[HIGH COURT OF AUSTRALIA.]

BEAR . . . . . APPELLANT;
COMPLAINANT,

AND

LYNCH . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 22; *May* 17, 21.

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

Liquor (Amendment) Act (N.S.W.), (No. 40 of 1905), secs. 17, 19—Person found on licensed premises during prohibited hours—Liability of licensee—"Lawful purpose"—Mens rea.

The *Liquor (Amendment) Act* 1905, by sec. 17, provides that any person found on licensed premises at any time when the premises should not be open for the sale of liquor shall be liable to a penalty unless he was at the time a *bonâ fide* lodger, servant, inmate, or traveller, or was not on the premises "in contravention of the provisions of this Act." Sec. 19, by sub-secs. (1), (2) and (3), empowers a police officer to make inquiries of any person found on licensed premises at such a time as to his name and address, and in certain cases to arrest him without warrant, and sub-sec. (4) provides that a licensee upon whose premises any person is so found shall, unless he proves that such person was there "for a lawful purpose," be liable to a penalty.

A person who was not a lodger, servant, inmate or traveller, was found by the police on licensed premises during prohibited hours playing cards with a lodger for money. The only prohibition in either the Principal *Liquor Act* 1898 or the Amending Act of 1905 with reference to card playing is in sec. 46 of the former Act, which makes it an offence for a licensee to suffer gaming for stakes or any unlawful game to be carried on on his premises. In a prosecution of the licensee for an offence under sec. 19, sub-sec. (4), it was proved that the licensee had no knowledge of the presence of the stranger on his premises.

Held, that the licensee was not guilty of an offence under the section. The words "lawful purpose" in that section mean a purpose not made unlawful by the Liquor Acts, and there is nothing in those Acts making the mere act of gaming for stakes on licensed premises irrespective of the knowledge of the licensee an unlawful act.

Per Griffith C.J.—Sec. 17 is expressly limited, so far as the test of lawfulness is concerned, to the provisions of the Amending Act, but

Quære, whether sec. 19, sub-sec. (4), is so limited.

Quære, also, whether knowledge or *mens rea* on the part of the licensee is necessary in order to render him liable under sec. 19.

Per O'Connor and *Isaacs* JJ.—The doctrine of *mens rea* has no application, the offence being constituted in such terms as to render the licensee's knowledge of the person's presence on his premises, or purpose in being there, immaterial.

Decision of the Supreme Court: *Ex parte Lynch*, (1908) 8 S.R. (N.S.W.), 636, affirmed.

APPEAL from a decision of the Supreme Court of New South Wales making absolute a rule *nisi* for a statutory prohibition.

The respondent, Peter Lynch, was convicted before a justice under sec. 19, sub-sec. (4) of the *Liquor (Amendment) Act* 1905 on an information which alleged that on 2nd May 1908, he "was then the licensee of certain licensed premises . . . . upon which licensed premises Andrew Melrose was found on the date aforesaid at a time when such licensed premises should not have been open for the sale of liquor . . . . and that the said Andrew Melrose when so found as aforesaid was not on such premises for a lawful purpose, contrary to the Act," &c. On the motion of the respondent, the Supreme Court granted a rule *nisi* for a statutory prohibition restraining further proceedings on the order of the magistrate on the ground that the evidence did not support the information, that on the evidence Melrose was in the licensed premises at the time alleged for a lawful purpose within the meaning of sec. 19, and that there was no evidence that the respondent had any knowledge that Melrose was on the premises for a purpose that was not lawful within the meaning of that section. The rule was afterwards made absolute for a prohibition: *Ex parte Lynch* (1). From that decision the present appeal

(1) (1908) 8 S.R. (N.S.W.), 636.

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was brought by special leave, leave having been granted on the appellant undertaking to submit to any order the Court might make with respect to the costs of the appeal.

The facts sufficiently appear in the judgments hereunder.

