DEPARTMENT OF LAW

UNIVERSITY OF PENNSYLVANIA LAW REVIEW

AND AMERICAN LAW REGISTER

FOUNDED 1852

VOL. { 58 O. S. / 49 N. S. } NOVEMBER, 1909 NUMBER 2

LEGAL CHARACTERISTICS OF JAPANESE BUSINESS ASSOCIATIONS.

A COMPARISON BETWEEN SUCH ASSOCIATIONS AND AMERICAN PARTNERSHIPS AND BUSINESS CORPORATIONS.

(Continued.)

PART II.

MAIN DIFFERENCES BETWEEN THE BUSINESS ASSOCIATIONS OF AMERICA AND THOSE OF JAPAN.

I. DIFFERENCES BETWEEN AN AMERICAN PARTNERSHIP AND A JAPANESE PARTNERSHIP UNDER THE CIVIL CODE.

In America a partnership is an association for business purposes. Hence voluntary associations for social and charitable purposes, such as clubs and the like are not proper partnerships, nor have their members the powers and responsibilities of partners. But a Japanese partnership under the Civil Law is not necessarily a commercial association. Any group of persons forming a club may be called a partnership, if each member of this club con-

tributes a certain amount of money, property, or service for their common purpose. Only the contribution of some thing in common is necessary to a contract of partnership. But there must be a contribution; a share in the profits does not make a person a partner.

A Japanese partnership is not treated as an entity. The rights and duties of the partnership are the rights and duties of all the partners in common, and consequently, though the act of an individual member may bind all the members of the partnership, it does not follow that the members are jointly and severally liable to the partnership creditors like the members of an American partnership. A creditor cannot compel any individual partner to pay more than his proportionate share. Each partner is unlimitedly liable for his own share. If a creditor knows the proportionate share of each partner when he transacts business with the partnership, he is bound by the contract of the partnership, though the richest partner may hold the smallest share. But the *bona fide* creditor without notice has a right to assume that each partner has an equal share and to hold him liable for such equal share, though his actual share may be less.

A Japanese partnership is simply a co-ownership. The partnership assets are not considered as a security for the benefit of the partnership creditors. The partnership creditors have no priority against the partnership assets, and must therefore compete with the creditors of the individual partners. On the other hand, the individual creditors have not any priority against the individual property, and the partnership creditors may compete with them. In a word, a partnership is not recognized by law as a juristic person. On the other hand, the Japanese partnership is never dissolved by the retirement of an individual member. If the duration of a partnership is not limited by the original contract, or it is provided that the partnership shall exist during the life of a certain member, then each partner can voluntarily retire, but this retirement does not dissolve the association. Even where the duration of the partnership has been fixed,

the member has a right to retire under exceptional circumstances. A member may also retire voluntarily through death, bankruptcy, permanent insanity and expulsion. In short, the Japanese partnership is in no sense a juristic person. Unlike an American partnership from the point of view of third persons, it is never treated as a separate legal entity. From the point of view of the members, however, it may be regarded as even more of an entity than an American partnership, as it is not dissolved by the death or retirement of one of its members. Essentially, however, it is a mere co-ownership; and, as in other cases of mere co-ownership, the property continues though the personnel of the owners and managers may change.

2. DIFFERENCES BETWEEN AN AMERICAN PARTNERSHIP AND A JAPANESE SOCIETE EN NOM COLLECTIF.

According to the Japanese commercial law now in force, the *société en nom collectif,* though a kind of incorporated company, more nearly resembles the American partnership than any other association known to Japanese law. There are, however, several points of difference. The American contract of partnership does not have to be in writing, but a *société en nom collectif* can only be formed by a written contract of association. Even a written contract will be ineffective if it is not made according to the formalities imposed by law. In America the contract of partnership need not be registered. But the formation of a *société en nom collectif,* if not registered in the court, cannot affect third parties, neither can the *Société* begin to carry on its business. After registration, however, if the Société fails for a period of six months to carry on business the court will dissolve it, unless the limitation of time has been extended on the application of its members for some reasonable cause. In America an incoming partner is not liable for the debts of the firm incurred before he became a member, unless he agrees to assume such liability. But the *société en nom collectif* being in a greater degree a separate legal person, a

member is held responsible for the debts irrespective of the time of his admission to membership, and this rule is compulsory and cannot be altered by a special arrangement between the members. The creditor of an American partnership sues the partners; but a *société en nom collectif* must be sued in its corporate name. Although its members are jointly and severally liable for the debts, they cannot be sued as individuals unless it is alleged that the assets of the association have been exhausted and still the claim is not satisfied.

