In the Privy Council.

No. 107 of 1938.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA APPELLATE DIVISION.

BETWEEN

THE BOARD OF TRUSTEES OF THE LETHBRIDGE NORTHERN IRRIGATION DISTRICT and L. C. Charlesworth, Trustee of The Lethbridge Northern Irrigation District (*Defendants*) - - - - - - - - - - *Appellants*

AND

THE INDEPENDENT ORDER OF FORESTERS (*Plaintiff*) *Respondent.*

CASE FOR THE RESPONDENT.

1. This is an appeal from a judgment of the Supreme Court of Alberta, Appellate Division, dated the 23rd May 1938, dismissing by a majority of three judges to one the Appellants' appeal from the judgment, dated the 29th October 1937, of Ewing J., whereby it was declared that the Provincially Guaranteed Securities Proceedings Act insofar as it relates to this case and The Provincial Guaranteed Securities Interest Act, being Chapters 11 and 12 respectively of the Statutes of Alberta 1937, were *ultra vires* of the legislature of Alberta, and whereby judgment was given for the Respondent for the sum of $5,430 with interest and costs and whereby it was further held that the Respondent was entitled to have its costs taxed and a Writ of Execution issued to enforce payment of the judgment of the Supreme Court of Alberta, pronounced by Ives J. on the 22nd February 1937, in favour of the Respondent against the Appellants in a previous action.

RECORD.
p. 41, l. 14.
p. 11, l. 20.
p. 11, ll. 35–38.
p. 11, ll. 31–34.
p. 12, ll. 4–14.
p. 11, l. 39–p. 12, l. 3.

2. The facts set out in the Statement of Claim were not disputed in the Statement of Defence or otherwise and the only question at issue is the constitutional validity of two statutes of the Legislature of Alberta, viz :—

pp. 1–9.
p. 10.

(*a*) The Provincial Guaranteed Securities Interest Act (being chapter 12 of Statutes of Alberta 1937), which, after defining "Guaranteed Securities" to mean, with an immaterial exception, "all debentures which are guaranteed by the Province," purports to reduce by one-half the interest payable on such debentures and

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p. 43, l. 38–p. 44, l. 14.

(*b*) The Provincially Guaranteed Securities Proceedings Act (being chapter 11 of Statutes of Alberta 1937), which, after the same definition of "guaranteed securities," provides by Section (3) that:

> "(3) Notwithstanding anything to the contrary in this Act or in any contract and notwithstanding any rule of law or equity to the contrary, no action or proceeding of any kind or description shall be commenced, taken, instituted, maintained or continued, for the purpose of the recovery of any money payable in respect of any guaranteed security, or for the purpose of enforcing any right or remedy whatsoever for the recovery of any such money, or for the purpose of enforcing any judgment or order at any time heretofore or hereafter given or made with respect to any guaranteed security, or for the purpose of enforcing any foreign judgment founded on a guaranteed security, without the consent of the Lieutenant-Governor-in-Council."

3. The constitutional validity of the statutes depends on the provisions of the British North America Act. By section 91 head 19 the authority of the Parliament of Canada to make laws for the peace order and good government of Canada includes, notwithstanding anything in the Act, exclusive authority over the subject of interest; and by section 92 heads 13 and 14 the Legislature in each province may exclusively make laws in relation of property and civil rights in the province, and in relation of the administration of justice in the province including procedure in civil matters in the provincial courts.

p. 4, ll. 11–15. 4. The Appellant Board of Trustees was empowered by the Irrigation Districts Act 1920 (being chapter 14 of Statutes of Alberta 1920) with the written assent of the Minister of Public Works to raise a loan on the credit of the District and to issue debentures to secure such loan. With such written p. 4, ll. 26–45. assent the Appellant Board issued its debentures in the principal amount of $5,400,000 payable to bearer or to the registered owner with interest at the rate of 6 per cent. per annum, payable half-yearly on the first day of May and the first day of November in each year to be paid, at the holder's option, at the principal office of the Imperial Bank of Canada in the Cities of Toronto, Montreal or Edmonton, in the Dominion of Canada, or at the office of the p. 6, ll. 40–44. Bank of Manhattan Company, in the City of New York, United States of America. The payment of the principal and interest of the debentures was guaranteed by the Province of Alberta.

