VALIDITY OF THE ORDERLY PAYMENT OF DEBTS ACT, 1959 (ALTA.)

1960

*Feb. 3, 4
May 16

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Constitutional law—Validity of The Orderly Payment of Debts Act, 1959 (Alta.), c. 61—Whether bankruptcy and insolvency legislation—The B.N.A. Act, 1867, s. 91(21)—The Bankruptcy Act, R.S.C. 1952, c. 14.

The Orderly Payment of Debts Act, 1959 (Alta.), c. 61, applies, with certain exceptions, to contract and judgment debts not in excess of $1,000 and, with the consent of the creditors, to judgment debts in excess of $1,000. Proceedings are instituted by the debtor applying to the clerk of the Court for a consolidation order. This application of the debtor must be supported by an affidavit setting forth, *inter alia*, particulars of his debts, of the nature and extent of his property, his and his wife's income and his dependants. The clerk settles the amount proposed to be paid by the debtor periodically or otherwise. The consolidation order, when made, becomes a judgment of the Court in favour of each creditor. After the making of the order, no process can be issued against the debtor, except as permitted by the Act or by leave of the Court.

On a reference as to the validity of the Act, the Appellate Division of the Supreme Court of Alberta held that it was *ultra vires* the Legislature of the Province. The appeal of the Attorney-General for Alberta to this Court was supported by the Attorneys-General for Ontario and Saskatchewan.

Held: The Act was *ultra vires*.

Per Kerwin C.J. and Taschereau, Fauteux, Abbott, Judson and Ritchie JJ.: The Act was *ultra vires* as it was in pith and substance bankruptcy and insolvency legislation. The provisions of the Act could be read in no other way than showing that they referred to a debtor who was unable to pay his debts as they matured. A debtor under the Act was one who ceased to meet his liabilities as they became due and, therefore, fell within s. 21(1)(*j*) of the *Bankruptcy Act*. The impugned legislation was not legislation for the recovery of debts.

Per Locke, Cartwright and Martland JJ.: While the Act does not declare in terms that the debtor must be insolvent in the sense that he is unable to pay his debts as they become due, it must be so construed. It is, therefore, a clear invasion of the legislative field of insolvency and is, accordingly, beyond the powers of the Legislature. Compositions and schemes of arrangement have for more than 100 years past been treated as subject-matters falling within the scope of statutes relating to bankruptcy and insolvency. The provisions of the impugned Act are in conflict with those in the legislation passed by Parliament dealing with the same matters in the *Bankruptcy Act* and the *Farmers' Creditors Arrangement Act*. The language of s. 91 of the *B.N.A. Act*, 1867, is that the exclusive legislative power of the Parliament extends to all matters in relation to, *inter alia*, bankruptcy and insolvency, and the provinces are excluded from that field. *A.G. for Ontario v. A.G. of Canada*, [1894] A.C. 189, distinguished.

*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie J.J.

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Per: Cartwright and Martland JJ.: In all the decisions of the Judicial Committee or of this Court, upholding provincial legislation impugned as affecting the rights and obligations of an insolvent entity and its creditors, two conditions have been found to exist: (1) that the legislation was not in truth and substance primarily in relation to bankruptcy and insolvency but rather in relation to one or more of the matters found in s. 92; and (2) that it was not in conflict with existing valid legislation of Parliament enacted in exercise of the power contained in s. 91(21), in so far as it affected the rights and obligations of an insolvent and its creditors. Neither of these conditions exists in this case.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], on a reference by the Lieutenant-Governor in Council. Appeal dismissed.

H. J. Wilson, Q.C. and *J. W. Anderson,* for the appellant, the Attorney-General for Alberta.

L. Ingle, for the intervenant, the Attorney-General for Saskatchewan.

W. McKimm, for the intervenant, the Attorney-General for Ontario.

G. H. Steer, Q.C., counsel appointed by the Court to represent the creditors or other persons opposed to the legislation.

The judgment of Kerwin C.J. and of Taschereau, Fauteux, Abbott, Judson and Ritchie JJ. was delivered by

THE CHIEF JUSTICE:—Under the provisions of *The Constitutional Questions Act,* R.S.A. 1955, c. 55, the Lieutenant-Governor in Council of the Province of Alberta referred to the Appellate Division of the Supreme Court of the Province[1] the following question for hearing and consideration:

> Is The Orderly Payment of Debts Act, being Chapter 61 of the Statutes of Alberta, 1959, *intra vires* the Legislature of Alberta, either in whole or in part, and if so, in what part or parts, and to what extent?

That Court directed that argument of the question be set down for hearing at its sittings to be held in Calgary commencing June 1, 1959, and that a copy of that direction and of the Order-in-Council and of the Act be served upon

(1) Canadian Bankers Association;

(2) Credit Granter's Association of Edmonton;

(3) Retail Merchants Association of Canada (Alberta) Inc.;

[1] (1959), 29 W.W.R. 435, 20 D.L.R. (2d) 503.

(4) Canadian Credit Men's Trust Association Ltd.;
(5) Canadian Consumer Loan Association (Canada);
(6) Attorney-General of Canada.

