PAUL WALTER AND OTHERS (*Plaintiffs*) ..... APPELLANTS;

AND

THE ATTORNEY GENERAL OF THE PROVINCE OF ALBERTA (*Defendant*) ..... RESPONDENT.

1968
*Oct. 31,
*Nov. 1
1969
Jan. 28

FRANK T. FLETCHER AND OTHERS (*Plaintiffs*) ..... APPELLANTS;

AND

THE ATTORNEY GENERAL OF THE PROVINCE OF ALBERTA (*Defendant*) ..... RESPONDENT.

AND

THE ATTORNEY GENERAL OF CANADA ..... INTERVENANT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Constitutional law—Validity of provincial legislation restricting acquisition of property by colonies such as the Hutterites—Whether legislation in respect of religion or in respect of property—Whether intra vires of the Province—Communal Property Act, R.S.A. 1955, c. 52.

The plaintiffs, other than the Fletchers, are Hutterians and form part of a religious community which bases its community life and its holding of property on religious principles. They challenged the validity of The *Communal Property Act,* R.S.A. 1955, c. 52, on the ground that the Act, the operation of which, it is alleged, prevents them from acquiring land, is legislation in respect of religion and therefore beyond the powers of a provincial legislature. The Hutterite colonies hold large tracts of land in Alberta and the effect of the legislation would restrict the colonies from acquiring additional lands. The actions were dismissed in the lower Courts. The plaintiffs appealed to this Court.

Held: The appeals should be dismissed.

The *Communal Property Act* was enacted in relation to the ownership of land in Alberta and the legislature had jurisdiction, under s. 92(13) of the *B.N.A. Act,* because it deals with property in the Province. The purpose of the legislation is to control the use of Alberta lands

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*PRESENT: Cartwright C.J. and Fauteux, Abbott, Martland, Judson, Ritchie, Hall, Spence and Pigeon JJ.

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as communal property. While it is apparent that the legislation was prompted by the fact that the Hutterites had acquired and were acquiring large areas of land in Alberta, held as communal property, it did not forbid the existence of Hutterite colonies. The Act was not directed at the Hutterite religious belief or at the profession of such belief, but at the practice of holding large areas of Alberta land as communal property, whether such practice stems from religious belief or not. It was a function of a provincial legislature to enact those laws which govern the holding of land within the boundaries of that province. The fact that a religious group upholds tenets which lead to economic views in relation to land holding does not mean that a provincial legislature, enacting land legislation which may run counter to such views, can be said, in consequence, to be legislating in respect of religion and not in respect of property. Freedom of religion does not mean freedom from compliance with provincial laws relative to the matter of property holding.

Droit constitutionnel—Validité d'une législation provinciale limitant les achats de terres par des colonies telles que les Hutterites—S'agit-il d'une législation concernant la religion ou la propriété—Est-elle intra vires de la province—Communal Property Act, R.S.A. 1955, c. 152.

Les demandeurs, autres que les Fletchers, sont des Hutterites et font partie d'une communauté religieuse dont la vie de communauté et la possession de propriétés sont fondées sur des principes religieux. Ils ont attaqué la validité du *Communal Property Act*, R.S.A. 1955, c. 52, pour le motif que le statut, dont l'application les empêche, prétendent-ils, d'acquérir des terres, est une législation concernant la religion et par conséquent au-delà des pouvoirs de la législature provinciale. Les colonies d'Hutterites possèdent de grandes étendues de terre en Alberta et la législation aurait pour effet de restreindre les colonies dans leurs acquisitions de terres additionnelles. Les Cours inférieures ont rejeté les actions. Les demandeurs en appelèrent à cette Cour.

Arrêt: Les appels doivent être rejetés.

Le *Communal Property Act* a été décrété par rapport au droit de propriété sur les terres en Alberta et la législature avait juridiction, en vertu de l'art. 92(13) de l'*Acte de de l'Amérique du Nord britannique*, parce que le statut traite de la propriété dans la province. La législation a pour but de contrôler l'usage des terres de l'Alberta comme propriétés de communauté. Bien qu'il soit évident que la législation a été suggérée par le fait que les Hutterites ont acquis et acquéraient de grandes étendues de terre en Alberta, pour les posséder comme propriétés de communauté, la législation ne défend pas l'existence des colonies d'Hutterites. Le statut ne s'attaque pas aux croyances religieuses des Hutterites ou à la profession de telles croyances, mais à la pratique de posséder comme propriétés de communauté de grandes étendues de terre en Alberta, que cette pratique provienne d'une croyance religieuse ou non. La législature provinciale a pour fonction de décréter des lois pour réglementer la possession des terres dans les limites de cette province. Le fait qu'un groupe religieux observe une doctrine qui mène à des vues économiques par rapport à la possession de terres ne veut pas dire qu'une législature provinciale, lorsqu'elle décrète une législation agraire qui peut aller à l'encontre de telles vues, peut être en conséquence considérée comme décrétant une légis-

lation concernant la religion et non la propriété. La liberté de religion ne veut pas dire liberté de ne pas se conformer aux lois provinciales se rapportant à la possession de terres.