Blacket, (*Curlewis* with him), for the appellant. The purpose for which Melrose was on the licensed premises, that is, playing cards for money with a lodger, was not a lawful purpose within the meaning of sec. 19, sub-sec. 4, of the *Liquor (Amendment) Act* 1905. The scheme of the Act is to prevent the sale of liquor after 11 o'clock, first, by directly prohibiting its sale, and secondly, by making the licensee responsible for the presence on the premises after that hour of any person who is not shown to be there for a lawful purpose. It may be conceded that "lawful purpose" means a purpose not unlawful under the provisions of the *Liquor Acts* of 1898 and 1905. But it is not restricted to purposes expressly made unlawful by those Acts. It covers purposes which, though not positively forbidden, tend to facilitate breaches of the Act. It is only by strict provisions of the kind that the mischief sought to be remedied by the legislature can be reached. The Principal Act, No. 18 of 1898, having been found insufficient to cope with the evil, more rigid and drastic provisions have been added by the Amending Act. Under the Principal Act the licensee was not liable except for things of which he had, or ought to have had, knowledge. Under the Amending Act a new duty is imposed upon him to see that persons do not use his premises during prohibited hours unless they come within the exceptions specified in the Act, and in prosecutions in respect of the presence of strangers on his premises the onus is cast on him of establishing the lawful purpose. The prosecution need only prove that a stranger was on the premises after 11 o'clock at night. It is then for the defendant to prove that the purpose of the stranger was the performance of some duty or business, or the discharging of some obligation making it necessary to be on the premises. The mere presence of a stranger on the licensed premises during prohibited hours unexcused is an offence in the licensee. [He referred to *Liquor Act*, No. 18 of 1898, sec. 63, sub-secs. (1), (2), (4) and (5); *Liquor (Amendment) Act*, No. 40 of

1905, secs. 16, 17, 18, 19.] If the facts proved in *Charles* v. *Grierson* (1) were present here the landlord would be liable, whether the other persons were there with his consent or not. This casts a heavy burden on the licensee, but he knows what he is undertaking when he takes his licence. Under the Principal Act a licensee is liable for suffering gaming for stakes on his premises, sec. 46. It cannot be said that a purpose which the licensee is by the Act compelled under penalty to prevent is a lawful purpose. Even if it is not positively unlawful in the person who is gaming, it is certainly one of the things which the legislature endeavours to prevent, as facilitating breaches of the Act. [He referred to *Dickins* v. *Gill* (2); *Sherras* v. *De Rutzen* (3); *Liquor Act*, No. 18 of 1898, sec. 47.]

Knowledge on the part of the licensee is immaterial. If the person is found by the police on the premises, whether the licensee knows it or not, the offence, unless a lawful purpose is proved, is complete. The prohibition is not against "permitting" a person to be there, but rather against so conducting the premises that the person is found there. [He referred to *Somerset* v. *Wade* (4); *Cundy* v. *Le Cocq* (5).]

[GRIFFITH C.J.—The Act says "unless he proves." Does not that imply that the licensee has knowledge or means of knowledge?]

It is a question of construction whether the legislature intended an absolute prohibition or not, whether it intended knowledge to be an element of the offence or not. In sec. 19 there is no reference, direct or indirect, to knowledge on the part of the licensee. [He referred to *Blaker* v. *Tillstone* (6); *Brooks* v. *Mason* (7).] The hardship on the licensee is more apparent than real. He can close his premises absolutely if he pleases. There is no such injustice as that dealt with in *In re Brockelbank*; *Ex parte Dunn* (8). Even if the hardship is great, that cannot affect the construction of clear words.

[ISAACS J. referred to *Burrows* v. *Rhodes* (9); *Reg.* v. *Bishop* (10); *Dyson* v. *Mason* (11); *Patten* v. *Rhymer* (12).]

(1) 7 C.L.R., 18.
(2) (1896) 2 Q.B., 310, at p. 314.
(3) (1895) 1 Q.B., 918.
(4) (1894) 1 Q.B., 574.
(5) 13 Q.B.D., 207.
(6) (1894) 1 Q.B., 345, at p. 347.
(7) (1902) 2 K.B., 743.
(8) 23 Q.B.D., 461.
(9) (1899) 1 Q.B., 816, at p. 831.
(10) 5 Q.B.D., 259.
(11) 22 Q.B.D., 351.
(12) 3 El. & E., 1.

