

BETWEEN

1921

January 8.

HIS MAJESTY THE KING, ON THE
 INFORMATION OF THE ATTORNEY-
 GENERAL OF CANADA..... } PLAINTIFF.

AND

MAX LITHWICK.....DEFENDANT.

AND

WILLIAM ALANSEN COLE, AS-
 SIGNEE TO THE DEFENDANT'S INSOL-
 VENT ESTATE..... } ADDED
 DEFENDANT.

Dominion Income Tax—Judgment against Defendant who had assigned under provincial Act for benefit of creditors—Priority of Dominion Crown—Constitutional Law.

Held: That the Crown, in right of the Dominion of Canada, was entitled to be paid the amount of a judgment for income tax under 10-11 Geo. V. ch. 49, obtained by it against a debtor who has made an assignment under the Ontario Assignments and Preferences Act (R.S.O. 1914, ch. 134) in priority to all other creditors of the same class.

The Queen v. Bank of Nova Scotia, 11 S.C.R. 1 and Liquidator of Maritime Bank v. Receiver General of New Brunswick (1892) A.C. 437, referred to.

2. That any provision in a Provincial Act relating to assignments for the benefit of creditors cannot, *ex proprio vigore*, take away any privilege or priority of the Crown as a creditor in right of the Dominion.

Gauthier v. The King, 56 S.C.R. 176, at 194, referred to.

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 v.
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 LETHWICK
 AND
 WILLIAM
 ALANSEN
 COLE.

INFORMATION exhibited by the Attorney-General¹ of Canada to recover from the defendant the sum of \$760.66 representing the amount of Income War Tax due by him for the year 1917 and praying that the said amount be paid by priority.

Reasons for
 Judgment.

January 5th, 1921.

Audette J.

Case was heard before the Honourable Mr. Justice Audette at Ottawa.

C. P. Plaxton and R. B. Law for plaintiff.

W. L. Scott for defendants.

The facts are stated in the reasons for judgment.

AUDETTE J. now (January 8, 1921) delivered judgment.

This is an amended information exhibited by the Attorney-General of Canada to recover from the above defendant, by priority, the sum of \$760.66 as representing the amount of Income War Tax due by him for the year 1917.

The defendant, although duly served with the original information has made default in filing any statement in defence but appeared by counsel on the issues raised by the amended information, at the hearing on the 5th instant.

The Assignee was added as defendant herein and from his affidavit, to which is attached a copy of the resolution authorizing him to contest the Crown's claim to priority, it now appears that the creditors are duly represented in the present proceedings.

The amount for which judgment is asked is not contested, the only controversy arising herein is as to whether the amount of Income tax due by defendant is to be paid in full in priority to all other creditors of equal degree who are herein represented by assignee Cole (sec. 9).

As stated by Lord Watson, at p. 441, in re *The Liquidators of the Maritime Bank of Canada vs. Receiver General of New Brunswick* (1):—"The Supreme Court of Canada had previously ruled, in *Reg vs. Bank of Nova Scotia* (2), that the Crown, as a simple contract creditor for public moneys of the Dominion deposited with a provincial Court, is entitled to priority over other creditors of equal degree. The decision appears to their Lordships to be in strict accordance with constitutional law."

Unless this priority to which the prerogative attaches in favour of the Crown has been taken away by competent statutory authority, I must find it is still good law. Much more so indeed, where it is not only in connection with an ordinary chirographic claim, but in respect of a claim for taxes—income taxes.

I am unable to follow the contention asserted at bar on behalf of the assignee that the Assignment and Preferences Act (R.S.O. 1914, ch. 134) established that all creditors must be collocated *pari passu* or on a basis of equality, and that the assignment by the insolvent takes away any priority any claim might have had.

In the first place this Ontario act could not, *ex proprio vigore*, take away or abridge any privilege of the Crown in the right of the Dominion. The distribution is made under a provincial statute that cannot affect the rights of the Federal Crown. *Gau-*

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(1) [1892] A.C. 437.

(2) 11 S.C.R. 1

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thier v. the King (1) per Anglin J. Then the argument, on behalf of the assignee, seems to confuse an assignment in the nature of a conveyance with the assignment contemplated by the act, which is for the express benefit of the creditors,—the act itself, by sec. 5, recognizing privileges.

