

The Attorney-General of Saskatchewan - - - - Appellant

v.

The Attorney-General of Canada and others - - - - Respondents

FROM

THE SUPREME COURT OF CANADA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 22ND NOVEMBER, 1948

Present at the Hearing :

VISCOUNT SIMON
LORD MACMILLAN
LORD SIMONDS
LORD OAKSEY
LORD MACDERMOTT

[*Delivered by* VISCOUNT SIMON]

This is an Appeal by special leave from a judgment of the Supreme Court of Canada, dated 13th May, 1947 (Rinfret C.J., Kerwin, Rand and Kellock, JJ., Mr. Justice Taschereau dissenting), which answered a question propounded by the Governor General in Council concerning the constitutional validity of Section 6 of the Farm Security Act, 1944, enacted by the legislature of the Province of Saskatchewan, as amended by Section 2 of Chapter 28 of the Statutes of Saskatchewan, 1945. There was also a second question, framed on the hypothesis that the said Section 6 was not *ultra vires*, and asking whether the section was operative in the case of mortgages securing loans by the Crown in right of Canada and in certain analogous cases. The majority in the Supreme Court held that Section 6 was wholly *ultra vires* and therefore found it unnecessary to answer the second question. Mr. Justice Taschereau was of opinion that Section 6 was *intra vires*, and answered the second question in the negative.

The questions referred by the Governor General in Council to the Supreme Court for hearing and consideration were formulated as follows:—

“ 1. Is section 6 of the Farm Security Act, 1944, being Chapter 30 of the Statutes of Saskatchewan 1944 (second session) as amended by section 2 of Chapter 28 of the Statutes of Saskatchewan, 1945, or any of the provisions thereof, *ultra vires* of the Legislative Assembly of Saskatchewan either in whole or in part and if so in what particular or particulars and to what extent?

2. If the said section 6 is not *ultra vires*, is it operative according to its terms in the case of mortgages

(a) securing loans made by His Majesty in right of Canada either alone or jointly with any other person under the National Housing Act, 1944, or otherwise;

(b) securing loans made by the Canadian Farm Loan Board; or

(c) assigned to the Central Mortgage and Housing Corporation? ”

The Farm Security Act, 1944, of Saskatchewan is entitled "An Act for the Protection of Certain Mortgagors, Purchasers, and Lessees of Farm Land" and the main object of the Act is to lighten the contractual obligations of a mortgagor or purchaser of farm land in the event of the yield of grain grown upon the land falling below a prescribed minimum. The earlier sections of the Act provide for relief of this nature being granted also to lessees, who rent such land on the terms that the lessor is to receive a share of the crop, but Section 6 is concerned only with the modification of the contractual rights of mortgagees or vendors of farm land in respect of the contractual payments due to them in the event of a "crop failure".

Subsection (1) of Section 6 defines "crop failure" as meaning a "failure of grain crops grown in any year on mortgaged land or on land sold under agreement of sale, due to causes beyond the control of the mortgagor or purchaser, to the extent that the sum realizable from the said crops is less than a sum equal to six dollars per acre sown to grain in such year on such land". The Subsection also contains a definition of the phrase "period of suspension", which means "the period commencing on the first day of August in the year in which the crop failure occurs and ending on the thirty-first day of July in the next succeeding year".

Subsection (2) of Section 6 must be set out in full. It runs as follows:—

"(2) Notwithstanding anything to the contrary, every mortgage and every agreement of sale shall be deemed to contain a condition that, in case of crop failure in any year and by reason only of such crop failure:

1. the mortgagor or purchaser shall not be required to make any payment of principal to the mortgagee or vendor during the period of suspension;

2. payment of any principal which falls due during the period of suspension and of any principal which thereafter falls due under the mortgage or agreement of sale shall become automatically postponed for one year;

3. the principal outstanding on the fifteenth day of September in the period of suspension shall on that date become automatically reduced by four per cent. thereof or by the same percentage thereof as that at which interest will accrue immediately after the said date on the principal then outstanding, whichever percentage is the greater; provided that, notwithstanding such reduction, interest shall continue to be chargeable, payable and recoverable as if the principal had not been so reduced."

In the view which their Lordships take on the constitutional validity of Subsection (2), and on its relation to the rest of Section 6, it is not necessary to set out the remaining Subsections of Section 6, though they have been carefully examined to see if they throw further light on Subsection (2).

The contention of the Respondents is that paragraph 3 of Subsection (2) is *ultra vires* of the Provincial Legislature of Saskatchewan because it is an enactment in relation to "interest"—a matter which by Section 91, Head 19, of the British North America Act is within the exclusive legislative power of the Dominion Parliament. It is further contended by the Respondents that the impeached provision conflicts with provisions of the Interest Act of Canada. Reliance was also placed on Head 21 of Section 91, which confers on the Dominion Parliament the exclusive power to legislate in relation to "Bankruptcy or Insolvency." On this last point their Lordships would be disposed to agree with Mr. Justice Taschereau (who alone deals with it) that the respondents' contention is unsound, but the real difficulty in the appellant's way lies elsewhere.

