

1936
 * Nov. 20,
 23, 24.

1937
 * Feb. 2.

IN THE MATTER OF THE BANKRUPTCY OF
 GENERAL FIREPROOFING COMPANY OF
 CANADA, LTD.

ON APPEAL FROM THE COURT OF APPEAL FOR
 ONTARIO

Bankruptcy—Distribution—Priorities—Claims by Provincial Treasurer (for tax under Corporations Tax Act, R.S.O., 1927, c. 29); City of Toronto (for business tax); Toronto Electric Commissioners (for supply of electrical energy); Landlord; Custodian and Trustee (costs, fees and expenses); Workmen's Compensation Board; Minister of National Revenue (for sales tax)—Bankruptcy Act, R.S.C., 1927, c. 11, ss. 121, 125, 126, 188; Assessment Act, R.S.O., 1927, c. 238, s. 112; Public Utilities Act, R.S.O., 1927, c. 249, s. 26 (2); Landlord and Tenant Act, R.S.O., 1927, c. 190, s. 37; Special War Revenue Act, R.S.C., 1927, c. 179—Costs.

In the distribution of the assets of a bankrupt company (consisting of personal property, insufficient to pay in full all claims now in question), which company had carried on business in Toronto, Ontario,

* PRESENT:—Duff C.J. and Rinfret, Crocket, Davis, Kerwin and Hudson JJ.

the following claimants were, for reasons stated below, held entitled to payment according to the following order of priority: (1) The Treasurer of the Province of Ontario (for tax under the *Corporations Tax Act*, R.S.O., 1927, c. 29); (2) The City of Toronto (for business tax imposed under the *Assessment Act*, R.S.O., 1927, c. 238), and The Toronto Electric Commissioners (for supply of electrical energy under the *Public Utilities Act*, R.S.O., 1927, c. 249); (3) The landlord; (4) The custodian and the trustee (for costs, fees and expenses); (5) The Workmen's Compensation Board (for indebtedness under the *Workmen's Compensation Act*, R.S.O., 1927, c. 179); (6) The Minister of National Revenue (for sales tax imposed under the *Special War Revenue Act*, R.S.C., 1927, c. 179).

- (1) The head priority of the Ontario Provincial Treasurer's claim was held not to be open to attack on this appeal, as it was virtually conceded in the courts below; otherwise, as expressed by this Court, it might have presented difficulty.
- (2) The claim of the City of Toronto for business tax took its aforesaid priority by virtue of s. 125 of the *Bankruptcy Act* and s. 112 of the *Ontario Assessment Act*.

The effect of s. 125 of the *Bankruptcy Act* is to leave undisturbed the provincial law in respect of the "collection of any taxes, rates or assessments" payable by the debtor; and thus leaves available to the City s. 112 (11) of the *Ontario Assessment Act*, which provides in effect—without the amendment in 1922 hereinafter mentioned—that where personal property liable to seizure for taxes has passed into possession of a third person through seizure, attachment, execution, assignment for the benefit of creditors, or liquidation, it shall be sufficient for the tax collector to give notice of the amount due for taxes, and requires payment thereof to him "in preference and priority to any other and all other fees, charges, liens or claims whatsoever." Even if the amendment in 1922 (12-13 Geo. V, c. 78, s. 24), extending the wording to include any authorized trustee in bankruptcy, be deemed *ultra vires*, the City's reliance on s. 112 (11) is not defeated. In its original form without the amendment it is not bankruptcy legislation and is competent provincial legislation, and (by force of s. 125 of the *Bankruptcy Act*) covers the present case. The amendment in 1922 may be disregarded or severed.

Per Duff C.J.: At the date of the adjudication in bankruptcy the bankrupt's goods and chattels were liable to seizure and sale by the City under s. 112 (2) of the *Ontario Assessment Act*. S. 112 (11) of that Act (and disregarding said amendment in 1922) provided procedure by notice in the circumstances therein mentioned and required the amount due for taxes to be paid "in preference and priority," etc., (see *supra*). The City's right under the law of Ontario to seize and sell and to pay the taxes out of the proceeds, and, in proceedings under provincial statutes for the distribution of the debtor's goods for the benefit of creditors, to be paid the amount due for taxes in preference and priority as aforesaid, is a right in the nature of a "lien or charge" within the contemplation of the second branch of s. 125 of the *Bankruptcy Act*, a right which, by force of s. 125, it is the trustee's duty to recognize. In this view, the validity of said amendment in 1922 is immaterial.

- (3) The Toronto Electric Commissioners are merely the statutory agent and manager of one of the City's public utilities, and their charges for supply of electrical energy come within the words "taxes, rates

1937

In re
THEBANKRUPTCY
OF
GENERAL
FIREPROOFING
CO. OF
CANADA LTD.

or assessments" in s. 125 of the *Bankruptcy Act*, and by the *Public Utilities Act*, R.S.O., 1927, c. 249, s. 26 (2), may be entered on the tax collector's roll; therefore they stand in the same position as the City.

