CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

THE COURTS OF THE PROVINCES

AND FROM

THE EXCHEQUER COURT OF CANADA.

HER MAJESTY THE QUEEN..... .....APPELLANT; 1885

AND

THE BANK OF NOVA SCOTIA *et al.*, Liquidators..... } RESPONDENTS.

*Feb'y. 23.
*June 26.

ON APPEAL FROM THE SUPREME COURT OF PRINCE EDWARD ISLAND.

Insolvent bank—Winding-up proceedings—Priority of Crown as simple contract creditor—Estoppel—Acceptance of dividends by Crown not waiver—45 Vic., ch. 23.

The Bank of Prince Edward Island became insolvent and a winding up order was made on the 19th June, 1882. At the time of its insolvency the bank was indebted to Her Majesty in the sum of $93,494.20, being part of the public moneys of Canada which had been deposited by several departments of the government to the credit of the Receiver General. The first claim filed by the

*PRESENT—Sir W. J. Ritchie, C.J., and Strong, Fournier, Henry and Taschereau, JJ.

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Minister of Finance at the request of the respondents (liquidators of the bank), did not specially notify the liquidators that Her Majesty would insist upon the privilege of being paid in full. Two dividends of 15 per cent. each were afterwards paid, and on the 28th February, 1884, there was a balance due of $65,426.95. On that day the respondents were notified that Her Majesty intended to insist upon her prerogative right to be paid in full. At this time the liquidators had in their hands a sum sufficient to pay in full Her Majesty's claim. The following objection to the claim was allowed by the Supreme Court of Prince Edward Island, viz: "That Her Majesty, the Queen, represented by the Minister of Finance and the Receiver General, has no prerogative or other right to receive from the liquidators of the Bank of Prince Edward Island the whole amount due to Her Majesty, as claimed by the proof thereof, and has only a right to receive dividends as an ordinary creditor of the above banking company.

On appeal to the Supreme Court of Canada,

Held,—(Reversing the judgment of the court below):—

1. That the crown claiming as a simple contract creditor has a right to priority over other creditors of equal degree. This prerogative privilege belongs to the crown as representing the Dominion of Canada, when claiming as a creditor of a provincial corporation in a provincial court, and is not taken away in proceedings in insolvency by 45 Vic., ch. 23.

2. That the crown had not waived its right to be preferred in this case by the form in which the claim was made, and by the acceptance of two dividends.

APPEAL from an order or decision of the Supreme Court of Prince Edward Island, made and given on the third day of November, A.D. 1884. The following is the special case:—

"The President, Directors and Company of the Bank of Prince Edward Island" were a banking corporation, incorporated by the Legislature of Prince Edward Island by an Act, passed in the year one thousand eight hundred and forty-four, intituled: "An Act to incorporate sundry persons by the name of 'The President, Directors and Company of the Bank of Prince Edward Island.'"

The said company, from the time of its incorporation,

until its insolvency, hereinafter mentioned, transacted a banking business in Prince Edward Island.

On the first day of July, A.D. 1873, Prince Edward Island became part of the Dominion of Canada.

The Bank of Prince Edward Island never came under the provisions of any of the Banking Acts of the Parliament of Canada, but the Parliament acknowledged its existence by the passage of an Act, in the forty-fifth year of the present reign, ch. 56, intituled: "An Act for the Relief of the Bank of Prince Edward Island."

The said Bank of Prince Edward Island became insolvent, and, on the nineteenth day of June, A.D. 1882, an order was made by the Hon. James Horsfield Peters, one of the judges of the Supreme Court of Prince Edward Island, for the winding up of the said bank, under the provisions of the Act, 45 Vic., ch. 23, intituled: "An Act respecting Insolvent Banks, Insurance Companies, Loan Companies, Building Societies and Trading Corporations."

The Bank of Prince Edward Island, at the time of its insolvency, was indebted to Her Majesty in the sum of $93,494.20, being part of the public moneys of Canada, which had been deposited by several departments of the Government, to the credit of the Receiver-General.

The respondents do not deny that the bank, at the time of its insolvency, owed her Majesty $93,496.20 of the public moneys of Canada, deposited to the credit of the Receiver-General, and the only question arising for decision now is: Is Her Majesty entitled to be paid in full? In other words, is Her Majesty a privileged creditor, or must she rank as an ordinary creditor and take a *pro rata* amount?

It is agreed between Her Majesty and the respondents that the question to be raised and decided on the present appeal shall be:—

Is Her Majesty, in her Government of Canada, entitled

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to be paid the full amount of the said indebtedness of the insolvent company to her, in priority to the simple contract creditors of the said insolvent company ?

