1895.
Sept. 13.

In the Matter of the Insolvency of M. L. MARIKAR ABDUL AZIS.

D. C., Galle, 258.

Practice—Appeal—Insolvency proceedings—Security for appeal costs—Ordinance No. 7 of 1853, s. 6—Rules and Orders of 1833—Civil Procedure Code, s. 756.

The provisions of the Civil Procedure Code, 1889, relative to the giving of security for the respondent's costs of appeal, do not apply to appeals from orders in insolvency cases.

Re insolvency of Philippo (*D. C., Colombo, 1,697*), *9 S. C. C. 120*, overruled.

THIS was an appeal by the insolvent against the refusal of the District Judge to grant him a certificate of conformity under the Ordinance No. 7 of 1853. No security for the respondent's costs of the appeal was given.

The case came on for argument before BONSER, C.J., and BROWNE, A.J., on June 21, 1895, and *De Saram* appeared for the insolvent and *Dornhorst* for the respondent.

Dornhorst took the preliminary objection that no security for costs in appeal was given as required by section 756 of the Civil Procedure Code, and relied on the case reported in *9 S. C. C. 120* (In the matter of the insolvency of Philippo).

De Saram contended that the case relied on was not in accordance with section 6 of the Ordinance No. 7 of 1853, and ought to be over-ruled.

The case was set down for argument before the Full Court (BONSER, C.J., WITHERS, J., and BROWNE, A.J.) on the point as to the necessity for giving security for costs.

De Saram (*Jayewardene* with him) on the preliminary objection contended that the provisions of section 756 of the Code dealt only with appeals from civil cases, and was never intended to touch insolvency proceedings, which had a special procedure of its own. No rule or order was ever made by the Supreme Court under section 4 of the Insolvency Ordinance, so that we must be guided by the regulations which existed at the time the Ordinance came into force. There were none; but orders in insolvency proceedings were treated as interlocutory orders, and required no security to be given. Clarence, A.C.J., in the case referred to, was wrong in dealing with the old Rules and Orders, 1833, for they did not touch insolvency appeals. If appeals from insolvency orders were dealt with under the Code, and required security, the difficulty would be to fix the class under which such security should be given.

Dornhorst, contra. The Civil Procedure Code dealt with appeals from any judgment, decree, or order of any original court, and it is submitted that orders in insolvency proceedings come within this section 754 of the Code. Original Court is defined in section 5 of the Code so as to include District Courts and Courts of Requests, and under section 756 security must be given for such appeals.

De Saram, in reply.

13th September, 1895. BONSER, C.J.—

This is an appeal in an interlocutory matter, and the preliminary objection is taken that the appellant has not given security for costs in appeal, and the question for our decision is—whether the objection is a good one or not. The practice before the introduction of the Civil Procedure Code appears to have been uniform, that no security was required in appeals under the Insolvency Ordinance. The right of appeal was given by section 6 of Ordinance 7 of 1853, and that section enacted that "every "such appeal shall be brought on and prosecuted in such "manner, and shall be subject to such regulations as now "exist, or shall hereafter be made by any rule or order of the "Supreme Court." Now, it is admitted that no rule or order of the Supreme Court was made after the date of the Insolvency Ordinance, either dealing with insolvency matters or any other appeals. At the date of the enactment of Ordinance 7 of 1853 there were in existence Rules and Orders which had been made in 1833 dealing with appeals generally from District Courts in respect of civil matters. The Rules and Orders therefore governed appeals in insolvency matters in the absence of any express rules

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made by the Supreme Court. In 1889 the Civil Procedure Code was passed. The question arises whether that Code expressly or impliedly repealed the then existing procedure in respect of appeals in insolvency matters.

There are clauses in the Civil Procedure Code which seem, at first sight, to show such an intention. Section 754 provides that "every appeal to the Supreme Court from any judgment, "decree, or order of any Original Court, ... shall be made in "the manner herein provided." But if we look to the requirements of the Code as to the contents of a petition of appeal, we see that one of the requirements is that the petition shall state the names of the parties to the action. An insolvency proceeding is not generally described as an action.

