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.*

RECORD OF PROCEEDINGS.

INDEX OF REFERENCE.

No.	Description of Document.	Date.	Page.
1	Order of Reference by the Governor-General in Council - - - - - - - - -	18th November 1935 -	3
	IN THE SUPREME COURT OF CANADA.		
2	Order of Supreme Court of Canada for inscriptions of Reference and directions - - - -	25th November 1935 -	4
3	Notice of hearing - - - - - - - - -	25th November 1935 -	5
4	Factum of The Attorney-General of Canada - -	- - - - - -	6
5	Factum of The Attorney-General of Ontario - -	- - - - - -	21

o G 17302 100 10/36 E & S

No.	Description of Document.	Date.	Page.
6	Factum of The Attorney-General of Quebec - -	- - - - - -	26
7	Factum of The Attorney-General of New Brunswick	- - - - - -	35
8	Factum of The Attorney-General of Manitoba -	- - - - - -	36
9	Factum of The Attorney-General of British Columbia	- - - - - -	36
10	Factum of The Attorney-General of Saskatchewan	- - - - - -	49
11	Formal Judgment - - - - - - -	17th June 1936 - -	49
12	Reasons for Judgment :—		
	(*a*) Duff C.J. (concurred in by Rinfret, Crocket, Davis and Kerwin JJ.). - - - - -	- - - - - -	51
	(*b*) Cannon, J. - - - - - - - -	- - - - - -	57
	IN THE PRIVY COUNCIL.		
13	Order in Council granting special leave to appeal to His Majesty in Council - - - - -	26th September 1936 -	60
	STATUTES AND OTHER DOCUMENTS.		
14	The Farmers' Creditors Arrangement Act, Statutes of Canada (1934) 24–25 George V. Chapter 53 (*Separate document*) - - - - - - -	- - - - - -	61
15	The Farmers' Creditors Arrangement Act Amendment Act, Statutes of Canada (1935) 25–26 George V. Chapter 20 (*Separate document*) - -	- - - - - -	61

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.*

RECORD OF PROCEEDINGS.

No. 1.

Order of Reference by the Governor-General in Council.

P.C. 3578

No. 1. Order of Reference by the Governor-General in Council, 18th November 1935.

Certified *to be a true copy of a Minute of a Meeting of the Committee of the Privy Council, approved by His Excellency the Governor-General on the 18th November,* 1935.

The Committee of the Privy Council have had before them a report, dated 13th November, 1935, from the Minister of Justice, referring to The Farmers' Creditors Arrangement Act, 1934, Chapter 53 of the Statutes of 10 Canada, 1934, being An Act to Facilitate Compromises and Arrangements between Farmers and their Creditors, and to its amending Act, The Farmers'

No. 1. Order of Reference by the Governor-General in Council, 18th November 1935 —*continued.*

Creditors Arrangement Act Amendment Act, 1935, Chapter 20 of the Statutes of Canada, 1935, the principal of which Acts was enacted as appears from the preamble thereof upon the recital that in view of the depressed state of agriculture the present indebtedness of many farmers was beyond their capacity to pay; that it was essential in the interest of the Dominion to retain the farmers on the land as efficient producers and for such purpose it was necessary to provide means whereby compromises or rearrangements might be effected of debts of farmers who were unable to pay.

The Minister states that doubts exist or are entertained as to whether the Parliament of Canada had jurisdiction to enact the said Acts; or either of them, in whole or in part, and that it is expedient that such question should be referred to the Supreme Court of Canada for judicial determination. 10

The Committee, accordingly, on the recommendation of the Minister of Justice, advise that the following question be referred to the Supreme Court of Canada for hearing and consideration, pursuant to Section 55 of the Supreme Court Act :—

> 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? 20

E. J. LEMAIRE,
Clerk of the Privy Council.

In the Supreme Court of Canada.

No. 2. Order for inscription of Reference and directions, 25th November 1935.

No. 2.

Order of Supreme Court of Canada for Inscription of Reference No. 6 and Directions.

IN THE SUPREME COURT OF CANADA.

BEFORE : The Right Honourable the Chief Justice of Canada.

MONDAY, the 25th day of November, A.D. 1935.

IN THE MATTER of the question referred to the Supreme Court of Canada as to whether the Parliament of Canada had legislative jurisdiction to enact The Farmers' Creditors Arrangement Act, 1934, being Chapter 53 of the Statutes of Canada, 1934; and its amending Act, The Farmers' Creditors Arrangement Act Amendment Act, 1935, being Chapter 20 of the Statutes of Canada, 1935. 30

UPON the application of the Attorney-General of Canada for directions as to the inscription for hearing of the case relating to the question herein referred by His Excellency the Governor-General in Council, for hearing and consideration by the Supreme Court of Canada, pursuant to the provisions of section 55 of the Supreme Court Act, R.S.C. 1927, chapter 35; upon hearing read the Order in Council, dated November 18th, A.D. 1935 (P.C. 3578) setting forth the said question; and upon the consent of the Attorneys-General of the Provinces of Ontario, Quebec, Nova Scotia, New Brunswick, 40

Prince Edward Island, Manitoba, British Columbia, Saskatchewan and Alberta, respectively, endorsed hereon :

It is Ordered that the said Reference be inscribed for hearing at the present sittings of this Honourable Court and be heard the 15th day of January, A.D. 1936.

And it is Further Ordered that the respective Attorneys-General of the several Provinces of Canada be notified of the hearing of the argument upon the said Reference by sending to each of them by registered letter on or before the 1st day of December, A.D. 1935, a Notice of Hearing of the said Reference together with a copy of this Order.

And it is Further Ordered that the documents relevant to this Reference be included in the printed Case referred to in the Order of Directions made by the Right Honourable the Chief Justice of Canada on the 14th day of November, A.D. 1935.

And it is Further Ordered that the Attorney-General of Canada and the Attorneys-General of the several Provinces of Canada be at liberty to file a factum of their respective arguments on the said Reference on or before the 10th day of January, A.D. 1936, and that the said Attorneys-General be at liberty to appear personally or by counsel upon the hearing of the said Reference.

Sgd. L. P. DUFF,
C.J.

No. 3. Notice of hearing, 25th November 1935.

No. 3.

Notice of Hearing of Reference No. 6.

IN THE SUPREME COURT OF CANADA

In the Matter of the question referred to the Supreme Court of Canada as to whether the Parliament of Canada had legislative jurisdiction to enact The Farmers' Creditors Arrangement Act, 1934, being Chapter 53 of the Statutes of Canada, 1934; and its amending Act, The Farmers' Creditors Arrangement Act Amendment Act, 1935, being Chapter 20 of the Statutes of Canada, 1935.

Take Notice that the Reference herein has, by Order of the Right Honourable the Chief Justice of Canada, dated the 25th day of November, A.D. 1935, been inscribed for hearing at the present sittings of the Supreme Court of Canada, and to be heard on the 15th day of January, A.D. 1936; and you are hereby notified of the hearing of the said Reference pursuant to the terms of the said Order, copy of which is hereto annexed.

Dated at Ottawa, this 25th day of November, A.D. 1935.

W. STUART EDWARDS,
Solicitor for the Attorney-General of Canada.

To : The Attorneys-General
of the several Provinces of Canada.

In the Supreme Court of Canada.

No. 4.
Factum of the Attorney-General of Canada.

No. 4.

Factum of the Attorney-General of Canada.

PART I

Statement of Case

1. By Order of His Excellency the Governor-General in Council, dated the 18th November, 1935 (P.C. 3578) (Record p. 4), the following question was referred to the Supreme Court of Canada for hearing and consideration pursuant to section 55 of the Supreme Court Act:

> 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? 10

2. These Acts were enacted as Chapter 53 of the Statutes of Canada, 1934, and as Chapter 20 of the Statutes of Canada, 1935, respectively. An office consolidation of the two Acts under the title "The Farmers' Creditors Arrangement Act" has been printed and for convenience in argument is hereinafter referred to as "The Act." Copies of this consolidation and of the Official prints of the Acts are furnished for the use of the Court. An office consolidation of the Bankruptcy Act and Bankruptcy Rules is also furnished for the convenience of the Court. 20

3. 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 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 30 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. The Act, although not divided into parts, is separated into sections by headings, and it is proposed to deal in detail with the provisions of the Act in order under these headings.

4. The preamble sets out the objects of the Act and recites:—

> "Whereas in view of the depressed state of agriculture the present indebtedness of many farmers is beyond their capacity to pay, and whereas it is essential in the interest of the Dominion to 40 retain the farmers on the land as efficient producers and for such purpose it is necessary to provide means whereby compromises or arrangements may be effected of debts of farmers who are unable to pay":

5. After the preamble and the first section giving the short title, the first heading is " Bankruptcy and Insolvency Provisions " (Sections 2 to 5A). Sections 2 to 5 were enacted in 1934, and Section 5A in 1935. Section 2 (1) is an interpretation section defining, among other things, " creditor " as including " secured creditor " (sec. 2 (1) (d)), and " farmer " as meaning a " person whose principal occupation consists in farming or the tillage of the soil " (Sec. 2 (1) (*f*)). Section 2 (2) applies the provisions of the Bankruptcy Act and Bankruptcy Rules, and reads as follows :—

> " (2) Unless it is otherwise provided or the context otherwise requires, expressions contained in this Act shall have the same meaning as in the Bankruptcy Act, and this Act shall be read and construed as one with the Bankruptcy Act, but shall have full force and effect notwithstanding anything contained in the Bankruptcy Act, and the provisions of the Bankruptcy Act and Bankruptcy Rules shall, except as in this Act otherwise provided, apply *mutatis mutandis* in the case of proceedings hereunder including meetings of creditors."

By Section 2 (3) it is provided that Part I of the Bankruptcy Act, notwithstanding Section 7 thereof, is to apply to a farmer who has failed to carry out the terms of his proposal. Provision is made for the appointment of Official Receivers to administer the Act and act as official receivers, custodians and trustees under the Bankruptcy Act, in the case of an assignment or petition involving a farmer (Sec. 3). The provisions of the Bankruptcy Act relating to gazetting are not to apply (Sec. 4). Exclusive jurisdiction in bankruptcy, subject to appeal, is granted to the Superior Court of the judicial district where the farmer resides in Quebec, and in other provinces, to the County or District Court, and the powers of the Judge and duties of the Clerk are defined in part (Sec. 5). Restrictions are laid on the release of persons or of security by proceedings under the Act (Sec. 5A).

5.* The second head, "Compositions" (Sections 6 to 11) defines the initial procedure under the Act. It provides that a farmer who is unable to meet his liabilities as they become due may make a proposal for a composition, extension of time or scheme of arrangement, and shall file the proposal with the Official Receiver, who shall forthwith convene a meeting of the creditors. (Sec. 6). The Official Receiver is to perform the duties and functions required by the Bankruptcy Act to be performed by a trustee in the case of a proposal for a composition, extension of time or scheme of arrangement. These duties and functions are found in sections 11, 12, 13, 14, 15 and 16 of the Bankruptcy Act, R.S.C. (1927), chapter 11, as amended, and are, generally, the submission to the meeting of the proposal, and, on its acceptance by the creditors, the application to the Court to approve it. A proposal may affect a debt owing to a secured creditor or owing to a person who has acquired property subject to a right of redemption, but except in the case of a proposal confirmed by the Board of Review, the concurrence of such creditor shall be required. (Sec. 7). Such a creditor, if the proposal relates to his rights, may value his security, and shall be entitled to vote only in respect of the balance of his claim after deducting

* *Sic.*

In the Supreme Court of Canada.

No. 4. Factum of the Attorney-General of Canada—*continued.*

his valuation, but no proposal shall be approved by the Court which provides for payment in excess of the valuation. (Sec. 8). The provisions of the Bankruptcy Act preventing the approval of a proposal which does not provide for a payment of not less than fifty cents on the dollar, and priority of payment of certain debts are declared not to apply. (Sec. 9). Power is given to the Court to order a farmer to execute instruments necessary to give effect to the proposal when it has received the approval of the Court or the confirmation of the Board of Review (Sec. 10). On the filing of a proposal, the property of the debtor is deemed to be under the authority of the Court, and creditors' remedies may not be exercised without leave of the Court for ninety days, or such further time as the Court may order (Sec. 11).

6. The third head " Provincial Boards of Review " (Sections 12 to 14) provides for the establishment in any Province of a Board of Review consisting of a Chief Commissioner, who shall be a Judge having jurisdiction in bankruptcy, and two Commissioners, one representative of creditors and one representative of debtors. (Sec. 12 (1) (2) and (3)). When the Official Receiver reports that no proposal has been approved by the creditors, although one has been made, the Board, on the written request of a creditor or the debtor, shall endeavour to formulate an acceptable proposal, and shall consider representations of the parties interested. (Sec. 12 (4)). If any such proposal is approved by the creditors and the debtor, it shall be binding on them. (Sec. 12 (5)). If such proposal is not approved the Board may confirm it and it will then be binding upon all the creditors and the debtor. (Sec. 12 (6)). The full Board must deal with every request to formulate a proposal, and the determination of the majority shall prevail. (Sec. 12 (7)). The Board shall base its proposal upon the present and prospective capability of the debtor to perform the obligations prescribed and the productive value of the farm, and may decline to formulate a proposal where it does not consider it can do so in fairness and justice to the debtor and the creditors. (Sec. 12 (8) and (9)). The Board is vested with the powers of a Commissioner appointed under the Inquiries Act. (Sec. 12 (10)). Special provision is made for insolvent farmer debtors residing in Quebec, whereby they may make an assignment for the general benefit of their creditors. (Sec. 12 (11)). Provision is also made for the appointment of a registrar and other necessary officers to assist the Board (Sec. 13) and for hearing the Official Receiver, custodian or trustee in person. (Sec. 14).

7. The fourth head, " Rules and Regulations " (Sections 15 and 16) gives power to the Governor in Council to make rules and regulations governing procedure and to establish a tariff of fees. (Sec. 15 (1)). Every trustee acting under the Act shall be subject to such supervision by the Superintendent of Bankruptcy as the Governor in Council may determine. (Sec. 15 (2)). The Minister of Finance is charged with the administration of the Act, and provision is made for the payment of expenses and a report to Parliament on the expenditure and proceedings under the Act. (Sec. 16).

8. The fifth head, " Interest on Farm Loans " (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.

9. Section 18 provides that the Act, except Section 17, shall not come into force in any Province until proclaimed by the Governor in Council to be in force. The Act has been proclaimed in every Province of the Dominion 10 of Canada—in Manitoba, Saskatchewan and Alberta as of the 1st September, 1934, in Ontario and Quebec as of the 1st October, 1934, and in British Columbia, Nova Scotia, New Brunswick and Prince Edward Island as of the 1st November, 1934. Section 19 provides that without the concurrence of the creditor, the Act shall not apply to any debt incurred after the 1st May, 1935.

PART II.

SUBMISSION OF THE ATTORNEY-GENERAL FOR CANADA.

10. The Attorney-General for Canada will contend that The Farmers' Creditors Arrangement Act, 1934, and The Farmers' Creditors Arrangement 20 Act Amendment Act, 1935, in their entirety are within the legislative powers of the Parliament of Canada as being, (*a*) legislation in relation to bankruptcy and insolvency; (*b*) legislation in relation to agriculture; (*c*) as to some of the provisions thereof, legislation in relation to interest, and (*d*) legislation under its residuary powers to make laws for the peace, order and good government of Canada.

PART III.

ARGUMENT.

11. The relevant provisions of the British North America Act appear to be the following :—

30 " 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 40 say,—

. . . .

19. Interest.

. . . .

In the Supreme Court of Canada.

No. 4. Factum of the Attorney-General of Canada—*continued.*

21. Bankruptcy and Insolvency.

. . . .

" 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."

" 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,— 10

. . . .

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 20 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."

12. *The Act is legislation in relation to Bankruptcy and Insolvency.*— The interpretation of the words " Bankruptcy and Insolvency " as used in head 21 of sec. 91 of the British North America Act, has come before the Judicial Committee of the Privy Council on several occasions, notably in the cases of *L'Union St. Jacques* v. *Bélisle* (1874), *L.R.* 6 *P.C.* 31; 30 *Cushing* v. *Dupuy* (1880) 5 *App. Cas.* 409; *The Voluntary Assignments Case, Attorney-General of Ontario* v. *Attorney-General for Canada* (1894) *A.C.* 189 and *Royal Bank of Canada* v. *Larue* (1928) *A.C.* 187. In the first case Lord Selborne in delivering the judgment said (at p. 36) :—

" The words describe in their known legal sense provisions made by law for the administration of the estates of persons who may become bankrupt or insolvent, according to rules and definitions prescribed by law, including of course the conditions in which that law is to be brought into operation, the manner in which it is to be brought into operation, and the effect of its operation." 40

In *Cushing* v. *Dupuy* (1880) 5 *App. Cas.* 409, Sir Montague Smith, in delivering the judgment said (at pp. 415, 416) :—

" It would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates without interfering with and modifying some of the ordinary rights of property, and other civil rights, nor without providing some mode of special

procedure for the vesting, realization, and distribution of the estate, and the settlement of the liabilities of the insolvent. Procedure must necessarily form an essential part of any law dealing with insolvency. It is therefore to be presumed, indeed it is a necessary implication, that the Imperial statute, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights and procedure within the Provinces, so far as a general law relating to those subjects might affect them."

