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BETWEEN:

HIS MAJESTY THE KING.....CLAIMANT;

AND

ALBERT SANSOUCY.....DEFENDANT.

1948

March 5
May 28

*Crown—Remedies for recovery of Crown debts—Writ of immediate extent —Jurisdiction of the Court—Exchequer Court Act, R.S.C. 1927, c. 34, ss. 30, 35, 36—General Rules and Orders 2, 8, 9, Form 4—Income War Tax Act, R.S.C. 1927, c. 97, ss. 48 (2), 48 (3), 54, 66, 70—Affidavit of debt and danger.*

Motion to set aside writ of immediate extent and fiat therefor on the grounds that the Court had no jurisdiction to grant fiat or issue writ and that affidavit of debt and danger in support of fiat was insufficient and defective.

*Held:* That this Court has had jurisdiction over writs of extent at the suit of the Crown as fully as it was possessed in the United Kingdom by the Court of Exchequer there and its successors and that such jurisdiction remains intact and is unaffected by the abolition of writs of extent in England.

2. That the practice and procedure for the issue of such writs is that in force in the High Court of Justice in England on January 1, 1928.

(1) (1921) 63 S.C.R. 141, 154. (2) (1882) 8 App. Cas. 82, 94.

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3. That in the affidavit in support of an application for a fiat for a writ of immediate extent it is not sufficient merely to allege that the defendant is indebted to the Crown in a specified sum; the facts from which the indebtedness is alleged to have arisen showing the nature and origin of the debt must be stated with reasonable certainty. It must also be shown that the debt is such that an action for it would lie, that is to say, that it is not only due but is also payable.

4. That it is not sufficient in an affidavit of debt and danger merely to state that the debt is in danger of being lost; it is necessary to set out the facts from which the conclusion may be drawn that the debt is in danger and that there is need for the issuance of a writ of immediate extent for its speedy recovery. *Rex* v. *Pridgeon* (1910) 2 K.B. 543 followed.

5. That the writ of immediate extent is an extraordinary remedy calling for the exercise of the discretion of the Court where the need for it appears and it is essential that the requirements of proof which the law imposes under the circumstances should be strictly complied with.

MOTION to set aside fiat for writ of immediate extent and writ issued thereunder.

The motion was heard by the Honourable Mr. Justice Thorson, President of the Court, at Ottawa.

*A. W. Beament K.C.* and *M. H. Fyfe* for the motion.

*J. A. Prud'homme K.C.* and *C. Prevost K.C. contra.*

The facts and questions of law raised are stated in the reasons for judgment.

THE PRESIDENT now (May 28, 1948) delivered the following judgment:

Application on behalf of the defendant to set aside the writ of immediate extent issued out of this Court herein on February 12, 1948, and the fiat of Angers J. of the same date under which it was issued. The fiat was granted on the application of the claimant and the affidavit of W. V. Scully, the Deputy Minister of National Revenue for Taxation, and the writ of immediate extent issued under it was directed to the Sheriff of the Judicial District of Montreal and his bailiff. The grounds on which the defendant's application was made were that this Court had no jurisdiction to grant the fiat or issue the writ and that even if it did have such jurisdiction the affidavit of Mr. Scully was insufficient.

