1963

*June 18, 19, 20 Dec. 16

THE ATTORNEY-GENERAL FOR ONTARIO ..... APPELLANT;

AND

BARFRIED ENTERPRISES LTD. .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law—Unconscionable transactions relief legislation—Whether intra vires of provincial Legislature—The Unconscionable Transations Relief Act, R.S.O. 1960, c. 410—Interest Act, R.S.C. 1952, c. 156, s. 2—British North America Act, s. 91 (19).

An applicant for relief under *The Unconscionable Transactions Relief Act*, R.S.O. 1960, c. 410, applied to have revised a certain mortgage transaction with the respondent lender. The mortgage was for a face amount of $2,250 with interest at 7 per cent per annum. The sum actually advanced was $1,500 less a commission of $67.50. The difference between the $1,500 and the face amount of $2,250 was made up of a bonus and other charges. The County Court judge set aside the mortgage in part and revised it to provide for payment of a principal sum of $1,500 with interest at 11 per cent per annum. No constitutional issue was raised before him.

*PRESENT: Taschereau C.J. and Cartwright, Fauteux, Martland, Judson, Ritchie and Hall JJ.

The respondent raised this issue for the first time in the Court of Appeal. That Court did not hear argument upon the merits and the right of counsel to make submissions thereon was reserved in case *The Unconscionable Transactions Relief Act* should be held to be *intra vires* of the legislature. Similarly in this Court the merits were not discussed.

The Act empowers the Court to grant specified relief in respect of money lent where it finds that the "cost of the loan" is excessive and the transaction harsh and unconscionable. "Cost of the loan" is defined to mean, among other things, "the whole cost to the debtor of money lent and includes interest, discount, subscription, premium, dues, bonus, commission, brokerage fees and charges". It was held by the Court of Appeal to be legislation in relation to interest, its essential purpose being to afford a remedy to a borrower to have the contract of loan modified, by having interest, "in the broad sense of the term as compensation for the loan", reduced. The Court also held that the Act was in direct conflict with s. 2 of the *Interest Act*, R.S.C. 1952, c. 156.

On appeal to this Court it was submitted: (a) that the Act is legislation in relation to a matter coming within s. 92(13) of the *British North America Act*, Property and Civil Rights in the Province, the subject-matter being rescission and reformation of a contract of loan under the conditions defined by the Act; (b) that in so far as the Act affects any matter coming within the classes of subjects assigned by the *British North America Act* to the exclusive legislative authority of the Parliament of Canada, it does so only incidentally; (c) that there is no conflict or repugnancy between the provisions of the Act and any validly enacted federal legislation.

Held (Martland and Ritchie JJ. dissenting): The appeal should be allowed.

Per Taschereau C.J. and Cartwright, Fauteux, Judson and Hall JJ.: Submissions (a), (b) and (c) are well founded and the Act is within the power of the provincial Legislature. It is not legislation in relation to interest but legislation relating to annulment or reformation of contract on the grounds set out in the Act, namely (a) that the cost of the loan is excessive, and (b) that the transaction is harsh and unconscionable. The wording of the statute indicates that it is not the rate or amount of interest which is the concern of the legislation but whether the transaction as a whole is one which it would be proper to maintain as having been freely consented to by the debtor.

There was error in the judgment of the Court below in following *Singer v. Goldhar* (1924), 55 O.L.R. 267, in holding that interest in the wide sense includes bonus instead of following subsequent cases which overrule it.

Reference re Saskatchewan Farm Security Act, 1944, s. 6, [1947] S.C.R. 394, (affirmed, [1949] A.C. 110); *Lethbridge Northern Irrigation District v. I.O.F.*, [1949] A.C. 513, distinguished; *Asconi Building Corporation v. Vocisano,* [1947] S.C.R. 358; *Day v. Victoria* [1938] 3 W.W.R. 161; *Ladore v. Bennett,* [1939] A.C. 468, referred to.

Per Cartwright J.: *The Unconscionable Transactions Relief Act* is legislation in relation to Property and Civil Rights in the Province and the Administration of Justice in the Province rather than legislation in relation to Interest. Its primary purpose and effect are to enlarge the equitable jurisdiction to give relief against harsh and unconscionable bargains which the courts have long exercised; it affects, but only incidentally, the subject-matter of interest specified in head 19 of s. 91 of the *British North America Act*.