10 In *The Voluntary Assignments* Case (1894) *A.C.* 189, an Ontario Act respecting assignments and preferences by insolvent persons was considered, and it was concluded that in the absence of Dominion legislation on the subject Provincial legislation was competent. In the most recent decision, *Royal Bank of Canada* v. *Larue* (1928) *A.C.* 187, the question of the priority of a judicial hypothec upon real assets of a debtor in the Province of Quebec was considered in the light of an authorized assignment subsequently made under the Bankruptcy Act. The Lord Chancellor, Viscount Cave, in delivering the judgment said (at p. 197) after reference to earlier judgments :—

"Taking these observations as affording assistance in the 20 construction of s. 91, head 21, of the Act of 1867, their Lordships are of opinion that the exclusive authority thereby given to the Dominion Parliament to deal with all matters arising within the domain of bankruptcy and insolvency enables that Parliament to determine by legislation the relative priorities of creditors under a bankruptcy or an authorized assignment. A creditor who has obtained judgment for his debt and has issued execution upon the debtor's lands or goods remains a creditor; and it is entirely within the authority of the Dominion Parliament to declare that such a creditor, although (as Newcombe J. expressed it) he has been 'first in the race for execution' 30 but has not yet proceeded upon his execution and become satisfied by payment, shall on the occurrence of bankruptcy or a *cessio bonorum* be reduced to an equality with the general body of creditors."

The powers of the Dominion Parliament with regard to head 21 of sec. 91 have recently been considered in the Supreme Court of Canada in the Reference concerning The Companies' Creditors Arrangement Act, 1934, S.C.R. 659. That Act has important features similar to those of the Act in question here. It provides that when a compromise or arrangement has been proposed between a bankrupt and insolvent company and its creditors 40 secured and unsecured, the proposal may be submitted to the Court and on approval by three-quarters in value of the class of creditors affected may be sanctioned by the Court and become binding on the creditors concerned and on the company. The Chief Justice of Canada said (at p. 660) :—

"The history of the law seems to show clearly enough that legislation in respect of compositions and arrangements is a natural and ordinary component of a system of bankruptcy and insolvency law."

In the Supreme Court of Canada.

No. 4. Factum of the Attorney-General of Canada—*continued.*

And again (at p. 661):—

> "Matters normally constituting part of a bankruptcy scheme, but not in their essence matters of bankruptcy and insolvency may, of course, from another point of view and in another aspect be dealt with by a provincial legislature; but, when treated as matters pertaining to bankruptcy and insolvency, they clearly fall within the legislative authority of the Dominion."

The Supreme Court held that the Companies' Creditors Arrangement Act was within the legislative power of the Parliament of Canada.

13. It is submitted that these cases establish the following relevant propositions as to the power of the Parliament of Canada to legislate under head 21 of sec. 91 :

(1) Parliament may prescribe and define the conditions which shall constitute the state of bankruptcy or insolvency and the circumstances under which bankruptcy and insolvency law may be brought into operation and the manner and effect of its operation.

(2) Parliament in so legislating may interfere with and modify property and civil rights and procedure within the Provinces and may provide various ancillary provisions in respect of matters which would otherwise be within the legislative competence of the Provinces, to prevent the law being defeated.

(3) Parliament may affect the priority of preferred creditors and the security of secured creditors as well as the rights of unsecured creditors.

(4) Parliament may provide for compositions and arrangements for they are natural and ordinary components of a system of bankruptcy and insolvency law.

14. The Act only applies to a farmer who is unable to meet his liabilities as they become due (Sec. 6 (1)). The Parliament of Canada is competent to treat such a condition as evidence of bankruptcy or insolvency and to enact legislation providing either for a compulsory distribution of the assets of such farmer or for a composition, extension of time or scheme of arrangement between such farmer or his creditors.

15. In England prior to 1861 there had been a distinction between bankruptcy and insolvency laws. Bankruptcy laws administered in the Bankruptcy Court applied only to traders and provided generally for the equal distribution of the debtor's assets among his creditors, and thereupon for the discharge of the liabilities of honest debtors. Insolvency laws administered in the Insolvent Debtors' Court applied to all debtors and provided generally for the release from prison of a debtor upon the assignment of his property for equal distribution among his creditors, but not for his release from his liabilities. In 1861 by "An Act to amend the law relating to Bankruptcy and Insolvency in England" (24–25 Vic. chap. 134) the two systems were merged and all debtors whether traders or not were made subject to the Act. (Sec. 69).

16. In Canada, prior to 1867, there had been similar legislation. Although there had been an Ordinance concerning Bankrupts in Lower

In the Supreme Court of Canada.

No. 4.
Factum of the Attorney-General of Canada—*continued.*

Canada in 1839 (2 Vic. chap. 36). The first general bankruptcy law was enacted in 1843 (7 Vic.) by chap. 10 of the Statutes of Canada which repealed the previous Ordinance. Both these enactments applied to traders and followed broadly the English bankruptcy laws. This Act of 1843 expired in 1865. Acts similar to the English insolvency laws had also been enacted in the Canadian Provinces. In 1864 the Parliament of Canada passed " An Act respecting Insolvency " (27–28 Vic. chap. 17) which had many of the features of the English Act of 1861. Generally, it applied in Upper Canada to any person unable to meet his engagements and in Lower Canada
10 to a trader in such circumstances and provided for voluntary and involuntary assignments for the benefit of creditors and for compositions. Subsec. 1 of sec. 9 reads as follows :—

" *Of Composition and Discharge*

" 9. A deed of composition and discharge executed by the majority in number, of those of the creditors of an Insolvent who are respectively creditors for sums of one hundred dollars and upwards, and who represent at least three-fourths in value of the liabilities of the Insolvent subject to be computed in ascertaining such proportion, shall have the same effect with regard to the remainder of his creditors,
20 and be binding to the same extent upon him, and upon them, as if they were also parties to it; and such a deed may be validly made either before, pending, or after proceedings upon an assignment, or for the compulsory liquidation of the estate of the insolvent; and the discharge therein agreed to shall have the same effect as an ordinary discharge obtained as hereinafter provided."

The Civil Code of Lower Canada of 1866 stated :—

" By ' bankruptcy ' is meant the condition of a trader who has discontinued his payments." Art. 17 (23).

17. It would appear clear from an examination of these statutes that
30 the words " bankruptcy and insolvency " as used in head 21 of sec. 91 of the British North America Act would embrace jurisdiction over the affairs of a debtor who is unable to meet his liabilities as they become due.

18. Subsequent legislation confirms this view. Provisions of the Canadian Insolvent Act of 1869, 32–33 Vic. chap. 16, applied to traders unable to meet their engagements (sec. 2) or ceasing to meet their liabilities as they became due (sec. 14). The Canadian Insolvent Act of 1875, 38 Vic. chap. 16, applied to an " insolvent " who was defined as " a debtor subject to the provisions of this Act unable to meet his engagements " (sec. 2 (*f*)). The Bankruptcy Act of 1919, 9–10 Geo. V, chap. 36, defines an " insolvent
40 person " and " insolvent " as including a person " who is for any reason unable to meet his obligations as they respectively become due " or " who has ceased paying his current obligations in the ordinary course of business " (sec. 2 (*t*)) and a similar provision is in the Bankruptcy Act as it now stands save the word " generally " has been substituted for " respectively " (R.S.C., 1927, chap. 11, sec. 2 (*u*)). In 1922 by an amendment to the Act of 1919 it was made an act of bankruptcy for a debtor to cease " to meet his liabilities

In the Supreme Court of Canada.

No. 4. Factum of the Attorney-General of Canada—*continued.*

as they became due " (12–13 Geo. V, chap. 8, sec. 3). This provision now states that a debtor commits an act of bankruptcy " if he ceases to meet his liabilities generally as they become due " (R.S.C., 1927, chap. 11, sec. 3 (*j*)). Under the Winding-up Act (R.S.C., 1927, chap. 213), a company is deemed insolvent " if it is unable to pay its debts as they become due " (sec. 3 (*a*)).

The Uniform Sale of Goods Act, (R.S.O., 1927, chap. 163, sec. 1 (3), and Imperial Statute 56–57 Vic., chap. 71, sec. 62) provides :—

> " A person shall be deemed to be insolvent within the meaning of this Act who either has ceased to pay his debts in the ordinary course of business or who cannot pay his debts as they become due." 10

19. The definition found in the statutes cited in the preceding paragraph is the one most frequently found in the cases. In *London* v. *Brighton* (1915) 2 *K.B.* 493, where the leading cases are discussed, Lord Justice Buckley sums up the authorities at pp. 501–502 :—

> " There are decisions as to the meaning of the word ' insolvent.' They all state that ' insolvency ' means commercial insolvency, that is to say, inability to pay debts as they become due. I need not refer to the details of the cases. They are these : *Bayly* v. *Schofield* (1 *M.* & *S.* 338) in 1813 ; *Parker* v. *Gossage* (2 C.M. & R. 617) in 1835 ; and In re *Muggeridge's Settlement* (29 *L.J.* (*Ch.*) 288) in 1860. In this 20 last case a life estate was limited to a person until he should be bankrupt or insolvent, and Wood V.-C. said : ' As to the meaning of the word " insolvent " it is now settled that it is not a technical term, but simply means a person who is incapable of paying his debts,' and he held that the life interest had determined upon insolvency in the commercial sense."

20. The Act applies only to a farmer who is unable to meet his liabilities as they become due (Sec. 6 (1)). Such a one in the general accepted sense of the term is an insolvent and in some instances a bankrupt and as such his insolvency or bankruptcy is a proper subject of legislation of the Parliament 30 of Canada.

21. *The Act in substance is an amendment to the Bankruptcy Act and part of the existing Bankruptcy legislation.*—The Act shows that it is supplementary to the Bankruptcy Act and might well have been enacted as an amendment to the Bankruptcy Act. Sec. 2 (2) of the Act provides that expressions in the Act shall be read and construed as one with the Bankruptcy Act, and that the provisions of the Bankruptcy Act and the bankruptcy rules shall, except as otherwise provided, apply *mutatis mutandis.* The Act is thus made a part of the existing bankruptcy legislation.

22. Other sections of the Act confirm this view. The Bankruptcy 40 Act (R.S.C., 1927, Chap. 11, sec. 7) expressly excepts persons engaged solely in farming or the tillage of the soil from the provisions of Part I relating to bankruptcy and receiving orders and acts of bankruptcy. The Farmers' Creditors Arrangement Act renders it possible for a receiving order to be made against a farmer and for a farmer to commit an act of bankruptcy. (Sec. 2 (3)). Part II of the Bankruptcy Act, R.S.C., 1927, chap. 11,

sec. 9 (1), makes provisions for the making of an assignment by an insolvent debtor, other than a resident of the Province of Quebec, engaged solely in farming or the tilling of the soil. The Farmers' Creditors Arrangement Act makes provision for an assignment by an insolvent debtor resident in the Province of Quebec engaged solely in farming or the tilling of the soil. (Sec. 12 (11)). In this aspect, The Farmers' Creditors Arrangement Act fills gaps in the Bankruptcy Act and completes and rounds out that legislation.

23. The duties of the Official Receiver, Custodian or Trustee under 10 the Bankruptcy Act (sec. 4, sec. 6 (2)), the right of appeal (sec. 5 (1)), the powers of the Registrar under sec. 159 of the Bankruptcy Act (sec. 5 (3)) are all expressly carried into The Farmers' Creditors Arrangement Act. Trustees under the Act shall be subject to supervision by the Superintendent of Bankruptcy (sec. 15 (1)).

24. When a proposal is filed with the Official Receiver, proceedings under The Farmers' Creditors Arrangement Act are regulated by the provisions of Part II of the Bankruptcy Act. It is only when no proposal has been approved by the creditors that the separate machinery of the Board of Review set up by The Farmers' Creditors Arrangement Act comes 20 into operation; otherwise a proposal under The Farmers' Creditors Arrangement Act is substantially the same as a proposal made by any one under Part II of the Bankruptcy Act. The Act provides administrative machinery whereby a farmer may make such a proposal and adapts to the particular case of farmers the provisions of bankruptcy and insolvency law developed for traders and others.

25. *Proposals for compositions, extensions of time and schemes of arrangement have long been a recognized feature of bankruptcy and insolvency legislation.*—The first, modern effective provision in the English bankruptcy laws for a composition was in 1825 (6 Geo. IV, chap. 16, sec. 133). Some-30 what similar relief was applied to all insolvent debtors in 1844 in England by " An Act for Facilitating Arrangements between Debtors and Creditors " (7–8 Vic., chap. 70). The Act of 1861 introduced provisions for deeds of arrangement (24–25 Vict., chap. 134, secs. 185 to 187). The essentials of all these provisions were that the estate of the debtor should vest in trustees, and that the approval of a proportion of the creditors should be binding on the others. In the Canadian Insolvent Act of 1864 (27–28 Vic., chap. 17), provision was made for a deed of composition and discharge, as set out in paragraph 16 above, and indeed the recital in the said Act stated it to be expedient that provision be made for giving effect to arrangements between 40 insolvent debtors and their creditors. The English Act of 1869 introduced in England a composition with creditors not involving the vesting of property in a trustee (32–33 Vict., chap. 71, secs. 125 and 127). The present provision in the Bankruptcy Act for a composition, extension of time or scheme of arrangement provides that it may be made after the making of a receiving order against the insolvent debtor or after the making of an authorized assignment by him (R.S.C., 1927, chap. 11, sec. 11). Under

In the Supreme Court of Canada.

No. 4.
Factum of the Attorney-General of Canada—*continued.*

the Bankruptcy Act of 1919 a proposal could be made prior to an assignment or receiving order (9–10 Geo. V, chap. 36, sec. 13 (1)).

In the *reference concerning the* Companies Creditors Arrangement Act (1934), S.C.R. 659, a statute involving compositions with creditors was in question. The Chief Justice of Canada said at p. 660 :—

> "The history of the law seems to show clearly enough that legislation in respect of compositions and arrangements is a natural and ordinary component of a system of bankruptcy and insolvency law."

Mr. Justice Cannon said at p. 663 :— 10

> "Moreover, I find, that before and since Confederation, arrangements with creditors have always been of the very essence of any system of bankruptcy or insolvency (laws) legislation."

It is therefore submitted that proposals for a composition, extension or scheme of arrangement such as are provided for in the Act are familiar forms of bankruptcy and insolvency legislation.

26. *The provisions of the Act relating to a secured creditor or person who had acquired property subject to a right of redemption are proper bankruptcy or insolvency legislation or properly ancillary thereto.*—The protection of ordinary secured creditors is apparently a modern development of bank- 20 ruptcy and insolvency law. From 1623 until 1869 the English Bankruptcy Acts contained a provision substantially to the following effect :

> "IX. And, for the better Division and Distribution of the Lands, Tenements, Hereditaments, Goods, Chattels and other Estate of such Bankrupt, to and amongst his or her Creditors; Be it enacted, That . . . . ; and that all and Every Creditor and Creditors having Security for his or their several Debts, by Judgment, Statute, Recognizance, Specialty with Penalty or without Penalty, or other Security, or having no Security, or having made Attachments in London, or any other Place, by virtue of any Custom there used, 30 of the Goods and Chattels of any such Bankrupt, whereof there is no Execution or Extent served and executed upon any of the Lands, Tenements, Hereditaments, Goods, Chattels, and other Estate of such Bankrupts, before such time as he or she shall or do become bankrupt, shall not be relieved upon any such Judgment, Statute, Recognizance, Specialty, Attachments, or other Security for any more than a rateable Part of their just and due Debts, with the other Creditors of the said Bankrupt, without respect to any such Penalty or greater Sum contained in any such Judgment, Statute, Recognizance, Specialty with Penalty, Attachment or other 40 Security." (1623) 21 Jac. 1, chap. 19, sec. 9.

By a further provision (21 Jac. 1, Chap. 19, sec. 13) it appears that mortgagees of real or personal property did not come within the broad description of secured creditors in sec. 9 above quoted.