It is more properly described as a matter, and from that I draw the conclusion that the provision in the Code as to appeals was only intended to refer to appeals in actions properly so designated. I am confirmed in this view by consideration of the general scope and frame of the Civil Procedure Code. It deals with appeals in civil actions; it makes no express provisions as to insolvency appeals, and, indeed, is altogether silent with respect to insolvency proceedings.

I am of opinion that it was never intended that insolvency proceedings should be touched by the Code, but that it was intended that the provisions of Ordinance 7 of 1853 should continue to regulate all proceedings under that Ordinance.

There is, however, a decision of two Judges to the contrary (*re* insolvency of Philippo, reported in *9 S. C. C. p. 120*), where it was held that the 58th chapter of the Civil Procedure Code deals with appeals generally, and that section 756 requiring security to be given applied to insolvency appeals. But the Court there does not appear to have dealt with section 6 of Ordinance No. 7 of 1853, which requires that all appeals under it should be prosecuted subject to the then existing regulations in default of any new regulations made by the Supreme Court thereafter. I confess that I cannot follow the reasoning of that judgment. Clarence, J., said there were no orders of the Supreme Court, but instead of inferring as a necessary consequence that, as there were no such orders, we must revert to the procedure under the regulations of 1833 and Ordinance 7 of 1853, he draws the conclusion that the Code must govern. I say that I cannot follow this reasoning, or agree with the decision. In my opinion the intention of the Code was to leave untouched the procedure as to appeals in insolvency cases. The objection to the reception of this appeal cannot be sustained, and the appeal must be heard.

WITHERS, J.—

I agree.

I venture to dissent from the learned Judges whose judgment is under review, for the simple reason that, in my opinion, the Civil Procedure Code has nothing whatever to do with insolvency matters.

The preamble of this Code recites that it is expedient to consolidate and amend the laws relating to the procedure of civil courts in the Colony. In section 5 of this Code "civil court" is defined to be "a court in which civil actions may be brought." Under chapter II. of this Code an action may be either regular or summary, the Code itself providing for all cases in which actions may be taken by way of summary procedure. "Insolvency" is not mentioned in the Code. "Action" is not an apt term to describe insolvency proceedings, the procedure in regard to which is regulated by Ordinance No. 7 of 1853.

The 6th section of that Ordinance enacts that "all decisions and "orders of the District Courts made under the authority of this "Ordinance shall be subject to an appeal to the Supreme Court, "and every such appeal shall be brought on and prosecuted in "such manner, and shall be subject to such regulations as now "exist, or shall be hereafter made by any rule or order of the "Supreme Court"

No rules especially adapted to appeals from orders in insolvency matters having been framed by the Supreme Court, we are carried back to the practice of appeals from judgments in civil courts obtaining at the date of that enactment. And here we are met with a difficulty. In the case of interlocutory orders only was no security required. In all other cases an appellant, if able, was obliged to furnish security for the subject of litigation as well as security for costs. If unable to furnish the former, he was allowed to furnish security for costs only, if he had a good cause of appeal.

However, as a matter of continuous practice from the date of the Insolvency Ordinance to the date of the judgment under review, orders in insolvency proceedings have been treated as interlocutory orders in civil courts.

They have always come up before a single Judge, without security for costs. That long-settled practice, whatever the reason for it, must be taken to be the law on the point, unless expressly or impliedly repealed. The Civil Procedure Code has not, I consider, repealed it.

The reason for the practice may have been that in insolvency proceedings there is no subject of litigation as in a contested

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action, and as all the property of the insolvent has vested in the assignee, he cannot be expected to furnish security for costs.

BROWNE, A.P.J.—I concur.

[On the merits the appeal was heard on the 17th September, 1895, and the case was sent back for further inquiry as to the financial position of the insolvent.]