If the Supreme Court of Canada decide that Her Majesty is so entitled, then the appeal is to be allowed, and the respondents ordered to pay the said indebtedness in full.

The Bank of Prince Edward Island became insolvent, and the winding-up order was made on the 19th June, 1882.

The first claim filed by the Minister of Finance, at the request of the respondents, did not specially notify the liquidators that Her Majesty would insist upon her privilege of being paid in full.

Two dividends of 15 per cent. each were afterwards paid, and on the 28th of February, 1884, there was a balance due of $65,426.95, over and above the $30,000.

On that day (28th February, 1884) Mr. Hodgson acting for the Crown, notified the respondents that Her Majesty intended to insist upon her prerogative right to be paid in full.

At the time of serving this notice the liquidators had in their hands a sum sufficient to pay Her Majesty's claim in full.

A more formal demand for preference was made on the 17th March, 1884.

The objections to Her Majesty's claim (filed by leave of Mr. Justice Peters) were heard before him. The first objection is:—

"That Her Majesty the Queen, represented as aforesaid" (by the Minister of Finance and the Receiver-General) "has no prerogative or other right to receive from the liquidators of the above-named banking company the whole amount due to Her Majesty, as claimed by the proof thereof, dated the 8th day of March, A.D. 1884, and has only a right to receive dividends as an

ordinary creditor of the above-named banking company."

This objection was allowed.

From the order allowing this objection, an appeal was taken (under sec. 78 of 45 Vic., ch. 23) to the Supreme Court of Prince Edward Island.

That court, by order dated 4th November, 1884, affirmed Mr. Justice Peters' order, and dismissed the appeal.

Permission to appeal to the Supreme Court of Canada from this order was granted by Mr. Justice Strong on the 26th day of November, 1884.

G. W. Burbidge, Q.C., and *E. J. Hodgson*, Q.C., for appellant:

It has been established beyond dispute, that when the rights of the Crown and of the subject concur, that of the Crown is to be preferred. Chitty on Prerogatives (1).

The Queen, as the head of the Government of Canada is invested with all her prerogatives, and will not be held to be deprived of any of them by parliament, unless the intention to do so is expressed in explicit terms, or the inference is inevitable (2); *Lenoir* v. *Ritchie* (3); *Cushing* v. *Dupuy* (4); *Johnston* v. *Ministers and Trustees of St. Andrew's Church* (5); *Theberge* v. *Landry* (6); *Hartington, Marquis of* v. *Bowerman* (7).

The court below conceived itself bound by the winding-up Act, 45 Vic., ch. 23, to order the distribution of the assets equally, even as against the Queen.

Now we admit that the Crown is bound by a statute "made for the public good, the advancement of religion and justice, and to prevent injury and wrong," without

(1) Pp. 290, 381.
(2) 31 Vic., ch. 1, sec. 7, sub sec. 33.
(3) 3 Can. S. C. R. 575.
(4) 5 App. Cas. 409.
(5) 3 App. Cas. 159.
(6) 2 App. Cas. 102.
(7) Ir. Rep. 2 C. L. 683.

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being expressly named. Bac. Abr. Prerogative (1); *The King* v. *Wright* (2). But the statute under which this insolvent bank is being wound up (45 Vic. ch. 23) is not a statute within these exceptions.

In *re Henley* (3) is decisive upon the question at issue in this case (4).

On the question of estoppel we contend :

(*a*) that estoppels do not bind the Crown. Chitty on Prerogatives (5); *Regina* v. *Renton* (6); *The Queen* v. *Fay* (7).

See the remarks of Mr. Justice Strong in *The Queen* v. *McFarlane* (8).

(*b*) That in this case there has been no election.

The receiving of the indebtedness by instalments was a mutual convenience.

The court below decided that the prerogative right to be paid in full is in the Government of Prince Edward Island, to the exclusion of the Queen in her Government of Canada, and that had this been an indebtedness to the former Government, and proper proceedings taken to make it a record debt, it would have been entitled to preference over all other creditors.

The learned judge, in the court below, has misapprehended the preamble to the British North America Act, when he says: "It is true that the provinces have given executive power to the Dominion over subjects before belonging to them, but by the convention recited in this preamble they are to have a constitution similar to that of England regarding her colonies, with respect to the subjects retained, and, if so, the Lieutenant-Governors must have the Queen's prerogative still vested in them."

(1) (E) 5.
(2) 1 A. & E. 434.
(3) 9 Ch. D. 469.
(4) See also *re Oriental Bank.* 28 Ch. D. 646.
(5) P. 381.
(6) 2 Ex. 216.
(7) 4 L. R. Ir. 606.
(8) 7 Can. S. C. R. at p. 212.