- (4) The rights and priorities of the landlord, upon the bankruptcy of a lessee, are left by s. 126 of the *Bankruptcy Act* to be determined by the laws of the province regulating the rights and priorities of the landlord consequent upon an abandonment or voluntary assignment by a lessee for the benefit of creditors. The "preferential lien of the landlord for rent" mentioned and restricted by s. 37 (1) of the *Landlord and Tenant Act*, R.S.O., 1927, c. 190, is, as created or given effect to therein, a statutory lien as a substitute for distress (*Re Fashion Shop Co.*, 33 Ont. L.R. 253, *Lazier v. Henderson*, 29 Ont. R. 673, and other cases in the Ontario courts, referred to). This preferential lien is preserved by force of s. 126 of the *Bankruptcy Act*, and, as s. 121 of that Act is expressly made subject to the provisions of s. 126, the landlord's claim takes precedence over the claims of those creditors given certain priorities by virtue of s. 121, including the custodian and the trustee and the Workmen's Compensation Board. But the landlord's claim is subject in priority to that of the City of Toronto (and to that of the Toronto Electric Commissioners), as the consequence that "would have ensued under the laws of the province" (s. 126 of the *Bankruptcy Act*), on a voluntary assignment for benefit of creditors, would have been that the City took priority over the landlord by virtue of s. 112 (11) of the *Ontario Assessment Act*.
- (5) The custodian's costs and expenses and the trustee's fees and expenses (all, for the purpose of priority, treated as one claim) and the claim of the Workmen's Compensation Board rank next (in the order given), in accordance with the priorities specifically given by s. 121 of the *Bankruptcy Act*.
- (6) As to the claim of the Minister of National Revenue for sales tax: The Crown in right of the Dominion is, by s. 188 of the *Bankruptcy Act*, bound by the priorities set up by that Act; and, having no lien or charge to secure the payment of its sales taxes, cannot rank ahead of those creditors or of the trustee who are by that Act secured or given a special priority. It takes first among ordinary creditors by virtue of the prerogative.

Judgment of the Court of Appeal for Ontario, [1936] O.R. 510, varied.

The orders granting special leave to appeal to this Court expressly provided that the appellants should not be required to give any security for the costs of their appeals. No security was in fact given, and s. 174 (4) of the *Bankruptcy Act* provides that in such circumstances an appellant "shall not be awarded costs in the event of his success upon such appeal." S. 174 (4) does not prevent costs being given against such an appellant when unsuccessful.

APPEALS (by special leave granted by a Judge of this Court) from the judgment of the Court of Appeal for Ontario (1) affirming, with one variation as to priority of claims, the judgment of McEvoy J. (2) on an application by the trustee in bankruptcy to the Judge in bankruptcy

(1) [1936] O.R. 510; 17 C.B.R. 371; [1936] 4 D.L.R. 88.

(2) [1936] O.R. 255; 17 C.B.R. 246; [1936] 2 D.L.R. 348.

for directions and to determine the priority in which the claims in question should be paid.

General Fireproofing Company of Canada Ltd., which carried on business in Toronto, Ontario, made an authorized assignment under the *Bankruptcy Act* on August 1, 1935. The assets of the estate (other than those pledged to a bank) consisted of cash on hand and machinery, equipment and shop supplies. These assets (other than cash) were sold, and, after payment of an amount owing under a conditional sale agreement and certain disbursements, the balance in the estate for distribution was \$4,318.65. The claims now in question (claimed as preferred claims) in the aggregate exceeded the said amount, and therefore the trustee made the aforesaid application for directions to determine priority of payment.

The claimants and the nature of the claims in question are sufficiently stated in the judgments now reported, more particularly in the judgment of Davis J., and are indicated in the above headnote.

D. L. McCarthy K.C. and *J. P. Kent* for the City of Toronto and the Toronto Electric Commissioners.

L. Duncan K.C. for the Trustee.

G. A. Urquhart K.C. and *H. H. Ellis* for the Attorney-General of Canada and the Minister of National Revenue.

L. A. Richard for the Treasurer of the Province of Ontario.

R. M. Fowler for Gibson Bros. (landlord).

W. F. Spence for the Workmen's Compensation Board.

DUFF C.J.—I have had the advantage of reading the judgment prepared by Mr. Justice Davis with which I fully agree. In the observations which follow I am putting my views on the points discussed in a slightly different form.

It will be convenient to consider first the claims of the Corporation of the City of Toronto and the Toronto Electric Commissioners. The amount due to the Corporation by the bankrupt for business tax for 1935 was \$330.67, and the amount due to the Tax Collector of the same Corporation for Hydro-Electric rates by the bankrupt was \$319.35. It is contended that, by force of section 125 of the *Bankruptcy Act*, it is the duty of the trustee to pay these claims

1937
In re
THE
BANKRUPTCY
OF
GENERAL
FIREPROOFING
CO. OF
CANADA LTD.

1937
 In re
 THE
 BANKRUPTCY
 OF
 GENERAL
 FIREPROOFING
 CO. OF
 CANADA LTD.

Duff C.J.

in priority to all other claims (other than the claim of the Treasurer of the Province of Ontario) now in question out of the moneys in his hands for distribution. It was conceded in the Court below that the claim of the Treasurer for the Province takes priority over other claims; and effect must be given to that concession here.

Section 125 is in these words:

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 or upon any property of 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.

The four preceding sections mentioned are, first of all, s. 123 which enacts that, subject to the provisions of the statute, all debts proved in the bankruptcy or under an assignment shall be paid *pari passu*.

Section 121 (1) provides for certain priorities: in respect of the costs and expenses of the custodian and fees and expenses of the trustee; in respect of certain costs of garnishing, attaching, execution and judgment creditors; in respect of the indebtedness of the bankrupt under any Workmen's Compensation Act and in respect of wages, salaries and compensation payable to employees.

