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*Jan. 26, 27, 28.

*Nov. 16.

JOHN H. QUIRT AND OTHERS (DEFENDANTS) ..... } APPELLANTS.

AND

HER MAJESTY QUEEN VICTORIA (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Constitutional law.—Right of legislation.—Banking and Incorporation of banks—Bankruptcy and insolvency—31 V. c. 17 (D)—33 V. c. 40 (D)—Validity of—B. N. A. Act, s. 91—R.S.O. (1887) c. 193 s. 7 ss. 1.

In 1866 the Bank of Upper Canada became insolvent and assigned all its property and assets to trustees. By 31 V. c. 17 the Dominion Parliament incorporated the said trustees giving them authority to carry on the business of the bank so far as was necessary for winding up the same. By 33 V. c. 40 all the property of the bank vested in the trustees was transferred to the Dominion Government who became seized of all the powers of the trustees.

Held, affirming the judgment of the Court of Appeal, that these acts were *intra vires* of the Dominion Parliament.

Per Ritchie C. J.—That the legislative authority of Parliament over "banking and the incorporation of banks" and over "bankruptcy and insolvency" empowered it to pass the said acts.

Per Strong, Taschereau and Patterson JJ.—The authority to pass the said acts cannot be referred to the legislative jurisdiction of Parliament over "banking and the incorporation of banks" but to that over "bankruptcy and insolvency" only.

After the property of the bank became vested in the Dominion Government a piece of land included therein was sold and a mortgage taken for the purchase money, the mortgagor covenanting to pay the taxes. Not having done so, the land was sold for non-payment. In an action to set aside the tax sale:

Held, affirming the judgment of the Court of Appeal, that the crown having a beneficial interest in the land it was exempt from taxation as crown lands. R.S.O. (1887) c. 193 s. 7 ss. 1.

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*PRESENT:—Sir W. J. Ritchie C. J., and Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

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APPEAL from a decision of the Court of Appeal for Ontario, *sub nomine The Queen* v. *The County of Wellington* (1) affirming the judgment of the Divisional Court (2) in favour of the crown.

The suit in this case was brought by the Dominion Government to set aside certain conveyances among the defendants of a lot of land claimed by the crown. The land originally belonged to the Bank of Upper Canada. In 1866 that bank transferred all its assets to trustees for the purpose of having them realized and the proceeds distributed *pro ratâ* among its creditors. In 1867, after confederation, the Dominion Parliament passed an act ratifying this assignment and creating the trustees a corporation with power to carry on the business of the bank, so far as was necessary to wind it up. In 1870 another Dominion act was passed transferring the bank assets to the Dominion Government as trustee to wind it up. In 1877 the land in question was sold to the defendant Anderson, who gave a mortgage for part of the purchase money and covenanted to pay the taxes.

In 1886 the land was sold for taxes, Anderson having allowed them to fall into arrear. The defendant Cutten became the purchaser at the tax sale and the defendant Quirt, at Anderson's instance, purchased the land from Cutten and afterwards transferred it to Anderson's wife. The crown brought a suit to have these conveyances set aside and to have it declared that the land was still vested in the crown and that the Anderson mortgage remained a charge upon it. The defendant Cutten did not appear to defend the suit; the other defendants entered an appearance and defence.

At the trial the conveyances were set aside on the ground that the land being property of the crown was

(1) 17 Ont. App. R. 421. (2) 17 O. R. 615.

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exempt from taxation, and the tax sale was, therefore, void. The Divisional Court held that the tax sale was not void but that the plaintiff's mortgage had priority over the other conveyances, and decided in favour of the crown on that ground. The case was then taken to the Court of Appeal where the judges were equally divided and the judgment of the Divisional Court was sustained. Two of their lordships in the Court of Appeal held the Dominion acts above referred to *ultra vires* of the Dominion Parliament.

The defendants then appealed to the Supreme Court of Canada.

