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DECENTRALIZATION.

In a pamphlet on "Notre Système Judiciaire," noticed in a recent issue, the author, though a stanch supporter of the system of decentralization, and eager for a further extension of it, depicts as follows the existing condition of things in the rural districts:—

"Aujourd'hui, on peut dire que chaque district a sa jurisprudence locale; un juge décide une question dans un sens, dans un district, et son collègue, dans le district voisin, décide la même question dans un sens diamétralement opposé."

This is probably only too true, and it is the natural fruit of a system which isolates the Judges of the Superior Court, and allows each one to build up a jurisprudence after his own fancy within the precincts of his allotted district. The author imagines that a remedy might be found in bringing three Judges together, to hear and decide each case in the country districts. Even if this proposition were practicable, it would not touch the grievance. Each section into which the country might be divided in order to obtain the necessary quota of Judges, would have its own jurisprudence, just as each separate district has now, and the uncertainty and confusion would evidently be no whit less than at present.

GRAND JURIES.

We see that a bill has been introduced in the Commons by Mr. Coursol, one of the members for Montreal, to enable grand juries to be dispensed with in the Province of Quebec, except in capital cases. The preamble states that an investigation before a grand jury in the majority of cases has been shown by experience to be unnecessary. We are not aware that any representation to this effect has been made to Government by the judges of the Court of Queen's Bench, and on a question of this importance the opinion of the judges should certainly be invited before anything is done. But apart from the merits of the grand jury system, there is an objection to the sectional character of the proposed legislation. Why should grand juries be abolished in Quebec and retained in all the other provinces of the Dominion?

THE LATE MR. A. ROBERTSON, Q.C.

The bar of Montreal, in common with the lay community, has sustained the loss of several prominent members during the past few weeks. The last of these afflictions has been felt to be almost a personal bereavement by his professional brethren, for there were few more generally esteemed and loved than the late Mr. Andrew Robertson. The deceased gentleman, as appears by the list for the Montreal district, was actually the oldest actively practising advocate of the section, the names which precede his being those of gentlemen who have withdrawn from active duties at the bar. No one, however, looked upon Mr. Robertson as likely to be soon incapacitated by age or infirmity for the work in which he had so long taken a leading part. He was a veteran who had seen much service, but until recently he retained all the energy of youth, and he died in harness after only a week's illness.

Mr. Robertson, who was born in Aberdeenshire, Scotland, was a student in the office of Judge Day, and commenced practice in 1841, at the age of 26. About five-and-twenty years ago he removed from Sherbrooke to Montreal, where he practised with great success as head of the firm of A. & W. Robertson. He was also associated with the late Judge Beaudry in the preparation of the Lower Canada Reports. In 1864 he published a digest of the reported decisions up to that date. Mr. Robertson was entirely devoted to his profession, and never suffered his attention to be diverted to political pursuits. Probably for that reason he never attained a position on the bench, while less capable juniors were appointed. He was also fond of literature, his acquaintance with which was very extensive. Some years ago, he experienced a failure of eyesight in consequence of too close application, and was obliged to cross the Atlantic to consult eminent oculists in London. In the end, the sight of one eye was lost, and this misfortune appeared to have affected his health, though he retained his good spirits and genial mood to the last. Mr. Rob-

ertson offered an admirable example of unvarying courtesy towards *confrères*, and sterling uprightness in his professional conduct.

PUBLICATIONS.

LE CODE CIVIL ANNOTÉ, by E. Lef. de Bellefeuille, Esq., Advocate. Beauchemin & Valois, publishers, Montreal.

The new edition which Mr. De Bellefeuille has prepared of his work upon the Civil Code, comes before the public vouched for by authority so high that the members of the profession will not require any further commendation of it to induce them to accept it as a valuable aid in their labors. The author adopted the plan of communicating advance sheets of his work to the judges, and to several leading members of the profession, and these gentlemen unite in bearing testimony in emphatic terms to the general excellence of the plan, and to the ability with which it has been carried out. However, for the benefit of those who may not have seen these letters, it may be desirable to notice briefly the contents of the work.

