1953
*Dec. 2
1954
*Mar. 31

WALTER EDWARD DeWARE .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Constitutional Law—Validity of Slot Machine Act, 1951, c. 215 (N.B.)—Application of definition of "slot machine"—Criminal Law—Property and Civil Rights—Confiscatory Legislation.

A "pin ball" machine, described in the reasons for judgment that follow, was seized in the possession of the appellant under the provisions of the New Brunswick Slot Machine Act, 1951, c. 215. The Act provided that no slot machine should be capable of ownership nor the subject of property rights within the Province and that no Court should give effect to any property therein and set up a procedure for seizure and confiscation. "Slot machine" was defined by s. 1(*b*) (i), (ii), (iii), quoted in full *infra*. The appellant appealed from a judgment of the Supreme Court of New Brunswick, Appeal Division, reversing the decision of a police magistrate and ordering the machine confiscated to the Crown in the right of the Province.

Held: (Kerwin and Estey JJ. dissenting), that the appeal should be allowed.

Taschereau, Rand and Kellock JJ. held that the machine did not fall within the definition of slot machine contained in the Act; Kerwin and Cartwright JJ. that it did not fall within clause (i) but did fall within clause (ii); Estey J. that it fell within clause (i). Locke J. in the view he took found it unnecessary to consider the point.

Kellock, Locke and Cartwright JJ. held that the Act was ultra vires. Kellock and Cartwright JJ. for the reasons they had given in *Johnson* v. *the A.G. for Alberta* [1954] S.C.R. . . . Locke J. regarded it as clear that the Act was aimed at the suppression of gaming which fell within the exclusive jurisdiction of Parliament under head 27 of s. 91 of the

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

B.N.A. Act. Kerwin and Estey JJ. for the reasons each had given in the *Johnson* case *supra,* and Taschereau J., for the reasons given by Kerwin J. in the latter case, were of opinion that the Act was intra vires. Rand J. reached his decision without considering this point.

APPEAL from a judgment of the Supreme Court of New Brunswick, Appeal Division (1) reversing the decision of a police magistrate and holding a certain pin ball machine to be a "slot machine" within the definition contained in the New Brunswick Slot Machine Act, 1951, c. 215.

J. T. Carvell for the appellant.

H. W. Hickman, Q.C. for the Attorney General of New Brunswick, the respondent.

KERWIN J. (dissenting):—By leave of this Court Walter Edward DeWare appeals from a judgment of the Supreme Court of New Brunswick, Appeal Division (1), reversing the decision of a police magistrate and confiscating to Her Majesty the Queen in the right of the Province of New Brunswick a certain pin ball machine, a description of which appears in the following extract from the reasons of the magistrate:—

> It is what is commonly called a "pin-ball" machine. It stands on four legs and at the top there is an inclined plane and what may be called a back-board. There is a slot on the front of the machine into which a five cent piece is inserted. When this is done, five balls appear. These balls take their place in turn in front of a firing pin or plunger. When this plunger is operated, the ball is propelled to the top of the inclined plane and moves down the plane by gravity. On its way down, it encounters certain obstructions which are electrically operated. As the ball touches an obstruction, numbers are flashed on the back-board and are added automatically as contact is made by the ball with each obstruction that it may touch. There are two buttons, one on each side of the machine and when the balls are on their way down the inclined plane, the operator may knock the balls up towards the top of the inclined plane again by means of flippers which are controlled by these buttons. There is a card on the machine saying that if the operator gets a score of more than 580,000, he is entitled to one free replay; if he gets more than 600,000, he gets two free replays; if his score is more than 650,000, he gets three free replays. The machine does not emit slugs or counters, or anything else. The free replays are given automatically. The machine does not pay off in money, merchandise or in anything except free plays.

The machine was seized pursuant to the provisions of *The Slot Machine Act,* c. 215, of the New Brunswick Statutes of 1951. S. 2 is the same as s. 3 of the Alberta Slot Machine Act considered in *Johnson* v. *Attorney General of*

(1) (1953) 32 M.P.R. 339.

1954

DEWARE
v.
THE QUEEN

Kerwin J.

