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agreement. Although they now hold and work the land under the new consolidated lease from the Government, they are still liable to pay the royalty agreed upon as compensation under the original agreement. For these reasons I am of opinion that the learned Chief Justice in the Court below came to a right conclusion, and that the appeal must be dismissed.

Appeal dismissed with costs.

Solicitor, for appellants, *H. M. Lee*, Melbourne.

Solicitors, for respondent, *Braham & Pirani*, Melbourne, for *Mark Lazarus*, Ballarat.

B. L.

[HIGH COURT OF AUSTRALIA.]

PRIOR . . . . . APPELLANT;
DEFENDANT,

AND

SHERWOOD . . . . . RESPONDENT.
COMPLAINANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *May* 11, 14, 15.

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

Gaming and Wagering—Place used for Betting—Public right of way or lane—Games, Wagers and Betting Houses Act (*N.S.W.*), (*No.* 18 *of* 1902), *secs.* 17, 19.

A bookmaker carried on his business standing in a lane or right of way which led from a street to the back entrances of some houses facing the street. The lane was open to the public at all times, and the part in which the bookmaker stood was a *cul de sac* branching off from the main passage. He had

been in the habit of standing at a spot near one of the corners furthest from the entrance to the lane from the street and a few feet from the door of a shop. It was not shown that he had any connection with the shop, but people used to enter the shop, in which information as to races and horses was supplied, and then come out into the lane and make bets with him. He had no apparatus set up in the lane nor any sign to indicate the nature of his business or that he had appropriated any particular part of the lane to himself, but no other bookmakers were present.

Held, that neither the lane nor any part of it was a place used by the bookmaker for the purposes of betting within the meaning of secs. 17 and 19 of the *Games, Wagers and Betting-Houses Act* 1902.

Per Griffith C.J. : The term "use" in those sections, having regard to the context, involves as an element of the offence that the place in question is in the occupation or possession of some person, by whom or by whose permission use is or might be made of it for the prohibited purpose.

The "place" used, if it is not a house, office, or room, must be some specific area of land which is in the actual occupation of the defendant or some person by whose permission he makes use of it. If that is portion of a larger area, open to the public, the defendant's occupation must be differentiated from that of others by some object of such a nature that its use involves the actual exclusive occupation of some portion of the area, or by some structural or natural boundaries.

Decision of the Supreme Court : *Sherwood v. Prior*, (1905) 5 S.R. (N.S.W.), 639, reversed.

APPEAL from a decision of the Supreme Court of New South Wales on a special case stated under the *Justices Act* 1902.

The appellant was charged upon an information which alleged that he used "a place to wit a right-of-way off King Street Sydney . . . . known as 'Bank Court' for the purpose of money being received by him . . as and for the consideration for a promise to give thereafter certain money on a contingency relating to a certain horse race thereafter to be run." The magistrate, after hearing the evidence, dismissed the information on the ground that the place referred to could not be a place within the meaning of sec. 19 of the *Games, Wagers and Betting Houses Act* 1902. He found as a fact that the place where the alleged offence was committed was a place open to the public at all times.

On the application of the complainant, an inspector of police, the magistrate stated a special case for the opinion of the Supreme Court.

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It appeared from the evidence, as stated by *Darley* C.J. in his judgment, *Sherwood* v. *Prior* (1), that Bank Court was a right of way off King Street in Sydney, and was a blind lane, or *cul de sac*, about 25 or 26 yards long, and about 12 feet wide. There was a branch off to the right, which was about 10 yards long and 9 feet wide. There was a back entrance in this lane to houses fronting King Street and George Street. One witness stated that he knew the place intimately for some months, and had never seen carts passing down the lane; other persons (witnesses for the defence) stated that horses and carts did use the lane. The same witness stated that he had seen the defendant in the lane continuously for the past two months, standing on a spot which he marked upon a plan shown to him. He further stated that opposite to that spot was a flight of steps leading into a room which was described by one of the witnesses for the defence as a "betting shop," and which he stated was there for three or four years. What took place was as follows :—Persons desirous of betting came up this lane, went into the room, where they obtained all information about the races and horses from persons in the room and from announcements on black boards, &c., then leaving the room, they found the defendant outside, a few feet from the steps leading to the room, and they made the bet with him, he receiving the money and giving them a ticket showing the amount to which the holders would be entitled should the horse win. This was the course pursued with respect to the witness mentioned and to several other persons both on the day he betted with him and on other days.

The Supreme Court held that the magistrate was wrong in dismissing the information, and that the defendant should have been convicted, and remitted the case to the magistrate for that purpose; *Sherwood v. Prior* (2).

From this decision the present appeal was brought by special leave. A motion by the respondent to rescind the special leave was allowed to stand over till the hearing of the appeal.

Lamb and *Blacket*, for the appellant. The effect of the decision of the Supreme Court is that a person habitually betting in a public

(1) (1905) 5 S.R. (N.S.W.), 639, at pp. 642, 643.
(2) (1905) 5 S.R. (N.S.W.), 639.

street can be found guilty of using the street as a place for betting within the meaning of the Act. But the Act was never directed against street betting. If it had been intended to prohibit such betting that could easily have been effected by the use of appropriate words. The original Act in this State, 39 Vict. No. 28, was called the *Betting Houses Suppression Act*, and was adopted from the English Act of 1853 (16 & 17 Vict., c. 119). In 1865 it was decided in England that a man, who frequented a spot near a tree in Hyde Park for the purpose of betting with people who resorted thither, was not guilty of using a house, room, office, or other place for betting within the meaning of the Act: *Doggett* v. *Catterns* (1). Our legislature must be taken to have adopted that interpretation by using the same words in the State Act as were in the English Act. The present Act is entitled an Act to consolidate the Acts concerning games, wagers, and for the suppression of betting houses, which does not suggest that it was aimed at the prevention of street betting. Part III. in which the section now in question is contained is headed "Betting-houses Suppression." Bank Court is not the kind of place that might be suspected of being used as a betting-house, or that might be entered and searched in the manner described in sec. 15. Obviously there must be some kind of structure capable of being entered, of being opened, kept, or used in the same manner as a house, office, or room, and it must be something which could appropriately be declared a common nuisance: secs. 16, 17. It must be capable of being deemed and taken to be a common gaming house in which persons might be found: sec. 18. A spot in the lane such as was referred to by the Supreme Court could not be appropriately described by such words. How much of the lane was the "place," which was being used by the appellant? It could not be the whole of it, because that was open to the public and was used by them, and if it was only a part, by what boundaries was it indicated? The words of secs. 19 and 20, which prescribe penalties for opening, keeping, or using such a "place," for being found therein, for receiving money &c. for the purpose of betting therein, and provide for the confiscation of money and valuable things found therein, are inapplicable to street betting.

(1) 19 C.B.N.S., 765; 34 L.J.C.P., 159.

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The whole matter was dealt with in *Powell* v. *Kempton Park Racecourse Co.* (1). Some of their lordships rested their decision on the nature of the "user," and others on the nature of the alleged "place." If the bookmakers in Tattersall's inclosure at Kempton Park were not within the Act, there can be no question that the appellant in this case was rightly discharged by the magistrate. The information was dismissed on one ground only, that this could not be a "place" within the meaning of the Act, but there was also a ground as to the nature of the "user."

[GRIFFITH C.J.—You are entitled to show that on the evidence there should not have been a conviction on any ground that was taken.]

There must be a defined place capable, by virtue of its condition, of being used for betting. The words "other place" must be construed in a sense *ejusdem generis* with the particular words before them. And the use must be in some sense exclusive of other persons, more than a mere being in the place. As was pointed out by Lord *Esher* M.R. (2), it is "beyond all reason" to say that a man uses the spot of ground on which he is at the moment standing as his house, room or office. *A. L. Smith* L.J. said (3) that the structure constituted the "place" in all the cases where it had been held that an offence had been committed, and that those cases would have been decided differently if there had not been some erection such as a desk, stool, umbrella, &c. [They referred also to the judgments of *Lindley* L.J., *Lopes* L.J., and *Chitty* L.J., in *Powell* v. *Kempton Park Racecourse Co.* (7).] Habitually doing the same thing in the same spot does not affect the nature of the user in any sense material to the question whether there has been an offence under this Act; *per* Lord *Halsbury* L.C. (8). There must be a use by a person having the dominion or control over the place used, such a use as would justify one in regarding the place used as the betting establishment of the person using it. These characteristics of place and user are to be found in all the earlier cases, not overruled or adversely criticised by the Court of Appeal or the

(1) (1897) 2 Q.B., 242; (1899) A.C., 143.
(2) (1897) 2 Q.B., 242, at p. 258.
(3) (1897) 2 Q.B., 242, at p. 275.
(7) (1897) 2 Q.B., 242.
(8) (1899) A.C., 143, at p. 158.

