NOTES.

TAXES PAYABLE BY INSOLVENT ESTATES.—In the matter of the *Estate of E. T. LeBlanc,* Authorized Assignor; *In re The City of Moncton* (not yet reported), the Supreme Court of New Brunswick has rendered a judgment bearing upon the rights of municipalities in respect of the payment of taxes out of insolvent estates. The issue arose out of a claim by the City of Moncton to rank as a preferred creditor for taxes in arrears at the time of the assignment.

The claim was based upon a section of the Charter of the City which provides that: "All moneys which from and after the passing of this Act shall become due to the City for any tax special or annual assessment, together with any percentage added thereto, under this Act, and costs, are and shall be privileged debts, and shall rank for payment in full without registration upon the proceeds of the real estate or personal property in respect of which such debt shall be due." There were included poll, income and personal property taxes, and the judgment is that by the combined effect of the section of the Charter quoted and subsection 6 of section 51 of The Bankruptcy Act, which reads as follows:—"Nothing in this section shall interfere with the collection of any taxes, rates or assessments now or at any time hereafter 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 situate, or in which the debtor resides, nor prejudice or affect any lien or charge in respect to such property created by any such laws," the claim as proved was to be treated as a privileged debt and entitled to rank in priority, seemingly, at least, to the general creditors.

It was not disputed that the Charter created no lien or charge on the personal property of the taxpayer apart from the effect of the section in question. The Assignee raised the following, among other, objections:—

(a) That the poll and income taxes were not due in respect of any personal property, and that therefore there were no proceeds available to them;

(b) That the priority, if any, could be only out of the proceeds of the property actually taxed; and

(c) That the section of the Charter in so far as it might be deemed to extend to proceeds in the hands of an Assignee in Bankruptcy was

ultra vires; and that there was nothing in subsection 6 of section 51 of The Bankruptcy Act to give it validity.

The Court held on the first point that the benefit of the section extended to the poll and income taxes as well as those on or in respect of personal property; and, on the second, that such priority extended to proceeds of goods other than those in existence when the taxes were originally imposed.

The third contention was rather briefly dismissed with the observation that by subsection 6 of section 51, "The negation of the contention is conceded by the Dominion Parliament itself," and that therefore, no case of ultra vires was made out.

Just what is the effect of subsection 6 of section 51? Whatever else it may be, it surely cannot be construed as enacting by way of implied incorporation ultra vires legislation of a province. By its very words its effect is negative—it does not "interfere" with the collection of taxes under provincial law. The language is "nothing in this section"—not, it will be observed, "this Act"—and the section deals with the distribution of bankruptcy assets. No other part of The Bankruptcy Act is touched. The subsection contemplates, therefore, the existence of the bankruptcy or assignment and the proceeds of the estate in the hands of a Receiver or Assignee for distribution. To the proceedings up to that point the subsection has no application, so that it cannot be argued that the proceeds are thereby deemed to be, for the payment of taxes, untainted by bankruptcy, and therefore merely "property within the Province." The result, then, is that the collection of taxes is remitted to provincial law free from interference by section 12. This means, surely, valid provincial law. If the provincial law were, apart from the subsection, ultra, if rendered valid it would be only by virtue of life given through the subsection and would then be not Provincial but Federal law.

The considerations mentioned by Orde, J., in *re West & Co.*, 1921, 2 C. B. R. 3, page 11, which the judgment in question would seem to follow, namely:—"It is clear that subsec. 6 of sec. 51 intended to preserve, for the purpose of collecting taxes, rates and assessments, all such remedies and rights as already exist in the creditor and as are consistent with the fact that the debtor's property has passed into the hands of the Trustee, and that the remedies and rights so preserved are not merely limited to cases where the tax or rate or assessment constitutes a lien or charge upon the debtor's property. To so limit the provisions of the subsection would nullify the effect of all the earlier portion of it and restrict its operation to the last few words. Those provisions, in my judgment, must be given a liberal construc-

