award—words which are often, and wisely, put in agreements and State awards—merely in the hope of eliciting the opinion of the Full Court on the whole subject, and of finding the precise limits of my power.

I do not think that the express power to "appoint" a Board for all Australia, now contained in sec. 40A, operates to withdraw such powers as were already contained in the original Act, under provisions which have not been repealed.

Questions answered accordingly.

Solicitors, for the respondents, *Derham & Derham.*

B. L.

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FEDERATED ENGINE-DRIVERS AND FIREMEN'S ASSOCIATION OF AUSTRALASIA *v.* BROKEN HILL PROPRIETARY CO. LTD.

Higgins J.

[HIGH COURT OF AUSTRALIA.]

RICHARDSON . . . . . APPELLANT;
DEFENDANT,

AND

AUSTIN . . . . . RESPONDENT.
INFORMANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *June* 13, 14, 15.

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

Markets—Sale of marketable goods in places other than markets—"Places," meaning of—Public places—"Shop," meaning of—Disturbance of market—Markets Act 1890 (*Vict.*), (*No.* 1115), *sec.* 25.

Sec. 25 of the *Markets Act* 1890 (Vict.) provides that the commissioners of markets "may fix the places within such town or portion of a town for the holding of markets, and may there erect and build or cause to be erected or built market houses with shambles stalls and other convenient buildings.

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And the said market places shall be the only places within the said town or portion of a town where any market for the sale of corn (except corn or grain sold by sample) butchers' meat poultry eggs fresh butter vegetables or other provisions shall for the future be held and kept. And if any person sell or expose to sale any of the said articles or other provisions usually sold in markets in any of the streets lanes entries or other public passages or places other than the places which may be so appointed by the commissioners as aforesaid except in his dwelling-house or shop, every such person shall on conviction thereof for every such offence forfeit and pay the sum of Five pounds."

Held that in the phrase "other public passages or places" the word "public" qualifies "places" as well as "passages," and, therefore, that a sale or exposure for sale in a private place was not an offence against the section.

Held also, on the evidence, that the place in question was a "shop" within the meaning of the section.

Held also that the section does not exclude the ordinary remedies for disturbance of market.

Weedon v. *Davidson*, 4 C.L.R., 895, explained.

Decision of *Cussen* J.: *Austin* v. *Richardson*, (1911) V.L.R., 11; 32 A.L.T., 135, reversed.

APPEAL from the Supreme Court of Victoria.

At the Court of Petty Sessions, at Geelong, on 27th September 1910, an information was heard whereby Herbert Arthur Austin, Mayor of the Town of Geelong, the respondent, on behalf of the Council of Geelong, charged Horace Frank Richardson, the appellant, for that, on 25th August 1910, at the Exchange, Little Malop Street, Geelong, he "did expose for sale certain provisions usually sold in markets to wit butter and such Exchange being a place other than the places appointed by the said Council and not being his dwelling house or shop contrary to the Statute in that case made and provided." The information having been dismissed, the respondent obtained an order *nisi* to review the decision on the ground that upon the evidence the appellant ought to have been convicted.

The order to review was heard by *Cussen* J., who on 7th November 1910 made it absolute, and imposed a fine of £5 upon the appellant. (*Austin* v. *Richardson* (1)). The appellant now by special leave appealed to the High Court.

(1) (1911) V.L.R., 11; 32 A.L.T., 135.

The facts are sufficiently stated in the judgments hereunder.

McArthur and *Sanderson* (*Bryant* with them), for the appellant. There is no offence under sec. 25 of the *Markets Act* 1890 unless the sale or exposure for sale takes place in a public place. The only grammatical interpretation of the words "other public passages or places" is other "public passages or public places." In *Ex parte Cooke*; *In re Donald* v. *Cooke* (1) and *Carmichael* v. *Forbes* (2) that was assumed to be so, and in *Weedon* v. *Davidson*, (3), the question was not raised, the only point for determination being whether the municipal council stood in the position of the commissioners in respect of the right to recover a penalty. In inserting the exception of a man's dwelling-house or shop the legislature recognized that exposure for sale in a dwelling-house or shop might be held to be an exposure for sale in a public place, and meant to make it clear that that should not be an offence. [They referred to 3 Vict. No. 19 (N.S.W.), sec. 23; *Markets and Fairs Clauses Act* 1847, (10 & 11 Vict. c. 14), sec. 13; 26 & 27 Vict. c. 13.] Even if the prohibition extends to places generally, the place in which the exposure for sale took place here was the appellant's shop, within the meaning of the exception. The justices have found as a fact that it is a shop. Structurally the place is a shop, at any rate the place where butter was exposed for sale. Neither the fact that the appellant sells goods for other people there, nor that he sells by auction renders the place any the less a shop. See *Pope* v. *Whalley*, (4); *Haynes* v. *Ford* (5); *Wiltshire* v. *Willett* (6); *Fearon* v. *Mitchell* (7); *Ashworth* v. *Heyworth* (8); *McHole* v. *Davies* (9). The place is not a market, for that requires a concourse of sellers as well as of buyers.

Davis (with him *Schutt*), for the respondent. The history of the legislation shows that the word "places" is not limited to public places. See 3 Vict. No. 19; 6 Vict. No. 7, secs. 71, 72; 6 Vict. No. 18, sec. 6; 13 Vict. No. 40, sec. 6; *Craies on Statute*

(1) 4 V.L.R. (L.), 1.
(2) 17 A.L.T., 61.
(3) 4 C.L.R., 895.
(4) 6 B. & S., 303.
(5) (1911) 1 Ch., 375; 27 T.L.R., 416.
(6) 11 C.B.N.S., 240; 31 L.J.M.C., 8.
(7) L.R. 7 Q.B., 690, at pp. 694, 696, 698.
(8) L.R. 4 Q.B., 316, at p. 319.
(9) 1 Q.B.D., 59.

