

BETWEEN:

HIS MAJESTY THE KING, in the right of the Dominion of Canada on the Information of the Attorney-General for Canada,

PLAINTIFF;

AND

THE ATTORNEY-GENERAL FOR ONTARIO,

DEFENDANT.

1933
 Oct. 14.
 Dec. 1.

Excise Act—Whether Province or Dominion entitled to fine imposed thereunder—Criminal Code—Prisons and Reformatories Act

D. was convicted by an Ontario Magistrate under s. 176 of the Excise Act, R.S.C., 1927, c. 60, and sentenced to imprisonment for one month and a fine of \$200, and in default of payment, to a further term of imprisonment for six months. He served the definite term of one month's imprisonment in the common gaol at North Bay and was then transferred to Burwash Industrial Farm, an institution maintained and administered by the Government of the Province of Ontario. While there, the fine of \$200 was paid to that institution and the money was transmitted to the Treasurer of the Province of Ontario from whom it was demanded by the Commissioner of Excise on behalf of the Receiver General of Canada. This action was brought to determine the ownership of the money.

Held, upon a consideration of s. 1036 of the Criminal Code, s. 133 of the Excise Act, R.S.C., c. 60 and s. 40 of the Prisons and Reformatories Act, R.S.C., 1927, c. 163, the money in question is the property of His Majesty in the right of the Dominion.

INFORMATION exhibited by the Attorney-General of Canada, to recover from the Defendant a certain sum of money paid to Defendant by way of fine imposed upon a person convicted under The Excise Act, R.S.C., 1927, c. 60.

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The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

No oral evidence was adduced, the facts material and relevant to the issues being admitted. Those particularly applicable are cited in the reasons for judgment.

F. P. Varcoe, K.C., for plaintiff.

E. Bayly, K.C., for defendant.

THE PRESIDENT, now (December 1, 1933) delivered the following judgment:

This is in the nature of a test case to determine the construction of certain statutory provisions to which I shall refer presently.

In June, 1932, one Denomme was convicted by the Police Magistrate of North Bay, Ont., under sec. 176 of the Excise Act, and was fined \$200 and costs and sentenced to imprisonment for one month, and in default of payment of the fine to a further term of imprisonment for six months.

After Denomme had served the definite term of imprisonment of one month in the common gaol at North Bay, he was transferred to the Burwash Industrial Farm, a prison or reformatory institution maintained and administered by the Government of the Province of Ontario, and while there serving the alternative term he paid the fine of \$200 to the Ontario institution mentioned, which sum was duly transmitted to the Provincial Treasurer of Ontario by whom it has since been retained though payment over of the same was demanded by the Commissioner of Excise, to the Receiver General of Canada. The question for decision is, who is entitled to the said sum of \$200, His Majesty in the right of the Dominion of Canada, or the Treasurer of the Province of Ontario. The plaintiff claims the moneys referred to by virtue of sec. 133 of the Excise Act, and sec. 1036 of the Criminal Code, while the defendant asserts claim thereto by virtue of sec. 40 of the Prisons and Reformatories Act, Chap. 163, R.S.C., 1927.

It will be convenient to refer at once to the statutory provisions which relate to the issue falling for determination. Sec. 1036 of the Criminal Code provides as follows: 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 shall be paid over by the magistrate or officer receiving the same to the treasurer of the province in which the same is imposed or recovered, except, that, (a) all fines, penalties and forfeitures imposed in respect of the breach of any of the revenue laws of Canada. . . . , and (b) all fines, penalties and forfeitures imposed for whatever cause in any proceeding instituted at the instance of the Government of Canada or of any department thereof in which that Government bears the cost of prosecution . . . , shall belong to His Majesty for the public uses of Canada, and shall be paid by the magistrate or officer receiving the same to the Minister of Finance and form part of the Consolidated Revenue Fund in Canada: Provided however, that with respect to the province of Ontario the fines, penalties and forfeitures . . . 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.

