1932

*Apr. 26.
*Jun. 15.

GEORGE BAMPTON ..... APPELLANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Club—Benevolent Societies Act, R.S.B.C., 1911, c. 19—Place "kept for gain"—Common gaming house—Game of cards played—Criminal Code, section 226—The Societies Act, R.S.B.C., 1914, c. 236.

The appellant was steward of a *bona fide* club organized pursuant to the *Benevolent Societies Act* (now the *Societies Act*) of British Columbia.

*PRESENT:—Anglin C.J.C. and Duff, Rinfret, Lamont and Smith JJ.

(1) [1911] A.C. 10, at 13.

The club had a membership of 1,700 and provided all the regular facilities of a social club, including meals, billiard rooms, reading rooms, various card games, etc.; it also leased and operated a football field. Members contributed ten cents apiece to the funds of the club for each half hour's play at the poker table, irrespective of whether they were winning or losing. This money was not taken from the stakes or the pot, but was collected by the appellant, as steward, from the players and paid over to the club. Only members were allowed in the premises, a by-law expressly forbidding the introduction of visitors to any part of the club property. The appellant was convicted, under section 226 of the Criminal Code, of unlawfully keeping a common gaming house; and the conviction was affirmed by the appellate court.

Held, reversing the judgment of the Court of Appeal ([1932] 1 W.W.R. 154), that, upon the facts, the club was not "a house * * * kept * * * for gain" within the meaning of section 226 Cr. C. and that the appellant had been wrongly convicted.

R. v. *Riley* ((1917) 23 B.C.R. 192 and *R.* v. *Cherry and Long* ((1924) 20 Alta. L.R. 400) approved; *R.* v. *Sullivan* ((1930) 42 B.C.R. 435) overruled.

APPEAL from the decision of the Court of Appeal for British Columbia (1), maintaining the conviction of the appellant of having kept a common gaming house.

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

J. W. de B. Farris K.C. for the appellant.

E. F. Newcombe K.C. for the respondent.

The judgments of Anglin C.J.C. and Rinfret, Lamont and Smith JJ. were delivered by

ANGLIN C.J.C.—After careful consideration of this appeal, I am satisfied that the order made by Newcombe J. granting leave herein was providently made and that this court has jurisdiction to entertain this appeal, on the ground of conflict between the decision of the Court of Appeal for British Columbia in it and the decision of the

(1) [1932] 1 W.W.R. 154.

1932

BAMPTON v. THE KING.

Anglin C.J.C.

same court in *R.* v. *Riley* (1), which, although impliedly overruled in *R.* v. *Sullivan* (2), had in the meantime been followed in *R.* v. *Cherry and Long* (3), decided by the Appellate Division of Alberta in 1924. No allusion was made by the Court of Appeal, either in the *Sullivan* case (2) or in the present case, to *R.* v. *Riley* (1) or *R.* v. *Cherry and Long* (3), although both were brought to the attention of the court, as appears in the report of the *Sullivan* case (2) at p. 436, and here in the appeal case and factums, probably because they had to do with payments for refreshments and were thought, on that ground, to be distinguishable.

We might have been disposed to hold that this case fell within clause (*b*) (ii) of s. 226 of the Criminal Code, but for the fact that the evidence does not shew that

> the whole or any portion of the stakes or bets or other proceeds at or from such games (i.e., games of chance, or mixed games of chance and skill) (was) either directly or indirectly paid to the person keeping such house, room or place.

In fact, the players would appear to have paid this money to the steward out of their own pockets rather than from any proceeds of the game. This appears from the evidence throughout the case. On this point we adopt the view of Beck J.A. in *R.* v. *Cherry and Long* (3) (at p. 407), where that learned judge says:

> In my opinion, the only reasonable interpretation of this clause ((*b*) (ii) of s. 226 Cr. C.) is that it refers, and refers only, to a payment made to the keeper out of one or all of the "pots" under a rule, regulation, agreement or understanding exacted by the keeper that such a payment shall be made as a rake-off, commission or other form of profit to the keeper.

