

BETWEEN:

ALBERT LAMARRE, in his quality  
as Trustee under the Bankruptcy Act  
of ENGINE WORKS & TRADING  
INC. ....

SUPLIANT,

1945  
Oct. 10  
—  
1947  
Dec. 22

AND

HIS MAJESTY THE KING.....RESPONDENT.

*Crown—Petition of right—Action by a trustee in bankruptcy to recover money in Crown's possession as part of a bankrupt's assets—Moneys delivered to a Minister of the Crown by a third party being neither a gift nor a payment constitute a contract of voluntary deposit within Articles 1799 to 1811 of the Civil Code of the Province of Quebec—Money received by the Crown by way of voluntary deposit may be claimed by a trustee in bankruptcy as asset of the bankrupt's estate.*

Suppliant, trustee of a bankrupt company, claims from the Crown certain money received by one F. from the company for services rendered prior to the bankruptcy and delivered by F., by cheque, to a Minister of the Crown because F. suspected irregularities in the management of the bankrupt company.

*Held:* That the remittance of the cheque by F. to the Minister of the Crown was not a gift nor a payment but merely a voluntary deposit, a civil contract to which articles 1799 to 1811 of the Civil Code of the Province of Quebec apply.

2. That the money received by F. and delivered by him to the respondent reverted into the assets of the bankrupt company and should have been remitted to the trustee for distribution among the creditors.

PETITION OF RIGHT by suppliant to recover certain money alleged as being assets of a bankrupt company.

The action was tried before the Honourable Mr. Justice Angers at Montreal.

*John Ahern, K.C.* for suppliant,

*C. A. Geoffrion* for respondent.

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

The case is reported on two points only.

ANGERS J. now (December 22, 1947) delivered the following judgment:

This is a Petition of Right by which Albert Lamarre, in his quality of Trustee of Engine Works & Trading Inc., a corporation formerly carrying on business in the City of Montreal, prays that it be declared that His Majesty the King, in the rights of the Dominion of Canada, is indebted to the suppliant in the cheque for the sum of \$3,035.98 payable to the Minister of Finance, drawn by Elmer W. Ferguson on the Montreal City and District Savings Bank, or to the proceeds thereof should the said cheque have been cashed, and that the said cheque or the proceeds thereof be adjudged and awarded to the suppliant with interest on the said sum from the day when, and if it was cashed, to the date of payment, and that judgment be rendered accordingly.

The suppliant, in his Petition, alleges in substance:

Engine Works & Trading Inc. was a corporation doing business in the City of Montreal and is presently being wound up under the provisions of the Bankruptcy Act, and Albert Lamarre was duly appointed its Trustee and he has been authorized to make the present Petition of Right by resolution of the Inspectors;

during 1941 and 1942 one Elmer W. Ferguson received, without legal consideration, a sum of \$3,035.98 from the funds belonging to the Company;

said sum was paid to the said Ferguson by the Company without authority and without approval of the Board of Directors;

on or about September 16, 1942, the said Ferguson forwarded to the Minister of Munitions and Supply, a creditor of the Company, his cheque for the said amount of \$3,035.98 to the order of the Minister of Finance, as he wished to avoid being involved in an investigation of the affairs of the Company then being conducted on behalf of the Minister of Munitions and Supply;

the said Ferguson, on September 16, 1942, was not debtor of the said sum of \$3,035.98 to either the Minister of Munitions and Supply or the Minister of Finance;

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on March 9, 1944, the suppliant moved the Superior Court, sitting in Bankruptcy for the District of Montreal, for an Order declaring that Elmer W. Ferguson owes the Estate of the Company Debtor the sum of \$3,035.98 and that the suppliant is entitled to obtain payment thereof, or to obtain delivery of the cheque for \$3,035.98 forwarded by the said Ferguson to the Minister of Munitions and Supply, and notice of the said motion was given to the Minister of Justice;

the said Ferguson did not contest the said motion, consented to judgment being rendered as prayed for by the suppliant, and judgment was rendered accordingly;

the said sum of \$3,035.98 forms part of the assets of the debtor company and the suppliant is entitled to obtain the same;

on May 9, 1944, judgment was rendered on the suppliant's motion in accordance with the prayer thereof, and a copy of the said judgment was forwarded to the Department of Justice on May 25, 1944, and demand was made on behalf of suppliant for delivery of the said cheque or the proceeds thereof if cashed;

the same demand was made on the Department of Finance without result, the Departments of Justice, of Finance and of Munitions and Supply refusing to deliver the said cheque or the proceeds thereof to the suppliant;

The suppliant prays that it be declared that His Majesty, in the rights of the Dominion of Canada, is indebted to suppliant in the cheque for the sum of \$3,035.98 payable to the Minister of Finance drawn by Elmer W. Ferguson on the Montreal City and District Savings Bank, Montreal, or to the proceeds thereof should the said cheque have been cashed, and that the said cheque or the proceeds thereof be adjudged and awarded to suppliant, with interest on the said cheque from the date when and if it was cashed to the date of payment, and that judgment be rendered accordingly, the whole with costs.

