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ringbark. A mere prohibition in a lease without more, leaves the general law to otherwise operate. But if the lease prohibits, either *in toto* or partially, the ringbarking of trees and also proceeds to declare its own penalty for breach, thereby specifying the limits of responsibility for contravention, and states the tribunal to determine as to liability and as to amount of the penalty, it appears to me to be more than a cumulative or auxiliary provision. It could not be intended by Parliament that a lessee should suffer the two penalties for the same act. It is substitutory, and takes the place of the earlier provision. That is precisely the present case. I therefore think the judgment of the Full Court was correct and should be affirmed.

Appeal dismissed with costs.

Solicitor, for appellant, *The Crown Solicitor for New South Wales.*

Solicitors, for respondent, *Brown & Beeby.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

CHARLES . . . . . APPELLANT;
INFORMANT,

AND

GRIERSON . . . . . RESPONDENT.
DEFENDANT,

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ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

MELBOURNE, *Oct.* 9, 12, 21.

Licensed premises—Presence thereon "in contravention of" provisions of the Act—Purpose of presence—Licensing Act 1906 (*Vict.*) (*No.* 2068), *sec.* 76.

Griffith C.J., Barton, O'Connor, and Isaacs JJ.

The words "in contravention of the provisions of this Act" in sec. 76 (2) of the *Licensing Act* 1906, mean "in prosecution of a purpose inconsistent with observance of the provisions of this Act."

So held by the Court (*O'Connor* J. dissenting).

Therefore, where a person went into a hotel on a Sunday (when the sale of liquor is prohibited) with the object of obtaining liquor, but was unsuccessful, his presence there was in contravention of the provisions of the Act, and he was properly convicted of having been found on licensed premises at a time when such premises should not be open for the sale of liquor to the public.

Decision of *Madden* C.J. : (*Charles* v. *Grierson*, (1908) V.L.R., 234; 29 A.L.T., 222), reversed.

APPEAL from a judgment of *Madden* C.J. in the Supreme Court of Victoria.

At the Court of Petty Sessions, Geelong, an information was heard whereby John Charles, a Licensing Inspector, charged James Grierson for that he on Sunday, 26th January 1908, not being a *bonâ fide* lodger, weekly or other boarder, traveller, inmate or servant, was found on certain licensed premises, viz., the Terminus Hotel at Geelong, at a time when such premises should not be open for the sale of liquor to the public, contrary to the provisions of the *Licensing Act* 1906.

At the hearing of the information evidence was given that Grierson and two other men entered the hotel by an open street door at half-past ten on the morning of the Sunday in question, passed through the house into the back yard, where they met the licensee; that they asked him if there was "any chance of a drink," and that he replied "No hope;" and that after being on the premises for about three minutes, the three men went out of the back gate into a lane where they were met by the police. The three men admitted that they had gone to the hotel for the purpose of getting liquor, but that they had not obtained any. Grierson, having been convicted and fined, obtained an order *nisi* to review on the ground that his presence on the premises was not in contravention of the Act.

The order *nisi* was heard by *Madden* C.J. who made the order absolute and quashed the conviction: *Charles* v. *Grierson* (1). The informant now appealed to the High Court.

Meagher, for the appellant. The meaning of the words "in contravention of the provisions of this Act" in sec. 76 (2) of the

(1) (1908) V.L.R., 234; 29 A.L.T., 222.