The plan followed by Mr. De Bellefeuille is to give first the text of the Code, with the amendments made by the legislature; then to reproduce such statutes as modify any of the articles. To the text of each article is appended a reference to the authorities that treat of the respective subjects. Lastly, the decisions of the courts interpreting or bearing upon each article are collated and stated in concise terms. This plan entailed no inconsiderable labor upon the author, especially when executed with the fidelity and accuracy which are apparent throughout the work, and which are eulogized by the learned chief justice of the Queen's Bench in the following terms: "Je puis lui "rendre ce témoignage que tout l'ouvrage me "paraît fait avec le plus grand soin, et que les "citations, en autant qu'il m'a été possible de "les vérifier, sont justes et applicables aux "différents articles qu'elles servent à expliquer." Besides the references to reported decisions, Mr. De Bellefeuille has taken the trouble to include in his book a considerable number of unreported cases, from notes communicated to him by the Chief Justice and others,—a feature which adds materially to the value of the compilation.

The system of citation followed in this province has been somewhat irregular, and we cannot say that we like the mode adopted by Mr. Bellefeuille of indicating the number of the volume by Roman letters. VIII L.C.R. for 8 L.C.R.; III R.L. for 3 R.L., &c., seems to be clumsy as well as unnecessary, and if the punctuation is not carefully observed, might lead to confusion. The common mode of putting the number of the volume before the contraction of the title, and the number of the page after it, with both numbers expressed in figures, involves no obscurity, and is much more easily written. However this is a small detail in no way affecting the value of the work which Mr. De Bellefeuille has presented to the profession, at the cost of much labor and time —a sacrifice which under the circumstances affecting legal authorship in this province, can meet with but scant reward.

THE CRIMINAL LAW MAGAZINE; F. D. Linn & Co., Jersey City.

The March number of this new magazine is fully on a par with the excellence of its predecessor, and justifies its claim to a place in the front rank of legal literature. We remark especially the Digest of recent criminal cases, drawn from many sources, and comprising forty-one pages. This alone is worth more than the subscription to every lawyer with business in the criminal courts.

NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, March 20, 1880.

LOVETT v. THE GRAND TRUNK RAILWAY CO. OF CANADA.

Railway—Accident at street crossing—Contributory negligence—Burden of proof.

MACKAY, J., said that this was an action of damages against the Grand Trunk Company, resulting from an accident which occurred on the line at the crossing on Ann Street, in the city of Montreal. The plaintiff while driving across the track was struck by a locomotive and severely injured. The case was very similar to an action brought by one *Rolland* some time ago against the same company. Rolland

sued the Grand Trunk Company for having demolished an omnibus which was being driven across the rails. He alleged that the train came at unusual speed, without ringing a bell, or whistling, and knocked over his omnibus. The company pleaded that they were ringing the bell; that it was not incumbent on them to sound a whistle, and that the plaintiff might have avoided the accident, if he had been careful. A number of witnesses were examined on each side, and Judge Mondelet, who rendered the judgment, decided that defendants had adduced sufficient evidence to exonerate them from blame; and their evidence, which was affirmative in its character, was more satisfactory than the negative evidence of the plaintiff, and that the defendants were entitled to the benefit of the doubt, and the action was dismissed. That was the judgment in the Rolland case. The question was whether there was any difference in the present case. Thirteen witnesses had been examined for the plaintiff, and five for the defendant. The witnesses for plaintiff did not say positively that the bell was not rung. They merely said that they did not hear the bell ringing, and that if it had been rung, they would probably have heard it. His Honor quoted the remarks which he had made in the case of *Wilson* v. *Grand Trunk Co.*, in giving the judgment of the Court of Review, allowing a new trial (see 2 Legal News pp. 45–47). The burden of proof was on plaintiff to show violation of duty by defendants. Another case, *Prideaux* v. *City of Mineral Point*, in the last volume but one of American Reports, was also referred to as to proof of negligence, and what proofs were upon the plaintiff, and what were not upon him, in chief, in cases like the present one. In the present case the plaintiff assumed the burden of proof, and at the end of his case the defendant had gone into proof. Upon the whole the Court had to say whether there was proof of fault by defendants, or, of contributory negligence on the part of the plaintiff. His Honor was of opinion that there was the latter, and the accident was unavoidable on the part of the Grand Trunk. The moment the engine driver saw the plaintiff he tried to back. The plaintiff was jumping the track at the time, and he was struck, being too late, by half a second, in clearing the rails. It was clearly proved by defendants' witnesses that the bell was rung. The accident took place about four o'clock in the morning, when few persons were about, and all who were there swear that the bell was rung. The affirmative testimony that the bell was rung was stronger than the counter negative testimony. Judgment would, therefore, go, dismissing the action, the plaintiff not having proved culpable negligence on the part of defendants' employees, and the defendants having proved the allegation of their first plea, to the effect that the injury was caused by plaintiff's own want of care.