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E. Milner Stephen, for the respondent. Admittedly some limitation must be placed on the words "lawful purpose" in sec. 19 sub-sec. (4). They should be limited to a purpose not in contravention of secs. 16, 17, 18 or 19 of the Act. Even if they are read with reference to the whole Act the effect is the same, because the prohibitions as to use of the premises during prohibited hours are mainly contained in these four sections. They are a set dealing with "times of selling" liquor, replacing secs. 63 and 64 of the Principal Act. Sec. 16 prescribes the hours during which liquor may not be sold. Secs. 17 and 18 deal with persons found on the premises during prohibited hours, and sec. 19 deals with cases in which the licensee is to be liable. The natural inference is that the licensee is only to be guilty of an offence where the persons for whom he is made responsible have offended against the provisions of the same set of sections. The test of lawfulness indicated is whether an infraction of the closing provisions has occurred, or is likely to occur. If there is any uncertainty in the words, it should not be assumed that the licensee is to be made liable when the person on the premises has committed no breach of the Act. Sec. 17 (2) is expressly limited to "contravention" of *this* Act. Sec. 19 (4), which is complementary to it, should be similarly limited. [He referred to secs. 26, 27 of the Act No. 40 of 1905.]

[O'CONNOR J. There are other things besides selling liquor which are unlawful under the Act. Why should these sections be restricted to breaches in respect of that?]

It does not affect the respondent's position whether the sections are so limited or not. They are certainly limited to this Act, and a strong reason for restricting them to the liquor selling provision is that in each case the offence can only be committed "at a time when the licensed premises should not be open for the sale of liquor." Those words would not be expected to occur in a section dealing with things that were unlawful irrespective of the hour. The words "lawful purpose" in sec. 19 (1) should at least be read as meaning a purpose "not in contravention of the Act." So read they can only refer to a breach or attempted breach of some provision of the Act: *Charles* v. *Grierson* (1). If everything

(1) 7 C.L.R., 18, at p. 23.

contrary to what is called the policy or scheme of the Act were treated as unlawful, there would be no defined limit to the operation of the section. It would depend altogether on the views of the particular magistrate whether the purpose was lawful or not. On the construction contended for by the appellant the mere presence of a stranger on the premises after hours would be unlawful and render the licensee liable. That confuses the ingredients of the offence with the nature of the proof required by the Act. It may be that the offence is deemed to be proved by merely showing that the person was "so found" on the premises, that is to say, that the law presumes that an offence has been committed, but it is quite another thing to say that the mere presence constitutes the offence. The effect of the section is really to throw the onus of proof on the licensee, not to define the offence. There is not an absolute duty on the licensee to keep persons off his premises. [He referred to *R.* v. *Harvey* (1); *R.* v. *James and Johnson* (2).

In any case there must be some proof of knowledge, or *mens rea* on the part of the licensee.

[GRIFFITH C.J. The section seems to assume the existence of circumstances that give the licensee the means of knowledge of the purpose for which the person is there. How can he know the purpose of a man being there at, say, 3 o'clock in the morning? Does not the section assume that the licensee is in some way in a position to know why the person is there? He has to prove what the purpose is. A man is as a general rule only made responsible criminally for circumstances that he may reasonably be taken to have known to exist.]

It is a general rule of criminal law that a person cannot be found guilty unless he had knowledge of facts which would make the act in question an offence. The only cases in which *mens rea* has been held to be unnecessary are those where the thing forbidden will injure someone and the legislature has absolutely prohibited it irrespective of knowledge on the part of the person charged, *e.g.*, cases of food adulteration.

[O'CONNOR J. The legislature here has made a licensee punishable not for anything done or left undone by himself, but when-

(1) L.R. 1 C.C.R., 282. (2) (1902) 1 K.B., 540.