27. It is submitted that the historical exception in favour of mortgagees is no longer justified on any ground of distinction from other secured

creditors. Since 1621 the position of mortgagees in the eyes of the Court has materially altered. Before that time the mortgagee held the legal title and the right of the mortgagor to redeem was limited strictly to the words of the deed. With the development of the doctrines of equity, the concept of the equity of redemption as an estate in land came into being. Equity looked at the substance of the transaction and found that the interest of the mortgagee in the land was as security for his debt. Thus there developed the rule that a mortgage is not real but personal estate and passes not to the heir but to the personal representative. In the cases establishing and discussing this rule there are clear statements of the nature of the mortgagee's interest. In *Thornborough* v. *Baker* (1675) 3 *Swans.* 628, where the doctrine was first established, Lord Nottingham says (at p. 630) :—

> ". . . for in natural justice and equity the principal right of the mortgagee is to the money, and his right to the land is only as security for the money."

In *Chester* v. *Chester* (1730) 3 *P. Wms.* 56, at p. 62, the judgment of the Court states :—

> "Now an estate, though mortgaged, continues still to be the estate of the mortgagor, subject to the payment of the pledge which is upon it; and the mortgagee's right is only to the money due upon the land, not to the land itself; for which reason, till the mortgage is foreclosed, it is not properly the mortgagee's land."

In *Casburne* v. *Scarfe* (1738) 2 Jac. & W. 194, The Lord Chancellor, Lord Hardwicke, said (at p. 195) :—

> "The person having the equity of redemption is considered as owner of the land and the mortgagee is entitled only to retain it as a security or a pledge for a debt."

While a different view as to the mortgagee's position has been expressed in certain judgments of the Courts, this would appear to be the prevailing view, and although in form the interest of the mortgagee is different from that of other secured creditors, in substance it is regarded as the same. Holdsworth, History of English Law, Vol. VI, 3rd ed., 1923, p. 663; Turner's Equity of Redemption, 1931, pp. 61, 68, etc., and *Tarn* v. *Turner* (1888), 39 Ch. Div., 456 at p. 459. In fact in the Bankruptcy Act, all secured creditors are treated alike and mortgagees derive their protection from the provisions relating to secured creditors. (R.S.C., 1927, chap. 11, secs. 2 (*ii*), 105–113 as amended).

28. The judgment of the Privy Council in *Royal Bank of Canada* v. *Larue* (1928) *A.C.* 187, shows that under the head of bankruptcy and insolvency, the Parliament of Canada may determine by legislation the relative priorities of creditors under a bankruptcy or authorized assignment and deprive a creditor, who is entitled under provincial legislation to security upon the assets of the debtor, of that security. It is submitted that this power of the Dominion Parliament extends to the determination of creditors' priorities under a proposal for a composition, extension of time or scheme of arrangement. On the Reference concerning the Companies' Creditors

Arrangement Act, 1934, S.C.R. 659, the validity of the provisions in that statute providing for a compromise or arrangement with secured creditors (including those claiming under charges of property of the debtor company) binding upon them, were held to be within the legislative powers of the Parliament of Canada in relation to bankruptcy and insolvency.

29. Two propositions may therefore be submitted: The first, that it is competent for the Parliament of Canada, in legislating in relation to bankruptcy and insolvency, to affect the security of secured creditors, and the second, that in this respect mortgages do not stand in any different position than do other secured creditors. 10

30. *The Act may also be justified as being legislation in relation to agriculture.*—The powers of the Dominion in relation to agriculture are to be found in sec. 95 of the British North America Act:—

> "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 20 as long and as far only as it is not repugnant to any Act of the Parliament of Canada."

This section has been broadly interpreted: Clement, Canadian Constitution, 3rd. ed., 1916, p. 776. In *Brooks* v. *Moore,* (1907) 13 *B.C.* 91, The Dominion Animal Contagious Diseases Act (now R.S.C., 1927, chap. 6) was held to be *intra vires* the Parliament of Canada. In *Rex* v. *Horning* (1904) 8 O.L.R. 215, An Act to prevent the Fraudulent Entry of Horses at Exhibitions, R.S.O., 1897, chap, 254, now R.S.O., 1927, chap. 271, was upheld as valid Provincial legislation in relation to agriculture in the absence of repugnant Dominion legislation. In *The King* v. *Eastern Terminal Elevator Company,* 30 (1925) *S.C.R.* 434, Mr. Justice Mignault, in dealing with a provision of the Canada Grain Act providing for the sale of surplus grain said, at p. 457:—

> "What we have here is trade legislation and not a law for the encouragement or support of agriculture, however wide a meaning may be given to the latter term."

In *Lower Mainland Dairy* v. *Crystal Dairy Ltd.* (1933) *A.C.* 168 it was sought to maintain the Dairy Products Sales Adjustment Act, 1929 (Stat. of British Columbia, (1929), c. 20) as amended, on the grounds that it was legislation in relation to agriculture. Lord Thankerton, in delivering the judgment of the Lords of the Privy Council, at p. 174, rejected this conten- 40 tion as untenable, as the Act did not "appear in any way to interfere with the agricultural operations of the farmers." It is submitted that the Act here in question is clearly distinguishable from those Acts found in the cases not to be in relation to agriculture.

31. The preamble of the Act recites, after referring to the depressed state of agriculture,

> . . . " it is essential in the interests of the Dominion to retain the farmers on the land as efficient producers and for such purpose it is necessary to provide means whereby compromises or rearrangements may be effected of debts of farmers who are unable to pay. . . ."

The Act applies only to farmers, that is, persons whose principal occupation consists in farming or the tillage of the soil and this limitation of the scope 10 of the Act has been strictly construed. *National Trust Company* vs. *Powers*, 1935, *O.R.* 492; *Re Marshall*, 1935, 1 W.W.R. 80.

32. An essential element in the administration of the Act is the revenue-producing capacity of the debtor's farm. The Board of Review must base any proposal it may make upon the present and prospective capability of the debtor to perform the obligations prescribed and the productive value of the farm (sec. 12 (8)). In this manner further provision is made for giving effect to the object declared in the preamble, namely, to retain the farmers on the land as efficient producers, the legislation as a whole being aimed at securing continuous efficient agricultural production in Canada.

20 33. It will not be questioned that agriculture is the principal basic industry of Canada, and that unless the farmers can be retained on the land as efficient producers, this basic industry will be seriously imperilled. Parliament has stated that its intention in passing the Act was to retain the farmers on the land as efficient producers and its purpose is to preserve agriculture in Canada. It is therefore submitted that the Act is legislation in relation to agriculture.

34. *Section* 17 *of the Act may be justified as legislation in relation to interest.*—Section 17 of the Act reads as follows :—

> " 17. (1) Notwithstanding the provisions of any other statute 30 or law, whenever any rate of interest exceeding seven per centum is stipulated for in any mortgage of farm real estate, if any person liable to pay the mortgage tenders or pays to the person entitled to receive the money, the amount owing on such mortgage and interest to the time of payment, together with three months' further interest in lieu of notice, no interest shall after the expiry of three months' period aforesaid be chargeable, payable or recoverable in respect of the said mortgage at any rate in excess of five per centum per annum.
>
> " (2) The provisions of this section shall apply in the case of 40 any mortgage heretofore or hereafter made and whether or not the principal sum is due and owing at the time such tender or payment is made."

This section is very similar in nature and effect to sec. 10 of the Interest Act, R.S.C., 1927, chap. 102, which reads as follows :—

> " 10. Whenever any principal money or interest secured by mortgage of real estate is not, under the terms of the mortgage,

payable till a time more than five years after the date of the mortgage, then, if at any time after the expiration of such five years, any person liable to pay or entitled to redeem the mortgage tenders or pays, to the person entitled to receive the money, the amount due for principal money and interest to the time of payment, as calculated under the provisions of the four sections last preceding, together with three months' further interest in lieu of notice, no further interest shall be chargeable, payable or recoverable at any time thereafter on the principal money or interest due under the mortgage. 10

"(2) Nothing contained in this section shall apply to any mortgage upon real estate given by a joint stock company or other corporation, nor to any debenture issued by any such company or corporation, for the payment of which security has been given by way of mortgage on real estate."

That section was held to be *intra vires* in the case of *Bradburn* v. *The Edinburgh Life Assurance Co.* (1903) 5 *O.L.R.* 657. Mr. Justice Britton's judgment in that case does not seem to have been questioned since that time. The power of the Parliament of Canada under this head was discussed in the case of *Lynch* v. *Canadian Northwest Land Co.* (1891) 19 *S.C.R.* 20 204, but the decision in that case turned upon another point. It is submitted that section 17 is legislation in relation to interest and as such within the power of the Parliament of Canada.

35. *The Act is a law for the Peace, Order and Good Government of Canada.*—If the Act cannot be justified under heads of section 91 or under section 95, then it may be justified under the residuary power of the Parliament of Canada to make laws for the peace, order and good government of Canada. While the normal relations of creditors and debtors may be matter of civil right or of a local and private nature within a province, the relations of farmers and their creditors throughout the whole of Canada in 30 a time of economic stress such as that through which Canada has been passing, are matters unquestionably of Canadian interest and importance. The preservation of the agricultural industry of Canada is one of the most vital and important factors in Canadian national life and legislation designed to keep the farmers on the farms is in its most important and paramount aspect legislation for the peace, order and good government of Canada. It is submitted that the Act may be justified under this power.

36. It will, therefore, be submitted on behalf of the Attorney-General for Canada that the answer to the question referred to this Court is that the Farmers' Creditors Arrangement Act, 1934, as amended by the Farmers' 40 Creditors Arrangement Act Amendment Act, 1935, is not, nor is any part thereof, *ultra vires* of the Parliament of Canada.

N. W. ROWELL.
L. S. ST. LAURENT.
C. P. PLAXTON.

No. 5.

Factum of the Attorney-General of Ontario.

By an Order-in-Council dated the 18th day of November, 1935, His Excellency the Governor-General of Canada referred to the Supreme Court of Canada for hearing and consideration, pursuant to the authority of Section 55 of the Supreme Court Act, the following question :—

> " Is the Farmers' Creditors Arrangement Act, 1934, as amended by the Farmers' Creditors Arrangement 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 ? "

This legislation can only be supported if it falls within head 21 of Section 91 of the British North America Act—91 (21)—Bankruptcy and Insolvency.

Unless it does fall within this specified enumerated head (21), then it comes within head (13) of Section 92 of the British North America Act—" Property and Civil Rights in the Province "—a matter exclusively within the jurisdiction of the Provincial Legislatures.

Arrangements, compromises and proposals between debtors and creditors, insofar as the same are within the constitutional capacity of the Parliament of Canada to enact legislation concerning them, was dealt with in :

> " In the matter of a Reference concerning the constitutional validity of The Companies' Creditors Arrangement Act," 1934, S.C.R. 659.
>
> In this case, Duff, C.J., stated at page 661 :
>
> " The powers conferred upon the Court under the Companies' Creditors Arrangement Act, 1933, came into operation when a compromise or arrangement is proposed between ' a company which is bankrupt or insolvent or which has committed an act of bankruptcy within the meaning of the Bankruptcy Act or which is deemed insolvent within the meaning of the Winding-Up Act '—and its unsecured creditors or any class of them.
>
> The important difference, as already observed, between the provisions of the Companies' Creditors Arrangement Act and those of the Bankruptcy itself in relation to compromises and arrangements, is that the powers of the first named Act may be exercised notwithstanding the fact that no proceedings have been taken under the Bankruptcy Act or the Winding-Up Act.
>
> The Act, however, creates powers which can be exercised in case, and only in case, of insolvency.
>
> Furthermore, the aim of the Act is to deal with the existing condition of insolvency, in itself, to enable arrangements to be made, in view of the insolvent condition of the company under judicial authority which, otherwise, might not be valid prior to the initiation of proceedings in bankruptcy.

In the Supreme Court of Canada.

No. 5.
Factum of the Attorney-General of Ontario—*continued.*

Ex facie it would appear that such a scheme in principle does not radically depart from the normal character of bankruptcy legislation.

Matters normally constituting part of a bankruptcy scheme, but not in their essence matters of bankruptcy and insolvency may, of course, from another point of view and in another aspect be dealt with by a Provincial Legislature; but, when treated as matters pertaining to bankruptcy and insolvency, they clearly fall within the legislative authority of the Dominion."

And at p. 662 :

" The ultimate purpose would appear to be to enable the Court to sanction a compromise which, although binding upon a class of creditors only, would be beneficial to the general body of creditors as well as to the shareholders." 10

It, therefore, appears from this decision that provisions for the settlement of the liabilities of the insolvent are an essential element of any insolvency legislation.

And further, the proceedings under the Act may be considered as " insolvency proceedings " with the object of preventing a declaration of bankruptcy and the sale of these assets, if the creditors directly interested for the time being reach the conclusion that an opportune arrangement to avoid such sale would better protect their interest, as a whole or in part. 20

The composition or arrangement dealt with in the Companies' Creditors Arrangement Act is one made by the creditors and the debtor, and so is the composition or arrangement that can be made under the Bankruptcy Act.

Any such composition or arrangement under both these Acts, depends upon a contract between the parties—creditors and debtors.

In such cases the composition or arrangement so made by the creditors, which the Court approves, must be the same as that which the creditors accept.

See *Lucas* vs. *Martin*, 1888, 37 *Ch. D.* 597. 30

The Court can only approve or reject; it cannot vary.

See *Martin* vs. *Riman*, 66 *O.L.R.* 394.

The Court must be satisfied that the required majority of the creditors have duly accepted the composition.

See *In re Richardson*, 1921, 61 *D.L.R.* 175.

In considering such compromise or arrangement, one of the facts that the Court must consider is " that the creditors are in favour of the proposals."

See *In re Kern Agencies Ltd.*
Re Salter & Arnold Ltd.
No. 2—1921—13, *C.B.R.* 11. 40

Having, therefore, this in mind, how can these principles be applied to the Farmers' Creditors Arrangement Act? Section 6 of this Act provides that:

" A farmer who is unable to meet his liabilities as they become due may make a proposal for a composition, extension of time or scheme of arrangement either before or after an assignment has been made."

Such proposal is filed with an " Official Receiver " appointed under the Act, who calls a meeting of the creditors to consider the proposal.

If in such cases the proposal is approved by the creditors, it is thought that the legislation would be *intra vires* of the Parliament of Canada, because you have—

(1) What might be considered " insolvency proceedings " with the object of preventing a declaration of bankruptcy and the sale of assets, where the " creditors " have reached the conclusion that an opportune arrangement to avoid such sale would better protect their interests as a whole or in part.

(2) A composition made by the creditors and the debtor depending upon a contract between the parties.

Further, it is thought that the provisions of Section 12, subsection 4 and subsection 5, whereby the Board of Review, appointed under the Act, in cases where the Official Receiver reports that a proposal made by a farmer has not been approved by the creditors, formulates a proposal after hearing representations from all interested parties, and such proposal so formulated is approved by the creditors, is *intra vires* of the Parliament of Canada, because you have a proposal or composition or arrangement made and approved by the creditors themselves, based on a contract between the parties.

Subsection 6 of Section 12 of the Act gives power to the Board, where the creditors decline to approve the proposal formulated by the Board, to confirm such proposal as formulated, or as amended by the Board, and when filed in the Court shall be binding on all creditors of the debtor.

It is contended that this provision, in so far as it relates to secured creditors, is *ultra vires* of the Parliament of Canada for the following reasons :

1. It is not a compromise between the debtor and the creditors, the creditors have no part in it.

2. It is a compulsory compromise made by a Board that has been arbitrarily set up and whose functions seem to be in the nature of " coercion and compulsion," irrespective of the wishes of the creditors.

3. The approval of the creditors, and the element of a compromise based on contract with the creditors, is not present.

4. It is not such a compromise as between creditors and the debtor as contemplated in connection with and related to " Bankruptcy and Insolvency " and as contemplated in the Bankruptcy Act or The Companies' Creditors Arrangement Act—and the decision in the latter case is not authority for saying that the Parliament of Canada has constitutional capacity to enact such legislation as this, which in effect is " compulsory compromise " with no approval or acceptance by the creditors.

Further, it is contended, for the same reasons, that the provision of Section 7 of the Act, which provides that a proposal may provide for a compromise or an extension of time or a scheme of arrangement in relation to a debt owing to a secured creditor—without the concurrence of such secured creditor, where such proposal is formulated and confirmed by the Board of

Review, as provided in Section 12, subsection 6—is *ultra vires* of the Parliament of Canada.

Any legislation within the constitutional capacity of the Parliament of Canada, dealing with a proposal, an arrangement, a scheme, or a compromise, which will fall under and be related to "Bankruptcy and Insolvency" and matters ancillary thereto, such proposals, etc., must be made by the secured creditors themselves, based on contract, and not by the Board that has been set up to make binding proposals, etc., without the sanction of the secured creditors.

