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| THE LIQUIDATORS OF THE MARITIME BANK..... | } APPELLANTS. | 1888 |
| | | *Nov. 20, 21. |
| AND | | 1889 |
| HER MAJESTY THE QUEEN..... | RESPONDENT. | Dec. 14. |
| ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK. | | |

Insolvent Bank—Assets—R. S. C. c. 120—Prerogative of crown—Deposit by insurance company—Priority of note holders.

The prerogatives of the crown exist in British Colonies to the same extent as in the United Kingdom. *The Queen v. The Bank of Nova Scotia* (11 Can. S.C.R. 1) followed.

The Queen is the head of the Constitutional Government of Canada, and in matters affecting the Dominion at large Her prerogatives are exercised by the Dominion Government.

The crown prerogatives can only be taken away by express statutory enactment. Therefore Her Majesty's right to payment in full of a claim against the assets of an insolvent bank in priority to all other creditors is not interfered with by the provision of the Bank Act (R.S.C. c. 120, s. 79) giving note holders a first lien on such assets, the crown not being named in such enactment. Gwynne and Patterson JJ. *contra*.

Held, per Gwynne J., that under legislation of the old Province of Canada, left unrepealed by the B. N. A. Act, no such prerogative could be claimed in the Provinces of Ontario and Quebec; the court would not, therefore, be justified in holding that such a right attached, under the B. N. A. Act, in one Province of Canada which does not exist in them all.

An insurance company, in order to deposit \$50,000 with the Minister of Finance and receive a license to do business in Canada according to the provisions of the Insurance Act (R.S.C. c. 124), deposited the money in a bank and forwarded the deposit receipt to the Minister. The money in the bank drew interest which, by arrangement, was received by the company. The bank having failed the government claimed payment in full of this money as money deposited by the crown.

*PRESENT: Sir W. J. Ritchie C.J. and Strong, Taschereau, Gwynne and Patterson JJ.

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Held, reversing the judgment of the court below, Strong J. dissenting, that it was not the money of the crown but was held by the Finance Minister in trust for the company; it was not, therefore, subject to the prerogative of payment in full in priority to other creditors.

APPEAL from a decision of the Supreme Court of New Brunswick (1) allowing an appeal from a *pro forma* judgment of the Chief Justice in favor of the liquidators of the Maritime Bank.

The Maritime Bank having become insolvent a claim was made by the Dominion Government for payment in priority to other creditors of two sums on deposit, one amount being placed in the bank by the Receiver General to his own credit and subject to his order, the other having been deposited under the following circumstances.

The Dominion Safety Fund Life Association, a life insurance society doing business in St John, N.B., on the assessment plan, was obliged to deposit \$50,000 with the Minister of Finance for a license. \$45,000 of this amount was deposited by the association in the Maritime Bank and a deposit receipt forwarded to the Minister. This receipt stated that the amount was payable to the Minister of Finance in trust for the association. The balance of the \$50,000 being deposited the receipt was accepted as a deposit of the \$45,000, and a license issued to the company which was renewed from year to year. The bank failed in September, 1887, and a demand was afterwards made upon the association for securities to replace the \$45,000. Up to 1888 the name of the association was among the companies mentioned in the yearly returns published in the "Canada Gazette" as licensed to do business.

The Government filed a claim against the liquidators

(1) 27 N.B. Rep. 351.

of the bank for the two amounts and two questions were raised and contested before the New Brunswick courts, namely, 1. Is the Dominion Government entitled by virtue of the royal prerogative to claim payment of money due from the bank in priority to other creditors? 2. Was the said sum of \$45,000 the money of the Government and subject to the prerogative right, or was it the money of the association?

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The Supreme Court of New Brunswick decided that the crown was entitled to priority of payment in respect to both sums. The liquidators appealed from such decision to the Supreme Court of Canada.

*A. A. Stockton* and *C. A. Palmer* for the appellants.

It is not necessary for the crown to be expressly named in order to take away the royal prerogative. If the intention is evident from irresistible inference it is sufficient. *Chitty on Prerogatives* (1); *In re Henley* (2); *The Mayor, &c., of Weymouth v. Nugent* (3).

It is submitted that there is such irresistible inference in this case. Interpretation Act, R.S.C. c. 1, s. 7; Bank Act R.S.C. c. 120, s. 79.

As to the second question we claim that the money was never deposited with the crown, but if it was it was still the money of the company and the crown holds it only as a bailee.

In the cases relied on by the crown and in the judgment of the court below there was no question that the money belonged to the crown. *Ex parte Usher* (4) is an authority in support of our contention.

*Weldon Q.C.* and *Barker Q.C.* for the respondent. The effect of the appellants' contention is to put the crown in a worse position under the Bank Act than under the Winding-up Act although not expressly named in either.

(1) P. 383.

(3) 6 B. & S. 22.

(2) 9 C. D. 482.

(4) 1 Rose 366.

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The crown has always represented to the policy holders that this money is held for their benefit and cannot now be heard to say that they never had it.

The following authorities were referred to: *The King v. Bennett* (1); *Salkeld v. Abbott* (2); *Citizens Insurance Co. v. Parsons* (3); *The Queen v. Patton* (4); *Wildes v. The Attorney General* (5); *In re Smith* (6); *The Queen v. Daly* (7).

SIR W. J. RITCHIE C.J.—The Maritime Bank of the Dominion of Canada, previous to March 7, 1887 carried on business as bankers at the city of St. John, under the Bank Act. Having become insolvent they, on that day, stopped payment and ceased to do business, and proceedings were afterwards taken for winding up the Bank's affairs under the provisions of "The Winding-up Act." At the time of the bank's failure they had on deposit to the credit of the Receiver General of Canada two sums of money: one of \$15,197.57 and the other of \$45,000. The first sum represented public moneys of the Government of Canada, deposited in the bank and lying there to the credit of the Receiver General and subject to his order. The other sum of \$45,000 was deposited in the bank by the Dominion Safety Fund Life Association to the credit of the Minister of Finance.

As to the sum of \$15,197.57 this was unquestionably a crown debt as to which I think the claim of the crown to priority must prevail. In Bacon's Abr. (8) it is said

Where a statute is general and thereby any prerogative, right, title or interest is divested or taken from the King, in such case the King

(1) Wightwick Rep. 1.

