[HIGH COURT OF AUSTRALIA.]

HIS MAJESTY THE KING . . . . APPELLANT;
DEFENDANT,

AND

THE MAYOR, ALDERMEN, COUNCILLORS AND CITIZENS OF THE CITY OF MELBOURNE . . . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Feb.* 17; *March* 1.

Knox C.J., Isaacs, Gavan Duffy and Rich JJ.

By-law—Penalty—To whom payable—Crown or City of Melbourne—Local Government Act 1915 (*Vict.*) (*No.* 2686), *secs.* 4, 197, 223, 720, 721—*Penalties Act* 1915 (*Vict.*) (*No.* 2706), *sec.* 3.

Sec. 4 of the *Local Government Act* 1915 (Vict.) provides that the Act "shall not apply to the City of Melbourne or the City of Geelong except where expressly so stated." Sec. 721 provides that "Except where it is by this Act provided to the contrary all penalties recovered for offences against this Act committed against the by-laws or regulations or in the municipal district or in any way in respect of any municipality shall be paid into the municipal fund of such municipality."

Held, that sec. 721 applies to the City of Melbourne, and, therefore, that all sums recovered by process of law for penalties for breaches of by-laws made by the Council of the City of Melbourne under the *Local Government Act* 1915 are payable to the City of Melbourne Corporation.

Decision of the Supreme Court of Victoria: *Mayor &c. of Melbourne* v. *The King*, (1919) V.L.R., 626; 41 A.L.T., 73, affirmed.

APPEAL from the Supreme Court of Victoria.

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In an action brought in the Supreme Court by the Mayor, Aldermen, Councillors and Citizens of the City of Melbourne against His Majesty the King, the following special case was stated by the parties :—

This action was commenced on 5th April 1919 by a petition whereby the plaintiffs claimed, (*a*) for money received by the defendant for the use of the plaintiffs, 12s. 6d. ; (*b*) a declaration that all sums recovered by process of law for penalties and costs for breaches of by-laws made by the Council of the City of Melbourne under the *Local Government Act* 1915 are payable to the plaintiffs : and the parties have concurred in stating the questions of law arising herein in the following case for the opinion of the Supreme Court :—

1. The plaintiffs are a body corporate incorporated under the law of the State of Victoria.

2. Under and by virtue of the powers conferred on it by the *Local Government Act* 1915 the Council of the City of Melbourne made a by-law, to wit, By-law No. 134 of the City of Melbourne.

3. Upon the information of one Michael Martin O'Toole, informant, against A. Dobles, defendant, for a breach of the said By-law No. 134, the said defendant, A. Dobles, was on 19th December 1918 convicted by the Court of Petty Sessions sitting at Melbourne and fined the sum of 10s. with 2s. 6d. costs ; and the said fine amounting to 10s. was paid by the said defendant A. Dobles to the Clerk of the Court of Petty Sessions at Melbourne.

4. In accordance with a general demand by the defendant for all sums recovered by process of law for penalties for breaches of by-laws made by the said Council under the said *Local Government Act*, the said sum of 10s. was on 8th January 1919 paid by the said Clerk of Petty Sessions into the Consolidated Revenue of the Crown for the State of Victoria.

5. Until 9th May 1918 all fines and costs recovered by process of law for breaches of such by-laws were paid to the plaintiffs.

6. Since 9th May 1918 the defendant has demanded and received such fines, claiming that sec. 721 of the *Local Government Act* 1915 does not apply to the City of Melbourne, and that consequently the same are, by virtue of the *Penalties Act* 1915, sec. 3, payable to the Consolidated Revenue of Victoria.

7. The defendant claims the right to retain the said sum of 10s., and to demand and receive all sums recovered by process of law for penalties for breaches of by-laws made by the said Council under the said *Local Government Act*.

The questions for the opinion of the Court are (1) whether the said sum of 10s. is in law recoverable by the plaintiffs; (2) whether all sums recovered by process of law for penalties for breaches of by-laws made by the Council of the City of Melbourne under the *Local Government Act* 1915 are payable to the plaintiffs.

8. It has been agreed between the parties that if the Court shall answer the first question in the affirmative judgment shall be given for the plaintiffs for 10s., and that if the Court shall answer the second question in the affirmative there shall be a declaration accordingly; and that in either case the plaintiffs shall also have judgment for their costs of the action to be taxed on the Supreme Court scale, but that if the Court shall answer both questions in the negative judgment shall be given for the defendant with costs of the action to be taxed on the Supreme Court scale.

