



No. 54 of 1931.

CASE FOR THE APPELLANT.

In the Privy Council.

ON APPEAL

FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

BETWEEN

THE CORPORATION OF THE CITY OF TORONTO (Suppliant) - - - - - *Appellant*

AND

10 HIS MAJESTY THE KING represented herein by HIS MAJESTY'S ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO (Respondent) - - - *Respondent*

AND

THE ATTORNEY-GENERAL OF CANADA and THE ATTORNEY-GENERAL FOR THE PROVINCE OF QUEBEC - - - - - *Interveners.*

Case for the Appellant.

1. This is an appeal from a judgment of the Appellate Division of the Supreme Court of Ontario (Latchford C.J. Riddell, Masten, Orde and Fisher J.J.A.) pronounced on the 28th day of March 1930 which allowed by a majority of three judges to two (Latchford C.J. and Orde J.A. dissenting) an appeal by the respondent from a judgment of the Honourable Mr. Justice Rose dated the 23rd day of April 1929 whereby it was adjudged that the appellant was entitled to the relief sought by its Petition of Right herein, viz: Payment to the appellant of a certain fine of Sixty Thousand Dollars with interest from the date of payment of the said fine and costs of the petition which fine was imposed on one Aemilius Jarvis on conviction at the Toronto Assizes for conspiracy to defraud an offence created and defined in section 444 of The Criminal Code of Canada.

RECORD.

p. 43.

p. 23.

2. The question to be determined is whether it was within the competency of the Parliament of the Dominion of Canada to enact by the proviso to section 1036 of The Criminal Code that the fines referred to in such proviso should be paid to the municipal authority (in this case the appellant, The Corporation of the City of Toronto).

3. By sections 444, 1035 (2) and 1036 of The Criminal Code as enacted by the Dominion Parliament, it was enacted as follows:—

“ 444. Every one is guilty of an indictable offence and liable to seven years’ imprisonment who conspires with any other person, by deceit or falsehood or other fraudulent means, to defraud the public or any person, ascertained or unascertained, or to affect the public market price of stocks, shares, merchandise, or anything else publicly sold, whether such deceit or falsehood or other fraudulent means would or would not amount to a false pretence as hereinbefore defined.” 10

“ 1035. (2) Any person convicted of an indictable offence punishable with imprisonment for more than five years may be fined, in addition to, but not in lieu of, any punishment otherwise ordered, and in such case, also, the sentence may in like manner direct imprisonment in default of payment of any fine imposed.” 20

“ 1036. Whenever no other provision is made by any law of Canada for the application of any fine, penalty or forfeiture imposed for the violation of any law or of the proceeds of an estreated recognizance, 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 or recovered, except, that,—

“ (a) all fines, penalties and forfeitures imposed in respect of the breach of any of the revenue laws of Canada, or imposed upon any officer or employee of the Government of Canada in respect of any breach of duty or malfeasance in his office or employment, and the proceeds of all recognizances estreated in connection with proceedings for the prosecution of persons charged with such breaches or malfeasance ; and 30

“ (b) all fines, penalties and forfeitures imposed for whatever cause in any proceeding instituted at the instance of the Government of Canada or of any department thereof in which that Government bears the cost of prosecution, and the proceeds of all recognizances estreated in connection with such proceedings, shall belong to His Majesty for the 40

“ public uses of Canada, and shall be paid by the magistrate
 “ or officer receiving the same to the Minister of Finance and
 “ form part of the Consolidated Revenue Fund of Canada ;

“ Provided, however, that with respect to the province of Ontario
 “ the fines, penalties and forfeitures and proceeds of estreated
 “ recognizances 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 administer-
 “ ing the law under which the same was imposed or recovered.

10 “ 2. Nothing in this section contained shall affect any right
 “ of a private person suing as well for His Majesty as for himself,
 “ to the moiety of any fine, penalty or forfeiture recovered in
 “ his suit.

20 “ 3. The Lieutenant Governor in Council may from time
 “ to time direct that any fine, penalty or forfeiture, or any portion
 “ thereof paid over to the treasurer of the province under this
 “ section be paid to the municipal or local authority if any, which
 “ wholly or in part bears the expenses of administering the law
 “ under which the same was imposed or recovered, or to be
 “ applied in any other manner deemed best adapted to attain the
 “ objects of such law and secure its due administration.”