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In his Statement of Defence, the Attorney General for Canada, on behalf of His Majesty, submits that the Petition of Right is insufficient and bad in substance and in law in that it does not allege any fact establishing a cause of action against His Majesty respecting the subject matter of the Petition or establishing any liability for which His Majesty is bound or may be adjudged to respond in so far as the suppliant is concerned, and reserving these and all other objections to the sufficiency in law of the Petition which the Attorney General submits should be heard and determined before trial of the issue of fact, pleads in substance:

it is admitted that Engine Works & Trading Inc. was a corporation formerly doing business in the City of Montreal and is presently being wound up under the provisions of the Bankruptcy Act, adding that such winding up commenced on March 16, 1943; it is also admitted that Albert Lamarre was appointed its Trustee in Bankruptcy;

it is admitted that by letter of September 16, 1942, addressed to the Honourable C. D. Howe, Minister of Munitions and Supply, Elmer W. Ferguson sent to the said Minister his cheque for \$3,035.98 for the reasons set forth in the said letter, which speaks for itself;

it is admitted that there existed on September 16, 1942, no obligation legally enforceable by His Majesty against the said Ferguson for the payment of the sum of \$3,035.98;

it is admitted that notice of the motion of March 9, 1944, to the Superior Court, sitting in Bankruptcy for the District of Montreal, praying for an Order declaring that Elmer W. Ferguson owes the Estate of Engine Works & Trading Inc. the sum of \$3,035.98 and that the suppliant is entitled to obtain payment thereof or the delivery of the cheque for the said amount forwarded by said Ferguson to the Minister of Munitions and Supply, was given to the Minister of Justice, and it is specially alleged that such notice is null, void and of no effect as regards His Majesty;

the judgment on the said motion has no effect as regards His Majesty;

the suppliant is not entitled to obtain from His Majesty the said sum of \$3,035.98;

it is admitted that on May 25, 1944, a copy of the judgment rendered by the Superior Court, sitting in Bankruptcy, was forwarded to the Department of Justice and that demand was made on behalf of suppliant for delivery of the aforesaid cheque or the proceeds thereof if cashed;

it is admitted that the Departments of Justice, of Finance and of Munitions and Supply refused the said demand and it is specially alleged that His Majesty was justified in refusing it;

the cheque which was sent to the Minister of Munitions and Supply by the said Ferguson was later returned to him and replaced by a certified cheque for the same amount;

there is no privity (of contract) or "lien de droit" between suppliant and His Majesty;

the said sum of \$3,035.98 was paid by the said Ferguson to His Majesty voluntarily from his own funds and without error on his part either in fact or in law and he has no right to recover the said amount from His Majesty; the other allegations of the petition are not admitted.

In his reply the suppliant says in substance as follows:

he prays act of the admissions contained in the Statement of Defence, joins issue with the denials therein and denies the other allegations;

in October 1943, the said Ferguson requested the respondent to deliver the cheque which he had issued to the order of the Minister of Finance to the suppliant; the original of the letter is in respondent's possession;

the sum of \$3,035.98 was paid by the said Ferguson to the respondent in error.

A brief summary of the evidence is apposite.

Elmer W. Ferguson, journalist and publicity agent, examined as witness on behalf of suppliant, filed as Exhibit 1 a copy of a letter from himself to the Minister of Munitions and Supply dated September 16, 1942, which contains, amongst others, the following statement:

Attached herewith, please find my cheque for \$3,035 98, this representing all sums paid me by Engine Works and Trading, of Montreal, for

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publicity work, from the time of my engagement with that firm, to date, less certain amounts already paid for income and National Defence taxes, last year and this.

There follows a detail of the sum of \$3,035.98, which is not material. The letter then continues:

I have taken this step, following my resignation from the Company filed immediately after recent newspaper revelations, purporting to be a resume of the evidence gleaned during a recent enquiry into the conduct of the Company, and carrying the implications that there had been irregularities in the conduct of this concern.

I was approached, a year ago, by Mr. P. T. Lynch, President of Engine Works and Trading, to undertake certain publicity which would capitalize upon his wide connection with sport, to the benefit of his firm, and as a means of creating goodwill thereto, at a salary set by himself, and not by me. I considered this a perfectly legitimate undertaking, but now that it has become apparent there were possible irregularities in the conduct of the firm, of which I, as an employee, would not be aware, I do not wish to retain a single penny of such monies. I am, therefore, returning in full the amounts paid me, in order that these may be diverted into the proper channels.