House of Lords, in which the person charged was held to be guilty of an offence against this Act. [They referred generally to the judgments of their Lordships (1).] Street betting is not punishable in England except under the Municipalities Acts, as was pointed out by Lord *Davey*, in the report of a Royal Commission on betting, *Reports of Committees* 1902, vol. v. Here it is dealt with by the *Vagrancy Act* (No. 74 of 1902), sec. 4, sub-sec. (2). *Bows* v. *Fenwick* (2) can only be supported on the ground that the umbrella used by the bookmaker was practically a tent; *per Esher* M.R. (3). *Reg.* v. *Humphrey* (4), in which a man betting in an archway was "held to have used a place" for betting, was founded upon *Hawke* v. *Dunn* (5), which was overruled by the House of Lords (1). In *Shaw* v. *Morley* (6) and *Brown* v. *Patch* (7) there were structures capable of being used as a room or office. In *Potter* v. *Thomas* (8), which followed the latter case, there was a private lane. A common passage leading to a common stair was held not to be a place within the meaning of the *Betting Act* 1853: *Wright* v. *Smith* (9); *Stone, Justice of the Peace* (1906), p. 391. If other persons have access to the place said to be used, it must be shown that the defendant's business was carried on with the authority of the owner of the place: *Rex* v. *Deaville* (10). In the present case there was no area defined in any way as the place used for betting purposes. In *Liddell* v. *Lofthouse* (11), the space was inclosed on three sides. It is doubtful whether the box in *Gallaway* v. *Maries* (12) would now be held to satisfy the requirements of the section. Bank Court was a lane of considerable extent, open to the public whether they wished to bet or not.

Gordon K.C. and *Pickburn*, for the respondent. This is not a case in which special leave to appeal should have been granted. The only point decided by the magistrate was that Bank Court was not capable of being deemed a "place" within the meaning

(1) (1899) A.C., 143.
(2) L.R. 9 C.P., 339.
(3) (1897) 2 Q.B., 242, at p. 257.
(4) (1898) 1 Q.B., 875.
(5) (1897) 1 Q.B., 579.
(6) L.R. 3 Ex., 137.
(7) (1899) 1 Q.B., 892.
(8) 19 N.S.W. L.R., 170.
(9) 6 F. (Just Cas.), 18.
(10) (1903) 1 K.B., 468.
(11) (1896) 1 Q.B., 295.
(12) 8 Q.B.D., 275.

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of sec. 19. The point as to user was not determined. On the appeal the Supreme Court held that that decision of the magistrate was erroneous, because in their opinion the lane was capable of being used as a place, and remitted the case to the magistrate to be dealt with subject to that opinion. Mr. Lamb argued that a part of a public lane could not be a place. That cannot be supported. The fact of this being a thoroughfare does not affect the question. The real question is whether the particular piece of ground in question could be used as a "place" for betting purposes. That does not involve any general principle.

[GRIFFITH C.J.—Surely on an appeal from a justice who has dismissed an information, if it appears that, notwithstanding that the reason for the decision is technically incorrect, the magistrate was bound on the evidence to dismiss the charge, the case will not be remitted to him. We must deal with this case as the Supreme Court ought to have dealt with it.]

On the main point, there is nothing in the authorities to support the contention that there cannot be a "place" in a public lane or street. A piece of ground may be open to other persons than those desirous of betting, and still be used for betting purposes within the meaning of the Act. It was so held in *Rex* v. *Lannon* (1) and *Rex* v. *Deaville* (2). "Any place which is sufficiently definite, and in 'which' a betting establishment might be conducted, would satisfy the words of the Statute," *per* Lord *Halsbury*, in *Powell* v. *Kempton Park Racecourse Co.* (3). That is to say, definite by reason of its physical characteristics, not by reason of ownership. The House of Lords thought that the whole inclosure at Kempton Park might have been used as a betting "place": *per* Lord *James of Hereford* (4). The place need not be roofed or closed, so long as there is a definite localization of the business, where a person carrying on the business of betting could be found. Bank Court was sufficiently defined. It was inclosed on three sides by the walls of houses, and capable of being used practically as a large room. There is no necessity for the betting man himself to have erected the structure or boundaries, he may

(1) (1903) Q.S.R., 315.
(2) (1903) 1 K.B., 468.
(3) (1899) A.C., 143, at p. 162.
(4) (1899) A.C., 143, at p. 194.

adopt those already existing: *Liddell* v. *Lofthouse* (1). In *Doggett* v. *Catterns* (2), a field was said to be capable of being a "place." That was not dissented from by Lord *Halsbury* in dealing with the case (3). There is no necessity for the possession of the defendant to be wholly exclusive of other persons, or that he should exercise dominion over it, as appears from the two cases last cited and *R.* v. *Lannon* (4). Nor can there be any necessity for the place to be structurally like a house, room or office; otherwise the umbrella, box and stool cases could not be supported. Of course there are limits to the extent of space that could be used for the prohibited purpose, as was pointed out by Lord *James of Hereford* in the passage already referred to. A whole street for instance could not be so used. But in each case it is a question whether the natural or artificial features of the area in question do not sufficiently mark it off from the rest of the world, as was held to be the case in the umbrella, box, and stool cases. The fact that other persons resorted thither might be the very reason why the bookmaker fixed upon the place as suitable for his business. It is impossible to lay down a general rule as to the limit of area, but there is nothing in the size of Bank Court to prevent its being used for betting purposes. At any rate it satisfied the requirements mentioned by the learned judges in the Court of Appeal and the House of Lords; it was a place where persons wishing to bet would be able to find the appellant, and where the appellant would always be found ready to accommodate them. [They referred generally to passages in the judgments in the Court of Appeal in *Powell* v. *Kempton Park Racecourse Co.* (5).]

Next as to the user. The place was used by the defendant for betting purposes. He was habitually there in the same position, near the betting shop, betting with persons who came there. There is no necessity that his user should be of right, exclusive of other persons, so long as he was making a use of the place different from and inconsistent with that of others who came there. The bookmaker in *Liddell* v. *Lofthouse* (1), which is not suggested to have been wrongly decided, was doing almost the

(1) 1896) 1 Q.B., 295.
(2) 19 C.B. N.S., 755; 34 L.J.C.P., 159.
(3) (1899) A.C., 143, at p.165.
(4) (1903) Q.S.R,. 315.
(5) (1897) 2 Q.B., 242.

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same thing, the bay between the hoardings in that case corresponding to the *cul de sac* in this. The appellant was carrying on his business there; he had localized it to such an extent that the place might well be regarded as his betting establishment, although he had not set up any notice or sign. The putting up of an umbrella, desk or stool in the series of cases in which one or other of those circumstances was present, was not relied upon as part of the user, but as a localization of the business, or an indication of the locality which the bookmaker had appropriated to it: *Brown* v. *Patch* (1). Here the appellant took advantage of the boundaries which he found there, and made use of the area so marked out for his own purposes, to the exclusion in fact, though not of right, of other bookmakers.

Lamb in reply. The walls of the lane cannot be considered a structure in the sense indicated by the Court of Appeal and the House of Lords in *Powell* v. *Kempton Park Racecourse Co.* (2). If that case had been decided before *Liddell* v. *Lofthouse* (3), the latter case would probably have been decided differently. In *Rex* v. *Deaville* (4) the "place" was a room, so that no question could arise as to the definiteness of the area used.

Cur. adv. vult.

GRIFFITH C.J. This is an appeal from the Supreme Court of New South Wales, reversing the decision of a magistrate, who had dismissed an information against the appellant charging him with using a place, to wit, a right of way in King Street called Bank Court, for the purpose of betting. The facts of the case as stated in the judgment of the learned Chief Justice of the Supreme Court are these. [His Honor read the passage from the judgment of *Darley* C.J. (5), which has already been set out, and continued.] There was no question that the circumstances were accurately described in that passage.

