Browning's frank admission. *Mr. Breckenridge*, it seems, merely intimated that, in view of the decision of the Full Court in *Macfarlane's Case* (1), he would not take up the time of their Honors with arguments which they had already overruled.

I understand that it has been the practice of the High Court to rescind the leave to appeal in such a case as the present; and I see no sufficient reason for departing from this practice under the circumstances.

Special leave rescinded.

Solicitor, for the appellant, *H. R. Clark.*

Solicitor, for the respondent, *The Crown Solicitor for New South Wales.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

HAMILTON . . . . . APPELLANT;
RESPONDENT,

AND

WARNE . . . . . RESPONDENT.
PETITIONER,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Insolvency Act 1890 (*Vict.*) (*No.* 1102), *secs.* 37 (VIII.), 45—*Petition for sequestration—Act of insolvency—Failure to satisfy judgment—Demand for more than is owing—Notice of objection, sufficiency of.*

Where judgment has been obtained against a debtor, and he has afterwards paid part of the amount due, a subsequent demand upon him for the whole amount of the judgment debt is not a good demand on the debtor to satisfy the judgment so as to constitute an act of insolvency within the meaning of sec. 37 (VIII.) of the *Insolvency Act* 1890.

(1) (1907) S.R. (N.S.W.), 149.

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On a petition for sequestration, a notice having been given by the debtor that he disputes the act of insolvency alleged in the petition (that he had been called on to satisfy a judgment, and had failed to do so), he is entitled to prove that the demand on which the act of insolvency was based was for a larger sum than was due, and, therefore, to give evidence that before the issue of execution he had paid part of the judgment debt.

Per Higgins J. *Quære*, whether the sheriff's officer is, for the purpose of the act of insolvency, to specify the exact amount that is owing—whether he may not, following the rule of the Act, simply call upon the debtor to "satisfy the judgment."

Judgment of *Hood* J.: *In re Hamilton*, (1907) V.L.R., 75; 28 A.L.T., 124, reversed.

APPEAL from the Supreme Court of Victoria.

On the petition of James Warne an order *nisi* was on 4th October 1905 issued for the sequestration of the estate of William Herdman Hamilton. The order *nisi* contained the following statement:—

"Upon reading the petition of James Warne . . . setting forth that the abovenamed W. H. Hamilton of No. 196 Flinders Street Melbourne in the said State Indent Agent is justly and truly indebted to the said petitioner in the sum of £56 15s. 4d. upon and by virtue of a judgment of the Supreme Court of the State of Victoria in an action No. 764 of 1905 whereby the petitioner on the 21st day of December 1905 recovered against against the said W. H. Hamilton the said sum of £56 15s. 4d. which sum of £56 15s. 4d. is now due and owing and that the petitioner's said debt is wholly unsecured and that the said W. H. Hamilton has committed an act of insolvency within six months before the presentation of the said petition and that the act of insolvency committed by him was that an execution issued on the said judgment obtained in the said Supreme Court in favour of the said petitioner in the said action No. 764 of 1905 instituted by the said petitioner has been returned unsatisfied in whole and the said W. H. Hamilton before the return of the said execution was and has been called upon to satisfy the said judgment by Charles James Hardy the officer charged with the execution thereof and has failed to do so," &c.

On 16th October 1906 Hamilton duly lodged notice of the following objections:—

"1. That I dispute the debt as alleged in the said order *nisi*.

"2. That I dispute the act of insolvency alleged in the said order *nisi*.

"3. That I will rely upon all objections appearing on the face of the proceedings."

On the return of the order *nisi* before *Hood* J., evidence was given that execution was issued for the full amount of the judgment debt, and that the sheriff's officer demanded that amount. Evidence was tendered on behalf of Hamilton to show that, between the date of the judgment and the issue of execution thereon, he had paid off part of the judgment debt. The learned Judge rejected the evidence, holding that it did not come within the objections of which notice was given, and he made the order absolute. (*In re Hamilton* (1)).

Hamilton now appealed to the High Court.

Winneke, for the appellant. If the evidence had been admitted it would have shown that execution was irregularly issued, being for an amount that was not owing, and that the demand was excessive. The debtor has not been asked to satisfy the judgment if he has been asked to pay more than is due: *In re Morgan* (2); *In re Tucker* (3); *In re Follows*; *Ex parte Follows* (4); *Ex parte Ford*; *In re Ford* (5); *In re Child*; *Ex parte Child* (6).

[ISAACS J. referred to *In re H. B.* (7).]

Execution could only properly have been issued for the amount of the judgment debt owing. The provisions of sec. 37 of the *Insolvency Act* 1897 should be most strictly complied with. The notice of objection is quite wide enough to cover this objection, for, if there was no proper demand, there was no act of insolvency.

