1933 *Present :* **Dalton and Poyser JJ.**

DE ZOYSA *v.* BAUR & CO.

136.—D. C. Colombo, 4,644.

Insolvency—Petition for sequestration of estate—Petition and affidavit of petitioning creditor—Proof of petitioning creditor's debt.

Where, in a petition for the adjudication of a person as insolvent, the only material before the Court was the petition and affidavit of the petitioning creditor,—

Held, that there was insufficient proof of the petitioning creditor's debt.

APPEAL from an order of the District Judge of Colombo.

Hayley, K.C. (with him *H. V. Perera, Nadarajah,* and *Aluwihare*), for appellant.

No appearance for respondent.

Cur. adv. vult.

November 30, 1933. POYSER J.—

This is an appeal against two orders of the District Judge of Colombo adjudging the appellant an insolvent. The proceedings in the District Court were as follows:—There were two petitions to have the estate of the appellant adjudged insolvent and placed under sequestration, viz., the petition of W. C. Brodie which set out that the appellant was indebted to him in a sum of Rs. 28,124.51 due under a decree entered in case No. 49,373 of the District Court of Colombo and had failed to pay such amount within thirty days after a notice under section 12 of the Insolvency Ordinance had been served on him. This petition was dated January 14, 1933.

The second petition was that of Alfred Baur. It was dated March 7, 1933, and was in respect of a sum of Rs. 1,261.15 due to the petitioner under a decree of the same Court.

Both the petitions were in the statutory form and no question arises in regard to them.

On March 18, 1933, Messrs. Julius & Creasy, Proctors for both creditors, filed proxies and the petitions for the sequestration of the appellant's estate and affidavits in support and moved that the appellant be adjudged an insolvent.

The learned Judge then ordered that the appellant be and is hereby adjudged an insolvent and directed notice to be issued on the insolvent to show cause against the adjudication on April 4, 1933.

On that date the appellant moved for one month's time to show cause against such adjudication and was allowed time till April 7. On the latter date the petitioning creditor, W. C. Brodie, withdrew his application and the adjudication on his petition was annulled.

The application of Baur & Company by consent stood over till May 16.

On May 15 the appellant filed a motion in the following terms:—"As the application by Messrs. Brodie & Company for Rs. 25,000 to adjudicate G. R. de Zoysa insolvent having been withdrawn and as the said G. R. de Zoysa is making arrangements with Mr. Hale of Messrs. Julius & Creasy to settle Messrs. Baur & Company's application for Rs. 700, I move for a further two weeks' time to show cause in this matter".

On May 16 the case was called but the appellant was absent. The motion for a further two weeks' time to show cause was then considered, the petitioning creditor objected to further time being granted and the learned Judge upheld the objection. The journal entry is as follows:—"No cause being shown by insolvent he is adjudicated insolvent in terms of section 12 of the Insolvency Ordinance".

On May 19 the appellant's proctor filed his proxy and moved that the order of May 16 be vacated and proceedings were stayed until May 30. On that date appellant's proctor moved that the order of May 16 should be vacated on the ground that the order of May 16 was made on insufficient material and also that his client was unable to be present in Court on that date.

The appellant gave evidence and stated that his non-appearance on May 16 was due to the fact that he thought that he would be given time as he did not anticipate any objection from the proctors for the petitioner. He also stated that he disputed the adjudication.

The learned Judge in his order dated June 6 found that the appellant had adduced no satisfactory explanation for the default committed by him on May 16 and, in regard to the point raised by the appellant's proctor that the order of May 16 was made on insufficient material, he held that the appellant did not challenge the adjudication and there was no necessity for the petitioning creditors to adduce any further proof that the affidavits filed by them established their debts and the adjudication must stand.

It is argued on behalf of the appellant that the orders made by the learned District Judge adjudicating the appellant insolvent were made on insufficient material, that there must be a definite inquiry before an adjudication is made and evidence adduced as in a trial at law and that neither on March 18 nor May 16 was there any evidence before the Court other than the affidavits in support of the petitions.

The Insolvency Ordinance, No. 7 of 1853, is based on the English Bankruptcy Act of 1849. The section of the Ordinance in connection with the proof of petitioning creditor's debt is section 26, and this section is practically identical with section 101 of the 1849 Act and subsequent English legislation in regard to such proof.

The material words of section 26 are as follows :—" The District Court, under a petition filed by a creditor, shall, upon proof of the petitioning creditor's debt and of the act of insolvency of the person against whom such petition is filed, adjudge such person insolvent ; . . . . ."

The principal point in this appeal is whether there was sufficient proof of the petitioning creditor's debt. The only proof before the District Judge both on March 18 and May 16 was the petition and the affidavit in support. These have been held to be insufficient proof. In the case of *ex parte* Lindsay in *In re Lindsay* [1], the headnote is as follows :—

> " At the hearing of a bankruptcy petition, even though the respondent has given no notice of his intention to show cause against the petition and does not appear the allegations contained in the petition must be supported by further evidence than the common affidavit. That affidavit is made only for the purpose of justifying the sealing of the petition ".

This case was followed in *ex parte* Dodd in *In re Ormston* [2]. In that case the debtor gave notice of his intention to dispute the statements in the petition and attended at the hearing but did not give any evidence or attempt to prove his objections. The Registrar made an order of adjudication on the production of the petition and affidavit in support and without any further evidence being adduced. Bacon C.J. held this was not sufficient proof of the petitioning creditor's debts and the Court of Appeal affirmed his decision.

In view of these authorities I think this appeal must succeed. It is clear from the record that both on March 18 and May 16 the only material before the learned District Judge was the petition of the petitioning creditor and the affidavit in support. No fresh evidence was adduced and there was consequently no evidence upon which an order of adjudication could be made.

[1] *19 Law Rep. (Equity Cases) 52.*

[2] *3 Chan. Div. 452.*

It will be seen from the cases already referred to that the fact that the adjudication is not disputed, assuming it to be undisputed in this case, is no reason for dispensing with formal proof of the petitioning creditor's debt. Further, as proceedings in bankruptcy are in the nature of penal proceedings inasmuch as they result or may result in an alteration of the debtor's status (Buckley L.J. in *In re a Debtor*[1]) there must be strict proof of the petitioning creditor's debt, that is, the debt must be proved not only to have existed at the time of the presentation of the petition but also to have continued to exist at the hearing and down to the making of the adjudication order.

In this case there was no such proof and I think the appeal must be allowed and the orders of the learned District Judge dated March 18 and May 16, adjudging the appellant insolvent set aside.

The petition however must be referred back to the District Court in order that it may be dealt with regularly, if the respondent so desires. The respondent does not contest this appeal, and we have been informed that he does not object to the adjudication being annulled. Further the proceedings in the District Court show that the adjudications were never contested on their merits but only on technical grounds.

Under all these circumstances I do not consider there should be any order as to costs.

DALTON J.—I agree.

Appeal allowed.