1942

*Feb. 4.
*Feb. 23.

CONSTANTIN LAPHKAS .....APPELLANT;

AND

HIS MAJESTY THE KING .....RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Criminal law — Automatic slot machine — Amusement only provided — Results determined by skill of operator — No element of chance or mixed elements of chance and skill—Whether service-vending machine —Common gaming house—Criminal Code, R.S.C., 1927, c. 36, sections 226, 229 and section 986, par. 4, as amended by 2 Geo. VI, 1938, c. 44, s. 46.

The appellant had in his premises an automatic slot-machine for the amusement of the public known under the name of "Evans Ten-Strike Miniature Bowling". Section 986 (4) of the Criminal Code enacts that, "if any house, room or place is found fitted or provided with * * * any automatic or slot machine used or intended to be used for any purpose other than for vending merchandise or services, * * * there shall be an irrebuttable presumption that such house, room or place is a common gaming house". The appellant was convicted of having kept a common gaming house, and the appellate court affirmed the conviction, holding that, under that section, all slot machines, including those vending amusement, were illegal.

Held, reversing the judgment appealed from (Q.R. [1942] 1 K.B. 1), that the machine found in the appellant's premises was providing a harmless amusement to the operator and that, for the purpose of determining this appeal, the word "services" should be construed as including "amusement." If a narrower interpretation of the word "services" was given, it would then be a criminal act, for instance, to keep in a hotel a music-recording slot machine, and this is not the letter nor the spirit of the law. Therefore, the conviction of the appellant should be quashed.

* PRESENT:—Duff C.J. and Rinfret, Kerwin, Hudson and Taschereau JJ.

Rex v. *Levine* ((1939) 72 Can. Cr. Cas. 312) followed.

Roberts v. *The King* ([1931] S.C.R. 417), *Rex* v. *Perlick* ((1939) 72 Can. Cr. Cas. 365), *Rex* v. *Granda* ((1941) 74 Can. Cr. Cas. 344), *Rex* v. *Collins* ((1939) 71 Can. Cr. Cas. 272) discussed.

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APPEAL, upon leave to appeal to this Court (1), from the judgment of the Court of King's Bench, appeal side, province of Quebec (2), affirming the conviction of the appellant for the offence of having illegally kept a common gaming house. By the judgment now reported, the appeal was allowed, the conviction quashed and the slot machine seized was ordered to be returned to the appellant.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgment now reported.

J. Crankshaw K.C. for the appellant.

G. Fauteux K.C., A. Pagé and *A. Macnaughton* for the respondent.

The judgment of the Court was delivered by

TASCHEREAU J.—The appellant was convicted by the Recorder of the city of Montreal, of having on the 28th day of March, 1941, illegally kept a common gaming house at number 2060 Bleury street, Montreal.

The judgment was upheld by the Court of King's Bench, appeal side, province of Quebec, and the appellant on application to a judge of the Supreme Court of Canada, under the provisions of section 1025 of the Criminal Code, was granted leave to appeal to this Court, the judgment of the Court of King's Bench, appeal side, province of Quebec, being in conflict with a judgment of the Court of Appeal of Ontario (*Rex* v. *Levine* (3)).

The record reveals that the accused had in his premises an automatic slot machine for the amusement of the public, known under the name of "Evans Ten-Strike Miniature Bowling". It is put in motion by placing a large five cent piece in a slide, which, under the pressure of the operator,

(1) *Reporter's note:* Leave to appeal to this Court was granted, on an application by the appellant, by Taschereau J. in chambers, under section 1025 Cr. C., the judgment then to be appealed from being in conflict with the decision of the Court of Appeal of Ontario in *Rex* v. *Levine*, 72 Cr. C.C. 312.

(2) Q.R. [1942] 1 K.B. 1. (3) (1939) 72 Cr. Can. Cas. 312.

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establishes an electrical current in the machine. A ball is then released, and a mechanical player receives it coming from a wooden chute and automatically holds it in its hand. The operator places the player in the desired position, and then pushes a button which releases the ball that strikes the pins at the other end of the alley. The number of pins knocked down by the ball is registered after every two plays, and automatically the pins are placed in front of the player who repeats the same operation five times, playing with two balls each time. The machine adds the total number of the pins knocked down during the game and indicates the final score.

The skill of the operator in aiming at the pins is the determining factor of the success of the operation; and it is clear from the evidence and the examination of the machine itself produced as an exhibit in the case, that in the playing of the game there is no element of chance, or mixed elements of chance and skill. A skilful operator will obtain far better results.

The relevant sections of the Criminal Code are the following:—

226. A common gaming house is—

(*a*) a house, room or place kept by any person for gain, to which persons resort to for the purpose of playing at any game of chance, or at any mixed game of chance and skill.