The judgment is as follows:—

"The Court, etc.,

"Considering that plaintiff has not proved the material allegations of his declaration, and particularly the one charging culpable negligence and neglect on the part of the employees and servants of defendants in charge of defendants' locomotive, to comply with the rules and regulations by law established for the passage of the locomotives and trains of the defendants through the streets of the city;

"Considering that defendants have proved the allegations of their first plea, to the effect that the injury to plaintiff complained about was caused by his own want of care;

"Considering that the collision, as it occurred, by which plaintiff was injured in July last, was avoidable by plaintiff, had he used proper or even common care, and that the defendants' servants were in no default, but using care, and that they did what was possible so soon as seeing that plaintiff's want of care was likely to lead to collision;

"Considering that the locomotive bell had been rung and was ringing at the time of the collision;

"Considering defendants not liable, doth dismiss plaintiff's action with costs."

Action dismissed.

Curran & Driscoll for plaintiff.

G. Macrae for defendants.

SUPERIOR COURT.

MONTREAL, March 20, 1880.

BREWIS v. STEWART.

Contract made by master while his ship is in peril—Ratification after the peril is past.

The agreement sued on was in these terms:—

"S. S. Nettlesworth, 19th July, 1879.

"I hereby promise to pay, as per agreement

the sum of £800, to tow the steamship Lake Champlain into Gaspé harbor.

"WM. STEWART, master S.S. Lake Champlain."

And the ratification referred to in the judgment was as follows:—

"S.S. Lake Champlain.

"This is to certify that the S.S. Nettlesworth has completed his agreement by towing the S.S. Lake Champlain into Gaspé.

"WM. STEWART, master S.S. Lake Champlain.
"20th July, 1879."

MACKAY, J., in giving judgment, said that this was an action for £800 stg., on an agreement resembling a promissory note, but without the name of a payee, by which defendant agreed to pay the sum of £800 for having his vessel, the steamship Lake Champlain, towed into Gaspé. The vessel was stranded about fifty miles from Gaspé, and had a valuable cargo—sometimes the cargo carried was worth as much as £100,000. There were also passengers on board. If bad weather had come on, the vessel would probably have become a total wreck. Stewart applied to Brewis, master of the S.S. Nettlesworth, for assistance, and gave this writing, and next day, when he was safe in Gaspé harbour, he gave Brewis another writing, to the effect that he had performed all that he had undertaken to do. Now Brewis sued Stewart on the agreement, and the latter said, I was in distress, and in order to be rescued, I agreed to exorbitant terms, and under such circumstances I should be held to have contracted under duress, and the bond being exorbitant, it should be reduced to a reasonable amount, viz., £400 sterling, which sum was tendered by the plea. Pothier cited the case of a man who contracts to be saved from imminent destruction, and the amount, if exorbitant, may be cut down. But this was a different case. After the defendant had arrived at Gaspé, and when he was perfectly safe, he gave Brewis a certificate that he had performed his engagement. Was not that a ratification of the original contract? His Honor was of opinion that it was, and therefore, although £400 would have been a handsome remuneration under the circumstances, the weather having proved fine for the voyage to Gaspé, the Court was estopped, as it were, by the ratification, and judgment must go for the amount of the bond. The agreement was for £800, which would usually mean pounds currency, but here the defendant himself had admitted that it was pounds sterling that both parties intended by it. Therefore, judgment for plaintiff for £800 sterling, capias and attachment maintained.

The judgment is as follows:—

"The Court, etc.