Counsel for the defendant took the objection that the place referred to in the information, being a public lane, could not be a

(1) (1899) 1 Q.B., 892, at p. 896.
(2) (1897) 2 Q.B., 242; (1899) A.C., 143.
(3) (1896) 1 Q.B., 295.
(4) (1903) 1 K.B., 468.
(5) (1905) 5 S.R. (N.S.W.), 639, at p. 642.

place within the meaning of sec. 19 of the *Games, Wagers and Betting Houses Act* 1901; secondly, that the defendant was not proved to have been using a place within the meaning of that Act; and thirdly, that there was no user by the defendant within the meaning of that Act. The magistrate found as a fact that the place where the offence was alleged to have been committed was open to the public at all times. He upheld the first objection and dismissed the information, and stated a case for the opinion of the Supreme Court. It was suggested before us that the only point that could be argued was whether the place referred to in the information was capable of being a place within the meaning of the Act. The answer to that is that if, on an appeal from the dismissal of an information by a magistrate, it appears clearly that the information was rightly dismissed, upon any ground disclosed by the circumstances of the case, the Court of Appeal will not refuse to entertain that ground. The Supreme Court entertained the whole matter, and as a result of their consideration of all the questions involved, reversed the decision of the magistrate, and held that the defendant ought to have been convicted, and remitted the case to the magistrate to be determined in accordance with that expression of opinion. We gave special leave to appeal because it was urged that the construction of the Act had been the subject of a great deal of discussion, and it was said that there were many conflicting decisions on the point, and it was important that the persons who were called upon to administer the Act should know definitely what interpretation they ought to put upon these sections in view of the conflict of judicial decision.

It will be convenient first to refer to the sections of the Statute. The Act now in force is No. 18 of 1902, which is entitled "An Act to consolidate the Act concerning Games and Wagers and for the suppression of Betting-houses." Part I. deals with repeal and interpretation. Part II. relates to Gaming and Wagering, dealing principally with common gaming-houses. Part III. relates to Betting-houses suppression. There are several sections in that part to which it is well to call attention. [His Honor then read secs. 15, 16, 17, 18, 19, 20, 21, 22 of the Act, and continued:] It will be observed that in all except the last-mentioned section the

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words "open keep or use" are to be found in conjunction with the words "house office room or place," and I think it is clear that these words must have the same meaning attributed to them in all the sections in which they occur. That appears to have been doubted at one time by certain learned Judges in England as well as in New South Wales, but the question must be taken to have been set at rest by the case of *Powell* v. *Kempton Park Racecourse Co.* (1), the judgments in which, if summed up, will be found to support the inference I should draw from those sections apart from any decisions on the subject. I will read a passage from the judgment of *Lindley* L.J. in that case in the Court of Appeal. Whether his judgment on all points accurately laid down the law or not is not material for my present purpose. I read it as a short summary of what may be deduced *à priori* from the words of the Act. He said (2):—"The language of the Act itself indicates what sort of place was aimed at by the legislature, although no definition of the word 'place' is to be found in the Act. The places aimed at are decribed as 'places called betting-houses or offices' (see the preamble);" (the preamble is absent from this Statute but was in the Act of which this is a consolidation,) "they are referred to as 'house, office, room or other place' (sec. 1);" (sec. 7 of the Act of New South Wales) "as some place to which persons do or can resort for betting (sec. 1);" (that is, sec. 21 of the New South Wales Act) "as some place where the business of betting is carried on (secs. 1, 3, 4);" (secs. 17, 19, 26) "as some place used as a betting house or office, and which can be forcibly entered under a magistrate's warrant or an order of the Commissioners of Police (secs. 11, 12);" (secs. 15, 16 of the New South Wales Act) "as some place which can be advertised as a betting-place (sec. 7);" (sec. 21 of the New South Wales Act) "as some place which can be reasonably regarded as a common nuisance (sec. 1);" (sec. 17 of the New South Wales Act) "and which it is not absurd to treat as a gaming-house within 8 & 9 Vict. c. 109, s. 2." I adopt that statement as the conclusion that I should draw from the words of these sections, if there were nothing to compel me to come to a different conclusion. A great number of prosecutions have taken

(2) (1899) A.C., 143.

(3) (1897) 2 Q.B., 242, at p. 261.

place in England under this Act, and there is said to have been a conflict of decisions. The learned Judges of the Supreme Court referred to a great many of these cases, but in my judgment they seem to be all summed up, and, if I may use the expression, swallowed up, by the decision of the House of Lords in *Powell* v. *Kempton Park Racecourse Co.* (1); and it is of little, if any, use now to refer to the opinions of learned Judges expressed before that case, because the House of Lords undertook to review them all and to lay down the law on the subject. The leading decision was that of Lord *Halsbury* L.C., in which Lords *Watson*, *Macnaghten*, *Morris* and *Shand* concurred. Lord *Herschell*, who was then dead, had before his death seen the judgment and expressed his concurrence in it. The opinion of Lord *Halsbury*, therefore, expressed the deliberate opinion of six members, who formed the majority, of the House of Lords. Whatever principle, therefore, can be extracted from that judgment every Court is bound to follow. Lord *James of Hereford*, who was also present, delivered a judgment containing slightly different arguments but arriving at the same conclusion. Lords *Hobhouse* and *Davey* dissented. But, however valuable their opinions may be, they cannot be taken into account in opposition to the opinion of Lord *Halsbury*, which was approved and concurred in by the majority. I propose, therefore, to refer to some passages in that judgment, which are not *obiter dicta*, but which, as I conceive, state the process of reasoning by which the learned Lord Chancellor arrived at his conclusion.

The place in which the person charged was alleged to have committed the offence was called Tattersall's inclosure at the Kempton Park Racecourse, in which several bookmakers were present carrying on their ordinary business of bookmakers. None of them was in exclusive occupation of it. They, and such other members of the public as obtained admission by payment, were there together, and the bookmakers stood and walked about carrying on the business of betting. I will now read some passages from the judgment of Lord *Halsbury* L.C. which appear to lay down the principle of his decision (2):—"Let us first see what is the substance of the enactment. It prohibits opening

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

(2) (1899) A.C., 143, at p. 159.

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a house, &c., for the purpose of the owner or occupier betting with persons resorting to the house so opened. It does not prohibit betting. . . . I think it is clear that what the Statute is dealing with here is the case of persons who are in control and occupation of the place which is assumed to be the betting establishment. The conducting of the business, whether as master or servant, is the thing made unlawful, and the business is that of a betting house or place to which people can resort for the purpose of betting, not with each other, but with the betting establishment.

"It is the employment of the words 'using the same' which to my mind has led to the difference of opinion. Those words, unless explained by the context, are necessarily ambiguous. In one sense every person who enters the inclosure uses it; but he does not use it in the character of owner, keeper, manager, or conductor of the business thereof. The betting man in his use of the place differs in this respect in no way from any other member of the public who enters it, and who neither does nor intends to bet. It is the personality of the betting man and not his being in any particular place which affords the opportunity of betting, and a man who walked along a public road shouting the odds in the way here described would be doing exactly the same thing. It is nothing to the purpose that there are a great many of them who may be found in this inclosure; there is no business being conducted by a keeper, owner, &c., in the inclosure. Each betting man is himself conducting his own business of a betting man, and, as I have said, his betting is in no way connected with the place, except that he as well as other people not betting men are there."