As to clause (*a*) of s. 226, we find it difficult to say that the "house, room or place (was) kept * * * for gain." No doubt, the moneys paid by the players constituted largely the revenue of the club and belonged to its members, playing being confined to them.

The question really presented for our determination is whether the decision of the Appeal Court of B.C. in *R.* v. *Sullivan* (2) or that earlier delivered by the same court (then (1916) composed of Macdonald C.J.A. and Martin and McPhillips JJ.A.) in *Rex* v. *Riley* (1) appeals to us as the better.

(1) (1917) 23 B.C.R. 192. (2) (1930) 42 B.C.R. 435.
(3) (1924) 20 Alta. L.R. 400.

In *R.* v. *Riley* (1), Macdonald C.J.A. said:

In Halsbury's Laws of England, vol. 4, p. 406, (par. 860), a club is defined as

A society of persons associated together for social intercourse, for the promotion of politics, sport, art, science or literature, or for any purposes *except the acquisition of gain.*

There is no finding that the Pender Club was not a *bona fide* club; there is no suggestion that the accused conducted the house under the name of the Pender Club for personal gain, and apart from the finding as to the "rake-off" it is not suggested that the Pender Club was conducted by the members thereof for gain. The real question involved in the submission therefore turns on whether or not the receipt by the club of moneys for refreshments, in the manner above set out, proves a keeping of the club premises for gain.

The rake-off was not compulsory; that was merely the method adopted by the players of paying for their refreshments. Instead of each one paying for his own refreshments, or treating in turn, they took from their common store from time to time sufficient money to pay for all the refreshments which they consumed.

* * * * *

I think the section is aimed at the keeping of a house for gain to which persons come by invitation, express or implied. The members of a *bona fide* club come as of right. This case is analogous to the case of *Downes* v. *Johnson* (2), where it was held that members of a *bona fide* club were not to be considered persons who resorted to the club.

and Martin J.A. said:

It cannot properly be said, on such facts (i.e., those in the case) that the house or place in question, conducted by the hundred (here seventeen hundred) members of the social club all equally interested (cf. Halsbury's Laws of England, Vol. 4, p. 406, par. 862) was "kept * * * for gain" within the meaning of the section and as defined by e.g., *Rex* v. *James* (3).

That learned judge concluded his judgment as follows:

His Worship has found that this benevolent club is only enabled to be kept open because of the gambling that is admittedly going on there, its revenue being otherwise very insufficient, but the correction of such an evil is for the legislature, and in the circumstances the courts can do nothing to stop it.

In *R.* v. *Cherry and Long* (4), Beck J.A., in delivering the judgment of the Appellate Division of Alberta said,

There is a company, duly incorporated under *The Companies Act* as "The Cooks and Waiters Club." In the memorandum of association, the objects of the company are stated as follows:

* * * * *

(*b*) To carry on a club for the use and recreation of cooks and waiters in Edmonton.

* * * * *

The company was incorporated on December 7, 1923. The company undoubtedly carried on a *bona fide* club * * * there was provision for admitting visitors or temporary members, on the recommendation of two

(2) [1895] 2 Q.B. 203.
(2) [1895] 2 Q.B. 203.
(3) (1903) 7 Can. Cr. Cas. 196.
(4) (1924) 20 Alta. L.R. 400.

1932

BAMPTON v. THE KING.

Anglin C.J.C.

members, for thirty days, after which period, if they desired to become permanent members they had to be voted for. Persons who were not cooks or waiters could not become permanent members; others could become visitors for thirty days.

* * * * *

The club kept generally a small stock of soft drinks, coca-cola, etc., "just ordinary refreshments served in a club," but there was no restaurant in the club. * * *

There was evidence given by the police, who watched the playing through the window on two occasions for a very few minutes, that Cherry was seen taking, sometimes twenty-five and sometimes fifty cents, from the "pot," on several occasions; that Cherry put this in the outside pocket of his coat. It seems to me the natural thing that, if provision was being made for paying for refreshments, the money should be kept by one person. Cherry was evidently selected as that person. It is not probable that he kept his own money in the outside pocket of his coat, so that it is to be inferred that he was keeping this refreshment money separate, to be used as occasion arose for the purpose intended.

