1936

*Feb. 4, 5.
*June 17.

IN THE MATTER OF A REFERENCE AS TO WHETHER THE PARLIAMENT OF CANADA HAD LEGISLATIVE JURISDICTION TO ENACT THE FARMERS' CREDITORS ARRANGEMENT ACT, 1934, 24-25 GEO V, C. 53, AS AMENDED BY THE FARMERS' CREDITORS ARRANGEMENT ACT AMENDMENT ACT, 1935, 25-26 GEO. V, C. 20.

Constitutional law—The Farmers' Creditors Arrangement Act—Constitutional validity—Bankruptcy and insolvency—B.N.A. Act, 1867, s. 91, ss. 21.

The Farmers' Creditors Arrangement Act, which is entitled "An Act to Facilitate Compromises and Arrangements between Farmers and their Creditors," provides by its enactments a procedure whereby a farmer may make a proposal for a composition, extension of time or a scheme of arrangement, to his creditors. If the proposal is accepted by the ordinary creditors and the secured creditors whose rights are affected concur, it is submitted to the Court for approval. If it is not accepted by the ordinary creditors or if a secured creditor whose rights are affected by it does not concur, the matter is referred to a Board of Review to formulate a proposal. If the proposal is accepted by the creditors and approved by the Court, or if it is formulated by the Board of Review and is approved by the creditors and the debtor, or if, though not so approved, it is confirmed by the Board of Review, it shall be binding upon all the creditors and the debtor.

Held, Cannon J. dissenting, that the Act is *intra vires* of the Parliament of Canada. The power of the Parliament to enact this statute is derived from subdivision 21 of section 91 of the B.N.A. Act, in virtue of which the exclusive legislative authority of the Parliament of Canada extends to the subject of Bankruptcy and Insolvency. The provisions of the statute affect farmers who are in such a situation that they are unable to pay their debts as they fall due; and it is competent to Parliament, possessing plenary authority in respect of bankruptcy and insolvency, to treat this condition of affairs as a state of insolvency.

Per Cannon J. dissenting:—In view of the accepted aims and past history of the bankruptcy and insolvency legislation, the Parliament of Canada, in enacting the Act, has exceeded the domain of bankruptcy and insolvency to which its jurisdiction is limited. More particularly, the Act does not provide, as in the case of an insolvent person, for the rateable distribution of the assets of the debtor among his creditors nor for the discharge of the debt. Section 17 of the Act, which fixes the rate of interest, is *intra vires* of the Parliament of Canada under ss. 19 of section 91 of the B.N.A. Act.

REFERENCE by His Excellency the Governor General in Council to the Supreme Court of Canada, in the exercise of the powers conferred by s. 55 of the *Supreme Court*

*PRESENT:—Duff C. J. and Rinfret, Cannon, Crocket, Davis and Kerwin JJ.

Act (R.S.C. 1927, c. 35) of the following question: Is the *Farmers' Creditors Arrangement Act,* 1934, as amended by the *Farmers' Creditors Arrangement Act Amendment Act,* 1935, or any of the provisions thereof, and in what particular or particulars or to what extent, *ultra vires* of the Parliament of Canada?

The Order in Council referring the question to the Court reads as follows:

The Committee of the Privy Council have had before them a report, dated 13th November, 1935, from the Minister of Justice, referring to *The Farmers' Creditors Arrangement Act,* 1934, chapter 53 of the statutes of Canada, 1934, being an Act to Facilitate Compromises and Arrangements between Farmers and their Creditors, and to its amending Act, *The Farmers' Creditors Arrangement Act Amendment Act,* 1935, chapter 20 of the statutes of Canada, 1935, the principal of which Acts was enacted as appears from the preamble thereof upon the recital that in view of the depressed state of agriculture the present indebtedness of many farmers was beyond their capacity to pay; that it was essential in the interest of the Dominion to retain the farmers on the land as efficient producers and for such purpose it was necessary to provide means whereby compromises or rearrangements might be effected of debts of farmers who were unable to pay.

The Minister states that doubts exist or are entertained as to whether the Parliament of Canada had jurisdiction to enact the said Acts; or either of them, in whole or in part, and that it is expedient that such question should be referred to the Supreme Court of Canada for judicial determination.

