CASE AND COMMENT

TRUST—DIRECTION IN WILL TO BUY ANNUITY—ASSIGNMENT OF ANNUITY—BREAKING THE TRUST—RESTRAINT DURING COVERTURE.—*Re Boxall Estate: Jenson* v. *Wutsky*[1] is an unsatisfactory decision that appears to go in the face of well-settled principles. It seems evident that the court became so engrossed in a secondary point that it overlooked the really cardinal point.

In brief, the case was this. A testator left a fund to trustees to buy for his daughter a Dominion annuity or other similar annuity, and also directed that this should not be "assignable, chargeable, alienable or attachable".

After the trustees had applied for a Dominion annuity contract, but before it had been obtained, the daughter notified the trustees that she did not wish the annuity but that she required payment of the fund to her.

A judge in chambers held that the trustees should ignore this notice and buy the annuity; and he was affirmed on appeal. The judge's reasons are not reported; but the reasons on appeal deal with the case as though the only point involved was whether the direction that the annuity should not be 'assignable, chargeable, alienable or attachable", could have any effect. The court examined a number of English decisions which held that an annuity was always assignable in spite of any prohibitions by the testator; but held these decisions inapplicable because the Government Annuities Act prevents the assignment of annuities.

This reasoning was unobjectionable enough, so far as it went, and would no doubt have been conclusive if the annuity had already been bought. Unfortunately the court's reasoning in no way met the point that the legatee had the right to prevent the buying of the annuity at all.

Nothing is better settled than that any person who is under no disability, and who is the only person taking a beneficial interest in a trust, can at any time break the trust and claim the trust property as absolute owner. This is the rule in *Saunders* v. *Vautier*[2] and it has never been doubted.

In the *Boxall* case no one but the daughter had any interest in the fund; there were no interests in remainder, because the capital would have been dissipated in the annuity. If the court had regard for the rule in *Saunders* v. *Vautier*, it could hardly

[1] [1946] 3 W.W.R., 413.
[2] (1841), Cr. and Ph. 240.

have denied the daughter's right to break the trust and take the fund rather than the annuity.

This statement needs qualifying only on one point not raised in the judgments. The daughter was married; and a married woman can be restrained during coverture from obtaining capital of which she is given the income, even though no one else is entitled. In the *Boxall* case the testator did not attempt a restraint during coverture; but assuming that a general restraint on a married woman can be interpreted as a restraint during coverture, this still would not justify denying the daughter the right to countermand directions for an unwanted annuity. There would still seem to be no reason why the daughter could not say to the trustees: I do not want the annuity; I want you to invest the fund in trustees' securities, pay me the income during coverture and, as soon as I am discovert, pay me the capital.

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QUEBEC — AUTHORIZED ASSIGNMENT IN BANKRUPTCY — CROWN PRIVILEGES—SALES TAXES PAYABLE TO THE CROWN—SPECIAL WAR REVENUE ACT—BANKRUPTCY ACT.—My attention has been drawn recently to the case of *In Re Colonial Piano Limited*,[1] in which the trustee in an authorized assignment refused to recognize any element of preference in a claim made by the Crown for an amount of sales tax due by the debtor under the Special War Revenue Act (R.S.C., 1927, c. 179, and amendments). The trustee's decision was based upon the principle that, under article 1994(10) of the Civil Code of Lower Canada, the only claims of the Crown that are privileged by nature are those against its accountants or "persons accountable for its moneys". Since the claim in this case arose out of a personal indebtedness of the debtor towards the Crown, it was contended by the trustee that it did not fall within the restrictive provision of article 1994(10) C.C. and that, consequently, all preference should be denied.

The judgment of the Superior Court was rendered by Mr. Justice Martin, who upheld the contentions of the trustee. The appeal of the Crown was unanimously dismissed for the same reasons as were expressed by Mr. Justice Martin in the Superior Court. Both tribunals relied on the fact that the Special War Revenue Amendment Act of 1925 (Statutes of Canada, 1925, c.

