APPELLATE CIVIL.

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, and Mr. Justice Braund.

U BA THI

v.

THE ADMINISTRATOR-GENERAL, BURMA.*

1939

Mar. 21.

Crown's prerogative right—Payment of taxes and statutory dues—Rule of universal application—Binding the Crown by statute—Express mention or reference by necessary implication—Burma Succession Act, Ch. VI, ss. 217, 322, 323—Crown debts outside the scope of Succession Act—Protection of decree-holders—Prerogative unaffected by Succession Act—Trade debts of the Crown—Duty of administrator under ss. 320, 322, Succession Act, s. 54 of Administrator-General's Act—Duty of discharging Crown debt first.

The Crown enjoys a prerogative right of preference in payment to all its subjects, of debts of equal degree, and, except in so far as the legislature has thought fit to interfere, this rule is of universal application.

Commissioners of Taxation, New South Wales v. *Palmer* (1907) A.C. 179, followed.

The Crown is not bound by a statute unless expressly mentioned or referred to by necessary implication.

In re Henley & Co., 9 Ch.D. 469; *Thèberge* v. *Landry*, 2 Ap. Ca. 102, referred to.

In Chapter VI of the Succession Act the legislature has furnished a scheme for the administration of the estates of deceased persons, in which it nowhere makes any express reference to debts due to the Crown. But it is not unreasonable to hold that debts, not trading debts but taxes, due to the Crown fall outside the scope of the Succession Act altogether, and the Crown is not bound by ss. 322 and 323 of the Succession Act by any necessary implication.

The words "according to their respective priorities, if any" in s. 322 of the Succession Act were inserted to protect a decree-holder and do not refer to the Crown's prerogative.

Nilkomal Shaw v. *Reed*, 17 W.R. 513, referred to.

The Food Controller v. *Cork*, (1923) A.C. 647, distinguished.

Trading activities of the Crown are on a different footing from taxes and statutory dues.

Re Northern Bengal Co., Ltd., 41 C.W.N. 458, referred to.

The Succession Act nowhere touches the prerogative of the Crown and the scope of the prerogative would fall under the definition of "any other law for the time being in force" in s. 217 of the Act. An administrator, whether he

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* Civil First Appeal No. 145 of 1938 from the order of this Court in Civil Misc. Case No. 114 of 1938.

1939

U BA THI v. THE ADMINISTRATOR-GENERAL, BURMA.

be the Administrator-General or another, or a District Judge with statutory duties, must have due regard to the prerogative of the Crown before paying other ordinary creditors in the order they are to be paid.

Thein Maung (Advocate-General) for the Crown. That Crown debts have priority over debts of equal degree is a matter of prerogative. It exists for the benefit of the public, and the monies thus recovered go into the public purse. Where the title of the King and the subject concur the King's title is preferred. *The Secretary of State* v. *The Bombay Landing and Shipping Co., Ltd.* (1). The prerogative cannot be taken away except by the consent of the Crown as shown by legislation. *Ganpat Putaya* v. *The Collector of Kanara* (2). The Crown's right to prior payment has been recognized in a series of cases. See *Gayanode* v. *Butto Kristo* (3) ; *Soniram* v. *Mary Pinto* (4) ; *The Secretary of State* v. *Ma Nyein Me* (5).

The question is whether the Crown's common law prerogative has been affected by the Succession Act, s. 323. Sections 320-323 of the Act occur in Part IX, and s. 217 says that that Part applies subject to any other law for the time being in force. One of such other law is the common law prerogative of the Crown. The Crown is not bound by a statute unless it is expressly mentioned therein or is referred to by necessary implication, *In re Henley & Co.* (6) ; and this rule is of universal application. *Commissioners of Taxation* v. *Palmer* (7). See also Maxwell's Interpretation of Statutes, p. 120 ; *Bank of Upper India* v. *The Administrator-General of Bengal* (8). The inference that the Crown is impliedly bound must be irresistible. *Charles Cushing* v. *Louis Dupuy* (9).

