership generally are not vested in the same individuals - Berle & Means' point.

Thus, in contrast to the subsistence family farm, neither internal nor external relations of this form of the corporation is confined, determined or shaped by family relationships. Firm and family exist as different and separate societal institutions. The literal coincidence of capacities and relations - indeed of institutions - at the initial extreme is totally absent at the other. They have become separated out in a process of differentiation and emancipation. This process concurred with - but can be distinguished from - the firm's development as such.

Some qualifying remarks may be necessary:
(i) The emancipation process does not imply that in the final stage firm and family operate in total isolation. There remain purely external or "differentiated" interlacements in that, perhaps trivially, firm members still are members of their respective and separate families.
(ii) Although there is a clear sense of direction in the historical process all cases do not (and do not have to) fit neatly into the progression just described.
(iii) The historical context in which the phases were described does not foreclose the existence of "earlier" forms of the firm and of firm-family interlacement in modern times. Indeed, all of these can be expected to exist and generally do.
(iv) It may be objected that it is not at all uncommon for family relations to exist between members of the most "modern" firm. As long as the working relation between such relatives in their firm capacities is unrelated to their kinship the characterisation of the modern relationship still holds. To the extent that it is not, it validates the view that all variations in the spectrum of firm-family interwovenness till can and do occur.

(b) Firm and personal property again

Reconsider, against this historical background, the distinction between personal property and firm property - with the former controlled by an individual by right of ownership, the latter by the manager as office-bearer within the firm (with the firm as such actually owning the property).

A comparison of the traditional form of the firm with the modern corporate form suggests that the separation process observed by Berle & Means can be interpreted as the separation or differentiation of these two kinds of property, each with its particular "controllership" (about which the next section will be more specific).

In the traditional firm the manager's personal belongings and the firm's property coincide, as do their respective "controllerships". It is because of this concurrence - and in particular the dominance of the family - that the firm (narrowed down to its assets) at that time appeared to be the property of this individual, the "owner-manager" - leading to the original application of the concept of ownership to the firm per se. It was, however, not tenable. In the modern "managerial" corporation firm property and personal property have become completely separated out, as have their controllerships. In intermediate forms such as the entrepreneurial corporation the two kinds of property have been separated, but the corresponding controllerships still coincide in those individuals who are shareholder-managers. Only when this concurrence disappears is the differentiation process complete. In this sense the managerial revolution - the so-called separation of ownership and control - was but the separation of two previously overlapping ownerships, and especially of firm property from individual (i.e. personal) ownership.

In the latter process the inception of the legal device of the corporate form appears as a critical factor. It secured a distinct (legal) sphere for the assets of the firm, independent of personal ownership claims. Thus it contributed critically to the ability of the firm to emerge as a separately constituted societal institution, as against a mere piece of property. Berle & Means argue that the corporate device in itself does not necessarily imply any separation of ownership and control, and site the one-man corporation as example. They are mistaken, for the incorporation of the one-man firm immediately separates that person's personal belongings from the firm's property, as expressed in the principle of limited liability. This is so even though he does occupy both controllerships. Conversely non-incorporation, as in a partnership, implies that firm and personal property still overlap - the firm has not been established as a distinct institution with its own property.

4. CAPITAL SUPPLY AND "OWNERSHIP" OF THE FIRM

Given that property rights do not provide a clear understanding of the nature of the relationship between the firm and shareholders, but given that shareholders are called owners, ons has to ask: what notions are really embodied in the concept of "ownership of the firm"? What is the basis and nature of the firm-shareholder relationship?

In the capitalist system proprietorship of the firm has always been associated with the supply of capital to the firm. This is true for the single-owner of (or partner in) a traditional firm as well as for the stockholder of a corporation. It suggests that this aspect of "ownership" - and its implications for the relationship between "owner" and firm - must be examined.

The relevant context is the distinction between the internal and the external relations of the firm. The former entails the relations between workers of a firm or between managers and workers. The latter refers to external exchange and market relations with the buyers of its product or with the suppliers of inputs.