1963

ATTY.-GEN. FOR ONTARIO v. BARFRIED ENTERPRISES LTD.

Per Martland and Ritchie JJ., *dissenting*: The power of a court, which has jurisdiction in an action for the recovery of a debt, to act under *The Unconscionable Transactions Relief Act* arises only if it has found that the cost of the loan is excessive. It must also find the transaction to be harsh and unconscionable, but it may happen, as it did in the present case, that the judge who hears the case decides that the transaction is harsh and unconscionable because of the excessive cost of the loan. The result is that the very court to which a creditor must resort in order to enforce payment of the interest or discount which the *Interest Act* says he may exact is, by the provincial legislation, empowered to decide whether that interest or discount is, in all the circumstances, excessive. Furthermore, if that court decides that it is excessive and that the transaction is harsh and unconscionable, it may relieve the debtor of the obligation of paying that portion of his obligation which it considers to be excessive, and thus is in a position to relieve him from the payment of an obligation which the Parliament of Canada has stated the creditor is entitled to exact from him. In these circumstances there is a direct conflict between the two statutes and, that being so, the legislation of the Canadian Parliament, validly enacted, must prevail.

Lethbridge Northern Irrigation District v. I.O.F., supra; Attorney-General for Canada v. Attorney-General for British Columbia, [1930] A.C. 111, referred to.

APPEAL from a judgment of the Court of Appeal for Ontario[1], which reversed an order of Clark Co. Ct. J., and declared the Ontario *Unconscionable Transactions Relief Act* to be unconstitutional. Appeal allowed, Martland and Ritchie JJ. dissenting.

E. R. Pepper, Q.C., for the appellant.

B. Sischy, for the respondent.

D. S. Maxwell, Q.C., and *N. A. Chalmers*, for the intervenant, Attorney General of Canada.

G. LeDain, and *J. H. Lafleur*, for the Attorney-General of Quebec.

The judgment of Taschereau C.J. and of Fauteux, Judson and Hall JJ. was delivered by

JUDSON J.:—The Attorney-General for Ontario appeals from a judgment of the Ontario Court of Appeal[1] which declared *The Unconscionable Transactions Relief Act*, R.S.O. 1960, c. 410, to be unconstitutional. The Attorney-General for Quebec has intervened and supports the appeal. No other province is represented. The appeal is opposed by

[1] [1962] O.R. 1103, 35 D.L.R. (2d) 449.

Barfried Enterprises Ltd., the lender under the impugned transaction, and by the Attorney General of Canada.

One Ralph Douglas Sampson, the borrower, applied in the County Court of the County of Wellington to have revised a certain mortgage transaction with the respondent Barfried. The mortgage is dated September 3, 1959, and was for a face amount of $2,250 with interest at 7 per cent per annum. The sum actually advanced was $1,500 less a commission of $67.50. The difference between the $1,500 and the face amount of $2,250 was made up of a bonus and other charges. The County Judge set aside the mortgage in part and revised it to provide for payment of a principal sum of $1,500 with interest at 11 per cent per annum. No constitutional issue was raised before him.

Barfried raised this issue for the first time in the Court of Appeal. Briefly, *The Unconscionable Transactions Relief Act* empowers the Court to grant specified relief in respect of money lent where it finds that the "cost of the loan" is excessive and the transaction harsh and unconscionable. "Cost of the loan" is defined in the Act to mean, among other things, "the whole cost to the debtor of money lent and includes interest, discount, subscription, premium, dues, bonus, commission, brokerage fees and charges." This was held by the Court of Appeal to be legislation in relation to interest, its essential purpose being to afford a remedy to a borrower to have the contract of loan modified, by having interest, "in the broad sense of the term as compensation for the loan", reduced. The Court also held that the Act was in direct conflict with s. 2 of the *Interest Act*, R.S.C. 1952, c. 156.

