

1905

IN THE
MATTER OF
THE LAND
TRANSFER
ACT, 1885

Court of
Appeal.

Provided that this section shall not apply in any case where the local authority having control of the road or street, by resolution, declares that the provisions hereof shall not apply to any specified road or street, or any specified part thereof, and such resolution is approved by the Governor-in-Council.

(2) In cases where the frontage on either side of any road or street has already been set back under the operation of this or any other Act, or voluntarily by the owner, or by arrangement with the local authority, the centre line of the road or street shall be taken to mean the centre of the road or street as it originally existed.

(3) The owner of the land so dedicated shall be entitled to compensation by the local authority having control of the road or street; such compensation to be assessed under the provisions of the principal Act.

(4) If any question or dispute arises hereunder between the owner and a local authority, or the owner or local authority and the District Land Registrar, or Registrar of Deeds, such question or dispute shall be referred to the Minister, whose decision in writing shall be final and conclusive on all parties; and he may for the purposes of such decision cause an inquiry to be held in the manner set forth in section 114 of the Principal Act.

(5) Sub-sections 3 to 6 of the last preceding section shall apply to this section.

(6) This section is in substitution for Section 21 of "The Public Works Act Amendment Act, 1900," and that section, and "The Public Works Amendment Act, 1901," are hereby repealed.

Court of Appeal,

Wellington.

June 29 and July 18,
1905.

Stout, C.J., Williams,
Edwards, Cooper,
and Chapman, J.J.

THE KING V. GEORGE MATHESON EWART.

*Criminal law—Offensive Publications Act, 1892—
Section 3—Mens rea—Report of judicial
proceedings—Object of publication legitimate
—Evidence.*

In the absence of *mens rea*, it is not an offence under Section 3 of "The Offensive Publications Act, 1892," to sell a newspaper containing indecent, immoral, or obscene matter; but as the statute has not expressly made wilfulness or knowledge an ingredient

of the offence, the onus of proving the absence of a guilty mind is on the accused.

On a prosecution for publishing a newspaper containing indecent matter, evidence is not admissible to show that the indecent matter published was a correct report of judicial proceedings (*Steele v. Brannan*, L.R., 7, C.P., 261, followed), or that the object of the publication was legitimate.

The law as to *mens rea* discussed.

This was a case reserved by Stout, C.J., for the opinion of the Court of Appeal, under Section 412 of "The Criminal Code Act, 1893." The prisoner was indicted for selling a newspaper known as Sydney "Truth," dated the 29th January, 1905, parts of which, it was alleged, were of an indecent, immoral and obscene nature. At the close of the evidence for the Crown, it was contended that as there was no evidence that the prisoner knew the contents of the paper, there was no case to go to the jury. That contention was over-ruled, and the prisoner was then called, and gave evidence that he was a bookseller, selling about two or three hundred newspapers of different kinds, and that he had not read the contents of "Truth" dated the 29th January, 1905, or of any other copy of "Truth," and that he did not know its contents. The Chief Justice, before whom the case was tried, rejected as inadmissible evidence which counsel for the prisoner proposed to call to show:—(1) That some of the matter alleged to be indecent was a correct report of judicial proceedings, and that the grosser details of the evidence given therein had been suppressed. (2) That the object of the publication was legitimate, and in the public interest. Two questions only were left to the jury:—(1) Did the prisoner sell the newspaper? (2) Was the newspaper indecent, immoral or obscene. The jury brought in a verdict of guilty, but sentence was deferred.

The conviction was quashed by the Court of Appeal (Stout, C.J., and Cooper, J., dissenting).

Mr H. D. Bell appeared for the King, and Mr C. P. Skerrett (with him Mr Alexander Dunn) for prisoner.

C. P. Skerrett (with him Alexander Dunn), for prisoner.—The questions to be decided arise on "The Offensive Publications Act, 1892." There is no evidence that the prisoner knew the contents of the paper sold, and he swears that he did not. Three points are to be argued: (1) *Mens rea* is a necessary element of the offence, and it must be proved that prisoner knew the contents of the

paper. (2) There is nothing to take the case out of the ordinary rule, and to do so would result in injustice. (3) The difference between the language of "The Police Offences Act, 1884," and the statute under which the charge is made, does not warrant the inference that it is not necessary to prove knowledge. The same offence is dealt with by "The Criminal Code Act, 1893," Section 139. The burden of proof lies on the Crown: *R. v. Sleep* (Leigh and Cave, 53); *Williamson v. Norrish* (1899, 1, Q.B., 7); *Chisholm v. Doulton* (22, Q.B.D., 736); *Dickenson v. Fletcher* (L.R., 9, C.P., 1); *R. v. Tolson* (23, Q.B.D., 168). The omission of the word "knowingly" is not sufficient to take the case out of the general rule. The seller of a newspaper cannot be held liable for a libel contained in a paper sold by him, unless he knew of the libel or was guilty of negligence. *Cooney v. Covell* (4, Gaz. L.R., 140; 21, N.Z.L.R., S.C., 106), shows that a book does not come under Section 5 of the Act. The omission of the word "knowingly" may merely change the onus of proof: *Sherras v. De Rutzen* (1895, 1, Q.B., 918). In order to amount to publication there must be proof of knowledge or negligence: *Emmens v. Pottle* (16, Q.B.D., 354); *R. v. Burdett* (4, B. & Ald., at page 126); *Martin v. Trustees of British Museum* (10, T.L.R., 338). The exceptions from the general rule are:—(1) Where the statute regulates a trade, calling or business. Here one of two results may happen: (a) Where the master has it in his power usually to prevent the regulation from being broken, and it is broken for the profit of the master, he is liable, as in the case of adulteration, or under the revenue Acts: *Parker v. Alder* (1899, 1, Q.B., 20). (b) The act of a servant, acting within the scope of his authority, subjects the master to the penalty, but *mens rea* in the servant must be shown. (2) The second exception relates to by-laws. (3) The third to enactments to restrain public nuisances. (4) The fourth to proceedings really to enforce civil rights. (5) The fifth, proceedings in which the party may exculpate himself: *Coppen v. Moore* (1898, 2, Q.B., 306). The case of *Mullins v.*

Collins (L.R., 9, Q.B., 293) is distinguished in *Somerset v. Hart* (L.R., 12, Q.B.D., 360). The licensing cases are distinguished because if the master were not responsible no one would be: *Bank of New South Wales v. Piper* (1897, A.C., 383). As to the last question: evidence was excluded to show that parts of the matter objected to were really reports of proceedings in Courts of Justice. The evidence was admissible. Matter may be obscene under some circumstances which is not in others: *Reg. v. Hicklin* (L.R., 3, Q.B., 376), per Blackburn, J. There is one New Zealand case on *mens rea*: *Ecclesfield v. Chilman* (11, N.Z.L.R., 719); *Hall v. Quinn* (Macassey, 744); *O'Connor v. Hammond* (4, Gaz. L.R., 377; 21, N.Z.L.R., 573). The publication of indecent matter was always an offence at common law: *R. v. Burdett*. Hardcastle on Statute Law, 459. As to the omission of the word "knowingly," *Hopton v. Thirwall* (9, L.T., 327).

H. D. BELL, for Crown.—The English Act is 52 and 53, Vict., c. 18; Chitty's Stat., Vol. 3, p. 402. The Court has to determine the scope and intent of the enactment. Distinction is drawn between crime and doing something against the public interest, and in the latter class of cases, where a minor penalty is imposed, knowledge is not so readily considered an essential of the offence. This is an offence punishable on summary conviction, and the statute is to prohibit a public nuisance. Voluntary or negligent ignorance is not an excuse in any case: Stephen's Dig. Cr. Law, 6th Ed., 27. It is the duty of a bookseller to know what he sells. *Commissioners of Police v. Cartman* (1896, 1, Q.B., 655); *Reg. v. Prince* (2, C.C.R., 154); *Reg. v. Tolson* (23, Q.B.D., 173); *Cundy v. Le Cocq* (13, Q.B.D., 207); *Dyke v. Gower* (65, L.T., 760); *Reg. v. Bishop*, (5, Q.B.D., 259); *Emary v. Nolloth* (1903, 2, K.B., 264); compare *Brooks v. Mason* (1902, 2, K.B., 743); *Pearks v. Ward* (20, Cox, 79); *Smithies v. Bridge* (20, Cox, 342). Denniston, J., has held that this statute is in effect a repeal of the provisions of the Act of 1884: *Simpson v. Neil* (12,

1905
THE KING
v
EWART.
Court of
Appeal.

1905
THE KING
v.
EWART.
Court of
Appeal.

N.Z.L.R., S.C., 445). The Act must have been intended to create a different offence from that created by the Act of 1884. Whether or not this was a *bona fide* report of proceedings in a Court of Justice could not be relevant because there was matter not part of any report which was indecent, but it is clear that the publication is not privileged on that ground: *Rex v. Mary Carlile* (3, B. and Ald., 167); *Steele v. Brannan* (L.R., 7, C.P., 268).

