No. 54.
of 1931

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,
represented herein by His Majesty's Attorney-General for the Province of Ontario,
(Respondent) RESPONDENT.

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In the Privy Council

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(Respondent) RESPONDENT.

RECORD OF PROCEEDINGS—PART I.

In the Supreme Court of Ontario.

No. 1.
Petition of Right, 12th May, 1925.

No. 1.

PETITION OF RIGHT

IN THE SUPREME COURT OF ONTARIO

TO THE KING'S MOST EXCELLENT MAJESTY:—

THE HUMBLE PETITION of the Corporation of the City of Toronto by its solicitor, William Johnston, of the City of Toronto, in the County of York and Province of Ontario,

SHOWETH THAT:

1. Your suppliant is a municipal corporation, and, as provided in The Territorial Division Act, for judicial purposes forms part of the County of York.

2. Under the provisions of certain agreements between your suppliant and the Corporation of the County of York your suppliant has erected and maintains the Court House and Gaol for the County of York and has for many years paid all moneys required by statute to be paid by the City of Toronto and the County of York, or either of them, for or in connection with the Administration of Justice.

3. Your suppliant also as required by various statutes, has provided and maintains a police force for the City of Toronto and also pays the salaries of the Police Magistrates for the City of Toronto and has provided and maintains

Police Stations, a Police Court, a Juvenile Court, a Juvenile Detention Home and two Industrial Farms, one for men and one for women.

4. Section 1036 of the Criminal Code as amended by an Act passed by the Parliament of Canada in the Twelfth and Thirteenth years of the reign of His Majesty King George the Fifth, Chapter 16, section 8, provides that with respect to the Province of Ontario, the fines, penalties or forfeitures imposed for the violation of any law 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.

5. On or about the 12th day of May, 1924, one Aemilius Jarvis the elder was arrested in the City of Toronto by a member of the Toronto Police Force on a charge of conspiracy to defraud the Province of Ontario and was subsequently brought before a Police Magistrate in the Toronto Police Court and was by him committed for trial.

6. The said Aemilius Jarvis the elder was tried before the Honourable the Chief Justice of the Common Pleas, sitting with a jury, at the sittings of the High Court Division of the Supreme Court of Ontario held at the City of Toronto in or about the month of October, 1924, upon a bill of indictment found against him and others by a jury of the County of York, as follows:—

(1) That Aemilius Jarvis the elder, Aemilius Jarvis the younger, Peter Smith and Harry G. Pepall, did in the years 1919 and 1920, unlawfully conspire, combine, confederate and agree together and with one another and with A. H. Pepall and with divers other persons whose names are to the Jurors unknown, to cheat and defraud the Government of the Province of Ontario by corruptly and fraudulently procuring from the said Peter Smith, he being then the Treasurer of the Province of Ontario, divers sums of money ostensibly as part of the price paid to Aemilius Jarvis the elder, Aemilius Jarvis the younger, and Harry G. Pepall for the redemption of divers debentures or securities issued by the Province of Ontario but in reality for the purpose of corruptly and improperly dividing and paying the said moneys between and to the said A. H. Pepall, Aemilius Jarvis the elder, Aemilius Jarvis the younger, Peter Smith and Harry G. Pepall to the evil example of all others in the like case offending and against the peace of our Lord the King, his Crown and dignity.

(2) That Aemilius Jarvis the elder, Aemilius Jarvis the younger, Peter Smith and Harry G. Pepall in the years and at the place aforesaid unlawfully did conspire, combine, confederate and agree together and with one another and with A. H. Pepall and with other persons unknown, by divers subtle means and devices and in consideration of large sums of money and certain valuable securities to be paid by the said Aemilius Jarvis the elder, Aemilius Jarvis the younger, and Harry G. Pepall to the said A. H. Pepall then acting as agent of the Government of the Province of Ontario and to the said Peter Smith then the Treasurer of the Province of Ontario that he, the said A. H. Pepall, during the time that he was agent of the Government of the Province of Ontario and that he, the said Peter Smith, during the time that he was Treasurer of the said Province and contrary to

their respective duties in these capacities should secretly and improperly use their influence as such in breach of trust in procuring contracts for the purchase by the Government of the said Province from the said Aemilius Jarvis the elder, Aemilius Jarvis the younger, and Harry G. Pepall sterling bonds and inscribed stock theretofore issued by the Province of Ontario or procuring for themselves and the said Aemilius Jarvis the elder, Aemilius Jarvis the younger and Harry G. Pepall large gains, profits, and undue benefits to the evil example of all others in the like case offending and against the peace of our Lord the King, his Crown and dignity.

(3) That Aemilius Jarvis the elder, Aemilius Jarvis the younger, Peter Smith and Harry G. Pepall in the years aforesaid at the place aforesaid unlawfully did conspire, combine, confederate and agree together and with one another and with A. H. Pepall and with other persons unknown by divers subtle means and devices that in consideration of large sums of money and certain valuable securities to be paid by the said Aemilius Jarvis the elder, Aemilius Jarvis the younger and Harry G. Pepall to the said A. H. Pepall then acting as agent of the Government of the Province of Ontario and to the said Peter Smith, then the Treasurer of the Province of Ontario that he, the said A. H. Pepall, during the time that he was agent of the Government of the Province of Ontario and that he, the said Peter Smith, during the time that he was Treasurer of the said Province of Ontario and contrary to their respective duties in those capacities should secretly and improperly use their influence as such in breach of trust in procuring contracts for the sale of bonds of the Province of Ontario to the said Aemilius Jarvis the elder, Aemilius Jarvis the younger, and Harry G. Pepall, and procuring for themselves and the said Aemilius Jarvis the elder, Aemilius Jarvis the younger, and Harry G. Pepall, large gains, profits and undue benefits to the evil example of all others in the like case offending and against the peace of our Lord the King, his Crown and dignity.

(4) That Aemilius Jarvis the elder, Aemilius Jarvis the younger, Peter Smith and Harry G. Pepall in the years aforesaid at the place aforesaid unlawfully did conspire, combine, confederate and agree together and with one another and with A. H. Pepall and with divers other persons whose names are to the jurors unknown that divers sums of money and divers valuable securities should be corruptly given by the said Aemilius Jarvis the elder, Aemilius Jarvis the younger, and Harry G. Pepall to the said A. H. Pepall and to the said Peter Smith in their official capacities; the said Peter Smith then being a public and ministerial officer, to wit, the Treasurer of the Province of Ontario, and the said A. H. Pepall being a public and ministerial officer, to wit, the agent of the Treasurer of the Province of Ontario, and that the said sums of money and divers securities should be corruptly accepted by the said Peter Smith and A. H. Pepall in their official capacities as inducements to the said Peter Smith and A. H. Pepall in violation of their official duty to do or omit to do divers acts, to wit, to show favour and to abstain from showing disfavour to the said

Aemilius Jarvis the elder, Aemilius Jarvis the younger, and Harry G. Pepall in relation to divers contracts and proposed contracts for the sale by the said Aemilius Jarvis the elder, Aemilius Jarvis the younger and Harry G. Pepall, to the Province of Ontario of sterling and inscribed stock, they the said Aemilius Jarvis the elder, Aemilius Jarvis the younger, and Harry G. Pepall then knowing the said acts and omissions to be in violation of the official duty of the said A. H. Pepall and Peter Smith to the evil example of all others in the like case offending and against the peace of our Lord the King, his Crown and dignity.

(5) That Aemilius Jarvis the elder, Aemilius Jarvis the younger, Peter Smith and Harry G. Pepall in the years and at the place aforesaid unlawfully did conspire together and with one another and with other persons unknown by deceit or falsehood or other fraudulent means to defraud His Majesty the King in the right of the Province of Ontario and the Government of the Province of Ontario contrary to section 444 of the Criminal Code.

(6) That Aemilius Jarvis the elder, Aemilius Jarvis the younger, Peter Smith and Harry G. Pepall in the years and at the place aforesaid unlawfully did steal about $600,000 in money, the property of His Majesty the King in the right of the Province of Ontario, contrary to the criminal code.

(7) That Aemilius Jarvis the elder, Aemilius Jarvis the younger, Peter Smith and Harry G. Pepall in the year 1920 and at the place aforesaid unlawfully did steal about $4,000 in money, the property of His Majesty the King in the right of the Province of Ontario, contrary to the Criminal Code.

7. On or about the 24th day of October, 1924, the said Aemilius Jarvis the elder was found guilty on the conspiracy charge and not guilty on the theft charge and the said Aemilius Jarvis the elder was thereupon sentenced by the said Judge to imprisonment in the Common Gaol of the County of York for six months, and also, jointly with one Peter Smith, to pay a fine of $600,000 to be paid by or levied from either or both, and to further imprisonment until the amount of such fine should be paid or levied.

8. The said Aemilius Jarvis the elder appealed against said sentence and his appeal was heard by the Appellate Division of the Supreme Court of Ontario, which Court by order dated the 23rd day of March, 1925, ordered that said sentence be varied and that as varied it should be as follows, namely:—

"That Aemilius Jarvis the elder be imprisoned in the Common Jail for the County of York for a period of six months and that he do forfeit and pay to our Sovereign Lord the King a fine of $60,000 and in default of payment thereof that he be imprisoned in the Common Jail for the County of York for a further term of five years commencing at the expiry of the said term of six months unless the said fine be sooner paid."

9. The said Aemilius Jarvis the elder was under said sentence imprisoned at the Toronto Industrial Farm which is maintained by your suppliant as

aforesaid, for a period of six months which expired on or about the 23rd day of April, 1925.

10. On or about the 22nd day of April, 1925, the said Aemilius Jarvis the elder paid or caused to be paid the amount of the said fine of $60,000 to Edmund Harley, Esquire, K.C., Senior Registrar of the Supreme Court of Ontario.

11. Before the amount of said fine was paid to the said Senior Registrar, your suppliant notified that Official in writing that under the provisions of section 1036 of the Criminal Code as amended by the statute 12-13 George V, Chapter 16, the said fine of $60,000 must be paid over to your suppliant.

12. Notwithstanding such notice the said Senior Registrar of the Supreme Court of Ontario wrongfully refused to pay the said fine to your suppliant and on or about the 23rd day of April, 1925, wrongfully paid the said fine to the Attorney-General of the Province of Ontario who caused same to be forwarded to the Provincial Treasurer of the Province of Ontario who now holds same as part of the funds of said Province and refuses to pay same to your suppliant.

Your suppliant, therefore, humbly prays:—

(a) That it should be declared by this Honourable Court that the Corporation of the City of Toronto is entitled to be paid the said fine of $60,000.

(b) That the Government of the Province of Ontario be ordered and adjudged to pay to the Corporation of the City of Toronto the amount of said fine with interest thereon from the date when it was paid to the Attorney-General for Ontario, and the costs of this petition.

(c) Such further and other relief as to this Honourable Court may seem meet and the circumstances may require.

And your suppliant as in duty bound will ever pray, etc.

The suppliant proposes that the trial of this petition shall take place at the City of Toronto.

Dated at Toronto, this 12th day of May, 1925.

(Sgd.) WILLIAM JOHNSTON,
City Hall, Queen Street West, Toronto,
Solicitor for the Corporation of the City of Toronto.

In the Supreme Court of Ontario.

No. 1. Endorsements on Petition.

ENDORSEMENTS ON PETITION OF RIGHT

Prayer for Plea or Answer, 12th May, 1925.

The suppliant prays for a plea or answer on behalf of His Majesty within twenty-eight days after the date hereof, or otherwise, that the petition may be taken as confessed.

Dated at Toronto, the 12th day of May, 1925.

"WILLIAM JOHNSTON,"
City Solicitor.

Recommendation for Fiat, 20th Nov., 1925.

The undersigned respectfully recommends that His Honour the Lieutenant-Governor do grant his fiat that right be done herein, 20th November, 1925.

"W. F. NICKLE," 10
Attorney-General.

Fiat of Lieutenant-Governor.

Let right be done.

"H. COCKSHUTT."

No. 2.

In the Supreme Court of Ontario.

No. 2. Statement of Defence, 23rd December, 1925.

STATEMENT OF DEFENCE

IN THE SUPREME COURT OF ONTARIO

BETWEEN:

THE CORPORATION OF THE CITY OF TORONTO,
SUPPLIANT,

AND

HIS MAJESTY THE KING,
represented herein by His Majesty's Attorney-General for the Province of Ontario,
RESPONDENT.

1. His Majesty's Attorney-General on behalf of the Respondent submits that the Petition is bad in substance and in law for the reason that the proviso to subsection 1 of section 1036 of the Criminal Code as enacted by section 8 of chapter 16 of the Statutes passed by the Parliament of Canada in the 12th and 13th years of the reign of His Majesty King George the Fifth, is *ultra vires* the Parliament of Canada.

2. His Majesty's Attorney-General on behalf of the Respondent further submits that the Petition is bad in substance and in law for the reason that the moneys mentioned in paragraph 10 of the Petition when paid to the said Edmund Harley, Esquire, K.C., became the property of His Majesty in the right of the Province of Ontario under section 109 of the British North America Act.