Alberta (1), and in which case judgment is being delivered contemporaneously herewith. Under s. 3 a peace officer may without a warrant seize what he believes to be a slot machine within the meaning of the Act and carry it before a magistrate who shall thereupon issue a summons to the person in whose apparent possession the same was at the time of seizure, requiring such person to show cause why the same should not be confiscated. By s. 4, if the party showing cause fails to satisfy the magistrate that the article is not a slot machine within the meaning of the Act, the magistrate shall order it to be confiscated. By s. 1(*b*), "slot machine" means:—

(i) An automatic machine intended to be used for vending merchandise or for any other purpose, the result of one or a number of operations of which is, as regards the operator, a matter of chance or uncertainty, or which as a consequence of a 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, and

(ii) A machine, contrivance, or device operated or designed or intended to be operated automatically or mechanically or manually with or without the aid of any instrument or automatically and mechanically, which upon the insertion therein or in a slot or receptacle thereof of any money, coin, token, counter, disc, slug or any other substance, or upon the payment of money or money's worth for the right or privilege of operating the same, and which, upon or without the operation of any handle, lever, plunger or other attachment thereof, delivers or may deliver, or upon or as a result of the operation of such machine, contrivance or device there may be delivered by any person, means or agency, to the operator thereof money or money's worth, or goods in varying quantities, or tokens, counters, discs, slugs or any other substance which may be exchanged for money or money's worth or replayed in any such machine, contrivance or device to again set it in motion, and

(iii) A machine or device of a class commonly known as a punch board.

We are not concerned with (iii) but, although it is stated by Chief Justice Michaud that counsel admitted before the Appellate Division that the machine did not fall within (ii), no such admission was made before us, and counsel for the Attorney General argued that it came within (i) and (ii). A comparison of "an automatic machine" in (i) and "a machine, contrivance, or device operated or designed or intended to be operated automatically or mechanically or manually with or without the aid of any instrument or automatically and mechanically" in (ii) indicates that the machine in question is not an automatic machine as the

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

above description and the evidence show a user of the machine may exercise a degree of skill in operating the buttons so as to obtain a high score. Therefore paragraph (i) does not apply.

However, in my opinion, the machine falls within (ii) since "upon or as a result of the operation of such machine, contrivance, or device there may be delivered by any person, means or agency, to the operator thereof money or money's worth". The two parts of the phrase are disjunctive as money or money's worth is entirely different from goods, tokens, counters, discs, slugs, or any other substance. In the present case there may be delivered to the operator the right to free replays. The witness Arsenault, called on behalf of the defendants, testified:—

> When Constable Fraser played the machine he got six free games coming to him; these free games are marked up from Mr. Fraser's score. Press the lever and the balls come down. You put no money in but the balls are ready to go again. There are still five free plays there.

And again:—

> Replays are on the backboard, the number of replays you have—in this case six; and then instead of putting a coin in the chute you push the chute in and as long as there are numbers showing there, he has free games to the number shown on the board.

The free plays are money's worth for which he would, if he continued to play, be obliged to pay.

While the question of the statute being ultra vires was not argued in exactly the same manner as in the case of Johnson, the reason given by me on that point in that case apply to the present. However, to them I add the following remarks. What was being considered in *Laphkas* v. *The King* (1), was s-s. 4 of s. 986 of the *Criminal Code* as enacted by s. 46 of c. 44 of the Statutes of 1938. The subsection referred to "any automatic or slot machine used or intended to be used for any purpose other than for vending merchandise or services" while paragraph (i) of s. 1 of the New Brunswick Act refers to "an automatic machine intended to be used for vending merchandise or for any other purpose." Furthermore my conclusion is not altered by the fact that the first New Brunswick enactment in 1936 was entitled "An Act for the Suppression of Slot Machines and Other Gambling Devices". The underlined words were

(1) [1942] S.C.R. 84; 77 Can. C.C. 142.

1954

DEWARE v. THE QUEEN

Kerwin J.

subsequently removed. In *Attorney General for Manitoba* v. *Attorney General for Canada* (1), the Judicial Committee held the Manitoba Sale of Shares Act ultra vires but in *Lymburn* v. *Mayland* (2), it held the Security Frauds Prevention Act of Alberta, 1930, c. 8, to be intra vires although that Act had repealed the Security Frauds Prevention Act, 1929, c. 10, which in turn had repealed the Sale of Shares Act, R.S.A. 1922, c. 169.

The appeal should be dismissed.

