[HIGH COURT OF AUSTRALIA.]

BOND . . . . . APPELLANT;
COMPLAINANT,

AND

FORAN . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1934.

ADELAIDE, *Oct.* 1.

SYDNEY, *Dec.* 13.

Rich, Starke, Dixon and McTiernan JJ.

Gaming—Unlawful gaming—Place used for purpose of unlawful gaming—Meaning of "used"—Occupier—Mens rea—Lottery and Gaming Act 1917-1930 (*S.A.*) (*No.* 1285—*No.* 1986), *sec.* 63.*

On a hot New Year's Day holiday a plainclothes policeman, in a very crowded bar room, watched a bookmaker for five minutes. During this time the bookmaker stood in the bar room of licensed premises with his back to a door which had been nailed up. Through a small orifice in the door from which the lock had been removed, the bookmaker was able to, and did, communicate with a recorder on the other side of the door. During the period of observation the bookmaker took six bets. It was not established that either the licensee or those in charge of his bar were aware that betting was going on there. The licensee was the "occupier" of the licensed premises within the meaning of the *Lottery and Gaming Acts* 1917-1930 (S.A.), and was charged with being the occupier of a place used for the purpose of unlawful gaming.

Held that there was no evidence that the premises had been "used" for unlawful gaming.

Powell v. *Kempton Park Racecourse Co.*, (1899) A.C. 143, applied.

* Sec. 63 of the *Lottery and Gaming Act* 1917-1930 (S.A.) provides:—"(1) No house, office, room, or place shall be opened, kept, or used for the purpose of—i. Unlawful gaming . . . (3) No person shall be the occupier of any such house, office, room, or place kept or used for any of the purposes aforesaid."

Held, further that *mens rea* was an essential ingredient of the offence with which the licensee was charged.

Decision of the Supreme Court of South Australia (Full Court): *Foran* v. *Bond*, (1934) S.A.S.R. 323, affirmed.

APPEAL from the Supreme Court of South Australia.

A complaint was laid against John Foran in a Court of Summary Jurisdiction in South Australia. The complaint alleged (*inter alia*) that the defendant "was the occupier of a certain place to wit the premises known as Grange Hotel situate at the corner of Jetty Street and Esplanade at Grange aforesaid which said place was used for the purpose of unlawful gaming. Contrary to the provisions of sec. 63 of the *Lottery and Gaming Act*, 1917 to 1930." Foran was the licensee of the Grange Hotel, and was the "occupier" thereof within the meaning of the *Lottery and Gaming Acts* 1917-1930 (S.A.). The evidence against him was that a plainclothes policeman had observed a bookmaker in the bar room of the hotel on a hot New Year's Day holiday. The period of observation was five minutes only, and during that time the bar room was very crowded. The bookmaker was seen to be standing in the bar with his back to a door which had been nailed up. This door had a small orifice from which a Yale lock had been removed. Through the orifice the bookmaker was able to communicate with a confederate on the other side of the door. While watched by the policeman the bookmaker took six bets. These were announced through the hole in the door to the confederate who acted as recorder. The policeman intervened, and the recorder fled. There was found on the bookmaker much currency in suitable denominations. The activities of the bookmaker amounted to unlawful gaming within the meaning of the *Lottery and Gaming Act* 1917-1930 (S.A.), but the magistrate who heard the complaint was not prepared to find that the defendant or those in charge of the bar were aware that betting was going on there. The magistrate found that the hotel was a "place" within the meaning of sec. 63 of the Act and that there was a "using" within the meaning of the section. He was also of opinion that *mens rea* was not an essential ingredient of the offence, and he convicted the defendant.

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The defendant appealed to the Supreme Court, and the appeal was allowed by *Angas Parsons* J.: *Foran* v. *Bond* (1). Upon an appeal being brought to the Full Court of South Australia, that Court, by a majority, dismissed the appeal: *Foran* v. *Bond* (2).

From this decision of the Full Court the complainant now appealed to the High Court.

Hannan, for the appellant. The scheme of the legislation is to prohibit unlawful gaming, and premises are brought within the purview of the Act. *Mens rea* is not essential. This is suggested by the context and by consideration of the Act as a whole. The previous legislation (sec. 14 of *The Lottery and Gaming Act* 1875) made it an offence for the occupier "knowingly and wilfully to permit" a place to be used for the purpose of unlawful gaming. These words are omitted from the *Lottery and Gaming Acts* 1917 to 1930. There is sufficient evidence that the premises have been "used" for the purpose of unlawful gaming. *Powell* v. *Kempton Park Racecourse Co.* (3) does not apply because of the different wording of the English legislation. [Counsel also referred to *Prior* v. *Sherwood* (4); *Lenthall* v. *Johnson* (5); *Bond* v. *Evans* (6); *Wells* v. *Noblett* (7); *Giles* v. *Bigham* (8); *Craies' Statute Law*, 3rd ed., (1923), p. 66; *Buxton* v. *Scott* (9); *Myerson* v. *Collard* (10); *Tasmania* v. *The Commonwealth and Victoria* (11); *Maxwell* on *The Interpretation of Statutes*, 6th ed. (1920), p. 329.

