in the *Gambino* case the Supreme Court either has repudiated the limitations set down in the *Weeks* and *Byars* cases and the basic conception underlying *Twining v. New Jersey* and cases of like tenor, or has established a shaky foundation for determining the admissibility of evidence by making the instant decision turn on a distinction without meaning—the fact, namely, that the State enforcement act had been repealed.

ABRAHAM E. MARGOLIN, '29.

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## ADJUDICATION OF PARTNERSHIP AS BANKRUPT UNDER VOLUNTARY PETITION IRRESPECTIVE OF THE ADJUDICATION OF THE PARTNERS

The question of whether the adjudication of a partnership as bankrupt necessarily adjudicates the members composing the firm as bankrupts is one which has troubled the Federal courts ever since they have been granted jurisdiction in bankruptcy, with the result that there are two distinct lines of Federal cases. Not until the recent decision of *Liberty National Bank v. Bear*[1] did the Supreme Court of the United States definitely decide the point, holding that the adjudication of the firm did not of itself amount to an adjudication of the individual partners as bankrupt.

The question has always been a knotty one and its decision has always hinged on whether the court recognized the partnership as an entity or not. The very question of the entity of a partnership has troubled the common law courts ever since the idea of partnership associations was conceived. *Newman v. Eldridge*[2] gives us the holding of the law merchant and the civil law that a partnership is considered a legal entity distinct from the individuals composing it. However, the common law for the most part has recognized this entity,[3] and for nearly all practical purposes a partnership in the eyes of the common law is not an entity, but merely a group of individuals.

In equity the situation is somewhat different and as illustrated by *Farney v. Hauser et al.*,[4] the entity of a partnership will be recognized for some purposes. Thus, in the marshalling

[1] (1928), 48 S. Ct. 252.

[2] (1901), 107 La. 315, 31 So. 688.

[3] Flexner v. Farson, (1918), 248 U. S. 289, 63 L. Ed. 250, 39 S. Ct. 97; In re Peck (1912), 206 N. Y. 55, 99 N. E. 258; Cutting v. Daigulau (1890), 151 Mass. 297, 23 N. E. 839; E. I. Du Pont de Nemours Powder Co. v. Jones Bros. et al. (1912), 200 F. 638.

[4] (1921), 109 Kan. 75, 198 P. 178.

of assets, which is purely of an equitable nature, the entity of a partnership is recognized to this extent, viz.: When a firm is in equity for an accounting, or for winding up proceedings, the firm creditors have priority to the firm assets only, and the individual creditors have priority to the individual assets. If there is any surplus after paying the respective debts, the two sets of creditors share *pro rata*. This is the rule of the Uniform Partnership Act as well as of the weight of authority of case law.[5]

However, it is with respect to cases arising under the Bankruptcy Statutes of the United States that there arises greatest confusion in regard to the nature of a partnership, and decisions have swung as a pendulum, first holding one way and then another. The Constitution gives Congress power to regulate bankruptcy, which Congress exercised in passing a Federal Bankruptcy Act.[6] The task is to determine whether a partnership as construed by this act is or is not an entity. Section 5 of the Act[7] deals with partnerships. *In re Bertenshaw*,[8] in construing portions of Section 5, holds that a partnership is a distinct entity, a legal person separate from the partners who compose it. It owns its property and owes its debts apart from individual property of its members which it does not own and apart from individual debts which it does not owe. It may be adjudged bankrupt although the partners who compose it are not so adjudged. Many other cases follow this line of authority.[9]

A leading case tending in the other direction is *Francis v. McNeal*.[10] In this case creditors filed a petition against three persons doing business as the Provident Investment Bureau, a partnership, alleging that the partners were bankrupt individually as well as the firm. The firm was adjudicated bankrupt in June, 1909; one McNeal was appointed trustee and filed a petition to order the partners to turn over their individual assets to him. Francis, one of the partners, objected on the ground that he never had been individually adjudged a bankrupt. The court, however, upheld the contention of the trustee, basing its decision upon the idea that despite the possible fact that the Federal Bankruptcy Act seems to impose the idea of an entity upon a partnership, the common law liability of the partners, nevertheless, was not intended to be cut off. Hence the individual property of the partners was ordered to be turned over to the

[5] U. P. A. Section 40h; Rodgers v. Meranda (1857), 7 Ohio St. 179.
[6] 11 U. S. C. A. 11h.
[7] 11 U. S. C. A. 23.
[8] (1907), 157 F. 363.
[9] In re Meyer (1899), 98 F. 976; In re Mercer (1903), 102 F. 384; Mills v. Fisher (1908), 159 F. 897.
[10] (1913), 228 U. S. 695, 33 S. Ct. 701, 57 L. Ed. 1029, L. R. A. 1915E, 706.

trustee in bankruptcy of the firm. Obviously, the court here came very near to deciding that the adjudication in bankruptcy of a firm *ipso facto* adjudicated the partners individually.

