1953
*June 1
1954
*Mar. 31

REGENT VENDING MACHINES LIMITED (*Plaintiff*) ..... APPELLANT;

AND

ALBERTA VENDING MACHINES LIMITED (*Defedendant*) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Whether certain coin machines, "slot machines", as defined by s. 2(b) of The Slot Machine Act, R.S.A. 1942, c. 333.

The appellant sued to recover the balance of the purchase price owing on eighteen coin machines. The respondent pleaded the machines were "slot machines" within the meaning of *The Slot Machine Act,* R.S.A. 1942, c. 333 and that under it there could be no property in them and no money owing in respect to them.

By s. 2(*b*) of the Act "slot machine" is defined to mean:

(i) any machine which under the provisions of s. 986(4) of the *Cr. Code* is deemed to be a means or contrivance for playing a game of chance.

(ii) any slot machine and any other machine of a similar nature, the result of one of any number of operations of which is, as regards the operator, a matter of chance and uncertainty or which as a

*PRESENT: Kerwin, Taschereau, Rand, Kellock, Estey, Locke and Cartwright JJ.

consequence of any given number of successive operations yields different results to the operator, notwithstanding that the result of some one or more or all of such operations may be known to the operator in advance.

(iii) any machine or device the result of one or any number of operations of which is, as regards the operator, a matter of chance or uncertainty or which as a consequence of any given number of successive operations yields different results to the operator notwithstanding that the result of some one or more or all of such operations may be known to the operator in advance.

The machines in question were operated by placing a coin in a slot whereupon discs, balls or other projectiles were released to be thereafter set in motion by means of a plunger, trigger or the like and the score made was automatically recorded. No free plays or prizes were awarded regardless of the score obtained and nothing was furnished, beyond entertainment through the test of skill, the score depending upon the proficiency in the handling or manipulation of the total operation.

Held: (Kerwin and Estey JJ. dissenting) that the machines were not "slot machines" within the definition of s. 2(*b*) of *The Slot Machine Act*. *Laphkas* v. *The King* [1942] S.C.R. 84, followed.

Decision of the Appellate Division of the Supreme Court of Alberta (1952-53) 7 W.W.R. (N.S.) 433 reversed and judgment at trial restored.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (Clinton J. Ford J.A. dissenting) (1) reversing a judgment of Egbert J. in favour of the appellant.

H. J. MacDonald for the appellant.

No one appeared for the respondent.

KERWIN J. (dissenting):—The appellant, Regent Vending Machines Limited, claims from the respondent, Alberta Vending Machines Limited, a sum of money alleged to be owing under a conditional sale contract covering eighteen machines. The defence is that each is a slot machine within the definition of that expression as contained in s. 2 of the Alberta Slot Machine Act, R.S.A. 1942, c. 333, and that, therefore, by virtue of s. 3 thereof, no recovery may be had. The trial judge directed judgment to be entered for the appellant but his decision was reversed by the Appellate Division, Clinton J. Ford J.A. dissenting, and the action dismissed.

(1) (1952-53) 7 W.W.R. (N.S.) 433.

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Kerwin J.

Sections 2 and 3 of the Act appear in the report of the judgment of this Court in *D. Johnson* v. *Attorney General of Alberta* (1). By the terms of s. 3, if the machines fall within any part of the definition of "slot machine" in s. 2, the appeal fails and it is therefore necessary to describe them. The appellant designates them as coin machines. Each is put in operation by the insertion of a coin in a slot. The ensuing classification and description taken from the appellant's factum are accepted as correct.

1. Miniature Bowling Games, viz:

6 United Five Player Shuffle Alleys

2 Six Foot Express Alleys

1 Gottlieb Bowlette Machine.

Miniature bowling pins are set up automatically, and the player is provided with projectiles with which he manually attempts to knock down the pins. The projectile does not strike the pins, but does strike electrical controls set in the same position underneath the pins so that the same result is obtained as if the pins were actually struck. The score made by the player is automatically recorded and displayed by the machine. A player does not know what score he will obtain. Successive operations will yield different results. The obtaining of a high score depends on the skill of the operator, and a skilful player will almost invariably obtain much better results than an unskilful one.

