PARTNERSHIP BANKRUPTCY.

A partnership under English law does not possess an entity distinct from that of the individual partners and the laws of bankruptcy apply to the winding up of a partnership which is insolvent. In general, the provisions of the Bankruptcy Acts do not distinguish between the bankruptcy of an individual who is not a partner in a firm and the bankruptcy of an individual who is. The legal procedures and legal incidents of bankruptcy apply to each individual member of the bankrupt partnership, as they would if he alone were bankrupt.

The bankruptcy of an individual member of a partnership does not necessarily mean that the partnership itself is bankrupt. However, the bankruptcy of a partnership necessarily means that each of the partners in the firm is bankrupt.

However, Section 63 of the Bankruptcy Act, 1914, provides that where one partner of a firm is adjudged bankrupt, a creditor to whom the bankrupt is indebted jointly with the other partners of the firm, or any of them, shall not receive any dividend out of the separate property of the bankrupt until all the separate creditors of the bankrupt partner have received the full amount of their respective debts. The consequences of this rule are considerable.

The legal principle regarding the liability in contract of a partnership is that each of the partners is jointly, but not severally, liable for partnership obligations. Accordingly, unless the particular contract provides otherwise, each partner is jointly, but not severally, liable with the other members of the partnership for its debts. This is not the case as regards liability in tort; each partner is jointly and severally liable with the other partners for any torts committed by the partnership. Nevertheless, as regards contractual liabilities (unless the contract otherwise provides) the liability of the partners is joint only, and the provisions of Section 63, as mentioned above, mean that, in the bankruptcy of the partnership, a partnership creditor has only a claim against partnership assets, in the first instance.

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The separate creditors of a partner will claim in the separate estate of that partner and receive the dividend available from that estate. Clearly such creditors will have no claim against the partnership property, unless that property is sufficient to pay out the partnership debts in full and to leave a surplus which is distributable, in the appropriate partnership proportions, amongst the estates of the individual partners. Conversely, as we have seen under Section 63, a creditor of the partnership will have no right of recourse to the separate estate of any individual partner unless there is a surplus in that estate after all the individual partner's creditors have been paid in full.

However, a creditor of the partnership who has stipulated in his contract that the partners shall be severally, as well as jointly, liable for the debt (as Banks usually do) and also anyone who has a provable claim against the partnership based on a tort committed by the partnership, have an advantage in respect of their claims, inasmuch as they are able to maintain a claim against the partnership estate and also a claim in the estate of each of the individual partners, providing that in no circumstances may the claimant receive, in total from all his claims, an amount exceeding the full sum due to him. Nevertheless, of course, in normal circumstances a claimant who has rights against both the partnership estate and the separate estates of the partners will recoup a higher percentage of his claim than would have been the case if his claim was maintainable only against the partnership estate.

All we have received by way of written evidence on the question of partnership bankruptcy is to be found in C4 and C117, of which summaries are attached, and in the Department of Trade memorandum, a copy of which is also attached. Of the points raised by the Department, there seems to be no obvious solution to the occasional difficulties experienced in identifying and tracing partners and procuring their surrender to the bankruptcy proceedings. The problem might indeed become somewhat worse, if the Register of Business Names were to be abolished. However, similar difficulties can arise in respect of many of our legal processes and their significance in partnership bankruptcy does not seem to be sufficiently great to justify any change in the present legal

position. As regards the Department's comments on preferential claims, these would be satisfactorily met if the Committee's general recommendations about such claims are accepted. The fact is that little written evidence has been received and the tenor of that evidence suggests, in general, that the present law works satisfactorily in partnership bankruptcy and needs no alteration.

However, if in the light of the above comments the Committee feel that there should be some change in the rights, in insolvency, of a creditor who has a joint and several claim against partners in a firm, it should be borne in mind that, in view of the long-standing and firmly-based legal principles relating to the liability of partnership, when solvent, it is likely that there would be considerable opposition to a change in those principles, and to change them, where insolvency supervenes, would result in different principles being applied to the incidence of liability upon partners during the solvency of the partnership from those applicable after bankruptcy had occurred. Thus the Committee may agree that in all the circumstances no changes in the present law are called for.

LIMITED PARTNERSHIPS

The Limited Partnerships Act, 1907, enables partnerships to be formed in which the liability of one or more of the partners is limited to the extent of the amount of capital each has contributed to the partnership in question. In a limited partnership there must be at least one general partner whose liability is not limited. A limited partner may not take any part in the management of the firm and, if he does so take part, he is fully liable for all debts and obligations of the firm incurred while he is so acting. Further, a limited partner may not withdraw any part of the capital he has contributed; if he does so he remains liable to the extent of both the remaining and the withdrawn portions. A limited partnership must be registered with the Registrar of Companies and failure to do so makes it an ordinary partnership as regards all its partners, limited or unlimited. However, the name of the firm need not show in any way that the partnership is a limited one.

No evidence has been received to suggest that any special problems arise in respect of the law applicable to the bankruptcy of such partnerships.

They are administered in bankruptcy in the same way as general partnerships, except for the minimum changes necessary to take account of the position of the partner or partners whose liability is limited.

PETER AVIS
JOHN ENDERSBY
JUNE 1980

PARTNERSHIP BANKRUPTCY

WRITTEN EVIDENCE SUBMITTED TO 16/6/80

C4 Furniture, Timber & Allied Trades Union. London District No.18

Attention is drawn to a father and son partnership which ceased to trade and failed to pay, in respect of an employee, accrued holiday pay, wages both earned and in lieu of notice and a protective award made by an Industrial Tribunal. In addition NI contributions had been deducted but not paid to the Dept. One partner (the son) has become personally insolvent but the father is ostensibly solvent and does not respond to correspondence. The OR has sent a proof of debt but points out that the claims of partnership creditors are postponed until the debtor's personal creditors have been paid in full. There are grounds for believing that the business is being carried on elsewhere as a limited company.

C117 CCAB

The CCAB, referring to s.33(6) and ss.114, 116-119 (BA 1914), say that the present law appears to work well and there does not seem to be any area for change.