DALE JOHNSON ..... APPELLANT;

AND

THE ATTORNEY GENERAL OF ALBERTA ..... RESPONDENT.

1953
*June 1, 3

1954
*Mar. 31

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Constitutional Law—Property and Civil Rights—Criminal Law—Confiscatory Legislation—Validity of The Slot Machine Act, R.S.A. 1935, c. 333.

The Slot Machine Act, R.S.A. 1935, c. 333, provided that no slot machine should be capable of ownership nor be the subject of property rights within the Province and that no court of civil jurisdiction should recognize or give effect to any property rights therein. It authorized the seizure under warrant of any machine believed to be a slot machine and provided that following an inquiry before a justice of

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

1954

JOHNSON v. A.G. OF ALBERTA

the peace the latter, unless satisfied that the machine was not a slot machine within the meaning of the Act, should order its confiscation to the Crown in the right of the Province.

The appellant, required to show cause why certain machines seized under the Act should not be confiscated, secured an order of Prohibition in the Supreme Court of Alberta which was set aside by a majority judgment of the Appellate Division. On appeal the sole question raised before this Court was whether the Act as it stood before an amendment which came into force on July 1, 1952, was intra vires the Alberta Legislature.

Held: (Kerwin, Taschereau and Estey JJ. dissenting) that *The Slot Machine Act,* R.S.A. 1942, c. 333 is ultra vires, since it is legislation in relation to criminal law, (Kellock, Locke and Cartwright JJ.); it is in relation to matters covered by the *Criminal Code,* (Rand J.)

Per: Rand J. Since the machines or devices struck at by the Statute are those dealt with in a similar manner by the *Code,* it is sufficient to say that the statute is inoperative.

Per: Kellock and Cartwright JJ. The Statute appears to be inseverable, to relate only to the prohibition and punishment of keeping contrivances for playing games of chance, that is to criminal law and to be ultra vires of the Legislature *in toto.* *Rex.* v. *Karminos* [1936] 1 W.W.R. 433 approved. *Industrial Acceptance Corporation* v. *the Queen* [1953] 2 S.C.R. 273 referred to. *Re Race Tracks and Betting* 49 O.L.R. 339 at 348 *et seq.* applied. *Provincial Secretary of P.E.I.* v. *Egan* [1941] S.C.R. 396, *Bédard* v. *Dawson* [1923] S.C.R. 681 and *Regina* v. *Wason* 17 O.R. 58 and 17 O.A.R. 221, distinguished.

Per: Locke J. In essence the Act was directed against gambling and nothing else, the exclusive jurisdiction to legislate in regard to which lies with Parliament under head 27 of s. 91 of the *B.N.A.* Act. *Russell* v. *the Queen* 7 App. Cas 829; *A.G. for Ont.* v. *Hamilton Street Ry. Co.* [1903] A.C. 425; *Proprietary Articles Trade Assoc.* v. *A.G. for Canada* [1931] A.C. 310; *R.* v. *Karminos* [1936] 1 W.W.R 433. *R.* v. *Nat Bell* [1922] A.C. 128, *Bédard* v. *Dawson* [1923] S.C.R. 681 and *Provincial Secretary of P.E.I.* v. *Egan* [1941] S.C.R. 396, distinguished.

Per: Kerwin and Taschereau JJ. (dissenting): The legislation impugned is neither criminal law nor incidental thereto. The Legislature was not attempting to create an offence and provide a penalty but was acting within its powers under s. 92 of the *B.N.A. Act* head 13, "Property and Civil Rights in the Province" and head 16, "Generally all Matters of a merely local or private nature in the Province". The Act was not aimed at gambling and, therefore, does not cover the same ground as the provisions of the *Criminal Code. Bédard* v. *Dawson* [1923] S.C.R. 681 at 684, 685, 687; *Lymburn* v. *Mayland* [1932] A.C. 318 at 323; *Provincial Secty. of P.E.I.* v. *Egan* [1941] S.C.R. 396 at 416. The jurisdiction exerciseable by a justice of the peace under the Alberta Act does not broadly conform to the type exercised by superior, district or county courts under s. 96 of the *B.N.A. Act. Re Adoption Act of Ontario* [1938] S.C.R. 398, approved and adopted in, *Labour Relations Board of Saskatchewan* v. *John East Iron Works Ld.* [1949] A.C. 134.

Per: Estey J. (dissenting) The effect of the legislation is to prevent rather than punish. It is, therefore, quite different from that which is classified as criminal law under s. 91 (27), or that of creating offences

and penalties under s. 92 (15) of the *B.N.A. Act*. The language used by the legislature expressly prevents the use of the machines and devices and a construction to that effect should be adopted rather than one which attributes to the legislature an effort to indirectly legislate in relation to criminal law. *A.G. for Manitoba* v. *A.G. for Canada* [1929] A.C. 260; *A.G. for Ontario* v. *Reciprocal Insurers* [1924] A.C. 328 at 345; *A.G. of Manitoba* v. *Liquor License Holders Association* [1902] A.C. 73 at 79; *Lymburn* v. *Mayland* [1932] A.C. 318.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1) (Frank Ford and Clinton J. Ford JJ. A. dissenting) reversing the judgment of the trial judge Egbert J. and setting aside the order prohibiting the magistrate from conducting any hearing, and from giving any judgment or order under *The Slot Machine Act* relative to the machines in question in these proceedings.

H. J. MacDonald for the appellant.

H. J. Wilson, Q.C. and *J. J. Frawley, Q.C.* for the Attorney General of Alberta, respondent.

KERWIN J. (dissenting):—On January 8, 1952, Egbert J. in the Supreme Court of Alberta granted an order that G. H. Ross, Q.C., Police Magistrate, sitting in the City of Calgary, and any other police magistrate or justice of the peace in the Province of Alberta be prohibited from taking further steps under *The Alberta Slot Machine Act* in proceedings wherein Dale Johnson (the present appellant) had been notified to appear and show cause why certain machines or devices seized by Acting Detective R. D. Pitman of the Calgary Police Department should not be confiscated. This order was set aside by a majority judgment of the Appellate Division on January 20, 1953 (1). By leave of the Appellate Division Dale Johnson appealed to this Court and the sole question is whether *The Slot Machine Act,* as it stood before an amendment which came into force on July 1, 1952, was intra vires the Provincial Legislature. The Attorney General of Canada was notified of the appeal but was not represented.

The Slot Machine Act which requires our attention is R.S.A. 1942, c. 333. S. 3 provides:—

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.

(1) (1952-53) 7 W.W.R. (N.S.) 193.

1954

JOHNSON
v.
A.G. OF ALBERTA

Kerwin J.

By s. 2(*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 of 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.

Section 4 provides in part that upon information on oath by any peace officer that there is reasonable grounds for believing that any slot machine is kept in any building or premises, it shall be lawful for any justice of the peace by warrant under his hand to authorize and empower the peace officer to enter and search the building or premises and every part thereof. By s. 5, every peace officer executing or assisting in the execution of any such warrant who finds upon the premises mentioned therein any machine or device which he believes to be a slot machine shall forthwith seize and remove it and bring it before a justice of the peace; and shall immediately thereafter serve upon the occupant of the premises or the person in whose possession the slot machine was at the time of the seizure a notice requiring the person so served to appear before any justice and which person shall then be there to show cause why the slot machine so seized should not be confiscated. S. 7 enacts:—

7. At the time and place mentioned in the notice any justice who shall then be there shall hear anything that may be alleged as a cause why the machine should not be confiscated and unless he is by reason of what is so alleged satisfied that the machine is not a slot machine within the meaning of this Act, he shall proceed to make an order declaring the machine to be confiscated to His Majesty to be disposed of as the Attorney General may direct and shall have power to make such order whether or not the person served with the notice is the owner, bailee or licensee of or otherwise entitled to the possession of the machine.

The necessary steps under ss. 4 and 5 were taken in connection with a number of coin machines or devices but proceedings under s. 7 were prohibited by the order of Egbert J. It is pointed out in the reasons for judgment of W. A. MacDonald J.A., speaking on behalf of the majority of the Appellate Division that, apart from the fact that the machines were placed under seizure, there is no evidence that they are of a type which under valid legislation were liable to confiscation. However, on the argument it was assumed that the machines fall within the definition of "slot machine" in the Act, and on this assumption the first contention was that the subject matter of the legislation falls under head 27 of s. 91 of the *British North America Act, 1867*:—"The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters."

In *Bédard* v. *Dawson* (1), this Court held that a statute authorizing a judge to order the closing of a disorderly house was intra vires the Quebec Legislature as it dealt with matters of property and civil rights by providing for the suppression of a nuisance and not with criminal law by aiming at the punishment of a crime. At page 684, Mr. Justice Duff, as he then was, states:—

> The legislation impugned seems to be aimed at suppressing conditions calculated to favour the development of crime rather than at the punishment of crime. This is an aspect of the subject in respect of which the provinces seem to be free to legislate. I think the legislation is not invalid.

and at page 685, Mr. Justice Anglin (as he then was) states:—

> I am of the opinion that this statute in nowise impinges on the domain of criminal law but is concerned exclusively with the control and enjoyment of property and safeguarding of the community from the consequences of an illegal and injurious use being made of it—a pure matter of civil right. In my opinion in enacting the statute now under consideration the legislature exercised the power which it undoubtedly possesses to provide for the suppression of a nuisance and the prevention of its recurrence by civil process.

Mr. Justice Mignault, at page 687, puts it thus:—

> La législature veut empêcher qu'on ne se serve d'un immeuble pour des fins immorales; elle ne punit pas l'offense elle-même par l'amende ou l'emprisonnement, mais elle ne fait que statuer sur la possession et l'usage d'un immeuble. Cela rentre pleinement dans le droit civil.

(1) [1923] S.C.R. 681.

1954

JOHNSON v. A.G. OF ALBERTA

Kerwin J.