Bain Q.C. for the appellants. The acts of 1867 and 1870, or, at all events, the latter, were *ultra vires*. They are not acts dealing with banking or the incorporation of banks. The bank of Upper Canada had ceased to exist as a bank when these acts were passed, and they simply dealt with the bank property which was held by the trustees under the assignment in 1866 as in the case of any other trust for creditors.

At all events the act of 1870 is *ultra vires*. The trustees were not made a banking corporation by the act of 1867 but were only to carry on the business for winding-up the bank, so the act of 1870 did not deal with a banking corporation.

Nor are the acts valid as dealing with bankruptcy and insolvency. The power given to the Dominion Parliament is only to make general laws on these subjects. *L'Union St. Jacques* v. *Bélisle* (1).

The learned counsel also referred to the following cases on this point: *Municipality of Cleveland* v. *Municipality of Melbourne* (2); *Colonial Building & Investment Assoc.* v. *Attorney General of Quebec* (3); *Citizens Insurance Co.* v. *Parsons* (4).

(1) L. R. 6 P. C. 31.
(2) 4 Legal News 277; 2 Cart. 241.
(3) 9 App. Cas. 157.
(4) 7 App. Cas. 96.

If the property was vested in the crown under these acts it is still liable to taxation. The property exempt is that in which the crown has the beneficial interest and not property held in trust as this was. The Ontario Assessment Act (1) exempts property of the Dominion held in trust for Indians; that shows that no other trust property is exempt. *Expressio unius exclusio est alterius.*

Gamble for the respondents. The Dominion acts are *intra vires*. The power to pass such acts must exist somewhere and if not expressly given to the provinces it must be in the Federal Parliament. *Valin* v. *Langlois* (2); *Leprohon* v. *City of Ottawa* (3); *Lambe* v. *Bank of Toronto* (4).

The courts will not presume that Parliament has exceeded its powers but will strive to uphold the validity of the act rather than to avoid it. *Edgar* v. *Central Bank* (5); *Valin* v. *Langlois* (6).

See also *Citizens Ins. Co.* v. *Parsons* (7); *McArthur* v. *Northern Junction Railway Co.* (8); *Cushing* v. *Dupuy* (9).

The defendant Anderson conveyed the land in fee to the crown by his mortgage and is estopped from denying the plaintiff's title. *Doe d. Hennesy* v. *Meyers* (10).

If the acts were *intra vires* the land was vested in the crown and could not be sold for taxes. B. N. A. Act sec. 125. *Leprohon* v. *City of Ottawa* (11).

The exemption extends to lands held by the crown in trust. *Reg.* v. *Williams* (12); *The Queen* v. *Guinness* (13).

(1) R.S.O. (1887) c. 193, s. 7.
(2) 3 Can. S. C. R. 1; 5 App. Cas. 118.
(3) 40 U.C. Q.B. 488.
(4) 12 App. Cas. 575.
(5) 15 Ont. App. R. 202.
(6) 5 App. Cas. 118.
(7) 7 App. Cas. 96.
(8) 17 Ont. App. R. 124.
(9) 5 App. Cas. 415.
(10) 2 O.S. 424.
(11) 40 U.C. Q.B. 478; 2 Ont. App. R. 522.
(12) 39 U.C. Q.B. 397.
(13) 3 Ir. Ch. 211.

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The mention of lands held in trust for the Indians does not exclude other trusts. The maxim *expressio unius exclusio est alterius* is not of universal application; *Saunders* v. *Evans* (1).

The expression "lands held by the crown in trust for Indians" does not denote a real trust. See *Church* v. *Fenton* (2).

Sir W. J. RITCHIE C.J.—I cannot see how it can be contended that an act for the settlement of the affairs of the Bank of Upper Canada, an insolvent institution, is *ultra vires* of the Parliament of Canada, to which body is confided the exclusive authority to deal with and legislate on banking, incorporation of banks, and bankruptcy and insolvency. If this is so, I think it equally clear that the legislature of Ontario could pass no act repealing, altering or interfering with the provisions of that act, and so could not have passed an act similar in its terms to the 33 Vic. ch. 40, "an act to vest in the Dominion for the purposes therein mentioned the property and powers now vested in the trustees of the Bank of Upper Canada."