(2) Hayes Ir. Ex. Rep. 576.

(3) 4 Can. S.C.R. 215.

(4) 7 U.C.Q.B. 83.

(5) 3 Moo. P.C. at p. 214.

(6) 2 Ex. D. 47.

(7) 1 Ir. L.R. 381.

(8) Prerogative E. 5 (c).

shall not be bound unless the statute is made by express words to extend to him.

This has been repeatedly recognised and adopted as a correct exposition of the law; and the Interpretation Act (1) emphasises this principle by enacting (2)

That no provision or enactment in any act shall affect in any manner or way whatsoever the rights of Her Majesty, her heirs or successors, unless it is expressly stated therein that Her Majesty shall be bound thereby.

It is, to my mind, abundantly clear, therefore, that the prerogatives of the crown cannot be affected except by clear, legislative enactment, and it is equally clear that the prerogative of the crown runs in the Colonies to the same extent as in England.

But it is said this priority right of the crown to be preferred before other creditors is taken away by the Bank Act, which by section 79 enacts that

The payment of the notes issued by the bank and intended for circulation, then outstanding, shall be the first charge upon the assets of the bank in case of its insolvency.

But not a word is said indicating an intention to interfere with or take away the rights of the crown. The first charge here referred to is, in my opinion, the first charge as between the ordinary creditors of the bank, but subject where the crown is a creditor to the prerogative rights of Her Majesty, and the section must be read as if the words "save and except the prerogative rights of the crown" had been added, but which were, in fact, wholly unnecessary, as the crown not being named expressly or by implication the law saved and excepted those rights.

In the case of *In re Oriental Bank Corporation* (3) Chitty J. says:

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

(1) R.S.C. ch. 1.

(2) Sec. 7 sub-sec. 46.

(3) 28 Ch. D. 647.

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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 & Co.* (1).

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No distinction was drawn in the argument, and very properly so, between the rights and prerogatives of the crown in respect of imperial rights and the rights of the crown with regard to the Colonies. I entirely agree with the court below that the crown is not bound either by the Bank or Winding-up Act, and therefore, with respect to the sum of \$15,197.57, being public monies of the Government of Canada deposited in the bank and, therefore, unquestionably a debt due to the crown, Her Majesty's claim to priority over the note holders and other creditors of the bank in equal degree must prevail, and as regards this amount the appeal must be dismissed.

The second sum of \$45,000, for which the court below held the crown was entitled to the like priority, raises a very different and much more difficult question.

It cannot be denied that whoever receives money of the crown becomes the immediate debtor of the crown, but it appears to me that the real question in this case in reference to this sum of \$45,000 is: Was this money received by the bank as the money of the crown or did it ever cease to be the money of the association? In other words: Did it ever become a crown debt so as to be entitled to priority?

The Insurance Act provides that no person shall accept any risk or issue any policy in Canada without first obtaining a license from the Minister of Finance and Receiver General. By the 5th section the license is to expire on the 31st March in each year and shall be renewable from year to year. By section 6 the Minister, as soon as the company has deposited in his

hands the securities hereinafter mentioned, and otherwise conformed to the requirements of the act, shall issue such license.

Sec. 7. Every company carrying on the business of life insurance \* \* shall before the issue of such license deposit with the Minister in such securities as are hereinafter mentioned the sum of \$50,000. \* Ritchie C.J.

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Sec. 8. Such deposits may be made in securities of the Dominion of Canada, or in securities of any of the provinces of Canada and by any company incorporated in the United Kingdom in securities of the United Kingdom; and by any company incorporated in the United States in securities of the United States; the value to be estimated at the market value at the time deposited,

Sub-sec. 2. If any other securities are offered they may be accepted at such valuation and on such conditions as the Treasury Board directs.

3. If the market value of any of the securities deposited declines below that at which they were deposited the Minister may notify the company to make a further deposit so that the market value of all the securities deposited shall be equal to the amount required by the Act to be deposited, and on failure to make such further deposit within 60 days after being called upon so to do the Minister may withdraw its license.

4. A company may deposit any further sums of money or securities beyond the sum required to be deposited; such further sums or securities shall be held and dealt with according to the provisions of the Act in respect to the original deposit and as if part thereof, and shall not be withdrawn unless with the sanction of the Governor in Council on report of the Treasury Board.

And sections 10, 11 and 33 very clearly show that the securities or moneys after such deposit remain the assets of the company.

The deposit is in these words :

The Maritime Bank of the Dominion of Canada.

\$45,000.

Saint John, N.B., 27th January, 1882.

The Dominion Safety Fund Life Association, of Saint John, New Brunswick, have deposited in this bank the sum of forty-five thousand dollars, payable to the order of the honorable the Minister of Finance of the Dominion of Canada, in trust for the Dominion Safety Fund Life Association, of Saint John, N.B., on the return of this certificate properly endorsed.

(Sg.) A. S. MURRAY,  
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(Sg.) ALF. RAY,  
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It is very clear that this \$45,000 forms no part of the revenues of the crown, nor is it a part of the public moneys of Canada, nor did it become such by the deposit by the association, but was, and is, an asset of and belonging to the association by the terms of the statute. This deposit was not received on behalf of the public, but for and on behalf of the company and those who dealt with it. The crown never became interested in nor responsible for the deposit of the association; the money was the private property of the company, and was, in fact, only deposited with the Minister of Finance for safe custody for the benefit of the company to enable it to do business throughout Canada, and in case of insolvency for the benefit of those dealing with the company, and cannot, that I can perceive, stand in any other or better position than bonds deposited under the statute or the other assets of the association. The deposit in this case thus continued to be part of the assets of the company; upon such deposit being made the company was enabled to transact business throughout the Dominion of Canada, and such deposit was to be held not for the use and benefit of the crown, but for distribution among the creditors of the company in the event of its insolvency, but never was, and never was intended, in any way, to belong to or be the property of the crown. Therefore, I cannot at all agree with Mr. Justice Tuck, "that from the evidence it is clear this \$45,000 was paid into the bank as crown money." On the contrary, from the evidence read in the light of the statute I think it is abundantly clear that it was paid in as part of the assets of the company, and that notwithstanding the deposit it was held by the Finance Minister as an asset of the company and in trust for the association; in fact, the deposit certificate distinctly shows such to have been the case.