Travers, for the respondent. The common law applies in South Australia and, until the Act of 1875, the first local legislation on gaming, it had full effect. At common law *mens rea* was necessary (*R.* v. *Rogier* (12); *R.* v. *Dixon* (13); *Buxton* v. *Scott* (9); *Jenks* v. *Turpin* (14); *Weathered* v. *Fitzgibbon* (15)). The element of

(1) (1933) S.A.S.R. 278.
(2) (1934) S.A.S.R. 323.
(3) (1899) A.C. 143.
(4) (1906) 3 C.L.R. 1054.
(5) (1934) S.A. 26th January, unreported.
(6) (1888) 21 Q.B.D. 249.
(7) (1933) S.A.S.R. 134.
(8) (1925) S.A.S.R. 27.
(9) (1909) 100 L.T. 390.
(10) (1918) 25 C.L.R. 154.
(11) (1904) 1 C.L.R. 329.
(12) (1823) 1 B. & C. 272; 107 E.R. 102.
(13) (1716) 10 Mod. Rep. 335; 88 E.R. 753.
(14) (1884) 13 Q.B.D. 505.
(15) (1925) N.Z.L.R. 331.

mens rea was continued under the Act of 1875. The Act of 1917 purports to be a consolidating Act (sec. 3), and should be construed as such (*Nolan* v. *Clifford* (1); *Riddle* v. *The King* (2)). On the true construction of the Acts *mens rea* is essential. The premises have not been "used" for unlawful gaming, and *Powell* v. *Kempton Park Racecourse Co.* (3) applies. [Counsel also referred to *Macleod, The High Court on the Interpretation of Statutes*, (1924), pp. 81, 115, 135, 136; *G. Laughton and Coombs Ltd.* v. *Master Butchers Ltd.* (4); *River Wear Commissioners* v. *Adamson* (5); *Chisholm* v. *Doulton* (6); *Commissioners of Police* v. *Cartman* (7); *R.* v. *Deaville* (8); *R.* v. *Moss* (9); *R.* v. *Davies* (10); *R.* v. *Mortimer* (11); *Jayes* v. *Harris* (12); *Shuttleworth* v. *Leeds Greyhound Association* (13); *Prior* v. *Sherwood* (14); *O'Donnell* v. *Hitchen* (15); *Whitehurst* v. *Fincher* (16); *McCann* v. *Blake* (17); *Deeley* v. *Ryan* (18).]

Hannan, in reply, referred to *Siviour* v. *Napolitano* (19).

Cur. adv. vult.

Dec. 13.

The following written judgments were delivered :—

RICH J. Special leave to appeal was granted at the instance of the Crown, the complainant, in this case upon representations that the construction given by the Supreme Court of South Australia to sec. 63 of the *Lottery and Gaming Acts* 1917 to 1930 would lead to much difficulty in the suppression of starting price betting in hotels and other places where this form of activity was pursued. Recent legislation has probably had the effect of diverting the stream of customers from these time honoured ministers to gaming. In the Supreme Court of South Australia *Angas Parsons* J. who heard the appeal from the magistrate took a view which, as I understand it, included the proposition that an offence could not be committed

(1) (1904) 1 C.L.R. 429.
(2) (1911) 12 C.L.R. 622, at p. 632.
(3) (1899) A.C. 143.
(4) (1915) S.A.L.R. 3.
(5) (1877) 2 App. Cas. 743.
(6) (1889) 22 Q.B.D. 736.
(7) (1896) 1 Q.B. 655.
(8) (1903) 1 K.B. 468.
(9) (1910) 74 J.P. 214.
(10) (1897) 2 Q.B. 199.
(11) (1911) 1 K.B. 70.
(12) (1908) 72 J.P. 364.
(13) (1933) 1 K.B. 400.
(14) (1906) 3 C.L.R. 1054.
(15) (1902) 27 V.L.R. 711; 23 A.L.T. 166.
(16) (1890) 62 L.T. 433.
(17) (1920) V.L.R. 89.
(18) (1930) V.L.R. 43.
(19) (1931) 1 K.B. 636.