Ferguson declared that the cheque was enclosed in the letter and that it was charged to his account in the bank. He stated that he received a reply from the Deputy Minister of Justice dated October 7, 1942, marked as Exhibit 2, the second paragraph whereof reads thus:

You will readily understand that at this stage of the investigation into the affairs of the above mentioned company I am quite unable to advise what disposition should be made of any moneys representing funds heretofore distributed by the company. If, however, it is your desire that the Crown should retain these moneys pending the outcome of proceedings, you may if you please authorize me to present this cheque certified at your bank and to hold the same until it is decided what disposition should be made thereof.

The witness admitted having written the letter addressed to the Deputy Minister of Justice and dated October 7, 1943, which was filed as Exhibit 3.

I deem it convenient to quote this letter verbatim:

*Re: Engine Works & Trading Inc.*

On September 16, 1942 I forwarded to the Minister of Munitions and Supply my cheque payable to the Minister of Finance for the sum of \$3,035.98, representing funds received by me from Engine Works & Trading Inc. There was at the time an investigation into the affairs of that corporation and public rumours to the effect that it had made illicit profits in the execution of war contracts for the Department of Munitions and Supply. As I did not wish to benefit from profits which might have been illegally made on war contracts, I forwarded the above mentioned cheque which represented payments made to me by the corporation for services rendered.

The Minister of Munitions and Supply forwarded the cheque to you.

The Trustee of Engine Works & Trading Inc., in Bankruptcy has requested you to deliver the said cheque to him to form part of the assets of the estate being liquidated.

I hereby, insofar as the same may be necessary, agree that you should deliver the said cheque to Albert Lamarre, Trustee of Engine Works & Trading Inc., to whom I will deliver a cheque for the same amount payable to his order in exchange for the one payable to the Minister of Finance, reserving my rights, if any, to have the courts decide my obligation to pay the said amount to the Trustee.

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Ferguson filed as Exhibit 4 a letter from the Acting Deputy Minister of Justice to him dated August 31, 1943, acknowledging receipt of his letter of August 27 with enclosures (which, by the way, was not produced), containing the following averments:

I note that the trustee in bankruptcy of the above estate proposes to institute action against you for the sum of \$3,035.98, alleged to have been received by you from the bankrupt company.

I have to advise you that it is not the function of this department to advise private litigants in connection with their rights and I would suggest that you seek the advice of your own solicitor in this matter.

The decision as to the final disposition of the moneys paid by you cannot be made until title to same has been established in the courts.

W. L. Covert, accountant for Albert Lamarre, the suppliant, filed as Exhibit 5 a certified copy of a judgment of the Superior Court, sitting in Bankruptcy, dated May 9, 1944, in re: Engine Works & Trading Inc., Debtor, and Albert Lamarre, Trustee, and Elmer W. Ferguson, respondent, which granted a petition of the Trustee, declared that the respondent owes the estate of the debtor the sum of \$3,035.98 and ordered the Minister of Finance or the Minister of Justice to deliver to the Trustee the respondent's cheque for the said sum of \$3,035.98.

The petition in question, which is reproduced in the judgment, after relating the winding up of the company debtor and the appointment of Albert Lamarre as Trustee, declares:

2. During the years 1941 and 1942 the Respondent received, without consideration, the sum of \$3,035.98 from the Company Debtor;

3. The said amount of money was paid to Respondent by the Company debtor without the required authority or approval of the Board of Directors;

4. On or about the 16th of September 1942, Respondent forwarded to the Minister of Munitions and Supply, Ottawa, a creditor of the Company Debtor, his cheque for the said amount of \$3,035.98 to the order of the

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Minister of Finance, who referred it to the Minister of Justice, who agreed to hold it pending outcome of proceedings between the Debtor Company and the Minister of Munitions and Supply;

5. After a Bankruptcy Order was made against the Debtor Company the Trustee made a claim on the Respondent for the said sum of \$3,035.98 and the Respondent agreed that his cheque for the said amount, which was in the possession of the Minister of Justice, be turned over to the Trustee;

6. The Trustee then made application to the Minister of Justice to obtain delivery of the said cheque and forwarded to him a letter signed by the Respondent agreeing to delivery of the said cheque to the Trustee, . . . ;

7. The Deputy Minister of Justice advised the Trustee that he was not prepared to instruct that the cheque be delivered to him unless and until it is established before some Court of competent jurisdiction that the cheque in question or the proceeds thereof is rightfully the property of the estate of the Company Debtor, . . .

Shown by Counsel for respondent a letter signed "W. L. Covert, for Albert Lamarre, Trustee", dated October 20, 1943, addressed to the Deputy Minister of Justice, Covert admitted that he had written and signed it; it was marked as Exhibit A. He agreed that the letter of October 7, 1943, therein mentioned is the letter which was filed as Exhibit 3.

No other evidence was adduced on behalf of respondent.

