1952

June 4 & 5

Sept. 12

BETWEEN:

INDUSTRIAL ACCEPTANCE CORPORATION LIMITED ..... } SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Crown—Petition of Right—The Opium and Narcotic Drug Act, 1929—Action to recover possession of an automobile sold under a conditional sales contract but forfeited by the Crown pursuant to provisions of s. 21 of the Act—The Opium and Narcotic Drug Act, 1929, within the competence of Parliament to enact—Provisions of s. 21 of the Act even though they affect "property and civil rights" necessarily incidental to powers conferred on Parliament by the British North America Act, s. 91, head 27—Action dismissed.

In this action the suppliant seeks to recover possession of an automobile (or alternatively its value) on the ground that it is the owner of and entitled to possession of the car under a conditional sales contract, some portion of the purchase price still being unpaid. The respondent admits being in possession of the car but claims that it has been forfeited pursuant to the provisions of s. 21 of the Opium and Narcotic Drug Act, 1929. On the facts the Court found that the automobile on the date in question contained "heroin"—one of the drugs mentioned in schedule to the Act—and was used in connection with the sale of that drug, and that under s. 21 of the Act it was duly forfeited.

Held: That in essence the Opium and Narcotic Drug Act, 1929, is within the term "the criminal law" as found in s. 91, head 27, of the British North America Act, 1867, and was therefore within the competence of Parliament to enact. *Attorney-General for Ontario* v. *Hamilton Street Railway* (1903) A.C. 524; *Proprietary Articles Trade Association* v. *Attorney-General for Canada* (1931) A.C. 310 referred to.

2. That the provisions for forfeiture as contained in s. 21 of the Opium and Narcotic Drug Act, 1929, do affect "property and civil rights" but that of itself does not make the Act *ultra vires* of Parliament. *Proprietary Articles Trade Association* v. *The Attorney-General for Canada* (1931) A.C. 310; *Attorney-General for British Columbia* v. *Attorney-General for Canada* (1937) A.C. 368 referred to.

3. That the provisions of s. 21 of the Opium and Narcotic Drug Act, 1929, insofar as they may appear to trench upon "civil and property rights" are necessarily incidental to the powers conferred on Parliament by s. 91, head 27, of the British North America Act, 1867, and are therefore *intra vires* of Parliament.

PETITION OF RIGHT by suppliant to recover from the Crown possession of an automobile which had been forfeited pursuant to the provisions of s. 21 of the Opium and Narcotic Drug Act, 1929.

The action was tried before the Honourable Mr. Justice Cameron at Toronto.

1952

INDUSTRIAL ACCEPTANCE CORPORATION LTD. v. THE QUEEN

W. S. Anderson for suppliant.

Geo. B. Bagwell, Q.C. and *J. T. Gray* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

CAMERON J. now (September 12, 1952) delivered the following judgment:

In this Petition of Right the suppliant, a corporation carrying on business throughout Canada as a finance company, seeks to recover from the Respondent possession of one 1949 Plymouth sedan, serial No. 96000590 (or alternatively the sum of $1,800, the alleged value of the car) on the ground that it is the owner of and entitled to possession of the car under a conditional sales contract, some portion of the purchase price still being unpaid. The Respondent admits that the car is in the possession of the Crown but submits that it had been forfeited pursuant to the provision of S. 21 of the Opium and Narcotic Drug Act, 1929, and amendments thereto.

There is no serious dispute as to the facts. On August 9, 1949, Rheaume Motor Sales of Windsor, Ontario, was the owner of the car and on that date sold it conditionally to one William J. Ciampi for $2,500, pursuant to the terms of a conditional sales contract (Ex. 2) which provided that the ownership of, property in, and title thereto should remain in the vendor until the purchase price should be paid in full. The contract shows that $1,000 was paid in cash, and that after adding insurance and finance charges the total deferred payments aggregated $1,853.50. Actually the vendor received $600 only in cash, and took from Ciampi his promissory note for $400. On the same date Rheaume Motor Sales assigned the conditional sales contract to the suppliant. Monthly payments were made by Ciampi to the suppliant, and as of August 5, 1950, the unpaid balance thereunder was $929.50. On that date the suppliant purchased for $400 the promissory note given by Ciampi to Rheaume Motor Sales and, after adding additional insurance and finance charges, took from Ciampi a promissory note for $1,631, representing the full amount of his indebtedness. Further monthly payments were made and as of March 1951, the general balance owing by Ciampi was $1,010 (Ex. 5). Had all his payments been

1952

INDUSTRIAL ACCEPTANCE CORPORATION LTD. v. THE QUEEN

Cameron J.

credited to the original conditional sales contract the balance owing thereunder would have been $308.50 and possibly some additional charges for interest and insurance.