Arthur, for the respondent. Where the intention of the debtor is to dispute the act of insolvency the practice is that he should give details of the objection. The real objection here is that the issue of execution was irregular and should have been set aside.

(1) (1907) V.L.R., 75; 28 A.L.T., 124.
(2) 2 W.W. & à B. (I.E. & M.), 2.
(3) 13 V.L.R., 551.
(4) (1895) 2 Q.B., 521.
(5) 18 Q.B.D., 369.
(6) (1892) 2 Q.B., 77.
(7) (1904) 1 K.B., 94.

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That is, at any rate, a special objection of which specific notice under sec. 45 should have been given. But the execution was good until it was set aside, and a demand made in accordance with it was a good demand. The execution was voidable but not void.

[HIGGINS J.—The writ of execution might have been amended: *Laroche* v. *Wasbrough* (1); *M'Cormack* v. *Melton* (2).]

See also *Gerard* v. *Lewis* (3). There may be a valid act of insolvency on an irregular writ of execution. The objection of the debtor amounts to a confession and avoidance. In *In re Tucker* (4) it was patent on the face of the proceedings that there was no act of insolvency. The objection is a "special defence" within the meaning of sec. 45 of the *Insolvency Act* 1890. The intention of that section is that, if there is anything special alleged by the debtor to take him out of the operation of the formal acts necessary to bring about insolvency, he must state them: *In re Ryan* (5); *Lewis's Insolvency Law of Victoria*, p. 141.

[HIGGINS J.—As to what is a special defence, see *Ex parte Griffin*; *In re Adams* (6).]

[Counsel also referred to *In re Walker* (7); *In re Wright* (8).]

Winneke, in reply, referred to *Robson on Bankruptcy*, 7th ed., p. 187; *Ex parte Danks* (9); *In re Elkington* (10); *In re McCutcheon*; *Ex parte Hatty* (11).

Cur. adv. vult.

June 24.

GRIFFITH C.J. This is an appeal from an order of *Hood* J. making absolute an order *nisi* for the sequestration of the estate of the appellant. The alleged act of insolvency was that execution, issued on a judgment in favour of the petitioning creditor, was returned unsatisfied in whole, and that the appellant before the return of the execution had been called upon to satisfy

(1) 2 T.R., 737.
(2) 1 A. & E., 331.
(3) L.R. 2 C.P., 305, at p. 310.
(4) 13 V.L.R., 551.
(5) 7 V.L.R. (I.P. & M.), 122; 3 A.L.T., 52.
(6) 12 Ch. D., 480.
(7) 15 V.L.R., 684.
(8) 15 A.L.T., 190.
(9) 2 DeG. M. & G., 96.
(10) 13 A.L.T., 240.
(11) 26 V.L.R., 175; 22 A.L.T., 26.

the judgment by the officer charged with the execution of it and had failed to do so. The appellant gave notice that he intended to dispute the debt and also the act of insolvency. At the hearing before *Hood* J., he tendered evidence to prove that he had paid off part of the judgment debt before the issue of execution, and consequently that the amount demanded from him by the officer charged with the execution of the writ was more than the amount due on the judgment. The Judge refused to admit that evidence, and made the order absolute.

It is conceded that, if the evidence had been admitted and believed, it would have proved that the defendant did not owe the full amount of the judgment debt. It is necessary, therefore, to consider whether such evidence was material, that is, whether the fact, if proved, would have been an answer to the petition.

Sec. 37 (VIII.) of the Act, in describing the act of insolvency alleged in the present case, uses these words: "When execution or other process issued on a judgment decree or order obtained in any Court in favour of any creditor in any proceeding instituted by such creditor is returned unsatisfied in whole or in part. Provided that the debtor has been called upon to satisfy such judgment decree or order by the officer or other person charged with the execution thereof and has failed to do so." The effect of insolvency is very serious. It not only divests all the debtor's property from him and vests it in someone else, but it imposes upon the debtor liability to the criminal law which would not otherwise follow, and acts which have been done by him in the past may become retrospectively criminal. So far as I know, the provisions of the law as to acts of insolvency have always been construed strictly. An analogy—not binding, it is true—may be found in the rule for the construction of provisions creating a forfeiture. I refer to a case which has not lost its authority by reason of its antiquity, viz.: *Fabian and Windsor's Case* (1) decided in the 31st and 32nd year of Elizabeth. That was a case of alleged forfeiture for non-payment of rent. It was held by all the Judges "that if in demand of rent the lessor, or any on his part doth demand one penny more or less than is due, or in his demand doth not show the certainty of the rent, and

(1) 1 Leon., 305.