The mere fact that s. 2(*b*)(i) of *The Slot Machine Act* refers to a section of the *Criminal Code* is not by itself of any importance. In *Lymburn* v. *Mayland* (1), Lord Atkin, speaking on behalf of the Judicial Committee, with reference to a bond required to be entered into under the Alberta Security Frauds Prevention Act, 1930, states at 323:—

> Registered persons must enter into a personal bond, and may be required to enter into a surety bond each in the sum of $500, conditioned for payment if the registered person, amongst other events, is (in the former bond) "charged with," (in the later bond) "convicted of," a criminal offence, or found to have committed an offence against the Act or the regulations made thereunder. It was contended on behalf of the Attorney-General for the Dominion that to impose a condition making the bond fall due upon conviction for a criminal offence was to encroach upon the sole right of the Dominion to legislate in respect of the criminal law. It indirectly imposed an additional punishment for a criminal offence. Their Lordships do not consider this objection well founded. If the legislation be otherwise intra vires, the imposition of such an ordinary condition in a bond taken to secure good conduct does not appear to invade in any degree the field of criminal law.

The extracts from the judgment of Mr. Justice Duff in the *Bédard* case and from that of the Judicial Committee in *Lymburn* v. *Mayland* are mentioned by the present Chief Justice of this Court, speaking on behalf of himself and two associates, in *Provincial Secretary of Prince Edward Island* v. *Egan* (2). What was there in question was a provincial enactment providing that if a person were convicted of driving a motor vehicle while under the influence of intoxicating liquor his provincial licence to operate a motor vehicle should forthwith and automatically be suspended for certain periods, or cancelled, depending upon whether it was a first, second or third conviction and providing that the Provincial Secretary should not issue a licence to any person during the period for which his licence had been so cancelled or suspended. A section of the *Criminal Code* provided that where a person was convicted of driving a motor vehicle while intoxicated, the Court might in addition to any other punishment provided, prohibit him from driving a motor vehicle anywhere in Canada during any period not exceeding three years. The present Chief Justice at page 414 pointed out that the field of the two enactments was not co-extensive, and, at page 415, that the legislation had to do with the civil regulation of the use of

(1) [1932] A.C. 318. (2) [1941] S.C.R. 396 at 416.

highways and personal property, the protection of the persons and property of the citizens, the prevention of nuisances and the suppression of conditions calculated to make circulation and traffic dangerous. Sir Lyman Duff stated at page 402 that the legislation was concerned with the subject of licensing drivers and motor vehicles of which it was essential that the province should primarily have control and at page 403 that he could find no adequate ground for the conclusion that the legislation in its true character attempted to prescribe penalties for the offences mentioned rather than enactments in regulation of licenses. Similar views were expressed by Mr. Justice Hudson and Mr. Justice Taschereau.

In the present case the Legislature has declared that there is no property in a slot machine. All that the tribunal before which the matter comes has to do is to hear representations that any particular machine is not a slot machine and, unless it is satisfied that such is the case, make an order confiscating it to His Majesty in right of the Province. The legislation impugned is neither criminal law nor incidental thereto. The Legislature was not attempting to create an offence and provide a penalty but was acting within its powers under s. 92 of the *British North America Act,* head 13, "Property and Civil Rights in the Province" and head 16 "Generally all Matters of a merely local or private Nature in the Province." It is not necessary under the Alberta Act that the slot machine be found in a gaming house. I do not read that Act as aimed at gambling and, therefore, in my opinion it does not cover the same ground as the provisions of the *Criminal Code.*

It was next argued that in any event the jurisdiction conferred upon a justice of the peace by the Act infringes the provisions of s. 96 of the *British North America Act, 1867:* —"The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick." The landmark upon this topic is the judgment of this Court delivered by Sir Lyman Duff in *Re Adoption Act of Ontario* (1). In *Labour Relations Board of Saskatchewan* v. *John East Iron Works Ld.* (2), Lord Simonds, at 152, describes it as "so exhaustive and

(1) [1938] S.C.R. 398. (2) [1949] A.C. 134; [1948] 2 W.W.R. 1055.

1954

JOHNSON v. A.G. OF ALBERTA

Kerwin J.

penetrating both in historical retrospect and in analysis of this topic, that their Lordships would respectfully adopt it as their own, so far as it is relevant to the present appeal." Later it was pointed out that it had been sufficient for the purpose of that case for Sir Lyman Duff to pose the question: "Does the jurisdiction conferred upon magistrates under these statutes broadly conform to a type of jurisdiction generally exercisable by courts of summary jurisdiction rather than the jurisdiction exercised by courts within the purview of s. 96?" Their Lordships preferred to put the question in this way which they thought might be more helpful in the decision of similar issues:— "Does the jurisdiction conferred by the Act on the appellant board broadly conform to the type of jurisdiction exercised by the superior, district or county courts?"

When one's attention is fixed upon what the justice of the peace may do under the Alberta Act, it matters not in my opinion in which form the question is put. If he is not satisfied that the machine is not a slot machine within the Act, his function is merely to make an order of confiscation. This jurisdiction broadly conforms to a type generally exercisable by Courts of summary jurisdiction. Provisions authorizing confiscation by a justice of the peace may be found in the *Criminal Code* and, while these examples indicate that Parliament was legislating with reference to criminal law, they also show that the jurisdiction exercisable by a justice of the peace under the Alberta Act does not broadly conform to the type exercised by the superior, district or county courts. One example is s. 543 of the *Criminal Code* providing for the confiscation and destruction of cocks found in a cock pit. Another is s-s. 3 of s. 641 of the *Code* dealing with the forfeiture of moneys or securities seized under a warrant in gaming houses, and yet another is s-s. 1 of s. 632 under which a justice of the peace may cause to be defaced or destroyed any forged banknote, bank note-paper, instrument or other things.

Counsel referred to several decisions of provincial courts in which the validity of various Provincial Slot Machine Acts was in issue. All of these statutes contained sections similar to some of those in the legislation before us but

nothing is said about such decisions as in the particular branches of constitutional law with which we are concerned, the line between validity and invalidity is very narrow.

The appeal should be dismissed with costs.

TASCHEREAU J. (dissenting):—For the reasons given by my brother Kerwin, I am of the opinion that *The Slot Machine Act* (R.S.A. 1942, c. 333) is intra vires the powers of the Legislature of Alberta, and I would dismiss the appeal with costs.

RAND J.:—In this appeal the validity of *The Slot Machine Act, 1935,* as amended, of Alberta, is challenged on three grounds: that the true nature of the legislation, directed against a public evil, is criminal law and within the exclusive jurisdiction of Parliament; that the provision for a declaration of confiscation by a justice of the peace is in conflict with s. 96 of the Confederation Act, and as that adjudication is essential to the administration of the Act the whole enactment must fall; and that in any event the field covered by the statute is already occupied by the *Criminal Code.* In view of the conclusion to which I have come it is unnecessary to deal with more than the last ground.

The definition of "slot machine" in s. 2 of the Act is as follows:—[see *ante* p. 130].

S. 3 declares that the machines shall not be capable of ownership nor be the subject of property rights within the province, and that no court of civil jurisdiction shall recognize or give effect to any rights in them. Ss. 4, 5, 6 and 7 provide that, upon information on oath by a peace officer that there are reasonable grounds for believing that any slot machine "is kept in any building or premises", a warrant may issue to search and seize and to bring the machine before a justice of the peace, and for notice to be served upon the person in possession to show cause why it should not be declared to be confiscated; and unless the justice is satisfied that the machine is not one within the meaning of the Act, he is to make an order of confiscation to Her Majesty.

In 1938, s. 986(4) of the *Criminal Code* was amended to its present form which, embracing slot machines for any purpose except vending services, declares that "if any house,

1954

JOHNSON v. A.G. OF ALBERTA

Rand J.

room or place is found fitted or provided with any such machine, there shall be an irrebutable presumption that such house, room or place is a common gaming house." That presumption arises in any prosecution under s. 229 for keeping a disorderly house, which, by s. 226, includes a common gaming house. The prosecution, preceded by an information made under oath, charges the person with being the keeper of a house to which, by the definition in s. 226, persons resort "for the purpose of playing at any game of chance." Once, then, that basis is established and the presence of such a machine is shown, the conviction for keeping a common gaming house necessarily follows.

We have no facts before us showing the nature of the machines involved in the proceeding taken and we are left, therefore, with the language of the statute and of the *Code* from which to deduce the limits of inclusion to which the definition can be taken to extend.

It has been decided that slot machines for amusement or entertainment purposes come within the exception to s. 986(4) as vending services: *Laphkas* v. *The King* (1); they are therefore excluded from para. (i) of the definition. In *Regent Vending Machines* v. *Alberta Vending Machines Ltd.* (2) the judgment in which is being delivered with that in this appeal, for the reasons given I was of opinion that the machines in that case which were games or means of entertainment into which skill entered were not within the language of paras. (ii) or (iii): and the question which is raised at this stage is whether there can be any machine coming within the scope of paras. (ii) and (iii) to which the provisions of the *Code* do not extend.

That the object of the statute is to eliminate what is considered to be a local evil is quite apparent but what evil? I can quite imagine an object of concern to be the waste of time and money, particularly of young persons, in the operation of such machines as were dealt with in *Regent Vending Machines Ltd.* (*supra*). Their operation may even be taken to tend to breed a gambling propensity, although that tendency, if it exist at all, must be admitted to be extremely tenuous. But that the legislative purpose is aimed primarily at the evil of gambling is patent from almost the opening words of the statute. There is the

(1) [1942] S.C.R. 84. (2) [1954] S.C.R.

incorporation of the instruments falling within s. 986(4) of the *Code* in para. (i); paras. (ii) and (iii) are couched in language which in its technical description of the functional result of the machines is identical with what is contained in that section. The only differences between paras. (ii) and (iii) are in the opening words of application in (ii) "any slot machine and any other machine of a similar nature" against in (iii) "any machine or device"; in line 6 of (ii), "any number" against, in line 5 of (iii), "any given number"; and in line 9 of (ii) "shall be known" against "may be known" in the last line of (iii). If significant differences in the interpretation of the two paragraphs exist, they have not been suggested to us. It is therefore, in my opinion, reasonably clear that if the scope of the statute in this respect does go beyond that of s. 986(4), it must be in relation to machines or devices that are of or are used for a gambling nature or purpose.