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Licensing Act 1906 is "in opposition to" or "inconsistent with" the provisions of the Act, or else "for the purpose," or "with the intention" of contravening those provisions. See *Stone's Justices' Manual* 1906, p. 524. Unless the words have one of those meanings they are inoperative, for if they mean "in disobedience of some positive enactment of the Act," there is nothing in the Act forbidding the presence of persons in licensed premises on a Sunday, nor is there anything in the Act which requires licensed premises to be closed on Sunday, as there is in sec. 24 of the *Licensing Act* 1872 (35 & 36 Vict. c. 94), sec. 24. The words "in contravention of the provisions of this Act" are taken from sec. 25 of that Act where they can be given a meaning by reference to sec. 24. The Court will attempt to give a meaning to the words consistent with the object of the Act, and will if necessary add words: *Rex* v. *Vasey and Lally* (1); *Sweeney* v. *Fitzhardinge* (2); *Salmon* v. *Duncombe* (3); *Rex* v. *Lyon* (4); *Weedon* v. *Davidson* (5); *Hodge* v. *The King* (6).

[He also referred to *Licensing Act* 1890, secs. 7, 136, 152, 153, 160; *Licensing Act* 1906, secs. 74, 78, 80, 91, 102; *Licensing Act* 1907, sec. 11; *Cairns* v. *Peterson* (7); *Biggs* v. *Lamley* (8); *Cooper* v. *Osborne* (9); *Harbottle* v. *Gill* (10); *Saunders* v. *Thorne* (11); *Saunders* v. *Borthistle* (12).

Wanliss, for the respondent. Sec. 76 (1) of the *Licensing Act* 1906 for the first time makes it an offence for one of the public to purchase or consume liquor, or be found drinking liquor, on licensed premises during the time when the premises should not be open for the sale of liquor. The object of sec. 76 (2) is to throw upon a person found on the premises during that time the burden of showing that he has not committed one of the offences mentioned in sec. 76 (1), or in some other section of the Licensing Acts. Where it is intended to make an unlawful purpose or an intent punishable, specific language is used. See secs. 88, 91 (3) of the *Licensing Act* 1906.

(1) (1905) 2 K.B., 748.
(2) 4 C.L.R., 716.
(3) 11 App. Cas., 627.
(4) 3 C.L.R., 770, at p. 787.
(5) 4 C.L.R., 895, at p. 904.
(6) 5 C.L.R., 373, at p. 386.
(7) 2 V.L.R. (L.), 143.
(8) (1907) V.L.R., 300; 28 A.L.T., 202.
(9) 35 L.T.,, 347.
(10) 41 J.P., 742.
(11) 78 L.T., 627.
(12) 1 C.L.R., 379, at p. 389.

[He also referred to *Russell on Crimes*, 6th ed., vol. I., p. 66.]

Meagher in reply.

Cur. adv. vult.

October 21.

GRIFFITH C.J. read the following judgment :—

The only question raised for decision in this appeal is as to the meaning to be put upon sec. 76 (2) of the *Licensing Act* 1906. The whole section reads as follows :—

"(1) Every person not being a *bonâ fide* lodger weekly or other boarder servant or traveller who purchases or obtains liquor or is found drinking liquor in any licensed premises at any time when such premises should not be open for the sale of liquor to the public shall for every such offence be liable to a penalty not exceeding Two pounds.

"(2) Every person found on any licensed premises at any time when such premises should not be open for the sale of liquor to the public shall unless he satisfies the Court that he was at the time when he was so found a *bonâ fide* lodger weekly or other boarder traveller inmate or servant or that his presence on such premises at such time was not in contravention of the provisions of this Act be liable to a penalty not exceeding Two pounds."

It is plain that the intention of the legislature in enacting the second paragraph was to create a new offence, consisting in being found on licensed premises at any time when they should not be (*i.e.*, ought not to be) open for the sale of liquor, but with this qualification, that the person so found might excuse himself by showing (amongst other things) that his presence was not in contravention of the provisions of the Act.

The learned Chief Justice held, in effect, that this onus was discharged by showing that the person so found was not engaged in committing a breach of some positive provision of the Act.

The words "in contravention of any of the provisions of the Licensing Acts" occur also in sec. 73, where they qualify the supply of liquor by persons other than licensees. In that section I think they must have their natural meaning of violation of a positive provision. Sec. 99 uses the words "In any prosecution for . . . contravention of any of the provisions," &c., where

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the word "contravention" has the same meaning. And, if the latter part of the second paragraph of sec. 76 were itself an incriminatory provision, I am disposed to think that the words "in contravention" as there used should be construed in the same way.