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under sec. 63 unless, to state it briefly, the man carrying on unlawful gaming in the house, office, room or place occupied by the defendant had so appropriated a pitch or stand to his purpose or otherwise localized his operations that he might be said to use a place within the meaning given to that expression in *Powell* v. *Kempton Park Racecourse Co.* (1). His Honor's judgment is open to the interpretation that he thought that the person charged as occupier must participate in or be privy to the operations of the other person who carried on the unlawful gaming, and it was criticized on this ground. I think, however, that his Honor's conclusion should be understood as I have stated it. In the Full Court the judgment of *Angas Parsons* J. was affirmed on another ground by *Napier* and *Richards* JJ., *Murray* C.J. dissenting. That ground was that upon the true construction of sub-sec. 3 of sec. 63 the occupier was not guilty of an offence, unless he had knowledge that unlawful gaming was being carried on by the other person upon his premises. The facts of the case do not raise the question whether that knowledge must be personal to himself or may be the knowledge of some servant or agent. The magistrate accepted the view that neither the defendant himself nor those in charge of his bar were aware that betting was going on there. Betting for a very short interval of time was proved. For five minutes on a hot New Year's Day holiday in a very crowded bar room a policeman in plain clothes watched a bookmaker standing in the bar with his back to a door which had been nailed up. Through a small orifice from which the lock had been removed he was able to communicate with a confederate on the other side. During the period of observation he took six bets and announced them through the keyhole to his recorder who stood on the safe side of the panel. The policeman intervened, and the man on the other side of the door fled. The bookmaker who had not this means of escape was found to carry on his person much currency of the realm in suitable denominations, but no other tokens of his art. These facts were not enough to induce the magistrate to reject the testimony of the licensee and his son, who swore to a fitting ignorance of these things. As a result of the magistrate's finding that the defendant was unaware of the unlawful gaming on

(1) (1899) A.C. 143.

his premises, the question which the majority of the Full Court decided against the Crown was necessarily raised. The statute which we are called upon to construe is a consolidation, and so describes itself (sec. 3). It was composed of materials contained in local legislation which took its foundation in the well known English legislation of 1853 and 1854. If this case contains any lesson, it may be found in the reflection that an attempt to weld into a consistent instrument old statutes passed at varying dates and interpreted by a stream of judicial decisions, and to clothe the product in the neat garb of a modern draftsman's phrasing leads to worse obscurity, inconsistencies and misgivings than the *disjecta membra* so brought together originally contained. The old statute distinctly said that the "occupier," as he is now called, a word which conceals a multitude of varying attributes under a statutory definition, must knowingly occupy or use a place where the gaming or betting took place. In reducing the tortuous periods of the original section to a brief and superficially attractive statement the draftsman of the consolidation omitted the word "knowingly." He thus raised the question upon which in the Full Court so much pains and ability have been expended. After reading more than once the careful and exhaustive statements made by *Murray* C.J. on the one side, and *Napier* and *Richards* JJ. on the other, of the conflicting evidence provided by the provisions of the statute for a negative or affirmative answer to the question whether *mens rea* remains necessary, I have come to the conclusion that the preponderance favours the view that it is necessary. I think that the final consideration is that it is a consolidating statute, and professes to be such. It was not intended to alter the law in fundamental particulars. The language employed is not inconsistent with the presumptive interpretation which makes consciousness of the existence of the facts that are made the ground of the offence a necessary element in guilt. Indeed, it is possible that the draftsman omitted the word "knowingly," relying upon the prima facie rule of law as making it surplusage. I agree, therefore, with the decision of the majority of the Full Court, but I am bound to say that I do not think that the judgment of *Angas Parsons* J., as I have interpreted, it was wrong. When the definition of occupier (sec. 4) is studied and read into sec. 63 it appears

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to me that all the considerations which affected the House of Lords in *Powell* v. *Kempton Park Racecourse Co.* (1) remain, and that the law as expressed in *Prior* v. *Sherwood* (2), and in the multitude of cases relating to "place," the most relevant of which are collected in the judgment of *Cussen* A.C.J. in *Deeley* v. *Ryan* (3) is applicable. If *Angas Parsons* J. did mean that the defendant, as occupier of the house or place where the bookmaker carried on unlawful gaming, must participate in the conducting of the unlawful gaming or in some way be responsible for it, I should disagree with the proposition, but I do think that the bookmaker must not be merely within the close which the defendant occupies. He must, within that close, have localized a place as the stand or pitch where his unlawful transactions are executed, or have appropriated the whole of the particular room or place to that purpose.

For these reasons I am of opinion that the appeal should be dismissed.