That being so, what is the scope of the provisions of the *Code* dealing with gaming and gambling instruments? It should be remarked at the outset that, generally, gambling devices are aimed at as the apparatus of gaming houses. In certain forms they may be found in homes and used if at all in purely private activities beyond the reach of the criminal law. I do not interpret the words of s. 4 of the statute "that any slot machine is *kept* in any building or premises" to extend to an instrument of any kind to be found in a home for family and social entertainment. To be "kept" in the text carries the implication both of keeping in use and for other than purely social purposes. What is intended to be struck at is a public or community evil, not what would involve in its enforcement the invasion of domestic privacy.

In addition to s. 986(4) the provisions of ss. 235 and 641 bear directly on the question. The former makes it an indictable offence to keep in any premises, "any gambling, wagering, or betting machine or device". No definition is given of these machines or devices, and we are left in each case to a determination of fact. Then s. 641 authorizes the seizure within any house, room or place which a peace officer believes to be a place kept as a gaming house, of all instruments of gaming found therein, to be brought before a justice who, by s-s. (3) is empowered in a proper

1954

JOHNSON v. A.G. OF ALBERTA

Rand J.

case to make an order of confiscation. Taken with s. 642 it furnishes the means and the occasion for initiating a prosecution under s. 229.

From this it is seen that the *Code* has dealt comprehensively with the subject matter of the provincial statute. An additional process of forfeiture by the province would both duplicate the sanctions of the *Code* and introduce an interference with the administration of its provisions. Criminality is primarily personal and sanctions are intended not only to serve as deterrents but to mark a personal delinquency. The enforcement of criminal law is vital to the peace and order of the community. The obvious conflict of administrative action in prosecutions under the *Code* and proceedings under the statute, considering the more direct and less complicated action of the latter, could lend itself to a virtual nullification of enforcement under the *Code* and in effect displace the *Code* so far by the statute. But the criminal law has been enacted to be carried into effect against violations, and any local legislation of a supplementary nature that would tend to weaken or confuse that enforcement would be an interference with the exclusive power of Parliament.

The penalty of the Act, in duplicating forfeiture, is supplementing punishment. That is not legislating either "in relation to" property or to a local object. Every valid enactment made under the authority conferred by means of that phrase is for an object or purpose which is within the power of the enacting jurisdiction, and legislation "in relation to" property is as much subject to that canon as any other head of ss. 91 or 92. Legislation from caprice or perverseness or arbitrary will affecting, say, property, cannot be brought within those words; when of such a nature it passes into another category. That law is reason is in such a sense as applicable to statutes as to the unwritten law. I am unable to agree, therefore, that under its authority to legislate in relation to property the province can in reality supplement punishment; that it may deal with conditions that conduce to the development of crime where what is proposed is in fact legislation of that character and infringes no legislative field beyond its jurisdiction though undoubted is not in question here.

The result is that since the machines or devices struck at by the statute are the same as those dealt with in similar manner by the Code, it is sufficient to say that the statute is inoperative.

The appeal must therefore be allowed and judgment go directing the issue of a writ of prohibition.

KELLOCK J.:—This appeal involves the constitutional validity of *The Slot Machine Act,* R.S.A., 1942, c. 333. Although the circumstances giving rise to these proceedings did not arise under s. 3, the entire statute was questioned on the argument.

As to s. 3, I think it is sufficient to say that in my opinion even if that section could be regarded as otherwise valid, as to which I offer no opinion, it is not severable. Apart from this, I concur in the reasoning and conclusion of my brother Cartwright. I would allow the appeal.

ESTEY J. (dissenting):—The first question in this appeal is relative to the competency of the legislature of Alberta to enact *The Slot Machine Act* (R.S.A. 1942, c. 333).

The appellant contends *The Slot Machine Act* is legislation in relation to criminal law and, therefore, by virtue of s. 91(27) of the B.N.A. Act, can be competently enacted only by the Parliament of Canada.

A slot machine is defined in s. 2(*b*) to mean: [see *ante* p. 130].

In sub-para. (iii) substantially the same language is used as in sub-para. (ii), but made applicable to "any machine or device." The legislature, by the addition of these sub-paras. (ii) and (iii), has included machines other than those which would be subject to the provisions of the *Criminal Code* and, in particular, would include a machine which otherwise comes within this provision if it be played for amusement only.

Then s. 3 provides:

> 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.

In subsequent sections provision is made for the seizure and confiscation of these machines or devices.

1954

JOHNSON v. A.G. OF ALBERTA

Estey J.

S. 3, under which slot machines, as defined, can neither be owned nor the subject of property rights within the province, sets forth the basic principle underlying the statute and, as such, is legislation in relation to property and civil rights.

It is, however, the contention of the appellant that when read as a whole the statute makes the possession of these machines and devices an offence and confiscation thereof a penalty; that in reality it is an attempt on the part of the province to legislate "for the promotion of public order, safety, or morals" and is, therefore, legislation in relation to criminal law.

Leaving aside, for the moment, the provisions for seizure and forfeiture, it may be observed that the phrase just quoted appears in the judgment of the Judicial Committee in *Russell* v. *The Queen* (1), which, at p. 839, reads:

> Laws of this nature designed for the promotion of public order, safety, or morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights. They are of a nature which fall within the general authority of Parliament to make laws for the order and good government of Canada, and have direct relation to criminal law.

The submission of the appellant would appear not to give sufficient weight to the words that immediately follow the phrase "public order, safety, or morals," from which it is evident that, in order to give such legislation the quality and character of criminal law, there must be an offence defined and a penalty provided therefor.

Lord Atkin gives expression to the same view when, after stating that the phrase "criminal law" in s. 91(27) of the *B.N.A. Act* is used in its widest sense and is not confined to what was criminal law in 1867, he continues:

> The power must extend to legislation to make new crimes. Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences? Morality and criminality are far from co-extensive; nor is the sphere of criminality necessarily part of a more extensive field covered by morality—unless the moral code necessarily disapproves all acts prohibited by the State, in which case the argument moves in a circle. *Combines Investigation Act* case (2).

(1) (1882) 7 App. Cas. 829. (2) [1931] A.C. 310 at 324.

The absence of any express provision in *The Slot Machine Act* making possession of these machines or devices an offence and providing a penalty therefor distinguishes it from the legislation of Saskatchewan which expressly included both and as a consequence was declared to be ultra vires the province in *Rex* v. *Karminos* (1). Even in that case Mr. Justice Turgeon would have held the provision, similar to the above-quoted s. 3, competent provincial legislation and severable from that which was criminal in character. In *Rex* v. *Stanley* (2), the Alberta Court of Appeal held that legislation in that province, prior to that here under consideration, was intra vires. It contained a direct prohibition against keeping and operating these machines, but did not provide a penalty therefor. The Appellate Division of the Supreme Court of New Brunswick in *Rex.* v. *Lane* (3), held similar slot machine legislation within the legislative competence of the province.

The appellant cited *Ouimet* v. *Bazin* (4). That case and *A.-G. for Ontario* v. *Hamilton Street Ry. Co.* (5), upon which it was mainly decided, further emphasize the distinction between legislation in relation to criminal law and the slot machine legislation here in question. In the *Hamilton Street Railway* case the Privy Council held an act to prevent the profanation of the Lord's Day legislation in relation to criminal law and, therefore, beyond the competence of the province to enact. The profanation of the Sabbath was a crime at common law (Encyc. of the Laws of Eng., Vol. 13, p. 707) and a statutory offence in Upper Canada prior to Confederation (Cons. S. of U.C. 1859, 22 Vict., c. 104). See also *In re Legislation Respecting Abstention from Labour on Sunday* (6). This feature was emphasized by their Lordships of the Privy Council at p. 589, where it is stated "that an infraction of the Act which in its original form . . . was in operation at the time of Confederation is an offence against the criminal law." In the *Ouimet* case the Quebec statute was similar to that in Ontario. It was entitled "An Act Respecting the Observance of Sunday" and it was held to be ultra vires.

(1) [1936] 1 W.W.R. 433.
(2) [1935] 3 W.W.R. 517.
(3) (1936) 67 Can. C.C. 273.
(4) (1912) 46 Can. S.C.R. 502.
(5) (1903) A.C. 524.
(6) (1905) 35 Can. S.C.R. 581.

1954

JOHNSON v. A.G. OF ALBERTA

Estey J.

The slot machine legislation would appear to be more appropriately classified under that type discussed in *Bédard* v. *Dawson* (1). In that case this Court held intra vires a Quebec statute providing for the closing of any building which continued to be used as a disorderly house after a conviction had been registered against the owner or occupant thereof. Duff J. (later C.J.) at p. 684, stated:

> The legislation impugned seems to be aimed at suppressing conditions calculated to favour the development of crime rather than at the punishment of crime. This is an aspect of the subject in respect of which the provinces seem to be free to legislate. I think the legislation is not invalid.

and Anglin J. (later C.J.) at p. 685:

> . . . I am of the opinion that this statute in no wise impinges on the domain of criminal law but is concerned exclusively with the control and enjoyment of property and the safeguarding of the community from the consequences of an illegal and injurious use being made of it—a pure matter of civil right.

These quotations distinguish between legislation which, in effect, prevents the use of property which the legislature has decided is undesirable in the interests of the community from that under which one who commits an offence may be prosecuted and punished therefor.

