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findings as to how far such business, taken separately, was a nuisance to the plaintiffs, and to reserve the question of amendment for argument after I had made such separate findings.

In my opinion the evidence does not enable me with any confidence to make separate findings about the three businesses although I think that possibly the boiling down and tallow rendering is the substantial cause of the nuisance of which the plaintiffs justly complain.

It may be that the defendant can carry on some portion of his business without causing a nuisance to the plaintiffs, either because the smell may be confined to one process only, or because he may be able to prevent all smells from emanating from his factory by some more adequate preventive measures than he has yet seen fit to adopt.

Despite the advantages to the plaintiffs which were urged by Mr. Alderman, if the onus were placed upon the defendant to satisfy the Court that he had satisfactorily eliminated the objectionable smell before he could have the injunction removed, I cannot feel that it would be just to make an order in terms as wide as the amendment would permit, and the plaintiffs now desire. The plaintiffs have not objected to the business of the defendant, but to the smells which emanate from it.

I think that justice will be done by making an Order restraining the defendant from committing the nuisance of which the plaintiffs complain. The Order will therefore be that the defendant, his agents, and servants and every of them be restrained and an injunction is hereby granted restraining them and every of them from causing, permitting or suffering to be upon the land of the plaintiffs Harkness, Halliday, Payne, and Wreford or any of them any offensive smell emanating from the defendant's factory or land on Allotment 130 Hundred of Noarlunga, County of Adelaide.

The defendant will pay the costs of the plaintiffs to be taxed.

The two plaintiffs Russell have not sought to establish their case, and the action against the defendant, so far as they are concerned, is therefore dismissed with such costs as the defendant shall be found to have incurred by their joinder as parties.

Liberty to speak to the Minutes.

Injunction restraining defendant, his agents, and servants from causing, permitting, or suffering to be upon the land of the plaintiffs any offensive smell emanating from defendant's factory, together with costs to be taxed.

[Solicitors—For the plaintiffs, Alderman, Brazel, Clark, and Ward; for the defendant, L. B. Mathews.] M. B.

Before LIGERTWOOD, J. March 7, April 28, 1950.

BELLING v. O'SULLIVAN

Licensing Act 1932-1948 (S.A.), sec. 170—Exclusion of children from billiard saloons —Failure of licensee to remove — Mens rea — Honest belief on reasonable grounds that child over 16 years.

It is a defence to a charge under sec. 170 of the Licensing Act 1932-1948 (S.A.) for the holder of a billiard table licence to show that he honestly believed on reasonable grounds that a child on his premises was at least 16 years of age.

APPEAL.

Belling, the licensee of a billiard saloon at North Adelaide, was convicted in Adelaide Police Court for having failed to remove two children under the age of 16 years from his saloon. A separate conviction was entered in respect of each child, and the defendant appealed against each conviction. The appeals were heard together.

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Joseph, for the appellant Belling.

Hannan, K.C., for the respondent O'Sullivan.

The following cases were cited:—*R. v. Turnbull*, (1943) 44 S.R. (N.S.W.) 108; *Proudman v. Dayman* (1941) 67 C.L.R. 536; *Laughton and Coombs v. Master Butchers Ltd.*, [1915] S.A.L.R. 3; *Williams v. Wright*, [1943] S.A.S.R. 301; *R. v. Prince*, (1875) LR 2 C.C.R. 154; *Poole v. Wah Min Chan*, 75 C.L.R. 218, [1947] A.L.R. 505; *Hefferman v. Richardson*, [1946] S.A.S.R. 201.

Cur. adv. vult.

LIGERTWOOD, J.—These were two appeals by Belling, the defendant in the Court below, against convictions for failing to remove from his billiard saloon two boys who were under the age of 16 years. There was a separate complaint with respect to each boy. The complaints and the appeals were heard together.

The defendant was the licensee of a billiard saloon at O'Connell Street, North Adelaide. On the evening of 15th November, 1949, a police constable called at the premises and found two boys named Decelis and Brice playing snooker. Each of them was proved to be of the age of 14 years. The defendant was present in the saloon, and when questioned about the boys, he said that he had told them on a previous occasion that they were not allowed on the premises if they were under 16 and each had assured him that he was over 16. The defendant confirmed this on oath, and his evidence on this point was accepted by the Magistrate. The defendant also said in effect that he honestly believed the boys were over 16.