"Considering plaintiff's allegations material proved; and that he is entitled to the execution of the contract alleged;

"Considering that even if defendant could be seen to have been under any unlawful *contrainte* or duress, on the 19th July 1879, when he contracted and gave the written promise declared upon, to wit, the promise to pay as per agreement to plaintiff, the sum of £800 sterling to tow the steamship "Lake Champlain" into Gaspé harbour, he can be seen to have ratified the said written promise afterwards, when free, to wit, in Gaspé, 20th July 1879, and so ought not now to be allowed to maintain his plea that the written promise aforesaid should be set aside, or even reduced;

"Considering the offers of defendant £400 sterling as a *quantum meruit* for plaintiff insufficient, and not to be allowed;

"Doth adjudge and condemn the said defendant to pay and satisfy to said plaintiff the said sum of £800 sterling money of Great Britain, with interest."

Capias and *saisie-arrêt* maintained.

Trenholme, Maclaren & Taylor for plaintiff.

Davidson, Monk & Cross for defendant.

SUPERIOR COURT.

MONTREAL, February 12, 1880.

DESMARTEAU & Co., insolvents, BAILLIE et al., assignees, and Dame M. L. V. PERRAULT, claimant contesting collocation.

Wife judiciairement séparée de biens—Matters of simple administration—Right to sue for rent without authorization.

The contestant, Dame M. L. V. Perrault, contested the collocation made by the dividend sheet, and prayed that it be set aside, and that she be collocated by privilege for the sum of $104 due her for rent.

The joint assignees Baillie et al. pleaded an exception in law, that the claimant was described in the contestation as "épouse judiciairement séparée quant aux biens de S. A. Tessier"; that by law the claimant could not

appear in, or institute, any judicial proceeding without the authorization of her husband, or his being joined in the suit, and that the husband, Tessier, was not joined in the contestation. The contestant answered that in suing for the rent due, she merely performed an act of administration of her property, as she was by law entitled to do so.

RAINVILLE, J., dismissed the exception by the following judgment :—

"Considering that according to Art. 176 of the Civil Code, the wife *séparée de biens* may sue before the court for acts of administration ;

"Considering that the contestant is suing for rent of a property leased by her, and that this lease is within the limits of her administration, and that in consequence the answer in law or *exception en droit* is unfounded in law, doth dismiss the same with costs, distraits," &c.

M. Corbeil for contestant.

Davidson & Cushing for joint assignees.

COURT OF REVIEW.

MONTREAL, February 28, 1880.

JOHNSON, MACKAY, RAINVILLE, JJ.

MILLOY v. O'BRIEN.

[From S. C., Montreal.

Attachment in insolvency—Sufficiency of affidavit—Admission of inability to pay liabilities in cash.

The plaintiff inscribed in review on a judgment rendered by the Superior Court sitting in insolvency, (Jetté, J.), setting aside a writ of attachment issued against the defendant. The following observations of the learned judge who rendered the judgment appealed from, explain the case fully :

JETTÉ, J. Le 28 Juin 1879, le demandeur a fait émettre un bref en liquidation forcée contre le défendeur, en vertu de l'article 9 de la loi de faillite.

Le défendeur a contesté, alléguant que l'affidavit du demandeur n'énonçait aucune raison suffisante pour le soumettre à l'opération de la loi, et qu'en outre, les raisons alléguées étaient fausses et mal fondées.

Cette contestation étant produite, le défendeur a inscrit le 5 Juillet, pour le 11 du même mois, pour enquête et audition sur le mérite de sa requête à l'encontre du bref en liquidation forcée.

Le demandeur, voyant cette inscription du défendeur, inscrit de son côté, le 8 pour le même jour, 11 Juillet, "*for hearing upon the law "issues raised in the defendant's petition.*"

Cette inscription est produite le même jour, mais elle n'est pas mise sur le rôle, et celle du défendeur y apparaît seule à la date du 11 Juillet. La cause étant appelée au jour fixé, est remise au mois d'Août, et les entrées subséquentes démontrent que les parties ont ensuite procédé de consentement, à l'enquête sur toute la contestation liée entre elles.