[1] (1929), 10 C.B.R. 111 (Court of Appeal), affirming (1927), 65 S.C. 316.

26, s. 9) had expressly repealed section 17 of the Special War Revenue Act (Statutes of Canada, 1922, c. 47), which stated that any claim of the Crown under the said statute "shall constitute a first charge on the assets".

These judgments have been followed in the Province of Quebec by others in the same sense, but they seem to overlook the existence and meaning of section 125 of the Bankruptcy Act (R.S.C., 1927, c. 11):

> 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 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 or charge in respect of such property created by any such laws.

In the case of *In Re D. Moore Company Limited*,[2] the Ontario Court of Appeal arrived at a different conclusion from that reached a few months previously by Mr. Justice Martin in the *Colonial Piano* case, taking into due account and consideration the disposition of section 51(6) of the Bankruptcy Act of 1919 (9-10 Geo. V. c. 36), which was the same as section 125 of the 1927 act. The Ontario Appeal Court held that the repeal of section 17 of the Special War Revenue Act of 1922 did not involve the abrogation of section 51(6) of the Bankruptcy Act. Hence the payment or collection of taxes due to the Crown continued to enjoy the same preference as decreed heretofore by the Bankruptcy Act.

I believe that the opinion expressed by the court in the *D. Moore Company Limited* case should be considered as more in keeping with the law in the Province of Quebec relating to the preferred position of Crown claims against bankrupt debtors. Although the right to legislate with respect to "property and civil rights" within their respective boundaries was granted to the provinces by section 92(13) of the British North America Act, jurisdiction over Bankruptcy and Insolvency was reserved to "the Queen, by and with the Advice and Consent of the Senate and the House of Commons". Section 125 of the Bankruptcy Act has been enacted by Parliament by virtue of such jurisdiction, and it has never been pronounced *ultra vires* by any court up to the present time. However, if the theory expressed in the *Colonial Piano* case is correct the section is rendered more or less meaningless.

[2] (1927), 8 C.B.R. 316.

The Quebec courts seem to have ignored the fact that in matters of bankruptcy, in Quebec, there is no legal contradiction in the application of section 125 of the Bankruptcy Act, if the true distinction between section 125 of the act and article 1994(10) of the Civil Code is made clear. The latter disposition of the Code is concerned with "privileges", which are a quality that attaches to the nature of the debt itself and which give it its rank in all matters where property and civil rights are involved. Section 125 of the act, on the other hand, being enacted for the particular case of bankruptcy, forms part of a series of five sections of the act, under the heading "Priority of Claims" and, like and with the other four sections, represents a direction to the trustee stating what reserve he should set aside before paying claims which are not mentioned in those five sections. Once that reserve is set up, nothing would prevent the other claims being ranked, as among themselves, in accordance with the order provided for in article 1994 of the Civil Code, where such claims have not already enjoyed a preference by virtue of the provisions of the Bankruptcy Act.

The preferred position of the Crown is particularly strengthened in the present case, where the Crown is claiming from the trustee the payment of taxes owed by the debtor under the Special War Revenue Act. Section 107 (1) and (2) of the latter act specifically directs the trustee not to effect any distribution before such taxes have been effectively paid:

> 107 (1). Trustees in bankruptcy, assignees, administrators, executors and other like persons, before distributing any assets under their control, shall obtain a certificate from the Minister certifying that no unpaid taxes or penalties as provided by Parts XI, XII, XIII and XIV of this Act properly chargeable against the person, property, business or estate, as the case may be, remain outstanding.
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> (2) Distribution without such certificate shall render the trustees in bankruptcy, assignees, administrators, executors and other like persons personally liable for the taxes and penalties.

De la Durantaye, in his "Traité de la Faillite en la province de Québec",[3] has this to say concerning the claims provided for in section 107:

> Lorsque les assujettis à l'impôt de guerre sur le revenu (St. fed. ch. 97, art. 37 et 50) ou à l'impôt spécial des revenus de guerre (ibid. ch. 179, art. 107) tombent en faillite, les contributions dont ils sont redevables comme tels à l'Etat sont à ce point une créance ayant priorité sur toutes les autres que le syndic doit les acquitter avant de sortir le bordereau de dividende: tant celles nées avant la faillite que

[3] (1934), No. 347, p. 210.

