

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Commissioners of Taxation for the State of New South Wales v. Palmer and others, from the Supreme Court of New South Wales ; delivered the 8th February 1907.*

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Present at the Hearing :

LORD MACNAGHTEN.

LORD DAVEY.

LORD ROBERTSON.

LORD ATKINSON.

[*Delivered by Lord Macnaghten.*]

This is an Appeal by special leave from a judgment or order of the Full Court of New South Wales affirming by a majority of two Judges to one a decision of the Judge in Bankruptcy.

The only question involved is whether in the case of the administration of a bankrupt's estate under the New South Wales Bankruptcy Act, 1898, the Crown is entitled to preferential payment over all other creditors.

In *The King v. Wells* (16 East 278), in a passage which has been often cited, Macdonald C.B. says (at p. 282) : " I take it to be an incontrovertible rule of law that where the King's " and the subject's title concur the King's shall " be preferred." Except so far as the legislature has thought fit to interfere, the rule is one of universal application, and perhaps not unreasonable, when it is considered that, after all, it only means that the interests of individuals are to be postponed to the interests of the community. The rule is enunciated by Lord

Coke in *Quick's case*, 9 Rep. 129 *b*. From Lord Coke's time to the present day it has never been questioned as a rule of law, and, so far as their Lordships are aware, there has never been any attempt on the part of any Court to limit the generality of its application except in the present case, and in two recent cases in the Colonies which will be referred to presently.

By the Bankruptcy Act of 1898 the estate of the bankrupt is vested in an Official Assignee (Section 10). It is one of the duties of the Official Assignee to present to the Court for confirmation a plan for the distribution of the assets (Section 69). Before the plan is confirmed "the bankrupt and any party interested in the estate, and any creditor," may within the prescribed time enter an objection in writing with the Registrar, and the Court upon hearing the parties may make such order as it thinks fit (Section 71 (1) (3)). The Court has—

"full powers to decide all questions of priorities and all questions whatsoever whether at law or in equity or of fact in any case of bankruptcy coming within the cognizance of the Court or which it may deem expedient or necessary to decide for the purpose of doing complete justice or making complete distribution of property in any such case." Section 134 (1).

The Act also provides that if the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the assignee, he may apply to the Court, and the Court may confirm, reverse, or modify the act or decision complained of, and make such order in the premises as may be just (Section 96).

The Bankruptcy Act of 1898 gives a preference to certain specified debts, not including among them or referring in any way to debts due to the Crown, and declares that subject to the provisions of the Act all debts proved in the Bankruptcy shall be paid *pari passu*; Section 48 (1) (4).

The Act, though it follows closely the English Bankruptcy Act, 1883, and adopts almost all its provisions, does not contain any section corresponding with Section 150 in the English Act, which declares that save as therein provided the provisions of the 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."

According to the evidence before their Lordships it was the practice in New South Wales until the present case occurred for the assignee in his plan for the distribution of the assets to make provision for the preferential payment of Crown debts. It is stated that prior to 1895 Crown debts were so paid without further verification than a letter from the Crown solicitor, but that since that time, in accordance with the directions of the late Mr. Justice Manning, claims on behalf of the Crown have been verified by the statutory declaration of a responsible officer of the Crown Department concerned who may have knowledge of the matter.

In the present case the claim on the part of the Crown was notified and verified in the usual manner. A plan of distribution was presented which did not provide for the preferential claim of the Crown. On objection being made, the Registrar refused to alter the plan. His decision was affirmed by the Judge in Bankruptcy, and on appeal by the Full Court, Simpson J. dissenting.

It can hardly be disputed that in the present case the rights of the Crown and the rights of ordinary creditors or "common persons" (as the phrase is in the old cases) do concur or come into competition. It is admitted that the Bankruptcy Act, 1898, does not bind the Crown. It

would therefore seem, on principle, that in the administration of the assets under the direction of the Court it was the duty of the Court to give effect to the Crown's prerogative.

As regards authority both in England and Ireland, the highest Courts in the country short of the House of Lords, have upheld the prerogative of the Crown. The Judgment of the Court of Appeal in *In re Henley & Co.* (9 Ch. Div. 469), seems to their Lordships, as it did to Simpson J., to be clear upon the point. The decision was rested upon two separate grounds and upon two distinct prerogatives. It was a case of winding up, not of bankruptcy. The property had not passed out of the Company. The Court therefore held that the Crown was still at liberty to pursue its extreme rights against the Company's property and was on that ground entitled to priority. But the Court also held that under the other and wider prerogative the claim of the Crown must prevail. "If the matter," said James L.J. (at p. 481), "is treated as a matter solely of administration of assets under the direction of the Court, I think it is also right. Whenever the right of the Crown and the right of a subject with respect to the payment of a debt of equal degree come into competition, the Crown's right prevails. Whether, therefore, the debt is treated as a debt of record or of specialty, or of simple contract, there being a right of priority in the Crown, it is right that the debt should be paid." The other Members of the Court, Brett and Cotton L.JJ. also rested their decision on both grounds separately. The reasons of the Lords Justices founded on the wider prerogative are summarily dismissed in the Full Court as judicial dicta inapplicable to a case where the narrower prerogative is no longer capable of being exercised, though the assets are

still under the direction of the Court vested in a public officer who has no beneficial interest in them. Of course, if that view be correct, the observations in Henley's case to which Simpson J. deferred were wholly idle and irrelevant. But it is impossible to treat a proposition which the Court declares to be a distinct and sufficient ground for its decision as a mere dictum, simply because there is also another ground stated upon which, standing alone, the case might have been determined. It is equally impossible to suppose that the very learned Judges who formed the Court, and who were beyond all others familiar with the law of bankruptcy, pronounced a Judgment apparently unqualified and unrestricted in its application, yet "with the tacit exception of administration in bankruptcy," as suggested by Griffith C.J. in the case of *In re Baynes*, 9 Queensl. L.J. 33, at p. 44.

The Judgment of the Court of Appeal in Ireland in *In re Galvin*, 1897 (1 I.R. 520), was a case in bankruptcy, and it is to the same effect. The Court there was composed of Ashbourne L.C., Palles C.B., and FitzGibbon and Walker L.JJ., and the Judgment of the Court was delivered by the Chief Baron, one of the most learned and accurate Judges on the Bench.

It is difficult to understand the suggestion made in the Court below that, because the Crown puts forward its claim to priority in the case of the administration of a bankrupt's estate, it must therefore be held to have abandoned an undoubted prerogative on which it is actually at the time insisting, and to have elected to come in with the ordinary creditors.

The attention of their Lordships was called to the case of *In re Baynes*, which has already been mentioned, and a case in Ontario, in both of which the right of the Crown to preferential payment out of assets being administered in

*Clarkson v. Attorney - General of Canada*, 15 Ont. Rep. 632; 16 Ont. App. Rep. 202.

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.* 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 benefit of which the Crown is now claiming, depends, as explained by Macdonald C.B. in *The King v. Wells*, 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."

Their Lordships will humbly advise His Majesty that the Appeal should be allowed, that the plan of distribution should be altered so as to provide for the preferential right of the Crown, and that the orders of the Registrar, the Judge in Bankruptcy and the Full Court should be discharged except as to costs.

Under the special circumstances their Lordships do not propose to advise His Majesty that the existing orders as to costs should be disturbed.

The Appellants in accordance with the undertaking given when special leave to appeal was granted will pay the costs of the first Respondent, who alone defended the Appeal, as between solicitor and client.

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