3. His Majesty's Attorney-General on behalf of the Respondent further submits that the Petition is bad in substance and in law for the reason that the Court has no jurisdiction to make an order against the Government of Ontario as requested in the Petition, particularly in clause (b) of paragraph 12.

4. His Majesty's Attorney-General on behalf of the Respondent admits that the Suppliant is a Municipal Corporation, and also admits the statements contained in paragraphs 4, 6, 8, and 10 of the Petition and also that one Aemilius Jarvis the elder was imprisoned under the sentence set forth in the said paragraph 8 for a period of six months which expired on or about the 23rd day of April, 1925.

5. His Majesty's Attorney-General on behalf of the Respondent further submits that the claims of the Suppliant as set forth in the Petition should be dismissed with costs.

In the Supreme Court of Ontario.

No. 2.
Statement of Defence, 23rd December, 1925.
—*continued.*

DELIVERED this 23rd day of December, 1925, by Edward Bayly, Parliament Buildings, Toronto, Solicitor for the Respondent.

To C. M. Colquhoun, Esq.,
City Hall, Toronto,
Solicitor for the Suppliant.

No. 3.

In the Supreme Court of Ontario.

No. 3.
Trial Proceedings, 15th February, 1929.

TRIAL PROCEEDINGS

IN THE SUPREME COURT OF ONTARIO

BETWEEN:

THE CORPORATION OF THE CITY OF TORONTO,

SUPPLIANT,

AND

HIS MAJESTY THE KING,

represented herein by His Majesty's Attorney-General for the Province of Ontario,

RESPONDENT.

TRIAL

Before THE HONOURABLE MR. JUSTICE ROSE, at Toronto, Ontario, February 15th, 1929.

G. R. GEARY, K.C.
J. JOHNSTON } *Counsel for the Suppliant.*

E. BAYLY, K.C. *Counsel for the Respondent.*

HIS LORDSHIP: What is this about, Mr. Geary?

MR. GEARY: This is an action, my Lord, by the Corporation of the City of Toronto against the Province, for a declaration, first, that the Province holds a certain sum of sixty thousand dollars, refuses to pay it to the City, and that the City should have this sixty thousand dollars, the sum of sixty thousand dollars in question being the amount of a fine which was adjudged against Aemilius Jarvis in connection with a conspiracy charge. Aemilius Jarvis was found guilty of conspiracy, he was imprisoned for six months in the Gaol Farm, and in addition was fined six hundred thousand dollars by his Lordship the Chief Justice of the Common Pleas. On appeal the Appellate Division, so far as this case is concerned, reduced the fine to sixty thousand dollars. Mr. Jarvis served six months in the Gaol Farm, and at the conclusion of the time paid sixty thousand dollars to Mr. Harley. The City notified Mr. Harley that that money belonged to it under the following section of the Criminal Code—

In the Supreme Court of Ontario.

No. 3.
Trial Proceedings, 15th February, 1929.
—*continued.*

HIS LORDSHIP: Does this turn on some statutes?

MR. GEARY: Yes, my Lord. It is the Criminal Code, section 1036.

HIS LORDSHIP: And is there anything else?

MR. GEARY: As amended finally in 1922. Here is one right up to date, my Lord, which Mr. Bayly has.

HIS LORDSHIP: It is Part II of the Revised Statutes of Canada, is it? Which volume is it in?

MR. GEARY: The Code is in the first volume. my Lord, chapter 36.

HIS LORDSHIP: Is there any statute I shall be wanting?

MR. GEARY: No, my Lord. Your Lordship will want to see the amendments that are finally put into this.

MR. BAYLY: Your Lordship will want to see the British North America Act, and volume IV of the Revised Statutes of Ontario.

MR. GEARY: If your Lordship pleases, I will read part of the section, which is a proviso to subsection 1 of section 1036 of the Criminal Code:

"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 administering the law under which the same was imposed "or recovered."

Then, my Lord, Mr. Harley had instructions from the Attorney-General to pay the fine to the Attorney-General, and did so pay the fine. The City of Toronto gave Mr. Harley notice that the fine should be paid to it, the corporation, but Mr. Harley did not follow its instruction, and paid the fine to the Province, and the Province has the money at the moment.

HIS LORDSHIP: Mr. Harley was the officer receiving the same, within the meaning of the words in the first part of section 1036, I suppose.

MR. GEARY: Yes, my Lord. Then the petition under which this action is brought—perhaps my friend does not want to detain me longer than is necessary in the way of proof, and perhaps if your Lordship will allow me to read the petition we could dispense with the evidence as far as possible, as I go through it. It is the humble petition of the Corporation of the City of Toronto by its solicitor—

HIS LORDSHIP: It is a petition of right, is it?

MR. GEARY: Yes, my Lord.

HIS LORDSHIP: Of course it would be.

MR. GEARY: "Your suppliant is a municipal corporation, and, as "provided in The Territorial Division Act, for judicial purposes forms part of "the County of York."

That is admitted?

MR. BAYLY: Yes.

MR. GEARY: "2. Under the provisions of certain agreements between "your suppliant and the Corporation of the County of York your suppliant has "erected and maintains the Court House and Gaol for the County of York and "has for many years paid all moneys required by statute to be paid by the City

"of Toronto and the County of York, or either of them, for or in connection with "the Administration of Justice."

MR. BAYLY: I will admit generally, my Lord, that the City of Toronto pays part of the cost of the administration of justice. Under that clause the fines go to the municipality, which pays wholly or in part. I will admit that the City of Toronto in part pays the cost of the administration of justice.

HIS LORDSHIP: The words are "bears the expense of administering the law."

MR. BAYLY: Well, bears the expense. I will admit whatever brings them within—you see, my Lord, the attack is on the constitutional validity of that section. We say that the Parliament has no right to pass that at all.

HIS LORDSHIP: Where is the Minister of Justice—

MR. BAYLY: There is a letter I handed in to the Registrar. He has been given notice half a dozen times, and does not intend to depend upon it. That is the letter, my Lord.

MR. GEARY: If I can file his reply as evidence, I think that would do. That is satisfactory, my Lord. There is some part of the expenses paid by the Province.

HIS LORDSHIP: By the City, you mean, don't you?

MR. GEARY: The main part is paid by the City, my Lord. That is the letter, my Lord, that the City Solicitor received from the Deputy Minister of Justice.

HIS LORDSHIP: Those perhaps had better go in, hadn't they?

MR. GEARY: Yes, my Lord.

EXHIBIT 1: Notice, E. Bayly to Attorney-General for Canada, May 18, 1926.
Letter (Copy), Deputy Attorney-General for Ontario to Deputy Minister of Justice for Canada, Nov. 6, 1928.
Letter, Deputy Minister of Justice for Canada to Deputy Attorney-General for Ontario, Nov. 7, 1928.

EXHIBIT 2: Letter, Deputy Minister of Justice for Canada to City Solicitor for Toronto, Oct. 30, 1928.

MR. GEARY: "3. Your suppliant also as required by various statutes, "has provided and maintains a police force for the City of Toronto and also pays "the salaries of the Police Magistrates for the City of Toronto and has pro-"vided and maintains Police stations, a Police Court, a Juvenile Court, a "Juvenile Detention Home and two Industrial Farms, one for men and one "for women."

MR. BAYLY: That is all included.

HIS LORDSHIP: That is just an amplification; it is immaterial, is it not, in view of the admission?

MR. GEARY: Oh, I think so, my Lord.

Then 4 has been admitted by my learned friend.

In the Supreme Court of Ontario.

No. 3.
Trial Proceedings, 15th February, 1929.
—*continued.*

"5. On or about the 12th day of May, 1924, one Aemilius Jarvis the elder "was arrested in the City of Toronto by a member of the Toronto Police Force "on a charge of conspiracy to defraud the Province of Ontario and was subse- "quently brought before a Police Magistrate in the Toronto Police Court and "was by him committed for trial."

MR. BAYLY: I should have thought my general admission covered all that. I do not know who arrested him or anything, but I should have thought it was—

MR. GEARY: Well, we have no admissions yet.

MR. BAYLY: My general admission, my Lord, is that the City comes within that—

HIS LORDSHIP: What Mr. Bayly admitted was that the City in part bears the expense of administering the law under which the same was—I suppose that means the same were—under which the fine was imposed or recovered.

MR. BAYLY: I do not really know all about that. I would have thought it was not very much—

HIS LORDSHIP: I should have thought that was sufficient for your purpose.

MR. GEARY: I think it is, my Lord. I have this police officer and clerk, and so on, here, but if the record—

HIS LORDSHIP: You can prove it if you want to—you know your case better than I do—but I should have thought that the admission that the City in part bears the expense of administering the law under which the fine was imposed and recovered—that is what I take Mr. Bayly to admit.

MR. GEARY: That is quite all right, my Lord; I am quite satisfied with that.

Number 6 is admitted formally, that he was tried before the Honourable the Chief Justice of the Common Pleas upon the bill of indictment set out over the next pages up to page 5.

"7. On or about the 24th day of October, 1924, the said Aemilius Jarvis "the elder was found guilty on the conspiracy charge and not guilty on the "theft charge and the said Aemilius Jarvis the elder was thereupon sentenced "by the said Judge to imprisonment in the Common Gaol of the County of "York for six months, and also, jointly with one Peter Smith, to pay a fine of "$600,000 to be paid by or levied from either or both, and to further imprison- "ment until the amount of such fine should be paid or levied."

Will that be admitted?

MR. BAYLY: Yes.

MR. GEARY: Then 8 is already formally admitted, my Lord.

HIS LORDSHIP: That is, he appealed and the Court varied the sentence; yes. 9, he was imprisoned.

MR. GEARY: 9, he was imprisoned. That is the fact, Mr. Bayly, he was imprisoned in the Gaol Farm.

MR. BAYLY: Yes.

MR. GEARY: 10, the fine was paid to Mr. Harley, Senior Registrar.

MR. BAYLY: Yes, $60,000. I will admit everything that I know of.

That was paid, and we admit receiving the money.

MR. GEARY: "11. Before the amount of said fine was paid to the said "Senior Registrar, your suppliant notified that Official in writing that under "the provisions of Section 1036 of the Criminal Code as amended by the "statute 12-13 George V, Chapter 16, the said fine of $60,000 must be paid over "to your suppliant."

The Province admits getting the money from Mr. Harley. I don't know that the notice makes any difference.

MR. BAYLY: I don't know that that makes any difference, my Lord. I have no doubt, if my learned friend says it is true, it is true.

HIS LORDSHIP: I suppose that was in writing, if anything turns on it.

MR. GEARY: We will have Mr. Harley show that.

"12. Notwithstanding such notice the said Senior Registrar of the "Supreme Court of Ontario wrongfully refused to pay the said fine to your "suppliant and on or about the 23rd day of April, 1925, wrongfully paid the "said fine to the Attorney-General of the Province of Ontario who caused same "to be forwarded to the Provincial Treasurer of the Province of Ontario who "now holds same as part of the funds of said Province and refuses to pay same "to your suppliant."

Now, of course my friend does not admit that that was wrongfully done.

MR. BAYLY: Everything else.

MR. GEARY: Everything else but that, yes.

MR. BAYLY: The facts are accurate.

HIS LORDSHIP: 12 admitted except the "wrongfully."

MR. GEARY: "Your suppliant, therefore, humbly prays (a) That it "should be declared by this Honourable Court that the Corporation of the City "of Toronto is entitled to be paid the said fine of $60,000."

I ask your Lordship's leave to amend that by saying "together with interest from the date"—

HIS LORDSHIP: I cannot amend a petition of right.

MR. BAYLY: No objection to the amendment, my Lord.

HIS LORDSHIP: I cannot amend a petition of right.

MR. BAYLY: Your Lordship cannot amend it.

HIS LORDSHIP: That is what I say.

MR. GEARY: "(b) That the Government of the Province of Ontario be "ordered and adjudged to pay to the Corporation of the City of Toronto the "amount of said fine with interest thereon from the date when it was paid to the "Attorney-General for Ontario, and the costs of this petition."

My learned friend I think objects, that your Lordship cannot make an order—

MR. BAYLY: That is formal. We just stated that because we pleaded—it deals with the form of judgment, my Lord. If we lose we will pay it.

HIS LORDSHIP: I know the form of judgment on petition of right.

MR. GEARY: Well, whether it is formal or properly phrased, it does include interest, that prayer.

HIS LORDSHIP: Oh, yes, interest is asked there.

In the Supreme Court of Ontario.

MR. GEARY: And costs, and such further and other relief.

Suppliant's Evidence.
No. 3.
Edmund Harley, Examination.

EDMUND HARLEY, Sworn.

Examined by MR. GEARY.