The Committee, accordingly, on the recommendation of the Minister of Justice, advise that the following question be referred to the Supreme Court of Canada for hearing and consideration, pursuant to Section 55 of the Supreme Court Act: —

> Is the *Farmers' Creditors Arrangement Act,* 1934, as amended by the *Farmers' Creditors Arrangement Act Amendment Act,* 1935, or any of the provisions thereof, and in what particular or particulars or to what extent, *ultra vires* of the Parliament of Canada?

E. J. LEMAIRE,
Clerk of the Privy Council.

1936

REFERENCE *re* FARMERS' CREDITORS ARRANGEMENT ACT, 1934, AND ITS AMENDING ACT, 1935.

The counsel mentioned in the report of the judgments on the Reference *re* Section 498A of the Criminal Code (p. 365) appeared on this Reference, except that *Aimé Geoffrion K.C.* for Quebec and *G. McG. Sloan K.C.* (Attorney-General) and *J. W. deB Farris K.C.* for British Columbia were not present; and *J. L. Ralston K.C.* appeared for the Attorneys-General for Quebec and British Columbia.

The judgment of Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ. was delivered by

DUFF C.J.—The title of the Act, which is really an office consolidation of a statute of 1934 with another of 1935, is "An Act to facilitate compromises and arrangements between farmers and their creditors."

The Act provides a procedure whereby a farmer may make a proposal for a composition, extension of time or scheme of arrangement to his creditors. If the proposal is accepted by the ordinary creditors, and secured creditors whose rights are affected agree to it, it is submitted to the Court for approval. If it is not accepted by the ordinary creditors, or if a secured creditor whose rights are affected does not agree, there is a reference to a board of review to formulate a proposal. If a proposal is formulated by the board of review and approved by the creditors and the debtor; or if, though not so approved, it is confirmed by the board of review, it is binding on all the creditors and the debtor.

"Farmer" means "a person whose principal occupation consists in farming or the tillage of the soil." "Creditor" includes "secured creditor."

Subsection 2 of section 2 makes the provisions of the *Bankruptcy Act* and rules applicable and is in these words:

> Unless it is otherwise provided or the context otherwise requires, expressions contained in this Act shall have the same meaning as in the *Bankruptcy Act*, and this Act shall be read and construed as one with the *Bankruptcy Act*, but shall have full force and effect notwithstanding anything contained in the *Bankruptcy Act*, and the provisions of the *Bankruptcy Act* and Bankruptcy Rules shall, except as in this Act otherwise provided, apply *mutatis mutandis* in the case of proceedings hereunder including meetings of creditors.

We are chiefly concerned with the provisions with regard to compositions. It is provided that a farmer who is unable to meet his liabilities as they become due may make a proposal for a composition, an extension of time or scheme of arrangement, and file a proposal with the Official Re-

ceiver who shall forthwith call a meeting of the creditors.

The Official Receiver is to perform the duties and functions required by the *Bankruptcy Act* to be performed by a trustee in the case of a proposal for a composition, extension of time or scheme of arrangement. These duties and functions are, generally, the submission to the meeting of the proposal, and, on its acceptance by the creditors, the application to the Court to approve it. A proposal may be one in relation to a debt owing to a secured creditor or owing to a person who has acquired property subject to a right of redemption, but except in the case of a proposal confirmed by the Board of Review, the concurrence of such creditor is required. Such a creditor, if the proposal relates to the debt owing to him, may value his security, and is entitled to vote only in respect of the balance of his claim after deducting the amount of his valuation, but no proposal is to be approved by the Court which provides for payment in excess of the valuation.

The provisions of the *Bankruptcy Act* preventing the approval of a proposal which does not provide for a payment of not less than fifty cents on the dollar, and priority of payment of certain debts are made inapplicable. Power is given to the Court to order a farmer to execute instruments necessary to give effect to the proposal when it has received the approval of the Court or the confirmation of the Board of Review. On the filing of a proposal, the property of the debtor is deemed to be under the authority of the Court, and creditors' remedies may not be exercised without leave of the Court for ninety days, or such further time as the Court may order.

Provision is made for the establishment in any province of a Board of Review consisting of a Chief Commissioner, who must be a Judge having jurisdiction in bankruptcy, and two Commissioners, one as representative of creditors and one as representative of debtors. When the Official Receiver reports that no proposal has been approved by the creditors, although one has been made, the Board, on the written request of a creditor or the debtor, is required to endeavour to formulate an acceptable proposal, and to consider representations by the parties interested. If any such proposal is approved by the creditors and the debtor, it is binding on them. If such a proposal is not approved, the

1936

REFERENCE re FARMERS' CREDITORS ARRANGEMENT ACT, 1934, AND ITS AMENDING ACT, 1935.