I have carefully examined all the cases which have been cited, and cannot discover that they establish this to be a crown debt entitled to priority in winding up the affairs of the bank: The case of *Rex v. Wrangham* (1) was decided on the ground that he who receives money of the crown (in that case duties) becomes the immediate debtor of the crown.

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In *re West London Commercial Bank* (2), there was no dispute that the bank knew from time to time that moneys were paid in by debtors to the crown, and that moneys so paid in were crown moneys.

Per Chitty J. :

The law, I take it, is now quite settled, and the case is covered by the authorities referred to : *Rex v. Wrangham* (3), *Rex v. Ward* (4), and *Regina v. Adams* (5). In *Rex v. Wrangham*, Lord Lyndhurst laid it down that whoever receives money of the Crown becomes an immediate debtor of the Crown.

*In re Arthur Heavens Smith* (6) was the case of a recognizance. The recognizance was to the crown direct and was held clearly a crown debt in law, and I do not see how it could be held otherwise, for a recognizance is clearly the acknowledgment of a debt owing to the crown and is a debt of record ; it matters not what the condition may be, it is a crown debt in every sense of the word, to which, unquestionably, the prerogative of the crown to claim priority for its debts before all other creditors clearly extends, and in the case just cited Lord Coleridge C. J. says :

I think this is clearly a Crown debt of law.

*Reg. v. Bayly* (7) was likewise on a recognizance.

When the bank failed and the security became impaired the Minister of Finance called for a further deposit and refused to renew the certificate ; this he certainly

(1) 1 C. & J. 408.

(4) 2 Ex. 301 n.

(2) 38 Ch. D. 367.

(5) 2 Ex. 299.

(3) 1 C. & J. 408.

(6) 2 Ex. D. 47.

(7) 1 Dr. & War. 213.

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had a perfect right to do. What then was the position of the parties? Why, if the company wished to continue doing business throughout the Dominion it should have given a deposit satisfactory to the Finance Minister and obtained a new certificate. Instead of that the president of the association on February 14th, 1888, writes:—

On return of the \$45,000 cash deposited with the Receiver General the association will comply with the request of the treasury board and make a deposit in bonds, &c.

But we have seen there never was any cash deposited with the Receiver General; the cash was deposited by the association in the bank payable to the order of the Finance Minister in trust for the association. It seems to me that the proper answer of the association would have been not "on return of the \$45,000 cash," but "on return of the certificate of deposit" the association will, &c. What right had the association to ask a return of the \$45,000 cash or anything other than what they had deposited with the Finance Minister? If they got this back what more could they require? The crown merely held it for what it was worth, and when the security became depreciated the association was bound to make it good. What right had it to ask to have it made good through the instrumentality of the crown at the expense of the other creditors of the bank? It will be noticed that this receipt does not make the amount deposited payable to the crown, but to the order of the Minister of Finance in trust for the Dominion Safety Fund Life Association. If this amount was the property of the association, and continued from and after its deposit an asset of the association, when and by what operation of law did it become a crown debt entitled to priority? And if an asset of the company, I can see no reason why it should be protected by the prerogative of the crown. It was

deposited to serve the ends of the company, and why should the mere depositing of it as an asset of the company give it a preference to which it would not be otherwise entitled to? I do not think it by any means clear, as the learned Chief Justice suggests, that "if it became necessary to take any proceedings to recover the money from the bank, such proceedings would necessarily be taken in the name of the Queen," or that, "in other words, the funds having been deposited in the bank by the Minister of Finance, it became a debt due by the bank to the crown." The receipt shows, as we have seen, that the funds were not deposited by the Finance Minister, but by the Dominion Safety Fund Life Association, and made payable by the association to the order of the Finance Minister in trust for the association. I can see no reason why, if it had been necessary to recover this money from the bank, it might not have been done in the name of the Finance Minister, the statutory trustee. When the bank failed and the company received notice to make the security good, had the association done so the certificate, properly endorsed, would have been returned, and all the company would have had to do would be to make their claim on the bank, and their position would have been the same as the other creditors of the bank, and this is the position in which I think they should now stand.

Therefore, in my opinion, this appeal should be allowed; but as the appeal has partially failed and been partially allowed there will be no costs.

STRONG J.—The facts of this case sufficiently appear from the statements contained in the judgments delivered in the court below and in this court upon the present appeal, and I need not repeat them.

As regards the general question of the right of the

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crown, claiming in the administration of assets under bankruptcy, insolvency or winding-up proceedings in respect of a simple contract debt to priority over other simple contract creditors, I have already stated my opinion in a judgment delivered in the case of *The Bank of Nova Scotia v. The Queen* (1), and as I adhere to that judgment it will be sufficient for me to refer to it for the reasons and authorities upon which the conclusion now arrived at is founded. I have heard nothing in the argument of this appeal in any way impeaching the authority of the three late cases of *The Oriental Bank Corporation* (2), *Re Henley* (3), *Re Bateman* (4), upon which my opinion in the case of *The Bank of Nova Scotia v. The Queen* (1) was based, and no new argument against the general right of the crown to priority has been put forward in the present case. The argument founded upon the enactment which now forms sec. 79 of the Banking Act was urged in the former case, and although it is not noticed in my judgment was then duly considered. It then appeared to me that the section in question did not take away or in any way interfere with the common law right of the crown to priority, and after further consideration I still retain that opinion. This 79th section is in these words :

The payment of the notes issued by the bank and intended for circulation, then outstanding, shall be the first charge upon the assets of the bank in case of its insolvency.

It is to be observed that this section does not give the holders of notes any charge upon the property or assets of the bank *ab initio*, but only a first charge "in case of its insolvency." In the administration of assets whether in bankruptcy, insolvency or winding-up proceedings, as also in the case of the administration of the

(1) 11 Can. S. C. R. 1.

(2) 28 Ch. D. 646.

(3) 9 Ch. D. 469.

(4) L. R. 15 Eq. 361.

estate of a deceased debtor, all debts form a charge upon the assets according to their priorities. This section is, therefore, only equivalent to a declaration that the note holders should be entitled to priority of payment out of the assets, if indeed it is as strong as an expressed declaration to that effect would have been. Then, for the reasons and upon the authorities stated by me in my former judgment before referred to, it seems clear that such an expressed declaration, the crown not being named, would have been insufficient to have taken away the right of the crown to be paid in priority to all other simple contract creditors.

