[HIGH COURT OF AUSTRALIA.]

SCOTT . . . . . APPELLANT;
DEFENDANT,

AND

CAWSEY . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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May 29, 31; *June* 4, 5.

Griffith C.J., Isaacs and Higgins JJ.

Sept. 3, 4, 13.

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

Sunday entertainment—Charge for admission—"Place"—Portion of room railed off and charge for admission to it—Entrance to rest of room free—Advertising entertainment—21 *Geo. III. c.* 49, *secs.* 1, 3.

The Act 21 Geo. III. c. 49 is in force in Australia.

In a large room a public entertainment within the meaning of 21 Geo. III. c. 49 was given on a Sunday. Portion of the room, containing about two-fifths of the sitting accommodation, was railed off, and in this portion the seats were more comfortable than those in the rest of the room, and it was the best part of the room for hearing and seeing the entertainment. The only entrance to the railed off portion of the room was from the other portion. There was only one entrance to the room from the outside, and any person might enter there without payment and participate in the entertainment, but a charge was made for entering the portion of the room which was railed off.

Held (*Isaacs* and *Higgins* JJ. dissenting) that neither the room itself nor the portion of it railed off was "a house, room, or other place, . . . opened or used for public entertainment or amusement" upon Sunday "and to which persons" were "admitted by the payment of money," within sec. 1 of 21 Geo. III. c. 49, and, also, that the advertising of an entertainment to be given under such circumstances was not within sec. 3 of that Act.

Judgment of *Chomley* J.: *Cawsey* v. *Scott*, 28 A.L.T., 112, reversed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court by Henry Cawsey against Ebenezer Erskine Scott to recover penalties under the Act 21 Geo. III. c. 49. The plaintiff alleged that the defendant was on three several Sundays "the keeper of a house, room, or place in Fitzgerald's Circus Building situate at South Melbourne which was then opened or used for public entertainment or amusement and to which persons were then admitted by the payment of money or by tickets sold for money." For this the plaintiff claimed a penalty of £200 in respect of each Sunday. Alternatively the plaintiff claimed a penalty of £100 from the defendant for managing or conducting such entertainment, or, alternatively, a penalty of £50 for receiving money or tickets sold for money for such entertainment. A further penalty of £50 was claimed for advertising such entertainment on two of the Sundays. The defence was a general denial.

In reference to the advertisements it was proved that at one of the entertainments a reflection was thrown by a lantern on a screen showing a notice stating that on the next Sunday a similar entertainment would be given.

The other facts are sufficiently set out in the judgments hereunder.

Chomley J., who heard the action, gave judgment for the plaintiff for £650, being £200 in respect of being the keeper of a place within the Act on each of the three Sundays, and £50 in respect of advertising, with costs: *Cawsey* v. *Scott* (1).

The defendant now appealed to the High Court.

May 29.

Schutt, for the appellant. The plaintiff is limited by his pleading to the "reserve," or portion of the room which was railed off, as being the place which was kept or used, and he cannot be heard to say that the whole room is the place which the appellant was charged with keeping. The reserve does not constitute a place within the meaning of the Act. There must be a charge for admission to the entertainment. Here the entertainment was free to any one who chose to enter the building. The only charge made was after a person had been admitted to the entertainment, and it was a charge for extra comfort only. A charge for

(1) 28 A.L.T., 112.

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reserved seats does not bring the entertainment within the Act: *Encyclopædia of Law of England*, tit. "Sunday"; *Williams* v. *Wright* (1). The terms of the Act are not applicable to a place within a place.

[HIGGINS J.—*Baxter* v. *Langley* (2) seems to assume that charging for reserved seats would bring the entertainment within the Act.]

The Act only contemplates a charge for admission to the room where the entertainment is held. The Act is not in force in Victoria. It is either a police law or an ecclesiastical law, or partly one and partly the other, and comes within the exceptions to the principle laid down in *Blackstone's Commentaries*, vol. I., p. 108, which is quoted in *Jex* v. *McKinney* (3), and in *Quan Yick* v. *Hinds* (4).

[HIGGINS J.—Was 9 Geo. IV. c. 83, sec. 24, intended to extend that principle, and to introduce into Australia more laws than would have been in force under the common law?]

No. It only put into statutory form what was the common law. The Act 21 Geo. III. c. 49 was not suitable or applicable to Australia where there was no established church, and where all creeds were equal. In *M'Hugh* v. *Robertson* (5), where it was held by the Full Court that this Act was in force in Victoria, the question whether it was a police law was not argued, but *Williams* J. in the Court below was inclined to think it was. There has been subsequent legislation in Victoria dealing with Sunday observance impliedly declaring that the English laws relating thereto are not in force in Victoria. That amounts to an implied repeal of 21 Geo. III. c. 49. At any rate, "limitations and modifications" of that Act, within the meaning of 9 Geo. IV. c. 83, have been established. See 18 Vict. No. 14, sec. 24; *Police Offences Act* 1890, sec. 31, *et seq.*; 6 Will. IV. No. 1; 5 Vict. No. 6. As to repeal by implication, see *R.* v. *Hilaire* (6); *Attorney-General for Victoria* v. *Moses* (7). [He also referred to *Raithby's Index to the Statutes at Large*, vol. III., tit. "Sunday."]

(1) 13 T.L.R., 551; 41 Sol. Jo., 671.
(2) L.R. 4 C.P., 21.
(3) 14 App. Cas., 77, at p. 81.
(4) 2 C.L.R., 345, at p. 355.
(5) 11 V.L.R., 410.
(6) (1903) 3 S.R. (N.S.W.), 228, at p. 229.
(7) (1907) V.L.R., 130; 28 A.L.T., 125.

Pigott, for the respondent. The Act 21 Geo. III. c. 49 has not been repealed by implication. There is no inconsistency or repugnancy between its provisions and those of subsequent Victorian legislation. *Hardcastle on Statutory Law*, 4th ed., p. 304. Sec. 2 of the *Theatres Act* 1896 recognizes that the disabilities created by 21 Geo. III. c. 49 still existed. The latter Act is not an ecclesiastical Act, nor is it a police Act within the principle stated by *Blackstone*. If the word "police" is there used as meaning "criminal" the principle must be corrected, for there is no doubt that the criminal law was introduced by the first settlers. *Bentham's Principles of Morals and Legislation*, Chap. XVIII. The Act 21 Geo. III. c. 49 is criminal law. *Delohery* v. *Permanent Trustee Co. of New South Wales* (1); *Attorney-General for Ontario* v. *Hamilton Street Railway Co.* (2). The Act may be held to apply to Victoria as being one to protect Sunday as a civil institution beneficial to the State, as expressed by *Williams* J. in *M'Hugh* v. *Robertson* (3). It has for more than fifty years been held to be in force in Victoria: *Ronald* v. *Lawlor* (4). See also *Walker* v. *Solomon* (5); *Ex parte Rogerson* (6). A part of a room is a "place" within the meaning of the Act if it is substantially differentiated from the rest of a room. *Prior* v. *Sherwood* (7).

[GRIFFITH C.J. referred to *Powell* v. *Kempton Park Racecourse Co.* (8), as to the meaning of "place."]

That is sufficiently done in this case by the wooden rail. If the admission for which a charge is made must be admission to the whole hall, then, if a person is admitted free to a part of the hall and is then charged for admission to another part, he is charged for admission to the hall. If the place has its own sufficient entity and the entertainment can be enjoyed there, that is sufficient. Thus the charging for admission to a room in a house to hear music, which was being played in an adjoining public place, would be contrary to the Act. There was here an advertising within the meaning of the Act. Anything expressed in

(1) 1 C.L.R., 283, at p. 293, *per Griffith* C.J.
(2) (1903) A.C., 524.
(3) 11 V.L.R., 410; 6 A.L.T., 227.
(4) 3 A.J.R., 11, 87.
(5) 11 N.S.W. L.R., 88.
(6) 9 N.S.W. L.R., 30.
(7) 3 C.L.R., 1054, at p. 1070.
(8) (1899) A.C., 143.

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the same way as a libel is required to be expressed in an advertisement.

[ISAACS J. referred to *Smith* v. *Mason & Co.* (1), as to the meaning of "advertisement."]

There must be knowledge on the part of the advertiser that a charge is to be made to the entertainment.

Schutt in reply. The construction of the Act contended for by the respondent requires the words "or part of a place" to be read after the word "place." Such a construction will not be given to a penal Act; *London County Council* v. *Aylesbury Dairy Co.* (2).

[ISAACS J. referred to *Dyke* v. *Elliott*; *The Gauntlet* (3).]

An advertisement must be a notification to the general public, and not to those persons only who happen to be at one of these entertainments.

Cur. adv. vult.

The case was subsequently directed to be re-argued before the Full Bench.

Sept. 3.

The case was re-argued when the following additional arguments were adduced.

Schutt, for the appellant. It is immaterial whether all the people or none of them are within the reserve. As long as a substantial portion of the hall is open without payment for admission, the Act is not infringed. Part of a room cannot be a "place" within the Act because the Act speaks of the "owner" or "occupier" of the place. Sec. 3 of the Act means that the advertisement must state that a charge was to be made for admission, and it must also be shown that the entertainment was held, and that a charge for admission was made. An advertisement must also be something printed and published. If there are two reasonable constructions of a penal Act open, one of them favourable to the defendant, he should have the benefit of that interpretation which is favourable to him: *Hardcastle on Statutory Law*, 4th ed., p. 430; *Nicholson* v. *Fields* (4).

