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The following piece was offered at the time of its date. Its inſertion was then ſuſpended under the impreſſion that a publication of it on the DAY ANTECEDENT to the opening of the books of the Potomac Bank might have an undue influence on ſubſcriptions, inaſmuch as the facts and reaſoning of the writer, however incorrect, could not be anſwered before the contemplated effect ſhould be produced. Believing the ſubject of eſtabliſhing banks, private as well as public, to be of conſiderable importance, it is with pleaſure we comply with the premiſe, made at the time of declining an immediate inſertion, to admit the ſubjoined performance when the cauſe of ſuſpenſion ceaſed to operate.——Editor of N. I.

For the NATIONAL INTELLIGENCER.

REFLECTIONS

ON

PRIVATE BANKS.

Mr. Editor,

IN the communication, on Banks, which you did me the favor to publiſh in your paper of the 24th inſt. it was hinted that every individual ſubſcriber to a non-incorporated bank would be liable in his whole fortune for the debts of the bank—unwilling, at that time, to treſpaſs too far on your columns, I refrained from entering into a reaſoning on this point: on more mature reflection, I can but think it important to that part of the community about to embark in aſſociations of the nature alluded to, to receive ſuch information as, if not ſatisfactory or concluſive in itſelf, will at leaſt direct their attention to the different parts of the ſubject not generally underſtood and enable them to make the requiſite enquiries. With this view principally, I will once more aſk your indulgence to uſe your paper, to adduce ſome arguments before purpoſely omitted—and to add ſome obſervations, which had eſcaped me when I laſt addreſſed you.—Firſt, as to the queſtion of liability—"A partnerſhip is a voluntary contract between two or more perſons for joining together their money, goods or labour upon an agreement, that the gain or loſs ſhall be divided proportionably."—This is the plain definition of a partnerſhip, intelligible to all men. But for the better underſtanding the effects of, and conſequences reſulting from ſuch an aſſociation, it is proper to conſider the relative ſituation of partners, as between each other and between themſelves, jointly and ſeverally, and the reſt of the world.

As between themſelves only, the contract of copartnerſhip entered into between them muſt govern and control. But as between them and the reſt of the world, their contract of copartnerſhip has no operation. A partnerſhip is a creature of human invention, formed as we have ſeen of two or more natural perſons. This creature has certain rights, duties and reſponſibilities, attached to it in its artificial capacity.

To aſcertain what theſe rights, duties and reſponſibilities are, we muſt reſort to the law reſpecting partnerſhips and joint trading. The firſt rule is, that all the partnerſhip effects are anſwerable for the demands againſt the partnerſhip.

This rule is applicable to partnerſhips in all countries. Under our law, the ſecond rule is, that the perſon of each partner is anſwerable for all ſuch demands, and that of courſe produces the third rule, to wit, that all the individual and private property of each partner is alſo ſubject to ſuch demand. For altho' in ſome parts of the world, confined and limited partnerſhips are allowed, under certain regulations; by the Engliſh law, which is our law, they are wholly diſallowed, and with us the rule is "That if a partner ſhares in the advantages, he ſhall alſo ſhare in all the diſadvantages of the partnerſhip concern."

Trading companies incorporated in England by royal charter, or banks incorporated in this country by legiſlative authority, are not partnerſhips; they are not within any of the legal principles applicable to partnerſhips, formed by the voluntary agreement of individuals. In ſuch acts of incorporation, there are expreſs proviſions, that the members ſhall not be liable in their individual capacities, on account of their joint buſineſs. This is ſo repugnant to the cuſtom of merchants reſpecting partnerſhips, and to the principles of law reſpecting joint traders, that it has been uniformly adjudged ſuch companies do not conſtitute partnerſhips.

Taking into view the definition of a partnerſhip, there can be no doubt that theſe late attempts to create banks without legiſlative authority, have and will conſtitute ſo many partnerſhips conſtituted of the individual ſubſcribers to, and ſtockholders in the reſpective projected inſtitutions. They come preciſely within the legal and technical definition of a partnerſhip. "Two or more perſons by a voluntary agreement joining together their money upon a contract, that the gain or loſs ſhall be divided proportionably."