With section 122, which deals with the application of the joint and separate assets of partners, and section 124, which provides for the payment of interest where there is a surplus, we are not concerned.

It will be observed that s. 125 enacts two things. First of all, that these provisions for distribution *pari passu* and for priorities shall not interfere in any way with the collection of taxes, rates or assessments chargeable against the bankrupt personally or against his property under any law of a province where such property is situate or where the bankrupt resides; and, further, that nothing in these provisions shall prejudice or affect any lien or charge in respect of such property created by any such laws.

It is not necessary for the purposes of this case, in my view of it, to consider the effect of the first branch of this section in cases to which the second branch has no application, that is to say, where no lien or charge upon the property of the debtor attaches to the obligation of the taxpayer in respect of the tax or assessment in question. My conclusion is that, by force of the enactments of the

Assessment Act of Ontario, such a lien or charge is created and is attached to the right of the municipality to be paid the tax known as business tax. It is not disputed that, in this respect, no substantial distinction exists between moneys payable as business tax and moneys payable as hydro-electric rates.

I turn then to the provisions of the *Assessment Act*. By section 9 (11):

Every person assessed for business assessment shall be liable for the payment of the tax thereon and the same shall not constitute a charge upon the land occupied or used.

Subsection 2 of section 112 reads:

Subject to the provisions of section 111, in case of taxes which are not a lien on land remaining unpaid for fourteen days after demand or notice made or given pursuant to sections 107, 109 or 111, the collector, or where there is no collector, the treasurer, may by himself or his agent (subject to the exemptions provided for in subsection 4) levy the same with costs by distress:

1. Upon the goods and chattels of the person taxed wherever found within the county in which the municipality lies for judicial purposes;

2. Upon the interest of the person taxed in any goods to the possession of which he is entitled under a contract for purchase, or a contract by which he may or is to become the owner thereof upon performance of any condition;

3. Upon any goods and chattels in the possession of the person taxed where title to the same is claimed in any of the ways defined by sub-clauses *a*, *b*, *c* and *d* in subsection 1 of this section, and in applying the said sub-clauses they shall be read with the words "or against the owner though his name does not appear on the roll," and the words "or such owner," and the words "on the land" omitted therefrom;

(The sub-clauses here mentioned are in these words:

(a) By virtue of an execution against the person taxed or against the owner, though his name does not appear on the roll; or

(b) By purchase, gift, transfer or assignment from the person taxed, or from such owner, whether absolute or in trust, or by way of mortgage or otherwise; or

(c) By the wife, husband, daughter, son, daughter-in-law or son-in-law of the person taxed, or of such owner, or by any relative of his, in case such relative lives on the land as a member of the family; or

(d) By virtue of any assignment or transfer made for the purpose of defeating distress;)

* * *

4. Upon goods and chattels which at the time of making the assessment were the property and on the premises of the person taxed in respect of business assessment and at the time for collection of taxes are still on the same premises, notwithstanding that such goods and chattels are no longer the property of the person taxed.

The right created by these provisions, it will be observed, is a right (*inter alia*) to take possession of and sell by process of distress any goods of the taxpayer within the county in which the municipality for judicial purposes lies.

1937
 In re
 THE
 BANKRUPTCY
 OF
 GENERAL
 FIREPROOFING
 CO. OF
 CANADA LTD.
 —
 Duff C.J.
 —

The same right is given in respect of any interest under any contract of purchase or any contract under which the taxpayer is entitled to acquire ownership on the performance of any condition. The right is operative notwithstanding the fact that title to the goods and chattels is claimed by virtue of an execution against the person taxed or that such title is claimed by purchase, gift, transfer or assignment from the person taxed, or that such title is claimed by virtue of any assignment or transfer made for the purpose of defeating distress; and the right is operative also in certain cases where the title is claimed by relatives.

Where goods liable to seizure under these provisions have been attached or seized under an attachment or execution, the procedure is provided for by subsection 11; and in that case it is sufficient to give a notice to the sheriff or bailiff stating the amount due for taxes; and it is then the duty of the sheriff or bailiff to pay such amount "in preference and priority to any other and all other fees, charges, liens or claims whatsoever."

The same procedure obtains and has the same legal consequences where the goods have come into the possession of a liquidator or an assignee for the benefit of creditors.

I confine my attention for the present to the statute as it stood prior to the amendment of 1922 by which it was in express terms made applicable to trustees in bankruptcy. The result was that, as regards goods and chattels falling within the classes mentioned, the municipality had the right to take possession and sell for the purpose of obtaining payment and to pay itself out of the proceeds of the sale; and in those cases in which process by execution had intervened or there had been an assignment for the general benefit of creditors or winding-up proceedings were in progress, there was a right to be paid in priority to other creditors. The winding-up proceedings contemplated by the statute prior to the amendment of the section in 1922, no doubt, were winding-up proceedings under the authority of the provincial law.

Turning again to s. 125 of the *Bankruptcy Act*. It would appear that this right given by the law of Ontario to seize and sell and to pay the taxes out of the proceeds of the sale and to require in the cases mentioned payment of the amount due for taxes in preference and priority over "all

other claims, fees, charges and liens" is a right in the nature of a "charge or lien" within the contemplation of that section, a right which, by force of the section, it is the duty of the trustee to respect and to acknowledge. It follows that the claim of the municipality must take priority over the claim of the trustee and the claim under the *Workmen's Compensation Act* and over the claims of ordinary creditors which are to be paid *pari passu*.