As I have said, the respondent relies on S. 21 of the Opium and Narcotic Drug Act, 1929, which is as follows:—

> When any person is convicted of an offence against this Act, the opium pipe or other article or the drug in respect of which the offence was committed and all receptacles of any kind whatsoever found containing the same, and any vehicle, motor car, automobile, boat, canoe, aeroplane or conveyance of any description, proved to have contained such opium pipe or other article or drug or to have been used in any manner in connection with the offence for which such person has been so convicted, and any moneys used for the purchase of such drug, shall be forfeited to His Majesty, and shall be delivered to the Minister for disposition.

The evidence adduced on behalf of the Respondent establishes beyond any doubt that the automobile in question on June 16, 1951, contained Diacetylmorphine (Heroin)—one of the drugs mentioned in schedule to the Act—and was used in connection with the sale of that drug to one Labrash. Exhibit A is the certificate of the Registrar of Motor Vehicles for Ontario indicating that the 1949 Plymouth sedan, licence No. 96000590 in 1951 was registered in the name of William J. Ciampi and bore licence No. 855 R. 4. Labrash—a constable in the Royal Canadian Mounted Police and employed in enforcing the provisions of the Act—stated that on June 16th, he, after being searched by his associates and supplied with bills, the serial numbers of which had been listed, made a telephone call in Windsor and then waited in a prearranged public place. Shortly thereafter a Plymouth sedan bearing licence No. 855 R. 4 approached him and he recognized the driver and sole occupant as Patrick Charles Riley who was previously known to him. Riley signalled to him and opened the car door. Labrash entered the car which was then driven away. Riley handed Labrash a small package for which the latter paid him $10. Labrash then left the car, taking the package with him. Constable Bearesdorf and Corporal McIver of the Royal Canadian Mounted Police were assisting Labrash in the case and had observed the approach of the Plymouth sedan bearing licence No. 855 R. 4 and driven by Riley, had seen Labrash enter the car and had followed

it until he got out. Riley was then searched, the listed bills were found in his possession, he was arrested and the car later seized.

Evidence was also given that the package purchased from Riley by Labrash was forwarded to Mr. C. S. Tinsley, a Dominion analyst, who gave evidence that upon analysis he found it to contain Diacetylmorphine (Heroin) a drug as defined in the Opium and Narcotic Drug Act. That evidence was not challenged in any way.

It is also fully established that Riley was convicted of the offence of selling Diacetylmorphine on that date. It appears from the certificate of the deputy clerk of the Court, dated February 21, 1952, (Ex. B.) that on that date Patrick Charles Riley was charged before His Honour Judge J. A. Legris, Judge of the County Court of the County of Essex, with a number of offences including the following:

> 5. Further for that he, on or about the 16th day of June 1951, at the city of Windsor, in the County of Essex, did unlawfully sell a drug, to wit Diacetylmorphine, to one Charles J. K. Labrash, without first obtaining a licence from the Minister, or without other lawful authority, contrary to Section 4(1) (*f*) of the Opium and Narcotic Drug Act, 1929, and amendments thereto.

To that charge Riley pleaded guilty and was sentenced to six months in gaol and a fine of $200.

Endorsed on the said Exhibit 2 is the following certificate signed by the presiding Judge:—

> I find that automobile bearing 1951 Ontario licence No. 855 R. 4 was used in the commission of the within offence Count Number Five (5).

