In the Privy Council.

No. 104 of 1936.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

IN THE MATTER of a reference as to whether the Parliament of Canada had legislative jurisdiction to enact The Farmers' Creditors Arrangement Act, being Chapter 53 of the Statutes of Canada, 1934, as amended by The Farmers' Creditors Arrangement Act Amendment Act, being Chapter 20 of the Statutes of Canada, 1935.

BETWEEN

THE ATTORNEY GENERAL OF BRITISH COLUMBIA *Appellant*

AND

THE ATTORNEY GENERAL OF CANADA AND THE ATTORNEYS GENERAL OF THE PROVINCES OF ONTARIO, QUEBEC, NEW BRUNSWICK, MANITOBA, ALBERTA AND SASKATCHEWAN - - *Respondents.*

CASE FOR THE RESPONDENT THE ATTORNEY GENERAL OF CANADA.

RECORD.

1. This is an appeal by special leave from the judgment of the Supreme Court of Canada pronounced on the 17th day of June, 1936, answering a question referred to the said Court for hearing and consideration by Order of His Excellency the Governor General in Council, dated November 18th, 1935, (P.C. 3578), pursuant to the provisions of Section 55 of the Supreme Court Act, touching the constitutional validity of The Farmers' Creditors Arrangement Act, 1934, and its amending Act of 1935. pp. 60–61. pp. 49–50. pp. 3–4.

2. The question referred to the Court was as follows: p. 4, ll. 17–20.

"Is the Farmers' Creditors Arrangement Act, 1934, as amended by the Farmers' Creditors Arrangement Act Amendment Act, 1935, or any of the provisions thereof, and in what particular or particulars or to what extent, *ultra vires* of the Parliament of Canada?"

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RECORD.

3. The full text of the principal Act and of its amending Act, referred to in the said question, will be found in the official prints which are separate documents on this appeal and are attached hereto.

4. The title of the Act is "An Act to Facilitate Compromises and Arrangements between Farmers and their Creditors," and, broadly, it accomplishes this by providing the procedure whereby a farmer who is unable to meet his liabilities as they become due may make a proposal for a composition, extension of time or a scheme of arrangement, to his creditors. If the proposal is accepted by the ordinary creditors and the secured creditors whose rights are affected concur, it is submitted to the Court for approval. If it is not accepted by the ordinary creditors or if a secured creditor whose rights are affected by it does not concur, the matter is referred to a Board of Review to formulate a proposal. If the proposal is accepted by the creditors and approved by the Court, or if it is formulated by the Board of Review and is approved by the creditors and the debtor, or if, though not so approved, it is confirmed by the Board of Review, it shall be binding upon all the creditors and the debtor. Section 17 provides that whenever any rate of interest exceeding seven per cent. is stipulated for in any mortgage of farm real estate, after tender or payment of the amount owing, together with three months' further interest, no interest, after the expiry of the three months, shall be chargeable at any rate in excess of five per cent per annum. A summary of the main provisions of the Act is set out in paragraphs 4 to 9, inclusive, of the factum of the Attorney General of Canada.

pp. 6-9.

5. The relevant provisions of the British North America Act contained in sections 91, 92 and 95 thereof are the following:

> "91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the legislatures of the Provinces, and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,—
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> . . . . .
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> 19. Interest.
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> . . . . .
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> 21. Bankruptcy and Insolvency.
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> . . . . .
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> And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the

Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces." RECORD.

"92. In each Province the Legislature may exclusively make laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,—

. . . . .

13. Property and Civil Rights in the Province.

. . . . .

16. Generally all Matters of a merely local or private Nature in the Province."

. . . . .

"95. In each Province the Legislature may make Laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from Time to Time make Laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces; and any Law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada."

6. On the hearing of argument on the 4th and 5th days of February, 1936, before Duff, C.J. and Rinfret, Cannon, Crocket, Davis and Kerwin, JJ., Counsel were heard on behalf of the Attorney General of Canada, as well as on behalf of the Attorneys General of the Provinces of Ontario, Quebec, New Brunswick, Manitoba, British Columbia, Alberta and Saskatchewan. p. 50, ll. 7–22.

7. On the 17th day of June, as aforementioned, the Court delivered judgment, answering the question referred to the Court as follows: p. 50, ll. 29–33.

