1900.
Sept. 27,
October 19,
and
November 1.

Re Insolvent Estate of H. G. ANDRIS.

D. C., Colombo, 2,001.

Insolvency Ordinance, No. 7 of 1853, ss. 6, 93, 110—Proof of claim—Right of insolvent to object to claim and appeal against order allowing it.

The right of an insolvent to object to a claim preferred is dependent upon his showing that he will be materially prejudiced in regard to his allowance or surplus of assets.

AS a creditor of the insolvent, one J. E. Aserappa, sought to prove his claim for a sum of Rs. 21,950.94. The insolvent admitted the claim to the extent of Rs. 3,487.46, and, upon affidavit filed, moved that he be heard before the Court accepted the said claim. The Court disallowed the motion and accepted the claim *in toto*.

The insolvent appealed.

Morgan de Saram, for appellant.—The insolvent appeals against the order which admitted a creditor's claim without giving an opportunity to the insolvent to be heard. [BROWNE, A.J.—Has the insolvent any right to object to the proof of any claim?] Section 93 of the Ordinance No. 7 of 1853 enables him to do so. He is a necessary party to the insolvency proceedings, notwithstanding the appointment of a provisional assignee (*Archbald's Bankruptcy, p. 193*). He has the right to cross-examine a

creditor. In D. C., Colombo, 1,762, *re* insolvency of Buchanan & Bois, the practice followed by the District Court was the rule now contended for by the insolvent. Under section 6 of the Ordinance, an order like the one complained of is appealable. *Zilva's case* (D. C., Colombo, 1817), decided in appeal on 25th October, 1895, shows that a creditor or assignee cannot appeal against an order allowing a claim, for their remedy was under section 110 of the Ordinance. But the insolvent has no remedy under that section, and every claim proved would affect him personally in regard to his allowance or the surplus of assets.

H. J. C. Pereira, for respondent.—The Court below has not pronounced an order or judgmnet, and therefore no appeal lies. Besides, the admission of proof is an *ex parte* proceeding, and the insolvent has no right of appeal. He can appear only when an order affects him personally. In all other matters the voice of the assignee is dominant. It is true that the insolvent has the right of cross-examination, but as the estate has yet to vest in the assignee the insolvent can speak only through the assignee, when appointed, in regard to proof of claims. The proper procedure is to move under section 110 of the Ordinance that the claim be expunged.

Margan de Saram replied.

Cur. adv. vult.

19th October, 1900. MONCREIFF, J.—

We have to determine whether the insolvent in this case has any right to ask this Court to expunge a creditor's proof, which was allowed by the District Judge. We find in the District Judge's journal on the 2nd August, 1900, the date of the first meeting of the insolvent's creditors. The following is the entry:—" Case " called. Insolvent present. Advocate de Saram for him..... " Mr. Alexander Silva proves claim of J. E. Aserappa & Co. for " Rs. 21,950.94. Mr. Saram will not accept this, except to the " extent of Rs. 3,487.46. I admit the whole claim."

According to the appellant he was not allowed to contest the claim. He says that he had a right to do so, and asks that the order of the Court below be reversed.

It is said that there was no judgment or order. I cannot agree. The admission of the debt converts it into a judgment debt (Ordinance No. 7 of 1853, section 152), so I apprehend there can be little doubt upon that point.

Then It was urged that the insolvent had no right to intervene in the matter because he had no personal interest in it. But it was decided (*Re Petit, Fonblanque B. C. 6*) that a bankrupt under the

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English Act of 1849 had a right to cross-examine upon a proof. In Griffith on Bankruptcy (*Ed. 1869, p. 720*) occurs the following passage:—

"If a proof is disputed, evidence upon it is subject to the same "rules of evidence as would be applicable on an action or suit for "the same demand. Thus, any of the credtors and even the "bankrupt himself may object to a proof."

I cannot believe that this right of cross-examination is general. I understand it only to exist where the insolvent has a direct personal interest in the matter—for example, where his surplus or allowance is concerned. And I imagine that the admission of a sum of Rs. 18,000 would in general affect his allowance or his surplus.

We were referred to a case (No. 1,817, D. C., Colombo, Insolvency) in which the Chief Justice and Withers, J., held that assignees, even when they had taken part in discussing proof, could not appeal from the District Judge's decision. The reasons given by the Court were (1) that the remedy of the assignee was contained in section 110 of the Insolvent Estates Ordinance (No. 7 of 1853); (2) that the assignee was bound to assist the judge, and that if he took part in the cross-examination, it was not in the capacity of a litigant. For the first of these reasons creditors have no right of appeal. They must proceed under section 110. But the insolvent is in a very different position, and he has no remedy under section 110.