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The writ of extent, or *extendi facias,* is a writ of execution at the suit of the Crown by which it may seize at once the lands, goods and debts or other choses in action of its debtor. There is some difference of opinion as to when it first became a remedy of the Crown. Robertson on Civil Proceedings by and against the Crown, 1908, at page 189, expresses the view that it was a Crown remedy at common law in the case of debts of record, and that it was extended by the Crown Debts Act, 1541-2, 33 Hen. VIII, chap. 39, to all debts owing to the Crown, whether of record or not. The weight of authority is against this view. The leading text book on the subject, West on Extents, 1817, states, at page 2, that "Extents at the suit of the crown are founded upon the stat. 33 H. VIII. c. 39". His opinion was that the writ of extent became a new process to the Crown by reason of the statute, that it was borrowed from the remedy previously available only to the subject by way of execution on what was known as the Statute Staple, "the extendi facias against body lands and goods being peculiarly the process on the statutes staple and statutes merchant", (securities for debts originally permitted among traders under certain circumstances for the benefit of commerce but now obsolete), and that it was first imparted to the Crown by the statute. *Vide* also in support of this view: Chitty on the Prerogatives of the Crown, 1820, at page 263; Manning's Exchequer Practice, 2nd edition, 1827, at page 4; *Bishop of Rochester* v. *Le Fanu* (1). But whether the writ of extent existed as a Crown remedy or not, even as to debts of record, prior to the statute referred to, it is clear, as West points out, that two important innovations in favour of the Crown were made by it; first, it gave the Crown the power of suing out process of execution for all its debts, whether they were debts of record or not, and secondly, it gave the Crown the power of taking the body, lands and goods of its debtor at once. Prior to the statute the Crown might have taken the body, lands and goods of its debtor, where the debt was one of record, but could not take them all at once; for example, it had to issue process against his goods and have a return of *nulla bona,* and take out a *capias* against his body, before it could proceed against his lands. To this extent the statute

(1) (1906) 2 Ch. 513 at 518.

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abrogated the commitment of Magna Charta that "we, or our bailiffs, shall not seize any land nor rent for any debt, as long as the chattels of the debtor forthcoming suffice to pay the debt, and the debtor himself be ready to satisfy therefore" and gave the Crown an extraordinary remedy against its debtor which it did not previously possess.

There were two classes of extents, namely, extents in chief and extents in aid. An extent in chief is one in which the Crown is the real, as well as the nominal plaintiff, which is sued out for the immediate benefit of the Crown and is for the recovery of the Crown debt, whether it be against the Crown's original debtor or the debtor of that debtor or a debtor in a more remote degree, whereas an extent in aid is one in which the Crown is the nominal plaintiff, the real plaintiff being a subject who is the Crown's debtor, and the action is for the recovery of the debt due to that subject and for his benefit. We are concerned here only with extents in chief.

These are of two kinds, namely, ordinary writs of extent and writs of immediate extent. There is no difference in their nature or scope but only in the circumstances under which each is issued. The ordinary writ of extent issues by way of execution in favour of the Crown on a judgment obtained by it or other debt of record due to it. The writ of immediate extent, on the other hand, issues even where there has been no judgment or other debt of record, due to it. The writ of immediate extent, on the other hand, issues even where there has been no judgment or other debt of record, in cases where the Crown debt is in danger of being lost. The writ of immediate extent had its origin in the Act of 33 Hen. VIII, chap. 39, which gave the Court of Exchequer power to issue the *extendi facias* if need shall require as unto the said Court shall be thought by its discretion expedient for the speedy recovery of the King's debts. The writ of immediate extent was, therefore, issued only when the Court in its discretion thought that need required it, the exercise of the discretion being shown by the fiat of one of the Barons of the Exchequer, later by that of one of the judges of the King's Bench, on proof of the Crown debt and that it was in danger. Such proof was by affidavit, commonly called an affidavit of debt and danger.

Although the statute gave the Court authority to issue the writ of immediate extent it was necessary since the writ was by way of execution that the Crown debt should be recorded and the practice was that a Commission issued under which an inquiry was held to find the debt; the debt having been found and certified by the Commissioners, the Court acted on their certificate and issued the writ. This practice of issuing a commission of inquiry to find the debt continued until it was provided by section 47 of the Crown Suits Act, 1865, that a commission to find a debt due to the Crown shall not be necessary for authorizing the issue of an immediate extent. This proviso is repeated in Rule 8 of the General Rules and Orders of this Court. Apart from such provision there was no change in the nature of the writ or in the conditions for its issue until the Crown Proceedings Act, 1947.

