

The Corporation of the City of Toronto - - - - *Appellant*

v.

The King - - - - - *Respondent*

AND

The Attorney-General of Canada and Another - - - - *Interveners*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 22ND OCTOBER, 1931.

Present at the Hearing :

VISCOUNT DUNEDIN.

LORD BLANESBURGH.

LORD ATKIN.

LORD RUSSELL OF KILLOWEN.

LORD MACMILLAN.

[*Delivered by* LORD MACMILLAN.]

On 24th October, 1924, at a sitting of the High Court Division of the Supreme Court of Ontario held at the city of Toronto, one Aemilius Jarvis, after trial before the Chief Justice of the Common Pleas and a jury, was found guilty of conspiring to defraud the Government of the Province of Ontario and was sentenced to be imprisoned for six months and to pay a fine (as reduced on appeal) of \$60,000. The fine was paid to the Senior Registrar of the Supreme Court of Ontario on the 22nd April, 1925. Thereupon, the present appellant, the Corporation of Toronto, founding on the proviso to section 1036 (1) of the Criminal Code of Canada, claimed that the fine should be paid over to it. That section enacts that "whenever no other provision is made by any law of Canada for the application of any fine . . . imposed for the viola-

tion of any law . . . the same shall be paid over by the magistrate or officer receiving the same to the treasurer of the province in which the same is imposed," with certain specified exceptions, after which follows this proviso :—

" Provided, however, that with respect to the Province of Ontario the fines . . . first mentioned in this section, shall be paid over to the municipal or local authority, where the municipal or local authority wholly or in part bears the expense of administering the law under which the same was imposed."

It was admitted that the expense of administering the law under which the fine of \$60,000 in question was imposed was in part borne by the appellant corporation.

The Senior Registrar did not give effect to the claim of the appellant and paid over the fine to the Attorney-General of the province of Ontario. The latter in turn forwarded it to the provincial treasurer who retained it as part of the funds of the province.

The appellant corporation then presented a petition of right in the Supreme Court of Ontario claiming (1) a declaration that it was entitled to payment of the fine and (2) an order for payment thereof. In the statement of defence lodged, on behalf of the respondent, the Attorney-General of the province submitted (1) that the proviso above-quoted to section 1036 of the Criminal Code of Canada was *ultra vires* of the Parliament of Canada and (2) that the fine in question when paid to the Registrar became the property of His Majesty in right of the province of Ontario under section 109 of the British North America Act. That section is in the following terms :—

" All lands, mines, minerals and royalties belonging to the several provinces of Canada, Nova Scotia and New Brunswick at the Union, and all sums then due or payable for such lands, mines, minerals or royalties shall belong to the several provinces of Ontario, Quebec, Nova Scotia and New Brunswick, in which the same are situate or arise, subject to any trusts existing in respect thereof and to any interest other than that of the province in the same."

The trial judge (Rose, J.) found the appellant corporation entitled to the relief sought but on appeal the Appellate Division, by a majority of three to two (Riddell, Masten and Fisher, JJ.A. ; Latchford, C.J., and Orde, J.A., dissenting) reversed the decision of the trial judge. Hence the present appeal. The Attorney-General of Canada was granted special leave to intervene and has lodged a case in which he maintains the legislative authority of the Parliament of Canada to enact the provisions of section 1036 of the Criminal Code of Canada and in particular the proviso now challenged. The Attorney-General of Quebec intervenes in support of the contentions for the province of Ontario.

The controversy which has thus in the aggregate equally divided judicial opinion in Ontario, presents a clear-cut issue. On the one hand the appellant corporation, supported by the Attorney-General for the Dominion, maintains that the legislation impugned was within the competence of the Dominion Parliament

under section 91 of the British North America Act whereby the exclusive legislative authority of the Parliament of Canada is declared to extend to—"27. The Criminal Law except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters." On the other hand it is maintained on behalf of the province that fines imposed for offences against the criminal law are "royalties" within the meaning of section 109 of the British North America Act above quoted, that the right to all such fines belonged to the province of Canada at the Union and consequently that all such fines arising in the province of Ontario have since the Union belonged and now belong to the province; it was therefore *ultra vires* of the Dominion Parliament to enact legislation depriving the province of a right which the British North America Act conferred upon it, and the provincial legislature alone was entitled to legislate as to the destination of fines imposed in the province, for such fines come under head 13 of section 92 of the Act as "Property and civil rights in the province."

The term "royalties" as used in section 109 of the British North America Act has more than once been the subject of interpretation by this Board. In *Attorney-General of Ontario v. Mercer*, 1883, 8 App. Cas. 767, it was held to include escheats; and in *Rex v. Attorney-General of British Columbia* [1924] A.C. 213, it was held to include bona vacantia. As was pointed out in the latter case (at p. 221), their Lordships have refrained from attempting any comprehensive definition of the content of the term, preferring to deal with each case as it arises. They are now called upon to consider the case of fines inflicted for breaches of the criminal law.