1937
In re
THE
BANKRUPTCY
OF
GENERAL
FIREPROOFING
CO. OF
CANADA LTD.
Duff C.J.

As regards the claim of the Minister of National Revenue, he has no lien or charge, and his privilege in virtue of the prerogative is only available as against ordinary creditors.

As to the landlord's claim, different considerations arise. His claim rests upon his right of distress and his cognate "preferential lien"; but it becomes operative solely by force of s. 126. It is not necessary for us to consider for our present purpose the relative rights of the landlord and the taxing authority under the law of Ontario when both have distrained or attempted to do so, because s. 126 provides explicitly that the landlord's place in the distribution in bankruptcy—his rights and priorities—is to be determined by ascertaining what his rights and priorities would have been if the debtor had made a voluntary assignment of his property for the benefit of his creditors under the law of the Province of Ontario. Now, in this respect, the enactments of subsection 11 seem to be unambiguous as well as explicit. In such a case the taxing authority is entitled to be paid in preference and priority over all other claims, liens and charges. This language is broad enough, and I have no doubt was intended, to embrace the claim of the landlord.

In this view it is unnecessary to discuss the question whether the amendment of section 112 (11) of the *Assessment Act*, which was effected in the year 1922, and which professed to extend the provisions of the section to "any trustee or authorized trustee in bankruptcy," is *ultra vires*. I am unable to perceive any valid ground for attacking the section as it stood prior to that amendment as an incompetent exercise of the legislative authority of the Legislature of Ontario. Assuming the amendment to have been *ultra vires*, that cannot, in the view expressed above, affect the substance of the matter. The substance of the matter is that, at the date of the adjudication in bankruptcy the

1937
 In re
 THE
 BANKRUPTCY
 OF
 GENERAL
 FIREPROOFING
 CO. OF
 CANADA LTD.
 Duff C.J.

goods and chattels of the bankrupt affected by the statute were liable to seizure and sale by the municipality to enable the municipality to obtain payment of taxes and, generally, in proceedings under the provincial statutes for the distribution of the goods of the debtor for the benefit of creditors, the municipality was entitled to be paid before anybody else.

This right being, in my view, in the nature of a lien or charge within the contemplation of section 125 of the *Bankruptcy Act*, it is the duty, as already observed, of the trustee under that section in the distribution of the bankrupt estate to recognize it.

The judgment of Rinfret, Crocket, Davis, Kerwin and Hudson JJ. was delivered by

DAVIS J.—This is a contest in bankruptcy among several creditors and the trustee, each seeking priority of payment against the others in the distribution of the property of the bankrupt company which is insufficient to pay all in full.

Sec. 123 of the *Bankruptcy Act* provides that, subject to the provisions of the Act, all debts proved in the bankruptcy shall be paid *pari passu*. Sec. 121 creates priorities in respect of four classes of creditors, only two of which, the custodian and the trustee treated as one, and the Ontario Workmen's Compensation Board as the other, are involved in this dispute. If they were the only creditors claiming priority and sec. 121 were held entirely to govern the priority of payment of their claims, the costs and expenses of the custodian and the fees and expenses of the trustee would be paid first and the Workmen's Compensation Board would have to look for payment to what, if anything, was left of the estate.

But the difficulties arise in that there are several creditors who claim a position higher even than that of the trustee and who further contend for certain priorities among themselves.

The landlord asserts a special priority on the assets of the estate by virtue of section 126, because section 121 is expressly made "subject to the provisions of section 126 as to rent." Section 126 reads as follows:

126. When a receiving order or an assignment is made against or by any lessee under this Act, the same consequences shall ensue as to the

rights and priorities of his landlord as would have ensued under the laws of the province in which the demised premises are situate if the lessee at the time of such receiving order or assignment had been a person entitled to make and had made an abandonment or a voluntary assignment of his property for the benefit of his creditors pursuant to the laws of the province; and nothing in this Act shall be deemed to suspend, limit or affect the legislative authority of any province to enact any law providing for or regulating the rights and priorities of landlords consequent upon any such abandonment or voluntary assignment; nor shall anything in this Act be deemed to interfere or conflict with the operation of any such provincial law heretofore or hereafter enacted in so far as it provides for or regulates the rights and priorities of landlords in such an event.

1937
 {
 In re
 THE
 BANKRUPTCY
 OF
 GENERAL
 FIREPROOFING
 Co. OF
 CANADA LTD.
 —
 Davis J.
 —

When the *Bankruptcy Act* was first enacted in 1919, 9-10 Geo. V, ch. 36, the Parliament of Canada made its own law with respect to the rights of landlords by section 52 thereof, but that section was repealed in 1923, 13-14 Geo. V, ch. 31, sec. 31, and the present section 126 was substituted. It is plain that Parliament decided to leave the rights and priorities of the landlord, upon the bankruptcy of any lessee, to be determined by the laws of the province, in which the land is situate, regulating the rights and priorities of landlords consequent upon an abandonment or voluntary assignment by a lessee for the benefit of creditors. The landlord in this case asserts by virtue of sec. 37 of the *Ontario Landlord and Tenant Act*, R.S.O., 1927, ch. 190, a preferential lien for the arrears of rent due during the period of three months next preceding and for three months following the date of bankruptcy. Sec. 37, subsec. (1), reads as follows:

37. (1) In case of an assignment for the general benefit of creditors, or an order being made for the winding-up of an incorporated company, or where a receiving order in bankruptcy or authorized assignment has been made by or against a tenant, the preferential lien of the landlord for rent shall be restricted to the arrears of rent due during the period of three months next preceding, and for three months following the execution of the assignment, and from thence so long as the assignee retains possession of the premises, but any payment to be made to the landlord in respect of accelerated rent shall be credited against the amount payable by the assignee, liquidator or trustee for the period of his occupation.