(1) (1894) 2 Q.B., 363.
(2) (1898) 1 Q.B., 106.
(3) L.R. 4 P.C., 184, at p. 191.
(4) 7 H. & N., 810.

[ISAACS J.—If both constructions are equally reasonable you have to look at the intent of the Statute. *Llewellyn* v. *Vale of Glamorgan Railway Co.* (1).]

Pigott, for the respondent. By the *Public Moneys Act* 1890, sec. 4, the Governor in Council may remit penalties for offences, so that the position here in that regard is the same as in England. On the construction contended for by the appellant the Act could be easily evaded, and the Court will construe the Act so as to prevent evasions of it: *Maxwell on Statutes*, 4th ed., p. 171; *Morris* v. *Blackman* (2); *Booth* v. *Bank of England* (3).

[ISAACS J. referred to *Bullivant* v. *Attorney-General for Victoria* (4).]

The word "place" should be interpreted *ejusdem generis* with "house" and "room," and, in its collocation, means part of a room: *Sandiman* v. *Breach* (5).

[ISAACS J. referred to *Plymouth, Stonehouse, and Devonport Tramways Co.* v. *General Tolls Co.* (6).

Schutt referred to *Anderson* v. *Anderson* (7).]

If on the evidence the judgment can be supported on any ground it should be supported, although it may not be for the same reason given by the Judge. The fact that the advertisement was produced by a means not known when the Act was passed does not affect the matter: *Graves* v. *Ashford* (8).

Schutt, in reply.

Cur. adv. vult.

The following judgments were read:—

Sept. 13.

GRIFFITH C.J. The Act 31 Geo. III. c. 49, provides (sec. 1) that "any house, room, or other place, which shall be opened or used for public entertainment or amusement, or for publicly debating on any subject whatsoever" on Sunday, "and to which persons shall be admitted by the payment of money, or by tickets sold for money, shall be deemed a disorderly house or place"; and that the keeper shall be liable to a penalty of £200 a day for every

(1) (1898) 1 Q.B., 473.
(2) 2 H. & C., 912.
(3) 7 Cl. & F., 509.
(4) (1901) A.C., 196.
(5) 7 B. & C., 96.
(6) 14 T.L.R., 531.
(7) (1895) 1 Q.B., 749.
(8) L.R. 2 C.P., 410.

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day that the house, room, or place is so opened or used, to be recovered by any person suing for it, and be otherwise punishable as the law directs in cases of disorderly houses. The third section of the same Act imposes a penalty of £50 for advertising any public entertainment or amusement or public meeting for debating on any subject whatsoever on Sunday "to which persons are to be admitted by the payment of money, or by tickets sold for money." In this section the admission spoken of is to the entertainment or amusement or meeting, whereas in the first section the admission spoken of is to the house, room, or place. The term "admission," however, involves the idea of locality, and of the ability of the person who permits the admission to exclude others from the place of entertainment or amusement except with his consent.

The material words of both sections are "to which persons shall be (are to be) admitted," and what is made unlawful is opening or using for the specified purposes a house, room, or place to which persons are admitted on payment, and not the receipt of money from persons already admitted in consideration of some special privilege, such as the use of a seat.

It appears in the present case that the appellant was in possession of a large hall in Melbourne called Fitzgerald's Circus Building, in which musical entertainments were given on Sunday evenings. The hall, which had eight sides, may be described as an elongated octagon, two sides being much longer than the others. The entrance to the hall was at one end. The short side adjoining that end to the right was occupied by a stage for the performers, who faced obliquely across the length of the hall. Around all the rest of the hall were gallery seats, and there was a large vacant space in the middle available for promenade. Some of the gallery seats on the part of the left hand side nearest the door were covered with carpet, and were enclosed with a light handrail, inside of which there were also some chairs. This part of the hall was spoken of in the evidence as the "reserve," but there was no notice put up to the effect that it was reserved. The admission to the hall was free, and persons who had obtained admission were at liberty to go to any portion of the gallery seats at the right hand side or at the end, or to any part of the

floor in the middle of the building, but, if they desired to use the part of the hall spoken of as the reserve, a small charge was made. According to the plan put in evidence the space to which there was free admission comprised at least three fourths of the total area.

The stage for the performers was, as already stated, on the opposite side of the hall from the reserve, so that the reserve was the best place for hearing, but all the persons in the hall could participate in the entertainment or amusement, with such difference only in point of amenity as arose from the point of view, the greater or less distance from the performers, and the degree of comfort afforded by the seats or absence of seats.

Under these circumstances this action was brought against the appellant claiming penalties for breaches of secs. 1 and 3 of the Act. The breaches alleged under sec. 1 were that he was on three specified Sundays the keeper of a house, room, or place which was then opened or used for public entertainment or amusement, and to which persons were then admitted by the payment of money or by tickets sold for money. The charge as originally framed was of keeping the whole building as a place of entertainment to which &c.; but at the trial the statement of claim was amended to charge the appellant with keeping a house, room, or place *in* the building, *i.e.*, the reserve, as such a place of entertainment. The respondent, in effect, claims that sec. 1 forbids admission by payment to any part of a room used for public entertainment or amusement, although free admission is granted to the room itself, and, alternatively, that, if a charge is made for admission to any part of the room which is in any way delimited from the rest, that part is a place within the meaning of the Statute.

In my opinion, the decision of the case depends upon the answer to two plain questions of fact. First, what was the house, room, or place which was in fact opened or used for public entertainment on the dates alleged? Second, were persons admitted to that house, room, or place by the payment of money or by tickets sold for money? The plain and obvious answer to the first question is that the house, room, or place opened or used was the large room or hall called Fitzgerald's Circus Building. The

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answer to the second must be in the negative. In my judgment this ends the matter.

It appears from the passage read by Mr. *Schutt* from the *Encylopædia of Law* that this is the accepted construction of the Statute in England. In the case of *Williams* v. *Wright* (1) an attempt was made to set up the construction now contended for by the respondent. That was an action against the publisher of the "Times" for a penalty under sec. 3 for publishing an advertisement of a Sunday entertainment. The advertisement announced the place, time, and character of the entertainment and added "Tickets 1/- 2/- 3/- 5/-." At the trial it appeared that the plaintiff had bought a ticket marked "Admission free: Reserved Seat 1/-" for which he paid 1/-. *Collins* J. (now Lord *Collins*) appears to have construed sec. 3 as relating only to advertisements of entertainments which were actually unlawful as being in contravention of sec. 1. And he held that, as it appeared by the evidence that admission to the hall in question (a well known hall in London) in which the entertainment advertised was held was in fact free, the entertainment was not within the prohibition, and the publisher of the advertisement was not liable. He pointed out that the Statute spoke of admission, not to a seat, but to an entertainment. The word "admission," as already pointed out, connotes a place from which persons can be excluded. So, sec. 1 speaks of admission, not to a seat, but to a place opened or used for entertainment. This view appears to have been followed ever since, and we are told that such entertainments have received the sanction of the Royal presence, and are regularly advertised. I cannot doubt that any Court in England would follow that decision.

It is, however, contended that the reserve should be regarded as a separate place, distinct from the rest of the hall, or, in other words, that the appellant opened and used for public entertainment two distinct and separate places, (1) the reserve, and (2) the rest of the hall, to one of which persons were, and to the other were not, admitted on the payment of money. By parity of reasoning, if he had had separate reserves or compartments in the hall with seats at different prices, he would have been the

(1) 13 T.L.R., 551.

keeper of as many different places, each separately opened for public entertainment, and would have been liable to a separate penalty of £200 in respect of each. If the room were a theatre, he would be liable to a separate penalty of £200 in respect of each box for admission to which payment was demanded, whether occupied or not. The appellant, in truth, opened and used for public entertainment one room, and one room only, the hall.

The word "place" is not a word of art, and its meaning may be different in different Statutes. In the *Betting Act* 1853, for instance, as pointed out in the cases of *Powell* v. *Kempton Park Racecourse Co. Ltd.* (1) and *Prior* v. *Sherwood* (2), it means a place which can at least constructively be regarded as a common gaming house, and over which the alleged keeper has actual and exclusive dominion for the time being. But it does not follow that every small area of the earth's surface, of which these attributes can be predicated, is a place within the meaning of some other Statute. I agree that part of a room may be a place within the meaning of the Statute now under consideration, if it is separated from the rest of the room by some line of demarcation, and is used for some purpose for which the rest of the room is not being used. But, when a single entertainment is given in a room, it is, in my opinion, impossible to construe the words "house, room, or other place" in such a way as to treat the single room as subdivided into several distinct places. To do so would be, in effect, to interpolate the words "or to any part of which" after the words "to which" in the section. Such an interpolation is not justified unless without it the enactment would fail to have any effect. In my opinion, the Statute as it stands is not capable of that construction. It is not, therefore, a case of ambiguity, and, if it were, the construction in favour of liberty should be adopted.

The fallacy of the argument for the respondent becomes manifest when it is stated in the form of a syllogism:—"Admittance to part of a room is admittance to the room: Therefore, refusal of admittance to part of a room is refusal of admittance to the room." *Aliter*, all B is A: no C is B: Therefore, no C is A. There could hardly be a plainer instance of the undistributed middle. It was suggested that the provision in sec. 2 of the Act,

(1) (1899) A.C., 143, (2) 3 C.L.R., 1052.

