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ON PARTNERSHIPS

WITH

LIMITED LIABILITY.

A PAPER READ BEFORE

THE DUBLIN STATISTICAL SOCIETY,

ON THE 20m JUNE, 1853

BY P. J. M'KENNA, ESQ.
BARRISTER-AT-LAW.

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On Partnerships with Limited Liability. By P. J. M^c^Kenna, Esq^

IF any apology, further than the importance of the subject, were required for a paper such as the present, after the very able and carefully written pamphlet of Mr. Colles, it would be found in the report of the select committee, appointed to consider the law of partnerships in these countries:—'"Your committee, considering the vast extent and importance of the proposed alteration in the law, are unwilling to proceed in such a matter without the greatest caution. They find that the best authorities are divided on the subject, and that it would require great care to devise the checks and safeguards against fraud, necessary to accompany such a general relaxation or change in the law."

Having due regard, then, to the difference of opinion on this question, as to the propriety of introducing into this country the system of limited liability, as also to the danger of rash or ill-considered legislation upon any subject; bearing in mind that any radical change can only be justified by a strong case being made for its necessity, let us consider the disadvantages which the present law of partnership imposes, and the objections which present themselves to a continuance of the system.

As already this subject has attracted much of public attention, and a very full and careful consideration from writers of eminence, but a very brief summary of the existing law of partnership m these countries will be necessary.

If a man stipulates for a portion of the profits of the business which he is engaged m,"as a clerk or otherwise, even as the reward of his labour, though he have no share in the partnership property ^ he will become to all intents a partner, and subject to all a partner's liabilities. *A fortiori,* if he have advanced money to the partnership, or is owner of any of the partnership property, and entitled to a portion of the profits, whether or not he is known to belong to the firm, he is liable for the debts of the firm to his last shilling. As Mr. Smith remarks, in his book on Mercantile Law, p. 22, "The distinction between the liability of an agent remunerated out of the profits, and that of one remunerated by a sum proportioned to the profits, is certainly extremely fine. It is, however, established upon high authority."

Lord Eldon, in the case of *ex parte* Hamper, 17 Yesey's Reports, 404, thus lays down the principle which governs the case of dormant partners:—"It is clearly settled, though I regret it, that if a man stipulates that, as the reward of his labours he shall have not a specific interest in the business, but a given sum of money, even in proportion to a given quantum of the profits, that will not make him a partner; but if he agrees for a part of the profits as such, giving him a right to an account, though having no property in the capital, he is as to third parties a partner " The rule as laid

down here has been always since acted on, and if anything were wanting to shew how little foundation such a rule has in justice and natural equity, it would be found in the distinction thus drawn by Lord Eldon. If a clerk, for his services, receives a share of the profits, he is liable as a partner ; if a sum bearing a certain proportion to the profits, he is not. Now how can it affect third parties in any way, whether he is to get say one-tenth of the profits, or a sum equal to one-tenth of the profits ? The distinction is entirely arbitrary, and shews how anxious the judges are to except cases out of the old rule, which they would not take upon themselves to disregard—that *every* person who gets a share of the profits shall be liable to make good the losses of the firm, as it has been strongly expressed, to his last shilling and last acre.

The separation of capital from labour, the almost necessary consequence of the existing law of partnership, is the chief, it might be said the only objection to it, as to that head we may refer the numerous inconvemencies and evils of which it is productive. We have, under our existing laws, no provision for the small capitalist, who, under the limited liability system, might at the same time benefit himself by a much greater return for the use of his money than the public securities can give, and afford the means to those who, with activity, character, industry, and youth, want but capital to obtain a remunerative employment in trade, and extend and add to the material prosperity of the country. Of this evil, two very common and very striking illustrations present themselves. A trader of the middle or even of the upper class, who has amassed what, according to his rank and position in society, he may consider a competence; and who is of an age or temperament which renders an active pursuit of business distasteful ; if anxious to retire, is forced under the present system, in common prudence, to withdraw his entire capital from business, whether it has been carried on by him in partnership or as a sole trader. The firm, if he has been in partnership, is by his retirement either entirely broken up, or sadly crippled for want of means, and is obliged to limit its trade to one-half or one-fourth of its former extent. If he has been a sole trader, his capital is *necessarily* withdrawn from trade, and invested in public or other securities. In the latter instance, some of the young men who may have been in his employment—in the former, his junior partners—may, by their business habits, cleverness, and good conduct, have won his esteem, and given promise of success if the means of engaging or continuing in trade were not wanting. From the small shopkeeper to the extensive merchant, according to their means, retiring traders may wish to assist such young men; especially when they can do so, with a fair prospect of pecuniary advantage, by sharing in the profits of the business to be carried on with their funds. Here, however, the existing law interposes, and declares that the retiring capitalist must not enter into such an arrangement,—for it amounts to nothing short of a virtual prohibition, to say that a man who is anxious to risk a,

third, or half of his means, by embarking it in trade—reserving a provision which will save him from want, in case of any of those accidents to which every person in trade is liable—cannot do so without making himself liable (and that, too, in a concern in the management of which he may take no part) to the last shilling of his property for the debts of such firm. Again, take the case of a clerk or shopman whose activity and shrewdness have been noticed by his employer. Can anything be more natural or proper, or more advantageous to both parties, than for the master to enter into an agreement to pay such a young man, instead of salary, a certain proportion of the profits? There would be here a premium offered for good conduct, and the natural result would be, from the attention and zeal of the servant, an increase in the profits of the establishment for the master, and a consequent increase of salary for the clerk. Yet such an arrangement, under the present state of the law, would constitute that clerk or shopman, without his name being used, without any power or authority having been delegated to him, without any further stipulation whatsoever, a partner to all intents and purposes with his employer, and with all the powers and liabilities of such a position Is it not hard to say that that servant, who may know nothing more of his master's position or transactions than a perfect stranger, and is merely interested m the efficient discharge of his own duties, should be liable for all that employer's debts, if by some wild speculation or unavoidable calamity he should become insolvent, and must submit to have the few hardly-earned pounds which he may have scraped together, swept away in the general wreck; instead of receiving, as other servants, his salary m priority to any claims against the bankrupt's estate? Can anything #e more injunous or impolitic than such a system, and are not those cases which have been selected, of daily occurrence in the experience of most people?