But there are some difficulties in the way of this construction. In the first place, the words are not used to describe a new offence. The scheme of the enactment is that mere presence is unlawful unless excused. The provision is, therefore, for the benefit or exculpation of the person found in the place. Again, the Victorian Acts do not, like those of some States, directly require that licensed premises shall be closed during certain hours, but only that liquor shall not be sold to the public during certain hours. The words of the section, however, borrowed from countries where closing is directly required, speak of times when the premises "should not be open" for the sale of liquor to the public. The word "contravention" is, therefore, apparently used in a sense which would regard the opening of the premises for that purpose as a contravention of that Act, although no penalty is provided for doing so. Further, if the words "in contravention" are limited to meaning "in breach of some positive provision," they are quite inoperative, for there is no independent provision in the Acts which makes mere presence on licensed premises at the times specified an offence, although some offences, which can only be committed upon licensed premises, of course involve the presence of the offender. It is suggested that the words are used with reference to some provisions of that sort which were thought to be inserted or were intended to be inserted, so that there is a *casus omissus* which cannot be supplied by judicial interpretation. I do not think that this view can be accepted. We must construe the Act as we find it. Once more, this construction gives no effect to the word "presence." The language used assumes that mere presence at the times mentioned, although the person found is not doing any act prohibited by some other provision of the Act, for which, of course, he might be prosecuted, may nevertheless be "in contravention," although not "a contravention," of the Act.

If similar words were used in a Statute which made offences

against its provisions indictable offences, I think that an attempt to commit any such offence would be "in contravention" of the Act in the ordinary acceptation of that term, especially if no other interpretation would give any effect to the provision. And I do not think that the circumstance that the offences created by this Act are punishable on summary conviction only makes any difference in this respect.

It follows that, since the only way to give any effect to the intention of the legislature to create a new offence, established by mere presence unexcused, is to construe the words "in contravention of" as meaning "in prosecution of a purpose inconsistent with observance of the provisions of the Act," that construction ought to be adopted if the words are fairly susceptible of that meaning. On the whole, I think that the words are fairly susceptible of it, and that the appeal should therefore be allowed.

BARTON J. I have come to the same conclusion, mainly because I am not able to suggest any way in which any effect whatever can be given to sec. 76 (2) unless some such construction as that suggested is adopted. It is said that the words "in contravention of" must be literally satisfied in this sense, that the person must be found upon the licensed premises actually committing an offence against the Act. I cannot come to that conclusion in view of the provisions of the rest of the Statute and of the *Licensing Act* 1890. To do so would be to declare that, when a person is found upon licensed premises under circumstances like the present, he is not liable to a penalty inasmuch as those circumstances disclose no actual contravention of the Act. The circumstances were that the accused endeavoured to buy a drink and, because the landlord was not willing to incur a penalty for selling liquor on a Sunday, he was told there was "no hope." He did all he could to buy a drink. Had he succeeded in doing so there would have been no question that he was liable to a penalty. Not having succeeded, the question is whether he was upon the premises in contravention of the provisions of the Act. Seeing that the Act itself evidently intends that a person found upon licensed premises at a time when the premises should not be open for the sale of

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liquor is, unless he gives some lawful excuse, to be held liable to a penalty, I am of opinion that the words "in contravention of" mean "in the course of contravening" or "in the process of contravening," so that, if a person does all that in him lies to commit a specific contravention of the Act—which in this case is the buying of liquor on a Sunday—although he fails to commit it, that is the thing actually aimed at by the section. I am of opinion, therefore, that the appeal should be allowed.