Therefore it necessarily follows that the legislative power to do so belongs to the Dominion Parliament alone.

I think the contention that the lands, though vested in the crown, were subject to taxation is equally untenable, and that the express exemption by R.S.O. (1887) ch. 193 sec. 7 ss. 1, of all property vested or held by Her Majesty or vested in any public body, body corporate, officer or person in trust for Her Majesty, or for the public uses of the crown, is too clear to be got over, and is in no way affected or controlled by the exemption of lands vested in Her Majesty in trust for the Indians.

(1) 8 H.L. Cas. 729.

(2) 28 U.C. C.P. 384.

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I think, as suggested by Mr. Justice Street, that this is borne out by sec. 137, which enacts "that the taxes assessed on any land shall be a special lien on such land having preference over any claim, lien, privilege, or incumbrance of any party except the crown.

I therefore think the enactment by the Dominion Parliament *intra vires* of that body, and the interest of the crown being exempt from taxation this appeal should be dismissed.

STRONG J.—This appeal, which was very ably argued at the bar, raises two important questions. The first of these involves the validity of the legislation of the Dominion Parliament relating to the winding up of the affairs and the distribution of the assets of the late Bank of Upper Canada, embodied in the statutes of 1867 and 1870. The second question relates to the scope and construction of the provision in the Ontario Assessment Act, exempting lands and property of the crown from taxation. If the judgment of the court below deciding these two questions in favour of the crown is upheld the other points raised become immaterial and need not be considered.

The first section of the act of 1870 vests all the assets of the bank in the crown, and the second section confers upon the Governor General in Council the same powers of dealing with and realizing these assets as the assignees under the prior act of 1867 had possessed. Therefore, unless it can be demonstrated that this legislation was *ultra vires* of the parliament of the Dominion, the crown had full power to sell the lands in question to Anderson and to take as security for the purchase money the mortgage which it is the object of the present action to enforce.

I am of opinion that the statutes of 1867 and 1870 were in all respects *intra vires*, and that for the reasons

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principally relied on by Mr. Justice Street in delivering the judgment of the Divisional Court, and by the Chief Justice and Mr. Justice Osler in the Court of Appeal. I rest this opinion, however, exclusively upon the 21st enumeration of section 91 of the British North America Act, and in no way upon the 15th which I do not consider applicable.

The 21st subsection gives to parliament the exclusive power to pass laws relating to bankruptcy and insolvency. That the acts of parliament in question come within the literal meaning of these terms appears to me very plain. The bank was insolvent, and the realization and distribution of its assets was a matter consequent upon that insolvency. The only reasonable ground upon which such enactments as these under consideration could be rejected from the category of bankruptcy and insolvency statutes authorized by section 91, subsection 21, would be that they were special and not general laws, and therefore were to be considered as assigned to the provincial legislature under the 16th clause of section 91, which authorizes legislation on matters of a local and private nature within the province. The answer to this, however, is that any matter which comes within the terms of any of the subjects enumerated in section 91, although in other respects it might be classed under the head of local and private legislation, is expressly excepted from the powers of the provincial legislatures by the last clause of section 91, which enacts that "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."

Then, it is said that this class of legislation is appro-

priated to the provinces under the head of property and civil rights. This argument, however, would prove too much since general legislation in matters of bankruptcy and insolvency, which subsection 21 undoubtedly confers on the Dominion, must always be an interference with property.

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Then, it can hardly be said that such special legislation as this, respecting a bank incorporated under the statutes of the Dominion, would be within the competence of a provincial legislature; the incongruity of such a construction, when we consider that the right to incorporate banks is exclusively in the Dominion, would alone be fatal to such contention, more especially as the act of incorporation itself might well provide for the winding-up of a particular bank in case of insolvency.

