

CLAUSON
J.

1936
Oct. 19.

In re A DEBTOR.

[490 of 1935.]

Bankruptcy—Receiving order—Subsequent payments by debtor to solicitor for costs of appeal—Application by trustee for repayment—Practice—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), ss. 8, 37, 38.

By s. 37, sub-s. 1, of the Bankruptcy Act, 1914: "The bankruptcy of a debtor . . . shall be deemed to . . . commence at the time of the act of bankruptcy being committed on which a receiving order is made against him, . . ."

The Court will not extend the practice of allowing a solicitor acting for a debtor to retain, as against the trustee in the bankruptcy, moneys bona fide paid by the debtor for costs of resisting the bankruptcy proceedings, so as to apply to moneys paid to him by the debtor after the date of the receiving order for costs of an appeal against it.

Dictum of Lord Esher M.R. in *In re Pollitt* [1893] 1 Q. B. 455, 458, considered.

MOTION.

By this motion the Official Receiver, as trustee of the property of a debtor, asked for an order that the respondents, who were the partners in the firm of solicitors who acted for the debtor, should, by virtue of ss. 8, 37 and 38 of the Bankruptcy Act, 1914, pay to him two sums of 25*l.* and 50*l.* paid to them by the debtor on July 29 and October 9, 1935, respectively, on the ground that they were moneys of the debtor which on adjudication formed part of her property divisible among her creditors. He asked also, on the same ground, for an order that so much of a sum of 50*l.*, which had been paid to the respondents by the debtor on May 3, 1935, as was not required for her expenses in opposing the bankruptcy proceedings up to the date of the receiving order, should be paid over to him. That sum had been paid by the debtor to the respondents, before the date of the receiving order, for those expenses, and the sum of 25*l.* and the other sum of 50*l.* had been paid by her to them after that date for the expenses of an appeal against the receiving order, the primary purpose of the 25*l.* being to provide the 20*l.* security

which a debtor must lodge as a condition of appealing against a receiving order. CLAUSON
J.

The respondents contended that they ought to be allowed to keep all the moneys, even though two of the sums had been paid to them after the date of the receiving order and strictly belonged to the applicant, on the ground that it was the practice of the Court to permit a debtor's trustee to allow the debtor's solicitor to retain money paid by the debtor to him and properly expended in resisting the bankruptcy proceedings, and that the debtor ought to be allowed to take all reasonable steps in so doing.

1936
A DEBTOR,
In re.

Tindale Davis for the applicant. Be it conceded that these moneys belonged to the debtor and were paid by her to the respondents, as her solicitors, for purposes connected with the bankruptcy: the question still arises whether they can be retained against the applicant, to whom they belong.

It has been held that a trustee in bankruptcy cannot recover money which a debtor has bona fide paid to his solicitor to resist the bankruptcy proceedings: *In re Sinclair*. (1) The Court, however, will not go further than that: and that is what it is being asked to do here, for the respondents are seeking to retain moneys paid to them in contemplation of an appeal. In *In re Pollitt* (2) and *In re Spackman* (3), *In re Sinclair* (1) was questioned. *In re Johnson* (4) does not go as far as *In re Sinclair* (1), but is the only reported case relying on *In re Sinclair* (1) as authority for the order made.

In re Sinclair (1) is the only case dealing with the point in an informative manner. Under the Act, all assets vested in the debtor at the commencement of his bankruptcy pass to his trustee. Persons dealing with him before, or without knowledge of, his act of bankruptcy, are protected by s. 45 of the Act.

Gerald Gardiner for the respondents. This is a point of obvious practical interest to all solicitors. Merely as a practical measure the Court has granted a concession which

(1) (1885) 15 Q. B. D. 616.

(2) [1893] 1 Q. B. 455.

(3) (1890) 7 Mor. 100.

(4) (1914) 111 L. T. 165.

CLAUSON J. *In re Sinclair* (1) has expressly applied to solicitors who give their services : that concession does not in any way depend on whether the money was paid before or after the receiving order.

1936
A DEBTOR,
In re.

Although, in strict law, the moneys in issue in the present case belong to the applicant, the principle which should be applied is that a person faced with the prospect of bankruptcy ought to have an opportunity to take reasonable steps to avoid it.

CLAUSON J. [after stating the facts:] It is certainly remarkable that if this application does not succeed and if the respondents are held entitled to retain the sums which were paid to them after the receiving order, the effect will be that the Court will sanction security for the costs of an appeal being lodged by the debtor out of the fund which would necessarily, in view of the receiving order having been made, unless the receiving order is upset, be moneys of the applicant.

With regard to the defence of the debtor against bankruptcy proceedings, it has long been a settled practice of the Court to approve of the trustee permitting the solicitors to whom the debtor has paid a sum as against their charges in the proceedings to retain so much of that sum as has been properly disbursed or allocated for the purpose for which it was paid. It is not easy, on the Act as it stands, to appreciate the justification for the practice ; but the practice is well settled and it has been accounted for by Lord Esher M.R. when presiding in the Court of Appeal in the case of *In re Pollitt* (2) as being due to the Court's consideration for the dictates of humanity. The question I have to determine is whether this practice (which I do not for one moment suggest should be departed from) is to be extended so as to apply to the costs of supporting an appeal which *ex hypothesi* is unsuccessful. I do not see my way to extend the practice. In my judgment this appeal must succeed and there must be an order for repayment of the 25*l.* and 50*l.* paid after the receiving order. With regard to the 50*l.* paid before the

(1) 15 Q. B. D. 616.

(2) [1893] 1 Q. B. 455, 458.

receiving order, there must be an order for repayment of the balance over and above the costs properly incurred by the respondents in opposition to the bankruptcy proceedings up to the receiving order.

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J.
1936
A DEBTOR,
In re.

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K. R. A. H.