3A. By section 91 Subsection 27 and Section 109 of The British
 North America Act 1867, it was enacted as follows :

30 “ 91. It shall be lawful for the Queen, by and with the
 “ Advice and Consent of the Senate and House of Commons, to
 “ make Laws for the Peace, Order and good Government of
 “ Canada, in relation to all Matters not coming within the Classes
 “ of Subjects by this Act assigned exclusively to the Legislatures
 “ of the Provinces, and for greater Certainty, but not so as to
 “ restrict the Generality of the foregoing Terms of this Section,
 “ it is hereby declared that (notwithstanding anything in this
 “ Act) the exclusive Legislative Authority of the Parliament of
 “ Canada extends to all Matters coming within the Classes of
 “ Subjects next hereinafter enumerated ; that is to say,—

* * * * *

“ 27. The Criminal Law, except the Constitution of Courts
 “ of Criminal Jurisdiction, but including the Procedure in
 “ Criminal Matters.

* * * * *

40 “ And any Matter coming within any of the Classes of
 “ Subjects enumerated in this Section shall not be deemed to

“ come within the Class of Matters of a local or private Nature
 “ comprised in the Enumeration of the Classes of Subjects by
 “ this Act assigned exclusively to the Legislatures of the
 “ Provinces.”

“ 109. 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 10
 “ to any Trusts existing in respect thereof, and to any Interest
 “ other than that of the Province in the same.”

p. 4, l. 27. 4. At the Toronto Assizes held in October 1924 a conviction
 was had of one Aemilius Jarvis of an offence under section 444 of The
 Criminal Code and thereupon a sentence of imprisonment was passed and
 p. 4, l. 34. a fine was imposed under section 1035 (2). The fine was reduced on appeal
 to the Appellate Division of the Supreme Court of Ontario to the sum of
 Sixty Thousand Dollars and this sum was paid to the Registrar of the
 Supreme Court of Ontario on the 22nd day of April 1925. The Appellant
 p. 5, l. 7.
 p. 14, l. 10.
 p. 16, l. 25. by notice served on the Registrar demanded payment of the money pur- 20
 suant to section 1036 of The Criminal Code but notwithstanding such
 demand the Registrar paid the money to the Attorney-General for the
 Province of Ontario on behalf of the said Province and the said Province
 refused to pay it to the appellant.

p. 1. 5. A Petition of Right was presented by the Appellant claiming
 the payment of the said sum of Sixty Thousand Dollars with interest
 p. 6, l. 12. thereon, and a fiat was granted and the necessary proceedings being taken
 the case came on for trial on the 15th day of February 1929 before
 p. 18. Mr. Justice (now Chief Justice) Rose who gave judgment on the 23rd day
 of April 1929 granting the relief sought by the petition. 30

6. After setting out the facts and that certain admissions having
 been made the only question before the Court was whether it was within
 the power of Parliament to enact that the fine in question should be paid
 to the respondent the learned Judge pointed out that it has been decided
 that the word “ Royalties ” as used in Section 109 of the British North
 America Act is used as the equivalent of *jura regalia* and that the right
 to certain fines is included in the description *jura regalia*. He said however
 that the prerogative right to fines did not extend to enable the Crown
 to claim all fines as for instance where an Act of Parliament provided
 otherwise. The Crown therefore did not have at Confederation a pre- 40
 rogative right to fines created by statute, unless the statute provided no
 other destination for such fines. The fine in question had been imposed

under legislation respecting the criminal law and so was within the exclusive power of the Parliament of Canada under Section 91, subsection 27 of the British North America Act. The criminal law in its widest sense is reserved for the exclusive authority of the Dominion Parliament (*Ontario v. Hamilton Street Railway*, 1903 A.C. 524) and there is no just occasion for splitting up the legislation in question, and, following that, to say that that part of the legislation creating the fine is within the power of Parliament but that that part of the legislation respecting the disposal of the fine is not within such power. It is all in pith and substance legislation respecting
 10 criminal law. Therefore Parliament legislating within its jurisdiction having defined a certain offence and authorized the imposition of a fine in respect thereto and the disposition of that fine, the Respondent could not claim the fine as a royalty reserved to it by Section 109 of the British North America Act.

7. The Respondent appealed from this judgment to the Appellate
 Division of the Supreme Court of Ontario. p. 25.

8. The appeal was heard on the 22nd day of November 1929 by the Second Divisional Court of the Appellate Division composed of Chief Justice Latchford, Mr. Justice Riddell, Mr. Justice Masten, Mr. Justice
 20 Orde and Mr. Justice Fisher.