STARKE J. The respondent Foran was charged upon complaint with three offences against the *Lottery and Gaming Acts* 1917 to 1930 of South Australia, and he was convicted of one of such offences (see sec. 80), namely, that he "was the occupier of a certain place to wit the premises known as Grange Hotel . . . which said place was used for the purposes of unlawful gaming, contrary to the provisions of sec. 63 of the . . . Act." That section provides: "(1) No house, office, room, or place shall be opened, kept, or used for the purpose of—i. unlawful gaming; . . . (3) No person shall be the occupier of any such house, office, room, or place kept or used for any of the purposes aforesaid."

Unlawful gaming includes betting in any premises licensed under the *Licensing Acts* (Act No. 1285, secs. 4, 37, 39; Act No. 1447, sec. 3; Act No. 1494, sec. 3). Occupier, in relation to occupiers of any house, office, room or place used for a purpose forbidden by the Act, means and includes the owner, occupier or keeper of any house, office, room or place or any person using the same or any person procured or employed by or acting for or on behalf of the owner,

(1) (1899) A.C. 143.

(2) (1906) 3 C.L.R. 1054.

(3) (1930) V.L.R. 43.

occupier or keeper or person using the same, or any person having the care or management or in any manner conducting the business thereof (Act No. 1285, sec. 4). It is true that sec. 63 is differently arranged from and wider in scope than the provisions of the English *Betting Act* of 1853, which were the subject of decision in *Powell* v. *Kempton Park Racecourse Co.* (1). But its opening words—no house, office, room or place shall be . . . used for the purposes mentioned—indicate that the section is directed against the opening or using of the house &c. for the purposes mentioned, and not against the persons who resort to the house &c. for those purposes. It is the user of a locality for certain purposes that is prohibited. There must be some definite localization of the operations described in the section as "unlawful gaming," "betting with persons resorting thereto," and so forth (*Powell* v. *Kempton Park Racecourse Co.* (1); *Prior* v. *Sherwood* (2); *McInaney* v. *Hildreth* (3); *Brown* v. *Patch* (4)). The real question, namely, whether there has been any such localization of operations, becomes in the end a question of fact (*McInaney* v. *Hildreth* (3); *Brown* v. *Patch* (4); *Deeley* v. *Ryan* (5)). If the place be one which a person uses in common with others, and over which he has no control, then there is no localization of his operations or business, and so no user within the Act. Such a case was *Powell* v. *Kempton Park Racecourse Co.* (1). And if the place be the bar of a public house which a person uses in the same way "as everyone else uses the public house," then again there is no localization of his operations or business, and so no user within the Act (*R.* v. *Deaville* (6); *Buxton* v. *Scott* (7)). But if it can be inferred that the licensee of a public house, or those he leaves in charge of his premises, permit or do not object to a person using the bar or any other room for the purpose of his operations or business, then a localization of those operations or that business may be inferred, and a user within the Act established. (See cases *supra*, and also those collected by Mr. *William Paul* in his book on *Police Offences* (Victoria), 3rd ed. (1934), pp. 201-203). The respondent in the

(1) (1899) A.C. 143.
(2) (1906) 3 C.L.R., at p. 1070.
(3) (1897) 1 Q.B. 600.
(4) (1899) 1 Q.B. 892.
(5) (1930) V.L.R. 43.
(6) (1903) 1 K.B. 468.
(7) (1909) 100 L.T. 390.

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present case did not, nor did any of his servants, use his hotel for the purposes of unlawful gaming. But it appears that a bookmaker named Marshall was in the bar room of the hotel on the 2nd January 1933, making bets with other persons who were there. It was a very hot day, and there were over one hundred men in the bar room. The New Year was being celebrated, and it was the busiest day of the year for the hotel. *Napier* J. thus states the facts: "The uncontradicted evidence is that in the course of a few minutes, whilst the bookmaker was under the observation of the police, six bets were made by different persons, each bet being reported to another man in an adjoining parlour, through a small hole in the door leading to that room" (1).

It was proved that the hole in the door was originally made for the purpose of fitting a Yale lock, but the lock had been removed from the door before the respondent took over the premises. The magistrate who heard the case was of opinion that those in charge of the hotel should have detected the betting that was going on if they had used due diligence, but he added that there was a possibility that the respondent and his servants did not know of the actual bets. The question is whether the facts stated warrant the inference that the bookmaker was using the bar room as a place where his operations were located, and at which he could be found, for the purpose of unlawful gaming.