tion, the evident intention being to enable those to whom taxes, rates or assessments are payable, whether it be the Crown in the right of the Dominion, or the Crown in the right of the Province, or a corporation, of a public character entitled to impose rates, taxes or assessments, such as a Municipal Corporation or a School Board, to collect such taxes, etc., in priority to the other creditors if the law of the Dominion or of the Province so provides," do not seem to require the construction that has been given. Whatever may have been the intention of Parliament, the question rather is, what has Parliament in fact enacted? As pointed out in the judgments given in the Court of Appeal of Ontario in the case of *In re Cicilian Co. Ltd.*, 2 C.B.R. 510, full effect can be given to the language and intent of the subsection without going beyond its precise meaning. The laws to which it refers include those of the Dominion as well as of the Provinces and to the former its promise is not a mere phantom.

The subsection, therefore, being one of non-interference merely, the inquiry is as to the validity of the section of the Provincial law which is invoked. The Provincial charter quoted seems clearly to deal with the distribution of or determination of rights in proceeds among persons or creditors entitled to share in them. The incidents of a "privileged debt" are not, under the New Brunswick law, clear. The expression would seem to be defined by the language immediately following in the section and this merely declares a right to a certain priority in ranking, but just to what extent is uncertain. Would Provincial taxes, for instance, be preferred to the expenses of the Assignee? Or to Dominion taxes? Or to a landlord's right under The Bankruptcy Act?

To proceeds under, say, the Provincial Creditor's Relief Acts or Voluntary Assignments Acts, among the known funds for distribution at the time the Moncton Charter was enacted, the section could validly apply, but to extend its application to the proceeds in question would seem directly and immediately to introduce it into bankruptcy, admittedly a field beyond the competency of the Province. The case of *The King* v. *Marsh,* Ex parte Washington, 21 Can. Cr. Cas. 413, seems to cover the principle of construction involved. A provision in the Dominion Lord's Day Act, Con. St. 1903, ch. 153, s. 16, somewhat similar to subsection 6 in question, left untouched Provincial legislation then "in force" respecting the observance of the Sabbath. The Supreme Court of New Brunswick, following *Attorney-General of Ontario* v. *Hamilton St. Ry.*, 7 Can. Cr. Cas. 326, held legislation ultra vires which had been passed by New Brunswick after Confedera-

tion and before The Lord's Day Act came into force. The words "in force" in the latter Act do not add to the effect of the section, and with them omitted, we have even narrower language than that under consideration.

In view of the frequently heavy arrears of taxes presented in administration of bankrupt estates, the decision is one that will not contribute much to the joy of general creditors. I. C. R.

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CUSTOMS DUTIES ON LIQUORS IMPORTED BY PROVINCE.—The Privy Council has affirmed the decision of the Supreme Court of Canada that liquors imported by British Columbia to be sold in Government liquor stores are subject to customs duties, notwithstanding section 125 of the B. N. A. Act, which provides that "no lands or property belonging to Canada or any province shall be liable to taxation." *Attorney-General for British Columbia* v. *Attorney-General for Canada* (1923), 3 W. W. R. 1249. Lord Buckmaster says of section 125:—

"It is to be found in a series of sections which, beginning with sec. 102, distribute as between the Dominion and the provinces certain classes of property and confer control upon the provinces with regard to the part allocated to them. But this does not exclude the operation of Dominion laws made in exercise of the authority conferred by sec. 91. The Dominion has the power to regulate trade and commerce throughout the Dominion, and, to the extent to which this power applies, there is no partiality in its operation. Sec. 125 must, therefore, be so considered as to prevent the paramount purpose thus declared from being defeated."

The case in the lower courts is reported in 21 Ex. C.R. at p. 281, and 64 S. C. R. at p. 377, and one may be permitted to suggest that the subject-matter will be found to have been treated in a more comprehensive and illuminating manner in the judgments there delivered than in the pronouncement of the Judicial Committee above referred to. Counsel for the Dominion said, in the course of the argument in the Supreme Court:

"The exemption from taxation provided by section 125 does not extend to goods which, though belonging to the province, are not intended to be used in the execution of the ordinary functions of the Government, or for the purposes of the provincial government as these were understood at the time of the Union."

