

In the Privy Council.

No. 54 of 1931.

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 the Attorney-General of the Province of
Ontario (Respondent) Respondent,

AND

THE ATTORNEY-GENERAL OF CANADA *Intervener.*

RESPONDENT'S CASE.

1. This is an appeal from a judgment of the Appellate Division of the Supreme Court of Ontario (Latchford C.J., Riddell, Masten, Orde and Fisher JJ.A.) delivered on the 28th March, 1930, reversing by a majority (Latchford C.J. and Orde J.A. dissenting) the judgment at the trial (Rose J.) delivered on the 23rd April, 1929, and entered on the 3rd October, 1929, in favour of the Appellant. Record.
p. 43.
p. 23.

2. One Jarvis and another, having been convicted on the 24th October, 1924, of the criminal offence of conspiracy to defraud the Government of Ontario, were sentenced to fine and imprisonment. The fine, which as reduced on appeal amounted to \$60,000, having been paid, the Appellant Corporation by Petition of right dated the 12th May, 1925, claimed to recover from the Crown in right of the Province of Ontario the amount of the fine with interest thereon from the date upon which it came to the p. 4, l. 27.
pp. 1-5.

Record. hands of the Treasurer of the Province of Ontario. The Appellant's claim was based on an amendment to the Canadian Criminal Code passed by the Parliament of Canada in the year 1922.

p. 7. 3. The Respondent's contention, which has been sustained by the judgment of the Appellate Division, is that such fines being *jura regalia* and within the meaning of the words "Royalties belonging to the several Provinces . . . at the Union," contained in Section 109 of the British North America Act, 1867, form part of the revenues of the Province and that legislation of the Parliament of Canada purporting to transfer such rights from the Province to the Municipality was incompetent. 10

4. Section 109 of the British North America Act is as follows :—

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

The term "Royalties" in Section 109 has been construed by the Judicial Committee in a number of Cases including *Rex v. Attorney-General of British Columbia* (1924) A.C. 213 and *Attorney-General for Ontario v. Mercer* (1883) 8 A.C. 767.

5. The following additional sections of the British North America Act 1867 are referred to :—

" 91. It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, 30 it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say :—

* * * * *

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

* * * * *

" 92. In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next herein- 40 after enumerated; that is to say :—

* * * * *

“ (13). Property and civil rights in the Province.

“ (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.

* * * * *

10 “ 102. 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 service of Canada in the manner and subject to the charges in this Act provided.”

6. Section 444 (under which the conviction was had) and Sections 1035 and 1036 of the Canadian Criminal Code, not including the amendment of 1922 hereinafter referred to, were, in part, as follows :—

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

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

30 “ 1036. Whenever no other provision is made by any law of Canada for the application of any fine, penalty or forfeiture imposed for the violation of any law or of the proceeds of an estreated recognisance, the same shall be paid over by the magistrate or officer receiving the same to the Treasurer of the Province in which the same is imposed or recovered, except, that,—”

(Here follow certain exceptions not material to this case.)

7. The Dominion Statutes 12 & 13 George V. ch. 16 Section 8 amended Sub-section 1 of Section 1036 of the Criminal Code by adding the following proviso at the end thereof :—

40 “ Provided, however, that with respect to the Province of Ontario the fines, penalties and forfeitures and proceeds of estreated recognisances first mentioned in this section shall be paid over to the municipal or local authority where the municipal or local authority

Record. wholly or in part bears the expense of administering the law under which the same was imposed or recovered.”

8. In exercise of the powers conferred on the Provinces by the British North America Act 1867, to administer justice in criminal matters and to constitute Courts both of Civil and of criminal jurisdiction and to regulate municipal Institutions, the Province of Ontario has enacted that Court Houses should be built and maintained by the Municipalities. Accordingly, it was admitted that the Appellant, in part, bore the expense of administering the law under which the fine in question had been imposed.

p. 11, l. 3.

9. All the judges in the Ontario Courts accept the view that at the date of the Union in 1867 conspiracy to defraud was a crime punishable by fine and imprisonment; that the right to fines imposed in respect of such offences was one of the *jura regalia* or Royalties and that, having regard to the decisions of the Judicial Committee, the word “Royalties” in Section 109 of the British North America Act, 1867, includes all Royalties belonging to the Provinces at the Union.

p. 22, l. 10.

p. 28, l. 8.

p. 32, l. 11.

p. 34, l. 28.

p. 39, l. 44.