Les deux parties se sont donc virtuellement entendues pour faire l'enquête sur le mérite même de la requête, et pour soumettre en même temps à la cour les questions de suffisance et de vérité des allégations de l'affidavit du demandeur, bâse de toute cette procédure ; et elles ont ensuite ratifié cette entente tacite par une déclaration expresse produite au dossier.

Or, la partie de la requête qui invoque l'insuffisance des allégations de l'affidavit, est de la nature d'une *défense en droit*, tandis que le reste constitue une *défense au fond.*

J'ai donc à examiner et à prononcer d'abord sur la contestation en droit, c'est-à-dire, sur la suffisance ou l'insuffisance des allégations de l'affidavit, car si ces allégations ne sont pas suffisantes, il est évident que quant même elles seraient prouvées, le bref ne pourrait être maintenu et devrait être cassé.

On a suivi, pour l'affidavit sur lequel repose cette procédure, la formule B, fournie par le statut. Cette formule est en rapport avec l'article 9 de la loi, qui déclare que tout créancier affirmant par affidavit qu'un commerçant lui est endetté en une somme prouvable en faillite, de pas moins de $200, en sus de toute garantie, aura droit à un bref en liquidation forcée contre ce commerçant, *pourvu que cet affidavit dévoile des faits et circonstances qui convaincront le juge ..... que ce commerçant est insolvable, et que ses biens sont devenus sujets à la liquidation* EN VERTU DES DISPOSITIONS DE CE STATUT.

Or, la loi elle-même, énumère dans l'article 3, quels sont les faits qui constituent des actes de faillite, et dont elle fait résulter la présomption légale de l'insolvabilité et de l'état de faillite du débiteur.

La formule du statut exige même que ces faits que le demandeur peut invoquer comme démontrant l'insolvabilité du débiteur soient

énoncées avec concision dans l'affidavit, afin que le juge puisse déclarer s'ils sont bien de ceux d'où découle la présomption de la loi, et si par suite la demande est bien fondée.

Dans l'espèce, l'affidavit est dans les termes suivants :

" 2nd. The defendant is indebted to me in a " sum provable in insolvency and unsecured of " six hundred and thirty-three dollars and four " cents currency.

" 3rd. To the best of my knowledge and belief, " the defendant is insolvent, within the meaning " of the Insolvent Act of 1875, and amending " acts, and has rendered himself liable to have " his estate placed in liquidation under the said " acts, and my reasons for so believing are as " follows :

" 1° That the said defendant gave me a " cheque on the Consolidated Bank of Canada " for the amount of the above claim, and said " cheque has been dishonored ;

" 2° That he has acknowledged to me his " inability to pay his liabilities *in cash ;*

" 3° That he has allowed several final judg- " ments to remain unsatisfied ;

" 4° That writs of capias have issued and a " demand of assignment has been made on " him."

L'article 18 de la loi de faillite, tel qu'amendé en 1877, dit que le failli pourra demander l'annulation du bref émis contre lui, " sur le motif " que la personne à l'instance de laquelle il a " été émané *n'a pas de réclamation contre lui*, ou " que sa réclamation ne s'élève pas à $200, en " sus de la valeur de toute garantie qu'elle pos- " sède, ou n'est pas prouvable en faillite, ou que " ses biens ne sont pas assujetis à la liquidation, " ou pour défaut d'affidavit, *ou pour insuffisance* " *en quelque point essentiel de l'affidavit requis par* " *l'article* 9, etc."

Profitant de cette disposition, le défendeur, par sa contestation, soulève d'abord la question de l'insuffisance des allégations essentielles de l'affidavit du demandeur, disant :

1° Que le demandeur ne fait pas voir quelle est *la nature* de la créance qu'il invoque contre lui.

2° Que les motifs par lui donnés pour affirmer que le défendeur est sujet à l'application de la loi de faillite, ne sont pas ceux que le statut indique, et sont complètement insuffisants.

Le premier moyen invoqué par le défendeur, que l'affidavit n'énonce pas la nature de la créance du demandeur, n'est pas sans difficulté. En effet, l'affidavit dit simplement :

" 2° The defendant is indebted to me *in a* " *sum provable in insolvency*, and unsecured of " $633.04 currency."

Pourquoi cette somme est-elle dûe au demandeur par le défendeur ? Est-ce pour un compte, pour un billet, ou pour toute autre cause ?