In order to appreciate the defendant's contention that this Court had no jurisdiction to grant a fiat for a writ of immediate extent or to issue the writ thereunder it is necessary to refer to the relevant statutory enactments and rules. By section 37 of 33 Hen. VIII, chap. 39, jurisdiction over suits to recover the King's debts, including the issue of writs of extent, was vested in the Court of Exchequer. Under the Judicature Act, 1873, this Court became the Exchequer Division of the Supreme Court of Judicature, until it was amalgamated with the Queen's Bench Division of that Court by Order in Council in 1880, which later became the King's Bench Division of the High Court of Justice. The jurisdiction over the issue of writs of extent originally vested in the Court of Exchequer remained in the King's Bench Division of the High Court of Justice until writs of extent were abolished by section 33 of the Crown Proceedings Act, 1947, which came into effect on January 1, 1948.

The Court of Exchequer was first established in Canada in 1875 by The Supreme and Exchequer Court Act, Statutes of Canada, 1875, chap. 11, under the name of the Exchequer Court of Canada, and continued as such under the same name in 1887 by An Act to amend "The Supreme and Exchequer Court Act", and to make better provision for the Trial of Claims against the Crown, commonly called the Exchequer Court Act, 1887, Statutes of Canada, 1887,

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chap. 16, by which this Court was established separately from the Supreme Court of Canada. By Section 17 of this Act, now section 30 of the Exhcequer Court Act, R.S.C. 1927, chap. 34, the Exchequer Court was given concurrent original jurisdiction in Canada, *inter alia,* in all cases relating to the revenue in which it is sought to enforce any law of Canada, and in all other actions and suits of a civil nature at common law or equity in which the Crown is plaintiff or petitioner. In my view, this Court has had jurisdiction over writs of extent at the suit of the Crown ever since its establishment as fully as it was possessed in the United Kingdom by the Court of Exchequer there and its successors. It has issued many writs of extent, both ordinary and immediate, and this is the first time that its jurisdiction to do so has been challenged. The challenge arises as the result of the combined effect of sections 35 and 36 of the Exchequer Court Act, Rule 2 of the General Rules and Orders of this Court and section 33 of the Crown Proceedings Act, 1947, of the United Kingdom. Section 35 of the Exchequer Court Act provides:

35. All provisions of law and all rules and orders regulating the practice and procedure including evidence in the Exchequer Court, now existing and in force shall, so far as they are consistent with the provisions of this Act, remain in force until altered or rescinded or otherwise determined.

And section 36, as amended in 1928, Statutes of Canada, 1928, chap. 23, reads:

The practice and procedure in suits, actions and matters in the Exchequer Court, shall, so far as they are applicable, and unless it is otherwise provided for by this Act, or by general rules made in pursuance of this Act, be regulated by the practice and procedure in similar suits, actions and matters in His Majesty's High Court of Justice in England on the first day of January, 1928.

Rule 2 of the General Rules and Orders of this Court, 1931, is in the following terms:

(1) In all suits, actions, matters or other judicial proceedings in the Exchequer Court of Canada, not otherwise provided for by any Act of the Parliament of Canada, or by any general Rule or Order of the Court, the practice and procedure shall:—

(*a*) If the cause of action arises in any part of Canada, other than the Province of Quebec, conform to and be regulated as near as may be, by the practice and procedure at the time in force in similar suits, actions and matters in His Majesty's Supreme Court of Judicature in England; and

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(*b*) If the cause of action arises in the Province of Quebec, conform to and be regulated, as near as may be, by the practice and procedure at the time in force in similar suits, actions and matters in His Majesty's Superior Court for the Province of Quebec; and if there be no similar suit, action or matter therein, then conform to and be regulated by the practice and procedure at the time in force in similar suits, actions and matters in His Majesty's Supreme Court of Judicature in England.