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Then ss. (3) of the same section provides:

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

The next statutory provision to be mentioned is sec. 40 of the Prisons and Reformatories Act, Chap. 163 R.S.C., 1927, which in part reads as follows:

Any person who, under the provisions of this Act, is liable to be removed from any prison or refuge, may be so removed notwithstanding that such imprisonment, or any part thereof, is imposed in default of the payment of a fine or penalty in money, and that such person is entitled to be discharged upon payment of such fine or penalty. (2) If the fine or penalty is paid after the removal of the offender, the same shall be paid to the proper officer of such prison or refuge, to defray the expenses of the removal of the said offender, and otherwise for the uses of such prison. This section also provides that nothing therein contained shall affect the right of any private person to such fine or penalty, or any part thereof. The Prisons and Reformatories Act authorized the transfer of prisoners from the common gaols of the province of Ontario to an industrial farm; it is not contended that the prisoner Denomme was unlawfully removed from the gaol at North Bay to Burwash Industrial Farm.

The remaining statutory provision to be mentioned is sec. 133 of the Excise Act, as enacted by sec. 6 of Chap. 30 of the Statutes of Canada for 1932, entitled an Act to amend the Excise Act, the first clause of which reads as follows:

All forfeitures and penalties under this Act, after deducting the expenses in connection therewith, shall belong to His Majesty for the public uses of Canada;

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it is provided however by subsections (a) and (b) that the net proceeds of any penalty or forfeiture may be divided among certain persons who gave information or otherwise aided in the recovery of the penalty or forfeiture. Sec. 133 of the Excise Act as enacted in 1932 differs slightly from the repealed section as found in Chap. 60 of the Revised Statutes of Canada 1927; the only difference between the repealed sec. 133 of the Excise Act, Chap. 60, R.S.C., 1927, and the substituted sec. 133 enacted in 1932, is that in the latter section the words "unless it is otherwise expressly provided" are omitted from the first clause of the section as quoted above, and it is suggested that the draftsman, in eliminating those words, had in mind sec. 40 of the Prisons and Reformatories Act and intended thereby to remove any doubt that all forfeitures and penalties imposed under the Excise Act should belong to His Majesty for the public uses of Canada.

Examining now with some care the statutory provisions which I have mentioned. Section 1036 of the Criminal Code may be reconstructed to read thus: "Whenever no other provision is made by any law of Canada, all fines or penalties imposed for the violation of any law, shall, in the province of Ontario, be paid over to the municipal or local authority bearing in whole or in part the expense of administering the law under which the same was imposed or recovered, except, that, all fines or penalties imposed in respect of the breach of any of the revenue laws of Canada, and all fines or penalties imposed for whatever cause in any proceedings instituted at the instance of the Government of Canada or any department thereof shall belong to His Majesty for the public use of Canada." That expresses, accurately and fully I think, the meaning of that section, in so far as this case is concerned. The scheme of the section was clearly to divide all fines and penalties recovered into two heads or groups with a different destination for each. The fines, penalties and forfeitures referred to in the first clause of the section, and designated in the last clause of ss. 1 of section 1036 as the fines, penalties, etc., "first mentioned in this section" relate generally to any fines or penalties imposed for the violation of any law and are to be paid over, in the province of Ontario, to certain municipal or local authorities, but "any law," by subsec-

tions (a) and (b) of sec. 1, does not include "revenue laws" for which another destination is prescribed for any fines or penalties paid thereunder, the latter group being expressly excepted from inclusion in the former group. So far, I think, that there is no difficulty whatever in ascertaining the purpose and meaning of this section of the Code. Standing by itself, it means that generally fines or penalties imposed for violation of any law shall, in the province of Ontario be paid over, by the magistrate or officer receiving the same, to a particular municipality or local authority, but there is an exception to this, namely, that if the fine is imposed for breach of the revenue laws of Canada, such as the Excise Act, or for whatever cause in any proceeding instituted at the instance of the Government or of any department thereof, the same belongs to His Majesty for the public uses of Canada. That would seem to be a natural and logical disposition of such matters. Then sec. 133 of the Excise Act, enacted as late as 1932, states that all penalties imposed under that Act shall belong to His Majesty for the public uses of Canada, provided however, that the net proceeds may be divided among certain persons who aided in the recovery of the penalties. This provision affirms the principle found in sec. 1036 of the Criminal Code in so far as concerns the destination of fines or penalties imposed and recovered for violation of the revenue laws of Canada. The provisions of the Criminal Code and the Excise Act therefore make it clear that it was the intention of parliament that the fine or penalty in question here, one recovered for the violation of the revenue laws of Canada, was intended to belong to His Majesty for the public uses of Canada.