It is necessary merely to advert to the existing law, in its bearing on cases in which moderate capitalists, who, as already remarked, do not wish to risk all they possess, are prevented from supporting neighbours and friends in extending their business. Local improvements of every kind, as waterworks, gasworks, &c, mining, banking, and insurance undertakings, which are not extensive enough to permit of the expense of obtaining an act of parliament, or charter, are all deprived of the spare capital of people of moderate means, who are thus prevented from effecting at the same time a public service, and turning their money to the best advantage. Let us take the case of small towns, where some local enterprize, as waterworks, a market-hall, &c. would require say £20,000 for its completion, with a fair prospect of paying ten per cent, on the capital expended, and also of affording a very great convenience to the townspeople. It would be difficult, if not impossible, to find one or two men who wDuld have the means of advancing, or wish in any way to risk such a sum, even if they could spare it from

their business; while nothing could be easier than to procure some ten, fifteen, or more individuals who would advance in different proportions sums sufficient for the purpose. They would have two motives to induce them to do so, private gain, and public convenience. This, however, the law forbids, unless each and every of them will risk all he is worth, and make himself liable to that extent. A retired trader worth £10,000, living on the interest of this sum invested m the funds, is anxious to see the work accomplished, and would not object to nsk £500 or £1,000, with a chance of getting double or treble the interest which he is receiving for his money in other securities. This advance, however, he dare not make; he must hold aloof entirely; for if he puts m but £50, and is to share in the profits, he may be beggared. Another instance of the injustice of the present law of partnership, is furnished by the case of an inventor, who must remain content to let his discovery be abandoned for want of means, or must sacrifice it, by disposing of it for a trifling consideration to some large capitalist, who will reap the entire profit which may arise from its introduction ; whereas, if persons could limit their liability, he would find but little difficulty m raising the means for carrying his improvements into operation.

If, then, as cannot be disputed, the present law of unlimited liability in every kind of partner, whether dormant or otherwise, is productive of so much hardship and injustice to individuals, if it forces such undue restraints on woiks of public utility, and interferes so injuriously with the general welfare of the community, the only thing further required to be shewn—im order not alone to justify but to demand a change in the existing laws—is that another system can be suggested, which would not be open to the grave objections already specified, which would facilitate the union of capital and enterprise, and which would not be productive of mischiefs, inherent in its constitution. The system which would best satisfy the general want, seems to be that which has been adopted m several of the American States, based on the French law as to partnerships "en commandite," which enables parties to engage in *every kind of trade and manufacture*, on the principle of limited liability of the dormant partners. On a careful consideration of the working of this system, with various modifications, in several states of the new and old world—of the opinions of the different jurists and political economists, as well as of traders practically acquainted with the evils of the present system; and of the few objections which are urged by the opponents of partnerships "en commandite,"[1] the application of that system to *every* species of mercantile pursuit, (subject, however, to certain limits and guards) will be found most advisable.

At the risk of repeating that with which most are acquainted, it would be well in a few woids to state what is the law in France, as to partnerships with a limited liability as to some of its members. The Societé Anonyme, open as it is to many and grave objections,

agd. becoming entirely unnecessary upon the introduction of the commandite system, may be left entirely out of consideration. The law recognises three kinds of partnership; these are, *en norm collectif,* the same as ours under the existing law of the United Kingdom; Society's Anonymes, similar to our chartered companies; and that which immediately concerns the proposed change, Societe's en Commandite, or with limited responsibility. Such a partnership as this, in the words of the French Code of Commerce, art. 23, " is contracted between one or more partners responsible to the full extent of their property, and one or more partners, temporary shareholders, who are called commanditaires, or partners en commandite." It is administered under a common firm, which must necessarily include the name of one or more of the partners responsible and *solidaires,* that is, liable to the full extent of their property, as in the law of England. The liability of these commanditaires is limited to the amount which they invested, 01 for which they had subscribed, and they are prohibited from taking any part in the administration, or being employed in any way in the affairs of the partnership, on pam of becoming *sohdaireSj* or liable as the active and nominated heads of the firm, who are called *gerants.* Such is the law which prevails with more or less of restriction m Spain, Portugal, Russia, Hungary, Holland, Lombardy, the Two Sicilies, Sardinia, and the United States of America; one which in its working has been found of the greatest utility and advantage in extending the trade of these countries, affording a desirable investment for small capitalists, developing national resources, affording a stimulus to industry, and conferring on localities very great accomm'odation in the shape of gas and waterworks, banking, insurance, and other companies. Such a system as this would manifestly provide for those cases already mentioned, where, under the existing law, capital and 'enterprise are held apart to their mutual loss; and would enable the man of business who is retiring from trade to assist his successors. It would furnish the small capitalist with a means of profitable as well as useful investment, and would render small local undertakings extremely easy of accomplishment.

Of the propriety of a change in the existing laws of partnership, and of the substitution of the limited liability system, *en commandite,* we have abundant testimony. A tacit approval is given to such a system by our own legislature, by the concession of charters which recognize and act on the limited liability principle. Which of our great public undertakings do we not owe to such companies? Our entire system of railroads, steam navigation, mining, and insurance companies, the most important of our banking establishments, our local enterprises in cities and great towns, all are due to that system of limited liability. What reason or pretence can there then be for saying, that a system which has worked so well, and been productive of results of such immense utility in extensive undertakings, would not in small be productive of similar results? The most

-eminent writers and jurists of our own and other countries, all unite in approving of this system of partnership *en commandite;* one, the necessity for which the plain common sense and daily -observation of every man m the community inculcate.

