1914.

Present : Lascelles C.J. and De Sampayo A.J.

In re THE INSOLVENCY OF SAMSUDEEN

8 D. C. Colombo, 2,537.

Frivolous and vexatious defence—" Within six months next preceding of the filing of the petition "—What is to be deemed the date of the offence ?

Obiter, per LASCELLES C.J.—" I am bound to say that I feel a good deal of difficulty in accepting the proposition that the offence of raising a false and frivolous defence must be taken from the date of the judgment in the action. and not from the filing of the answer."

A defence which is disbelieved by the Court is not necessarily " frivolous and vexatious " within the meaning of section 151 (7).

THE facts are set out in the judgment of the District Judge (H. A. Loos, Esq.):—

Only one of the insolvent's creditors gave notice of opposition to the grant of a certificate of conformity to him, but that notice was not given three clear days before the date of the certificate meeting, so that the notice must be disregarded.

[1] *2 N. L. R. 38.* [2] *1 S. C. R. 120.*

The insolvent was sued in the action No. 35,063 of this Court for the recovery of a sum of Rs. 5,400 in respect of certain machinery alleged to have been purchased by him. He filed answer denying the purchase, and on April 15, 1913, judgment was entered against him for the amount claimed, with costs.

The insolvent did not appeal against that judgment, but on April 30, 1913, declared himself insolvent.

The question is, whether the insolvent has not been guilty of an offence under sub-section (7) of section 151 of the Ordinance No. 7 of 1853.

It was not contended by his counsel that the defence raised by the insolvent in the action No. 35,063 was not vexatious and frivolous, or that the creditor had not been put to unnecessary expense—in view of the finding in that action, such a contention could scarcely have been put forward with any success—but he contended that the offence, if any, had been committed longer than six months before the filing of the petition of sequestration of his estate by the insolvent, and that therefore he had not been guilty of the offence referred to in section 151 (7) of the Ordinance.

His contention was that the offence, if any, must be taken to have been committed when he refused to accept delivery of the machinery, and he relied on the case, *In re Insolvency of Silva*, D. C. Kalutara, 136,[1] in support of his contention.

The authority referred to appears to me to be against the insolvent's contention; for it was held in that case that the offence must be deemed to have been committed upon the date of the judgment deciding the facts upon which the offence is based.

It was held in that case that the point of time at which it is judicially determined that the expense, referred to in section 151 (7) of the Ordinance, has been caused to a creditor is that at which it should be held that the offence has been committed.

Now, in the action No. 35,063, it was held on April 15, 1913, that the defence raised by the insolvent was practically false—so that that was the date on which the offence "must be deemed to occur," and that was the date on which it was judicially determined that unnecessary expenses had been caused to the creditor.

So that the petition for sequestration of his estate having been filed by the insolvent two weeks after that date, it appears to me that he is clearly guilty of the offence under section 151 of the Ordinance, and therefore disentitled to a certificate of conformity.

I decline to award him a certificate.

The insolvent appealed.

Bawa, K.C., for the appellant.—The offence referred to by the District Judge was committed prior to six months of the filing of the petition of sequestration. The offence of filing a false and frivolous defence must be reckoned from the filing of the answer. Counsel cited *Ex parte Johnson* [2] *Vanderstraaten's Reports 2, In re the Insolvency of Silva* [1]. The District Judge in case No. 35,063 does not say that the defence was false or frivolous and vexatious.

[1] *(1910) 13 N. L. R. 254.*

[2] *4 De Gex & Smale's Reports 25.*

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In re the Insolvency of Samsudeen

Even if the defence in 35,063 was false, it could not be said that it was therefore frivolous and vexatious. They refer to false defences. Counsel referred to Annual Practice, Order 25, Rule 4, and the cases there cited; D. C. Colombo, 2,184.

February 10, 1914. LASCELLES C.J.—

This is an appeal by the insolvent against the refusal of a certificate of conformity. The ground, and the only ground on which the certificate has been refused, is that indicated in the seventh sub-section of section 151 of the Insolvency Ordinance of 1853, namely, that within six months next preceding the filing of the petition the insolvent has "put any of his creditors to any unnecessary expense by way of any vexatious and frivolous defence or delay to any action for the recovery of any debt of demand provable under the insolvency." The learned District Judge has held that the defence raised by the insolvent in action No. 35,063 of the District Court of Colombo amounts to an offence under the section. There is, in the first place, a difficulty as to whether the alleged offence was committed within six months of the filing of the petition. It has been suggested that the period must be reckoned from the date of the judgment in the action, and not from the date of the filing of the answer, and in support of that proposition we have been referred to the judgment *In re the Insolvency of Silva*. I am bound to say that I feel a good deal of difficulty in accepting the proposition that the offence of raising a false and frivolous defence must be taken from the date of the judgment in the action and not from the filing of the answer. I should have thought that the specific point of time at which the offence is committed would have been the time when a frivolous and vexatious defence is placed on the file, and I find that there is considerable authority in our reports in Ceylon for that view of the question. But I do not think it necessary to decide the present appeal on that ground. The action in which the insolvent is said to have raised a frivolous and vexatious defence is one in which he was alleged to have been the highest bidder at an auction for certain machinery. It appears from the evidence that on the day after the auction, when the insolvent became aware that the property had been knocked down to him, he at once repudiated the purchase, and denied that he had made the highest bid. When he was sued for the price of the goods he raised the same defence, and the learned District Judge, after hearing the evidence on both sides, gave judgment for the plaintiff, disbelieving the evidence of the defendant and his witnesses. In my opinion a defence of this sort is not a frivolous and vexatious defence within the meaning of the section. It is not a defence that

[1] *D. C. Min., Feb. 26, 1906.*

[2] *(1910) 13 N. L. R. 254.*

is obviously, and on the face of it, unsustainable. It is not a defence raised for the purpose only of gaining time or of harassing the creditor. It is a defence that was raised almost immediately after the conclusion of the sale, and it represents the answer which the insolvent had rightly or wrongly made to the claim against him. I am, therefore, of opinion that a certificate ought not to have been refused on the ground that the defence in the other action was frivolous and vexatious. I would set aside the order of the District Judge, and remit the case to him to decide whether any certificate, and if so of what class, should be allowed to the insolvent.

DE SAMPAYO A.J.—I agree.

Set aside.