The essence of the judgment appealed from is contained in the following passage from the reasons for judgment of the Court of Appeal:

> The statute is applicable to only one kind of contract—a money-lending contract. Its essential purpose and object is to provide a remedy to a borrower to enable him to have the terms of such a contract modified. The end result of an application to the Court in accordance with its provisions, if the borrower is entitled to succeed, must be that the interest in the broad sense of that term, payable as compensation for the loan will be reduced. It matters not, in my opinion, whether this result is achieved through the intervention of a Court order or through the operation of a provision in the Act itself fixing a stated rate or scale of interest. In either case it is unquestionably legislation in relation to interest under the pith and substance rule, and, in my opinion, clearly invalid as an infringement of the exclusive legislative power committed to Parliament. Moreover it is

1963

ATTY.-GEN. FOR ONTARIO v. BARFRIED ENTERPRISES LTD.

Judson J.

in direct conflict with the provisions of s. 2 of the Interest Act, R.S.C. 1952, c. 156. Accordingly, it is beyond the province's legislative competence to enact.

Both provinces submit common grounds of error:

(a) That the Act is legislation in relation to a matter coming within s. 92(13) of the *British North America Act,* Property and Civil Rights in the Province, the subject-matter being rescission and reformation of a contract of loan under the conditions defined by the Act;

(b) That in so far as the Act affects any matter coming within the Classes of Subjects assigned by the *British North America Act* to the exclusive legislative authority of the Parliament of Canada, it does so only incidentally;

(c) That there is no conflict or repugnancy between the provisions of the Act and any validly enacted federal legislation.

The powers of the Court are stated in s. 2 of the Act, which reads:

> 2. Where in respect of money lent, the court finds that, having regard to the risk and to all the circumstances, the cost of the loan is excessive and that the transaction is harsh and unconscionable, the court may,
>
> (*a*) re-open the transaction and take an account between the creditor and the debtor;
>
> (*b*) notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, re-open any account already taken and relieve the debtor from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of the principal and the cost of the loan;
>
> (*c*) order the creditor to repay any such excess if the same has been paid or allowed on account by the debtor;
>
> (*d*) set aside either wholly or in part or revise or alter any security given or agreement made in respect of the money lent, and, if the creditor has parted with the security, order him to indemnify the debtor.

The terms "money lent" and "cost of the loan" are defined as follows:

> "Money lent" includes money advanced on account of any person in any transaction that, whatever its form may be, is substantially one of money-lending or securing the repayment of money so advanced and includes and has always included a mortgage within the meaning of *The Mortgages Act,* R.S.O. 1950, c. 402, s. 1; 1960, c. 127, s. 1.

"Cost of the loan" means the whole cost to the debtor of money lent and includes interest, discount, subscription, premium, dues, bonus, commission, brokerage fees and charges, but not actual lawful and necessary disbursements made to a registrar of deeds, a master or local master of titles, a clerk of a county or district court, a sheriff or a treasurer of a municipality.

In my opinion all these submissions are well founded and the Act is within the power of the provincial Legislature. The foundation for the judgment under appeal is to be found in the adoption of a wide definition of the subject-matter of interest used in the *Saskatchewan Farm Security Act* case reference[1]. The judgment of this Court is that case was affirmed in the Privy Council[2]. Interest was defined:

> In general terms, the return or consideration or compensation for the use or retention by one person of a sum of money, belonging to, in a colloquial sense, or owed to, another.

This is substantially the definition running through the three editions of Halsbury. However, in the third edition (27 Hals., 3rd. ed., p. 7) the text continues:

> Interest accrues *de die in diem* even if payable only at intervals, and is, therefore, apportionable in point of time between persons entitled in succession to the principal.

The day-to-day accrual of interest seems to me to be an essential characteristic. All the other items mentioned in *The Unconscionable Transactions Relief Act* except discount lack this characteristic. They are not interest. In most of these unconscionable schemes of lending the vice is in the bonus.

In the cases decided in this Court under s. 6 of the *Interest Act*, it is settled that a bonus is not interest for the purpose of determining whether there has been compliance with the Act. Section 6 reads:

> . . . whenever any principal money or interest secured by mortgage of real estate is, by the same, made payable on the sinking fund plan, or on any plan under which the payments of principal money and interest are blended . . . , no interest whatever shall be . . . recoverable . . . , unless the mortgage contains a statement showing the amount of such principal money and the rate of interest chargeable thereon, calculated yearly or half-yearly, not in advance.