An American partnership may be dissolved by a voluntary or involuntary act of an individual partner. But such an act of a member of a *société en nom collectif* does not necessarily affect the existence of the association. The death, bankruptcy, or permanent insanity of a member is only a cause of his retirement. Neither is the misconduct of a member a ground for dissolution, since the member can be expelled. Moreover, a *société en nom collectif*, is not dissolved by the voluntary withdrawal of a member. Thus, a member may withdraw, if the duration of the association is not limited, unless the limitation is the "life of a certain member," when, as the limitation is illegal, any member may withdraw. So, also, he can voluntarily retire by transferring his whole interest to a stranger with the consent of the other members, or for certain causes stipulated in the original contract.

When an American partnership is dissolved, no particular form of public notice is required; neither need the retirement of a partner be registered in a public office. But the dissolution of a *société en nom collectif* and the retirement of a member must be registered in the court. The joint and unlimited liability of its members cannot be released during five years after the dissolution is recorded, and a retired member is still liable during two years after the registration of his retirement.

3. DIFFERENCES BETWEEN AN AMERICAN LIMITED PARTNERSHIP AND A SOCIETE EN COMMANDITE.

The *société en commandite* is similar to an American limited partnership, both being derived from the Civil Law. The limited partnership in America is treated as a form of partnership; in Japan, as on the Continent of Europe, it is merely a form of association recognized by the Commercial Code.

In America the contribution of the special partners must be actually paid in before the certificate is filed and the certificate must contain a recital of that fact. The affidavit, when required, must aver the payment of the contribution. But it is quite unnecessary for a member of limited liability of a *société en commandite* to pay for his contribution before its formation is recorded. The article of association must set forth the value or estimated value of the contribution, but not its actual payment or delivery. Again, in America, it is generally provided that no part of the sum contributed by a special partner as capital shall be withdrawn by him or be paid or transferred to him in the shape of dividend, profits, or otherwise, at any time during the continuance of the partnership. Under such a provision the special partner cannot withdraw his capital during the life of the partnership, even with the consent of the general partners. But the members of limited liability of a *société en commandite* can voluntarily or involuntarily retire without dissolving the company, and in such a case, they are entitled to withdraw the capital contributed by them. The law does not impose any duty upon them in the event of retirement except that the fact must be recorded with the court. The members of unlimited liability may also retire as in the case of a *société en nom collectif* without dissolving the association. The members of unlimited liability are continually liable, during two years after the recording of their retirement, for debts contracted before their retirement, but this rule is not applicable to members of limited liability.

In America a special partner may be subject to the lia-

bilities of a general partner, if the organization of the partnership is defective. Thus, the special partner has been held generally liable on the ground that the statements contained in the certificate were false, though the falsehood was unintentional. But the formation of a *société en commandite,* if not properly registered, would be voidable, but not absolutely void. Before it is cancelled by the court, the members of limited liability cannot be held unlimitedly liable. So, too, a special partner becomes liable as a general partner, if any alteration be made in the names of the partners, the nature of the business, or the capital stock of the firm, or in any other matter specified in the certificate. But the articles of association of a *société en commandite* can be freely altered by the unanimous consent of the members without effecting the liability of either kind of members. The alteration must be recorded in order to effect third parties; but if not recorded, it is still valid between the members.

In America the death of a general partner always results in the dissolution of the partnership, and the death of a special partner has often the same result. But the death of a member of unlimited liability of a *société en commandité* only operates as a retirement; and if the members of limited liability die, their interest in the company will go to the hands of their representatives. Moreover, the members of limited liability do not retire in case of permanent insanity.

Notice of dissolution or retirement is necessary both in the case of a *société en commandite* and of a limited partnership. But, in Japan, as has been pointed out, the members of unlimited liability, like the members of a *société en nom collectif,* are only continually liable for debts contracted while they are members for a period of two years after the dissolution or retirement is registered, and the members of limited liability are released from any responsibility after the registration of their retirement.

4. DIFFERENCES BETWEEN AN AMERICAN CORPORATION AND A SOCIETE ANONYME.

A *société anonyme* resembles an American corporation both in form and in substance. There are, however, important differences in regard to formation of the association, the contract of membership and other important matters.