Skerrett, in reply.—The argument for the Crown seeks to establish a new class of exceptions contrary to the spirit of the authorities: it raises a ground of expediency. This is a crime, and the onus of showing that it is not necessary to prove guilty knowledge rests upon the Crown. It is an offence at common law. In *Reg. v. Prince mens rea* was involved. All the cases cited are cases in which the punishment was fine, and in default imprisonment; here it is fine or imprisonment, at the discretion of the Magistrate. *Sherras v. De Rutzen* is in point, and was approved in *Bank of New South Wales v. Piper*. This is not a statute to regulate a trade or the conduct of tradesmen. The question of voluntary ignorance did not go to the jury. *Brooks v. Mason* (1902, 2, K.B., 743), is distinguishable.

Bell.—As to the effect of “knowingly” being in one section and not in the other: *Cundy v. Le Cocq*.

Cur. adv. vult.

STOUT, C.J.—The first question that arises in this case is whether the provisions of Section 3 of “The Offensive Publications Act, 1892,” requires that before conviction can be affirmed against an accused person, there must be proof that he knew the publication he sold to be indecent, and whether there can be no conviction if the jury believes he did not know that the newspaper he sold was indecent—in fact, whether *mens rea* is required to be proved under this Act.

The maxim *Non est reus nisi mens sit rea* has been generally applied when any charge has been

brought against a person of having committed a crime. The maxim is, however, not of universal application. There are many exceptions to it. The following exceptions may be mentioned: (1) If the act done is wrong, though not a crime, then if the act should turn out to be a crime, that the actor must be deemed to have taken the risk, and his intention is of no moment. This was the decision in *R. v. Prince* (L.R., 2, C.C.R., 104). In that case it was held that a person who took a girl from her home, though he did not know, and had no reason to believe, she was under sixteen years of age, was guilty of an offence under the statute. (2) In cases in which a trade is regulated by a statute, a breach of the regulation may be a crime, however innocent of wrong-doing the actor may be. The case of *Cundy v. LeCocq* (13, Q.B.D., 207) illustrates this exception. (3) There is the class of cases where the Legislature has declared that certain goods shall not be imported. Even if such goods are innocently brought in, an offence is committed. *Bell v. Commissioner of Customs* (1902, A.C., 563). (4) Another class of cases is where the Legislature has substituted summary proceedings in cases that would otherwise have been offences at common law, and tried in higher Courts. The cases under the Imperial statute 38 and 39, Vict., c. 63—“The Food and Drugs Act, 1875”—illustrates this class. At common law the sale of unwholesome food was an indictable misdemeanour. It was an offence to sell unwholesome food. (See Coke’s Institutes, Vol. IV., p. 261, quoted in *Barnby v. Bollett*, 16, M. and W., 654, by Baron Parke, as correctly stating the law.) And it would have been necessary to state and prove that the sale had been knowingly made. The Imperial statute already cited, however, provided for a summary procedure in dealing with the sale of unwholesome food or adulterated and unwholesome drugs, and when this statute came to be enforced, the question was raised whether the rule of *mens rea* should be applied. Sections 3 and 4 of the statute contained provisions against mixing, etc., articles of food, etc., with any ingredient or material so as

to render the article injurious to health, etc., and Section 6 provided that any person who sold to the prejudice of the purchaser any article of food, or drug, which was not of the nature, substance, or quality of the article demanded by such purchaser, should be rendered liable to a penalty. In the case of *Betts v. Armstead* (20, Q.B.D., 771), it was contended that the Court should read into the section the word "knowingly," and that a person who it was proved had sold bread containing alum, not knowing that there was any alum in the bread, ought not to be found guilty. But this contention was overruled, the Court saying:—"Those terms," that is, the terms of Section 6, "are not in any way qualified. But it was suggested that the Justices ought to read into the section the word "knowingly," and they adopted that suggestion. That word is not to be found in the section, and it is clear from the words of the other sections of the Act that the word "knowingly" was intentionally omitted from Section 6." This case was followed in the cases of selling milk (*Brown v. Foot*, 66, L.T., N.S., 649; and *Parker v. Alder*, 1899 1, Q.B., 20), in which the seller did not know that the milk was not pure. Lord Russell, of Killowen, said in the last case:—"This is one of the class of cases in which the Legislature has in effect determined that *mens rea* is not necessary to constitute the offence." In the beer cases in which, unknown to the seller, arsenic had contaminated the beer, the seller was nevertheless held guilty under Section 6 of the statute referred to. (See *Goulder v. Rook*, 1901, 2, K.B., 290). A like decision was given in the case of the sale of butter mixed with water. (*Perks, Gunston, etc., v. Ward*, 20, Cox, C.C., 283.) (5) There are also cases where the terms of the Legislature are express, and where in such a case the Courts have said that the intention of the actor was of no moment. One old case under this head is *R. v. Woodrow* (1846, 15, M. and W., 204), where a dealer in and retailer of tobacco, for having in his possession adulterated tobacco, although he had purchased it as genuine, and had no knowledge or cause to suspect that it was not

so, was nevertheless held guilty of an offence. During the argument in that case the following observations were made:—Pollock, C.B., said:—"There can be no doubt that every stringent law, that is made for the purpose of working some great public good, will be attended with frequent cases of hardship, and sometimes with cases of apparently great injustice. That, however, is a matter for the consideration, either of those who make the laws, or of those who call for the execution of them. Suppose it a case, not of protecting the revenue, but of protecting the public health, as where the Beer Act forbids persons to have certain things in their possession at all. So, you are not allowed to have bank paper in your possession; it is so dangerous that any person should be allowed to have it, that it is absolutely prohibited." It was contended that in the cases mentioned by the learned Judge the parties were wilfully disobeying the Act of Parliament, but Pollock, C.B., said:—"So you are here wilfully disobeying the Act of Parliament if you do not take due pains to examine the article in which you deal, and to ascertain before you receive it that it is of a character which the law permits you to have." It was contended that this might require a nice chemical analysis, but Parke, B., said:—"You must get someone to make that nice chemical analysis, or you must rely upon the manufacturer or dealer who sells to you, and take your remedy against him." In his judgment Pollock, C.B., said (p. 415):—"It appears to me that in this case, it being within the personal knowledge of the party that he was in possession of the tobacco (indeed, a man can hardly be said to be in possession of anything without knowing it), it is not necessary that he should know that the tobacco was adulterated; for reasons probably very sound, and not applicable to this case only, but to many other branches of the law, persons who deal in any article are made responsible for its being of a certain quality." Parke, B., said in his judgment (p. 417):—"It is very true that in particular instances it may produce mischief, because an innocent man may suffer from his want of care

1905
THE KING
v.
EWART.
Court of
Appeal.

1905

THE KING
v
EWART.Court of
Appeal.

in not examining the tobacco he has received, and not taking a warranty; but the public inconvenience would be much greater, if in every case the officers were obliged to prove knowledge."

In the case of *R. v. Bishop* (5, Q.B.D., 259), the defendant was convicted under 8 and 9, Vict., c. 100, s. 44, of a misdemeanour, for receiving into her house two or more lunatics, such house not being an asylum or hospital registered or licensed. The learned Judge in that case—Mr Justice Stephen—directed the jury that if one other such person besides the admitted lunatic was received into the house, an honest belief on the part of the defendant that that person was not a lunatic would be immaterial. The jury found the defendant guilty, and they found that she did honestly and on reasonable grounds believe that no one of her patients was a lunatic except, of course, the admitted lunatic. Lord Chief Justice Coleridge said:—"I think the conviction was right. If the knowledge of the parties so receiving lunatics is the only question, it is quite plain." And Denman, J., said:—"If we were not to so hold, the object of the statute might be frustrated." And Baron Pollock said:—"With regard to the count whether knowledge or absence of knowledge of the keeper is material, I am clearly of opinion it is not." Field and Stephen, J.J., were of the same opinion. The *ratio decidendi* in these cases was that if the statute was express, effect must be given to it. In *R. v. Hale* (O.B. and F., 73, C.A.) this Court held that where a man voted twice, though with no wilful intent to break the law, a conviction must be upheld.