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APPELS de jugements de la Cour d'appel de l'Alberta[1], confirmant un jugement du Juge Milvain. Appels rejetés.

APPEALS from judgments of the Supreme Court of Alberta, Appellate Division[1], affirming a judgment of Milvain J. Appeals dismissed.

Max Moscovich, Q.C., William B. Gill, Q.C., and *I. Michael Robison,* for the plaintiffs, appellants.

S. Friedman, Q.C., and *W. Henkel, Q.C.,* for the defendant, respondent.

C. R. O. Munro, Q.C., and *David Kilgour,* for the intervenant.

The judgment of the Court was delivered by

MARTLAND J.:—The question in issue in both these appeals is as to the constitutional validity of *The Communal Property Act,* R.S.A. 1955, c. 52, as amended, hereinafter referred to as "the Act". In each of the two actions the real purpose was to obtain a declaration that this statute was ultra vires of the Legislature of the Province of Alberta and they were consolidated for trial.

The facts are not in issue. The appellants, other than the Fletchers, are Hutterians. The Fletchers are owners of land in Alberta which their fellow plaintiffs sought to purchase. The plaintiffs in the other action also sought to purchase Alberta lands. It is conceded that the lands in each case sought to be acquired would be held in common as defined in s. 2(*b*)(i) of the Act and that the operation of the Act prevents the acquisition of the lands. The appellants, other than the Fletchers, in each case formed part of a religious community which based its community life and its holding of property on religious principles.

As of December 31, 1963, Hutterite colonies held approximately 480,000 acres of land in Alberta and over 10,000

[1] (1967), 58 W.W.R. 385, 60 D.L.R. (2d) 253.

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acres had been added in 1964. The approximate population of Hutterites in Alberta as of December 31, 1963, was 6,000.

The Act is described as "An Act respecting Lands in the Province Held as Communal Property." "Communal Property" is defined in s. 2 of the Act, which states:

> 2. In this Act,
>
> (*a*) "colony"
>
> ((i) means a number of persons who hold land or any interest therein as communal property, whether as owners, lessees or otherwise, and whether in the name of trustees or as a corporation or otherwise,
>
> (ii) includes a number of persons who propose to acquire land to be held in such manner, and
>
> (iii) includes Hutterites or Hutterian Brethren and Doukhobors;
>
> (*b*) "communal property" means
>
> (i) land held by a colony in such a manner that no member of the colony has any individual or personal ownership or right of ownership in the land, and each member shares in the distribution of profits or benefits according to his needs or in equal measure with his fellow members, and
>
> (ii) land held by a member of the colony by personal ownership or right of ownership or under a lease, if the land is used in conjunction with and as part of other land held in the manner described in subclause (i);
>
> (*c*) "Board" means the Communal Property Control Board established pursuant to this Act.

The general scheme of the Act for controlling the holding of land as communal property is as follows:

Unless otherwise authorized by the Lieutenant Governor in Council in the public interest (s. 5(2)) no colony existing on the 1st day of May, 1947, may increase the holdings of its land beyond its holdings on the 1st day of March, 1944 (s. 4(1)), or, if on that date the holdings were less than 6,400 acres, they may be extended thereto (s. 4(5)). The significance of the dates May 1, 1947, and March 1, 1944, referred to in the statute is as follows: The first Alberta legislation in relation to acquisition of land by Hutterites to come into force was *The Land Sales Prohibition Act,* 1944 (Alta.), c. 15, which came into force on March 1, 1944. In general that statute prohibited the selling of land to and the purchase of land by Hutterites. That Act, as amended, remained the law until it expired on May 1, 1947, and on that date *The Communal Property Act,* 1947 (Alta.), c. 16, came into force. So that between March 1, 1944, and May 1, 1947, no Hutterite could acquire

any land in Alberta, but by virtue of the provisions of *The Communal Property Act* which came into force on the latter date the restrictions on the acquisition of land were lessened somewhat in relation to Hutterites and the new provisions were made applicable to all "colonies", whether Hutterite or otherwise.