Pursuing the same line of thought, Idington, J., holds that the property meant to be exempt was not property employed in the activities of a government as a trading corporation. He says:

"The mere mention of a possibility of any province embarking upon such an enterprise as the Province of British Columbia has done, and is now in question, I venture to think would have surprised anyone in the far-off day when the B. N. A. Act was enacted after much public discussion."

Sir Walter Cassels had made a similar remark at page 295 of the Exchequer Court report.

Duff, J., in discussing the authority of the Dominion over the "regulation of trade and commerce," makes the point that the customs duties are an essential instrument for the regulation of external trade, and that the control of this trade would be seriously impaired if the claim of the province were allowed.

Anglin, J., says of customs duties, that they are not only a mode of taxation for the raising of money and a typical form of indirect taxes, "but they are, it seems to me, something more—they are tolls levied at the border as a condition of permission to import goods into the country being granted by the governmental authority clothed with jurisdiction either entirely to prohibit their entry or to prescribe conditions on which such entry may be effected"; and Mignault, J., takes the same ground.

Anyone who desires to thoroughly understand the question, will need to study the judgments in the courts below. The Privy Council judgment will serve merely to show how the case was finally decided.

R. W. S.

* * *

INCOME TAX LIEN.—The benchers of several provinces have passed resolutions condemning the Dominion legislation contained in section 25 of The Income War Tax Act, 1917, as enacted by section 10 of chapter 52 of the statutes of 1923. This section makes the income tax a lien upon the assets of the taxpayer, both real and personal, and proceeds: "This lien shall be deemed to attach or to have attached on the first day of May immediately succeeding the taxation year in respect of which the tax is payable or to which the interest and penalty relate, and, notwithstanding lack of notice, registration or publication, shall have priority over any mortgage, charge, lien or hypothec or any assignment or conveyance, including any security taken under section eighty-eight of the Bank Act, executed or created after the said first day of May," save and except certain liabilities due the Crown and the rights of purchasers of personal property for value without notice.

The confusion and embarrassment which this enactment is likely

to cause may be seen at a glance. Every intending purchaser, and every person intending to advance money upon the security of land, will be obliged to ascertain that all arrears of income tax, not only of the present owner, but of all persons who have owned the land subsequently to the date when the Act came into force, have been paid, and this may be no easy matter. Even if provision were made for the issue, upon application, of certificates similar to those mentioned in section 28, stating either that all income taxes had been paid or the amounts remaining unpaid, experience shows that at present months ordinarily elapse between the payment of the tax and the return of an official receipt, and similar delays might be anticipated in obtaining the certificates.

Again, how will a mortgagee proceed to foreclose where the land is subject to a charge in favour of the Crown for taxes accrued subsequently to the mortgage? Will he be obliged to present a petition of right in the Exchequer Court? Some considerations bearing upon this question may be found discussed in *Esquimault and Nanaimo Railway Co.* v. *Wilson* (1920), A. C. 358, where the Attorney-General of British Columbia was added as a party, it appearing that interests of the Crown were affected. But in that case no remedy was sought against the Crown; and, moreover, it was the interests of the Crown in the right of a province that were involved.

Suppose the matter to be before the Exchequer or any other Court, what authority would the tribunal possess to bar the Crown's right? It may be argued that the statute, having given priority to the Crown's charge over subsequent incumbrances, impliedly makes it subject to prior incumbrances, and therefore that a prior mortgagee could obtain foreclosure of the Crown's lien in the same manner as he can obtain foreclosure of the interest or charge of a subject. But the ordinary rule is that the Crown cannot be foreclosed, although an order for sale may be made if the Crown does not object. See Holmested's Judicature Act, p. 1030, and cases there cited. If, then, foreclosure is limited to the rights only of subsequent incumbrances other than the Crown, what will the land subject to the Crown's lien, often of indefinite extent, be worth?