On the facts alone I would have no hesitation in finding that the Crown has proven its claim, that under S. 21 of the Act the car was duly forfeited. A more difficult question, however, is raised by the suppliant's reply, paragraph 4 of which is as follows:—

> The Suppliant alleges that if the said Statute forfeits the said motor vehicle to Her Majesty as alleged in the Statement of Defence, which the Suppliant does not admit but denies, such Statute purports to forfeit property of the Suppliant who was and is innocent of any violation of the said Statute and of any participation in the alleged offence of Patrick Charles Riley, and such Statute is therefore, in such respect, beyond the Legislative competence of the Parliament of Canada.

1952

INDUSTRIAL ACCEPTANCE CORPORATION LTD. v. THE QUEEN

Cameron J.

It is submitted that S. 21 of the Act (supra) is ultra vires of the Parliament of Canada in that in providing for forfeiture of property it is an encroachment upon the power exclusively delegated by the British North America Act to the provinces to enact laws regarding "property and civil rights in the province," (S. 92 head 13), and that in any event it is ultra vires insofar as it purports to forfeit property of innocent persons who were not in any way concerned with the commission of the offence.

For the respondent it is submitted that the Opium and Narcotic Drug Act is in pith and substance criminal law, the enactment of which is exclusively assigned to the Parliament of Canada by S. 91, head 27 of the B.N.A. Act, and that the power to declare forfeiture of property is necessarily incidental to the carrying out of the true intent of the Act, namely the complete suppression of the use of and the trafficking in of drugs as defined in the Act, except under licence or other lawful authority.

Disregarding for the moment the provisions for forfeiture as contained in S. 21, it is my opinion that in essence the Act is within the term "the criminal law" as found in S. 91, head 27, and was therefore within the competence of Parliament to enact.

As stated in *Attorney-General for Ontario* v. *Hamilton Street Railway,* (1) the Criminal Law in its widest sense is reserved for the Dominion Parliament. The extent of that power was considered in *Proprietary Articles Trade Association* v. *Attorney-General for Canada* (2). In that case it was contended that certain sections of the Combines Investigation Act, R.S.C. 1927, C. 26, were ultra vires of Parliament on the ground that they related to property and civil rights and did not fall within the Dominion powers under S. 91 head 27. In that case Lord Atkin stated at p. 323,

> In their Lordships' opinion s. 498 of the Criminal Code and the greater part of the provisions of the Combines Investigation Act fall within the power of the Dominion Parliament to legislate as to matters falling within the class of subjects, "the criminal law including the procedure in criminal matters" (s. 91, head 27). The substance of the Act is by s. 2 to define, and by s. 32 to make criminal, combines which the legislature in the public interest intends to prohibit. The definition is wide, and may cover activities which have not hitherto been considered to be criminal. But only those combines are affected "which have operated or are likely to operate to the detriment or against the interest

(1) (1903) A.C. 524 at 529. (2) (1931) A.C. 310.

of the public, whether consumers, producers, or others"; and if Parliament genuinely determines that commercial activities which can be so described are to be suppressed in the public interest, their Lordships see no reason why Parliament should not make them crimes. "Criminal law" means "the criminal law in its widest sense". *Attorney-General for Ontario* v. *Hamilton Street Ry. Co.* It certainly is not confined to what was criminal by the law of England or of any province in 1867. 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. 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.

Adopting the principles set forth in that decision, there is no ground on which it may be held that the legislation here in question on its true construction is not what it professes to be, that is, an enactment creating criminal offences and providing penalties for the commission of such offences, in exercise of powers vested in Parliament by S. 91, head 27, of the B.N.A. Act. Indeed in *Ex. p. Wakabayashi and Ex. p. Lore Yip* (1) the predecessor Act—the Opium and Narcotic Drug Act 1923, was held to be one for remeding an evil and creating a new crime and therefore intra vires of Parliament. In that case Macdonald, J. in rejecting a submission that the Act was one for licensing a particular trade, stated at p. 234,

When I view the "mischief" sought to be remedied and the manner in which this was to be accomplished, the state of the law as it existed prior to the Act of 1923, and the nature of the remedy thus applied, I have no hesitation in holding, that the Act in question is criminal and not licensing legislation. The primary object was to create a crime and afford punishment for its infraction. The licensing provisions were necessary but did not affect the validity of the legislation. It was within the competence of the Dominion Parliament and did not invade the jurisdiction allotted to the province by the B.N.A. Act.