The general scheme of the Act goes on to provide as follows:

No "colony" which exists or existed outside the province may acquire land without the consent of the Lieutenant Governor in Council (s. 6).

No land may be acquired for the purpose of establishing a new "colony" without the consent of the Lieutenant Governor in Council (s. 7).

By an amendment to the statute which came into force on May 1, 1951, the Lieutenant Governor in Council was authorized to divide the province into zones and to designate the number of acres a "colony" established after that date may acquire in any zone or class of zones (s. 5(1)). By virtue of an amendment made in 1960, "colonies" established after May 1, 1947, were also limited to the number of acres designated by the Lieutenant Governor in Council for each zone (s. 9).

The Lieutenant Governor in Council is authorized to establish a Communal Property Control Board (s. 3a(1)), which is to hear applications by "colonies" for leave to acquire land. Where the application is for leave to acquire additional lands for a "colony" already holding lands, the Board may grant or refuse the application, subject to an appeal to a judge of a district court by "a person or colony not satisfied with the decision of the Board..." (s. 13, subss. (1) to (6)).

Where the granting of the application would result in the establishment of a new "colony", the Board is to give public notice of the application, and hold such hearings and make such inquiries as it deems necessary to determine whether the granting of the application would be in the public interest, giving consideration to the location of the lands applied for, the location of existing "colonies", the geographical location of the lands intended for communal use in relation to the lands not so used, and any other factors which the Board may deem relevant.

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Following its investigation the Board is to submit a report to the Minister of Municipal Affairs as to its recommendations in the matter. After consideration of the report the Lieutenant Governor in Council may consent or withhold consent as he deems proper in the public interest, irrespective of the Board's recommendation (s. 14).

Dispositions of land to "colonies" which would result in contravention of the provisions of the statute are prohibited (s. 11).

The submission of the appellants is that the Act is legislation in respect of religion and, in consequence, is beyond the legislative powers of a provincial legislature. The respondent contends that the Act is legislation in respect of property in Alberta, controlling the way in which land is to be held, by regulating the acquisition and disposition of land to be acquired by colonies to be held as communal land.

The learned trial judge, Milvain J. (as he then was), held that, in pith and substance, the Act relates to land tenure in the province and is, therefore, intra vires of the Legislature of the Province of Alberta under s. 92(13) of the *British North America Act*.

This judgment was sustained on appeal[2]. Johnson J.A., with whom Kane J.A. concurred, while holding that the Act was aimed at controlling the expansion of Hutterite colonies in Alberta, and that living in colonies and holding land communally were tenets of the Hutterite faith, decided that, even though the Act, therefore, related to religion, it was valid because the province, under s. 92(13), had legislative jurisdiction in relation to religion.

McDermid J.A., with whom the Chief Justice concurred, decided that the Act related to land tenure, and that the fact that it might restrict the religious practices of the Hutterites did not render it invalid, even if provincial legislatures cannot legislate in relation to religion.

Porter J.A. said that he agreed with Johnson J.A. and McDermid J.A. that the legislation was valid, but expressed doubts as to the adequacy of the material submitted.

In my opinion, the Act was enacted in relation to the ownership of land in Alberta and the Legislature had jurisdiction, under s. 92(13) of the *British North America Act*,

[2] (1967), 58 W.W.R. 385, 60 D.L.R. (2d) 253.

because it deals with property in the province. The scheme of the legislation indicates that the Legislature considered the use of large areas of land in Alberta for the purposes of communal living was something which, in the public interest, required to be regulated and controlled. The Act restricts, but does not prohibit, the use of land for such purposes.

It would seem to me to be clear that a provincial legislature can enact laws governing the ownership of land within the province and that legislation enacted in relation to that subject must fall within s. 92(13), and must be valid unless it can be said to be in relation to a class of subject specifically enumerated in s. 91 of the *British North America Act* or otherwise within exclusive Federal jurisdiction.

There is no suggestion in the present case that the Act relates to any class of subject specifically enumerated in s. 91.

It was on the basis that the legislation in question in the cases of *Henry Birks & Sons (Montreal) Limited v. The City of Montreal*[3] and *Switzman v. Elbling*[4] related to the subject of criminal law, assigned specifically to the Parliament of Canada by s. 91(27) of the *British North America Act,* that the statutes were held to be ultra vires of the Legislature of the Province of Quebec.