Duff C.J.

Board may confirm it and it becomes binding upon all the creditors and the debtor. The full Board must deal with every request to formulate a proposal, and the determination of the majority prevails. The Board must base its proposal upon the present and prospective capability of the debtor to perform the obligations prescribed and the productive value of the farm, and may decline to formulate a proposal where it does not consider it can do so in fairness and justice to the debtor and the creditors. The Board is invested with the powers of a Commissioner appointed under the *Inquiries Act*. Special provision is made for insolvent farmer debtors residing in Quebec, whereby they may make an assignment for the general benefit of their creditors.

Section 17 provides that whenever any rate of interest exceeding seven per cent is stipulated for in any mortgage of farm real estate, after tender or payment of the amount owing, together with three months' further interest, no interest, after the expiry of the three months, shall be chargeable at any rate in excess of five per cent per annum.

As above mentioned, the provisions of the statute are made a part of the general system for the administration of the assets of bankrupts and insolvents established by the *Bankruptcy Act;* and they come into operation only where a farmer who is unable to meet his liabilities as they become due makes a proposal for a composition, extension of time or scheme of arrangement.

The grounds upon which the validity of the statute is impeached are, mainly, two: First, it is argued that it is not competent to the Parliament of Canada, in exercising its powers in relation to bankruptcy and insolvency, to enact legislation depriving a secured creditor of his right to realize his security fully for the recovery of the debt owing to him, where such security consists of a conventional charge upon the property of the insolvent or affecting that right by subjecting him in respect of it to the discretionary order of a tribunal.

Second, it is contended that the Parliament of Canada is incompetent to legislate in such a way as to affect the rights of the government of a province as creditor of an insolvent in the manner in which this statute professes to do.

The general scope of the jurisdiction in relation to bankruptcy or insolvency conferred under section 91 is thus described by Lord Selburne in *L'Union St. Jacques* v. *Bélisle* (1):—

> The words describe in their own legal sense provisions made by law for the administration of the estates of persons who may become bankrupt or insolvent, according to rules and definitions prescribed by law, including of course the conditions in which that law is to be brought into operation, the manner in which it is to be brought into operation, and the effect of its operation.

These words would indicate that Parliament, in providing for the administration of the estates of bankrupts and insolvents, has a very wide discretion and is not necessarily limited in the exercise of that discretion by reference to the particular provisions of bankruptcy legislation in England prior to the date of the B.N.A. Act. It is not necessary, however, for the purpose of passing upon the validity of this statute to determine to what extent Parliament is empowered, when making provision for the administration of such estates, to depart from the broad lines of such legislation as known and understood in 1867.

It is not open to dispute in this Court that legislation in respect of "compositions and arrangements is a natural and ordinary component of a system of bankruptcy and insolvency law" (*In re Companies' Creditors Arrangement Act* (2). Nor can the authority of Parliament be controverted to enact provisions by which the security of a creditor of an insolvent may be prejudicially affected without his consent. That was decided in the case just referred to. By the statute under consideration on that reference, it is enacted (section 4) that

> Where a compromise or arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of such creditors, or class of creditors, and, if the court so determines, of the shareholders of such company, to be summoned in such manner as the court directs.

By section 5 it is provided that,

> If a majority in number representing three-fourths in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections three and four of this Act, or either of such sections, agree to any compromise or arrangement either as proposed . . . . or modified at such meeting or meetings, the compromise

(1) (1875) L.R. 6 P.C. 31, at 36. (2) [1934] S.C.R. 659.

1936

REFERENCE *re* FARMERS' CREDITORS ARRANGEMENT ACT, 1934, AND ITS AMENDING ACT, 1935.

Duff C.J.

or arrangement may be sanctioned by the court, and if so sanctioned shall be binding on all the creditors, or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and shall also be binding on the company. . . .

"Secured creditors" include the "holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company. . . ."