Q. Mr. Harley, you are the Senior Registrar?
A. Yes, sir.
Q. Of the Supreme Court. And you have heard the statement?
A. Yes.
Q. Thus far made. You did receive that fine?
A. I received sixty thousand dollars.
Q. You had notice from the City that the City claimed it?
A. I had I think it was verbal notice. I do not remember any written notice, but Mr. Colquhoun had spoken to me about it.
Q. Then you had instructions from the Attorney-General?
A. No, I got no instructions from the Attorney-General. Sometime before the thing was paid over Mr. Nickle at one time spoke to me—the Attorney-General—but I had no instructions from him. I paid it because I thought it was the proper thing to do.
Q. Well, whether you were asked for it or not, you thought it was the proper thing to do, and instead of following the City's request or demand you paid the money—
A. I paid the money to the—
Q. To the Attorney-General?
A. I endorsed the cheque over to the Province and handed it over to Mr. Nickle, the then Attorney-General.
Q. Well, Mr. Harley, would you step down just for a moment till Mr. Colquhoun comes?
(Witness retires.)
MR. GEARY: I call Mr. Harrison, of the Treasurer's Department.

R. V. Harrison, Examination.

ROYAL V. HARRISON, Sworn.

MR. GEARY: My Lord, may I at this stage put in a certified copy of Order-in-Council dated the 28th day of November, 1916? This was an Order-in-Council, my Lord, reciting the Code as it stood at the moment—section 1036, subsection 3, read by the amendment of 1909, as follows:

"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."

Following that amendment, my Lord, this Order-in-Council was passed:

"The Minister recommends that commencing on the first day of

"January, 1917, one-half of the net amount of the said fines, penalties or "forfeitures received pursuant to the said section 1036 by the Provincial "Treasurer, be paid over to the municipality in which the fine, penalty or "forfeiture was imposed or recovered."

I am putting that in.

Examined by MR. GEARY.

Q. Mr. Harrison, you are an officer in the Department of the City Treasurer?

A. I am.

MR. BAYLY: I do not follow this Order. If the Order is that if we should, even if we do pay thirty thousand—I would like it to be pleaded, if it is a new claim.

MR. GEARY: I am just putting the Order-in-Council in, my Lord, to show the course of dealing under the different amendments of the Code with these fines. There is a period commencing in June, 1917—

HIS LORDSHIP: Your petition does not say that under an Order-in-Council you are entitled to half the fine; your petition says that under the Statute you are entitled to the whole of the fine. If Mr. Bayly were setting up an Order-in-Council as evidencing a bargain that you were not to have what the Statute gave you, I could understand the relevancy of the document going in, but—

MR. BAYLY: All I meant, my Lord, was, I do not want to be confronted now for the first time with a claim for thirty thousand on some old—

MR. GEARY: Oh, I have no intention of making such a claim.

MR. BAYLY: This Order may have been repealed—I do not know. I know of the Order, and I know of the old practice, but I do not want at this moment to have a claim for fifty per cent. of something that I have not followed up and know nothing about.

HIS LORDSHIP: I understand, and I do not see the relevancy on this record of the Order-in-Council.

MR. GEARY: Perhaps it is not, my Lord, I put it in only for this purpose, to show that the Province of Ontario has acted in conformity with the provisions of the Code up to the time of the sentence of Jarvis. From the date of that Order-in-Council to the amendment which is in question here, the Province of Ontario did act under the Criminal Code provision as to paying part of the fine to the municipality incurring expense, and did pay to the City of Toronto following the course of the Statute. Then when 1036 was amended in 1922 the Province followed the Code once more, and paid all the fine to us until the Jarvis fine was imposed. It is just to show the course, that the Province has acted in conformity with the provisions of the Statute, all along.

HIS LORDSHIP: Perhaps I had better take it subject to the objection, but I do not even now, after your statement, grasp the relevancy.

MR. BAYLY: I will admit, my Lord, that the Province has frequently followed the provisions of the Code at the time my learned friend refers to, if that is in any way material.

MR. GEARY: Well, that is all I want. Then I do not think I need pursue

In the Supreme Court of Ontario.

Suppliant's Evidence.
No. 3.
R. V. Harrison, Examination.
—*continued.*

the matter further, witness, if Mr. Bayly does admit that under the Order-in-Council half the indictable offence fines were paid to the City of Toronto while that provision was in force.

MR. BAYLY: As far as I know.

MR. GEARY: And then from 1922 and until the imposition of the Jarvis fine the Province paid over all the fines to the municipality.

MR. BAYLY: Well, I do not know if they did in fact, but I know they paid a great many. In other words, my Lord, we undoubtedly acted pursuant to the Code as it then was, perhaps without due consideration.

EXHIBIT 3: Order-in-Council, dated Nov. 28, 1916.

MR. GEARY: All right, then, Mr. Harrison.

(Witness retires.)

Edmund Harley, Examination.
—*continued.*

EDMUND HARLEY, Recalled.

Examined by MR. GEARY.

Q. Mr. Harley, I show you a very formidable looking document with a great red seal on it, a copy of which was said to have been given you. Mr. Colquhoun tells me that he gave it to you.

A. I would not say it was not, but I say my recollection was that it was a verbal notice, but it might have been in writing. I don't know that it makes any difference; I had notice of it.

Q. All right, thank you, Mr. Harley.

(Witness retires.)

C. M. Colquhoun, Examination.

CHARLES M. COLQUHOUN, Sworn.

Examined by MR. GEARY.

Q. Mr. Colquhoun, do you remember giving Mr. Harley notice in regard to payment over to the City of the fine of sixty thousand dollars imposed on Mr. Aemilius Jarvis?

A. Yes.

Q. How did you give Mr. Harley notice?

A. May I explain, answer that in my own words?

Q. Yes.

A. In April, 1925, at this time it was a matter of some notoriety that proceedings were being taken to pay Mr. Jarvis's fine and secure his release. I remember the solicitors, Mr. Gow was acting, and he was rather undecided as to whom payment should be made. Finally decided that it should be made to Mr. Harley as Registrar of the Court. I went up with Mr. Harley on I think it was the 23rd day of April. My recollection as to dates is confirmed by notes that I made at the time, but I remember being there, apart from the notes I remember going up with Mr. Mason, and served Mr. Harley with the

notice—my recollection is it was under the seal of the City—demanding payment to the City of the amount of this sixty thousand dollars, setting out the grounds upon which the City made the claim. We first saw Mr. Harley, Mr. Mason and I, about ten o'clock in the morning, and I think he said he had not received the money at that time, although in the course of conversation it developed that some negotiations had taken place. We saw Mr. Harley again in the afternoon about four o'clock of the same day, and he said that the cheque had been paid to him, the sixty thousand dollars, but that he was holding it pending the receipt of some advice as to what he should do with it; and I think he said that he would let us know in the morning what he decided to do. In the morning I again, the next day about ten o'clock, the time Mr. Harley's office opened, I saw Mr. Harley, and he said that—confirmed that he had the cheque and had not yet paid it out, and would not pay it out until the Court made an order as to whom it should be paid. I then—my notes say that I saw Mr. Justice Orde; I have no recollection of that, but I saw Mr. Justice Kelly, who was the judge of the week at that time, and got leave to serve short notice of motion before him returnable at three o'clock of the same day, for an order directing Mr. Harley to pay the money to the City. I saw Mr. Harley again and advised him of that, and about noon I think it was, the same day, or shortly after noon, he advised me that he had taken further advice and had paid the money over to the Attorney-General. Then the motion was returnable at three o'clock, I was there and Mr. Harley was there, and it appearing that the money had been paid and that there was nothing to order, the motion was dropped.

Q. That (produced) is the notice, or copy that I had in my brief, Mr. Colquhoun; do you recognize it?

A. Yes, that is the notice that was served.

MR. GEARY: May I put in a copy of the notice, My Lord?

HIS LORDSHIP: Oh, yes.

EXHIBIT 4: Notice (copy), City of Toronto to E. Harley et al, April 22, 1925.

HIS LORDSHIP: Any questions?

MR. BAYLY: I don't think it is of any consequence. We got the money.

(Witness retires.)

MR. GEARY: My Lord, that is the case.

HIS LORDSHIP: Any evidence on your side, Mr. Bayly?

MR. BAYLY: No, my Lord.

HIS LORDSHIP: Then I suppose I ought to hear you first, Mr. Bayly, shouldn't I, if it is an attack on the Statute?

Certified,

R. N. DICKSON, C.S.R.,
Official Reporter, S.C.O.

In the Supreme Court of Ontario.

No. 4.

No. 4.
Reasons for judgment of Rose, J.
23rd April, 1929.

REASONS FOR JUDGMENT OF ROSE, J.

S. C. O.
THE CORPORATION OF THE CITY OF TORONTO,
v.
THE KING.

REASONS FOR JUDGMENT OF ROSE, J., delivered 23rd April, 1929.
G. R. GEARY, K.C., and J. JOHNSTON for the Applicants.
E. BAYLY, K.C., for the Respondent.

This is a petition of right. There is only one question for determination, viz.: whether it was within the power of Parliament by the proviso to sec. 1036 of the Criminal Code to enact that the fines referred to in the proviso should be paid to the municipal authority. Notice that the constitutional validity of the proviso was brought in question was given to the Attorney-General for Canada, but he, reserving his right to appear later if the case should go to a higher court, declined to be represented by counsel at the trial.

By sec. 444 of the Criminal Code, it is made an indictable offence, punishable by seven years' imprisonment, to conspire, by deceit or falsehood or other fraudulent means, to defraud the public or any person, ascertained or unascertained, whether or not the deceit or falsehood, or rather fraudulent means, amounts to a false pretence.

By sec. 1035 (2) it is enacted that 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.

By sec. 1036 it is enacted that 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, the same (except in certain cases not here important) 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; "provided, however, that with respect to the Province of Ontario the fines, penalties and forfeitures . . . . . 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 or recovered."

A conviction was had at the Toronto assizes for the offence described in sec. 444. A sentence of imprisonment was passed and in addition a fine was imposed under sec. 1035 (2). The fine was reduced by the Appellate Division. A cheque for the amount of the reduced fine was handed to the senior registrar of the Supreme Court of Ontario. The city corporation, by notice served upon the registrar, demanded payment of the money pursuant to the proviso of sec. 1036. The registrar delivered the cheque to the Attorney-General. Thereupon this petition of right was presented, and, a fiat having been granted and the requisite proceedings taken, the case came on for trial.

It is admitted that the City of Toronto wholly or in part bears the expense of administering the law under which the fine was imposed and recovered; and, as has been stated, the only question is whether it was within the power of Parliament to enact that the fine should be paid to the City.

The contention of the Attorney-General for Ontario is that the fine is one of the "royalties belonging to" the Province of Canada at Confederation; that it belongs therefore to the Province of Ontario under sec. 109 of the British North America Act; and that the power by sec. 91 (27) conferred upon Parliament to legislate with respect to "The Criminal Law except the constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters," does not extend to enable Parliament to decree that the fine shall go to the municipality rather than to the Province.

The profits arising from the King's ordinary courts of justice are treated in the books as a branch of the ordinary revenue of the Crown, and therefore as one of the *jura regalia;* see, for instance, Chitty's Prerogatives of the Crown, pp. 199, 236; and these profits consist not only in fines imposed upon offenders, but also in certain fees due to the Crown in a variety of legal matters. Therefore, if the fine that is in question here was such a fine as is dealt with in the books, it would seem that there was a prerogative right to collect and retain it; and if that prerogative right belonged at Confederation to the Crown in the right of the Province of Canada, it would seem that it belongs now to the Crown in the right of the Province of Ontario; for the enactment in sec. 109 that the royalties shall belong to the several Provinces amounts to a reservation of those royalties to the Legislatures of the Provinces, and to an exception of them from sec. 102, by which section all duties and revenues over which the respective Provincial Legislatures at the Union had power of appropriation (except, *inter alia,* such portions thereof as are by the Act reserved to the respective Legislatures of the Provinces) are appropriated for the public service of Canada. All this follows, I think, from the judgment of the Judicial Committee of the Privy Council in *Rex v. Attorney-General of British Columbia,* [1924] A.C. 213. In that case it is decided that the word "royalties" as used in sec. 109 is used as the equivalent of *jura regalia,* and that its meaning is not limited by its association with the words "lands, mines, minerals."

