1963
*Oct. 29
1964
Jan. 28

WINNIPEG FILM SOCIETY (*Accused*) ..APPELLANT;

AND

JOHN C. WEBSTER (*Informant*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Criminal law—Sunday observance—Non-profit film society providing dues-paying members with showings of films in a theatre on Sunday—No charge made for admission—Whether a performance elsewhere than in a church at which a fee was charged directly or indirectly contrary to the Lord's Day Act, R.S.C. 1952, c. 171, s. 6(1).

The appellant film society, a non-profit organization whose main function was to provide its members with the opportunity to enjoy films of a character not usually shown at commercial theatres, provided a "performance" by the showing of two films elsewhere than in a church on a Sunday. The society was convicted of violating s. 6(1) of the *Lord's Day Act*, R.S.C. 1952, c. 171. An appeal from the conviction was dismissed in the County Court and a further appeal was dismissed by the Court of Appeal.

The society's membership dues, which were determined in accordance with its financial position and the anticipated expenses of the coming year, were fixed for the year 1961-62 at $6, in exchange for which the members were entitled to attend the showings of the society's films without payment of any admission charge and to participate in the affairs of the society generally.

On appeal to this Court, the main question to be determined was whether the appellant by providing its dues-paying members with showings of films in a theatre on Sunday without making a charge for admission at such theatre did unlawfully provide a performance elsewhere than in a church at which a fee was charged directly or indirectly for admission to such performance.

*PRESENT: Cartwright, Fauteux, Martland, Ritchie and Hall JJ.

Held: The appeal should be allowed and the conviction quashed.

There was nothing in the *Lord's Day Act* to prevent the society from providing any kind of performance anywhere on Sunday provided that it was not one at which a fee was charged directly or indirectly.

The Court was of the opinion that the fee charged for annual membership in the society bore no relationship to the number of times the individual members actually attended the performances which the society provided, and having regard to all the circumstances, these payments had more of the character of "membership" than of "admission" fees. This would not, however, necessarily conclude the matter if it had been shown that the performance provided by the appellant was one *at which* any kind of fee was charged directly or indirectly which entitled the person paying it to admission to the performance.

This was not a case where money or money's worth was paid *at the performance* under some device intended to give the payment the appearance of being charged for something other than admission (*Recreation Operators Ltd. v. R.* (1952), 15 C.R. 360), nor was it a case in which the admission charge was defrayed by the tender of money's worth in the form of a ticket purchased in advance (*Marin v. United Amusement Corporation Ltd.* (1929), 47 Que. K.B. 1).

APPEAL from a judgment of the Court of Appeal for Manitoba[1], affirming a judgment of Philp Co. Ct. J. whereby appellant's appeal from its conviction by Dubienski P.M. for a violation of s. 6(1) of the *Lord's Day Act*, R.S.C. 1952, c. 171, was dismissed. Appeal allowed.

M. J. Arpin, Q.C., for the appellant.

J. J. Enns, for the respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal brought by leave of this Court from a judgment of the Court of Appeal of Manitoba[1] which affirmed a judgment of Judge Philp of the County Court of Winnipeg whereby the learned County Court Judge dismissed the appellant's appeal from its conviction by Magistrate Dubienski at the Winnipeg Magistrate's Court on the charge that it

> On the Lord's Day, to wit: the 7th day of January, A.D. 1962, at the City of Winnipeg aforesaid did unlawfully provide a performance elsewhere than in a church at which a fee was charged, directly or indirectly, for admission to such performance, contrary to the provisions of the statute in such case made and provided . . .

[1] [1963] 3 C.C.C. 18, 40 W.W.R. 643.

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The statutory provisions which the appellant is alleged to have contravened are those contained in s. 6(1) of the *Lord's Day Act*, R.S.C. 1952, c. 171, which read as follows:

> It is not lawful for any person, on the Lord's Day, except as provided in any provincial Act or law now or hereafter in force, to engage in any public game or contest for gain or for any prize or reward, or to be present thereat, or to provide, engage in, or be present at any performance or public meeting, elsewhere than in a church, at which any fee is charged, directly or indirectly, either for admission to such performance or meeting, or to any place within which the same is provided, or for any service or privilege thereat.

A breach of this section exposes the offender to the penalty provided by s. 12 of the Act and upon conviction the appellant in the present case was sentenced to pay a fine of twenty-five dollars and costs and in default to have distress levied upon it for the said fine and costs.

It is not disputed that the appellant was duly incorporated in January of 1960 under the provisions of *The Companies Act*, R.S.M. 1954, c. 43, for the purposes of carrying on without pecuniary gain, objects of a national, patriotic, philanthropic, scientific, artistic or social character or the like and it is admitted that this society provided a "performance" by the showing of two films elsewhere than in a church on Sunday, January 7, 1962.