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ever certain circumstances are proved to exist. The licensee, who could control the matter, is made responsible. He referred to *Sherras* v. *De Rutzen* (1).

ISAACS J. After hours the licensee should know who are on his premises and for what purpose they are there. He takes all risks when he gets his licence.]

In *The Queen* v. *Tolson* (2), the prohibition was absolute, yet the Court held that honest belief on reasonable grounds was an excuse. That applies still more strongly to a case like the present, where the licensee is made responsible for the act of another which he may not have an opportunity of preventing. If *mens rea* is not necessary, the licensee would be liable if a person broke into the premises. No diligence could prevent that. [He referred also to *Ferrier* v. *Wilson* (3); *Lyons* v. *Smart* (4).]

Blacket in reply. The doctrine of *mens rea* has no application where a man is made responsible for the act of another. The question is not what was the licensee's intention, but what was the purpose of the other person. [He referred also to *Immigration Restriction Acts* 1901-1905.]

Cur. adv. vult.

May 21.

GRIFFITH C.J. In this case the respondent was proceeded against before a justice on an information which alleged that he was a licensee of licensed premises upon which one Andrew Melrose was found at a time when the licensed premises should not have been open for the sale of liquor, and that Melrose when so found on the premises was not there for a lawful purpose, contrary to the provisions of the Liquor Acts. The facts were that at 12.30 at night Melrose was upon the respondent's premises without the knowledge of the respondent, and it was proved before the justice that he was there for the purpose of playing a game called "Yankee Grab" for money with a lodger. The magistrate convicted the respondent and imposed a nominal penalty. The respondent appealed to the Supreme Court, which

(1) (1895) 1 Q.B., 918.
(2) 23 Q.B.D., 168.
(3) 4 C.L.R., 785, at p. 794.
(4) 6 C.L.R., 143.

quashed the conviction, *Cohen* J. dissenting. The question to be determined by us depends upon the construction of sec. 19 of the *Liquor Amendment Act* 1905. That section is one of a group of four, secs. 16, 17, 18, 19, headed "Times of selling," which deal with the prevention of the sale of liquor in licensed houses at certain prescribed times. Sec. 16 provides that no licensee shall keep his licensed premises open for the sale of liquor or sell any liquor or permit it to be consumed on his premises on certain days and at certain times mentioned, subject to a penalty; one of the times at which the sale is forbidden being at any time except between the hours of six in the morning and eleven at night. Sec. 17 provides that every person, not being a *bonâ fide* lodger, traveller, &c., found drinking on licensed premises at any time when the premises should not be open for the sale of liquor shall be liable to a penalty not exceeding £2. The second paragraph provides that every person found on any such premises at any time when such premises should not be open for the sale of liquor shall, unless he satisfies the Court that he was at the time when he was so found a *bonâ fide* lodger, traveller &c., or that his presence on such premises was not in contravention of the provisions of this Act, be liable to a penalty &c. Sec. 19 provides that certain police officers may demand of any person found on licensed premises at any time when the premises should not be open for the sale of liquor his name and address, and require evidence of the correctness of the name and address given, and if such person refuses or neglects to give his name and address or fails to produce the required evidence, he may be arrested without warrant and brought before justices, and if he refuses or neglects to give his name and address, or fails to give the required evidence, or gives a false name or address, or produces false evidence, he is liable to a penalty. Then comes the fourth paragraph, which provides that "every licensee upon whose licensed premises any person is so found, shall, unless he proves to the satisfaction of the Court or justices that such person was on such premises for a lawful purpose, be liable to a penalty not exceeding £5." I think that the words "for a lawful purpose" must mean for some purpose which is not unlawful, and, as the onus of proving that a person was on the premises for