The effect of the provisions of subsection 6 of Section 12 and of Section 7, in so far as a Mortgagee, or the holder of an Agreement of Sale of a farm is concerned, is that, just because a farmer Mortgagor cannot meet his liabilities, and wishes to have a proposal confirmed whereby his creditors shall take less than their full claims, and simply because he desires to make some compromise, the Board can arbitrarily, and without any concurrence of such Mortgagee, etc., confirm a proposal that reduces the principal monies of the mortgage security, and wipe out completely arrears of interest due.

A Mortgagee in Ontario of a farm has the fee in the land, the Mortgagor has parted with the fee, all he has is a right to redeem.

The property, the farm, is the Mortgagee's.

The Mortgagee has a right to realize his security without being compelled by legislation such as this, to have his principal money reduced by an arbitrary Board acting without the consent of the Mortgagee.

Such legislation as this surely cannot be seriously contended, falls with "Bankruptcy and Insolvency."

It is, it is contended, gross interference with "Property and Civil Rights in the Province" that has nothing to do with Bankruptcy or Insolvency, either as direct or ancillary legislation.

It is not for the Parliament of Canada to place any such restrictions on a Mortgagee's contract such as this. You find no such drastic provisions in the Bankruptcy Act itself, or in any other Acts dealing with compromises, etc., which are ancillary to Bankruptcy and Insolvency.

The whole scheme and idea of compromise is something that is calculated to benefit the general body of creditors, by way of some settlement of the liabilities of the insolvent person, that it will secure some method whereby the insolvent's assets shall be rateably distributed among his creditors, and this must be borne in mind when interpreting the words "Bankruptcy and Insolvency."

The above essential elements are not present in any such compulsory proposals made without the concurrence or consent of a Mortgagee or vendor of farm land, and it never was intended that legislation under "bankruptcy and insolvency" in a scheme of compromises, etc., could go so far as to reduce the monies justly due on mortgages and agreements for sale.

If it can be done for the farmer under this legislation, it can be done for mortgagees and vendors of all classes of land other than farms—and the result would be that some Board set up by Dominion legislation would have the power to say to all mortgagees—"If you do not agree to accept a proposal

that reduces the principal monies due you, and waive your rights to arrears of interest, we will formulate a proposal, and we will do it, and whether you like it or not, it is binding upon you. "

No constitutional capacity is given the Parliament of Canada to enact any such legislation under "Bankruptcy and Insolvency" or any other power under Section 91 of the British North America Act.

Further in this connection, it is contended that a mortgagee is entitled to say—" I have not been paid my purchase money, and I must have the property. I have a specific charge on that property and I want to realize on that mortgage." "No legislation of the Parliament of Canada such as this can cut down the principal and interest due me under my contract."

In the Supreme Court of Canada.

No. 5. Factum of the Attorney-General of Ontario—*continued.*

There appears to be authority for this:

In Re *David Lloyd & Company*
Lloyd vs. *David Lloyd & Company,*
1877, 6 *Ch. D., p.* 339.

The Company owed Lloyd £40,000 and leases and other title deeds were deposited as security for the repayment to him and subject thereto in trust for the Company.

An Order was made to wind up the Company under the provisions of the Winding-Up Act, but before the order was made, Lloyd had commenced an action, and an application was made by Lloyd for liberty to continue the action under the 87th Section of the Companies Act, which provides:

" When an order has been made for winding up a company under this Act, no suit, action or other proceeding shall be proceeded with or commenced against the company, except with the leave of the Court, and subject to such terms as the Court may impose."

Jessel, M.R., says at p. 343:

" Now, as a rule, a mortgagee has a right to realize his security, and of course, as incidental to that, a right to bring an action for foreclosure."

Those who say that he should be restrained from bringing or proceeding with such an action must either show some special ground for restraining him, or must say:

' We can offer the mortgagee all he is entitled to, foreclosure or sale, as the case may be, at once, without any proceeding in the action.'

That, of course, would be a reason for refusing leave to proceed with an action if commenced, or for not giving leave to commence a threatened action.

But, short of that, it appears to me that the Court ought not, under the 87th Section of the Act, to interfere with the rights of the mortgagee."

James, L.J., in the same case says, at p. 344:

" These Sections in the Companies Act, and the corresponding legislation with regard to bankrupts, enabling the Court to interfere with actions, were intended, not for the purpose of harassing, or impeding, or injuring third persons, but for the purpose of preserving

In the Supreme Court of Canada.

No. 5. Factum of the Attorney-General of Ontario—*continued.*

the limited assets of the company or bankrupt in the best way for distribution among all the persons who have claims upon them.
—— But that has really nothing to do with the case of a man, who for the present purpose is to be considered as entirely outside the company, who is merely seeking to enforce a claim, not against the company, but against his own property.

The position of a mortgagee under such circumstances is, to my mind, exactly similar to that of a man who said : You, the Company, have got property which you have taken from me; you are in possession of my property by way of trespass, and I want to get it back again.

There is some property upon which I have a certain specific charge, and I want to realize this charge.

I have nothing to do with the distribution of your property amongst your creditors, this is my property.

Why a mortgagee should be prevented from doing that, I cannot imagine.

The Court would have due regard to the rights of independent persons.

A mortgagee is, to my mind, such an independent person, and his right ought not to be interfered with because his mortgagors have chosen to become insolvent and to have a winding up."

The Court in this case did not think it right to interfere with a mortgagee's taking the proper legal means for realizing that which is his own property.

Furthermore, the case recognizes the right of the Mortgagee to the full amount due him on his security—there can be no cutting down.

The Attorney-General of Ontario submits for these reasons and those which will be advanced on the argument that—

(1) Insofar as the provisions of the Act, Section 7 and subsection 6 of Section 12 relate to secured creditors, the said Sections are *ultra vires* of the legislative competence of the Parliament of Canada.

(2) Insofar as the other provisions of the Act are concerned, they are probably *intra vires* of the Parliament of Canada.

I. A. HUMPHRIES.

January, 1936.

No. 6. Factum of the Attorney-General of Quebec.

No. 6.

Factum of the Attorney-General of the Province of Quebec.

The question referred as to these Acts is as follows :

" 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 ? "

The material parts of the Act referred to in this question are, for the purpose of this reference, the following:

In the Supreme Court of Canada.

No. 6. Factum of the Attorney-General of Quebec—*continued.*

Preamble :

"WHEREAS in view of the depressed state of agriculture the present indebtedness of many farmers is beyond their capacity to pay; and whereas it is essential in the interest of the Dominion to retain the farmers on the land as efficient producers and for such purpose it is necessary to provide means whereby compromises or re-arrangements may be effected of debts of farmers who are unable
10 to pay :............"

....

"2. (1) In this Act unless the context otherwise requires or implies, the expression

....

(*d*) 'creditor' includes a secured creditor;

....

(*f*) 'farmer' means a person whose principal occupation consists in farming or the tillage of the soil;

(*g*) 'mortgage' includes a hypothec and also a deed of sale
20 with a right of redemption;

....

(*j*) 'proposal' means a proposal for a composition, extension of time or scheme of arrangement made by a farmer hereunder.

"(2) Unless it is otherwise provided or the context otherwise requires, expressions contained in this Act shall have the same meaning as in the *Bankruptcy Act,* and this Act shall be read and construed as one with the *Bankruptcy Act,* but shall have full force and effect notwithstanding anything contained in the *Bankruptcy*
30 *Act,* and the provisions of the *Bankruptcy Act,* and Bankruptcy Rules shall, except as in this Act otherwise provided, apply *mutatis mutandis* in the case of proceedings hereunder including meeting of creditors.

"(3) In any case where the affairs of a farmer have been arranged by a proposal approved by the court or confirmed by the Board as hereinafter provided, Part I of the *Bankruptcy Act* shall notwithstanding section seven thereof thereafter apply to such farmer but only failure on the part of such farmer to carry out any of the terms of the proposal shall be deemed to be an act of bank-
40 ruptcy. Provided that such failure shall not be deemed an act of bankruptcy if, in the opinion of the Court, such act was due to causes beyond the control of such farmer.

"3. ....

"(3) The Governor in Council may appoint any person to be an Official Receiver under this Act including the holder of any other office, whether Dominion or provincial, and the holder of any such office shall, notwithstanding anything contained in any other statute

In the Supreme Court of Canada.

No. 6. Factum of the Attorney-General of Quebec—*continued.*

or law, be bound to perform the functions and duties of the Official Receiver.

....

" 5. ....

" (3) The prothonotary of the Superior Court and the clerk of the county or district court shall perform all the duties of the registrar, except its judicial duties.

" 6. (1) A farmer who is unable to meet his liabilities as they become due may make a proposal for a composition, extension of time or scheme of arrangement either before or after an assignment has been made. 10

(2) Such proposal shall be filed with the Official Receiver who shall forthwith convene a meeting of the creditors and perform the duties and functions required by the *Bankruptcy Act* to be performed by a trustee in the case of a proposal for a composition, extension of time or scheme of arrangement.

" 7. A proposal may provide for a compromise or an extension of time or a scheme of arrangement in relation to a debt owing to a secured creditor, or in relation to a debt owing to a person who has acquired movable or immovable property subject to a right of redemption, but in that event the concurrence of the secured creditor or such person, shall be required, except in the case of a proposal formulated and confirmed by the Board of Review as hereinafter provided. 20

....

" 9. Subsections three and five of section sixteen of the *Bankruptcy Act* shall not apply in the case of a proposal for a composition, extension of time or scheme of arrangement made by any farmer.

....

" 11. (1) On the filing with the Official Receiver of a proposal, no creditor whether secured or unsecured, shall have any remedy against the property or person of the debt, or shall commence or continue any proceedings under the *Bankruptcy Act*, or any action, execution or other proceedings for the recovery of a debt provable in bankruptcy, or the realization of any security unless with leave of the court and on such terms as the court may impose : Provided, however, that the stay of proceedings herein provided shall not be effective for more than ninety days from the date of filing of the proposal with the Official Receiver, unless the Court makes one or more orders extending the time for the purpose of any proceedings in connection with the proposal. 30 40

(2) On a proposal being filed the property of the debtor shall be deemed to be under the authority of the court pending the final disposition of any proceedings in connection with the proposal

and the court may make such order as it deems necessary for the preservation of such property.

" 12. (1) The Governor in Council may, whenever he considers it expedient, establish in any province a Board of Review which shall exercise in such province the jurisdiction hereinafter provided.

....

(5) If any such proposal formulated by the Board is approved by the creditors and the debtor, it shall be filed in the court and shall be binding on the debtor and all the creditors.

10 (6) If the creditors or the debtor decline to approve the proposal so formulated, the Board may nevertheless confirm such proposal, either as formulated or as amended by the Board, in which case it shall be filed in the Court and shall be binding upon all the creditors and the debtor as in the case of a proposal duly accepted by the creditors and approved by the Court.

....

(11) Notwithstanding anything contained in the *Bankruptcy Act*, an insolvent debtor resident in the Province of Quebec, engaged solely in farming or the tilling of the soil, whose liabilities to creditors 20 provable as debts under the *Bankruptcy Act* exceed five hundred dollars, may make an assignment for the general benefit of his creditors in any case where the Board declines to formulate a proposal and certifies that in its opinion the debtors' affairs can best be administered under the *Bankruptcy Act.*

....

" 17. (1) Notwithstanding the provisions of any other statute or law, whenever any rate of interest exceeding seven per centum is stipulated for in any mortgage of farm real estate, if any person liable to pay the mortgage tenders or pays to the person entitled to 30 receive the money, the amount owing on such mortgage and interest to the time of payment, together with three months' further interest in lieu of notice, no interest shall after the expiry of three months period aforesaid be chargeable, payable or recoverable in respect of the said mortgage at any rate in excess of five per centum per annum.

(2) The provisions of this section shall apply in the case of any mortgage heretofore or hereafter made and whether or not the principal sum is due and owing at the time such tender or payment is made."

40 ....

" 19. The said Act shall not, without the concurrence of the creditor, apply in the case of any debt incurred after the first day of May, 1935."

In the Supreme Court of Canada.

No. 6. Factum of the Attorney-General of Quebec—*continued.*

In addition, it is well to bear in mind :—

(*a*) the following provisions of the *Bankruptcy Act* (S.C.R., 1927, Chap. 11) :—

" 2. In this Act, unless the context otherwise requires or implies, the expression.

(*u*) ' insolvent person ' and ' insolvent ' includes a person, whether or not he has done or suffered an act of bankruptcy;

(i) who is for any reason unable to meet his obligations as they generally become due, or 10

(ii) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(iii) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due, thereout;

" 3. A debtor commits an act of bankruptcy in each of the following :— 20

(*a*) If in Canada or elsewhere he makes an assignment of his property to a trustee for the benefit of his creditors generally, whether it is an assignment authorized by this Act or not;

(*b*) If in Canada or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof;

(*c*) If in Canada or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon, which would under this Act be void as a 30 fraudulent preference if he were adjudged bankrupt;

(*d*) If with intent to defeat or delay his creditors he does any of the following things, namely, departs out of Canada, or, being out of Canada, remains out of Canada, or departs from his dwelling house or otherwise absents himself, or begins to keep house;

(*e*) If he permits any execution or other process issued against him under which any of his goods are seized, levied upon or taken in execution to remain unsatisfied until within four days from the time fixed by the sheriff for the sale thereof, or for 40 fourteen days after such seizure, levy or taking in execution, or if the goods have been sold by the sheriff or the execution or other process has been held by him after written demand for payment without seizure, levy or taking in execution or satisfaction by payment for fourteen days, or if it is returned endorsed to the effect that the sheriff can find no goods whereon to levy or to seize or take: Provided that where

interpleader proceedings have been instituted in regard to the goods seized, the time elapsing between the date at which such proceedings were instituted and the date at which proceedings are finally disposed of, settled or abandoned, shall not be taken into account in calculating any such period of fourteen days;

(*f*) If he exhibits to any meeting of his creditors any statement of his assets and liabilities which shows that he is insolvent, or presents or causes to be presented to any such meeting a written admission of his inability to pay his debts;

(*g*) If he assigns, removes, secretes or disposes of or attempts or is about to assign, remove, secrete or dispose of any of his goods with intent to defraud, defeat or delay his creditors or any of them;

(*h*) If he makes any bulk sale of his goods without complying with the provisions of any Bulk Sales Act applicable to such goods in force in the province within which he carries on business or within which such goods are at the time of such bulk sale;

(*i*) If he gives notice to any of his creditors that he has suspended or that he is about to suspend payment of his debts;

(*j*) If he ceases to meet his liabilities generally as they become due.

" 4. Subject to the conditions hereinafter specified, if a debtor commits an act of bankruptcy a creditor may present to the court a bankruptcy petition.

....

" 7. The provisions of this Part shall not apply to wage-earners or to persons engaged solely in farming or the tillage of the soil.

....

" 9. Any insolvent debtor (other than a resident in the province of Quebec engaged solely in farming or the tilling of the soil) whose liabilities to creditors, provable as debts under this Act, exceed five hundred dollars, may, at any time prior to the making of a receiving order against him, make an assignment of all his property for the general benefit of his creditors.

....

(*b*) 24 *Geo. V, Chap.* 24 (1934).

" 1. The Lieutenant-Governor in Council shall have power to do and authorize such acts and things and to make from time to time such orders and regulations as he may deem necessary or advisable to give effect in this Province:

....

2. To any act of the said Parliament of Canada respecting bankruptcy and insolvency as regards compromises between creditors and debtors or any other matter within the legislative authority of the Province.

In the Supreme Court of Canada.

No. 6. Factum of the Attorney-General of Quebec—*continued.*

" 2. All orders and regulations made under this act shall have the force of law and shall be enforced in such manner and by such officers and authorities as the Lieutenant-Governor in Council may prescribe, and may be varied, extended or revoked by any subsequent order or regulation; but, if any order or regulation is varied, extended or revoked, neither the previous operation thereof nor anything duly done thereunder shall be affected thereby, nor shall any right, privilege, obligation or liability acquired, accrued, accruing or incurred thereunder be affected by such variation, extension or revocation. 10

....

" 5. This act shall come into force on such date as it may please the Lieutenant-Governor in Council to fix by proclamation; and it shall cease, as well as all the orders and regulations adopted hereunder, on the fifteenth day of the Session of the Legislature following that now in progress."

It may be noted that this Act never came into force, no proclamation having been promulgated.

The British North America Act, 1867, distributes the legislative powers 20 of the Parliament and the Provincial legislatures mainly by sections 91 and 92.

Section 91 provides :

" 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 (notwith- 30 standing 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,—

....