The differences of opinion were limited to the questions whether the right to recover the fine in question was a Royalty belonging to the Province at the Union and if so, whether it was competent to the Parliament of Canada, in exercise of its power to legislate in regard to the criminal law, to deprive the Province of such right and to confer it upon another.

p. 47.

p. 49.

10. Notice that the constitutional validity of the proviso added to Section 1036 of the Criminal Code in 1922 was brought in question was given to the Attorney-General for Canada, but, while reserving his right to appear later if the Case should go to a higher Court, the Attorney-General of Canada declined to be represented by Counsel at the trial.

pp. 18-22.

11. Chief Justice Rose (then Mr. Justice Rose) who delivered judgment on the 23rd April, 1929, stated that 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*; that if the fine in question is 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 that if such prerogative right belonged at Confederation to the Crown in the right of the Province of Canada it would now belong to the Crown in right of the Province of Ontario. This resulted, in the learned judge's opinion, from Section 109 of the British North America Act and the decision of the Judicial Committee in *Rex v. Attorney-General of British Columbia*. After referring to legislation in Upper Canada under which fines and penalties were in certain cases to be paid to the Treasurer of the County and citing authorities, he came to the conclusion that the prerogative right of the Province did not at Confederation extend to all fines but only to fines in respect to which no other disposition had been made by Statute. He observed that it could scarcely be said that the power to enact that the money when paid should

belong to someone other than the Crown was a necessary incident of the power to create the fine, but he did not think it followed that the Respondent's contention should prevail. Starting with the fact that criminal law in its widest sense was reserved by the British North America Act, Section 91 (27), to the Dominion Parliament and considering that Section 1036 of the Criminal Code, including the proviso, was "in pith and substance" legislation within Section 91, it followed that such legislation ought to be upheld as a whole unless there was a compelling reason for saying that part was beyond the power of Parliament. He thought that in prescribing punishments
 10 Parliament had an unfettered choice; that if the punishment selected were a fine the choice of the kind of fine seemed to be equally unfettered and that, the fine imposed in the present case being of a class that is not reached by the royal prerogative, no royalty came into existence and Section 109 of the British North America Act had no application. The judgment accordingly directed payment by the Respondent to the Appellant of the amount of the fine with interest.

Record.

12. The Respondent appealed to the Appellate Division of the Supreme Court of Ontario, and, on the 28th March, 1930, judgment was delivered allowing the appeal and declaring that the Appellant was not entitled to
 20 the relief sought for in the Petition of Right. Riddell, Masten and Fisher J.J.A. were in favour of allowing the appeal. Latchford C.J. and Orde J.A. dissented.

p. 25.

p. 43.

13. Chief Justice Latchford (dissenting) stated the questions for consideration as being: was the fine in question a royalty belonging to the Province at the time it was imposed and, if so, does it fall within the ambit of Section 109 of the British North America Act as did *bona vacantia* in the British Columbia Case. He was of opinion that the fine, even if a royalty, was not a royalty that at any time belonged to the Province; that, apart from the constitution of Courts of criminal jurisdiction, criminal law in its
 30 widest sense was reserved to the Dominion by the British North America Act; that the fine was the result of the exercise of that jurisdiction and that it was within the power of the Dominion to enact the proviso added to Section 1036 of the Criminal Code in 1922.

pp. 27-28.

14. Mr. Justice Riddell agreed with the trial judge that a fine imposed in a criminal case is a *jus regale* or royalty, and that the word "royalties" covered not only concrete moneys accrued due at the time of the Union but also the right to receive moneys of this character as and when they accrue due from time to time. He differed, however, from the trial judge upon the question whether such royalties belonged to the Province at the Union. The
 40 legislation in Upper Canada cited by the trial judge did not, in Mr. Justice Riddell's opinion, contain a statutory direction to pay the fine in such a case as the present to the Treasurer of the County and, even if it had done so, he was not to be considered as agreeing to the proposition that such a statutory direction would have taken the fine out of the category of "Royalties belonging to the Province." His conclusion was that at the

pp. 28-32.

Record. time of the Union in 1867 the fine for this offence went to the King, was a *jus regale*, the right to receive it a "royalty," and that this right was property of the Province which could not be taken away by the Dominion. He considered that if the disposition of a fine comes within "the Criminal law" at all, these words must be read as limited by the provision giving royalties as property to the Province.

pp. 32-38.
p. 42, l. 17.