George H. Steer, Esq., Q.C., was appointed as counsel to argue the case on behalf of creditors or other persons who might be opposed to the provisions of the Act. At the hearing counsel for the Attorney General for the Province and one counsel for three credit associations appeared to uphold the Act while Mr. Steer presented argument against its validity. No one else appeared, although the others mentioned above were duly notified. Judgment was reserved and the Court consisting of the Chief Justice, H. J. Macdonald, M. M. Porter and H. G. Johnson, J.J.A., unanimously decided that the Act was wholly *ultra vires* the Legislature of the Province.

The Attorney General for Alberta appealed to this Court. In accordance with the Rules notice was duly served upon the Attorney General of Canada and by direction notice was also served upon the Attorney General for each of the other provinces. Before us counsel for the Attorney General for Ontario and for the Attorney General for Saskatchewan supported the appeal. No one else appeared except Mr. Steer. On behalf of the three provinces it was submitted, as apparently it was argued in the Appellate Division, that the Act was within the legislative competence of the Province of Alberta under Heads 13, 14 and 16 of s. 92 of the *British North America Act,* 1867:

13. Property and Civil Rights in thet Province.
14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction and including Procedure in Civil Matters in those Courts.
16. Generally all Matters of a merely local or private nature in the Province.

Mr. Steer contended that the subject matter of the Act dealt with bankruptcy and insolvency and was therefore within the sole competence of the legislative authority of the Parliament of Canada under Head 21 of s. 91 of the *British North America Act.* He also contended it was *ultra vires* because it encroached upon the following heads of s. 91 of that Act:

15. Banking, incorporation of Banks and the issue of Paper Money.

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18. Bills of Exchange and Promissory Notes.
19. Interest.

and because it gives to the clerk of a District Court the powers of a judge contrary to the provisions of s. 96 of the *British North America Act*.

I agree with the Appellate Division that the Act is *ultra vires* on the ground that in pith and substance it is bankruptcy and insolvency legislation and that it is therefore unnecessary to consider the other grounds of attack.

Section 3 of *The Orderly Payment of Debts Act* provides:

3. (1) This Act applies only

(*a*) to a judgment for the payment of money where the amount of the judgment does not exceed one thousand dollars,

(*b*) to a judgment for the payment of money in excess of one thousand dollars if the creditor consents to come under this Act, and

(*c*) to a claim for money, demand for debt, account, covenant or otherwise, not in excess of one thousand dollars.

(2) This Act does not apply to a debt due, owing or payable to the Crown or a municipality or relating to the public revenue or one that may be levied and collected in the form of taxes or, unless the creditor consents to come under this Act,

(*a*) to a claim for wages that may be heard before, or a judgment therefor by, a magistrate under *The Masters and Servants Act*,

(*b*) to a claim for a lien or a judgment thereon under *The Mechanics Lien Act*, or

(*c*) to a claim for a lien under *The Garagemen's Lien Act*.

(3) This Act does not apply to debts incurred by a trader or merchant in the usual course of his business.

Provision is then made whereby a debtor may apply to the clerk of the District Court of the judicial district in which he resides for a consolidation order, showing by affidavit all his creditors together with the amount he owes to each one, his income from all sources and, if he is married, the amount of the income of his wife, the number of persons dependent upon him, the amount payable for board or lodging or rent or as payment on home property and whether any of his creditors' claims are secured, and if so, the nature and particulars of the security held by each. The clerk is to settle an amount proposed to be paid by the debtor into court periodically or otherwise on account of the claims of his creditors and provide for hearing objections by the latter.

After such a hearing, if necessary, a consolidation order is to be made, which order is a judgment of the Court in favour of each creditor, and provision is made for a review by the Court of any such order.

Sections 12, 13 and 14 are important and read as follows:

12. The court may, in deciding any matter brought before it, impose such terms on a debtor with respect to the custody of his property or any disposition thereof or of the proceeds thereof as it deems proper to protect the registered creditors and may give such directions for the purpose as the circumstances require.

13. Upon the making of a consolidation order no process shall be issued in any court against the debtor at the instance of a registered creditor or a creditor to whom this Act applies

(*a*) except as permitted by this Act or the regulations, or

(*b*) except by leave of the court.

14. (1) The clerk may at any time require of, and take from, the debtor an assignment to himself as clerk of the court of any moneys due, owing or payable or to become due, owing or payable to the debtor or earned or to be earned by the debtor.

(2) Unless otherwise agreed upon the clerk shall forthwith notify the person owing or about to owe the moneys of the assignment and all moneys collected thereon shall be applied to the credit of the claims against the debtor under the consolidation order.

(3) The clerk may issue a writ of execution in respect of a consolidation order and cause it to be filed with the sheriff of a judicial district and at any land titles office.