That the Sovereign has a prerogative right to receive fines imposed on convicted persons may be accepted as a general principle, but it is not an absolute or unqualified right. Historically it is no doubt associated with the conception of the administration of justice by the King as at once a duty and privilege and a valuable source of profit. "The Crown, and the Crown alone, is charged generally with the execution and enforcement of penal laws enacted by public statute for the public good and is interested *jure publico* in all penalties imposed by such statutes; and therefore may sue for them in due course of law, where no provision is made to the contrary" (*per* Selborne, L.C., in *Bradlaugh v. Clarke*, 1883, 8 App. Cas. 354 at p. 358). The law is "that every unappropriated penalty goes to the King" (*Ibid.* at p. 368). While the right to receive fines imposed for criminal offences may thus with sufficient accuracy be described as a *jus regale* or royalty, it is a right of a special kind. The legal characteristics of the *jura regalia* vary. Some are incommunicable to a subject; others may be granted to or acquired by subjects. Some are absolute; others are qualified. In the case of fines, it is only those which are "unappropriated" which belong to the Crown, *i.e.*, those the disposition of which has not been by competent

authority otherwise directed. The criminal law provides many instances in which fines imposed for particular crimes or offences are directed to be paid over to named persons or institutions, for example, to a common informer. The motive may be either the encouragement of the detection and prosecution of crime or the recognition of the special claim of a particular institution or object to the benefit of this source of revenue. In so far as the legislature directs the special application of fines the prerogative right to fines is abrogated. It is only where, as Lord Selborne says in the passage above quoted, "no provision is made to the contrary" that fines belong *de jure* to the Crown.

Turning now to section 91 of the British North America Act, their Lordships find that "notwithstanding anything in this Act," and therefore notwithstanding the provisions of section 109, "the exclusive legislative authority of the Parliament of Canada extends to all matters coming within . . . the Criminal Law." Plainly, and indeed admittedly, this confers on the Dominion Parliament the exclusive right by legislation to create and define crimes and to impose penalties for their commission. In their Lordships' opinion it no less empowers the Dominion Legislature to direct how penalties for infraction of the criminal law shall be applied. It has always been regarded as within the scope of criminal legislation to make provision for the disposal of penalties inflicted, as innumerable instances show, and the power to do so is, if not essential, at least incidental, to the power to legislate on criminal matters for it may well go to the efficacy of such legislation. If the power to direct the manner of application of penalties were to be dissociated from the power to create such penalties and were to be lodged in another authority, it is easy to see how penal legislation might be seriously affected, if not stultified.

Assuming then, though without deciding, that the term "royalties" as used in Section 109 of the British North America Act is apt to include fines imposed for infraction of the criminal law, their Lordships reach the conclusion that any right conferred by that section on the province of Ontario to claim fines as "royalties" extends only to such fines as have not been otherwise appropriated by competent authority and that the Dominion Parliament is an authority competent to direct that, and how, such fines may be otherwise appropriated.

Holding this view their Lordships find it unnecessary to enter at any length upon the question whether the particular crime of which Jarvis was convicted and for which he was fined was or was not a recognised crime at the Union, or whether it was a common law crime or a statutory crime. They note that the indictment on which he was charged embraced seven heads of which four appear to be common law charges and three to be charges of contravening the Criminal Code. The charge upon which he was actually convicted and fined appears to have been the charge of conspiracy to defraud, which is expressly created and defined by Section 444

of the Criminal Code, while the fine imposed was authorised by the combined effect of that section and section 1035 (2). The particular case in hand would therefore seem to be one in which the fine was imposed under the Criminal Code for a crime committed against that Code and as to which therefore there might well be room for argument that the right to such a fine did not belong to the province of Canada at the Union. Their Lordships, however, do not proceed upon this ground, but on the general principle that any prerogative right to fines which as a "royalty" passed from the province of Canada to the province of Ontario at the Union was a right only to such fines as might not be otherwise appropriated by the Dominion Parliament in the exercise of its exclusive right to legislate on all matters coming within the Criminal Law. They therefore hold that the impugned proviso to section 1036 (1) of the Criminal Code of Canada was not *ultra vires* of the Parliament of Canada.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, the judgment of the Appellate Division reversed and the judgment of the trial Judge restored. The appellant Corporation will have its costs here and below.

In the Privy Council.

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v.

THE KING AND OTHERS

DELIVERED BY LORD MACMILLAN.

Printed by

Harrison & Sons, Ltd., St. Martin's Lane, W.O. 2;

1931.