I am therefore of opinion that in respect of the sum of \$15,197.57, the money of the crown deposited in the bank by the Finance Minister, this appeal is wholly unfounded.

If the foregoing conclusion is correct I fail to see that the crown is not also entitled to priority in respect to the \$45,000. It appears from the evidence that this amount was deposited by the Dominion Safety Fund Life Association, a Life Insurance Company coming within the provisions of the Consolidated Insurance Act, 1877 (40 Vic. ch 42), to the credit of the Receiver General or Minister of Finance, as a deposit to meet the requirements of sections 5 and 6 of the act referred to, and that a deposit receipt in favor of the Minister of Finance was signed by the cashier and forwarded to the proper officers at Ottawa. It further appears that such deposit was accepted by the proper officers of the crown as a sufficient deposit entitling the company to a license pursuant to the terms of the act in question.

The crown could at any time after the acceptance of the deposit to its credit, according to the tenor of the receipt, have demanded payment from the bank of the sum deposited, and the bank could not have discharged itself by any payment other than the one in the hands

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of the crown. The Insurance Company had, therefore, no right to call for payment, and all privity between itself and the bank was at an end so soon as the deposit was accepted by the Finance Minister. This being clearly so it would appear to me that this sum of \$45,000, although in a sense a trust fund to be held and administered by the crown, was nevertheless a debt due by the bank to the crown which was, as between itself and the bank, the sole creditor. There was, it is true, an ultimate trust of the sum deposited in favor of the Insurance Company, but there were primary trusts in favor of policy holders, whose rights the crown was bound to protect and whom it could not properly protect unless it was entitled to the absolute possession or control and disposition of the fund. In a general and popular sense the crown may be said to be a trustee of all public moneys which come to its hands to be applied to public uses, but still it is entitled to priority of payment over other creditors when it seeks to recover money which, when received, would be applicable to public uses. In the present case although the crown would not, if it had called upon the bank for actual payment of this deposit fund into the hands of its own officer, the Finance Minister, have been a trustee of it for the general public, yet it would still be a trustee, not for ascertained persons but for a portion and an indeterminate portion of the general public, namely, for those persons who might, in case of the insolvency of the Insurance Company, prove to be holders of policies at the date of the insolvency.

There does not appear, therefore, to be grounds for any legal distinction in respect of the right of priority between the debt due to the crown by the bank in the present case, and any ordinary debt due to the crown unaffected by any color of trust, statutory or other-

wise, except such as is always incidental to public monies held by the crown.

These considerations, and others pointed out in the learned judgments delivered in the court below, have convinced me that this \$45,000 constitutes a debt on simple contract—for money had and received—due by the bank to the crown for which the latter has been properly held entitled to its prerogative priority of payment. Indeed, it would seem from the authorities referred to by the learned judges in the court below, and especially from the case of *Re Smith* (1), that wherever a legal right of action to receive money is vested in the crown the crown is entitled to be paid such debt in priority to other creditors of equal degree irrespective altogether of the ultimate destination of the money, and that it makes no difference that the money when recovered will be for the use and benefit of a subject.

For these reasons I also concur in the judgment appealed from as to the amount of \$45,000.

The appeal should be dismissed with costs.

TASCHEREAU J.—As to the \$45,000 I would allow this appeal on the ground that these monies do not belong to the crown.

First.—The Insurance Act requires the deposit to be made in securities of a particular description. The Minister of Finance has no authority to take part of the amount in money.

Secondly.—The license granted to an insurance company, under ch. 124 R. S. C., is not a license by the crown but a license by the Minister of Finance; and the deposits required by the act are also made into the hands of the Minister of Finance, as *persona designata*. They are not deposited with the crown as crown monies.

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This very sum was not deposited to the credit of the crown. They do not and cannot form part of the consolidated revenue of the country. This very contestation fully demonstrates it. In whose interest is it carried on? Clearly in the interest of the insurance company alone. The crown has no interest whatever in the result of the case. I agree for these reasons and those given by my brother Patterson that the appeal should be allowed on this ground.

As to the item of \$15,000 I agree that this appeal should be dismissed for the reasons given by His Lordship the Chief Justice. The crown is not mentioned in the Banking Act. consequently, under the Interpretation Act, the prerogative right of priority remains unaffected thereby.

GWYNNE J.—As to the deposit receipt for \$45,000 issued by the Maritime Bank of the Dominion of Canada of the date of the 27th January, 1882, I am of opinion that it is not open to the construction that it constituted a debt due to the Dominion Government. The monies represented by that deposit receipt continued, in my opinion, to be the property of the Dominion Safety Fund Life Association, remaining in the bank at the risk of the association for the benefit of the policy holders of the association under the provisions of the Act respecting insurance, and by the Dominion Bank Act, 43 Vic. Ch. 22 sec. 4, passed on the 7th May, 1880, all deposits held by any bank of the nature of that under consideration are required to be entered in the monthly returns of liabilities required to be made by all banks to the Dominion Government under a distinct heading from that directed for deposits of Government monies, namely, under the heading of

Deposits held as security for the execution of Dominion Government Contracts and “for Insurance Companies.”

In the reasoning of my brother Patterson upon this point, in the judgment which will be read by him, I concur.

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As to the sum of \$15,197.57 of the public monies of the Dominion of Canada, deposited in the bank to the credit of the Receiver General of Canada, I am of opinion that the clause of the Dominion Bank Act, which enacts that payment of the notes issued by a bank and intended for circulation shall be the first charge upon the assets of the bank in case of its insolvency, necessarily excludes all claim of the Dominion Government by way of preference to have a debt due to that Government paid before payment of the notes of the Bank in circulation, even if, but for such enactment, the Dominion Government would have had a preferable claim over the other creditors of the insolvent bank which it could enforce in Her Majesty's name in virtue of Her royal prerogative, upon the assumption that a debt due to the Dominion Government is, without any statutory enactment, a debt due to Her Majesty.