While the Act applies only to claims or judgments which do not exceed one thousand dollars, unless in the case of a judgment for the payment of money in excess of one thousand dollars the creditor consents to come under the Act, I can read these provisions in no other way than showing that they refer to a debtor who is unable to pay his debts as they mature. Why else is authority given the Court to impose terms with respect to the custody of his property or any disposition thereof or of the proceeds thereof as it deems proper to protect the registered creditors (s. 12)? And why else may no process be issued in any court against the debtor at the instance of a registered creditor or a creditor to whom the Act applies, except as stated (s. 13)? Section 14 authorizing the clerk to require an assignment to him by the debtor of any monies due, owing or payable or to become due, owing or payable to the debtor, or earned or to be earned by the debtor is surely consonant only with the position of an insolvent debtor. In fact a debtor under the Act

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is ceasing to meet his liabilities generally as they become due and therefore falls within s. 20(1)(*j*) of the *Bankruptcy Act*, R.S.C. 1952, c. 14.

In *Attorney General for British Columbia v. Attorney General for Canada et al.*[1], Lord Thankerton speaking for the Judicial Committee states at p. 402:

> In a general sense, insolvency means inability to meet one's debts or obligations; in a technical sense, it means the condition or standard of inability to meet debts or obligations, upon the occurrence of which the statutory law enables a creditor to intervene, with the assistance of a Court, to stop individual action by creditors and to secure administration of the debtor's assets in the general interest of creditors; the law also generally allows the debtor to apply for the same administration. The justification for such proceeding by a creditor generally consists in an act of bankruptcy by the debtor, the conditions of which are defined and prescribed by the statute law.

This was said in an appeal affirming the decision of the majority of this Court in the *Reference as to the Validity of The Farmers' Creditors Arrangement Act of the Dominion*, as amended[2].

In *Canadian Bankers' Association v. Attorney General of Saskatchewan*[3], this Court held that *The Moratorium Act* of Saskatchewan was *ultra vires* as being in relation to insolvency. There the decision of the Judicial Committee in *Abitibi Power and Paper Company v. The Montreal Trust Company*[4] was relied upon, but, for the reasons given by Mr. Justice Locke, it was held that it had no application. As was pointed out, the Judicial Committee in the 1943 case held that the purpose of the impugned legislation was to stay proceedings in the action brought under the mortgage granted by the Abitibi Company until the interested parties should have an opportunity of considering such plan for the re-organization of the company as might be submitted by a Royal Commission appointed for that purpose. For the same reason that decision is inapplicable here. The older decision of the Privy Council in *Attorney General for Ontario v. The Attorney General of Canada*[5], dealing with *The Ontario Assignments and Preference Act*, is quite distinguishable, although in my view it is doubtful whether in view of later pronouncements of the Judicial Committee

[1] [1937] A.C. 391, 1 D.L.R. 695, 18 C.B.R. 217, 67 C.C.C. 337.
[2] [1936] S.C.R. 384, 3 D.L.R. 622, 17 C.B.R. 359, 66 C.C.C. 180.
[3] [1956] S.C.R. 31, [1955] 5 D.L.R. 736, 35 C.B.R. 135.
[4] [1943] A.C. 536, 4 D.L.R. 1, 3 W.W.R. 33.
[5] [1894] A.C. 189.

it would at this date be decided in the same sense, even in the absence of Dominion legislation upon the subject of bankruptcy and insolvency.

The Act in question is not legislation for the recovery of debts. It has no analogy to provincial bulk sales legislation because there the object is to make sure that when a person sells his stock of goods, wares, merchandise and chattels, ordinarily the subject of trade and commerce, the creditors will not be placed in any difficulty because of the disappearance of the proceeds of the sale. It is unnecessary to express any opinion as to the validity of s. 156 of *The Division Courts Act* of Ontario, R.S.O. 1950, apparently introduced for the first time in 1950 by c. 16 of the statutes of that year, which provides for a consolidation order.

The debtor under *The Orderly Payment of Debts Act* is not in the same position as the appellant in *L'Union St. Jacques de Montréal v. Bélisle*[1], and the appellant can gain no comfort from *Ladore v. Bennett*[2], because there it was held that the *City of Windsor (Amalgamation) Act*, 1935 and Amendment were in pith and substance Acts passed in relation to "municipal institutions in the Province" and did not encroach upon the exclusive legislative power of the Dominion Parliament in relation to bankruptcy and insolvency, interest, or private rights outside the Province. This was a decision of the Judicial Committee affirming that of the Court of Appeal for Ontario[3], which latter, in the meantime, had been applied by the Court of Appeal for British Columbia in *Day v. Corporation of the City of Vancouver, McGavin and McMullen*[4]. The legislation in question in each of these cases was quite different from the effort by Alberta in *Board of Trustees of the Lethbridge Northern Irrigation District v. I.O.F.*[5].

The appeal should be dismissed.

The judgment of Locke and Martland JJ. was delivered by

LOCKE J.:—The *Orderly Payment of Debts Act* was passed by the Legislature of Alberta and appears as c. 61 of the Statutes of 1959. By s. 22 it is declared that the Act is

[1] (1874) L.R. 6 P.C. 31.
[2] [1939] A.C. 468, 3 D.L.R. 1, 2 W.W.R. 566.
[3] [1938] O.R. 324, 3 D.L.R. 212.
[4] (1938), 53 B.C.R. 140, 4 D.L.R. 345, 3 W.W.R. 161.
[5] [1940] A.C. 513, 2 D.L.R. 273.