But the prerogative right to fines did not extend to enable the Crown to claim all fines. Thus in Comyn's Digest, "Prerogative," it is said (D.54.a.): "A fine may be imposed, where a man is indicted and convicted for any trespass or misdemeanour . . . . . ;" and (D.55): "The King, by his prerogative, shall have all fines paid for writs, or imposed for crimes. And therefore, if upon a conviction for extortion, a man be fined to pay so much to the party grieved, (unless where by Act of Parliament it is directed,) it is error. R.11 Car. I, 1 Rol. 220. I.10." (In Rolle's note of the case cited, *Brunsdens* case, no reference is made to the prerogative. The fine, however, had been to pay treble damages to the party grieved; and the judgment was reserved because it was not warranted by any statute). And in Upper Canada at Confederation the statute law was that in cases not otherwise provided for in which by the criminal law of England in force in Upper Canada the whole or any part of

a fine or penalty imposed for the punishment of any offence was in any manner appropriated to a purpose inapplicable to the existing state of Upper Canada, such fine or penalty, or the part thereof so appropriated, should when received be paid to the proper officer of the county or city in which the conviction had taken place; whereas every fine and penalty imposed for the punishment of an offence prohibited by a statute having force of law in Upper Canada only, and for the appropriation of which fine or penalty no other provision was made, should be paid into the hands of the Receiver-General, and should form part of the consolidated revenue fund of the Province; and that certain other fines and penalties should be paid to the county treasurers for a use specified: C.S.U.C. 1859, ch. 118. I think, therefore, that much of what was said in the House of Lords in *Bradlaugh v. Clarke* (1883), 8 App. Cas. 354, concerning penalties, could accurately have been said in Upper Canada concerning fines. At p. 358 the Earl of Selborne, L.C., said:—

"It was acknowledged, as an incontestable proposition of law, that 'where a penalty is created by statute, and nothing is said as to who may recover it, and it is not created for the benefit of a party grieved, and the offence is not against an individual, it belongs to the Crown, and the Crown alone can maintain a suit for it.' "

And Lord Watson said (p. 378):—

"In the case of statutory penalties, enacted solely for the purpose of enforcing or protecting the interests of the public, the Crown alone has, by virtue of its prerogative, a title to sue and recover, unless the Legislature shall otherwise direct."

And Lord FitzGerald said (p. 383) that the authorities and precedents supported the position taken by the defendant in that case, viz.: (p. 382):—

"That where a statute imposes a penalty as a punishment for an offence, that penalty when incurred, belongs to the Crown, unless the statute provides otherwise, either expressly or by distinct or particular terms, or unless from the language of the statute and its subject-matter, and the machinery provided for enforcing the penalty, it can fairly and reasonably be inferred that the Legislature intended to give it to the informer;"

And he quoted from Bacon's Abridgment the following statement:—

"Also where a statute giveth a forfeiture either for nonfeasance or misfeasance, the King shall have it, unless it be otherwise particularly directed by the statute."

It seems to me, therefore, that it cannot be said that at Confederation the Crown in the right of the Province of Canada, had a prerogative right to all fines imposed and levied in the Province; the right in respect of such fines as in Upper Canada were imposed and levied under a statute arose, I think, only in case no other disposition of the fines had been made by the statute.

The fines created by sec. 1035 (2) of the Criminal Code are—or rather the fine authorized to be imposed in this particular case is—punitive rather than compensatory, and it is difficult to see how the punitive force of a fine can be affected by an enactment concerning the disposition to be made of the money levied. And since, in the absence of any such enactment, there would always

be a hand to receive the money, and the title to the money when received would be in the Crown in the right of the Province, it can scarcely be said that the power to enact that the money when paid shall belong to some one other than the Crown is a necessary incident of the power to create the fine; but I do not think that it follows that the contention put forward on behalf of the Province in this case is entitled to prevail. There can be no doubt that the power of Parliament to legislate concerning the criminal law includes the power to create a fine as a punishment; and I think that, were it not for the suggestion that fines, when imposed, are by the British North America Act given to the Provinces in which they are collected, there could be no doubt that Parliament, in exercise of the power conferred by sec. 91 (27) of the Act, would have the right to say what disposition should be made of the money collected. For "the reservation of the criminal law for the Dominion of Canada is given in clear and intelligible words which must be construed accoring to their natural and ordinary signification. . . . . It is, therefore, the criminal law in its widest sense that is reserved . . . . . The fact that from the criminal law generally there is one exception, namely, 'the constitution of Courts of criminal jurisdiction,' renders it more clear if anything were necessary to render it more clear, that with that exception . . . . . the criminal law, in its widest sense, is reserved for the exclusive authority of the Dominion Parliament;" *Attorney-General for Ontario v. Hamilton Street Railway Co.* [1903] A.C. 524.

In order to reach the conclusion that the proviso to sec. 1036 of the Criminal Code is invalid, it is necessary, as it seems to me, to proceed somewhat as follows: First you must treat the legislative authority in respect of fines as divisible into parts, one part being the power to create the fine and another part being the power to say what shall be done with any money collected; then you must treat the latter power, not as one expressly conferred, but as one conferred only inferentially, as incidental to the former, and as exercisable only when its exercise is essential to the effective exercise of the power to create the fine; and finally having so split up the legislative authority, you must proceed to split up the legislation itself, and you must uphold the creation of the fine as coming within the power of Parliament, while you declare against the validity of the proviso on the ground that no necessity for passing the proviso has been shewn to have existed. But so to proceed would be, as I think, to treat the question in too narrow a manner and to go against the established canons of construction of the British North America Act. A much broader treatment seems to be indicated by the judgments of the Judicial Committee, for instance, *Attorney-General for Ontario v. Reciprocal Insurers,* [1924] A.C. 328, and the case referred to already, *Attorney-General for Ontario v. Hamilton Street Railway Co.,* [1903] A.C. 524.

The correct procedure seems to me, in the case in hand, to be this: You start with the fact that the criminal law "in its widest sense" is reserved for the exclusive authoriy of Parliament. Then you consider as a whole the legislation contained in sec. 1035 (2) and sec. 1036 (including the proviso). So considered, the legislation is seen to be "in pith and substance" legislation

in relation to the subject assigned to Parliament by sec. 91 (27) of the British North America Act. You know, therefore, that the legislation is to be upheld as a whole unless there is a compelling reason for saying that it was beyond the power of Parliament to pass the part attacked—the proviso. But Parliament in the exercise of the power conferred by sec. 91 (27) of the British North America Act can prescribe punishments, and in prescribing punishments has an unfettered choice. The punishment may be imprisonment, whipping, forfeiture, fine, or anything else that to Parliament seems proper; and if the punishment selected is a fine the choice of the kind of fine would seem to be equally unfettered. So that if there are fines the nature of which is such that money due in respect of them may be collected and retained by the Crown in the exercise of the royal prerogative, and if there are other fines the nature of which is such that the royal prerogative will not reach the money due in respect of them, it is open to Parliament in its discretion to prescribe a fine of the one class or of the other. Therefore, if it seems that the legislation as a whole can reasonably be treated as legislation by which Parliament has created a punitive fine of the class that (the money being payable to a municipality) is not reached by the royal prerogative, and no necessity is discovered for treating it as legislation by which Parliament has created a fine of the class that is reached by the prerogative, and has attempted in defiance of sec. 109 of the British North America Act, to deprive the Province of the "royalty" so created, you find that no royalty came into existence, and that sec. 109 has no application, and, the creation of a fine of the particular class coming within one of the classes of subjects enumerated in sec. 91, you are not concerned with an inquiry as to whether, if Parliament were simply to create a fine of the class that is reached by the prerogative, later provincial legislation as to the disposition of any moneys received in respect of that fine could be upheld as coming within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by the Act assigned exclusively to the Legislatures of the Provinces.

My opinion is that there is less of the artificial involved in treating the legislation as resulting in the creation of a fine of the class that is not reached by the prerogative than there is in treating it as resulting in the creation of a "royalty" to which sec. 109 of the British North America Act applies. The circumstance that sec. 1056 of the Criminal Code as originally enacted did not contain the proviso, which was inserted by sec. 8 of the amending Act of 1922 (12 and 13 Geo. V. ch 16), is of no importance. What is in question here is the right to the money paid in respect of a fine recently imposed; and in Ontario since 1922 no court sitting in such a municipality as is mentioned in the proviso has had authority under sec. 1035 (2) to impose, for an infraction of sec. 444, a fine to which the prerogative right can attach.

For these reasons, the judgment will be that the suppliants are entitled to the relief sought by their petition, viz.: payment of the fine with interest thereon from the day when the money came to the hands of the Treasurer of the Province of Ontario, and the costs of the petition.

No. 5.

In the Supreme Court of Ontario.

No. 5.
Judgment of Rose, J., at Trial, 23rd April, 1929.

JUDGMENT OF ROSE, J. AT TRIAL

($2.40 Law stamps, cancelled.)

IN THE SUPREME COURT OF ONTARIO

THE HONOURABLE MR. JUSTICE ROSE. } TUESDAY, THE TWENTY-THIRD DAY OF APRIL, A.D. 1929.

IN THE MATTER OF A PETITION OF RIGHT

BETWEEN:

THE CORPORATION OF THE CITY OF TORONTO,

SUPPLIANT,

AND

HIS MAJESTY THE KING,

Represented herein by His Majesty's Attorney-General for the Province of Ontario,

RESPONDENT.

The Petition of Right of the above named Suppliant having come on to be heard on the FIFTEENTH day of FEBRUARY, A.D. 1929, before this Court at the City of Toronto, in the County of York, for trial of actions without a Jury, upon His Majesty's command that right be done, in the presence of Counsel for both Suppliant and Respondent, His Majesty's Attorney-General for the Dominion of Canada having elected not to appear. UPON READING the Petition and the Defence thereto, AND UPON HEARING the evidence adduced and what was alleged by Counsel aforesaid, this Court was pleased to direct that the Petition should stand over for judgment, and the same coming on this day for judgment,

2. THIS COURT DOTH ORDER AND ADJUDGE that the Suppliant is entitled to the relief sought by its Petition of Right herein, that is to say, payment of the fine in the Petition mentioned, in the sum of SIXTY THOUSAND DOLLARS, together with interest upon the money paid in respect of such fine and being the aforesaid sum, at the rate of five per centum per annum from the twenty-third day of April, 1925, being the day upon which such money came to the hands of The Honourable the Treasurer for the Province of Ontario.

In the Supreme Court of Ontario.

No. 5.
Judgment of Rose, J., at Trial, 23rd April, 1929.
—*continued.*

3. AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the said Suppliant is entitled to be paid by His Majesty its costs of this Petition of Right forthwith after taxation thereof.

JUDGMENT signed this 3rd day of October, A.D. 1929.

"E. HARLEY,"
Senior Registrar, S.C.O.

Entered J.B. 42, page 41,
Oct. 3rd, 1929.
"E.B."

No. 6.

In the Supreme Court of Ontario.

No. 6.
Notice of Appeal to Appellate Division,
7th May, 1929.

NOTICE OF APPEAL TO APPELLATE DIVISION

IN THE SUPREME COURT OF ONTARIO

BETWEEN:

THE CORPORATION OF THE CITY OF TORONTO,
SUPPLIANT,

AND

HIS MAJESTY THE KING,
RESPONDENT.

TAKE NOTICE that the Respondent appeals to a Divisional Court from the judgment pronounced by the Honourable Mr. Justice Rose on the 23rd day of April, 1929, and asks that the said judgment may be revised and that judgment should be entered in favour of the Respondent by dismissing the claim of the Suppliant as set forth in the Petition of Right herein, upon the following grounds:—

1. The learned trial judge should have held that section 1036 of the Criminal Code of Canada, in so far as it purports to deal with the application of fines imposed for criminal offences, is *ultra vires* the Parliament of Canada.

2. The learned trial judge should have held that legislation dealing with the application of fines such as section 1036 of the Criminal Code was not legislation in relation to "criminal law" or "procedure in criminal matters" under class 27 of section 91 of the British North America Act, but that it related solely to the "administration of justice in the province, including the . . . . maintenance . . . . of provincial courts, both of civil and of criminal jurisdiction," under class 14 of section 92 of the British North America Act, and was therefore within the exclusive legislative jurisdiction of the Provincial Legislature.

3. The learned trial judge, although he rightly held that fines were royalties within the meaning of section 109 of the British North America Act, should have held that fines imposed in respect of criminal offences generally became the property of the Provinces under the said section, and that section 1036 of the Criminal Code could not and did not override the provisions of the Confederation Act in that regard.

4. The learned trial judge should have held that the Parliament of Canada by directing that in Ontario fines imposed for criminal offences should be paid to the municipalities, instead of leaving them to go to the Province under section 109 of the British North America Act, could not do indirectly what it was powerless to do directly.

In the Supreme Court of Ontario.

No. 6.
Notice of Appeal to Appellate Division, 7th May, 1929.
—*continued.*

5. The learned trial judge should have dismissed the Suppliant's petition of right with costs.

And upon such other grounds as counsel may advise.

DATED at Toronto, this 7th day of May, 1929.

E. BAYLY,
Parliament Buildings,
Toronto,
Solicitor for the Respondent.

To:—

C. M. COLQUHOUN, ESQ.,
City Hall, Toronto,
Solicitor for the Suppliant.

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No. 7.

In the Supreme Court of Ontario.

No. 7. Reasons for judgment of Appellate Division (Latchford, C.J.), 28th March, 1930.

REASONS FOR JUDGMENT OF APPELLATE DIVISION

APPELLATE DIVISION — Reasons for Judgment of

SECOND DIVISIONAL COURT

Delivered 28th March, 1930.