(1) (1928) 3 D.L.R. 226.

1952

INDUSTRIAL ACCEPTANCE CORPORATION LTD. v. THE QUEEN

Cameron J.

While such legislation constituted a new crime, it was remedial, in order, if possible, to destroy an existing evil. It was for the promotion of "public order, safety and morals," and was enacted by Parliament for the public good.

(See, also, *Dufresne* v. *The King*, 19 C.C.C. 414.)

Reference may also be made to *Russell* v. *The Queen* (1). There it was decided that The Canada Temperance Act 1878 (Dominion C. 16), did not properly belong to the class of subjects "property and civil rights". In that case Sir Montague E. Smith said:—

> It has in its legal aspect an obvious and close similarity to laws which place restrictions on the sale or custody of poisonous drugs, or of dangerously explosive substances. These things, as well as intoxicating liquors, can, of course, be held as property, but a law placing restrictions on their sale, custody, or removal, on the ground that the free sale or use of them is dangerous to public safety, and making it a criminal offence punishable by fine or imprisonment to violate these restrictions, cannot properly be deemed a law in relation to property in the sense in which those words are used in the 92nd section. What Parliament is dealing with in legislation of this kind is not a matter in relation to property and its rights but one relating to public order and safety. That is the primary matter dealt with, and though incidentally the free use of things in which men may have property is interfered with, that incidental interference does not alter the character of the law. Upon the same considerations, the Act in question cannot be regarded as legislation in relation to civil rights. In however large a sense these words are used, it could not have been intended to prevent the Parliament of Canada from declaring and enacting certain uses of property, and certain acts in relation to property, to be criminal and wrongful. Laws which make it a criminal offence for a man wilfully to set fire to his own house on the ground that such an act endangers the public safety, or to overwork his horse on the ground of cruelty to the animal, though affecting in some sense property and the right of a man to do as he pleases with his own, cannot properly be regarded as legislation in relation to property or to civil rights. Nor could a law which prohibited or restricted the sale or exposure of cattle having a contagious disease be so regarded. 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 assigned exclusively to the Parliament of Canada.

I turn now to a consideration of the effect of S. 21 of the Act (*supra*). In providing for forfeiture of drugs and containers and of conveyances of any description which contained drugs or were used in any manner in connection with

(1) (1882) 7 A.C. 829.

the offence for which there has been a conviction, property and civil rights are undoubtedly affected. But that of itself does not make the Act ultra vires of Parliament. In *Proprietary Articles Trade Association* v. *The Attorney-General for Canada* (1) it was stated,

> If then the legislation in question is authorized under one or other of the heads specifically enumerated in s. 91, it is not to the purpose to say that it affects property and civil rights in the Provinces. Most of the specific subjects in s. 91 do affect property and civil rights but so far as the legislation of Parliament in pith and substance is operating within the enumerated powers there is constitutional authority to interfere with property and civil rights.

In the case of *Attorney-General for British Columbia* v. *Attorney-General for Canada* (2) the validity of Section 498(A) of the Criminal Code of Canada was in question. By that section certain trade practices were declared to be offences and penalties were provided. In affirming the validity of the section and rejecting the argument that it dealt with "property and civil rights in the province," it was—

> Held, that the section was in toto intra vires of the Parliament of Canada under s. 91, head 27, of the B.N.A. Act, 1867—"The Criminal Law . . . ." There was no reason for supposing that the Dominion were using the criminal law as a pretence or pretext for invading the Provincial legislative field, or that the legislation was in pith and substance only interfering with civil rights in the Province.
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> The only limitation on the plenary power of the Dominion to determine what should or should not be criminal was the condition that Parliament should not in the guise of enacting criminal legislation in truth and in substance encroach on any of the classes of subjects enumerated in s. 92 of the B.N.A. Act. It was no objection that it did in fact affect them for if it was a genuine attempt to amend the criminal law it might obviously affect previously existing civil rights.
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> There was no other criterion of "wrongness" than the intention of the Legislature in the public interest to prohibit the act or omission made criminal.
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> *Proprietary Articles Trade Association* v. *Attorney-General for Canada* (1931) A.C. 310 applied.