" 19. Interest.

....

" 21. Bankruptcy and Insolvency.

....

" And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the 40 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 "

Section 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 o) a merely local or private Nature in the Province.

Unless the Farmers' Creditors Arrangement Act can be supported under the above provisions in s. 91, the subject matter falls under the exclusive legislative power of the province since it clearly affects " Civil Rights in the Province."

The exact meaning of the words " Bankruptcy and Insolvency ", 10 as used in the British North America Act, has not been determined by any judicial decision, but in *Royal Bank of Canada* v. *Larue* (1928) A.C. 187, it was said in the judgment delivered by the Lord Chancellor :

" The expression Bankruptcy and Insolvency in s. 91 head 21, of the British North America Act was referred to by Lord Selborne in *L'Union St-Jacques de Montréal* v. *Bélisle* as ' describing in their known legal sense provisions made by law for the administration of the estates of persons who may become bankrupt or insolvent, according to rules and definitions prescribed by law, including of course the conditions in which that law is to be brought into opera- 20 tion, the manner in which it is to be brought into operation, and the effect of its operation '."

The Act referred does not fall within any of the postulates of this definition.

Bankruptcy legislation, it is submitted, is concerned only with the realization of the property of a debtor and the distribution of the proceeds rateably amongst his creditors. Such legislation may provide for the possession and dealings with the property for the ascertainment of the creditors and the proof of their claims, the priorities of the debts established according to their rank, how and when dividends from the available funds 30 shall be paid and generally make all necessary rules for the protection and benefit of the whole body of the creditors.

Such provisions cannot however interfere with the debts, which are matters of contract and under the exclusive jurisdiction of the provinces as civil rights.

It was pointed out in *Citizens Insurance Co. of Canada* v. *Parsons* (1881) 7 App. Cas. 96 that " In looking at sec. 91 it will be found not only " that there is no class including, generally contracts and the rights " arising from them, but that one class of contracts is mentioned " and enumerated viz : ' 18. Bills of Exchange and Promissory Notes ', 40 " which it would have been unnecessary to specify if authority over all " contracts and the rights arising from them had belonged to the Dominion " Parliament."

The subjects of Bankruptcy and Insolvency do not comprehend power of legislation of the Dominion by which the exclusive power of the Provinces over contracts can be overborne.

It is to be noted that in *Royal Bank of Canada* v. *Larue* above referred to the decision went upon the ground that the judicial hypothec, which

In the Supreme Court of Canada.

No. 6. Factum of the Attorney-General of Quebec—*continued.*

alone was in question there, was in the nature of an execution. It decided nothing as to the legal or the conventional hypothec.

Thus the object of bankruptcy legislation is not the release of insolvent persons from their debts but the realizing of the bankrupt's property for the satisfaction so far as it will go of his debts. It is not primarily at any rate for the benefit of the debtor which from the preamble to the Act would appear to be its object.

But neither can such object be supported by the general powers in s. 91 for it has been held in many cases that it is not " the mere fact that " Dominion legislation is for the general advantage of Canada or is such " that it will meet a mere want which is felt throughout the Dominion " renders it competent if it cannot be brought within the heads enumerated " in s. 91."

" There may be cases arising out of some extraordinary peril to the " national life of Canada as a whole such as the cases arising out of a war " where legislation is required of an order that passes beyond the heads " of exclusive provincial competency. Such cases may be dealt with under " the words Peace, Order and good Government, simply because such " cases are not otherwise provided for. But instances of this are highly " exceptional."

Toronto Electric Commissioners v. *Snider* (1925) A.C., 396.

The allegations in the preamble to the Farmers' Creditors Arrangement Act cannot be held to be any such exceptional instance as to be a ground for legislation by the Parliament.

Attorney-General for Ontario v. *Attorney-General for the Dominion & Distillers & Brewers Association of Ontario* (1896) A.C., 348.

Attorney-General for Canada v. *Attorney-General for Alberta* (1916) 1 A.C., 588.

Attorney-General for Canada v. *Attorney-General for British Columbia* (1930) A.C., 111.

A sale with a right of redemption stands upon a different footing to a mortgage for the former is an absolute sale of the property and not a security for a debt as a mortgage is. There is no debt as in the latter for which the mortgagor can be sued. It is a contract by the mortgagee to sell within a fixed period at a certain price. The mortgagor is not bound to pay this price and the mortgagee cannot recover as for a debt. If the mortgagor does not pay the right to re-purchase is simply at an end.

S. 17 appears in the Act under the caption : " Interest on Farm Loans ".

This section refers to an altogether different subject matter to that contained in the part of the Act concerning farmers' creditors arrangements and has no reference at all to that subject matter. Its aim is to put an end to a contract entered into by the parties presenting the character mentioned in the section and as such is an encroachment upon contractual rights which appertain exclusively to the domain of " Property and Civil Rights ".

FOR THE ABOVE REASONS and the arguments which may be advanced at the hearing of the Reference, the Attorney-General of Quebec submits that the Acts in question must be declared *ultra vires* of the Parliament of Canada.

CHARLES LANCTOT,
LUCIEN CANNON.

No. 7.

Factum of the Attorney-General of New Brunswick

PART ONE.

STATEMENT OF FACTS.

This matter comes before the Supreme Court of Canada as a result of the reference made by the Committee of the Privy Council on the recommendation of the Minister of Justice as set out in the Record herein on Page Three, inscribed for hearing before the said Court on the Fifteenth day of January, A.D. 1936, by order of the Rt. Hon. The Chief Justice of Canada, bearing date the Twenty-fifth day of November, A.D. 1935, as appears in the Record on Pages Four and Five, pursuant to Section 55 of the Supreme Court Act, R.S.C. 1927, Chapter 35.

PART TWO.

GROUNDS OF OBJECTION.

The Province of New Brunswick associates itself with the grounds of objection set out in the Factum of the Province of Quebec and endorses and adopts the stand taken by that Province in opposing the validity of the said referred legislation.

PART THREE.

ARGUMENT.

The Province of New Brunswick associates itself with the argument contained in the Factum of the Province of Quebec and endorses, adopts and relies upon such argument and authorities as are contained in said Factum, with respect to the legislation involved in this reference.

DONALD V. WHITE,
Counsel for the Attorney-General of New Brunswick.

In the Supreme Court of Canada.

No. 8. Factum of the Attorney-General of Manitoba.

No. 8.

Factum of the Attorney-General of Manitoba.

The Attorney-General of Manitoba at present expresses no opinion on this question referred to the Supreme Court of Canada as follows:

> 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?

but reserves the right to appeal from any judgment which is rendered.

W. J. MAJOR,
Attorney-General of Manitoba.

10

Winnipeg, January 6th, 1936.

No. 9. Factum of the Attorney-General of British Columbia.

No. 9.

Factum of the Attorney-General of British Columbia.

PART I.

SUMMARY OF FACTS.

The "Farmers' Creditors Arrangement Act," chapter 53 of the Statutes of Canada, 1934, went into effect in British Columbia on the 1st day of November, 1934.

The points to be raised in argument necessitate reference to the actual application and operation of the Act in the Province of British Columbia, particularly with regard to the conflict of its provisions and conferred powers with the rights of the Crown in the right of the Province existing under various Provincial Statutes. While there is no evidence with regard to the operation of the Act formally before the Court, it is submitted that the following illustrations will be of assistance when the Court examines the "pith and substance" of the Act and the incidents thereof.

20

A.G. British Columbia v. *Kingcome Navigation Co.* (1934), *A.C.* 45.

LAND TAXES.

The Board of Review for British Columbia constituted under the "Farmers' Creditors Arrangement Act" purported to make the following proposal and direction with regard to the affairs of one Robert A. Copeland, a farmer of Lumby, British Columbia :—

30

> "With regard to the claim of the Province of British Columbia
> " for arrears of taxes upon the above-described land, that all interest
> " due thereon with penalties be written off, and that the amount
> " payable be allowed and fixed at the sum of $1,408·03 (which is
> " inclusive of the taxes assessed and payable in 1935); and that the
> " said sum shall be payable in three equal annual instalments of

" $469·34 each, without interest, on the 31st days of October in the
" years 1936, 1937, and 1938 respectively; and the Board directs
" that no tax-enforcement proceeding shall be taken against the
" Debtor in respect of these payments until after the 31st day of
" October, 1939. The Debtor shall pay all current taxes payable
" to the Province in the year 1936 and subsequent years until and
" *including the year 1940 regularly and in accordance* with the
" provisions of the Statute in that behalf."

In British Columbia land taxes are levied, collected, and secured
10 pursuant to the provisions of the " Taxation Act," cap. 254, R.S.B.C. 1924.

Section 21 (3) *provides that taxes on land* " shall be deemed to be
" due and payable on the first day of April of the year for which the assess-
" ment roll on which they are shown has been prepared; and if such taxes
" remain unpaid on the thirtieth day of June of that year they shall be
" deemed to be delinquent on that day."

Section 23 deals with penalties and reads as follows :—

" All taxes which become delinquent shall bear interest at the
" rate of eight per centum per annum from the date on which they
" become delinquent until paid or recovered; and all interest accrued
20 " thereon shall for all purposes be deemed to be part of the delinquent
" taxes in all respects as if it had originally formed part thereof."

Section 143 provides that " All taxes assessed or imposed and due
" in respect of property shall form a lien or charge in favour of the Crown
" on the property."

Part of the taxes dealt with in the proposal above referred to are
" school taxes " provided for under the " Public Schools Act," cap. 226,
R.S.B.C. 1924, which are also collected under the " Taxation Act." The
Board of School Trustees advises the Provincial Assessor of the amount
required for school purposes for the year, and the required sum is rateably
30 assessed against the land in the district, and the sum in question is paid to
the trustees from the Consolidated Revenue Fund of the Province.

Notice was then given to the Province that the said proposal of the
Board of Review would be dealt with under Rule 19 of the Regulations
passed under the Act.

LICENCE FEES.

Proposals have also been made under the Act purporting to interfere
with the statutory collection by the Crown of licence fees for water rights
imposed under the " Water Act," cap. 271, R.S.B.C. 1924. Under that
Act fees are due annually by licence-holders and the Statute provides that
40 the Crown may cancel the licence on non-payment thereof. Cancellation
by the Crown of Provincial water rights might be prohibited by the Board
of Review under the powers purported to be contained in the " Farmers'
Creditors Arrangement Act."

SALE OF CROWN LANDS.

On March 22nd, 1932, one William Smith, of Vanderhoof, B.C., entered
into an agreement in writing with the Minister of Lands for the purchase

of certain Crown lands for the sum of $1,600, payments to be made on account of principal on certain dates and interest to be paid at the rate of 7 per cent. per annum. On April 27th, 1935, the following proposal was formulated on behalf of Smith under the " Farmers' Creditors Arrangement Act " :—

" Whereas William Smith, of Vanderhoof, B.C., farmer, is " indebted to the Province of British Columbia in the sum of $1,200, " bearing interest at the rate of 7 per cent. per annum, representing " the balance of purchase price on the W. ½ of Sec. 26–12–5, Coast " District, Vanderhoof, B.C., under Agreement of Sale in writing : 10

" It is hereby proposed by the said William Smith that the " said Agreement be cancelled, together with all indebtedness there- " under, and that the said creditor, the Provincial Government of " British Columbia, shall give a new Agreement in writing of the " said land for the price of $1,200, bearing interest at 5 per cent. " per annum, and to be repaid as follows : $50 per year for first " five years—namely, 1936–1937–1938–1939–1940—and $100 per " year thereafter, with interest at 5 per cent. per annum, date of " payments to be the first day of May in each and every year."

This proposal, upon taking effect under the Act, would be a direct 20 interference with the Crown in the right of the Province in the management and sale of the public lands belonging to the Province. Injunction proceedings instituted by the Crown in the right of the Province were successful in preventing the Board of Review from giving effect to the Copeland and Smith proposals (*inter alia*).

PART II.

OUTLINE OF ARGUMENT.

The words of the reference are as follows :—

Is the " Farmers' Creditors Arrangement Act, 1934," as amended by the " Farmers' Creditors Arrangement Act, 1935," or any of the pro- 30 visions thereof, and in what particular or particulars or to what extent *ultra vires* of the Parliament of Canada ?

The answer submitted to that question is as follows :—

A. The Act is one affecting property and civil rights within the Province and is not bankruptcy legislation.

B. Even if the Act has for its object the enactment of a system of bankruptcy or insolvency regulations, it is not legislation competent to the Dominion Parliament as it deals only with the contractual obligations of a particular class.

C. The Act is *ultra vires* in so far as it purports to empower the Board 40 of Review to make orders and directions which affect the Crown in the right of the Province as a creditor of a farmer debtor.

PART III.

ARGUMENT.

It is submitted that the "Farmers' Creditors Arrangement Act" is *ultra vires* the Parliament of Canada for the following reasons (*inter alia*):—

(A.) The Act is one primarily affecting property and civil rights within the Province but is not bankruptcy legislation.

(B.) Even if the Act has for its object the enactment of bankruptcy or insolvency legislation, it is not legislation competent to the Dominion Parliament as the provisions of the Act are restricted to the contractual obligations of a particular class.

(C.) The Act is *ultra vires* in so far as it purports to empower the Board of Review to make orders and directions which affect the Crown in the right of the Province as a creditor of a farmer debtor.

"A."

Dealing with heading "A," it is trite law that all bankruptcy legislation must be to some extent an invasion of the field of property and civil rights, and that proper bankruptcy legislation is paramount so long as it is confined to bankruptcy or matters necessarily incidental thereto.

It therefore becomes important to examine the Act with a view to deciding whether or not it properly is bankruptcy legislation and what is its real reasonable effect, its pith and substance.

The preamble of the Act may be looked at to aid in determining its intent and purpose.

> "Whereas in view of the depressed state of agriculture the "present indebtedness of many farmers is beyond their capacity to "pay; and whereas it is essential in the interest of the Dominion "to retain the farmers on the land as efficient producers, and for "such purpose it is necessary to provide means whereby compro- "mises or rearrangements may be effected of debts of farmers who "are unable to pay;
>
> "Therefore His Majesty, by and with the advice and consent of "the Senate and House of Commons of Canada, enacts as follows."

It is fair to assume that the preamble correctly sets forth the object of Parliament and therefore that object appears to be "the retaining of farmers on the land as efficient producers." In order to effect that end, provision has been made for a scheme of compromises and arrangements. Nothing is said in the Act about the division of the property of the debtor among his creditors. One finds in place of the usual and basically essential scheme provided by Bankruptcy Acts—i.e., the distribution of the assets of the debtor among his creditors—something which is the exact converse, a scheme which deprives the creditors of their assets in favour of their debtors.

It is provided that a compromise or proposal shall be based upon the present and prospective capability of the debtor to perform the obligations prescribed and upon the productive value of the farm. (Sec. 12 (8).)

In the Supreme Court of Canada.

No. 9. Factum of the Attorney-General of British Columbia—*continued.*

This basis of settlement provided supports the contention that the object of the Act was to " retain farmers upon the land."

It is submitted that this is a feature not found in any Bankruptcy or Insolvency Act either before or after Confederation. The " Insolvency Act " of 1864, in force in Canada at Confederation, does contain provisions for a composition or scheme of arrangement as pointed out by Mr. Justice Cannon in his judgment in the *Companies' Creditors* Case (hereinafter referred to), but it is submitted that the composition there provided had for its object the distribution of the assets of the debtor among his creditors.