If the special legislation regarding insolvency is *intra vires* of the Dominion in the case of a new bank, it is hard to see why it should not be so in the present case of a bank incorporated and reduced to insolvency before confederation. Any distinction between the two cases would be purely arbitrary.

On the whole it seems to me that whilst there is no power in the provinces to which these enactments could be reasonably referred the Dominion Parliament does, according to the literal interpretation of the terms used, possess a power which includes them. For these and other reasons, in which I concur, set forth in the opinions of the learned judges whose views prevailed in the courts below it seems to me that this first objection to the judgment under review entirely fails.

As regards authority, I am of opinion that the case in the Privy Council of *Union St. Jacques* v. *Bélisle* (1), so far from being an authority for the appellant, supports the conclusion I have reached. The act of the Quebec

(1) L. R. 6 P. C. 31.

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legislature questioned in that case was held to be *intra vires* upon the distinction expressly taken in the judgment that it was not an act providing for a winding up as in the case of bankruptcy or insolvency, but was rather an enactment designed for the purpose of avoiding such a result. I therefore consider the Privy Council as indicating that a special statute providing for the winding-up of an incorporated company would be bankruptcy or insolvency legislation.

Next it is said that the interest vested in the crown under the mortgage made by Anderson is liable to taxation under the Ontario Assessment Act. I agree, however, with Mr. Justice Osler, in whose judgment on this point the learned chief justice concurred, that it is not so liable. All property vested in the crown is exempted from taxation unless made liable by some express enactment. No statute can be pointed to making the beneficial interest which the crown as mortgagees undoubtedly had in these lands liable to assessment for taxes, and that is sufficient to dispose of the case. I am also of opinion that in the absence of express enactment no difference ought to be made between property vested in the crown as a trustee, and that in which it had a beneficial interest. The crown is entitled to the prerogative of priority of payment out of assets, even though it sues as a mere trustee, as in the case of an action on a recognisance given for the benefit of subjects, and I c
reason why the analogy should not prevail in the present case. However, the crown is far from being a mere trustee in this case. The statute of 1870 recites that it is the largest creditor; it therefore has a beneficial interest in the assets of the bank. As I have said, in the absence of express enactment to the contrary property vested in the crown would not be taxable, and it is, therefore, rather for the appellants to show

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that the property of the crown is made liable to assessment than for the respondent to show the contrary.

The argument founded on the provision relating to Indian lands is well answered by Mr. Justice Osler, whose reasoning appears to me conclusive. The rights of the crown as regards Indian lands are of such an anomalous and peculiar nature, and so different from a right of property either as a fiduciary or beneficial owner, that it would be carrying the argument *expressio unius est exclusio alterius* to an altogether unwarrantable length to hold that ordinary trust property vested in the crown was made liable to taxation by a mere inference derived from this exception.

I am of opinion that this appeal must be dismissed with costs.

FOURNIER J.—Concurred in dismissing the appeal.

TASCHEREAU J.—I am of opinion that this appeal should be dismissed for the reasons given by Mr. Justice Patterson in his judgment.

GWYNNE J.—I have no doubt whatever that the Dominion Parliament had jurisdiction to pass these acts.

PATTERSON J.—When the British North America Act, 1867, took effect the Bank of Upper Canada had forfeited its charter and all its privileges. That was the result of a provision contained in the act of the province of Canada (1) under which the bank had, from the first of January, 1857, held its corporate powers. By the 33rd section of that act a suspension of specie payments, if it extended to sixty days, operated as a forfeiture of the charter and of all and every

(1) 19 & 20 Vic. ch. 121.

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the privileges granted to the bank by that or any other act. Specie payments were suspended on the 18th of September, 1866, and were not resumed. During the sixty days, and therefore while the powers of the bank continued, the bank made an assignment to five trustees of all its property upon trusts declared in the deed.

