

The Attorney-General of Canada - - - - *Appellant*

v.

The Attorney-General of the Province of Quebec - *Respondent*

AND

The Bank of Montreal - - - - - *Appellant*

v.

The Attorney-General of the Province of Quebec - *Respondent*

AND

The Attorneys-General of Saskatchewan, Alberta
and Manitoba - - - - - *Intervenors*

CONSOLIDATED APPEALS

FROM

THE COURT OF KING'S BENCH FOR THE PROVINCE OF
QUEBEC

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 23RD OCTOBER, 1946

Present at the Hearing:

VISCOUNT SIMON
LORD WRIGHT
LORD PORTER
LORD UTHWATT
SIR LYMAN POORE DUFF

[*Delivered by* LORD PORTER]

In this matter consolidated appeals are brought to the Judicial Committee by the Attorney-General of Canada and the Bank of Montreal from a Judgment of the Court of King's Bench for the Province of Quebec (Appeal Side) dated June 29th, 1943, affirming by a majority the Judgment of the Superior Court of the Province (Demers J.) delivered on October 6th, 1941, which held the Quebec Statute entitled "An Act Respecting Certain Vacant Property Without an Owner" (3 George VI 1939 Ch. 28) to be within the powers of the legislature of Quebec to enact and to apply to the Bank of Montreal. The Court of King's Bench consisted of Létourneau C.J., St. Germain, Walsh, Francoeur and Marchand JJ., Marchand J. dissenting.

The material clause in the Quebec Statute runs as follows:—

"The following are deemed to be vacant property and without an owner, belonging to His Majesty in the rights of the province of Quebec, deposits of money and of securities and all credits in specie or in securities, with the fruits thereof, in credit institutions and all other establishments which receive funds or securities on deposit, whenever, for thirty years or more, such deposits or credits have not been the subject of any operation or claim by the persons entitled thereto."

The Act came into force on April 28th, 1939.

In November, 1940, the Attorney-General of Quebec instituted proceedings in the Superior Court alleging that the Bank of Montreal was a "credit institution" within the meaning of the Act and that it held

deposits of money, etc., made by certain depositors as set out in an attached list, which deposits had not been the subject of any operation or claim by the persons entitled thereto, for thirty years or more. The Declaration claimed that, in virtue of the Quebec Statute, these deposits were deemed to be "vacant property and without an owner" and the Attorney-General of Quebec accordingly claimed that the Defendant Bank should pay over the total of these deposits to him, together with the total of certain other deposits in the Molson's Bank, which were similarly left untouched by their owners for more than thirty years and which had been taken over by the Bank of Montreal when it absorbed Molson's Bank.

To this Declaration the Bank of Montreal pleaded that it was not a "credit institution", so that the Act did not apply to it at all, and it also pleaded that the funds it had received from depositors were not "deposits" within the meaning of the Act. Apart from these special points the Bank raised the broad contention that the Act was beyond the powers of the Quebec legislature to pass, as "banking" is one of the subjects allotted exclusively to the Parliament of Canada and, moreover, that the Bank Act of the Dominion (24-25 George V. 1934, Ch. 24) contains provisions with which the Statute of Quebec is in conflict.

On this last issue of the validity of the Quebec Statute of 1939, the Attorney-General of Canada at once intervened to support the view that the Act of the Quebec legislature is beyond its powers and void, at any rate in respect to Banks, and their Lordships have heard arguments on his behalf as well as on behalf of the Bank of Montreal, in support of the Appeal. On the other side the Attorney-General of Quebec has been supported by Counsel acting for the Attorneys-General of Saskatchewan, Alberta and Manitoba.

It is convenient firstly to deal with the special contentions advanced by the Bank of Montreal as to the true interpretation of the Quebec Statute, leaving until later the examination of the constitutional issue. None of the Judges who have dealt with this case in Canada accepted the contention that the Quebec Statute did not apply to banks in general, and to the Bank of Montreal in particular. On the contrary, Mr. Justice Demers expressed the suspicion that the draftsman of the Act while using the phrase: "credit institutions and all other establishments which receive funds or securities on deposit" deliberately avoided the use of the word "bank" because the presence of this word would provoke a constitutional challenge. Be this as it may, their Lordships agree with the view unanimously taken in the Canadian Courts that the Statute is aimed at certain deposits in banks in Quebec. Neither can the Bank's other special contention prevail, viz., that the only deposits referred to are so-called "regular" deposits where the identical thing that is entrusted to the bank must be returned, which is the contract of *commodatum* in Roman Law. It is clear from the language of the section that what are called "irregular" deposits, where the bank is not bound to return the identical coins, but to repay the amount of the loan (the contract of *mutuum* in Roman Law) are also included.

The real issue that is left is the constitutional question, and this may be raised in two ways.