The case, I think, is near the line. An exclusive use of the room or of some definite part of the room is not required. But here the evidence does not establish repeated use of the room: it only relates to one particular day, and that, more or less, a public holiday; it does not establish any consent on the part of the licensee or his servants to the use of the room. It is consistent with the evidence that the bookmaker was using the bar room in the same way as everyone else was using it, or in other words as a common place to which the public had access and could resort for their own purposes. The burden of proof is upon the prosecution, and the evidence falls just short of proving that the hotel was used, in the relevant sense, by the bookmaker, for unlawful gaming. This aspect of the case was not, I think, discussed in the Supreme Court, but it goes to the

(1) (1934) S.A.S.R., at p. 330.

root of the charge against the respondent. The failure of the evidence to warrant the requisite inference establishes the correctness of the decision of the Supreme Court in setting aside the conviction. The decision may also, in my opinion, be supported upon the ground taken by *Napier* and *Richards* JJ. in the Supreme Court. But I can add nothing to their judgments, and merely express my concurrence in the conclusion reached by those learned Judges.

The appeal should be dismissed.

Dixon J. The respondent was the licensee of a hotel at a beach resort near Adelaide. In the bar room was a small door which had been disused and nailed up. The lock had been removed leaving a small circular aperture about half way up the door. On a very warm afternoon of a public holiday, a constable, in plain clothes, entered the bar room when it contained about a hundred customers. He noticed standing at the closed door a man who twice appeared to make bets with bystanders. He watched him for five minutes standing close to him. While he watched, four men came up to the man and made bets with him on horses running at races held that day. As he made each bet the man leant down and repeated the bet through the aperture to some one on the other side of the door who apparently was keeping the record. The constable arrested the man, but his confederate on the other side of the door made off. A great deal of money was found upon the arrested man. He was prosecuted and convicted under the *Lottery and Gaming Acts* 1917 to 1930 (S.A.).

A hotel is a "public place" by virtue of the amended definition of that expression contained in sec. 4, and sec. 39 makes it an offence to be in any public place for the purpose of betting.

The respondent was then prosecuted and convicted under sec. 63 (3) of being the occupier of a place, namely, his hotel, which was used for the purpose of unlawful gaming.

"Unlawful gaming" is defined by sec. 4, as amended, to include any contravention or failure to observe any provisions of the Act whether relating to unlawful gaming as otherwise defined or not. What the bookmaker at the door had been doing amounted, therefore, to unlawful gaming. The respondent was, of course, the occupier

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of the hotel. These elements in the charge were not open to dispute. But, for his defence, the respondent relied upon two grounds. He denied that the unlawful gaming, which had occurred at his hotel, made it a place used for the purpose of unlawful gaming within the meaning of the charge, and said that neither he nor his servants nor agents knew of its occurrence. The magistrate was not prepared to find that the respondent, or anybody for whom he was responsible, did know that the man was betting in the hotel, but, nevertheless, he convicted the respondent, being of opinion that *mens rea* was not a necessary element in the offence constituted by sec. 63 (3). On appeal to the Supreme Court, *Angas Parsons* J. set aside the conviction on the ground that, upon the true construction of sec. 63 (3), the occupier was not guilty of the offence unless he was concerned in the unlawful gaming. The Full Court (*Napier* and *Richards* JJ., *Murray* C.J. dissenting), affirmed this decision, not upon the ground given by *Angas Parsons* J., but upon the ground that *mens rea* was a necessary element of the offence.

An appeal is now brought to this Court by special leave.

The question whether the respondent ought or ought not to have been convicted depends upon the meaning of sec. 63, no easy matter to determine. The Act in which it stands is expressed to be a consolidation of seven South Australian statutes enacted at intervals during a period of more than thirty years. Sec. 63, together with the definition of the word "occupier" in sec. 4, appears to be an attempt to restate the effect of secs. 13, 14 and 20 of the *Lottery and Gaming Act* 1875. These provisions contain much verbiage, and the repetition of its circumlocution is avoided by the consolidation with an almost painful care. Unfortunately the verbiage was taken from provisions of the English *Betting Act* 1853 and *Gaming Act* 1854—classic texts with a meaning fixed by many precedents. In assuming a form less offensive to modern drafting taste, the enactment has necessarily sacrificed the certainty of interpretation which at many points the old text had thus obtained. Further, as redrafted provisions of earlier statutes often do, in avoiding the confusing particularity of the old expression, it fell into a brief generality of statement no less embarrassing because of its indefinite connotation. Sub-sec. 1, in impersonal terms, enumerates three

purposes for which it enacts that no house, office, room or place shall be opened, kept or used. The first of these purposes is "unlawful gaming," a highly artificial conception, which covers all contraventions of the numerous provisions of the *Lottery and Gaming Acts*, as well as gaming in the generally received sense of playing a game of skill or chance for money, as distinguished from wagering or betting. This purpose is an enlargement of that to which the *Gaming Act* 1854 is directed and does not come from the familiar provisions of sec. 1 of the *Betting Act* 1853, on which, in the main, the second and third purposes are founded.