LATCHFORD, C.J., RIDDELL, MASTEN, ORDE AND FISHER, J.J.A.

CITY OF TORONTO, v. THE KING. — EDWARD BAYLY, K.C., and W. B. COMMON, for Defendant, Appellant. G. R. GEARY, K.C., for Plaintiff, Respondent.

LATCHFORD, C.J.: This appeal is from the judgment of Rose, J., rendered on the 23rd April, 1929.

The facts are fully stated in the report of the judgment appearing in 64 O.L.R. 129, and need not be repeated.

Were it not for the decision of the Judicial Committee in *Rex v. Attorney-General of British Columbia,* [1924] A.C. 213, affirming the judgment of the Supreme Court of Canada, *Attorney-General for British Columbia v. The King,* (1922) 63 Can. S.C.R. 622, the appeal would not, I think present any serious difficulty. It was there held that the word "royalties" in sec. 109 of the British North America Act is not limited in its scope to the words preceding it, "lands, mines, minerals," but must be construed in its natural sense as the equivalent in English of *"jura regalia,"* and therefore included what were, upon the admission of both parties to the litigation, *bona vacantia.* Their Lordships, however, declined to express an opinion as to whether the words "belonging to" in sec. 109 mean "already in fact appropriated," or only "such as the Province was entitled to appropriate." They thought it, they said (p. 221), "sufficient to observe that this question, which is substantially one of fact, has not been established in favour of the Dominion in the sense of the argument advanced on its behalf, and that the point must be taken to have failed for the purpose of the present appeal."

Their Lordships were also careful to confine the expression of their opinion to *bona vacantia,* the case in hand, leaving other *jura regalia* to await decision till the cases should arise.

The fine in question in the present case is, I think, one of the *jura regalia* or "royalties" still awaiting decision, and that on two points: Was it a royalty "belonging to the Province at the time it was imposed?" And, if so, does it fall within the ambit of sec. 109, as did the *bona vacantia* in the British Columbia case?

I am of the opinion that the fine, even if a royalty, is not a royalty that was at any time "belonging to" the Province.

Its imposition was pursuant to sec. 1035, subsec. 2, of the Criminal Code.

In the Supreme Court of Ontario.

No. 7. Reasons for judgment of Appellate Division (Latchford, C.J.), 28th March, 1930. —*continued.*

Apart from the *constitution* of courts of criminal jurisdiction, criminal law, in its widest sense, is reserved by sec. 91 (27) of the British North America Act, in clear and intelligible words, for the exclusive authority of the Dominion Parliament. Such is, in substance, the declaration of the Judicial Committee, as expressed by the Lord Chancellor, in *Attorney-General for Ontario v. Hamilton Street Railway Co.*, [1903] A.C. 524, at pp. 528 and 529.

The fine was not the result of any prerogative right enjoyed by the Province, but of the exercise of a jurisdiction restricted to the Dominion. As it was never "belonging to" the Province, it did not fall within sec. 109 of the British North America Act, but was in my view as properly the subject of Dominion legislation as any other penalty prescribed in the enactment of criminal law. It therefore seems to me that it was within the power of the Dominion to enact clause (b) of sec. 1036 of the 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 shall be paid over to the municipality.

Accordingly, I think that the appeal fails, and that it should be dismissed with costs.

(Riddell, J.A.), 28th March, 1930.

RIDDELL, J.A.: This is an appeal by the Crown, as represented by the Attorney-General for the Province of Ontario, against the judgment of Mr. Justice Rose, 64 O.L.R. 129.

There is no dispute as to the facts, historical or otherwise; in 1791, the Province of Quebec—which itself was enlarged by the Quebec Act of 1774, 14 Geo. III, ch. 83 (Imp.), beyond the limits of the original Government of Quebec, formed without delay after the formal cession of Canada by the Treaty of Paris, 1763, so as to take in what is now the Province of Ontario—was divided by order in council into two Provinces, those of Upper and Lower Canada, the government of which was provided for by the Canada or Constitutional Act of 1791, 3 Geo III, ch. 31 (Imp.). By the Union Act of 1840, 3 & 4 Vict., ch. 35 (Imp.), the two Provinces were united into the Province of Canada. In the seventh decade of the last century, after much negotiation and discussion, the statesmen of Canada, in conjunction with those of the separate Provinces of Nova Scotia and New Brunswick, formulated a scheme for the Confederation of these Provinces into a new political entity—the admission of other parts of British North America being contemplated and, in part, provided for. This scheme, which was in the Imperial Parliament called, and which was in fact, "a treaty of union" (185 Hansard 558), "a compact between the colonies" (*ib.* 1191), was put into the form of an Act of Parliament in order to make it legally binding. The British North America Act (1867), 30 & 31 Vict., ch. 3 (Imp.), is the result. *Inter alia,* the Province of Canada was redivided and two Provinces formed of its territory, Ontario and Quebec, corresponding to the former Provinces of Upper and Lower Canada.

Section 91 (27) gives the Dominion exclusive powers to deal with: "The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters."

Section 109 of this Act reads:—

"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."

In 1922, the Dominion Parliament, in ostensible pursuance of its powers contained in this section, 91 (27), passed an Act (12 & 13 Geo. V, ch. 16) amending the Criminal Code, which, by sec. 8, provides as follows:—

"Subsection 1 of section 1036 of the said Act as amended by chapter 9 of the statutes of 1909 is amended by adding the following proviso at the end thereof:—"

"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 administering the law under which the same was imposed or recovered."

The full legislation on this matter is now sec. 1036 of the Criminal Code, R.S.C. 1927, ch. 36.

This special legislation, affecting the Province of Ontario only, was passed pursuant to petitions from numerous municipalities in this Province, and was not, as has been thought and, indeed, has been said by some, passed at the instance of the Government of Ontario. Had it been, it would make no difference in the result, as the Crown is not bound by estoppel. The reason for this special provision for the Province of Ontario was stated in the House of Commons by a leading member—that in Ontario, differing from Quebec, the municipalities build the court-houses and maintain them, and it was thought right that the municipalities should have this slight recompense (Can. Hansard (1922), vol. III, p. 2832).

The legislation above stated seems to have been acquiesced in for some time by the Province, but again that is of no importance—*Nullum tempus occurrit regi*—even if such asquiescence would be of any consequence in the case of a private individual, and I do not suggest that it would. The parties are not hampered by anything technical in their way to determine the rights of each. We have nothing to do with the reason of the legislation—the language being plain, we have simply to determine its meaning and see if the legislation is within the ambit of the powers of the enacting body.

The argument of the Crown is very clear—the British North America Act expressly gives to the Province the "Royalties belonging to the . . . . . Province of Canada . . . . . at the Union," and goes on to provide that "all sums then due and payable for . . . . . royalties shall belong to the Province of Ontario . . . . . ." if "the same are situate or arise" there. Then it is claimed (1) that fines of this kind come within the meaning of the word

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"Royalties," and that (2) they belonged to the Province of Canada at the Union—consequently, it is argued that the Dominion Parliament has attempted to take away the property of the Province. If this were so, admittedly the legislation would be invalid.

The learned trial Judge finds that a fine imposed in a criminal case is a *Jus Regale,* a "Royalty," and as to that I think there cannot be the slightest question; and, indeed, had there been any necessity to do so, he might have gone further and found that a fine in a civil case also comes within the meaning of the words—the old Year Books are full of cases in which one party or the other in a civil case is made to pay a fine to the King, for failure to prove a case or to proceed with it, or bringing a useless action or defending one that is defenceless, etc., etc.; generally, indeed, the fine for the party *"in misericordia"* was only *dim.m.,* half a mark, 6s. 8d., but even 6s. 8d was a lot of money six centuries ago.

The next question is whether the word "Royalties" covers only concrete moneys accrued due at the time of the Union, or does it mean also the right to receive moneys of a certain character as and when they become due? Even independently of authority, I should think it clear that the word is not confined in its meaning to concrete moneys already accrued due, but includes the right to moneys of this character as and when they accrue due from time to time; the section quoted makes a provision for what has already accrued due, and the provision we are now considering is additional. But whatever doubt there might otherwise have been is dissipated by the decisions of the Judicial Committee in *Attorney-General of Ontario v. Mercer,* 8 App. Cas. 767, and *Rex v. Attorney-General of British Columbia,* [1924] A.C. 213.

These views are in accord with those of the learned trial judge; and his judgment is to be supported in these respects. It is, I think, clear that a fine imposed in a criminal proceeding is within the meaning of the word "Royalties" in the Act, and that the word goes so far as to include the right to receive a fine, as and when imposed.

The learned Judge, however, decides that this right was not a right "belonging to the Province of Canada at the time of the Union"—it is not contended that the right lost its appellation of "Royalty," nor could it do so; even if granted to another, it still retained the name—*Dyke v. Walford,* 5 Moo. P.C. 434,—as "the King's Silver" continued to be paid after the King had lost his head at Whitehall, and the money was payable "to the State:" "An Action at Law in the Time of the Commonwealth," 7 N.Y. Univ. L.Q. Rev., P. 74. But, while there is often much in a name, it cannot be said that the retention of the name "Royalty" gives any right to the Province in itself—it is only such "Royalties" as belonged to the Province of Canada at the time of the Union that the Province can claim as its own; Mr. Justice Rose (64 O.L.R. at p. 131) adopts the statement of law in Comyn's Digest, D.55: "The King, by his prerogative, shall have all fines . . . . . imposed for crimes;" but thinks that, nevertheless, he was not entitled to this kind of fine at the time of the Union; he cites the C.S.U.C. 1859, ch. 118, as shewing that fines in certain cases were not payable to the Crown in Upper Canada at the time of the Union; but, with

great respect, I think that that is *nihil ad rem.* Even supposing that a statutory direction to pay the fine in such a case as this to the treasurer of the county or other person, would take the fine out of the category of "Royalties belonging to the Province"—and I am not to be considered as agreeing to that proposition —there is no such provision in the case of a fine of this character.

The statute directs that:—

"1. In all cases not otherwise provided for in which, by the criminal law of England in force in Upper Canada, the whole or any part of a fine or penalty imposed for the punishment of any offence is in any manner appropriated for the support of the poor, or to any parochial or other purpose, inapplicable to the existing state of Upper Canada, such fine or penalty, or the part thereof so appropriated, shall when received be paid to the Treasurer of the County or Chamberlain of the City in which the conviction has taken place, to be appropriated to the purposes thereof, and accounted for in the same manner as the general rates and assessments levied therein are applicable and accountable by law.

"2. Every fine and penalty imposed for the punishment of any offence prohibited by any statute having force of law in Upper Canada only, and for the appropriation of which fine or penalty no other provision is made, and any duty or sum of money and the proceeds of any forfeiture by any such statute given to the Crown shall be paid into the hands of the Receiver-General and shall form part of 'The Consolidated Revenue Fund.'

"3. All fines and penalties imposed upon and levied in the several Counties in Upper Canada, not payable to the Receiver-General or to any Municipal Corporation, and all fines upon Jurors for non-attendance levied therein, shall be paid to the Treasurers of each of the said Counties respectively, and shall form part of the fund for the payment of Petit Jurors."

The fine here in question was imposed after a conviction for conspiracy to defraud; *Rex v. Jarvis,* (1925) 28 O.W.N. 81. "The criminal law of England in force in Upper Canada" was "The Criminal Law of England, as it stood on the 17th day of September in the year of our Lord 1792 . . . . . as modified . . . . . by any Act of the Imperial Parliament having force of law in Upper Canada" or by Canadian Statutes: C.S.U.C. 1859, ch. 94, sec. 1.

By the criminal law of England as it stood on the 17th September, 1792, the day of the opening of the first Legislature of Upper Canada, which it was that formally introduced the English civil law into the Province, leaving the criminal law of the former Province of Quebec in force—in those days, a statute had its beginning with the first day of the enacting Parliament unless otherwise stated in the statute itself—this criminal law being practically the same as the English criminal law, as the Quebec Act of 1774 changed only the law in civil cases, leaving the English law as introduced by the Royal Proclamation of 1763 in full force.

On the 17th September, 1792, conspiracy to defraud was a Common Law offence—Russell on Crimes, 8th ed., pp. 171 sqq., and cases cited—the statutes dealing with conspiracy being directed against quite another class of offences:

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(1300) 28 Edw I, St. 3, ch. 10; (1305) 33 Edw. I, St. 2; do., do., St. 3; (1420) 7 Hen. V; (1548) 2 & 3 Edw. VI, ch. 15. This Common Law crime was punishable by fine and imprisonment, and there was no provision in the English Law that the fine or any part of it should be "appropriated for the support of the poor, or to any parochial or other purpose"—accordingly this offence does not come within sec. 1 of the statute quoted.

Whether it comes within sec. 2 is wholly immaterial—it does not, in fact—if it comes within this secton, the fine is payable to the Receiver-General for the King (Queen); if not, it is unprovided for, and the Common Law rule applies, that the fine goes to the King (Queen).