After referring to the ambiguity arising from the employment of the word "use," which he thought led the dissenting Lords into error, he went on (1):—"It is not the repeated and designed, as distinguished from the casual or infrequent, use which the employment of that word imports here, but the character of the use as a use by some person having the dominion or control over the place, and conducting the business of a betting establishment with the persons resorting thereto." Then, referring to the

(1) (1899) A.C., 143, at p. 160.

question of what a place is, he said (1):—"It seems to me clear that the thing against which the enactment is levelled is any place used in the sense I have explained. There must be a business conducted, and there must be an owner, occupier, manager, keeper, or some person who, if these designations do not apply to him, must nevertheless be some other person who is analogous to and is of the same genus as the owner, keeper, or occupier, who bets or is willing to bet with the persons who resort to his house, room, or other place. In this view it is not an offence under this Act of Parliament to allow persons to assemble for the purpose of betting with each other; there is, upon this hypothesis, no business being conducted at all. The different betting people, or each individual bettor, is conducting his own business, and doing it in a house used indeed, but only used, just as he might do it on the race-course or on the high road. There is no betting establishment at all, and there is no keeper of one. I do not think, therefore, that the important question is, what is a 'place'? I think in this respect with *Rigby* L.J. that any place which is sufficiently definite, and in which a betting establishment might be conducted, would satisfy the words of the Statute." Then he went on to apply the rule so laid down to the facts of that particular case, and came to the conclusion that the defendants, the book-makers carrying on business in Tattersall's inclosure, could not be said to be using the place in the sense in which that expression is used in that Statute. With that judgment the other six learned Lords concurred. Lord *James of Hereford* also made some observations which I think it is proper to quote. He said (2):—"The provisions of this second clause are very important when construing and applying the first. In order to bring the first clause into operation something must exist that can at least constructively be regarded as a common gaming-house. As the betting at Kempton Park was not carried on in a house, room, or office, it becomes necessary to determine what effect is to be given to the words 'other place,' and how far they can be held to apply to the inclosure wherein the alleged illegal betting took place. Speaking in general terms, whilst the place mentioned in the Act

(1) (1899) A.C., 143, at p. 161.

(2) (1899) A.C., 143, at p. 193.

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must be to some extent *ejusdem generis* with house, room, or office, I do not think that it need possess the same characteristics; for instance, it need not be covered in or roofed. It may be, to some extent, an open space. But certain conditions must exist in order to bring such space within the word 'place.' There must be a defined area so marked out that it can be found and recognized as 'the place' where the business is carried on and wherein the bettor can be found." Then he made reference to Salisbury Plains and Epsom Downs, and said that the inclosure at Kempton Park might, physically speaking under certain conditions constitute "a place" within the meaning of the Act. He then went on (1):—"But the main question involved in this case has still to be solved, namely, Was the inclosure opened, kept, or used for the purpose of the owner, occupier, or other person using the same, or of any person conducting the business thereof, betting with persons resorting thereto? In my opinion this question must be answered in the negative. For I think that the certain conditions I have just referred to do not exist, and that in consequence of the absence of those conditions this inclosure cannot be held to be 'a place' wherein an offence has been committed." His Lordship continued (2):—"In thus dealing with the case, I have treated the whole inclosure as being the alleged 'place.' There is another view that may be presented, namely, that each peripatetic bookmaker using the inclosure occupies 'a place,' that is, the ground upon which his two feet rest, and that having permission so to stand upon any particular spot he may from time to time select, there is a shifting appropriation of each of such spots for the purpose of carrying on his business. But in such case, what can be said to constitute the 'place' requisite to constitute the offence? There is nothing in any way resembling a house, office, or room. No defined area exists; nothing to indicate where the bookmaker can be found is to be seen; and, as was admitted by Mr. Asquith during his argument at the bar, every piece of earth on which a betting man's feet rest, say on Salisbury Plain, cannot constitute a place *ejusdem generis* with house, office, or room. I think the statement of the same learned

(1) (1899) A.C., 143, at p. 194.

(2) (1899) A.C. 143, at p. 196.

counsel that 'a place must be a place where a man according to the ordinary usages would be found' is correct."

I think that a clear principle is established by that case, which I will state directly. The learned Judges of the Supreme Court were of opinion that that case did not apply to the present, and referred to some of the other cases which were reviewed by the learned Lords in their speeches. The learned Chief Justice, after pointing out that it was said by *Channell* J. in *Brown* v. *Patch* (1), as had also been pointed out by Lord *Halsbury*:—"The important question is not so much, what is a place? but what is the character of the user of it?" went on to say (2):—"From a consideration of these authorities, I deduce the principle, which I think applicable to all these cases, that any position, whether it be in a public park, public street, or lane, which is habitually used by an individual as a position upon which he habitually carries on his business of betting with all persons resorting thereto for that purpose will fall within the words 'any other place.' The bookmaker by his habitual use of the position for the purpose mentioned defines the place for betting purposes in the same degree and to the same extent as if the betting carried on by him took place in a 'house, room, or office.' The one is as much within the mischief aimed at by the Act as the other." With great respect, we have no right to extend the meaning of the Act by reason of any idea we may have as to what the legislature might be expected to have done or to have thought it desirable to do. It may be that in an Act against street betting, if indeed there is any such Act, the word "place" might bear a much wider signification, but in such a case one would expect to find that the legislature had used some such language as they used in the *Lotteries Act*, where they intended that the word "place" should include places in the street as well as anywhere else. The learned Chief Justice went on to say (3):—"I cannot in my mind separate the 'list shop' or betting shop from the betting spot a few feet away." If there had been any evidence to connect the defendant with the shop, or that the shop was under his control, or that he was in league with the person who kept the shop, there would have been a great deal of force

(1) (1899) 1 Q.B., 892, at p. 897.
(2) (1905) 5 S.R. (N.S.W.), 639, at p. 647.
(3) (1905) 5 S.R. (N.S.W.), 639, at p. 648.

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in that argument. But there was no evidence to connect him with the shop except that he was standing outside the shop door in the street, and I do not think, therefore, that that fact can be taken into consideration. There is, no doubt, a strange dislike on the part of eminent English lawyers to give definitions, and in consequence our law has received the description of "a codeless myriad of precedents." But in the case of a Statute that has to be applied by magistrates in all parts of the country, it is, at any rate, desirable that they should know the meaning of the words of the Act they are called upon to interpret; and, although I recognize fully the difficulty and danger of attempting a definition, still I do not regard it with the same dislike as many eminent English Judges. In my opinion, the passages I have read from the decision in *Powell* v. *Kempton Park Racecourse Co.* (1), which may be taken to have over-ruled anything to the contrary in previous decisions, enable the following rule to be laid down for the construction of this Statute:—The term "use" having regard to the context, involves as an element of the offence that the place in question is in the occupation or possession of some person, by whom or by whose permission use is or might be made of it for the prohibited purpose. It follows that the place used, if it is not a house, office, or room, must be some specific area of land which is in the actual occupation of the defendant or some person by whose permission he makes use of it. If the area alleged to be used for the prohibited purpose forms part of a larger area, to which other persons are entitled to access, and the whole of which is not in the actual occupation of the defendant the character of his occupation of the specific area must be such that it is differentiated from that of other persons present either by the existence of some extrinsic object, which is itself of such a nature that its use involves the actual exclusive occupation of some specific portion of land (however small) of which the defendant has the use, or else by the existence of some structural or natural features which delimit a specific area of which he is, and they are not, in actual occupation.

If these conditions do not exist, there is no user of the place within the meaning of the Statute.

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

I am not prepared to say that in every case which falls exactly within the terms of that definition there would be an offence against the Statute, but I think that in every case which does not fall within it there could be no offence against the Statute. The definition is consistent with every case decided under the Statute which was not over-ruled by the House of Lords in *Powell* v. *Kempton Park Racecourse Co.* (1), and I think that it is the true construction which should guide Magistrates in administering the Act.

Now, I ask myself, do these conditions exist in the present case? It is clear that they do not. The defendant was not in occupation of any specific portion of land in such a way that its use by him was distinguishable from its use by any other person there. He was standing in the street betting. It may be very desirable to put down that sort of betting. Very likely it is. But that is the business of the legislature, and not of Courts of justice. I am of opinion, therefore, that this case is governed by the decision in *Powell* v. *Kempton Park Racecourse Co.* (1), and that the defendant is not proved to have committed any offence against the Statute.

BARTON J. In this case Police Inspector Sherwood proceeded against the appellant Prior under the *Games, Wagers and Betting Houses Act* 1902 upon an information charging that "he did use a place, to wit, a right of way in King Street, for the purpose of betting." The facts which are in evidence have been fully stated. The case, being under the Statute I have mentioned, chiefly depends on the meaning of two sections, namely, sec. 19, under which the information was laid, and sec. 17, which are equivalent in that order to secs. 2 and 1 of the English Act of 1853. [His Honor then read secs. 17, 18, and 19 of the Act No. 18 of 1902, and proceeded:] Now, the principles deduced from the authorities by their Honors of the Supreme Court; and which, if correctly deduced, make an end of this case in favour of the police officer, may be shortly stated as they appear in the report of the judgment (2), where His Honor the Chief Justice, after an analysis of the various authorities down to *Powell* v. *Kempton Park Race-*

(1) (1899) A.C., 143. (2) (1905) 5 S.R. (N.S.W.), 639, at p. 647.