(a) Does the exclusive power of the Parliament of Canada to legislate in the matter of "banking" (Head 15 of the Enumerated Classes of Subjects in Section 91 of the British North America Act) in itself establish the invalidity of a Provincial Law dealing with bank deposits which for thirty years have not been the subject of any operation or claim by the persons entitled thereto?

(b) Even if this is not so, do the provisions of the Dominion Bank Act upon which the Appellants rely, stand in conflict with the Quebec legislation so that the latter is invalid in so far as it conflicts with the former?

If the true subject-matter of the Quebec Statute is "banking" it is *ultra vires* of the Provincial legislature: if its provisions conflict with the Federal Act, the Federal Act must prevail. An answer therefore to either question in favour of the Dominion is sufficient to invalidate its provisions.

Their Lordships propose accordingly to consider the earlier and more general question first.

So long ago as 1894 the Board through the mouth of Lord Watson in *Tennant v. the Union Bank of Canada* [1894] A.C. 31 pointed out that by Sect. 91 of the British North America Act, notwithstanding anything contained in the Act, the exclusive legislative authority of the Parliament of Canada extended to all matters coming within the enumerated classes and went on to declare that some at any rate of those classes could not be operated without interfering with and modifying some of the ordinary rights of property, that one of those classes was "banking", and that that expression is wide enough to embrace every transaction coming within the legitimate business of a banker. "These" (i.e. the legislative powers of the Parliament of Canada), he adds, "depend on Section 91 and the power to legislate conferred by that clause may be fully exercised, although with the effect of modifying civil rights in the Province."

The matter which their Lordships have to determine is accordingly whether the transaction of receiving from depositors bank deposits and repaying those deposits to the depositors comes within the legitimate business of a banker. *Prima facie* it does, and the respondents admit that the receiving and payment of deposits comes within that category, but, they say, this function need not necessarily include payment out to the person who made the deposits or to his order; the question to whom they are to be paid is a matter of property and civil rights in the province.

In their contention the Province under this heading in Section 92 can regulate the transmission of property without interfering with the business of banking, and in doing so no more trench upon the field of banking than the general law does in regulating the transmission of property on death or its seizure in execution. The Bank, they say, must repay the money to a legal claimant but the Province can determine who that legal claimant shall be: the Bank is concerned with the possession of the deposits not with their property and prescription is a function of the Province which can determine when money becomes *bona vacantia* and passes to it as such.

A transfer of property, they maintain, is incidental to property and civil rights and not to banking: the ownership of deposits is no concern of the bank.

They support this contention by pointing out that within its own field the provincial legislature is not subordinate to the Dominion Parliament but "continues to be free from the control of the Dominion and as supreme as it was before the passing of the British North America Act; (see *Liquidators of the Maritime Bank of Canada v. Receiver General of New Brunswick* [1892] A.C. 437 at page 442;) and by citing such cases as *Bank of Toronto v. Lambe*, 12 App. Cas. 575, and *A.G. of Ontario v. A.G. of Canada* [1894] A.C. 189.

It does not appear to their Lordships that much assistance in elucidating the contentions of the parties in the matter now in dispute is to be obtained from the principles laid down in these cases. The former has been explained in *A.G. of Alberta v. A.G. of Canada* [1939] A.C. 117 at p. 133 where it is pointed out that no suggestion of encroachment on the field of banking arose in *Lambe's* case in which nothing was sanctioned other than a legitimate attempt to raise revenue for Provincial needs and that many other interests besides banking were affected.

In the latter an Act which gave assignments purely voluntary for the general benefit of creditors precedence over all judgments and executions not completely executed by payment, was held valid because, as no compulsion to make such assignments was imposed, the field of bankruptcy was not touched upon and in any case the provisions of the Act were merely ancillary to bankruptcy and insolvency.

Nevertheless an answer is still required to the question, what is the pith and substance of this Act, the validity of which is challenged.

No doubt in many cases it can be said that the enactment which is under consideration may be regarded from more than one angle and as operating in more than one field. If however the matter dealt with comes within any of the classes of subjects enumerated in Section 91 it is under the terms of that section not to be deemed to come within the classes of subjects assigned exclusively to the Legislatures of the Provinces even though the classes of subjects looked at singly overlap in many respects. The whole scheme for distribution of powers must be looked at, as their Lordships pointed out in *A.G. of Alberta v. A.G. of Canada* (*supra*) at page 129.

Moreover as their Lordships laid down in *A.G. of Canada v. A.G. of British Columbia* [1930] A.C. 111 at p. 118, it is within the competence of the Dominion Parliament to provide for matters which though otherwise within the competence of the Provincial Legislature are necessarily incidental to effective legislation by the Parliament of the Dominion upon a subject of legislation expressly enumerated in Section 91.

"Legislation," says Lord Maugham in delivering the judgment of the Board in *A.G. of Alberta v. A.G. of Canada* [1943] A.C. 356 at page 370. "coming in pith and substance within one of the classes specially enumerated in Section 91 is beyond the legislative competence of the Provincial Legislatures under Section 92."