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which makes the fact that refreshments are sold in the room at higher than ordinary prices sufficient evidence that persons are admitted to the room on payment, supports the respondent's view. In my opinion it has a contrary operation. The legislature thought fit to single out one set of circumstances as sufficient evidence of one element of the offence. The omission to say that a different set of circumstances should have the same effect indicates, if it indicates anything, that they did not intend that result, not that they did intend it.

Cases may be supposed in which the only part of a room to which admission is free is so small as to be illusory. That would raise a question of fact to be proved by evidence. It certainly does not arise in the present case.

In this view it is unnecessary to consider the subsidiary question raised under sec. 3.

I am myself unable to discover any provision in the Act showing an intention, or even any suggestion of a desire, to prohibit a charge for special comfort afforded to persons present at an entertainment to which admission is free. In my opinion, both upon principle and upon authority, the case is free from doubt.

On the question whether the Statute is in force in Australia I should be strongly disposed, if the matter were *res integra*, to adopt the view originally taken by *Molesworth* J. But, having regard to the fact that the English Acts relating to Sunday observance were held forty years ago to be in force in Victoria, I do not feel justified in disturbing the law as then laid down.

I think that the appeal should be allowed.

BARTON J. As to the main question in this case, that is whether the appellant is liable to be penalised as keeper of a disorderly house within the meaning of the *Sunday Observance Act* 1780, our duty, looking the Statute in the face, is to determine, (1) whether, at the time he is alleged to have incurred such a liability, he was the keeper of a "house, room, or other place" which was during any part of Sunday opened or used for public entertainment or amusement, and (2) whether persons were admitted to that "house, room, or other place" by "the payment

of money, or by tickets sold for money." Now, I have no doubt on either of these queries, answering the first in the affirmative and the second in the negative. The Statute clearly requires that the "house, room, or other place, which shall be opened or used" for the purposes described must be the same house, room, or place to which the public were admitted (to be amused or entertained) on "the payment of money, or by tickets sold for money." That was not so in this instance. The entertainment was beyond question carried on in the large hall, being Fitzgerald's Circus Building, or being in the Circus Building; I do not care which. No one was excluded—that is, all were admitted—to that house or room free. But, as the appellant admitted to Sergeant McManamny, there was a part reserved with chairs (and carpet covered seats) and the tenants, one of whom is the appellant, had men standing at the entrance for the purpose of collecting a small sum from people to go in (*i.e.* to these chairs and seats) and, as he phrased it, "have comfort." The rest of the audience had to stand or to sit elsewhere. The part reserved was within the large hall, and was reached through the same entrance by which all were admitted, it was lightly railed off and had an opening, but no gate or bar thereat. But the people who paid for this extra privilege of a seat—this "comfort,"—had been admitted to hear and see the whole entertainment without charge, and, therefore, before they engaged seats they were on the same footing as the rest of the audience. They could stand and see and hear everything without paying anything. The place in which the entertainment took place was the place of which the appellant was undoubtedly a "keeper," but no charge was made for admission to that place. That is the state of facts established beyond all doubt by the evidence, and *Chomley* J. does not appear to have found otherwise; but he has come to the conclusion that the reserved portion was a "place" within the meaning of the Act, and as money was charged for admission to it, he held the defendant, now the appellant, liable.

The circumstances of this case cannot be distinguished in substance from those of *Williams* v. *Wright* (1). There *Collins* J., afterwards Master of the Rolls, and now Lord *Collins*, held that,

(1) 13 T.L.R., 551.

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where persons could gain entrance to the building generally and hear and see the entertainment without being subjected to any charge, the fact that a portion only of the building in which the entertainment was held, was reserved, so that people who desired seats might have them on paying a charge for admission, or for a ticket which admitted them, to this comfort and privilege, did not render the last mentioned portion a "house, room, or other place" within the meaning of the Act.

On the other hand, *Hodges* J. in *Cawsey* v. *Davidson* (1), a case from which he said he was not sure he could distinguish that of *Williams* v. *Wright* (2), seems to have thought, though he had not to decide, that under circumstances such as exist in the present case the reserved seats were a place within the meaning of the Act.

To my mind the place "opened or used for public entertainment or amusement" was the large hall, and, though the reserved seats were within it, that did not make them another place. Therefore the reason of the matter, as well as the high authority of Lord *Collins*, leads me to the conclusion that the appellant ought to succeed.

In *Reid* v. *Wilson* (3) a case involving the construction of this Statute, but on another point, Lord *Esher* M.R. said of it:—"The Act imposes penalties, and therefore must be construed and applied strictly;" and *Lopes* L.J. said (4):—"This is a penal Statute, and it is a well-established rule that the person whom it is sought to make liable under such a Statute must be strictly brought within its words. The defendants must, therefore, be strictly brought within the description of the persons mentioned in this Act as intended to be made liable to penalties." These words are as applicable to facts and things as to persons in the process of ascertaining whether the person is liable.

But it is not pretended in these days that this rule should be so applied that cases, which would be ordinarily included within the meaning of the terms used, should be placed outside it by a forced or strained construction. To use the words of the Judicial

(1) (1906) V.L.R., 32; 27 A.L.T., 121.
(2) 13 T.L.R., 551.
(3) (1895) 1 Q.B., 315, at p. 320.
(4) (1895) 1 Q.B., 315, at p. 322.

Committee of the Privy Council in *Dyke* v. *Elliott*; *The Gauntlet* (1):—"No doubt all penal Statutes are to be construed strictly, that is to say, the Court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip or a *casus omissus*, that the thing is so clearly within the mischief that it must have been intended to be included and would have been included if thought of." To my thinking, the plain meaning of the words does not render the appellant liable. But if I had any real doubt as to them, I should be guided by the very plain sense of the words of Lord *Esher*, then *Brett* J., when in *Dickenson* v. *Fletcher* (2), he said:—"Those who contend that a penalty may be inflicted, must show that the words of the Act distinctly enact that it shall be incurred under the present circumstances. They must fail, if the words are merely equally capable of a construction that would, and one that would not, inflict the penalty." It is as true now as when *Blackstone* wrote it, that "The law of England does not allow of offences by construction." It has been urged that the interpretation endorsed by the high authority of Lord *Collins* leads or will lead to evasion of the Act. What then is meant by an evasion? *Chitty* L.J. in *Attorney-General* v. *Beech* (3) said, in a judgment concurring with that of *A. L. Smith* L.J., *Collins* L.J. concurring with both:—"Much was said upon opening the door to evasion. Would these be cases of evasion? Certainly not. Indeed, the whole argument on evasion of the Act is fallacious. *The case either falls within the Act or it does not. If it does not, there is no such thing as an evasion.*" That is much the same thing as *Jessel* M.R. said in *Yorkshire Railway Wagon Co.* v. *Maclure* (4) thirteen years earlier:—"It seems to me our decision in this case will by no means encourage people to evade the Act of Parliament, or enable them to evade it, *that is, to do anything which is either expressly or impliedly prohibited by the Act of Parliament.*"

On the question arising under sec. 3, as to the advertisements, I think the appellant is entitled to succeed. The word "admitted" in that section clearly implies locality, and means admitted to

(1) L.R. 4 P.C., 184, at p. 191.
(2) L.R. 9 C.P., 1, at p. 7.
(3) (1898) 2 Q.B., 147, at p. 157.
(4) 21 Ch. D., 309, at p. 316.

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such an entertainment or public meeting on a Sunday as the Statute attacks, that is, one held in some "house, room, or other place," if the admission is on "payment of money, or by tickets sold for money." As I hold that in this case admission to the "house, room, or other place" for the entertainment was not charged for, I cannot think the appellant liable under the third section by reason of the advertisements.

For these reasons I am of opinion that the appeal ought to be allowed.

O'CONNOR J. This is an appeal from a judgment of Mr. Justice *Chomley* awarding £650 penalties against the appellant under the *Sunday Observance Act*, 21 Geo. III., c. 49. That Act was passed by the British Parliament in 1781. It has been decided by the Supreme Court of Victoria to be in force here, and it must, I think, be taken as now settled that it is part of the law of Victoria. How far its provisions may be in accord with modern public opinion it is no part of the duty of this Court to inquire. If an offence under the Act has been committed, the Statute gives the plaintiff a right to recover these penalties, and he is entitled to have his right enforced. The sole matter therefore for our consideration is whether the facts proved in evidence and found by the Judge constitute an offence under the Act.

The charge upon which the plaintiff based his case is set out in the beginning of Mr. Justice *Chomley's* judgment as follows:— "The plaintiff claims £200 for that the defendant was (stating date) the keeper of a house, room, or place in Fitzgerald's Circus Building situate at South Melbourne which was then opened or used for public entertainment or amusement and to which persons were then admitted by the payment of money or by tickets sold for money." That charge may be read as applying either to the whole room in which the entertainment was being held, or to the reserved portion only. It is clear that the learned Judge in the Court below regarded the charge as referring to the reserved portion only. His finding of fact is directed solely to that view. ". . . the evidence to my mind," he says, "shows clearly that persons who paid a small sum, a silver coin, were admitted within the reserved portion, but if they did not pay that sum

they were directed elsewhere. Following the judgment of *Hodges* J. with whom I agree I hold that this reserved portion was a 'place,' and for the reasons already stated I think that money was charged for admission thereto" (See *Cawsey* v. *Scott* (1).)