15. Mr. Justice Masten, with whom Mr. Justice Fisher concurred, stated that it was not in controversy that fines generally speaking were royalties; that the question whether the term "royalties" in Section 109 was subject to some narrower interpretation excluding fines had been 10 determined by the Judicial Committee in *Rex v. Attorney-General for British Columbia* (1924) A.C. 213, where it was held that *bona vacantia* belonged to the Province and that he could draw no distinction between *bona vacantia* and fines. Mr. Justice Masten agreed with Mr. Justice Riddell that the Statute of Upper Canada relied on by the trial judge did not divest the Crown of fines such as that now in question. In addition he pointed out that there was nothing in the Upper Canada Statute which gave the Treasurer of a county or the Receiver-General of a Province the right to sue a defendant for the fine imposed upon him and that the sentence of the Court and the judgment read that the defendant "do pay to the Crown" the fine imposed. 20

p. 4, l. 39.

His conclusion was that at Confederation 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 Assembly to the municipalities or to the consolidated fund. The learned Judge considered it unnecessary to deal with the suggestion that the Dominion Parliament in the exercise of its exclusive jurisdiction over criminal law in its widest sense had power to create a new offence with a new penalty attached and as part of such enactment to provide that the fine should never become a royalty of the Crown but should be payable direct to the municipality, because conspiracy to defraud was not a new 30 offence, but had been a crime in Upper Canada punishable by fine in addition to imprisonment and had so continued. The only new enactment by the Dominion was the proviso added to Section 1036 in 1922 by which Parliament assumed to take away the right of property which the British North America Act, 1867, had accorded to the Crown in right of the Province, and in the opinion of the learned Judge this proviso was *ultra vires* the Parliament of Canada.

pp. 38-42.

16. Mr. Justice Orde (dissenting) considered that the effect of Section 91 (27) of the British North America Act was to give Parliament the power, if it should see fit to exercise it, of so dealing with fines for criminal offences 40 as to remove them from the category of royalties belonging to the Provinces; that in so far as the fine in question is concerned Parliament had effectively exercised that power and that it would clearly be within the jurisdiction of Parliament over criminal law to say where any such fine should go, whether to the Government of Canada or the Government of the Province or a municipality or some charity or a common informer or the person aggrieved.

The learned Judge distinguished royalties, which were dependant upon the happening of some event, from property such as land and he did not consider that Section 109 of the British North America Act had deprived Parliament of its power to deal with fines for criminal offences in any way it might see fit. While the statutory vesting of all future royalties in the Province by virtue of Section 109 would entitle the Province to all such fines as might thereafter be imposed under the criminal law as it then stood the right or *jus regale* was in the learned Judge's opinion necessarily dependant upon that particular species of royalty remaining of the same character and was subject to the
 10 exercise of any legislative power over the subject matter to which the right or royalty attached.

17. By order of His Majesty-in-Council, the Attorney-General of Canada has been granted leave to intervene in this Appeal.

18. The Respondent submits that the appeal ought to be dismissed and the judgment of the Appellate Division of the Supreme Court of Ontario affirmed for the following, among other

REASONS.

1. Because the fine in question was payable to the Crown.
- 20 2. Because the right to fines imposed by sentences in criminal cases is a royalty within the meaning of Section 109 of the British North America Act, 1867.
3. Because such royalty belonged to the Province of Canada at the Union and now belongs to the Province of Ontario.
4. Because it is not competent to the Dominion Parliament to appropriate to another a source of revenue assigned by the British North America Act, 1867, to the Province.
5. Because the proviso added to Section 1036 of the Criminal Code by the Dominion Statute of 1922 is not criminal law or ancillary thereto and is *ultra vires*.
- 30 6. Because the administration of Justice, including the constitution, maintenance and organisation of the Courts and all expenses connected therewith, are matters assigned to the Provincial Legislatures.
7. Because the reasons for the judgments of Riddell and Masten J.J.A., concurred in by Fisher J.A., are right.

E. BAYLY.

In the Privy Council.

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*On Appeal from the Appellate Division of the
Supreme Court of Ontario.*

BETWEEN

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CITY OF TORONTO (*Suppliant*) *Appellant,*

AND

HIS MAJESTY THE KING repre-
sented herein by the Attorney-
General of the Province of Ontario
(*Respondent*) *Respondent,*

AND

THE ATTORNEY - GENERAL
OF CANADA - - - *Intervener.*

CASE FOR THE RESPONDENT.

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