And finally, section 33 of the Crown Proceedings Act, 1947, of the United Kingdom provides:

33. No writ of extent or of diem clausit extremum shall issue after the commencement of this Act.

the commencement date being January 1, 1948. It is obvious, of course, that the Crown Proceedings Act, 1947, of the United Kingdom does not *per se* extend to Canada or have any effect here but the argument is made that the abolition of writs of extent, being a matter of practice and procedure, is brought into effect in Canada through the instrumentality of Rule 2 of the General Rules and Orders of this Court and the authority of section 36 of the Exchequer Court Act. It is clear that if it were not for Rule 2 and the use of the words "at the time in force" therein the practice and procedure regulating the issue of writs of extent would be that in force in the High Court of Justice in England on January 1, 1928, as set forth in section 36 of the Exchequer Court Act. The argument of counsel for the defendant, therefore, really turns on the use of the words "at the time in force" in Rule 2 and runs, as I understand it, as follows: namely, that even if the cause of action in the present case arose in the Province of Quebec, where the defendant resides, thus bringing the case within Rule 2 (1) (*b*), there is no similar suit, action or matter in the Province of Quebec as a writ of extent at the suit of the Crown; that resort must consequently be had to the practice and procedure at the time in force in the Supreme Court of Judicature in England; that the relevant time in force is the date of the issue of the writ, namely, February 12, 1948; that at such date writs of extent had been abolished in England by section 33, of the Crown Proceedings Act, 1947; that there was then no jurisdiction in England to issue writs of extent and consequently no practice or procedure for issuing them; and that by virtue of Rule 2 there was no practice or procedure for issuing

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them in Canada. From this reasoning the conclusion is drawn that since January 1, 1948, this Court no longer had any jurisdiction to issue any writ of extent.

There are several reasons why a conclusion leading to such an astonishing result cannot be adopted. One fallacy in the argument lies in the fact that it fails to distinguish between the practice and procedure regulating the exercise of a right and the right itself. When the Act of 33 Hen. VIII, chap. 39, authorized the issue of writs of extent for the recovery of the King's debts it conferred a right upon the Crown which did not previously exist. This was not a matter of practice and procedure but of substantive right. The right to issue the writ must be distinguished from the practice and procedure regulating its issue. Similarly, the abolition of writs of extent by the Crown Proceedings Act, 1947, was not a matter of practice or procedure. If it had been it could have been accomplished by the judges under their rule making powers. It was the abrogation of a previously existing right which only Parliament could effect. Moreover, it is axiomatic that the rules made by the judges under their rule making power are designed for the purpose of regulating the exercise of the jurisdiction of the Court, and cannot either create or destroy jurisdiction. If, therefore, Rule 2 has the result suggested by counsel for the defendant it is clearly beyond the powers of the rule making authority and must be held to be invalid. But such a result ought not to be found unless the language of the rule necessarily so demands. And it ought not to be held that Parliament intended to abrogate a right of the Crown of long standing or to destroy the Court's jurisdiction over it in the circuitous manner suggested, if the language of the rule in its context with the governing section of the Act is fairly capable of an interpretation that would lead to a more reasonable result. As I read Rule 2 and section 36 of the Exchequer Court Act, it was contemplated that resort should be had to the practice and procedure in force in the High Court of Justice in England on January 1, 1928, unless there was some other later practice or procedure that should be in force. The section gave authority to the judges to make a rule substituting for the practice and procedure referred to therein the practice and procedure

that should be in force at the time the cause of action should arise. But it is essential that the rule should lead to a practice and procedure that is in force at such time, and not to the absence of any practice or procedure. The alternative is between a practice and procedure in force at the fixed date mentioned in the section and a subsequent practice and procedure in force at the time of the cause of action in accordance with the rule. Section 36 and rule 2 contemplated that the procedure in force at the time of the cause of action should be substituted for that in force at the time specified in the section if it should be different from it, but the section did not authorize the making of a rule that would result in the nullification of the section by the substitution of the absence of any practice or procedure at all for that prescribed by the section. Yet such an absurd interpretation of the section and rule would have to be made if the argument for the defendant were adopted. Consequently, since the rule does not lead to a practice or procedure in England that was in force at the time the writ of immediate extent was issued it can have no application in the present case and resort must be had to the practice and procedure that was in force in the High Court of Justice in England on January 1, 1928, as specified in section 36. That being so, the foundation for the defendant's argument of lack of jurisdiction in the Court wholly disappears. I have no hesitation in expressing the opinion that the jurisdiction of this Court in respect of writs of extent remains intact and is unaffected by the abolition of such writs in England.