It is not the Provinces, but the Dominion of Canada, which the preamble declares is to have a constitution "similar in principle to that of the United Kingdom :" *City of Fredericton* v. *The Queen* (1).

The whole judgment of the court below is based on this fallacy.

The fact of the insolvent bank being a local institution does not affect the question to be decided. If moneys due to the Crown were in the possession of a commercial firm or private individuals, residing and doing business in Prince Edward Island, and they became insolvent, the Queen would not be deprived of her prerogative right to be paid in preference to other creditors on the ground that the commercial firm or the private individual had never been brought under the control or influence of the Dominion Government.

R. Fitzgerald, Q.C., and *A. Peters* for respondent :

The Crown's claim to a preference arises under what are termed the minor prerogatives of the Crown, which do not extend to this province. See *Attorney General* v. *Judah* (2).

The right of the Crown in relation to all such minor prerogatives can only be exercised in Prince Edward Island by the Queen in her government thereof, and for the benefit of the province. This would clearly have been the case before confederation, and there is nothing in the British North America Act conferring on the Government of Canada the right to exercise these prerogatives.

The autonomy of the provinces is preserved by the British North America Act, and their several Lieutenant-Governors represent the Queen in the performance of many executive prerogative and administrative acts. It is contended that the prerogative here claimed (if it

(1) 3 Can. S. C. R. per Gwynne, J., at p. 560.

(2) 7 Legal News, Q., 147.

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exists) is vested in the Lieutenant-Governor, and cannot be exercised both by the Provincial and the Dominion Governments. If such a right existed in both Governments their several interests might clash, and in case of deficiency of assets must clash. Supposing such a contest, can it be contended that the provincial prerogative, which existed previous to confederation, has been taken away without express enactment. *Attorney General* v. *Mercer* (1); *Holmes* v. *Regina* (2).

At confederation only such of the prerogatives as were necessary for carrying on the general government of Canada, became vested in the Governor General, and the prerogative right to a preference here claimed is not necessary for such purpose.

The Crown's claim in this case clearly arises out of a simple trading contract, the Crown dealing with the bank as an ordinary customer, and in such case we contend the Crown has no privilege over any other creditor. *Attorney General* v. *Black* (3); *Monk* v. *Ouimet* (4).

Another ground for affirming the judgment is that the Crown, in this case, elected to prove their claim under the Winding-up Act, and to stand in the same position as other creditors, and having done so, cannot now revoke their election and claim a preference. See *Bigelow* on Estoppel (5); also, argument *in re Bonham* (6).

It is further submitted, that even if the Crown has a legal preference, the proper course has not been taken to enforce it, and that before such preference can be enforced the debt must be made a debt of record and writ of extent must issue. Manning's Exch. Practice (7); Chitty on Prerogatives (8); West on Extents (9); *Doe dem. Hayne* v. *Redfern* (10).

(1) 5 Can. S. C. C. R. 538.
(2) 8 Jur., N. S. 76.
(3) Stewart's Rep. 325.
(4) 19 L. C. Jur. 71.
(5) P. 503.
(6) 10 Ch. D. 598.
(7) 2nd edit. 90.
(8) P. 358.
(9) P. 193.
(10) 12 East 96.

In relation to the $30,000 draft, under no circumstances can the Government of Canada now claim any prerogative right. So far as liquidation proceedings are concerned, the Bank of Montreal is the only creditor therefor, and with the consent of the government were duly settled on the list of the creditors of said bank by order of the Judge in liquidation.

E. J. Hodgson, Q.C., in reply:—

When the bank became insolvent, there was no dispute as to its indebtedness to the Crown, nor is there any now. The matter of the $30,000 is not a disputed indebtedness; the Bank of Prince Edward Island admits owing the money; the contest is, who is to rank as a creditor, the Bank of Montreal or the Queen?

RITCHIE, C.J.:—

The debts due by the insolvent bank to "the various persons and corporations" are due by simple contract only.

The ground upon which Mr. Justice Peters has rested his judgment is stated by him as follows:—

I have now gone through the various points raised by the issues, and I wish to observe, that although some of my observations may apply to provincial banks and corporations generally, the ground on which I rest my decision is, that the insolvent bank is a purely local institution, never brought under the control or influence of the Dominion Government in any way, and whose claim is, therefore, a civil right of a merely local and private nature in this province. Whether a provincial bank, holding its charter from the Dominion Government or brought under the Dominion Bank Act, would occupy the same position, is a question not before me, and on which I, therefore, express no opinion.