[1] [1947] S.C.R. 394 at 411, 3 D.L.R. 689.
[2] [1949] A.C. 110, 1 W.W.R. 742, 2 D.L.R 145.

1963

ATTY.-GEN. FOR ONTARIO v. BARFRIED ENTERPRISES LTD.

Judson J.

Schroeder J.A. cited *Singer v. Goldhar*[1], as defining interest in wide terms. In *Singer v. Goldhar* there was no provision for interest in the mortgage but there was a very big bonus. The Court of Appeal held that this infringed s. 6 of the *Interest Act,* the bonus being the same thing as interest. But in *Asconi Building Corporation v. Vocisano*[2], Kerwin J. pointed out that *London Loan and Savings Co. of Canada v. Meagher*[3], had overruled *Singer v. Goldhar*. It is now established that in considering s. 6 of the *Interest Act,* a bonus is not interest and the fact that interest may be payable on a total sum which includes a bonus does not involve an infringement of s. 6 of the Act. This was recognized in all the reasons delivered in the *Asconi* case. It was in this context that the wide definition of interest above referred to was used in the *Saskatchewan Reference* case. The Court held that the subject-matter of the legislation was interest and that to call it a reduction of principal did not change its character.

There is, therefore, error in the judgment of Schroeder J.A. in following *Singer v. Goldhar* in holding that interest in the wide sense includes bonus instead of following the subsequent cases which overrule it.

The *Lethbridge Northern Irrigation* case[4] and the *Saskatchewan Farm Security* case[5], do not govern the present case. In the first of these cases, provincial legislation reduced the rate of interest on provincial debentures or provincially-guaranteed debentures. This legislation was concerned with interest in its simplest sense and nothing more and was held to be *ultra vires.*

The *Saskatchewan Farm Security* case was treated as being on the same subject or matter. Legislation which provided that in case of crop failure as defined by the Act, the principal obligation of the mortgagor or purchaser of a farm should be reduced by 4 per cent in that year but that interest should continue to be payable as if the principal had not been reduced, was held to be legislation in relation to interest.

[1](1924), 55 O.L.R. 267, [1924] 2 D.L.R. 141.
[2][1947] S.C.R. 358 at 365.
[3][1930] S.C.R. 378, 2 D.L.R. 849.
[4][1940] A.C. 513, 1 W.W.R. 502, 2 D.L.R. 273.
[5][1947] S.C.R. 394, 3 D.L.R. 689.

Day v. Victoria[1] and *Ladore v. Bennett*[2] come much closer to the present problem. In *Day v. Victoria,* legislation altering the rate of interest of municipal debentures was held to be incidental to a recasting of the city debt structure and was within the competence of the province under s. 92(8) "Municipal Institutions in the Province", and s. 92(13) "Property and Civil Rights in the Province." In *Ladore v. Bennett* a reduction in the rate of interest on municipal debentures was incidental to an amalgamation of four municipalities and a consolidation of their separate indebtedness and the issue by the new municipality of its own debentures in place of the old but at a reduced rate of interest.

The issue in this appeal is to determine the true nature and character of the Act in question and, in particular, of s. 2 above quoted. The Act deals with rights arising from contract and is *prima facie* legislation in relation to civil rights and, as such, within the exclusive jurisdiction of the province under s. 92(13). Is it removed from the exclusive provincial legislative jurisdiction by s. 91(19) of the Act, which assigns jurisdiction over interest to the federal authority? In my opinion, it is not legislation in relation to interest but legislation relating to annulment or reformation of contract on the grounds set out in the Act, namely, (a) that the cost of the loan is excessive, and (b) that the transaction is harsh and unconscionable. The wording of the statute indicates that it is not the rate or amount of interest which is the concern of the legislation but whether the transaction as a whole is one which it would be proper to maintain as having been freely consented to by the debtor. If one looks at it from the point of view of English law it might be classified as an extension of the doctrine of undue influence. As pointed out by the Attorney-General for Quebec, if one looks at it from the point of view of the civil law, it can be classified as an extension of the doctrine of lesion dealt with in articles 1001 to 1012 of the *Civil Code.* The theory of the legislation is that the Court is enabled to relieve a debtor, at least in part, of the obligations of a contract to which in all the circumstances of the case he cannot be said to have given a free and valid consent. The fact that interference with such a