In calling attention to these principles their Lordships are but repeating what has many times been set forth in judgments of the Board and it only remains to apply them to the individual case under consideration.

Is then the repayment of deposits to depositors or their successors in title under the law as existing a part of the business of banking or necessarily incidental thereto or is it concerned primarily with property and civil rights or incidental to those subjects? Their Lordships cannot but think that the receipt of deposits and the repayment of the sums deposited to the depositors or their successors as defined above is an essential part of the business of banking.

The relation between banker and customer who pays money into the bank is stated in words which have ever since been accepted in *Foley v. Hill* (1848) 2 H.L.C. 28 as "the ordinary relation of debtor and creditor with a superadded obligation arising out of the custom of bankers to honour the customer's drafts".

No question of possession of or property in the deposit arises. The obligation is *mutuum* not *commodatum*. Once the deposit is made there remains only a debt due from the banker to the customer.

It is urged, however, on behalf of the respondents that the legislation is not aimed at banks. It is, they say, of general application and affects not banks only but credit institutions of all kinds. The Chief Justice of Quebec has pointed out in answer and St. Germain J. appears to agree with him that it is directed only at the banks because in every other case these deposits had already become the property of the depositors by prescription. In so stating he no doubt had in mind Section 92 of the Bank Act of the Dominion 24 and 25 Geo. V. Ch. 24 and the fact that apart from those made by banks most loans are repayable at a fixed or indefinite time and not as in the case of advances by banks repayable on demand, so that even if in some cases it may apply to other institutions in the vast majority of cases and primarily the legislation now in question affects banks and them alone.

If that be the main object and effect of the Provincial Act it does in their Lordships' view invade the field of banking. It comes in pith and substance within that class and the fact that it may incidentally affect certain other institutions cannot take away its primary object and effect. Indeed the Chief Justice would himself have decided in favour of the appellants had he not felt himself constrained by the reasoning of the Supreme Court of Canada in *Provincial Treasurer of Manitoba v. Minister of Finance for Canada* (1943) S.C.R. 370 to hold otherwise. That case

decided that certain trust money in the hands of a trustee which had not been and some of which could not be distributed to the *cestuis que trustent* could not be regarded as *bona vacantia* but that it passed to the Province under an Act which provided that:—

“ 2. All personal property, including money or securities for money deposited with or held in trust by any person in the province, which remains unclaimed by the person entitled thereto for twelve years from the time when such property, money or securities were first payable shall notwithstanding that the depositee or trustee has delivered or paid or transferred such personal property, money or securities to any other person or official within or without the province as depositee or trustee vest in and be payable to His Majesty in the right of the province of Manitoba subject only to His Majesty's pleasure with respect to any claim thereafter made by any person claiming to be entitled to such property, money or securities.”

The only question in that case material to that which their Lordships are now considering was whether the special Act was in conflict with Sections 139 and 140 of the Winding-up Act of the Dominion Parliament or trenching upon the field of bankruptcy and insolvency. It was held that the special Act was not invalidated for either reason. The money in question was not simply a debt—it was trust money—a fund secured upon immovable property and was not an asset of the liquidator in the winding-up but held as trustee for the individual depositors. There was no reason therefore why the Province should not transfer the possession, which the Court held to be all that passed, to the A.G. of Manitoba as trustee for the depositors, or indeed for that matter to him as *bona vacantia*. Winding-up and insolvency were not interfered with—only property and civil rights: the sum in dispute being trust money could not be used by the liquidator in the winding-up.

Hudson J. however in delivering the judgment of the Court does say at p. 381, “ the provisions of the Winding-up Act do not deal with ownership but only with the immediate possession of the funds, leaving the matter of ownership to be established later ”, and the learned Chief Justice in the appeal in the present case thought that an analogy might be drawn between money deposited with a bank and the trust fund, the right to which was litigated in this case in the Supreme Court.

As their Lordships have observed, however, money deposited with a bank is not trust money which the trustee must preserve and not use; on the contrary it is lent for use and the bank is not a trustee but a debtor to the depositor. The difference between property and possession of deposits does not come in question; the only obligation under which the bank lies is to repay a like sum in the like currency. Their Lordships, rejecting as they do the suggested analogy between the two cases, take the same view and reach the result at which the learned Chief Justice would have arrived if he had not regarded the decision in the Supreme Court as one which he ought to follow. In their view a Provincial Legislature enters upon the field of banking when it interferes with the right of depositors to receive payment of their deposits, as in their view it would if it confiscated loans made by a bank to its customers. Both are in a sense matters of property and civil rights, but in essence they are included within the category of banking.

Having regard to their view upon the first point it is not necessary for their Lordships to express any opinion upon the second.

They will humbly advise His Majesty that the Appeal should be allowed and the action dismissed and that the respondents should pay the costs of the appellants the Bank of Montreal of the hearing before the Board and in both courts in Canada.

In the Privy Council

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DELIVERED BY LORD PORTER

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