

IN THE MATTER OF THE BANKRUPTCY OF
T. H. COLLINGS1936
* Dec. 16.
1937
* Jan. 4.

EX PARTE T. H. COLLINGS

EX PARTE K. MURPHY

(NO. 2)

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Costs—Bankruptcy—Costs on dismissal of application of trustee in bankruptcy for special leave to appeal to Supreme Court of Canada—Settlement of minutes of judgment—Costs against trustee as trustee, not against him personally—Tariff applicable—Costs given to trustee in other proceedings in the bankruptcy not to be embraced in the order so as to allow for set-off.

Upon application for settlement of the minutes of the judgment delivered on application by the trustee in bankruptcy for special leave to appeal to this Court, and reported *ante*, p. 609:

- Held* (1) The trustee appeared (on said application for leave) in his capacity as trustee and the dismissal of his application with costs could affect him only as trustee and not personally; costs were payable by him out of the funds in his hands.
- (2) Upon appeals to this Court in bankruptcy matters the tariff which applies is that provided for in the Rules (91 *et seq.*) of this Court, and contained in Form I set out in the schedule thereto; and the costs of said application for leave should be taxed according to that tariff, and not according to the tariff prevailing in the bankruptcy courts. The judge hearing said application was not empowered to adjudicate otherwise.
- (3) Certain taxable costs given the trustee in other proceedings in the course of the bankruptcy should not be embraced in the order now in question so as to give right to a set-off.

Moreover, contentions to the effect that the costs should be adjudicated against the trustee personally, that they should be taxed according to the tariff prevailing in the bankruptcy courts, and request that a set-off be provided for as aforesaid, could not now be raised for the first time on settlement of the minutes—they were contrary to the intention of the said judgment, and were equivalent to asking amendment thereof; which there was no reason to grant. (*Paper Machinery Ltd. v. J. O. Ross Engineering Corpn.*, [1934] Can. S.C.R. 186, referred to).

APPLICATION for settlement of the minutes of the judgment rendered by Rinfret J. (1) dismissing with costs applications by the Trustee in Bankruptcy for special leave to appeal to this Court. The questions had to do with costs of said applications and are sufficiently set out in the judgment now reported and are indicated in the above head-note.

* Rinfret J. in chambers.(1) *Ante* p. 609.

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J. T. Wilson for T. H. Collings and K. Murphy.

D. K. MacTavish for the Trustee.

RINFRET J.—Upon application for settlement of the minutes of the judgments rendered by me in these matters on the 31st day of October, 1936, I have come to the conclusion that:

(1) Edward Wilkins was before me in these matters in his capacity of Trustee. In fact, it was objected at the argument that he had no *locus standi* precisely because he was making the applications in his capacity of Trustee. The argument in respect of the absence of *locus standi* would have been without any foundation whatever if he had appeared in his personal capacity.

It follows that, on the applications on which I gave decisions, on the 31st day of October, 1936, the dismissal with costs could affect him only as Trustee and could not affect him personally.

(2) Although these are bankruptcy matters and the Supreme Court of Canada is given jurisdiction to hear appeals therein by the *Bankruptcy Act* (with the aid of the enabling section 44 of the *Supreme Court Act*), these appeals are nevertheless made to the same Supreme Court of Canada as is organized under the provisions of sections 3 *et seq.* of the *Supreme Court Act* and as is given an appellate jurisdiction within and throughout Canada under section 35 thereof.

Accordingly, upon appeals in bankruptcy matters, the tariff which applies is that provided for in Rules 91 *et seq.* of the Court and contained in Form I set out in the schedule to these rules. A Judge of this Court is not empowered to adjudicate otherwise.

(3) I may say, moreover, that the points now raised by counsel on behalf of the respondents Katherine Murphy and Thomas H. Collings (to the effect that the costs should be adjudicated against the Trustee personally and that they should be taxed according to the tariff prevailing in the bankruptcy courts) were not even mentioned in the course of the argument made before me on the applications for special leave to appeal. I consider that they cannot be raised at this stage, where the only question to be decided upon is the settlement of the minutes of the judgments I

have delivered on the 31st of October, 1936. When delivering those judgments, I did not intend that the costs should be adjudicated against Mr. Edward Wilkins personally, nor that they should be taxed by the Registrar of the Bankruptcy Court under the tariff prevailing in that court.

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To ask me now to settle the minutes so as to give such a meaning to my judgments is equivalent to a demand that I should amend my judgments; and I can see no reason for doing so (*Paper Machinery Ltd. et al. v. J. O. Ross Engineering Corpn. et al.* (1)).

I, therefore, order that the judgments be settled so that the costs be payable by the Trustee out of the funds in his hands; and I shall fix the fees upon his applications, if and when counsel will come before me for that purpose.

As for the further request that certain taxable costs given the Trustee against the debtor Collings, which remain unpaid, should be embraced in the order, so as to entitle Collings to a set-off, it should not be entertained:

(a) because the matter was not submitted to me in the course of the argument on the application and, therefore, the same reasons apply as given above to refuse to modify my judgment in other respects;

(b) I do not think costs incurred upon other matters and other proceedings in the course of the bankruptcy should be set off against the costs on the present applications.

Solicitor for T. H. Collings: *Lewis Duncan.*

Solicitors for K. Murphy: *Joy & Chitty.*

Solicitors for the Trustee: *Ellis & Ellis.*