It was suggested during the argument that we should infer that Cherry, who was only a visiting member, had in some way rented or got control of the use of the particular room in which he was, for his own purposes and profit, but such an inference from the evidence would, to my mind, be quite unreasonable. Long was a permanent member of the club, and was voluntarily in charge on the occasion in question for a portion of the time during which the play was going on.

* * * * *

The first question for decision * * * is whether the place was being conducted "for gain."

As to whether a place is kept for gain, if, from the stakes, bets or other proceeds at or from the game, money is paid to a *bona fide* club, in whose premises the game is being played, in payment for refreshments supplied by the club, I adopt the decision of the Court of Appeal of British Columbia in *R.* v. *Riley* (1), and hold that in such a case the club is not kept for gain within the meaning of the statute.

* * * * *

Such a payment is not made to the keeper *qua* keeper, but as a seller of refreshments. Nor is the money paid *qua* part of the pot, but is in reality a contribution by the several players out of their own pockets, just as much as if they severally contributed to the fund from their own pockets. It is paid for a purpose and for a consideration in no way incident to the game as a game, and I think, therefore, for the two reasons indicated, it is not the kind of payment which is contemplated by the Act.

This view is strengthened by two considerations: (1) The Act under consideration is criminal, and nothing is to be found in it by intendment, but only what is clearly expressed; and (2) To hold otherwise would be to interfere with a harmless practice which is not uncommon in what perhaps may be called high-class social clubs, those resorted to by persons of divers callings, occupying the highest positions in the public and social life of the country.

(1) (1917) 23 B.C.R. 192; [1917] 1 W.W.R. 325; 26 C.C.C. 402.

The case at bar, in its facts, seems to be clearly indistinguishable from *R.* v. *Sullivan* (1). For instance, here, as there, the *bona fide* existence of the club is conceded, the players, who sat at the poker table for a certain period of time, all contributed (ten cents apiece for each half hour in this case), to the funds of the Club; no profits were or could be distributed amongst the members, although all the property of the Club and its revenues belonged to them (*The Societies Act,* R.S.B.C., 1924, c. 236, s. 5); the steward collected this money from the players and paid it over to the club; only members were allowed in,—in fact, in the present case, by-law no. 18 expressly forbade the introduction of visitors to any part of the club premises; the accused was steward of the club. In all these features the case resembles *R.* v. *Sullivan* (1), where the decision was based on s. 226, 1 (*a*), of the Code, and the Chief Justice, delivering the judgment of the court said,

> The appellant swore that he received nothing but his salary as steward. I think, however, that s. 69 of the Criminal Code is applicable to the appellant, since it is apparent that the club was a common gaming house.

From this passage and the rest of the report, however, it would seem that the main question considered by the court was the responsibility of the steward in the premises, rather than the question now before us.

But, we agree with Martin J.A., where he said, in the case at bar,

> This case cannot, in my opinion, be distinguished in principle from our decision in *R.* v. *Sullivan* (1). Indeed, in some respects it is a stronger case for conviction than that * * *.

Not improbably the learned judge here referred to the fact that, in the *Sullivan* case (1), the club in question had, in addition to other features, a lunch counter where patrons could buy meals, soft drinks, tobacco and cigars,—a feature which was entirely lacking in the present case.

The same points made at bar in the present case would appear to have been made in the Court of Appeal in the *Sullivan* case (1), yet the court there held that,

> The appellant, therefore, was properly convicted of being a keeper (of a common gaming house *kept for gain* within clause (*a*) of s. 226).

The present case, however, would seem to be *a fortiori* a case for conviction in that here the moneys paid by the

(1) (1930) 42 B.C.R. 435.