TASCHEREAU J.:—For the reasons given by my brother Kerwin in *Johnson* v. *Attorney General of Alberta, (supra)* I am of opinion that *The Slot Machine Act* (c. 215, New Brunswick Statutes, 1951) is intra vires the powers of the Legislature of New Brunswick.

However, as I do not think that the Pin Ball machine which has been confiscated is a slot machine within the meaning of the Act, I would allow the appeal.

RAND J.:—The issue here is whether certain slot machines which are used only for entertainment or amusement purposes are within the language of *The Slot Machine Act* of New Brunswick and subject to forfeiture under its provisions.

The definition of the devices to which the statute applies is contained in two paragraphs of 1(*b*). Para. (i) describes an "automatic machine intended to be used for vending merchandise or for any other purpose". The machines here are not automatic; called pin ball machines, they admit of a definite element of skill in playing them through manipulation of the firing pin and of the flippers by means of which the marbles or balls can be sent back to the top of the inclined plane to roll down again into the electrical network of obstructions.

The second paragraph is in these words:—

> A machine, contrivance, or device operated or designed or intended to be operated automatically or mechanically or manually with or without the aid of any instrument or automatically and mechanically, which upon the insertion therein or in a slot or receptacle thereof of any money, coin, token, counter, disc, slug or any other substance, or upon the payment of money or money's worth for the right or privilege of operating the same, and which, upon or without the operation of any handle, lever, plunger or other attachment thereof, delivers or may deliver, or upon or as a result

(1) [1929] A.C. 260. (2) [1932] A.C. 318.

of the operation of such machine, contrivance or device there may be delivered by any person, means or agency, to the operator thereof money or moneys' worth, or goods in varying quantities, or tokens, counters, discs, slugs or any other substance which may be exchanged for money or money's worth or replayed in any such machine, contrivance or device to again set it in motion;

Giving this language its full scope, I am unable to agree that the automatic returning of the balls or marbles to their place in front of the plunger is a delivery to an operator of any thing which can be replayed in the machine: the word "replay" in this text means that the machine, by the use of something so delivered, is again put in the state it was brought to, or is made ready for use by the operator as it was, by the original insertion, say, of the coin. The renewed propulsion of the marbles is not, then, a replaying of something in the machine to set it again in motion. The machine is, no doubt, continued in motion, but it is not again set in motion through something having been replayed in it.

Nor can I agree that as a result of the operation of the machine there may be delivered to the operator "money's worth". What that language contemplates is money's worth distinct and apart from the operation of the machine; it does not include an automatic setting of the machine in motion for a further operation.

I would, therefore, allow the appeal and restore the judgment of dismissal made by the magistrate.

KELLOCK J.:—The question involved in this appeal is as to whether or not a certain machine is a "slot machine" within the meaning of either paragraph (i) or paragraph (ii) of s. 1(*b*) of *The Slot Machine Act,* 15 Geo. VI, c. 215. The machine is described by the magistrate as follows:

It is what is commonly called a "pinball" machine. It stands on four legs, and at the top there is an inclined plane and what may be called a back-board. There is a slot on the front of the machine into which a five cent piece is inserted. When this is done, five balls appear. These balls take their place in turn in front of a firing pin or plunger. When this plunger is operated, the ball is propelled to the top of the inclined plane and moves down the plane by gravity. On its way down, it encounters certain obstructions which are electrically operated. As the ball touches an obstruction, numbers are flashed on the back-board and are added automatically as contact is made by the ball with each obstruction that it may touch. There are two buttons, one on each side of the machine and when the balls are on their way down the inclined plane, the operator may knock the balls up towards the top of the inclined plane again by means

1954

DEWARE
v.
THE QUEEN

Kellock J.

of flippers which are controlled by these buttons. There is a card on the machine saying that if the operator gets a score of more than 580,000, he is entitled to one free replay; if he gets more than 600,000, he gets two free replays; if his score is more than 650,000, he gets three free replays. The machine does not emit slugs or counters, or anything else. The free replays are given automatically. The machine does not pay off in money, merchandise or in anything except free plays.