The second purpose has a false appearance of simplicity. It is the purpose of "the occupier betting with persons resorting thereto." Its simplicity vanishes when the definition of "occupier" contained in sec. 4 is incorporated, as it must be. That definition is as follows: "'Occupier' in relation to occupiers of any house, office, room, or place used for a purpose forbidden by this Act means and includes the owner, occupier, or keeper of any house, office, room, or place, or any person using the same, or any person procured or employed by or acting for or on behalf of the owner, occupier, or keeper, or person using the same, or any person having the care or management, or in any manner conducting the business thereof."

Now the purpose obtained by combining the definition of "occupier" with par. (ii.) of sub-sec. 1 is precisely that expressed by the first part of sec. 1 of the English *Betting Act* 1853, the result of which may be shortly described as prohibiting the conduct of a place for the purpose of betting with persons personally resorting thereto.

The third purpose, that stated in par. (iii.) of sec. 63 (1), is the second of the purposes given by sec. 1 of the English Act, 1853. It is unnecessary to set out the terms in which it is expressed. In brief, this part of the enactment prohibits the conduct of a place for receiving stakes in the course of ready money betting.

The statement of these three purposes in sec. 63 (1) is introduced by the one phrase, "No house, office, room, or place shall be opened, kept, or used." In this phrase, two words of very indefinite meaning occur, "place" and "used." In sub-sec. 3, the provision under which the respondent was convicted, they again occur. "No person

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shall be the occupier of any such house, office, room, or place kept or used for any of the purposes aforesaid." The substance of the charge laid against the respondent is that he occupied a place, namely, his licensed premises, which the bookmaker at the nailed up door used for the purpose of unlawful gaming, i.e., betting. Can the bookmaker correctly be said to have "used a place" in, or consisting of, the hotel premises for this purpose? The answer depends on the meaning to be attached to those words in the introductory part of the sub-section. But that meaning must be the same for all three purposes which the introductory part governs. And, in my opinion, in relation to the second and third purposes, that meaning is settled by the construction given to the first part of sec. 1 of the English *Betting Act* 1853 in the well known case of *Powell* v. *Kempton Park Racecourse Co.* (1). It is needless to discuss that case. Its effect has often been considered. In this Court it was explained in *Prior* v. *Sherwood* (2). Perhaps the clearest exposition of the effect of this part of the enactment, so interpreted, is that of *Channell* J. in *Brown* v. *Patch* (3), the following extracts from which may suffice for present purposes:—"There is no difficulty in understanding what is the law and what is the interpretation of the statute, but there is considerable difficulty in applying it in particular cases. The statute seems clearly to be directed against betting places, not against betting persons. Clearly also, it does not forbid persons using a place by going there and meeting and betting with each other. Nor does it forbid keeping a place where persons may meet and bet with each other. Nor does it forbid carrying on the business of betting with any one who will bet with you. But it does forbid carrying on the business of keeping an office or place to which persons may come and bet with you. The judgments in the case in the House of Lords clearly show that that is the matter to be considered. The important question is not so much, what is a place? but, what is the character of the user of it? and although the words used are 'house, office, room, or other place' and it is clear that, according to the ordinary rule, 'place' must be something *ejusdem generis* with 'house, office,

(1) (1899) A.C. 143.
(2) (1906) 3 C.L.R. 1054.
(3) (1899) 1 Q.B., at pp. 898-900.

room,' yet the analogy is with respect to the way the place is used rather than with respect to the way in which it is constructed. . . . If a man . . . uses certain apparatus with his name on it, and a statement of the odds he is prepared to lay, that apparatus may be used only to indicate his identity, and that he is willing to bet with anybody who will bet with him. If the apparatus is used for those purposes only, it does not in any way localise his business of betting, or bring him within the provisions of the Act. But if it be used to indicate the place at which there is a man to be found who will bet with anyone who will come and bet with him there, then that apparatus becomes an extremely important and valuable matter to consider. In each case the facts must be looked at to see whether the bamboo stage, or the umbrella, or whatever it is the man has got, is being used by him merely to indicate that he is prepared to bet with anybody who will bet with him, or whether he is using it to indicate that there is a place at which the business of betting is carried on by him, and to which, therefore, people can go for the purpose of betting with him. . . . The question, after all, is a question of fact in each case—whether you come to the conclusion that there has been a user of a place, analogous to the user of a place like a betting office, at which the person who keeps or uses that place is prepared to bet with people who come there and bet with him."