The second part of the defendant's argument may now be considered. It dealt with the propriety of granting the fiat and issuing the writ under it on the material before the Court on the assumption that it had the necessary jurisdiction. The only General Rules and Orders of this Court relating particularly to writs of extent are Rules 8 and 9, of which the former reads as follows:

8 A commission to find a debt due to the Crown shall not be necessary for authorizing the issue of an Immediate Extent or a writ of Diem Clausit Extremum; and an Immediate Extent may be issued on an affidavit of debt and danger, or a writ of Diem Clausit Extremum may be issued on an affidavit of debt and death, and, in either case, on

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the *fiat* of a judge of the Exchequer Court of Canada. See 28-29 Vict. (U.K.), ch. 104, sec. 47, and following. (For forms of affidavit, order and writ, see Forms 4, 5 and 6 in the Appendix to these Rules).

It is an essential condition of the issue of a writ of immediate extent that there should be a fiat of a judge of the Court and an affidavit of debt and danger. The fiat herein was granted by Angers J. on the following affidavit of William Vincent Scully:

1. That I am the Deputy Minister of National Revenue for Taxation and as such have knowledge of the matters hereinafter deposed to.

2. That a preliminary assessment of the taxpayer's revenue was made on the 11th day of February, 1948, from which it appears that the above taxpayer is indebted to the Crown for taxes for the years 1942 to 1946 inclusive, amounting to the sum of $863,331.85 or thereabouts, plus interest.

3. That securities amounting to approximately $1,000,000, belonging to the above mentioned taxpayer, are at present under seal by the Foreign Exchange Control Board, who are contemplating prosecution of Albert Sansoucy for withholding United States funds and also are considering releasing the above mentioned securities to Sansoucy upon completion of prosecution against him as hereinabove described.

4. That I am informed and verily believe that unless some method more speedy than the ordinary proceedings at law be had against the said Albert Sansoucy, the said sum of $863,331.85 or thereabouts, plus interest, owing as aforesaid is in danger of being lost.

Three attacks were made upon the proceedings in the present case. The first was that the fiat was not for the amount sworn to in the affidavit and that the writ was not for the amount mentioned in the fiat. The fiat authorized the issue of a writ for the recovery of the sum of $863,313.85 whereas the writ was issued for the sum of $863,331.85. This is the amount specified in the affidavit. It is obvious that the figure set out in the fiat is the result of a purely clerical error, which ought not, in my judgment, to serve as a ground for setting aside the proceedings.

The other two attacks were directed against the affidavit. It was contended that it was insufficient and therefore defective in two respects, namely, that there was no proper evidence of a debt to the Crown, and that no proof of danger was given. It is clear that although section 47 of the Crown Debts Act, 1865, dispensed with the requirement of a commission of inquiry to find the debt due to the Crown, when it was not a judgment or other debt of record, it made no change in any other requirements of the proof necessary for the valid issue of a writ of immediate

extent. The old authorities as to what must be proved in an affidavit of debt and danger are still fully applicable.

I shall deal first with the proof of debt that is required. Under the old procedure of a commission of inquiry to find the debt the evidence as to its existence given before the Commissioners was by way of affidavit. The kind of debt that might be found on an inquisition is stated by West, at page 25, as follows:

> Wherever there is such a debt to the Crown as that an action of debt or indebitatus assumpsit, might be maintained against the debtor, were it due to a subject; such debt may, it is apprehended, be found under the inquisition, for the purpose of issuing a scire facias, or immediate Extent for it.

West also says that the inquisition should state how the debt to the King is constituted and not merely that the party is indebted to the King. *Vide* also Manning's Exchequer Practice, at pages 15 and 18. The fact that no commission of inquiry is now needed to find the debt does not change the nature of the kind of debt that must be proved or the kind of proof that must be made. The former rule that a mere allegation of indebtedness is not sufficient still applies and is the basis of the indication in Form 4 in the Appendix to the General Rules and Orders of this Court that the affidavit should state the manner in which the indebtedness to the Crown arose. It follows that in the affidavit in support of an application for a fiat for a writ of immediate extent it is not sufficient merely to allege that the defendant is indebted to the Crown in a specified sum; the facts from which the indebtedness is alleged to have arisen showing the nature and origin of the debt must be stated with reasonable certainty. It must also be shown that the debt is such that an action for it would lie, that is to say, that it is not only due but is also payable.