Counsel for the suppliant submits, however, that the power of forfeiture is not necessarily incidental to the effective carrying out of the purpose and intent of the Act. He refers to the four propositions (and more particularly

(1) (1931) A.C 310 at 326. (2) (1937) A C. 368.

1952

INDUSTRIAL ACCEPTANCE CORPORATION LTD. v. THE QUEEN

Cameron J.

to proposition three) stated in *Attorney-General for Canada* v. *Attorney-General for British Columbia* (1) where it was stated,

> Questions of conflict between the jurisdiction of the Parliament of the Dominion and provincial jurisdiction have frequently come before their Lordships' Board, and as the result of the decisions of the Board the following propositions may be stated:—
>
> (1). The legislation of the Parliament of the Dominion, so long as it strictly relates to subjects of legislation expressly enumerated in s. 91, is of paramount authority, even though it trenches upon matters assigned to the provincial legislatures by s. 92:
>
> (2). The general power of legislation conferred upon the Parliament of the Dominion by s. 91 of the Act in supplement of the power to legislate upon the subjects expressly enumerated must be strictly confined to such matters as are unquestionably of national interest and importance, and must not trench on any of the subjects enumerated in s. 92 as within the scope of provincial legislation, unless these matters have attained such dimensions as to affect the body politic of the Dominion:
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> (3). It is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the legislative competence of the provincial legislature, are necessarily incidental to effective legislation by the Parliament of the Dominion upon a subject of legislation expressly enumerated in s. 91:
>
> (4). There can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be ultra vires if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail.

In considering to what extent encroachment of property and civil rights is necessarily incidental to the effective enforcement of the Act attention must be given to the nature of the "mischief" sought to be remedied. It was referred to by Macdonald, J. in Ex. p. Wakabayashi 1928 (3) D.L.R. 226 at 227 as follows:—

> When one considers, for a moment, that the traffic covered by such Act in narcotics and improper use of opium and drugs constitutes one of the greatest evils of modern times, and legislative efforts have been made in all civilized countries to control, and if possible, destroy this evil, the importance of these applications become apparent. In fact, the matter has been considered, so important from the world's standpoint, that it was dealt with by the League of Nations.

The vicious nature of the drug traffic in all its ramifications, the participation therein by racketeers and criminals, the great profits to be obtained from the ultimate users of the drugs and the deplorable effects on drug addicts themselves made it imperative to take every possible step to stamp it out and to provide penalties which would not only punish the actual offenders but be a deterrent to others. To impose a fine and imprisonment upon a user or vendor

(1) (1930) A.C. 111 at 118.

would be but a small step in the elimination of the traffic. Forfeiture of the drugs was undoubtedly necessary if the "mischief" was to be prevented—and that was conceded by counsel for the suppliant.

Realizing also that narcotics are brought into Canada and must be transported from place to place in order to reach the ultimate user, Parliament also made it an offence for other than common carriers to take or carry or cause to be taken or carried any drug without first obtaining a licence, and in all cases to deliver or distribute such drugs without a licence or other proper authority. It was necessary to strike not only at the distributor and vendor but also at the instrumentalities which aided them in effecting the distribution and sale and more particularly the conveyances so used. By imposing a penalty in rem—the forfeiture of the conveyance which would normally be of considerable value—the convicted person would be handicapped in the distribution of drugs and penalized by the loss of his property which in many cases would be much more valuable than the drugs themselves.

By its terms s. 21 does provide for forfeiture of drugs, receptacles and conveyances under the circumstances specified therein, and whether or not they were the property of the convicted person. So far as conveyances are concerned it is only necessary to prove that *any* person was convicted of an offence under the Act and that the conveyance either contained the opium pipe or other article or the drug in respect of which the offence was committed, or that it had been used in any manner in connection with such offence. The rights of owners of property who have not been convicted of any offence and of owners who were not concerned in any way with and had no knowledge that the offence was likely to be committed are not in any way protected by the section or exempted from the provisions for forfeiture. In that respect the Act differs from the Excise Act, Statutes of Canada 1934, C. 52 as amended. There provision is made by s. 169A under which those who claim an interest as owner, mortgagee, lien holder and the like in any conveyances or appliance which has been seized as forfeited may apply to the courts for an order declaring their interest therein; and if it be made to appear to the satisfaction of the judge that such claimant

1952

INDUSTRIAL ACCEPTANCE CORPORATION LTD. v. THE QUEEN

Cameron J.

was innocent of any complicity in the offence, and that he exercised reasonable care in respect of the person permitted to obtain possession of the conveyance or other appliance the claimant is entitled to "an Order that his interest be not affected by such seizure."