A. Formation.

The *société anonyme* is not incorporated by the legislature, like an American corporation, but voluntarily formed by individuals. Now that it is generally possible in America to form a corporation by mechanical compliance with a general incorporation law, this difference is not so marked. The *société anonyme,* however, can be formed for any lawful business purpose, while in America, though recent legislation in most of the States tends to produce the same result, in no State is the result completely attained. On the other hand, in Japan there is a far greater actual supervision over the various steps leading to the complete formation of the *société anoyme,* than there is in America. This supervision is exercised by the Court. The formation of the association is not valid against third parties unless it has been registered. The result of the attempt to do business under a defective organization is doubtful. The first commercial code expressly provided that in such a case the members of the association would be jointly, and unlimitedly liable for the debts. The present commercial code fails to cover the matter by an express provision. Joint and several liability is a principal of the commercial code only. If the act of attempting to do business under a defective organization of a commercial association is an act subject to the commercial code, the members would be jointly and severally liable; if it is regarded as an act not subject to the commercial code, the members would only be liable as the members of a Japanese partnership are liable, that is, each member would be unlimitedly liable for a portion of the debt

equal to his interest in the association. Before the registration, if the promoters subscribe the total amount of shares, the Court will appoint a visitor to investigate it. After registration, a special visitor may be appointed on the application of a certain number of shareholders for the purpose of examining the corporate business or assets. The alteration of the article of association, the issuing of bonds, consolidation, dissolution and liquidation are also recorded in the Court.

The articles of association of the *société anonyme* may be freely drawn up by the promoters or the preliminary meeting. These articles, therefore, are not like the charter of an American corporation, which is in a form fixed by law. The particulars which appear in the articles of association of the *société anonyme* may be divided into three parts; some are essential to its validity, such as the amount of capital, the amount of each share, etc.; some are not absolutely necessary, but the omission of them will render it impossible to claim that these provisions really exist, such as the special interest given to promoters, the compensation for their services, etc.; the rest are those which may or may not be set forth, as the members desire, such as the salary of directors, the penalty imposed on delinquent shareholders, etc. In a word, the promoters or the preliminary meeting can put anything in the article of association, if such a thing is not in violation of law.

It is said that the formation of an American corporation involves a contract, not only between the corporators, but a contract between the state and the corporation. In Japan, however, there is only a contract between the corporators. The registration in the court is not a contract between the state and the corporation. This registration is compulsory, not voluntary. It is simply a notice to the public through the judicial body or arm of the government, and this body by accepting the registration, warrants that the association is properly formed and may enjoy certain corporate rights under the commercial law.

B. Differences in the Contract of Membership.

It is the duty of the promoters of a *société anonyme* to provide a certain kind of blank form, in which the important points of the article of association, the amount of shares subscribed by the promoters, and other particulars must be set forth. Each subscriber should fill up, sign and file two of these blank forms, one for the corporation and the other for the Court. If the promoters or subscribers fail to observe the formalities imposed by law, the subscription is void. As a result of this provision, the weight of authority in Japan is to the effect that the law will not recognize any subscription made upon conditions precedent or upon special terms, as it will in America.

After a *société anonyme* is recorded, the contract of membership cannot be rescinded on the ground of fraud or duress, because the rescision would be an injury to the persons who transact business with the corporation. But there are two grounds on which a subscriber has a right to rescind his original contract: first, when one fourth of the capital stock is not paid in within one year after the subscription; secondly, when the preliminary meeting of shareholders is not called during six months after the payment of one fourth of the capital. In both these cases, the subscriber can claim the repayment of the amount he has paid.

The contract of membership of a *société anonyme* can be altered by the general meeting of shareholders. In order to alter the contract it is not necessary to obtain the unanimous consent of the members. A majority both in number and in interest will be sufficient. The dissenting minority has no right to withdraw or to compel the majority to conform to their original contract. Any alteration of the original contract must be recorded, otherwise it would not effect those persons who transact business with the corporation.

Shares of stock in a *société anonyme* can be declared forfeited for breach of contract; that is, non-payment of calls. It is held in the United States that the shareholder

who has forfeited his shares is discharged from liability for any calls remaining unpaid, although the shares may sell for less than the amount of the calls. But, in Japan, the delinquent shareholder is not only obliged to make up the deficiency, but also to pay damages suffered by the corporation, or to pay a penalty if a penalty is provided by the articles of association. If the shares are sold for more than the amount of the calls, the corporation is under no obligation to give back the balance to the delinquent shareholders.