The claim of the Crown must be dismissed with costs, and I order that the costs, when taxed, be deducted from the dividend now ready to be paid to the Receiver-General of the Dominion.

This, it appears to me, is conclusively answered in the factum of the appellant, where it is said:—

"The appellant contends that the fact of the insolvent

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bank being a local institution does not affect the question to be decided. If moneys due to the Crown were in the possession of a commercial firm or private individuals residing and doing business in Prince Edward Island, and they became insolvent, the Queen would not be deprived of her prerogative right to be paid in preference to other creditors, on the ground that the commercial firm or the private individuals had never been brought under the control or influence of the Dominion Government."

I do not think there can be a doubt that the Crown is entitled at common law to a preference in a case such as this, for when the rights of the Crown come in onflict with the right of a subject in respect to the payment of debts of equal degree, the right of the Crown must prevail, and the Queen's prerogative in this respect, in this Dominion of Canada, is as exclusive as it is in England, the Queen's rights and prerogatives extending to the colonies in like manner as they do to the mother country.

I am at a loss to conceive how the acceptance of two dividends on account of the indebtedness of the bank to the Crown, can deprive the Crown of payment of its claim in full, there being sufficient funds, independent of the two dividends, to satisfy the Crown's demand in full. It is unquestionable that no laches can be imputed to the Crown; the interests of the Crown are certain and permanent, and, as it is said, "it must not suffer by the negligence of its servants or by the compacts or combinations with the opposite party." There is no pretence for saying that there ever was any waiver of the prerogative rights of the Crown by the Deputy-Receiver General, nor that he had any power or authority to waive them; and if the officers of the Crown, in receiving the dividends, should have insisted on payment in full, and did not do so, this could not enure to the detriment

of the crown. As the Crown cannot be prejudiced by the misconduct or negligence of any of its officers, so neither can an officer give consent that shall prejudice the rights of the Crown. He could not give an express consent that could prejudice the rights of the Crown, still less, impliedly waive the Crown's rights.

The Deputy Receiver General might have refused the dividends and insisted on payment in full. That claim is not to be barred or extinguished; for, as has been said, no laches can be attributed to the Crown, and the Crown cannot be deprived of its prerogative right by any neglect of its subordinate officers; but here there was neither laches nor neglect. The receipt of a portion of the Crown's claim by instalment may have been, and, as suggested, probably was for the mutual convenience and benefit of all parties, and was no abandonment of the Crown's rights, or election on the part of the Crown to be paid ratably with the other creditors.

I think this case too clear on principle to require authority (1), and if modern authorities are required the cases in *Giles* v. *Grover*; *in re Henley* and *in re Oriental Bank* are directly in point

In *Giles* v. *Grover* (2), Alderson, J., says:

> The next prerogative of the Crown about which I apprehend there is no dispute is, that, where the right of the Crown and the subject concur, that of the Crown is to be preferred; a prerogative depending, first, on the principle that no laches is to be imputed to the king, who is supposed by our law to be so engrossed by public business as not to be able to take care of any private affair relating to his revenue; and, secondly, on the ground that by the King is, in reality, to be understood the nation at large, to whose interests that of any private individual ought to give way. In the quaint language of Lord *Coke*, *Thesaurus Regis est firmamentum pacis et fundamentum belli.* And until restrained by various enactments of the statute law, this prerogative extended to

(1) *Co. Little* 30 B. 4 Co. 55, 9 Co.129; Hard. 24; Bac. Ab. Prerogative E. 4.

(2) 9 Bing. 156.

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prevent the other creditors of the King's debtor from suing him, and the King's debtor from making any will of his personal effects without special leave first obtained from the Crown. But without further adverting to the ancient state of the prerogative, it is clear that at this day the rule is, that if the two rights come in conflict that of the Crown is to be preferred.

If, however, the right of the subject be complete and perfect before that of the King commences, it is manifest that the rule does not apply, for there is no point of time at which the two rights are in conflict; nor can there be a question which of the two ought to prevail in a case where one, that of the subject, has prevailed already. But if, whilst the right of the subject is still in progress towards completion, the right of the Crown arises, it seems to me that two rights do come into conflict together at one and the same time, and that the consequence in that case is, that the right of the Crown ought to prevail. Lord Mansfield expresses this proposition in shorter language when he says: No inception of an execution can bar the Crown. *Cooper* v. *Chitty* (1).

In re Henley & Co. (2), James, L.J.:

It appears to me clear on every principle that the Crown is not bound by the Companies Act, 1862, not being specially mentioned in it. * * * Whenever the right of the Crown and the right of a subject with respect to 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.