In the case mentioned, this statute was held to be *intra vires*. The decision necessarily involves the proposition that Parliament may legislate in such a way as to make the terms of a compromise, to which a majority of three-fourths in value of secured creditors, or any class of secured creditors, in the sense mentioned, are parties, where the composition has received judicial sanction, binding upon a secured creditor who is not a party to the composition and has not given his assent to it. The principle of the legislation, in a word, is that a secured creditor under the conditions mentioned may be required by law to accept a composition to which he has not given his assent.

It has, of course, been a familiar characteristic of the operation of bankruptcy and insolvency legislation that a creditor possessing security on the property of his debtor in virtue of a judgment or of an execution should lose his privileged position to the extent to which the judgment or execution remains unsatisfied on bankruptcy supervening. But the argument under consideration distinguishes between the kind of security given by law to a judgment creditor and a conventional security and, in particular, a security in the nature of mortgage. From the point of view of the judgment creditor, the distinction, perhaps, does not rest upon very satisfactory grounds. It was at one time the law in some of the provinces of Canada that a judgment registered in a land registry office constituted a charge upon the lands of the judgment debtor enforceable in the same manner as an equitable charge for securing the payment of money; and a confession of judgment at one time was a form of security well known. Such security, although it derived its effectiveness from the privileges conferred by the law upon judgment creditors, had its origin in convention. Moreover, the judgment creditor who, by the law of the province, is the holder of a hypothec upon the lands of the judgment debtor or by virtue of the registration of his judgment, has what

amounts to an equitable charge upon such lands may suffer as great a deprivation by bankruptcy legislation which takes away his privilege upon a supervening bankruptcy as would a mortgagee affected in the same way. Nevertheless, it is true that, traditionally, mortgages have not, by bankruptcy legislation, been prejudicially affected in their right to resort to their securities.

Mr. Rowell has called our attention to section IX of chapter 19 (21 Jac. 1), and it appears that from the date of that enactment (1623) down to 1869, English bankruptcy legislation has contained a substantially similar provision. The section is in these words:—

> IX. And, for the better division and distribution of the lands, tenements, hereditaments, goods, chattels and other estate of such bankrupt, to and amongst his or her creditors; Be it enacted, That . . .; and that all and every creditor and creditors having security for his or their several debts, by judgment, statute, recognizance, specialty with penalty or without penalty, or other security, or having no security, or having made attachments in London, or any other place, by virtue of any custom there used, of the goods and chattels of any such bankrupt, whereof there is no execution or extent served and executed upon any of the lands, tenements, hereditaments, goods, chattels, and other estate of such bankrupts, before such time as he or she shall or do become bankrupt, shall not be relieved upon any such judgment, statute, recognizance, specialty, attachments, or other security for any more than a rateable part of their just and due debts, with the other creditors of the said bankrupt, without respect to any such penalty or greater sum contained in any such judgment, statute, recognizance, specialty with penalty, attachment or other security.

By force of another section of the same statute, mortgages of real or personal property are not within the general words "other security." The section in itself, however, is of significance. Among the securities mentioned are "statutes and recognizances."

Statutes merchant and statutes staple are discussed by Blackstone (Ed. 1766, Clarendon Press, Vol. II, ch. 10, s. 4, p. 160). This section is devoted to one species of estates defeasible on condition and is preceded, in section 3, by a discussion of estates held *in vadio*, or pledge, which are said to be of two kinds—*vivum va dium*, or living pledge, and *mortuum vadium*, or dead pledge or mortgage. These sections (3 and 4) are introduced thus:

> There are some estates defeasible upon condition subsequent, that require a more peculiar notice. Such are

Section 4 is in these words:

> A fourth species of estates, defeasible on condition subsequent, are those held by *statute merchant*, and *statute staple*; which are very nearly

1936

REFERENCE *re* FARMERS' CREDITORS ARRANGEMENT ACT, 1934, AND ITS AMENDING ACT, 1935.

Duff C.J.

related to the *vivum vadium* before mentioned, or estate held till the profits thereof shall discharge a debt liquidated or ascertained. For both the statute merchant and statute staple are securities for money; the one entered into pursuant to the statute 13 Edward I *de marcatoribus,* and thence called a statute merchant; the other pursuant to the statute 27 Edw. III, c. 9, before the mayor of the staple, that is to say, the grand mart for the principal commodities or manufactures of the kingdom formerly held by act of parliament in certain trading towns, and thence this security is called a statute staple. They are both, I say, securities for debts, originally permitted only among traders, for the benefit of commerce; whereby the lands of the debtor are conveyed to the creditor, till out of the rents and profits of them his debt may be satisfied: and during such time as the creditor so holds the lands, he is tenant by statute merchant or statute staple. There is also a similar security, the recognizance in the nature of a statute staple, which extends the benefit of this mercantile transaction to all the king's subjects in general, by virtue of the statute 23 Hen. VIII, c. 6.