Now the words in the statute under which the indictment in this case is laid are express, and the question is whether the statute did not mean to abolish the rule of *mens rea* in this case. I am of opinion that the course of our legislation on the selling of indecent and immoral literature shows that the Legislature, by the Act of 1892, did not mean to make knowledge an essential ingredient of the offence. In 1884 The Police Offences Act was passed, and it provided that any

person who wilfully offers for sale or for distribution, or exhibits to public view in any public place, or who exposes or causes to be exposed to view in the window or other part of any shop or other building situate in any public place, any indecent, or obscene book, paper, writing, print, picture, drawing, or representation," should be liable to imprisonment with hard labour for any time not exceeding one year. At the time this law was passed, and up to 1893, the common law was in existence, and it provided that a person who knowingly sold or distributed immoral literature should be liable to indictment, and subject to fine and imprisonment. The Legislature in 1892 passed The Offensive Publications Act, under which the indictment in this case has been preferred. The Act provided for the punishment of anyone who sells any book or printed or written matter which is of an "indecent, immoral, or obscene nature." The punishment was only to be a penalty not exceeding £5, or, in the discretion of the Court, imprisonment for any term not exceeding three months for a first offence. By "The Offensive Publications Act Amendment Act, 1894," there was provision made for an extension of the penalty, namely to any term not exceeding one year, if the offence was of so gross a nature as, in the opinion of the Justices, to merit a greater punishment. In 1893 The Criminal Code Act was passed. It repealed all common law offences, and brought every indictable offence under the Code. By this Act any person who "knowingly, without lawful justification or excuse," sells any indecent literature, was made liable to two years' imprisonment. If a person were charged with such an offence under the Criminal Code, the prosecution would not require to prove knowledge. (See Archbold's Cr. Pr., p. 1134.) All that would be necessary would be to prove the sale and that the literature was indecent. Can it be that the Legislature meant to make no alteration in the law when it enacted the 1892 statute? Looking at the legislation on the subject, I am of opinion the Court cannot hold that the offence to be punished summarily under the Act of 1892 was

an offence of the same nature as that dealt with in Section 139 of the Criminal Code, which re-enacts the common law. Where the Court finds in three statutes *in pari materia*, dealing with obscene literature, a variation such as exists in our statutes, the Court is bound, in my opinion, to assume that the Legislature intended by its difference of punishments, to differentiate the three kinds of offences. We have the Police Offences Act, which awards punishment up to twelve months' imprisonment, without the option of a fine; then we have the Offensive Publications Act of 1892, in which only a fine of £5, or three months' imprisonment, can be imposed, and lastly we have the Criminal Code Act, which provides for punishment up to two years' imprisonment. The first Act puts in the word "wilfully" before mention of the act charged as criminal, the second Act omits both "wilfully" and "knowingly," and the third Act contains the word "knowingly." In my opinion this is a plain declaration by the Legislature that the Act of 1892 was meant to punish those who sold indecent literature, whether they knew that the literature was indecent or not. They had to take the risk of seeing whether the literature was indecent or not before they sold it. And there are many reasons why this should be so. If persons are allowed to sell literature, and to state that they have not read it, and did not therefore know whether it was indecent or not, it would be almost impossible to put down the sale of indecent literature. A Government censor would be required to be continually warning booksellers what they could sell, and what they could not sell. The Legislature seems to have cast upon the bookseller the responsibility of being his own censor. No doubt if he could show that he was selling well-known newspapers, or literature ordinarily respectable and decent, no Court, if it found him guilty, would inflict a penalty. But if it were said that a person could get rid of responsibility in selling indecent literature by stating that he had not read it, and therefore did not know that he was committing an offence, the beneficial operation of the Offensive Publications

Act would be exceedingly restricted, if not rendered entirely nugatory. For example, suppose the seller of such literature could not read; can he be excused for selling indecent and immoral papers and books until he is informed of the nature of the literature he is selling? This would be contrary to the old rule of giving an advantage to the learned—the benefit of clergy—and would be conferring a privilege on the ignorant and unlearned.

The case of *R. v. Tolson* (23, Q.B.D., 168), may be cited as showing when an act done under a *bona fide* belief on reasonable grounds may be excused. The prisoner was indicted for bigamy, and was convicted. Mr Justice Stephen had charged the jury that a belief in good faith and on reasonable grounds that the husband of the prisoner was dead would not be a defence to a charge of bigamy. Nine Judges held it would be, viz.:—Lord Coleridge, C.J., Hawkins, Stephen, Cave, Day, A. L. Smith, Wills, Grantham, and Charles, J.J.; and five, Denman, Field, and Manisty, J.J., and Pollock and Huddleston, B.B., dissented. Legal opinion widely differed as to whether under that statute *mens rea* had to be considered, and since that decision an eminent jurist has said, and I entirely concur in his remarks:—"If the Judges are to qualify the plain language of a statute by the introduction of limitations and provisoes as to which not a hint is to be found in the Act, statutory legislation must necessarily become hopelessly confused. If the Courts hold that Parliament cannot mean what Parliament says, then how is anyone to make sure as to what an Act really means?" The case is not reconcilable with many that had preceded it. It is not, however, conclusive, nor, do I think, of much value in this case, because, as I have already pointed out, of the three different provisions in our statutes dealing with the offence charged in this case. That this is a consideration that cannot be overlooked is acknowledged in the judgment of Wills, J., which was perhaps the most important judgment delivered in the case. He

1905
—
THE KING
v.
EWART.
—
Court of
Appeal.

1905
THE KING
v.
EWART.
Court of
Appeal.

said:—"Again, the nature and extent of the penalty attached to the offence may reasonably be considered." Can it be that the New Zealand Legislature has fixed three widely different penalties or punishments for one offence, though the language in the three separate statutes dealing with that offence is so different? The judgments of the majority of the Judges in *Tolson's case* pointed out that if the doctrine of *mens rea* were not applied, a woman who had taken all possible care to discover whether her husband was dead, who had received evidence of his death which she was entitled to believe, might nevertheless be convicted of a felony—and much was made of this aspect of the case. Another case relied on by counsel for the prisoner was that of *Sherras v. De Rutzen* (1895, 1, Q.B., 918). In that case it was said by Mr Justice Wright (at p. 921) that the presumption that *mens rea*—an evil intention, or a knowledge of the wrongfulness of the act—could be displaced either by the words of the Act creating the offence, or by the subject matter with which it dealt. Later in his judgment the same learned Judge said:—"No care on the part of the person charged could have saved him from a conviction, as it would have been easy for the constable to say he was not on duty."

The reasoning of the Judges in both these cases is entirely inapplicable to this case. The intention of the Act in this case is, to my mind, as plain, because of the different provisions, as it was held to be in the cases under the Imperial Food and Drugs Act of 1875, before referred to. In the cases under that Act the seller could not ascertain, without employing an analyst to find out, whether the foods sold were adulterated, and yet they were held liable, and that because the word "knowingly" did not appear. Surely this is a far stronger case. The seller could without any trouble have ascertained that the newspaper sold was immoral or indecent. And is not a law as necessary for preventing the sale of literature morally poisonous, as the sale of bread containing alum, or beer containing arsenic, or milk with

water in it? There is a considerable analogy between this case and the cases under "The Food and Drugs Act, 1875." It is an offence at common law, and it is said to be a nuisance, to sell unwholesome food. *R. v. Stevenson*, 3, F. and F., 100; *R. v. Jarvis*, *ibid*, 108; and Coke's Institutes, Vol. IV., p. 261). In such cases *mens rea* had to be proved. "The Food and Drugs Act, 1875," has abolished this in England, and that without express words, but merely by not using the word "knowingly" or "wilfully." Indecent exhibits, etc., were also punishable as a nuisance. (*R. v. Sedley*, Sid., 168; 1, Keb., 620; *R. v. Camden*, 2, Camp., 89.) The Act under which the defendant has been indicted has omitted the word "knowingly," though, as has been pointed out, it has kept the word in the Criminal Code Act, where the common law was codified. Can it then be said that this Court can by interpretation add a proviso similar in language to Section 5 of the Food and Drugs Act, and allow a defendant to show that he did not know the contents of the paper he was selling?