Assuming, however, that the charge can be read either way, the question is whether the evidence and findings disclose any offence against the Act. The Act follows a plan common enough in the criminal legislation of that time. The first section declares that under certain stated circumstances a house, room, or place shall be deemed to be a disorderly house or place, thereby giving the house or place the criminal status of a gaming house, or an unlicensed place of entertainment. It then proceeds to impose on the keeper of the house or place a fine of £200 for every day on which the house or place shall be opened or used under the circumstances stated; it further directs him to be punished as the law directs in the case of disorderly houses, and follows by imposing fines of less and less amount on managers, conductors, and chairmen, doorkeepers, and servants, according to the descending scale of responsibility. The essence of the offence is concentrated in the circumstances which are declared by the section to constitute the house or place a disorderly house or place.

Leaving out the reference to Sunday public debates, consideration of which is not material in this case, the following circumstances must concur. The "house, room, or other place" must be opened or used on Sunday for public entertainment or amusement, and there must be a charge for admission to the house, room, or place, either in the shape of direct payment of money or presentation of tickets sold for money. The legislature might, if it thought fit, have declared that any charge for the viewing or listening to or being present at the entertainment would have constituted the house, room, or place a disorderly house or place, but they have not done that. They have declared in very clear language that the circumstance which shall constitute a house, room, or place opened or used on Sunday for public entertainment or amusement a disorderly house or place is the charge for admission into the house, room, or place which is then so opened and used. If it is once established that the public are admitted into the house, room,

(1) 28 A.L.T., 112.

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or place free of charge the action must fail. There is nothing in the Act to prevent the managers of the entertainment from making a charge to any member of the public after his free admission into the house, room, or place for special advantages in the way of more comfortable or more exclusive seats or a better view of the performance. As to this, *Williams* v. *Wright* (1) is directly in point. That was an action against the printer and publisher of the "Times" for penalties under the same Act. The offence charged was under sec. 3 for advertising a Sunday evening concert in the Queen's Hall, London. The defendant pleaded that the advertisement was not the advertisement of a public entertainment or amusement within the meaning of the Act, alleging that it was not the advertisement of a public entertainment or amusement to which persons were admitted by the payment of money. It became necessary, therefore, to establish that there was a charge for admission to the entertainment. The plaintiff proved that he had gone to the concert and had paid 1/- for a ticket. The ticket had on it :—

"Admission free."

"Reserved Seat 1/-."

One of the grounds of defence was that on the ticket it was stated that admission was free, and that, unless the entertainment was illegal, the advertisement could not be illegal. Mr. Justice *Collins*, now Lord *Collins*, who tried the case, upheld that defence, and found for the defendant on the ground that on the ticket was printed "Admission Free." From the very condensed report of this judgment in the Times Law Reports he appears to have said (2) :—"The fact that 1/- was charged for a reserved seat was not incompatible with the admission being free. The Statute spoke of admission, not to a seat, but to an entertainment."

In that case the material question was whether the charge for a reserved seat to hear the entertainment was a charge for admission to the entertainment. It being established in this case that the public were admitted free into the room in which the entertainment was being held, the material question is whether the charge for a seat in the reserved portion of the room amounted to a charge for admission into the room itself. To my

(1) 13 T.L.R., 551.

(2) 13 T.L.R., 551, at p. 552.

mind the same principle is applicable to both cases, and therefore Mr. Justice *Collins'* decision is a direct authority, if such authority were needed, that, when the public are admitted free to a room then being used for public entertainment, a charge made for admission to some special accommodation provided in part of it is not a charge for admission to the room within the meaning of the first section.

In the view which the learned Judge in the Court below took of the facts it was not necessary for him to find, and he did not expressly find, that the public were admitted without charge into the room in which the entertainment was being held. But it is quite clear that no charge was made for entering into the room, and no payment was required or suggested to persons in the room except to those who required the special accommodation of the reserved area. Taking therefore the wider view of the plaintiff's complaint, namely, that it applies to the room in which the concert was being held, it is clear that the plaintiff has failed to prove that there was a charge for admission within the meaning of the first section.

I turn now to the more limited view of the complaint upon which Mr. Justice *Chomley's* judgment was based. He must be taken to have found that the reserved portion of the concert room was a "place" opened and used for public entertainment and amusement to which persons were admitted by payment within the meaning of the Act, and that the defendant was the keeper of that place. Circumstances no doubt may arise in which portion of a room, if sufficiently marked off from the rest of it, may be a place within the meaning of the section. But, in my opinion, that cannot be so on the facts established in this case.

The offence, leaving out words not applicable to the present case, may be thus stated. Any house, room, or place used on Sunday for public entertainment, and to which house, room, or place while so being used persons shall be admitted by the payment of money or by ticket sold for money, shall be deemed a disorderly house or place, and the keeper of such house, room, or place shall be liable to penalties. The respondent alleges that the reserved portion was used for public entertainment, that money was charged for admission to it while so being used, and

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that, as the appellant was the keeper of it, the offence is complete.

The difficulty I have in accepting that contention is that I cannot see any evidence that the reserved portion was "used for public entertainment" in the sense intended by the Act. The only evidence of user for public entertainment was that an entertainment, held in the room of which the reserved portion was part, was heard and seen by the occupants of that portion in common with the rest of the audience. Though the entertainment was seen and heard from the reserved portion, it by no means follows that the reserved portion was *used* for the entertainment. It was the one entertainment that was seen and heard from all parts of the room, and the whole room, not the reserved portion only, was used for holding it.

If the respondent's contention is right, then two parts of the same room were at the same time being used for the same entertainment, but with different consequences. The use of the reserved portion constituted that portion a disorderly place, and rendered the keeping of it a criminal offence. But the use of the rest of it was entirely legal. If we inquire what it was that could make the use of one portion of the room innocent, and the use of the other portion criminal, the answer must be—it was the fact that a charge was made for admission to one part of the room and not to the other. In other words, the offence of which the defendant has in reality, though not in form, been found guilty is being the keeper of a room used for Sunday entertainment, to a portion of which room money was charged for admission. There is no such offence under the Act. It is the charge for admission into the room or place used for entertainment, not the charge for admission to a portion of the room or place, which constitutes the room or place a disorderly house or place.

It has been urged that, unless the Act is read as the respondent contends, it can be easily evaded, and illustrations were given in which, if the appellant's contention were adopted, a concert hall, in which all but a small portion of the auditorium contained paying seats, could carry on a Sunday business with impunity. The answer to that is twofold. First, in cases where there is in reality a charge for admission to the room used for public Sunday

entertainment the tribunal which tries the facts can so find, notwithstanding any fraudulent device to conceal the real nature of the transaction. Secondly, where a Statute constitutes the committing of certain acts a criminal offence, the commission of those acts must be proved before the defendant can be found guilty. It is not enough to prove that he has committed acts of the same kind and which would lead to the same result. Nor is it the duty of a Court to so add to the language of a Statute as to make it include the committing of acts of the same kind which lead to the same result, but which the legislature has not constituted an offence. To do so would be to make laws, not to interpret them.

For these reasons I am of opinion that, on the facts of this case, the reserved portion of the room in which the entertainment was held was not a "place" within the meaning of the Act, and that the evidence disclosed no offence under the first section.

It must follow that there was no offence in the publication of the advertisement. The advertisement which is prohibited by the Act is the advertisement of an entertainment which is contrary to the provisions of the Act.

On the whole case, therefore, I am of opinion that the appeal must be allowed, the judgment appealed from must be set aside, and judgment entered for the defendant.

ISAACS J. The *Sunday Observance Act* of 1780, under which this action was brought, enacts in the first section as follows:— "That any house, room, or other place, which shall be opened or used for public entertainment or amusement, or for publicly debating on any subject whatsoever, upon any part of the Lord's day called Sunday, and to which persons shall be admitted by the payment of money, or by tickets sold for money, shall be deemed a disorderly house or place." Then follow provisions for penalties.

The appellant has been adjudged to have contravened this law, and he contends that he has not done so. In the first place he argues that the Act is not in force. But as to this I agree with what has fallen from the learned Chief Justice. The application of this and similar Acts to Victoria has been the subject of decisions of various Full Courts going back to 1864. My own

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view is that these decisions were right, and I agree with the reasons given by *Holroyd* J. in *M'Hugh* v. *Robertson* (1). But even if I entertained a doubt, I should be very slow to overrule the opinions of men who lived much nearer to the time and circumstances by which the applicability of the law must be tested.

It was also suggested that the local legislature had assumed to deal with the question of Sunday observance in various directions, and it was argued that this Act might be treated as impliedly repealed or as no longer in force. But no trace of any parliamentary reference to the Act can be found, and there is no local legislation touching the particular phase of Sunday observance dealt with by the Statute, nor is there any inconsistency between it and any later enactment. I am, therefore, not able to accede to the view that the Act is not in force in Victoria.