The legislature in *The Slot Machine Act,* in effect, prevents the use of these machines or devices. That it may prevent the commission of criminal offences may be conceded. That was the precise effect of the legislation in the *Bédard* case. *The Slot Machine Act* goes further and prevents the use of machines and devices which, in the judgment of the legislature, tend to foster criminal or other tendencies detrimental to the community.

In determining the nature and character of legislation one examines the effect thereof and not its purpose. Viscount Sumner in *Attorney-General for Manitoba* v. *Attorney-General for Canada* (Provincial Sale of Shares Act) (2). It is here neither the purpose nor the effect of the legislation that offences and penalties are provided with respect to the possession or use of slot machines and devices. The legislature is not concerned with how and in what manner these machines and devices have been used, but rather that they shall not be used at all within the province.

(1) [1923] S.C.R. 681. (2) [1929] A.C. 260 at 268.

With that end in view it has defined those it deems undesirable and whether they be slot machines within the language of the *Criminal Code* is not in issue. The only issue under this legislation is whether these machines are within the definition in s. 2. If so, they cannot be owned or made the subject of property rights, but will be confiscated to Her Majesty. The effect of the legislation is to prevent rather than punish. It is, therefore, quite different from that which is classified as criminal law under s. 91(27), or that of creating offences and penalties under s. 92(15). The language used by the legislature expressly prevents the use of these machines and devices and a construction to that effect should be adopted, rather than one which attributes to the legislature an effort to indirectly legislate in relation to criminal law. The position is comparable to that described by Sir Lyman Duff, writing on behalf of the Privy Council, where he stated:

> . . . the terms of the statute as a whole are, in their Lordships' judgment, capable of receiving a meaning according to which its provisions, whether enabling or prohibitive, apply only to persons and acts within the territorial jurisdiction of the Province. In their opinion it ought to be interpreted in consonance with the presumption which imputes to the Legislature an intention of limiting the direct operation of its enactments to such persons and acts. *Attorney-General for Ontario* v. *Reciprocal Insurers*. (1).

It is emphasized, in support of the invalidity of the legislation here in question, that the language of the definition in s. 2(*b*)(ii) and (iii) is almost identical with a portion of s. 986(4) of the *Criminal Code*. Before any conclusion should be drawn from this circumstance it should be observed that s. 986(4), as enacted in the *Criminal Code,* is designed to serve two purposes: first, that the automatic or slot machine there defined is "deemed to be a means or contrivance for playing a game of chance" within the meaning of ss. 226 and 229 of the *Criminal Code;* second, that any house, room or place fitted or provided with such automatic or slot machines raises an irrebuttable presumption that such is a common gaming house within the meaning of ss. 226 and 229 of the *Criminal Code*. The *Slot Machine Act* contains no such provisions. Moreover, s. 986(4) is restricted to automatic or slot machines, while s. 2(*b*)(ii) applies to "any slot machine and any other

(1) [1924] A.C. 328 at 345.

1954

JOHNSON v. A.G. OF ALBERTA

Estey J.

machine of a similar nature" and (iii) applies to "any machine or device." This being so, the language of s. 2(*b*)(ii) and (iii) must be construed in its context and in relation to the purposes for which it is there used, rather than the context of s. 986(4).

When regard is had for the true nature and character of this legislation, it is the machine or device, and not the owner or party in possession thereof, against which the legislation is directed. The essential difficulty, therefore, in describing the confiscation here provided for as a penalty is that there is no offence to which it can be attached. "Confiscation" is not a word of art and, while it may be used in association with an offence as constituting part of the penalty, it does not follow that confiscation is always a penalty. In *Rex* v. *Lane, supra,* Chief Justice Baxter, after stating that "Property can be taken from one person and given to another, or, as by the Act in question, it can be vested in the Crown," goes on to cite *Levin* v. *Allnutt* (1), and *Re Barnett's Trusts* (2), where the word "confiscation" is used not in the sense of a penalty. The essential feature of the legislation here is that slot machines cannot be owned or subject to property rights and, if the legislation stopped there, the property in these machines would pass, *bona vacantia,* to the Crown. However, the legislature here provides an opportunity for those who contend that their machines are not within the definition to have that issue judicially determined and, if determined adversely to the party so contending, the magistrate, under the statute, has no alternative but to direct their confiscation, not as a penalty for an offence, but under the authority of a province to declare that in respect of property subject to its legislative jurisdiction it may be neither owned nor the subject of property rights and to take possesion thereof.

The slot machine legislation, directed as it is to the prevention of the use of these machines and devices within the province, may be classified under either s. 92(14) or (16). In this connection it is not unimportant to observe that the province has a right to legislate, as Lord Macnaghten states in *A.-G. of Manitoba* v. *Liquor Licence Holders Assoc.* (3), upon "matters which are 'substantially of local or of private

(1) 15 East 267.

(2) (1902) 71 L.J.Ch. 408.

(3) [1902] A.C. 73 at 79.

interest' in a province—matters which are of a local or private nature " from a provincial point of view," . . ." At p. 78 Lord Macnaghten states:

> In legislating for the suppression of the liquor traffic the object in view is the abatement or prevention of a local evil, rather than the regulation of property and civil rights—though, of course, no such legislation can be carried into effect without interfering more or less with "property and civil rights in the province."

In *Lymburn* v. *Mayland* (1), it was held that the Alberta Security Frauds Prevention Act (S. of A. 1930, Ch. 8) was intra vires. It was there contended before the Judicial Committee that "the Act was invalid because under the colour of dealing with the prevention of fraud in share transaction sit was assuming to legislate as to criminal law." This contention was not accepted and in the course of their reasons it was stated at p. 324:

> There is no reason to doubt that the main object sought to be secured in this part of the Act is to secure that persons who carry on the business of dealing in securities shall be honest and of good repute, and in this way to protect the public from being defrauded.

and at p. 326:

> The provisions of this part of the Act may appear to be far-reaching; but if they fall, as their Lordships conceive them to fall, within the scope of legislation dealing with property and civil rights the legislature of the Province, sovereign in this respect, has the sole power and responsibility of determining what degree of protection it will afford to the public.

These cases are illustrations of the jurisdiction a province possesses to legislate in respect to morality, order and general welfare, under the appropriate headings of s. 92, and the imposition of penalties for infractions thereof, as provided in s. 92(15).

The fact that Parliament has, in legislating in relation to criminal law, dealt with slot machines does not militate against the jurisdiction of the province to prohibit their use. That was expressly decided in the *Bédard* case. The principle underlying that case would appear to support the view that in respect to property such as slot machines a provincial legislature may, if it deems them undesirable, legislate to prohibit their use, irrespective of whether Parliament has included provisions in regard to them in its legislation in relation to criminal law. A conclusion to the contrary would leave the province without legislative capa-

(1) [1932] A.C. 318.

1954

JOHNSON v. A.G. OF ALBERTA

Estey J.

city to prevent the use of such chattels, however objectionable or undesirable, in the opinion of the legislature, they may be. That the legislature possesses such a jurisdiction appears to be established by the authorities mentioned and in my view the slot machine legislation here in question should be held to be competently enacted.

The appellant's second contention is that the legislature of Alberta cannot require a magistrate to "hear anything that may be alleged as a cause why the machine should not be confiscated and unless he is by reason of what is so alleged satisfied that the machine is not a slot machine within the meaning of the Act, he shall proceed to make an order declaring the machine to be confiscated . . ." (s. 7); or, as otherwise stated, that a police magistrate cannot decide such, as his decision would constitute "a judgment *in rem* concerning *'bona vacantia'* as the subject matter." In effect, his contention is that such a matter can only be decided by a judge appointed under s. 96 of the B.N.A. Act. S. 96 reads as follows:

96. The Governor General shall appoint the judges of the Superior, District and County Courts in each Province except those of the Courts of Probate in Nova Scotia and New Brunswick.

Section 92(14) of the *B.N.A. Act* provides that the administration of justice, including the constitution, maintenance and organization of provincial courts, vests in the province. These ss. 96 and 92(14) were considered in a Reference Concerning, *inter alia,* the Authority of Police Magistrates and Justices of the Peace to Perform the Functions Vested in Them by Provincial Legislatures (1). It was there pointed out that prior to Confederation courts presided over by magistrates and justices of the peace exercised a jurisdiction both in civil and criminal matters. After referring to s. 129 of the *B.N.A. Act,* under which all laws in force in Canada, Nova Scotia and New Brunswick were continued until amended by the appropriate legislative body, Sir Lyman Duff stated at p. 413:

The effect of this section, of course, was that the authority of magistrates and justices of the peace in these civil matters, as well as of all judicial officers not within section 96 continued after Confederation in the provinces mentioned, subject to alteration by the legislature.

(1) [1938] S.C.R. 398.

> . . . The *B.N.A. Act,* therefore, by its express terms provided for the continuance of courts possesing civil jurisdiction which were not within the scope of section 96 and concerning the powers of which the provinces had exclusive authority in virtue of section 92(14).

It was also pointed out at p. 418 that the provinces possess a jurisdiction to change or vary the jurisdiction of inferior courts "whether within or without the ambit of s. 96." The problem, therefore, appears in each case to be a question of whether, by its legislation, a province has constituted "a court of a class within the intendment of s. 96."

The magistrate, under *The Slot Machine Act,* exercises a judicial function in arriving at his decision as to whether "he is by reason of what is so alleged satisfied that the machine is not a slot machine within the meaning of this Act." That does not appear to be different in character from that which justices of the peace were called upon to decide both prior to and since Confederation. In my opinion the legislature of Alberta has not endeavoured to constitute, nor has it constituted by this legislation, a court of a class within the scope of s. 96.

The forfeiture provided under this legislation is a statutory consequence which, of necessity, results unless the magistrate is "satisfied that the machine is not a slot machine . . ." Even if, however, it be said that, in reality, the magistrate decides that question, it should be noted that prior to Confederation similar matters were decided under the fish and game laws in Upper Canada, 23 Vict., c. 55, s. 12; Cons. S. of C., c. 62, s. 37; also in Nova Scotia, 10 Geo. IV, c. 33, ss. 21 and 22.