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course Co. (1), as to which case he is unable, he says, to see how it in any way affects the question, said: [His Honor then read from the judgment of *Darley* C.J. the passage already set out in the judgment of *Griffith* C.J., and continued:] *Pring* J., arrived at the same conclusion, though it is somewhat more shortly put. He said (2): "The defendant localized himself in one spot: by reason of that localization and not by reason of his personality, he—to use Lord *Halsbury's* words—afforded the opportunity of betting to other people." That, His Honor seems to put as the ground for his conclusion.

We have to consider whether these statements of the law are correct and, whether they are so or not, whether the conclusion arrived at by their Honors was correct, and the answer to that depends, first of all, on the principles on which these sections are to be construed. The Act is a penal one, and without troubling our heads very much with the strength or effect of the statement that a penal Act should be construed strictly, and bearing in mind what *Chitty* L.J. said in the Court of Appeal in *Powell* v. *Kempton Park Racecourse Co.* (3), that Acts of Parliament must be construed reasonably, what *Lopes* L.J. says in the same case seems to be a short and clear way of putting the matter, (4) "that the Court in construing such a Statute must see that the thing charged is an offence within the plain meaning of the words used, so as to carry out the true intention of the legislature." So much for the method of construction of this Statute as a penal one. Now, there is another principle of construction which is called the rule of *ejusdem generis*, or *noscitur a sociis*, which is stated thus in *Maxwell* on *The Interpretation of Statutes*, 3rd ed., p. 461: "When two or more words, susceptible of analogous meaning, are coupled together, *noscuntur a sociis*; they are understood to be used in their cognate sense. They take, as it were, their colour from each other, that is, the more general is restricted to a sense analogous to the less general." I may say now, that in dealing with the Kempton Park case which, because of the reasoning of the Lords Justices of the Court of Appeal and the House of

(1) (1899) A.C., 143.
(2) (1905) 5 S.R. (N.S.W.), 639, at p. 655.
(3) (1897) 2 Q.B., 242, at p. 298.
(4) (1897) 2 Q.B., 242, at p. 265.

Lords, will have in my view a very close relation to the matter now before us, I shall extract the reason for the decision from the opinions of the Lords Justices, because it is plain that the decision of the House of Lords proceeds in the main upon the same course of reasoning, though in the House of Lords some of their Lordships attached chief importance to the nature of the place itself, and others to the nature of the user of it. Lord *Esher* M.R. said, (1) that where general words are used following particular or more limited words there should be "an interpretation of the general words limiting them to matters or things of the same kind, as to the mischief being dealt with, as the previous words; but an interpretation as wide as the limitation just described will admit." And, according to *Lopes* L.J. (2): "That doctrine may be thus expressed, namely: Where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified." He instanced *Powell* v. *Boraston* (3), where it was held that "other building" in sec. 27 of the *Reform Act* 1832, must be something *ejusdem generis* with the preceding words "house, warehouse, counting-house, shop." And, applying these considerations more closely to the present case, *Chitty* L.J. said (4): "The ordinary rule of construction sometimes called '*ejusdem generis*,' sometimes '*noscitur a sociis*,' applies. 'Place' must mean something of the same kind; something which conforms to the leading idea conveyed by the words with which it is associated. Plainly the inclosure is not a 'house' nor a 'room' nor an 'office.' The word 'office' in this connection appears to me to have the most comprehensive meaning and the largest import of the three unambiguous words. What are the characteristics, the usual fittings up, or accessories of an office? A desk, a table, a chair and things of that description. Now in this inclosure the bookmakers have no apparatus of that kind." There must, before the person charged can be found guilty, be a place within the meaning of the Act, in some sense related to the idea of "house, room, or office;" and, secondly, a

(1) (1897) 2 Q.B., 242, at p. 257.
(2) (1897) 2 Q.B., 242, at p. 266.
(3) 18 C.B.N.S., 175.
(4) (1897) 2 Q.B., 242, at p. 301.

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user of the place for the purposes prohibited in sec. 17 and punishable under sec. 19.

Now, looking for a moment at the structure of the material sections, and comparing them, it is important to observe that the expression "house, office, room, or other place" runs through them all. I will take the group beginning with sec. 15 and ending with sec. 21. The description of the offence as that of opening, keeping or using such a place is used in all those sections. Sometimes the word "other" is used before the word "place," at other times it is not. That, however, is perfectly immaterial in applying the principle to which I have referred. [His Honor then read sec. 15, and continued.] Sub-sec. 2 of that section is, I think, inapplicable to the idea that a mere "spot" in a lane is to be considered a "place" within the meaning of the Act, used for the business of betting with persons resorting thereto. Sec. 16 empowers the Inspector-General to authorize the Inspector to enter such house, office, room, or place, and also to authorize him to use force if necessary "for the purpose of effecting an entry whether by breaking open doors or otherwise." So that we have in these two sections not only words inconsistent with the idea of making punishable the using of so much ground as a man's two feet will cover, but words applicable only to the possession or occupation of some place in such a way that doors may have to be broken, or at any rate force used, in order that an entry may be made. The 18th section, which stands between the section prohibiting the alleged offence and the section providing for the punishment, is most material. [His Honor read sec. 18 and continued]: Part II., which is referred to in that section, deals with gaming and wagering, and among the important sections in that part, for the purpose of dealing with such a place as a gaming house, is the 6th section, which makes the owner or keeper of such a house, or the person having the management of it, liable to a penalty of £100 or imprisonment for six months, and every person found upon the premises without lawful excuse liable to a penalty of £5. Whatever the meaning of those words may be, it seems to me, without going into any closer analysis, that in secs. 15, 16, 17, 18, 19, 20 and 21 the meaning to be attached to these words "house, office, room,

or other place" is the same, and, although it may be that in one or another there are expressions relating to occupation which are not found in the others, it is impossible to say that the expressions used in all are not identical in their meaning with respect to the words "house, office, room, or other place." If we find, on examination of other sections than that under which the information was laid, that the terms used as to locality, entry, occupation and use are practically identical, it can scarcely be supposed that a mere open place, or some place of which there is no control or occupation, even momentary, was intended, unless there is something in the context, which I do not find, to compel us to that conclusion. It seems to me that the ordinary rules of construction compel us to regard the words in secs. 17 and 19 as the same in sense as the words in the other sections.

I proceed then to consider—as there must be some place related in sense to a "house, office, or room"—what sort of "place" there must be. It must be a place which can be "opened, kept or used." And, in that connection, it seems to me, that the term user is not employed in any loose sense, but in the sense of opening or occupying, that is to say, that the person charged must have something, however brief, in the nature of occupation, and therefore, the place must be one capable of being so occupied. If it is in its nature incapable of such occupation, I cannot see how the prohibition in this section, or in the punishing section is applicable to it. Then we see by the 18th section that this locality must be one capable of being taken and deemed to be a common gaming house. Parliament, of course, may do anything it pleases; it may declare, I suppose, that a street lamp is a common gaming house, but before holding that Parliament has done such a thing, we ought to see, by comparison, reference, and analysis, whether Parliament has in its seriousness done a thing that is not very sensible. Now, I think that considerations which save one from a conclusion of that kind will be found by a comparison and analysis of the remaining sections, because it seems to me quite beyond reason that a mere spot of ground, or a place in which public traffic can and does go on, should be intended by Parliament to be under any circumstances included in the term common gaming house. I find no