By paragraph (i) "slot machine" means

> (i) An automatic machine intended to be used for vending merchandise or for any other purpose, the result of one or a number of operations of which is, as regards the operator, a matter of chance or uncertainty, or which as a consequence of a number of successive operations yields different results to the operator, notwithstanding that the result of some one or more or all of such operations may be known to the operator in advance;

It is to be observed that the machines struck at by paragraph (i) are limited to "automatic" machines, while paragraph (ii), on the other hand, includes machines operated "automatically or mechanically" or "mechanically or manually" or "automatically and mechanically". I think, therefore, that paragraph (i) is to be restricted to machines which are purely automatic in character, which is not the case with the machine here in question.

By paragraph (ii), (so far as material), "slot machine" means,

> (ii) A machine, contrivance, or device . . . which upon the insertion therein or in a slot or receptacle thereof of any money, coin, token, counter, disc, slug or any other substance, or upon the payment of money or money's worth for the right or privilege of operating the same, . . . delivers or may deliver, or upon or as a result of the operation of such machine, contrivance or device there may be delivered by any person, means or agency, to the operator thereof money or money's worth, or goods in varying quantities, or tokens, counters, discs, slugs, or any other substance which may be exchanged for money or money's worth or replayed in any such machine, contrivance or device to again set it in motion;

It is contended for the respondent that there is delivered by the appellant's machine "money's worth" in the form of the right of replay and that the statute is thereby satisfied. In my view the statute is not capable of this construction. From the latter part of paragraph (ii) it is clear, I think, that the right of replay is to be brought about by the employment of some physical thing capable of being inserted "in" the machine. While money's worth, in the contemplation of the statute, may be exchanged for such a

thing, it is not the right of replay in itself. In my opinion, the legislation is not so expressed as to include a machine of the characteristics here in question.

I am, in any event, for the reasons which I have given in *Johnson* v. *Attorney General of Alberta*, (*supra*) of opinion that the statute is ultra vires. I would allow the appeal.

ESTEY J. (dissenting):—This is an appeal from the Appellate Division of the Supreme Court of New Brunswick reversing the finding of the magistrate that the machine here in question was not a slot machine within the meaning of *The Slot Machine Act* (R.S.N.B. 1952, c. 212). A slot machine is defined in s. 1(*b*) and it will be necessary to set out only sub-clause (i):

1. In this Act, unless the context otherwise requires,

* * *

(*b*) "slot machine" means (See ante p. 188).

The operation of the machine may be summarized as follows: Upon the insertion of a five cent piece into a slot five balls automatically appear. These are in turn propelled by a firing pin or plunger operated by the player to the top of an inclined plane and as, because of gravity, they return or move back down the plane there are two buttons, one on each side of the machine, which, when operated by the player, may, by means of flippers, knock the balls up toward the top again. As the balls come down the plane they touch certain obstructions, causing numbers to be flashed on a back board which are added automatically. There is a card on the machine saying that if the operator gets a score of more than 580,000 he is entitled to one free play; if he gets more than 600,000 he gets two free plays and if his score is more than 650,000 he gets three free plays. The machine does not emit slugs, or counters, or anything else. The free plays are made available automatically upon the attainment of the scores already suggested.

The magistrate found "that the machine now in question yields only amusement to the operator of it." He also stated:

I conclude from these demonstrations that the result of the operation of this machine was, as regards the operators, a matter of chance or uncertainty in so far as the total alone was concerned. . . . All the witnesses, of course, admitted that there is a definite element of skill in the playing of

1954

DEWARE v. THE QUEEN

Estey J.

this machine. In other words one who has played it often should make a higher score than a novice at the game. Again skill may be shown in the manipulation of the firing pin and of the flippers even in the case of a beginner.

It appears this machine comes within s. 1(*b*)(i) of the definition and, in particular, that portion reading as follows:

> An automatic machine . . . which as a consequence of a 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 . . .

A machine, to come under this portion of subclause 1(*b*)(i), must be found to contain two essentials: first, that it is automatic; second, that successive operations yield different results to the operator.

That the machine was automatic appears to have been taken for granted in the courts below. In any event, I agree that it is an automatic slot machine. The magistrate finds that there is a definite element of skill in the playing of this machine, both in the manipulation of the firing pin and of the flippers. It may well be that through practice a player would acquire some skill in manipulating the firing pin that would enable him to gauge the force with which that pin strikes the ball and also some degree of skill in the manner of operating the flippers, but the machine remains essentially automatic in its operation.