By the Bank Act, 34 Vic. ch. 5, passed on the 14th April, 1871, it was enacted, among other things, that the amount of notes intended for circulation issued by a bank and outstanding at any time should never exceed the amount of its unimpaired paid-up capital, and that if any paid-up capital should be lost the loss should be supplied by calls upon all subscribed capital not then paid up, and that such loss should be mentioned in the then next monthly report required by the act to be made to the Government, and moreover, that whenever the capital of any bank should be impaired by loss all net profits should be applied to make good such loss. The act required monthly returns to be made to the Government by the bank signed by the president or vice-president, and by the manager, cashier

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or other chief officer of the bank at its chief seat of business, exhibiting the condition of the bank on the last judicial day of the preceding month in a prescribed form, showing all the liabilities and assets of the bank, in which returns under the head of "liabilities," the amount of "notes in circulation" is prescribed to be the first item. The act also enacted that the bank should always hold, as nearly as might be practicable, one-half of its cash reserves in Dominion notes, and that the proportion of such reserves held in Dominion notes should never be less than one-third thereof, and further, that no division of profits, either by way of dividends or bonus, or both combined, or in any other way, exceeding the rate of eight per centum per annum, should be paid by the bank unless, after paying the same, it should have a rest or reserved fund equal to at least 20 per cent. of the paid-up capital, deducting all bad and doubtful debts before calculating the amount of such rest.

Now, the Maritime Bank of the Dominion of Canada was incorporated by the Dominion Act 35 Vic. ch. 58, passed on the 14th June, 1872, and was, thereby, expressly made subject to all the provisions of the above act, 34 Vic. ch. 5. It was also, by the Dominion Acts 43 Vic. ch. 22, and 46 Vic. ch. 20, subjected to all the provisions of the former of these last mentioned acts as amended by the latter, by which it was, among other things, enacted that certified lists of the shareholders (or of the principal partners if the bank be *en commandite*), with their additions and residences, and the number of shares they respectively hold, and the par value of the said shares, should be transmitted every year to the Minister of Finance before the day appointed for the opening of the session of parliament, to be by him laid before parliament within fifteen days after the opening of the session, and that any

bank neglecting to transmit to the Minister of Finance such lists within the time limited thereby should incur and pay a penalty of fifty dollars for each and every day during which such neglect should continue; and further, that if it should appear by any monthly statement to be made by the bank under the section of the Bank Act (34 Vic. ch. 5, and the Act 43 Vic. ch. 22,) that the amount of notes in circulation during the month to which such statement should relate exceeded the amount authorized by the Bank Act such bank should incur and pay certain pecuniary penalties therein mentioned proportionate to the amount by which the notes in circulation should in any month exceed the authorized amount; and further, that any bank holding at any time a less amount of cash reserves in Dominion notes than is prescribed by the Bank Act, as amended by 43 Vic. ch. 22, should incur and pay a penalty of two hundred and fifty dollars for each and every time that such contravention should occur, but that nothing in the act should be construed to prevent any contravention of the Bank Act, (34 Vic. ch. 5) or of any act amending it, from being punished as a misdemeanor, or by forfeiture of its charter, if without the act it would be so punishable. By this act, 43 Vic. ch. 22, as amended by 46 Vic. ch. 20 and consolidated now in ch. 120 of the Revised Statutes of Canada, it was further enacted that the monthly returns should be made to the Government in a prescribed form, showing all and singular the several liabilities of the bank (under which heading the first item is "notes in circulation") and all the assets of the bank of every description with a preciseness and particularity calculated to enable the Government to see the first appearance of approaching insolvency and to interfere with its authority in the interest of the public to prevent the insolvency taking place; and it

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enacts in express terms that in case insolvency should take place payment of the notes issued by a bank should be the first charges upon the assets of the bank.

The true construction of this enactment, in my opinion, is that all notes issued by a bank for circulation upon the instant of their being issued have, for the purpose of securing their free circulation, this quality attached to them as an inseparable condition to their being issued at all, that they are in reality as well as in name a first charge upon all the assets of the bank in case of insolvency until all the notes so issued shall be paid and redeemed by the bank, and that to the necessary exclusion of any right of preference, if any there be, which the Dominion Government could claim to have any debt due to it first paid. I cannot doubt that the monthly returns required to be made by the bank to the Dominion Government were so required, and the quality of being a first charge upon all the assets of the bank in case of insolvency was attached to the notes, for the express purpose of securing a free circulation of the notes and of inspiring the public with a perfect confidence in their value and that they should in case of insolvency be redeemed and paid in preference to all other claims of all other descriptions whatever they might be. That the Dominion Government should now have the right to invoke a royal prerogative to enable them to recover a debt due to themselves first as having a preference over the holders of the notes issued by this bank now in insolvency would, as it appears to me, be little short of a fraud upon the note holders and upon the act of parliament upon the faith of which the notes obtained circulation.

I am of opinion, therefore, for the above reasons, that such a right is necessarily excluded by the terms of the bank acts even if, in the absence of the clause which makes the notes issued by a bank a first charge upon

its assets in the case of insolvency, the Dominion Government would have the right to invoke the royal prerogative to have all debts due to them paid first.

This view seems also to me to be supported by section 103 of the Winding-up Act, 49 Vic. ch. 129, which imposes upon the liquidators of an insolvent bank the obligation, as the first duty they have to discharge, to ascertain as nearly as possible the amount of the notes of the bank actually outstanding in circulation, and to reserve until the expiration of two years at least after the date of the winding-up order, or until the last dividend if that is not made until after the expiration of said two years, dividends upon such parts of such amount reserved in respect of which claims should not have been made in the liquidation, at the expiration of which time, and not until then, the amount reserved in respect of outstanding notes and for which no claim should then have been made, becomes applicable to other purposes of the liquidation. I am, however, of opinion that the recognition of such a right in the Dominion Government as the exercise by it of the particular prerogative relied upon is not warranted by the letter or spirit of the British North America Act. By the special ordinance of the old Province of Lower Canada, passed in 1840, 4 Vic. ch. 30, consolidated in ch. 37 of the Consolidated Statutes of Lower Canada, all preferential lien of the crown upon any lands and tenements situate within the limits of the said province, whether arising out of any deed, judgment, recognizance, judicial act or proceeding, or any instrument or document, and every privileged right, claim, or charge from whatever cause resulting whereby any real estate in Lower Canada should be affected or charged, was wholly done away with, save only such preference as the crown in like manner as all other persons should obtain by priority of registration under

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the provisions of the act ; and upon the 1st August, 1866, the Civil Code of Lower Canada became law in virtue of 29 Vic. ch. 41. By art. 1994 of this code it was enacted as follows :—

Art. 1994, C. C.—The claims which carry a privilege upon movable property are the following, and when several of them come together, they take precedence in the following order, and according to the rules hereinafter declared, unless some special law derogates therefrom.