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a lawful purpose is cast upon the licensee, it follows that the onus is cast on him of proving what the purpose was, in order that it may be ascertained whether it was a lawful purpose within the meaning of sec. 19. The last enactment in sec. 19 is founded obviously upon the principle that under the liquor laws a licensee enjoys certain *quasi* privileges—from one point of view they are privileges—and has certain correlative duties imposed upon him, and upon another doctrine recognized in connection with licensees, that they are held liable to the penal provisions of the law for the acts of persons who are under their control. It has been urged that it is very hard that a man should be liable for things done absolutely without his knowledge. So it is, but in the case of licensees of licensed premises strict duties are in many instances imposed upon them so as to render them liable for things done on the premises without their actual knowledge, if they are done under such circumstances that proper supervision would have prevented them. It was admitted by learned counsel for the appellant that the words "lawful purpose" must have some limitation. For instance, it was not suggested that a licensee would be liable under this section if a burglar were found on his premises, though the burglar would certainly not be on the premises for a "lawful purpose." And the limitation to the extent of which he was willing to go was that the purpose shown must be a purpose not unlawful under the provisions of the Licensing Acts, that is, not forbidden by the Acts. Mr. *Stephen* for the respondent contended for a further limitation. He argued that secs. 19 and 17 were complementary, that it would be a strange thing that a person found upon licensed premises, who proved that he was not there in contravention of the provisions of the Act, should go free, while, with respect to the same person, the licensee might be found guilty upon the ground that he had not shown that that person was there for a lawful purpose. There is, I think, a great deal in that argument. But in the view I take of this case it is not necessary to decide that point, and I express no opinion upon it. I prefer to keep my mind open upon the subject until the point actually arises in a case before us.

In the present case the respondent was not aware of the man's presence on the premises, and an argument was addressed to us

founded upon what is known as the doctrine of *mens rea*. With the profoundest respect to the learned persons by whom that doctrine has been discussed, I cannot help saying that I think that, now at least, it has become a misleading expression. Ordinarily, no doubt, a man is not responsible for things about which he knows nothing, or for the existence of a state of facts which he has good reason for believing not to be the facts. It is sufficient, with regard to that doctrine, to say that licensees, in view of special privileges conferred upon them, are made responsible in a special degree for what is done on their premises. In some cases mere ignorance is not a defence. I express no opinion on that point or on another that may arise some day, which I regard as one of considerable difficulty, that is, whether, if it were found as a fact that a licensee had taken all reasonable care to prevent any person coming on his premises for a purpose which is not lawful, or had taken all reasonable care to ascertain that the purpose for which a person had come on his premises was lawful, that would be a good defence to a charge under this section. The only question that it is absolutely necessary for us to decide in the present case is whether the purpose for which Melrose was on the respondent's premises was a purpose not unlawful within the meaning of sec. 19. Whether that section is limited to cases of contravention of the provisions of the Act of 1905, or extends to contravention of the Principal Act as well, it was proved, I think, that Melrose was there for a purpose that was not unlawful. I think that the words "this Act" in sec. 17 sub-sec. (2) refer to this Act of 1905 only, and not to the Principal Act as well. That view is strongly supported by the fact that sec. 26 contains the expression "any offence against the Principal Act or this Act," distinguishing between the two. For the purposes of the decision in this case it is not material whether sec. 19 goes further than sec. 17 or not, for there is no provision in either Act which makes the mere act of gaming for money on licensed premises without the permission of the licensee unlawful on the part of the player. It was not suggested that Melrose was on the premises for the purpose of playing with the permission of the licensee, and there is nothing to make him punishable for being there and playing without

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that permission. If he had been there for the purpose of playing with the permission of the licensee, then the licensee would have been guilty of an offence under the Principal Act. Possibly Melrose might have been guilty also as an abettor of the licensee's offence. But there is nothing that makes such an act on the part of a stranger without the permission of the licensee an offence. I think, therefore, that the conviction was properly quashed, but I am unable to go as far as the majority of the Supreme Court, who thought that sec. 19 only applied to cases of contravention of the provisions relating to drinking upon licensed premises. I think, for the reasons I have given, that their decision was right and should be affirmed.