This subject has recently occupied the attention of the legislature, and we find that in February, 1851, a committee composed of some of the ablest, most intelligent, and most practical men in England, was appointed to inquire and report on the expediency of limiting the liability of dormant partners. The sittings of this committee were held at intervals, during the months of April, May, June, and July of that year, and during this time they examined, amongst other witnesses, as to the theory and actual practice of the commanditaire system, the eminent English lawyer Mr. Phillimore, reader of civil law and jurisprudence to the Honoiirable Society of the Middle Temple ; Leone Levi, the author of one of the most comprehensive, useful, and carefully arranged works on the commercial law of the world that has ever been published; Mr. John Howell, a partner in one of the principal warehousing firms in London; Mr. Turner Townsend, an importer of French manufactured goods, long and extensively engaged in foreign trade ; Mr. Fane, Commissioner of Bankruptcy ; Mr. William Cotton, formerly Governor of the Bank of England; Mr. Davis, Secretary to the American Legation ; and Mr. E. W. Field, the eminent solicitor. In the cautious and jealously worded report which they made at the -termination of their sittings, recommending an immediate but much too partial modification of the present rule, we find the following passages referring to the existing law, and the propriety of encouraging local undertakings, as water and gas works, markets, washhouses, etc.:—[u] Such general and unlimited liability can be restricted to any given sum or share only by special Act of Parliament or Charter from the Crown ; neither of which is obtained without much difficulty, expense, and delay, and in many cases cannot be obtained at all. Your Committee thinks it would be a subject of regret, if cautious persons of moderate capital, and esteemed for their intelligence and probity in their several neighbourhoods, should be now deterred from taking part m such undertakings, by the heavy risk of unlimited liability; yet such persons would in many instances be the best guides for their humble and less experienced neighbours, and their names would afford security that the enterprize had been well considered, and was likely to be well conducted.

" Your Committee think that it would be desirable to remove any obstacles which may now prevent the middle, and even the more thriving of the working classes from taking shares in such investments, under the sanction of, and conjointly with, their richer neighbours; as thereby their self respect is upheld, their industry and intelligence encouraged, and an additional motive is given to them to preserve order, and respect the laws of property."

It would be as tedious as unnecessary to quote the opinions of the immense number of jurists, political economists, and mercantile

men, who have borne testimony to the superior advantages of the commanditaire system, speaking both from their actual experience and knowledge of the evils of the existing law, and of the beneficial results of the working of the societés commanditaires in other countiies, as well as from the light which reason throws upon the subject. There is an overwhelming mass of authority in its favour ; and it will be sufficient here to mention the names of those who have expressed themselves in favour of the commanditaire system. We find in the list of writers, Mills, Babbage, Porter, Senior, Pardessus, Bavard Veyrières, Troplong, Livingstone, and many others. Of merchants, judicial and other officers, who have superior opportunities of perceiving the dangers which might arise from this commanditaire system as suggested by its opponents, and who have been called on to give evidence, we have favourable opinions from nearly all. Alderman Hooper, Leone Levi, Mr Howell, Mr. Townsend, Mr. William Hawes, Mr. Bancroft Davis, Mr. Mathew Clark, Mr. Commissioner Fane, Mr. Holroyd, Commissioner of Bankrupts, Sir G. Eose, Master in Chancery, Mr. Yan der Ondermeulan of Amsterdam, Privy Councillor, etc, and Mr W. F. Mark, Her Majesty's Consul at Malaga, have borne testimonj?- in favour of partnerships *en commandite.* A question such as this, however, is not one which should be concluded either way by authority. Although names of considerable weight and importance may be found discouraging, rather than actively opposing, the introduction of the commanditaire system, it would be more satisfactory to consider the reasons for this opposition and the objections which are urged, in the same manner as we have already canvassed the disadvantages of the existing law; to judge for ourselves as to the benefits which may be derived from the legalization of partnerships of limited liability, rather than to seek to determine the matter by an array of names on either one side or the other. Before entering upon those objections, it would be well to state exactly the extent to which we should seek the legalization of these partnerships *en commandite,* and the regulations and restrictions which seem advisable, as well for the protection of the commanditaires as of third parties dealing with these firms. It will thus be more readily seen that the objections to the proposed change, unimportant even though they may appear on investigation, go rather to evils which may be guarded against, than to faults inherent in the system,—to the form rather than the substance of the contemplated change.

The main provisions of a bill for the purpose of introducing the law of limited liability of partners, in order to sufficiently secure both the commanditaires and the public, might be as follows:—

1st. That partnerships *en commandite* might be entered into for the purposes of every trade, manufacture, or undertaking; that the gerants, the active partners in whose names the business should be conducted, should be unlimitedly liable to third parties; and that the commanditaires, the dormant partners who merely advance

their capital, should be liable only for the sum subscribed by them, and the profits as hereinafter specified.

2nd. That any such commanditaire, or dormant partner, who might engage, and take an active part, in the management or conduct of the partnership trade, should become subject to an unlimited liability; such rule, however, in no way to interfere with his right of advising and taking counsel with the other partners as to the conduct of the partnership concern or trade.

3rd. That the deed of co-partnership should set forth the number and names of the acting and dormant partners, specifying each individual, the sum contributed by each person, the commencement and duration of the partnership, the objects and title of the firm; such deed to be signed by the partners, and registered within a limited time after its complete execution, and before entering on the partnership trade; to be open to public inspection free of charge, and a summary of the partnership deed to be sufficiently advertised in the local papers.