In support of the point of law raised by respondent in his defence that the suppliant's petition does not allege any fact establishing a cause of action against His Majesty or any liability for which His Majesty is bound or may be adjudged to respond in so far as the suppliant is concerned, it was argued that, since the action is primarily one for the revendication of a cheque, there is no privity of contract between the parties because the suppliant cannot maintain that he is the owner of the cheque.

It was submitted by counsel for respondent that the cheque in question was made by Elmer W. Ferguson and sent by him to the Minister of Munitions and Supply and that consequently the owner of the cheque is either Ferguson or His Majesty the King and not the suppliant. Counsel concluded that in the circumstances the claim cannot be based on the fact that the suppliant is the owner of the cheque or of the money. He agreed that the suppliant may be a creditor of Ferguson in the sum of \$3,035.98 but said that he is not the owner of the

actual funds which Ferguson turned over to the Government. He summarized his argument in stating that money is "chose fongible" and cannot be identified for purposes of ownership. He concluded that suppliant does not own the cheque nor the money and that therefore he cannot revendicate it.

I do not think that the point of law set forth by respondent in his defence is tenable. Counsel, in my opinion, misapprehended the question.

The facts are simple and need not be expounded at any great length. Ferguson, who did some publicity work for Engine Works & Trading Inc. and received \$3,035.98 for his services, suspecting that there had been irregularities in the conduct of the company, decided not to keep the money and sent a cheque to the Minister of Munitions and Supply for the amounts paid to him "in order that these may be *diverted into the proper channels*" (see letter Exhibit 1).

On October 7, 1942, as we have seen, the Deputy Minister of Justice wrote Ferguson that the Minister of Munitions and Supply had forwarded to him his letter and cheque and had asked him his advice as to what disposition should be made of the cheque. After stating that, at the present stage of investigation into the affairs of the Company, he is unable to advise what disposition should be made of moneys representing funds heretofore distributed by the Company, the Deputy Minister intimated that, if it is the addressee's desire that the Crown should retain the moneys pending the outcome of proceedings, he may, if it pleases him, authorize the Deputy Minister to present the cheque at the bank and hold it *until it is decided what disposition should be made thereof*.

On August 31, 1943, in reply to a letter dated the 27th of the same month, which has not been filed, the Acting Deputy Minister of Justice wrote to Ferguson taking note that the trustee proposed to institute action against him to recover the sum of \$3,035.98 alleged to have been received by him from the bankrupt Company and notifying him that it is not the function of the Department of Justice to advise private litigants in connection with

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their rights and suggesting that he should seek the advice of his own solicitor. The Acting Deputy Minister added that the decision as to the final disposition of the moneys paid by him cannot be made until title to the same has been established by the courts.

One year exactly after the letter of the Deputy Minister of Justice to him, to wit on October 7, 1943, Ferguson, as already said, wrote to the said Deputy Minister reminding him of the request of the trustee of Engine Works & Trading Inc. to deliver to him the cheque aforesaid to form part of the assets of the estate being liquidated and telling him that, in so far as it might be necessary, he agreed that the Deputy Minister should deliver the said cheque to the trustee to whom he (Ferguson) would remit a cheque for the same amount payable to his order in exchange for the one payable to the Minister of Finance, reserving his rights, if any, to have the courts decide his obligation to pay the said amount to the trustee.

In his letter to the Deputy Minister of Justice (Exhibit A) W. L. Covert, writing for the trustee, enclosed Ferguson's letter to the Deputy Minister of Justice of October 7, 1943, (Exhibit 3) and made, among others, the following statements:

You will note from the letter that Mr. Ferguson does authorize that you deliver the said cheque of \$3,035.98 to me as trustee of the Engine Works & Trading Inc. in bankruptcy.

Kindly, under the above mentioned circumstances, favour me by forwarding the cheque of Mr. Ferguson to this office.

The Department of Justice disregarded the letter of the trustee as well as the judgment of the Superior Court, sitting in bankruptcy, for the District of Montreal. In his statement of defence the respondent admitted that notice of the petition for an order declaring that Elmer W. Ferguson owes the estate of the company debtor the sum of \$3,035.98 and that the suppliant is entitled to obtain payment thereof or delivery of the cheque for the said sum forwarded by Ferguson was given to the Minister of Munitions and Supply, but avers that the said notice is null, void and of no effect as regards His Majesty. The respondent further admitted that on May 25, 1944, a copy of the judgment rendered by the Bankruptcy Court ("Act"

by error), District of Montreal, on May 19, 1944, was forwarded to the Department of Justice and demand made on behalf of suppliant for delivery of the cheque or the proceeds thereof, if cashed, but alleges specially that the said judgment can have no effect as regards His Majesty.

It seems to me apposite to quote the conclusion of the judgment:

DOTH GRANT said petition; DOTH DECLARE that the respondent owes the estate of the Company Debtor the sum of \$3,035.98; DOTH ORDER the Minister of Finance or the Minister of Justice to deliver to the trustee, Albert Lamarre, the respondent's cheque for the said sum of \$3,035.98,—the whole with costs against respondent.