Given this distinction one can ask why, in principle, a capital supplier need be in a relationship to the firm that is different from that of another supplier. Capital supply implies an exchange relationship in which financial capital is supplied in return for some form of payment or promise to pay, the nature of which depends on historical and legal conventions. What seems to make this exchange different is that customarily the payment has not taken a form commonly associated with market relations. Rather - and evidently as a result of viewing the firm as property and shareholding as the participation in ownership of the firm - this payment has taken the form of an ownership-claim, and has been considered as the benefits of ownership. Hence the term share. This has obscured that we are dealing with a market exchange or supply relation. A "share" in a corporation is nothing but a claim to a part of the payment for the provision of capital to that firm.

This is paramount because it implies that as a capital supplier the "owner" is external to the firm, that he is not a member of the firm. The classical picture of shareholder-management relations does not take account of the distinction between internal and external relations and commonly views the shareholder as having authority over management. However, in principle the nature of an external exchange relationship precludes the presence of any inherent relation of authority and subordination.

Thus as capital supplier the "owner" has no intrinsic authority over "his" firm, no authority-"right" to control management.(The existence of non-voting stock and of capital supply by bondholders acknowledges this.)

This conclusion also applies to the unincorporated form of the firm, provided one does not neglect the development perspective on these forms. In the single owner- or partnership the capital supply relation can be seen to be entirely "closed" in the sense that it is contained within a member of the firm, namely the manager. The manager as individual supplies capital to the firm of which he is - coincidentally - sole manager. This confinement is opened somewhat when in the sleeping partnership it is extended to persons other than managers (although initially limited to his/their family circle(s)). In the entrepreneurial corporation the situation is similar except that the firm has been incorporated. When a manager of such a firm also supplies capital to the firm it formally involves two distinct legal persons. In the managerial corporation the capital supply relationship is fully opened or extended, not being limited to or even including managers (or their family and friends).

This provides another interpretation of the separation of "ownership" and control. The unification of "ownership" (in the sense of capital suppliership) and "control" (managing authority) in the traditional firm can be seen to be a by-product of a still closed capital supply relation. The manager just happens to be a capital supplier as well. The "managerial revolution" can thus be seen to involve the opening-up or extension of the capital supply relation whereby the manager ceases to be a capital supplier as well. The latter capacity comes to be fulfilled by an investor. Moreover, the process can be understood as the separation or differentiation of the two capacities of manager and capital supplier respectively - two separate and distinct roles. This capacity differentiation process is implied by the opening-up or extension of the capital supply relation.

In these two capacities we have the more precise meaning of the two ownerships, each with its differently founded controllership. The capital supplier owns and, as owner, controls the payment or promise to pay he received from the firm (his shares or bond certificates). The manager as office bearer controls the capital now owned by the firm. Accordingly the separation-of-capacities process complements, and is equivalent to, the separation-of-property process described above. Both are implied by the opening up or extension of the capital supply relationship. The latter thus proves to be an essential element in the so-called separation of ownership and control.

5. CONCLUSION

This paper has suggested a conceptual rethink of the shareholder-firm relationship. Two capacities intimately associated with the shareholder - "ownership" and capital suppliership - have been investigated. The former, it was argued, is a false concept and not reconcilable with the typical nature of the firm. The latter - being a market exchange relation - provides no basis for any intrinsic authority or control relation between shareholder and firm. A shareholder ("owner") having a role in management merely reflects the interwovenness of two different capacities in one person due to an only partially extended capital supply relationship. It is a developmental peculiarity likely to disappear if and when further development (extension) occurs, thereby manifesting the typical differentness of the two capacities.

In any case such interwovenness provides no general basis for any intrinsic right of the "owner" to control the firm. Consequently any absence of control should not be regarded as the violation of an intrinsic right of the shareholder, and even less of a property right. Moreover, since capital suppliership is voluntarily entered into, Berle & Means' description of modern corporate managers as dictators who suppress the property rights of owners is inappropriate. There is nothing reprehensible about corporations being managed by executives who supplied little or none of the company's capital. The legitimacy of management is not to be founded in property or property rights.