(1) 5 Bom. H.C.R. (O.C.J.) 23, 50.
(2) I.L.R. 1 Bom. 7, 9.
(3) I.L.R. 33 Cal. 1040.
(4) I.L.R. 11 Ran. 467.
(5) [1937] Ran. 344.
(6) 9 Ch.D. 469.
(7) (1907) A.C. 179.
(8) I.L.R. 45 Cal. 653, 662.
(9) 5 A.C. 409, 419.

The learned trial Judge said that the Crown could have proceeded under the Rangoon Insolvency Act to enforce its priority, but s. 111 of the Act shows that the Act does not apply if letters of administration have been granted to the Administrator-General as in this case. Even assuming that two remedies are open to the Crown, it is open to the Crown to pursue any remedy it likes. *The Deputy Commissioner of Police, Madras* v. *Vedantam* (1), *Manikkam Chettiar* v. *The Income-tax Officer, Madura South* (2).

The decision relied upon by the learned trial Judge in *The Food Controller* v. *Cork* (3) is easily distinguishable. In that case the Crown had lost its prerogative by reason of the express provisions of the Companies Act. The construction adopted in that case is also in accordance with the maxim *expressio unius est exclusio alterius.* The exercise of the Crown's prerogative under the Succession Act would not lead to absurd results. Priority is being claimed only in respect of unsecured debts, and the Crown is seeking to come in only after satisfaction of funeral debts and payment of wages due for services rendered. Further the Crown debt is due not in respect of a trading venture, but represents arrears of income-tax. *Re Northern Bengal Coal Co., Ltd.* (4).

There is no mention of the Crown in ss. 320-323 of the Succession Act, and s. 322 expressly saves priorities, if any, in respect of debts other than those mentioned in the preceding sections. Therefore it is not possible to argue that the opening words of s. 323, namely " Save as aforesaid no creditor ", have the effect of bringing the Crown within the operation of that section. This construction is also in accordance with s. 55 of the Administrator-General's Act which says that the

(1) I.L.R. 59 Mad. 428.
(2) I.L.R. [1938] Mad. 744.
(3) (1923) A.C. 647.
(4) 41 C.W.N. 458.

1939

U BA THI v. THE ADMINISTRATOR-GENERAL, BURMA.

Succession Act is not to supersede the rights and duties of the Administrator General. It is the duty of the Administrator-General to give effect to the common law rule of priority, and any creditor may apply to the Court for directions to be given to the Administrator-General as has been done in this case.

Clark for the respondent. The Succession Act, ss. 320-323, provides a complete scheme for the distribution of the deceased's estate and it is a reasonable construction to say that the Crown is bound by it. If the Crown's contention is correct it must really come in before payment is made, say, even of funeral expenses.

S. 54 of the Administrator-General's Act suggests that the Administrator-General has to comply with the provisions of the Succession Act. If this is borne in mind the relevancy of the *Food Controller's* case becomes apparent.

If the Crown is not bound by the Succession Act it follows that the Administrator General's Act also does not apply to the Crown, and if the Administrator General were to make a payment to the Crown in the circumstances of this case he will not be entitled to the protection given by s. 26. This construction is absurd.

Sections 320-323 of the Succession Act have by necessary implication postponed the priority of the Crown. The English cases are not of much help because one has to construe each piece of legislation in its own setting, but they may be referred to for general rules of construction.

The Administrator-General is himself a servant of the Crown, and he is asking the Court for directions. Would it be proper for him to pay a debt due to him in priority to all other debts because the debt is really due to the Crown ? This would be the result of holding that the Crown is entitled to priority in this case.

The last words of s. 322 which say that the other debts of the deceased shall be payable according to their respective priorities, if any, do give rise to some difficulty, but they seem to refer to secured and unsecured debts.

ROBERTS, C.J.—The question raised in this appeal may be stated in a very few words, but the answer is by no means free from difficulty. The question is whether, by necessary implication, the Crown is bound by sections 322 and 323 of the Succession Act, 1925.