* * *

229. Every one is guilty of an indictable offence and liable to one year's imprisonment who keeps any disorderly house, that is to say, any common bawdy-house, common gaming-house, or common betting-house, as hereinbefore defined.

There can be no doubt that under these two sections, the appellant operating or keeping in his premises this innocent machine for the amusement of the public could not be convicted. (*Roberts* v. *The King* (1)). But the respondent relies on section 986, paragraph 4 of the Criminal Code as amended in 1938, chap. 44, section 46, and which reads as follows:—

4. Slot machines.—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

(1) [1931] S.C.R. 417.

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.

It is in virtue of this subsection that the appellant has been convicted.

The Court of King's Bench, appeal side, province of Quebec, had dealt with similar cases since the amendment of 1938, and relied upon its former decisions to dismiss the appeal in the present case.

In *Rex* v. *Perlick* (1), the court of appeal had to consider a "Target Skill" which was alleged to be useful in developing revolver shooting. The court reached the conclusion that under section 986 (4) of the Criminal Code, this apparatus not being used or intended to be used for the vending either of merchandise or services was illegal, and that its possession created an irrebuttable presumption that the place where such a machine was kept was a common gaming house. It also held that the shooting at a stationary target which affords no return other than amusement, may not be called a "service" within the meaning of section 986, paragraph 4, Cr. C.

In that case, Mr. Justice Hall said:—

> The effect of this new paragraph (986-4) is that every automatic or slot machine, except those vending merchandise or services, is presumed to be a gambling device.

In *Rex* v. *Granda* (2), the same court dealing with a Pin Ball Slot Machine expressed identical views.

The Court of Appeal of Saskatchewan, in *Rex* v. *Collins* (3), had then already given its decision as to the legality or illegality of this Pin Ball Slot Machine. Although it dismissed the appeal on the ground that this machine was a game of chance yielding Collins a gain, it expressed views as to the interpretation of section 986, paragraph 4, Cr. C., which were adopted by the court of appeal of Quebec.

The result of the above pronouncements and of the judgment of the court of appeal of Quebec, now before this Court, is that section 986, paragraph 4, of the Criminal Code declares all slot machines vending amusements illegal,

(1) (1941) 74 Cr. Can. Cas. 344. (2) (1939) 72 Can. Cr. Cas. 365.
(3) (1939) 71 Cr. Can. Cas. 272.

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and that there is an irrebuttable presumption that a room or place where such a machine is found is a common gaming house.

With the greatest respect, I cannot agree with these judgments, and I believe that the opposite views adopted by the Court of Appeal of Ontario in *Rex* v. *Levine* (1) should be upheld.

In the present case, we have to deal with a machine that provides a harmless amusement to the operator, and I believe that for the purpose of determining this case the word "services" includes "amusement". This word must not be given the narrow interpretation that some courts have attempted to give to it, and its meaning must not be limited to cover only certain necessaries of life like lavatories and telephones. If such an interpretation were accepted, it would then be a criminal act, for instance, to keep in a hotel or a restaurant a gramophone reproducing music or vocal sounds after a five cent piece has been deposited in a slot. I am satisfied that this is not the letter nor the spirit of the law. This recording machine, and the one seized in the present case, do sell "services", in the sense that they furnish innocent recreation for the benefit and advantage of the public.

I fully agree with the interpretation given by the Chief Justice of Ontario in the *Levine* case (2):—

> The word "service" or "services" is properly used as meaning "help" or "benefit" or "advantage" conferred. I do not know why amusement, which is all that is got by the operation of the machine in question, may not properly be spoken of as a "help" or a "benefit" or an "advantage". In one way and another many wise people spend a good deal of time and money in obtaining amusement, and to a normal person it is almost one of the necessaries of life. In my opinion it does no violence to the language of the statute in question to say that an automatic machine that does nothing but amuse is a machine used, or intended to be used, for vending services.

This machine selling services is excluded from the application of the Act, and is not the kind of a machine which is the object of the new enactment, and the possession of which creates the "irrebuttable presumption" which is found in the amendment.

It is necessary, however, to add, as the Chief Justice of Ontario has pointed out, that certain machines vending merchandise and services may be illegal if for instance

(1) (1939) 72 Cr. Can. Cas. 312. (2) (1939) 72 Cr. Can. Cas. 312.

they have gaming as their purpose. The vending of merchandise or services does not authorize the use of a slot machine that for other reasons would violate the dispositions of the Criminal Code. But this is not the case here. The machine which furnishes only amusement and which has no other purpose than vending services, does not come within the ban of the Act.

I am, therefore, of opinion that this appeal should be allowed, the conviction quashed and that the machine seized should be returned to the accused.

Appeal allowed, and conviction quashed.