It follows that, at the time of the Union, the fine for this offence went to the King, that is, in Canada, to the Public Treasury; it was a *Jus Regale,* the right to receive it a "Royalty"; and this right is the property of the Province, which cannot be taken away from the Province by the Dominion.

If the disposition of a fine comes within the words in sec. 91 (27) "The Criminal Law," at all, these words must be read as limited by the provision giving "Royalties" as property to the Province.

I cannot think that because "Royalties" of much the same character as fines, in another class of offences, are given to others, the Dominion is therefore empowered to take away this property from the Province. I would allow the appeal with costs here and below.

(Masten, J.A.), 28th March, 1930.

MASTEN, J.A.: Appeal by the Crown, represented by the Attorney-General for Ontario, from a judgment of Rose, J., dated the 23rd April, 1929, by which it was adjudged that a certain fine amounting to $60,000 imposed on one found guilty of conspiracy to defraud, and paid to the Registrar of the Supreme Court and by him to the Provincial Treasurer of Ontario, was the property of the Respondents, the Corporation of the City of Toronto.

As stated by the learned trial Judge, there is only one question for determination, viz.: whether it was within the power of Parliament of Canada to enact that the fines referred to in the proviso to sec. 1036 of the Criminal Code, should be paid to the municipal authority.

The sentence imposing the fine in question was pronounced on the 24th October, 1924, and, as varied, was affirmed by a Divisional Court on the 23rd day of March, 1925. On those dates the statutory provisions which had been enacted by the Parliament of Canada, and by the Legislature of Ontario, respectively, read as follows:—

Section 1036 of the Criminal Code, R.S.C. 1906, ch. 146, as amended prior to 1924, enacts that:—

> "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" (Here follow certain exceptions not material to this case.)
>
> "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 adminstering the law under which the same was imposed or recovered."

(It is common ground that the respondent corporation bears in part the expense of administering the law under which the fine in question was imposed.)

The Fines and Forfeitures Act, R.S.O. 1914, ch. 99, sec. 5, provides that:—

"Every pecuniary fine and penalty imposed for a contravention of any statute in force in Ontario and the proceeds of every forfeiture imposed and given to the Crown by any such statute shall, where the disposal thereof is within the power of this Legislature, and except so far as other provision is made in respect thereto, be paid to the Treasurer of Ontario and shall form part of the Consolidated Revenue Fund."

No amendments were made to the above section from 1914 until 1926.

These enactments are in conflict and raise the question, in the present appeal, which of them is constitutionally valid?

On the part of the Appellant, the Attorney-General for Ontario, the contention is made that fines are royalties, and that under sec. 109 of the British North America Act all royalties to which the Provinces of Canada were entitled at the time of Confederation passed, according to their location, to the Province of Ontario or to the Province of Quebec; that sec. 109 under the term "royalties" gives to the Province of Ontario the right and property not only in fines then imposed and uncollected, but in all future fines, and that legislation on the part of the Dominion Parliament attempting without compensation to deprive the Province of Ontario of the right so conferred upon it by sec. 109 is *ultra vires.* Consequently that the fine in question passed to the Crown for Ontario, and under the statute above quoted it is properly allocated and paid into the Consolidated Revenue Fund of the Province of Ontario.

For the Suppliant, the Corporation of the City of Toronto, it is contended not only that the criminal law in its widest sense embraces the creation of fines and the prescribing of the penalty to be imposed, but also that in creating a fine, with its incidents, the Parliament of Canada has the power as part of its criminal jurisdiction, and as one of the incidents of an offence so created, to determine that a fine levied under it shall go to one of the King's subjects instead of to the Crown itself.

To this contention the answer of the Crown in the right of the Province was that the criminal law goes only to the creation of a new offence, and the prescribing of the penalty; in other words conferring on the Court the power to impose a fine for the offence, and that having established the offence and prescribed the penalty which may be imposed, the power of the Dominion Parliament is exhausted, the fine when imposed in pursuance of the statute becomes a royalty, that is a property right belonging to the Crown in the right of the Province, and that the Parliament of Canada has no jurisdiction or power to deprive the Province of such royalty in the manner here attempted.

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The following are extracts from the British North America Act relating to the question under consideration.

By sec. 91, head (27), exclusive jurisdiction is conferred on the Dominion in respect of "the Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters."

By sec. 92 (13) and (14), exclusive jurisdiction is conferred on the Province in respect of "(13) Property and civil rights in the Province" and "(14) the administration of justice in the Province, including the constitution, maintenance, and organisation of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts."

Section 102 provides that:—

> "All duties and revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick before and at the union had and have power of appropriation, except such portions thereof as are by this Act reserved to the respective Legislatures of the Provinces, or are raised by them in accordance with the special powers conferred on them by this Act, shall form one Consolidated Revenue Fund, to be appropriated for the public services of Canada in the manner and subject to the charges in this Act provided."

And sec. 109 provides that:—

> "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 of the Province in the same."

That fines generally speaking are royalties is not in controversy. The question is whether the term "royalty" as it appears in sec. 109 is subject to some narrower interpretation excluding fines, and, secondly, assuming that sec. 109 does include fines, whether in 1867, at Confederation, fines "belonged to" the Crown in the right of Upper Canada.

I think the answer to the first question is determined by the Privy Council in their judgment in *Rex v. Attorney-General of British Columbia,* [1924] A.C. 213. Dealing with the interpretation of that section Lord Sumner says (p. 219) that the argument for the Dominion dwells on two points:—

> "(1) That the collocation of 'all lands, mines, minerals and royalties' involves that rule of construction, which is called the *ejusdem generis* rule, or, alternatively, that indicated by saying *noscitur a sociis,* so that the word 'royalties' must by construction be limited to royalties of a territorial character; and (2) that all these things thus named must further 'belong to' the Province at the time of the Union as a condition of falling to it under the Act."

Referring to the words "all lands, mines, minerals, and royalties," he says (pp. 219, 220):—

> "The truth is, that they constitute a simple enumeration, that the

word 'all' applies equally to all four, and that it is in no case limited, except by the words 'belonging to the several Provinces,' and the words might equally well have been 'all royalties, lands, mines and minerals' or 'all royalties, all lands, all mines and all minerals' . . . . . The other argument that the word 'royalties' here means royalties—*jura regalia*—having something to do with lands or minerals, and so *noscitur a sociis,* appears to beg the question."

At p. 220 he concludes:—

"Their Lordships must take the words of sec. 109 as they stand, and, as they stand, they enumerate certain Crown rights the benefit of which is to be enjoyed by the Provinces, then existing or under appropriate legislation thereafter brought within the ambit of that benefit, as British Columbia has been. By that enumeration their Lordships, like other Courts, are bound."

With reference to the interpretation of the words "belonging to" he says (p. 221):—

"Without expressing any opinion on the question whether the words 'belonging to' mean 'already in fact appropriated,' or only 'such as the Province was entitled to appropriate,' their Lordships think it sufficient to observe that this quesion, which is substantially one of fact, has not been established in favour of the Dominion in the sense of the argument advanced on its behalf, and that the point must be taken to have failed for the purpose of the present appeal."

That case related to *"bona vacantia"* and was determined in favour of the Province.

In construing sec. 109, I find myself unable to draw any distinction between *bona vacantia* and fines; and, as it has been determined by the Privy Council that *bona vacantia* are royalties within the true interpretation of sec. 109 of the British North America Act, it follows, in my opinion, that fines also are royalties.

The fact that the words of sec. 109 give specifically to the Province all sums then due or payable for royalties implies that the earlier words of the section, "all royalties," refer to something else, namely a right to all royalties thereafter accruing, and the section appears to have been so construed in the British Columbia case.

As I read his judgment, the learned trial Judge in the present case was of opinion that, though fines were royalties, yet a fine like that here in question did not at Confederation "belong to" the Crown in right of the Province of Upper Canada because by the statute it had been granted to others. The statute which was in force in Upper Canada at the time of Confederation was ch. 118 of C.S.U.C. 1859, reading as follows (see the judgment of Riddell, J.A., *supra*):—

In my opinion, the statute does not have the effect or produce the result, either directly or indirectly, which is ascribed to it by the learned trial Judge.

"Royalties" (otherwise known as *jura regalia*) is a word of wide signification and content. It includes, among other rights and privileges of the

Sovereign, that branch of the prerogatives known as the fiscal prerogatives. These ancient fiscal prerogatives included the right of the Sovereign to revenues of the demesne lands of the Crown, treasure trove, escheats, fines, and several others.

Of these sources of revenue, fines in early times formed a very important part, as appears from a history of the General Eyre as detailed in the lectures of 1921 of Bolland on "The General Eyre" and from the Year Books.

These different classes of *jura regalia* differ widely in their nature and in their special qualities or essential characteristics. The grant of a specific escheat to a subject or the grant to a subject of a franchise for a ferry might well carry by implication, as an incident of the grant, a right of action conferred on the holder of the franchise to sue for the escheated lands or to collect ferry tolls directly and in person; but, as it seems to me, the nature of a fine is such that it is not only highly impracticable but almost impossible without clear and express statutory provision to vest in a subject the right to sue for a fine like that here in question.

In Chitty on Prerogatives of the Crown, p. 260, it is said:—

> "On a fine imposed by K.B. for an offence, the amount becomes, by the record of judgment, a debt due to the King *instanter,* and process may either issue out of that Court, or the fine may be estreated into the Exchequer, and proceedings taken therein."

In *Rex v. Woolf,* (1819) 21 R.R. 412, 2 B. & Ald. 609, 613, the defendant had been found guilty of a misdemeanour and sentenced to two years' imprisonment, to pay a fine of $10,000, and to be further imprisoned till the fine was paid. While the defendant was still in prison undergoing sentence a writ of *levari facias* was issued to recover the fine, and a motion was made to set aside the writ as unwarrantably issued. It was, however, held by the full Court in banc that on pronouncement of sentence and entry of judgment the fine becomes a debt of record for which execution may issue at the suit of the King, and Bayley, J., in the course of his judgment, says:—

> "Here there is a judgment that the defendant do pay to the King a fine of a certain sum. By that judgment the debt becomes a debt to the King, of record; and it is payable to the King *instanter.*"

I agree with the observation of my brother Riddell that this statute (C.S.U.C. 1859, ch. 118) did not divest the Crown of fines such as that in question. In addition, I desire to point out that there is nothing in the statute which expressly or by implication gives to the treasurer of a county or to the chamberlain of a city, or to the Receiver-General of a Province, the right to sue a defendant for the fines imposed upon him. The sentence of the Court and the judgment entered in pursuance of it remains a judgment of record that the defendant *do pay to the Crown* the fine imposed. I conclude therefore that at Confederation in 1867 fines remained royalties belonging to the Crown in right of the Province, even though the beneficial interest in them had been granted by the King, by and with the advice and consent of the Legislative Council and Assembly of Canada, to the municipalties, or to the consolidated

fund, and hence that as a royalty the right to a fine passed to the Crown in right of the Province as its property.

It is suggested, however, on behalf of the Respondents, that the Dominion Parliament, in the exercise of its exclusive jurisdiction over criminal law in its widest sense, has power to create a new offence with a new penalty attached and as part of such enactment to provide that the fine shall never become a royalty of the Crown, but shall be payable directly to the municipality.

It is unnecessary to determine the question so raised, for conspiracy to defraud is not a new offence nor is a fine a new penalty for that offence. Whether the crime of conspiracy to defraud originated at common law, which appears to be the better opinion (see 1 Hawkins' Pleas of the Crown, 446; 2 Coke's Inst. 561; and the decisions in the United States of *State v. Buchanan,* (1921) 5 Harr. & J. (Md.) 317, at p. 336, and *State v. de Witt,* (1834) 27 Am.D. 371; 12 Corpus Juris 542, notes 11 and 12), or whether the jurisdiction arose out of the Statute of Edw. I, is immaterial, for it is clear that, at the time when Upper Canada adopted the criminal law of England, conspiracy to defraud had become a part of the criminal law of that country, and so became part of the criminal law of Upper Canada.

Then as to the penalty: conspiracy to defraud was always a misdemeanour; as is said in Archbold's Criminal Pleading, 25th ed., 1349, "Conspiracy is an indictable misdemeanour, consisting in the agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means," and there was always power in the Court to impose a fine in addition to imprisonment for a misdemeanour. It thus appears that both the crime and the penalty existed in Upper Canada in 1867 and subsequently. The only new enactment by the Parliament of Canada was the proviso in question by which the Dominion Parliament assumed to take away the right of property which the British North America Act had accorded to the Crown in right of the Province. It is well settled law that this cannot be done: *Attorney-General for British Columbia v. Attorney-General for Canada,* [1914] A.C. 153, at p. 172; *Montreal City v. Montreal Harbour Commissioners,* [1926] A.C. 299, at pp. 312 and 313.