p. 5, ll. 1–4. 5. The Respondent at its Head Office in the City of Toronto in the Province of Ontario, is the bearer *bona fide* holder and owner of such debentures to the principal amount of $181,000.

p. 6, l. 45–p. 7, l. 5. 6. On December 15th, 1936, the Respondent presented for payment at the principal office of the Imperial Bank of Canada in Toronto, Ontario, coupons of the said debentures for interest which according to the terms of the p. 7, l. 6. debentures was due on the 1st November, 1936. Payment thereof was refused by the Bank. Relying on Chapter 11 of 1936 (Second Session) a Statute

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which purported to reduce by one-half after June 1st, 1936 the interest payable on all obligations of the province, both direct and indirect, the Bank tendered the sum of $17.50 for each $30 coupon. This tender was refused by the Respondent, which thereupon commenced an action against the Appellants in the Supreme Court of Alberta and obtained a judgment, reported in [1937] 2 Dominion Law Reports, 109, declaring the said Chapter 11 of the Statutes of Alberta 1936 (Second Session) to be invalid and giving judgment in favour of the Respondent for the full amount of the interest coupons with interest thereon.

p. 7, ll. 7-11.

p. 7, ll. 12-43.

7. Notice of Appeal from the said judgment was given but subsequently the Statutes in question herein, namely, chapters 11 and 12 of 1937, were enacted, being assented to April 14th 1937 and chapter 11 of 1936 (Second Session) was repealed. The appeal was thereafter abandoned. The Respondent thereupon attempted to tax its costs in the action and to levy execution but on objection by the Appellants the Clerk refused to tax the costs or to issue a Writ of Execution on the ground that he was precluded from so doing by the Provincially Guaranteed Securities Proceedings Act (Chapter 11 of 1937).

p. 7, l. 44. p. 8, ll. 1-7.

p. 8, ll. 8-10.

p. 8, ll. 11-27.

8. On or about May 11th 1937 the Respondent presented for payment to the principal office of the Imperial Bank of Canada in Toronto the interest coupons due the 1st May 1937, attached to its debentures. Payment was again refused and one-half of the amount thereof was tendered, and refused by the Respondent which thereupon brought this action claiming *inter alia* :—

p. 8, ll. 30-35.

p. 8, ll. 36-40.

p. 8, l. 41-p. 9, l. 8.

(*a*) payment of the judgment in the previous action;

(*b*) payment of the sum of $5430 in respect of interest coupons falling due the 1st May, 1937, and

(*c*) a declaration that the Provincial Guaranteed Securities Interest Act (chapter 12 of 1937) and the Provincially Guaranteed Securities Proceedings Act (chapter 11 of 1937) are *ultra vires* of the Legislature of the Province of Alberta.

9. The defence to this action was :—

(*a*) that Chapter 12 of the Statutes of 1937 reduced the rate of interest from 6 per cent. to 3 per cent. per annum, and that the full amount of interest payable was duly tendered to the Respondent in accordance with the terms of the debentures and the provisions of the said Act;

p. 10, ll. 2-8.

(*b*) that the consent of the Lieutenant Governor in Council to the commencing of the action was not obtained as required by Section 3 of Chapter 11 of 1937, and that therefore the action is not maintainable and the Court is without jurisdiction;

p. 10, ll. 9-14.

(*c*) that the judgment in favour of the Plaintiff in the former action is a bar to any action on the said judgment herein;

p. 10, ll. 15-19.

With the defence the sum of $2715 the amount tendered, was paid into Court.

p. 10, ll. 26-28.