Le demandeur n'en dit rien ; il se contente d'affirmer que sa créance est *prouvable en faillite*, employant ici les expressions de l'article 9 de la loi, sans aller plus loin. Mais la formule B exige que le déposant indique brièvement et clairement *la nature de la dette*, et l'article 114 dit que les formules annexées au statut, ou autres formules *équivalentes seront employées* pour les procédures à l'égard desquelles ces formules sont prescrites.

Enfin, la règle de pratique No. 13, déclare formellement que : " All affidavits of indebted- " ness made by a creditor, or by the clerk or " agent of a creditor, *shall set forth the particulars* " *and nature of the debt, with the same degree of* " *certainty and precision as is required in affidavits* " *to hold to bail in civil process in the Courts of* " *Lower Canada.*"

L'affidavit du demandeur ne semble donc pas répondre sur ce point, aux exigences de la loi et de la règle de pratique. Néanmoins, comme le demandeur allègue plus loin, que le défendeur lui a donné un chèque pour le montant de sa créance, lequel, bien qu'il n'ait pas été payé, constitue, néanmoins, une reconnaissance de cette dette, je ne suis pas disposé à casser un bref sur ce premier motif.

Mettant donc de côté ce premier point, je passe maintenant à l'appréciation des motifs ou des faits sur lesquels le demandeur s'est basé pour affirmer que le défendeur est insolvable et que ses biens sont devenus sujets à liquidation, en vertu des dispositions du statut.

Le demandeur allègue quatre faits distincts :

" 1° That the said defendant gave me a " cheque on the Consolidated Bank of Canada, " for the amount of the above claim, and said " cheque has been dishonored."

Il n'a pas été et il ne pouvait être soutenu sérieusement, que c'était là un motif suffisant pour demander l'émission d'un bref en liquidation forcée. La loi a longuement énuméré les actes dont elle fait résulter la présomption d'in-

solvabilité d'un débiteur, mais rien de tel ne s'y trouve, et je ne saurais admettre que le refus d'acceptation de ce chèque puisse constituer seul un acte de faillite.

Le second motif allégué par le demandeur est comme suit :

" 2° That he (the defendant) has acknowledged to me his inability to pay his liabilities *in cash*."

Les termes du statut sont :

" Art. 3. A debtor shall be deemed insolvent :

" *a*. If he has called a meeting of his creditors for the purpose of compounding with them, or if he has exhibited a statement showing *his inability to meet his liabilities*, or if he has otherwise acknowledged his insolvency."

La version française dit :

" 3° Un débiteur sera réputé en faillite :—

" (*a*) S'il a convoqué une assemblée de ses créanciers dans le but de composer avec eux, ou s'il a produit un état, exposant *son incapacité à faire honneur à ses engagements*, ou s'il a autrement confessé son insolvabilité."

C'est un principe qui a été sanctionné déjà en jurisprudence, que cette partie de la loi qui énumère les faits qui constituent des actes de faillite, et soumettent le débiteur à son application, est de la nature d'un statut pénal et qu'elle doit être interprétée strictement.

Je trouve aussi que dans une cause de *Dutton* v. *Morrisson*, jugée en Angleterre (17 Vesey, p. 196), le Lord Chancelier Eldon a déclaré que : " *nothing can be an act of bankruptcy but what the statutes have made such.*"

Or, qu'est-ce que la loi déclare ici être un acte de faillite ? A quel fait, à quel aveu ou reconnaissance attache-t-elle la présomption d'insolvabilité qui soumet le débiteur à ses dispositions ? A une déclaration sans réticence, sans restriction. Le débiteur doit admettre purement et simplement *qu'il est* incapable de faire honneur à ses engagements. ' Une admission restreinte, un aveu qualifié, n'est pas ce à quoi la loi attache la présomption d'insolvabilité requise pour son application.

Dans l'espèce, le débiteur a reconnu : *his inability to pay his liabilities* IN CASH. A-t-il, par là, confessé son insolvabilité ? Je ne le crois pas.

Il n'est sans doute pas contestable qu'en droit, un débiteur qui ne peut faire honneur à ses engagements, c'est-à-dire payer ses dettes et satisfaire à ses obligations *en argent*, généralement et à mesure qu'elles échoient, est insolvable.

