Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice, and Mr. Justice Wood Renton.

1908.
July 7.

In the Matter of the Insolvency of PITCHE TAMBY.

PITCHE TAMBY *v.* ABDULLA.

D. C., Colombo, 2,273.

Insolvency—Last examination of insolvent—Duty of Judge—Certificate examination—Assignee's report, effect of—Irregularity in procedure—Ordinance No. 7 of 1853.

At the last examination of an insolvent under section 89 of the Insolvency Ordinance, if no creditor wishes to question him on his balance sheet and accounts, and if he himself does not offer any evidence, the Judge ought to examine him, so that the evidence taken on such examination may be available at the subsequent public sitting under section 124 for the allowance of the certificate.

The Ordinance does not seem to contemplate that the Judge at the last examination and at the proceedings under section 124 should rely wholly on the balance sheet and accounts and on the assignee's report.

Where the Judge relied exclusively on the debtor's sworn balance sheet and accounts and on the assignee's report, and no objection to this course was taken either by the creditor or by the insolvent—

Held, that the proceedings were not void for irregularity.

APPEAL by the insolvent from an order of the District Judge of Colombo refusing to grant him a certificate. The facts fully appear in the judgments.

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

F. J. de Saram, for creditor, respondent.

Cur. adv. vult.

July 7, 1908. HUTCHINSON C.J.—

This is an appeal by an insolvent against an order refusing to grant him a certificate. On December 19 last, the date fixed after some adjournments for the last examination of the insolvent under section 89 of the Ordinance No. 7 of 1853, the assignee's report was tendered; the insolvent was present, but no creditor; and the examination was adjourned to January 16, 1908. On that day it is recorded that Mr. Advocate Perera—there is nothing to show for whom he appeared—stated that he did not desire to examine the insolvent; the Court declared the sittings closed, and fixed the certificate meeting for February 20. The only note of the proceedings on February 20 is " Case called. Insolvent present. C. A. V." And on the 25th the Judge made the order now under appeal.

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HUTCHINSON C.J.

My brother Wood Renton in his judgment just delivered has sufficiently stated the facts. It seems to me that at the "last examination of the insolvent" under section 89, if no creditor wishes to question him on his balance sheet and accounts, and if he himself does not offer any evidence, the Judge ought to examine him, so that the evidence taken on such examination should be available at the subsequent public sitting under section 124 for the allowance of his certificate. The Ordinance does not seem to contemplate that the Judge at the last examination and at the proceedings under section 124 should rely wholly on the balance sheet and accounts and on the assignee's report, as was done in the present case. I approve of the opinions on this point expressed by the Court in the two cases quoted by Wood Renton J. At the same time the Ordinance does not expressly require such an examination by the Judge; and where no creditor objected to the proceedings, and the debtor, being present, made no objection, I should not hold that the proceedings were necessarily invalid because the Judge relied exclusively on the debtor's sworn balance sheet and accounts and on the assignee's report. I think the appeal should be dismissed.

WOOD RENTON J.—

This is an appeal by an insolvent against an order made by the District Judge of Colombo, under section 124 of "The Insolvent Estates Ordinance, 1853" (No. 7 of 1853), refusing to grant him any certificate of conformity. If the learned District Judge was entitled to act on the materials before him, they justify his decision. Mr. Morgan de Saram suggested in his argument on behalf of the appellant that the Supreme Court had laid down the rule that a certificate of conformity ought not generally to be absolutely refused; and he further cited in the same connection the case of *ex parte Manico*,[1] which does frequent duty in insolvency appeals, and in which Turner L.J. said that "If the Court, in cases of this description, where one only of the offences has been committed, is bound to inflict the extreme penalty, I know not what is to be done where every one of the offences has been committed." In *ex parte Manico*, however, the Court found that the bankrupt, though his conduct had been highly blameworthy, had kept his books regularly, and that in no instance had he been shown to have uttered any untruth in his business dealings or to have been guilty of ostentatious or selfish expenditure. Under these circumstances, the Judges held that he ought not to be refused a certificate altogether. But Turner L.J. did not, I think, intend, in using the language above cited, to say or imply that a certificate could not be withheld where one only of the statutory offences had been committed. He was

[1] *(1853) 3 De G. M. & G. 502.*

dealing with section 256 of the Bankrupt Law Consolidation Act, 1849 (12 and 13 Vict. c. 106), which is substantially identical with section 151 of our own Ordinance, and his meaning is clear from the following passage, which comes immediately after the words I have already quoted, and which embodies the only general rule that any Court of law could with propriety lay down on the subject: "I think the Legislature intended to intrust the Court with a reasonable discretion to see which and how many of the offences have been committed, and what mitigatory circumstances there are to induce it to diminish the punishment which the statute has awarded."