2. A Hoop Game, viz: 3 United Shufflecade

Those operate in the same manner as the miniature bowling games except that the player's object is to project the ball or puck over a hurdle into hoops of varying values. A machine returns the puck to the player after each shot.

3. A Miniature Hockey Game, viz: 1 United Hockey Machine.

This game is played by two players. On the board within the machine are miniature hockey players which are manipulated by levers by human players. The insertion of the coin releases 10 balls which are played one at a time. The object of the game is to score on the opponent's goal by the manipulation of the miniature players. The machine in no way controls the movements of the miniature players and does not record the score.

4. A pistol and Target Game, viz: 2 Exhibit Gun Patrol Machines.

Each of these consists of a pistol, mounted on a swivel, and a target. After the insertion of a coin, the player aims the pistol at the moving target and shoots. No bullet is actually fired, but an arm at the bottom of the gun electrically records a hit by the falling of the target and the ringing of a bell if the player has aimed and shot properly—in other words, the same result is shown as if a bullet had actually been fired. The accuracy of the player's aim and the proper pressing of the trigger determines the result. The machine does not record the total score made by the player.

(1) [1954] S.C.R. 127.

None of the machines emits any merchandise, slugs or tokens. A prize or award is not received by any player, and he does not obtain any right to play an additional game or games free of charge. The only thing received by the player in exchange for his coin is the right to use the machine to play a game and the amusement derived therefrom. The player has no chance of winning anything; the owner of the machine has no chance of losing anything or of receiving anything other than the fee paid by the player for the use of the machine.

It is contended that there is no difference in the meaning of paragraphs (i), (ii) and (iii) of s. 2 of the Act and that, therefore, since the machines in question are forms of amusement only and do not emit slugs or tokens, and no prize or reward is given, they are of the type dealt with in *Laphkas* v. *Rex* (1), where such a machine was declared to be a machine for vending services. I agree that in view of this decision the machines are not covered by (i) since they are not games of chance. However, the Legislature was not satisfied to adopt as a definition of a slot machine one which is deemed to be a means or contrivance for playing a game of chance under s-s. 4 of s. 986 of the *Criminal Code* but added its own definitions by (ii) and (iii). Even if it could be said that they do not fall within (ii) because the result of one of any number of operations of a machine is not, as regards the operator, a matter of chance *and* uncertainty, the machines are caught by (iii) in which the conjunction "or" is used in "chance or uncertainty". While there may be no chance, there is an uncertainty. This conclusion is arrived at without considering the succeeding phrase "or which as a consequence of any given number of successive operations awards different results to the operator."

The appeal should be dismissed but as the respondent was not represented, there will be no costs.

TASCHEREAU J.:—The appellant and the respondent entered into a conditional sale agreement on the eighth day of March, 1951, by which the former sold to the latter, for the total consideration of $7,921, eighteen coin machines described as:

6 United Five Player Shuffle Alleys
3 United Shufflecades
2 Six Foot Express Alleys
1 United Hockey Machine

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Taschereau J.

2 Exhibit Gun Patrol Machines
1 Gottlieb Bowlette Machine
1 Silver-King Target (gun) Vendor
1 Silver-King Hunter (gun) Vendor
1 Silver-King Hot Nut Vendor

The respondent paid $6,186.28, but refused to pay the balance of $1,734.72, alleging that the coin machines which were the subject of the contract, are slot machines within the meaning of *The Slot Machine Act* (c. 333, R.S.A. 1942), and that the appellant cannot recover.