Under this legislation slot machines can neither be owned by, nor can individuals obtain a property right or interest therein. As found they are seized and, upon an order by a magistrate, confiscated to the Crown. They come to the Crown, therefore, not because of property in which there may be diverse claims, but by virtue of these statutory provisions.

The appeal should be dismissed.

LOCKE J.:—The nature of these proceedings and the language of the sections of the Slot Machine Act of Alberta (R.S.A. 1942, c. 333) are described in other reasons to be delivered in this matter. While we were informed upon

1954

JOHNSON
v.
A.G. OF ALBERTA

Locke J.

the argument that ss. 4 to 7 inclusive alone were dealt with on the argument addressed to the courts in Alberta and a decision upon the constitutional validity of those sections is sufficient to dispose of the matter, I think s. 3 should also be dealt with.

In *Rex* v. *Stanley* (1), the Appellate Division of the Supreme Court found that the Slot Machine Act of 1935 (c. 14), which contained a provision similar to s. 3 of the present Act was intra vires and the accuracy of that decision is brought into question in this appeal.

The objection to the power of the Province to pass this legislation is based upon the contention that it is an infringement upon the powers of Parliament under head 27 of s. 91 of the *British North America Act* by which the exclusive legislative authority, in relation to the criminal law, was vested in Parliament, except the constitution of courts of criminal jurisdiction but including the procedure in criminal matters.

It is of assistance in determining the matter to consider the history of the provisions of the *Criminal Code* dealing with the devices which may be generally described as slot machines. In the *Code* as it appeared as c. 146, R.S.C. 1906, under a sub-heading entitled "Evidence on the Trial", it was provided by s. 986 that in any prosecution under s. 228 for keeping a common gaming house, or under s. 229 for playing or looking on while any other person is playing in a common gaming house, it should be prima facie evidence that the place was used as a common gaming house if it was found fitted or provided, *inter alia,* "with any means or contrivance for unlawful gaming." By c. 13 of the Statutes of 1913, that section was repealed and there was substituted a section providing that if the place was provided, *inter alia,* with any means or contrivance for unlawful gaming or betting, it should be prima facie evidence that it was a common gaming house. By s. 5 of c. 16 of the Statutes of 1918, the section was further amended by striking out the words "unlawful gaming" and substituting the words: "playing any game of chance or any mixed game of chance or skill."

(1) (1935) 3 W.W.R. 517.

By c. 35 of the Statutes of 1924, s. 986 was further amended by adding as s-s. 3 thereof the following:—

> In any prosecution under section two hundred and twenty-eight any automatic machine intended to be used for vending merchandise or for any other purpose, 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, shall be deemed to be a means or contrivance for playing a game of chance, within the meaning of subsection (1) of this section, notwithstanding that the result of some one or more or all of such operations may be known to the operator in advance.

While it is not questioned that this legislation was within the powers of Parliament, I think it is of some assistance to consider certain of the cases decided by the Judicial Committee and by this Court in which the extent of its jurisdiction under head 27 has been defined. In *Russell* v. *The Queen* (1), where the validity of the Canada Temperance Act, 1878, was upheld on the ground that the objects and scope of the Act were general, that is, to promote temperance by means of a uniform law throughout the Dominion and so related to the peace, order and good government of Canada and not to the class of subjects "property and civil rights", Sir Montague Smith, in delivering the judgment of the Court, said in part (p. 839):—

> Laws of this nature designed for the promotion of public order, safety, or morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights. They are of a nature which fall within the general authority of Parliament to make laws for the order and good government of Canada, and have direct relation to criminal law, which is one of the enumerated classes of subjects asisgned exclusively to the Parliament of Canada.

In *Attorney-General for Ontario* v. *Hamilton Street Railway* (2), where the Judicial Committee found that the *Lord's Day Act* passed by the Province of Ontario was ultra vires, the Lord Chancellor, in delivering the judgment of the Court, said that the reservation of the criminal law to the Dominion of Canada was given in clear and intelligible words which must be construed according to their natural and ordinary signification and (p. 529):—

> The fact that from the criminal law generally there is one exception, namely, "the constitution of Courts of criminal jurisdiction," renders it more clear, if anything were necessary to render it more clear, that with that exception . . . the criminal law, in its widest sense, is reserved for the exclusive authority of the Dominion Parliament.

(1) (1882) 7 App. Cas. 829. (2) [1903] A.C. 524.

1954

JOHNSON v. A.G. OF ALBERTA

Locke J.

The language employed in expressing the opinion of the Board gave effect to the argument of counsel who sought to uphold the judgment which had held the Act beyond the powers of the Legislature, that the primary object of the Act under consideration was the promotion of public order, safety and morals and not the regulation of civil rights as between subject and subject.

In *Proprietary Articles Trade Association* v. *Attorney General for Canada* (1), where the Judicial Committee upheld the validity of the Combines Investigation Act, Lord Atkin, after referring to what had been said in the *Hamilton Street Railway* case, said (p. 324):—

> Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences? Morality and criminality are far from co-extensive; nor is the sphere of criminality necessarily part of a more extensive field covered by morality—unless the moral code necessarily disapproves all acts prohibited by the State, in which case the argument moves in a circle. It appears to their Lordships to be of little value to seek to confine crimes to a category of acts which by their very nature belong to the domain of "criminal jurisprudence"; for the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished.

The provision introduced in s. 986 by the amendment of 1924 was further amended by s. 24 of c. 38 of the Statutes of 1925 but in a manner which is immaterial to the matter we are considering.

In 1924 the Legislature of Alberta enacted *"The Slot Machine Act"*, this apparently being the first of such statutes adopted by any legislature in Canada. By that Act, "slot machine" was defined as follows:—

> any automatically or mechanically operated contrivance or device which delivers or purports to deliver to any person upon or subsequently to the insertion therein of any money or any substance representing money, any premium, prize or reward consisting either of money or money's worth or anything which is intended to be exchanged for money or money's worth, and whether such contrivance or device also delivers or causes to be delivered any goods to, or performs or causes to be performed any service for any person or not.

(1) [1931] A.C. 310.

By s. 3 it was declared that no slot machine should be capable of ownership or be the subject of property rights within the province.

In the revision of the Statutes of Canada of 1927, s-s. 3 of s. 986 as enacted in 1924 and amended in 1925 appears as s-s. 4.

By s. 27 of c. 11 of the Statutes of 1930, s-s. 4 was repealed and reenacted in the following terms:—

(4) In any prosecution under section two hundred and twenty-nine any automatic machine intended to be used for vending merchandise or for any other purpose, the result of one of 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, shall be deemed to be a means or contrivance for playing a game of chance, within the meaning of subsection two of this section, notwithstanding that the result of some one or more or all of such operations may be known to the operator in advance.

The Federal legislation was in this form when in the years 1935 and 1936 some of the other provinces of Canada, apparently acting in concert, adopted legislation dealing with slot machines, an expression which, up to that time, had not appeared in the *Criminal Code*. In 1935 the Legislature of Saskatchewan passed the Slot Machine Act (c. 72, S.S. 1935) and in the same year a Slot Machine Act was enacted in Manitoba (c. 43, S.M. 1935). In the same year the Legislature of Alberta repealed c. 36 of its Statutes of 1924 and enacted the Slot Machine Act 1935. In 1936 the Provinces of Nova Scotia, New Brunswick and Prince Edward Island dealt with the subject by legislation. The Statute of Nova Scotia appeared as c. 2 of its Statutes of that year: in New Brunswick as c. 48 and in Prince Edward Island as c. 25. The Province of British Columbia did not enter this legislative field, apparently being satisfied to leave matters of this nature to be dealt with under the provisions of the *Criminal Code*.

The Statutes thus adopted by six of the provinces of Canada, while differing in some respects in the language employed in defining what was a slot machine and in dealing with the matter of penalties, had one provision in common, namely, that such machines were declared to be incapable of ownership or of giving rise to property rights. The Province of Ontario enacted a Slot Machine Act in 1944. (c. 57) and the Province of Quebec in 1946 (c. 19).

1954

JOHNSON v. A.G. OF ALBERTA

Locke J.

To complete the history of the legislation upon the subject, so far as it is necessary that it should be considered, it should be said that by s. 46 of c. 44 of the Statutes of Canada of 1938, s-s. 4 of s. 986 was again repealed and a new subsection enacted. For the first time, the expression "slot machine" appeared in the *Criminal Code* in this amendment.

While the Appellate Division of the Supreme Court of Alberta had upheld the validity of the Act of 1935 passed by that province, the legislation in Saskatchewan was attacked and in *Rex.* v. *Karminos* (1), Haultain, C.J.S., Martin, Mackenzie and Gordon JJ.A. held the Act to be ultra vires. Turgeon J.A. differed from the other members of the Court in this respect only that he considered that s. 3 which declared that no one could claim any property in a slot machine was within the Provincial powers.

In Manitoba, where the Act was challenged in *Rex* v. *Magid* (2), the Court of Appeal came to a different conclusion, specifically holding the provision that there could be no property in such a machine to be within the powers of the province.

In Russell on Crime, 10th Ed. p. 1744, the learned author says:—

> Common gambling houses are a public nuisance at common law, being detrimental to the public, as they promote cheating and other corrupt practices; and incite to idleness and avaricious ways of gaining property persons whose time might otherwise be employed for the good of the community.