The main function of the society is to provide its members with the opportunity to enjoy films of a character not usually shown at commercial theatres; it is affiliated with the Canadian Federation of Film Societies and the work of its unpaid executive includes obtaining such films as the membership may desire, renting the premises where the films can be displayed, advising the membership of the nature of available film material and attending to the financial and social affairs of the society. The annual membership dues, which are determined in accordance with the financial position of the society and the anticipated expenses of the coming year, were fixed for the year 1961-62 at six dollars, in exchange for which the members were entitled to attend the showings of the society's films without payment of any admission charge and to participate in the affairs of the society generally. Membership in the society also included the privilege of bringing guests to the theatre if seats were available, but no fee of any kind was charged to anyone at the performance. It is relevant to note that

many members of the society did not attend all film showings during any year and that some did not attend any at all.

Leave to appeal to this Court was granted in general terms and twelve grounds of appeal are set out in the notice of appeal, but the main question to be determined is whether the appellant by providing its dues-paying members with showings of films in a theatre on Sunday without making any charge for admission at such theatre "did" to employ the words of the charge "unlawfully provide a performance elsewhere than in a church at which a fee was charged directly or indirectly for admission to such performance".

The final paragraph of the reasons for judgment delivered by Schultz J.A. on behalf of himself and Miller C.J.M., reads as follows:

> The evidence is clear that in the instant case the society provided a showing of films for 850 of its members on Sunday, January 7, 1962, at a place other than a church; that no persons other than members of the society could, or did, obtain admission thereto; that such showing was paid for from the proceeds of the society's annual membership fees. In my opinion this constituted payment of an indirect charge and was a breach of sec. 6(1) of the Lord's Day Act.

Monnin J.A., whose reasons for judgment were concurred in by Guy J.A., concluded by saying:

> The society, under the umbrella of the duly incorporated non-profit organization was attempting to do what was forbidden to commercial organizations and to other individuals or groups of individuals. The annual membership fee for all practical purposes is a season ticket but for an undetermined number of performances. The membership fee, being an indirect fee, is a violation of sec. 6(1) of the Lord's Day Act.

The question of whether an annual membership fee entitling the member to repeated and general use of the facilities of a club or society is to be treated, for taxation purposes, as an "admission fee" for each occasion of actual use of those facilities, was considered in the case of *Executives Club of Louisville v. Glen*[1], in which Circuit Court Judge Miller had occasion to refer to the test of what constitutes a "due or membership fee" laid down by Mr. Justice Jackson in the Supreme Court of the United States in *White v. Winchester Club*[2] in the following terms:

> Consideration of the nature of club activity is a necessary preliminary to the formulation of a test of what constitutes a "due or membership fee." So far as finances go, the fundamental notion of club activity is that operating expenses are shared without insistence upon equivalence between

[1] (1952), 107 Fed. Supp. 668. [2] (1941), 315 U.S. 32 at 41.

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the proportion of an individual's contributions and the proportion of the benefits he receives. Thus, on the one hand, payment of the price of an individual dinner at the club dining room or of a single round of golf lacks the element of making common cause inherent in the idea of club activity. But, on the other hand, payment for the right to repeated and general use of a common club facility for an appreciable period of time has that element and amounts to a "due or membership fee" if the payment is not fixed by each occasion of actual use.

The same test was applied in *Merion Cricket Club v. United States*[1].

The appellant is a *bona fide* non-profit organization with national associations, the members of which, in addition to being admitted without charge to its performances, enjoy many of the intangible benefits to be derived from the sharing of common interests with fellow club members and from participating in guiding the administrative policy of the organization, including the selection of its films.

I am satisfied that the charge of six dollars for annual membership in the Winnipeg Film Society bears no relationship to the number of times the individual members actually attend the performances which the society provides, and having regard to all the circumstances, I think that these payments have more of the character of "membership" than of "admission" fees. This would not, however, in my view, necessarily conclude the matter if it had been shown that the performance provided by the appellant on January 7, 1962, was one *at which* any kind of fee was charged directly or indirectly which entitled the person paying it to admission to the performance.

It is to be noted that s. 6(1) of the *Lord's Day Act* does not make it unlawful for any person to provide "a performance" elsewhere than in a church on Sunday, and there is nothing in the *Lord's Day Act* to prevent any society from providing any kind of performance anywhere on Sunday provided that it is not one "at which any fee is charged directly or indirectly".