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warrant in the other portions of the Act for thinking that Parliament has declared anything to be taken and deemed a common gaming house other than such a place as is capable of being put to such a use. The place, then, is not only to be capable of being used and dealt with in the same sense as a common gaming house is used or dealt with, but, whether a defined place or not, as Lord *Esher* M.R. put it (1), it must be "capable from its condition of being used by a person who desires so to use it as if it were his house, room, or office, used by him as such for his betting business." And, as an illustration of the sense in which he is speaking, when he comes to deal with *Bows* v. *Fenwick* (2), in the decision of which he took part, he says (3): "Whether the Statute was in that case rightly applied to what was called an umbrella may be doubtful. If the thing was really a tent I should think the decision right; if the thing was really an ordinary umbrella I think the decision was wrong." As a matter of fact the structure in that case was an umbrella capable of covering several persons, with words indicating its owner's business painted on it, fixed to the ground by a spike, and furnished with a stool on which the bookmaker or his agent could sit and carry on his business of betting. That seems to me to satisfy the idea of a "place," if it is used for the purpose of betting. But it is equally clear to me that the umbrella was a tent or was used as a tent, and that was why it was capable of being used as a betting house. *Lindley* L.J. in the same case, dealing with the occupying and using of a place, said this (4):—"The language of the prohibition being in these respects plain and unambiguous, it cannot be properly restricted by the language of the preamble. But when it becomes necessary to ascertain what sort of places other than betting-houses, rooms, or offices were aimed at, there is much more difficulty." Here I would remark that in the judgments of the Court of Appeal and the House of Lords frequent references are made to the preamble for the purpose of strengthening the construction put upon the Act. The New South Wales Act contains no preamble. But, notwithstanding that, it is clear to my mind that the reasoning adopted in the Court of Appeal and in

(1) (1897) 2 Q.B., 242, at p. 257.
(2) L.R. 9 C.P., 339.
(3) (1897) 2 Q.B., 242, at p. 259.
(4) (1897) 2 Q.B., 242, at p. 261.

the House of Lords would have led to the same conclusion if there had been no preamble to the Act. His Lordship goes on to say "no person can bet except in some place or other, and whenever he bets in any place he uses that place for betting. To construe 'other place' or 'place' in its ordinary sense of any and every place where persons can or do bet would involve an absolute prohibition of betting, and would have rendered it quite unnecessary to specify betting-houses, rooms or offices." It appears there and from the rest of his judgment that that very eminent Lord Justice has adopted the conclusion that the Act must be construed as if the words in question were *ejusdem generis*, and there he is in accord with the bulk of authority in the House of Lords. He goes on, after referring to the sections, to say that the place must be some place to which persons can and do resort for betting; where the business of betting is carried on, some place used as a betting house or office, which can be forcibly entered under warrant; some place which can be advertised as a betting place; which can be reasonably regarded as a common gaming house; and which it is not absurd to treat as a gaming house within 8 & 9 Vict. c. 109, sec. 2. Then he refers to the section which corresponds to sec. 18 of this Act. It is apparent, then, applying the rule of construction that we must apply, that the words "house, room, office, or other place" are used in the same sense in all the sections; and, since we find a number of sections dealing with the same matter, which forbid the idea of the "place," as the word is used in a particular section, being some indeterminate, undefined, or unoccupied spot, if by the evidence it is something of that kind that is attempted to be used for the purpose of betting, it does not become a place within the meaning of this Act. It is one thing to make a bet in the street and another to keep a betting establishment. The "place" must be capable of being a betting establishment, or something equivalent to a betting house, room or office. Now reliance was placed in *Powell* v. *Kempton Park Racecourse Co.* (1) on the fact that in the cases where such things as a desk, stall, umbrella or box had been set up, these things had been treated as *indicia* of user or possession. *Lopes* L.J. expressed

(1) (1897) 2 Q.B., 242.

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the opinion that he did not believe that in any of these cases a conviction would have taken place if these various signs of occupation had not been present. And *A. L. Smith* L.J., referring to several of these cases, said practically the same thing. There must be then, I take it, some indication of occupation beyond such as is afforded by a man standing ordinarily in the same position in a public lane. And I would here refer with great respect to an expression of *Darley* C.J. His Honor says (1):— "I cannot in my mind separate the 'list shop' or betting shop from the betting spot a few feet away." That shop is a room referred to in the evidence as close to where the defendant was standing. There is in this case no evidence whatever that the defendant had the control or management of the room or shop to which it is said that persons resorted before they came to him to bet. So that the occupation or user which the defendant has carried on is severed from that of the room or office, and must be taken by itself, and, so taken, it is outside that class or form of occupation which has been regarded in England as establishing user of a place. It must be remembered also that the defendant is not charged with using a room or office. He is charged with using, for the purpose of carrying on this betting business, a public lane or right of way called Bank Court. If there were evidence that the defendant used a room or office, then there was no evidence that he used the public lane, and the evidence did not support the information; and, if His Honor was correct in his opinion as to the nature of the house, room, or office, that was not the place outside; and it seems to me clear that the charge ought to have been dismissed, however liable by other evidence the defendant might hereafter be made for using the house, room, or office.

Reverting to the sections referring to the opening, occupying, &c., and applying the principles of construction to which I have referred, it must be evident how right *A. L. Smith* L.J. was when he said that the "place" or "other place" must be akin or equivalent to a house, office, or room. I take that to mean akin or equivalent, not by way of being four walled, or having a roof, but by being some place the form and use of which would

(1) (1905) 5 S.R. (N.S.W.), 639, at p. 648.

suggest that somebody was conducting it, and conducting it as a betting establishment, whether in occupation of others in other parts or not. The learned Lord Justice indicated what was in his mind by the passage in which he said (1):—"If a person carries on the business of betting in a place akin to a betting-house, whether such place is set up upon a racecourse or elsewhere, then he is guilty of the betting made illegal by the Act, for he is then carrying on the business of a betting-house in a prohibited place." There again he used the expression "set up on a racecourse," evidently entertaining the idea that there must be something which could be set up, some object which could be placed on the ground permanently or even temporarily. He explained his decision in the case of *Snow* v. *Hill* (2), by pointing out that the appellant there was not within the Act of 1853, "because he exercised his business of bookmaker upon no ascertained piece of ground, in other words, upon no premises akin or equivalent to a betting-house or office as in *Shaw* v. *Morley* (3)," and other cases. That again shows clearly that there must be some defined piece of ground, and also, I think, how that Lord Justice would have looked upon this case where there was no ascertained piece of ground, unless we take the whole area, which was open to the public, as being an ascertained piece of ground, an argument which I cannot accept because it seems to me to be opposed altogether to the notion of a place analogous to a house, room, or office. When we come to the consideration of what is a "place" within the meaning of the Act, in the judgment of Lord *James of Hereford*, we see how much importance he attached to the words of sec. 2, corresponding to the 18th section of the Act of New South Wales. He said (4): "In order to bring the first clause into operation something must exist that can at least constructively be regarded as a common gaming house." And he speaks again of dedication or appropriation of the place to betting, which seems to imply that that feature must be present, and that the absence of it is fatal to the idea of the betting establishment described in this Act. The whole of that paragraph which His Honor the Chief Justice read (5) from the judgment

(1) (1897) 2 Q.B., 242, at p. 276.
(2) 14 Q B.D., 588.
(3) L.R. 3 Ex., 137.
(4) (1899) A.C., 143, at p. 193.
(5) (1899) A.C., 143, at p. 196.

