A football club held a smoke concert in licensed premises, having previously obtained the permission of the police to continue the entertainment after 10 p.m. on condition that no liquor was consumed after that hour. The appellant, the licensee of the hotel, remained in the room till shortly before 10 p.m., when he was obliged to leave in order to attend to customers in the bar owing to the sudden illness of his barman. Before he left he informed the vice-president of the club that no liquor was to be consumed after 10 p.m., and the vice-president undertook to see that these instructions were carried out. The Magistrate found that liquor had been consumed after 10 p.m., and convicted the appellant of an offence under section 190 of the Licensing Act, 1908, of allowing liquor, although purchased before, to be consumed on the licensed premises after closing-hours.

Held, That the conviction must be quashed, there being no evidence of knowledge or connivance on the part of the appellant. Bailey *v.* Pratt followed (20 N.Z. L.R. 758).

APPEAL on point of law, under the provisions of the Justices of the Peace Act, 1908, from a conviction of the appellant by W. G. Riddell, Esq., S.M., at Wellington, of an offence against the provisions of section 190 of the Licensing Act, 1908. The facts are fully stated in the judgment of Cooper, J.

Bell, K.C., and *G. H. Fell*, for the appellant, cited the following cases: Emary *v.* Nolloth ([1903] 2 K.B. 264); McKenna *v.* Harding (69 J.P. 354); Somerset *v.* Hart (12 Q.B.D. 360); Somerset *v.* Wade ([1894] 1 Q.B. 574); Sherras *v.* De Rutzen ([1895] 1 Q.B. 918); Massey *v.* Morriss ([1894] 2 Q.B. 412); Weiss *v.* Green (26 N.Z. L.R. 945.)

Ostler, for the respondent, referred to section 190 of the Licensing Act, 1908, section 61, subsection 1, of the Licensing (Consolidated) Act, 1910 (10 Edw. VII and I Geo. V, c. 24); and Paterson's Licensing Acts (21st ed. p. 556); and cited Thompson *v.* Greig (34 J.P. 214); Pearce *v.* Gill (41 J.P. 742); Bailey *v.* Pratt (20 N.Z. L.R. 758); Jull *v.* Treanor (14 N.Z. L.R. 513); Ireland *v.* Connolly (21 N.Z. L.R. 314).

Bell, K.C., in reply, stated that Bailey *v.* Pratt (20 N.Z. L.R. 758) was decided before Emary *v.* Nolloth ([1903] 2 K.B. 264.)

Cur. adv. vult.

COOPER, J.:—

The appellant, the licensee of the New-Zealander Hotel, Wellington, was convicted by the Stipendiary Magistrate, Wellington, on the 17th of August, 1910, upon an information laid by the respondent charging the appellant with allowing liquor purchased before the hour of closing of the hotel to be consumed on the licensed premises after the hour of closing.

The facts stated by the Magistrate are that on the 8th of August the Ramblers Football Club held a smoke concert in the dining-room of the hotel; that prior to that date the representatives of the club inquired from the Inspector of Police, Wellington, whether the club would be allowed to continue its concert after 10 p.m., and that they were informed by the Inspector that so long as the meeting was orderly no proceedings would be taken against any of those present after the hour of 10 p.m. for being on licensed premises without lawful excuse, but that no liquor must be consumed after 10 p.m.; that the concert commenced at 7.30 p.m., and the proceedings were of an orderly character, and a number of those present were total abstainers; that the appellant (the licensee of the hotel) remained for some time in the dining-room where the smoke concert was being held, and intended to remain there until 10 o'clock and after for the purpose of preventing any liquor being consumed after that hour; that 10 gallons of beer and two bottles of whisky were taken into the dining-room before the concert commenced, but no liquor was taken in there afterwards; that during the evening the appellant was called from the dining-room in consequence of the fact that his barman had taken ill, and had been compelled to leave the hotel and go home, and that it was necessary for some person to go into the bar, and the appellant was the only person available; that before leaving the room the appellant informed Harry Waters, one of the representatives and the vice-president of the club, and a promoter of the concert, of his reason for having to leave the room, and also informed Waters that no liquor must be consumed after the hour of 10 o'clock; that Waters undertook and promised to see that no liquor was served after that hour; that the appellant had no servant available, after his barman became ill, to station in the dining-room; that it is the custom for police officers in Wellington to visit the bars of the various hotels in Wellington shortly after 10 o'clock, and it is necessary that immediately after 10 o'clock the bar should be cleaned up and the glasses and bottles removed, and that this work takes half an hour or so to perform, and the appellant on the occasion in question remained in the bar for the purpose of doing such work; that at 10.35, just as the appellant was completing his work in the bar, Sergeant Kelly and a constable knocked at the door of the hotel, and were at once admitted; that after inspecting the bar they went into the dining-room and saw on the table several glass jugs containing beer, and also a number of glasses containing aerated waters and some containing beer, and that in some cases there was only a small quantity of beer in the glasses; that the police remained a very short time in the room, probably a minute; that there was no direct evidence of any actual consumption of liquor after 10 o'clock, but Waters stated that the jugs were filled with beer about 9.55 o'clock, and he was not prepared to say that no beer was consumed after 10 o'clock.