Then, dealing with the Act as it stands, I pass by for the moment the appellant's argument as to the way in which the complaint was framed. The facts are few and simple. At Fitzgerald's Circus there was a large building, the interior consisting of an octagonal room capable of holding about 3,500 people, and in which Sunday secular concerts were given by the appellant. There was one entrance to the room, which was called the main entrance. Immediately to the right of the main entrance was erected a stage for the performers, and all around the room were seats. About two-fifths of the seating accommodation was entirely separated from the rest by a railing and baize curtain about 3 feet high; this was called the reserve. There was, however, a special entrance into this reserve at which an attendant was stationed.

According to one of the witnesses, the reserve would hold 1,000 persons, according to another 2,000. The latter witness said that on one of the occasions the subject of the action, it held 1,500. Both witnesses agreed that the total capacity of the room was about 3,500.

The facts establish beyond doubt that nearly everybody who entered the reserve was compelled to pay, and did pay, for admission there.

The main entrance had no door or gate, but it was divided into

(1) 11 V.L.R., 410, at p. 430.

two passages by a rail 3 ft. or 3ft. 6in. high running inwards and having a passage of about 3ft. or 3ft. 6in. on either side of it. There at the very entrance stood 3 or 4 persons, namely the defendant, his partner and one or two attendants, with plates. When a person was in the act of entering a plate was presented. If no coin was put in the plate he was allowed to enter, but was directed to the unreserved portion. If a coin was put in the plate he was allowed to pass in, sometimes with and sometimes without a ticket, to the reserved portion. There he found another attendant with a plate at the entrance of the reserve who said "Collection Please." If no ticket were presented or coin put in the plate the visitor was sometimes allowed to enter the reserve, but nearly always directed to the unreserved portion. On one occasion the room was crowded both in the reserve and other portions. It was conceded that any person could, if he insisted, enter the unreserved portion without payment.

The only difference between the seating accommodation in the reserve and elsewhere was that some of the seats in the reserve were chairs, and others were covered with carpet, while in the rest of the auditorium the benches were bare. The evidence is clear that the charge was made, not merely for seating accommodation, but for bare admission to a particular part of the room which, besides being reserved, was in a very advantageous position from which to witness the performance.

The appellant's contention is that he has not contravened the Act. He says, first, that, so far as the whole room is concerned, it is true it was used for the entertainment, but everybody was allowed to enter the room free, and, once being in, a charge could lawfully be made for permission to occupy any special part of it, however extensive that part might be, always supposing some other substantial part of the room was not charged for.

I should notice that, it was said, the way in which the claim was ultimately framed enables the appellant to maintain that the respondent did not rely on the whole room being used for the concert, but only the reserve. He urges that by the use of the word "in" instead of the word "namely" the plaintiff deliberately abandoned all contention that the concert took place in the whole room, and proceeded merely on the assumption that the reserve

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was the only place where any part of the entertainment was held. Notwithstanding the complaint still alleges that the "defendant was the keeper of a house room or place in Fitzgerald's Circus Building situate in South Melbourne which was then opened or used for public entertainment or amusement and to which persons were then admitted by the payment of money &c," the defendant says, that by virtue of the word "in" the plaintiff was pinned down for all purposes to the reserve as the place used for entertainment, and could not call in aid the rest of the facts which have already been alluded to. I am unable to read the claim with such limitations. The word "room" still remaining in the claim ought not, I think, to be ignored. It is true the learned Judge below thought the plaintiff's case sufficiently established by treating the reserve as a "place" in law both as being used for entertainment and as being charged for. But if the learned Judge were wrong in this, that should not, in my opinion, defeat the plaintiff's case, if his claim be properly made and sufficiently supported by the evidence. If he can show that the Judge should have decided in his favour on any ground, the decision he has already obtained ought to be sustained.

I proceed, therefore, to consider whether the plaintiff has proved a breach of the law, on the assumption that the whole room was alleged to have been used, as indisputably it was in fact used, for the purpose of entertainment.

This leads us at once to the construction of the Act. It was urged that this Act being penal should receive a strict construction. If by that is meant that a Court should construe an Act of Parliament so as to exclude from it as much as an ingenious mind can by a possible interpretation contrive to exclude, I do not agree with the contention. If it means simply that the Court should not strain the words beyond their fair meaning, I do agree with it. As this contention is so frequently put forward it is desirable to deal with it fully.

When it is said that penal Acts or fiscal Acts should receive a strict construction I apprehend it amounts to nothing more than this. Where Parliament has in the public interest thought fit in the one case to restrain private action to a limited extent and penalise a contravention of its directions, and in the other to

exact from individuals certain contributions to the general revenue, a Court should be specially careful, in the view of the consequences on both sides, to ascertain and enforce the actual commands of the legislature, not weakening them in favour of private persons to the detriment of the public welfare, nor enlarging them as against the individuals towards whom they are directed.

In *Attorney-General* v. *Sillem* (1), *Bramwell* B. quoted a passage from *Sedgwick on Statutory and Constitutional Law*, which he said was "a passage in which good sense, force and propriety of language are equally conspicuous; and which is amply borne out by the authorities, English and American," which he cites. The passage is as follows:—"But the rule that Statutes of this class are to be considered strictly, is far from being a rigid and unbending one; or rather, it has in modern times been so modified and explained away, as to mean little more than that penal provisions, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment; the Courts refusing on the one hand to extend the punishment to cases which are not clearly embraced in them, and on the other, equally refusing by any mere verbal nicety, forced construction, or equitable interpretation, to exonerate parties plainly within their scope."

James L.J. in delivering the judgment of the Privy Council in *Dyke* v. *Elliott*; *The Gauntlet* (2), said:—"Where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument, according to the fair common-sense meaning of the language used, and the Court is not to find or make any doubt or ambiguity in the language of a penal Statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument."

The views expressed by *Chitty* L.J. for the Court of Appeal in *Llewellyn* v. *Vale of Glamorgan Railway Co.* (3), when interpreting a penal Statute may be referred to as completing the statement of the rule. His Lordship said:—"When an Act is open to two constructions, that construction ought to be adopted which is the

(1) 2 H. & C., 431, at pp. 531, 532.
(2) L.R. 4 P.C., 184, at p. 191.
(3) (1898) 1 Q.B., 473, at p. 478.

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more reasonable, and the better calculated to give effect to the expressed intention."

Two further references of high authority may with advantage be made. In *Caledonian Railway Co.* v. *North British Railway Co.* (1), *Selborne* L.C. said :—"The more literal construction ought not to prevail if (as the Court below has thought) it is opposed to the intentions of the legislature, as apparent by the Statute; and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated."

This is in perfect accordance with the statement of the Supreme Court of the United States in *Johnson* v. *Southern Pacific Co.* (2), which I cite because it so well represents my own views. One question was whether a locomotive engine was a "car" within the meaning of a penal Statute. *Fuller* C.J., in delivering the unanimous judgment of the Court, said:—"It is settled that 'though penal laws are to be construed strictly, yet the intention of the legislature must govern in the construction of penal as well as other Statutes; and they are not to be construed so strictly as to defeat the obvious intention of the legislature'. *United States* v. *Lacher* (3)." The learned Chief Justice quotes a passage from a judgment of Mr. Justice *Story* in *United States* v. *Winn* (4), referring to the rule that penal Statutes are to be construed strictly, in which that learned Judge said:—"I agree to that rule in its true and sober sense; and that is, that penal Statutes are not to be enlarged by implication, or extended to cases not obviously within their words and purport. But where the words are general, and include various classes of persons, I know of no authority, which would justify the Court in restricting them to one class, or in giving them the narrowest interpretation, where the mischief to be redressed by the Statute is equally applicable to all of them. And where a word is used in a Statute, which has various known significations, I know of no rule, that requires the Court to adopt one in preference to another, simply because it is more restrained, if the objects of the Statute equally apply to the largest and broadest sense of the word. In short, it appears to me, that the

(1) 6 App. Cas., 114, at p. 122.
(2) 196 U.S., 1, at pp. 17, 18.
(3) 134 U.S., 624.
(4) 3 Sumn., 209.

proper course in all these cases, is to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner, the apparent policy and objects of the legislature." Applying those principles of interpretation to this Act, the defendant has, in my opinion, committed a breach of the first section, and the plaintiff is entitled to hold his judgment as to the penalties for the concert.

The statutory prohibition is against admitting persons to the room by payment of money or tickets sold for money. Can it not reasonably be said that persons who are admitted to a particular part of the room by payment of money are admitted to the room by payment of money? It seems to me that the part to which they are admitted by payment is no less for this purpose to be considered the room, than the portion to which they are admitted free. It is an irrelevant circumstance that some persons are admitted free to the whole room, if others are charged; and it appears equally irrelevant that the same person is admitted free to one half of the room if he is charged in respect of the other half. The admission to the room in the latter case is free up to a certain point, that is as to one portion of the room, and not free as regards the remainder of the room; and if, as regards the remainder, a charge is made, I am forced to the conclusion, if any substantial validity is to be preserved for the Statute, that there is then a contravention of its provisions. The Act looks to the whole room as a place where the entertainment is given, and forbids a breach by insisting on payment as to any part of it. The opposite view, which is not only possible, but commends itself to a majority of my learned colleagues, appears to me to have this overpowering defect, that it practically reduces the Act to a nullity. That is a result that a Court should always strive against, if the language permits.