In England, by 33 Hen. VIII. c. 39, ss. 52, 54-56, Crown debts by judgment or specialty,—bonds, recognizances, etc., were made a charge upon the debtor's lands, but by The Land Charges Act, 1900 (63 & 64 Vic. c. 26), s. 2, a judgment or recognizance, whether obtained or entered into on behalf of the Crown or otherwise, shall not operate as a charge on land or on any interest in land, or on the unpaid purchase money of land, unless a right or order for the pur-

pose of enforcing it is registered under The Land Charges and Searches Act, 1888 (51 & 52 Vic. c. 51), s. 5.

The Dominion Government might well take a leaf out of the statute of 1900 above mentioned. If the charge on land created by The Income War Tax Act is to be retained, provision should be made (1) that the tax shall only bind lands from the date when a caveat or caution has been filed, showing taxes in default and stating a definite sum which the Crown claims to be due therefor; and (2) for the prompt issue of tax certificates. R. W. S.

* * *

VALUING SECURITY IN BANKRUPTCY PROCEEDINGS. — In the case of *Bank of Hamilton* v. *Atkins,* reported in (1924) 1 W.W.R. at page 92, the Court of Appeal for British Columbia appears by the syllabus to have held that if "a company has gone into liquidation and made an authorized assignment under The Bankruptcy Act, and a creditor, in putting in its claim, values its securities at the amount of the debt, the valuation being accepted, the creditor has thereafter no claim against the sureties who had guaranteed the debt."

In giving his reasons for judgment, the Chief Justice of the Court said in part: "Suppose on their claim of $12,069.00 they had valued their securities as $5.000.00. They would then put in their claim for $12,069.00, and if their valuation were accepted they would rank for $7,069.00. In other words, the claim would be paid *pro tanto.*"

Now the creditor of a bankrupt estate holding security must do one of two things: (1) He must either put in no claim against the estate and rely solely on his security, or (2) he must put in a claim and value his security. If he adopt the first course and his security is not worth the amount of his claim, he loses his right to rank on the estate of the debtor, and it is reasonable to think that the guarantor of the debt might take the position that he had suffered by reason of the creditor's failure to make a claim on the estate, and that he would be discharged to the extent of any loss that he had so sustained.

If, on the other hand, the creditor follows the second course and in valuing his security places too high a value on it, his valuation will naturally be accepted, and according to the decision in *Bank of Hamilton* v. *Atkins,* the guarantor is discharged to the extent of the value so placed and the creditor must lose by the amount that he has overvalued his security. But if he undervalues his security, it may well be that the trustee of the bankrupt estate would feel like taking over the security, and if there was not sufficient in the estate to pay

out the creditor's claim in full, the guarantor might take the position that the security had been undervalued, that he had thereby suffered loss and to that extent he was discharged.

The result of the decision seems to be that the creditor of one who becomes bankrupt and whose debt is guaranteed by a third party, is compelled to buy whatever securities he holds and must at his own risk pay for them exactly what they are worth—no more and no less. Is this not an absurd result? The whole matter would be simple if the creditor could obtain immediate payment from his guarantor, turn the securities over to him and allow him to proceed as he saw fit; but in practice immediate payment cannot always be obtained from the guarantor.

LONDON MEETING.

The arrangements for the London meeting, so far as the English Bar is concerned, have been in the hands of a Committee appointed by the Right Honourable the Attorney-General. The general election in Great Britain, followed by the change of Government, has naturally caused some delay, but we are assured that the Committee is actively at work and we hope soon to have a draft programme. There is every indication that the visit of the American and Canadian Bar Associations to England is regarded as a very important event, not only by the Bench and Bar of England, but by influential individuals and organizations not directly connected with the profession.

It is probable that the headquarters for the Canadian Bar Association will be established at the Hotel Cecil.

The well known firm of Thos. Cook & Son has undertaken to make hotel reservations for the visitors and is sending to every member who has intimated his intention of being present a circular setting out a list of hotels and rates in order that individual reservations of rooms may be arranged.

TRANSPORTATION TO LONDON MEETING.

At the meeting of the Council of The Canadian Bar Association held in Toronto on the 26th of January, it was reported that most of the accommodation on Decks "A," "B" and "C" of the 'Montlaurier,' sailing from Quebec on July 8th, had been allotted by the steamship officials to members of the Association who had made direct application. This left accommodation on Deck "D" available. It