I am of opinion that there is, considering the legislation on the subject, a plain intention on the part of the Legislature to repeal the maxim of *mens rea* which is generally applicable to all cases of crime. I doubt if in any statute a plainer indication can be found of the intention of the Legislature to displace the maxim of *mens rea*.

The other question to be determined in this case is as to whether evidence should have been allowed to be given that some of the matter alleged to be indecent were correct reports of judicial proceedings, and that the grosser details of the evidence had been suppressed. I am of opinion as to this question that it has been concluded by authority. In the case of *Steele v. Brannan* (41, L.J., M.C., 85), the exact point was decided. See also *Reg. v. Carlile* (1, Cox, C.C., 229), and *Reg. v. Hicklin* (L.R., 3, Q.B., 360). It is no answer to a charge of publishing indecent literature that the publication is the report of proceedings in a Court of law. Everyone knows that in a Court,

when certain offences are being investigated, evidence of immorality and indecency must be given, but it has never been held that this permits any person to publish what he has heard in a Court. Nor can it be said that if part of the matter published were a correct report, that would enable the jury to decide whether the matter published was decent or indecent. I am therefore of opinion that the evidence was properly rejected.

Nor can it be contended that the object of the publication, whether legitimate or illegitimate, could be given in evidence. The sole questions, in my opinion, that the jury had to determine were (1) whether the prisoner did sell the newspaper, and (2) whether the newspaper sold was indecent, immoral, or obscene. The jury found both these questions in the affirmative.

I am therefore of opinion that the conviction should be affirmed.

WILLIAMS, J.—The whole law relating to the doctrine of *mens rea* may be said to be contained in the judgments in the cases of *R. v. Prince* (L.R., 2, C.C.R., 154), *R. v. Tolson* (23, Q.B.D., 168), and *Sherras v. De Rutzen* (1895, 1, Q.B., 918). The rule is stated by Wright, J., in *Sherras v. De Rutzen*, “that 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.” That learned Judge then goes on to specify as isolated and extreme exceptions to the rule *Lolley’s case* (R. and R., 237), and *R. v. Prince*. But the later case of *R. v. Tolson* is inconsistent with *Lolley’s case*, and *R. v. Prince* is not really an exception to the rule, but merely shows what is necessary to constitute *mens rea*. Wright, J., then classifies the principal exceptions to the rule and says, “but, except in such cases

as these, there must in general be guilty knowledge on the part of the defendant, in order to constitute an offence.” The case of *R. v. Prince* shows that where a particular thing is forbidden by statute and a person intended to commit and did commit an immoral act, and in so doing unwittingly did the act forbidden by the statute, *mens rea* existed, although he did not intend to infringe the statute. The mere fact that the act is forbidden *simpliciter*, and that the statute does not expressly make it an ingredient of the offence that it should be done knowingly or wilfully, does not itself render the existence of *mens rea* unnecessary. That was expressly decided in the cases of *R. v. Tolson*, and *Sherras v. De Rutzen*. As was said by Wills, J., in *R. v. Tolson*, “the intention of the Legislature cannot be decided on simple prohibitory words, without reference to other considerations,” and he invokes the case of *R. v. Prince* as a direct and cogent authority for that proposition. That learned Judge says further, “that all circumstances must be taken into consideration which tend to show that the one construction or the other is reasonable, and amongst such circumstances it is impossible to exclude the consequences.” But where an act is made an offence by statute, and the statute does not expressly make wilfulness or knowledge an ingredient of the offence, the cases referred to in the judgment of Wills, J., in the *Queen v. Tolson*, and that case itself, and also the case of *Sherras v. De Rutzen*, show that the burden of proof is shifted, and that it makes it necessary for the defendant to show matter of excuse, and to negative the guilty mind instead of its being necessary for the Crown to show the existence of the guilty mind. The general rule was stated by Brett, J., in *R. v. Prince*, that “it would seem that there must be proof to satisfy a jury ultimately that there was a criminal mind or *mens rea*, in every offence really charged as a crime. In some cases the proof of the committal of the acts may, *prima facie*, either by reason of their own nature, or by reason of the form of the statute, import the proof of the *mens rea*. But even in these cases it is open to the prisoner to rebut the

1905
THE KING
v.
EWART.
Court of
Appeal.

1905.
—
THE KING
v.
EWART.
—
Court of
Appeal.

prima facie evidence, so that, if in the end the jury are satisfied that there was no criminal mind, or *mens rea*, there cannot be a conviction in England for that which is by the law considered to be a crime? In that principle, according to Stephen and Hawkins, J.J, in *R. v. Tolson*, all the Judges in *R. v. Prince* concurred, although they differed in the application of it to the particular case. In the present case, therefore, although the act is made an offence without qualification, yet if the defendant can show honest ignorance of what he was doing, he is entitled to be acquitted unless the case comes within some class of exception similar to those mentioned by Wright, J., in *Sherras v. De Rutzen*, or unless there is something in the scope of the enactment itself beyond the mere absence of qualification, to make it an exception to the rule. Revenue cases are a recognised exception. Revenue statutes are for the protection of the revenue. If the effect of a prohibited act is injurious to the revenue, the fact that it was done by mistake or accident is immaterial. Cases where, although the proceeding is criminal in form, it is really only a summary mode of enforcing a civil right, are also an exception. Such are unintentional trespass in pursuit of game, and unconscious dramatic piracy. So also are some public nuisances, the reason being as stated by Mellor, J., in *R. v. Stephens*, that though the proceeding is in point of form of a criminal nature, yet in substance it is in the nature of a civil proceeding. Then there are offences which are not criminal in any real sense. Such are cases under the revenue statutes already referred to, under the Lunatics Act, and under several other statutes, which make penal acts which do not as a rule or of necessity involve moral wrongdoing, but which in the public interest are prohibited. Of these the Adulteration Acts and the Acts relating to public health are those which it is sought to apply by analogy to the present case. The objects of these acts is to protect purchasers and to conserve the public health. As was said by Blackburn, J., in *Fitzpatrick v. Kelly* (L.R., 8, Q.B., 337), "the

sale of an adulterated article as unadulterated may well be made punishable without knowledge on the part of the seller, for a very little care would enable a tradesman to ascertain if he wishes to avoid all danger that the articles he sells are not adulterated, or he may, if he likes, proclaim that he does not sell unadulterated articles, and then, unless they are adulterated to his knowledge, so as to be injurious to health, he would be safe." If a tradesman sells adulterated articles or tainted meat, then, whether he is or is not aware of the adulteration or taint, the purchaser is in fact defrauded, and the public health is endangered. Apart from legislation, it is the duty of a tradesman to ascertain that before he delivers an article of food to a customer it is an article of the kind asked for by the customer, and fit for food. If he fails in that duty, and the customer is injured, the tradesman is civilly liable, however innocent. There is nothing unreasonable for the purpose of protecting purchasers, and of preserving the public health, to clothe what is in most cases already a civil wrong with penal consequences. Both the Adulteration Acts and the Public Health Acts are for the regulation of trade, and stand, in my opinion, on the same footing as municipal regulations. I think the present case does not come within any class of the recognised exceptions to the rule which was mentioned by Wright, J., in *Sherras v. De Rutzen*. In none of the excepted cases is criminality or immorality necessarily involved. There is, for instance, nothing morally wrong in receiving more than two lunatics in a house not duly licensed, as was the case in *R. v. Bishop* (5, Q.B.D., 259). The offence was in the strictest sense *malum prohibitum* only. The supreme object of the Lunatics Act was to protect lunatics, and the morality or otherwise of the act prohibited is beside the question. So, also, the supreme object of the Adulteration and Public Health Acts is to protect the public and the public health. The act of selling adulterated articles or tainted meat may or may not in any particular case be immoral, but the object of these statutes is not to punish immorality, but to regulate trade, and to