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p. 10, l. 34–p. 11, l. 18. 10. The Plaintiff joined issue and pleaded in reply that both the Statutes relied upon by the Defendant are *ultra vires* of the Legislature of the Province of Alberta, and that the judgment in the first Action remained at the time of the issue of the Statement of Claim herein unpaid.

p. 9, l. 20. 11. Pursuant to Section 34 of The Judicature Act (Chapter 72 of the Revised Statutes of Alberta, 1922) notice was duly given to the Attorney-General of the Province of Alberta that the Respondent was bringing in question the constitutional validity of the said Statutes.

pp. 12–18. p. 14, ll. 11–43. 12. The action came for trial before Ewing J., who in his reasons for judgment (reported in [1937] 4 Dominion Law Reports 398) points out that Section (3) of chapter 11 of 1937 (like section 3 (2) of chapter 11 of 1936 (Second Session) which had been held to be invalid) applies equally to the enforcement of those rights which the Act takes away as well as to those remaining rights which the Act itself asserts. In his view this fact lends some support to the argument that in this particular case the 1937 statute is in no better position than was the general prohibition contained in the 1936 Act.

p. 17, ll. 17–19. 13. The learned Trial Judge then goes on to agree with the conclusions of Masten J.A. in *Ottawa Valley Power Company v. Hydro Electric Power Commission* (1937) Ontario Reports 265 at page 309; [1936] 4 Dominion Law Reports 594 at page 603 to the following effect :—

p. 16, l. 34–p. 17, l. 7.

"(1) The general rule is clear that the administration of justice being by the B.N.A. Act committed to the Provinces the jurisdiction of the several Courts set up by the Legislature to administer justice is that which is prescribed by the Legislature. Generally speaking any statute passed by a Provincial Legislature limiting the jurisdiction of the Provincial Court is binding on it.

"(2) But to that general rule I think there is this exception, viz :—that the Legislature cannot destroy usurp or derogate from substantive rights over which it has by the Canadian Constitution no jurisdiction and then protect its action in that regard by enacting that no action can be brought in the Courts of the Province to inquire into the validity of its legislation, thus indirectly destroying the division of powers set forth in the B.N.A. Act. In other words, it cannot by such indirect means destroy the Constitution under which it was created and now exists."

The learned Trial Judge then concludes that chapter 11 of 1937 is invalid.

p. 17, ll. 24–29. (*a*) because it derogates from the rights with respect to interest and therefore from rights over which the Legislature of Alberta has no jurisdiction, and

p. 17, ll. 29–36. (*b*) because it is in conflict with Section (2) of The Interest Act of Canada (Revised Statutes of Canada 1927, chapter 102).

p. 17, ll. 37–42. It is therefore unnecessary to consider the question of the incapacity of the Legislature to legislate owing to the fact that the securities in question

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are payable in the Province of Ontario to a holder whose head office is outside the Province of Alberta. The learned Trial Judge however held that the statute is not rendered valid by the prohibition not being absolute but operating only in case the consent of the Attorney-General is not obtained. He then for the reasons given by Ives J. with respect to chapter 11 of the Statutes of Alberta, 1936 (Second Session) concludes that chapter 12 of the Statutes of Alberta 1937 is *ultra vires* and makes a declaration to that effect and to the effect that the Provincially Guaranteed Securities Proceedings Act (chapter 11 of 1937) is invalid in so far as it relates to the subject matter of the action, i.e., the interest claimed. He also declared that the Plaintiff was entitled to judgment for $5430.00 with interest as prayed, together with the costs of the action.

p. 17, l. 43–p. 18, l. 3.
p. 18, ll. 4–11.
p. 18, ll. 12–19.

14. An appeal was taken and is reported in [1938] 3 Dominion Law Reports 89 and (1938) 2 Western Weekly Reports 194. Harvey C.J.A. with whom Lunney J.A. and Shepherd J. concurred holds on the authority of a previous decision of the Appellate Division of Alberta dealing with the Reduction and Settlement of Debts Act (1936 (Second Session) chapter 12) (*Credit Foncier Franco Canadien v. Ross* [1937] 3 Dominion Law Reports 365 and (1937) 2 Western Weekly Reports 353) that the subject matter of chapter 12 of 1937 is interest and interest alone. He then proceeds to deal with chapter 11 and points out that in determining the pith and substance of the legislation the Court must have regard both to the object and purpose of the Act and holds that the two statutes in question " are complimentary parts of a single legislative plan " and that the clear purpose, as well as the effect of chapter 11 is to render fully effective chapter 12 which is *ultra vires*. He concludes that the appeal should, therefore, be dismissed.

p. 18, l. 28.
pp. 42–47.
p. 43, ll. 5–35.
p. 43, l. 35–p. 47, l. 16.
p. 45, l. 26.
p. 47, l. 12.
p. 47, l. 17.

