

1939

Present : **Hearne and de Kretzer JJ.****FERNANDO v. MILLER & Co. et al.**59—*D. C. Chilaw, 46.*

*Insolvency—Right of an insolvent to protection—Power of Court to withdraw protection—Last examination—Insolvency Ordinance, ss. 36 and 151 (Cap. 82).*

The protection granted to an insolvent by section 36 of the Insolvency Ordinance is a privilege which the Court has no right to withdraw except in the exercise of the powers conferred on the Court under section 151 of the Ordinance.

**A** PPEAL from an order of the District Judge of Chilaw.

*N. E. Weerasooria, K.C.* (with him *A. E. R. Corea*), for insolvent, appellant.

November 21, 1939. DE KRETZER J.—

The insolvent in this case was duly granted protection, and he had been partly examined and the examination adjourned for a certain date. On the adjourned date the insolvent was absent but forwarded a telegram to the Court intimating that he was ill and that a medical certificate was being sent. The District Judge then withdrew the protection granted to the insolvent and in his order stated that the insolvent's conduct had been unsatisfactory in certain respects which he specified.

Thereupon two of the creditors moved to have a certificate in Form R issued and, after some postponements, their applications were allowed. On the insolvent being arrested an application was made for his release but was refused. He therefore appealed to this Court and was granted protection pending the appeal. In spite of an order that the certificate meeting should be duly held notwithstanding the appeal, the certificate meeting has not in fact been held as yet.

We decided that whatever view we may take of a submission on the law made by Counsel, we would direct the District Judge to grant the insolvent protection until the certificate meeting.

The point of law taken by Mr. Weerasooria was that the Court had no option in the matter, and that the insolvent was entitled to protection as of right. He quoted the case *In the Matter of the Insolvency of Punchedwage Don Juanis*<sup>1</sup> in which Lawrie J. held that the protection granted by section 36 of the Ordinance was a positive enactment of a privilege which it is not within the power of a District Court to take away, and that the mere announcement that the insolvent was not protected was unavailing and *ultra vires* of the District Judge.

Our Insolvency Ordinance copies the provisions of 12 & 13 *Victoria Chap. 106, s. 112*, and that in turn is almost identical with the terms of 6 *George IV., Chap. 16, s. 117* under which section it was held—in the case of *Ex parte Leigh* (1 *Glyn and Jamieson's Reports, p. 264*)—by the Lord Chancellor after consultation with the Lord Chief Justice, that a



bankrupt derived his right to protection from arrest from the terms of the statute and independently of the Commissioner's certificate. And in *Price's Case* (3 *Vessey & B.* p. 23) it was held that a bankrupt was protected through the whole period of his examination enlarged by the Commissioners, though they had omitted to endorse the adjournment on his summons. In both cases it was indicated that the endorsement was only necessary in order that the bankrupt might show on arrest that he was entitled to release, and also to fix the liability of the arresting officer in the penalty provided by the Ordinance.

It would seem therefore that there is authority both in the English reports and in our reports to support the position taken up by Mr. Weerasooria. The insolvent is accordingly entitled to be protected. The District Judge perhaps intended to act under section 151, but if so the offences which he thought the insolvent had committed must have appeared on the previous day when the insolvent had been partly examined; and that was the proper occasion for him to exercise the powers granted to him by section 151. He would then have been acting in the presence of the insolvent and his proctors, and would no doubt have given them an opportunity of showing cause. But he did not act on that occasion, and on the adjourned date nothing more appeared than that the insolvent was absent. The medical certificate did arrive in the course of that day and showed that the insolvent was ill with dysentery.

I think therefore the insolvent is entitled to protection from arrest until the certificate meeting. The protection will issue accordingly. There is nothing to indicate that the respondents were responsible for the action taken by the Judge and therefore no order for costs will be made.

HEARNE J.—I agree.

*Appeal allowed.*