A similar contention was raised in *Rex* v. *Collins* (1), and was effectively disposed of by Chief Justice Turgeon, writing on behalf of the Court, at p. 71:

> In arguing as to the application of s. 986(4) to the case, counsel for the appellant contended in the first place that the machine is neither an "automatic" nor a "slot" machine. He referred to the second definition of the word "automatic" given in the *Oxford New English Distionary*, 1888. He submitted that a truly automatic machine is one which once started always produces the same result, a definite, consecutive, non-varying succession of movements or events. We do not think the dictionary definition bears out counsel's interpretation in all its rigidity. But however the word "automatic" may be defined in the abstract, we think we must ascertain how it is to be interpreted in the statute, having regard to the context. Now, it is clear that in enacting this subsec. (4) Parliament had in mind a machine which, while called "automatic," might nevertheless operate in some cases so that to quote the language used, "the result of one or any number of operations is, as regards the operator, a matter of chance or uncertainty," or so that "as a consequence of any given number of successive operations it yields different results to the operator." Therefore we have in the subsection itself a definition of the word used, that is, a description of the kind of machine or at least of one

(1) [1939] 1 W.W.R. 68.

of the kinds of machines at which the legislation is aimed. There is ample breadth of definition in the dictionaries to justify the use of the word "automatic" in the sense given to it by the context of the subsection.

Chief Justice Turgeon was there dealing with the provisions of s. 986(4), but the same reasoning is applicable to the definition in this case. See also *Rex* v. *MacLaughlan* (1); *Fielding* v. *Turner* (2); *Donaghy* v. *Walsh* (3).

The contention of the appellant that "the outcome of the operation of the machine is not the score flashed on the backboard, which is a part of the automatic operation of the machine, but the amusement vended" is not tenable, having regard to the language of s. 1(*b*)(i). This subclause is directed to results that the successive operations yield to the operator. The word "results" in that context refers to the score, or such indications of achievement as may be found in a particular machine. This construction is emphasized by the words that follow: "notwithstanding that the result of some one or more or all of such operations may be known to the operator in advance". No doubt the operator plays this, as any other game, for amusement and entertainment. It is not that feature against which the legislation is directed, but rather to the nature and character of the operations and the results yielded by the machine. The legislature has here expressed its intention in wide and comprehensive language which includes the machine here in question.

The appellant contended that *The Slot Machine Act* was legislation in relation to criminal law and, therefore, its enactment was ultra vires the province. The Appellate Division in New Brunswick, in *Rex* v. *Lane* (4), held earlier and somewhat similar legislation to be intra vires the province. In *Johnson* v. *The Attorney General of Alberta*, (*supra*), this Court recently considered the validity of the slot machine legislation in Alberta. Though the latter legislation is not identical, the questions raised as to the competency of the legislature to enact it are, in effect, the same. The view which I there expressed, to the effect that

(1) 95 Can. C.C. 257.
(2) [1903] 1 K.B. 867 at 871.
(3) [1914] 2 I.R. 261.
(4) (1936) 11 M.P.R. 232; 67 Can. C.C. 273.

1954

DEWARE v. THE QUEEN

Estey J.

the legislation was competently enacted by the province, is appropriate hereto and need not be repeated. I agree the legislation is intra vires the province.

The appeal should be dismissed.

LOCKE J.:—The appellant in this matter contends that the Act, which since the revision of the statutes of New Brunswick in 1952 is called the *Slot Machine Act* (c. 212), is beyond the powers of the Province and that, accordingly, the confiscation of his property directed by the judgment appealed from is unauthorised. A further contention is that the machine in question does not fall within the definition of a slot machine in the Act. In reasons for judgment in the case of *Johnson* v. *Attorney-General of Alberta* (1), which will be delivered with my reasons in this matter, I have referred to the history of the provincial legislation relating to slot machines in several of the provinces of Canada, indicating that the Provinces of Saskatchewan, New Brunswick, Nova Scotia and Prince Edward Island apparently acted in concert in entering this field of legislation in the years 1935 and 1936, to be followed later by the Provinces of Ontario and Quebec.