[1] [1938] 3 W.W.R. 161, 53 B.C.R. 140, 4 D.L.R. 345.
[2] [1939] A.C. 468, 2 W.W.R. 566, 3 D.L.R. 1.

1963

ATTY.-GEN. FOR ONTARIO v. BARFRIED ENTERPRISES LTD.

Judson J.

contract may involve interference with interest as one of the constituent elements of the contract is incidental. The legislature considered this type of contract as one calling for its interference because of the vulnerability of the contract as having been imposed on one party by extreme economic necessity. The Court in a proper case is enabled to set aside the contract, rewrite it and impose the new terms.

This legislation raises the very case which the Privy Council refrained from deciding in the *Saskatchewan Farm Security* case when it said, at p. 126:

> Their Lordships are not called on to discuss, and do not pronounce on, 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 Kerwin J. said, "the legislation here in question is definitely in relation to interest," reliance on such a decision as *Ladore v. Bennett* is misplaced.

Under the Ontario statute an exercise of judicial power necessarily involves the nullity or setting aside of the contract and the substitution of a new contractual obligation based upon what the Court deems it reasonable to write within the statutory limitations. Legislation such as this should not be characterized as legislation in relation to interest. I would hold that it was validly enacted, that no question of conflict arises.

I would therefore reverse the order of the Court of Appeal for Ontario and hold that the *Unconscionable Transactions Relief Act* is within the powers of the Legislature of the Province of Ontario. The record should be referred to the Court of Appeal to be dealt with on the merits. There should be no order as to costs in this Court.

CARTWRIGHT J.:—The constitutional question raised on this appeal and the relevant statutory provisions are set out in the reasons of other members of the Court.

The facts with which the learned County Court Judge had to deal may be briefly stated. The applicant for relief under *The Unconscionable Transactions Relief Act,* one Ralph Douglas Sampson, had executed a first mortgage to Barfried Enterprises Ltd., dated September 3, 1959, under

the terms of which he was obligated to pay $2,250 with interest at 7 per cent per annum as follows:

> The sum of Twenty-five ($25.00) Dollars shall become due and payable on the 1st day of October, 1959 and on the 1st day of each and every month thereafter up to and including the 1st day of August, 1964.
>
> The aforesaid monthly payments shall be applied firstly in payment of interest computed from the 1st day of September, 1959 and calculated half-yearly not in advance as well after as before maturity and both before and after default on the 1st days of March and September in each year until the mortgage is fully paid, and secondly in reduction of principal.
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> The balance of the said principal sum together with interest as aforesaid shall become due and payable on the 1st day of September, 1964.

The amount actually advanced to Sampson was $1,432.50; the difference between this amount and the $2,250 being made up of a bonus of $750 and a commission of $67.50. Both of these items would form part of the "cost of the loan" as defined in s.1(a) of *The Unconscionable Transactions Relief Act*. For the reasons given by my brother Judson I am of opinion that neither of these items is "interest", within the meaning of that term as used in the *Interest Act*, R.S.C. 1952, c. 156. If, contrary to this view, the bonus and commission should be held to be interest then it would seem that s. 6 of the *Interest Act* would prevent the mortgagee from recovering any interest. That section reads as follows:

> 6. Whenever any principal money or interest secured by mortgage of real estate is, by the same, made payable on the sinking fund plan, or on any plan under which the payments of principal money and interest are blended, or on any plan that involves an allowance of interest on stipulated repayments, no interest whatever shall be chargeable, payable or recoverable on any part of the principal money advanced unless the mortgage contains a statement showing the amount of such principal money and the rate of interest chargeable thereon, calculated yearly or half-yearly, not in advance.