They have indeed attempted to annex to this partnerſhip, a quality that would tranſmute it into an incorporated company, but no individuals poſſeſs the power to effect this, it is a power belonging excluſively to the legiſlature. It is an attempt, by individuals, to change and alter the law of partnerſhips, which they are no more competent to do, than to change the law of deſcents, the law concerning marriages, or any other branch of the exiſting law. Should a company of merchants enter into partnerſhip for carrying on commerce, but before their commencement, advertiſe, that their capital was made up by a ſpecific ſum of money paid in by each partner, and that thoſe, who dealt with them, were to rely on this capital only, and to have no recourſe to them individually; would ſuch an advertiſement have the effect to abrogate the law reſpecting partnerſhips? Or would it produce any effect other than to expoſe the attempt to general ridicule? How do theſe propoſed aſſociations differ from ſuch a ſuppoſed partnerſhip? In nothing, but in the nature of the buſineſs they are about to purſue. But this difference, they vainly ſuppoſe, affords them completely the means of evading the law; this will be the ſubject of future conſideration.

The power of repealing, is as important a Branch of Legiſlation as the power of enacting: heretofore, in this country, they have both been deemed to belong excluſively to the repreſentatives of the people conſtitutionally elected for that purpoſe. But theſe perſons have reſorted to ſubtle inventions to evade the exiſting law in this particular, in which, if they ſucceed, they will have gained one branch of legiſlative authority; the power of abrogating and repealing exiſting laws; and having gone ſo far, they will no doubt by ſome new device, very ſoon obtain the power of enacting laws. It is to be regretted, that theſe ſchemers do not bear in mind, that every attempt to evade the ſettled principles of law, is idle and ineffectual.

But let us conſider theſe ſubtle inventions. As they deal wholly in money, the device reſorted to, is, that in their bank notes, which they iſſue as the repreſentative of money, they ſet forth capitals, refer to the terms of their aſſociation as publiſhed, and reſtrict the notes for payment to that ſpecial fund. Thereby reſorting to another principle of law, which declares that a note drawn upon a ſpecific fund creates no perſonal reſponſibility, on any body. But this ſubterfuge for protection from perſonal reſponſibility, if underſtood by the world at large, muſt effectually deſtroy the contemplated Bank, by preventing the circulation of its notes. For if it be true, that theſe notes drawn upon a particular fund, will create no reſponſibility upon the ſtockholders, a circumſtance not calculated to give them additional credit, it is equally a clear and ſettled principle of law, that ſuch a note is not negotiable under the ſtatute of Anne, & therefore cannot be aſſigned or transferred from one to another, ſo that the holder of ſuch a note, unleſs it be payable to himſelf, can have no more authority to demand payment, than would the holder of a bond who found it in the ſtreet, which was payable to another, and not endorſed by the obligee.

That theſe aſſociations do, to ſome purpoſes, conſtitute partnerſhips, cannot be denied. Their buſineſs is ſimple.—They take the note of an individual for a given ſum, and they give him their notes in exchange, their notes being deemed equal to ſpecie. The reſult then is, that the note they receive is payable to the partners, by their partnerſhip name, and is a genuine partnerſhip tranſaction and debt, whilſt thoſe they give in exchange for it, being charged upon a particular fund, create no reſponſibility upon any perſon. The one ſide of the ſame contract is purely a partnerſhip tranſaction, and ſubject to all the principles of the law of partnerſhip, the other ſide has nothing of a partnerſhip tranſaction in it, and is ſubject to none of the principles of the law of partnerſhip. Such are the ſtrange abſurdities and difficulties, in which thoſe are involved, who ſeek to evade the ſettled principles of law.