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1. Law costs and all expenses incurred in the interest of the mass of the creditors.
2. Tithes.
3. The claim of the vendor.
4. The claims of creditors who have a right of pledge or of retention.
5. Funeral expenses.
6. The expenses of the last illness.
7. Municipal taxes.
8. The claim of the lessor.
9. Servants wages and sums due for supplies of provisions.
10. The claims of the Crown against persons accountable for its monies.

The privileges specified under numbers 5, 6, 7, 9 and 10 extend to all the moveable property of the debtor, the others are special and affect only some particular objects.

This article is entered in the code as having been the old law of the Province of Lower Canada, not as new law ; at the time, therefore, of the passing of the B.N.A. Act, which is the sole constitutional charter of the Dominion of Canada, there did not exist, nor did there ever exist within that part of the late Province of Canada formerly constituting the Province of Lower Canada, any preferential right in the crown to have such a claim as that of the Dominion of Canada now under consideration paid in priority to the claims of any other creditor of an insolvent debtor, and to this effect is the judgment in *The Exchange Bank v. The Queen* (1).

By an act of the Parliament of the late Province of Canada passed in 1851, 14 & 15 Vic. ch. 9, all preferential lien of the crown upon lands of its debtors,

(1) 11 App. Cas. 157.

situate in that part of the late Province of Canada formerly constituting the Province of Upper Canada, was abolished, save only such preference as should be obtained by priority of registration under the provisions for that purpose contained in the act. And by another act of the Parliament of the Province of Canada passed in 1866, 29 & 30 Vic. ch. 43, intituled "An act to amend the law of Upper Canada relating to crown debtors," after reciting among other things that it was desirable that all bonds or covenants made, and debts due by, a subject to the crown should be placed on the same footing as if they were made or due from a subject to a subject, it was enacted:—1. That no bond, covenant, or other security thereafter to be made or entered into by any person to Her Majesty, her heirs or successors, or to any person on behalf of, or in trust for, Her Majesty, her heirs or successors, should bind the real or personal property of such person so making or entering into such bond, covenant or other security, to any further, other or greater extent than if such bond, covenant or other security had been made or entered into between subject and subject of Her Majesty, and

2nd. That the real and personal property of any debtor to Her Majesty, her heirs or successors, for any debt thereafter contracted should be bound only to the same extent and in the same manner as the real and personal property of any debtor where a debt is due from any subject of Her Majesty.

At the time, then, of the passing of the B. N. A. Act Her Majesty had not, in virtue of her royal prerogative, any preferential claim for payment of the debts due to the crown in Upper Canada, in priority to the claims against the same debtor of any of Her Majesty's subjects, all of whom were placed on the same footing with the crown in respect of the debts due to them

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respectively ; and in that part of the Province of Canada formerly constituting the Province of Lower Canada no prerogative right existed to have payment made of ordinary crown debts in priority to the claims of other creditors of the same debtor, nor any right save only the limited statutory right vested in the crown in virtue of the law as it is expressed in Art. 1994 of the Civil Code, against persons accountable to the crown for its monies—that is to say, as explained in the *Exchange Bank v. The Queen* (1), against persons employed in the collection of the revenue and bound to account for the monies collected by them and not to apply them to their own use.

Now, the B. N. A. Act has not repealed or annulled the above provisions of the statute law of the late Province of Canada. There is nothing in that act which can be construed as having, either expressly or by implication, any reference to any prerogative right being vested in or exercisable by the Dominion Government enabling it to recover and enforce payment of debts due to it in priority of the claims of, and debts due to, other creditors of the same debtor. It is clear, therefore, that the Dominion Government is not invested with, and has not, any right in virtue of Her Majesty's royal prerogative, or otherwise, to have a debt due to it paid in priority of debts due by the same debtor to other creditors where such debt accrued due to the Dominion Government within either of those provinces of the Dominion of Canada which formerly constituted the Province of Canada. Now, the fact that the debt of \$15,197.57 due to the Dominion Government by the Maritime Bank of the Dominion of Canada arises by reason of a deposit made in the bank at its place of business in St. John, in the Province of New Bruns-

(1) 11 App. Cas. 157.

wick, can, in my opinion, make no difference. The chief seat of business of the bank, it is true, is declared by the act of incorporation to be the said city of St. John, but the bank has its corporate existence, and the power to transact banking business, in every Province of the Dominion. It has no limited existence, if that would make any difference. The debt due by the bank to the Dominion Government is as much due at the seat of Government of the Dominion at Ottawa, where no such prerogative as that relied upon exists, as it is due at the chief seat of business of the bank. The prerogative right of claiming priority in payment of debts due to the Dominion Government must, in my opinion, exist throughout the whole of the Dominion, if it exist at all. There is nothing in the letter of the British North America Act which warrants the contention, nor are we, in my opinion, required by the spirit of the act to hold, nor should we be justified in holding, that the Dominion Government can invoke and exercise the royal prerogative relied upon to enable it to recover deposits made by it in a banking institution at its place of business in one of the provinces of the Dominion when it could not invoke or exercise the like prerogative in respect of deposits made in the same bank at its places of business in others of the provinces. But that the royal prerogative insisted upon can be invoked and exercised by the Dominion Government is rested upon a claim of right, which is relied upon as above, and *dehors*, the constitutional charter of the Dominion of Canada, namely, that all monies due to the Dominion Government are debts due to Her Majesty, and that the royal prerogative relied upon attaches at common law in respect of all debts due to Her Majesty. Now, I do not at all question the authority of *in re Bateman's Trusts* (1), or

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any like case, but I must say that, in my opinion, we make a very great mistake if we treat the Dominion of Canada, constituted as it is, as a mere colony. The aspirations of the founders of the scheme of confederation will, I fear, prove to be a mere delusion if the constitution given to the Dominion has not elevated it to a condition much more exalted than, and different from, the condition of a colony, which is a term that, in my opinion, never should be used as designative of the Dominion of Canada.