But it was contended by Mr. Bayly that sec. 40 of the Prisons and Reformatories Act provides an exception to the provisions of the Criminal Code and the Excise Act mentioned, in respect of the distribution of certain fines or penalties. Sec. 40 of the former Act provides that where a term of imprisonment is imposed in default of the payment of a fine or penalty in money, and default occurs prior to the prisoner's removal from one prison to another under the provisions of that Act, but is paid after the removal of the offender, the same shall be paid over, not to the municipal or local authority in the Province of

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Ontario bearing the expense of administering the law under which the same was imposed or recovered as provided by the Criminal Code, but to the proper officer of either the prison from which the prisoner was removed or the one to which he was removed, "to defray the expenses of the removal of the said offender, and otherwise for the uses of such prison". It is difficult to say just what "prison" is to have the use of such fine or penalty, the prison from which the prisoner was removed,—ordinarily the common gaol as it was in this case—or the prison to which he was removed. It does look as if the statute directs the money penalty to go to the prison from which the prisoner was removed. But whatever the section in this respect means or was intended to mean, it states that the money penalty to which it refers is to be paid to some officer to defray the expenses of the removal of the offender, and otherwise "for the uses of such prison," and not as formerly, in the Province of Ontario, to the municipal or local authority mentioned in the last clause of sec. 1 of sec. 1036 of the Criminal Code. That would seem to be the only reason requiring the enactment of sec. 40 of the Prison and Reformatories Act, so far as I can see; it purports to alter the previously prescribed destination of the fines or penalties referred to therein, as I have just explained. The section, and its purpose, is perhaps difficult to understand, but after all that, I think, matters little. It is clear, I think, that whatever was the real intention and purpose of sec. 40 referred to, it was not intended to disturb the division or grouping of fines and penalties mentioned in the Criminal Code provision, still less that fines or penalties imposed for violation of the revenue laws of Canada should not be paid over by the magistrate or officer receiving the same to the proper Dominion authority but to be applied to the uses of some prison, which, if intended, one would expect to find expressed in the most explicit language. Sec. 40 merely purports to alter the destination of a fine falling within the first group of fines, and does not expressly or by implication suggest that the fines mentioned in ss. (a) and (b) of sec. 1036 of the Criminal Code and sec. 133 of the Excise Act, should be paid over to any authority except that there mentioned. The words "whenever no other provision is made by any law of Canada for the application of any fine," at the beginning of the Criminal Code pro-

vision, was stressed by Mr. Bayly, but I doubt if such words were intended to apply to the Province of Ontario, because the last clause of sec. 1 of sec. 1036 of the Criminal Code fixes another destination altogether in that Province for the fines mentioned in the first part of that section, and which fall within the first group of fines, and does not, I think, relate to that group of fines distinctly earmarked by that statute, and the Excise Act, as belonging to the Dominion authorities. There is nothing in sec. 40 of the Prisons and Reformatories Act which suggests that any of the fines falling within the second group are not to be paid over to the Dominion authorities as prescribed by the provisions of the Criminal Code and the Excise Act.

Upon a careful consideration of the statutes here relevant, I have no difficulty in reaching the conclusion that the moneys in question belong to His Majesty in the right of the Dominion by virtue of ss. (a) and (b) of sec. 1 of sec. 1036 of the Criminal Code, and sec. 133 of the Excise Act, although I must confess that during the hearing it did appear to me that neither the affirmative nor the negative of the contrary propositions advanced by counsel were obvious. I think there is no conflict between the provisions of the Criminal Code and the Excise Act, and sec. 40 of the Prisons and Reformatories Act. In the result the plaintiff's contention must prevail but there will be no order as to costs.

Judgment accordingly.

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