But this ſubterfuge is a vain one. Theſe men aſſociate themſelves together. They ſay they will by different inſtalments, create a capital to a given amount. That this capital is the only fund to which thoſe who deal with them, are in any event to have recourſe. Here they ſtop; but this does not contain a true ſtatement of the caſe, to enable us to form a correct opinion. We muſt add to this ſtatement; that they themſelves are to declare when this capital has been paid in, they themſelves are to have the management and controul of this capital, none but ſome one or more of themſelves can be admitted to examine their proceedings, they themſelves are to declare when this capital ſum is exhauſted, and when one of their notes is preſented for payment, they themſelves are to determine whether they themſelves will pay. Can there be a caſe among individuals, where there has been no legiſlative interference, in which a note paſſed for a fair, legal and valuable conſideration, created no perſonal reſponſibility upon any perſon whatever? I believe there can be no ſuch caſe. It muſt create a perſonal reſponſibility ſomewhere, either upon the drawer of the note, or upon the owner of the funds, upon which it is drawn. Here the drawers of the notes are the owners of the funds, out of which they are to be paid, and the perſons who are to pay them. In ſome ſhape or other theſe partners muſt be individually anſwerable for all the tranſactions of the reſpective banks. If it ſhould be admitted, that the notes upon the face of them impoſe no perſonal reſponſibility upon the ſtockholders, becauſe of the ſpecial manner in which they are drawn, a point that can never be conceded, ſtill it is certain that in all other reſpects they are partners, and as ſuch are anſwerable for the conduct of each other in the management of theſe funds. They hold out to the world, what the capital upon which they act is, or is to be. Surely each ſtockholder is perſonally anſwerable that this capital ſhould be brought in, and properly managed. This capital being created by various inſtalments or payments from the ſtockholders, if upon the call for the ſecond, third or other inſtalment, the payment ſhould be tendered in their own notes, ſuch a payment will produce no increaſe of capital, and would not be admitted as a compliance with their propoſition for raiſing ſuch capital; nor, as I apprehend, would any thing but the actual ſpecie be deemed a competent payment. When the capital is made up, they have the excluſive and uncontrouled management of it; and for any corrupt or imprudent uſe of it, ſome perſon muſt be reſponſible, and whenever reſponſibility is incurred, ſo far as relates to the creditors of the bank, there is nothing that can fix it upon one of the ſtockholders more than another. At beſt ſhould it be admitted that the bank notes create no perſonal reſponſibility, in the event of a failure of every ſtockholder, to free himſelf from liability, muſt be prepared to prove that the capital ſtock has been fairly and fully paid in; that it was fairly managed, with due care and caution; and that the whole is actually and fairly exhauſted. But it is believed, that no arrangement among themſelves, no device that can be reſorted to, will reſtrain the fundamental principle of law "that he who ſhares in the diſadvantages ſhall alſo ſhare in all the advantages of the partnerſhip concern."

If there be any truth in this reaſoning, it is common to all aſſociations ſet up without the ſanction of the law, and not regularly incorporated, as well in Maryland as in Virginia, or in the diſtrict of Columbia. There are ſome peculiarities, ariſing from the differences in the laws of Virginia and Maryland, as they reſpectively relate to paper tranſactions, which place the ſubject on one ground within the ſtate of Maryland—and that part of the diſtrict of Columbia, to the north of Potomac; on another ground within the ſtate of Virginia, and that part of the diſtrict of Columbia to the ſouth of Potomac. In Maryland, and in ſo much of the diſtrict of Columbia as lies north of Potomac, (the laws of Maryland being there yet in force) promiſſary notes are governed by the ſame rules as are foreign bills of exchange; ſuch notes are negotiable as bills of exchange are from one aſſignee or endorſer to the other, and the holder may after non-payment on ſimple demand from the drawer, immediately have legal remedy againſt any one, or all the endorſers, and this under the ſtatute of Anne, as it is called in the books, an act of parliament paſſed in England during the reign of Queen Anne, and adopted in Maryland, which likened promiſſary notes, not before aſſignable in England, to bills of exchange, and gave them all the negotiable qualities of bills of exchange. In Virginia, the ſtatute of Anne never has been adopted. In that ſtate, and in ſo much of the diſtrict of Columbia as lies to the ſouth of Potomac (the laws of Virginia being there yet in force) promiſſary notes and bonds ſtand, in law, preciſely on the ſame footing, as relates to the community at large, the only legiſlative proviſion is comprized in two acts of aſſembly, ſo ſhort that they may be extracted and inſerted here—Sec. 3d, "An action of debt may be maintained upon a note or writing, by which the perſon ſigning the ſame ſhall promiſe or oblige himſelf to pay a ſum of money or quantity of tobacco to another."—Sec. 4th, "aſſignments of bonds, bills and promiſſary notes, and other writings obligatory for payment of money ſhall be valid; and an aſſignee of any ſuch, may thereupon maintain an action of debt in his own name, but ſhall allow all juſt diſcounts, not only againſt himſelf, but againſt the aſſignor, before notice of the aſſignment was given to the defendant," reviſed code of Virginia, paſſed December 1785, chapter XXIX.—and again, ib. chapter CXCI. ſec. 2d, "a ſuit may be maintained in the name of aſſignee or aſſignees of any bond, bill, or obligation whatever, in like manner as ſuch ſuit may be maintained by the aſſignee or aſſignees of a bond, bill or obligation for the payment of money or tobacco," paſſed December 1795.