protect the public from unwholesome food. The mental attitude of the person doing the prohibited act is therefore immaterial. The sale of adulterated articles or tainted meat is not necessarily or even presumably an immoral act, because everybody knows that in the ordinary course of business a trader may be perfectly unaware of the existence of the defect. The object, however, of the Offensive Publications Act is not to regulate trade nor to protect the public health, but to prevent and punish acts which are in themselves of a highly immoral and disgraceful nature. No doubt the statute is also for the purpose of preventing the corruption of public morals, and it is true that if obscene matter is sold or distributed by accident or mistake, the injury to the morals of those who read it is the same as if it had been distributed intentionally. But the object of the statute is to protect the public morals by the prevention and punishment of a series of immoral acts. The majority of the acts mentioned in Section 3 are of a kind in which the mental element of knowledge can hardly be imagined to be absent, and I think the terms of the section connote the mental element of knowledge as an ingredient of the offences specified. It is assumed that the offender must be aware of what he is doing. The acts forbidden are all on the face of them grossly immoral, and the essence of them is their immoral character. It is because they are immoral that they are prohibited. If the essential part of a prohibited act is its immorality, there must, in my opinion, be some immoral mental condition on the part of the perpetrator to justify a conviction. I do not think that because Sub-section 1 of Section 24 of "The Police Offences Act, 1884," uses the word "wilfully" in respect to similar offences, that the omission of that word in the Act of 1892 negatives the requirement of *mens rea* in offences under that Act. The Act of 1892 has a wider scope than the earlier Act. Apart from the considerations already referred to, there is a direct indication in Section 3 that *mens rea* is a necessary ingredient in the offences created by it. The sale and distribution is prohibited not only

of matter which is manifestly of an indecent, immoral or obscene nature, but of matter which the Court shall be satisfied is intended to have an indecent, obscene, or immoral effect. The question of intention, that is, of the existence of a mental condition on the part of the offender, is thus expressly recognised. If a person cannot exculpate himself by showing honest ignorance, a man morally innocent might be convicted of an offence of a most disgraceful kind, and be liable to be imprisoned for it. If he received only a nominal sentence, the conviction itself would be a lifelong stigma. Imagine such a man a witness in some case afterwards, and under cross-examination: "Were you not on such a day convicted of distributing obscene literature?" "Yes, but I did not know that it was obscene." Then counsel, sarcastically: "Didn't you, indeed, a very likely story." Every bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop. It would be altogether unreasonable to demand so near an approach to omniscience. A newspaper agent who received for distribution newspapers from all parts of the world would be responsible for the contents of every one of them. Fine or imprisonment would be his lot if any one of them happened to contain a quack doctor's advertisement for the cure of nervous debility. So would every newspaper runner who sold the paper. A person who was employed to distribute circulars closed and addressed would be guilty of the offence although he did not know, and had no reasonable ground to suspect that they were of an indecent character. No doubt an innocent agent cannot be found guilty of a criminal offence, but if distribution, apart from knowledge itself, constitutes the offence, the agent who distributes is not innocent. Exactly similar considerations apply to Sub-section 5 of Section 82 of "The Post Office Act, 1900." That sub-section makes it penal, without any qualification, to post any postal packet containing indecent or obscene matter. A bishop who was obliging enough to post such a packet for a stranger, would have to be convicted if knowledge

1905
THE KING
v.
EWART.
Court of
Appeal.

1905
THE KING
v.
EWART.
Court of
Appeal

were immaterial. In my opinion, therefore, honest ignorance is a defence to the charge in the present case. The act forbidden having been done, it lay upon the defendant to show that he did it unwittingly, and without a guilty mind. If he knew the publication contained indecent matter, or if he suspected that it contained such matter, and abstained from ascertaining whether it did or not, the tainted mind would be present. It would be, however, competent for him to establish its absence, and if the jury were satisfied upon the evidence that it was absent, he was entitled to be acquitted, and I think the jury should have been so directed. As to the other questions raised, I agree with His Honour. I think, therefore, the conviction should be quashed, and that there should be a new trial.

EDWARDS, J.—That the common law doctrine that to constitute crime there must be a guilty mind, applies also to offences created by statute, unless it can be deduced from the statute itself that the intention of the Legislature was to exclude the application of that doctrine, appears to me to be firmly established by authority. That the true rule for the determination of the question whether or not the application of the common law doctrine is excluded by the statute under consideration in each case is to consider the scope and object of the statute, and the various circumstances which may make the application of the doctrine reasonable or unreasonable, as well as the language of the particular statute under consideration, appears to me to be equally firmly established. In *Reg. v. Prince* (2, C.C.R., at p. 177), Lord Bramwell, speaking for himself and seven other Judges, said:—"I say it is a question of the construction of this particular statute in doubt, bringing thereto the common law doctrine of *mens rea* being a necessary ingredient of crime." In *Cundy v. Le Cocq* (12, Q.B.D., 210), Mr Justice Stephen said:—"Against this view we have had quoted the maxim that in every criminal offence there must be a guilty mind; but I do not think that maxim has so wide an application as it is sometimes

considered to have. In old times, and as applicable to the common law or earlier statutes, the maxim may have been of general application; but a difference has arisen, owing to the greater precision of modern statutes. It is impossible now, as illustrated by the cases of *Reg. v. Prince* (2, C.C.R., 154), and *Reg. v. Bishop* (5, Q.B.D., 259), to apply the maxim generally to all statutes, and the substance of all the reported cases is that it is necessary to look at the object of each Act that is under consideration to see whether and how far knowledge is of the essence of the offence created." In *Reg. v. Tolson* (23, Q.B.D., at p. 172), Mr Justice Wills said:—"Although *prima facie*, and as a general rule, there must be a mind at fault before there can be a crime, it is not an inflexible rule, and a statute may relate to such a subject matter, and may be so framed as to make an act criminal whether there has been any intention to break the law, or otherwise to do any wrong, or not. There is a large body of municipal law in the present day which is so conceived. By-laws are constantly made regulating the width of thoroughfares, the height of buildings, the thickness of walls, and a variety of other matters necessary for the general welfare, health, or convenience, and such by-laws are enforced by the sanction of penalties, and the breach of them constitutes an offence, and is a criminal matter. In such cases it would, generally speaking, be no answer to proceedings for the infringement of the by-law that the person committing it had *bona fide* made an accidental miscalculation, or an erroneous measurement. The Acts are properly construed as imposing the penalty when the act is done, no matter how innocently, and in such a case the substance of the enactment is that a man shall take care that the statutory direction is obeyed, and that if he fails to do so, he does so at his peril. Whether an enactment is to be construed in this sense, or with the qualification ordinarily imported into the construction of criminal statutes, that there must be a guilty mind, must, I think, depend upon the subject matter of the enactment, and the various circum-

stances that may make the one construction or the other reasonable or unreasonable." The learned Judge then goes on to cite a number of cases in which, the same kind of language being used, a guilty mind has been held necessary in some cases, unnecessary in others.

There are, therefore, two classes of cases under the statute law—(1) Those in which, following the common law rule, a guilty mind must either be necessarily inferred from the nature of the act done, or must be established by independent evidence. (2) Those in which, either from the language, or the scope and object of the enactment to be construed, it is made plain that the Legislature intended to prohibit the act absolutely, and the question of the existence of a guilty mind is only relevant for the purpose of determining the *quantum* of punishment following the offence. There is also a third class in which, although, from the omission from the statute of the word "knowingly" or "wilfully," it is not necessary to aver in the indictment that the offence charged was "knowingly" or "wilfully" committed, or to prove a guilty mind, and the commission of the act in itself *prima facie* imports an offence, yet the person charged may still discharge himself by proving to the satisfaction of the tribunal which tries him that in fact he had not a guilty mind.