At the first session of the Dominion Parliament an act was passed (1) which confirmed the assignment, which is set out in a schedule, and declared it valid from the day of the date thereof; incorporated the trustees by the name of the Trustees of the Bank of Upper Canada; added certain special provisions to the provisions of the deed of assignment; and provided a shorter form for the registration of the deed of assignment in the counties where lands of the bank lay, in place of registering it in full as the registry law of Ontario required. The act contained also the declaration, the validity of which is questioned, that the trustees as a corporation should have, hold and possess all the properties, estate and effects, real and personal, of the Bank of Upper Canada.

Then in 1870 another act (2) declared that all the assets, &c., held by the trustees of the Bank of Upper Canada under the former act or acquired by them since the passing of that act should be and were thereby transferred to and vested in Her Majesty for the Dominion of Canada and the purposes of the act.

The transfer of real estate in the province from one person to another obviously falls within the subject of Property and Civil Rights in the province, which by section 92 of the British North America Act, 1867, is assigned to the exclusive legislative authority of the province. The acts are therefore invalid unless the subject falls also within one of the enumerated classes in section 91.

(1) 31 Vic. ch. 17. (2) 33 Vic. ch. 40.

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It is argued that it falls within article 15, Banking, Incorporation of Banks, and the issue of Paper Money; or within article 21, Bankruptcy and Insolvency; or within both of those articles.

In the Divisional Court (1) the decision in favour of the validity of the acts was rested on article 21. In the Court of Appeal (2), two of the learned judges considered that both articles applied, or rather, if I correctly understand the opinions expressed, that either article 15 or article 21 was sufficient; while two judges held the acts to be *ultra vires*.

It is remarked by one of the learned judges who held the acts to be valid that the defendants, when before the Court of Appeal, confined their attack to the act of 1870, but the act of 1867 was, in his opinion, material to be considered as showing the character of the legislation. I also am of opinion that the act of 1867 cannot be left out of the discussion. It is in reality upon that act that the objection is founded, because the act of 1870 purports to vest in Her Majesty whatever the act of 1867 vested in the corporate body called the Trustees of the Bank of Upper Canada, and therefore unless the earlier act was valid the later one had nothing to operate on.

I am unconvinced by the arguments advanced to bring the legislation within article 15. The trustees were not carrying on the business of banking, they were merely administering the assets of an insolvent bank whose powers were forfeited. The incorporation of the trustees was not the incorporation of a bank. And I do not consider that the legislative authority to make laws on the subject of banking or to incorporate banks so far overrides the power conferred expressly upon the provinces to make laws in relation to pro-

(1) *Reg.* v. *The County of Wellington*, 17 O. R. 615.

(2) 17 Ont. App. R. 421.

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perty and civil rights in the province as to carry with it the power to establish a mode of dealing with real estate when a bank is concerned, or for that matter with chattel property either, differing from the provincial system. There is no incident of banking that requires that business to be put on a different footing in this particular from any other business. The judgment of the Judicial Committee in *Bank of Toronto* v. *Lambe* (1), delivered by Lord Hobhouse, may be usefully referred to as an exposition of the extent of this word "banking" in article 15.

I entirely agree with Mr. Justice Burton and Mr. Justice Maclennan in what they said in the Court of Appeal on the subject of article 15.

I cannot, however, adopt their conclusion respecting article 21. The words bankruptcy and insolvency in that article no doubt point primarily to the enactment of a general bankrupt or insolvent law, as was well explained by Lord Selborne in delivering the judgment of the Judicial Committee in *L'Union St. Jacques de Montreal* v. *Bélisle* (2); but, as I think is conceded by the same judgment, a special act for the winding-up of some particular company which was insolvent, and the distribution of its assets, would not be beyond the competency of the Dominion Parliament. It is at least doubtful if a provincial legislature could pass an act of the kind without transgressing the limits of its authority, but that point does not now require to be definitely decided. It is easy to imagine cases arising in connection with bankruptcy proceedings under a general law where special legislation would be required, such for instance as the necessity for curing some irregularity so as to validate or remove doubts as to titles taken under the proceedings. There must be power to do this in one legislature or the other, and I

(1) 12 App. Cas. 575. (2) L. R. 6 P. C. 31.