The *Birks* case involved the validity of a statute which empowered municipal councils of cities and towns to pass by-laws to compel the closing of stores on New Year's Day, the festival of Epiphany, Ascension Day, All Saints' Day, Conception Day and Christmas Day. The legislation was supported in argument on the basis that it related to the control of merchandising and the well-being of employees. It was held to be ultra vires of the Legislature of Quebec because it authorized the compulsion of Feast Day observance, and such legislation in England, as in the case of Sunday observance legislation, had been assigned to the domain of criminal law. Legislation in this field was held to relate to the subject of criminal law, assigned specifically to the Parliament of Canada by s. 91(27).

[3] [1955] S.C.R. 799, [1955] 5 D.L.R. 321, 113 C.C.C. 135.
[4] [1957] S.C.R. 285, 117 C.C.C. 129, 7 D.L.R. (2d) 337.

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Rand J. went on to add that the legislation was in relation to religion, and beyond provincial competence, and he referred to the *Saumur* case. Kellock and Locke JJ. said that, even if it were not properly "criminal law", it was beyond the competence of the Legislature as being legislation with respect to freedom of religion, a matter dealt with in the statute of the Province of Canada of 1852, 14-15 Vict., c. 175, the relevant portion of which is quoted later in these reasons.

Switzman v. Elbling involved the validity of *The Act Respecting Communistic Propaganda,* R.S.Q. 1941, c. 52, which, inter alia, made it illegal for any person who possessed or occupied a house in the province to use it or to allow any person to make use of it to propagate communism or bolshevism by any means whatsoever. It was attempted to support the legislation on the ground that it dealt with property in the province.

The majority of the Court was of the opinion that the legislation was in respect of criminal law which, under s. 91(27), was within the exclusive competence of the Parliament of Canada.

It was submitted by the appellants that the Act is aimed at preventing the spread of Hutterite colonies in Alberta, that, because the maintenance of such colonies is a cardinal tenet of the Hutterite religion, the Act seeks to deal with religion, and that the subject of religion is within the exclusive jurisdiction of the Parliament of Canada. Their position is stated in the reasons of Johnson J.A., in the Court below, as follows:

> This Act then in its pith and substance is legislation restricting the acquisition by Hutterites of more land in the province. If a by-law which prevents the distribution of religious tracts (the *Saumur* case) was an interference with religion, I find it difficult to say that legislation which is aimed at the restriction of new and existing colonies and the holding of land in common as practised by these colonies when living in such colonies and holding lands in that manner are the principal tenets of Hutterian faith, does not also deal with religion.

With respect, I do not share this view. I do not think that the case of *Saumur v. The City of Quebec*[5] is analogous to the present one. The law, the validity of which was in issue there, was a by-law which forbade the distribution in the streets of the City of Quebec of any book, pamphlet,

[5] [1953] 2 S.C.R. 299, 106 C.C.C. 289.

circular or tract unless the written permission of the Chief of Police to do so had been obtained. The granting of permission depended upon the content of the document proposed to be distributed. The by-law restricted, at the will of the Chief of Police, the dissemination, on the streets, of tracts dealing with religious, political or other views.

Of the nine judges who heard the appeal, four (Rand, Kellock, Estey and Locke JJ.) held that the by-law was invalid, because it was legislation in relation to religion and free speech and not in relation to the administration of the streets, and was, therefore, not within s. 92(13). Two judges (Rinfret C.J. and Taschereau J. (as he then was)) held that in pith and substance the by-law was to control and regulate the usage of streets. They also held that freedom of worship is a civil right within the provinces. Two judges (Cartwright J. (as he then was) and Fauteux J.) held that it was within provincial competence to authorize the enactment of this by-law, and that provincial legislation in relation to matters assigned to the provinces is not rendered invalid because, to a limited extent, it interferes with freedom of the press or freedom of religion. Kerwin J. (as he then was), while holding that freedom of religion was a civil right within the province, held that to the extent that the by-law interfered with the profession of religion it was not applicable because of its conflict, to that extent, with the provisions of a pre-Confederation statute of 1852, of the old Province of Canada, 14-15 Vict., c. 175, which provided:

> That the free exercise and enjoyment of Religious Profession and Worship, without discrimination or preference, so as the same be not made an excuse for acts of licentiousness, or a justification of practices inconsistent with the peace and safety of the Province, is by the constitution and laws of this Province allowed to all Her Majesty's subjects within the same.

This provision continued to operate in the Province of Quebec by virtue of s. 129 of the *British North America Act*, which provides:

> 129. Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers, and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the

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Parliament of the United Kingdom of Great Britain and Ireland,) to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act.