The statutes which introduced these forms of securities were repealed in 1863. These securities, it should be observed, were effected by recognizance, the debtor's lands being bound as from the date of the recognizance. Blackstone, however, treats the security as one arising from conveyance, and Blackstone may be safely accepted as giving the current professional view of such transactions. The effect of the section quoted was that the holders of such securities were put in the same position as a judgment creditor; and upon bankruptcy a creditor holding such a security ranked on the assets rateably with unsecured creditors.

Even if it were open to us to depart from our recent decision in the reference concerning the *Companies' Creditors Arrangement Act* (1), we should, treating the matter as *res integra,* have thought that the history of bankruptcy legislation down to the year 1867 would not justify a conclusion that provisions such as those in the *Companies' Creditors Arrangement Act,* or those in the statute before us dealing with secured creditors were provisions beyond the discretion of Parliament to incorporate in a system for the administration of the estates of insolvents.

Before turning to the second ground upon which the legislation is attacked, it is convenient to refer to the nature of the proposal which is authorized in the case of secured creditors. That appears from section 7 which is in these words:

7. A proposal may provide for a compromise or an extension of time or a scheme of arrangement in relation to a debt owing to a secured

(1) [1934] S.C.R. 659.

creditor, or in relation to a debt owing to a person who has acquired movable or immovable property subject to a right of redemption, but in that event the concurrence of the secured creditor or such person, shall be required, except in the case of a proposal formulated and confirmed by the Board of Review as hereinafter provided.

It will be observed that the character of proposal contemplated in such cases is strictly limited to one which provides for a compromise, an extension of time or scheme of arrangement in relation to a debt owing to the secured creditor. The statute apparently, as counsel for the Dominion argued, does not envisage any interference with the rights of secured creditors except in relation to the debts owing to them and then (in the absence of the assent of the creditor) only to a compromise or extension of time or scheme of arrangement embodied in the proposal formulated and confirmed by the Board of Review.

As to the second ground of objection, the judgment of the Judicial Committee *in Re Silver Brothers* (1) seems very clearly to lay down and decide that it is competent to the Dominion, in legislating in relation to bankruptcy or insolvency, to deal with the privilege attaching to debts owing to the Crown in the right of a province and to take away any priority accorded to such debts by the law of a province. The legislative authority in bankruptcy matters to deal with debts owing to a province is no less than the authority to deal with debts owing to the Dominion.

To summarize: The power to enact this statute is derived from subdivision 21 of section 91 of the B.N.A. Act —in virtue of which the exclusive legislative authority of the Parliament of Canada extends to the subject of Bankruptcy and Insolvency. The broad purpose of the statute is, in the words of the title, " to facilitate compromises and arrangements between farmers and their creditors." The provisions of the statute affect farmers who are in such a situation that they are unable to pay their debts as they fall due. It is competent to Parliament, possessing plenary authority in respect of bankruptcy and insolvency, to treat this condition of affairs as a state of insolvency. The provisions of the statute only come into operation where such a state of insolvency exists. *Prima facie,* therefore, it is, within the ordinary meaning of the words, a statute dealing with insolvency. The statute is, by its express terms, incor-

(1) [1932] A.C. 514, at 519-521.

1936

REFERENCE *re* FARMERS' CREDITORS ARRANGEMENT ACT, 1934, AND ITS AMENDING ACT, 1935.

Duff C.J.

porated into the general system of bankruptcy legislation in force in Canada and it is not open to dispute that legislation in respect of "compositions and arrangements is a natural and ordinary component of a system of bankruptcy and insolvency law" (see page 5 of the judgment).

It is contended on behalf of the provinces that the jurisdiction of the Dominion in relation to this subject is limited to the enactment of legislation which at least in its broad lines, conforms to the systems of bankruptcy and insolvency legislation which had prevailed in Great Britain or in Canada down to the time of the passing of the B.N.A. Act. We do not consider it necessary to decide upon the question whether or not the powers vested in Parliament in relation to this subject are for all time restricted by reference to the legislative practice which obtained prior to the passing of the B.N.A. Act. The attack upon the statute was mainly directed against the provision which makes it possible to force the terms of a composition upon a secured creditor by which a secured creditor may be compelled to submit to a reduction of the debt owing to him by the insolvent.