The keeping of such a gaming house was held indictable at common law (*R.* v. *Rogier* (3)). When the *Criminal Code* was first enacted in Canada by c. 28 of the Statutes of 1892, s. 198 declared that any person who kept, *inter alia,* a common gaming house was guilty of an indictable offence. By s. 703 it was provided that it should be prima facie evidence in any prosecution for keeping a common gaming house under s. 198 that the place was so used and that the persons found thereupon were unlawfully playing therein if, *inter alia,* such place was found fitted or provided with any means or contrivance for unlawful gaming. It was not, however, until the amendment of 1924 that the

(1) [1936] 1 W.W.R. 433. (2) [1936] 1 W.W.R. 163.
(3) 1 B. & C. 272; 2 D. & R. 431.

Code was amended to include the provision above quoted regarding automatic machines deemed to be a contrivance for playing a game of chance.

The Alberta Act was assented to on April 12 while the amendment to the *Criminal Code* did not come into force until the 1st of October in that year. S-s. (*b*) of s. 2 of the Alberta Act, which used and defined the expression "slot machine" was clearly directed against automatic or mechanically operated contrivances which delivered or purported to deliver money prizes or rewards and I think it to be clear that these might exceed in value any money inserted in the machine to cause it to operate. In essence, the Act was directed against gambling and, in my opinion, nothing else, and, in addition to declaring that no slot machines should be capable of ownership, prohibited any person from keeping or operating such a machine and permitted its seizure and confiscation.

In 1935, however, when the Slot Machine Act was re-enacted, its purpose was made even more abundantly clear. In the interval since the passing of the 1924 Act, s-s. 4 had been added to s. 986 of the *Code* in the revision of the Statutes of 1927 and the new s-s. (*b*) of s. 2 of the Alberta Act substituted for the definition of a slot machine, as it appeared in the Act of 1924, a definition declaring the expression to mean any machine which under the provisions of s. 986, s-s. 4 of the *Criminal Code* was deemed to be a means or contrivance for playing a game of chance. In addition to other penalties, the *Code,* by s. 641, had provided that automatic machines of the nature referred to in s. 986(4) might be seized and brought before a magistrate or justice who might direct that they shoud be destroyed or otherwise disposed of. The Legislature substituted for this penalty its own provisions declaring that such a machine should not be capable of ownership and might be seized and declared forfeited in the manner provided. I think it would be difficult to find a more direct encroachment upon the exclusive jurisdiction of Parliament than this.

1954

JOHNSON v. A.G. OF ALBERTA

Locke J.

The definition in the Alberta Act, however, went farther and adopted as its description of a slot machine a large part of the language of s-s. 4 of s. 986. Thus, s-s. (*b*)(ii) in describing the machine read:—

> 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 of such operations shall be known to the operator in advance.

In subsection 4 the word before the word "uncertainty" read "or": before the word "results" there appeared the word "given" and after the word "more" the words "or all": otherwise the language was identical. The only material difference between the Alberta enactment and that in the Code was that the words:—

> shall be deemed to be a means or contrivance for playing a game of chance within the meaning of subsection 2 of this section.

which appeared in the latter statute were omitted for what I think were obvious reasons.

In the following year, the Alberta Legislature amended the Act of 1935 by adding to its definition of a slot machine a new clause as subsection (*b*)(*iii*), which again followed the above quoted language of s-s. 4 of s. 986 of the *Code* but substituted for the words:—

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

which appeared in subsection (*b*)(*iii*) the words:—

> any machine or device.

The Alberta Act of 1942 is in the same terms as that of 1935 as it was amended by the Act of 1936. We are spared the necessity of attempting to interpret the involved language of subsections 2 and 3 of the Alberta Act by the fact that automatic or slot machines falling within that description also fall within s-s. 4 of s. 986 of the *Criminal Code,* and that statute declares that if such a machine is found in any house, room or place, there shall be an irrebuttable presumption that such place is a common gaming house. This, in turn, has the consequences provided for by s. 229 and s. 641 of the *Criminal Code* and the keeping of such a gambling device is an indictable offence under s. 235(*b*). As was said by Lord Atkin in the *Proprietary Articles* case to which I have referred, it is for Parliament to define what is a crime, to which may be added that it is for the like

authority to declare what is evidence of a crime. The whole argument of the present case proceeds upon the basis that the machines in respect of the possession of which Johnson was prosecuted fell within the definition contained in the Slot Machine Act. That being so, they fall equally within the definition of s-s. 4 of s. 986 of the *Criminal Code*.

The determination of this matter does not, in my opinion, depend alone upon the fact that if the provincial legislation was lawfully enacted there would be a direct clash with the terms of the *Criminal Code:* rather is it my opinion that the main reason is that the exclusive jurisdiction to legislate in relation to gaming lies with Parliament under head 27 of s. 91. It may, however, be noted that if the contention of those who seek to uphold this statute were correct, the person keeping a place in Alberta in which a machine falling within the definition were found might be convicted of an indictable offence under s. 229 of the Code and sentenced to one year's imprisonment and the machine brought before a justice and destroyed or disposed of under the provisions of s. 641(3) and also indicted under s. 235(*b*), while the machine might be seized under the provisions of s. 5 of the Slot Machine Act and confiscated to Her Majesty in right of the Province of Alberta.

In delivering the judgment of the Appellate Division in *Rex* v. *Stanley* (1), the late Mr. Justice McGillivray said that it had never been thought that confiscatory provisions in provincial legal enactments were not within the legislative authority of the province and referred to *Rex* v. *Nat Bell* (2), saying that if such legislation was valid he could not understand why the legislation in question was not also valid. With great respect, I do not think the decision of the Judicial Committee in the *Bell* case touches the matter. It is to be remembered that in *Russell* v. *The Queen* (3), the enactment of the Canada Temperance Act of 1878 had been held to be within the powers of Parliament and that in *Attorney for Manitoba* v. *Manitoba Licence Holders Assoc.* (4), the validity of the Manitoba Liquor Act had been upheld as a matter of a merely local nature in the province, within the meaning of head 16 of s. 92. Under

(1) (1935) 3 W.W.R. 517.
(2) [1922] 2 A.C. 128; [1922] 2 W.W.R. 30.
(3) (1882) 7 App. Cas. 829.
(4) [1902] A.C. 73.

1954

JOHNSON v. A.G. OF ALBERTA

Locke J.

head 15 the province was empowered to impose punishment by fine, penalty or imprisonment for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in s. 92. In the *Bell* case, Lord Sumner in delivering the judgment of the Board held that the power to forfeit was covered by the word "penalty." However, it must be realized that this was a penalty imposed for the breach of a statute, the validity of which could not be questioned unless it came into conflict with Dominion legislation validly enacted. In *Attorney-General for Ontario* v. *Attorney-General for Canada* (1), where the validity of an Ontario Liquor Act was questioned, Lord Watson, in delivering the judgment of the Board and after discussing the decision in *Russell's* case and in *Hodge* v. *Reg.* (2), said in part:—(p. 369)

> If the prohibitions of the Canada Temperance Act had been made imperative throughout the Dominion, their Lordships might have been constrained by previous authority to hold that the jurisdiction of the Legislature of Ontario to pass s. 18 or any similar law had been superseded. In that case no provincial prohibitions such as are sanctioned by s. 18 could have been enforced by a municipality without coming into conflict with the paramount law of Canada. For the same reason, provincial prohibitions in force within a particular district will necessarily become inoperative whenever the prohibitory clauses of the Act of 1886 have been adopted by that district.

Had the Canada Temperance Act been in force in the District of Alberta where the seizure in the *Nat Bell* case arose, it seems clear that the forfeiture provisions of the Provincial Liquor Act could not have been invoked or the Act been of any validity. There was, however, no such conflict or invasion of an exclusive Federal field as in the present case.

The learned Judge further referred to *Bédard* v. *Dawson* (3), as authority for the proposition that the jurisdiction vested in Parliament under head 27 did not exclude the power of the province to suppress the use of slot machines

(1) [1896] A.C. 348. (2) (1883) 9 App. Cas. 117.
(3) [1923] S.C.R. 681.

as instruments calculated to favour the development of crime or as provincial evils or nuisances under its legislative authority to deal with property and civil rights. That decision has been frequently invoked in an attempt to support provincial encroachments in the field of criminal law. In that case a statute of the Quebec Legislature was considered, which provided, *inter alia,* that it should be illegal for any person who owns or occupies any house or building to use or allow any person to use the same as a disorderly house. The reasons for judgment make it clear that it was the opinion of all the members of the Court that the real purpose of the statute was the control and enjoyment of property and that it was not directed to the punishment of a crime. It is the judgment of Duff J., as he then was, in which it was said that the legislation impugned seemed to be aimed at suppressing conditions calculated to favour the development of crime rather than at the punishment of crime, which has so often been quoted in support of provincial legislation questioned as an invasion of the jurisdiction of Parliament. I do not think that this language has the meaning sought to be attributed to it. Municipal legislation authorizing the clearing out of slums is, no doubt, of a nature which tends to prevent the existence of conditions which may foster crime, but no one would suggest that on that account it was legislation *relating* to crime, within the meaning of head 27 of s. 91, and the legislation impeached in *Bédard's* case seems to me no more capable of being classified as trenching upon the Dominion powers. The point to be determined is, of course, just what is the true nature of the legislation which is impugned, and in that case the members of the Court were all of the opinion that its true nature was municipal government. I am unable, with respect for other opinions, to see how this touches the question to be decided in the present case.

When *Rex* v. *Stanley* (1) was decided in 1935 the definition in the Slot Machine Act was that above referred to,

(1) [1935] 3 W.W.R. 517.

1954

JOHNSON v. A.G. OF ALBERTA

Locke J.

which was enacted in that year. The reasons delivered in the Appellate Division do not mention the fact that that definition merely repeated the definition in s-s. 4 of s. 986 of the *Criminal Code,* with the exceptions above pointed out, and that the Act as it stood was in this respect merely a provincial reenactment of the *Code,* with an added penalty. The learned Judge who delivered the judgment of the Court attached importance to the fact that the *Code* at that time made the possession of such a machine merely prima facie evidence that the place where it was found was a common gaming house and said that nowhere in the *Code* was there to be found a prohibition against the keeping or using of a slot machine of any kind. Apparently, s. 235(*b*) of the *Code* was overlooked. It may also be noted that since the decision in that case s. 988(4) was amended in 1938, so that the mere presence of such a machine created an irrebuttable presumption that the place is a common gaming house.