O'CONNOR J. read the following judgment:—The respondent was the holder of a publican's licence under the Liquor Licensing Acts. In the night time, at an hour when the sale of liquor is prohibited by law, a stranger, that is to say, a person who was neither lodger, servant, inmate, nor traveller, was found by a constable on the respondent's licensed premises, in a lodger's bedroom playing with the latter at a game of throwing dice for money. The respondent had no knowledge of the stranger's presence on the premises, and was entirely unaware that gaming was going on in the lodger's room. The respondent being charged on these facts with a contravention of sub-sec. 4, sec. 19, of the *Liquor Amendment Act* 1905, the magistrate convicted him. The Supreme Court of New South Wales made an order prohibiting further proceedings on the conviction on the ground that there was no evidence to support it. This Court has now to decide whether that order was right. Two objections were advanced. First, that the prosecution had failed to prove that the licensee knew of the stranger being on the premises, or that he was there for an unlawful purpose. Secondly, that the evidence established conclusively that the porpose for which the stranger was on the premises was a lawful purpose. Both objections involve the construction of the section. In respect of the first it is claimed that *mens rea* on the part of the licensee is necessary to constitute the offence. In respect of the second it is contended that throwing dice for money is a law-

ful purpose within the meaning of the section. To the latter I shall first address myself, because, if it is determined in the respondent's favour, the conviction cannot stand. It is clearly the intention of the section to impose on the licensee the responsibility of preventing persons being on his premises for a purpose not lawful under the Act during the time when liquor may not be legally sold. The extent of that responsibility depends upon the meaning to be given to the expression "lawful purpose." Speaking generally, every purpose is lawful which is not prohibited by some positive law. If, therefore, the licensee can show that the purpose for which the stranger was on the premises was the doing of something not prohibited by law he cannot be convicted. At this point arises the ambiguity in the use of the word "lawful." Is the licensee bound to prove that the purpose was one which no law in force in the State makes unlawful? Or will it be enough for him to satify the magistrate that the purpose was one which no provision of the liquor licensing laws makes unlawful? To adopt the wider application of the word would be to impose on the licensee the responsibility of preventing the entry upon the premises of a stranger for any purpose made unlawful by any law out of the whole body of State laws. It would, as has been pointed out, make him liable for the presence of a thief whose purpose was to rob the premises. Mr. *Blacket*, for the prosecution, properly admitted that such an interpretation, leading as it would to the imposition on the licensee of a burden so unjust and altogether unreasonable, would not be adopted unless the words used by the legislature were so express and definite as to leave no other construction open. He conceded that the words of the section did not drive the Court to that interpretation, and that the limitation of meaning which would best carry out the intention of the legislature was to be found by a consideration of the purpose of the section in relation to the whole body of laws dealing with liquor licences. Read in that light the expression "lawful purpose" must be taken to mean some purpose not made unlawful by the Liquor Licensing Acts. That, I think, is a sound basis on which to limit the generality of the expression "lawful." Mr. *Stephen* asked the Court to narrow the operation of the section still further by holding "lawful purpose" to include any purpose

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not made unlawful by the provisions of the Liquor Acts relating to the sale of liquor. I can see no tangible ground on which that construction can be based. The legislature has deemed it necessary for the proper carrying on of the liquor traffic to impose on the licensee duties in connection with the management of his business that have no relation to the sale of liquor. For instance, the licensed house must be kept sanitary in accordance with the Act. It must be conducted in a decent and orderly fashion. It is an offence to neglect the sanitary requirements of the Acts, to allow the house to be used for purposes of prostitution or of gambling. In the interpretation of the section under consideration the provisions of the Principal Act of 1898 creating these offences cannot be left out of consideration. The 1905 Act directs the two Statutes to be construed together. In some instances the legislature has used words in the latter Act which on the face of them prevent the incorporation of the provisions of the Principal Act—sec. 17 is an example—and I am prepared to assent to Mr. *Stephen's* contention that the offence of being present on licensed premises during forbidden hours "in contravention of this Act," to quote the exact words, cannot arise in respect of contraventions of the Principal Act. But in the sub-section which we are called upon to interpret there is nothing to show that the legislature intended that its general direction to construe the Acts together should not apply. That being so, I am of opinion that sec. 19 was enacted as an aid to the prevention of any offences against the Liquor Licensing Acts, and that the legislature has therein expressed an intention of imposing upon the licensee during the hours when liquor may not be sold the responsibility of preventing persons other than lodgers, travellers etc. being on his licensed premises for any purpose which is made unlawful by the Liquor Acts. It follows that, in my opinion, the expression "lawful purpose" in sub-sec. 4 must be construed as meaning any purpose which is not prohibited by any provision of those Acts.