It was contended that the affidavit of Mr. Scully did not meet these necessary requirements. Paragraph 2 of the affidavit was criticized on a number of grounds, namely, that it did not state the kind of taxes that were due, that there was no such thing as a "preliminary" assessment, and that the Income War Tax Act did not provide for the assessment of a taxpayer's revenue but only of his income. While I am of the opinion that these criticisms of the affidavit were well founded and that it was not drawn as

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carefully and as precisely as would be desirable, I am also of the view that if this were the full extent of counsel's criticism of the paragraph these defects would not be fatal. But counsel went farther and contended that there was no proof of a payable debt. He relied upon an admission that section 48 (2) of the Income War Tax Act was not applicable to the defendant taxpayer in respect of the years 1942 to 1946 and contended that his case came under section 48 (3) which reads:

> 48. (3) Every person, other than a corporation or a person to whom subsection two of this section applies or a person whose chief business is that of farming, shall pay all taxes, which he is liable to pay upon his income during any taxation year under any of the provisions of this Act except sections 9B, 27 and 88 thereof, as estimated by him on his income for the year last preceding the taxation year or on his estimated income for the taxation year, in either case at the rates for the taxation year, by quarterly instalments during the taxation year as follows . . . and if, after examination of any person's return under section fifty-three of this Act, it is established for the purposes of this Act that the instalments paid by him under this subsection amount, in the aggregate, to less than the tax payable, he shall forthwith after notice of assessment is sent to him under section fifty-four of this Act, pay the unpaid amount thereof together with interest thereon at four per centum per annum from the thirty-first day of December in the taxation year until one month from the date of mailing of the said notice of assessment and thereafter at seven per centum per annum until the date of payment.

From this section he argued that, since it was provided that if the amount of income tax paid by a taxpayer on his income as estimated by him was less than the tax which he ought to have paid "he shall forthwith after notice of assessment is sent to him under section fifty-four of this Act, pay the unpaid amount thereof", it followed as a necessary consequence that there was no payable debt by the taxpayer to the Crown until after notice of the assessment under section 54 of the Act had been sent to him. It was submitted that, even although there was always a liability on the part of the defendant to pay the tax that ought to be paid, and even although the tax became debt due to the Crown on the making of the assessment under section 54 of the Act and pursuant to section 70 thereof, it was a condition precedent to the debt becoming a payable debt that notice of the assessment should have been sent to the defendant; that before a writ of immediate extent can validly issue it must be shown

that there is a debt upon which the Crown could at the time of the issue of the writ proceed to judgment; that it was consequently necessary to prove not only that an assessment had been made but also that notice of it had been sent to the defendant; that there was no statement in the affidavit that notice of the assessment had been sent to the defendant; and that since the affidavit failed to prove this essential condition of there being a payable debt it was defective and could not sustain the fiat or the writ under it. Counsel for the claimant did not meet this particular objection and I have been unable to find any answer to it. I have come to the conclusion that in addition to stating the facts relating to the making of the assessment the affidavit should also have set out that notice of the assessment was sent to the defendant, if such was the case, and that the amount of the assessment remained unpaid, and that counsel for the defendant was right in his contention that the affidavit did not prove a payable debt to the Crown and that it was consequently defective.

But even if the affidavit were considered as sufficiently proving a payable debt to the Crown the remaining objection that it was defective in that no proof of danger was given appears to me to be unanswerable. Paragraph 4 of the affidavit is open to several criticisms. In the first place, the affiant does not say by whom he was informed or on what grounds he bases his belief as he ought to have done under Rule 168. But there is a much stronger reason for holding that the affidavit is defective. There is merely a statement that the sum specified as owing is in danger of being lost. It is, I think, indisputable that such a bare statement is insufficient. In dealing with the proof of danger required West on Extents says, at page 52:

> With respect to the allegation of danger in the affidavit, it is apprehended that the affidavit should contain not only a general allegation of the defendant's insolvency, but also some fact or instance of insolvency: such as "that he has stopped payment", "has absconded", "a docquet has been struck against him", or that he has committed an act of bankruptcy or insolvency, particularizing the act.