The appellant argues that the "pith and substance" of paragraph 3 is "property and civil rights", a matter in relation to which the Provincial Legislature has an exclusive legislative power, and that in so far as paragraph 3 affects "interest" it does so only incidentally. In

support of this view the Attorney General for Saskatchewan relies upon *Ladore v. Bennett* [1939] A.C. and especially on the concluding passage of Lord Atkin's judgment on page 483. A further ground on which the appellant contends that the impeached paragraph is *intra vires* of the Province is that its "pith and substance" is "agriculture in the Province" within the meaning of Section 95 of the British North America Act, and that it is not repugnant to any Act of the Parliament of Canada such as is referred to in that Section.

It is convenient to deal first with this last contention, which provided a chief ground upon which the dissenting judgment of Mr. Justice Taschereau was based.

There was abundant evidence that agriculture is the main industry of Saskatchewan and that it is the principal source of revenue of its inhabitants. It is moreover clear that the result of the impeached legislation, if it is validly enacted, would be to relieve in some degree a certain class of farmers from financial difficulties due to the uncertainties of their farming operations. But, as Mr. Justice Rand points out, there is a distinction between legislation "in relation to" agriculture and legislation which may produce a favourable effect upon the strength and stability of that industry. Consequential effects are not the same thing as legislative subject-matter. It is "the true nature and character of the legislation"—not its ultimate economic results—that matters (*Russell v. The Queen* 7 A.C. 829 at p. 840). Here, what is sought to be statutorily modified is a contract between two parties one of which is an agriculturist but the other of which is a lender of money. However broadly the phrase "agriculture in the province" may be construed, and whatever advantages to farmers the reshaping of their mortgages or agreements for sale might confer, their Lordships are unable to take the view that this legislation can be regarded as valid on the ground that it is enacted in relation to agriculture.

A more difficult question is raised by the alternative contention that the legislation is in relation to civil rights in the Province. Contractual rights are, generally speaking, one kind of civil rights and, were it not that the Dominion has an exclusive power to legislate in relation to "interest," the argument that the provincial legislature has the power, and the exclusive power, to vary provisions for the payment of interest contained in contracts in the province could not be overthrown. But proper allowance must be made for the allocation of the subject matter of "interest" to the Dominion legislature under Head 19 of Section 91 of the British North America Act. There is another qualification to the otherwise unrestricted power of the provincial legislature to deal with civil rights in Head 18 "Bills of Exchange and Promissory Notes". The Dominion power to legislate in relation to interest cannot be understood to be limited to a power to pass statutes dealing with usury such as were repealed in the United Kingdom in 1854 (17 & 18 Vict. c. 90). So restricted a construction was rejected by the Judicial Committee in *Board of Trustees of Lethbridge Irrigation District v. Independent Order of Foresters and A.G. of Canada* [1940] A.C. 513 for reasons stated by Viscount Caldecote at pp. 530, 531. The validity of the Interest Act of the Parliament of Canada (Revised Statutes c. 120) has not been challenged in any particular. Section 2 of this Statute provides:

"Except as otherwise provided by this or by any other Act of the Parliament of Canada, any person may stipulate for, allow and exact, on any contract or agreement whatsoever, any rate of interest or discount which is agreed upon."

It is therefore clear that a provincial statute which varies the stipulation in a contract as to the rate of interest to be exacted would not be consonant with the existence and exercise of the exclusive Dominion power to legislate in respect of interest. The Dominion power would likewise be invaded if the provincial enactment was directed to postponing the contractual date for the payment of interest without altering the rate, for this would equally be legislating in respect of interest.

There thus remain two questions to be considered: first, does the provincial statute now under consideration operate to the above effect? And secondly, even if it does, can the consequent invalidity be avoided because this result should be regarded as merely incidental to the achievement of the real and valid statutory purpose, so that, although the topic of interest is trenced upon, the subject of interest is not the pith and substance of the Act?

The first of these questions must be answered in the light of an established rule of construction in such cases, viz., that regard must be had to the substance and not to the mere form of the enactment, so that "you cannot do that indirectly which you are prohibited from doing directly" (per Lord Halsbury in *Madden v. Nelson and Fort Sheppard Ry. Co.* [1899] A.C. 626 at p. 627). If, under colour of an arrangement which purports to deal only with the principal of a debt, it is really the contractual obligation to pay interest on the principal which is modified, the enactment should be regarded as dealing with interest.

With this rule in mind, Their Lordships have examined the language and effect of section 6 of the Farm Security Act with much care, and they have been greatly assisted in this task by the arguments of Counsel on either side.