4th Dormant partners to be liable to the creditors of the firm, in addition to the sum subscribed by them, to the extent of their share of the profits for the two years preceding insolvency; and a provision to be made extending the offences against the bankrupt laws, and providing for the punishment of accomplices as well as principals in any offence against the bankrupt or insolvent laws.

5th. That whenever the directors should have proof that the partnership capital had sustained a loss of from 50 per cent., or upwards, of their capital, they should be bound to record it in a register to be kept for that purpose, and to announce it in the public papers.

6th. That a provision should be made, allowing a clerk or agent to receive a portion of the profits as a compensation for labour, or a factor a certain proportion of the profits on sales; and that such remuneration should not render such agent or factor a partner, when it appears to be intended merely as a mode of payment adopted to increase and secure exertion.

The objections urged to the commanditaire partnerships resolve themselves into two classes; 1st, Danger that small capitalists becoming commanditaires, led away by the desire of large returns, would be victimized by clever and designing men who would originate such partnerships, and having little or nothing themselves to lose, would engage in the wildest speculations regardless of the consequences. 2nd, Danger to third parties dealing with such a partnership, which, as its liability would be limited, would enter into the most extensive contracts, satisfied to risk its limited capital in the hopes of realizing enormous profits. Now, there is a truism, the correctness of which is becoming every day more generally admitted and acted on ; that it is as futile as inexpedient for a state to provide for its inhabitants anything further than protection from absolute fraud, or to care for those who will not make use of the ordinary prudence and discretion which are requisite in the conduct of all the affairs of life. If this be applied *em* a test to the consid-

oration of the foregoing objections, it will be found that they should not be allowed to prevail to the exclusion of a system which presents so many and such perceptible advantages. But as a matter of fact, it cannot be conceded that either of these objections is well-founded. The unlimited liability system opens the door to as gross frauds on the dormant partners as can readily be imagined. The active partners, most likely, not being men of great wealth, and getting into difficulties, in crder to retrieve themselves, enter on the most desperate and extensive speculations, which may produce either enormous profits or rum the establishment. Parties contracting with such a firm, knowing that the dormant paitneis are men of capital and subject to an *unlimited* liability, although they are fully aware of the extent and danger of the contracts into which the firm is enteimg, do not hesitate, on the credit of the dormant partners, to confirm those dangerous transactions; while, if they were aware that the dormant partners were liable only to a certain extent, they would refuse to enter on such extensive and speculative engagements, and thus an opportunity would not be given to the gerants or acting partners to peril the partnership funds.

Here, then, would be a fair and reasonable protection—a protection which justice demands—given to the doimant partners under the limited liability system; while at the same time third parties dealing with the firm would have always before their eyes a sufficient warning, and would be protected to the extent of fair and reasonable contracts, entered into honestly and bona fide by them, and such as would be within the scope and means of the firm. A very remarkable instance of the truth of these remarks is found amongst other cases, in that of the North of England Banking Company, which stopped payment some years ago, and which, on a capital of £149,000, contracted liabilities to an amount close upon £2,000,000 These liabilities they incurred by a system of re-discountmg with other banks bills which they had taken ; an unusual and illegitimate course of proceeding, amounting to nothing less than borrowing money for the purpose of lending it to their customers.

Mr. T. Lietch, a solicitor m extensive practice, on his examination before the committee, gives the following evidence on the subject:—"The knowledge of the unlimited liability of the shareholders, induces a reckless system of credit being extended to the company by large capitalists, and other banking companies, who advance money to the joint stock bank, or re-discount, on deposit of bills and promissory notes, m a manner that they would not advance money, if it were not for the unlimited liability of the shareholders: and that, in the case of more concerns than one that have come under my own immediate knowledge, has gone on to a frightful extent and now goes on to a frightful extent. Several banking companies—I would not wish unnecessarily to mention names or circumstances—have obtained and do obtain very large advances from other banking companies, from the surplus capital of

those companies, upon the re-discount of bills and notes, the character of which is known to them to be little better than worthless. * * * * Had it not been for that system of unlimited liability, such improper credit would never have been extended, because when a private banker takes paper to be re-discounted, which he would very rarely venture to do, except under circumstances which he could explain, when he takes the paper to re-discount, the bank, or discounting establishment taking the paper scrutinizes the character of the paper: whereas, in the case of the joint-stock bank with unlimited liability, they look less to the character of the paper than to the credit of the innocent shareholders, who know nothing of what is going on. * * * * I think it is of great importance that the public should be protected; but I think that question must be looked at generally, that is, taking all things into account together, both for the creditors, for the shareholders, and the public generally. I by no means say that, considering the creditors only, and putting out of the question every other interest, that the result of safety to the creditors is best arrived at on the principle of unlimited liability; on the contrary, I think the result would be better secured by limited liability. Because the same reckless credit would not be attainable by the managers if there were not the shareholders to fall back upon. I can mention a circumstance in relation to one of these companies. I was conversing with the manager of one of the Scotch Banking Companies about the improper credit extended to the North of England Bank, and I obtained the answer to which I have before alluded, viz., that they looked only to the share list; and the party went on to say, ' even now, a certain establishment wants £100,000, and they have sent us a parcel of the veriest trash that can be gathered together.' My answer was, '1 think you deserve to lose your inoney.*"

Again, as regards the excessive speculation which it is suggested commanditaire partnerships would lead to, is it to be argued that men will be entirely careless as to what speculations they engage in, because, forsooth, failure will not bring utter ruin on them? Are we to take for granted that the sum placed *en commandite* is regarded by the depositor merely as a large stake by a desperate gambler; or is it not more likely such sum as can be spared by the small capitalist, and for which he seeks some more remunerative investment than the public or other securities afford, not being unwilling to run the ordinary risks of calamities from which not even the safest trade can be entirely free? True it is, that the unlimited liability system in many instances protects from every casualty the small capitalist, and from over speculation the community; but it does so by entirely withdrawing that small capital from trade—by refusing monied men a fair investment—by depriving industry of a field for its exercise—and by crushing all speculation as far as it possibly can. Push, however, that argument to its full extent, and if

* Minutes of evidence taken before the Select Committee on the Law of Paitnership, pp. 137, 13S, 1'42, queries, 891, 894, 927, 929.

safety only is to be provided for, safety to the individual from loss, and to the community from over-speculation, that object will be best effected by the small capitalist keeping his money safely locked in a chest in his own custody, while his neighbour, by discounting bills, by making loans, by investing in the funds, leaves himself open to many accidents.