The New Brunswick Statute was enacted as c. 48 of the statutes of that province in the year 1936, being assented to on April 24th of that year. The Act is described in the statutes as being "An Act for the Suppression of Slot Machines and other Gambling Devices." The expression "slot machine" was defined in two ways: firstly, by the practical adoption of the definition in subsection 4 of s. 986 of the *Criminal Code*, and secondly in this manner:—

> A machine, contrivance, or device operated or designed or intended to be operated automatically or mechanically, or manually with or without the aid of any instrument or automatically and mechanically, which upon the insertion therein or in a slot or receptacle thereof of any money, coin, token, counter, disc, slug or any other substance, or upon the payment of money or money's worth for the right or privilege of operating the same, and which, upon or without the operation of any handle, lever, plunger or other attachment thereof, delivers or may deliver, or upon or as a result of the operation of such machine, contrivance or device there may be delivered, to the operator thereof money or money's worth, or goods in varying quantities, or tokens, counters, discs, slugs or any other substance which may be exchanged for money or money's worth or replayed in any such machine, contrivance or device to again set it in motion.

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

After thus defining the nature of the machines against which the Act was directed, it was by s. 3, as in the corresponding Alberta legislation referred to in *Johnson's* case, declared that no slot machine should be capable of ownership or 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 in any such machine. Further provisions authorised any peace officer to seize any machine of the nature described and carry the same before a magistrate who might thereupon issue a summons requiring the person in whose apparent possession the machine was, at the time of seizure, to show cause why the same should not be confiscated: thereafter, if the magistrate was not satisfied that the machine was not a slot machine as defined in the Act, he might order the same confiscated to His Majesty in the right of the Province, which might be disposed of as the Attorney-General might direct.

The Act was amended by c. 38 of the Statutes of 1937 but in a manner which does not affect the present consideration. In the year 1950, by c. 35, the matter was further dealt with. It was provided that from the title the words "and other Gambling Devices" were to be struck out and the sections dealing with the procedure before the magistrate and the matter of an appeal from his decision amended. It was declared that the amending Act should come into force on a day to be fixed by proclamation, but we are informed that it was never proclaimed. In the revision of the statutes, however, the Act bore the short title to which I have referred above.

The definition of slot machine thus has continued in its present form from the date the Act was passed. That it was directed against gambling devices was declared by the Legislature when it was first enacted. The language taken from the *Criminal Code* is that which was considered appropriate by Parliament to describe a means or contrivance for playing a game of chance. The second description, with certain variations which appear to me not to affect the issue, is similar to that considered by the Court of Appeal of Saskatchewan in *Rex* v. *Karminos* (1). In the Saskatchewan case the Court of Appeal came to the conclusion that the statute was ultra vires as an invasion of

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

1954

DEWARE
v.
THE QUEEN

Locke J.

the field of criminal law exclusively assigned to Parliament by head 27 of s. 91 of the *British North America Act*.

In deciding whether legislation, either of a Provincial Legislature or of Parliament is beyond the powers vested in them respectively by ss. 92 and 91, the decisive point is as to what is the true nature and purpose of the legislation or, as it was put by Lord Watson in *Union Colliery* v. *Bryden* (1), in the words that have been so often quoted, what is the pith and substance of the enactment. The decision of that question, as pointed out by Viscount Haldane in *Attorney-General for Manitoba* v. *Attorney-General for Canada* (2), does not turn only on the language used by the Legislature but on the provisions of the Imperial Statute of 1867. It is, however, permissible to consider the language of the title in arriving at a conclusion.

In *Fielding* v. *Morley Corporation* (3), Lindley M.R., in delivering the judgment of the Court of Appeal, in a case involving the construction of a statute, said in part:—

> I read the title advisedly, because now, and for some years past, the title of an Act of Parliament has been part of the Act. In old days it used not to be so, and in the old law books we were told not so to regard it; but now the title is an important part of the Act, and is so treated in both Houses of Parliament.

In *Fenton* v. *Thorley* (4), where the question was as to the proper construction of the expression "injury by accident" in the Workmen's Compensation Act 1897, Lord Macnaghten said in part (p. 447):—

> The title of the Act is, "An Act to amend the law with respect to compensation to workmen for accidental injuries suffered in the course of their employment". It has been held that you cannot resort to the title of an Act for the purpose of construing its provisions. Still, as was said by a very sound and careful judge, "the title of an Act of Parliament is no part of the law, but it may tend to shew the object of the legislature." Those were the words of Wightman J. in *Johnson* v. *Upham* (5), and Chitty J. observed in *East and West India Docks* v. *Shaw, Savill and Albion Co.* (6), that the title of an Act may be referred to for the purpose of ascertaining generally the scope of the Act.