In his judgment in the case of *L'Union St. Jacques de Montreal* v. *Belisle* (1874), L.R. 6, P.C. 31, Lord Selbourne said :— 10

" Now it has not been alleged that it comes within any other " class of the subjects so enumerated except the 21st, ' Bankruptcy " and Insolvency '; and the question therefore is whether this is a " matter coming under the class 21, of bankruptcy and insolvency? " Their Lordships observe that the scheme of enumeration in that " section is, to mention various categories of general subjects which " may be dealt with by legislation. There is no indication in any " instance of anything being contemplated, except what may be " properly described as general legislation; such legislation as is 20 " well expressed by Mr. Justice Caron when he speaks of the general " laws governing Faillite, bankruptcy and insolvency, all which are " well-known legal terms expressing systems of legislation with which " the subjects of this country, and probably of most other civilized " countries, are perfectly familiar. The words describe in their " known legal sense provisions made by law for the administration " of the estate of persons who may become bankrupt or insolvent, " according to rules and definitions prescribed by law, including " of course the conditions in which that law is to be brought into " operation, and the effect of its operation." 30

In the *Voluntary Assignments* Case, 1894, A.C. 447, the Lord Chancellor said, at p. 200 :—

" It is not necessary in their Lordships' opinion, nor would it " be expedient to attempt to define, what is covered by the words " ' bankruptcy ' and ' insolvency ' in section 91 of the ' British North " America Act.' But it will be seen that it is a feature common to " all the systems of bankruptcy and insolvency to which reference " has been made, *that the enactments are designed to secure that* in " the case of an insolvent person *his assets* shall be *rateably dis-* " *tributed amongst his creditors* whether he is willing that they shall 40 " be so *distributed or not.* Although provision may be made for " a voluntary assignment as an alternative. In reply to a question " put by their Lordships the learned counsel for the respondent " were unable to point to any scheme of bankruptcy or insolvency " legislation which did not involve *some power of compulsion by* " *process of law to secure to the creditors the distribution amongst* " *them of the insolvent debtor's estate.*"

The basic feature common to all systems of bankruptcy and insolvency —namely, the provision for the rateable distribution of assets of the debtor among his creditors—is lacking in the " Farmers' Creditors Arrangement Act." In its place is substituted the granting of certain rights to the farmer, one of which is the right to put his affairs before a tribunal vested with power to scale down, cancel, or postpone his debts with the admitted object of ensuring to him the continued occupation of his farm. Up until the farmer makes default in the payments ordered under the scheme there is no provision at all approaching what is commonly known and understood
10 as bankruptcy or insolvency law. The invocation of the provisions of the " Bankruptcy Act " dealing with assignments and petitions in bankruptcy is only what is called in the *Voluntary Assignments* Case an " alternative."

In *Attorney-General for Ontario* v. *Reciprocal Insurers*, 1924, A.C. 328, Mr. Justice Duff said, at p. 342 :—

" In accordance with the principle inherent in these decisions " their Lordships think it is no longer open to dispute that the " Parliament of Canada cannot, by purporting to create penal " sanctions under s. 91, head 27, appropriate to itself exclusively " a field of jurisdiction in which, apart from such a procedure, it
20 " could exert no legal authority, and that if, when examined as a " whole, legislation in form criminal is found, in aspects and for " purposes exclusively within the Provincial sphere, to deal with " matters committed to the Provinces, it cannot be upheld as valid. " And indeed, to hold otherwise would be incompatible with an " essential principle of the Confederation scheme, the object of " which, as Lord Watson said in *Maritime Bank of Canada* v. " *Receiver-General of New Brunswick*, was ' not to weld the Pro- " vinces into one or to subordinate the Provincial Governments to " a central authority.' "

30 It is submitted that, when the " pith and substance " of the " Farmers' Creditors Arrangement Act " is examined, it is not bankruptcy or insolvency legislation, and that the rights and privileges allowed farmers as a class by this Act are such that could only be validly conferred by legislative enactment of the Province under one or more of the appropriate heads of section 92. Once it is decided that the " pith and substance " of the Act is not a matter falling within one of the appropriate heads of section 91, then the whole Act must fall.

" B."

Dealing with heading " B," it is indisputable that one of the main
40 features of the Act is that its operation is confined to farmers and the contracts of farmers. No general application of the law of bankruptcy is attempted, and the " pith and substance " of the whole Act is the establishment of a procedure for the writing-down of the contractual obligations of a certain class—namely, farmers. It is submitted that legislation of such a character, restricted as it is in its operation to one class, cannot be supported as bankruptcy legislation, but only as legislation conferring civil rights upon a privileged occupation.

In the Supreme Court of Canada.

No. 9. Factum of the Attorney-General of British Columbia—*continued.*

It was held in *Citizens Insurance Company of Canada* v. *Parsons* (1881), 7 A.C. 96, that the words "regulation of trade and commerce" used in No. 2 of section 91 include political arrangements in regard to trade requiring the sanction of Parliament, regulation of trade in matters of interprovincial concern, and it may be general regulation of trade affecting the whole Dominion; but do not include the regulation of the contracts of a particular business or trade such as the business of fire insurance in a single Province.

In this connection it must be stressed that the "Farmers' Creditors Arrangement Act" deals only with the contracts of persons of one occupation. 10

Furthermore, apparently the Act was not intended to be applied to Canada as a whole, but only to such Provinces as the Governor-General may by Proclamation direct.

In dealing with the subject of trade and commerce and the necessity of the Dominion Parliament confining its legislative functions to enactments of a general nature, Sir Montague Smith, in the *Parsons* Case (*supra*), said, at pp. 112 and 113:—

> "The words 'regulation of trade and commerce' in their
> " unlimited sense are sufficiently wide, if uncontrolled by the context
> " and other parts of the Act, to include every regulation of trade 20
> " ranging from political arrangements in regard to trade with foreign
> " Governments requiring the sanction of Parliament, down to
> " minute rules for regulating particular trades. But a consideration
> " of the Act shows that the words were not used in this unlimited
> " sense. In the first place, the collocation of No. 2 with classes of
> " subjects of national and general concern affords an indication that
> " regulations relating to general trade and commerce were in the
> " mind of the Legislature, when conferring this power on the
> " Dominion Parliament. If the words had been intended to have
> " the full scope of which in their literal meaning they are susceptible, 30
> " the specific mention of several of the other classes of subjects
> " enumerated in section 91 would have been unnecessary; as, 15.
> " banking; 17, weights and measures; 18, bills of exchange and
> " promissory notes; 19, interest; and even 21, bankruptcy and
> " insolvency.
>
> "'Regulation of trade and commerce' may have been used in
> " some such sense as the words 'regulation of trade' in the Act of
> " Union between England and Scotland (6 Anne, c. 11) and as these
> " words have been used in Acts of State relating to trade and com-
> " merce. Article V. of the Act of Union enacted that all the subjects 40
> " of the United Kingdom should have 'full freedom and inter-
> " course of trade and navigation' to and from all places in the
> " United Kingdom and the Colonies; and Article VI. enacted that all
> " parts of the United Kingdom from and after the Union should be
> " under the same 'prohibitions, restrictions, and regulations of
> " trade.' Parliament has at various times since the Union passed
> " laws affecting and regulating specific trades in one part of the

" United Kingdom only, without its being supposed that it thereby
" infringed the Articles of Union. Thus the Acts for regulating the
" sale of intoxicating liquors notoriously vary in the two kingdoms.
" So with regard to Acts relating to bankruptcy and various other
" matters.

" Construing, therefore, the words 'regulation of trade and
" commerce' by the various aids to their interpretation above sug-
" gested, they would include political arrangements in regard to
" trade requiring the sanction of Parliament, regulation of trade in
10 " matters of interprovincial concern, and it may be that they would
" include general regulation of trade affecting the whole Dominion.
" Their Lordships abstain on the present occasion from any attempt
" to define the limits of the authority of the Dominion Parliament
" in this direction. It is enough for the decision of the present case
" to say that, in their view, its authority to legislate for the regulation
" of trade and commerce does not comprehend the power to regulate
" by legislation the contracts of a particular business or trade, such
" as the business of fire insurance, in a single Province, and there-
" fore that its legislative authority does not in the present case con-
20 " flict or compete with the power over property and civil rights
" assigned to the Legislature of Ontario by No. 13 of section 92 (1)."

In *Toronto Electric Commissioners* v. *Snider* (1925), A.C. 396, Viscount Haldane expressed the same view when he said, at p. 409 :—

" The contracts of a particular trade or business could not,
" therefore, be dealt with by Dominion legislation so as to conflict
" with the powers assigned to the Provinces over property and civil
" rights relating to the regulation of trade and commerce. The
" Dominion power has a really definite effect when applied in aid
" of what the Dominion Government are specifically enabled to do
30 " independently of the general regulation of trade and commerce;
" for instance, in the creation of Dominion companies with power
" to trade throughout the whole of Canada. The same thing is
" true of the exercise of an emergency power required as on the
" occasion of war, in the interest of Canada as a whole, a power
" which may operate outside the specific enumerations in both sec-
" tions 91 and 92."

In the case of *L'Union St. Jacques de Montreal* v. *Belisle*, L.R. (1874), P.C., reference is made by Lord Selbourne to the interpretation which should be placed on the words " bankruptcy and insolvency " as used in
40 No. 21 of section 92, when he said, at p. 8 :—

" There is no indication of anything being contemplated except
" what may be properly described as *general legislation ;* such
" legislation as is well expressed by Mr. Justice Caron when he
" speaks of the *general laws governing Faillite, bankruptcy, and*
" *insolvency.* . . . "

It is submitted that if Parliament had intended to apply bankruptcy law to farmers it could have done so by the simple expedient of repealing

In the Supreme Court of Canada.

No. 9. Factum of the Attorney-General of British Columbia—*continued.*

section 7 of the " Bankruptcy Act." Such a procedure would have made farmers subject to the general bankruptcy law. The fact that this course has not been pursued fortifies the submission that the " Farmers' Creditors Arrangement Act " is not bankruptcy or insolvency legislation. Nor can it be logically suggested, it is submitted, that the Act is legislation necessarily ancillary to the operation of general bankruptcy law. In fact, the " Farmers' Creditors Arrangement Act " is regarded as the substantive Act and provisions of the " Bankruptcy Act " are treated as ancillary to its objects.

" C."

Dealing now with heading " C " : The real extent of the invasion 10 of the Provincial field of legislative jurisdiction is only disclosed when the operation of the Act is examined in so far as it affects the Crown in the right of the Province. The principle that the Province is the supreme authority in the matter of the management and sale of Crown lands in the Province, and the disposition of the moneys derived from the sales of Crown lands or owing on such sales has never been successfully challenged.

In *Province of Ontario* v. *Dominion of Canada* (1909), 42, S.C.R., Mr. Justice Duff said :—

" The independence of the Province as regards their control " of the property and revenues appropriated to them by the Act 20 " has been emphasized in a series of decisions; and it has been " frequently pointed out that the parts of the Act in which property " and revenues are declared to ' belong to ' or to be ' the property of ' " the Provinces import simply that the public property and revenues " referred to while continuing to be vested in the Crown are made " subject to the exclusive disposition of the Provincial Legislatures."

It would be difficult to appreciate what measure of independence the Provinces have if the Federal authority, under guise of bankruptcy and insolvency legislation, can direct the Provinces what price they will take for their Crown lands, the length of time for payment on the purchase 30 thereof, and the rate of interest to be charged. All these matters are the subject of Provincial statute law and regulations.

The power of the Province to raise revenue by taxation is most seriously interfered with by the Act in question. An assessment, the rate for which is provided for by Provincial Statute, may virtually be reduced, and the Crown in the right of the Province is enjoined from invoking the remedies provided for by Statute for the enforcement of the Crown's lien for taxes.

Rates struck for the raising of funds for education are arbitrarily interfered with, thus depriving the Province of the exclusive jurisdiction over education provided for in section 93 of the " British North America 40 Act."

Provincial legislation setting licence fees can be rewritten by the simple expedient of treating the fees as debts, and by postponing the time for payment or by simply reducing or cancelling the debt.

When all these matters are considered it becomes manifest that the " Farmers' Creditors Arrangement Act " not only conflicts with " property

and civil rights in the Province," but conflicts with the right of the Province to administer a majority of the exclusive powers granted to the Province under section 92.

In addition, it is submitted that the Act goes to the extent of affecting the proprietary rights of the Province in its own lands. It was held in *Attorney-General for Canada* v. *Attorney-General for Quebec*, 1921, A.C. 413, that the Dominion power to regulate sea-coast and inland fisheries must not be so exercised to deprive the Province or private persons of proprietary rights which they possess.

10 Then it is submitted that the principle underlying the decision of the Privy Council in *Union Collieries* v. *Bryden* (1899), A.C. 580, is applicable to the Act now under consideration to indicate that the Dominion Parliament cannot under the guise of bankruptcy and insolvency legislation invade the Provincial field so as to interfere with or abrogate contractual relationships of the Crown Provincial with a certain class of its debtors.

In *Union Colliery* v. *Bryden, supra,* it was held that section 4 of the British Columbia " Coal-mines Regulation Act," which prohibits Chinamen of full age from employment in underground coal-workings, is, in that respect, *ultra vires* of the Provincial Legislature. Regarded merely as a 20 coal-working regulation, it would come within section 92, subsection (10), or section 92, subsection (13), of the " British North America Act." But its exclusive application to Chinamen who are aliens or naturalized subjects establishes a statutory prohibition which is within the exclusive authority of the Dominion Parliament conferred by section 91, subsection (25), in regard to " naturalization and aliens."

In the course of his judgment, Lord Watson said, at p. 585 :—

> " There can be no doubt that, if section 92 of the Act of 1867 " had stood alone and had not been qualified by the provisions of " the clause which precedes it, the Provincial Legislature of British 30 " Columbia would have had ample jurisdiction to enact section 4 " of the ' Coal-mines Regulation Act.' The subject-matter of that " enactment would clearly have been included in section 92, sub- " section (10), which extends to Provincial undertakings such as " the coal-mines of the appellant company. It would also have " been included in section 92, subsection (13), which embraces " ' property and civil rights ' in the Province.
>
> " But section 91, subsection (25), extends the legislative juris- " diction of the Parliament of Canada to ' naturalization and aliens.' " Section 91 concludes with a proviso to the effect that ' any matter 40 " 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 " subjects by this Act assigned exclusively to the Legislatures of " the Provinces.'
>
> " The provisions of which the validity has been thus affirmed " by the Courts below are capable of being viewed in two different " aspects, according to one of which they appear to fall within the

In the Supreme Court of Canada.

No. 9. Factum of the Attorney-General of British Columbia — *continued.*

" subjects assigned to the Provincial Parliament by section 92 of
" the 'British North America Act, 1867,' whilst, according to the
" other, they clearly belong to the class of subjects exclusively
" assigned to the Legislature of the Dominion by section 91, sub-
" section (25). They may be regarded as merely establishing a
" regulation applicable to the working of underground coal-mines;
" and, if that were an exhaustive description of the substance of the
" enactments, it would be difficult to dispute that they were within
" the competency of the Provincial Legislature by virtue either of
" section 92, subsection (10), or section 92, subsection (13). *But* 10
" *the leading feature of the enactments consists in this : that they have,*
" *and can have, no application except to Chinamen who are aliens*
" *or naturalized subjects,* and that they establish no rule or regulation
" except that these aliens or naturalized subjects shall not work, or
" be allowed to work, in underground coal-mines within the
" Province of British Columbia."

So in this case it is the leading feature of the "Farmers' Creditors Arrangement Act" to confer upon farmers a right to abrogate their contracts with the Crown and others.

Then in the case of *Brooks-Bidlake & Whittall, Ltd.* v. *Attorney-General* 20 *for B.C.* (1923), A.C. 318, Viscount Cave said, at p. 323 :—

"Section 91 reserves to the Dominion Parliament the general
" right to legislate as to the rights and disabilities of aliens and
" naturalized persons; but the Dominion is not empowered by that
" section to regulate the management of the public property of the
" Province. . . ."

Applying the language used by Viscount Cave, it is then submitted that the Parliament of Canada cannot regulate the management of the public property of the Province through the agency of an Act such as the "Farmers' Creditors Arrangement Act." 30

It will be urged by those seeking to uphold the Act that the constitutional validity thereof is settled by the decision in the reference *re The "Companies' Creditors Arrangement Act"* (1934), S.C.R., p. 659. It is submitted, however, in view of the several distinctions between the two Acts, that the constitutional validity of the "Farmers' Creditors Arrangement Act" is still open to question.

It would appear from the reported decision (*supra*) that the only two objections raised in the *Companies' Creditors* Case were as follows :—

1. That under a system of bankruptcy compositions and arrangements cannot be dealt with before a receiving order or assignment has been made. 40

2. That the Act does not endeavour to treat equally all contracts between the debtor and his creditors, but allows the interest of some of them to be sacrificed in the interest of the Company and of other classes of creditors.

No argument, it seems, was advanced that the "Companies' Creditors Arrangement Act" was *ultra vires* in so far as it affects the Crown as a

creditor. Indeed, that Act does not purport by specific enactment to bind the Crown, nor are appropriate sections of the "Bankruptcy Act" invoked to effectuate that purpose.

An examination of the two Statutes, the "Companies' Creditors Arrangement Act" and the "Farmers' Creditors Arrangement Act," discloses that the two Acts are not so similar in principle as would justify a conclusion that the decision in the "*Companies' Creditors Act*" *Reference* Case is by any means conclusive of all the questions raised in issue here. The "Companies' Creditors Arrangement Act" may be summarized as 10 follows:—

In the Supreme Court of Canada.

No. 9. Factum of the Attorney-General of British Columbia—*continued.*

(*a*) It relates only to debtor companies, defined as meaning companies which are bankrupt or insolvent or which have committed an act of bankruptcy within the meaning of the "Bankruptcy Act" or which are deemed insolvent within the meaning of the "Winding-up Act," or have made an authorized assignment, or against which a receiving order has been made under the "Bankruptcy Act," or which are in the course of being wound up under the "Winding-up Act" because of insolvency.