It follows that the bookmaker must so act as to establish the place as his business site. It must appear as the pitch or stand at which the business of betting is conducted. Where a room is appropriated to this purpose, little or no difficulty should arise. But where the bookmaker does the betting in a place of common or public resort, such as a bar, the test is not so easily satisfied. He may come to a congregation of people in order to work in and out among them, obtaining bets from them. His connection with the bar room may be no greater than theirs. In cases where a bookmaker habitually operates in a bar, the fact that he has the authority of the licensee has sometimes been considered decisive against him, because it serves to make his presence there attributable to a special title to treat the room as his place of business (see *Belton* v. *Busby* (1);

(1) (1899) 2 Q.B. 380.

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Whitehurst v. *Fincher* (1); *Tromans* v. *Hodkinson* (2); *R.* v. *Deaville* (3); *Buxton* v. *Scott* (4); *Deeley* v. *Dick* (5); cf. *Deeley* v. *Ryan* (6)). But within the larger area of the bar, of which the licensee is "occupier," the bookmaker or other offender may establish a "place," which he "uses for the purpose of" some breach of the Act amounting to unlawful gaming, or which, as the "occupier" (in the special sense of the definition) of that "place," he "uses" for the purpose of betting with persons resorting thereto. Does the evidence warrant the conclusion that the bookmaker did so in this case? But for the hole in the door and the confederate on the other side there would be nothing to give any particular spot a connexion with the betting business. His purpose would have been served as well at any part of the bar room, and nothing he did would have established a stand or location for his customers to resort to. It would remain his "personality as a betting man," as Lord *Halsbury* expresses it in *Powell* v. *Kempton Park Racecourse Co.* (7), "and not his being in a particular place which affords the opportunity of betting." It is impossible to regard him as "using" the whole bar as his stand. He has nothing like dominion or control over it. It is his choice of the door because of the protection it gave his confederate which causes the difficulty. But, although this caused him to remain in the one place, his purpose in doing so was not to mark that place as the locale of his operations for the resort of clients. Nor is there evidence of his having ever been there before. Indeed, it is not unlikely that he came because of the public holiday, and found the advantage of the door with its hole. From the possession of so much money, it may be inferred that he had taken many stakes in the bar before the constable came, but, from the statements of the witnesses for the defence, which the magistrate was not prepared wholly to reject, it may also be inferred that he could not have been at the door all the time: for otherwise he must have been noticed.

On the whole, I have come to the conclusion that there was no evidence that the bookmaker used, in the required sense, the place

(1) (1890) 62 L.T. 433.
(2) (1903) 1 K.B. 30.
(3) (1903) 1 K.B. 468.
(4) (1909) 73 J.P. 133; 100 L.T. 390.
(5) (1928) V.L.R. 121.
(6) (1930) V.L.R. 43.
(7) (1899) A.C., at p. 160.

for the purpose of unlawful gaming. This is sufficient to dispose of the appeal, but I think it right to state that I agree with the view of *Napier* and *Richards* JJ. that *mens rea* is a necessary element in the offence described by sub-sec. 3 of sec. 63. The language in which the sub-section is expressed would be understood as implying this requirement, unless, because of the subject matter of the legislation, the context, or the general legislative policy as ascertained from parallel enactments, it appeared that liability independently of personal fault was more probably intended. Whatever might have been inferred if such provisions appeared in an enactment devoted to changing the law, it ought not to be supposed that a consolidating statute intended to make so drastic an alteration in the substance of the law. The rigor of the clause would be very great, and that which it supersedes expressly makes knowledge essential. The absence in sub-sec. 3 of words distinctly requiring knowledge is probably to be accounted for by an assumption on the part of the draftsman that the presumption that *mens rea* was an ingredient applied and was sufficient.

For these reasons I think the appeal should be dismissed with costs.

McTiernan J. There is no dispute that the respondent was the occupier of the premises which, the complaint alleged, were used for the purpose of unlawful gaming. The evidence shows that unlawful gaming was carried on in the bar of the hotel, not by the respondent but by a bookmaker. There is no proof of any connection between the bookmaker and the respondent. The question for decision is whether, upon the evidence given before the magistrate, the respondent could be rightly held to be the occupier of a place used for the purpose of unlawful gaming within the meaning of sec. 63 (3) of the *Lottery and Gaming Acts* 1917 to 1930 of South Australia. It is unnecessary for me to set out the evidence upon which the appellant relies to prove that the bookmaker used the premises for this purpose.