This class of cases is referred to in the judgment of Lord Esher (then Mr Justice Brett) in *Reg. v. Prince* (2, C.C.R., at pp. 161-163, in these words:—"In the same way the word 'knowingly' is used where the noxious character of the prohibited acts depends upon a knowledge in the prisoner of their noxious effects, other than the mere knowledge that he is doing the acts. The presence of the word calls for more evidence on the part of the prosecution, but the absence of the word does not prevent the prisoner from proving to the satisfaction of the jury that the *mens rea*, to be *prima facie* inferred from his doing the prohibited acts, did not in fact exist. In *Reg. v. Marsh* (2, B. and C., 717), the measure of the effect of the presence of the word "knowingly" is

explained. The information and conviction were against a carrier for having game in his possession contrary to the statute 5 Anne, c. 14, which declares that "any carrier having game in his possession is guilty of an offence unless it be sent by a qualified person." The only evidence given was that the defendant was a carrier, and that he had game in his waggon on the road. It was objected that there was no evidence that the defendant knew of the presence of the game, or that the person who sent it was not a qualified person. The Judges held that there was sufficient *prima facie* evidence, and that it was not rebutted by the defendant by sufficient proof on his part of the ignorance suggested on his behalf. The judgments clearly import that if the defendant could have satisfied the jury of his ignorance, it would have been a defence, though the word "knowingly" was not in the statute. In a word, that its presence or absence in the statute only alters the burden of proof. "Then as to knowledge, the clause itself says nothing about it. If that had been introduced, evidence to establish knowledge must have been given on the part of the prosecution; but under this enactment the party charged must show a degree of ignorance sufficient to excuse him. Here there was *prima facie* evidence that the game was in his possession as carrier. Then it lay on the defendant to rebut that evidence': Bayley, J. 'The game was found in his waggon employed in his business as carrier. That raises a presumption *prima facie* that he knew it, and that is not rebutted by the evidence given on the part of the defendant': Littledale, J. From these considerations of the forms of criminal enactments, it would seem that the ultimate proof necessary to establish a conviction is not altered by the presence or absence of the word 'knowingly,' though by its presence or absence the burden of proof is altered: and it would seem that there must be proof to satisfy a jury ultimately that there was a criminal mind, or *mens rea*, in every offence really charged as a crime. In some enactments or common law maxims of crime, and therefore in the indictments charging the committal of those crimes, the name

1905
THE KING
v.
EWART.
Court of
Appeal.

1905

THE KING
v.

EWART.

Court of
Appeal.

of the crime imports that a *mens rea* must be proved, as in murder, burglary, etc. In some the *mens rea* is contained in the specific enactments as to the intent, which is made part of the crime. In some the word 'feloniously' is used, and in such cases it has never been doubted but that a felonious mind must ultimately be found by the jury. In enactments in a similar form, but in which the prohibited acts are to be classed as a misdemeanour, the word 'unlawfully' is used instead of the word 'feloniously.' What reason is there why, in like manner, a criminal mind, or *mens rea*, must not be ultimately found by the jury in order to justify a conviction, the distinction always being observed that in some cases the proof of the committal of the acts may *prima facie*, either by reason of their own nature, or by reason of the form of the statute, import the proof of the *mens rea*? But even in these cases it is open to the prisoner to rebut the *prima facie* evidence, so that if in the end the jury are satisfied that there was no criminal mind, or *mens rea*, there cannot be a conviction in England for that which by the law is considered to be a crime."

In *Reg. v. Tolson* (23, Q.B.D., at pp. 194, 195), Mr Justice Hawkins said:—"As to the meaning of the term 'feloniously,' I do not think I can better define my understanding of it, when introduced into an indictment as descriptive of the act charged, than by saying that I look upon it as meaning that such act was done with a mind bent on doing that which is wrong, or, as it has been sometimes said, a guilty mind. As to this I may refer to Hawkins' P.C., Book 1, c. 25, s. 1, where it is said that the term 'felony' *ex vi termini* signifies '*quodlibet crimen felleo animo perpetratum*.' In support of this view a whole list of authorities might be quoted. I shall, however, content myself by citing the most recent of them, *Reg. v. Prince* (2, C.C.R., 154), in which most of the cases bearing on the subject are very carefully reviewed by the present Master of the Rolls, then Brett, J., whose language I cheerfully adopt as expressive of my own views touching the prin-

ciples of law which govern such questions as that before us." Mr Justice Hawkins then quotes certain passages from the judgment of Brett, J., which are included in the passage which I have already cited. He then proceeds:—"In this view of the law, so stated by Brett, J., all the other Judges, fifteen in number, before whom the matter was heard, practically acquiesced. They differed, however, in the application of the law to the facts of the particular case, Brett, J., thinking that there was in the prisoner no such *mens rea* as to constitute a crime, the rest of the Court thinking that the act of abduction of which the prisoner was guilty, being a morally wrong act, afforded abundant proof of his criminal mind."

Several cases may be cited in which the principles so laid down have been acted upon. In *Ilearne v. Garton* (2, E. and E., 16; 28, L.J., M.C., 216), the respondents were charged with sending oil of vitriol by the Great Western Railway without marking or stating the nature of the goods. By 20 and 21 Vict., c. 43, s. 168:—"Every person who shall send or cause to be sent by the said railway any oil of vitriol, shall distinctly mark or state the nature of such goods, on pain of forfeiting," &c. The respondents had in fact sent oil of vitriol unmarked; but the Justices found that there was no criminal knowledge, but that on the contrary the respondents acted under the full belief that the goods were correctly described, and had previously used all proper diligence to inform themselves of the fact. They refused to convict. In that case, as in this the respondents did in fact the act prohibited. The Court upheld the decision of the Magistrates, holding that the statute made the doing of the prohibited act a crime, and that therefore there must be a criminal mind, which there was not. The decision proceeded upon the fact that the presumption that the respondents knew the contents of the packages containing vitriol had been rebutted.

In *Sherras v. De Rutzen* (1895, 1, Q.B., 918), it was held by Day, J., and Wright, J., that the

effect of the omission of the word "knowingly" from one section of the Act creating the offence (that word appearing in other sections of the same Act) was not to render the question of a guilty mind immaterial, but to cast upon the person charged the burden of proving that he had not knowledge of the fact which made the act an offence.

The question then is, within which of these three classes of cases does the present case fall?

Is the offence charged against the prisoner one to establish which it is necessary, following the common law rule, not only to prove that the prisoner sold printed matter of an indecent, immoral or obscene nature, but also to prove that the prisoner knew what he was selling?

Or is the sale of printed matter of an indecent, immoral, or obscene nature made by the statute the complete offence, so that the existence of a guilty mind is immaterial, and that he who sells printed matter must do so at his peril?

Or is the sale of printed matter of an indecent, immoral or obscene nature an act which in itself *prima facie* imports a guilty mind, but as to which the presumption arising from the doing of the act may be rebutted by evidence adduced by the person charged?

The prosecution is under "The Offensive Publications Act, 1892," Section 3. The offence charged is that the prisoner sold certain printed matter, to wit, a newspaper, which printed matter was as to parts thereof of an indecent, immoral and obscene nature.

The enactment under consideration is, in the main, copied from the Imperial statute, 52 and 53, Vict., c. 18, intituled "The Indecent Advertisements Act, 1889." The Imperial statute, as its title imports, is directed against acts the mere doing of which would in most cases infer a guilty mind in those who commit them. In addition to the acts prohibited by the Imperial statute the Act of 1892 has brought within its prohibition any

person who sells, offers, distributes or shows any picture or printed or written matter, which is of an indecent, immoral or obscene nature, or which the Court shall be satisfied is intended to have an indecent, immoral or obscene effect. The prohibition of the Imperial statute in this respect—repeated also in the Colonial Act—is directed against the offender who delivers, or attempts to deliver, or exhibits to any inhabitant, or to any person being in or passing along any street, road, public highway, or footpath, or who throws down the area of any house, or exhibits to public view in any house or shop, any picture or printed or written matter, which is of an indecent, immoral, or obscene nature. There are other offences mentioned in both the Imperial and the colonial Act, but they are all of such a nature as in most cases to involve the inference of a guilty mind in those who commit them. If knowledge is not an ingredient of the crime, it is, however, quite possible, even under the Imperial Act, to commit an offence against the statute without a guilty mind. If, for example, a quack doctor should enclose his indecent advertisements in envelopes, or should fasten them down at the edges, and should entrust them to a messenger, with directions to throw them down the areas in a particular locality, the messenger obeying these instructions would certainly commit an act within the prohibition of the statute. Could the messenger under such circumstances be convicted under the statute, if he could show to the satisfaction of the jury that he did not know the nature of the matter he was distributing, and that he had no reason to suspect that it was of an indecent, immoral, or obscene nature? Again, if the quack doctor enclosed indecent advertisements in envelopes, addressing them by name to various persons at their houses, and directed his messenger to deliver the envelopes, having all the appearance of letters, at the houses of the persons to whom they were addressed, could the messenger, though he established that he was entirely innocent of knowledge, or of any intention to break the law, be so convicted?

1905
—
THE KING
v.
EWART
—
Court of
Appeal.