[The learned judge here refers to the jurisdiction of the Bankruptcy Courts and proceeds]:

After a careful perusal of the pertinent sections of the Act and rules I have reached the conclusion that instead of proceeding by way of petition to the Superior Court, "in Bankruptcy" the suppliant should have brought an action before the Superior Court carrying on its original jurisdiction as fixed by the Code of Civil Procedure.

This, however, does not settle the problem involved; it merely disposes of an incidental question, to which undue importance was perhaps attributed. What I must determine is whether the respondent is entitled to appropriate a sum which was entrusted to him conditionally. The sum of \$3,035.98 was remitted by Elmer W. Ferguson to the Minister of Munitions and Supply in his letter of September 16, 1942 (Exhibit 1), for reasons set forth by the writer, with which we are not concerned, in order that it "may be diverted into the proper channels". The remittance in question was not a gift nor a payment; it was merely, as I think, a voluntary deposit. It is apparently the view which the Deputy Minister of Justice, to whom the Minister of Munitions and Supply had forwarded the cheque, took of the case when in his letter of October 7, 1942 (Exhibit 2), he said: "If, however, it is your desire that the Crown should retain these moneys pending the outcome of proceedings, you may if you please authorize me to present this cheque certified (?) at your bank and to hold the same until it is decided what disposition should be made thereof."

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In his letter of October 7, 1943 (Exhibit 3), to the Deputy Minister of Justice, Ferguson confirmed the desire expressed in his previous letter (Exhibit 1) and wrote in part, as we have seen: "I hereby . . . agree that you should deliver the said cheque to Albert Lamarre, Trustee of Engine Works & Trading Inc., to whom I will deliver a cheque for the same amount payable to his order in exchange for the one payable to the Minister of Finance, reserving my rights, if any, to have the courts decide my obligation to pay the said amount to the Trustee."

The relations existing between Elmer W. Ferguson and the respondent are those resulting of a contract of voluntary deposit, to which Articles 1799 to 1811 of the Civil Code apply.

Articles 1803, 1804, 1807, 1810, which are particularly applicable in the present case, read thus:

1803 The depositary has no right to use the thing deposited without the permission of the depositor.

1804 The depositary is bound to restore the identical thing which he has received in deposit.

If the thing have been taken from him by irresistible force and something given in exchange for it, he is bound to restore whatever he has received in exchange.

1807. The depositary is bound to restore any profits received by him from the thing deposited.

He is not bound to pay interest on money deposited unless he is in default of restoring it.

1810. The depositary is obliged to restore the thing to the depositor whenever it is demanded, although the delay for its restoration may have been fixed by the contract, unless he is prevented from so doing by reason of an attachment, or opposition, or other legal hindrance, or has a right of retention of the thing, as declared in article 1812.

Article 1812 has no application in the present case.

The evidence discloses that the suppliant, to whom Ferguson had agreed that the cheque or the proceeds thereof be remitted, requested such remittance from the respondent and that his request was refused. The trustee was thus compelled to bring an action. The respondent persisted in his refusal to surrender the cheque or the proceeds thereof and contested the suppliant's action, pleading (*inter alia*) that the sum of \$3,035.98 was paid by Ferguson voluntarily from his own funds and without error on his part, either in fact or in law, and that he has no right to recover the said amount from His Majesty.

Ferguson's decision not to keep the amount received from Engine Works & Trading Inc. in payment of his services but to return it so that it might "be diverted into the proper channels" had, in my view, the effect of causing it to revert into the assets of Engine Works & Trading Inc. It thereby became subject to distribution among the creditors of the company by the trustee.

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It was argued on behalf of respondent that he has a privileged claim and is entitled to be paid in priority to all other creditors. I have given the matter due consideration and made a careful and elaborate review of the jurisprudence, although I do not attach as much importance to the question as counsel for respondent did, for the reason that I do not believe that a party, even be it His Majesty the King, can take the law in his own hands.

The question of priority of claims is fixed by sections 121 and following of the Bankruptcy Act.

Section 121 provides that, subject to the provisions of section 126 as to rent, in the distribution of the property of the bankrupt or authorized assignor, there shall be paid, in the following order of priority:

1. the costs and expenses of the custodian and the fees and expenses of the trustee;
2. the costs of the execution or judgment creditor coming within the provisions of subsection 1 of section 25 and subsection 3 of section 29 and subsection 2 of section 29A;
3. all indebtedness of the bankrupt or authorized assignor under any Workman's Compensation Act and all wages, salaries, commissions or compensation of any clerk, servant, etc., in respect of services rendered to the bankrupt or assignor during three months before the date of the receiving order or assignment (there follows a proviso which is not material herein);
4. claims resulting from injuries to employees of the debtor to which the provisions of any Workmen's Compensation Act do not apply, but only upon moneys paid or payable to the insolvent estate by persons or companies guaranteeing the insolvent debtor against damages resulting from such injuries.