In case of the insolvency of partnerships *en commandite*, a much greater protection would seem to be afforded to the creditors of the firm, and a much more simple process of detecting fraud, or a making away with partnership funds, than when an ordinary partnership is brought before the Bankrupt Court or forced to call a meeting of its creditors. According to the present law, there is no necessity to have any written instrument to constitute the partnership, much less to state in any deed or paper the sums which are advanced by each partner. There may be consequently no data on which to proceed, no sum to be accounted for; and though from the books of the partnership, and the deeds, which as a matter of mutual convenience are generally executed by the co-partners, the court or creditors may be able to ascertain a sum for which some account must be given, yet we must recollect that few partners have the entire of their capital invested in the firm of which they are members—that it is on their general reputation for wealth, not on the sum actually engaged in the partnership, that third parties at present depend, and of this general property nothing can be accurately known. In the case of limited liability, with the provisions already suggested creditors will know the means of the firm; with the most ordinary care, they need not trust them beyond their means; and when such a company suspended payment, there would be a specific sum to be accounted for, and nothing could be easier than to establish the guilt and thus secure the punishment of the partner and his accomplices who could not account for every penny of the partnership funds. Of the many witnesses examined before the committee, two only expressed themselves opposed to the introduction of commanditaire partnerships, Messrs. Cotton and Hawes. After a careful perusal of their evidence, the reasons offered by them resolve themselves into one or other of the two classes already referred to. The sum of Mr. Cotton's objections are found in the following passage, " I think such a system of law would be giving facility to scheming peisons to obtain those sums of £200 or £2,000, the loss of which would be serious to the parties themselves who advance them: it would be an encouragement to parties to advance their money on hazardous speculations. I think it would be particularly the case with women, who, under the idea of getting a little more interest or profit, would be induced to advance £200 or £300 upon some speculative object, when if they were responsible to the full amount of their property, they would be cautious in doing so." This is in substance an objection to every kind of joint stock company, and an assumption that people will generally act with an amount of recklessness and stupidity which would unfit

tliem for the management of their own affairs. Surely if such an observation as the foregoing is worth anything, and the legislature is thus to take heed of people who will act with the most excessive folly at any and every cost, it should be good ground for the introduction of a law absolutely forbidding women to enter into any contract, to take shares in any railway or other company, or to engage in any trade or manufacture; for we have Mr. Cotton admitting that " women are rather liable to be deceived in business transactions, and that they have been more deceived with regard to railways, mines, joint stock banks, and a variety of other things than we are aware of." As an instance of the resorts to which men blindly attached to a fallacious opinion are driven in its defence, a most striking illustration is found in the ridiculous contradiction between Mr. Cotton's replies to queries 598, 599, page 97.—*" I think it is very probable that in a small town, ivhere.people are all "known to one another, there might be an advantage in those little corporations which ivould not exist in England :* nor do I think it likely that the same frauds would be practised there by parties setting up a variety of schemes to induce parties to contribute their portions of capital, which I fear would result from the establishment of small corporations all over England."

Question 599.—" If such towns should turn out to be New York and Boston, with 300,000 people m the one, and 150,000 in the other, and that system works well there, you would probably be surprised at the result ?" "I should not be surprised: I do not think they would work so badly m our large towns here, as they would in our smaller towns. *It is in our smaller towns that the greatest frauds would be practised* "

There are, however, some reasons offered against the limited liability system, which form a different class to that already considered. It is said, and so far with great propriety and correctness, that unless something is to be gained, unless some necessity exists for the change, there should be no legislation on the subject. It is then attempted to be shown that there is not that general separation of capital and industry of which we complain under the existing law. Some are found hardy enough to say that they know of no fair, reasonable speculation, or invention which offered well, where capital could not be had for the purpose of carrying on such trade, or working such invention. As a matter of fact, the truth of this general proposition, opposed as it is to the experience of most people, and to every probability, must be denied. As far as is generally known of such matters, we find that inventions of the greatest utility have lain for many years entirely unknown and unapplied; that the ill-fated inventor is generally ruined, and his small means swept away, in an attempt to carry into operation his improvements; or that the creation of his knowledge and industry, to the perfection of which he may have devoted a life time, is sold for a trifle to some great capitalist, who reaps the greater part if not the whole of the profits.

Mr. Hawes, in his evidence given before the committee, though forced to confess that the accounts of the working of the commanditaire system in Holland, the United States, France, etc. were most favourable, observes, for the purpose of explaining away the effects of this admission, that the law of debtor and creditor is much more stringent in those countries than in England, and that thus the contemplated evils of this system are neutralized. On inquiry, however, we will find that there is very little difference between, say the bankruptcy laws of France (the country from which we have the most favourable accounts of the limited liability law) and those of England. The chief difference is, that in France accomplices in any fraud on the creditors are made criminally liable, and that in cases of simple or as it is called excusable bankruptcy, the creditors anterior to the settlement enter into their entire rights against the~person alone of the insolvent; that is to say, the person .of the insolvent is not in any case protected by passing through the court. If the insolvent is not declared excusable, the creditors re-enter into their individual actions against both his person and property.—*Code de Commerce*, 1838, Articles 526 and 539. Arts. 586, *et seq.* point out what acts shall bring an insolvent within the class of simple bankrupts, viz. when his household expenses are excessive, when he has squandered money at gambling, when he borrows large sums, when his assets are 50 per cent, less than his debts, or when he has resold goods at a loss, when he has been absent without excuse when his case was before the court, when irregularities not amounting to fraud are found in his books, and when all the books have not been produced. On being convicted of simple bankruptcy (it is referred to the tribunal of Correctional Police) he is liable to an imprisonment for one month at least, and for a period not exceeding two years. Arts. 593 *et seq.* point out what shall constitute fraudulent bankruptcy, misrepresentation, purloining any property of the estate, fictitious collusive admission of debts, and fabricating bonds; of which when parties are convicted, they are liable *a travaux forces a temps*, that is, for a period not less than five and not exceeding twenty years.