Such an application came before Dysart, J. in Manitoba in *North West Mortgage and Finance Co. Ltd.* v. *Commissioner of Excise* (1). In that case the claimant had held a chattel mortgage on a car which was seized by Excise officers as it was being used by its owner for transportation of liquor in violation of the provisions of the Excise Act. Dysart, J. not only found the claimant entitled to the Order provided for in s. 169A of that Act but also declared that "the legislation here in question affects the exclusively provincial property rights of innocent persons, and is ultra vires of the Dominion."

An appeal therefrom was taken by the Crown (2) but was dismissed on the ground that there was no right of appeal from an Order made under Section 169A.

In reaching his conclusion that the legislation to the extent indicated was ultra vires the Dominion, Dysart, J. stated at p. 363,

> During the argument, I raised the question of the legislative power of the Dominion to confiscate the property of innocent citizens of a province; on a subsequent day the constitutionality of the act was argued.
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> For the commissioner, reliance was placed upon the decision of the Supreme Court of Canada in *The King* v. *Krakowec et al*, (1932) S.C.R. 134, 57 C.C.C. 96, (1932) 1 D.L.R. 316, in which the Court unanimously declared that the proper interpretation of sec. 169 of The Excise Act is that the Dominion has the right to forfeit such a car, for the reason chiefly that the legislation is in rem. That case, however, was dealt with before sec. 169A came into existence. Also, the respondents were not represented on the appeal, and the constitutionality of the forfeiture clause was not raised. I do not regard the case, therefore, as decisive on this point. In none of the decisions of provincial courts is constitutionality raised; and in any event, those decisions are not binding upon this Court.
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> It is admitted, of course, that the Dominion has the power to enact all provisions which are necessarily incidental to effective legislation upon any subject falling within any of the classes expressly enumerated in sec. 91. *Attorney-General for Ontario* v. *Attorney-General for Canada*, (1894) A.C. 189, 63 L.J.P.C. 59; *Attorney-General for Ontario* v. *Attorney-General for Canada*, (1896) A.C. 348, 65 L.J.P.C. 26; *Attorney-General for Canada* v. *Cain*, (1906) A.C. 542, 75 L.J.P.C. 81.

(1) (1945) 52 Man. L.R. 360. (2) (1945) 52 Man. L.R. 365.

It will be admitted also that The Excise Act would carry with it, as incidental thereto, the right to punish offenders against the Act, by all legitimate means, including forfeiture of their automobiles, or of their interests in automobiles, used in violations of the Act.

But it is difficult to find justification for the forfeiture of property belonging to people who are entirely free and innocent of a violation of the Act. These people have their rights to property established by the province, under its exclusive jurisdiction over "Property and Civil Rights"; sec. 92 of the British North America Act. If such confiscation of the property of persons can be justified as being incidental to the punishment of offenders, then it is difficult to understand where the limit must be drawn. If a man's car were stolen, for instance, and used in contravention of The Excise Act, the forfeiture would be maintainable—but at the same time would be an outrage on justice. What essential difference is there between such a case and this present one?

There is nothing in the principles of law or justice that can support this provision of The Excise Act, and while the right of the Dominion should be supported, in so far as its legislation is necessarily incidental to the enforcement of The Excise Act, it seems impossible to understand or to justify the punishment of innocent persons under pretence of enforcing the Act against guilty persons. I am not aware that this point has ever been raised, or strongly supported, or adjudicated upon and therefore I feel at liberty to express my opinion of it. In my opinion, the legislation here in question affects the exclusively provincial property rights of innocent persons, and is ultra vires of the Dominion.