Sec. 63 (1) enacts that " No house, office, room, or place shall be opened, kept, or used " for any one of the three purposes mentioned in the sub-sections. One of these purposes is unlawful gaming. Sec. 4 defines " unlawful gaming," and what the bookmaker was

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proved to have done is within that definition. Sec. 63 (3), under which the respondent was charged, says :—" No person shall be the occupier of any such house, office, room, or place kept or used for any of the purposes aforesaid." The bookmaker made bets with members of the public in the bar. There can be no doubt that unlawful gaming took place in the bar. But was the bar, or a place within the bar, used for that purpose so that the respondent was an occupier of a place tainted with an unlawful use ? The question turns upon the meaning of " used " in sec. 63. The object of legislative concern in each of the three sub-sections of sec. 63 is the use of any place in the above category of places, for any one of a number of specified purposes. It is clear, I think, that the word " used " was intended to have the same meaning wherever it occurs in sec. 63. In *Powell* v. *Kempton Park Racecourse Co.* (1), Lord *Hobhouse* in his dissenting judgment said :—" The place must be used for a purpose before it can fall within the prohibition. The word ' used ' is almost as wide in range as the word ' place.' It may be applied to most human actions. But to use a thing for a purpose is an expression with a much more limited range, and the nature of the purpose will confine it within narrower limits still. . . . The phrase ' use-for-a-purpose ' necessarily implies a deliberate use, a designed choice of the thing used for the purpose in hand. . . . If then we read the statute as striking at places the use of which for the purpose of betting is deliberate, designed, and repeated, either on the part of the owner or the person having the control, or on the part of other persons using the same, we shall, as I conceive, give to its words their plain and ordinary meaning, and we shall not give to it any extravagant latitude such as has been suggested." This criterion for determining whether a place was used for the purpose of betting was not adopted by the majority of the House of Lords. The Earl of *Halsbury* in propounding the criterion which was adopted said :—" My noble friend Lord *Hobhouse* admits the word ' use ' is ambiguous, and limits it by such words as " deliberate, designed, and repeated ' ; but to my mind these words miss the point. It is not the repeated and designed as

(12) (1899) A.C., at pp. 172, 173.

distinguished from the casual or infrequent, use which the employment of that word imports here, but the character of the use as a use by some person having the dominion and control over the place, and conducting the business of a betting establishment with the persons resorting thereto " (p. 160). The word " used " appears in secs. 1 and 3 of the *Betting Act* 1853 (16 & 17 Vict. c. 119) which is the subject of these pronouncements, in a collocation similar to that in sec. 63. The interpretation whereby it was determined what was necessary to constitute the use of a place for a purpose within the intendment of these two sections should, in my opinion, be applied to resolve any uncertainty as to what the Legislature intended by the word " used " in sec. 63. It is impossible to say upon the evidence that the bookmaker was present in the bar or at a place in the bar for the purpose of affording an opportunity to persons who came there to bet with him. He made bets with persons on the premises, but that is not sufficient in itself to constitute a use of the place for the purpose of betting. It follows that the respondent should not have been convicted of being the occupier of a place used for the prohibited purpose alleged.

I would add that, in my opinion, proof of the commission of an offence under sec. 63 (3) is not complete without proof of *mens rea* on the part of the occupier. The *Lottery and Gaming Act* of 1917 consolidates and repeals earlier legislation including the Act entitled " An Act for the Suppression of Lotteries and of Unlawful Gaming " of 1875, secs. 13, 14, and 20 of which are repealed by sec. 63. The learned Chief Justice of South Australia in his judgment sets out the difference in the verbiage of the two Acts. In the antecedent sections which are repealed by sec. 63, knowledge on the part of the occupier is expressed to be an ingredient of the offence. These Acts clearly show that the Legislature did not intend to suppress gambling by exposing the occupier of any place to the liability to punishment, if, without his knowledge, that place was used for any of the purposes forbidden by the sections which have been transmuted into sec. 63 of the *Lottery and Gaming Act* 1917. This Act does not introduce any new measures to combat the evil. There is no ground for the assumption that the Legislature omitted to say in sec. 63 (3) that *mens rea* on the part of the occupier was a necessary element

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of the offence because it intended that every person would at his peril be an occupier of a place used for any of the prohibited purposes. The elimination of *mens rea* as an ingredient in the offence for which the occupier is made punishable would work a revolutionary change in the law relating to the liability of occupiers, and would, in view of the definition of occupier, widely extend the area of liability. It cannot be predicated that because the Legislature is silent on this question, it intended to make this elimination. The statute is expressed to be a consolidating Act (sec. 3). There is, in my opinion, no sufficient ground for saying that the Legislature intended to change the law so as to expose the occupier to the risk of punishment if his premises should, without any knowledge on his part, be used for any one or more of the specified purposes. It is not, I think, inconsistent either with the terms of sec. 63 (3) or with the Act to say that the occupier is not exposed to that risk.

In my opinion the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant, *A. J. Hannan*, Crown Solicitor for South Australia.

Solicitors for the respondent, *Villeneuve Smith, Kelly, Hague & Travers.*

C. C. B.