Section 170 of the Licensing Act 1932-1948 under which the complaints were laid provides as follows:—

- (1) If any child is in or upon the licensed premises of any holder of a billiard table licence and that child is not the son, daughter or servant of the said holder of the licence the said holder if he is on the premises while the child is there or if he is not on the premises, the person who is in charge of the premises at that time, shall forthwith remove the said child or cause him to be removed from the licensed premises.
- (2) Any person who fails to comply with this section shall be guilty of an offence against this Act. Penalty — Not less than two pounds nor more than twenty pounds.
- (3) In this section "child" means any person under the age of 16 years.

The Magistrate considered the question as to how far upon the true construction of the section the element of *mens rea* was an ingredient of the offence. He said there were three possibilities:—

1. That the offence was absolute so that no question of *mens rea* arises.
2. That *mens rea* was a necessary ingredient of the offence, so that the prosecution must prove affirmatively beyond reasonable doubt that the defendant had knowledge of the fact that the boy was under the age of 16 years.
3. That although *mens rea* was a necessary ingredient of the offence, the onus was not on the prosecution of proving it beyond reasonable doubt, but the defendant could escape by proving on the balance of probabilities that he made an honest and reasonable mistake or in other words that he believed on reasonable grounds that the boy was over the age of 16 years.

The Magistrate adopted the first construction and rejected the other two. At the same time he found that if the defence of reasonable mistake were open to the defendant, then, if he honestly believed the boy was over 16, he did not have reasonable grounds for so believing.

The grounds of the appeal were:—

1. That the conviction was wrong in law.
2. That the conviction was against the evidence.
3. That the Magistrate should have held that *mens rea* was necessary to support a conviction within the section.
4. That whether *mens rea* was necessary to support a conviction or not, the Magistrate should have held that an honest and reasonable belief by the defendant that the boy was above the age of 16 years was sufficient to exculpate him.

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5. That the Magistrate should have found that on the evidence the defendant had such an honest and reasonable belief.

On the hearing of the appeal, the appellant's Counsel, Mr. Joseph, feeling that on the evidence, he could not seriously contest the Magistrate's finding that the defendant's belief as to the boy's age, whether honestly held or not, was not based upon reasonable grounds, was compelled to contend that no offence was proved unless the prosecution established beyond reasonable doubt that the defendant knew that the boy was under 16 years of age. As the Magistrate had made no such finding he submitted that the conviction should be set aside.

Mr. Hannan for the respondent contended that *mens rea* was not a necessary ingredient and that the offence was conclusively proved, if it was shewn that the boy was on the premises, that the defendant was present, and that the boy was in fact under the age of 16 years. He submitted that since the defence of honest belief on reasonable grounds was not expressly given by the section, it could not be implied. He referred to other sections of the Act where that defence was expressly allowed. On at least two previous occasions such an argument has been described as the application of the Mikado principle, "there's not a word about mistake or not knowing or having no notion or not being there" (*Thomas v. The King*, 59 C.L.R. 279, at pp. 303, 304, *per* Dixon, J., (1938 A.L.R. 46), and *Rex v. Turnbull*, (1920) 44 N.S.W.S.R. 108 at p. 110 (*per* Jordan, C.J.).

I do not think it necessary to embark upon an elaborate discussion of *mens rea* in relation to statutory offences. It is sufficient to say that whether *mens rea* is an ingredient of an offence and if so, what degree of *mens rea* is required and whether the defence of honest and reasonable belief is open are always questions of construction of the particular enactment, (*G. Laughton and Coombs Ltd. v. Master Butchers Ltd.*, [1915] S.A.L.R. 3, *Dayman v. Proudman*, [1941] S.A.S.R. 87, and *Proudman v. Dayman*, 65 C.L.R. 536, *Sherras v. DeRutzen*, (1895) 1 G.B. 918, *Rex v. Turnbull (supra)*).