This is not a new feature of insolvency legislation although, down to the enactment of the *Companies' Creditors Arrangement Act* in 1933, mortgagees had never been by legislation placed in such a position. The statute now under consideration does not in this respect differ from the *Companies' Creditors Arrangement Act* and the principle of our decision on the Reference respecting that statute (1) is applicable; that this, although a departure from previous practice in bankruptcy or insolvency legislation, was not beyond the discretionary authority bestowed upon Parliament under head no. 21 of section 91.

The statute being *intra vires,* the interrogatory addressed to us should be answered in the negative.

CANNON J.—This Court, on a previous reference reached the conclusion that the *Companies' Creditors Arrangement Act* (1), 23-24 Geo. V, ch. 36, was *intra vires* of the Parliament of Canada because the matters dealt with came within the domain of "bankruptcy and insolvency" within the intent of sec. 91, par. 21, of the B.N.A. Act.

(1) [1934] S.C.R. 659.

The Chief Justice said at p. 662:—

It seems difficult, therefore, to suppose that the purpose of the legislation is to give sanction to arrangements in the exclusive interest of a single creditor or of a single class of creditors and having no relation to the benefit of creditors as a whole. The ultimate purpose would appear to be to enable the court to sanction a compromise which, although binding upon a class of creditors only, would be beneficial to the general body of creditors as well as to the shareholders.

In my judgment, with the concurrence of Lamont, J., I found that arrangements, as provided for by the *Companies' Creditors Arrangement Act,* are, and have been, before and since Confederation component part of any system "devised to protect the creditors and at the same time help the honest debtor to rehabilitate himself and obtain a discharge."

In the dissenting judgment of Mr. Justice Badgley, whose conclusions were subsequently upheld by the Privy Council, *re L'Union St. Jacques & Bélisle* (1), I find the following at pp. 455 & 456:—

A statutory bankrupt and insolvent legislation had been in force in the two Canadas since the first *Insolvent Act* of 1864, which was continued with amendments to the time of the making of the Dominion Law of Insolvency in 1869, which repealed the provincial enactments and substituted a general Dominion Law upon the subject. By the Provincial Act of 1864, the first section specially enacts that "*the Act should apply in Lower Canada to traders only*" "AND IN Upper Canada to all persons whether traders or not," and this provision was not interfered with in the subsequent statutory amendments of that Provincial Act.

By the Dominion "Act respecting Insolvency" of 1869, the Lower Canada statutory restriction is extended throughout the Dominion of the four provinces, and it is enacted by the first section of the Dominion Act of 1869. "This Act shall apply to traders only." Now it is nothing but just to read the general subject of bankruptcy and insolvency by the light of the Dominion legislation itself, as indicating the intent of that legislature as to the enumerated subjects for its action, and it becomes undeniable therefore, that the Society, the appellant here, comes within the express limitation and restriction of the general law, and being neither in character nor purpose commercial nor a trader, and solely and simply what it has always been, a charitable and eleemosynary institution in and for the province of Quebec, the provincial enactment for its relief can, under no circumstances be brought within the operation of the laws of Bankruptcy and Insolvency attributed to the Dominion legislature.

It must also be borne in mind that a farmer, before and since Confederation, as far as the province of Quebec was concerned, even when insolvent, was not subject to bankruptcy proceedings; he could not be compelled to assign in the other provinces, where he could voluntarily make

(1) (1872) 2 Rev. Critique 449.

1936

REFERENCE *re* FARMERS' CREDITORS ARRANGEMENT ACT, 1934, AND ITS AMENDING ACT, 1935.

Cannon J.

an assignment for the distribution of his assets among his creditors, but could not be forced into insolvency. This latter provision was first made applicable to Quebec in 1919, but a special provision was subsequently passed to withdraw it from its operation. (1919, ch. 36, sec. 9; 1923, ch. 31, sec. 11; 1932, ch. 39, sec. 6.)

It may be reasonably said, as a matter of history, that nobody contemplated for a long period after Confederation that "bankruptcy or insolvency" proceedings and their essentially compulsory features could or would apply to farmers.