C. Differences in Regard to the Transfer of Shares.

A shareholder of a *société anonyme* can transfer his shares to a man of straw, but by a mere transfer, his liability as a shareholder is not necessarily discharged. If the transferee fails to pay for calls and his shares are declared forfeited, the corporation can make a call upon the original shareholder. In such a case, if the transferor pays the whole amount in arrear, he will become a shareholder again; but if not, he will be obliged to make up the deficiency in case the shares are sold for less than the amount of the calls. The original shareholder is also liable for the damages suffered by the company and the penalty, if any, imposed by the articles of association for the non-payment of calls. The liability of the original shareholder for calls is released after the transfer has been executed for two years.

There are two kinds of shares in a *société anonyme*—signed and unsigned. Shares are generally signed by the shareholders, but the full paid-up shares can be changed into unsigned shares with the consent of the association. Unsigned shares are transferred by delivery like other chattels, but signed shares are transferred by writing the name of the transferee on the certificate and also his name and address on the books of the company. Thus, if the shares have not been transferred in the books of the *société*, the transferee of the certificates, though a *bona fide* purchaser for value is not protected as equitable owner.

D. Differences in Regard to the Officers of the Corporation, Their Rights and Duties, and the Rights of Shareholders Against the Officers.

The officers of a *société anonyme* consist of two parts, the board of directors and the auditor or auditors. As in the case of the directors, the auditor is appointed by the majority of the general meeting of shareholders. The number of directors must be more than three, but the number of auditors is not limited. The term of office for a director must not be more than three years. There are, however, no other limitations. On the other hand, the term of an auditor must be one year. The object of this rule is to prevent a conspiracy between the auditor and the directors resulting from a long acquaintance with each other. The director must own the number of shares stipulated in the articles of association; but it is sufficient for an auditor to own even a single share. The auditor has power to examine the corporate business and assets. On his demand, the board of directors is obliged to make a report to him. A week before the general meeting of the shareholders is held, the board of directors must present the books and accounts of the company to the auditor and ask for his examination and report. The auditor can express his opinions to the general meeting of shareholders in regard to the accounts and books presented by the board of directors. The auditor has a right to call a general meeting of shareholders if he thinks fit, especially in case the directors negligently or fraudulently decline to call a meeting. When a director or directors want to transact business with the corporation, they must get the permission of the auditor. When the directors are sued by the shareholders, the auditor represents the corporation as plaintiff. The auditor cannot hold the office of director or manager, since his duty is to oversee the board of directors.

The directors of a *société anonyme* are appointed from the shareholders. They must deposit a certain number of shares with the auditor. This is to prevent the directors

selling all their shares and thus losing their interest in the corporation. The deposited shares, however, are not a security for the performance of their duties, and therefore the corporation has not a lien upon them. It was construed by the Japanese Supreme Court that the appointment of directors is not an offer. Thus, the appointment will be valid even if they have not accepted.

It seems to me that the directors of a *société anonyme* are not vested with so much power as the directors of an American corporation. For instance, the directors of an American corporation have, to a great extent, a discretionary power to decide whether the profits should be withheld in the corporation or distributed to the shareholders; but in Japan this power is only vested in the majority of the general meeting of shareholders. On the other hand, the majority of the general meeting of shareholders has much more power than in an American corporation, as is shown by the fact that the majority both in number and in interest can alter the original contract without the consent of the minority, even to altering the character of the business. As stated, the directors of a *société anonyme* can be sued by the corporation. In such a case, the auditor will represent the corporation as plaintiff. If the general meeting of shareholders does not like to have the auditor act as a representative, they may appoint someone else to represent the *société* instead of the auditor.

So also the minority in the *société anonyme* would appear to have much more efficient weapons for the protection of their rights in Japan than have the minority of an American corporation. Thus, if the majority of the general meeting of shareholders, siding with the directors, or the directors themselves, have enough shares to control the general meeting, the minority, whose shares amount to one-tenth of the capital, objecting to the action taken, have a right to make the auditor as plaintiff representing the corporation, sue the directors, as defendants. And in such a case the minority may appoint another representative instead of the auditor

just as the majority may do when they desire to sue the directors.