However, the question now before us simply is, whether such incongruity exists in the B. N. A. Act, which is the constitutional charter of the Dominion, as that the Dominion Government can invoke and exercise what, as regards the circumstances and conditions of this Dominion, may be said to be a most unjust and obnoxious privilege in one of the provinces of the Dominion which it cannot exercise in all the others. In view of the fact that at the time of the passing of the B. N. A. Act the particular prerogative right insisted upon did not exist in the late Province of Canada, and in view of the fact that there is no provision in the act annexing the right to the constitution of the Dominion, and of the fact that the prerogative does not under, or since the passing of, the B. N. A. Act exist in those parts of the Dominion consisting of the Provinces of Quebec and Ontario, and lastly, in view of the fact that there is nothing in the act requiring or justifying the conclusion that such an incongruity exists in the constitutional charter of the Dominion as that the Dominion Government should have a right to invoke and exercise a royal prerogative in one of its provinces which it could not exercise in all the others, the necessary implication, in my opinion, arises that the Dominion Government has no right to invoke or exercise the particular prerogative relied upon in any part of the

Dominion. By so holding we shall be acting more in harmony with the ideas prevailing at the present day—with the spirit of the age—and, in my opinion, with the letter and spirit of the constitutional charter of the Dominion. The Dominion Parliament itself, by an act passed in its very first session, 31 Vic. ch. 37, intitled, “An Act respecting the security to be given by officers of Canada,” seems to have entertained the opinion in conformity with the opinion of the Parliament of the late Province of Canada as expressed in the statutes of that province above referred to, that the Dominion Government should not have the privilege insisted upon in any part of the Dominion, even in the case of the persons who alone are those who are designated in art. 1994, C. C., as accountable to the Government for its revenue collected by them.

By this act, which was passed for the purpose of requiring every person appointed upon or after the 1st day of July, 1867, to any civil office or employment of public trust, or concerned in the collection, receipt, disbursement, or expenditure of any public money under the Government of Canada, to give bonds executed by themselves with such sureties for the due performances of the trusts reposed in them, and for the due accounting for the public money entrusted to them respectively, it was expressly provided that no such bond or security, given under the act, to Her Majesty, her heirs and successors, should constitute any other or greater lien or claim upon the lands or tenements, goods or chattels of such person than if such bond had been given to one of Her Majesty's subjects. Debts accrued by bonds given by persons employed in the collection and receipt of the public funds of the Dominion being thus placed on the same footing as debts secured by bonds executed by a subject to a subject, the Dominion Government cannot, in my opinion,

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consistently with the spirit of the act, claim priority in respect of an ordinary debt accrued due by deposit in a bank to secure which no bond is taken or required. For all the above reasons I am of opinion that the appeal should be allowed and with costs.

PATTERSON J.—The general rule of English law which gives the crown, when claiming as a creditor, priority over other creditors of equal degree is not questioned on this appeal, nor is it contended that there is anything in the Winding-up Act of the Dominion (1) to restrict the operation of that rule in the distribution of the assets of an insolvent corporation.

There may be practical force in the suggestion that the law would be more in consonance with the real life and spirit of the time if the public in the aggregate, nominally represented by the crown, and the public as individuals, were made to stand in this particular on the same footing. I understand it to be so in the Province of Quebec (2), and it may perhaps be so in Ontario under the legislation of the old Province of Canada (3). But the general rule, to the extent to which it was in question before this court in *The Queen v. The Bank of Nova Scotia* (4), does not strike me as being, since that decision, open to controversy in this court. The important questions in this appeal did not arise in that case.

The first is whether, in the winding-up of one of the incorporated banks to which the Bank Act (5) applies, the notes of the bank are a first charge on the assets as against the crown as well as against the other creditors. This question affects both the claims of \$15,000 and \$45,000.

(1) R. S. C. ch. 129.

(3) 29-30 Vic. ch. 43; R. S. O.

(2) *Exchange Bank v. The Queen*, 1887, ch. 94.

(11 App. Cas. 157.)

(4) 11 Can. S. C. R. 1.

(5) R. S. C. ch. 120.

The second question affects only the \$4,5000 claim, and it is whether that is properly a crown debt. The solution will depend on a consideration of the Insurance Act (1).

Both questions have been answered in the court below in favor of the crown, the arguments for that view being presented in able judgments by the learned Chief Justice and Mr. Justice Tuck.

It is impossible to deny the force of the views presented by those learned judges. I have hesitated a long time before venturing to differ from them, and I do not now adopt a different conclusion without some lingering distrust of its soundness, particularly with regard to the second point.

On the first point the controversy mainly centres on section 79, which declares that the payment of the notes issued by the bank and intended for circulation, then outstanding, shall be the first charge upon the assets of the bank in case of its insolvency. On one side it is asserted, and on the other it is denied, that this provision binds the crown which is nowhere named in the statute.

My first impression was that the negative proposition was unanswerable. The clause struck me as dealing with the general assets of the bank, and creating a preference, in relation to those assets, in favor of one class of creditors, namely, the note holders, and depriving the crown of its common law priority. On further reflection, however, I do not think that the correct way of looking at this statute.

I think the search, which in ordinary cases we institute for the purpose of discovering whether the crown is indicated, either in terms or by necessary implication, tends in this instance to lead us away from the real question.

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The proper inquiry I consider to be: What are the assets of the bank with which the section deals? The answer, in my view, is that they owe their existence to this statute. They represent the capital which is subscribed under regulations beginning with section 5, governed by rules laid down with detail and minuteness running through the following sections down to section 23, and required to be periodically accounted for to the stockholders and to the Government in elaborate returns which are made public. There are various provisions touching the acquisition and holding of property either by direct purchases or by taking it in the first place as security for loans or debts—see sections 45 to 60. There are many other departments of the business of the bank dealt with in various sections; and we have the issue of notes and regulations touching them in sections 40 to 44, the first provision being a limitation of the amount by reference to the unimpaired paid up capital. The whole of these enactments are but parts of the one system in which the affairs of the bank, including the notes issued and the capital paid up into whatever form of assets it becomes converted, are inextricably mingled together.