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to come into force on a date to be fixed by proclamation. We are informed that, pending the determination of this reference, it has not been proclaimed.

In my opinion of the various grounds upon which it is contended that the Act is *ultra vires* the legislature it is necessary to consider only that as to whether it infringes upon the exclusive jurisdiction of Parliament to make laws in relation to bankruptcy and insolvency under head 21 of s. 91.

While "bankruptcy" and "insolvent person" are defined in s. 2 of the *Bankruptcy Act*, R.S.C. 1952, c. 14, it is rather the meaning that these words commonly bear that is to be given to them in construing the words in s. 91. In *Parker v. Gossage*[1], Parke B. said that an insolvent in the ordinary acceptation of the word is a person who cannot pay his debts. In *Reg. v. Saddlers Company*[2], Willes J. adopted what had been said by Baron Parke as to the meaning assigned to the term "insolvent" and said that the words "in insolvent circumstances" had always been held to mean not merely being behind the world, if an account were taken, but insolvency to the extent of being unable to pay just debts in the ordinary course of trade and business.

In *Attorney General of British Columbia v. Attorney General of Canada*[3], referring to the words in head 21, Lord Thankerton said that, in a general sense, insolvency means inability to meet one's debts or obligations.

When the *Bankruptcy Act* was first enacted in 1919 (c. 36) "insolvent person" and "insolvent" were declared to include a person who is for any reason unable to meet his obligations as they respectively become due, or who has ceased paying his current obligations in the ordinary course of business, thus substantially adopting what had been said by Parke B. and Willes J. The meaning commonly borne by the terms employed in head 21 of s. 91 did not differ in 1867 from their present day meaning.

[1] (1835) 5 L.J. Ex. 4.
[2] (1863), 10 H.L.C. 404 at 425.
[3] [1937] A.C. 391 at 402, 1 D.L.R. 695, 18 C.B.R. 217, 67 C.C.C. 337.

The statute to be considered does not refer in terms either to bankruptcy or insolvency and this, while not decisive, is a matter to be considered in determining the question as to what is its true nature.

The Act is declared by s. 3 to apply to a judgment not in excess of one thousand dollars, to a judgment in excess of that amount if the creditor consents to come under the Act and to a claim for money, demand for debt, account, covenant or otherwise, not in excess of one thousand dollars. Debts due to the Crown or to a municipality or relating to the public revenue, claims for wages that might be heard before a magistrate under the *Masters and Servants Act,* claims for a lien or a judgment thereon under the *Mechanics Lien Act,* claims for a lien under the *Garagemen's Lien Act* and debts incurred by a trader or merchant in the usual course of business are exempted from the operation of the Act.

As is the case of a proposal made by a debtor under the provisions of s. 27 of the *Bankruptcy Act* or s. 7 of the *Farmers' Creditors Arrangement Act,* R.S.C. 1952, c. 111, proceedings under this statute are initiated by the debtor who may apply to the clerk of the district court of the judicial district in which he resides for what is called a consolidation order. With the application the debtor is required to file an affidavit in the prescribed form setting forth, *inter alia,* particulars of the debts owing by him, of the nature and extent of his property, the amount of the income of himself and his wife and the number of persons dependent upon him.

Section 5 requires the clerk to file the affidavit and the particulars in a register and:

> upon reading the affidavit and hearing the debtor settle an amount proposed to be paid by the debtor into court, periodically or otherwise, on account of the claims of his creditors and enter particulars thereof in the register or, if so proposed, enter in the register a statement that the present circumstances of the debtor do not warrant the fixing of any amount.

The clerk is then required to give notice of the application to each of the creditors and fix a date on which he will hear objections. If no objections are received within twenty days after the notices are mailed, the clerk is required to note the fact in the register and issue a consolidation order.

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By s. 7 it is provided that any creditor may within the time limited file an objection with the clerk either to the amount entered in the register as the amount owing to him or to any other creditor or to the amount "fixed to be paid into court by the debtor or the times of payment thereof or to the statement fixing no amount." Upon such objection being filed the clerk is required to notify the debtor and any other creditor whose claim is objected to.

By s. 8 the clerk is empowered to bring in and add to the register the name of any creditor of the debtor of whom he has notice and who is not disclosed in the affidavit of the debtor.

Section 9 reads:

(1) At the time appointed for the hearing the clerk shall consider all objections filed with him in accordance with this Act and

(*a*) if an objection is to the claim of a creditor and the parties are brought to agreement or if the creditor's claim is a judgment of a court and the only objection is to the amount paid thereon, he may dispose of the objection in a summary manner and determine the amount owing to the creditor.

(*b*) if an objection is to the proposed terms or method of payment of the claims by the debtor or that terms of payment are not but should be fixed, he may dispose of the objection summarily and determine as the circumstances require the terms and method of payment of the claims, or that no terms be presently fixed, or

(*c*) in any case he may on notice of motion refer any objection to be disposed of by the court or as the court otherwise directs.

(2) The clerk shall enter in the register his decision or the decision of the court, as the case may be, and shall issue a consolidation order.