The question next arises—is there any such provision which makes the throwing of dice for money unlawful under the circumstances shown to have existed in this case? Mr. *Blacket* was obliged to admit that there is no express provision to that effect. But he contended that the operation of sec. 46 of the *Liquor Act*

1898 was to render the playing of such a game unlawful in the player. That section makes it an offence in the landlord to suffer gaming to be carried on in his licensed premises. But there is no portion of the Acts which makes gaming on licensed premises an offence in the players. The principle of *Charles* v. *Grierson* (1) was relied on in support of the contention. In that case, which was decided on a section of the Victorian Licensing Acts identical in language with sec. 17 of the New South Wales Act, a stranger was on the premises during prohibited hours with the purpose of contravening the law, if he could, by buying liquor. He did not effect his purpose because the licensee would not sell. Nevertheless the Court held that, though the defendant had not succeeded in his object, as he was on the premises in prosecution of a purpose inconsistent with the observance of the provisions of the Act, he was guilty of a contravention within the meaning of the section. But under the circumstances of this case, even if the licensee was aware of and permitted the gaming complained of, and thus committed an offence, the Act has not made that gaming unlawful on the part of the player. *Charles* v. *Grierson* (1) therefore has no application. That being so, the purpose of the stranger's presence on the premises was lawful within the meaning of the sub-section, and the licensee was entitled to be acquitted. On this ground the order of the Supreme Court granting the prohibition must be upheld. In that view of the case it becomes unnecessary to decide the question raised by the first objection, namely, whether the existence of a *mens rea* in the licensee must be established by the prosecution. But as the point was fully argued I shall express the opinion I have formed. In *Sherras* v. *De Rutzen* (2), Mr. Justice *Wright* in the course of his judgment says:—"There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the Statute creating the offence or by the subject matter with which it deals, and both must be considered." The state of a man's mind can be material only in reference to what he himself has done or has left undone. It is difficult therefore to see how the doctrine of *mens rea* can be

(1) 7 C.L.R., 18.

(2) (1895) 1 Q.B., 918, at p. 921.

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applied to an offence under sub-sec. 4. The licensee has the power, subject to the rights of travellers and other persons under the Acts, to regulate admission to his licensed premises as he thinks fit. It is within his power to prevent the presence therein of persons whose purpose is to contravene the liquor laws. The legislature has by the sub-section imposed on him a duty which practically forces him to police his own premises by making him liable to a penalty if any person not within the excepted class of travellers and inmates is found on the licensed premises during forbidden hours. But it permits him to escape from that liability if he can prove that the person was on the premises for a purpose not made unlawful by the Liquor Acts. The licensee's knowledge of the person's presence or of the person's purpose has no relation to any element of the offence so constituted. On the whole case, therefore, I am of opinion that the appeal must be dismissed.

ISAACS J. read the following judgment:—Andrew Melrose was found by a sub-inspector of police on the licensed premises of the respondent at 12.30 in the morning. The respondent was sued under sec. 19 (4) of the Act of 1905 for the penalty. That section clearly made him liable unless he proved that Melrose was on the premises for a lawful purpose. The purpose proved was playing dice for money, in other words, gaming for stakes; and the only question in the case is whether that is a "lawful purpose" within the meaning of the clause.