Section 122 deals with the case of partners, with which we are not concerned.

Section 123 states that, subject to the provisions of the Act, all debts proved shall be paid *pari passu*.

Section 124 relates to interest and has no materiality herein.

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Section 125, regarding taxes, rates or assessments, reads thus:

Nothing in the four last preceding sections shall interfere with the collection of any taxes, rates or assessments payable by or levied or imposed upon the debtor or upon any property of the debtor under any law of the Dominion, or of the province wherein such property is situate, or in which the debtor resides, nor prejudice or affect any lien of charge in respect of such property created by any such laws.

Section 188 in Part VIII of the Act, headed "Supplemental Provisions", enacts that "save as provided in this Act, the provisions of this Act relating to the remedies against the property of a debtor, the priorities of debts, the effect of a composition or scheme of arrangement, and the effect of a discharge, shall bind the Crown".

A brief recapitulation of the precedents seems convenient.

In *re Toronto Metal and Waste Company* (1), it was held by the Supreme Court of Ontario, in bankruptcy, Orde J., that the claim of the Crown against a bankrupt for sale taxes due under The Special War Revenue Acts is not one depending upon any lien or charge but is a prerogative right of the Crown to be paid upon a distribution in bankruptcy in priority to unsecured creditors, which right is preserved by sec. 51 (6) of the Bankruptcy Act (now sec. 125); that this prerogative right apart from any writ of extent or some lien or charge in favour of the Crown is one which is subject to the trustee's right to be paid his fees and expenses of the bankruptcy and to the lien for sheriff's fees payable under sec. II of The Bankruptcy Act, on the sheriff's surrender of goods seized by him to the trustee, and is also subject to the lien of the seizing execution creditor for costs under said sec. II (now sec. 29, subsec. 3).

I deem it expedient to quote a passage from the judgment of Mr. Justice Orde which is exactly in point (p. 139):

This motion raises directly the question upon which I touched in my judgment in *In re West & Co.* (1921) 2 C.B.R. 3, namely, whether the Crown's priority for taxes, which is preserved under subsec. 6 of sec. 51 of The Bankruptcy Act, entitles the Crown to rank ahead of the trustee's fees and expenses. I suggested there that as the collection of the taxes of which the Crown reaps the benefit must under the circumstances be

made through the medium of the bankruptcy, it would seem to be wholly unreasonable and unfair that the Crown should be entitled to take advantage of the administration of the estate by the trustee without being subject to the expense incidental to such administration.

There is no parallel between the position of the Crown under sub-sec. 6 of sec. 51, and that of the landlord under sec. 52. The landlord's right to priority depends upon the right of distress, a right in the nature of a lien, and as already held in *In re Auto Experts, Ltd.* (1921) 1 C.B.R. 418, 19 O.W.N. 532, 20 O.W.N. 2, that right is superior even to the trustee's fees and expenses. But the claim of the Crown does not depend upon any lien or charge upon the bankrupt estate, but is a prerogative right of the Crown to be paid upon a distribution in bankruptcy in priority to other unsecured creditors. As pointed out in the *West Case, supra*, this prerogative is quite distinct from that which, prior to the adjudication in bankruptcy or to the making of an authorized assignment, might have been exercised by the process of a writ of extent: *Commissioners of Taxation for New South Wales v. Palmer*, (1907) A.C. 179, 76 L.J. P.C. 41.

The prerogative is one which the Crown is entitled to assert in the bankruptcy proceedings. But in bankruptcy (whether the administration is under a receiving order, or under an authorized assignment) the property in the debtor's estate has passed to the trustee, the right to issue a writ of extent is gone, and the only prerogative left to the Crown is that already mentioned. The prerogative is, therefore, merely a right of preference in the administration of the estate.

No authority was cited for the contention that this prerogative went the length of depriving the trustee of his fees and expenses. And I see no ground whatever for holding that it does so.

The relevant observations of Mr. Justice Orde in *re West & Co.* above referred to appear on page 15 of the report.

In *re Solomons Bochner Fur Company* (1), it was held that since The Special War Revenue Amendment Act, 1922, the Crown has a claim for war revenue tax against an insolvent estate which will take priority over a landlord's claim for rent, but the trustee's fees, costs and expenses are to be first paid under that Act where there are not sufficient assets to satisfy both the war revenue tax and the trustee's remuneration.