Then it was said that the admission of proofs was an *ex parte* proceeding, and that the insolvent could have no right of appeal from the Judge's ruling, that a claim against his estate amounting to more than Rs. 20,000. but of which he only admits Rs. 3,487.46 to be due, may be passed and converted into a judgment debt, not only without the existence of any right of appeal, but without any right to contest it on the part of the debtor. But is the proceeding *ex parte* as regards the insolvent? Surely the answer to that question depends upon whether the insolvent is a litigant. He was obliged to be present at that, the first, meeting of creditors; and although his presence was not necessary at the following meetings, he had a right to attend them if he chose, whilst he required no notice of them if he was a litigant party. It seems to me that the question is, Was the insolvent present as a litigant? No assignee had as yet been appointed; he was represented by counsel, and he had a right within certain bounds to cross-examine the creditors who proved their debts. What does this right signify? Not that he was there, like the assignee, simply to assist the Court; nor that he was called upon by the Court for assistance under the powers

contained in section 93. He was there with a right to cross-examine. Persons who are not parties—such as, for example, the public prosecutor on the hearing of election petitions in England—are allowed by the Court to cross-examine; but I can think of no case in which a person who is not a party and a litigant has a right to cross-examine.

In the case of a disputed proof under the Bankruptcy Act of 1849 the creditor was cross-examined by the solicitor for the assignees. The bankrupt's solicitor then proposed to cross-examine. This being objected to, the Court held that " the bankrupt has a right to cross-examine as to a proof, more particularly as under the new statute debts proved under a bankruptcy may have the force of judgment debts " *re Petit, Fonblanque B. C. 6.*

This ruling was given in 1849, and it is cited twenty years later in *Griffith on Bankruptcy (Ed. 1869, p. 720)* as being a correct statement of the case.

Now, by section 6 of the Insolvent Estates Ordinance, every decision and order of the District Court under that Ordinance is subject to an appeal to the Supreme Court. I have already stated that in my opinion there was in this case an order or decision of the District Court, and that I am unable to conceive the existence of a person who has a right to cross-examine and who is not a litigant party. If the insolvent is a litigant party, he certainly had a right to appeal from the District Judge's order, at least where he has a direct personal interest.

It appears from a case reported in 1838 (*ex parte Pitchforth, 3 Deacon, 487*) that under the *6th Geo. IV., c. 16*, the bankrupt had a right to petition (*i.e.*, appeal to) the Court for the expunging of a debt proved by a creditor, provided that the admission of the debt was calculated to affect the surplus or the allowance of the bankrupt. Section 60 of that Act, like section 110 of our Ordinance, gives to the assignee, or two or more creditors, power to apply for the expunging of proofs. In that case Sir John Cross required that the bankrupt should state that his surplus or allowance was likely to be affected.

Perhaps the insolvent should have made some such averment in this case. If so, I think that he ought to have an opportunity of amending his petition. On the understanding that that is done, I should be disposed to allow him to go into the merits of the appeal. If he does not do so within a fortnight, he ought to lose any right of appeal he may possess.

BROWNE, A.J.—

Since, at all events, the time of Mr. Ferdinands, D. J., it has always been the practice in the District Court of Colombo, when

a creditor tenders proof of a claim and an insolvent is present, to ask the insolvent whether he admits the amount to be correct. Seldom, if ever, has there been a dispute.

In the present case, however, the insolvent desired to dispute the amount, but the learned District Judge intimated to him that his proper procedure to do so would be to have the claim expunged under section 110 of Ordinance No. 7 of 1853. Possibly he had in mind the decision of this Court in 1817, Insolvency D. C., Colombo (*S. C. M., 25th October, 1895*), that there is no appeal open to a creditor or assignee against a proof allowed under section 93, for that the procedure under section 110 is open to them. But if he did, he forgets that such proceedings under section 110 are not open to an insolvent. To him, however, the proof of a creditor's claim may mean that there is entered against him the proof of a debt due by him, of which proof the creditor can, under the conditions prescribed in section 152, obtain and enforce a warrant for his arrest and detention for six months, so that without right of appeal he would be without remedy were judgment so entered against him for a sum in excess of what he truly owed. Doubtless the contingency in which the reduction of the amount proved to a sum under Rs. 100 would prevent arrest may be so infrequent that it may be considered to be almost non-existent, yet in principle I consider no debtor should have judgment entered against him without his having opportunity to be heard.