The Treasurer of the Province of Ontario claims to rank ahead of all the other creditors and the trustee in respect of a small claim under the *Corporations Tax Act*, R.S.O., 1927, ch. 29. Sec. 20 of that Act reads as follows:

20. Every tax and penalty imposed by this Act shall be a first lien and charge upon the property in Ontario of the company liable to pay the same.

Counsel for the Provincial Treasurer not only claimed priority by prerogative of the Crown, in right of the Province,

1937
In re
THE
BANKRUPTCY
OF
GENERAL
FIREPROOFING
CO. OF
CANADA LTD.
Davis J.

but claimed that the Province was by virtue of said sec. 20 a secured creditor and its rights as such preserved by secs. 24 and 25 of the *Bankruptcy Act*; and further that the Province's claim to taxes is in any case preserved by sec. 125 of the *Bankruptcy Act*, which reads as follows:

125. 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 or upon any property of 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.

The Attorney-General of Canada and the Minister of National Revenue also claim to take first place in respect of sales taxes due by the debtor to the Crown in right of the Dominion. The claim for sales taxes arose under sec. 86 of the *Special War Revenue Act*, R.S.C., 1927, ch. 179, and amending Acts, and more particularly subsec. 1 (a) thereof which, speaking generally, imposed a sales tax of six per cent. on the sale price of all goods produced or manufactured in Canada, payable by the producer or manufacturer at the time of the delivery of such goods to the purchaser thereof. Sec. 107 of this Act imposes certain duties on trustees in bankruptcy in the distribution of estates. Counsel for the Attorney-General and the Minister of National Revenue contended that by virtue of sec. 125 of the *Bankruptcy Act* and of the prerogative of the Crown, in right of the Dominion of Canada, the claim for sales taxes is a preferred claim payable by the trustee in priority not only to the claim of the Province of Ontario and the claim of the trustee but in priority to all other claims. It may be observed here that at one time the payment of sales taxes was specifically secured by a statutory lien or charge but such provision was repealed and is not now available to the Minister of National Revenue in the collection of sales taxes.

The Ontario Workmen's Compensation Board claims priority by virtue of sec. 121 of the *Bankruptcy Act* and alternatively as an agency of the Crown in right of the Province.

The City of Toronto and the Toronto Electric Commissioners assert the right to come first for their claims for business taxes and for the supply of electrical energy, respectively, by virtue of the combined effect of sec. 125 of the *Bankruptcy Act* and of subsec. (11) of sec. 112 of

the Ontario *Assessment Act*, which latter provision reads, since its amendment in 1922 by 12-13 Geo. V, ch. 78, sec. 24, as follows:

112 (11). Where personal property liable to seizure for taxes as hereinbefore provided is under seizure or attachment or has been seized by the sheriff or by a bailiff of any court or is claimed by or in possession of any assignee for the benefit of creditors or liquidator or of any trustee or authorized trustee in bankruptcy or where such property has been converted into cash and is undistributed, it shall be sufficient for the tax collector to give to the sheriff, bailiff, assignee or liquidator or trustee or authorized trustee in bankruptcy notice of the amount due for taxes, and in such case the sheriff, bailiff, assignee or liquidator or trustee or authorized trustee in bankruptcy shall pay the amount of the same to the collector in preference and priority to any other and all other fees, charges, liens or claims whatsoever.

This provincial enactment is relied upon as available to the municipality in the collection of its taxes, rates or assessments by virtue of sec. 125 of the *Bankruptcy Act*.

The trustee claims to rank first upon the estate as a fund in his hands impressed with a trust out of which he is entitled to be paid, as a first charge thereon, his compensation and disbursements.

It is convenient to dispose of the Dominion and the Province before proceeding to discuss the difficult question of the municipality's claim to priority over both the landlord and the trustee. So far as the Dominion is concerned, sec. 188 of the *Bankruptcy Act* expressly enacts that, save as provided in the Act, the provisions of the Act relating to remedies against the property of a debtor and the priorities of debts shall bind the Crown. The Crown in right of the Dominion is bound, therefore, by the priorities set up by the *Bankruptcy Act*, and, having no lien or charge to secure the payment of its sales taxes, cannot rank ahead of those creditors or of the trustee who are either secured or given a special priority by the *Bankruptcy Act*. The contention of the Province of Ontario might present considerable difficulty but for the fact that the Province was given by the courts below the first position and its claim is not open to attack on this appeal because the Province was virtually conceded in the courts below priority over all others, perhaps because its claim was only \$116.76.