1932

BAMPTON v. THE KING.

Anglin C.J.C.

card players constituted a chief source of revenue of the club.

After having given to this case, and to the cases cited at bar, the fullest consideration, we prefer the decisions and the reasoning put forward in the *Riley* case (1) and in *R.* v. *Cherry and Long* (2) to the decision and the reasons in support thereof given in the *Sullivan* case (3). That being so, it follows that the *Sullivan* case (3) must be overruled, the appeal herein allowed and the conviction against the appellant must be quashed.

DUFF J.—The question is whether, on the facts disclosed in evidence, the appellant could be lawfully convicted of keeping a common gaming house, within the meaning of section 226 of the Criminal Code. The relevant parts of the section are as follows:

Section 226. A common gaming house is

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

(*b*) a house, room or place kept or used for playing at any game of chance, or any mixed game of chance and skill in which

1. * * *

2. The whole or any portion of the stakes or bets or other proceeds at or from such game is either directly or indirectly paid to the person keeping such house, room or place.

The appellant was the steward of the club, which, admittedly, was a social club, incorporated under the *Benevolent Societies Act* (now the *Societies Act*), which owned a club house, as well as a football ground, and provided facilities for the social intercourse and the amusement of its members. The indoor amusements consisted of billiards, card games, including poker.

The point in controversy concerns the manner in which poker games were conducted, and the particular fact upon which the Crown relies is this: every half hour a member occupying a seat at a table and engaged in playing poker was charged a certain sum. It is true also that the respondent, the steward, provided chips to members for which no charge was made, a circumstance, which, so far as I can see, has no bearing on the question at issue.

(1) (1917) 23 B.C.R. 192. (2) (1924) 20 Alta. L.R. 400.
(3) (1930) 42 B.C.R. 435.

1932

BAMPTON v. THE KING.

Duff J.

Members only were admitted to the premises; and it is well perhaps to emphasize the fact already mentioned that the club was not a proprietary club, but a club incorporated under the *Societies Act*. I have no hesitation in holding that there is no evidence that this club was "a house, room or place kept by any person for gain." There is not the slightest evidence to indicate that the club was not precisely what it purported to be—a club kept for the amusement and recreation, and solely for that purpose, of the members. Fees and other contributions made by the members were for the purpose of defraying the expenses.

The real question seems to be whether or not the accused can be convicted under subsection (*b*) 2 of section 226, i.e., whether or not the room in which poker was played was

> a room or place kept or used for playing therein at any game of chance or any mixed game of chance and skill in which the whole or any portion of the stakes or bets or other proceeds at or from such games as either directly or indirectly paid to the person keeping such house, room or place.

It is argued by Mr. Farris that the small fee charged for the use of the chair cannot be described as a "gain," within the meaning of these words. I pass by that question because my mind is perfectly clear upon this point, namely, that the payment of this fee is not a payment of

> the whole or any portion of the stakes or bets or other proceeds at or from

the games. Admittedly, it is, of course, not a payment from the bets or stakes. Is it a payment of "the whole or any portion" or "other proceeds at or from such games"? The word "proceeds" here must be read in connection with bets and stakes, and I think we are justified in saying that the word is *noscitur a sociis*, and that it is limited to the proceeds of a betting or gambling game as such, and proceeds similar in character to bets and stakes. The broader construction would lead to consequences which it is impossible to suppose could have been contemplated. The section is aimed, I think, at the participation by the owner of the place where the game is carried on, in the profits or other proceeds accruing to members from the game itself.

No doubt where it is shewn that gain is the real object of the keeping of the place, you have a case within subsection (*a*). But, as I have said, no such case is made out

1932

BAMPTON v. THE KING.

Duff J.

here, and I think the argument based upon subsection (*b*) fails also.

The appeal should be allowed and the conviction quashed.

Appeal allowed.

Solicitor for the appellant: *T. B. Jones.*

Solicitor for the respondent: *A. C. Bass.*