Section 10 provides that the consolidation order shall state the amount owing to each creditor, the amount to be paid into court by the debtor and the times of payment, and declares that a consolidation order is a judgment of the court in favour of each creditor for the amount stated and is an order of the court for the payment by the debtor of the amounts specified.

Section 11 provides that on notice of motion a judge of the district court may review a consolidation order made by the clerk and vary it or set it aside. Under the provisions of s. 12 the judge may impose such terms on a debtor with respect to the custody of his property or any disposition thereof as he deems proper to protect the registered creditors and give such directions for that purpose as the circumstances require.

Section 13 declares that upon the making of a consolidation order no process shall be issued in any court against the debtor at the instance of a registered creditor or a creditor to whom the Act applies, except as permitted by the Act or the regulations, or by leave of the court.

Section 14 enables the clerk at any time to require the debtor to assign to him any moneys owing to or to become owing or to be earned by the debtor and authorizes him to issue a writ of execution "in respect of a consolidation order" and to file it with the sheriff or at any land titles office.

Section 15 permits an application to be made by a creditor whose claim is not entered in the consolidation order to have it entered in the register and provides the manner of settlement of any dispute as to its amount.

Section 16 declares that a registered creditor holding security for his claim may, at any time, elect to rely upon his security and if the security is realized any excess above the amount of the creditor's claim is to be paid to the clerk and applied in payment of other judgments against the debtor.

By s. 17 provision is made, *inter alia,* for an application by any registered creditor where a debtor defaults in complying with an order for payment or any other order or direction of the court, or where any other proceeding for the recovery of money has been brought against the debtor, or where a judgment is recovered against him for an amount in excess of one thousand dollars and the judgment creditor refuses to permit his name to be added to the register for leave to take proceedings on behalf of all of the registered creditors to enforce the consolidation order. The section further provides for an *ex parte* application to the court where a debtor is about to abscond or has absconded or, with intent to defraud his creditors, is about to remove his property from Alberta.

Section 18 provides that the debtor or any registered creditor may at any time apply *ex parte* to the clerk for a further examination of the debtor as to his financial circumstances and, after notice has been given to all parties to the consolidation order, vary the order as to the time, amount and method of payment.

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Section 19 requires the clerk to distribute the moneys paid into court on account of the debts of a debtor at least once every three months *pro rata* among the registered creditors.

While, according to s. 3, the Act applies only to judgments or claims which do not exceed one thousand dollars, the total of such claims is not mentioned so that the Act can be applied irrespective of the aggregate amount of the debts. While the debtor may be required by the clerk under the provisions of s. 14 to assign any moneys due, owing, payable, or to become due or earned by the debtor, there is no express provision for the conveyance of the debtor's other assets to the clerk, though the powers of the district court judge under s. 12 would permit such an order to be made.

Persons engaged in farming in Alberta, as that expression is defined in the *Farmers' Creditors Arrangement Act,* who are entitled to make a proposal to their creditors under the terms of s. 7 of that Act are among those to whom the *Orderly Payment of Debts Act* will be applicable.

The language of s. 5 is that the clerk, upon an application being filed, after reading the affidavit required by s. 4 and hearing the debtor (apparently *ex parte*) shall "settle an amount proposed to be paid by the debtor into court periodically or otherwise on account of the claims of his creditors" or, "if so proposed" (presumably by the debtor) enter in the register a statement that the present circumstances of the debtor do not warrant the fixing of any amount. This language, while lacking in clarity, appears to indicate that, at least in the first instance, the clerk is to accept the debtor's estimate as to what, if anything, he can pay to his creditors and record this in the court records. Providing no objections are received within twenty days, this estimate appears to be conclusive by virtue of s. 6 and a consolidation order will issue.

Where objections are filed, they are to be dealt with under s. 9 which gives to the clerk power to settle the amount payable under any judgment if the amount is in dispute and, where the proposed scheme of payment is objected to, he may dispose of the objection summarily and decide upon the terms of the consolidation order.

This procedure may be compared with that provided for dealing with proposals which may be made to a trustee in bankruptcy by an insolvent person under the provisions of Part 111 of the *Bankruptcy Act* where the proposal is submitted to a meeting of the creditors and, if accepted by them and approved by the court having jurisdiction in bankruptcy under the terms of s. 34, becomes binding upon the parties concerned. Under the Act in question, where the proposal is objected to by a creditor whose claim does not exceed one thousand dollars, the wishes of the creditors may be disregarded by the clerk. The provisions of s. 13 which prohibit the taking of any proceedings by a registered creditor or a creditor to whom the Act applies are, after a consolidation order has been made as to these creditors, similar in their effect to the provisions of s. 40 of the *Bankruptcy Act* and s. 11 of the *Farmers' Creditors Arrangement Act* relating to bankruptcy and to proposals. While s. 4 details certain information that is to be contained in the debtor's affidavit, the form of the affidavit which may be prescribed by the Lieutenant-Governor in Council by regulation is not before us. Whether that affidavit is to contain a statement that the debtor is unable to meet his debts as they become due, or whether the clerk who is required to act by s. 5 is to do so upon the unsworn statement of the debtor that he is in insolvent circumstances, does not appear.