9. On the 28th day of March 1930 the Court gave judgment,— p. 27.
 Mr. Justice Riddell, Mr. Justice Masten and Mr. Justice Fisher that the appeal should be allowed, the Chief Justice and Mr. Justice Orde that the appeal should be dismissed.

10. The Chief Justice came to the conclusion that the fine was
 not the result of any prerogative right enjoyed by the Province but of the exercise of the jurisdiction reserved to the Dominion. As it never
 “belonged” to the Province, it did not fall within Section 109 of the British North America Act, but was as property, the subject of Dominion
 30 legislation as any other penalty prescribed in the enactment of the criminal law. It therefore was within the power of the Dominion to enact Clause (B) of Section 1036 of the Criminal Code and to direct that where, as in Toronto, the Municipal authority wholly or in part bears the expense of administering the law under which the fine was imposed the fine should be paid over to the municipality. p. 28, l. 7.

Orde, J.A., held that while it might well be that the statutory
 vesting of all future “royalties” in the Provinces by virtue of Section 109 of the British North America Act would entitle the Provinces to all such
 40 fines as might thereafter be imposed under the criminal law as it then stood, that is on the 1st July 1867 the *jus regale* thereto was necessarily dependent p. 38, l. 22.

upon that particular species of royalty remaining of the same character and was dependent upon and was subject to the exercise of any legislative power over the subject matter to which the right or royalty might attach. It does not follow from the fact that there existed at the time of Confederation, 1st July 1867, the common law crime of conspiracy that the jurisdiction of the Dominion Parliament over the criminal law was excluded as to any such offence. Parliament, having within its domain the whole field of criminal law, has power to legislate as to the punishment for such offence notwithstanding that there existed at the time of Confederation certain common law crimes such as conspiracy. It has so legislated as to 10 deprive the Province of Ontario of what might otherwise be its right to receive the fine in the present case. Section 1036 of the Criminal Code is not limited in its operation to fines for offences defined by the Criminal Code itself, but deals with "any fine, penalty or forfeiture imposed for the violation of any law" and extends therefore to all fines imposed for any crime, whether such crime be declared such by the Criminal Code or any other statute or is still existing and punishable as a common law crime. He concludes that Parliament's exclusive and over-riding power to legislate upon the criminal law in its widest sense is not to be hampered by the fact that among the things vested in the Province at Confederation by 20 Section 109 was a mere right dependent for its enforcement upon contingencies of an uncertain character and conditional for the very existence and creation of the subject matter or thing over which the right might be asserted upon the will of a legislative body exercising a power over which the Province had no control or jurisdiction whatever.

p. 28, l. 19.

Riddell, J.A. found that a fine was a royalty within Section 109 of the British North America Act and as the crime of conspiracy to defraud existed at the time of Confederation, first of July 1867, as a common law offence such a royalty belongs to the Province and could not be taken from it by the Dominion. He held therefore that if the disposition of a 30 fine comes within Section 91 (27) of the British North America Act, that section must be read as limited by Section 109 of the same Act. Section 1036 of the Criminal Code is therefore *ultra vires* the Parliament of Canada.

p. 32, l. 22.

Masten, J.A., said that were it not for the provisions of Section 109 prerogative rights arising out of the criminal law would *prima facie* pass to the Dominion and become subject to its legislation and would so hold with respect to the question at issue, but in his view the term "Royalties" as employed in Section 109 of the British North America Act includes future fines as well as fines then outstanding and uncollected and that therefore this royalty being a right to fines as and when they become payable is a 40 property right which the Dominion authority cannot confiscate for the benefit of itself or another. The specific ground provided by Section 109 prevails over the more general view and precludes the Dominion authority in the exercise of its jurisdiction over criminal law from dealing with that

particular phase of the prerogative which relates to fines in criminal cases so as to divert them away from the consolidated fund of the Province in favour of municipalities.

Fisher, J.A. agreed with Masten, J.A.

p. 42, l. 17.

11. The majority of the Appellate Court were accordingly of the opinion that a fine imposed under Section 1036 of the Criminal Code of Canada belonged to the Province of Ontario and that therefore Section 1036 (2) of the Criminal Code providing for its payment to the municipality is *ultra vires* the Dominion Parliament.

10 12. The appellant contends that the judgment of the majority of the Appellate Court is erroneous and ought to be reversed.

13. It is submitted that a statute, otherwise validly enacted by Parliament or Provincial legislature, might curtail or defeat the royalty prerogative as effectively as an Act of Parliament may in England.