Let us now see what are the provisions of our law as to offences by bankrupts and the manner in which they are punished. The 44th sec. of 12 & 13 Vie. c. 107, Irish,* provides that any bankrupt who shall not surrender at the prescribed time, or who shall not disclose all his real and personal estate, how disposed of, etc., who shall not deliver up all his estate, books, papers, etc., who shall remove, conceal, or embezzle any part of such estate, being convicted of any of the above offences, shall be liable to be transported for life, or not less than seven years, or imprisoned for any period not exceeding seven years, with or without hard labour, at the discretion of the judge. The 46 & 47 secs.f enact that if any

* The corresponding section of the 12 & 13 Vic. c. 106 (English) is the 104th.

f Sees. 252 & 253 in the English Act.

bankrupt, in contemplation of bankruptcy, etc. shall mutilate, alter, destroy, or falsify any accounts, books, or other documents, or shall make, and be privy to the making of any false entries with intent to defraud, he shall be guilty of a misdemeanor, and liable to imprisonment for any term not exceeding three years, when convicted; and that if within three months before his bankruptcy he should obtain credit for any goods, or chattels, with intent to defraud the owner, he shall be liable when convicted to an imprisonment not exceeding two years. Then, as regards the protection of the Act to such persons as have obtained their certificate of conformity, the 55th sec.*I* provides that when any bankrupt shall have lost by gaming, etc £20 in one day; or within one year next preceding his bankruptcy, £200; or if he have lost £200 by any contract for any speculative sale or purchase of government stock; or if, in contemplation of bankruptcy, he shall have concealed, destroyed, altered or falsified any books or other documents, or caused such concealment, mutilation, etc. or made, or caused to be made any false entry, or allowed any person to prove a false debt, he shall not be entitled to his certificate ; and if he have obtained it, it shall be void to all intents. The substitution of the insolvent for the bankrupt law of this country, as far as the gerants are concerned, would without any further trouble answer the purposes of the provision in the French law, which under all circumstances leaves the person of the bankrupt liable. The 78th sec. of the 3 & 4 Vic. c. 107, (the Insolvent Act) provides that every person seeking the benefit of the act should before the adjudication execute a warrant of attorney, authorizing the assignee to enter up judgment against him for the amount of the debts stated by him in his schedule; and if at any time it should be shown, to the satisfaction of the court, that the insolvent was able to pay his debts, or any part thereof, or that he died leaving assets for that purpose, that the court might permit execution to be taken ont for such sum as they might order; such sum to be divided rateably amongst the creditors. Sec. 79 *et seq.* provides for cases where there should be any difficulty in making the property of the insolvent available.

There can be no apology necessary for going at such length into the comparison of the insolvent laws of England and France, as the great difference between the law of debtor and creditor in the two countries is one of the principal topics employed as an argument against the introduction of the commanditaire partnerships into these countries. With what justice can it be said that men can raise as much money under the existing law as they can properly require, and that there can be no fear, as the usury laws have been abolished, but that small capitalists will have all the temptations to invest in trade presented by that large interest for their money which a share of the profits would offer ? Now, even granting that men retiring from business with small capitals would think well of enter-

J Analogous sec. English Act, 201.

ing into what most right-minded and honourable traders would look upon as a degradation, viz. an usurious contract, and passing by the danger and instability to which any firm is subject who may at some vital moment be called on repay this loan to the utter confusion of all their affairs, and most likely to their ruin, let us not lose sight of the effect which such loans would have on that class for which the opponents of the commanditaire system express so much care—the creditors of the firm. If that firm should become bankrupt, the lender, who, under the commanditaire system, would have been a partner assisting to the extent of the sum advanced, to pay the creditors of the firm, instead of adding to the common stock, would now come in as a creditor, and thus diminish the assets for the payment of the liabilities of the firm.

The reasons which first induced our judges to hold that any person who takes share of the profits of a concern should be subject to all the liability of a partner, are that it would be unjust that any man who takes share of the profits should not also answer for the losses of the firm to its creditors, and also to prevent an infraction of the usury laws, as Lord Mansfield says, "The law with respect to them is not disputed, viz. that they are liable, when discovered, because they would otherwise receive usurious interest without any risk." As to this last reason, the usury laws having been abolished, a maxim of our common law may be considered as sufficiently disposing of it, " Cessante ratione, cessat et ipsa lex " As to the first, it would be difficult to conceive how it can be held m strict justice that any dormant partner, who might receive say a tenth of the profits of a firm as his share, and who had but a small portion of his capital invested in that partnership, should be held liable to his last penny for the debts of the entne. All pretence, however, of injustice to creditors will be removed, when notice is given to third parties dealing with the firm that those dormant partners only engage to be liable for a certain amount, naming it It would be as reasonable to say that a man could not give a limited guarantee for a friend, but that if he said to a third person, " I will be liable to you for the extent of £500 for any credit you may give my friend;" and that unlimited credit were given, and thrice that sum became due, that the creditor might yet injustice turn round and say, " You ought to pay me this entire debt, and not the amount alone specified by you, as it was through your intervention that I first became acquainted with my debtor, and trusted him as I have done." Would not the simple answer, " non haec in foedera veni," be a just and honest defence to such a claim ?