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the day of payment of it, and when it was due, the demand is not good, for a condition which goes in defeasance of an estate is odious in law, and no re-entry in such case shall be given, unless the demand be precisely and strictly followed." That case is referred to as an authority in the notes to *Duppa* v. *Mayo* in *Williams' Saunders* (1), and in modern text books. The principle, that there should be no forfeiture unless the terms of the condition are exactly complied with, being in my opinion applicable, what does the Act require? The answer is—the debtor must be called upon to satisfy the judgment. I am not prepared to say that if the officer called upon the debtor to pay less than was due, that that would necessarily be fatal. But I do think that, if the officer calls upon the debtor to pay more than he owes on the judgment, that is fatal, and I do not know of any case in which it has been held to the contrary. The English authorities on bankruptcy notices are not directly in point because the language of the English Statute is different. But, in my opinion, a demand upon the debtor to pay more than is due is a bad demand. It is suggested that the officer need not demand any particular amount. In construing the Act we must have regard to the state of circumstances which the legislature was dealing with? The sheriff's officer has a warrant delivered to him directing him to levy a particular sum. He knows how much he is directed to levy; the debtor does not until he is told. In my opinion, the duty of the officer is to demand the precise sum which he is directed to demand. If that is more than the actual amount owing, the debtor has not been called upon to satisfy the judgment, but has been called upon to do something else. If the law were as contended for, the officer might come to the debtor and say, "Satisfy this judgment." The debtor might say, "I do not remember how much I owe," and the officer might say, "I do not know how much you owe." It would be absurd to say that such a demand would be calling upon the man to satisfy the judgment, as that phrase is used in a Statute under which failure to satisfy the judgment involves the divesting of property and imposes serious disabilities upon the debtor. I am, therefore, of opinion that the evidence was admissible.

(1) 1 Saund., 276, at p. 287.

The learned Judge was, however, of opinion that the objection could not be taken under the notice of intention to dispute the act of insolvency. The Act (sec. 45) requires the debtor, if he intends to oppose the making absolute of the order *nisi*, to give a notice stating "whether he disputes the act of insolvency or the petitioning creditor's debt or both, and if he intends to rely on any special defence such notice shall contain the particulars of any such defence." It is argued that the defence that a greater amount was demanded than was due was a special defence. I am disposed to think that the words "special defence" mean something in the nature of confession and avoidance, and, if the correct view is that a demand for a greater sum than is due is not a demand at all, evidence is admissible, without amendment, to show that state of facts. But even if this be a special defence, it was a case in which an amendment should have been allowed *ex debito justitiæ*, when once it was brought to the notice of the Court that the answer intended to be made was that the debtor had not committed the act of insolvency alleged.

For these reasons I am of opinion that the appeal must be allowed, and that the case must be remitted to the Supreme Court for further hearing. I think the respondent should pay the costs of this appeal.

BARTON J. I entirely concur, for the same reasons.

ISAACS J. read the following judgment. The order *nisi* in pursuance of sec. 43 of the *Insolvency Act* 1890 set out as the act of insolvency relied on that contained in sub-sec. (VIII.) of sec. 37. The officer's demand to satisfy the judgment, and the debtor's failure to do so is an essential part of the act of insolvency. See *In re Field* (1). The respondent, by his notice pursuant to sec. 45, disputed the act of insolvency, and thereby put the demand and failure in issue.

If the evidence tendered had been given and believed, the amount due upon the judgment, and for which execution could properly have been levied, would be £1 0s. 9d. less than the sum directed to be levied, and actually demanded.

(1) 17 A.L.T., 30.

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The demand under the Statute must be made by the officer charged with the execution of the judgment; he must be authorized to make it, and it must be a demand such as the law requires.

Here the demand was made by the proper officer, he made it in strict pursuance of his authority, but the demand, if the evidence tendered were true, went beyond the amount required to satisfy the judgment, and therefore beyond what the law permitted and required.

An excessive demand by a pledgee, who could only sell after demand for payment, was held bad in *Pigot* v. *Cubley* (1), recognized in *Deverges* v. *Sandeman, Clark & Co.* (2).

I think, therefore, that the learned Judge was in error in excluding the proffered evidence to displace the *primâ facie* case made by production of the judgment, the writ of execution and the testimony of the Sheriff's officer respecting the demand. Sec. 45 prescribes what notice the respondent shall give. It provides that:—"Such notice shall state whether he disputes the act of insolvency or the petitioning creditor's debt or both, and if he intends to rely on any special defence such notice shall contain the particulars of any such defence and such notice shall be a waiver of all technical objections to the proceedings." A special defence must mean something outside the defences expressly mentioned.

