1954
October 2

H. A. TONKS
v.
H. A. TONKS
LTD.

[HALLINAN, C.J., AND GRIFFITH WILLIAMS, J.]
(October 2, 1954)

HAROLD ALBERT TONKS OF NICOSIA,
Appellant,

v.

H. A. TONKS LTD. IN LIQUIDATION,
Respondent.

(*Civil Appeal No.* 4112)

Bankruptcy Law—Necessary preliminaries to act of bankruptcy under section 3 (*h*)—*Meaning of "bankruptcy notice".*

The creditor is purported to serve a bankruptcy notice on the debtor in respect of a claim in debt not the subject of a final judgment. Thereafter the creditor, upon presenting a petition alleging an act of bankruptcy under section 3 (*h*) of the Bankruptcy Law (Cap. 6), obtained a receiving order under section 4.

Under section 3 (*h*) a debtor commits an act of bankruptcy if he fails to pay a debt provable in bankruptcy and (*a*) he has served a bankruptcy notice and (*b*) the Court on the application of the creditor has fixed a time within which to pay or secure his debt.

No act of bankruptcy had been proved since.

Upon appeal,

Held: (i) A bankruptcy notice under section 3 (*h*) must be based on a judgment debt: and

(ii) the creditor had not applied to the Court as required in section 3 (*h*).

Receiving order set aside.

Appeal by debtor from the order of the District Court of Nicosia (Bankruptcy Petition No. 2/54).

A. G. Soteriades for the appellant.

A. Michaelides for the respondent.

The judgment of the Court was delivered by:

HALLINAN, C.J.: This is an appeal by a debtor against a receiving order made against him under the Bankruptcy Law (Cap. 6) on the 21st July, 1954. He seeks to set aside the receiving order on the ground that no act of bankruptcy has been committed by him within the meaning of section 3 of the Bankruptcy Law. Section 3 (1) (*g*) provides that where a creditor has obtained a final judgment or a final order against the debtor the Court at the request of the creditor may issue a bankruptcy notice calling on the debtor within seven days either to pay or give security for the debt, or to satisfy the Court that he has a counter-claim, set-off or cross demand.

Now, in the present case, the creditor had no final judgment or final order. The creditor was an English company

claiming that the debtor, who had been a director of that company, was indebted to the company which was in liquidation. Counsel for the respondent has submitted, however, that the act of bankruptcy was committed under paragraph (*h*), the succeeding paragraph, which provides that, if being indebted to a creditor in virtue of a debt provable in bankruptcy the debtor fails to pay or secure or compound for such debt, within such time as shall be allowed by an order made by the Court upon the application of the creditor, then he commits an act of bankruptcy. But that paragraph contains a proviso that the Court does not fix the time within which the debtor must pay his debt or secure it until there has been a bankruptcy notice served on him and he has been called upon to show cause against the same. So that there are two steps necessary in order to establish an act of bankruptcy under that paragraph: first, there must be a bankruptcy notice, and the debtor must have failed to pay or to secure the debt, and the Court must be satisfied that he has no counter-claim or set-off. The second step is that then, upon the application of the creditor, the Court fixes the time within which the debtor must pay or secure his debt.

Now, two questions arise in the application of this paragraph to the facts of this present case: first, does the paragraph require the bankruptcy notice to be founded on a judgment debt, and, secondly, whether in the facts of the case the two steps contemplated by the paragraph have been taken.

As to the first point, it has been submitted by counsel for the respondent that the operation of paragraph (*h*) would be rendered nugatory unless we infer that the bankruptcy notice referred to in paragraph (*h*) need not be based on a judgment debt. On the other hand, liability for debt is best determined by the pleadings and the course of evidence in an action; it would be a major departure from this procedure if such matters were determined upon on application supported by an affidavit. One would expect a radical change of this sort to be the subject of express provision; in the absence of such provision we are unable to hold, as a mere matter of inference, that the bankruptcy notice referred to in paragraph (*h*) need not be based on a judgment debt.

As regards the second point, the failure of the creditor respondent to apply to the Court to fix the time within which the debt be paid, this point has not been answered in any way by the creditor respondent. We consider it an essential step in the procedure, and by failing to take it the respondent has failed to establish that the appellant has committed an act of bankruptcy.

For these reasons we consider that the receiving order, not being based on an act of bankruptcy, must be set aside and this appeal allowed with costs.