(*b*) A compromise or arrangement may be made between the debtor companies and its creditors whether secured or unsecured, and the Court 20 may order that a meeting of creditors be held.

(*c*) Any compromise effected at a meeting of creditors or class of creditors may be sanctioned by the Court, whereupon it shall be binding upon all creditors, or all creditors of that particular class.

(*d*) An appeal may be taken by any person dissatisfied by an order made under the Act.

The "Farmers' Creditors Arrangement Act" may be summarized as follows:—

(*a*) The Act applies to farmers who are unable to meet their obligations as they become due (section 6 (1)).

30 (*b*) A farmer who is unable to meet his liabilities as they become due may make a proposal for a composition, extension of time, or scheme of arrangement either before or after assignment has been made (section 6). The proposal is filed with the Official Receiver, who thereupon convenes a meeting of the creditors and performs the duties and functions required by the "Bankruptcy Act" to be performed by the trustee in the case of a proposal for a composition, extension of time, or scheme of arrangement.

(*c*) Provision is then made for the appointment of a Board of Review, who, in the event of the farmer's proposal not being accepted by the creditors, may formulate a proposal.

40 (*d*) If the Board's proposal is accepted by the creditors and the debtor, it is filed in Court and thereupon becomes binding on the debtor and all his creditors.

(*e*) If the creditors or the debtor decline to approve the proposal, the Board may nevertheless confirm it, in which case it shall be approved by the Court and shall thereupon become binding on all parties.

(*f*) The Board must base its proposal upon the prospective capability of the farmer debtor to perform the obligations prescribed and the productive value of the farm.

(*g*) Part I. of the " Bankruptcy Act " shall apply to a farmer whose affairs have been arranged by a proposal approved by the Court or confirmed by the Board, but only failure on the part of the farmer to carry out the terms of the proposal shall be deemed an act of bankruptcy.

The Acts therefore differ in the following particulars :—

(*a*) The " Companies' Creditors Arrangement Act " refers only to companies which are bankrupt or insolvent or are otherwise deemed to be insolvent, while the " Farmers' Creditors Arrangement Act " relates solely to farmers who are unable to meet their liabilities as they become due without any reference to bankruptcy.

(*b*) While a farmer comes within Part I. of the " Bankruptcy Act " only, when his affairs have been arranged by a proposal approved or confirmed, the companies dealt with are admittedly subject to the " Bankruptcy Act " throughout.

(*c*) In the case of companies the proposal requires to be accepted by a definite percentage of the creditors concerned. In the case of farmers, however, nothing is said in this connection unless it can be said to be implied from the provisions requiring the Official Receiver to perform the duties and functions required by the " Bankruptcy Act " to be performed by a trustee.

(*d*) In the resolution relating to farmers, power is given to the Board of Review to formulate its own proposal in amendment to that submitted by the debtor. No such arbitrary power is given under the " Companies' Creditors Arrangement Act."

(*e*) The proposal of the Board of Review in the case of debts owing by farmers is required to be based upon the present and prospective composition of the debtor to perform the obligations prescribed and the productive value of the farm. No such provision is contained in the other Act.

(*f*) Under the " Companies' Creditors Arrangement Act " proceedings may be initiated either by the company or its creditors. Under the " Farmers' Creditors Arrangement Act," however, the proceedings can only be initiated by him, and are, in the first instance, entirely voluntary on his part, but may become of a compulsory character at a later date.

By its judgment delivered on 11th June, 1934 (S.C.R. 1934, p. 659), the Supreme Court of Canada decided that the " Companies' Creditors Arrangement Act " is *intra vires* of the Dominion Parliament. Owing to the various distinctions between that enactment and the " Farmers' Creditors Arrangement Act, 1934," it is submitted that the validity of the latter enactment is by no means established by the Supreme Court pronouncement.

All of which is respectfully submitted.

GORDON McG. SLOAN,
of Counsel for the Province of British Columbia.

In the Supreme Court of Canada.

No. 10.

Factum of the Attorney-General of Saskatchewan.

No. 10. Factum of the Attorney-General of Saskatchewan.

The Attorney-General of Saskatchewan at present expresses no opinion on this question referred to the Supreme Court of Canada as follows :

> 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 ?

10 but reserves the right to appeal from any judgment which is rendered.

SAMUEL QUIGG,
of Counsel for the
Attorney-General of Saskatchewan.

Regina, January 6th, 1936.

No. 11.

Formal Judgment.

No. 11. Formal Judgment, 17th June 1936.

IN THE SUPREME COURT OF CANADA.

Wednesday, the seventeenth day of June, A.D. 1936.

PRESENT :

20 THE RIGHT HONOURABLE SIR LYMAN P. DUFF, P.C., G.C.M.G., C.J.C.
THE HONOURABLE MR. JUSTICE RINFRET.
THE HONOURABLE MR. JUSTICE CANNON.
THE HONOURABLE MR. JUSTICE CROCKET.
THE HONOURABLE MR. JUSTICE DAVIS.
THE HONOURABLE MR. JUSTICE KERWIN.

IN THE MATTER of a Reference as to whether the Farmers' Creditors Arrangement Act, 1934, being Chapter 53 of the Statutes of Canada, 1934, as amended by the Farmers' Creditors Arrangement Act Amendment Act, 1935, being Chapter 20 of the Statutes of Canada, 30 1935, or any of the provisions thereof, and in what particular or particulars or to what extent, is *ultra vires* of the Parliament of Canada.

WHEREAS by Order in Council of His Majesty's Privy Council for Canada, bearing date the eighteenth day of November, in the year of our Lord, one thousand nine hundred and thirty-five (P.C. 3578), the important question of law hereinafter set out was referred to the Supreme Court of

In the Supreme Court of Canada.

No. 11. Formal Judgment, 17th June 1936—*continued.*

Canada, for hearing and consideration, pursuant to section 55 of the Supreme Court Act, Revised Statutes of Canada, 1927, chapter 35 :—

" 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 ?

AND WHEREAS the said question came before this Court for hearing and consideration on the fourth and fifth days of February, in the year of our Lord, one thousand nine hundred and thirty-six, in the presence of Hon. N. W. Rowell, K.C., Mr. Louis St-Laurent, K.C., Mr. C. P. Plaxton, K.C., and Mr. R. St. Laurent, of counsel for the Attorney-General of Canada; Hon. A. W. Roebuck, K.C., and Mr. I. A. Humphries, K.C., of counsel for the Attorney-General for the Province of Ontario; Mr. Charles Lanctot, K.C., and Mr. Aimé Geoffrion, K.C., of counsel for the Attorney-General of the Province of Quebec; Mr. D. V. White, of counsel for the Attorney-General for the Province of New Brunswick; Hon. G. McG. Sloan, K.C., and Mr. J. W. de B. Farris, K.C., of counsel for the Attorney-General of the Province of British Columbia; Mr. J. Allen, K.C., of counsel for the Attorney-General for the Province of Manitoba; and Mr. S. Quigg, of counsel for the Attorney-General for the Province of Saskatchewan; and after due notice to the Attorneys-General for the Provinces of Alberta, Nova Scotia and Prince Edward Island;

WHEREUPON and upon hearing what was alleged by counsel aforesaid, this Court was pleased to direct that the said Reference should stand over for consideration, and the same having come on this day for determination; the Court hereby certifies to His Excellency the Governor-General in Council for his information, pursuant to subsection 2 of section 55 of the Supreme Court Act, that the opinion of the Court is as follows :—

" 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.*

and that the reasons for such answers are to be found in the reasons for the answers written by the Chief Justice and concurred in by Mr. Justice Rinfret, Mr. Justice Crocket, Mr. Justice Davis and Mr. Justice Kerwin, and in the reasons for the answers written by Mr. Justice Cannon, copies of which reasons are hereunto annexed.

(Sgd.) J. F. SMELLIE,
Registrar.

In the Supreme Court of Canada.

No. 12.
Reasons for Judgment.
(*a*) Duff C.J. (concurred in by Rinfret, Crocket, Davis, and Kerwin JJ.).

No. 12.

Reasons for Judgment of Duff C.J.

(*a*) The CHIEF JUSTICE (Concurred in by Rinfret, Crocket, Davis and Kerwin JJ.)—The title of the Act, which is really an office consolidation of a statute of 1934 with another of 1935, is " An Act to facilitate compromises and arrangements between farmers and their creditors."

The Act provides a procedure whereby a farmer may make a proposal for a composition, extension of time or scheme of arrangement to his creditors. If the proposal is accepted by the ordinary creditors, and secured creditors whose rights are affected agree to it, 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 does not agree, there is a reference to a board of review to formulate a proposal. If a proposal is formulated by the board of review and approved by the creditors and the debtor; or if, though not so approved, it is confirmed by the board of review, it is binding on all the creditors and the debtor.

" Farmer " means " a person whose principal occupation consists in farming or the tillage of the soil." " Creditor " includes " secured creditor."

Subsection 2 of section 2 makes the provisions of the Bankruptcy Act and rules applicable and is in these words :

> Unless it is otherwise provided or the context otherwise requires, expressions contained in this Act shall have the same meaning as in the Bankruptcy Act, and this Act shall be read and construed as one with the Bankruptcy Act, but shall have full force and effect notwithstanding anything contained in the Bankruptcy Act, and the provisions of the Bankruptcy Act and Bankruptcy Rules shall, except as in this Act otherwise provided, apply *mutatis mutandis* in the case of proceedings hereunder including meetings of creditors.

We are chiefly concerned with the provisions with regard to compositions. It is provided that a farmer who is unable to meet his liabilities as they become due may make a proposal for a composition, an extension of time or scheme of arrangement, and file a proposal with the Official Receiver who shall forthwith call a meeting of the creditors.

The Official Receiver is to perform the duties and functions required by the Bankruptcy Act to be performed by a trustee in the case of a proposal for a composition, extension of time or scheme of arrangement. These duties and functions are, generally, the submission to the meeting of the proposal, and, on its acceptance by the creditors, the application to the Court to approve it. A proposal may be one in relation to a debt owing to a secured creditor or owing to a person who has acquired property subject to a right of redemption, but except in the case of a proposal confirmed by the Board of Review, the concurrence of such creditor is required. Such a creditor, if the proposal relates to the debt owing to him, may value his security, and is entitled to vote only in respect of the balance of his claim after deducting the amount of his valuation, but no proposal is to be approved by the Court which provides for payment in excess of the valuation.

The provisions of the Bankruptcy Act preventing the approval of a proposal which does not provide for a payment of not less than fifty cents

on the dollar, and priority of payment of certain debts are made inapplicable. Power is given to the Court to order a farmer to execute instruments necessary to give effect to the proposal when it has received the approval of the Court or the confirmation of the Board of Review. On the filing of a proposal, the property of the debtor is deemed to be under the authority of the Court, and creditors' remedies may not be exercised without leave of the Court for ninety days, or such further time as the Court may order.

Provision is made for the establishment in any province of a Board of Review consisting of a Chief Commissioner, who must be a Judge having jurisdiction in bankruptcy, and two Commissioners, one as representative of creditors and one as representative of debtors. When the Official Receiver reports that no proposal has been approved by the creditors, although one has been made, the Board, on the written request of a creditor or the debtor, is required to endeavour to formulate an acceptable proposal, and to consider representations by the parties interested. If any such proposal is approved by the creditors and the debtor, it is binding on them. If such a proposal is not approved, the Board may confirm it and it becomes binding upon all the creditors and the debtor. The full Board must deal with every request to formulate a proposal, and the determination of the majority prevails. The Board must base its proposal upon the present and prospective capability of the debtor to perform the obligations prescribed and the productive value of the farm, and may decline to formulate a proposal where it does not consider it can do so in fairness and justice to the debtor and the creditors. The Board is invested with the powers of a Commissioner appointed under the Inquiries Act. Special provision is made for insolvent farmer debtors residing in Quebec, whereby they may make an assignment for the general benefit of their creditors.

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.

As above mentioned, the provisions of the statute are made a part of the general system for the administration of the assets of bankrupts and insolvents established by the Bankruptcy Act; and they come into operation only when a farmer who is unable to meet his liabilities as they become due makes a proposal for a composition, extension of time or scheme of arrangement.

The grounds upon which the validity of the statute is impeached are, mainly, two : First, it is argued that it is not competent to the Parliament of Canada, in exercising its powers in relation to bankruptcy and insolvency, to enact legislation depriving a secured creditor of his right to realize his security fully for the recovery of the debt owing to him, where such security consists of a conventional charge upon the property of the insolvent or affecting that right by subjecting him in respect of it to the discretionary order of a tribunal.

Second, it is contended that the Parliament of Canada is incompetent to legislate in such a way as to affect the rights of the government of a province as creditor of an insolvent in the manner in which this statute professes to do.

The general scope of the jurisdiction in relation to bankruptcy or insolvency conferred under section 91 is thus described by Lord Selborne in *L'Union St. Jacques* v. *Belisle* (1) :—

The words describe in their own legal sense provisions made by law for the administration of the estates of persons who may become bankrupt or insolvent, according to rules and definitions prescribed by law, including of course the conditions in which that law is to be brought into operation, the manner in which it is to be brought into operation, and the effect of its operation.

These words would indicate that Parliament, in providing for the administration of the estates of bankrupts and insolvents, has a very wide discretion and is not necessarily limited in the exercise of that discretion by reference to the particular provisions of bankruptcy legislation in England prior to the date of the B.N.A. Act. It is not necessary, however, for the purpose of passing upon the validity of this statute to determine to what extent Parliament is empowered, when making provision for the administration of such estates, to depart from the broad lines of such legislation as known and understood in 1867.

It is not open to dispute in this Court 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 Arrangements* Act (2)). Nor can the authority of Parliament be controverted to enact provisions by which the security of a creditor of an insolvent may be prejudicially affected without his consent. That was decided in the case just referred to. By the statute under consideration on that reference, it is enacted (section 4) that

Where a compromise or arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of such creditors, or class of creditors, and, if the court so determines, of the shareholders of such company, to be summoned in such manner as the court directs.

By section 5 it is provided that,

If a majority in number representing three-fourths in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections three and four of this Act, or either of such sections, agree to any compromise or arrangement either as proposed . . . . or modified at such meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned shall be binding on all the creditors, or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and shall also be binding on the company. . . .

" Secured creditors " include the " holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company. . . ."

(1) (1875) L.R. 6 P.C. 31, at p. 36. (2) (1934) S.C.R. at p. 659.

In the Supreme Court of Canada.

No. 12.
Reasons for Judgment.
(*a*) Duff C.J. (concurred in by Rinfret, Crocket, Davis, and Kerwin JJ.)—*continued.*

In the case mentioned, this statute was held to be *intra vires.* The decision necessarily involves the proposition that Parliament may legislate in such a way as to make the terms of a compromise, to which a majority of three-fourths in value of secured creditors, or any class of secured creditors, in the sense mentioned, are parties, where the composition has received judicial sanction, binding upon a secured creditor who is not a party to the composition and has not given his assent to it. The principle of the legislation, in a word, is that a secured creditor under the conditions mentioned may be required by law to accept a composition to which he has not given his assent. 10

It has, of course, been a familiar characteristic of the operation of bankruptcy and insolvency legislation that a creditor possessing security on the property of his debtor in virtue of a judgment or of an execution should lose his privileged position to the extent to which the judgment or execution remains unsatisfied on bankruptcy supervening. But the argument under consideration distinguishes between the kind of security given by law to a judgment creditor and a conventional security and, in particular, a security in the nature of mortgage. From the point of view of the judgment creditor, the distinction, perhaps, does not rest upon very satisfactory grounds. It was at one time the law in some of the provinces of Canada 20 that a judgment registered in a land registry office constituted a charge upon the lands of the judgment debtor enforceable in the same manner as an equitable charge for securing the payment of money; and a confession of judgment at one time was a form of security well known. Such security, although it derived its effectiveness from the privileges conferred by the law upon judgment creditors, had its origin in convention. Moreover, the judgment creditor who, by the law of the province, is the holder of a hypothec upon the lands of the judgment debtor or by virtue of the registration of his judgment, has what amounts to an equitable charge upon such lands may suffer as great a deprivation by bankruptcy legislation which takes away his 30 privilege upon a supervening bankruptcy as would a mortgagee affected in the same way. Nevertheless, it is true that, traditionally, mortgages have not, by bankruptcy legislation, been prejudicially affected in their right to resort to their securities.