It was in the following year that *Rex* v. *Karminos* (1) was decided in the Court of Appeal of Saskatchewan. The language of the Slot Machine Act of that province was not, as in the case of the Alberta legislation, taken practically verbatim from the *Criminal Code* but contained a definition of a slot machine closely resembling the definition adopted that year in other provinces. One of the contentions made in support of the legislation was that, while admitting that gambling machines or devices fell within the definition, it also included machines which were not gambling machines or devices such as the machines which had been considered in *Rex* v. *Wilkes* (2), and by this Court in *Roberts* v. *Rex* (3). After pointing out that the possession of a machine such as that defined was made indictable by s. 235(*b*) of the *Criminal Code,* the Chief Justice of Saskatchewan said that the main purpose of the Act was to prevent the keeping of gambling machines, which was already

(1) [1936] 1 W.W.R. 433. (2) (1930) 66 O.L.R. 319.
(3) [1931] S.C.R. 417.

an offence under the *Criminal Code* and to punish that offence in the interests of public morality. In his opinion, the penalties including confiscation were not directed to the enforcement of a provincial law relating to property and civil rights but rather to punish a public wrong. The learned Chief Justice quoted with approval a passage from a judgment of Street J. in *Reg.* v. *Wason* (1), which reads:—

> There are good reasons for holding that the Provincial Legislatures could not, by the mere act of passing a statute forbidding the doing of some thing, already an offence, but affecting property and civil rights in the Province, confer upon themselves jurisdiction to inflict a new punishment for the offence, and justify it upon the ground that they were merely enforcing their own statute. The foundation for the jurisdiction claimed would be defective because of its dealing with matters of criminal law.

Turgeon J.A., who considered that the section which authorized confiscation was within provincial powers but that the other provisions of the Act which provided for penalties were ultra vires, said that the Act purported to create an offence and that this in relation to the matter under consideration was ultra vires. That learned Judge said that it was one thing for the Legislature to create the civil effects pertaining to the possession of property and another thing to set up the criminal effects of such possession and referred to *Bédard* v. *Dawson* as illustrating the point. In his opinion, the real object and true nature of the enactment was to create an offence in the interests of public morals and referred to the passage from *Russell* v. *Reg.*, of which I have made mention above. An argument had been made in support of the legislation on the ground that it did not cover any specific provision of the *Criminal Code* as it then stood but, as to this, Turgeon J.A. pointed out that it being found that the subject matter was of a criminal nature the fact that Parliament had not dealt with it could not confer any jurisdiction on the province and referred to what had been said in the Judicial Committee in *Union Colliery* v. *Bryden* (2), at p. 588.

(1) (1889) 17 O.L.R. 58.

(2) [1899] A.C. 580; 68 L.J.P.C. 118.

1954

JOHNSON v. A.G. OF ALBERTA

Locke J.

Martin J.A. (now C.J.S.) considered that the Act was an attempt to extend the provisions of the *Code* by including some machines which did not fall within its provisions and that in pith and substance it had been enacted in the interests of public morality with respect to a subject already dealt with in the *Criminal Code* and was accordingly invalid. As to the section providing for confiscation, he considered that it could not be severed from the rest of the Act.

Mackenzie J.A., in an exhaustive review of the authorities, commented upon the various arguments made in support of the legislation. In considering what was the true nature of the legislation, he said that there was nothing to suggest that the prohibition of slot machines was because they were physically harmful but that, since it was the keeping or operating of them which was forbidden, the conclusion necessarily followed that it was in their use that the evil lay. As to the nature of the evil, it had obviously been considered such as should be dealt with under the provisions of the *Code* and he referred to a number of cases in which there had been convictions of keeping a common gaming house by invoking s. 986(4), and of keeping or operating slot machines under s. 235(*b*), in several of the Provinces of Canada. As in all the many cases to which he referred the slot machines fell within the definition contained in the Saskatchewan Statutes, he concluded that the real purpose of the Act was to suppress gambling. As to the argument that some of the machines in question were not gambling devices, a contention advanced on behalf of the Attorney General, he said that he considered the main object of the legislation was to try to stiffen the existing criminal law against gambling by slot machines. Speaking of the section which declared that no slot machine was capable of ownership, he said (p. 451):—

> Under the circumstances, it seems to me that sec. 3 must be treated merely as a sanction, in which event it adds little, if anything, to the other sanctions contained in the Act, and that, since on its face it has to do with a matter of property and civil rights, its real function is to give the Act a provincial complexion, and so to mask its criminal quality . . .

Conversely, I do not see how it can be competent to the provincial Legislature to attempt to justify, as in the present case, an interference with the exclusive authority of the Dominion Parliament in the matter of criminal law, by enacting, in aid thereof, such a provision as sec. 3, founded upon its power to legislate in matters relating to property and civil rights. Such legislation may doubtless be conceived to be in the interests of public morality, but for that very reason it constitutes an attempt to encroach upon a forbidden field.

The learned Judge referred, amongst others, to the following cases: *Reg.* v. *Keefe* (1); *Reg.* v. *Wason* (2), the *Hamilton Street Railway* case (3) and *In re Race Tracks and Betting* (4), all of which, in my opinion, support his view. Mackenzie J.A. distinguished *Bédard* v. *Dawson* upon the same ground as that adopted by Turgeon J.A.

Gordon J.A., in a short judgment, agreed that the Act in its entirety was ultra vires as being an infringement upon head 27 of s. 91 or within a field already occupied by Dominion legislation.

The amendment effected by s. 46 of c. 44 of the Statute which amended the *Criminal Code* in 1938 reads:—

46. Subsection four of section nine hundred and eighty-six of the said Act, as enacted by section twenty-seven of chapter eleven of the statutes of 1930, is repealed and the following substituted therefor:—

(4) In any prosecution under section two hundred and twenty-nine any automatic or slot machine used or intended to be used for any purpose other than for vending merchandise or services shall, and any such machine used or intended to be used for vending merchandise shall, if the result of one of any number of operations of it is, as regards the operator, a matter of chance or uncertainty or if as a consequence of any given number of successive operations it yields different results to the operator or if on any operation it discharges or emits any slug or token, other than merchandise, be deemed to be a means or contrivance for playing a game of chance notwithstanding that the result of some one or more or all of such operations may be known to the operator in advance and if any house, room or place is found fitted or provided with any such machine there shall be an irrebuttable presumption that such house, room or place is a common gaming house.

While the nature of the machines referred to is defined in more detail and the words "or if on any operation it dis-

(1) (1890) 1 Terr. L. R. 280.
(2) 17 O.L.R. 58; 17 O.A.R. 221.
(3 [1903] A.C. 524.
(4) (1921) 41 O.L.R. 389.

1954

JOHNSON v. A.G. OF ALBERTA

Locke J.

charges or emits any slug or token, other than merchandise" were added, the language:—

> the result of one of any number of operations of it is, as regards the operator, a matter of chance or uncertainty or if as a consequence of any given number of successive operations it 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.

which, as I have pointed out, had been adopted practically verbatim in the Alberta Statute of 1935 and the amendment of 1936, remains.

It is true that the present subsection in the *Code* and the language of the Alberta Act differ in this respect that the *Code* refers to any automatic or slot machine used or intended to be used for any purpose other than for vending merchandise or services and any such machine used or intended to be used for vending merchandise, while paragraphs (ii) and (iii) of s. 2(*b*) of the Alberta Act respectively refer to "any slot machine and any other machine of a similar nature" and "any machine or device", but I think it to be perfectly clear that no machines other than those which it was attempted to describe in the section of the *Criminal Code* are included in the language of the Slot Machine Act. It is true that the word "device" is capable of a more general meaning than the words "slot machine or machine". However, the Legislature has described the statute as a Slot Machine Act and, just as one is entitled to refer to the preamble of a statute to assist in determining its meaning when there is ambiguity in its language (*Powell* v. *Kempton Park* (1)), so, in my opinion, one may refer to the title and this indicates that it is machines of the nature of automatic or slot machines or of the nature described in the *Code* which the statute is intended to reach. If, however, it should be the case that machines of some other nature are included in the definition in the Provincial statute, I would, for the reasons assigned by Haultain C.J.S. and Turgeon and Mackenzie JJ.A. in *Rex.* v. *Karminos* (*supra*), consider the legislation an invasion of a field exclusively assigned to Parliament.

(1) [1899] A.C. 143.

When the New Brunswick Legislature passed the Act of 1936, it was entitled "An Act for the Suppression of Slot Machines and other Gambling Devices": the Quebec Statute was entitled "An Act respecting Gaming Apparatus" and adopted the definition in the *Criminal Code*. The nature and purpose of the legislation was thus made manifest. The Alberta Legislature, by its virtual adoption of the language of the *Code*, has, in my opinion, made the matter equally clear.

We have been referred to the judgment of this Court in *Provincial Secretary of Prince Edward Island* v. *Egan* (1), in support of this legislation but, when the reasons delivered in that case are examined, the real basis of the decision is shown to be that the legislation had to do with the regulation of highway traffic and did not invade the jurisdiction of Parliament under head 27 of s. 91. Sir Lyman Duff, it may be noted, in expressing his agreement with the judgment of the Court, added (p. 403):—

> It is, of course, beyond dispute that where an offence is created by competent Dominion legislation in exercise of the authority under s. 91(27), *the penalty or penalties attached to that offence, as well as the offence itself,* becomes matters within that paragraph of s. 91 which are excluded from provincial jurisdiction.

In my opinion, the judgment of the Court of Appeal of Saskatchewan in *Rex* v. *Karminos* was right and, despite the difference in the language of the statute there considered, the reasons delivered by the majority of the Court, and in particular those of the late Mr. Justice Mackenzie, with which I respectfully agree, are applicable to the present case.