20 It can make no difference that there was a common law offence of conspiracy to defraud in Canada at the time of Confederation for which a Court might have exacted a fine which the Crown might have claimed as a royalty or that this condition might also have existed after Confederation. If the Legislature having competency should later enact a statute creating an offence of conspiracy to defraud, and prescribe a fine as a penalty therefor, and prescribe that such fine should be paid to a person other than the Crown, a fine imposed by virtue of this statute could not be claimed by the Crown as a royalty. The offence under which the fine in question here was imposed was created and defined by the Criminal Code, and the fine imposed by virtue of the Criminal Code. No such fine at any time was a royalty or belonged to the Province of Ontario or the Province of Canada.

30 14. It is submitted that Section 1036 of the Criminal Code deals with fines for the violation of any law and that it includes offences at common law. It is submitted that such a fine as that in question is not and never has been a royalty and therefore does not fall under Section 109 of the British North America Act as provincial property.

15. It is submitted further that if a fine such as that in question were a royalty within Section 109 of the British North America Act, what was allocated thereby to the Province in 1867 was simply a right then existing to receive future property as and when it might come into existence. This right was of an adventitious nature; it depended for its operation on the extent of the Royal prerogative at the time the property came into existence. If the law should in the interval be so altered by legislation

otherwise *intra vires* the property would no longer fall within the class of royalty and the right could not be invoked. The legislative authority then would have invaded and curtailed the prerogative of the Crown and apart altogether from what has been heretofore submitted, this is what the Parliament of Canada did when it enacted Section 1036 of the Criminal Code.

It is submitted further that the imposition of the fine being within the exclusive jurisdiction of Parliament the Parliament has power to declare to whom such fines should be paid.

16. It is submitted further that this conclusion does no violence 10 to Section 109 of the British North America Act which was not intended to do more than vest certain property and property rights in the Provinces leaving the Dominion spheres of jurisdiction untouched and Parliament legislating under its authority over the criminal law given by Section 91 (27) of the British North America Act was in no way restricted thereby. The jurisdiction of Parliament under section 91 (27) British North America Act is exclusive "notwithstanding anything in this Act."

It is submitted that if, as the majority of the Appellate Court seem to hold, all fines imposed in respect of any offences under the criminal law belong under section 109 of the British North America Act to the 20 Province, the jurisdiction of Parliament over the criminal law would be greatly restricted. Similarly, to hold that those fines belong to the Province which are imposed in respect of offences under the Criminal Code where a similar offence existed as a common law offence at the time of Confederation is subject to the same criticism and would impose the necessity of deciding in each case whether it was a new offence or was a common law offence at the time of Confederation. This cannot be sound for the criminal law in its widest sense is reserved for the exclusive jurisdiction of the Dominion Parliament.

17. The appellant therefore respectfully submits that the judgment 30 of the Appellate Division of the Supreme Court of Ontario was wrong and should be reversed and that the judgment of the trial Judge should be restored for the following among other

REASONS.

- (1) BECAUSE the Parliament of Canada had power under section 91 subsection 27 of The British North America Act 1867 to enact section 1036 of The Criminal Code including the proviso.
- (2) BECAUSE the subject matter of the said section of The Criminal Code or of the proviso thereto does not 40

fall under section 92 subsection 14 of the said British North America Act nor under any of the other subsections of that section.

- (3) BECAUSE a fine such as that in question in this appeal is not and never was a royalty of the Crown and consequently does not fall under section 109 of the British North America Act.
- (4) BECAUSE within the limits prescribed by the British North America Act 1867 the Parliament of Canada is supreme and can if necessary curtail or defeat the royal prerogative.
- (5) BECAUSE the jurisdiction in criminal law conferred upon the Parliament of Canada by section 91 subsection 27 of the British North America Act is not qualified by or subject to anything in section 109 or in any other section of that Act.
- (6) BECAUSE the reasons given by Chief Justice Rose, Chief Justice Latchford and Mr. Justice Orde are right and ought to be adopted.

G. R. GEARY.

GEOFFREY LAWRENCE.

In the Privy Council.

ON APPEAL

*From the Appellate Division of the Supreme
Court of Ontario.*

BETWEEN

**THE CORPORATION OF THE CITY OF
TORONTO** (Suppliant) - *Appellant*

AND

HIS MAJESTY THE KING (Respondent)
Respondent

AND

**THE ATTORNEY-GENERAL OF CANADA
and THE ATTORNEY-GENERAL OF
QUEBEC** - - - *Intervenors.*

Appellant's Case.

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