The conclusions at which I arrive may be summarised as follows: The Crown of the British Empire is one and single—and so is the prerogative of the Crown. They never die. The prerogative has at all times formed part of the law of this Province; whether adopted here with the other laws of England, or inherent in the Sovereignty of the reigning King, is immaterial. Prior to Confederation it coincided with the prerogative as it existed in England, save in so far as it had been varied by the Parliament of Canada with the consent of the Crown.

At Confederation the administration of the prerogative of the Crown in Canada was divided, and, in so far as it appertained to subjects assigned to the Federal authority, passed to the Dominion, and, so far as it appertained to subjects assigned to the Provinces, passed to the Provinces.

Prerogative rights arising out of the criminal law would *prima facie* on that footing pass to the Dominion and become subject to its legislation, and so I would conclude with respect to the question at issue, were it not for the specific

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grant to the Crown, in right of the Province, of all royalties.

The term "royalties," as employed in sec. 109 of the British North America Act, includes future fines as well as fines then outstanding and uncollected. This royalty, being thus a right to fines as and when they become payable, is a property-right which the Dominion authority cannot confiscate for the benefit of itself or of another.

The specific ground provided by sec. 109 prevails, in my opinion, over the more general view which I have indicated above—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.

These considerations, if well founded, are sufficient to support a judgment that the appeal should be allowed; the proviso of sec. 1036 of the Criminal Code, whereby fines in Ontario are to be paid over to the municipal or local authority, should be declared *ultra vires* of the Parliament of Canada, and the petition of the Suppliant should be dismissed with costs here and below.

I should add that I express these views with diffidence both because because the appeal raises some questions which are unusual and have not been customarily considered in the Courts of Ontario, and also on account of the high respect which I entertain for the differing conclusion of the trial Judge.

(Orde, J.A.), 28th March, 1930.

ORDE, J.A.: I think there can be little doubt that under the judgments of the Judicial Committee in the escheats case of *Attorney-General of Ontario v. Mercer,* 8 App. Cas. 767, and the *bona vacantia* case of *Rex v. Attorney-General of British Columbia,* [1924] A.C. 213, sec. 109 of the British North America Act had the effect of vesting in the respective Provinces, as royalties or *jura regalia,* all future fines imposed for infractions of the criminal law, as the criminal law of Canada then stood, that is on the 1st July, 1867.

I emphasise the words "as the criminal law of Canada then stood" because, in my judgment, the exclusive authority given by sec. 91 of the British North America Act to the Parliament of Canada to legislate upon "all matters coming within" the subject of "The Criminal Law, except the Constitution of Courts of Criminal jurisdiction, but including the Procedure in Criminal matters," gave Parliament the power, if it should see fit to exercise it, of so dealing with fines for criminal offences as to remove them from the category of royalties belonging to the Provinces. And, in so far as the fine here in question is concerned, I think that Parliament has effectively exercised that power.

Once the term "royalties" is dissociated from the words "lands, mines, and minerals" in sec. 109, and is therefore not to be confined to royalties merely arising out of or incidental to or otherwise of the same nature as lands or mines or minerals (and it must be so dissociated under the two decisions already mentioned), the word has obviously a much more extended meaning. It extends to and includes the prerogative right of the Crown, in certain events, to the ownership of property which may previously not have existed. Royalties of that type differed essentially from the title then given to lands, mines, and minerals which were then in existence and could be ascertained and defined.

Such royalties constitute merely enforceable rights, necessarily dependent upon the happening of some event, to become effective. Just as a right to collect tolls for passage along a highway or over a bridge would depend upon the arrival of a traveller demanding passage, so the right to the escheat in the *Mercer* case depended upon the death without heirs of the owners of the lands, and the right to the *bona vacantia* in the *British Columbia* case depended upon the dissolution and winding-up of the company which had previously owned them. The prerogative right to receive all fines imposed for criminal offences would necessarily depend upon many things for its enforcement. There must at the outset be some law authorising the imposition of a fine as a punishment for some crime. There must be a conviction, and in most cases the exercise of some judicial power imposing the fine.

Where does the legislative power to impose fines by way of punishment for criminal offences rest? It must be in the Dominion Parliament. No one in his senses would suggest that under the British North America Act a provincial legislature could exact a fine for breach of the Criminal Code as such. In whom is vested the power to alter or vary the existing law as to fines for criminal offences? Under no theory can that power be elsewhere than in the Parliament of Canada.

If the legislative power to impose a fine by way of punishment for a crime, and to fix the amount thereof, and to alter or vary the amount or to abolish the fine as a form of punishment, is vested in the Dominion Parliament as part of its jurisdiction over criminal law, it would clearly be within that jurisdiction, under sec. 91, to say where any such fine should go, whether to the Government of Canada, or to the Government of the Province, or to a municipality, or to some charity, or to a common informer, or to the person aggrieved.

In *Attorney-General for Ontario v. Hamilton Street Railway Co.*, [1903] A.C. 524, the Judicial Committee, at p. 529 stated that under para. 27 of sec. 91 it was "the criminal law in its widest sense" that was reserved to the Dominion Parliament. This statement cannot, of course, carry the realm of jurisdiction beyond its legitimate limits, so as to justify a legislative invasion into the field of provincial jurisdiction by enacting ancillary provisions under the professed authority of para. 27: *In re Board of Commerce Act,* (1922) 1 A.C. 191, at p. 199.

But, if we had to deal with the legislative authority of the Parliament of Canada under sec. 91, without reference to any other part of the British North America Act, would there be any question as to its jurisdiction to deal with fines for criminal offences in any way it might see fit?

Has sec. 109 deprived Parliament of that power or can it hamper its exercise of it? Not only is the legislative authority of Parliament over all matters coming within the 29 classes of subjects which are enumerated in sec. 91 exclusive, but the authority may be exercised "notwithstanding anything in this Act."

While it might well be that the statutory vesting of all future "royalties" in the Provinces by virtue of sec. 109 would entitle the Provinces to all such fines as might thereafter be imposed under the criminal law as it then stood,

In the Supreme Court of Ontario.

No. 7.
Reasons for judgment of Appellate Division (Orde, J.A.), 28th March, 1930.
—*continued.*

the right or *jus regale* thereto was necessarily dependent upon that particular species of royalty remaining of the same character, and was, I think, necessarily subject to the exercise of any legislative power over the subject-matter to which the right or royalty might attach.

To hold that the legislative authority of Parliament over the criminal law in its widest sense includes the power to dispose of fines and to dispose of them in such a way as to deprive the Province of what, but for the exercise of such legislative authority, would be the right to collect and receive such fines, does no real violence to sec. 109. The royalties thereby vested in the Provinces included many other species of right than that of receiving fines. The escheat and *bona vacantia* cases are examples of such other rights. And, as pointed out by Lord Sumner in the *bona vacantia* case, at p. 221, there are many other *jura regalia* than those we have been discussing in this case.

Though counsel for the Province may not have put their argument quite in these words, it virtually amounted to this: that, notwithstanding that Parliament may have power to abolish all or any fines as penalties for criminal offences, yet so long as the law provides for the imposition of fines for criminal offences those fines belong of right to the Provinces. Parliament can do nothing to affect their destination otherwise. But, even if this contention is not applicable to fines imposed by legislation subsequent to Confederation (over the disposal of which Mr. Bayly admitted Parliament may have complete jurisdiction), it must apply to fines for common law crimes such as conspiracy under the law as it existed at Confederation.

The legislative authority of Parliament over the classes of subjects enumerated in sec. 91 is, of course, paramount, and legislation upon those subjects may not only validly affect provincial rights of property, as in the Fisheries case, *Attorney-General for Canada v. Attorneys-General for Ontario, Quebec and Nova Scotia,* [1898] A.C. 700, at pp. 712, 713, but may go to the length of expropriating or destroying property rights theretofore vested in the Provinces: *Attorney-General for British Columbia v. Canadian Pacific Railway Co.,* [1906] A.C. 204; though there may be some limitations upon such power, as was exemplified in *Montreal City v. Montreal Harbour Commissioners,* [1926] A.C. 299.

It is unnecessary to consider whether or not an Act of Parliament, passed under its authority over criminal law, which might have the effect of taking away from a Province some concrete piece of property actually vested in it (if such legislation were possible) could be valid. We are not dealing here with property of that character at all. I am clearly of the opinion that when the so-called property consists of something not of a concrete nature, but of a mere right, which, in so far as it may ever bear fruit, is wholly adventitious in character, being dependent, where the right to collect fines is concerned, wholly upon the criminal law as a foundation for the imposition of the fines, then the power of Parliament to legislate upon criminal law is paramount, even if its effect is to destroy any property-rights of the Province in the fines as *jura regalia.* How attenuated the nature of the right to collect a fine is, becomes more apparent when it is remembered that after its judicial imposition the fine

may be remitted by the Governor-General in Council in the exercise of executive clemency.

It really tends to obscure the point to regard the right or *jus regale* to collect a fine as a right of property at all. The so-called property-right is really conditional or adventitious. The thing to which the right entitles the Province to lay claim depends in this case upon the criminal law for its very existence. If the criminal law so defines the thing as to take it out of the ambit of the right, then the thing itself never becomes subject to the provincial claim.

I cannot believe that the British North America Act ever intended that the comprehensive and exclusive power to legislate over the criminal law should be hampered by the mere fact that fines for criminal offences, as the law then stood, were included among the royalties vested in the Provinces at Confederation.

I have found myself quite unable to follow the argument that there is any distinction in this regard between fines for common law offences and fines for offences declared such by statute. The whole field of criminal law is within the domain of Parliament, and the fact that it has left untouched certain common law crimes, such as conspiracy, does not affect its power to legislate as to the punishment for such offences, whether it be by way of fine or otherwise.

The power to impose a fine upon a conviction for conspiracy may exist at common law, but sec. 1035 of the Criminal Code, in authorising the imposition of a fine for any indictable offence, is wide enough to include common law indictable crimes.

The Parliament of Canada having complete power to declare, as part of the criminal law of Canada, how fines shall be paid, and to whom, the sole question remaining to be determined is whether or not Parliament has so legislated as to deprive the Province of Ontario of what might otherwise be its right to receive the fine in the present case.

Section 1036 of the 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 by any other statute, or is still existing and punishable as a common law crime. That section is, in my judgment, wholly within the legislative authority of Parliament, and the proviso that "with respect to the Province of Ontario the fines, penalties and forfeitures and proceeds of estreated recognizances first mentioned in this section" (*i.e.* for the violation of any law) "shall be paid over to the municipal or local authority," etc., is valid and effective.

It is not without interest to note, as examples of the range of Parliamentary legislation as to punishment for crimes, some of the instances in the Criminal Code of what might be regarded, but for Parliament's overriding powers when legislating upon the special subjects mentioned in sec. 91, as intrusions into the domain of "Property and Civil Rights." Goods may be forfeited, such as, for example, gambling implements (sec. 641); liquor near His Majesty's vessels (sec. 639); instruments and materials used in counterfeiting money (sec. 569);

In the Supreme Court of Ontario.

No. 7.
Reasons for Judgment of Appellate Division (Orde, J.A.), 28th March, 1930.
—*continued.*

and dangerous weapons (sec. 622). The Court may order the restitution of stolen property to the owner (sec. 1050), and may order compensation to be paid to persons whose property has been stolen or injured (sec. 1048), or who have in good faith purchased stolen property (sec. 1049). All these are probably justifiable as forms of punishment and so part of the criminal law.

There can be nothing anomalous or unusual in Parliament's assuming complete power to say to whom fines imposed as punishment for crimes shall be paid. And, in my judgment, Parliament's exclusive and overriding 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 Provinces at Confederation by sec. 109 was a mere right, dependent for its enforcement upon events of an adventitious 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 exercised in a field over which the Provinces had no control or jurisdiction whatever.

For these reasons I think the appeal should be dismissed.

FISHER, J.A., agreed with MASTEN, J.A.

(Fisher, J.A.), 28th March, 1930.

No. 8.

In the Supreme Court of Ontario.

No. 8. Judgment of Appellate Division, 28th March, 1930.

JUDGMENT OF APPELLATE DIVISION IN THE SUPREME COURT OF ONTARIO

(No stamps.)

THE HONOURABLE THE CHIEF JUSTICE OF THE SECOND DIVISIONAL COURT.
THE HONOURABLE MR. JUSTICE RIDDELL.
THE HONOURABLE MR. JUSTICE MASTEN.
THE HONOURABLE MR. JUSTICE ORDE.
THE HONOURABLE MR. JUSTICE FISHER.

(Supreme Court Seal)

FRIDAY, the TWENTY-EIGHTH day of MARCH, A.D. 1930.

BETWEEN:

THE CORPORATION OF THE CITY OF TORONTO,

SUPPLIANT,

AND

HIS MAJESTY THE KING,

as represented herein by His Majesty's Attorney-General for the Province of Ontario,

RESPONDENT.