O'CONNOR J. read the following judgment:—

For the first time in the legislation of Victoria the *Licensing Act* 1906, by sec. 76, makes it an offence in the customer (not being one of the excepted persons) to purchase, or obtain, or be found drinking liquor on licensed premises at any time when the premises should not be open to the public for the sale of liquor. To establish the offence under sec. 76 (1) the prosecution must prove, in accordance with the Act, that the accused purchased, or obtained, or was found drinking liquor in the licensed premises during the prohibited time. But in regard to the offence created by sec. 76 (2) the onus of proof is reversed. Every person found on licensed premises during the prohibited time is liable to a penalty unless he satisfies the Court that he is within the class of persons allowed by law to be then on the premises. There is no provision as in corresponding sections of the English Licensing Acts directing the whole licensed premises to be closed. A prohibition is no doubt implied against keeping the premises open for the sale of liquor during any time when its sale is made unlawful by the Act; there is also an express direction that the bar and all access to it shall during that time be kept closed, but there is nothing to prevent the rest of the premises from being open and free to public access for all other purposes. So stringent, however, are the provisions of sub-sec. (2) that any person whosoever found on the premises during Sunday, whether living there or not, may be put to prove his innocence, and is liable to a penalty unless he satisfies the Court that he is a "*bonâ fide* lodger weekly or other boarder traveller inmate or servant or that his presence on such premises at such time was not in contravention of the provisions of this Act."

The prosecution gave sufficient *primâ facie* evidence of the offence merely by proving that the respondent was found on the premises. It was for him to clear himself by showing that his presence there was, under the circumstances, not in contravention of the Act. The circumstances are beyond controversy. On the Sunday in question the premises, though not open for the sale of liquor, were apparently open for all other purposes. The respondent walked into the house by an open door, through the house, and into the yard, asked the licensee to supply him with liquor, and was refused. Under these circumstances it may be taken that he was on the premises for the purpose of obtaining, or with the intent to obtain, or in the attempt to obtain liquor. The question for determination is whether his presence under these circumstances was in contravention of the provisions of the Act.

The expression "in contravention" of the Act is to be found in many sections of the Licensing Acts. In all but one section it is used as meaning some breach of the Act punishable as an offence. But sec. 102 of the *Licensing Act* 1906 uses it with regard to breaches of the provisions of the Licensing Acts "for which no penalty is expressly enacted." In this wider sense it must, I think, be taken to have been used in the sub-section under consideration, and, in my opinion, the disobedience of any direction or prohibition of the Licensing Acts, whether made an offence by other sections or not, would be a contravention of the Act within the meaning of the sub-section under consideration.

But, if the accused establishes that his presence on the premises was not in disobedience of any prohibition or direction of the Licensing Acts, his innocence will be established. Sub-sec. (1) prohibits a person situated as the respondent was from purchasing or obtaining or drinking liquor on the premises. But there is no section in any of the Acts which prohibits him from attempting to do any of these things, or from being on the premises with the purpose or intent of doing any of them. Several provisions of the Licensing Acts expressly forbid the presence on licensed premises of persons under certain circumstances. By sec. 88 of the Act of 1906 a person against whom a prohibition order has been issued is forbidden from being in a bar

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except for some lawful purpose, and he may be proceeded against merely for being present in a bar. By sec. 152 of the Principal Act a drunken, quarrelsome, or disorderly person may be turned out of licensed premises by the licensee, and if he remains after being requested by the licensee to leave, his mere presence renders him liable to a penalty. By sec. 153 of the same Act any person found drunk on licensed premises may be arrested and prosecuted. His presence on the premises in that condition is punishable under the Act. Sec. 143 of the same Act requires that the bar on licensed premises shall be kept closed and locked during the time when liquor may not be sold, including Sundays, and declares that the presence therein of any person other than the licensee, his servant or agent, shall be deemed *primâ facie* evidence of a sale. The presence in the bar of a would-be customer under these circumstances, though not made an offence by the section, must, I have no doubt, be taken to be prohibited by the Act.