15. Ford J.A. in his dissenting judgment agrees that in considering the validity of chapter 11 not only is chapter 12, passed at the same Session, to be taken into consideration but also all the circumstances leading up to the enacting of chapter 11 as set out in the judgment of Ewing J. Ford J.A. does not dissent from the view that chapter 12 was *ultra vires* of the Legislature of Alberta and for the purposes of his inquiry into chapter 11 he assumes that chapter 12 is legislation affecting interest, a subject expressly reserved to the Parliament of Canada. After reviewing cases on colourable attempts by the Dominion or a province to invade the other's field Ford J.A. concludes that the legislation " in its true nature and character," in its " pith and substance " is not an invasion of any Dominion legislative field colourably or openly but a frank expression of an intention to limit the enforcement in the Province of certain contractual rights. After quoting more fully than does the learned Trial Judge the propositions laid down by Masten J.A. in *Ottawa Valley Power Company v. Hydro Electric Power Commission* (1937) Ontario Reports at page 309 and paragraph 13 of this Case) to the effect that a Provincial Legislature cannot by limiting the jurisdiction of the Provincial Court indirectly destroy the division of powers set forth in the British North America Act, Ford J.A. deals with the authority of the Parliament of Canada to impose powers and duties on provincial Courts and expresses the opinion that it may be that the Parliament of Canada in the exercise of its jurisdiction

pp. 47–53.
p. 45, ll. 41–44.
p. 47, l. 45–p. 48, l. 3.
p. 48, l. 30–p. 49, l. 24.
p. 49, l. 25–p. 50, l. 2
p. 50, ll. 17–38.
p. 51, l. 27–p. 52, l. 10.

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to make laws in respect of interest can provide means for enforcing by legal processes in the provincial courts against the will of a provincial legislature the payment of interest, at any rate under any contract enforceable in Canada. He further suggests that if Section (2) of the Dominion Interest Act (Revised Statutes of Canada, 1927, chapter 102), having regard to the word "exact" as used therein has that effect then it may be that chapter 11 is ineffective as preventing such exaction, but he does not think that Section (2) of the Interest Act bears that meaning and if it does it may be beyond the legislative competence of the Parliament of Canada as suggested in Lefroy's Legislative Powers in Canada at page 389 and in the same author's Canada's Federal System at page 277. Ford J.A. however concludes that there is no conflict between the Interest Act of Canada and chapter 11 of 1937 and is, therefore, of the opinion that chapter 11 is a valid exercise of the power to legislate given to the Provincial Legislatures by Clauses 13 and 14 of Section 92 of the British North America Act.

p. 52, ll. 10–13.
p. 52, ll. 13–14.
p. 52, ll. 14–44.
p. 52, l. 45–p. 53, l. 8.