I have made these observations on *ex parte Manico* because it is often cited (although Mr. Morgan de Saram did not use it in that sense in the present case) as if it tied the hands of the Court. On the contrary, it unbinds them. It leaves the Court free, if it is satisfied, as it must be, that one or more of the statutory offences have been committed, to take account of all the surrounding circumstances, and to do what, in each case, justice requires. Here it is not very easy to analyse either the report of the assignee or the decision of the District Judge from the point of view of section 151 of Ordinance No. 7 of 1853. I venture to think that it would assist us materially in the determination of such cases as this, if the Judge would say specifically: "I find such and such facts proved, and they constitute, in my opinion, the following offences," referring us at the same time to the clauses in section 151 on which he relies. But here, in any event, we have a finding which satisfies section 151 (3), viz., that the insolvency is itself the result of fraud, and the surrounding circumstances as stated in the assignee's report and in the judgment clearly make it desirable that an example should be made of this particular insolvent in the interests of the community. But Mr. Morgan de Saram has taken another and a more serious point on behalf of his client. The second sittings were closed on January 16, 1908, without any examination of the insolvent, either on his own behalf, or on behalf of opposing creditors, or by the Court. The certificate meeting was fixed for and held on February 20, and on February 24 the District Judge made the order now under appeal. With the exception of his statutory declaration to answer truthfully all questions proposed to him and make a full disclosure of his estate (form M in Schedule to Ordinance No. 7 of 1853), the insolvent in this case seems never to have been examined by or in the presence of the Court. He was examined on affirmation by the assignee, and the Court at the certificate meeting had before it merely the assignee's report and his notes of that examination. Mr. Morgan de Saram contends (and although the point was not taken in the petition of appeal, I think that we ought to consider it) (i.) that Ordinance No. 7 of 1853 makes no provision even for a report by the assignee, still less for any examination by him of the insolvent under affirmation; and (ii.) that no certificate of conformity should be

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granted or refused without some form of verification by the Court itself, under oath or affirmation, of the insolvent's evidence. It is a curious and not very satisfactory circumstance that, although England has long since departed from the scheme of insolvency legislation embodied in the Bankrupt Law Consolidation Act, 1849, and most of her colonies have modelled their own bankruptcy laws after modern English legislation, Ceylon is still under the primitive *régime* of the Act of 1849. But we must take the law as we find it: and my own opinion on the points raised by Mr. de Saram is this. It may fairly be contended that under Ordinance No. 7 of 1853 (*cf.* sections 66, 69, and 78) the assignee is practically an officer of the Court and that the Court has a right to call and ought to call for a report from him before adjudicating on the insolvent's application for a certificate (*cf. In re Armitage*; [1] *In re Presslie*; [2] *In re de Croos* [3]). Although the Ordinance contemplates the examination of the insolvent in Court, and the assignee has no right, so far as I can see, to examine him on oath or affirmation, there can be no objection to the assignee putting questions as to the property or as to transactions affecting it to the insolvent, who is required by section 31 to " assist " the assignees " in making out the accounts of his estate." There can be equally little objection to the assignee utilizing the answers to such questions for the purposes of his report. But, in my opinion, there ought to be some form of verification on oath or affirmation by the insolvent himself in Court of the truth and fulness of the disclosure that he has made of his estate and effects before a certificate of conformity is granted or withheld. The statutory form of certificate (Q) seems to require this. The Judge has to certify " that the said insolvent did on the ——— day of ——— last finish his examination, and upon such examination made a full disclosure and discovery of his estate and effects, and in all things confirmed; and so far as the Court can judge there doth not appear any reason to question the truth or fulness of such discovery." The form of this certificate imposes on the Court itself a duty, which cannot be discharged by mere reliance on the initial statutory declaration (form M) of the insolvent or on the assignee's report. The question of the procedure that should be adopted has come twice before the Supreme Court.

In 52 D. C. (Inty.), Colombo, 2,157,[4] Layard C.J. and Grenier J. stated that it had been the practice in the District Court of Colombo for nearly a quarter of a century to insist on the insolvent, if the certificate is not opposed, presenting an affidavit to the District Judge, setting out clearly and distinctly the reasons which have led to his insolvency, before any certificate is granted, and they held that the second statutory sitting should not be closed until the insolvent, by affidavit or examination by the Court, has established

[1] *(1883) 5 S. C. C. 216.*
[2] *(1895) 1 N. L. R. 321.*
[3] *(1903) 6 N. L. R. 271.*
[4] *S. C. Minutes, June, 1905.*

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that point. In the later case of *In re Silva*,[1] Layard C.J. and I said that before fixing the certificate meeting the District Judge himself should examine the insolvent, even if no creditor expressed a desire to do so. I think that this view is in accordance with the spirit of the Ordinance, which requires the insolvent to surrender and submit himself to be examined from time to time on oath, and the Judge to certify that he has done so. It is no doubt difficult to find an express statutory justification for some of the practice that has grown up under Ordinance No. 7 of 1853. Successive generations of Judges have failed to take advantage of the power given to the Supreme Court by section 2 of the Ordinance to make rules for its regulation. The Legislature has not stepped in where the judiciary omitted to tread. And so the Courts, charged with the administration of the law, have had to develop it and adapt it to modern requirements for themselves. Thus, " the trade assignee " of the Act of 1849 has been invested with the powers of an official assignee, and also apparently with some of those of a Bankruptcy Court of first instance jurisdiction. I do not think that so long as the present insolvency law is permitted to remain on the Statute Book there can be any practical objection to the assignee being regarded as an officer of Court, to whose assistance, by way of report or otherwise, the Court is entitled. But the Court cannot delegate to the assignee the examination of the insolvent or its own duty of ascertaining by his examination his claims to a certificate of conformity. I do not think, however, that we need interfere at the expense of the creditors in the present case. They are satisfied with the result, and no objection to the form of the proceedings was taken by the insolvent in the Court below.

I would dismiss the appeal.

Appeal dismissed.

[1] *(1905) 2 Bal. 85.*