The legislature has thus under these different sets of circumstances prohibited the presence of persons on licensed premises, and in most cases made their presence an offence. In these differing sets of circumstances the legislature has thus expressly prohibited the presence of persons on licensed premises, and in all the cases except the last has fixed a penalty. The fair inference to be drawn is that, where the legislature intends to forbid the presence of persons on licensed premises in any particular set of circumstances, it expresses that intention. There is no section in any of the Acts which suggests in the remotest degree that persons are prohibited from attempting or intending to obtain or purchase liquor on licensed premises during forbidden times, or that their presence during those times in pursuance of that purpose is prohibited or forbidden.

It was contended that the breach of sec. 76 (1) of the Act of 1906 was a misdemeanour at common law, and that the attempt to commit that breach was therefore a misdemeanour, and so in contravention of the Act. But the contention will not bear examination. Breach of the sub-section could not amount to a misdemeanour at common law; it is a new offence, and the section creating it has, in prescribing summary conviction as the

procedure, prevented the inference that the legislature intended the offence to be punishable as a misdemeanour at common law; *Archbold's Criminal Pleading*, 22nd ed., p. 4. As the offence is not a misdemeanour the attempt to commit it cannot be a misdemeanour.

Two cases were relied on by the appellant, both decided under the provisions of the English *Licensing Act* 1872: *Cooper* v. *Osborne* (1), and *Harbottle* v. *Gill* (2). The convictions in both cases were under sec. 25 of the English *Licensing Act* 1872, from which the section of the Victorian Act now under consideration has evidently been copied. But both convictions rested on a provision in sec. 24 of the English Act, which expressly directs that all licensed premises shall be closed during certain times when the sale of liquor is made unlawful. The Victorian Statute has no such provision. If in this case the respondent had been found in the bar, the only portion of the premises which the Victorian Licensing Acts direct to be closed on Sundays, some argument might have been drawn from these cases. But they have under the circumstances no application.

Differing, unfortunately, from my learned colleagues, I have for these reasons come to the conclusion that the Licensing Acts have not forbidden or prohibited the respondent under the circumstances proved from attempting to purchase or obtain liquor or from being present on licensed premises for that purpose, and that he has therefore established that his presence was not in contravention of the Act, and he was entitled to be acquitted.

It has been urged that this construction of the Act gives no effect to sub-sec. (2). I cannot assent to that view. Sub-sec. (1) puts on the prosecutor the proof of the breaches of the Act there made punishable. He must prove affirmatively that the offence has been committed. But sub-section (2) relieves him of that onus. It is only necessary to prove the presence of the accused on the premises during the forbidden time, and he cannot escape conviction unless he proves that he was not present in the commission of some offence under the Acts, or in the doing of something which, though not an offence, was in disobedience of some

(1) 35 L.T., 347. (2) 41 J.P., 742.

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of their provisions. That, as it seems to me, gives sub-sec. (2) a most effective operation, and the only operation which the legislature, judging by its language, has intended.

It follows that, in my opinion, the learned Chief Justice in the Court below came to a right conclusion and the appeal should be dismissed.

ISAACS J. read the following judgment:—

I am of opinion that this appeal should be allowed. The learned Chief Justice of Victoria correctly, as I think, put in a few words the situation of a person in the position of the respondent who was entitled to be acquitted. Referring to the Act his Honor said (1):—"It puts the whole burden on the person who is found in a public-house of showing he was not there for a wrongful purpose within the meaning of the Act. And if he says—'Well, I point out all the provisions of the Act which forbid my doing anything in a public-house and show I was not doing any of the prohibited acts.'" Up to that point I thoroughly agree. If the presence of the defendant is shown to be unconnected with any wrongful purpose, he must go free. But his Honor then went on to apply the rule in these terms. He assumes the defendant to say:—"I simply came in and asked for a drink which was refused," and the learned Chief Justice added that as this was established the defendant was entitled to be acquitted. It is the application of the test that I think makes the result erroneous. It depends upon the construction of the Act as to whether the defendant was on the premises for an unlawful purpose. In other words, is it unlawful for a person not being a *bonâ fide* lodger, weekly or other boarder, traveller, inmate, or servant to come into or remain upon licensed premises on Sunday for the purpose of purchasing or obtaining liquor? In my opinion it is.