> celles de la faillite elle-même dans la poursuite de l'exploitation. Et si le syndic distribue les biens sans se munir de l'acquit de ces contributions, il répondra personnellement et de l'impôt et des amendes. C'est comme si par une fiction de la loi la Couronne détiendrait à ce sujet une garantie contre tous les biens, mais une garantie que le syndic réaliserait pour elle, à la manière d'un fiduciaire.

But even if the whole question of the ranking of the different claims in a bankruptcy were to be determined exclusively in accordance with article 1994 of the Civil Code, which places in tenth place the claim of the Crown against persons accountable for its moneys, taxes due under the Special War Revenue Act should still be paid before the ordinary debts. The general principle with respect to the distribution of the debtor's assets is laid down by article 1984 C.C.:

> Among privileged creditors preference is regulated by the different *qualities* of the privileges or the *origin* of the claims.

This in my opinion would be sufficient to warrant the application of the constitutional principle stated in *Re Elgin Drug Company*[4] to the effect that

> . . . where the King's and the subject's title concur, the King's shall be preferred. . . .,

which is nothing but the restatement of one of the essential prerogatives of the Crown under the Common Law.

It would seem that Mr. Justice Martin and the judges of our Court of Appeals in the *Colonial Piano* case have formed the opinion, based on article 2006a C.C., that this prerogative does not exist in Quebec as against *personal* tax debtors:

> 2006a. The privileges of the Crown are defined by special statutes.

With all due respect I believe that the article concerned refers to Crown privileges which are intended to rank over and above those already given a privileged position by law or statute. But its terms do not appear to be clear and specific enough to justify a conclusion that a fundamental prerogative, whereby the claim of the Crown is preferred to that of its subject's in any case where both have concurring titles, is thereby abolished. Prerogative rights of the Crown cannot be considered as civil matters exclusively governed by Civil Law: they are matters of public order, governed by the underlying principles of our public law and, unless such a prerogative be expressly abolished by statute, it is deemed to be in force and effect. It is true that this Province is governed by the old French Civil Law, as restated

[4] (1935), 16 C.B.R. 356.

and modified by the Civil Code and the Code of Civil Procedure, but only with respect to the Civil Law. The public laws of England apply, unless revoked, in any matter relating to the rights of the Crown (*The Queen* v. *The Bank of Nova Scotia*[5]).

The maintenance of the fundamental rights and prerogatives of the Crown, according to this point of view, is clearly expressed in article 9 C.C., with which article 2006a should be read. Article 9 C.C. provides in part:

> No act of the legislature affects the rights or prerogatives of the Crown, unless they are included therein by special enactment.

I may be asked, however, as to the purpose of article 1994(10), which enacts the privilege of the Crown for claims against persons accountable for its moneys. My answer is that even with the admission of the general prerogative referred to above, the article has a specific application: the claim mentioned in it is to be paid in preference to other claims of the Crown, where the latter concur in title with other ordinary claims. If, however, there are funds left to pay for the non-privileged claims or part of them, then the prerogative should be applied and the Crown's ordinary claim should be "preferred to that of its subject's".

GUY F.

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VERBATIM FROM BOILEAU

Once (says our Author, where I need not say)
Two travellers found an oyster in their way;
Both fierce, both hungry, the dispute grew strong,
While scale in hand Dame Justice past along.
Before her each with clamour pleads the laws,
Explain'd the matter and would win the cause.
Dame Justice, weighing long the doubtful right,
Takes, opens, swallows it, before their sight.
The cause of strife remov'd so rarely well,
There take (says Justice) take ye each a *shell.*
We thrive at Westminster on Fools like you:
'Twas a fat Oyster—Live in peace—Adieu.

(Alexander Pope: Miscellanies)

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[5] (1885), 11 S.C.R. 1.