With the greatest respect I find it difficult to understand why in that case the learned judge found it necessary to express any opinion as to whether or not the provisions of the Excise Act relating to forfeiture were invalid in so far as they affected innocent persons. The point was not raised by the parties themselves and in the Court of Appeal counsel for both parties disclaimed any desire to raise the question and no argument was made in regard thereto. Indeed the very point raised by Dysart, J., namely, the protection of property of innocent persons, was specifically provided for in The Excise Act itself and was the basis of the application then before him. In his judgment he found that the claimant was fully entitled to the relief claimed and as provided for in Section 169A. In my view his opinion that the legislation was ultra vires was purely obiter and a reading of the judgment itself suggests very strongly that he did not consider it otherwise.

It is submitted by counsel for the suppliant that while that decision was made in respect to the Excise Act, I should by parity of reasoning apply the same principle to the Opium and Narcotic Drug Act. It seems to me, however, that the true principle to be followed is found in the

1952

INDUSTRIAL ACCEPTANCE CORPORATION LTD. v. THE QUEEN

Cameron J.

case of *The King* v. *Krakowec* (1) referred to and distinguished by Dysart, J. In that case the holder of a conditional sales agreement on a truck resisted a claim for forfeiture of the truck which had been seized while being used for the purpose of removing unlawfully manufactured spirits. It was admitted that the claimants were not concerned in any way with the commission of the offence. It was held that the truck was liable to forfeiture not only as against the person in whose possession it was found, but also as against the unpaid vendors although the latter had no notice or knowledge of the illegal use which was being made of it. Speaking for the full court, Rinfret, J. (now C.J.) stated in part at p. 142,

> It is sufficient to say that, in the provision respecting forfeiture, the object in view is the connection between the vehicles and the spirits unlawfully manufactured or imported. The point is that the vehicles "have been used or are being used for the purpose of removing the same"; and it is immaterial to whom the vehicles belong. In the words of Sedgwick, J., in The Ship *"Frederick Gerring Jr."* v. *The Queen* (1897) 27 Can. S.C.R. 271, at 285,
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> > In the enforcement of fiscal law, of statutes passed for the protection of the revenue or of public property, *such provisions are as necessary as they are universal,* and neither ignorance of law, nor, as a general rule, ignorance of fact, will prevent a forfeiture when the proceeding is against the thing offending, whether it be the smuggled goods or the purloined fish, or the vehicle or vessel, the instrument or abettor of the offence.
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> That the proceeding is, under the Excise Act, "a proceeding against the thing," that is, in the nature of a proceeding in rem, is apparent throughout the Act (Secs. 79, 83, 121, 124, 125, 131, etc.), but is nowhere more evident than in sec. 125, under which all vehicles, vessels, goods and other things seized as forfeited . . . . shall be deemed and taken to be condemned and may be dealt with accordingly, unless the person from whom they were seized, or the owner thereof . . . . gives notice . . . . that he claims or intends to claim the same.
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> As will be noticed, the automatic condemnation is against the thing seized.
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> * * *
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> Adverting to the particular case before us, it is not assuming too much to say that it must have been known to the legislature, when it passed the Excise Act, that a great many drivers of motor vehicles are not the owners thereof, but possess and operate them subject to conditional sale agreements, and if sec. 181 was meant to apply only to vehicles driven by the owners thereof, it is obvious with what ease the provision respecting forfeiture could be evaded.

(1) (1932) S.C.R. 134.

1952

INDUSTRIAL ACCEPTANCE CORPORATION LTD. v. THE QUEEN

Cameron J.