"The Chief Justice, Mr. Justice Rinfret, Mr. Justice Crocket, Mr. Justice Davis and Mr. Justice Kerwin are of the opinion that the statute is *intra vires;* Mr. Justice Cannon is of the opinion that the statute, except section 17 is *ultra vires* and that section 17 is *intra vires.*"

8. The judgment of the majority of the Court was delivered by the Chief Justice and concurred in by Rinfret, Crocket, Davis and Kerwin, JJ. The learned Chief Justice, after examining the Act and reviewing the cases of *L'Union St. Jacques* v. *Belisle* (1875) L.R. 6 P.C. 31 and *In re Companies' Creditors Arrangement Act* (1934) S.C.R. 660, considered the nature of bankruptcy legislation and the history of its relation to securities and the position of secured creditors. In summarizing his opinion, he said that the power to enact this statute was derived from subsection 21 of section 91 of the British North America Act in virtue of which the exclusive legislative authority of the Parliament of Canada extended to the subject of Bankruptcy and Insolvency. The broad purpose of the statute was, in the p. 51 to p. 57 ll. 21.

RECORD. words of the title, " to facilitate compromises and arrangements between farmers and their creditors." The provisions of the statute affected farmers who were in such a situation that they were unable to pay their debts as they fell due. It was competent to Parliament, possessing plenary authority in respect of bankruptcy and insolvency, to treat this condition of affairs as a state of insolvency. The provisions of the statute only came into operation where such a state of insolvency existed. *Prima facie*, therefore, it was, within the ordinary meaning of the words, a statute dealing with insolvency. The statute was, by its express terms, incorporated into the general system of bankruptcy legislation in force in Canada and it was not open to dispute that legislation in respect of " compositions and arrangements is a natural and ordinary component of a system of bankruptcy and insolvency law " : *In re Companies' Creditors' Arrangement Act* (1934) S.C.R. 659.

It was contended on behalf of the provinces that the jurisdiction of the Dominion in relation to this subject was limited to the enactment of legislation which at least in its broad lines conformed to the systems of bankruptcy and insolvency legislation which had prevailed in Great Britain or in Canada down to the time of the passing of the British North America Act. They did not consider it necessary to decide upon the question whether or not the powers vested in Parliament in relation to this subject were for all time restricted by reference to the legislative practice which obtained prior to the passing of the British North America Act. Notwithstanding this statement the learned Chief Justice said in the course of his judgment that

p. 55, l. 41. " Even if it were open to us to depart from our recent decision in the reference concerning the Companies' Creditors' Arrangement Act, we should, treating the matter as *res integra*, have thought that the history of bankruptcy legislation down to the year 1867 would not justify a conclusion that provisions such as those in the Companies' Creditors' Arrangement Act, or those in the statute before us dealing with secured creditors were provisions beyond the discretion of Parliament to incorporate in a system for the administration of the estates of insolvents."

Continuing with his summary, the learned Chief Justice further said that the attack upon the statute was mainly directed against the provisions which made it possible to force the terms of a composition upon a secured creditor by which a secured creditor might be compelled to submit to the reduction of the debt owing to him by the insolvent. This was not a new feature of insolvency legislation, although down to the enactment of the Companies' Creditors' Arrangement Act in 1933 mortgagees had never been by legislation placed in such a position. The statute now under consideration did not in this respect differ from the Companies' Creditors' Arrangement Act and the principle of their decision on the reference respecting that statute (1934 S.C.R. 659) was applicable; that this, although a departure from previous practice in bankruptcy or insolvency legislation, was not

beyond the discretionary authority bestowed upon Parliament under head No. 21 of Section 91. RECORD.

9. Cannon, J. said the paramount consideration was that the Act which they were considering lacked the essential elements of bankruptcy legislation, to wit: the distribution of the debtor's assets rateably among his creditors, in the case of an insolvent person, whether he was willing that his assets be so distributed or not. Although provision might be made for a voluntary assignment as an alternative, it was only as an alternative. See: Voluntary Assignment Case, *Attorney General of Ontario* v. *Attorney General of Canada* (1894) A.C. 189 at 200. p. 57, ll. 22–48; pp. 58–59; p. 60, ll. 1–5.