What might have given rise to the contention offered on behalf of the assignee in refusing the priority sought by these proceedings is the decision of the Courts of Ontario in *Clarkson v. the Attorney-General of Canada* (2); but the authority of that decision has now been impaired by the decision of His Majesty's Committee of the Privy Council in *re New South Wales Taxation Commissioners v. Palmer* (3), wherein it is said:—

“The attention of their Lordships was called to the case of *In re Baynes*, (4) which has already been mentioned, and a case in *Ontario, Clarkson v. Attorney-General of Canada*, (2) in both of which the right of the Crown to preferential payment out of assets being administered in bankruptcy was denied. Their Lordships have carefully considered those cases. With every respect to the courts by which they were decided, their Lordships cannot help thinking that in both cases the learned judges have not sufficiently kept distinct the two prerogatives which formed separate grounds of decision in *In re Henley & Co.* (5). The judgments are devoted in a great measure to a consideration of the prerogative under which the Crown was entitled to peculiar remedies against the debtor and his property, and of the law and the authorities bearing upon it. The principle upon which that prerogative depends is not to be confounded with the principle invoked in the present case. The prerogative, the

(1) 56 S.C.R. 176, at 194.

(2) 15 Ont. R. 632; 16 Ont. A.R.
202.

(3) [1907] A.C. 185.

(4) 9 Queens land. L. J. 33 at 44.

(5) 9 Ch. D. 469.

benefit of which the Crown is now claiming, depends, as explained by Macdonald C. B. in *the King v. Wells* (1), upon a principle 'perfectly distinct * * * and far more general determining a preference in favour of the Crown in all cases and touching all rights of what kind soever where the Crown's and the subject's right concur and so come into competition.'"

In *Attorney-General for N.S. Wales v. Curator of Interstate Estates* (2), it was held that the Insurance Act therein mentioned did not bind the Crown which was entitled to be paid by virtue of its prerogative in priority to all other creditors of the deceased.

The case of *Sykes v. Soper* (3), was also mentioned at bar but has no importance here in view of the above decision in the *Palmer* case.

The decision in *re Henly & Co.* (4), above referred to, decided that when a company is being wound up the Crown has a right to payment in full of a debt due from the company for property tax before commencement of the winding up, in priority to the other creditors—See also *In re Oriental Bank Corporation* (5)

Then *In re Laycock* (6), also decided that sec. 33 of the Bankruptcy Act 1914, which after giving statutory priority to certain Crown and other debts in the distribution of a bankrupt's or deceased insolvent's property, provides that subject thereto all debts shall be paid *pari passu*, does not apply to the private administration of a deceased insolvent's estate out of Court, and therefore does not affect the *common law* priority of any Crown debt in such a case.

In re Galvin (7), it was held that the Crown was entitled to priority in respect of legacy duties.

(1) 16 East, 278.

(2) [1907] A.C. 519.

(3) 29 Ont. L.R. 193.

(4) L.R. 9 Ch. Div. 469.

(5) L.R. 28, Ch. D. 643.

(6) [1919] 1 Ch. 241.

(7) [1897] Ir.R., 1 Ch. D. 520.

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A number of authorities in support of this view will also be found in Robertson, On Civil Proceedings, p. 164 et seq.

The Canadian Income War Tax, 10-11 Geo. V, ch. 49, sec. 10, sub-sec. 9, further provides that in cases wherein assignees, etc., are administering and distributing estates etc.: "they * * * shall pay any tax and surtax and penalties assessed and levied with respect thereto *before making any distribution of the said property, business or estate.*" The Act thereby recognizes and preserves the priority, if the tax has to be paid before distribution is made.

Moreover statutes made for the benefit of the Crown must be beneficially construed, Hals. 27, p. 166 n.

Income Tax owing to the Crown has priority over all other insecure debts. Hals. p. 879 et seq.; Vol. 2, p. 217.

The rule of law formulated in the maxim *Quando jus domini et subditi concurrunt, jus regis praeferri debet*, cited by Strong J. *in re The Queen v. Bank of Nova Scotia* (1), and approved of in the case of *Liquidators Maritime Bank v. Receiver General N.B.* (2) has still full force and effect and must be followed.

Therefore there will be judgment condemning the defendant Lithwick to pay, as prayed, the sum of \$760.66 with interest and costs, and ordering the added defendant Cole, in his capacity of assignee, as aforesaid to pay the same to the plaintiff in full priority to all creditors of equal degree of the said defendant Lithwick.

Judgment accordingly.

Solicitors for plaintiff: *C. F. Elliott.*

Solicitor for defendants: *Ewart, Scott, Kelly & Kelly.*

(1) 11 S.C.R. 1, at 15.

(2) [1892] A.C. 437.