In that case it does not appear that any question was raised as to whether the provisions for forfeiture were in any degree ultra vires of Parliament. The judgment therefore, does not directly decide that the provisions for forfeiture were "necessarily incidental" to the effective working of the Excise Act but I think that such a finding is implicit thereunder. Emphasis is placed on the connection between the vehicles and the unlawful act and the immateriality of the ownership of the vehicles. Then in the reference to the Frederick Gerring, Jr. case the *necessity* and universality of provisions for forfeiture of vehicles, "the instruments or abettors of the offence" is stressed, and that neither ignorance of the law nor, as a general rule, ignorance of fact would prevent a forfeiture when the proceeding is against the thing offending. Then finally it is pointed out that it is common knowledge that motor drivers of cars operate them subject to conditional sales agreement and the ease with which the provisions for forfeiture could be effected, if forfeiture applied only to vehicles driven by their owners. In my opinion that is a clear indication that if the Excise Act were to be effectively administered the powers of forfeiture must necessarily extend to vehicles which were the instruments or abettors of the offence, regardless of ownership thereof, subject now however, to the special provisions of S. 169A thereof which section was not in the Act at the time the Krakowec decision was rendered.

Now if I am correct in so interpreting the judgment in that case I see no reason why the same principles should not be applied to the instant case. It cannot be doubted for one moment that the health and welfare of the people of Canada, the protection of which is sought by the provisions of the Opium and Narcotic Drug Act, is of at least as great (if not greater) importance as the collection of national revenue by means of the Excise Act. In each case vehicles are frequently used in the commission of offences. The driving of cars subject to conditional sale contracts is more widespread now than it was in 1932. It would be a very simple matter for any distributor of drugs to ensure that the vehicle to be used was that of some other person, or that it was subject to a conditional sale agreement or to a chattel mortgage, if by so doing the penalty of forfeiture

1952

INDUSTRIAL ACCEPTANCE CORPORATION LTD. v. THE QUEEN

Cameron J.

could be avoided. By such means the effective administration of the Act would be seriously handicapped and the provisions for forfeiture readily evaded. Forfeiture of vehicles used in committing offences is one means and no doubt a very effective means of suppressing the drug traffic.

It may be true, as suggested by counsel for the suppliant, that the mere taking away of the property of innocent parties does not aid in the enforcement of the Act. That, however, is not the point, but rather the fact that the forfeiture of property which has been of assistance in the commission of the offence is of assistance in preventing a continuance of the "mischief" sought to be eradicated and in penalizing the convicted person who, conceivably at least, would be liable to the innocent owner for the loss of his vehicle.

For these reasons I have come to the conclusion that the provisions of S. 21 of the Opium and Narcotic Drug Act insofar as they may appear to trench upon "civil and property rights" are necessarily incidental to the powers conferred on Parliament by S. 91 head 27 of the B.N.A. Act and are therefore intra vires of Parliament.

I may add that it is not the function of the Court to concern itself with the propriety of an act which by forfeiture does affect the rights of innocent parties. If it be found that Parliament has the power to enact such legislation and if the Act clearly brings within its ambit the forfeiture of such property—and I have so found in this case—it is the duty of a judge to administer the law as he finds it and not to endeavour to mould a statute so as to make it agree with his own conception of justice.

In the Opium and Narcotic Drug Act there is no provision for declaring that the interest of innocent parties in articles which have been forfeited is not affected by such seizure, such as is found in S. 169A of the Excise Act and in S. 179 of the Customs Act, R.S.C. 1927 C.42 as amended. Moreover it would appear that the powers for remission of duties and forfeitures conferred on the Governor-in-Council by S. 33 of the Consolidated Revenue and Audit Act, Statutes of Canada 1931 C.27, do not apply to forfeitures under the Opium and Narcotic Drug Act. From the point

1952

INDUSTRIAL ACCEPTANCE CORPORATION LTD. v. THE QUEEN

Cameron J.

of view of the suppliant and others similarly situated it may be regrettable that such is the case. On the other hand it may be an indication that Parliament was of the opinion that in dealing with the nefarious drug traffic it was necessary that the forfeiture of goods and vehicles should be automatic and complete without any provision for relief of innocent parties.

Counsel for the Crown raised a technical objection that the Court had no jurisdiction to consider a claim such as this. In order that the matter might be dealt with on its merits, I have assumed—but without deciding—that S. 18 of the Exchequer Court Act R.S.C. 1927 C. 34 is sufficiently broad to include a claim of this nature.

The Petition of Right will therefore be dismissed and there will be judgment declaring that the suppliant is not entitled to the relief claimed. The respondent is entitled to be paid costs after taxation.

Judgment accordingly.