The Magistrate states that he "held that defendant had left Waters in charge of the dining-room, and as Waters was unable to say that no beer was consumed between 10 o'clock and 10.35 o'clock, the matters hereinbefore stated afforded no ground of answer or defence to the said information," and he convicted the appellant.

The question for the opinion of the Court is whether the Magistrate's determination was erroneous in point of law.

Two questions have been argued. The first is whether there was any evidence upon which the Magistrate could properly infer that liquor had been consumed in the dining-room after 10 o'clock. In my opinion there was. The fact that beer had in fact been poured into the glasses by some of the party just before 10, and that at 10.35 there was some beer remaining in some of the glasses, is evidence that between 9.55 and 10.35 beer had been consumed, and the Magistrate could properly infer from that fact that some beer had been consumed by some of the footballers after 10 o'clock. It is not necessary in order to prove the consumption of liquor within the prohibited hours that there should be direct evidence of such consumption. It is sufficient if there is presumptive evidence; and here the fact that the vice-president of the club would not state that the beer had not been consumed after 10 o'clock, coupled with the fact that he had permitted it to be poured into the glasses five minutes before 10, and the conditions of the glasses as observed by the police about half an hour afterwards, the smoke concert being then still in progress, is, in my opinion, amply sufficient evidence to establish a *prima facie* case of consumption within the prohibited hours. The other question is whether the appellant "allowed" the consumption of beer after 10 o'clock. The Magistrate has held that, upon the facts found by him, Waters was placed by the appellant in charge of the room, and that therefore, as there was evidence from which a consumption of liquor after 10 o'clock could properly be presumed, the appellant "allowed" this consumption. Mr. Ostler has admitted that the facts proved by the Magistrate do not justify any inference that Waters was constituted by the appellant his agent or servant during the appellant's absence from the room, and in my opinion this admission is right. Waters, as vice-president of the club and one of the promoters of the concert, may fairly be said to have been in charge of the concert, but the concert was allowed by the express permission of the police to be continued after 10 o'clock, subject, it is true, to a condition made with the promoters of the concert that no liquor should be consumed after that hour. The facts do not justify the inference that the appellant left Waters as his (the appellant's) representative in charge of the room, but merely show that the appellant, who was obliged to leave the room, emphasized to Waters the condition on which the police had, at the request not of the appellant but of the representative of the club, allowed the concert to continue. I agree, therefore, with Mr. Ostler that an inference that Waters was representing the appellant cannot properly be drawn, and that Waters was not the agent or servant of the appellant. The only ground urged by Mr. Ostler in support of the conviction is that the Magistrate must be held to have found that the appellant connived at the consumption of liquor after 10 o'clock by purposely abstaining from returning to the room in order to give the footballers an opportunity to consume beer after 10 o'clock. In my opinion the case as stated shows that the Magistrate did not draw such an inference, and, even if he had done so, the facts found by him could not, in my opinion, support such a conclusion. The Magistrate has found as facts that the appellant had no intention of leaving the room, but that the sudden illness of his barman made it absolutely necessary for the appellant to do so, and he has found as a further fact that the appellant had no person in his employ to take the barman's place or to attend in the dining-room. He has also found as a fact that the appellant, before leaving the dining-room had expressly told Waters that liquor must not be consumed after 10 o'clock. Some liquor remained in the room after the appellant left. The hour at which he left is stated to have been "during the evening" and it was evidently some time before 10 o'clock, for he had to take the barman's place, and, according to the Magistrate, he was necessarily absent until 10.35.