The Full Court answered both questions in the affirmative, and ordered judgment to be entered for the plaintiffs: *Mayor &c. of Melbourne* v. *The King* (1).

From that decision the Crown now, by special leave, appealed to the High Court.

A. H. Davis, for the appellant. The answers to the questions depend on whether sec. 721 of the *Local Government Act* 1915, or, alternatively, the provisions of the special Acts relating to the City of Melbourne, apply to penalties for breaches of by-laws made by the City of Melbourne under the *Local Government Act* 1915. If neither of these alternatives is right, then under sec. 3 of the *Penalties Act* 1915 the penalties go to the Crown. Sec. 721 does not apply to such penalties. By sec. 4 of the *Local Government Act* 1915 that Act does not apply to the City of Melbourne except where it is expressly stated to apply. It is expressly so stated in sec. 197, which gives power to make by-laws. It is reasonable to say that some of the sections which follow sec. 197 in Part VII. of the Act,

(1) (1919) V.L.R., 626; 41 A.L.T., 73.

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by reason of their subject matter, are also applicable to the City of Melbourne, but the extent to which those sections are by implication from sec. 197 to be read as so applicable is limited to matters relating to the making of by-laws and to matters which are necessarily incidental to by-laws, including their enforcement. But Part VII. exhausts the operation of the implication from sec. 197. In the absence of any express statement, there is nothing in sec. 721 or in the sections associated with it to connect it or them with the City of Melbourne. The appropriation of penalties is not a necessary part of the making and enforcement of by-laws. Such appropriation is a matter specially dealt with by Parliament in different Acts, such as the *Police Offences Act* 1915. When Parliament passed sec. 3 of the *Penalties Act* 1915 it contemplated that there were cases like the present where penalties were not appropriated in a particular way.

[KNOX C.J. At present the Court is against you as to sec. 721.]

Sir Edward Mitchell K.C. (with him *Ham*), for the respondents. The limitation put by the appellant upon the applicability of Part VII. to the City of Melbourne would exclude sec. 223, which provides that all offences against any by-law in force in any municipality shall be deemed to be an offence against the Act. That section must apply to the City of Melbourne, otherwise the penalty in this case would not have been rightly imposed. There can be little doubt that sec. 720, which provides for the mode of recovering penalties, applies to the City of Melbourne; and, if it does, sec. 721 must also apply. Sec. 4 of the *Local Government Act* is not like a section in the Constitution. It cannot be read strictly as applying to each section of the Act.

Cur. adv. vult.

March 1.

The following judgments were read :—

KNOX C.J., ISAACS AND RICH JJ. (read by KNOX C.J.). The question raised for our decision by this special case is whether penalties and costs recovered by process of law in respect of breaches of the by-laws made by the Council of the City of Melbourne under

the power conferred by the *Local Government Act* 1915 should be paid to the Crown or into the municipal fund. The Supreme Court of Victoria having decided in favour of the respondents (the plaintiffs in the action), an appeal was instituted in this Court by the Crown, and it appearing that the amount actually in dispute in the action was less than £300, special leave was given in order to enable the question to be decided by this Court.

The answers to be given to the questions submitted by the special case depend on the true construction of certain sections of the *Local Government Act* 1915, more particularly secs. 4, 197 and 721; and the exact point at issue is whether sec. 721 of the Act applies to penalties recovered for offences committed against the by-laws of the City of Melbourne made under the Act. By sec. 4 it is provided that "This Act shall apply to every municipality constituted or to be constituted but shall not apply to the City of Melbourne or the City of Geelong except where expressly so stated." By sec. 197, the material part of which is expressly declared to apply to the City of Melbourne, power is conferred "subject to the provisions hereinafter contained" to make by-laws for any municipality for certain purposes defined by the section. The effect of this section is, in our opinion, to declare that with regard to the provisions of the Act relating to by-laws the City of Melbourne is to be included within the expression "municipality." It is common ground that the by-law for breach of which the fine now under consideration was imposed was properly made under this section. It cannot be disputed that the penalty was properly sued for and recovered under sec. 720 of the Act, which is the only section in the Act prescribing the procedure for the recovery of penalties for offences against the Act. By sec. 223 of the Act all offences against any by-laws in force in any municipality are to be deemed to be offences against the Act.