In *Liberty National Bank v. Bear, supra,* W. L. Becker and W. L. Becker, Jr., were partners doing business as W. L. Becker and Co. On August 20, a writ was granted adjudging the firm bankrupt. Prior to that, on July 31 of the same year, the plaintiff bank had recovered a judgment against the firm and the individuals and acquired its lien in the usual method against the separate property of the individuals. They filed their claim with the trustee of the partnership assets (who nine months later also became trustee of the individual assets), and he refused the claim on the ground that the partners individually were adjudged bankrupt by the firm's having been adjudged bankrupt, and that the lien was nullified since it was acquired within four months of the adjudication in bankruptcy. The District Court reversed the decision of the referee, who had found for the trustee, on the ground that the adjudication of the firm did not of itself adjudicate the partners and rendered judgment for the bank. The Circuit Court of Appeals reversed the District Court, adopting the holding of the referee and the line of decisions on which he relied. The Supreme Court in the first hearing[11] straddled the issue without deciding the critical point and sent the case back to be retried on a different theory. The Circuit Court of Appeals again found for the referee and the plaintiff again brought the case to the Supreme Court on a writ of certiorari. This time the Court came directly to the point, holding that the adjudication in bankruptcy of a partnership did not of itself adjudicate the individual partners as bankrupts; hence the bank's lien was upheld as having been acquired more than four months before the bankruptcy adjudication of the partners.

The Court in reaching its decision was faced with the old problem, namely, "Is a partnership a legal entity?" The Bankruptcy Act seems to favor the entity theory. The court points out the difference between the old Bankruptcy Act of 1867 and the present one. The law of 1867 did not permit the partnership entity to become bankrupt, but merely provided that when two or more persons who were partners in business were adjudged bankrupt the property of the partnership as well as that of the partners should be taken over by the court for adminis-

[11] (1928), 72 L. Ed. 255, 44 S. Ct. 49, in which the court reversed the Circuit Court of Appeals on the ground that there was no pleading nor proof as to the insolvency of the Beckers when the plaintiff bank recovered its judgment and that there was no ground under 67C or 67F of the Bankruptcy Act, 30 Stat. 565, for annulling the lien.

tration.[12] The present act not only omits this provision of the former law, but after providing generally that the word "persons" when used in the act shall include "partnerships"[13] and that a petition in bankruptcy may be filed against a person who is insolvent and has committed an act of bankruptcy, declares in Section 5a, *supra,* that a partnership during the continuation of the partnership business or after its dissolution and before final settlement thereof, may be adjudged a bankrupt. The inference here is clear that a partnership as an entity may be adjudged bankrupt; but it is doubtful that Congress intended to impart this idea, which necessarily would carry with it some very peculiar results.

The court then cites *Francis v. McNeal, supra,* and reconciles it with the case at hand on the ground that the court in the former did not decide the point in question, but another one entirely. A close examination of the case, however, will show that the court came near to deciding the case *contra* to the holding at hand. We now have these holdings which, while not *contra* to each other, give rise to the further question, may the two cases exist logically together? A partner individually is liable for the debts of the firm in law as well as in equity. This proposition is too well settled to require citation. This liability is one of the "assets" which firm creditors are entitled to reach, whether the firm is considered an entity or not, as for example, in states recognizing the entity of partnerships, the individual liability of the partners remains intact and unchanged. Therefore, as between a partner and a firm creditor, his individual liability may be regarded as quasi firm property, and accordingly when the firm is adjudged bankrupt, the court has the power to order it to turn over its assets which include the individual liability of each partner. Hence under this argument and under *Francis v. McNeal,* the court may order the partners of a firm which has been adjudged bankrupt to turn over their separate assets even though they as individuals have not been adjudged bankrupt.

Congress in the Bankruptcy Act, as interpreted by *Bank v. Bear,* is taken to say that a firm may be adjudged bankrupt apart from the individuals composing it. Does this mean that Congress intended that the individual liability of the partners, so carefully guarded at common law and equity, is to be removed in bankruptcy proceedings? To adopt such an interpretation would result in making a firm creditor file his claim with the trustee of the partnership, get his satisfaction, and then sue the individuals for the deficiency. This would be imposing a burden upon him, which neither law nor equity ever has imposed.