If payment for admission to any specified portion of the room is not sufficient to constitute a breach, then there is never a breach, so long as mere ingress in permitted free, always provided it is real and actual ingress. But if once the public are admitted to enter clear within the doors, they are, on this assumption, admitted to the room within the meaning of the Act; and if no

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charge is made so far, the promoters of the entertainment can, despite the Act, charge whatever they like for either sitting accommodation or standing space anywhere else.

A concert manager may engage or build a vast hall, divide off a small portion near the entrance, to which gratuitous freedom of access is given, and whether a single person remains in or enters that free part or not, the management may with impunity charge whatever it pleases for the rest of the place.

The fallacy of the appellant's view as a matter of reasoning appears to me to consist in regarding admission as the mere passing the doors. It assumes that if up to a certain point of space —namely, the interior of the room—it is free, the admission continues free ever afterwards, whatever charge is insisted upon for other portions of the room. It regards admission as looking to nothing but bare entrance to the room, or rather to some part of it, and takes no account of the opportunity by presence in the room to share in the entertainment or amusement. A very probable case may be supposed which tests this position. A large hall is used for dancing. Admission through the doors is free in the first instance. On entering, you find a raised stage or platform on which the band is seated. At a distance of six feet from the walls and from the stage a barrier is constructed within which the dancing takes place. To this inner portion admission is charged for. The band is outside the barrier and beyond the free space. In the case supposed, the entertainment or amusement necessarily includes both the band, and the dancing within the inner portion; no dancing taking place in the intermediate space. According to the appellant's argument, admission to the room being free, there is no contravention of the Act, and as we shall see presently, he also contends that, as the band is not within the dancing reserve, that reserve is not a "place" within the meaning of the Act; and so he is altogether clear of the Statute.

Or the promoters might vary the situation by providing a part of the room, small, inconvenient and rough, as a free part for dancing, while charging for admission to a large, and prepared portion of the same room barricaded off.

They might even further extend their operations under the shelter of the word "house" in the Statute. If bare admission

to any part of the room where an entertainment is proceeding is admission to the room, so admission to any part of the house must be admission to the house. And therefore if in several rooms in a house dancing is proceeding, so long as gratuitous admittance to them by the street door and into one of the rooms is permitted, the promoters of the amusement could without any breach of the Act charge for admission to all the other rooms. A room divided off into distinct compartments by barricades, is for this purpose no different from one house divided into several rooms.

I think the true position is that admission may be free up to a point, and cease to be free afterwards. The original admission is limited to a prescribed space, and it is just as if at the outer door the proprietor said :—"You can go in free to such a space, and you must pay to enter the rest of the room." If payment is made there and then for the rest of the room, it would seem an unanswerable case that admission, quâ the unfree portion, is admission by payment of money. And it appears to me to make no difference that the charge is made after entrance. It makes no more difference in my opinion than if admission were free for the first hour to the whole room, and permission to remain charged for during the remainder of the performance.

A striking instance of what can be done appears in the present case. On 1st April, as testified by Constable Bateman, the building was crowded, both the reserve and the other portions. Among those in the reserve there were probably many hundreds who could not have found space within the room at all had they not gone to the reserve itself and paid, and yet by the appellant's argument they are supposed to have been admitted to the place free. Indeed every theatre may, so far as this Act is concerned, be opened on Sunday, the ordinary performance given and the ordinary charges made, provided only some portion of the place, however inconvenient and insufficient to accommodate the whole audience, be allotted as a free portion.

It is said this is the intention of the legislature as gathered from the words of the Statute. I confess, however reluctant to differ from the weighty opinions of my learned brethren, I am unable to discover that intention.

On the contrary, as I read the Act, a different intention is dis-

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coverable, not merely from the nature of the evil struck at, and the incompetency of the Statute to meet it if construed on the appellant's lines, but also from the express provisions of the enactment.

Sec. 2, which begins by referring to the many "subtle and crafty contrivances" of the keepers of the houses, rooms, or places dealt with, provides *inter alia* that any room at which persons are supplied with refreshments of eating or drinking on Sunday at more than usual prices on other days, shall be deemed a room to which persons are admitted by the payment of money, although money is not taken as for admittance, or when the persons enter or depart from the room. This is not the creation of a new offence, but it is guarding against a subtle contrivance to evade the consequences of the offence already provided against, and throws light upon what that offence comprehends. It clearly, to my mind, evinces that the legislature was not narrowly confining the word "admittance" to the mere original entry into the room, with permission to charge afterwards whatever the proprietor might desire, but was giving a larger meaning to it by including in admittance to the room of entertainment the providing for payment something which was part of the inducement to enter or remain in the room as being the entertainment or as a part of the entertainment, even though it was perfectly optional once the person was inside to take the refreshment or not. If this particular class of charge be included as a charge for admittance, still more must the legislature have regarded the compulsory payment for actual admission to the best part of the room to witness or participate in the entertainment as admittance to the room by the payment of money.

The case of *Williams* v. *Wright* (1) was pressed upon us. The view taken of that decision by three of my learned brethren certainly adds greatly to its force. I have closely examined it, but cannot say it is so clear and convincing to me as to dispel the views I have otherwise formed of the effect of sec. 1 of the Statute. It is to be observed that there was no railed off space deposed to in that case, and the learned Judge did not address himself to the meaning of the term "place." He treated the

(1) 13 T.L.R., 551.

Statute as speaking of admission to an entertainment, and went on the ground that there might be free admission to an entertainment consistently with a seat being charged for. If, however, the principle be the same, and if the view of *Collins* J. be correct, then the consequence follows that, without contravening the section, theatres could be open for Sunday entertainments, as I have mentioned, without infraction of this Statute, a result I regard as quite opposed to the fair intendment of the enactment. The case has not found its way into any of the regular reports.

The suggested signification of the term "admittance" seems to me to disappoint the intention of the legislature. I shall presently refer to the history of the Act and the position it occupies in the legislation of the period. But, whatever its history, if the words were so plain and precise as to be capable of one signification only so that the actual provision were its own expositor, leaving no room for construction, no Court could venture to alter its meaning. However absurd or unexpected the result might be, the legislature alone could in that case intervene to change the law it had plainly and unequivocally declared. But here the exoneration of the appellant is a matter at least open to grave doubt. The mere fact that up to the present case, which has been a mere experiment so far as Victoria is concerned, the whole of this community has constantly acted upon the assumption that the law prohibited what the appellant contends for as lawful, is sufficient to preclude the assertion that his contention is beyond the region of controversy. And, in passing, I think the general understanding in this country of the effect of the Act is as important as the asserted general understanding at the present day to the contrary in England.

If the words here, at all events capable as I think them of the interpretation I have put on them, are interpreted so as to give effect to the intention of the Act as apparent from its general provisions, the present case falls both within the words and the spirit of the Statute according to the rule in "*The Gauntlet*" (1), and the judgment ought to stand.

If, moreover, the charge of contravention be confined entirely

(1) L.R. 4 P.C., 184.

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to the reserve, I think there is still enough to bring the appellant within the words of the Act.

After the best consideration I am able to give to the question, it appears to me that the railed off portion has received, by the very act of the appellant himself, a distinctive character as a place of entertainment, and is as much a separate locality, for the purpose of entertaining such of the audience as are willing to pay, as if a high partition had been erected. It was certainly "used" by the appellant for entertaining spectators as much as any other part of the room, and its use was distinct from the remainder of the building in this respect that it was fenced off and "reserved" for those who pay. If the appellant insists on treating it as a separate subdivision of his property for the purpose of charging for admission, I think he cannot complain if he be held to the legal consequences of its separate character. He cannot be heard to say it is separate from the rest so as to make free admission to the other part a free admission to the room, and yet that it is inseparable from the other part as to the holding of the concert. Nor do I think the absence of the entertainers from this portion of the building affects the position. The entertainment they afford reaches the audience seated in the reserve, and it seems to me obviously to be a place of entertainment. The spectators do not desire, and could not well have, the bodily presence of performers in the reserve, but find their pleasure in seeing and hearing them from a distance. The appellant procures the entertainers, provides the entertainment, and creates a distinct and quite defined place for the entertained for admission to which he demands money. He is certainly, as I have already said, within the spirit of the law. He is also, in my opinion, even as regards this railed off space, within the letter of it.

The expression "house, room, or place" is found in the *Gaming Act* 1745 (18 Geo. II. c. 34), which is still in force. With some variation it has appeared in various English Acts relating to gaming. In the Act 16 & 17 Vict. c. 119 (1853) the words are "house, office, room or other place," and they appear in conjunction with "opened, kept or used." In the Act 17 & 18 Vict. c. 38 (1854) the expression is "house, room or place." It was on the words of the Act of 1853 that the House of Lords decided the

case of *Powell* v. *Kempton Park Racecourse Co. Ltd.* (1). The *Earl of Halsbury* L.C. said (2):—" any place which is sufficiently definite, and in which a betting establishment might be conducted, would satisfy the words of the Statute." Lord *James of Hereford* said (3):—" directly a definite localization of the business of betting is effected, be it made 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."

The analogue here of the betting establishment is the place of entertainment—that is where the public are entertained.

Turning now to the Georgian legislation as to entertainments, we find that about the same period, that is in 1751, an Act 25 George II. c. 36 was passed which is styled an Act for the better preventing thefts and robberies and for regulating places of public entertainment and punishing persons keeping disorderly houses. In that Act the phrase is " house, room, garden or other place." That Statute required licences for places of entertainment, otherwise they were to be disorderly houses and places.