In construing sec. 170 of the Licensing Act, it is important to notice its form. It is not a prohibition, as is the case in most of the decisions in which the question of *mens rea* has arisen. Subsection (1) imposes an active duty upon the licensee. He is required to remove the boy — a duty which in the last resort may require the exercise of force. The offence is created by subsection (2) and consists in the failure to comply with the section, that is to say, the failure to perform the duty.

The word "fail" when used in relation to criminal responsibility may contain in itself a mental element. In *Brotherton v. Metropolitan and District Joint Committee*, (1893) 9 T.L.R. 645, the question was whether a railway passenger had failed to produce a ticket on request, and Lord Esher, M.R., said:—

It was impossible to say that, as a matter of law, the non-production of a ticket at the very moment when it was demanded would be in every case a failure to produce the ticket within the meaning of the section. If all the plaintiff meant to say in this case was that he had his ticket and that he did not absolutely refuse to produce it, but the whole time intended to produce it but could not find it, the jury might say there was no failure to produce the ticket.

Even when determining civil rights or liabilities the word "fail" may contain a mental element. In *Loates v. Maple*, (1903) 88 L.T. 288, an agreement provided that a jockey was to have a retaining fee of £2,000 a year for three racing seasons and that, "in case he shall die or shall fail to procure a licence during the said term, this agreement shall be at an end." Wright, J., at p. 290, said:—

It seems to me that the word "fail" must have some meaning given to it and fairly construed it points to something in the nature of failure by reason either of misconduct on his part or a want of due diligence in trying to obtain a licence.

Compare also *re Neilson*, 18 Session Cases 338.

In my opinion a person cannot be said to criminally fail in the performance of an active duty, unless he knows of circumstances, which either

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[LIGERTWOOD, J.]

positively call for its exercise or which at least put him on enquiry as to whether it should be exercised. To that degree, in my opinion, proof of *mens rea* is required by the section. Such a construction will give effect to the object of the section which is to keep young boys out of billiard saloons and will occasion no difficulty in practice.

To raise a *prima facie* case against a licensee, it would be sufficient for the prosecution to show four things:—

1. That the boy was on the licensed premises.
2. That the licensee was present.
3. That the boy's appearance was such that a reasonable person would think he was under the age of 16 years.
4. That the boy was in fact under the age of 16 years.

Proof of these facts would establish *prima facie* that the licensee had failed in his duty to remove the boy. The licensee could meet the charge by traversing any one of the above matters. It would also be open to him to show that he was unaware of the boy's presence — for instance that the boy had just come into the saloon when his back was turned. Other facts of a similar nature would be relevant as tending to negative a failure of the duty or to raise a reasonable doubt on the subject.

Finally, I think the form of the section is such that it leaves open to the defendant the common law defence that he honestly believed on reasonable grounds that the boy was 16 years of age or over, (*R. v. Tolson*, (1889) 23 Q.B.D. 168; *Dayman v. Proudman*, [1941] S.A.S.R. 87; *Proudman v. Dayman*, 67 C.L.R. 536; *Mayer v. Musson*, 52 C.L.R. 100), [1935] A.L.R. 80. I do not think that a defendant can be said to fail in the performance of an active duty, if on reasonable grounds he has an honest belief in facts, which if true would negative the existence of the duty.

In each of the present cases, there was ample evidence to raise a *prima facie* case against the defendant. He himself thought in the first instance that each boy was under the age of 16 years. He was thus put on inquiry. He was content in each case with the boy's assurance that he was over 16. The Magistrate did not regard the defendant's questioning of the boys as affording reasonable grounds for an honest belief that they were over 16. His finding is not one with which an appellate Court ought to interfere. He had the advantage of seeing each boy when he gave his evidence and he said in effect that no reasonable person would be satisfied with the boy's word that he was over 16.

In my opinion the convictions were justified. The appeals are dismissed with one set of costs, which I fix at £7 7s. 0d., to be paid by the appellant to the respondents.

Appeals dismissed.

[Solicitors—For the appellant, G. Joseph; for the respondents, A. J. Hannan, Crown Solicitor.] M. B.