(1) [1899] A.C. 580.
(2) [1925] 561 at 566.
(3) [1899] 1 Ch. 1 at p. 3.
(4) [1903] A.C. 443.
(5) (1859) 2 E. & E. 263.
(6) (1888) 39 Ch.D. 531.

In a more recent case, *R.* v. *Bates* (1), Donovan J., in construing the Prevention of Fraud (Investments) Act, 1939, said (p. 844):—

> I agree that the long title is a legitimate aid to the construction of s. 12(1) and I take the same view, in this case, of the cross-heading. When Parliament proclaims what the purpose of an Act is, it would be wrong to leave that out of account when construing the Act—in particular, when construing some doubtful or ambiguous expression. In many cases the long title may supply the key to the meaning. The principle, as I understand it, is that where something is doubtful or ambiguous, the long title may be looked to to resolve the doubt or ambiguity, but, in the absence of doubt or ambiguity, the passage under construction must be taken to mean what it says, so that, if its meaning be clear, that meaning is not to be narrowed or restricted by reference to the long title.

The matter is further dealt with and the effect of the cases summarized in the Tenth Edition of *Maxwell* published last year where, at page 42, the learned author says:—

> It is now settled law that the title of a statute is an important part of the Act and may be referred to for the purpose of ascertaining its general scope, and of throwing light on its construction.

While I would regard it as clear, without the assistance of the title, that the Slot Machine Act of New Brunswick is aimed at the evil of gaming, the matter appears to me to be put beyond doubt by the title under which the statute was the law of that Province from 1936 to 1952. In an inquiry of this nature, the fact that in the revision the words "and other Gambling Devices" were stricken out cannot affect the matter when the language of the Act itself remains unchanged.

I will not repeat what I have said in *Johnson's* case as to the nature of such legislation. It is for Parliament to declare what conduct is criminal in its nature and to prescribe the penalties. The matter is, in my opinion, concluded by the judgments of the Judicial Committee in *Russell* v. *The Queen* (2), *Attorney-General for Ontario* v. *Hamilton Street Railway* (3), and *Proprietary Articles Trade Association* v. *Attorney-General for Canada* (4). The matter of the suppression of gaming and of operating gaming houses was dealt with when the *Criminal Code* was first enacted in 1892, and the field is one which falls within the exclusive jurisdiction of Parliament under head 27 of s. 91 of the *British North America Act*.

(1) [1952] 2 All E.R. 842.
(2) (1882) 7 App. Cas. 829.
(3) [1903] A.C. 524.
(4) [1931] A.C. 310.

1954

DEWARE v. THE QUEEN

Locke J.

The Act in question was considered by the Appellate Division of the Supreme Court of New Brunswick in *The King* v. *Lane* (1), and found to be intra vires and the Appellate Division, in considering the present case, treated the matter as being concluded by that judgment. In *Lane's* case Baxter C.J., with whom Grimmer J. agreed, was of the opinion that the Act was within the powers of the Legislature as legislation "assisting the Dominion jurisdiction." But, with respect, this overlooks the fact that, if the legislation is "in relation to criminal law" within the meaning of s. 91, the Province is excluded from the field and cannot trespass upon it under the guise of exercising the powers conferred upon it by heads 15 and 16 of s. 92. As was said by Sir Lyman Duff in *Provincial Secretary of Prince Edward Island* v. *Egan* (2):—

> It is beyond dispute that where an offence is created by competent Dominion legislation . . . under s. 91(27) the penalty . . . attached to that offence as well as the offence itself . . . are excluded from provincial jurisdiction.

With respect, I think that *The King* v. *Lane* was wrongly decided and should not be followed. It was contended, though rather faintly, on the argument before us that the second definition of a slot machine which I have quoted above was capable of being construed as describing machines which were not gaming devices. As to this, in my opinion, the interpretation of that language afforded by the title of the statute should be accepted. I am further of the opinion for the same reasons which I have given in *Johnson's* case that it would make no difference if machines other than gaming devices were intended to be described. This same argument was advanced and rejected by all of the judges of the Court of Appeal in Saskatchewan in *Rex* v. *Karminos* (3). In that case, as in this, the decision of this Court in *Bedard* v. *Dawson* (4), was relied upon in supporting the validity of the legislation and Turgeon J.A. (p. 440) pointed out that, since the real object and true nature of the Act was to create an offence in the interests of public morality and not for the protection of civil rights, the legislation could not be supported. That observation applies with full force to the statute under consideration.