Brett, L.J.:

I am of the same opinion. There are two prerogatives of the Crown bearing upon this question. The first is that the Crown is not bound by a statute in which it is not specially mentioned. Therefore the Crown is not bound by the Companies Act. It follows that, this being clearly a debt for which the Crown can distrain, its powers of distress are not taken away by the Act, and it can proceed to distrain in this case. It is, therefore, right that the debt should be paid in priority to other creditors. But suppose we regard it merely as a simple contract debt: then in the administration of the assets of the company the Crown comes into competition with the other simple contract creditors, and then the other prerogative to which I have alluded comes in, namely, that in competition with subjects the right of the Crown must prevail. Therefore, in which ever way

(1) 1 Burr. 36. (2) 9 Ch. D. 481.

we look at the question, I think the Crown ought to be paid this debt in priority.

In re Oriental Bank Corporation ex parte The Crown (1).

McNaughton, Q.C., and W. Latham, for the liquidator:

We are willing to concede that the prerogative of the Crown in the colonies is as high as in this country.

Chitty, J.:

It is settled law that on the construction of the Companies Act, 1862, the Crown is not bound, the Crown not being named, and there being no necessary implication arising from the Act itself by which the Crown's prerogative is affected or taken away. That is the short statement of the decision of the Court of Appeal in the case of *in re Henley* (2). In that case there were two prerogatives brought into question—the one was the prerogative of the Crown, when assets had to be administered, to priority over the subject. It was held that that prerogative was not taken away. The other was the prerogative which the Crown, not being bound by the statute, had notwithstanding the statute, to issue process. That was also held not to be taken away.

The 98th section of the Act of 1862 contains an enactment that the court shall cause the assets of the company to be collected and applied in discharge of its liabilities. Now, the fund to be administered would consist, by virtue of the decision in *In re Henley & Co.*, of the whole of the assets of the company, if the Crown came in under the liquidation, and sought to prove; and the Crown would then retain its rights of priority as against the other creditors. But if the Crown stood out and insisted on its prerogative, then the assets to be administered would be the assets of the company, less that portion of the assets which the Crown had taken away.

No distinction was drawn in argument, and very properly, between the rights and prerogatives of the crown suing in respect of Imperial rights, and the rights of the Crown with regard to the colonies.

In re Bateman's trust, Sir James Bacon, V.C., said:

I cannot hesitate to say and to decide, that the Queen's prerogative is as extensive in New South Wales as it is here, in this county of Middlesex. It has been contended that the title of the Crown by

(1) 28 Ch. D. 646.
(2) 9 Ch. D. 469.
(3) L. R. 15 Eq. 361.

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forfeiture was confined to this soil—the soil of England. But the Queen is as much the Queen of New South Wales as she is the Queen of England, and I must hold that every right which the Queen possessed by forfeiture extended as much to the colonies as to this country.

The learned judge in the court below referred to what I said in *Atty.-Gen.* v. *Mercer* (1) as to the Lieut.-Governors of provinces representing, in a limited manner, the Crown. To all that I said in the case referred to by the learned judge I still adhere, but what I then said has no bearing on the present case, but must be read with reference to the cases I was then considering. In regard to the case before us, I may say I can discover nothing in the B. N. A. Act which takes away from Her Majesty the prerogative right in regard to debts due Her Majesty in the Dominion of Canada of an Imperial character, or in relation to the Government of Canada.

No question arises in this case as to the rights of the Local Government, should it be a creditor, or of the relative rights of the Dominion and Provincial Governments, should both be creditors, with assets only sufficient to pay one, as has been suggested. It will be quite time enough to deal with these questions when they arise.

STRONG, J.:

Four questions are raised by this appeal. First, the right of the Crown, claiming as a simple contract creditor, to priority over other creditors of equal degree, as a general rule, of English law, is disputed. Secondly, assuming the Crown to have this right according to the general rule it is denied that such a prerogative privilege appertains to the Crown, as representing the dominion of Canada, when claiming as a creditor of a provincial corporation in a provincial

(1) 5 Can. S. C. R. 538.

court. Thirdly, it is insisted that the priority of the Crown, even if it exists and applies in favor of the Crown in its government of Canada, as regards ordinary proceedings for the recovery of debts at common law, is taken away by the Act of Parliament (45 Vic. ch. 23) under which the present proceedings in insolvency are being taken. And lastly, it is urged, that, failing all of the preceding contentions, the Crown has, in the present instance, by the form in which its claim was made and by the acceptance of the two dividends already declared, waived its right to be preferred to other simple contract creditors.