UPON MOTION made unto this Court on the twenty-second day of November, A.D. 1929, by counsel on behalf of the Respondent by way of appeal from the judgment of the Honourable Mr. Justice Rose dated the third day of October, A.D. 1929, in the presence of counsel for the Suppliant: UPON HEARING read the Petition of Right and the Statement of Defence herein and the evidence adduced at the trial: AND UPON HEARING what was alleged by counsel aforesaid, this Court was pleased to direct the Motion to stand over for judgment and the same coming on this day for judgment:

THIS COURT DOTH ORDER that this appeal be and the same is hereby allowed and that the said judgment be varied and as varied be as follows:

1. THIS COURT DOTH DECLARE that the Suppliant is not entitled to the relief sought by the Petition of Right herein and DOTH ORDER AND ADJUDGE the same accordingly.

2. AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the Respondent do recover from the Suppliant his costs of this Petition of Right forthwith after taxation thereof.

In the Supreme Court of Ontario.

No. 8.
Judgment of Appellate Division, 28th March, 1930.
—*continued.*

AND THIS COURT DOTH FURTHER ORDER that the Respondent do recover from the Suppliant his costs of this appeal forthwith after taxation thereof.

JUDGMENT signed this 7th day of May, 1930.

(Sgd.) E. HARLEY,
Senior Registrar, S. C. O.

(Supreme Court Seal)
Entered J.B. 42, page 528.
May 7, 1930.
(Sgd.) E.B.

10

No. 9.

In the Supreme Court of Ontario.

No. 9. Order allowing Security and admitting Appeal to Privy Council, 5th November, 1930.

ORDER ALLOWING SECURITY AND ADMITTING APPEAL TO PRIVY COUNCIL

($1.40 Law Stamps, Cancelled.)

IN THE SUPREME COURT OF ONTARIO

THE HONOURABLE MR. JUSTICE ORDE, IN CHAMBERS. } Wednesday the Fifth day of November, A.D. 1930.

BETWEEN:

THE CORPORATION OF THE CITY OF TORONTO,

SUPPLIANT,

AND

HIS MAJESTY THE KING,

as represented herein by His Majesty's Attorney-General for the Province of Ontario,

RESPONDENT.

1. UPON THE APPLICATION of Counsel for the Suppliant in the presence of Counsel for the Respondent, upon hearing read the judgment of the Second Divisional Court of the Appellate Division of the Supreme Court of Ontario pronounced on this Petition of Right on the 28th day of March, A.D. 1930, the reasons for the said judgment, the affidavit of John Johnston filed and the receipt of the Canadian Bank of Commerce dated October 24th, 1930, for the sum of Two Thousand Dollars paid into Court exhibited thereto, and upon hearing what was alleged by Counsel aforesaid and it appearing that the Suppliant has, under the provisions of The Privy Council Appeals Act, being R.S.O. 1927, chapter 86, a right to appeal to His Majesty in His Privy Council.

2. IT IS ORDERED that the said sum of Two Thousand Dollars so paid into Court be and the same is hereby approved and allowed as good and sufficient security that the Suppliant will effectually prosecute its appeal to His Majesty in His Privy Council from the said judgment of the Second Divisional Court and will pay such costs and damages as may be awarded in case the said judgment is confirmed.

3. AND IT IS FURTHER ORDERED that an appeal by the said Suppliant in this Petition of Right to His Majesty in His Privy Council from the said judgment of the Second Divisional Court be and the same is hereby admitted.

In the Supreme Court of Ontario.

No. 9.
Order allowing Security and admitting Appeal to Privy Council, 5th November, 1930.
—*continued.*

4. AND IT IS FURTHER ORDERED that the costs of this application be costs in the said Appeal.

"E. HARLEY,"
Senior Registrar, S. C. O.

Entered O.B. 114, pages 377-8.
Nov. 6, 1930.
"E.B."

PART II—EXHIBITS.

In the Supreme Court of Ontario.

Exhibits.
No. 1.
Notice—E. Bayly to Attorney-General for Canada,
May 18th, 1926.

EXHIBIT No. 1.

NOTICE—E. BAYLY TO ATTORNEY-GENERAL FOR CANADA.

IN THE SUPREME COURT OF ONTARIO

BETWEEN:

THE CORPORATION OF THE CITY OF TORONTO,

SUPPLIANT,

AND

HIS MAJESTY THE KING,

represented herein by His Majesty's Attorney-General for the Province of Ontario,

RESPONDENT.

TAKE NOTICE that proceedings by way of Petition of Right have been instituted by the Suppliant in the Supreme Court of Ontario against the Respondent for a declaration that the Suppliant is entitled to be paid a fine of Sixty Thousand Dollars ($60,000) paid to the Senior Registrar of the Supreme Court of Ontario by one Aemilius Jarvis the elder, pursuant to an Order of the First Appellate Division of the Supreme Court of Ontario, dated the 23rd day of March, 1925, and for an Order that the Government of the Province of Ontario be ordered and adjudged to pay the said amount with interest to the Suppliant, and that the Respondent in its defence has submitted and at the trial will contend that the Petition is bad in substance and in law for the reasons that:—

(a) the proviso to subsection 1 of section 1036 of the Criminal Code as enacted by section 8 of chapter 16 of the Statutes passed by the Parliament of Canada in the 12th and 13th years of the reign of His Majesty King George the Fifth is *ultra vires* the Parliament of Canada, and—

(b) that the said fine is the property of His Majesty in the right of the Province of Ontario under section 109 of The British North America Act,

AND FURTHER TAKE NOTICE that the said Petition of Right was set down for trial at the Toronto Non-Jury sittings of the Supreme Court of Ontario on the 30th day of April, 1926, AND THAT it will be placed upon the ready list of the said sittings on Friday, the twenty-first day of May, 1926,

In the Supreme Court of Ontario.

Exhibits.
No. 1.
Notice—E. Bayly to Attorney-General for Canada, May 18th, 1926.
—*continued.*

AND THAT no definite date has been set for the trial of the said Petition, AND THAT this notice is given pursuant to section 33 of The Judicature Act, Revised Statutes of Ontario 1914, chapter 56.

DATED at Toronto this 18th day of May, 1926.

E. BAYLY,
Parliament Buildings,
Toronto.
Solicitor for the Respondent.

To:—
His Majesty's Attorney-General
for Canada.

No. 1.
Letter (copy), Deputy Attorney-General for Ontario to Deputy Minister of Justice for Canada, November 6th, 1928.

LETTER (COPY), DEPUTY ATTORNEY-GENERAL FOR ONTARIO TO DEPUTY MINISTER OF JUSTICE FOR CANADA.

1082-25

Toronto 5, Nov. 6th, 1928.

My dear Sir:—

—Re City of Toronto vs. The King—

Referring to your letter to me of 29th January, 1927, in which you stated it was not the intention of the Attorney-General for Canada to be represented on this action, I beg to say that it will probably come up this Friday and I assume that you will take the same position as you did then. As the Judge may ask, I shall be glad to receive either a wire or a letter, so that the trial which has been long delayed will not be further postponed from next Friday.

Yours faithfully,

(E. BAYLY),
Deputy Attorney-General.

W. Stuart Edwards, Esq., K.C.,
Deputy Minister of Justice,
Ottawa, Ont.

In the Supreme Court of Ontario.

Exhibits.
No. 1.
Letter, Deputy Minister of Justice for Canada to Deputy Attorney-General for Ontario, November 7th, 1928.

Letter, Deputy Minister of Justice for Canada to Deputy Attorney-General for Ontario.

(Crest)
Department of Justice, Canada
WSE/ELJ.
Please address
The Deputy Minister of Justice
Ottawa

Ottawa, November 7, 1928.

Atty. Gen'l's. Dept.
Received
Nov. -8 1928
Ackng'd .....

Re: City of Toronto v. The King.

My dear Sir,

In reply to your letter of the 6th instant (1082-25), I may say that it is not the function of the Attorney-General of Canada to be heard at the trial of this action. He, however, reserves the right to appear later on if the case should go to a higher court.

Some days ago I was served by the solicitors for the City with the usual statutory notice, and in reply advised them to the same effect.

Yours faithfully,

W. STUART EDWARDS,
Deputy Minister of Justice.

E. Bayly, Esq., K.C.,
Deputy Attorney-General,
Toronto, 5, Ont.

In the Supreme Court of Ontario.

Exhibits. No. 2. Letter, Deputy Minister of Justice for Canada to City Solicitor for Toronto, October 30th, 1928.

EXHIBIT No. 2.

LETTER, DEPUTY MINISTER OF JUSTICE FOR CANADA TO CITY SOLICITOR FOR TORONTO.

(Crest)
DEPARTMENT OF JUSTICE, CANADA
WSE/ELJ.
Please address
THE DEPUTY MINISTER OF JUSTICE
OTTAWA

Ottawa, October 30, 1928.
Received
Oct. 31 '28
City Solicitor's Office

City of Toronto v. The King.

Dear Sir,

I am in receipt under date the 29th instant of a notice from your Ottawa agents stating that at the trial of this action the constitutional validity of the proviso in section 1036 of the Criminal Code, relating to the application of fines, etc., in the Province of Ontario will be called into question.

I am to state that the Attorney-General of Canada does not desire to be heard at the trial, but reserves his right to appear later on if this point should be carried to a higher court.

Yours truly,

W. STUART EDWARDS,
Deputy Minister of Justice.

C. M. Colquhoun, Esq., K.C.,
City Solicitor,
City Hall,
Toronto, Ont.

In the Supreme Court of Ontario.

Exhibits.
No. 3.
Copy of an Order-in-Council approved by His Honour the Lieutenant-Governor of the Province of Ontario, November 28th, 1916.

EXHIBIT No. 3.

COPY OF AN ORDER-IN-COUNCIL APPROVED BY HIS HONOUR THE LIEUTENANT-GOVERNOR OF THE PROVINCE OF ONTARIO.

(Crest)
ONTARIO

EXECUTIVE COUNCIL OFFICE

Copy of an Order-in-Council, approved by His Honour the Lieutenant-Governor, dated the 28th day of November, A.D. 1916.

The Committee of Council have had under consideration the report of the Honourable the Provincial Treasurer, dated 27th November, 1916, wherein he states that by the Criminal Code, Section 1036, as amended by 8-9 Edward VII (Dom.) Chapter 9, it is enacted that when 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 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, and that in the said Section as amended power is given to the Lieutenant-Governor in Council to direct that any fine, penalty or forfeiture or any portion thereof, paid over to the Treasurer of the Province under the said section be paid to the Municipal or local authority if any, which wholly or in part bears the expense of administering the law under which the same was imposed or recovered, or to be applied in any other manner deemed best adapted to obtain the objects of such law and secure its due administration. That applications have been at various times made by Municipalities for refunds of fines or some portion thereof imposed by Magistrates, and on the 1st day of November, 1916, a deputation representing a large number of Municipalities waited upon the Government and made similar requests.

The Minister recommends that commencing on the First day of January, 1917, one-half of the net amount of the said fines, penalties or forfeitures received pursuant to the said section 1036 by the Provincial Treasurer, be paid over to the Municipality in which the fine, penalty or forfeiture was imposed or recovered.

The Committee concur in the recommendation of the Minister and advise that the same be acted on.

Certified,

C. F. BULMER,
Clerk, Executive Council.

In the Supreme Court of Ontario.

Exhibits.
No. 4.
Notice (copy), City of Toronto to E. Harley et al, April 22nd, 1925.

EXHIBIT No. 4.

NOTICE (COPY), CITY OF TORONTO TO E. HARLEY ET AL.

TO E. HARLEY, Senior Registrar of the Supreme Court of Ontario,
AND TO Major W. J. Morrison, Superintendent, Toronto Municipal Farms, Langstaff,

AND TO all other persons whom it may concern:

WHEREAS by Judgment of the Appellate Division of the Supreme Court of Ontario dated the Twenty-third day of March, A.D. 1925, Aemilius Jarvis, Senior, at present undergoing a term of imprisonment in the Toronto Municipal Farm, there was imposed upon the said Jarvis a fine of Sixty thousand dollars, and it was by the said judgment adjudged that in default of payment of the said fine the said Jarvis should be imprisoned in the common Gaol of the county of York for a further term of five years, unless the fine should be sooner paid.

NOW THEREFORE TAKE NOTICE that by virtue of Section 1036 of the Criminal Code, being Revised Statutes of Canada, 1906, Chapter One hundred and forty-six as amended by Chapter Forty-six of the Statutes of 1919, and as amended by Chapter Sixteen of the Statutes of 1922, this fine must be paid over to the Corporation of the City of Toronto.

AND FURTHER TAKE NOTICE that in case this fine is paid over to any of you, the Corporation of the City of Toronto will hold the one to whom such fine is paid responsible for the payment over of the said fine to it in accordance with the provisions of the Criminal Code.

DATED at Toronto this Twenty-second day of April, A.D. 1925.

"THOMAS FOSTER,"
Mayor.

SEAL

"A. E. BLACK,"
Deputy City Treasurer, and Keeper of the Seal.