In that view we can understand how it may have been considered right in the *re Petit, Fonb. 6*, and apparently in proceedings under section 164 of the Act of 1849 (*12 and 13 Vict. c. 106*)—section 93 of our Ordinance—that the insolvent should be allowed to cross-examine a creditor. This, as Messrs. Griffith and Holmes remark (*Ed. 1869, p. 720*), was before the subsequent Bankruptcy Act (*24, 5 Vict. c. 134, section 148*), which empowers the Court on the application of the assignee, a creditor, or the insolvent, or *mero motu*, to examine on oath any person who tenders or who has made a proof. The same writers show that the Court may, after hearing evidence and notwithstanding the oath of the party tendering proof, reject the proof or admit it only as a claim from which orders the only remedy is by appeal.

This later extension of inquiry into proofs offered of debts I regard to be only a development of the principle that the insolvent has a right to be heard against the proof offered ere it is finally accepted, and to appeal from any order thereon. I would expect that in the majority of cases when the Court has acted on the rule (*G. & H., ibid*) that it is bound to accept the

proof on the oath of the creditor, unless there be adverse evidence or it is attended with circumstances which makes it improper to admit it, the insolvent, with, as I have said, but very remote if indeed any prospect of any substantial benefit coming to himself out of the disputing of the amount, will be content with the ground he makes thereby for obtaining his own certificate, especially as against any opposition by this creditor, whose claim he disputes. By such cross-examination he will have disclosed to the assignee, the other creditors, and the Court, the true state of his liability in such instance, so as to show his own honesty and his due conformity to the proceedings the certificate whereof he desires.

I would therefore be willing to recognize the right of the insolvent to be heard in the Insolvency Court itself against the proof of any debt alleged to be due by him, but with the limitation that it would be entirely within the discretion of the Court, exercised in regard to the materials placed before it, how far it would require any further inquiry or evidence ere it should accept the proof to be of an amount *prima facie* due.

At the same time, the possibility of reducing the debt below Rs. 100 being in general so remote, and the material to obtain grant of certificate of conformity being otherwise adducible, there might not therein appear to be any practical advantage to the insolvent in the extension of the inquiry beyond the ascertainment of what is *primâ facie* due, commensurate with the time and trouble to the Court and creditor which it might necessitate. As regards, therefore, the preferring of an appeal from any order of the Insolvency Court upon proof of a claim, I would agree with my brother that the insolvent should show this Court there was danger to him that his allowance during the proceedings or his surplus at their close might be affected if this reduction of the proof against himself was not made. No balance sheet has as yet been filed. The claims as yet proved and admitted by the insolvent amount to Rs. 23,041.56, and the nett proceeds of assets realized by the provisional assignee Rs. 882.20. There may be further claims and assets to be disclosed, and we cannot see for ourselves whether any such prejudice is presently possible.

I agree that we should make it a condition precedent to the hearing of this or any such appeal that the petition to us should satisfy us there is danger that the insolvent would be so materially prejudiced, and make now the order which my brother has proposed.

In pursuance of the order made by the Supreme Court the insolvent submitted an affidavit wherein he averred that " by the

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" deletion of the said sum of Rs. 18,462.76 from the aforesaid " claim, the balance against my estate will be decreased and there " will be a larger sum to be distributed among my creditors, and " my estate will be materially benefited by such deletion."

The Supreme Court, after hearing counsel, held this averment insufficient, and refused to entertain the insolvent's appeal.

F. M. de Saram, for insolvent, appellant.

H. J. C. Pereira, for creditor, respondent.

1st November, 1900. BROWNE, A.J.—

The order made by my brother and myself on the 19th ultimo made it a condition, as to the further hearing of this appeal, that the insolvent should aver that the admission of so much of his creditor's claim as he disputed was calculated to affect the surplus or the allowance to himself; that is, that he would in all probability suffer pecuniary loss either during the continuance of the insolvency proceedings by the allowance to him being reduced in amount, or after they were closed by his receiving less surplus assets. The insolvent, however, has instead averred only that " by " the deletion of the said sum of Rs. 18,462.76 from the aforesaid " claim the balance against my estate will be decreased and there " will be a large sum to be distributed among my creditors, and " my estate will be materially benefited by such deletion." This does not, to my mind, comply with the requirements of our order, and therefore I consider that he should not be allowed to be heard further upon his appeal.

BONSER, C.J.—

I agree. I consider that we are bound by the order made on the previous occasion when this case was before this Court.