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take it to be obvious that the power would be in the Dominion legislature alone. Such legislation would be, like that now under consideration, special legislation addressed to an individual case, but it would not on that account be *ultra vires*. That seems to have been the view of the provincial legislature when, at its first session, which was early in 1868, in passing a registry act for the province (1) it made an exceptional provision for the registration of the assignment, declaring that:—

It shall not be necessary to register in full the deed of assignment from the Bank of Upper Canada to Thomas C. Street, &c., bearing date the 12th day of November, A.D. 1866, and confirmed by the act of the Parliament of Canada passed in the 31st year of Her Majesty's reign, chapter 17, which shall be deemed validly registered in any county or city, if registered in the manner provided in and by the said act, or by a declaration under the corporate seal of the trustees of the Bank of Upper Canada in the form following:

The forms given in both acts contain the express statement that the lands are held by the trustees as a corporation under the Dominion act.

Purchasers of lands from the trustees in the interval between March, 1868, when the Provincial Registry Act became law, and May, 1870, when the unsold lands were vested in the crown, took their titles on the faith of this provincial recognition of the validity of the Dominion Act of 1867 thus recorded for their information in the registry books.

It is going very far to ask the courts to say at this distance of time that the legislatures were both mistaken and that the title remained in Mr. Street and the four other gentlemen associated with him as grantees under the deed of assignment.

Now holding, as I think it is imperative upon us to hold, that it was within the authority of the Dominion

(1) 31 V. c. 20, s. 550.

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Parliament to legislate in relation to the winding-up of the affairs of this insolvent bank, whose powers had been forfeited although the corporation was not extinct, —*Brooke* v. *Bank of Upper Canada* (1)—we virtually decide the whole controversy.

The right to legislate concerning bankruptcy and insolvency includes the power to make a statutory conveyance of the estate to the person charged with the administration of it. That is so in every system which the parliament may be supposed to have had in view in passing the act of 1867 (2). It was so under the Insolvent Act of 1864 which was then in force in Ontario and Quebec. It was so under the Insolvent Acts of 1869 and 1875 subsequently passed by the Dominion Parliament. It was not under any misapprehension in this particular that the provincial parliament recognised the title of the corporate trustees.

The act of 1870 must be judged on the same principle as the act of 1867. It altered in some respects the scheme of the earlier act for the winding-up of the affairs of the bank, but it still had that purpose in view. It is described in the title of another act to which I am about to allude, as "respecting the settlement of the affairs of the Bank of Upper Canada." The administration of the estate was taken from the trustees and committed to the Governor in Council, and the estate itself was vested in Her Majesty, which measure was followed in the next year (3) by the appropriation of $250,000 to pay off claims on the bank in anticipation of the realisation of the assets. It is not for us to criticise the mode in which the legislature exercises its powers, and once we reach the conclusion that the authority to make laws in relation to bankruptcy and insolvency brought the affairs of the bank, or, more

(1) 4 Ont. P. R. 162 ; 16 Grant 249 ; 17 Grant 301.

(2) 31 V. c. 17, s. 3, ss. 22.

(3) 34 V. c. 8.

properly, the winding-up of those affairs, within the scope of that authority, there no longer remains any reason for denying the validity of the statutory conveyance.

On the question of the liability of the lands vested in Her Majesty to taxation I have nothing new to advance. I see no tenable ground for distinguishing them from crown lands in general.

I agree that we should dismiss the appeal.

Appeal dismissed with costs.

Solicitors for appellants: *Bain, Laidlaw & Co.*

Solicitors for respondent: *C. & H. D. Gamble & Dunn.*