In my opinion, the Crown is entitled to succeed on every one of these points, and that upon authority so clear and decisive as to leave little room even for argument on the part of the liquidators.

The rule of law formulated in the maxim *Quando jus domini regis et subditi concurrunt, jus regis præferri debet* we find propounded by Lord Coke in 9 Rep. 129, and also in Co. Litt. 30*b*, and recognized in many later authorities (1): and its existence at the present day, as a well established principle of the constitutional law of the Empire relating to the royal prerogative, was distinctly recognized and acted on by the English Court of Appeal in the late case of *Re Henley* (2), decided as recently as 1879. This case of *Re Henley* has been said, not to be a decision upon the point in question, but a mere dictum. This is not so, for the report of the case itself, as well as later judicial recognition and comments, shows that the right of the Crown, as a simple contract creditor, to priority over other simple contract creditors, was one of the *rationes decidendi* upon which all of the three eminent

(1) *Giles* v. *Grover*, 9 Bing. 128; *Rex* v. *Edwards*, 9 Ex. pp. 32, 628, 5 Bac. Ab. 558.

(2) 9 Ch. D. 469.

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judges who decided it proceeded. That case arose under a "winding-up" proceeding under the Companies Act, 1862. The claim of the Crown was for arrears of income tax, in respect of which it had a right of distress. Vice-Chancellor Malins, in a long judgment, which need not be particularly referred to, held that the Crown was only entitled to payment out of the assets of the company rateably with other creditors of like degree. The Crown appealed, and, although the arguments of counsel are not given in *extenso* in the report, it is apparent, from the authorities cited, that the right of the Crown was rested, not merely on the statutory right of distress, but also on the general preference which is now in question; and that the judgment of the court proceeded as much on one of these grounds as on the other, is apparent from the language of the learned judges.

James, L.J. says:

> But if the matter 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.

Brett, L.J. says:

> But suppose we regard it merely as a simple contract debt: then, in the administration of the assets of the company, the Crown comes into competition with the other simple contract creditors, and then the other prerogative to which I have alluded comes in, namely, that in competition with subjects the right of the Crown must prevail. Therefore, in whatever way we look at the question, I think the Crown ought to be paid this debt in priority.

Cotton, L.J. concludes his judgment as follows:

> But if the case is looked at as one in which the Crown submits to come in under the administration of assets in the winding-up, there is still the right which the Crown has, when in competition with other creditors, of being paid in priority.

These extracts show conclusively, that the principle now disputed was one on which the judgment in *Re Henley* was based by all the judges who took part in the ultimate decision of that case. Further, if anything additional is wanting to show that what the judges who decided *Re Henley* say in the quotations before given were no mere *dicta*, the case of *The Oriental Bank Corporation ex parte The Crown* (1) may be cited. Chitty, J., who decided the last-mentioned case, referring to *Re Henley*, says :—

> In that case there were two prerogatives brought into question: the one was the prerogative of the Crown, when assets had to be administered, to priority over the subject. It was held that such priority was not taken away.

And again :

> Now the fund to be administered would consist, by virtue of the decision in *Re Henley*, of the whole of the assets of the company, if the Crown came in under the liquidation and sought to prove, and the Crown would then retain its right of priority as against the other creditors.

These observations of Mr. Justice Chitty show that he recognized the authority of *Re Henley* as determining the point which now calls for decision; but, further than this, it appears that, without question by the counsel for the liquidator, Mr. Justice Chitty acted on this view of the effect of *Re Henley*, and in this same case of the *Oriental Bank Corporation* gave the Crown priority in respect of simple contract debts over other simple contract creditors.

It being thus demonstrated by satisfactory authorities that the Crown has the right of precedence now claimed, according to the fundamental doctrines of English constitutional law, is any distinction to be made in applying such a rule in England and in the province of Prince Edward Island? That the law of England is the rule of decision in the province

(1) 28 Ch. D. 643.

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has not been and cannot be disputed, nor has it been pretended (save as regards the very statute now in question, a matter to be separately considered hereafter) that by any express and direct legislation, provincial, federal or imperial, the rights of the Crown, as applicable in Prince Edward Island, have been in any way interfered with. Authorities which it would be useless to quote, so familiar are they, establish, that, in a British colony governed by English law, the Crown possesses the same prerogative rights as it has in England, in so far as they are not abridged or impaired by local legislation, and that, even in colonies not governed by English law, and which, having been acquired to the Crown of Great Britain by cession or conquest, have been allowed to remain under the government of their original foreign laws, all prerogative rights of the Crown are in force, except such minor prerogatives as may conflict with the local law. The two decisions of the Court of Queen's Bench of the Province of Quebec *Monk* v. *Ouimet*(1) and *Attorney-General* v. *Judah*(2) may, perhaps, be referred to this distinction. Then, if the Crown's right of priority has been taken away in Prince Edward Island, it can, apart from the provisions of the Insolvent Act, only be by some of the provisions of the British North America Act. The most careful scrutiny of that statute will not, however, lead to the discovery of a single word expressly interfering with those rights, and it is a well settled axiom of statutory interpretation, that the rights of the Crown cannot be altered to its prejudice by implication, a point which will have to be considered a little more fully hereafter, but which, it may be said at present, affords a conclusive answer to any argument founded on the British North America Act. Putting aside this