The relevant sections of the Alberta Act as it stood in 1952 prior to the amendments are the following:

2. In this Act, unless the context otherwise requires,—

(*b*) "Slot machine" means,—

(i) any machine which under the provisions of section 986, subsection (4), of *The Criminal Code,* is deemed to be a means or contrivance for playing a game of chance;

(ii) any slot machine and any other machine of a similar nature, the result of one of any number of operations of which is, as regards the operator, a matter of *chance and uncertainty,* or which as a consequence of any number of successive operations yields different results to the operator, notwithstanding that the result of some one or more or all of such operations shall be known to the operator in advance; and

(iii) any machine or device the result of one or any number of operations of which is, as regards the operator, a matter of *chance or uncertainty* or which as a consequence of any given number of successive operations yields different results to the operator, notwithstanding that the result of some one or more or all of such operations may be known to the operator in advance.

3. No slot machine shall be capable of ownership, nor shall the same be the subject of property rights within the Province, and no court of civil jurisdiction shall recognize or give effect to any property rights in any slot machine.

Mr. Justice Egbert before whom the case was tried, found that none of the machines in question were "Slot Machines" within the definitions contained in *The Slot Machine Act,* and gave judgment against the respondent for the amount claimed, but the Court of Appeal reversed this decision and dismissed the action (Mr. Justice C. J. Ford dissenting).

With this decision of the Court of Appeal, I respectfully disagree. I do not think that the machines sold by the appellant to the respondent, are machines which under the

provisions of s. 986, s-s. (4) of the *Criminal Code,* are deemed to be means or contrivances for playing a game of chance. It is the skill of the operator that will determine the score and not the machine itself, and it is obvious that a skilful player will obtain far better results. The hitting of the pins in the "Bowling Game", the placing of the ball or puck over a hurdle into hoops in the "Hoop Game", the scoring in the opponent's goal by the manipulation of the players in the "Hockey Game", as well as the hitting of the target in the "Pistol and Target Game", are not games of chance and merely furnish, I believe, quite innocent recreation to the player. (*Laphkas* v. *The King* (1)).

As to the contention that the Legislature has covered a wider field than the *Criminal Code* in enacting paragraphs (2) and (3) of s. 2(*b*), and that as regards the operator, the result is a matter of *chance and uncertainty,* or of *chance or uncertainty,* I fully agree with what has been said by Mr. Justice Ford, who dissented in the Court of Appeal.

I would allow the appeal with costs throughout.

RAND J.:—This is another appeal arising out of the question of slot machines. Those in controversy here were sold by the plaintiff to the defendant under a conditional sale agreement, for the balance of the price of which the action was brought and the question is whether it can be maintained.

The contrivances consist of miniature bowling games in three forms called shuffle alleys, express alleys and bowlette machines; a hoop game called a shufflecade; a miniature hockey machine; and a pistol and target game. Upon placing a coin in a slot, disks, balls or other projectiles are released to be thereafter set in motion by means of a plunger, trigger or the like, and the score made is automatically recorded. Nothing is furnished beyond entertainment through the test of skill; and the score made will depend upon the proficiency in the handling or manipulation of the total operation.

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Rand J.

Since they are for entertainment only, they do not come within s. 986(4) of the *Criminal Code: Laphkas* v. *The King* (1), and are consequently beyond the scope of s. 2(*b*) para. (i) which defines "slot machine" in terms co-extensive with s. 986(4).

Are they, then, such machines as in the language of s. 2(*b*) para. (ii) or para. (iii). [see *ante* p. 102].

At the conclusion of the argument I was disposed to the view that they were not and after the best consideration I can give the question I have concluded that in the circumstances there is so much doubt about the scope of the language of these paragraphs that it must be held not to extend to them. Two considerations weigh strongly in favour of this interpretation. The machines are designed solely for entertainment and what they furnish is the pleasure resulting from the degree of skill the operator is able to bring to their manipulation; but from the three paragraphs of the definition, which have been taken virtually verbatim from the *Code,* as well as the context of the statute as a whole, it is reasonably clear that the purpose of the legislation was to strike at instruments of a gambling nature. The second consideration is the fact of the confiscation of this property of substantial value which the statute makes absolute upon the machine acquiring in some form a local situs in the province. If a provincial legislature, for a proper purpose, decides to work such an exceptional exercise of legislative power upon them, it must clearly and beyond any reasonable doubt, by the language it uses, make that intention evident. This, in my opinion, it has not done here.