Sec. 134 of the *Licensing Act* 1890 imposes a penalty on every licensed person on whose licensed premises liquor is sold, &c., on Sunday except in the case of lodgers and travellers.

Sec. 143 of the same Act requires the bar door to be shut and locked on Sunday.

(1) (1908) V.L.R., 234, at p. 238.

The *Licensing Act* 1906 by sec. 76 in the first sub-section punishes any person other than a lodger, boarder, servant or traveller who actually purchases or obtains liquor, or is found drinking liquor in licensed premises "at any time when such premises should not be open for the sale of liquor to the public." That, of course, includes Sunday (see *Biggs* v. *Lamley* (1)).

By the second sub-section, under which this case arose, it is enacted that every person, found on licensed premises at any time when such premises should not be open for the sale of liquor to the public, shall be fined unless he satisfies the Court either that he is an excepted person, or that "his presence on such premises at such time was not in contravention of the provisions of this Act."

Now, the force of the sub-section is in the words "at the time." Was his presence "at the time" a contravention of the provisions of the Act? "At the time" means, by reference to antecedent, "when such premises should not be open for the sale of liquor to the public." It does not matter whether they are in fact so open —but if the time is one when the premises should not be open for the purpose it is enough. Therefore a contravention by the landlord in actually selling liquor is not essential to the defendant's contravention. If the premises should not be open for the sale of liquor to the public, then, as "sale" connotes "purchase," the premises should not then be open for the purchase of liquor by the public; and if at such time a person, not being an excepted person, enters licensed premises for the express purpose of purchasing liquor, he enters, and remains so long as his purpose endures, in contravention of the Act. He evinces more than an intention, more than an attempt, his very presence with such a purpose is itself a disobedience of the statutory provisions which makes unlawful the opening of the premises for the purchase by him of liquor on that day. He has acted as if the premises were lawfully open for the purpose, when the Act says that they are not, and he has acted, not merely intended or attempted to act, in defiance of the Statute. He cannot consequently, in my opinion, claim that he has exculpated himself by showing that his presence on the premises at that time was innocent and not in contraven-

(1) (1907) V.L.R., 300; 28 A.L.T., 202.

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tion of the provisions of the Act. Any other conclusion would leave the words without meaning unless the second sub-section were regarded as merely evidentiary. But it is clearly more than evidentiary because, independently of any other provision, it directly constitutes a new substantive offence and affixes the penalty. The decision of the Court of Petty Sessions was therefore right and should be restored.

Appeal allowed. Order appealed from discharged. Order nisi discharged with costs.

Solicitor, for appellant, *Guinness*, Crown Solicitor for Victoria.
Solicitors, for respondent, *White, Just & Moore.*

B. L.

[HIGH COURT OF AUSTRALIA.]

SWEENEY . . . . . APPELLANT;

AND

KELLY . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1908.

SYDNEY, *August* 28.

Griffith C.J., Barton, O'Connor and Isaacs JJ.

Practice—Special leave—Appeal from Supreme Court—Refusal to quash conviction on technical point—Matter of discretion—Licensing Act 1885 (*Qd.*) (49 *Vict. No.* 18), *sec.* 75 (2)—*Liquor Act* 1886 (*Qd.*) (50 *Vict. No.* 30), *sec.* 25—*Notice of intention to prosecute—Evidence.*

The licensee of an hotel was convicted and fined for an offence against the *Licensing Act* 1885. Sec. 25 of the *Liquor Act* 1886, requires that written