In 1781 was passed the Act now under consideration which describes itself in the title as " An Act for preventing certain abuses and profanations on the Lord's Day, called Sunday." It recites that certain " houses, rooms, or places " had of late frequently been opened for public entertainment or amusement upon Sunday evening &c., and then forbids the taking of money for admission on Sunday.

Looking at the two lines of legislation, and the course of each, I feel no real doubt—except such as is naturally occasioned by the opinions of those of my learned brethren from whom I have the misfortune to differ—first, that the same method of interpretation must be applied to the Act we are now considering, to discover the meaning of the term " place," and next, that in each case there may be as many such places as the defendant chooses to segregate and localize for his own purposes.

I should observe that the manifest intention of the Act of 1781 was to put an additional check for the purposes of Sunday observance upon the same classes of entertainments as were

(1) (1899) A.C., 143. (2) (1899) A.C., 143, at p. 162.
(3) (1899) A.C., 143, at p. 194.

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already partially dealt with by the Act of 1751. In the earlier Act, entertainments were included which were held in a "house, room, garden or other place" and for effective purposes it is only natural to suppose that the expression "house, room, or other place" in the later Act has a signification as extensive as that in the prior enactment. A licence under the earlier Act for the whole of a garden, for instance, would cover every part of the garden, no matter how it was sub-divided; and, if immediately the *Sunday Observance Act* were passed, a whole garden were used for Sunday entertainment or amusement, fireworks in one part, dancing in another, singing in a third, music in a fourth, with the usual connected and lighted paths and communications, though the whole of the garden were licensed, yet if the portion confined to fireworks were free, and those devoted to dancing, singing, and music were charged for, it would be difficult to say that the later Act was not contravened. The whole garden would, of course, be in its entirety one place of public amusement, of a varied nature, and admission through the outer gates could be said to be free admission to the garden with equal force to that of the appellant's argument here. But the case would, I consider, be obviously an infringement of the Act. And, if so, I am unable to perceive the difference between that case and the present.

The appellant argues that, if the reserve be itself a place of entertainment, there would be a separate "place," wherever a distinct reserve existed. Thus in a theatre, the dress circle, the reserved stalls, the unreserved stalls, the pit and the gallery would each be a place, and subject him to a separate penalty. And why not? It is within his own absolute uncontrolled power to prevent it. No one can force him to incur penalties. All he has to do is to refrain from charging, or if he does charge, he may throw the whole of the seating accommodation open at the one price. Then he has only one place to be liable for. But if, while breaking the law, he chooses to increase his profits by creating several distinct places, even if he choose to carry it so far as to make different prices for different seats, what just cause of complaint can he have if the law takes him at his word? If there are separate places for his profit, there is no injustice in considering them separate places for his responsibility. He might urge the same argument

with equal force with respect to several rooms in one house, opened for dancing.

On every ground, therefore, in my opinion, the judgment of Mr. Justice *Chomley* was correct as to the first part of the claim, and should be sustained.

With regard to the advertisements, if the main judgment appealed from is right, I think that the respondent should succeed on this branch also. The appellant contended that the notice on the screen was not an advertisement. I think it was. There are many methods of advertising; insertion in newspapers, placards on hoardings and walls, sky signs, and notices published on screens are equally intimations to the public; these are advertisements. Then he argued that the advertisement did not state that admission was to be charged for. I agree that an advertisement is not of the nature struck at by the section, unless, on the face of it, it states directly or indirectly that the entertainment is one to which persons are to be admitted by the payment of money or tickets sold for money. It was not contemplated by the legislature that a printer, for instance, having no reason to suppose the entertainment to be of that nature, should be liable for these penalties.

But much depends on the circumstances in which the advertisement appears. Here the notice was given in the following terms:—"Our patrons are respectively notified that we shall continue these concerts every Sunday night with the same completeness as hitherto but no advertisement will be inserted in the papers. Kindly inform your friends."

The expression "these concerts," means, when there and then published to the persons present, concerts of the same class; if admission was charged for at the concert when the notice was given, then it conveys the intimation that admission was to be charged for in future.

Holding the views I have expressed on the main question, I think that on this branch also the decision appealed from was correct and should be upheld.

HIGGINS J. I should have been glad to think that the appellant is not liable to these penalties, not only because thereby my judgment would be in accord with that of the majority of the Court,

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but because I cannot but feel that the Act 21 Geo. III., c. 49, is not such an Act as public opinion in Victoria would permit at the present day. But, after full consideration, I see no course open to me but to say that the defendant has brought himself within the provisions of the Act. It appears that the entertainment consisted of some innocent songs and some innocent biograph pictures; that the performances were well-conducted; and that the public appreciated them. There was no disorder: and yet, if persons are admitted by the payment of money, the "house, room, or other place" where they are entertained is, by the Act, to be deemed a "disorderly house or place." Even if a place be used for public debate on Sunday, with payment for admission, and if the discussion be limited to texts of holy scripture, it becomes, by the Act, "a disorderly place," without further proof; because, forsooth, the Houses of Parliament in England, in 1781, conceived that such debates were necessarily held "by persons unlearned and incompetent to explain" the holy scripture, "to the corruption of good morals, and to the great encouragement of irreligion and profaneness."

I concur with my colleagues that we have to treat the Act of 1781 as being in force in Victoria by virtue of the Act of 9 Geo. IV., c. 83, sec. 24, if not by virtue of the principle that colonists take with them all appropriate British laws. In face of the long and consistent course of decisions in Victoria, enforcing Sunday Acts such as this, and in view of the decisions to the same effect in New South Wales, it is impossible for this Court to hold that in 1829 the Act was not reasonably applicable to these Colonies. Indeed, the *Theatres Act* 1896 of Victoria treats the Act as applicable. I also concur with my colleagues in thinking that this Act has not been repealed as to Victoria by any legislation that has been enacted since. If there has been a change in the fashion of regarding such subjects, it is for the legislature to alter the law, not for the Court. The only question that remains is, has the defendant so acted as to come within the penalties of the Act? The difficulty which arises as to this point is owing to the endeavour of the defendant to evade the Act—probably acting under well-considered advice. I do not say "evade" in any unpleasant sense. It is our duty to "evade" Acts, in the sense

of not disobeying them. But the defendant has tried how far he can go in the direction of giving public entertainments on Sunday, for payment, without violating the letter of the law.

Now the Act provides (sec. 1) that "any house, room, or other place, which shall be opened or used for public entertainment or amusement . . . upon any part of the Lord's day called Sunday, and to which persons shall be admitted by the payment of money, or by tickets sold for money, shall be deemed a disorderly house or place; and the keeper of such house, room, or place shall forfeit the sum of £200 for every day that such house, room, or place shall be opened or used as aforesaid." The hall is a large one. People are admitted free of charge to all parts except the gallery which faces the stage—the part which is obviously the best place for seeing the biograph pictures, and for watching the performances; but as to this "reserve," as it is called, the learned Judge who tried the case has found—and there is ample evidence to support his finding—"that persons who paid a small sum, a silver coin, were admitted within the reserved portion, but if they did not pay that sum, they were directed elsewhere." The reserve would hold from 1,000 to 2,000 people; but people come into the unreserved portion also. The reserve is railed off by a thin small rail, about three feet high, with baize attached. There is a man in charge of the reserve, standing at the entrance, and collecting the money and the tickets. I am of opinion that this "reserve" is a "place" within the meaning of the Act; that it was "used" for public entertainment or amusement; and that persons were admitted to that "place" by the "paying of money, or by tickets sold for money."

The differentiating fact which makes a lawful entertainment unlawful, as regards any definite place, is payment for admission. It is quite true that the entertainers are not in the reserve, but on the stage; but I cannot regard it as being any the less "used for public entertainment" merely because the music is rendered, and the biograph is worked, on the stage opposite; or because other people not in the reserve are also entertained (though not so satisfactorily). The public are entertained in the reserve, and for money; and it makes no matter that others of the public are entertained in other places in the hall without money. I quite

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accept the position that the use of one place in this huge hall for entertainment is legal, and that the use of another place is illegal —the distinction lying in the payment for admission to the latter place. I might have had more difficulty in coming to this conclusion if the words of the Act were "used for a public entertainment," implying that the entertainment must be one and indivisible. But the phrasing is simply "used for public entertainment." Here I find the fallacy of the appellant's argument. He says there is no evidence that the reserve was used for "the" entertainment. Quite true, in one sense; but the Act does not require such a fact to be proved. It requires proof merely that the reserve was used for entertainment. If the defendant's contention is right, of course the Act becomes practically a dead letter without any action on the part of the Parliament. Halls and theatres may be opened for entertainments and amusements on Sundays; and those who hold the entertainment will escape penalties by simply leaving a portion of the hall or theatre free of charge. Mr. *Schutt*, for the defendant, admits that this is the result. If the defendant's contention succeed, a building such as a theatre may be opened, and a performance in the nature of a concert or a ballet-dance may take place on Sunday, provided only that no charge be made for admission (say) to a portion of the "gods."