I would therefore allow the appeal and direct judgment for the appellant for the amount found due it with costs throughout.

KELLOCK J.:—Paragraphs (i) and (ii) of s. 2(*b*) of *The Slot Machine Act,* 1942, R.S.A., c. 333, are derived from s. 2 of c. 14 of the Statutes of 1935, and paragraph (iii), from s. 2 of c. 25 of the 1936 Statutes. Paragraph (i) reads:

> any machine which under the provisions of section 986, subsection (4), of *The Criminal Code,* is deemed to be a means or contrivance for playing a game of chance;

(1) [1942] S.C.R. 84.

At the time of the enactment of paragraph (i), s. 986(4) of the *Criminal Code* was to be found in s. 27 of c. 11 of the Statutes of 1930, which, in turn, was derived from s. 1 of c. 35 of the Statutes of 1924. The machine with which the said section dealt was

> any automatic machine . . . the result of one or any number of operations of which is as regards the operator a matter of chance or uncertainty, or which as a consequence of any given number of successive operations yields different results to the operator . . . notwithstanding that the result of some one or more or all of such operations may be known to the operator in advance.

It was decided in *Roberts* v. *The King* (1), that the above language applied only to machines capable of producing results to the operator of a material value, and that the legislation was not concerned with machines or devices whose operation furnished the operator with amusement only and involved him in no loss. *Rex* v. *Freedman* (2), which had decided in the contrary sense, was expressly disapproved.

By reason of s. 20 of the *Interpretation Act*, R.S.A., 1942, c. 1, paragraph (i) of *The Slot Machine Act* must now be taken to refer to s. 986(4) of the *Criminal Code* as amended in 1938 by c. 44, s. 46. It was, however, held in *Laphkas* v. *The King* (3), that a machine of the type here in question is not one involving any element of chance or mixed elements of chance or skill, within the meaning of the section, as "the skill of the operator in aiming at the pins is the determining factor".

For this reason the machines here in question do not come within the terms of paragraph (i), as well as for the reason that they involve no loss to the operator other than the spending of his money in return for the amusement he derives from their operation, the type of result not contemplated by the legislation. The addition in the 1938 amendment of the words "or if on any operation it discharges or emits any slug or token other than merchandise", emphasizes the view that the word "results" in the subsection means results not merely subjective on the part of the operator. Otherwise, the amendment was unnecessary.

(1) [1931] S.C.R. 417. (2) (1931) 39 Man. R. 407.
(3) [1942] S.C.R. 84.

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Kellock J.

Coming to paragraphs (ii) and (iii), it is to be observed that while s. 986(4) of the *Code*, as amended in 1938, deals with "any automatic or slot machine" used or intended to be used for any purpose other than vending "services", paragraph (ii) of the provincial Act includes

> any slot machine and any other machine of a similar nature,

and paragraph (iii) extends to "any machine or device". Both paragraphs, however, like paragraph (i), contain the descriptive language taken from the Dominion statute of 1924, already set out. In my view the extension of the language in these two paragraphs, as above indicated, was all that was in the contemplation of the legislature, and the construction placed on the language of s. 986(4), which is common to the three paragraphs, should govern.

I agree, therefore, in the result arrived at by both the learned trial judge and the learned dissenting judge in the Appellate Division, and would allow the appeal with costs here and below.

I have not considered the effect, if any, of the 1952 amendments to the provincial Act. They have no application to these proceedings, not having come into effect until July 1, 1952.

ESTEY J. (dissenting):—The appellant (plaintiff) brought this action to recover the balance of the purchase price owing under a conditional agreement covering eighteen machines, all but three of which the respondent (defendant) claimed are slot machines within the meaning of *The Slot Machine Act* (R.S.A. 1942, c. 333) and, therefore, because of the provisions of that statute, a judgment ought not to be directed in favour of the appellant. The learned trial judge's judgment in favour of the appellant was reversed by a majority of the learned judges in the Appellate Division of the Supreme Court of Alberta.