1905
THE KING
v
EWART.
Court of
Appeal

As to the additional acts prohibited by the colonial statute, it is highly probable that they might be done in complete ignorance, and with an innocent mind. In the present case, for example, if the prisoner had had a dozen subscribers to the newspaper in question, and he had wrapped a dozen copies of the objectionable issue in ordinary newspaper wrappers, addressed to his subscribers, and had directed his shop boy to deliver the papers so addressed, there can be no doubt that the lad who distributed the papers accordingly would come within the very words of the statute, although he was acting in complete ignorance of the contents of the papers, and in the ordinary discharge of his duty.

It is therefore, I think, plain that the offence charged in the present case does not come within the first class of cases to which I have referred. The doing of the act does not necessarily show a guilty mind, so as to dispense with proof of knowledge of the contents of the paper. On the other hand, the authorities to which I have referred show conclusively that the omission of the word "knowingly" relieves the prosecutor from proving that the prisoner knew, or must be deemed to have known, the contents of the paper which he is charged with selling.

Nor, in my opinion, does the case come within the second class of cases. Bearing in mind the consequences which such a construction would involve, I cannot think that this case is one as to which the Legislature has made it plain that all persons must take care that the statutory direction is obeyed, and that he who fails to do so fails at his peril, as in *Reg. v. Prince* (2, C.C.R., 154), in which the act done was morally wrong, apart from the statute, and in the by-law cases, to which the same rule applies, *Reg. v. Tolson* (23, Q.B.D., per Wills, J., at p. 172), the obvious reason being that breaches of by-laws of the kind referred to if not punishable in any event, would result in a permanent interference with general schemes for the public welfare, health, or convenience. Nor

does it come within the principle upon which such cases as *Cundy v. LeCocq* (12, Q.B., 210), and *Coppen v. Moore* (1898, 2, Q.B., 306), have been decided. These cases rest upon the principle that those who carry on trades must, for the protection of the public, be held liable for the acts of their servants done within the scope of their employment.

The case does, I think, clearly come within the third class of cases to which I have referred. The act charged is, I think, clearly an act which, upon the true construction of the statute, is made in itself *prima facie* to import a guilty mind, but as to which the presumption arising from the doing of the act may be rebutted by evidence adduced by the person charged. This, I think, is the result of the authorities, and it is one which will ensure justice being done in all such cases.

I desire to guard myself from appearing to suggest that a person charged with this offence can in all cases discharge himself from the consequences simply by swearing that he did not know the contents of what he was selling. In any case it will be for the jury to decide whether they will believe the prisoner's evidence upon that point or not. Further, I think that if the prosecution can in any such case establish that any particular newspaper or serial publication has acquired the reputation of publishing indecent, immoral or obscene matter, and that nevertheless the person charged has sold any issue of that paper or serial publication which does contain indecent, immoral, or obscene matter, the jury would be justified in inferring, and indeed ought to infer, that if the person charged did not take the precaution to see that what he sold did not contain such matter, it was because he wilfully abstained from making an inquiry which it was his duty to make. It may, I think, be safely laid down that it is the duty of a news-vendor to know at least the general character of the newspapers and serial publications which he sells, and either to abstain altogether from selling those which in their previous issues have acquired

a doubtful character, or to ascertain with respect to each copy that he sells that it contains nothing indecent, immoral, or obscene.

In my opinion the case, as it stood, ought to have been left to the jury, with the direction that if they believed that the prisoner was honestly ignorant of the contents of the newspaper in question, then they should acquit him. The prisoner is therefore, in my opinion, entitled to a new trial, and there should be an order accordingly.

I agree that the evidence tendered to show that the obscene publication was a *bona fide* report of proceedings in a Court of Justice was not admissible in the prisoner's defence. Upon this question the case of *Steele v. Brannan* (L.R., 7, C.P., 261), is a conclusive authority.

COOPER, J.—I am unable to agree with the conclusions arrived at by the majority of the Court in this case. Mr Justice Edwards has, in discussing in his judgment the application of the doctrine of *mens rea*, classified the cases in which the doctrine has been considered into three classes. This classification I agree with, but I differ from the majority of the Court upon the question under which one of these classes the present case comes. In my opinion it is within the second class, namely, that class of cases in which, from the language and the scope and object of the enactment to be construed, it is plain that the Legislature intended to prohibit the act absolutely, and in which the question of the existence of a guilty mind is only relevant for the purpose of determining the *quantum* of punishment following the offence.

There is nothing in the language of Section 3 of "The Offensive Publications Act, 1892," requiring proof on the part of the Crown that the person charged with a breach of this section shall have had knowledge of the indecent, immoral, or obscene nature of the printed or written matter in respect of which the charge is laid, nor is there any provision in the statute enabling such person

to escape from the consequences of his act by proof on his part of want of knowledge.

Can we then read into the Act of 1892 a proviso that it shall be a sufficient defence to a charge under Section 3, if the person charged shall establish ignorance on his part of the indecent nature of the matter.

In my opinion, this Act belongs to the same class as the Acts regulating the sale and supply of food to the public. The Adulteration Acts, and those provisions of the Public Health Act upon which the Courts have decided that *mens rea* is not an ingredient in the offence, and that proof of want of knowledge, or even of the entire absence of neglect or moral blame, does not exculpate a person charged with the offence, if he has in fact done that which the statute prohibited, were passed for the purpose of protecting the physical health of the people, and to prohibit the sale of impure food. "The Offensive Publications Act, 1892," was passed to protect the moral health of the people, and to prohibit the sale or dissemination among the people of impure literature.

In *Mallinson v. Carr* (1891, 1, Q.B., 48), the question of the liability of a person on whose premises unsound meat was found was under consideration. Section 116 of "The Public Health Act, 1875," made it an offence for any person to have in his possession or upon his premises unsound meat intended for human food. The section did not contain the word "knowingly." Although in this case the question of *mens rea* was not directly raised, it was incidentally, and Stephen, J., made the following observations:—"It was argued that this construction would render liable to conviction persons who were ignorant of the fact that the meat found in their possession was unfit for human food, and it was said to be an unreasonable intention to impute to the Legislature. I do not think that is a proper way to interpret an Act of Parliament. The true rule is to take the words in their ordinary and natural sense, and to construe them accord-

1905.

THE KING

v.

EWART.

Court of
Appeal.

1905

THE KING
v.
EWART.
Court of
Appeal

ingly, without reference to any supposed intention of the Legislature which cannot be gathered from the natural and ordinary meaning of the words. The short result is that a person in possession of meat intended for human food, and unfit for human food, is liable to conviction, and for my own part I think he is liable whether he knows or does not know that the meat was unfit for human food."

In *Blaker v. Tillson* (1894, 1, Q.B., 345), a person convicted of the same offence appealed on the ground of the absence of *mens rea*. Lord Coleridge said:—"The object of the Act is that people shall not be exposed to the danger of eating and drinking poison, and that anything which is likely to injure life shall not be sold." Referring to the argument that knowledge of the unsoundness of the meat was necessary to constitute the offence, he expressed an opinion that to hold so would be to render the Act of Parliament nugatory, "for," he added, "it would then always be open to the defendant to say that he was not aware of the condition of the article sold, and that it was not his duty under the statute to make inquiries upon the point, with the obvious result that a man might in practice go on selling meat which was positively injurious, without the possibility of getting a conviction against him."

The cases under the Adulteration Acts also clearly establish that where an act is prohibited, and the statute containing the prohibition does not make *scienter* an ingredient in the offence, a person doing the prohibited act is liable to be convicted, even though he was ignorant of the nature of the act done, and was not guilty of negligence, and was entirely free from moral blame. *Parker v. Alder* (1890, 1, Q.B., 20), is one of the latest of these cases. There Mr Justice Wills said:—"The legislation on the subject was intended to be drastic, and the offence was created quite independent of the moral character of the act"; by which he meant the state of mind of the person committing the act. Lord Russell con-

sidered that a person committing a breach of the statutes in question (The Food and Drugs Acts) could not be relieved from the responsibility, even though he established affirmatively ignorance on his part of the fact that the goods sold were adulterated. He said that to allow such a defence would open a very wide door for evading the beneficial provisions of the legislation. Both the Judges considered that proof of the innocent conduct of the defendant was only relevant in mitigation of penalty. In my opinion, these authorities are applicable to the present case.

