St. John's Law Review

Volume 15
Issue 1 *Volume 15, November 1940, Number 1*

Article 10

July 2013

Bankruptcy--Appointment of Receiver as an Act of Bankruptcy--Limited Receivership Under Martin Act (Elfast v. Lamb, 111 F.2d 434 (2d Cir. 1940))

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It seems, therefore, that the objections to the use of the criminal sections of the anti-trust laws against labor unions have no legal basis. The remedy would be to apply to Congress for legislative changes in the present law, and not to attack it on grounds of invalidity of the form of action.[22]

A. A.

BANKRUPTCY—APPOINTMENT OF RECEIVER AS AN ACT OF BANKRUPTCY—LIMITED RECEIVERSHIP UNDER MARTIN ACT.—The appellant, having been adjudicated a bankrupt, seeks to set aside the order of adjudication upon the ground that he has not committed any act of bankruptcy. It was alleged in the involuntary petition that the appellant and his partner, while engaged in the business of selling securities to the public, permitted the appointment of a receiver. The receiver was appointed after an action had been commenced by the Attorney General in the Supreme Court in New York pursuant to the provisions of the Martin Act.[1] The appellant consented to the appointment. The complaint in that action alleged that the defendants had intermingled their funds with those of their customers to such an extent that the assets could not be identified in kind because of such intermingling. The receiver was appointed to take possession of, administer, and liquidate so much of the defendants' property which would be found to be acquired by means of such fraudulent practices in the sale of securities. The appellant in his answer to the involuntary petition contended that this appointment did not constitute an act of bankruptcy as defined by the Chandler amendments to the Bankruptcy Acts.[2] *Held,* the appointment of the receiver did not constitute an act of bankruptcy, proceeding dismissed, order vacated. *Elfast* v. *Lamb,* 111 F. (2d) 434 (C. C. A. 2d, 1940).

The appointment of a receiver in an action pursuant to the provisions of the Martin Act[3] does not constitute an act of bankruptcy. It is expressly stipulated in General Business Law, Section 353a, among other things, that the judgment entered in an action pursuant to the provisions of the aforementioned Act may provide that the powers of the receiver are limited only to those assets which were derived by means of fraudulent acts. This is exactly what had occurred in this case. The order of appointment provided that the receiver is directed to "take possession and title of the property and

[22] See letter of Assistant Attorney-General Thurman Arnold to the Secretary of the Central Labor Union of Indianapolis, N. Y. Times, Nov. 20, 1939, p. 1, col. 4, stating the liberal policy which will be pursued in respect to prosecution of labor unions under the Anti-trust Act.

[1] N. Y. GEN. BUS. LAW §§ 353, 353a.

[2] 52 STAT. 844, 11 U. S. C. A. § 21a(5) (1938): "Acts of bankruptcy by a person shall consist of his having * * * (5) while insolvent or unable to pay his debts as they mature, procured, permitted, or suffered voluntarily or involuntarily the appointment of a receiver or trustee to take charge of his property."

[3] See note 1, *supra.*

assets of every kind and nature of the * * * defendants, derived by means of fraudulent acts, practices or transactions in the sale of securities * * * and liquidate same or any part thereof for the benefit of all persons * * *". From the language of the order it is to be seen that the powers of the appointed receiver were limited. The receivership, which is contemplated by the Chandler Act [4] to constitute an act of bankruptcy, is one where the powers of the receiver are unlimited and general in their scope. There has to be a complete liquidation of all the property of the bankrupt, and, in substance, should amount to a general assignment of the assets.[5]

J. A. S.

CIVIL SERVICE—EXAMINATION FOR UNEMPLOYMENT INSURANCE REFEREE—ASSIGNMENT OF RELATIVE WEIGHT TO WRITTEN EXAMINATION—EXCLUDING LAWYER APPLICANTS WHO ARE NOT GRADUATES OF LAW SCHOOLS.—Petitioners are lawyers who were admitted to the Bar under rules authorized by statute [1] and rules promulgated by the Court of Appeals.[2] Each have had at least five years' experience in active practice. The State Industrial Commissioner was authorized to appoint "subject to the regulations of the civil service" as many unemployment insurance referees as might be necessary to perform the prescribed duties under the law.[3] Accord-

[4] See note 2, *supra*.

[5] Burns v. Maguire, 255 App. Div. 552, 8 N. Y. S. (2d) 313 (1st Dept. 1938), *aff'd*, 280 N. Y. 700, 21 N. E. (2d) 203 (1939). An action brought by a receiver appointed under the Martin Act (see note 1, *supra*) was dismissed because the receiver failed to allege that the cause of action arose out of fraudulent practice; since the receiver was not a "general receiver", he could not maintain the action without such an allegation. The Court of Appeals affirmed the decision of this case upon the authority of *Goldberg, et al. v. Weihman, et al.*, 247 App. Div. 734, 277 N. Y. Supp. 657 (2d Dept. 1935), *aff'd*, 269 N. Y. 537, 199 N. E. 524 (1935). Plaintiff in this case was appointed receiver pursuant to the Martin Act; he sued for an accounting and damages were alleged to have been sustained through the mismanagement of the directors of the corporation. The court held that the acts complained of did not affect the property of the corporation since such assets were derived by means of the fraudulent practices denounced by the Act. Therefore plaintiff had no legal capacity to sue. Hughes v. Ellenbogen, 256 App. Div. 1103, 11 N. Y. S. (2d) 561 (2d Dept. 1939) (the scope of the receivership, contemplated under the Martin Act, is limited to such property as derived by means of fraudulent practices and does not extend to general assets). See People v. Lother, 241 App. Div. 524, 273 N. Y. Supp. 669 (4th Dept. 1934).

[1] N. Y. JUD. LAW § 53.

[2] N. Y. CT. OF APP. RULES FOR ADMISSION OF ATTYS. III, IV.

[3] N. Y. LABOR LAW §§ 518 (6a), 530 (The statutory duties of an unemployment insurance referee are defined as follows: "It shall be the duty of a referee, under the supervision, direction and administrative control of the appeal board, to hear and decide disputed claims for benefits, to hear and decide cases arising under section five hundred twenty-three hereof and to conduct further hearings in connection with the foregoing, as may be required by the appeal board").