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of Lord *James of Hereford* seems to me full of meaning with regard to the case we are now engaged in deciding, and especially that part where he says:—"There is another view that may be presented, namely, that each peripatetic bookmaker using the inclosure occupies 'a place,' that is, the ground upon which his two feet rest, and that having permission so to stand upon any particular spot he may from time to time select, there is a shifting appropriation of each of such spots for the purpose of carrying on his business. But in such case, what can be said to constitute the 'place' requisite to constitute the offence? There is nothing in any way resembling a house, office, or room." It is true that His Lordship wound up by saying that the statement of learned counsel that "a place must be a place where a man according to the ordinary usages would be found" was correct. In the argument an attempt was made to use that passage to show that if that requirement existed that was enough. That was precisely the opinion of the learned Judges of the Supreme Court. But that is not the sense in which Lord *James of Hereford* spoke when he said that the notion of a place within the Act necessitated that it must be a place where a man according to the ordinary usages would be found. It would not be reasonable to stop at that point, not taking that expression with the remainder of his judgment. He regarded that as one of the ingredients necessary to constitute a "place," just in the same way as the appropriation of some piece of ground to betting was an ingredient. There must be more than both of these to constitute a place. He was saying that there must at the least be that ingredient whatever more might be required. Lord *Esher* M.R. said (1) there "must be some essential rights of a person using a place as his house, his office, or his room different from the rights as to it of persons who are not using it as their house, office, or room." Mr. Pickburn in his very thoughtful argument referred to this passage and read the remainder of it, and I think the remainder is very instructive; the meaning is entirely applicable in exoneration of the defendant in this case. His Lordship said (1):—"He must have some right of user peculiar to himself and exclusive of their rights, if any. A man

(1) (1897) 2 Q.B., 242, at p. 257.

cannot be said to be using a room as his room or office if, when he comes to it, he finds it full of people, even if they have come to see him or to deal with him, and yet he has no right to say, 'make way or room for me to come into my room or office.' A man cannot be said to be using a table as his table if any person who can find room at the table has as much right as he has to come to it and use it in any way such person thinks fit. The user by a person of a place as if it were his room or office necessarily implies some exclusive right in him as against some other persons." Of course that use may be only for a limited time, but it must exist in the sense of appropriation and occupation. And a little further on His Lordship uses words peculiarly applicable to the present case. "To say that he uses or claims to use the spot of ground on which he is at the moment standing as his room, office, or place exclusively as against all the world, as if it were his room or office, is beyond all reason." And so, I take it, with all respect, in the present case there must be a user peculiar to the person charged and exclusive of the rights of others, of a place, and unless there is such a user there is not the user contemplated in the Act. Lord *Halsbury* L.C. in his judgment in the House of Lords, already referred to, puts the user as a matter of control and occupation (1). He calls it "the conducting of the business, whether as master or servant," and says that that is the thing which makes it an establishment, that there must be a business conducted, and an owner, occupier, manager or keeper, or some person who is analogous to and of the same genus as the persons so designated, who is willing to bet with persons resorting to the "house, room, or other place." And he said (2):—"The second part of the section is in strict accordance with what I have suggested as the meaning of the Statute" that is, the portion of sec. 17 which declares these places to be common nuisances. "It assumes a place or establishment for receiving money or some valuable thing being received by or on behalf of an owner, occupier, keeper or person; here the Statute uses the words 'as aforesaid,' that is 'person using same,' for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or

(1) (1899) A.C., 143, at p. 159. (2) (1899) A.C. 143, at p. 161.

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valuable thing on any event or contingency of or relating to any horse-race or other race, fight, game, sport, or exercise. Then every house, office, room, or other place opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance and contrary to law." His Lordship then said that it seemed clear that the thing against which the enactment was levelled was any place used in the sense which he had explained, and that he attached more importance to the "use" than to the "place." It is clear to my mind that that concept is not satisfied unless there is some defined or appropriated piece of ground (whether there is any such structure or external indication as in *Liddell* v. *Lofthouse* (1), or not) which is capable of being used for the purposes of a betting establishment. Now, how can a public lane be *ejusdem generis* with house, room or office, and, referring to sec. 16 again, how can it be deemed a place into which the Inspector-General may authorize constables or others to enter and seize documents &c., found upon the premises? Where is it that the documents are to be found that are to be seized, and the lists &c., relating to racing or betting? Is it to be the documents found on the persons who are there? No. It is the documents in such house or premises. So, in such a case as this, of a person standing in the lane, whether a bookmaker or not, engaged in the business of betting with people around, suppose there is an entry upon the premises under these sections by the police, who are then to seize the documents or lists found on the premises; where in that case is the common gaming-house? Could that be satisfied by the notion of such a place as that occupied by the defendant in this case? The word "spot" has been used. But the Act does not deal with a spot, but with something capable of being far more accurately ascertained. Thus if there is not a kind of betting house, there is no offence under secs. 15 and 16, because, if the word "place" is not used in that sense in those sections, it is obviously absurd to apply to it the provisions for seizure of things only to be found on premises as distinct from those found on persons.

Thus I come to the conclusion, first, that a place, in order to be within the words "other place" in these sections, must be some-

(1) (1896) 1 Q.B., 295.

thing very different from a mere spot on which a man is standing; that it must be something capable of being used as a betting-house or establishment; and anything at all capable of being so used may be a "place" within the meaning of the Act. On the evidence, the position which the defendant occupied in this lane is not such a place, and, therefore, I think, construing the first objection taken by Mr. Lamb as an objection that the place was not a place within the meaning of the Act, that the magistrate was right in sustaining the objection. More than that, as the spot on which the defendant was standing is not any such spot as is capable of being used as an establishment of the kind struck at by the Act, on Mr. Lamb's second objection the magistrate was clearly right in dismissing the case. Holding this opinion, I am entirely at one with my brother the Chief Justice in concluding that the evidence entirely fails to bring the defendant within the Act, and that if he is to be brought within any of its express provisions further legislation is necessary for that purpose.

I may say that I wholly agree with the definition of user which has been put forward by His Honor the Chief Justice.

O'CONNOR J. I am of opinion that on the facts stated in the special case the appellant cannot be legally convicted of the offence charged. The information was laid under section 19 of the *Games, Wagers and Betting Houses Act* 1901, which is practically identical with the section of the English Act 16 & 17 Vict. c. 119 under consideration in *Powell* v. *The Kempton Park Racecourse Co.* (1). In the hearing of that case both in the Court of Appeal and in the House of Lords all the earlier decisions were carefully examined and discussed, and the principles to be applied in the interpretation of the Statute were elaborately expounded. Under these circumstances it would appear to be unnecessary to refer to the earlier cases, and it may now be taken that the decision of the House of Lords in the *Kempton Park Case* authoritatively lays down the principles properly applicable to a case of this kind. It is well, however, to bear in mind at the outset that the question is not to be decided on any general principles of public policy. The charge

(1) (1897) 2 Q.B., 242; (1899) A.C., 143.

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is laid under a Statute, and the only question to be determined is whether the facts disclose an offence constituted by the Statute. Taking the Act generally, its scope and purpose may be well described in the words which *Channell* J. used in reference to the English *Gaming Act* in *Brown* v. *Patch* (1):—

"The Statute seems clearly to be directed against betting places, not against betting persons. Clearly, also, it does not forbid persons using a place by going there and meeting and betting with each other. Nor does it forbid keeping a place where persons may meet and bet with each other. Nor does it forbid carrying on the business of betting with anyone who will bet with you. But it does forbid carrying on the business of keeping an office or place to which people may come and bet with you."

In order to convict the appellant, therefore, it must be shown not only that he carried on the business of betting with all persons who wished to bet with him, but that he carried on the business of keeping or using "a place" within the meaning of the Act to which persons might resort who wished to bet with him. In considering whether the Statute is applicable to the facts two questions arise. First, is Bank Court a place within the meaning of the Act? Secondly, if it is, did the defendant "use" that place, in the sense intended by the Act, for the prohibited purposes? As to what constitutes "a place" within the meaning of the Act Lord *James of Hereford* in the *Kempton Park Case* uses these words (2):—

"Speaking in general terms, whilst the place mentioned in the Act must be to some extent *ejusdem generis* with house, room, or office, I do not think that it need possess the same characteristics; for instance, it need not be covered in or roofed. It may be, to some extent, an open space. But certain conditions must exist in order to bring such space within the word 'place.' There must be a defined area so marked out that it can be found and recognized as 'the place' where the business is carried on and wherein the bettor can be found. Thus, if a person betted on Salisbury Plain, there would be no 'place' within the Act. The whole of Epsom Downs or any other racecourse where betting takes place

(1) (1899) 1 Q.B., 892, at pp. 898–99. (2) (1899) A.C., 143, at p. 194.

would not constitute a place ; but directly a definite localization of the business of betting is effected, be it under a tent or even movable umbrella, it may be well held that a 'place' exists for the purposes of a conviction under the Act. If this view be correct, I think that the inclosure existing at Kempton Park might, physically speaking, under certain conditions constitute a 'place' within the meaning of the first and second sections of the Act of 1853. It is a defined space limited by metes and bounds, and of such an area that a person therein carrying on the business of betting can be found."