(1) (1936) 11 M.P.R. 232.
(2) [1941] S.C.R. 306 at 403.
(3) [1936] 1 W.W.R. 433.
(4) [1923] S.C.R. 681.

It was attempted on the argument before us to distinguish that case on the ground that the New Brunswick statute did not declare the possession of a slot machine to be an offence or provide a penalty by fine or imprisonment, as did the Saskatchewan Act, and was thus not "in relation to criminal law." As to this, while the Act does not in terms declare the possession of such a machine to be an offence, the effect of it is to prescribe a penalty for such possession, namely, that it may be seized and forfeited to the Crown, without recompense. I can see no force in this argument.

The fallacy of the argument advanced in support of this legislation may perhaps be demonstrated by an illustration. In a case recently before this Court, *Industrial Acceptance Corporation* v. *The Queen* (1), the validity of a seizure of an automobile used for the carriage of a narcotic drug under the *Opium and Narcotic Drug Act, 1929* was considered. S. 21 of that Act provides for the seizure and forfeiture to the Crown of a motor car proved to have been used in connection with the offence charged. The argument that this provision for forfeiture was beyond the powers of Parliament was rejected, it being held that such a forfeiture was an integral part of the criminal law. Could it be said that provincial legislation, also providing for the forfeiture of motor cars used in the transport of narcotics, could be supported as legislation having to do with the control of highway traffic such as that considered in *Egan's* case? In my opinion, to ask the question is to answer it: such a contention would clearly be untenable. Parliament has under head 27 dealt with the crimes of possessing narcotic drugs and gambling devices and provided the penalties deemed by it to be appropriate. Are the provinces, under the pretence that they are exercising the powers given to them by s. 92, authorized to impose other or additional penalties? Nothing, in my opinion, could be more calculated to create confusion in the administration of justice in criminal matters.

In the view I take of this matter, it is unnecessary to consider whether the machine seized fell within the definition in the statute.

I would allow this appeal.

(1) [1953] 2 S.C.R. 273.

1954

DEWARE v. THE QUEEN

CARTWRIGHT J.:—Two questions arise on this appeal, (i) whether the machine in question falls within the definition of "slot machine" contained in *The Slot Machine Act*, 1951 N.B. c. 215 and (ii) whether that Act is *intra vires* of the Legislature. If either of these questions is answered in the negative the appeal must be allowed but I think it desirable to deal with both of them.

The relevant provisions of the Statute and the description of the machine are set out in the reasons of my brother Kerwin.

On the first question, for the reasons given by my brother Kerwin, I agree with his conclusion that the machine here in question does not fall within s. 1(*b*)(i). In my opinion it does fall within the words of s. 1(*b*)(ii) as being "a machine . . . operated mechanically or manually . . . which upon the insertion therein . . . of money . . . may deliver . . . to the operator thereof . . . money's worth . . . in varying quantities." The pleasure of playing a game is the money's worth which the operator receives in exchange for the money he deposits in the machine and the quantity of such pleasure delivered in return for one coin may vary from that afforded by the playing of one game to that afforded by the playing of four games.

On the second question, while the Statute under consideration is by no means identical with the Alberta Statute dealt with in the case of *Johnson* v. *Attorney-General of Alberta*, judgment in which is being delivered contemporaneously with that in this appeal, the constitutional questions raised are, in effect, the same in both cases. I am of opinion that the main object of this Statute is the same as that of the Alberta Statute and, for reasons similar to those which I gave in *Johnson's* case, I have concluded that it is *ultra vires* of the Legislature of New Brunswick.

I would allow the appeal and restore the order of the learned magistrate. There should be no order as to costs.

Appeal allowed and order of the Police Magistrate restored, Kerwin and Estey JJ. dissenting.

Solicitor for the appellant: *J. T. Carvell.*

Solicitor for the respondent: *The Attorney General of New Brunswick.*