(1) 19 L. C. Jur. 71. (2) 7 Leg. News 147.

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rule altogether, I deny, however, that there is anything in the Imperial legislation of 1867 warranting the least inference or argument that any rights which the Crown possessed at the date of confederation, in any province becoming a member of the dominion, were intended to be in the slightest degree affected by the statute ; it is true, that the prerogative rights of the Crown were by the statute apportioned between the provinces and the dominion, but this apportionment in no sense implies the extinguishment of any of them, and they therefore continue to subsist in their integrity, however their locality might be altered by the division of powers contained in the new constitutional law. It follows, therefore, that the Crown, speaking generally, still retains this right to payment in priority to other creditors of equal degree in Prince Edward Island.

It is said, however, that, whilst the last proposition may be true as regards the rights of the Crown as representing the provincial government of the Island, it does not apply to the Crown as representing, as in the present case it does, the government of the dominion. This objection is concluded by authority still more decisive than the former. That the Crown is at the head of the government of the dominion, by which I mean that Her Majesty the Queen is, in her own royal person, the head of that government, and not her Viceroy, the Governor General, there can be no doubt or question, for it is in so many words declared by the ninth section of the British North America Act, which enacts— "The Executive Government and authority in and over Canada is hereby declared to continue and be vested in the Queen."

That, for the purpose of entitling itself to the benefit of its prerogative rights, the Crown is to be considered as one and indivisible throughout the Empire, and is not

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to be considered as a quasi-corporate head of several distinct bodies politic (thus distinguishing the rights and privileges of the Crown as the head of the government of the United Kingdom from those of the Crown as head of the government of the dominion, and, again, distinguishing it in its relations to the Dominion and to the several provinces of the dominion) is a point so settled by authority as to be beyond controversy. In the case already referred to of the *Oriental Bank Corporation* (1) this very point occurred, and the counsel who opposed the contention of the Crown, with the approval of the learned judge, declined to argue it. The claim of the Crown there was to priority, over simple contract creditors, in respect of a simple contract debt (amongst others) due to it in right of its government of the colony of Victoria—a colony possessing a constitutional government; and the counsel for the liquidator, so far from drawing any distinction between the claims of the Crown in respect of its Imperial rights, or as representing colonies, and as representing Victoria, say: "We are quite willing to concede that the prerogative of the Crown in the colonies is as high as in this country;" and the learned judge (Mr. Justice Chitty) says, at the end of his judgment:—

> No distinction was drawn in argument, and very properly, between the rights and prerogatives of the Crown suing in respect of Imperial rights and the rights of the Crown with regard to the colonies.

In re Bateman (2), the Crown claimed in England the goods and personal property of a felon, as for a forfeiture on a conviction for felony in the colony of New South Wales, and it was there seriously argued, that the rights accruing to the Crown under such forfeiture were not enforceable in England. The court (Bacon, V.C.), however, entirely rejected this contention, and determined that the rights of the Crown were not to be considered

(1) 28 Ch. D. 643. (2) L. R. 17 Eq. 355.

divisible according to the several governments and jurisdictions into which the Empire is apportioned, but that prerogative rights, accruing to it in one jurisdiction, may be enforced against persons and property anywhere throughout the Queen's dominions. To these authorities may also be added the well known cases which have determined that the benefit of the prerogative applies when the Crown sues nominally, though entirely in the interests of private parties, upon recognizances given by, or as security for, receivers and committees of lunatics, in which cases it has long been the universal practice to treat such debts as debts of record due to the Crown, entitling the parties interested to the benefit of the Crown's title to priority in respect of that class of obligations. It is therefore safe to conclude, as a general proposition of law, that whenever a demand may properly be sued for in the name of the Queen, the prerogative rights of the Crown attach in all portions of the British Empire subject to the prevalence of English law, irrespective of the locality in which the debt arose and of the government in right of which it accrued.

