Present: Bertram C.J. and De Sampayo J.

1922.

In re the Insolvency of NADARAJAH.

113—D. C. Colombo, 2,979.

May opposing-creditor call insolvent as witness to prove his charges at the certificate meeting?—Power of Supreme Court to set aside a certificate—Insolvency Ordinance, ss. 89 and 129.

At the certificate meeting the creditor opposing the allowance of a certificate cannot call the insolvent into the box to examine him to prove his charges against the insolvent.

THE second sitting was closed on June 28, 1921, and certificate meeting was fixed for July 26, 1921. The appellant gave due notice on July 21, 1921, that he would oppose the granting of the certificate on certain grounds which he specified. On the day appointed for the certificate meeting, the appellant's Counsel moved to examine the insolvent who was present in Court in regard to the various grounds on which the appellant based his opposition. The District Judge (A. Beven, Esq.) held that as the second sitting was closed, the insolvent could not be examined till the opposing-creditor had led evidence to prove the charges framed against him; and that, then, the insolvent can be called to rebut the charges brought against him.

The opposing-creditor appealed.

Samarawickreme, for the appellant.

Jayawardene, K.C. (with him *Alwis* and *Siriwardene*), for the respondent.

1922. February 7, 1922. BERTRAM C.J.—

In re the Insolvency of Nadarajah

This is an appeal against an order of the District Court of Colombo refusing an application made on behalf of the opposing-creditor in an insolvency case for permission to examine the insolvent on the occasion of his application for a certificate. The learned Judge refused that application. He said: "I hold that as the last sitting was closed, the insolvent cannot be examined now, till the opposing-creditor has led evidence to prove the charges framed against him. He can, in my opinion, only be called to rebut these charges." The only thing before us is an appeal against that order, and we can only say that that order is absolutely correct. The Insolvency Ordinance makes various provisions for the examination of the insolvent debtor in the course of the proceedings. But it is specifically declared in section 89 that the last examination of the insolvent shall be the second public sitting of the Court; and this second public sitting was over long before this application was made. Moreover, the learned Judge was acting in entire accordance with a previous unreported decision of this Court. The opposing-creditor appears to have been very unfortunate in the legal advise which he received in the course of the proceedings. He had, it seems to me, repeated opportunities of putting his possibly legitimate grievances forward, and of submitting the bankrupt to a searching examination. Those who appeared for him did not think it necessary to take advantage of those opportunities, and even when the insolvent was examined, he was not cross-examined on behalf of the opposing-creditor. There is no doubt that on that ground he changed his legal advisers. But the subsequent history appears to have been no more fortunate, because his case was staked upon a legal point, namely, his claim to examine the insolvent at that stage of the proceedings. Having so staked his case, those who represented him, although they appear to have been in Court at the time when the Judge proceeded to inquire into the question of the issue of a certificate, or, at any rate, on the same day, did not bring any evidence forward, and, when the order for the issue of the certificate was finally made, did not appeal against it. It seems to me that we cannot do anything more in this case, than give our judgment in the appeal.

Mr. Samarawickreme, however, has invited us to go further, and to act under section 129, which gives a special power to the Supreme Court, within six months after a certificate has been issued, to set it aside. No doubt these proceedings are not fortunate proceedings. They are in accordance with the standard of proceedings in insolvency cases which the Courts of this Colony have unfortunately adopted. They have been frequently made the subject of comment in this Court. In my opinion, the present standard of insolvency proceedings is not creditable to the Courts

of this Colony. In this very case there has been no assignee's report. The Court knows nothing about the bankrupt's affairs, beyond what it can gather from the balance sheet. It has not thought it necessary (and, indeed, in a busy Court such a course is hardly practicable) to act on its own intentions and to assume responsibility for the examination of the bankrupt's affairs, and consequently a certificate has been issued, which does not represent any considered determination of the Court, and does not really imply that the bankrupt really deserves it. But what we are asked to do now is, on an appeal against one order of the learned Judge, to take special action under a very special section, intended for special circumstances, without any notice having been given to the insolvent, and without this Court having been approached in a formal way. The application is simply made in the course of the speech of learned counsel for the appellant who has addressed us. Whatever may be the defects in the proceedings, I do not think that this is the way in which this section should be set in operation. If those who advise the opposing-creditor wish to approach the Court under that section, they must do so formally, though, in view of the history of the case, I am not to be taken as suggesting, even if this action is taken, they are likely to take it with success.

In my opinion, the appeal against the order of the learned Judge, declining to allow the opposing-creditor to examine the bankrupt in the proceedings for the issue of a certificate, must be dismissed, with costs.

DE SAMPAYO J.—I agree.

Appeal dismissed.