"Lawful purpose" in that sub-section means, in my opinion, a purpose not unlawful with reference to the statutory regulation of licensed premises under either Act, and therefore in some degree connected with the duties or responsibilities of the licensee. It is not to be presumed, without the clearest language so enacting, that Parliament would intend anything so unjust as to punish one man for the misdeeds of others, where he is not expected to prevent or endeavour to prevent them. The question then resolves itself into this: Is gaming for stakes during prohibited hours *per se* contrary to any provision of the Licensing Acts?

Gaming for stakes in hotels is not declared by the Liquor Acts to be unlawful; it is not prohibited. No person by engaging in

it is liable to punishment or contravenes any provision of the Statute. It would have been quite easy for Parliament to declare it illegal—but that has not been done. The only prohibition with reference to gaming is in sec. 46 of the Principal Act, and that is directed against the licensee only. If he "suffers" it to take place he may be penalized. If it takes place without his permission, express or implied, no provision of the Act touches the case. It may be that the legislature thought that sufficient to prevent gaming in licensed premises, but, whatever the motive, all the Court can deal with is the actual language, and the natural meaning and effect of the words used. And the effect stops short of making the mere playing dice for stakes unlawful. The respondent here did not "suffer" the gaming to take place. Melrose did not intend to convey his purpose to Lynch, or to get any permission whatever, and therefore was in the licensed premises for a purpose which did not in any way contravene any provision of the Liquor Acts, and consequently was "lawful" so far as they were concerned.

It was contended that in any case *mens rea* on the respondent's part is necessary to be shown, and we were strongly invited to express an opinion upon it. It is really unnecessary to consider it having regard to the foregoing observations, but it has been argued, and as it is of some public importance I state my opinion that *mens rea* is immaterial to the offence charged. The language is plain and unequivocal. The one ground of exculpation is that the "person was on such premises for a lawful purpose"—and not that the licensee *believed* he was. There is no room for such a construction. The suggested interpretation would advance the law nothing beyond sec. 46, and similar sections in the Principal Act. The guiltiness of mind is beside the question, when the condition of mind of the accused is not material. The Privy Council said in *Bank of New South Wales* v. *Piper* (1) "the absence of *mens rea* really consists in an honest and reasonable belief entertained by the accused of the existence of facts which, if true, would make the act charged against him innocent." "Act" there is intended to include "omission" But in the present case no act or omission is charged against the accused.

(1) (1897) A.C., 383, at p. 389.

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It is the mere presence of another person that has to be justified; and the licensee's power of control over his own premises, and his consequent power of profiting by a breach of the Act are the basis of the provision. He is therefore not attacked for doing or omitting anything—he has at his peril to explain the presence of the other man, and to justify it by showing that man's lawful purpose. The material facts are therefore extrinsic to the licensee. It is not this purpose that is inquired after. We were strongly urged to regard the unfairness of the result, but I see no unfairness in requiring the licensee to take the risk of knowing the inmates of his house and their business after 11 o'clock at night, and before 6 o'clock in the morning, and of turning out all who had no lawful business at closing hours, and not admitting anyone except for a lawful purpose before the lawful hour in the morning. It may occasionally operate hardly—but on the whole that will not be so, and the subject is one that experience has shown needs drastic remedies even to approach efficiency. It is not an unknown course for Parliament, when important public ends are to be attained and public dangers to be met, to put an unusually heavy burden on the individuals from whose operations the necessity for legislation arises. An illustrative instance occurs in *Shepheard* v. *Broome* (1), under the Companies Acts. Lord *Lindley* said:—"To be compelled by Act of Parliament to treat an honest man as if he were fraudulent is at all times painful; but the repugnance which is naturally felt against being compelled to do so will not justify your Lordships in refusing to hold the appellant responsible for acts for which an Act of Parliament clearly declares he is to be held liable."

So here the words are unequivocal and leave the Court no duty but to apply them to facts; and so doing, I am of opinion, for the reasons stated, that this appeal should be dismissed.

Appeal dismissed with costs.

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

Solicitors, for the respondent, *Pigott & Stinson* for *Alexander & Windeyer*, Hay.

C. A. W.

(1) (1904) A.C., 342, at p. 346.