It appears to me that s. 6(1) of the *Lord's Day Act* has its origin in the statute entitled "An Act for preventing certain Abuses and Profanations on the Lord's Day, called Sunday" which was passed in England in 1781 as 23 Geo. III, c. 49, and it is interesting to note that no offence is created by s. 1 of that statute for keeping open a place of

[1] (1941), 315 U.S. 42.

entertainment on Sunday unless it be an entertainment "to which persons shall be admitted by the payment of money or by tickets sold for money". The section in question reads in part:

> That, from and after the passing of this present Act, any house, room or other place, which shall be opened or used for public entertainment or amusement, or for publicly debating on any subject whatsoever, upon any part of the Lord's Day called Sunday, and to which persons shall be admitted by the payment of money, or by tickets sold for money, shall be deemed a disorderly house or place; and the keeper of such house, room, or place, shall forfeit the sum of two hundred pounds for every day that such house, room, or place, shall be opened or used as aforesaid. . . .

It is clear that payment of money or money's worth for admission to a Sunday performance was an essential ingredient of the offence so created, but the meaning of the words "admitted by the payment of money" as used in this section was expressly extended by s. 2 of the same statute which reads, in part, as follows:

> . . . any house, room, or place, which shall be opened or used for any public entertainment or amusement, or for public debate, on the Lord's Day at the expense of any number of subscribers or contributors to the carrying on any such entertainment or amusement, or debate, on the Lord's Day, and to which persons shall be admitted by tickets, to which the subscribers or contributors shall be entitled, shall be deemed a house, room, or place, to which persons are admitted by the payment of money, within the meaning of this Act.

The Parliament of Canada has, however, not seen fit to extend the meaning of the words "any performance . . . at which any fee is charged directly or indirectly for admission . . ." as they occur in s. 6(1) of the *Lord's Day Act*, and it appears to me that these words are clearly open to the interpretation that the charging of a fee either directly or indirectly *at the performance* is an essential ingredient of the offence here charged. It is contended on behalf of the respondent that the language of the charge and of the statute refers not only to a fee which is charged *directly or indirectly at the performance,* but also to an annual subscription which is charged at a place other than the performance in exchange for the privilege of belonging to the society which provides the performance. This appears to me to be tantamount to saying that a performance for which a fee is charged indirectly at another place and not necessarily on Sunday shall be treated for the purposes of the *Lord's Day Act* as being ". . . a performance . . . at which a fee is charged . . . indirectly" on Sunday.

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This latter construction does not appear to me to reflect the primary meaning of the language used in the charge by which the appellant is accused that it "did unlawfully provide a performance elsewhere than in a church *at which* a fee was charged directly or indirectly for admission . . .". If these words were capable of the extended meaning sought to be placed upon them by the respondent they would, in my opinion, at best be ambiguous and if the two interpretations could both be sustained, the penal character of the statute would entitle the appellant to the benefit of the construction more favourable to it.

The relevant rule governing the construction of penal statutes is well summarized in Halsbury's Laws of England, 3rd ed., vol. 36 at p. 415:

> It is a general rule that penal enactments are to be construed strictly and not extended beyond their clear meaning. At the present day, this general rule means no more than that if, after the ordinary rules of construction have first been applied, as they must be, there remains any doubt or ambiguity, the person against whom the penalty is sought to be enforced is entitled to the benefit of the doubt.

The matter was succinctly stated by Lord Simonds in *London and North Eastern Ry. Co. v. Berriman*[1], where he said:

> A man is not to be put in peril upon an ambiguity, however much or little the purpose of the Act appeals to the predilection of the court.

This is not a case where money or money's worth was paid *at the performance* under some device intended to give the payment the appearance of being charged for something other than admission (e.g. food, see *Recreation Operators Ltd. v. The Queen*[2]), nor is it a case in which the admission charge was defrayed by the tender of money's worth in the form of a ticket purchased in advance (*Marin v. United Amusement Corporation Ltd.*[3]).

Under all these circumstances it cannot in my opinion be said that the language of s. 6(1) of the *Lord's Day Act* and of the charge here laid is such as to apply without doubt or ambiguity to the performance provided by the appellant on Sunday, January 7, 1962.

[1] [1946] A.C. 278 at 313-14. [2] (1952), 15 C.R. 360, 104 C.C.C. 284.
[3] (1929), 47 Que. K.B. 1.

I would accordingly allow this appeal with costs throughout and direct that the conviction of the appellant be quashed.

Appeal allowed with costs and conviction quashed.

Solicitors for the appellant: Arpin, Rich, Houston & Karlicki, Winnipeg.

Solicitor for the respondent: O. M. M. Kay, Winnipeg.