The penalty for an offence against the Act is provided for by sec. 719, which is in the following words:—"Every person guilty of an offence against this Act shall for every such offence be liable to the penalty expressly imposed by this Act or by any by-law in force in that behalf and if no other penalty is imposed to a penalty of not more than twenty pounds." This section is found in Part XXXVIII.,

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Division 2, of the Act, but is by its express words clearly connected with secs. 197 and 223 of the Act, and equally with those sections applies to the by-laws of the City of Melbourne made under the Act.

Sec. 720 prescribes the procedure for the recovery of penalties, and what has been said with regard to sec. 719 applies equally to this section. Moreover, as pointed out above, the proceedings out of which the penalty now in question arose were properly instituted under this section. Sec. 721 provides for the application of penalties recovered under sec. 720, and this fact alone would seem to indicate that it was intended to extend to all cases in which penalties were recovered under that section, whether the by-law broken was a by-law of the City of Melbourne or of some other municipality. But it is contended on behalf of the appellant that the provisions of this section are prevented from applying to penalties for breaches of the by-laws of the City of Melbourne, by force of sec. 4 of the Act, inasmuch as sec. 721 contains no express statement that its provisions shall apply to the City of Melbourne. We think sec. 197 should be read as enacting that the City of Melbourne and every other municipality may make by-laws for the purposes therein defined, and that the other sections which have been referred to above (223, 719, 720, 721) expressly deal with and apply to all by-laws properly so made. We can see no distinction so far as regards the application of these sections between the by-laws of the City of Melbourne made under the authority of sec. 197 and those of any other municipality. We may add that no reason was suggested why any distinction should be made in respect of the application of penalties recovered between the City of Melbourne and any other municipal corporation. We think the plain meaning of the words "subject to the provisions hereinafter contained" is that the power to make by-laws is given to the City of Melbourne and to all other municipalities, controlled and supplemented by such provisions contained in subsequent sections of the Act as are properly applicable to such by-laws. Those provisions, when identified, are the "provisions hereinafter contained" referred to in sec. 197, and are by force of that section expressly made to apply to the City of Melbourne.

The conclusion at which we have arrived is fortified by the provisions contained in sec. 724, which deals with disputes and returns of municipalities, and is expressly declared to apply to the City of Melbourne. By that section the Minister is empowered in certain events to order (*inter alia*) "all fines or penalties which may be payable to such council not to be paid." This provision clearly rests on the implication that fines and penalties recoverable under the Act in respect of breaches of by-laws of the City of Melbourne are payable to the City.

In this view of the case it is not necessary for us to express any opinion as to the earlier Acts relied on by the Full Court of Victoria in support of their decision. We agree for the reasons stated above that both questions submitted by the special case should be answered in the affirmative.

We have not overlooked the difficulty created by sec. 203, which contains express provision for the application of that section to the City of Melbourne and the City of Geelong, but we think the considerations to which we have adverted outweigh those which arise from the inclusion of this express provision in sec. 203.

The order will be that the appeal be dismissed with costs.

GAVAN DUFFY J. Sec. 197 of the *Local Government Act* of 1915 authorizes the making of certain municipal by-laws, and declares that the provisions of the section enabling such by-laws to be made shall apply to the City of Melbourne. Sec. 203 of the Act prescribes the manner of making such by-laws, and declares that its provisions shall apply to the City of Melbourne. Sec. 721 of the Act is as follows: "Except where it is by this Act provided to the contrary all penalties recovered for offences against this Act committed against the by-laws or regulations or in the municipal district or in any way in respect of any municipality shall be paid into the municipal fund of such municipality." It is said that this section does not apply to by-laws made under the authority of sec. 197, and in the manner prescribed by sec. 203, because it is not expressly stated that the section applies to the City of Melbourne, as required by sec. 4 of the Act. It must be

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conceded that it is nowhere stated in terms that this section shall apply to the City of Melbourne, but that is of no importance if the words of the section themselves expressly refer to the by-laws of the City of Melbourne, and, in my opinion, they do expressly refer to those by-laws. The section does not mention them separately, but it mentions a class in which they are necessarily included. The words " the by-laws " in sec. 721 in my opinion mean all by-laws made under the Act, and therefore include by-laws made by the City of Melbourne under the provisions of secs. 197 and 203.

I agree in thinking that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant, *E. J. D. Guinness*, Crown Solicitor for Victoria.

Solicitors for the respondents, *Malleson, Stewart, Stawell & Nankivell.*

B. L.