The Crown enjoys a prerogative right of preference in payment to all its subjects of debts of equal degree, and except in so far as the Legislature has thought fit to interfere this rule is of universal application, as stated by Lord Macnaghten in *Commissioners of Taxation for the State of New South Wales* v. *Palmer* (1). In the case of *In re Henley & Co.* (2) it was pointed out that the Crown is not bound by a statute unless expressly mentioned or referred to by necessary implication. See also *Thèberge and another* v. *Landry* (3).

In Chapter VI of the Succession Act the Legislature has furnished a scheme for the administration of the estates of deceased persons, in which it nowhere makes any express reference to debts due to the Crown. By section 320 it is enacted that funeral expenses, death-bed charges and board and lodging for one month previous to death shall be paid before all debts. Funeral expenses are not strictly debts, but sums due for board and lodging for the month preceding death are debts. Section 321 directs that the expenses of obtaining probate or letters of administration are to be paid next. Then section 322 reads as follows:

"Wages due for services rendered to the deceased within three months next preceding his death by any labourer, artizan or

(1) (1907) A.C. 179. (2) 9 Ch.D. 469.
(3) 2 App. Ca. 102.

1939

U BA THI
v.
THE ADMINISTRATOR-GENERAL, BURMA.

ROBERTS, C.J.

domestic servant shall next be paid, and then the other debts of the deceased according to their respective priorities (if any)."

Section 323 says :

"Save as aforesaid, no creditor shall have a priority over another ; but the executor or administrator shall pay all such debts as he knows of, including his own, equally and rateably as far as the assets of the deceased will extend."

The learned trial Judge held that the Legislature by necessary implication must have intended to interfere with the prerogative of the Crown, and considered that it was impossible to hold that the words "no creditor" in section 323 meant "no creditor save the Crown."

In the *New South Wales* case (1) it was observed that there was no provision in the Bankruptcy Act in force there, which corresponded with the provisions of section 150 of the Bankruptcy Act then in force in England that the Crown should be bound except as provided therein.

Accordingly, though by section 48 of the New South Wales Bankruptcy Act all debts provable in the bankruptcy should be paid *pari passu*, it was held that this enactment did not override the prerogative of the Crown. In my opinion, this authority is binding upon us in the present appeal.

We have had the benefit of a very careful argument on both sides and perhaps I may be allowed to say that the doubts entertained and frankly referred to by the learned trial Judge as to the correctness of his decision have assisted me in concluding after some hesitation that this appeal should be allowed. Had he expressed himself with greater conviction I should no doubt have hesitated longer before reaching the conclusion at which I have arrived.

Some reference has been made to *The Food Controller* v. *Cork* (2). In that case the Companies

(1) (1907) A.C. 179. (2) (1923) A.C. 647.

Consolidation Act, 1908, fell to be considered, and Lord Birkenhead observed that whilst section 186 enacted that the property of a company in a voluntary winding up should be applied in satisfaction of its liabilities *pari passu*, section 209 allowed priority to specified Crown debts, specified wages, and to workmen's compensation. Therefore it followed that the generality of section 186 had to be supplemented and corrected by the particularity of the exceptions in section 209. He said,

"Among these exceptions are certain particular Crown debts. It would have been plainly impossible to adopt this form of legislation if it had been intended that other Crown debts should retain a priority inconsistent alike with the general language of section 186 and with the motive which led to the specification of admitted exceptions contained in section 209."

Now, section 209, sub-section (*1*) (*a*), of the Companies Act specifically mentions a priority in favour of all assessed taxes, land tax, property or income-tax, assessed up to a specified period. Accordingly the statute in express terms touches the Crown's prerogative. Since this has been done no claim that Crown debts are entitled to a general priority on the winding up of the company can, to use Lord Birkenhead's words, "survive the particular enumeration contained in section 209."

Lord Atkinson considered that where a statutory scheme for the administration of the estates of bankrupts or for the administration and application of insolvent limited liability companies which are being wound up, was of such a nature that the concurrent exercise by the Crown of one or both of its prerogatives produced unreasonable and absurd results, one must conclude that the Legislature must have intended to trench upon the prerogatives sufficiently to avoid these results. He pointed out that there was really one prerogative

1939

U BA THI v. THE ADMINISTRATOR-GENERAL, BURMA.