But the paramount consideration is that the Act which we are considering lacks the essential elements of bankruptcy legislation, to wit: the distribution of the debtor's assets rateably among his creditors, in the case of an insolvent person, whether he is willing that his assets be so distributed or not. Although provision may be made for a voluntary assignment as an alternative, it is only as an alternative. See: *Voluntary Assignment* case, *Attorney-General of Ontario* v. *Attorney-General of Canada* (1).

The Act does not provide for the rateable distribution of the assets of the debtor nor for the discharge of the debt. On the contrary, the only aim of the Act is to keep the farmer on his land at the expense of his creditors; the proposal for arrangement must come from him and covers only a composition, extension of time or scheme of arrangement either before or after an assignment has been made.

Another difference with the *Companies' Creditors Arrangement Act* is found in an entirely new feature which gives the Board of Review, under clause 12, paragraphs 6, 7, 8 and 9, extraordinary powers:—

(6) If the creditors or the debtor decline to approve the proposal so formulated, the Board may nevertheless confirm such proposal, either as formulated or as amended by the Board, in which case it shall be approved by the Court and shall be binding upon all the creditors and the debtor as in the case of a proposal duly accepted by the creditors and approved by the court.

(7) Every request to formulate a proposal shall be dealt with by the full Board, but a determination of the majority shall be deemed to be the determination of the Board.

(1) [1894] A.C. 189, at 200.

(8) The Board shall base its proposal upon the present and prospective capability of the debtor to perform the obligations prescribed and the productive value of the farm.

(9) The Board may decline to formulate a proposal in any case where it does not consider that it can do so in fairness and justice to the debtor or the creditors.

These evidently are not provisions similar to what we considered proper proceedings in insolvency in the *Companies' Creditors Arrangement Act,* because they lack the essential element of a compromise: the mutual agreement of the debtor and of at least a fixed majority of the creditors.

Under subsection 6, the Board may impose an entirely new contract to the parties, confiscate, if they deem it advisable, in whole or in part, the principal due to the creditors and consider only under subsection 12, sec. (8), the present and prospective capability of the debtor to perform the obligation prescribed by the Board and the productive value of the farm, which is not to be considered as an asset to be distributed among the creditors but as an intangible and unseizable asset reserved for the enjoyment and protection of the debtor.

In the judgment of Lord Selborne in *L'Union St. Jacques* v. *Bélisle* (1), we find, at page 38:—

> The fact that this particular society appears to have been in a state of embarrassment, and in such a financial condition that unless relieved by legislation, it might have been likely to come to ruin, does not prove that it was in any legal sense within the category of insolvency. And in point of fact the whole tendency of the Act is to keep it out of that category, and not to bring it into it. The Act does not terminate the company; it does not propose a final distribution of its assets on the footing of insolvency or bankruptcy; it does not wind it up. On the contrary, it contemplates its going on, and possibly at some future time recovering its prosperity and then these creditors, who seem on the face of the Act to be somewhat summarily interfered with, are to be reinstated.

Their Lordships were clearly of opinion that this was not a case for insolvency legislation, but a local and private matter within the provincial jurisdiction.

Applying this test, I would say that the *Farmers' Creditors Arrangement Act* is one which might be within the competence of the provincial legislature, for the same reasons, applicable in each province to each individual farmer who finds himself in difficulties, which then applied

(1) (1875) L.R. 6 P.C. 31.

1936

REFERENCE *re* FARMERS' CREDITORS ARRANGEMENT ACT, 1934, AND ITS AMENDING ACT, 1935.

Cannon J.

to L'Union St. Jacques, in order to enable him to carry on and, possibly at some future time, to recover his prosperity. But I cannot in view of the accepted aims and past history of the bankruptcy and insolvency legislation, reach the conclusion that Parliament, in passing this legislation, did not exceed the domain of bankruptcy and insolvency, to which its jurisdiction is limited. It has set up a charitable or eleemosynary institution, to be established in each separate province by proclamation; such local charities are to be established, maintained and managed under provincial legislation by virtue of 92 (7). The legislation has nothing to do directly with agriculture, with the science, the art or the process of supplying human wants by raising the products of the soil.

I answer the question in the affirmative, for the whole Act excepting clause 17 which fixes the rate of interest, under certain conditions which do not clearly exceed the powers of Parliament under 91 (19).