The Unconscionable Transactions Relief Act appears to me to be legislation in relation to Property and Civil Rights in the Province and the Administration of Justice in the Province, rather than legislation in relation to Interest. Its primary purpose and effect are to enlarge the equitable jurisdiction to give relief against harsh and unconscionable bargains which the courts have long exercised; it affects, but only incidentally, the subject-matter of Interest specified in head 19 of s. 91 of the *British North America Act*. For this reason and for the reasons given by my brother Judson I agree with his conclusion that *The*

1963

ATTY.-GEN. FOR ONTARIO v. BARFRIED ENTERPRISES LTD.

Cartwright J.

Unconscionable Transactions Relief Act is not *ultra vires* of the Legislature of Ontario.

Particular cases may arise in which the provisions of the Provincial Act will come into conflict with those of the Dominion Act. In such cases the Dominion Act will of course prevail. The case at bar does not appear to me to be such a case. It has not been suggested that the applicant could have obtained any relief from a bargain to pay interest at 7 per cent on the amount actually advanced to him. It is of the items other than interest making up the "cost of the loan" that complaint is made.

In the reasons of the Court of Appeal it is stated that the Court did not hear argument upon the merits and that the right of counsel to make submissions thereon was reserved in case the Act should be held to be *intra vires* of the legislature. Similarly in this Court the merits were not discussed.

I would set aside the order of the Court of Appeal and direct that the record should be returned to that Court to deal with the merits. There should be no order as to costs in this Court.

The judgment of Martland and Ritchie JJ was delivered by

MARTLAND J. (*dissenting*):—The question in issue in this appeal is as to the constitutional validity of *The Unconscionable Transactions Relief Act*, R.S.O. 1960, c. 410, the relevant portions of which provide as follows:

> 1. In this Act,
>
> (*a*) "cost of the loan" means the whole cost to the debtor of money lent and includes interest, discount, subscription, premium, dues, bonus, commission, brokerage fees and charges, but not actual lawful and necessary disbursements made to a registrar of deeds, a master or local master of titles, a clerk of a county or district court, a sheriff or a treasurer of a municipality;
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> (*b*) "court" means a court having jurisdiction in an action for the recovery of a debt or money demand to the amount claimed by a creditor in respect of money lent;
>
> (*c*) "creditor" includes the person advancing money lent and the assignee of any claim arising or security given in respect of money lent;
>
> (*d*) "debtor" means a person to whom or on whose account money lent is advanced and includes every surety and endorser or other person liable for the repayment of money lent or upon any agreement or collateral or other security given in respect thereof;

(*e*) "money lent" includes money advanced on account of any person in any transaction that, whatever its form may be, is substantially one of money-lending or securing the repayment of money so advanced and includes and has always included a mortgage within the meaning of *The Mortgages Act*.

2. Where, in respect of money lent, the court finds that, having regard to the risk and to all the circumstances, the cost of the loan is excessive and that the transaction is harsh and unconscionable, the court may,

(*a*) re-open the transaction and take an account between the creditor and the debtor;

(*b*) notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, re-open any account already taken and relieve the debtor from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of the principal and the cost of the loan;

(*c*) order the creditor to repay any such excess if the same has been paid or allowed on account by the debtor;

(*d*) set aside either wholly or in part or revise or alter any security given or agreement made in respect of the money lent, and, if the creditor has parted with the security, order him to indemnify the debtor.

The Court of Appeal of Ontario, before which the issue as to the constitutionality of this enactment was first raised, held unanimously that it was *ultra vires* of the Legislature of the Province of Ontario. Schroeder J.A., who delivered the judgment of the Court, said:

> The statute is applicable to only one kind of contract—a money-lending contract. Its essential purpose and object is to provide a remedy to a borrower to enable him to have the terms of such a contract modified. The end result of an application to the Court in accordance with its provisions, if the borrower is entitled to succeed, must be that the interest in the broad sense of that term, payable as compensation for the loan will be reduced. It matters not, in my opinion, whether this result is achieved through the intervention of a Court order or through the operation of a provision in the Act itself fixing a stated rate or scale of interest. In either case it is unquestionably legislation in relation to interest under the pith and substance rule, and, in my opinion, clearly invalid as an infringement of the exclusive legislative power committed to Parliament. Moreover it is in direct conflict with the provisions of s. 2 of the Interest Act, R.S.C. 1952, c. 156. Accordingly, it is beyond the province's legislative competence to enact. Since, therefore, the learned Judge was without jurisdiction to pronounce the Order in appeal, that order is without effect and must be quashed: *Display Service Ltd. v. Victoria Medical Building Ltd.*, [1958] O.R. 759 at p. 763.