It is vital to note that it is not suggested that there is no factual control of shareholders over managers or that there are no rights to be encroached upon, nor that there should not be any such control. The capital supplier may indeed be in a special relation to the firm given the crucial and foundational role of capital in the founding and existence of a firm. The suggestion is that if such control exists or if the capital supplier is indeed in a special relation to the firm it should not be viewed as being founded in property rights, and any absence of such control should not be interpreted as an abrogation of property rights. Its true foundation is to be sought elsewhere.

Finally, some remarks on the importance of an historical perspective. The origin of the use of the term "ownership" with respect to the firm lies in the historical coincidence of the two capacities of managership and capital suppliership, as such a consequence of a still relatively closed capital supply relationship in early forms of the firm. Its misuse originates in the failure to consider traditional, managerial and other firms in a development context. Without a historical perspective the ownership issue remains clouded.

In addition the analysis gives fresh insight into the historical context of the different organisational forms of the firm. Firstly, it shows why the corporate form should not be negatively evaluated. It is the result of a "natural" unfolding process. An important corollary of this emancipation is the extension of the capital supply relationship which in particular implies the separation of firm and individual property and the differentiation of the capacities of capital suppliership and managership.

Secondly, consider the criticism that Berle & Means failed to analyse the forces that had given rise to ownership patterns and did not look for an underlying dynamic generating these patterns (Rosenberg, 1983). The analysis above suggests that there is something more to the evolution of organisational forms. It explains the nature of this evolution by suggesting a typical, underlying nature of ownership and capital supply relations in the firm. That is, to use evolutionary terms, the different organisational forms all are of the same species: they exhibit different forms of some underlying relational structure. What differs is the degree of extension and development of these relationships and the accompanying degree of capacity differentiation.

The common thread that provides continuity in this historical development process is an underlying relational structure typically linked to the firm as economic institution. It is thus not the corporate form that caused the changes in ownership relations, like some interventionist force. These changes are developmental manifestations of an underlying relational structure, with the corporate form merely as legal vehicle. These changes were part and parcel of the emergence of the firm as a distinctly organised societal institution.

BIBLIOGRAPHY

Berle, A.A. & Means, G.C. (1932): The Modern Corporation and Private Property, New York: Harcourt Brace & World.

Chandler, A.D. Jr. (1978): The Visible Hand, Cambridge, Massachusetts: Harvard University Press.

Demsetz, H., (1983): The Structure of Ownership and the Theory of the Firm, Journal of Law & Economics, June.

ELLERMAN, D.P. (1980); Property theory and orthodox economics, in Nell, E.J. (ed.), Growth, profits and property, Cambridge: Cambridge University Press.

Fama, E.F., (1980): Agency Problems and the Theory of the Firm, Journal of Political Economy, April.

Fama, E.F. & Jensen, M.C., (1983): Agency Problems and Residual Claims, Journal of Law and Economics, June.

Fourie, F.C.v.N. (1989): Firms and Markets: Do Transactions Approaches Help?, *South African Journal of Economics,* June.

Friedman, M. (1962): Capitalism and Freedom, Chicago: University of Chicago Press.

GRAHAM, C. (1989): Regulating the company, in: Hancher, L. & Moran, M. (eds.): Capitalism, Culture and Economic Regulation, Oxford: Clarendon Press.

Hessen, R., (1983): The Modern Corporation and Private Property: A Reappraisal, Journal of Law and Economics, June.

Jensen, M.C. & Meckling, W.H., (1976): Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure, Journal of Financial Economics, October.

Klein, B., (1983): Contracting Costs and Residual Claims: The Separation of Ownership and Control, Journal of Law and Economics, June.

Means, G.C., (1983): Hessen's 'Reappraisal', Journal of Law and Economics, June.

North, D.C., (1983): Comments on Stigler and Friedland: 'The Literature of Economics: The Case of Berle and Means', Journal of Law and Economics, June.

Ricardo-Campbell, R., (1983): Comments on the Structure of Ownership and the Theory of the Firm, Journal of Law and Economics, June.

Rosenberg, N., (1983): Comments on Robert Hessen, 'The Modern Corporation and Private Property: A Reappraisal', Journal of Law and Economics, June.