The demand in this case was for a specific sum of money, viz.:—£56 15s. 4d.—correct if the respondent's suggested payment were not sustained, too much by £1 0s. 9d. if the payment were established.

Sub-sec. (VIII.), in my opinion, requires a demand for a specific sum for the purpose of completing an act of insolvency. It is not analogous to the case of a debtor who is bound to find his creditor and pay him without demand. Here the creditor is endeavouring to alter the status of his debtor, and attach to him quasi-penal consequences: See *In re Phillips*; *Ex parte Treboeth Brick Co.* (3); *Hood Barrs* v. *Heriot* (4). Where the law for the purpose of insolvency requires the creditor to see that the debtor is called

(1) 15 C.B.N.S., 701.
(2) (1902) 1 Ch., 579.
(3) (1896) 2 Q.B., 122.
(4) (1896) 2 Q.B., 375.

upon to satisfy the judgment, it means that the debtor is to be asked to pay a named and definite sum, as to which there can, of course, be no mistake in the mind of the creditor or the officer, and which is the sum remaining unpaid or otherwise unsatisfied —in other words the sum for which execution could properly be levied and enforced. If it were otherwise, a debtor, having ample means to discharge his liability, and honestly desirous of doing so, might by an error of memory or calculation hand a less sum than the amount actually due for principal, interest and costs to the officer, who, according to the argument, being under no obligation to correct the error, would return the writ unsatisfied in part and so complete an unwitting act of insolvency. Having regard to the consequences, the risk of this error ought not to fall on the debtor. Again, a sheriff's officer may, without reference to the debtor, sell property belonging to him, and realize only enough to partly satisfy the writ. If the officer were under no obligation to make a specific demand upon the debtor, it might be quite impossible for him to know the balance proper to be paid.

As supporting the views I have stated I would refer, in addition to cases already mentioned, to the Victorian cases of *In re Morgan* (1); *In re Willison* (2); *In re Tucker* (3) and the principles relied on by the Court in the English case of *In re H. B.* (4).

HIGGINS J. read the following judgment. I am also of opinion that the appeal should be allowed. Unfortunately the notes of the evidence taken before the learned Judge do not appear in the transcript; but counsel on both sides have admitted what took place, so far as is necessary for our decision. The act of insolvency alleged is failure to satisfy a judgment for £56 15s. 4d. under sub-sec. (VIII.) of sec. 37 of the *Insolvency Act* 1890; and it is admitted that the officer charged with the execution of the judgment demanded payment of the specific sum of £56 15s. 4d. appearing on the writ of execution. He did not demand in general terms that the debtor should "satisfy the judgment." Counsel for the debtor tendered evidence to

(1) 2 W. W. & aB. (I.E. & M.), 2.
(2) 4 V.L.R. (I.P. & M.), 67.
(3) 13 V.L.R., 551.
(4) (1904) 1 K.B., 94.

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show that a sum of £1 0s. 9d. had been paid off since the judgment; and that evidence was rejected on the ground that the notice of objections did not raise an objection of part payment. The form of the notice of objections is prescribed in sec. 45:—"Such notice shall state whether he disputes the act of insolvency or the petitioning creditor's debt, or both, and if he intends to rely on any special defence such notice shall contain the particulars of any such defence." One of the grounds of objection appearing in the notice was "That I dispute the act of insolvency alleged in the said order *nisi*." This is a general traverse of all the material facts constituting the act of insolvency as alleged in the order *nisi*; and, amongst other things, it is a traverse of the statement that the debtor was "called upon to satisfy the judgment." Sub-sec. (VIII.) of sec. 37 had been satisfied, so far as regards the facts (1) that the execution in favour of a creditor had been issued, (2) that it had been returned unsatisfied. But there is a proviso—a condition precedent to proceedings for sequestration—that the debtor shall be "called upon to satisfy the judgment," and that he has failed to do so; and the debtor is entitled to call any evidence relevant to this issue. The question then arises, is a judgment debtor called upon to "satisfy the judgment," when he is called upon to pay the full amount for which judgment was entered, although part of the debt has been paid off? In my opinion, he is not. The debtor may have a judgment against him for £150; he may have paid off £50, and have got together the £100 to satisfy the judgment when demand is made; and I do not think that he can be made insolvent under sub-sec. (VIII.) because he fails to comply with a demand for £150. Sequestration divests him of all his property, and alters his status. The proceedings are quasi-penal; and his conduct must come strictly within the words of the Act in order to justify the Court in making the order absolute. My view is that, if there was any part payment in fact, the debtor, when called upon to pay the full sum of £56 15s. 4d., was not called upon to "satisfy the judgment," but to satisfy a demand which was excessive. A man satisfies a judgment by paying what remains owing under it, by paying what is enough to complete his obedience to the Court's order. The evidence was, therefore, in my opinion, wrongly

rejected; and the appeal should be allowed, and the order *nisi* remitted to the Supreme Court for re-trial.