At page 754 we find the following comments by Fisher J.:

I am of opinion that Parliament made the trustee's costs, fees and expenses, a first charge because it would be unreasonable and unfair that the Crown should take advantage of the administration of the estate without being subject to the trustee's expenses in the administration of it. In all cases where there is no claim made by the Crown for war revenue tax, the landlord's right of priority under sec. 52 remains. The amendment is a sweeping one, as it declares "notwithstanding The

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Bankruptcy Act (and this must include sec. 52 of it) or any statute or law". The priorities under secs. 51 and 52 of The Bankruptcy Act (1 C.B.R. 55-57, 577-79) stand as before this amendment where there is no claim by the Crown for war revenue tax.

In *re Davis Candy Academy* (1), the head note, fairly comprehensive, reads thus:

A landlord's preferential lien for rent in cases of bankruptcy is a first charge and payable in priority to the trustee's remuneration, except in cases where war revenue taxes have become due prior to the rent, in which case the costs, charges, and expenses of the trustee are to be paid first, the war revenue tax second and the landlord's rent third.

In *re Imperial Clothing Company Limited* (2), the Chief Justice of the King's Bench Division of the Supreme Court of New Brunswick expressed the following opinion (p. 187):

The claim of His Majesty being one for taxes under a Dominion statute, it is not to be affected by anything in sections 121 to 124. It is claimed by the respondent that sec. 188 of The Bankruptcy Act (9 C.B.R. 331), which is the centre around which the argument turns, destroys the Crown's prerogative priority of payment and puts it on an equality with ordinary unsecured creditors. But I do not think that is so. Sec. 188 binds the Crown in regard to priorities and places it on an equal footing with ordinary creditors in all matters, "save as provided in this Act," i.e. The Bankruptcy Act; but nothing in secs. 121 to 124 (both inclusive) which fix priorities, is to interfere with the collection of any taxes (sec. 125). The prerogative right of the Crown to rank in preference to unsecured creditors, for taxes, has not, in my opinion, been destroyed by sec. 188.

The question under discussion has been agitated and adjudicated upon in several cases arising in Ontario. There it has been held that although The Special War Revenue Act contains no provision making sales taxes a lien or charge upon the property of the debtor, the Crown, in right of the Dominion is entitled to priority under sec. 125 (per Orde J., in *In re West & Co.* (1921), 2 C.B.R. 3, 50 O.L.R. 631). And the Court of Appeal for Ontario has held that notwithstanding sec. 188, the Crown's prerogative still exists, and that even in those cases where taxes, rates or assessments are not given priority by the statute creating them, the Crown is entitled to be paid in priority to ordinary creditors (*In re D. Moore & Co.* (1927), 8 C.B.R. 479, 61 O.L.R. 434). These decisions being in entire accord with my own views, I refer to them here as supporting the opinion which I have expressed.

In *re General Fireproofing Company of Canada Limited* (3), the head note preceding the judgment of the Supreme Court of Canada, which is quite accurate, contains, among others, the following statements:

On an appeal, by special leave, by the City of Toronto, the Toronto Electric Commissioners, the Attorney-General for Canada and the

(1) (1924) 4 C.B.R. 698.  
 (2) (1930) 13 C.B.R. 184.

(3) (1937) 18 C.B.R. 159.

Minister of National Revenue, the Ontario Workmen's Compensation Board, from the judgment of the Court of Appeal for Ontario, 17 C.B.R. 371, varying the judgment of J. A. McEvoy J., 17 C.B.R. 246, where the facts are stated in the headnote, the Supreme Court settled the respective priorities of the parties in the distribution of the debtor company's property which was insufficient to pay all in full, as follows:

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- (1) The Treasurer of Ontario, for taxes under The Corporations Tax Act, R.S.O. 1927, ch. 29.
- (2) The City of Toronto and the Toronto Electric Commissioners for business taxes, and for charges for electric energy, respectively.
- (3) The landlord, for arrears of rent and accelerated rent.
- (4) The custodian and trustee, for fees and expenses.
- (5) The Ontario Workmen's Compensation Board.

It was directed that the Minister of National Revenue for sales taxes under The Special War Revenue Act, R.S.O. 1927, ch. 179, should be ranked first among ordinary creditors by virtue of the Crown's prerogative.

Special directions were given as to the payment of costs.

I may note that the judgment of the Court of Appeal of Ontario is reported in 17 C.B.R. 371.

In the case of *Vandeweghe Limited, débiteurs, et Harry Lassner, gardien, et Ministre du Revenu National du Canada, requérant* (1), it was held by Mr. Justice Surveyer of the Superior Court of the Province of Quebec, on a petition of the Minister of National Revenue, that the Federal Government, according to the Bankruptcy Act, is an ordinary creditor.

It seems to me apposite to note that a different opinion was adopted in *Canadian Peerless Jewelry Co., in liquidation, and Royal Trust Company, liquidator, and His Majesty in right of the Dominion of Canada, through the Minister of Customs and Excise, contestant* (2), and in *re Kingston Auto Wreckers Limited* (3).