Mr. Rowell has called our attention to section IX of chapter 19 (21 Jac. 1), and it appears that from the date of that enactment (1623) down to 1869, English bankruptcy legislation has contained a substantially similar provision. The section is in these words :—

IX. And, for the better division and distribution of the lands, tenements, hereditaments, goods, chattels and other estate of such bankrupt, to and amongst his or her creditors; Be 40 it enacted, That . . .; and that all and every creditor and creditors having security for his or their several debts, by judgment, statute, recognizance, specialty with penalty or without penalty, or other security, or having no security, or having made attachments in London, or any other place, by virtue of any custom there used, of the goods and chattels of any such bankrupt, whereof there is no execution or extent served and executed upon any of the lands, tenements, hereditaments, goods, chattels, and other estate of such bankrupts, before such time as he or she shall or do become bankrupt, shall not be relieved upon any such judgment, statute, recognizance, specialty, attachments or other security for any more than a rateable

part of their just and due debts, with the other creditors of the said bankrupt, without respect to any such penalty or greater sum contained in any such judgment, statute, recognizance, specialty with penalty, attachment or other security.

By force of another section of the same statute, mortgages of real or personal property are not within the general words " other security." The section in itself, however, is of significance. Among the securities mentioned are " statutes and recognizances."

Statutes merchant and statutes staple are discussed by Blackstone (Ed. 1766, Clarendon Press, Vol. II, ch. 10, s. 4, p. 160). This section is
10 devoted to one species of estates defeasible on condition and is preceded, in section 3, by a discussion of estates held *in vadio*, or pledge, which are said to be of two kinds—*vivum vadium*, or living pledge, and *mortuum vadium*, or dead pledge or mortgage. These sections (3 and 4) are introduced thus :

There are some estates defeasible upon condition subsequent, that require a more peculiar notice. Such are

Section 4 is in these words :

A fourth species of estates, defeasible on condition subsequent, are those held by *statute merchant*, and *statute staple ;* which are very nearly related to the *vivum vadium* before mentioned, or estate held till the profits thereof shall discharge a debt liquidated or ascer-
20 tained. For both the statute merchant and statute staple are securities for money; the one entered into pursuant to the statute 13 Edward I *de marcatoribus*, and thence called a statute merchant; the other pursuant to the statute 27 Edw. III, c. 9, before the mayor of the staple, that is to say, the grand mart for the principal commodities or manufactures of the kingdom formerly held by act of parliament in certain trading towns, and thence this security is called a statute staple. They are both, I say, securities for debts, originally permitted only among traders, for the benefit of commerce; whereby the lands of the debtor are conveyed to the creditor, till out of the rents and profits of them his debt may be satisfied ; and during such time as the creditor so holds the lands, he is tenant by statute merchant or statute staple. There is also a similar security, the recognizance in the nature of a statute staple, which
30 extends the benefit of this mercantile transaction to all the king's subjects in general, by virtue of the statute 23 Hen. VIII, c. 6.

The statutes which introduced these forms of securities were repealed in 1863. These securities, it should be observed, were effected by recognizance, the debtor's lands being bound as from the date of the recognizance. Blackstone, however, treats the security as one arising from conveyance, and Blackstone may be safely accepted as giving the current professional view of such transactions. The effect of the section quoted was that the holders of such securities were put in the same position as a judgment creditor; and upon bankruptcy a creditor holding such a security ranked
40 on the assets rateably with unsecured creditors.

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.

In the Supreme Court of Canada.

No. 12. Reasons for Judgment. (a) Duff C.J. (concurred in by Rinfret, Crocket, Davis, and Kerwin JJ.)—*continued.*

Before turning to the second ground upon which the legislation is attacked, it is convenient to refer to the nature of the proposal which is authorized in the case of secured creditors. That appears from section 7 which is in these words:

7. A proposal may provide for a compromise or an extension of time or a scheme of arrangement in relation to a debt owing to a secured creditor, or in relation to a debt owing to a person who has acquired movable or immovable property subject to a right of redemption, but in that event the concurrence of the secured creditor or such person, shall be required, except in the case of a proposal formulated and confirmed by the Board of Review as hereinafter provided. 10

It will be observed that the character of proposal contemplated in such cases is strictly limited to one which provides for a compromise, an extension of time or scheme of arrangement in relation to a debt owing to the secured creditor. The statute apparently, as counsel for the Dominion argued, does not envisage any interference with the rights of secured creditors except in relation to the debts owing to them and then (in the absence of the assent of the creditor) only to a compromise or extension of time or scheme of arrangement embodied in the proposal formulated and confirmed by the Board of Review.

As to the second ground of objection, the judgment of the Judicial 20 Committee in *Re Silver Brothers* [1] seems very clearly to lay down and decide that it is competent to the Dominion, in legislating in relation to bankruptcy or insolvency, to deal with the privilege attaching to debts owing to the Crown in the right of a province and to take away any priority accorded to such debts by the law of a province. The legislative authority in bankruptcy matters to deal with debts owing to a province is no less than the authority to deal with debts owing to the Dominion.

To summarize: The power to enact this statute is derived from subdivision 21 of section 91 of the B.N.A. Act—in virtue of which the exclusive legislative authority of the Parliament of Canada extends to the subject 30 of Bankruptcy and Insolvency. The broad purpose of the statute is, in the words of the title, "to facilitate compromises and arrangements between farmers and their creditors." The provisions of the statute affect farmers who are in such a situation that they are unable to pay their debts as they fall due. It is 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 come into operation where such a state of insolvency exists. *Prima facie*, therefore, it is, within the ordinary meaning of the words, a statute dealing with insolvency. The statute is, by its express terms, incorporated into the general system 40 of bankruptcy legislation in force in Canada and it is 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" (see page 5 of the judgment).

It is contended on behalf of the provinces that the jurisdiction of the Dominion in relation to this subject is limited to the enactment of legislation

[1] (1932) A.C. at pp. 519–521.

which at least in its broad lines, conforms 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 B.N.A. Act. We do not consider it necessary to decide upon the question whether or not the powers vested in Parliament in relation to this subject are for all time restricted by reference to the legislative practice which obtained prior to the passing of the B.N.A. Act. The attack upon the statute was mainly directed against the provision which makes it possible to force the terms of a composition upon a secured creditor by which a secured creditor may be compelled to submit to a reduction of the debt owing to him by the insolvent.

In the Supreme Court of Canada.

No. 12. Reasons for Judgment. (a) Duff C.J. (concurred in by Rinfret, Crocket, Davis, and Kerwin JJ.)—*continued.*

This is 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 does not in this respect differ from the Companies' Creditors Arrangement Act and the principle of our decision on the Reference respecting that statute (1934 S.C.R. 659) is 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.

The statute being *intra vires*, the interrogatory addressed to us should be answered in the negative.

(b) Cannon, J.

(b) CANNON, J.—This Court, on a previous reference, 1934 S.C.R., p. 659, reached the conclusion that the Companies Creditors' Arrangement Act, 23–24 Geo. V, ch. 36, was *intra vires* of the Parliament of Canada because the matters dealt with came within the domain of " bankruptcy and insolvency " within the intent of sec. 91, par. 21, of the B.N.A. Act.

The Chief Justice said at p. 662 :—

" It seems difficult, therefore, to suppose that the purpose of the legislation is to give sanction to arrangements in the exclusive interest of a single creditor or of a single class of creditors and having no relation to the benefit of creditors as a whole. The ultimate purpose would appear to be to enable the court to sanction a compromise which, although binding upon a class of creditors only, would be beneficial to the general body of creditors as well as to the shareholders."

In my judgment, with the concurrence of Lamont, J., I found that arrangements, as provided for by the Companies Creditors' Arrangement Act are, and have been, before and since Confederation component part of any system " devised to protect the creditors and at the same time help the honest debtor to rehabilitate himself and obtain a discharge."

In the dissenting judgment of Mr. Justice Badgley, whose conclusions were subsequently upheld by the Privy Council, *re L'Union St. Jacques & Bélisle* (1872), 2 Revue Critique, 449, I find the following at pp. 455 & 456 :—

" A Statutory Bankrupt and Insolvent legislation had been in force in the two Canadas since the first Insolvent Act of 1864, which was continued with amendments to the time of the making of the Dominion Law of Insolvency in 1869, which repealed the provincial enactments and substituted a general Dominion Law upon the subject. By the Provincial Act of 1864, the first section specially enacts that '*the Act should apply in Lower Canada to traders only*' 'AND IN Upper Canada to all persons whether traders or not,' and this provision was not interfered with in the subsequent statutory amendments of that Provincial Act.

In the Supreme Court of Canada.

No. 12. Reasons for Judgment. (*b*) Cannon, J.—*continued.*

" By the Dominion 'Act respecting Insolvency' of 1869, the Lower Canada statutory restriction is extended throughout the Dominion of the four Provinces, and it is enacted by the first section of the Dominion Act of 1869, 'This Act shall apply to traders only.' Now it is nothing but just to read the general subject of Bankruptcy and Insolvency by the light of the Dominion Legislation itself, as indicating the intent of that legislature as to the enumerated subjects for its action, and it becomes undeniable therefore, that the Society, the appellant here comes within the express limitation and restriction of the general law, and being neither in character nor purpose commercial nor a trader, and solely and simply what it has always been, a charitable and eleemosynary institution in and for the province of Quebec, the provincial enactment for its relief can, under no circumstances be brought within the operation of the laws of Bankruptcy and Insolvency attributed to the Dominion Legislature." 10

It must also be borne in mind that a farmer, before and since Confederation, as far as the Province of Quebec was concerned, even when insolvent, was not subject to bankruptcy proceedings; he could not be compelled to assign in the other provinces, where he could voluntarily make an assignment for the distribution of his assets among his creditors, but could not be forced into insolvency. This latter provision was first made applicable to Quebec in 1919, but a special provision was subsequently passed to withdraw it from its operation. (1919, ch. 36, sec. 9; 1923, ch. 31, sec. 11; 1932, ch. 39, sec. 6.) 20

It may be reasonably said, as a matter of history, that nobody contemplated for a long period after Confederation that "bankruptcy or insolvency" proceedings and their essentially compulsory features could or would apply to farmers.

But the paramount consideration is that the Act which we are considering lacks 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 is willing that his assets be so distributed or not. Although provision may be made for a voluntary assignment as an alternative, it is only as an alternative. See: *Voluntary Assignment* case, *Attorney-General of Ontario* v. *Attorney-General of Canada*[1] 30

The Act does 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 is to keep the farmer on his land at the expense of his creditors; the proposal for arrangement must come from him and covers only a composition, extension of time or scheme of arrangement either before or after an assignment has been made.

Another difference with the Companies Creditors Arrangement Act is found in an entirely new feature which gives the Board of Review, under Clause 12, paragraphs 6, 7, 8 and 9, extraordinary powers :— 40

" (6) If the creditors or the debtor decline to approve the proposal so formulated, the Board may nevertheless confirm such proposal, either as formulated or as amended by the Board, in which case it shall be approved by the Court and shall be binding upon all the creditors and the debtor as in the case of a proposal duly accepted by the creditors and approved by the court.

" (7) Every request to formulate a proposal shall be dealt with by the full Board, but a determination of the majority shall be deemed to be the determination of the Board.

---

[1] (1894) A.C. p. 189, at page 200.

" (8) The Board shall base its proposal upon the present and prospective capability of the debtor to perform the obligations prescribed and the productive value of the farm.

" (9) The Board may decline to formulate a proposal in any case where it does not consider that it can do so in fairness and justice to the debtor or the creditors."

These evidently are not provisions similar to what we considered proper proceedings in insolvency in the Companies Creditors' Arrangement Act, because they lack 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, the Board may impose an entirely new contract to the parties, confiscate, if they deem it advisable, in whole or in part, the principal due to the creditors and consider only under subsection 12, sec. (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 is 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.

In the judgment of Lord Selborne in *L'Union St. Jacques* v. *Belisle* [1], we find, at page 38 :—

" The fact that this particular society appears to have been in a state of embarrassment, and in such a financial condition that unless relieved by legislation, it might have been likely to come to ruin, does not prove that it was in any legal sense within the category of insolvency. And in point of fact the whole tendency of the Act is to keep it out of that category, and not to bring it into it. The Act does not terminate the company; it does not propose a final distribution of its assets on the footing of insolvency or bankruptcy; it does not wind it up. On the contrary, it contemplates its going on, and possibly at some future time recovering its prosperity and then these creditors, who seem on the face of the Act to be somewhat summarily interfered with, are to be reinstated."

Their Lordships were clearly of opinion that this was not a case for insolvency legislation, but a local and private matter within the provincial jurisdiction.

Applying this test, I would say that the Farmers' Creditors Arrangement Act is one which might be within the competence of the provincial legislature, for the same reasons, applicable in each province to each individual farmer who finds 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. But I cannot 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 is limited. It has set up a charitable or eleemosynary institution, to be established in each separate province by proclamation; such local charities are to be established, maintained and managed under provincial legislation by virtue of 92 (7). The legislation has 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.

---

[1] (1875) L.R., 6 P.C., 31.

In the Supreme Court of Canada.

No. 12. Reasons for Judgment. (b) Cannon, J.—*continued.*

I answer the question in the affirmative, for the whole Act excepting clause 17 which fixes the rate of interest, under certain conditions which do not clearly exceed the powers of Parliament under 91 (19) and I certify as mine the above answer and reasons to the questions submitted to this court by Order in Council 3578.

In the Privy Council.

No. 13. Order in Council granting special leave to appeal to His Majesty in Council, 26th September 1936.

No. 13.

Order in Council granting special leave to appeal to His Majesty in Council.

AT THE COURT AT BALMORAL

The 26th day of September 1936.

PRESENT

THE KING'S MOST EXCELLENT MAJESTY

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 29th day of July, 1936, in the words following, viz. :—

" WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of the Attorney-General of British Columbia in the matter of an 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 1934 as amended by the Farmers' Creditors Arrangement Act Amendment Act 1935 : And humbly praying Your Majesty in Council to order that the Petitioner shall have special leave to appeal from the Judgment of the Supreme Court dated the 17th June 1936 and for such further or other Order as to Your Majesty may appear fit :

" THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and on behalf of the Attorney-General of Canada and the Attorneys-General of the Provinces of Ontario, Quebec, New Brunswick, Manitoba, Alberta and Saskatchewan Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute an Appeal against the Judgment of the Supreme Court of Canada dated the 17th day of June 1936.

" And Their Lordships do further report to Your Majesty that the authenticated copy under seal of the Record produced by the

Petitioner upon the hearing of the Petition ought to be accepted (subject to any objection that may be taken thereto by the Respondents) as the Record proper to be laid before Your Majesty on the hearing of the Appeal."

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government of 10 the Dominion of Canada for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

A. H. L. HARDINGE.

In the Privy Council.

No. 13. Order in Council granting special leave to appeal to His Majesty in Council 26th September 1936 —*continued.*

STATUTES AND OTHER DOCUMENTS.

Statutes and other Documents.

No. 14.

The Farmers' Creditors Arrangement Act, Statutes of Canada (1934), 24–25 George V, Chapter 53.

(Separate document.)

No. 14.

No. 15.

The Farmers' Creditors Arrangement Act Amendment Act, Statutes of Canada (1935), 20 **25–26 George V, Chapter 20.**

(Separate document.)

No. 15.

In the Privy Council.

No. 104 of 1936

ON APPEAL FROM THE SUPREME COURT O
CANADA.

IN THE MATTER of a Reference as to whether th
Parliament of Canada had legislative jurisdictio
to enact The Farmers' Creditors Arrangemen
Act, being Chapter 53 of the Statutes of Canad
1934, as amended by The Farmers' Credito
Arrangement Act Amendment Act, being Cha
ter 20 of the Statutes of Canada 1935.

BETWEEN

THE ATTORNEY-GENERAL OF BRITIS
COLUMBIA - - - - *Appella*

AND

THE ATTORNEY-GENERAL OF CANAD
and THE ATTORNEYS-GENERAL of th
PROVINCES of ONTARIO, QUEBEC, NE
BRUNSWICK, MANITOBA, ALBERTA an
SASKATCHEWAN - - - *Respondent*

RECORD OF PROCEEDINGS.

GARD, LYELL & CO.,
47, Gresham Street,
London, E.C.2.
Solicitors for the Appellan

CHARLES RUSSELL & CO.,
37, Norfolk Street,
Strand,
London, W.C.2.
Solicitors for the Respondent the Attorney-General of Canad

BLAKE & REDDEN,
17, Victoria Street,
London, S.W.1.
*Solicitors for the Respondents the Attorneys-General of Ontari
New Brunswick, Manitoba, Alberta and Saskatchewan*

LAWRENCE JONES & CO.,
Lloyds Building,
Leadenhall Street, E.C.3.
For the Attorney-General of Quebec

EYRE AND SPOTTISWOODE LIMITED, EAST HARDING STREET, E.C.4