While the Act does not require that the debtor who applies must be insolvent in the sense that he is unable to pay his debts as they become due, it must, in my opinion, be so construed since it is quite impossible to believe that it was intended that the provisions of the Act might be resorted to by persons who were able to pay their way but do not feel inclined to do so. In my opinion, this is a clear invasion of the legislative field of insolvency and is, accordingly, beyond the powers of the legislature.

There have been bankruptcy laws in England since 1542 dealing with the estates of insolvent persons, and the terms of statutes in force in England prior to 1867 may be looked at as an aid in deciding what subject matters were generally regarded as included in these terms.

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The *Bankruptcy Consolidation Act* of 1849, 12-13 Vict., c. 106, which consolidated the law relating to bankrupts, contained in ss. 201 to 223 provisions by which a trader unable to meet his engagements with his creditors might petition the court to approve a composition or scheme of arrangement for the payment of his debts and declared the manner in which such a proposal might be submitted to the creditors and, if approved, to the court for its approval.

The manner in which disputes between the official assignee and the creditors as to the carrying out of a deed of composition or arrangement were to be settled was further dealt with in 1861 in s. 136 of an *Act to amend the law relating to bankruptcy and insolvency in England,* 24-25 Vict., c. 134.

Compositions and schemes of arrangement have thus for more than 100 years past been treated as subject matters falling within the scope of the statutes relating to bankruptcy and insolvency. The provisions dealing with this subject at the present day in England are to be found in the *Bankruptcy Act* of 1914 as amended (see Williams on Bankruptcy, 17th ed., p. 92). When the *Bankruptcy Act* was enacted in Canada in 1919 it contained in s. 13 provisions whereby an insolvent debtor who wished to make a proposal to his creditors for a composition in satisfaction of his debts or an extension of time for payment thereof or a scheme of arrangement of his affairs might, either before or after the making of a receiving order against him or the making of an authorized assignment by him, require in writing an authorized trustee to convene a meeting of his creditors for the consideration of such proposal and provisions whereby the scheme, if approved, might become binding upon the parties concerned. Similar provisions for dealing with such a proposal, a term which is defined to include a proposal for a composition, an extension of time, or for a scheme of arrangement, are contained in the *Bankruptcy Act* as it is today.

These provisions are made applicable to proposals by farmers in Alberta, Manitoba and Saskatchewan by the *Farmers' Creditors Arrangement Act* above mentioned. The Act under consideration appears to be an attempt to substitute for the provisions of the *Bankruptcy Act* and

the *Farmers' Creditors Arrangement Act* relating to proposals for an extension of time or a scheme of arrangement which are submitted to the interested creditors for their approval and, if approved, thereafter to the judge in bankruptcy, a scheme whereby the propriety of accepting such a proposal is to be determined by the clerk of the district court and with regard, apparently, only to the claims of those creditors the debts owing to whom are less than one thousand dollars in amount and those to whom greater amounts are owing who consent to come under the Act, leaving other creditors whose claims are greater to resort to such remedies as they may be advised to take for the enforcement of their claims. The provisions of the provincial Act thus conflict with those in the legislation passed by Parliament dealing with the same matters.

In *Attorney General of British Columbia v. Attorney General of Canada*[1], where the *Farmers' Creditors Arrangement Act 1934* of the Parliament of Canada, as amended by the *Farmers' Creditors Arrangement Act Amendment Act 1935* was considered, Lord Thankerton said in part:

> it cannot be maintained that legislative provision as to compositions, by which bankruptcy is avoided, but whch assumes insolvency, is not properly within the sphere of bankruptcy legislation.

and referred to the judgment of this Court in the matter of the *Companies' Creditors Arrangement Act*[2], where Sir Lyman Duff, delivering the judgment of the majority, said that the history of the law seems to show clearly that legislation in respect of compositions and arrangements is a natural and ordinary component of a system of bankruptcy and insolvency law.

Some support for the validity of this legislation is sought in the judgment of the Judicial Committee in *Attorney General of Ontario v. Attorney General of Canada*[3]. The question in that appeal was as to whether s. 9 of c. 124, R.S.O. 1887, was within the powers of the legislature. The Act was entitled *"An Act respecting assignments and preferences by insolvent persons."* A majority of the members of the Court of Appeal who considered the question

[1] [1937] A.C. 391, 1 D.L.R. 695, 18 C.B.R. 217, 67 C.C.C. 337.
[2] [1934] S.C.R. 659, 4 D.L.R. 75, 16 C.B.R. 1.
[3] [1894] A.C. 189.

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had found the section to be *ultra vires*. In an earlier case, *Clarkson v. Ontario Bank*[1], Haggarty C.J.O. and Osler J.A. had held the Act as a whole to be *ultra vires* as legislation relating to bankruptcy and insolvency, while Burton and Patterson JJ.A. considered it to be *intra vires* as being in relation to property and civil rights in the province.

Prior to the passing of that statute the *Insolvency Act of 1875* (c. 16) had been repealed by Parliament by c. 1 of the Statutes of 1880 and there was no Bankruptcy or Insolvency Act of the Dominion.