Stigler, G.J. & Friedland, C., (1983): The Literature of Economics: The Case of Berle and Means, Journal of Law and Economics, June.

FOOTNOTES

Witness the 1982 Hoover Institution Conference on Corporations and Private Property (Journal of Law and Economics, June 1983 issue). This conference appear to have been intended to bury Berle & Means rather than to celebrate it. Also see Graham (1989).

Berle & Means (1932) document, with considerable alarm, a tremendous increase in the size of corporate firms, a resulting concentration of economic power, and an accompanying ever wider dispersion of stock ownership in the United States.

Since, as they see it, managers have no right to control property that they do not own and since "inactive and irresponsible" property owners who surrender control over their property do not necessarily deserve full protection of those rights, some kind of social control over or amendments to the corporate system are warranted - and would, moreover, not constitute an infringement of property rights. This has been interpreted by critics as a "clarion call for government intervention" (Stigler & Friedland, 1983; North, 1983).

Hessen has criticised Berle & Means for having an unacceptably narrow view of private property which is restricted to exclusive control over tangible assets, and which assumes a primitive, pastoral, or at minimum pre-industrial setting. This, says Hessen, stacks the deck against the corporate form, for it suggests that all forms of joint or shared ownership somehow are not really property (1983:282).

This view has been expressed by, for example, Milton Friedman (1962:135).

This becomes clear as soon as one realises that, formally, any subjective juridical rights (such as a property right) necessarily presupposes a legal object, i.e. existence of a subject-object relation. A person or group of persons can, however, not be the legal object of a subjective legal right, for juridical relations between persons or groups of persons are relations between juridical subjects, i.e. they are subject-subject relations, not subject-object relations. The important thing is that the former at most allows one juridical subject to have a juridical competence to exercise authority over another subject or to demand fulfillment of contractual obligations from another subject, but specifically excludes something like ownership rights (or other subjective juridical rights). Accordingly a team or organisation of people such as a firm cannot be reduced to being the object of a property right, cannot be owned by a person or group of persons.

In a critical analysis of the handling of property in orthodox economics, Ellerman (1980) stated the thesis, among others, that ownership of the firm is a myth. Although the analysis of the present paper derives independently and from a quite different perspective, the two contributions do relate to each other, since this paper argues the sustainability and tenability, historically and otherwise, of views such as that of Ellerman.

At this point the analysis clearly parts company with the extremely individualistic contracts approaches to the firm, for their eyes can only see individuals - all else is fiction. That these approaches harbour serious inconsistencies is discussed in Fourie (1989).

9 Only a very cryptic and stylized analysis is presented. Chandler (1978) is the basic reference.

Thus, although the manager of the traditional firm owns the assets (land) of the firm, he can be seen to do so not in his capacity as manager - actually he "owns" these assets indirectly and coincidentally.

11 The need for a clear distinction between these two classes of relations is discussed in Fourie (1989). For a contrary opinion see Klein (1983:373).

12 Hessen - in arguing against Berle & Means' proposal for social intervention - seems to suggest the acceptability of seeing at least some "owners" as mere investors and of splitting investment and management into two distinct functions (1983:285-287). The implications of this for the rights and obligations of investors and managers is not pursued, however, nor is the set of relations analysed in any depth. Demsetz (1983:383) notes the specialization of business activity into owning and managing respectively, and also seems to suggest that share ownership need not be seen as ownership of the corporation.

This will be the subject of a forthcoming paper in which the topics of corporate democracy and "control contracts" will be discussed, and in which the special nature of the position of the capital supplier will be clarified.

14 Fama & Jensen (1983) attribute the historical evolution of ownership patterns to the continuing adaptation of organisational forms to consumer demands for output at lowest price (while covering costs), i.e. as the outcome of the "market for organisational forms". In line with their usual contracts approach they point to the separation of decision and risk-bearing functions as the consequence of what is essentially an agency problem, with varying degrees of organisational effectiveness in handling it as central evolutionary mechanism. Their analysis thus can be seen as an attempt to explain the causes of what is described here as a relation-extending and capacity differentiation process.