So also in the same case in the Court of Appeal, *Esher* M.R. said (1): "It need not be a building built like a house, room, or office; it need not be a covered place; it need not be railed off, or boarded off, so as to prevent physical access to it except through a particular part of the railing or boarding; but it must be a defined space, capable from its condition of being used by a person who desires so to use it as if it were his house, room, or office, used by him as such for his betting business. I think that the inclosure described and existing in this case was, in consequence of its structural condition, a defined space, capable of being used by a person desirous of so using it as if it were his house, room or office, used as such for his betting business."

Applying these definitions to the facts before us, although it is difficult to see how the whole of Bank Court could be used as a place within the meaning of the Act, it seems to me that, having regard to its limited area, and its well marked boundaries, it is quite possible that a portion of it might become a place in the words of *Esher* M.R., "capable of being used by a person desirous of so using it as if it were his house, room, or office, used as such for his betting business." But then arises the more difficult question, was the appellant guilty of a user of any portion of Bank Court in the sense contemplated by the Act? As the "place" itself to come within the Act must be a place *ejusdem generis* with a house, office or room in which the business of betting is carried on, so the "user" of the place must be a user analogous to that of a house, office or room in which the business of betting is carried on, and here I may say that I entirely concur in the

(1) (1897) 2 Q.B., 242, at p. 257.

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definition of "user" which was given by my learned brother the Chief Justice in his judgment. The definition cannot, of course, be regarded as exhaustive, but it entirely covers all the cases which remain law since the decision of the House of Lords in the *Kempton Park Case*. Lord Justice *A. L. Smith* in the Court of Appeal in the *Kempton Park Case* (1) explains concisely the kind of user aimed at by the Act. He said: "There must however be an user such as takes place in the keeping of a betting house or office to be within the Act, and the user of a place in common with mankind in general is not such an user as is contemplated by the Act." In other words, the user of the place must be of the same kind as if the place were his house, office, or room used by him as such for his betting business. I can see no evidence of such user. The facts relied on were that the appellant stood in the lane habitually in the same place opposite the doorway of a room described by some of the witnesses as a betting shop, but with the use of which room there was apparently no evidence to connect the appellant. The learned Chief Justice in the Court below states his view of these facts (2) as follows :—

"The bookmaker by his habitual use of the position for the purpose mentioned defines the place for betting purposes in the same degree and to the same extent as if the betting carried on by him took place in a 'house, room, or office.'"

It is difficult to see how a person by merely standing on a certain spot in a public lane for a certain time every day can be said to be using that spot "as if it were his house, office, or room, used by him as such for his betting business." If another person happens to be there before him that other person can occupy the same spot as any person has an equal right to stand in the same place. Again, how is it possible to define what portion of the lane he was using—how far around him does the "place" used extend? If the place he occupies is a place within the meaning of the Act, serious consequences may follow to persons other than himself present in the place. "The place" may be treated as a "common gaming house." Persons found therein may be arrested and brought before a magistrate,

(1) (1897) 2 Q.B., 242, at p. 276.
(2) (1905) 5 S.R. (N.S.W.), 639, at p. 648.

and persons found there without lawful excuse are liable to a maximum penalty of £5. It would be unreasonable to suppose that the whole lane was, under the circumstances, being used as a "place" within the meaning of the Act, thus exposing all persons who happen to be within its limits to such serious risks. On the other hand, if not the whole lane, what portion of it was being used by the appellant as if it were his house, office, or room used by him as such for his betting business? Where the place alleged to be "used" contrary to the Act is one to which the public have access, it would appear impossible that it can be said to be used by one person more than another as a place for carrying on a business of betting as if it were his house, office, or room, unless that person has actually appropriated to himself for the time being by occupation a certain portion of it defined in some visible way. Such portion might be defined by some natural feature of the ground or by an existing structure such as the bays of the hoarding in *Liddell* v. *Lofthouse* (1), or by some act of physical possession by the person alleged to have so used the place, such as the erection of an advertising stand as in *Brown* v. *Patch* (2), or the setting up of an umbrella, stool, or box, as in the earlier cases. The necessity of some defining of the limits of the place used in such cases is well put by *Esher* M.R. in *Powell* v. *Kempton Park Racecourse Co.* (3), in the Court of Appeal. Speaking of the inclosure at Kempton Park, to which other members of the public had equally with bookmakers right of access and user, he says:—

"Then arises the second question, whether any person did so use the inclosure as to enable the Court to say that he used it as if it were his house, office, or room, used by him as such for his betting business. Now there are and must be some essential rights of a person using a place as his house, his office, or his room different from the rights as to it of persons who are not using it as their house, office, or room. He must have some right of user peculiar to himself and exclusive of their rights, if any. A man cannot be said to be using a room as his room or office if, when he comes to it, he finds it full of people, even if they have come to see him

(1) (1896) 1 Q B., 295. (2) (1899) 1 Q.B., 892.
(3) (1897) 2 Q.B., 242, at p. 257.

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or to deal with him, and yet he has no right to say 'make way or room for me to come into my room or office.' A man cannot be said to be using a table as his table if any person who can find room at the table has as much right as he has to come to it and use it in any way such person thinks fit. The user by a person of a place as if it were his room or office necessarily implies some exclusive right in him as against some other person. He may have partners in the room, or he may use part of the room as his office, whilst others have an independent right to use another part of the room as their office; but the part of the room or place which can be said in any reasonable sense to be used by him as his office must be a part which he claims to use and does use exclusively as his against some people."

Further on he deals with an argument similar to that used in this case (1):—"To say that he uses or claims to use the spot of ground on which he is at the moment standing as his room, office, or place exclusively as against all the world, as if it were his room or office, is beyond all reason." I can see in this case no evidence of any such marking off or appropriation of any portion of Bank Court by the appellant in such a way as to indicate any difference between his occupation of such portion and that of any member of the public who happened to be standing opposite the same doorway. I feel, therefore, compelled to come to the conclusion that, assuming a portion of Bank Court to be capable of being used as a place within the meaning of the Act, there is no evidence of any such user by the appellant of any portion of the place as would render him liable to prosecution for the offence charged. I am of opinion, therefore, that the magistrate's decision must be upheld, and that the decision of the Supreme Court reversing it must be set aside.

Appeal allowed. Order appealed from discharged. Appeal from magistrate dismissed with costs. Respondent to pay the costs of the appeal and of the motion to rescind.

(1) (1897) 2 Q.B., 242, at p. 258.

Solicitors, for appellant, *Crick & Carrol.*

Solicitor, for respondent, *The Crown Solicitor for New South Wales.*

C. A. W.

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[HIGH COURT OF AUSTRALIA.]

PRESTON v. DONOHOE.

GORDON v. DONOHOE.

Prohibited Immigrant—Member of ship's crew absent from muster—"Opinion of the officer"—Construction—Immigration Restriction Act (No. 17 of 1901), secs. 3, 9—Immigration Restriction Amendment Act (No. 17 of 1905), secs. 4†, 12.*

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SYDNEY, *May* 22, 25. MELBOURNE, *June* 29.

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

* Sec. 3 of the *Immigration Restriction Act* 1901 is as follows :—

3. The immigration into the Commonwealth of the persons described in any of the following paragraphs of this section (hereinafter called "prohibited immigrants") is prohibited, namely :—

(*a*) Any person who when asked to do so by an officer fails to write out at dictation and sign in the presence of the officer a passage of fifty words in length in an European language directed by the officer ;

. . . . . .

But the following are excepted :—

. . . . . .

(*k*) the master and crew of any other vessel landing during the stay of the vessel in any port in the Commonwealth : Provided that the master shall upon being so required by an officer, and before being permitted to clear out from or leave the port, muster the crew in the presence of an officer ; and if it is found that any person, who according to the vessel's articles was one of the crew when she arrived at the port, and who would in the opinion of the officer be a prohibited immigrant but for the exception contained in this paragraph, is not present, then such person shall not be excepted by this paragraph, and until the contrary is proved shall be deemed to be a probibited immigrant and to have entered the Commonwealth contrary to this Act ; . . . . . .

† Sec. 4 of the *Immigration Restriction Amendment Act* 1905 is as follows :—

4. Section three of the Principal Act is amended—

(*a*) by omitting the whole of paragraph (*a*) and inserting in lieu thereof the following paragraph :—

(*a*) Any person who fails to pass the dictation test : that is to say, who, when an officer dictates to him not less than fifty words in any prescribed language, fails to write them out in that language in the presence of the officer.