The judgment allowing the appeal was delivered by Herschell L.C. The Act, the first two sections of which dealt with fraudulent preferences by insolvents or those knowing themselves to be on the eve of insolvency, permitted a debtor-solvent or otherwise—to make an assignment of his exigible assets to a sheriff for the purpose of realization and distribution *pro rata* among his creditors. Section 9 provided that such an assignment should take precedence of all judgments and all executions not completely executed by payment. There were no provisions permitting proposals for a composition or extension of time for payment of debts. It was said that the effect to be given to judgments and executions and the manner and the extent to which they might be enforced was *prima facie* within the legislative powers of the legislature and that the validity of the assignment and the application of s. 9 did not depend on whether the assignor was or was not insolvent. Such an assignment, their Lordships said, did not infringe on the exclusive legislative power of Parliament under head 21. The concluding portion of the judgment reads (pp. 200-201):

> Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as part of a bankruptcy law, and the provincial legislature would doubtless be then precluded from interfering with this legislation inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament. But it does not follow that such subjects, as might properly be treated as ancillary to such a law and therefore within the powers of the Dominion Parliament, are excluded from the legislative authority of the provincial legislature when there is no bankruptcy or insolvency legislation of the Dominion Parliament in existence.

[1] (1890), 15 O.A.R. 166.

As Parliament has dealt with the matter, the concluding portion of this judgment would be fatal to the appellant's contention, even if the subject of bankruptcy and insolvency were one in relation to which the province might legislate in the absence of legislation by the Dominion. But the language of s. 91 is that the exclusive legislative power of the Parliament of Canada extends to all matters in relation to, *inter alia,* bankruptcy and insolvency, and the provinces are excluded from that field. As Lord Watson said in *Union Colliery v. Bryden*[1]:

> The abstinence of the Dominion Parliament from legislating to the full limit of its power could not have the effect of transferring to any provincial legislature the legislative power which had been assigned to the Dominion by s. 91 of the Act of 1867.

Neither *Ladore v. Bennett*[2] nor *Abitibi Power and Paper Co. v. Montreal Trust Co.*[3], affect the question, in my opinion. In the former case the legislation, while it affected the rights of persons who had claims against insolvent municipalities, was found to be in pith and substance in relation to municipal institutions in the province and, as such, was *intra vires* the legislature under s. 92(8). In the latter case the purpose of the impugned legislation was to stay proceedings in an action brought under a mortgage until the interested parties should have an opportunity of considering a plan for the reorganization of the company, and the true nature of the legislation was held to be to regulate property and civil rights within the province.

I would dismiss this appeal.

The judgment of Cartwright and Martland JJ. was delivered by

CARTWRIGHT J.:—I agree with the conclusion of my brother Locke, that in its true nature and character *The Orderly Payment of Debts Act* is legislation in relation to matters coming within the class of subjects specified in head 21 of s. 91 of the *British North America Act,* and is wholly *ultra vires* of the Legislature of the Province of Alberta, and I am in substantial agreement with his reasons.

[1] [1899] A.C. 580 at 588, 68 L.J.P.C. 118.
[2] [1939] A.C. 468, 3 D.L.R. 1, 2 W.W.R. 566.
[3] [1943] A.C. 536, 4 D.L.R. 1, 3 W.W.R. 33.

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I wish, however, to add some observations as to some of the decisions relied upon by counsel who supported the appeal.

The first of these is the judgment of the Judicial Committee in *Attorney-General of Ontario v. Attorney-General for the Dominion of Canada*[1]. The decision of the Court of Appeal for Ontario in that case is reported in[2]. The question referred to the Court was:

> Had the Legislature of Ontario jurisdiction to enact the 9th section of the Revised Statutes of Ontario, ch. 124, and entitled 'An Act respecting Assignments and Preferences by Insolvent Persons?'

The Court consisted of four judges. Hagarty C.J.O. and Burton J.A. answered in the negative; Maclennan J.A. answered in the affirmative; Osler J.A. made no answer. In the result the decision was that the section was *ultra vires* of the Legislature. On appeal to the Judicial Committee this decision was reversed and the question was answered in the affirmative.

In the earlier case of *Clarkson v. Ontario Bank*[3], Hagarty C.J.O. had reached the conclusion that the whole Act was *ultra vires* of the Provincial Legislature; in the later case, the learned Chief Justice adhered to the opinion he had expressed in *Clarkson's* case and speaking of s. 9, to which alone the question put to the Court had reference, he said at p. 493:

> I find it impossible to separate it from the rest of the Act, or to give any opinion as to its effect, standing by itself, unless I arrived at a judgment the opposite to that expressed in 1888 to which I still fully adhere.