The Act did not provide for the rateable distribution of the assets of the debtor nor for the discharge of the debt. On the contrary, the only aim of the Act was to keep the farmer on his land at the expense of his creditors; the proposal for arrangement must come from him and covered only a composition, extension of time or scheme of arrangement either before or after an assignment had been made.

The learned Judge proceeded to refer to the powers vested in the Board of Review under Section 12, subsections 6, 7, 8 and 9 of the Act and said these evidently were not provisions similar to what they considered proper proceedings in insolvency in the Companies' Creditors' Arrangement Act because they lacked the essential element of a compromise; the mutual agreement of the debtor and of at least a fixed majority of the creditors. Under subsection 6, section 12, the Board might impose an entirely new contract on the parties, confiscate, if they deemed it advisable, in whole or in part, the principal due to the creditors and consider only under subsection 8 the present and prospective capability of the debtor to perform the obligation prescribed by the Board and the productive value of the farm, which was not to be considered as an asset to be distributed among the creditors but as an intangible and unseizable asset reserved for the enjoyment and protection of the debtor. The learned Judge then quoted a passage from the judgment of Lord Selborne in *L'Union St. Jacques* v. *Belisle* (1875) L.R. 6 P.C. 31, 38, where the case of the appellant Society was considered to be not a case for insolvency legislation but a local and private matter within the provincial jurisdiction. Applying this test, the learned Judge said the Farmers' Creditors Arrangement Act was one which might be within the competence of the provincial legislature, for the same reasons, applicable in each province to each individual farmer who found himself in difficulties, which then applied to L'Union St. Jacques, in order to enable him to carry on and, possibly at some future time, to recover his prosperity. He could not, in view of the accepted aims and past history of the bankruptcy and insolvency legislation, reach the conclusion that Parliament in passing this legislation did not exceed the domain of bankruptcy and insolvency to which its jurisdiction was limited. It had set up a charitable or eleemosynary institution, to be established in each separate province; such local charities were to be established, maintained and managed under provincial legislation by virtue of section 92 (7).

RECORD. The legislation had nothing to do directly with agriculture, with the science, the art or the process of supplying human wants by raising the products of the soil. He therefore answered the question referred to the Court in the affirmative for the whole Act excepting Section 17 which fixed the rate of interest under certain conditions which did not clearly exceed the powers of Parliament under Section 91(19).

The full text of the reasons for judgment, delivered by the Chief Justice and Cannon, J., respectively, will be found reported in (1936) S.C.R. at pp. 384-398.

10. The Attorney General of Canada submits that the answer given by the majority of the Court to the question referred to it is right and that given by Cannon, J., except as to section 17 of the Farmers' Creditors Arrangement Act is wrong and that the said question should be answered, without qualification, in the negative, for the reasons set out in the judgment of the learned Chief Justice of Canada and for the reasons set out in the factum filed on behalf of the Attorney General of Canada in the Supreme Court of Canada and for the following among other

REASONS

1. Because the legislation is legislation in relation to bankruptcy and insolvency which is competent under Head 21 of the British North America Act, 1867.
2. Because the legislation in substance is an amendment to the Bankruptcy Act and part of the existing bankruptcy legislation.
3. Because since 1623 bankruptcy and insolvency legislation has extended to the rights of a secured creditor or a person who has acquired property subject to a right of redemption.
4. Because proposals for compositions, extensions of time and schemes of arrangement have long been a recognized feature of bankruptcy and insolvency legislation.
5. Because the powers of the Parliament of Canada in relation to bankruptcy and insolvency are not limited to re-enacting legislation similar to that in force in Great Britain or Canada prior to 1867.
6. Because the provisions of the legislation relating to a secured creditor or person who has acquired property subject to a right of redemption or relating to proposals for compositions, extensions of time and schemes of arrangement are proper bankruptcy or insolvency legislation or properly ancillary thereto.

7. Because Section 17 of the Act may be justified as legislation in relation to interest under Head 19 of Section 91 of the British North America Act, 1867.

8. Because, by reason of the conditions described in the preamble to the Act, it is legislation in relation to agriculture and to the peace, order and good government of Canada.

N. W. ROWELL.

L. S. ST. LAURENT.

C. P. PLAXTON.

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CASE FOR THE RESPONDENT THE ATTORNEY GENERAL OF CANADA.

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