It is, however, said, that this right of the Crown to priority over other creditors, in a case like the present, where the assets of an insolvent banking company are being administered under the statute 45 Vic., ch. 23, is taken away by the necessary effect of the statute making equality the rule of distribution. The general rule for the construction of statutes, when the prerogatives of the Crown are in question, is thus stated in a work of authority (1) :—

> Where a statute is general and thereby any prerogative, right, title, or interest, is divested or taken away from the King, in such case the King shall not be bound, unless the statute is made by express words to extend to him (2).

(1) Bac. Abrid. Pre. E. 5.

(2) See also Maxwell on Statutes, 2 Ed. p. 161 et Seq.

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In the case of *re Bonham, ex parte The Postmaster General* (1), it was held that the Crown, though named in some of the provisions of the English Bankruptcy Act, 1869, was not bound by provisions in which it was not expressly named. And in the cases *re Oriental Bank* and *re Henley*, before cited, it was held, that the Crown was not bound by the winding-up clauses of the Companies Act, 1862.

By the 150th section of the English Bankruptcy Act, 1883, the priority of the Crown is expressly taken away.

These authorities, which could be multiplied to any extent, are sufficient citations in point to exemplify a rule so familiar as that just stated.

Then, applying it here, there is no pretence for saying that the Crown is bound by the Act under which these proceedings are taken. In no one clause of the Act is the Crown named, and it can be no more said that, by necessary implication, it includes the Crown than the same could have been said of the English Bankruptcy and Companies Acts, which, as just shown, do not affect the Crown.

The last and most untenable of all the points which have been made against this appeal is, that the Crown has waived and abandoned its priority by the way in which it proved, and by accepting the two dividends of 15 per cent. each. I have examined the claim, but find nothing in it indicating any intention of waiver, even if the rights of the Crown could be waived in this way, which I doubt. As regards the acceptance of the dividends, that, under the admitted fact stated in the case, that at the time of serving the notice claiming payment in full, on the 28th February, 1884, a date long subsequent to the receipt of the last dividend, the liquidators had in their hands a sum sufficient to pay the Crown in full, can amount to no more than

(1) 10 Ch. D. 595.

a creditor receiving part payment, which surely does not amount to waiver.

My conclusion is, that the order of the court below must be reversed, and an order allowing the claim of the Crown to be paid in full substituted for it, with costs both in this court and the court below.

FOURNIER, J.:

For the reasons given by the Chief Justice, I am of opinion that the appeal should be allowed.

HENRY, J.:

I never had any difficulty in this case. There is no authority, that I can find, in opposition to the principle that where the claim of the Crown under a simple contract and the claim of a subject under a simple contract conflict, the Crown has precedence. So, whatever may be the degree of the claim, when the Crown is otherwise on an equal footing with the subject, the decisions have always been that the Crown is entitled to precedence. The Crown represented in the dominion and the Crown represented in Prince Edward Island—in fact, in each of the provinces—might possibly have claims against the same debt. What proportion should be allotted to each in such a case would be a matter for subsequent regulation and settlement; but the fact that the Crown has a claim for the dominion, and a claim for each of the provinces, certainly cannot affect the decision in this case.

I think the grounds taken by the learned judge below were untenable. I do not think there is any waiver in this case. The evidence does not point to any such waiver. Certainly, the parties who received dividends did not expressly stipulate that there should be a waiver of any of the rights of the Crown; and even if they had done so, I do not think they had the

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power to bind the Crown. I think the appeal should be allowed.

TASCHEREAU, J.:—

I am also of opinion that this appeal should be allowed. The question does not, it seems to me, admit of any doubt. The contention that the local government of Prince Edward Island could alone exercise this prerogative right in the province is untenable. The Lieutenant-Governors, no doubt, in the performance of certain of their duties as such under the B. N. A. Act, may be said to represent Her Majesty, in the same sense and as fully, perhaps, as Her Majesty is represented, for instance, by justices of the peace, constables and bailiffs, in the execution of their duties. But it is the first time that I hear it contended, as has been done in this case, that the Lieutenant-Governor in a province, on matters not exclusively left to the provinces under the B. N. A. Act, could ever use Her Majesty's name and prerogatives to defeat Her Majesty's rights and prerogatives. Not less extraordinary, to my mind, is the dictum of the court below, that if Her Majesty had proceeded in the Exchequer Court at Ottawa to recover judgment for this indebtedness, the court of Prince Edward Island, if applied to, would grant a prohibition to prevent the process of the Exchequer Court from being enforced.

Appeal allowed with costs.

Solicitor for appellant: *Edward J. Hodgson.*

Solicitor for respondent: *Rowan R. Fitzgerald.*