Il y a en effet une différence considérable entre la *déconfiture* et l'*insolvabilité*. La *déconfiture* est l'état du débiteur dont le passif excède l'actif ; l'*insolvabilité* est l'état du commerçant qui ne peut payer généralement ses obligations à l'échéance, quand même son actif excèderait son passif ; ou plus exactement, en d'autres termes, c'est *la cessation de paiements*.

Mais de ce qu'un débiteur peut être insolvable par le fait de son incapacité de rencontrer ses obligations *en argent*, généralement et à mesure qu'elles échoient, il ne s'ensuit pas que ce débiteur avoue et admette son insolvabilité lorsqu'il déclare qu'il n'est pas capable de payer ses obligations *en argent*. D'après le sens que comportent ces mots, dans le langage ordinaire, ils signifient simplement que le débiteur a plus d'actif que de passif, mais que si on lui demandait à l'instant de solder son passif en argent, il serait incapable de le faire.

Or, est-ce là l'aveu que la loi requiert pour armer le créancier de la rigueur de ses dispositions ? Certainement non. Car le débiteur qui affirme qu'il a plus d'actif que de passif n'admet pas son insolvabilité, au contraire ; et le fait qu'il ne serait pas prêt à payer *immédiatement* toutes ses dettes en argent, ne constitue pas non plus, ni dans notre droit, ni dans nos mœurs, l'insolvabilité. Il y a plus, le fait même du non paiement à échéance de quelque dette, ne suffit pas non plus pour constituer l'insolvabilité, il faut pour cela, dans le langage du statut, qu'un débiteur cesse de faire honneur à ses engagements généralement. (sec. 4.)

En présence de semblables dispositions serait-il possible de donner à la déclaration que l'on invoque contre le défendeur, le sens et la portée que le demandeur lui attribue ?

En Angleterre l'aveu d'insolvabilité par le débiteur, ne peut être fait que sous la forme d'une déclaration écrite, signée par lui et produite en Cour avec la contresignature d'un avoué ou d'un procureur. Notre loi de faillite n'est sans doute pas aussi exigeante, mais elle a beaucoup des caractères de la loi anglaise, et il n'est pas inutile de consulter les dispositions de celle-ci pour apprécier la nôtre.

Qui ne voit d'ailleurs combien il serait dangereux de permettre à un créancier de modifier à son gré, dans son affidavit, l'affirmation des faits que la loi exige pour constituer l'insolvabilité, et de diminuer par un qualificatif la portée d'une déclaration, de façon à admettre une restriction mentale qui sauve, au point de vue du droit civil et du droit criminel, la responsabilité de celui qui jure ?

Non, ce que la loi a voulu c'est l'affirmation précise de certains faits déterminés auxquels elle attribue la présomption légale d'insolvabilité ; et lorsqu'au nombre de ces faits elle place l'admission que peut faire le débiteur de son incapacité à faire honneur à ses engagements, elle demande cette déclaration pure et simple, sans restriction aucune et sans qu'il puisse y avoir place au doute sur le sens que le débiteur lui-même attribuait à ses paroles.

Je ne puis donc pas admettre que le défendeur en reconnaissant his inability to pay his liabilities *in cash*, ait confessé son insolvabilité dans le sens de la loi.

Le *troisième motif* allégué par le demandeur est :

3o. "That he (the defendant) has allowed several final *judgments* to remain unsatisfied.

Ce n'est pas à ce fait que la loi attribue la conséquence que cherche le demandeur. Le par. *k* de l'article 3 de la loi ne parle que de *saisie exécution*, et non de jugements, et encore faut-il que le débiteur néglige de payer jusqu'à une époque rapprochée du jour fixé pour la vente, ou pendant quinze jours après la saisie si la vente est fixée pour une date plus éloignée, pour que sa négligence constitue un acte de faillite pouvant donner lieu à l'émission d'un bref en liquidation forcée.

Ce motif n'est donc pas admissible non plus.

J'arrive maintenant au *quatrième* et dernier.

4o. "That writs of capias have issued and a demand of assignment has been made on him.