It is not necessary for the purpose of our decision to say whether the specific sum due must be mentioned by the officer, in making an effective demand under sub-sec. (VIII.) of sec. 37. But I desire to guard myself against the view that this is necessary. The officer has to call upon the debtor to "satisfy the judgment." This is all that is expressed in the Act; and I cannot see that any more is necessarily implied. Whether wisely or unwisely the legislature has not annexed to this act of insolvency the further condition that the sheriff's officer must, at peril of the creditor, specify the exact amount that is owing. Ordinarily, a debtor must, at his peril, know what he has to pay, and pay it. This is not one of those exceptional cases in which the amount payable depends on some fact known to the party claiming, and not to the other party, as in *Brown* v. *Great Eastern Railway Co.* (1). A mortgagee, in giving notice to pay before exercising his power of sale, does not state what he claims to be owing (cf. *Davidson's Conveyancing*, vol. II., pt. II., Mortgages, 4th ed., 409; vol. V., pt. II., 3rd ed., 708; *Transfer of Land Act* 1890, sec. 114). At present, I am strongly disposed to think that the officer need only ask the debtor to "satisfy the judgment," and the debtor must, at his peril, tender the amount which is, in fact, adequate to satisfy it. The English cases, as to bankruptcy notices, do not affect this construction of sub-sec. (VIII.); for the English *Bankruptcy Act* and rules specifically provide that the amount due shall be inserted in the notice (*Bankruptcy Act* 1883, sec. 4 (1) (*g*); *Bankruptcy Rules* 1886 Appendix, Form, No. 6).

It has to be remembered that the sheriff's officer, in the exercise of his ordinary function under a writ of *fi. fa.*, need not make any demand of any amount on the debtor. His duty is to seize and sell sufficient goods of the debtor to satisfy the writ (*quod fieri facias de bonis et catallis*). He has also power to receive from the debtor the amount in the writ, in lieu of selling; and, if the execution creditor receives more money than is really due to him, the debtor has his remedy. But the officer has a novel function put upon him by sub-sec. (VIII.) of sec. 37, for the purpose of insol-

(1) 2 Q.B.D., 406.

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vency proceedings, to call upon the debtor to "satisfy the judgment." I am strongly inclined to think that we should not add anything by way of implication to the express requirements of the section, or find a new pitfall for creditors seeking their dues, or lay additional technical responsibilities on sheriff's officers. However, the question has not yet arisen, and I concur with my learned brothers that the appeal should be allowed.

Appeal allowed. Order appealed from discharged. Case remitted to the Supreme Court. Respondent to pay costs of appeal. Costs of first hearing to be costs in the proceedings.

Solicitor, for appellant, *W. R. Rylah.*

Solicitor, for respondent, *A. R. Daly.*

B. L.

Discd *West* v *Deputy Commissioner of Taxation (NSW)* (1937) 56 CLR 657

Discd *McCawley* v *R* (1918) 26 CLR 9

[HIGH COURT OF AUSTRALIA.]

SIR POPE COOPER, CHIEF JUSTICE OF THE SUPREME COURT OF QUEENSLAND . . } APPELLANT;

AND

COMMISSIONER OF INCOME TAX FOR THE STATE OF QUEENSLAND . . } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1907.

BRISBANE, *April* 22, 23, 24; *June* 28.

Griffith C.J., Barton, O'Connor, Isaacs and Higgins JJ.

Income Tax (Consolidated) Acts 1902-4 (*Qd.*) (4 *Edw. VII. No.* 9), *secs.* 3, 7, 12, 58—*Income Tax Declaratory Act* 1905 (*Qd.*) (5 *Edw. VII. No.* 34), *sec.* 2—*Order in Council, 6th June,* 1859, *pars.* II., XV., XVI., XXII.—*Constitution Act* 1867 (*Qd.*), (31 *Vict No.* 38), *secs.* 4, 16, 17—*The Constitution* (63 & 64 *Vict. c.* 12), *sec.* 106—*Judicial Salaries, income tax on—"Diminution"—"Paid and Payable"—State Laws, inconsistency with State Constitution—Powers of Legislatures under written Constitutions—Colonial Laws Validity Act* 1865 (28 & 29 *Vict. c.* 63), *secs.* 2, 3, 5.