In the first case it was held by White J. that "the Crown, under the provisions of section 10 of the Income War Tax Act, 10-11 George V, Chapter 49, is entitled to be paid in full before any general distribution of the money derived from the sale of the assets of the company".

The learned judge, in his notes, refers to the judgment in *re Humberstore Coal Co. Ltd.* (4).

(1) (1937) 43 R. de J. 348.

(2) (1926) R.J.Q. 64 C.S. 576.

(3) (1935) 17 C.B.R. 96.

(4) (1925) 5 C.B.R. 719.

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The head note in the second case is in the following terms:

On a motion by the trustee for his discharge, the Court held that a sum due by the debtor company under The Corporations Tax Act, R.S.O. 1927, ch. 29, and a sum due for income tax under The Income War Tax Act, R.S.C. 1927, ch. 97, should have been paid in priority to all other claims against the estate including the fees and disbursements of the trustee. The Court accordingly refused to grant the discharge until the sums referred to were paid.

(*In re Canadian Peerless Jewelry Co.* (1926), 64 Que. S.C. 576, 3 Can. Abr. 939, referred to.)

It seems to me opportune to quote a passage from Duncan and Reilley's treatise on bankruptcy in Canada. At page 632 the authors, dealing with the prerogative right of the Crown, write:

3. Prerogative right of Crown.

- (a) In common law provinces. The common law prerogative of the Crown to priority over creditors of equal degree for payment of all its claims is destroyed by section 188 in both the Dominion and the common law provinces. It is now limited in the common law provinces to a priority over ordinary creditors for taxes, including sales tax and customs duties.
- (b) In the province of Quebec. In the province of Quebec there is but one general privilege of the Crown, namely, that upon moveable property "against persons accountable for its moneys". The effect of section 188 is to cut this privilege down to cases in which the claim of the Crown is one against a "comptable" for taxes.
- (c) Non-existent prerogative rights. The result is that in bankruptcy the following among other prerogative rights no longer exist:
  - (i) the remedy by writ of extent against the Crown's debtor.
  - (ii) priority for payment for a commercial debt.
  - (iii) priority for payment of a penalty for infraction of a statute.
- (d) Contrast rule in winding-up. The rule is not the same under The Winding-up Act, for the Crown in the right of the Dominion can under that Act rank for damages for breach of contract in priority to the unsecured creditors.
- (e) Crown's prerogative and secured creditors. Where the claim of the Crown is based merely on the prerogative right of preference over ordinary creditors, a secured creditor will be entitled to retain the proceeds of his security against the Crown.
- (f) Crown's prerogative and landlord. The preferential claim of the landlord ranks in priority to the prerogative claim of the Crown to taxes.
- (g) Crown's prerogative and trustee. The prerogative right of the Crown does not depend on any lien or charge on the debtor's property, but is a right to be paid preferentially out of the fund realized in the administration. It is therefore subordinate to the claim of the trustee for his fees and expenses.

Reference may be had beneficially to the authorities relied upon by the authors and referred to in the notes at the foot of pages 631-634.

It is now well settled law that, apart from the preferential claim of the landlord for rent, the extent of the preference being naturally determined by the law of the province in which the leased premises are situate, the trustee's fees and expenses have priority over all other claims.

The amounts which Ferguson had received from Engine Works & Trading Inc. for services rendered to the company and which he did not care to keep but sent to the Minister of Munitions and Supply, "in order that they may be diverted into the proper channels" reverted, in my opinion, into the assets of the bankrupt company and should have been remitted to its trustee, the suppliant herein, for distribution.

When Ferguson's cheque was transmitted by the Minister of Munitions and Supply to the Department of Justice, the Deputy Minister of the latter wrote to Ferguson the letter Exhibit 2 stating, as we have seen: "If, however, it is your desire that the Crown should retain these moneys pending the outcome of proceedings, you may, if you please, authorize me to present this cheque certified at your bank and to hold the same until it is decided what disposition should be made thereof". Evidently the Deputy Minister had not at that time decided that the respondent had the right to withhold this money.

It was, in my opinion, the respondent's duty to remit to the trustee the cheque in question or the proceeds thereof. Under the provisions of the Bankruptcy Act the assets of the bankrupt are to be distributed by the trustee. Needless to say, the trustee, in preparing his dividend sheet, is bound to take into consideration the various preferences recognized by the Act. If a creditor is not satisfied with the rank given to him in the dividend sheet, he is free to contest it within the delay prescribed by law.

After having given the matter full consideration, perused carefully the evidence literal and verbal, listened to and read attentively the able and exhaustive argument

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of counsel, studied the law and reviewed the jurisprudence, I have reached the conclusion that the petition of right is well founded and that the suppliant is entitled to recover from the respondent the sum of \$3,035.98, with costs.

No interest is allowed against the Crown unless provided for by statute or stipulated in an agreement.

*Judgment accordingly.*