Mr. H. B. Kerr, a gentleman whose opinion has been regarded as entitled to considerable respect, opposes generally the introduction of partnerships *en commandite* into England. Printed queries were sent to several eminent men in England, the answers to which are to be found at the end of the minutes of the evidence taken before the committee.* Among others we have the reply of Mr. Kerr,

* Appendix, p. 165.

and he there admits that, as regards Ireland, the introduction of this system would be most advantageous. He also thinks that charters should be granted at a trifling expense, and with much greater facility, for local undertakings; an admission which would seem to concede the entire question. The chief reason, however, offered by him for his opposition, is the danger of interfering with existing laws, and that he should prefer seeing how chartered companies of small capitalists for local undertakings would work in England, before introducing the commanditaire system. Lord Brougham merely writes that his opinion in favour of the commanditaire partnerships was shaken by a report from Mr. Kerr on the subject. He does not think that there are sufficient guards for the protection of third parties, as they would credit the commanditaires, having opportunities of ascertaining their names; in this observation losing sight of the fact that the sum subscribed would also be before the eyes of such third parties, and that they could then have no excuse for an unlimited trust in the names alone of the commanditaires.

Before offering reasons for asking to have the benefits of the commanditaire system extended to *every* branch of industrial pursuit, it ^wonld be -well to notice some arguments offered against partnerships of limited liability, by men of the highest -mercantile positions in England; and which will be found appended to the Report inferred to by Lord Brougham, made in 1837, by Mr Kerr to the Board of Trade. Messrs. Jones Lloyd, (now Lord Overstone) Thomas Tooke, Larpent, Palmer, Horsley, there express themselves as opposed to the introduction of limited liability, and for entertaining this opinion offer several reasons. Of most of them we have already disposed, but there are some put with an ingenuity which requires a little trouble to explain them away satisfactorily. Mr. Tooke considers that no such encouragement is wanting in England as in France to bring capital into trade, and that therefore there is not the same necessity for limited liability in these countries as in France. Such an argument amounts to nothing more than this: True it is, the system works well in France, and is favourable to the introduction of capital into trade; but the English are a speculative people, attached to enterprise, and *notwithstanding, and in despite of* the difficulties in which they are placed by the existing laws, her merchants have made England the first commercial country in the world. Now, in order to render such reasoning deserving of consideration, it should be assumed that England has reached the climax of commercial prosperity; that it would not be possible, or, if possible, that it would not be desirable, that she should any further extend her trade or invest her capital in manufactures or commerce. As well might it be argued, that because, under the commanditaire system, France cannot compete with England in the extent of her trade, therefore the system under which England is thus prosperous is preferable to that under which France is comparatively speaking so inferior, as regards her manufacturing and

mercantile position and national wealth. The true distinction, it need hardly be said, consists in the character of the people, and nothing shows more strongly the spirit of English capitalists than the fact that, in spite of these drawbacks, the commerce of England is thus flourishing.

It is ingeniously put forward by Mr. Jones Lloyd, that small capitalists do not want for investment, nor industrious men of good repute for capital, under existing circumstances; and that the benefit of the commanditaire system is attained in this way, that the country banks are m the habit of taking deposits of a very small amount, and allowing a fair interest for it to the depositors; and that the money is advanced by the bankers to men of business, who thus are enabled to engage more extensively in trade and manufactures, and thus indirectly the desired object is attained. As far as the small capitalists are concerned, it may be asked, is it sufficient encouragement for them to thus invest, to get something on an average about two and a-half per cent, at the utmost for interest on their money? One would be safe in saying, that while but one man out of a hundred, with a couple of hundred pounds, would thus invest his money, ninety-nine would sink it in a commanditaire partnership. It may be said JboMLy, *tkant* -such an investment for *a* small capitalist possesses little or no inducement. Then, as to capital being thus united to industry, it is doubtful if many banks would be found (it would be contiary to their usual course) to advance money to a young man who possessed nothing but good character and abilities for trade pursuits. Such advances and to such men are not made in the course of business; they are rather a kindness from the friends of such a young man, who may admire his character, and who, under the existing law, should do themselves an injustice by assisting him as dormant partners. Even if the banks should advance money to the same extent as commanditaires, the parties to whom such advances would be made could not have the same confidence or stability; neither, as has been remarked, is there thus the same protection given to third parties, when the lender, instead of increasing, diminishes the assets for the payment of creditors. These parties are at the mercy of such a creditor, who, actuated either by fear or caprice, may at a moment's notice insist on repayment.

One of the apparently strongest reasons against the practical utility of introducing the commanditaire system, is the fact that an Act of Parliament (the Anonymous Partnership Act, 21 and 22 G-eo. 3, c. 46) recognizing the commanditaire priii? ciple, and limiting the liabilities of dormant partners in Ireland, has been of late years almost entirely neglected, and that during the last eleven years but twelve partnerships have been formed under this act. One, and rather an extraordinary reason might be offered for this, that the act is little if at all known of; that by the great trading public, particularly humble men, it has never even been heard of. In the act itself, however, many provisions will be found offering a satisfactory explanation of the