The four judges who were of the opinion that the by-law was invalid reached that conclusion because they felt that it was not enacted in relation to the administration of streets but rather to provide a means of censorship of published material distributed on the streets. It restricted, inter alia, the dissemination of religious views.

The purpose of the legislation in question here is to control the use of Alberta lands as communal property. While it is apparent that the legislation was prompted by the fact that Hutterites had acquired and were acquiring large areas of land in Alberta, held as communal property, it does not forbid the existence of Hutterite colonies. What it does is to limit the territorial area of communal land to be held by existing colonies and to control the acquisition of land to be acquired by new colonies which would be held as communal property. The Act is not directed at Hutterite religious belief or worship, or at the profession of such belief. It is directed at the practice of holding large areas of Alberta land as communal property, whether such practice stems from religious belief or not. The fact that Hutterites engage in that practice was the circumstance which gave rise to the necessity for the Legislature's dealing generally with the holding of land as communal property, but that does not mean that legislation controlling the holding of land in that way is not in relation to property in the Province of Alberta.

It is a function of a provincial legislature to enact those laws which govern the holding of land within the boundaries of that province. It determines the manner in which land is held. It regulates the acquisition and disposition of such land, and, if it is considered desirable in the interests of the residents in that province, it controls the extent of the land holdings of a person or group of persons. The fact that a religious group upholds tenets which lead to economic views in relation to land holding does not mean that a provincial legislature, enacting land legislation which may run counter to such views, can be said, in consequence, to be legislating in respect of religion and not in respect to property.

Religion, as the subject-matter of legislation, wherever the jurisdiction may lie, must mean religion in the sense that it is generally understood in Canada. It involves matters of faith and worship, and freedom of religion involves freedom in connection with the profession and dissemination of religious faith and the exercise of religious worship. But it does not mean freedom from compliance with provincial laws relative to the matter of property holding. There has been no suggestion that mortmain legislation by a provincial legislature is incompetent as interfering with freedom of religion.

In *Carnation Company Limited v. The Quebec Agricultural Marketing Board*[6], reference was made, at p. 252, to the distinction between legislation "affecting" the appellant's interprovincial trade and legislation "in relation to" the regulation of trade and commerce. In my opinion, the legislation in question here undoubtedly affects the future expansion and creation of Hutterite colonies in Alberta, but that does not mean it was enacted in relation to the matter of religion. The Act is in relation to the right to acquire land in Alberta, if it is to be used as communal property, and, in consequence, it is within provincial jurisdiction under s. 92(13).

Having reached this conclusion, it is unnecessary for me to express any opinion in respect of the submission of the respondent that legislation in relation to religious freedom falls within the exclusive jurisdiction of provincial legislatures, a view which was supported by three of the judges in the *Saumur* case.

The appellants also contended that the Act was in conflict with the statute of the Province of Canada of 1852, to which reference has already been made, it being contended that this statute was in force in Alberta by virtue of s. 129 of the *British North America Act* and ss. 3 and 16 of *The Alberta Act,* 4-5 Edward VII, c. 3. The Appellate Division of the Supreme Court of Alberta had held that this Act was in force in Alberta, in *R. v. Gingrich*[7]. I agree with the view expressed by Johnson J.A. and by McDermid J.A. that the effect of s. 129 of the *British North America Act,* which continued laws in force in Canada, Nova Scotia and

[6] [1968] S.C.R. 238, 67 D.L.R. (2d) 1.
[7] (1958), 29 W.W.R. 471 at 474, 31 C.R. 306, 122 C.C.C. 279.

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New Brunswick in Ontario, Quebec, Nova Scotia and New Brunswick *respectively,* was only to continue that Act in effect in the Provinces of Ontario and Quebec, and not to make it a part of the law of any other province.

In any event, it may be noted that that statute protected the free exercise and enjoyment of "Religious Profession and Worship". The Act does not interfere with the profession of the Hutterite faith or with religious worship in that faith. It controls the land holdings of colonies of people of that faith.

I would dismiss the appeals with costs. No costs should be paid by or to the intervenant.

Appeals dismissed with costs.

Solicitors for the plaintiffs, appellants Walter et al: Moscovich, Moscovich, Stanos & Matisz, Lethbridge.

Solicitors for the plaintiffs, appellants Fletcher et al: Gill, Conrad & Cronin, Calgary.

Solicitor for the defendant, respondent: S. A. Friedman, Edmonton.

Solicitor for the intervenant: D. S. Maxwell, Ottawa.