In order the more readily to be underſtood, let us apply theſe obſervations to the only two private banking companies in the part of the country which have, as yet, brought themſelves into the view of the public; the *Union Bank* at Baltimore, and the projected bank of Potomac, at Alexandria, the firſt operating under the laws of Maryland, the laſt, if ever it operates at all, under the laws of Virginia.

The firſt, however, in ſpite of all its artifices, it may have ſubmitted the whole fortunes of its ſtockholders to the diſcretion of its directors, as did the celebrated bank of Ayr in Scotland, however, it may have ſubjected itſelf, and the fate of its dealers to legiſlative interference, as in the caſe of the merchants bank at New-York; ſtill it may as yet circulate its private bank notes, without penalty or embarraſſment, (unleſs indeed by inſiſting on their ſpecific fund ſyſtem, they ſhould deprive themſelves of the benefits of the ſtatute of Anne, and they may receive the full advantage and ſecurity of endorſers on the notes they diſcount by the ability to ſue on the face of the note, without off ſet—any or all of their endorſers.—The aſſociates in the bank of Potomac, can only have a very inferior ſort of ſecurity from the endorſers, on the paper they may diſcount:—They can ſue no endorſer until the drawer has been firſt in due diligence proſecuted to judgement, and evidence is given of no property to ſatisfy, from him; this may take years, in mean time the endorſers may fail, or remove out of reach. Thus will their capital be loaned on bonds or paper preciſely, in law, ſimilar to bonds; on which they muſt reſort to this mode of recovery; as to the ſecurities, ſlow and hazardous in the extreme; and moreover ſubject to all diſcounts for tranſactions between drawer and endorſer, and one endorſer and another, until it reached them for diſcount, and until notice of aſſignment be given.