The sole question, the facts being admitted, is are these fifteen slot machines within the meaning of that statute. These fifteen are placed in four groups: miniature bowling games, hoop game, miniature hockey game, pistol and target game. No goods, money or slugs are received as prizes or otherwise through these machines which are operated by the insertion of a coin in a slot. When this is done,

the player apparently seeks to make a high score or whatever may evidence success in that particular machine. They are operated for amusement only.

"Slot machine" is defined in the Act as follows:

[see *ante* p. 102]

The first sub-clause includes what, by the provisions of s. 986(4) of the *Criminal Code,* is "deemed to be a means or contrivance for playing a game of chance." In this s. 986(4) Parliament defines the value or effect of a certain machine as evidence in a prosecution of a keeper or inmates of a common gaming house under ss. 226 and 229 of the *Criminal Code.* Section 986(4) expressly excepts any automatic or slot machine "vending . . . services." As amusement was held in *Laphkas* v. *Rex* (1), to be a service, it follows that the machines here in question do not come within sub-clause (i).

The legislature, however, was not content to restrict the effect and scope of *The Slot Machine Act* to those machines so deemed under s. 986(4) when it went further and added other machines under sub-clauses (ii) and (iii). It, therefore, remains to be determined whether the machines here in question come under these sub-clauses (ii) and (iii). Sub-clause (ii) was first enacted in 1935 and applies to "any slot machine and any other machine of a similar nature." Then in 1936 sub-clause (iii) was added to include "any machine or device." Sub-clauses (ii) and (iii), after the naming of the machines, are identical in language, apart from two changes not material hereto, which language is taken from s. 986(4). It is contended that because the legislature has so adopted a part of the language of s. 986(4), therefore these sub-clauses should be construed as dealing with exactly the "same kind of machines," which, as I understand the submission, means that the legislature was legislating in relation to machines or devices which might be deemed to be means or contrivances for playing games of chance and that these sub-clauses should be construed to that effect.

The history of this legislation discloses that in 1924 (S. of A., c. 36) the legislature for the first time provided

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Estey J.

that slot machines could not be owned nor made the subject of property rights. The definition of a slot machine in that statute was entirely different and aimed at machines which offered premiums, prizes or rewards. In 1935 (S. of A., c. 14) the legislature enacted a new statute, retaining the provision under which these machines could neither be owned nor made the subject of property rights, but entirely rewriting the definition of a slot machine. The definition as then enacted read as sub-clauses (i) and (ii) in the present statute. Then in 1936 (S. of A., c. 25) the present sub-clause (iii) was added. These sub-clauses were obviously intended to include machines not included in sub-clause (i) and, though the language which follows the machines or devices specified in these sub-clauses is taken from s. 986(4), there are significant omissions. There is no reference to gaming, no exception of machines vending merchandise or services and the words "or if on any operation it discharges or emits any slug or token, other than merchandise" are omitted. The adoption of the language with these omissions, in relation to those additional machines specified in sub-clauses (ii) and (iii), supports the view that the language of these sub-clauses ought not to be construed in the restricted sense the appellant submits. Moreover, in so far as the history of this legislation may be of assistance, it leads to the conclusion that the legislature is not, in this statute, concerned with gaming, which is legislation in relation to criminal law and, therefore, beyond its competence, but rather with the presence within the province of slot machines, machines of a similar nature and devices that come within the language of sub-clauses (ii) and (iii) construed as it would ordinarily be read and understood.

While these machines would attract one who might play merely to see how high a score he could make, as well as those who would enter into competition, it would rather appear that the latter would be the more usual or likely. In either event, the primary object in the operation of these machines is the attainment of the highest possible score or its equivalent in a particular machine. It is this that primarily makes the machine attractive and provides the amusement. It may be that a degree of skill could be acquired by persistent practice, but the definition is not

concerned with that feature. The language of the definition in both (ii) and (iii) is explicit and includes those machines or devices where the "consequence of any number of successive operations yields different results to the operator, notwithstanding that the result of some one or more or all of such operations shall be known to the operator in advance." This language is directed to the results of successive operations and not to whatever amusement or entertainment the operator may realize from the operation of the machine.