In the Judicial Committee, the Lord Chancellor, Lord Herschell, who gave the judgment of their Lordships, referred to certain other sections of the Act in order to explain the meaning of section 9 but did not deal with the question of the validity of those other sections or of the Act as a whole. At pp. 198 and 199, he said:

> Their Lordships proceed now to consider the nature of the enactment said to be ultra vires. It postpones judgments and executions not completely executed by payment to an assignment for the benefit of creditors under the Act. Now there can be no doubt that the effect to be given to judgments and executions and the manner and extent to which they

[1] [1894] A.C. 189.
[2] (1893), 20 O.A.R. 489.
[3] (1890), 15 O.A.R. 166.

may be made available for the recovery of debts are prima facie within the legislative powers of the provincial parliament. Executions are a part of the machinery by which debts are recovered, and are subject to regulation by that parliament. A creditor has no inherent right to have his debt satisfied by means of a levy by the sheriff, or to any priority in respect of such levy. The execution is a mere creature of the law which may determine and regulate the rights to which it gives rise. The Act of 1887 which abolished priority as amongst execution creditors provided a simple means by which every creditor might obtain a share in the distribution of moneys levied under an execution by any particular creditor. The other Act of the same year, containing the section which is impeached, goes a step further, and gives to all creditors under an assignment for their general benefit a right to a rateable share of the assets of the debtor, including those which have been seized in execution.

But it is argued that inasmuch as this assignment contemplates the insolvency of the debtor, and would only be made if he were insolvent, such a provision purports to deal with insolvency, and therefore is a matter exclusively within the jurisdiction of the Dominion Parliament. Now it is to be observed that an assignment for the general benefit of creditors has long been known to the jurisprudence of this country and also of Canada, and has its force and effect at common law quite independently of any system of bankruptcy or insolvency, or any legislation relating thereto. So far from being regarded as an essential part of the bankruptcy law, such an assignment was made an act of bankruptcy on which an adjudication might be founded, and by the law of the Province of Canada which prevailed at the time when the Dominion Act was passed, it was one of the grounds for an adjudication of insolvency.

* * *

Moreover, the operation of an assignment for the benefit of creditors was precisely the same, whether the assignor was or was not in fact insolvent.

Viewing the impugned section in this way their Lordships were able to hold that, at all events in one aspect, its true subject matter fell within heads 13 and 14 of s. 92 of the *B.N.A. Act* (although in another aspect that subject matter would fall within head 21 of s. 91) and so could stand while there was no bankruptcy or insolvency legislation of the Dominion Parliament in existence in relation to the same subject matter.

In *Ladore v. Bennett*[1], their Lordships held that the impugned legislation was in its true nature and character in relation to the subject matter comprised in head 8 of s. 92, Municipal Institutions in the Province, and that the fact that the municipal institutions dealt with in the legislation had become insolvent did not remove the subject matter from the ambit of provincial legislative power.

[1] [1939] A.C. 468, 3 D.L.R. 1, 2 W.W.R. 566.

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In *Abitibi Power & Paper Co. v. Montreal Trust Co.*[1], their Lordships regarded the subject matter of the legislation there in question as falling within heads 13 and 14 of s. 92. The Montreal Trust Co., as trustee for the bond-holders, had commenced an action in the Supreme Court of Ontario on September 8, 1932, against the Abitibi Company for the enforcement of the security of a deed of trust and bond mortgage. On September 26, 1932, the Abitibi Company was adjudicated bankrupt. On December 7, 1932, leave to continue this action was granted pursuant to s. 21 of the *Dominion Winding Up Act*. The bond-holders made no claim in the winding-up, and in their Lordships' view, once leave had been granted "the action proceeded as a provincial action, subject to the provincial law regulating the rights in such an action and subject to the sovereign power of the legislature to alter those rights in respect of property within the province". The judgment of their Lordships continues as follows at pp. 547 and 548:

> It could not be denied that the action proceeded subject to the possibility of being stayed under the ordinary rules of procedure as, for instance, for security for costs, default in pleading or discovery, or any special circumstances which the court might think demanded a stay. Middleton J.A. appreciated this position, but he expressed the opinion that the action would proceed in accordance with the orders and rules of practice that were in existence at the date of the application. The limitation to existing rules is significant. Their Lordships can see no ground for such a restriction. If the rules of procedure were subsequently altered before the action came to an end, it must proceed thereafter subject to the rules as amended. The province, therefore, could enact rules in the course of the action imposing a further ground of stay, and, if it can thus impose what may be a general moratorium, there is no reason why its sovereign power should be so limited as not to enable it to impose, if it so desired, a moratorium limited to a special class of action or suitor, or to one particular action or suitor.

I do not propose to refer in detail to the other authorities relied upon in support of the appeal but, after examining all of them, I think I am right in saying that in every decision of the Judicial Committee or of this Court in which provincial legislation, impugned on the ground that it affected the rights and obligations of an insolvent entity and its creditors and thereby trenched on the subject matter comprised in head 21 of s. 91, has been upheld it appears that in the view of the court two conditions were

[1] [1943] A.C. 536, 4 D.L.R. 1, 3 W.W.R. 33.

found to exist; (i) that the impugned legislation was not in truth and substance primarily in relation to Bankruptcy and Insolvency but rather in relation to one or more of the matters enumerated in s. 92; and (ii) that in so far as it affected the rights and obligations of an insolvent and its creditors it did not conflict with existing valid legislation of Parliament enacted in exercise of the power contained in head 21 of s. 91.

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In the case at bar, as is shown in the reasons of my brother Locke, neither of these conditions exists.

I would dismiss the appeal.

Appeal dismissed.