How far this mode of doing buſineſs will ſuit the indiſpenſibly punctual tranſactions of the banking ſyſtem, the public, who know the difference between bonds and bills of exchange every where, and in Maryland between bonds and promiſſary notes, will readily judge—and one would have thought it was a ſubject worth the previous conſideration of the aſſociates to this ſcheme. The legiſlature of Virginia were abundantly ſatisfied, that the banking ſyſtem could not exiſt under any ſuch circumſtances, and in the only two banks ſhe ever did eſtabliſh, ſpecial proviſion was made to give to all the paper, the bank ſhould deal in negotiable qualities, not before poſſeſſed, and to ſubject the endorſers to be ſued in the firſt inſtance. I have not the charter of the bank of Alexandria before me, but the following proviſion made in the law eſtabliſhing the bank of Virginia, paſſed as late as January laſt, will ſufficiently evince the impreſſions on the legiſlative mind at that time—"The bills obligatory, and of credit, under the ſeal of the ſaid corporation, which ſhall be made to any perſon or perſons, ſhall be aſſignable by endorſement thereupon, under the hand or hands of ſuch perſon or perſons, and of his, her, or their aſſignee, ſo as abſolutely to transfer and veſt the property in each and every aſſignee or aſſignees ſucceſſively; and to enable ſuch aſſignee or aſſignees, to bring and maintain an action thereupon, in his, her, or their own name, or names, and bills or notes which may be iſſued by order of the ſaid corporation, ſigned by the preſident, and counterſigned by the principal caſhier or treaſurer thereof, promiſing the payment of money to any perſon or perſons, his, her, or their order, or to the bearer, though not under the ſeal of the ſaid company, ſhall be binding and obligatory upon the ſame in the like manner, and with the like force and effect as upon any private perſon or perſons, if iſſued by him or them, in his, her, or their private or natural capacity or capacities; and ſhall be aſſignable and negotiable in like manner as if they were ſo iſſued by ſuch private perſon or perſons, that is to ſay, thoſe which are payable to any perſon or perſons, his, her, or their order, ſhall be aſſignable by endorſement in the like manner, and with the like effect as foreign bills of exchange now are; and thoſe which are payable to the bearer, ſhall be negotiable and aſſignable by delivery only; and all notes or bills at any time diſcounted by the ſaid corporation, ſhall be, and they are hereby placed on the ſame footing as foreign bills of exchange; ſo that the like remedy may be had for the recovery thereof, againſt the drawer or drawers, endorſer or endorſers, and with the like effect, except ſo far as relates to damages; any law, cuſtom or uſage to the contrary notwithſtanding."—Sec. 8th, rule 9th.

I have ſtated in a former communication that the notes of the intended Bank of Potomac could not circulate in Virginia on account of a law of that ſtate forbidding the circulation of private bank notes; if I conſtrue the law correctly, the caſe is much ſtronger than I then apprehended—the laws of Virginia are in force in Alexandria, ſo too is this very law: Then a bank note can't paſs the threſhold of the bank door without meeting the prohibition immediately in its courſe! but admit for a moment, that all their emiſſions may be compoſed of notes payable to order, and endorſed by one of their officers in blank, may ſo remain and circulate unmoleſted—theſe bank notes then, which ought to be equivalent to ſpecie are no more nor leſs than the promiſſary notes to order, of a private company of traders, governed by the laws of 1786 and 1795, quoted above. They are not poſt notes of the bank, commonly ſo called, as are the notes to order, of other banks, having different legiſlative proviſion—they are virtually the bonds of this banking company, paſſed to a perſon without a conſideration and by him, as the ſervant of the company, to a third, for a conſideration, and have no more force in law or facility in legal negotiability, and recovery, than the bond of any individual in ſociety, and how far the holder of one of theſe notes might be able to maintain an action againſt the bank for the recovery of ſuch a bond or note, may very well be queſtioned. The legiſlature of Virginia ſeem to have thought it requiſite to make a ſpecial proviſion in their act of 1804, (ſee the 2d member of that part of the act herein quoted) for the negotiability of ſuch bank paper in the caſe of the bank of Virginia.

The projectors of the Bank of Potomac, initigated, as it would ſeem, by the apparent ſucceſs of the projectors of the Union Bank, have undertaken to form an eſtabliſhment upon ſimilar principles, and have with very little trouble and much leſs thought, ſimply copied almoſt verbatim, from the newſpapers, the terms of aſſociation given to the world by theſe laſt, without any regard to difference of circumſtances and ſituation; taking it for granted that the monied intereſt of the country would haſten to pour caſh into their coffers without further enquiry. How far they will ſucceed time will ſhew. The pulſations of the bank fever do not appear to be ſo high as they have been, at leaſt delirium ſtage will probably paſs away before the coffers of the Potomac Bank are opened.

N. P.

Auguſt 29th, 1894.

Bank of Columbia.

THE Board of Directors having declared a Dividend for the half year, ending this day, at the rate of 8 per cent. per annum, the ſame will be paid to the Stockholders or their repreſentatives.

WM: WHANN, Caſh'r.

September 21, 1804—4w