[12] 14 Stat. 517.
[13] 11 U. S. C. A. 1.

Therefore, it seems hardly probably that Congress intended to establish such a result.

The Bankruptcy Act must be interpreted in the light of both *Francis v. McNeal* and *Bank v. Bear,* that is, that a partnership may be adjudged bankrupt as an entity, but nevertheless, the court may order the non-bankrupt individual partners to turn over their assets to make up for any deficiency which may happen to exist.

Hence, *Francis v. McNeal* and *Bank v. Bear,* must exist side by side for a logical interpretation of the Bankruptcy Act, the former to prevent the peculiar result mentioned above, and the latter to allow the bankruptcy of a firm without necessarily purging partners of their debts by also adjudging them bankrupts.

We now have a situation in which a firm may be adjudged bankrupt irrespective of the adjudication of the partners, with the court having power to order such non-bankrupt partners to turn over their separate assets to the trustee of the firm property. Along with the rule of these two cases we have Section 5f of the Bankruptcy Act, which provides in substance that the firm creditors shall have priority only to firm assets and that individual creditors shall have priority to individual assets, and that any surplus remaining in either fund shall be divided *pro rata* between the two sets of creditors.

Keeping these three rules in mind, let us apply them to a hypothetical case which may arise and probably has arisen many times. A and B are partners doing business as A B & Co., a partnership, the firm is insolvent and is adjudged a bankrupt irrespective of the partners under *Bank v. Bear.* The court relying on *Francis v. McNeal,* orders the non-bankrupt partners to turn over their individnal property to the trustee of the firm property. A and B are both insolvent as to firm and individual debts, but both have enough property to pay their individual creditors. Now must the separate creditors of A and B stand by and see the property, to which Section 5f gives them priority, go to the trustee of the firm property, and perhaps become exhausted so as not to be sufficient to cover the individual debts? This situation seems to render the two cases repugnant to Section 5f, but let us see.

The law does not aid persons who sleep on their rights. Hence if the separate creditors of A and B are not awake to the situation, the separate assets will be turned over to the trustee of the firm and paid to firm creditors. Of course this may work a hardship and an injustice on separate creditors who are away from home or who are otherwise unable to act in the matter. But the same is true in any situation where two creditors seek

payment from the same fund; the more alert will be successful. Section 5f presupposes that all the parties have been adjudged bankrupt, in which situation the rule of marshalling of assets is applied. Therefore where a firm is adjudged bankrupt irrespective of the individual partners, whether Section 5f, which clearly is favorable to them is to apply, depends on the vigilance of creditors of the individual partners who likewise have been adjudged bankrupt.

For a clearer understanding of the above, which at most is a mere forecast as to what the Supreme Court will hold when the issue arises, it must be remembered that before a person may be adjudged bankrupt, he must be proved insolvent. Although the entity of a partnership in bankruptcy had been recognized by the weight of authority prior to the decision of *Bank v. Bear*, nevertheless, it was held, that before a firm could be proved insolvent, the individual property of the partners plus the property of the firm had to be insufficient to pay firm debts, and a firm was never held to be bankrupt, as long as one of the members was solvent. But to this holding there was a real objection on the ground that the firm was an entity, and hence the separate property of the partners could not be taken into cognizance.[14] This objection may gain recognition in the light of *Bank v. Bear*, which finally settled the question of the partnership as an entity in bankruptcy. If it does gain recognition, the intricate question of the administration of the separate assets of the non-bankrupt, solvent partner, will arise. But this is anticipating too far and has no place in this article.

The long period of oscillating decisions is over and the Supreme Court has decided once and for all that a partnership is an entity in bankruptcy, which may be adjudicated a bankrupt irrespective of the partners composing it. This decision is in harmony with the earlier leading case of *Francis v. McNeal*, and both cases are in perfect harmony with Section 5f of the Bankruptcy Act, in the light of its present interpretation.

STANLEY WEISS, '29.

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## THE PROBLEM OF THE TRANSIENT NONRESIDENT MOTORIST

A question of increasing importance, especially in this age of almost universal use of the automobile, recently has been presented to the courts. It is as follows: May a state subject to

[14] Collier on Bankruptcy 12th Ed. p. 172 and cases thereunder; Remington 2nd Ed., Section 1348.