Il y a deux chefs dans cet allégué :

1o. L'émission de brefs de capias.

2o. Une demande de cession.

L'article 3 de la loi ne mentionne ni l'un ni l'autre de ces faits parmi ceux auxquels elle attribue la présomption d'insolvabilité.

Elle ne veut pas qu'on s'en rapporte aux procédés que d'autres créanciers ont pu adopter contre le débiteur ; c'est directement qu'elle exige que le demandeur procède, et si le défendeur est sur le point de laisser frauduleusement le pays, comme dans le cas du capias (*b*), ou s'il est emprisonné pendant plus de trente jours, à raison d'un contrat civil pour plus de $200, (*f*) elle voit là des actes de faillite et permet de s'en autoriser. Mais on comprend qu'elle n'attache aucune importance à des faits essentiellement discutables, émanant de tierces personnes, et ne pouvant valoir tout au plus que comme témoignages *ex parte*, dans le sens de celui qui les invoque.

Au reste, comme je viens de le dire, la loi n'en fait aucune mention, et ses dispositions ne peuvent être étendues de manière à comprendre des faits qu'elle n'a pas admis.

Ainsi donc aucun des faits allégués par le demandeur dans son affidavit et sur lesquelles il se fonde pour affirmer que le défendeur est insolvable et que ses biens doivent être mis en liquidation forcée, ne rentre dans la catégorie d'actes auxquels le statut attribue ce résultat.

La procédure du demandeur est donc mal fondée en droit et ne peut être maintenue.

Arrivant à cette conclusion sur les moyens de droit invoqués par le défendeur, il est évident que je n'ai pas besoin d'aller plus loin.

Les faits allégues par le demandeur étant insuffisants en droit, quand même ces faits seraient prouvés, le bref n'en doit pas être moins cassé.

Il est donc fort regrettable que les parties aient procédé à une enquête aussi considérable, sans faire vider préalablement les questions de droit soulevées dans la cause. Elles auraient ainsi évité des retards nécessairement dommageables, et des frais énormes que leur négligence commune me force de diviser entre elles. Car s'il est vrai que le défendeur a eu tort de mêler dans sa requête le droit et le fait, le demandeur peut se reprocher, de son côté, de ne pas avoir forcé le défendeur de séparer ces moyens par lui invoqués, de manière à lui permettre d'inscrire en droit avant de s'engager dans une contestation au mérite aussi longue et aussi couteuse.

Le bref sera donc cassé et annulé avec dépens contre le demandeur, sauf les frais d'enquête lesquels seront également partagés entre les parties.

Frais de pièces inclus dans les dépens.

In review,

JOHNSON, J., said in this case an attachment in insolvency was taken against the defendant, who appeared and contested the attachment on the ground of the insufficiency of the allegations of the affidavit. There were four reasons alleged in the affidavit for the insolvency of the defendant. 1st, That defendant had given him a check on the Consolidated Bank for the amount of the claim, and the check had been dishonored. 2nd, That defendant had acknowledged to deponent his inability to pay his liabilities in cash. 3rd, That he had allowed several final judgments to remain unsatisfied. 4th, That writs of capias have issued, and a demand of assignment has been made on him. It was obvious that as regards the first and the two last reasons, there was nothing in them. The mere fact of a check being dishonored amounted to nothing. The same might be said of the allegation that there were judgments unsatisfied. With regard to the writs of capias and the demand of assignment, it was not stated when these writs were issued, nor when the demand of assignment was made. On the face of the affidavit, the only ground which had any plausibility was the second,—that defendant had acknowledged his inability to pay his liabilities in cash. It was true that inability to pay liabilities in cash was insolvency. Payment in cash is the payment which the law contemplates. But that was not the question now. The question was as to the sufficiency of the affidavit. The Court must take language in its common meaning, and when the defendant said he was unable to pay his liabilities in cash, it must be taken to mean that he could not pay all his liabilities with money ready in hand. But that was not an act or proof of insolvency. He was only bound to pay his liabilities as they matured. If he had said that he would be unable to meet his liabilities as they matured, the case would be different.

Judgment confirmed.

M. J. F. Quinn for plaintiff.

J. L. Morris and *W. B. Lambe* for defendant.