Again—according to the defendant's argument—there may lawfully be a Sunday Christy Minstrel entertainment in the organ wing of the Melbourne Exhibition Building, and a charge made for admission to that wing, provided that the rest of the building be left open to all, free of payment. I do not say that the argument allows evasion of the Act. Every one is entitled to evade an Act by not disobeying its terms. What I say is that the argument involves that the Act was futile, and obviously futile, for its purposes; and I regard it as the duty of the Court so to construe the Act, if possible, as to avoid treating the legislature as making an utterly futile provision—to construe the Act *ut res magis valeat quam pereat*: *Curtis* v. *Stovin* (1); *"The Duke of Buccleuch"* (2); *Macleod* v. *Attorney-General for New*

(1) 22 Q.B.D., 513.

(2) 15 P.D., 86, at p. 96.

South Wales (1). There is nothing whatever in the Act to indicate that the "place" to which payment admits must be roofed in separately from all places in respect of which there is no payment.

I adopt the words of the *Earl of Halsbury* L.C., in an analogous case, *Powell* v. *Kempton Park Racecourse Co.* (2). In that case, the question was as to a "place . . . open kept or used" for betting; but, paraphrasing his Lordship's words so as to meet the present case, I should say that, for the purposes of the Act now in question, every place which is sufficiently definite, and in which the public can be entertained, would satisfy the words of the Act. There is no need to introduce any refinement or subtlety into the crude language of this crude enactment. I feel strongly that men trained in law are ever under a tendency to over-subtlety in matters of verbal interpretation, and that it is necessary for us, again and again, to revert to the ordinary lay attitude. There are no technical associations with this Act. The word "place" is as wide as any word that could be used; and when it is used in the collocation "house, room, or other place . . . used for public entertainment," any layman would, I think, conclude that for the purposes of the section it is sufficient if there be a house, or a room, or a part of a hall. Probably, the place *in a* room or hall would have to be of considerable size; for, otherwise, the *public* could not be entertained there, or *any* considerable number of people. Mr. *Pigott* has urged that the *only* meaning of "place" in this context is a part of a room. But, without adopting the argument in this extreme form, I think a portion of a room or hall was probably the thing primarily before the minds of those who framed the section. As for the contention that, on the plaintiff's view, every row of seats could be considered as a "place," and there could be a score of "places," some legal and some illegal, within the same room, it does not impress my mind. There may be more difficulty in dealing with the case of a charge for admission to very small portions of a room. But that difficulty does not apply where the reserve for which charge is made takes up, as here, about two-fifths of the room. It is an unpleasant thing to find that one's

(1) (1891) A.C., 455, at p. 457. (2) (1889) A.C., 143, at p. 162.

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house or garden or enclosure may possibly be called "a disorderly house or place"—with all the nasty associations which such an expression evokes—but such is the language of the legislature, and it is not for us to alter it. There is nothing that I can find in the Act to indicate that a place cannot be "used for public entertainment" unless both entertainers and entertained are present in that place. The stage of a theatre is usually excluded to the audience; and it could hardly be meant to allow tickets to be issued for the stalls, for the dress circle, for the family circle, for the "gods," simply because the entertainers are not in these places, but on the stage. A man with the lease of a cricket ground may use it for the entertainment of the public by sending up fireworks outside the enclosure, and admitting the public within the enclosure. It is unnecessary to consider the case of a man allowing the public to enter his garden for payment, in order to hear music provided by others outside the garden; for in this case before us the same man provides both the music and the enclosure in which to hear it.

As for the case of *Williams* v. *Wright* (1) the report is unsatisfactory. There is no report of it in the *Law Reports* or in the *Law Journal* or in the *Law Times.* But, so far as I can gather from the report that we have, Mr. Justice *Collins* was not asked to decide whether a reserved portion of a hall, for admittance to which reserved portion a charge is made, could be treated as a "place" within the meaning of the Act. The charge was made under a different section of the Act—sec. 3—against the publisher of the *Times* newspaper for publishing an advertisement of a public entertainment "to which persons are to be admitted by the payment of money." The word "place" is not used in sec. 3; and therefore no question could arise as to the meaning of the word "place" in that case. The ticket said "Admission free, reserved seats 1/-;" and *Collins* J. came to the conclusion of fact that the charge was for the seat, not for the admission to the entertainment. "The Statute spoke of admission, not to a seat, but to an entertainment." The learned Judge dealt only with two alternatives—admission to a seat and admission to an entertainment. He had not to deal with the third case—admission to a

(1) 13 T.L.R., 551.

reserve. The plaintiff was not represented by counsel, and the decision turned on the charge being made merely for the seat—just as a charge might be made for the use of an opera glass. There was nothing, in the facts as found, to show any charge for a reserved area. I cannot attach much importance to the statement made in the *Encyclopædia of the Laws of England*, "Sunday" page 36. The statement is that the Act is usually evaded *e.g.*, at the Albert Hall, and Queen's Hall, by giving free admission, and charging for "reserved seats." There is not in these words, I think, any clear indication that a definite portion of the hall is set apart for those who pay; and, even if that is the practice, the practice has not been tested in the law Courts. It is also gravely urged that Royalty has been present at such entertainments. This alleged fact does not appear in evidence; and we should not, I presume, take judicial notice of it. Rather than admit the possibility of His Majesty doing even so much wrong as would be involved in helping people to break one of his own laws, it might be proper to presume that, as, in the drama of Euripides, the real Helen was not carried away to Troy, but some wraith or *simulacrum* of the lady, so the King himself was not present *in propriâ personâ* at the Queen's Hall on a Sunday. In any case, as Lord Coke informed His Majesty King James the First, the King does not expound the law personally, but through the mouths of his faithful servants the Judges (1). *Baxter* v. *Langley* (2) shows that the point raised by the defendant here, as to the meaning of "place," was raised by the defendant there, amongst other things; but the Court decided in defendant's favour merely on the ground that there was no "entertainment" within the Act, without saying anything against a reserve being a "place." The Judges in England enforce the penalties with regret, and do not hesitate to say so. (See *Terry* v. *Brighton Aquarium Co.*) (3); and immediately after, and probably in consequence of the *Brighton Aquarium Case*, the British Parliament specifically authorized the Government to remit the penalties under this Act (38 & 39 Vict. c. 80). The Government of Victoria has also general power to remit such penalties: *Public Moneys Act* 1890, sec. 4.

(1) 12 Rep., p. 64. (2) 38 L.J.M.C., 1. (3) L.R. 10 Q.B., 306.

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As for the penalty of £50 for advertising on a screen during the performance, I had much doubt; but I think that it was rightly imposed. Sec. 3 of the Act provides that "any person advertising . . . any public entertainment or amusement . . . on the Lord's day to which persons are to be admitted by the payment of money . . . shall . . . forfeit the sum of £50." During the performance, there were thrown on a screen these words:—"Our patrons are respectfully notified that we shall continue these concerts every Sunday night with the same completeness as hitherto but no advertisement will be inserted in the papers. Kindly inform your friends." It is urged that there is nothing in this notice to indicate that payment will be expected for admission. But I cannot find anything in the Act requiring that payment should be actually mentioned in the advertisements. The advertising may be, as in the present case, the act of the entertainer himself, and effected at an entertainment for which payment has been made; and when he announces to his "patrons" that he will "continue these concerts every Sunday night" the audience knows, without being told, that they are to come on the same terms. The words of sec. 3, "to which persons are to be admitted by the payment of money" mean, as in sec. 1, that *as a fact* persons are to be admitted by the payment of money. I am strongly opposed to improving or altering an Act by implying words that are not there, unless the words are *necessarily* implied; and the Act does not say that the advertisements must state that there is to be a payment. It is enough that payment is in fact to be made; and, as for the argument that on this construction a newspaper publisher would be rendered liable to the penalty, although he knew nothing about payment being required, I am of opinion that he would not be liable if he did not know about the payment. For criminal offences there must be guilty knowledge—knowledge here that payment will be required unless the Act clearly indicates the contrary. In *Reg.* v. *Sleep* (1) a Statute made it an offence to be found in the possession of naval stores marked with the broad arrow. The jury found that there was not sufficient evidence to show that the prisoner knew the stores to be so marked, and the

(1) 30 L.J.M.C., 170.

conviction was held bad. (See also *Anonymous* (1); *Hearne* v. *Garton* (2)). Knowledge of the relevant fact is necessarily implied in Acts creating crimes, unless expressly negatived. I see no reason for differing from the additional view put by *Isaacs* J., to the effect that, if a charge be made for admission so far as regards a prescribed portion of a room, it is made for admission to the room. But I prefer to rest on the simpler aspect of the case.

I accept unreservedly the doctrine that in Statutes imposing taxes or penalties the person sought to be charged has to be brought within the letter of the law. I do not suggest any addition to or qualification of the words of the Act. It seems to me that the appellant here is within both the letter and the spirit of the law, and, but for the contrary opinions of my colleagues, I should regard the case as free from doubt. I am therefore of opinion that the judgment of Mr. Justice *Chomley* in this case, and the judgment of Mr. Justice *Hodges*, so far as it relates to the same points, in *Cawsey* v. *Davidson* (3) are right; and that this appeal should be dismissed with costs.

Appeal allowed. Order appealed from discharged. Judgment for defendant with costs. Respondent to pay costs of appeal.

Solicitor, for appellant, *W. E. Brunt.*

Solicitor, for respondent, *Guinness*, Crown Solicitor for Victoria.

B. L.

(1) Fost., 439.
(2) 2 El. & E., 66.
(3) (1906) V.L.R., 32; 27 A.L.T., 121.