Now as to the City of Toronto. The Toronto Electric Commissioners are merely the statutory agent and manager of one of the city's public utilities and will stand in the same position as the city unless the charges for the supply

1937
In re
THE
BANKRUPTCY
OF
GENERAL
FIREPROOFING
Co. OF
CANADA LTD.
Davis J.

1937
In re
THE
BANKRUPTCY
OF
GENERAL
FIREPROOFING
CO. OF
CANADA LTD.

Davis J.

of electrical energy cannot be said to come within the words "taxes, rates or assessments" in sec. 125 of the *Bankruptcy Act*. This question may be passed over for the moment. The real dispute is between the municipality and the landlord. The trustee did not appeal to this Court but is respondent in the appeals of the Attorney-General of Canada, the Ontario Workmen's Compensation Board and the City of Toronto and Toronto Electric Commissioners, and if any variation of the allocation of the claims of the several creditors and of the trustee to priority as fixed in the judgment appealed from is to be made in this Court upon the appeals of those creditors who did appeal, we should examine the whole matter, including the true position of those parties who would be affected adversely by any re-allocation.

The City's contention is based, as already noted, upon sec. 112 (11) of the *Ontario Assessment Act*, which, it is argued, is available to the city by virtue of sec. 125 of the *Bankruptcy Act*. The city's claim is for business taxes. There is no lien or charge upon the property of the taxpayer to secure the payment of business taxes as there is in the case of land taxes, nor is there any lien or charge to secure the payment of the charges of the Toronto Electric Commissioners. The city therefore has to rely upon the provisions of sec. 112 (11) of the *Ontario Assessment Act*. This remedy is really a substitute for distress where personal property liable to seizure for taxes, or the undistributed cash proceeds thereof, are taken or held in the course of execution or liquidation. It is contended against the city, and this view prevailed in the court below, that sec. 112 (11) is *ultra vires* the province in so far as by the amendment of 1922 the provisions of the then section were extended to include any trustee in bankruptcy. But Parliament plainly intended by sec. 125 of the *Bankruptcy Act* that the Act should not interfere with "the collection of any taxes, rates or assessments" payable by or levied or imposed upon the debtor or upon any property of the debtor under any law of the province wherein such property is situate or wherein the debtor resides. The provincial law in that respect was preserved and there was to be no interference by the Parliament of Canada, dealing in bankruptcy matters, with the collection of taxes. Sec. 112 (11)

of the Ontario *Assessment Act* was in full force and effect before the passing by the Parliament of Canada of the *Bankruptcy Act*, except as to the amendment made in 1922 by the Ontario Legislature adding throughout the subsection the words "or of any trustee or authorized trustee in bankruptcy." Plainly sec. 112 (11) in its original form is not bankruptcy legislation and is competent provincial legislation. It covered every possible condition known to the Legislature at the time of its enactment that might occur whereby the goods of the debtor would pass into the possession of some third person owing to seizure, attachment, execution or liquidation. That was the remedy available for the collection of municipal taxes under the provincial law, and the effect of sec. 125 of the *Bankruptcy Act* was to leave the local law in respect of the collection of taxes undisturbed. There was no real necessity for the amendment of the Ontario Act; it was broad enough itself to cover a case such as this, provided the Dominion statute left the provincial law unaffected and this it did by sec. 125. If, however, it be thought that the amendment was beyond the power of the province in that it directs that the trustee in bankruptcy "shall pay the amount of the [taxes] to the collector in preference and priority to any other and all other fees, charges, liens or claims whatsoever," the amendment may be disregarded or the subsection severed. The service of the notice would remain and be sufficient in itself because sec. 125 of the *Bankruptcy Act* provides that the collection of taxes imposed by provincial laws is not to be interfered with by the *Bankruptcy Act*.

Counsel for the landlord argued that, even in this view of sec. 112 (11) of the Ontario *Assessment Act*, the City is not entitled to rank ahead of the landlord, because sec. 125 relating to the collection of taxes commences with the words "Nothing in the four last preceding sections shall interfere with" and not with such words as "Nothing contained in this Act shall interfere with," and sec. 121, the first of the "four last preceding sections," expressly commences with the words "Subject to the provisions of section 126 as to rent." By virtue of sec. 126 "the same consequences shall ensue as to the rights and priorities of his landlord," when a receiving order or an assignment is made against or by any lessee under the Act, "as would

1937
In re
THE
BANKRUPTCY
OF
GENERAL
FIREPROOFING
CO. OF
CANADA LTD.
Davis J

1937
 In re
 THE
 BANKRUPTCY
 OF
 GENERAL
 FIREPROOFING
 CO. OF
 CANADA LTD.

Davis J.
 —

have ensued under the laws of the province in which the demised premises are situate" if the lessee had made an abandonment or voluntary assignment of his property for the benefit of his creditors pursuant to the laws of the province. Counsel for the landlord further calls our attention to the concluding words in sec. 126, that

nothing in this Act shall be deemed to suspend, limit or affect the legislative authority of any province to enact any law providing for or regulating the rights and priorities of landlords consequent upon any such abandonment or voluntary assignment; nor shall anything in this Act be deemed to interfere or conflict with the operation of any such provincial law heretofore or hereafter enacted in so far as it provides for or regulates the rights and priorities of landlords in such an event.

The entire section, 126, has already been set out and it is unnecessary to repeat it.