The appeal should be dismissed.

LOCKE J.:—While the learned trial Judge considered the application of *The Slot Machine Act,* R.S.A. 1942, c. 333, as amended by c. 86 of the Statutes of Alberta of 1952, to the issues raised by the pleadings, the rights of the parties are to be determined as of the date the action was commenced. The relevant date is May 15, 1952, while the amendment did not come into force until July 1 of that year and, therefore, it is the Act as it stood prior to that date which is to be considered.

The appeal has been argued upon the footing that to pass the statute was within the legislative powers of the Province and, in view of my conclusion, I may deal with the matter on this basis.

In my opinion, the machines defined in clause (*b*) of s. 2 of the Act are of the same nature as those described in s-s. 4 of s. 986 of the *Criminal Code.*

The manner of operation of the machines in respect of which this action has been brought is described in the evidence, and that contrivances of this nature do not fall within the section of the *Code* was decided by the judgment of this Court in *Laphkas* v. *The King* (1).

I would allow the appeal with costs throughout and direct that the judgment at the trial be restored.

CARTWRIGHT J.:—This case has been dealt with throughout on the assumption that s. 3 of The Alberta Slot Machine Act R.S.A. 1942, c. 333 is *intra vires* of the Legislature and that the only question for determination is

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Cartwright J.

whether the machines sold by the appellant to the respondent are "slot machines" within the meanings given to that term by s. 2(*b*) of the Act.

The machines in question are described in the reasons of my brother Kerwin. Clause (*b*) of s. 2 of the Act reads as follows:—[see *ante* p. 102].

The decisions of this Court in *Rex* v. *Roberts* (1) and *Laphkas* v. *The King* (2), make it clear that the machines in question do not fall within sub-clause (i). A more difficult question is whether they fall within sub-clauses (ii) or (iii). I propose to discuss only sub-clause (iii) as its wording appears to me to be so wide as of necessity to include any machine which would fall within sub-clause (ii).

There is no doubt that the machines in question fall within the opening words of the clause "any machine or device". Can it be said that the result of any operation thereof is "as regards the operator a matter of chance or uncertainty"? In my view in the case of all these machines what the operator receives in exchange for the coin which he deposits is the privilege of playing a game of skill. There is no chance of his obtaining more or less than this privilege. However skilfully he plays he can not hope to gain a prize as was the case in *Peers* v. *Caldwell* (3). There is no uncertainty as to what he will get in return for his money. On the other hand it can not be doubted that the score which the individual operator will obtain in the case of the machines other than the "Miniature Hockey Game" is uncertain or that in the case of the last mentioned machine the questions which of the two players will win and by what score are matters of like uncertainty. The solution of the question before us appears to me to depend on whether the word "result" as used in the clause is intended to refer to the final score obtained by the operator or to the consideration which he receives in exchange for his coin. If it refers to the former I would say these machines fall within the clause but not if it refers to the latter.

(1) [1931] S.C.R. 417. (2) [1942] S.C.R. 84.
(3) [1916] 1 K.B. 371; 85 L.J.K.B. 754.

Not without hesitation, I have reached the conclusion that in the case of the machines with which we are concerned the result of their operation is as regards the operator that he obtains the right to play a game of skill and that there is neither chance nor uncertainty in such result within the meaning of the clause. I would respectfully adopt the reasoning of Clinton J. Ford J.A. in the following passage:—

> . . . Where the controlling factor in the outcome of the game is the machine and not the operator, one might give effect to the view that as regards him there is chance and uncertainty. On the other hand, where he is free as he is when operating these machines to play a good or an indifferent game, according to his skill on the occasion, it cannot be said that the operations of the machine produce the result. It is the operator himself as it is in any game, or sport, or competition

I would allow the appeal and restore the judgment of the learned trial judge with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Shouldice, Milvain & Macdonald.*

Solicitors for the respondent: *Mahaffy & Howard.*