fact, that people so seldom avail themselves of the privileges conferred by it. In the fourth section the following provision is made, after enacting that each subscriber or co-partner, on the execution of the co-partnership deed, should actually pay to the acting partners not less than one-fourth of the sum subscribed; " and in case any of the said anonymous co-partners, his executors or administrators, shall neglect or refuse to pay or tender to the said acting partner or partners the said three-fourths, at the time and in manner aforesaid, *he shall absolutely forfeit, for the benefit of* the said other partners and the partnership creditors, the said one fourth so paid by him, and all profits of the said trade arising during the said partnership from the said one-fourth of his said subscription so had or deposited as aforesaid by him, and shall no longer be deemed or considered as one of said co-partners." It then goes on to provide that such person, and his representatives, shall be liable to the full amount subscribed for, and, at the end or dissolution of the partnership, in case it turned out beneficially, and when each of the other partners had got his principal money, and interest thereon, that then the one-fourth might be refunded to such defaulting partners, without any interest or profits. Although, m justice to the co-partners, some regulation should be made for enforcing payment of the sum subscribed, such a stringent rule as that the dormant partner, if he pay not to the day, should forfeit everything paid by him, should be deprived of all partnership benefits, shoiild remain liable for the full amount subscribed, and at best, and very likely after several years, should be entitled to receive back, without interest or profit, his one fourth, is quite sufficient to terrify any person from engaging in such a partnership, unless he were certain that he would have the entire sum available, to the last shilling, in time to satisfy the requirements of the Act. Coupling this with the provision that the joint stock should not be less than £1,000, that but half profits could be taken until the end of the partnership, and that shopkeepers, selling by retail, should not be within the benefit of the Act, it is easy to ascertain why, particularly m a poor and unenterprising country like Ireland, this Act has proved of such little utility. The above restrictions are unnecessary for the protection of either the co-partners or the public, as has been before shewn. It follows, then, that nothing like a fair trial has been given to the commanditaire system in Ireland. If it were not for these objectionable provisions, the Anonymous Partnership Act would be a mo st excellent one, and might form as safe a basis for future legislation on the subject as could be found.

Thus far merely the general question has been considered, as to the propriety of introducing the commanditaire system. As to the extent to which the sanction of the legislature should be asked, it would be well to offer a few remarks. We have, as an authority for introducing it to the fullest extent, both theory and practice; for when it is once 'admitted that the limited liability system is desirable, it is necessary for those who wish to except particular

pursuits from its operation, to make out and establish a case offering sufficient reasons for so limiting the law. The text writers to whom we have already referred, approve of the limited liability system> generally; and in looking to the entire evidence upon the subject, it will be found difficult to obtain any particular reason which will not come under some one of the heads of objections already referred to, as put forward by the opponents of the system generally. The choice seems almost entirely arbitrary on the part of those who would confine the commanditaire system to particular branches of industry, and exclude others. Mr. Livingstone, considered by Mr. Phillimore one of the greatest jurists that ever lived, in preparing the Louisianian Code, made no exception to the limited liability system in its fullest extent. The best, however, and most faithful test of such laws is to be found in the actual working; and if we look to the United States of America, (a country in which it cannot be denied that the commanditaire system is of the greatest benefit, both to the individuals concerned, and to the public,) we will find that in effect this system is, without any limitation, applied to every species of undertaking, public as well as private; and that of those limitations, which it is sought to impose on the exercise of such a law, there is not one single instance. The only exceptions to the simple partnerships *en commandite* are banking and insurance companies; and for these, charters must be obtained—charters, however, which, unlike ours, require for their procurement but little more trouble and expense than the ordinary *en commandite* partnerships require to perfect. With regard to water works, gas works, ferries, or other public works of that kind, there is a statute as to each, regulating the manner in which persons who wish to associate for the purpose of carrying out such works, may unite themselves and become as corporations. In reply to Mr. Tufnell, Mr. Bancroft Davis, who has been already alluded to, stated that a charter would not cost 1000 cents in the United States. In England, the cost of obtaining a charter would be at least £1,000. Mr. Davis also states it as his impression that the sole official charge is some 8s. or 10s. for an official copy of the Act, and that he has never known a charter refused except on the ground of the proposed amount of stock being too small; and he says (and, from his position and means of judging, his evidence is deserving of the highest consideration) that m his opinion the limited liability law of these States works well; and that the number of failures under that law is much less than among those who are doing business in the ordinary way, and that it acts as a preventive to over-speculation. Towards the close of his evidence we find a passage which needs no comment, and which illustrates more strongly than the fairest reasoning, the utility of the *commandite* system to small capitalists, and the moral effect which it must have on the humbler classes :—"Then, humble people are enabled to become partners with a rich capitalist in the same interest ?"—" Yes; and I have been told, (I cannot state it of my own knowledge,) that in Lowell many of the girls, as well as men, who work in the mills,

own stock in the mills, and many also in banks."—" Does not that, in your opinion, give them an additional interest in the welfare of the country?"—" Certainly, I think so. It gives them what we call * a stake in the hedge.' Certainly, everybody is looking forward, although poor to-day, to being rich to-morrow."

Although very recently some publications on this subject have been printed, and evidence on several of the matters in question, particularly on the working of the commanditaire system, has been given strongly favourable to this law, I have thought it better to confine myself to what ought to be the most trustworthy evidence on the subject, viz. that given to committees of the legislature.

It is difficult to induce the legislature to take a step such as this, and to effect innovations if not a complete revolution in existing laws. They are, and properly so, slow to interfere, unless the necessity is very clearly shown, and the proposed advantages are apparent beyond a reasonable doubt. If, however, this necessity be shown, and these advantages made apparent, it becomes an imperative duty, with all the speed consistent with careful legislation, to introduce the desirable change. The writer of this paper, after considering with all the care and respect to which they are entitled, the opinions of those opposed to this measure, and the reasons offered for those opinions, has come to that conclusion which most dispassionate and disinterested persons in the community would soon arrive at, that there is hardly a shadow of a pretence for saying that the introduction of the *commanditaire* system would not be of the greatest advantage to the community. He can hardly hope to have thrown any new light upon this subject; but if, from collecting and comparing the evidence which has been given, and the arguments which have been offered both for and against the proposed measure, he shall have made a single convert, or in any way forwarded the introduction of this system, he will be amply repaid for any little time or trouble which this paper has cost him.