I would allow this appeal with costs throughout and declare that *The Slot Machine Act,* R.S.A. 1942, c. 333, is ultra vires of the Legislature of Alberta.

CARTWRIGHT J.:—The relevant provisions of the Slot Machine Act of Alberta and of the *Criminal Code* are set out in the reasons of other members of the Court.

(1) [1941] S.C.R. 396.

1954

JOHNSON v. A.G. OF ALBERTA

Cartwright J.

It will be observed that the Alberta Act contains three definitions of "slot machine". The first adopts the definition of a means or contrivance for playing a game of chance contained in s. 986(4) of the *Criminal Code*. The second and third differ in minor matters of wording but the essential requirement in each is that to fall within the definition a machine must be such that the result of one of any number of its operations shall be, as regards the operator, a matter of chance or uncertainty. The words in which this requirement is expressed are taken directly from s. 986(4) of the *Criminal Code*.

On a consideration of the Act in its entirety, and even without such assistance as is to be derived from its history which is dealt with in the reasons of my brother Locke, the conclusion appears to me to be inescapable that the main object of the Act is to forbid the keeping of gambling machines in the interest of public morality and to punish any breach of such prohibition by confiscation. I think this appears particularly from the insistence in each item of the definition section on the existence of the element of chance or uncertainty in the result of the operations of the machines with which the Act deals.

I agree with the reasoning that led the majority of the Court of Appeal in Saskatchewan to hold, in *Rex* v. *Karminos* (1), that the Slot Machine Act there under consideration was *ultra vires in toto*. The following passages in that judgment appear to me to be applicable to the case at bar:—

Haultain C.J.S. at pages 438 and 439:—

> The main object and purpose of the Act is to prevent the keeping of gambling machines which is already an offence under the *Criminal Code*, and to punish that offence in the interest of public morality. The penalties imposed, including confiscation, are not directed to the enforcement of a provincial law relating to property and civil rights but rather to punish a public wrong. I include "confiscation" because the real character of the Act makes it, in my opinion, an additional sanction or penalty enacted to enforce obedience to the Act.

(1) [1936] 1 W.W.R. 433.

Martin J.A. at page 443:—

> The Legislature, in its attempt to improve upon the Act of Parliament—and for the same reason as must have prompted the Parliament of Canada to enact the provisions of the *Criminal Code,* namely, in the interests of public morality and to prevent gambling—has enacted provisions in conflict with those of the *Criminal Code* and these provisions are, therefore, *ultra vires: In re Race-Tracks and Betting* (1921) 49 O.L.R. 339; *Rex* v. *Lichtman* (1923) 54 O.L.R. 502.

Section 3 of the Act under consideration in *Rex* v. *Karminos* was substantially identical with s. 3 of the Alberta Act and I agree with Mackenzie J.A. when he says at page 451:—

> Under the circumstances, it seems to me that sec. 3 must be treated merely as a sanction, in which event it adds little, if anything, to the other sanctions contained in the Act, and that, since on its face it has to do with a matter of property and civil rights, its real function is to give the Act a provincial complexion, and so to mask its criminal quality. This is to violate the principle which was laid down by the Privy Council in *In re Board of Commerce Act and Combines and Fair Prices Act,* 1922, *supra,* and was reiterated by it in *In re Reciprocal Insurance Legislation, supra,* at p. 407 [1924] 2 W.W.R.) where it is said, that it was not competent to the Dominion Parliament to interfere with the class of subject committed exclusively to the Provincial Legislature, and then to justify this by enacting ancillary provisions designated as new phases of Dominion criminal law, which require a title to so interfere as the basis of their application.
>
> Conversely, I do not see how it can be competent, to the provincial Legislature to attempt to justify, as in the present case, an interference with the exclusive authority of the Dominion Parliament in the matter of criminal law, by enacting, in aid thereof, such a provision as sec. 3, founded upon its power to legislate in matters relating to property and civil rights. Such legislation may doubtless be conceived to be in the interests of public morality, but for that very reason it constitutes an attempt to encroach upon a forbidden field.

I also agree with the conclusion of Mackenzie J.A. that the main object of the Legislature was "to try and stiffen the existing criminal law against gambling by means of slot machines."

I have not overlooked the fact that the Alberta Statute provides no penalty by way of fine or imprisonment, while the Saskatchewan Act did so provide; but I am driven to the conclusion that under the form of denying the exis-

1954

JOHNSON v. A.G. OF ALBERTA

Cartwright J.

tence of ownership in the defined machines and providing procedure for their seizure and confiscation the substance of the enactment is to forbid their use under penalty of forfeiture. As was pointed out in *Industrial Acceptance Corporation* v. *The Queen* (1), legislation providing for the forfeiture of property used in the commisison of a criminal offence is legislation in relation to and forms an integral part of criminal law. In Canada, the keeping of a gambling device was a crime and such device was liable to forfeiture before the earliest Alberta Slot Machine Act was passed.

It appears to me that the action of the legislature in passing this statute is similar to that described by Middleton J. in *re Race-Tracks and Betting* (2), at pages 348 and 349 where he said in part:—

> To the Dominion has been given exclusive jurisdiction over "criminal law". It alone can define crime and enumerate the acts which are to be prohibited and punished in the interests of public morality. The Province may prohibit many things when its real object is the regulation of and dealing with property and civil rights, or any of the subjects assigned to its jurisdiction. Parliament may deal with the same things from the standpoint of public morality, so there may be in many cases room for discussion as to the apparent conflict between the two legislative fields.
>
> In the case in hand the proposed legislation is not in any way within the ambit of the provincial jurisdiction, but it is an attempt by the Province to deal with the question of public morals. Gambling is regarded as an evil. Parliament has undertaken, in the exercise of its powers, to lay down rules in the interest of public morals to regulate it. It has considered the question of gambling in connection with horse-races, and has declared that on certain race-tracks betting by means of pari-mutuel machines shall not be unlawful. The Province, thinking this does not sufficiently guard public morals, seeks, in an indirect way, to accomplish that which it thinks the Dominion should have done, and so proposes to prohibit racing on all tracks upon which it is lawful under the Dominion Act to operate pari-mutuel machines.
>
> This is in no sense a conflict between the two jurisdictions by reason of the overlapping of the fields, but it is a deliberate attempt to trespass upon a forbidden field.
>
> The case is governed by the Lord's Day case, *Attorney-General for Ontario* v. *Hamilton Street R. W. Co.* (3).

(1) [1953] 2 S.C.R. 273. (2) (1921) 49 O.L.R. 339.
(3) [1903] A.C. 524.

Adapting this language to the statute with which we are concerned, it may be said, that gambling is regarded as an evil, that Parliament has undertaken in the exercise of its powers to lay down rules in the interest of public morals to regulate it, that it has considered the question of gambling by the use of gambling devices of the sort commonly described as slot machines, that it has made it an offence (by s. 235) to buy, sell, keep or employ any gambling device, that (by s. 986(4)) it has defined the kinds of slot machines which shall be deemed contrivances for playing a game of chance, that it has provided machinery (by s. 641) for the seizing and confiscation of such devices; that the Province thinking that the provisions of the *Code* do not sufficiently guard public morals seeks to accomplish that which it thinks Parliament should have done by widening the definition of slot machines to include not only the devices covered by the *Criminal Code* but also all other devices the result of any operations of which is, as regards the operator, a matter of chance or uncertainty and by providing for the confiscation of all such machines by a procedure somewhat different from that provided in the *Criminal Code*.

The fact that the proceedings to bring about confiscation under the Alberta Statute may properly be described as proceedings *in rem* dealing with items of property in the province does not appear to me to assist the respondent, for s. 641 of the *Criminal Code* has already provided for such proceedings. In *Rex* v. *Greenfield* (1), Harvey C.J.A. delivering the unanimous judgment of the Court of Appeal said at page 339, referring to s. 641:—

> It is to be noted that under s-s. 1, though the searchers may find no one on the premises searched they may take before the magistrate money and securities, instruments of gaming, etc., and s-s. 3 gives authority to forfeit or destroy them regardless of whether any one is convicted or even charged. In other words as far as they are concerned the proceedings are *in rem*.

This view was approved by the Court of Appeal for Manitoba in *Rex* v. *Denaburg* (2), particularly at page 218, and by the Court of Appeal for Ontario in *Rex* v. *Martin* (3), particularly at page 35.

(1) (1934) 62 Can. C.C. 334. (2) (1935) 64 Can. C.C. 216.
(3) (1943) 81 Can. C.C. 33.

1954

JOHNSON v. A.G. OF ALBERTA

Cartwright J.

I am unable to relate the Statute in the case at bar to any provincial purpose falling within heads 13 or 16 of s. 92 of the *British North America Act* as the courts have been able to do in other cases in which the validity of provincial legislation was called in question on the allegation that it infringed upon the field of criminal law, as, for example, in the cases of *Provincial Secretary of Prince Edward Island* v. *Egan* (1), (the civil regulation of the use of highways), *Bédard* v. *Dawson* (2), (the suppression of a nuisance and the prevention of its recurrence by civil process) and *Regina* v. *Wason* (3), (the regulation of the dealings of cheese-makers and their patrons). The Statute here in question appears to me to be inseverable, to relate only to the prohibition and punishment of keeping contrivances for playing games of chance, that is to criminal law, and to be *ultra vires* of the Legislature *in toto*.

I would allow the appeal and restore the judgment of Egbert J. with costs throughout.

Appeal allowed with costs throughout.

Solicitors for the appellant: *Milvain & MacDonald.*

Solicitor for the respondent: *The Attorney General for Alberta.*

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(1) [1941] S.C.R. 396.
(2) [1923] S.C.R. 681.
(3) (1889) 17 O.L.R. 58; 17 O.A.R. 221.