The charge created by section 79 thus differs essentially from a burden imposed on property which had previously been free from it. It is in principle not unlike the pledge of a railway enterprise for the security of bondholders. That very usual security may or may not be effected through the medium of a formal mortgage, but it derives its efficacy from special legislation.

The crown may retain its common law priority in the distribution of the assets of this bank, but it is a priority in respect of such assets as remain after the

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So long as any company's deposit is unimpaired, and the conditions of this act are satisfied, and no notice of any final judgment against the company, or order made in that behalf for the winding-up of the company or the distribution of its assets, is served upon the minister, the interest upon *the securities forming the deposit* shall be handed over to the company as it becomes due.

In a later part of the statute (1) provision is made for the release of the securities, or their application in indemnifying policy holders, when a company ceases, either voluntarily or by withdrawal of its license, to do business.

The Dominion Safety Fund Life Association applied for a license in January, 1882.

The president of the company inquired by letter to the superintendent of insurance concerning the securities to be deposited, and was told, amongst other things, that

a deposit receipt in some bank to the credit of the Receiver General in trust for the company is accepted (subject to the approval of the treasury board) as a temporary deposit. In this case the company makes its own arrangement with the bank as to the interest to be allowed, and the Receiver General instructs the bank to pay the interest to the company as it falls due.

The company then arranged with the Maritime Bank for a credit on the books of the bank of \$45,000, and obtained the following deposit receipt which was transmitted to the Receiver General's department, and now forms the foundation of the claim for priority.

Number 22,161. CERTIFICATE OF DEPOSIT. Payable on demand.

THE MARITIME BANK OF THE DOMINION OF CANADA.
 \$45,000. ST. JOHN, N.B., 27th January, 1882.

The Dominion Safety Fund Life Association, of St. John, New Brunswick, have deposited in this bank the sum of forty-five thousand dollars, payable to the order of the Honourable the Minister of Finance of the Dominion of Canada, in trust for the Dominion Safety Fund Life Association, of Saint John, N.B., on the return of this certificate properly endorsed.

A. S. MURRAY,
 Accountant.

ALF. RAY,
 Cashier.

The effect as well as the intention, of this transaction was that the security given and accepted was the credit of the bank, as it might have been the credit of a Municipality or of the Dominion or a provincial government if bonds or public securities had been deposited. There was no intention to hand over money to the Receiver General, nor was what was done equivalent to handing over money. The terms of the Insurance Act, to which I have referred, do not permit the deposit of money under the circumstances, while the rule that the securities must be kept up to their original value applies alike to all kinds of security given on application for license, a deposit receipt as well as a municipal bond. I see no more power under the Insurance Act in the Receiver General to handle the money now than there was in 1882 when the receipt was given. It has not become necessary to realise the security in order to pay off or reinsure any risks of the company, and I do not know that even in that case the realisation is to be by the minister.

The security having become depreciated by the failure of the bank it was the duty of the company to replace it by good security. The statute required that, and it was called for by the Treasury Board in January, 1888.

In connection with this part of our subject I may notice what seems to me a fallacious application of an indisputable proposition into which the learned Chief Justice in the court below appears to have inadvertently fallen. I refer to the following passage from his judgment :

An objection was taken that as the Insurance Act required the deposit to be made in securities of a particular description, the Minister of Finance had no authority to take part of the amount in money. Admitting that such may be the construction of section 5, I do not see what right the bank has to raise the objection after admitting the receipt of \$45,000 from the Minister of Finance. If the minister exceeded

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1889 his authority, that will not authorise the bank to keep the money.

THE MARITIME BANK v. THE QUEEN. Whether the deposit was in public securities or in money, the bank in which the deposit was made cannot raise the objection that the minister had no right to take anything but securities.

Patterson J. The fallacy is in treating the objection as one raised by the bank against the existence of the debt. The debt is not disputed. The contest is on the part of the creditors, and is over the competition between this debt and the other debts of the bank.

A more important consideration is suggested by some observations of Mr. Justice Tuck, which I quote from his judgment :—

Here, in order to protect the public who effect insurance with the company, the statute requires that a deposit should be made with the Government. Suppose the company failed to-morrow, would not the policy-holders have a right to call upon the Government to make good their losses to the extent of fifty thousand dollars? Undoubtedly they would. As trustee the Government is responsible, and it would be no answer to say "your money was lost by the failure of the Maritime Bank." To such an answer the reply would be at once made, if the money was deposited in bank, it became a crown debt, and a first charge upon the assets of the company.

I see no reason to doubt that if money were received by the government and lost the government would be answerable for it, just as the learned judge here assumes. It may not be safe to say *ex cathedrâ* that it would be so, because the question is not before us for decision, but the logical connection between the acceptance of money and responsibility for its safety unavoidably crops up. The crown is responsible, I understand the learned judge to argue, therefore the crown must have priority. The converse proposition is the crown has priority because the money belongs to the crown, therefore the crown is responsible to the company and its policy-holders for the money. The conclusion may or may not be irresistible in either case, but it is evident that to accede to the present contention for the crown would be to open up a question

of considerable gravity. The responsibility of the government for more than the safe custody of the securities is certainly not contemplated by the Insurance Act, and it would probably be a matter of pardonable surprise to find that it was extended by the effect of taking a deposit receipt so as to be a guarantee of the solvency of the bank which the company found it convenient to deal with.

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It must further be noticed that the contention for the crown, when it treats the transaction as in effect a deposit of money by the crown with the bank, goes beyond the evidence—not merely beyond the evidence that no money was handled either by the government or by the company, but beyond what the deposit receipt imports.

That document states that the money has been deposited in the bank by the company, payable to the order of the minister in trust for the company. That trust must be within the terms of the Insurance Act. The minister cannot represent the crown outside of the authority conferred by the act, and nothing in the act empowers him to convert this security into cash.

I think that the proper conclusion is that this debt is not a debt for which priority can be claimed on the part of the crown, and that on both questions the appeal should be allowed.

Appeal dismissed as to the sum of \$15,197.57 and allowed as to the sum of \$45,000.00 without costs to either party.

Solicitor for appellants : *C. A. Palmer.*

Solicitor for respondent : *L. R. Harrison.*