ORIGINAL INSOLVENCY.

Before Mr. Justice Wadsworth.

IN THE MATTER OF NAMBI CHETTY, AN INSOLVENT.* 1937, September 6.

Presidency-towns Insolvency Act (III of 1909), sec. 49 (3)— Official Assignee intending to launch litigation in respect of assets of insolvent—Agreement between him and indemnifying creditor giving the latter a percentage of net realisation —Validity of.

A proposal by the Official Assignee, (i) that an indemnifying creditor shall be promised a percentage of the net realisations to the estate from a litigation which the Official Assignee proposes to launch as the purchase price for his assistance, (ii) that this price shall be treated as "costs of administration" under section 49 (3) of the Presidency-towns Insolvency Act and (iii) that all the creditors (including the indemnifying creditor) shall share rateably in the balance of the realisations, does not offend against the principle of equality of distribution of assets and as such could be approved by the Court.

Guy v. *Churchill*(1) followed. *In the matter of V. Purushothamdoss & Brothers*(2) referred to.

PETITION No. 453 of 1936 taken out by the Official Assignee for directions.

Official Assignee (*F. H. Wilson*) appeared in person.

JUDGMENT.

This application by the Official Assignee relates to a difficult and important question which is constantly arising in insolvency work, namely, how is an individual creditor, who is willing for a consideration to finance and indemnify the Official Assignee in an attack on an alleged fraudulent alienation, to be compensated for the

* Petition No. 453 of 1936.

(1) (1888) 40 Ch.D. 481. (2) (1927) 55 M.L.J. 657.

NAMBI CHETTY, *In re.*

risk which he runs, without offending against the principles on which the insolvency law is based. A former proposal, that the financing creditor should be rewarded by having his debt paid in full in priority to the other creditors out of any amount that might be recovered, was disapproved by VENKATASUBBA RAO J. in *In the matter of V. Purushothamdoss & Brothers*(1) as being opposed to the policy of equal distribution of assets—though the then CHIEF JUSTICE in the appeal from that decision (Original Side Appeals Nos. 150 of 1927 and 5 of 1928) observed that such an arrangement might be unobjectionable if the other creditors consented to it.

In his present report the Official Assignee suggests another way of attaining the same end and asks for the Court's directions. He desires to attack a purchase by the insolvent in the name of his wife as fraudulent. The creditors as a body are not willing to act and no individual creditor is prepared to run the risk of indemnifying the Official Assignee unless he gets some substantial benefit (in addition to his rateable dividend) out of the proceeds in case of success. This seems to me perfectly reasonable—the creditor who risks having to pay all the costs of failure naturally looks for something more than those who have refused to bear their share of the risk, in case of success. All that he will get by way of preferential rights under the Insolvency Rules (Order VI, rule 9) is a first charge on the realisations for any actual disbursements with interest thereon. Obviously this is not a very powerful inducement to altruistic action. The Official

(1) (1927) 55 M.L.J. 657.

Assignee therefore proposes that the indemnifying creditor shall be promised twenty-five per cent of the net realisations to the estate from this litigation as the purchase price for his assistance, that this price shall be treated as " costs of administration " under section 49 (3) of the Presidency-towns Insolvency Act, and that all the creditors (including, of course, the indemnifying creditor) shall share rateably in the balance of the realisations.

I can see no legal nor practical objection to this proposal. It is in effect a scheme whereby the Official Assignee, just as he buys the services of an Advocate and debits the estate, may buy the services of a guarantor and debit the estate. There is no offence against the principle of equality of distribution of assets ; all that is proposed is to treat as a legitimate expense to the estate the cost of procuring for the Official Assignee an insurance against the consequences of failure. The scheme is, in fact, very similar to that approved in *Guy* v. *Churchill*(1), whereby when bankruptcy intervened in the middle of an action by the bankrupt and the trustee was unwilling to incur the risk of continuing it, one of the creditors was permitted to do so at his own expense and risk in return for three-fourths of the net realisations from the action. It was held that this arrangement offended neither against the law of maintenance nor against the law of bankruptcy.

The only difference between that case and the present proposal is that we are now concerned with a new litigation, not with the continuance of a pending action. This difference does not

(1) (1888) 40 Ch. D. 481.

NAMBI CHETTY, *In re.*

affect the recognition of the principle, viz., that it is lawful for the trustee in bankruptcy to buy the financial guarantee of one of the creditors by promising him a proportion of the net realisations as the price of his services and to treat this expenditure as a legitimate part of the cost of getting in the assets of the estate. I therefore approve of the Official Assignee's recommendation.

G.R.