Subsection (2) of Section 6 provides in effect that, in the event of crop failure, (a) the mortgagor or purchaser shall not be required to make any payment of principal during the period of suspension (b) the payment of any principal which is contractually due during that period and any principal which thereafter falls due shall be postponed for one year (c) the principal outstanding on the fifteenth of September in the period of suspension shall on that date become automatically reduced by 4 per cent. thereof "or by the same percentage thereof as that at which interest will accrue immediately after the said date on the principal then outstanding, whichever percentage is the greater", but (d) notwithstanding such reduction, interest shall continue to be chargeable payable and recoverable as if the principal had not been so reduced.

It is not in dispute that mortgages or agreements to defer payment of purchase money of land in Saskatchewan, practically without exception, provide for interest on outstanding principal at a rate greater than 4 per cent. per annum. The effect, therefore, is to reduce the outstanding principal, in the event of crop failure, by an amount equal to the amount of interest called for under the contract, but to require this same amount of interest to continue to be paid as though the outstanding principal had not been reduced. If the Subsection had said in plain terms that for the period of suspension there should be no interest charged and that the payment of outstanding principal should be postponed, the result (at any rate in the first year of suspension) to the mortgagee or vendor would be the same. Moreover, such agreements normally stipulate for a "rate" of interest on outstanding principal, and a "rate" is the ratio which the sum payable as interest bears to the amount of such outstanding principal. To provide that principal is to be reduced by statute but that the amount to be paid as interest is to remain unaltered is necessarily to increase the rate on the principal outstanding. But provincial legislation which alters a stipulated rate of interest would conflict with Section 2 of the Interest Act.

These considerations lead Their Lordships to confirm the conclusion to which the majority of the Supreme Court has arrived, that paragraph 3 of Subsection 2 of Section 6 trenches upon the Dominion field. It is obvious that the language used has been ingeniously chosen in an endeavour to avoid a conflict with Dominion powers and legislation, but in the view of Their Lordships the endeavour is not successful. This view of the matter renders it unnecessary to determine what would be the correct application of the words used in the difficult situation of successive years of suspension analysed in the judgment of Mr. Justice Kellock.

Secondly, can the remaining argument be upheld that this interference with the topic of interest none the less remains valid because it is merely incidental to the exercise of a valid power to legislate for a modification of principal debts? On this, it is to be observed that there is not only an

exclusive power to legislate in relation to interest vested in the Dominion Parliament, but that such legislation has been enacted in the Interest Act. Viscount Maugham laid it down on behalf of this Board in *A.G. for Alberta v. A.G. for Canada* [1943] A.C. 356 at page 370, that .

“ Since 1894 it has been a settled proposition that, if a subject of legislation by the Province is only incidental or ancillary to one of the classes of subjects enumerated in s. 91 and is properly within one of the subjects enumerated in s. 92, then legislation by the Province is competent unless and until the Dominion Parliament chooses to occupy the field by legislation.”

Viscount Maugham's reference to the year 1894 points to the decision of this Board in *A.G. for Ontario v. A.G. for Canada* [1894] A.C. 189. Apart, however, from the obstacle created by the existence of the Dominion Interest Act, Their Lordships are unable to take the view that the dealing with interest is only incidental, for it lies at the heart of the matter. Their Lordships are not called upon to discuss, and do not pronounce upon, a case where a provincial enactment renders null and void the whole contract to repay money with interest. Here the contracts survive, and once the conclusion is reached that, as Mr. Justice Kerwin said, “ the legislation here in question is definitely in relation to interest ”, reliance upon such a decision as *Ladore v. Bennett* [1939] A.C. 468 is misplaced. The provincial legislation there considered was legislation in relation to “ municipal institutions in the province ”, and, as Viscount Caldecote pointed out in the *Lethbridge* case (*ubi supra* at p. 532)

“ having come to . . . the conclusion that the pith and substance of the legislation in question related to one or more of the classes of subjects under s.92, the Board had no difficulty in holding that the regulation of the interest payable on the debentures of the new City was not an invasion of Dominion powers under head 19 of s.91.”

Lastly, does the invalidity of paragraph 3 involve the consequence that Section 6 is *ultra vires* as a whole? Their Lordships agree with the Supreme Court that it does, and this view renders it unnecessary to answer the final question posed by the Governor General in Council. The Board has recently had occasion, in *A.G. of Alberta v. A.G. of Canada* [1947] A.C. 503, to set out some of the considerations which have to be weighed in deciding whether legislation, a portion of which is found to be *ultra vires*, is invalid only as to that portion. Applying these tests, it is clear that paragraphs 1 and 2 of Subsection (2) of Section 6 are bound up with paragraph 3 and that Subsection (2) expresses a single scheme. Subsection (2) in its turn is the main effective provision of Section 6 and thus Section 6 is *ultra vires* as a whole.

Their Lordships will humbly advise His Majesty that the Appeal should be dismissed.

In the Privy Council

THE ATTORNEY-GENERAL OF
SASKATCHEWAN

v.

THE ATTORNEY-GENERAL OF
CANADA AND OTHERS

DELIVERED BY VISCOUNT SIMON

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