ROBERTS, C.J.

only, namely, the right to require the debtor to the Crown to pay this debt before he pays the debts he may owe to others. And, therefore, as it seems to me, we must look at the Succession Act to see whether there is anything unreasonable or absurd in holding that debts, not trading debts but taxes, due to the Crown fall outside the scope of the Succession Act altogether. Where trading debts have to be considered the effect of admitting the Crown's right of priority, as pointed out by Lord Shaw of Dunfermline, might widen the scope of the prerogative, and he observed that the case their Lordships were deciding in relation to a debt arising purely " in commercio " was at the other end of the scale from the *New South Wales* case (1) which was concerned with the sum of £53 for land and income-tax and fine due under statutory authority. It has been held by the High Court of Calcutta that trading activities are on a different footing in this respect from taxes and statutory dues. [*Re Northern Bengal Co., Ltd.* (2).]

Now, why is it unreasonable or absurd to say that the Crown is not bound by the Succession Act, unless there is a clear implication that it is so bound? Mr. Clark says if the words " save as aforesaid no creditor shall have a right of priority over another " in section 323 do not include the Crown, then the Crown is not bound by the Administrator-General's Act either. By section 26 of that Act the Administrator-General may distribute the assets of an estate in discharge of such claims as he has notice of, after giving the prescribed notice to creditors. But *ex hypothesi* the Crown would not be a creditor, and the Administrator-General could never get the protection against claims by the Crown which he gets against other creditors by section 26.

(1) (1907) A.C. 179. (2) (41) C.W.N. 458.

Then he says at any rate priorities are expressly mentioned by section 322 of the Succession Act which must be taken by implication to refer to the Crown's prerogative, "according to their respective priorities, if any." But the history of the inclusion of the words in the section seems to be that they were inserted to protect a decree-holder: [*Nilkomal Shaw* v. *Reed* (1)]: they were not in the Act of 1865. The phrase "debts of the deceased" in the section does not expressly include debts due to the Crown and the phrase "their respective priorities" does not approach the prerogative any more nearly.

I am also unable to accept the argument with reference to the Administrator-General's Act. It does not seem to me absurd or unreasonable that the Administrator-General should first satisfy himself that the debts due to the Crown have been paid before he seeks to distribute assets with the protection accorded to him by section 26 of the Act. Under section 54 the District Judge in certain cases is to take charge of property and to make payments for certain purposes the validity of which is unaffected by the Succession Act. But I do not see that the Succession Act anywhere touches the prerogative of the Crown. Doubtless a right may exist to pay mere funeral expenses for these are not debts due by the deceased at all; but payment of anything that is a debt due from the estate including hospital charges for attendance upon the deceased during his lifetime (under section 320 of the Succession Act to be paid by the executor or administrator) or wages due for services rendered by a labourer, artizan or domestic servant (whether paid under section 322 of the Succession Act, or under section 54 of the Administrator-General's Act by the

(1) 17 W.R. 513.

1939

U BA THI v. THE ADMINISTRATOR-GENERAL, BURMA.

ROBERTS, C.J.

District Judge) seems to me to be permissible only after due regard to the prerogative of the Crown whose rights remain unaffected by either Act.

I see nothing extraordinary in the view that an administrator, whether he be the Administrator-General or another, or a District Judge with statutory duties, should approach his task with the knowledge that the primary task is laid upon him of discharging the obligations of the deceased in respect to his payment of taxation before he turns to see who are the ordinary creditors and in what order they should be paid.

As regards the Succession Act, section 217 deals with the methods of administration of assets and says that it shall be carried out in accordance with the provisions of Part IX "save as otherwise provided by this Act or by any other law for the time being in force." It seems to me that the scope of the Crown prerogative falls under the definition of "any other law for the time being in force." In this part of the Succession Act there has been no reference at all to the Crown's prerogative and the necessary implication which follows in my mind is that the Legislature was careful to leave it alone.

Accordingly, in my opinion this appeal should be allowed. Costs to follow the event, advocate's fee twenty gold mohurs.

BRAUND, J.—I agree.