It becomes necessary now to examine the question raised against the landlord by counsel for the city that the "preferential lien," so-called, referred to in sec. 37 of the *Landlord and Tenant Act*, above set out, is not in reality a security in the nature of a charge or lien upon the property, but is merely a preference, and that, accordingly, the city, with its statutory right under sec. 112 (11) of the *Assessment Act* to payment "in preference and priority to any other and all other fees, charges, liens or claims whatsoever," is entitled to rank ahead of the landlord whose claim, it is argued, is only that of a preferred creditor without security. The settled jurisprudence of the province of Ontario in relation to the words "the preferential lien of the landlord for rent" was stated by the late Chancellor Boyd in *Re Fashion Shop Co.* (1):

The phrase "the preferential lien of the landlord for rent" means * * * that the landlord has a statutory lien upon goods available for distress, independent of actual distress or possession, for the amount of the rent as limited by the section.

This conclusion was based upon the decision and the reasoning of Street, J., in *Lazier v. Henderson* (2), especially at pp. 678-9, where it is observed that any other construction would make the words of the section meaningless. The decision in *Tew v. Toronto Savings & Loan Co.* (3) followed the *Lazier* decision (2), as did also the case of *Re D. S. Paterson Co.* (4). As early as 1879 the Ontario Court of Appeal in *Re McCracken* (5) discussed the same

(1) (1915) 33 Ont. L.R. 253.

(3) (1898) 30 Ont. R. 76.

(2) (1898) 29 Ont. R. 673.

(4) [1932] O.R. 432.

(5) 4 Ont. A.R. 486.

phrase "the preferential lien of the landlord for rent" as it appeared in the then *Insolvent Act* of 1875. I know of no decision that has ever reduced the substance and effect of the language of the statute, "the preferential lien of the landlord for rent" to a mere preferred claim in liquidation and I am quite satisfied, consistent with the decisions as I read them, that it is perfectly plain that the landlord was given a statutory lien as a substitute for distress. Underlying the right to the lien there must be a contractual obligation for the acceleration of rent in the events specified, but the statute, while creating or giving effect to the lien to secure the payment of rent, expressly limits and restricts the lien to the arrears of rent during the period of three months next preceding and for three months following the execution of the assignment. This preferential lien is preserved by force of sec. 126 of the *Bankruptcy Act* and as sec. 121 of the *Bankruptcy Act* dealing with priority of claims is expressly made subject to the provisions of sec. 126, the claim of the landlord plainly takes precedence over the claims of those creditors given certain priorities by virtue of sec. 121 of the *Bankruptcy Act*.

That does not yet determine the question of priority as between the municipality and the landlord. Sec. 126 only gives to the landlord "the same consequences" as would have ensued under provincial law if the lessee had made an abandonment or a voluntary assignment of his property for the benefit of his creditors pursuant to the laws of the province. That section entitles us, in considering the conflict between the municipality and the landlord, to exclude bankruptcy legislation in arriving at the rights of the landlord and the municipality between themselves. If the debtor here had not in fact become bankrupt but had made in Ontario an abandonment or a voluntary assignment of his property for the benefit of his creditors, the claim of the municipality would have taken priority over the claim of the landlord because under provincial law the landlord, while entitled to "the preferential lien" to which we have referred, would have had to give way to the right of the municipality under sec. 112 (11) of the *Ontario Assessment Act* to collect the amount due for taxes "in preference and priority to any other and all other fees,

1937
 In re
 THE
 BANKRUPTCY
 OF
 GENERAL
 FIREPROOFING
 CO. OF
 CANADA LTD.
 ———
 Davis J.
 ———

1937
In re
THE
BANKRUPTCY
OF
GENERAL
FIREPROOFING
CO. OF
CANADA LTD.
Davis J.

charges, liens or claims whatsoever." That undoubtedly would have been the consequence that "would have ensued under the laws of the province" if the lessee had made an abandonment or a voluntary assignment of his property for the benefit of his creditors pursuant to the laws of the province. Can it be said that under the *Bankruptcy Act* the landlord is entitled to a better position as between himself and the municipality than he would have had, if the lessee had made a voluntary assignment? Sec. 125 of the *Bankruptcy Act* says, "nothing in the four last preceding sections shall interfere with" the collection of taxes nor prejudice or affect any lien or charge in respect of the property of the debtor created by any law of the province wherein such property is situated. The consequence that would have ensued, as between landlord and the city, on a voluntary assignment under provincial laws would have been that the city would have taken priority over the landlord by virtue of sec. 112 (11).

But the landlord takes, by virtue of sec. 126 of the *Bankruptcy Act*, priority over the custodian, the trustee, and the Ontario Workmen's Compensation Board, who are specifically given certain priorities by virtue of sec. 121 and cannot claim a better position than that given to them by the express language of the *Bankruptcy Act*.

The charges of the city's statutory agent, the Toronto Electric Commissioners, for the supply of electrical energy come within the words "taxes, rates or assessments" in sec. 125 of the *Bankruptcy Act*, and by the Ontario *Public Utilities Act*, R.S.O., 1927, ch. 249, sec. 26 (2), may be entered on the tax collector's roll. Therefore the Toronto Electric Commissioners stand in the same position as the city.

The respective priorities of the parties involved in these proceedings should be settled as follows:

- (1) The Province of Ontario.
- (2) The City of Toronto and the Toronto Electric Commissioners.
- (3) The landlord.
- (4) The custodian and trustee.
- (5) The Ontario Workmen's Compensation Board.

The Minister of National Revenue takes first among ordinary creditors by virtue of the prerogative.