And in *Rex* v. *Jans vel Smith* (1) the statement that the defendant "was in suspicious circumstances, and that the

(1) (1731) Bunb. 300.

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debt was in danger of being lost" was held not to be sufficient. The following statement was also made by West, at page 180:

> If the affidavit be defective in the statement of the defendant's insolvency, the defendant may move to set it aside: and it is the more necessary that this statement should be complete, as the defendant has no means of contradicting or explaining the fact which is alleged as the proof of insolvency; the Court having refused to grant a rule to shew cause on counter affidavits as to that point: and that he could not traverse the fact of insolvency is clear; as it constitutes no part of the record, but is merely a statement in the affidavit required by the rules of the Court, as a ground for the exercise of their discretion in issuing the Extent:

*Vide* also Chitty on the Prerogatives of the Crown, at page 278. I agree with counsel's suggestion that the matter is concluded by the decision of Bray J. in *Rex.* v. *Pridgeon* (1). There a writ of extent had been issued upon an affidavit of debt and danger in which the deponent stated the fact that a debt was due to the Crown from a certain debtor, and the nature and origin of the debt, and proceeded to allege that from enquiries he had made he had ascertained and believed that the debt due to the Crown from the debtor would be lost unless some more speedy course than the ordinary method of proceeding were forthwith had and taken to recover the same on behalf of His Majesty. On a motion to set aside the writ it was held that the affidavit was defective in that it omitted to state the facts from which the Court might infer that the debt was in danger of being lost and the writ was accordingly set aside. The case establishes that it is not sufficient in an affidavit of debt and danger merely to state that the debt is in danger of being lost; it is necessary to set out the facts from which the conclusion may be drawn that the debt is in danger and that there is need for the issuance of a writ of immediate extent for its speedy recovery. Bray J. approved the statement of West, at page 180, to which I referred and said of the cases cited in support of it:

> They establish that it is necessary to state facts leading to the conclusion that the debt is in danger. Even in a case where insolvency is alleged it is not sufficient simply to state the fact of insolvency without specifying facts which lead to that inference. The affidavit in the present

(1) (1910) 2 K.B. 543.

case does not go so far as even to allege insolvency. It merely alleges that there is danger of the debt being lost. In my opinion the affidavit is insufficient and the proceedings are irregular.

I come to a similar conclusion in the present case. Counsel for the claimant suggested that the allegations in paragraph 3 of the affidavit sufficiently supported the statement that the debt was in danger of being lost. I am unable to agree. I cannot see what bearing these allegations have on the issues before the Court. Nor can the practice of the Court in the past of issuing writs of immediate extent on affidavits similar in effect to the one under review be an answer to the defendant's complaint. The repetition of an erroneous practice cannot make it a correct one and this is the first time that the practice has been challenged. Nor can it be said that the correct practice is difficult to find. Indeed, it is indicated in Form 4 of the Appendix to the General Rules and Orders, where it is stated that the affidavit "should contain not only a general allegation of the defendant's insolvency, but also some particular fact or instance, such as that he has committed an act of bankruptcy, or stopped payment, or absconded or that an execution has issued against him." The form itself shows that a mere allegation of danger is not enough.

The writ of immediate extent is an extraordinary remedy calling for the exercise of the discretion of the Court where the need for it appears. In the very nature of things the application for it is made ex parte. The applicant for the remedy must show that a proper case has been made out for the exercise of the Court's discretion. The remedy sought being such an extraordinary one it is essential that the requirements of proof which the law imposes under the circumstances should be strictly complied with. There has not been such compliance in the present case. It follows that there must be judgment setting aside the fiat and the writ of immediate extent issued under it. The defendant will also be entitled to his costs.

*Judgment accordingly.*