It is the contention of the appellant, the Attorney-General for Ontario, supported by the intervenant, the Attorney-General of Quebec, that this legislation is within the jurisdiction of the Province to enact, under subss. 13

1963

ATTY.-GEN. FOR ONTARIO v. BARFRIED ENTERPRISES LTD.

Martland J.

and 16 of s. 92 of the *British North America Act*, as relating to Property and Civil Rights in the Province and to Matters of a merely local or private Nature in the Province.

Whether or not this contention could be maintained successfully, in the absence of legislation by the Parliament of Canada in the same field, it is unnecessary for me to consider, since I have reached the conclusion that the provisions of the Act under consideration come into conflict directly with the provisions of s. 2 of the *Interest Act*, R.S.C. 1952, c. 156, which provides as follows:

> 2. 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 that is agreed upon.

That the validity of the provisions of the *Interest Act*, under s. 91(19) of the *British North America Act*, is unquestionable was stated by Viscount Caldecote L.C. in *Board of Trustees of the Lethbridge Northern Irrigation District v. Independent Order of Foresters*[1]. Section 2 of that Act, above quoted, provides that, except as provided by that Act or any other Act of the Parliament of Canada, a person may not only stipulate for any rate of interest or discount that is agreed upon, but may exact the same. Parliament has, therefore, given to a creditor, who has agreed with his debtor upon a rate of interest or discount, the legal right to demand and to enforce payment of the same.

As Schroeder J.A. has pointed out in the passage from his judgment previously quoted, the Ontario statute applies only to money-lending contracts. It defines "cost of the loan" as including interest and discount. It purports to confer upon a Court, which has jurisdiction in an action for the recovery of a debt, the power, if it finds the cost of the loan to be excessive and the transaction to be harsh and unconscionable, to reopen the transaction and to relieve the debtor from payment of any sum in excess of the sum which it adjudges to be fair and reasonable.

The power of the Court to act under this Act arises only if it has found that the cost of the loan is excessive. It is true that it must also find the transaction to be harsh and unconscionable, but it may happen, as it did in the present case, that the judge who hears the case decides that the

[1] [1940] A.C. 513 at 531.

transaction is harsh and unconscionable because of the excessive cost of the loan. The result is that the very Court to which a creditor must resort in order to enforce payment of the interest or discount which the *Interest Act* says he may exact is, by the Provincial legislation, empowered to decide whether that interest or discount is, in all the circumstances, excessive. Furthermore, if that Court decides that it is excessive and that the transaction is harsh and unconscionable, it may relieve the debtor of the obligation of paying that portion of his obligation which it considers to be excessive, and thus is in a position to relieve him from the payment of an obligation which the Parliament of Canada has stated the creditor is entitled to exact from him.

In these circumstances there is a direct conflict between the two statutes and, that being so, the legislation of the Canadian Parliament, validly enacted, must prevail. As Lord Tomlin said in *Attorney-General for Canada v. Attorney-General for British Columbia*[1]:

> There can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be ultra vires if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail.

In my opinion, therefore, the legislation in question is *ultra vires* of the Ontario Legislature and this appeal should be dismissed with costs. No costs should be awarded against or in favour of the intervenant.

Appeal allowed, Martland *and* Ritchie JJ. *dissenting.*

Solicitor for the appellant: E. R. Pepper, Toronto.

Solicitors for the respondent: Atlin, Goldenberg & Sischy, Toronto.

Solicitor for the Attorney General of Canada: E. A. Driedger, Ottawa.

Solicitors for the Attorney-General of Quebec: Farley & Beaudry, Hull.

[1] [1930] A.C. 111 at 118.