I have carefully examined the provisions of Section 3 of "The Offensive Publication Act, 1892," and in my opinion there is nothing in the language used which indicates that the Legislature had any other object in view than to prohibit absolutely the sale and distribution of immoral literature. I think that the language used establishes that the intention of the Legislature was to cast upon the person selling or distributing immoral literature the duty to ascertain the nature of the publication. This view is strengthened by the fact that the provisions of "The Police Offences Act, 1884," and which are not repealed by the Act of 1892, do not provide for the infliction of a fine in lieu of imprisonment, and require *mens rea* on the part of the person charged, whereas the Act of 1892 enables the Magistrate to inflict a fine, but omits any such words as "wilfully or knowingly," in the description of the offence. The view I take is not, in my opinion, in conflict with *Reg. v. Tolson* (23, Q.B.1. 168). The crime of bigamy in England is a felony. Every felony is accompanied by an evil intention, and as Hawkins, J., states in his judgment in that case the definition of the crime in the statute as a felony means that the act must be done by a person with a mind bent on doing that which is wrong, or, in other words, with a guilty mind. The case of *Sherras v. De Rutzen* (1895, 1, Q.B., 918), even if we were bound to follow it, does not, in my opinion, conclude this question in favour of the defendant. I read the opinion of Mr

Justice Wright, as governed by the introductory words of his judgment, in which he admits that the presumption that *mens rea* is an essential ingredient in every offence 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. Nor does the fact that the law may act harshly in cases where it is contended that the element of *mens rea* has been excluded necessarily enable the Court to accept the argument for the defendant. In *Reg. v. Woodrow* (15, M. and W.), Pollock, C.B., in referring to this fact said:—"There can be no doubt that every stringent law which is made for the purpose of working some great public good would be attended with frequent cases of hardship and sometimes with cases apparently of great injustice. That, however, is a matter for the consideration of those who make the laws, or of those who call for the execution of them."

The view I take is shortly this.

Prior to the passing of the Act of 1892 the sale or distribution of immoral literature was punishable only under "The Police Offences Act, 1884," and in order to obtain a conviction, it was necessary to prove that the act was "wilfully" done. It was also punishable as a misdemeanour at common law, and "knowledge" on the part of the defendant of the nature of the literature had to be shown. The onus of ascertaining whether the literature was indecent or not was not thrown upon the vendor or distributor, and the moral health of the people suffered. The Act of 1892 was then passed to conserve the moral health of the people, and to prevent in every possible way the sale or distribution of impure literature among the people, and contains an absolute prohibition. The element of "knowledge" is eliminated, and the Act makes it an offence to sell or to deliver to any person any written or printed matter of an indecent or immoral nature. It contains no matter of defence upon which the breach of this condition can be excused, and we ought, in my

opinion, to construe the words of the statute in their ordinary and natural sense, and I do not see why we should introduce into its provisions exceptions which have not been enacted, and which cannot, I think, be inferred from the natural and ordinary meaning of the language.

In my opinion the Legislature had in view that a very great and increasing public evil existed in the dissemination of impure literature among the people of the colony, and that the law as it stood up to 1892 was inefficient in checking the evil. I think that the Act of 1892 shows that for the purpose, in the public interest, of stopping the circulation of this literature, the Legislature deliberately excluded any defence based upon *scienter* which was available under the prior statute, and intended to throw upon the vendor or distributor of literature the onus of ascertaining its nature; and, recognising that in some cases the prohibition might be broken through inadvertence or ignorance, or without moral blame, intended to give to those administering the law the fullest discretion as to the minimum *quantum* of penalty which should be inflicted in cases where a prosecution was instituted under the Act of 1892.

In the present case, as the Jury have found that the publication in question was indecent, and that the defendant in fact sold it, the essential elements constituting the offence are present, and the conviction should be upheld.

CHAPMAN, J.—I have come to the conclusion that this conviction cannot be sustained.

It is always open to question to which class a penal statute belongs, whether to that class which relates to acts for which the accused is to be held responsible in all events, or to that class which relates to acts for which he is only to be held responsible if he is found to have done the thing complained of with knowledge. There are many authorities on this subject, and the tendency in

1905
THE KING
v.
EWART.
Court of
Appeal.

1905
THE KING
v
EWART—
Court of
Appeal.

cases of modern statutes, no doubt, is to hold that a person who does the thing forbidden is responsible in any event. There is now recognised a third class of cases in which the person charged may be convicted without any further proof of knowledge than is inferred from his doing the forbidden act, but with respect to which he is entitled to give evidence negating knowledge. In *Hearne v. Garton* (28, L.J., M.C., 216) it was held that some proof of guilty knowledge was necessary before a person could be convicted under a statute providing that every person who shall send, or cause to be sent, by the Great Western Railway any aquafortis, oil of vitriol, gunpowder, or other goods of a dangerous quality, shall give notice of the nature of such goods. The person prosecuted was a forwarding agent, and Lord Campbell, C.J., asks the pertinent question:—"Can you say that they were bound to unpack the goods? The question is whether the Legislature intended that a man should be liable who sent goods with the most perfect innocence." Erle, J., in his judgment, draws the well known distinction, and says:—"Now, I do not say that it is not a criminal proceeding, but I rather thought that the enactment was in the nature of a protective clause, providing that if any one sent destructive articles by the railway, he should be liable . . . but if this proceeding is a criminal one, which I do not deny, I cannot say that they are liable unless they had knowledge of the dangerous nature of the goods." Exculpatory evidence was given, and was believed by the Justices. Upon this Lord Campbell, C.J., says:—"It appears that not only was there an absence of all proof of guilty knowledge on the part of Garton and Stone, but the presumption of such guilty knowledge, if there be any, was rebutted, for they proved that they were imposed on by Nicholas . . . They have rebutted the presumption that they knew the nature of the goods which were sent, and have proved that there was no negligence on their parts, for they used all diligence by making enquiries to ascertain the contents of the packages." The ground on which that case was decided was that

the wording of the statute was such as to make the act complained of criminal in its nature, and that this rendered proof or presumptive evidence of *mens rea* a necessary ingredient. I have quoted Lord Campbell's observations at length, because they seem to me to afford a key to this case. I do not think that a statutory offence, in which imprisonment may be awarded as under this statute, can be regarded otherwise than as a criminal proceeding in the fullest sense. I come to the conclusion, however, that the Legislature did not intend that a man should be free to sell what he chose, so long as it was not affirmatively proved that he actually knew the contents of the particular newspaper which he is charged with selling.

Mr Skerrett suggested that any distinct warning that a named periodical publication sometimes contained indecent matter would suffice to put a person on his guard against selling it without examination. I go further, and hold that a vendor of miscellaneous publications ought to be on his guard against the risk of selling such as contain indecent matter. I cannot, however, think that the statute was intended to place in the hands of a Magistrate or any other Court the power to sentence a man for a term of imprisonment who might be able to satisfy him or a jury that he received and sold a book, or paper, in the belief, well founded so far as he is concerned, that it was a perfectly proper publication. If it were otherwise, quite unexpected results might occasionally ensue. Though it is quite reasonable that a man should be held *prima facie* responsible for whatever he sells in his shop, I cannot think that he is to be precluded from showing that with all care on his part, something pernicious has been accidentally sold. In the same way, I do not think that it was intended that a newspaper runner was to be convicted when he receives a parcel for sale and instantly proceeds in all innocence to sell the papers without any real means of knowing the pernicious character of the one he is charged with

selling. I think that the case cited justifies this conclusion. It is a case which is still fully recognised as giving a correct statement of the law. Cases like *Cundy v. Le Cocq* (13, Q.B.D., 207) stand on a somewhat different footing. This view is borne out by the authorities. The judgment of Wright, J., in *Sherras v. De Rutzen* (1895, 1, Q.B., 918), refers to cases in which proof of the principal fact is sufficient *prima facie* evidence of the defendant's knowledge of its quality, in which, however, he ought to be permitted to show that he was wholly innocent. There was a strong reason for holding in *Cundy v. Le Cocq* that the publican was absolutely responsible for the sale of liquor to a drunken man, which places that class of case on a different footing. The very nature of his calling renders such a disciplinary measure almost necessary.

I do not think that a comparison of this statute with Section 24 of "The Police Offences Act, 1884," tends to a different conclusion. That section refers to matters done in a public place, or otherwise in public, save the first words, "Wilfully offers for sale or for distribution." This statute covers the same and a great deal more ground. The Criminal Code being a subsequent enactment, cannot assist us in interpreting this statute.

The result, in my opinion, is that the jury ought to have been told that, if they were satisfied that he believed on proper grounds that the publication was an innocent one, he was entitled to be acquitted.

I think there should be a new trial.