The directors can sue the corporation, represented by the auditor. So also, the auditor can sue, or be sued by the corporation represented by the directors. The minority of shareholders have the same right to sue the auditor as the directors have.

E. Differences in Regard to the Corporate Funds and the Rights of Directors.

The capital stock of a *société anonyme* must be contributed in money or in the form of property to be used in the association's business. A contribution of services by a shareholder would not discharge his obligation to creditors. Moreover, it was held by the Japanese Supreme Court that the shareholder cannot discharge his duty by a mere delivery of promissory notes, bills of exchange, checks, or bonds, but that he must actually pay in cash. The contribution must be examined and acknowledged by the visitor appointed by the Court. But, under a special statute for railways, no property can be contributed by the shareholders of a *société* for the conduct of a railway except money.

The capital of a *société anonyme* cannot be decreased without the consent of the creditors. When the general meeting of shareholders resolves to decrease its capital, a notice must be given to the creditors. If they object to the resolution of the general meeting, the corporation is obliged to pay its debt or provide a security for its creditors, before the resolution can be carried into execution. The *société* is absolutely prohibited from becoming the owner or pledgee of its own shares, lest the capital should be diminished.

It is the duty of a *société anonyme* to reserve a certain amount of money as a sinking fund. Until the amount of the sinking fund reaches one-fourth of the capital of the association, one-twentieth of the net profits must be kept in the association before the profits are distributed to the share-

holders. This fund is called the compulsory sinking fund, and every *société anonyme* is obliged to observe this law, irrespective of the nature of its business.

The shareholders of a *société anonyme* never assume an additional liability beyond their contribution, as do the shareholders of a national bank in the United States. Some of the Japanese writers have proposed that a kind of English Company called the Association Limited by Guaranty, should be introduced, which would have this feature, but this proposal has not as yet been adopted.

F. Differences in Regard to Dissolution and Consolidation.

A *société anonyme* can never be dissolved by the legislature; only by the court. The bankruptcy of the corporation is one of the causes of its dissolution. Whenever the amount of the corporate debts is in excess of that of the corporate assets, the directors must apply to the court for a declaration of bankruptcy. If they fail to do so, they are subject to a fine.

The majority of the general meeting of shareholders has power to decide whether the corporation should consolidate with another company. But if the creditors reject the consolidation, it cannot be carried into execution, unless the corporation has paid its debts or provided a security which satisfies the creditors.

5. CONCERNING THE SOCIETE EN COMMANDITE PAR ACTIONS AND THE OLD SOCIETE EN COMMANDITE.

There is no exact equivalent of the *société en commandite par actions* in the United States. It is really a kind of limited partnership, the special partners being shareholders. Since the business of the *société en commandite par actions* is managed only by the members of unlimited liability, the association also resembles those American corporations whose directors are unlimitedly liable to creditors under statutes, though the liability of the latter is not created by contract and they become liable only under certain con-

tingencies. These American corporations are also like the old Japanese *société en commandite,* but the capital of the old *société en commandite* is not divided into shares and the interest of a member in the association cannot be freely transferred to strangers as in the case of an American corporation. It is said that the old *société en commandite* is the equivalent of an English joint stock company, but the power of the member of a joint stock company to transfer his interest and the individual liability of the members of such company are sufficient to show the fundamental differences between the two kinds of companies.

In some respects, the old *société en commandite* is similar to the partnership associations existing in some States of the United States, since they both are associations of *delectus personarum* and their members are limitedly liable to creditors. But the members of a partnership association are always limitedly liable unless they are held as general partners in case of any substantial defect in the organization or violation of the duties imposed by law. In the old *société en commandite* a part of the members may be unlimitedly liable to creditors under the original contract of membership and those who direct the affairs of the *société* are always individually responsible for the debts incurred during their administration.

The nearest approach to the old *société en commandite* in the United States which the writer has been able to find, are the registered partnerships under the Act of 1899 of the State of Pennsylvania, where at the option of those forming the association some or all of the members may be of limited liability. In the American association, the managers are not necessarily liable for the debts contracted during the period of their management, and, unless the articles of association expressly permit, the transfer of the interest of one of the members, while he succeeds to the property rights of the transferor, does not entitle him to participate in the subsequent business of the partnership, unless elected as a member by a vote of the majority in number and interest of the remaining members.

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