16. McGillivray J.A. agrees with the judgment of the learned Chief Justice that by reason of its previous decision the Court is bound to hold chapter 12 to be interest legislation and, therefore, beyond the competence of the provincial legislature. He also agrees that chapter 11 is *ultra vires* of the provincial legislature as it is not just a denial of rights to creditors except upon condition, but a somewhat frank defiance of the legislative limitations of provincial legislatures. He points out that if the legislature having passed an interest Act held to be *ultra vires* may now re-enact it and make it effective by the simple expedient of denying access to the Courts at the pleasure of the executive branch for those who seek the collection of interest monies which the *ultra vires* Act denied them, then the whole scheme of Confederation may be set at naught at the will of any provincial legislature. The learned Judge in Appeal then expresses his opinion that by necessary implication from what has been said in the British North America Act the superior Courts whose independence is thereby assured are just as surely made the arbiters of the constitutional validity of statutory enactments as Parliament and the Legislatures are made law-enacting bodies. The learned Judge then expresses the opinion that the decisions are not to the effect that a bad motive makes a bad statute but rather to the effect that the invasion of the provincial field of legislative authority by the Dominion or the invasion of the Dominion field by a Legislature is bad, no matter how the particular enactment may be designated or disguised by the enacting body and once discovered in its true character the enactment must be placed in the category of legislative nullities to which it properly belongs. In his view chapters 11 and 12 should be read together, and they deal with the subject of interest, a subject committed to the legislative care of the Dominion, quite as surely as if they were one enactment and so must be declared to be *ultra vires* of the Alberta Legislature. The learned Judge in Appeal then goes on to say that even if chapter 11 is not to be considered as if it were just in aid of chapter 12, his opinion is that it is invalid and ineffectual insofar as it is an obstacle to prevent the collection of interest monies except with the consent of the Lieutenant Governor in Council. He bases this opinion upon giving to the word "exact" in Section 2 of the

pp. 53–56.
p. 53, ll. 17–23.
p. 53, ll. 23–29.
p. 53, ll. 30–35.
p. 53, l. 36–p. 54, l. 7.
p. 54, ll. 8–18.
p. 54, ll. 18–33.
p. 54, ll. 23–27.
p. 54, l. 30–p. 55, l. 44.

Interest Act (Revised Statutes of Canada, 1927, chapter 102) its ordinary meaning and upon the proposition that there is no doubt as to the power of Parliament to legislate upon the subject of interest with paramount authority even though that legislation trenches upon property and civil rights and procedure in civil matters in the courts. He concludes that it is immaterial whether chapter 11 is *ultra vires* as an invasion of the Dominion legislative field, or ineffectual to prevent the Respondent's right to bring and pursue his action without leave to enforce payment because of clashing with the Interest Act, which is of paramount authority.

p. 56, ll. 1–24.

17. The Respondent respectfully submits that the appeal should be dismissed for the following amongst other

REASONS.

1. Because chapter 12 of Statutes of Alberta 1937 in its true character is interest legislation which by section 91 head (19) of the British North America Act is within the exclusive legislative authority of the Parliament of Canada.
2. Because even if chapter 12 of 1937 could be said in the absence of Dominion legislation on the subject to come within one of the heads of Section 92 of the British North America Act it is *ultra vires* of the Provincial Legislature because it conflicts with Section 2 of The Interest Act of Canada.
3. Because chapter 12 of 1937 is legislation affecting property and civil rights outside the Province of Alberta, whereas the Legislature of Alberta has under section 92 head 13 of the British North America Act power to make laws only in relation to property and civil rights in the province.
4. Because the purpose as well as the effect of chapter 11 of 1937 is to render fully effective chapter 12 of 1937 and if chapter 12 is *ultra vires,* chapter 11 is also *ultra vires.*
5. Because the purpose as well as the effect of chapter 11 of 1937 is, by preventing the constitutional validity of chapter 12 of 1937, being considered by the Supreme Court, to enable the Provincial Legislature indirectly to legislate upon a subject reserved to the Parliament of Canada by Section 91 of the British North America Act.
6. Because chapter 11 of 1937 should be read with chapter 12 and together they deal with interest, a subject reserved to the Parliament of Canada.
7. Because chapter 11 of 1937 considered alone is *ultra vires* because and to the extent to which it prevents the exaction of interest as provided for by Section 2 of The Interest Act of Canada.
8. Because the reasoning of Ewing J., Harvey C.J.A., Lunney J.A., Shepherd J., and McGillivray J.A., is to be preferred to that of Ford J.A.

FRANK GAHAN.

In the Privy Council.

No. 107 of 1938.

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AND

THE INDEPENDENT ORDER OF FORESTERS (*Plaintiff*) - - - - *Respondent.*

CASE FOR THE RESPONDENT.

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