In the circumstances of this case it is impossible to fix equitable debits and credits as to costs. The City of Toronto and the Toronto Electric Commissioners, appellants, have succeeded in the appeal in gaining second place, after the Province of Ontario (whose claim is only \$116.76), whereas they were given no priority and treated as ordinary unsecured creditors in the judgments of both McEvoy J. and the Court of Appeal. The landlord, Gibson Bros. Limited, who were given the second place in both courts below for their claims totalling \$2,812.50, are now put in the third position, immediately after the City of Toronto and the Toronto Electric Commissioners, whose claims total \$650.02. In the ordinary course the City of Toronto and the Toronto Electric Commissioners, having succeeded in their appeal, would be entitled to their costs, but the order of my brother Kerwin in granting special leave to appeal to this Court expressly provided that these appellants should not be required to give any security for the costs of their appeals, and no security was in fact given. Sec. 174 (4) of the *Bankruptcy Act* provides that in such circumstances an appellant "shall not be awarded costs in the event of his success upon such appeal." Therefore the appellants the City of Toronto and the Toronto Electric Commissioners, though successful, are not entitled to be awarded the costs of their appeal. A similar order dispensing with security for costs was made when special leave to appeal was granted to the Attorney-General of Canada and the Minister of National Revenue for Canada, and again when leave was granted to the Ontario Workmen's Compensation Board. The former appellants do not succeed. They were given sixth place by McEvoy J. and were raised to fifth place by the order of the Court of Appeal but are now put in the class of ordinary creditors subject only to the prerogative right of being paid first among the ordinary creditors. The City of Toronto and the Toronto Electric Commissioners as well as the Workmen's Compensation Board have gained priority over them. The appellant, the Workmen's Compensation Board, did not succeed in its main contention on its appeal and, though it remains in the sixth place, it finds the City of Toronto and the Toronto Electric Commissioners now ahead of it, but the priority of the Minister of National Revenue has disappeared. Sec. 174 (4) does not prevent costs being

1937
In re
THE
BANKRUPTCY
OF
GENERAL
FIREPROOFING
CO. OF
CANADA LTD
—
Davis J.
—

1937

In re

THE

BANKRUPTCY

OF

GENERAL
FIREPROOFING

Co. OF

CANADA LTD.

Davis J.

given against such appellants when they are unsuccessful. But the total claim of the Workmen's Compensation Board was only \$82.51, while the claim of the Minister of National Revenue for sales taxes was \$1,566.74. It is quite impossible to work out any equitable scheme for the apportionment or distribution of the costs, and, under all the circumstances, justice, I think, will be done in directing that there be no costs in the appeals for or against any of the parties, except that the trustee shall have his costs, as between solicitor and client, out of the estate.

But we must consider the disposition of costs in the courts below. The Court of Appeal ordered the City of Toronto and the Toronto Electric Commissioners to pay to the trustee and to the Treasurer of Ontario and to Gibson Bros. Limited, the landlord, one-half of their costs in the Court of Appeal, and the Attorney-General of Canada and the Minister of National Revenue to pay to the trustee and to the Treasurer of Ontario and to Gibson Bros. Limited one-half of their costs in the Court of Appeal. As to the costs before McEvoy J., the Court of Appeal, with some hesitation, left the disposition of the costs of the application for directions as McEvoy J. had disposed of them, that is, to be paid out of the assets of the estate in priority to the payment of the claims of the several creditors.

In view of the re-allocation of priorities made by this Court, it would be unfair to the City of Toronto and the Toronto Electric Commissioners to leave undisturbed the order of the Court of Appeal whereby they were ordered to pay one-half of the costs of the trustee and of the Treasurer of Ontario and of the landlord. Obviously that provision, in view of our disposition of the appeals, should not stand. On the other hand, the Attorney-General of Canada and the Minister of National Revenue, having failed in their appeals to this Court, are not entitled to have the order of the court appealed from disturbed.

The order of this Court as to costs will be, therefore, that there be no costs for or against any party either in this Court or in the Court of Appeal for Ontario except that the trustee shall have his costs, as between solicitor and client, of the appeals to this Court, and that the Attorney-General of Canada and the Minister of National Revenue shall remain liable to pay to the trustee and to the Treasurer of Ontario and to Gibson Bros. Limited one-

half of their costs of the appeal to the Court of Appeal for Ontario, and that so much of the costs of the trustee, as between solicitor and client, of the appeal to the Court of Appeal which may not be recovered from the Attorney-General of Canada and the Minister of National Revenue shall be paid out of the assets of the estate. The trustee's costs shall take priority over payment of the claims of those creditors represented in these proceedings. The order of McEvoy J. as to the costs of the application before him shall remain as affirmed by the Court of Appeal.

1937
In re
THE
BANKRUPTCY
OF
GENERAL
FIREPROOFING
CO. OF
CANADA LTD.
Davis J.

*Judgment appealed from varied as to the
respective priorities of the parties.*

Solicitor for the City of Toronto and the Toronto Electric Commissioners: *C. M. Colquhoun.*

Solicitor for the Trustee: *L. Duncan.*

Solicitor for the Attorney-General of Canada and the Minister of National Revenue: *G. A. Urquhart.*

Solicitor for the Treasurer of the Province of Ontario: *L. A. Richard.*

Solicitors for Gibson Bros. Ltd. (Landlord): *McMaster, Montgomery, Fleury & Co.*

Solicitors for the Workmen's Compensation Board: *Spence, Shoemaker & Spence.*