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Law, 4th ed., pp. 198, 297; *Clarke* v. *Bradlaugh* (1). Sec. 25 of the *Markets Act* 1890 is a substitution for the rights as to disturbance of market: *Weedon* v. *Davidson* (2). The penalty clause is evidently designed to prevent injury to the right conferred by the immediately preceding clause. That right is injured by the setting up of a rival market which on the evidence was what was done here. Where words in an Act are capable of two constructions that should be adopted which supports the prohibition in the Act.

[GRIFFITH C.J. referred to *Tuck & Sons* v. *Priester* (3).]

The exception of dwelling-houses and shops, neither of which are public places, would be meaningless if "places" meant public places. Even if the prohibition is confined to public places, this building is a public place: *Reg.* v. *Wellard* (4). The legislature intended to include in public places any place in which a rival market was set up: *Ex parte Brian* (5); *Great Eastern Railway Co.* v. *Goldsmid* (6): *Wilcox* v. *Steel* (7); *Mayor &c. of Dorchester* v. *Ensor* (8); *McHole* v. *Davies* (9). This place cannot be held to be a shop by any application of the ordinary canons of construction: *Wiltshire* v. *Willett* (10); *Fearon* v. *Mitchell* (11). The business of the appellant was to hold auctions on the market days.

GRIFFITH C.J. The appellant was charged on the information of the respondent, the Mayor of Geelong, that he the appellant, on 25th August 1910, within the Town of Geelong, did expose for sale certain provisions usually sold in a market, namely butter, in a place other than the place appointed by the council not being his dwelling-house or shop, contrary to the Statute in that case made and provided. The Statute referred to is the *Markets Act* 1890, sec. 25 of which provides that "the said commissioners" —which in this case means the municipal council of Geelong— "may fix the places within such town . . . for the holding

(1) 8 Q.B.D., 63.
(2) 4 C.L.R., 895, at pp. 901, 902, 907, 912.
(3) 19 Q.B.D., 629.
(4) 14 Q.B.D., 63.
(5) 2 S.R. (N.S.W.,) 125.
(6) 25 Ch. D., 511; 9 App. Cas., 927, at p. 947.
(7) (1904) 1 Ch. 212, at p. 219.
(8) L.R. 4 Ex., 335.
(9) 1 Q.B.D., 59.
(10) 11 C.B.N.S., 240.
(11) L.R. 7 Q.B., 690.

of markets, and may there erect and build or cause to be erected or built market houses with shambles stalls and other convenient buildings." The next provision in the section is that "the said market places"—that is, those established by the council—"shall be the only places within the said town . . . where any market for the sale of corn (except corn or grain sold by sample) butchers' meat poultry eggs fresh butter vegetables or other provisions shall for the future be held and kept." Then follows the provision under which the charge was brought, "if any person sell or expose to sale any of the said articles or other provisions usually sold in markets in any of the streets lanes entries or other public passages or places other than the places which may be so appointed by the commissioners as aforesaid except in his dwelling-house or shop, every such person shall on conviction thereof for every such offence forfeit and pay the sum of Five pounds." The charge was that the appellant sold butter in "a place" other than the place appointed. When the case came before the justices objection was taken for the appellant that no offence was disclosed by the information, and so the justices held. But *Cussen* J. was of the contrary opinion with considerable doubt. He made absolute an order to review and imposed a fine.

The appellant is a produce dealer in a large way of business in Geelong. He occupies large premises of an irregular shape having a frontage of about 100 feet to Little Malop Street. Part of the premises extends back to another street, and the whole, except a passage extending through to the back, is roofed in. The interior of this building is used for receiving and storing produce, some sent by various owners to be sold by him, and some the appellant's own. The premises are closed and locked at night. On these premises the appellant holds auction sales once or twice a week, and during the rest of the week he sells goods there by private contract. Besides selling the goods of other persons the appellant also sells large quantities of butter of his own manufacture. Sometimes he sells a ton of his own butter a week, and seldom, if ever, sells his own butter by auction.

The first question is as to the construction of sec. 25. The appellant contends that in the phrase "or other public passages or places" the word "public" qualifies "places" as well as

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"passages." The respondent contends that the phrase should be read "or other public passages or any places." In 1878 this section came before the Full Court of Victoria for consideration in the case of *Ex parte Cooke*; *In re Donald* v. *Cooke* (1). The question there discussed was whether the place where the sales were alleged to have been made was a public or a private place. It did not occur to any one to suggest that that question was entirely immaterial. On the contrary, it was assumed that it was the one question to be determined. It is true that the case was not argued on both sides, the opposite view was not presented to the Court, and the case cannot be regarded as a decision upon the point. But that interpretation has been accepted ever since—upwards of thirty years—until it occurred to the ingenuity of someone to lay this information. In my opinion that interpretation was the correct one as a matter of mere grammatical construction, apart altogether from the maxim *noscitur e sociis*, which has special application to a section framed as this is. I come to the conclusion that, as a matter of common English, the words "or other public passages or places" mean "or other public passages or public places." The most that can be said for the respondent's construction is that the words are open to both constructions. Assuming that they are, then the respondent is confronted with the difficulty pointed out by Lord *Esher* M.R. and *Lindley* L.J. in the case of *Tuck & Sons* v. *Priester* (2) to which I referred yesterday. Lord *Esher* M.R. said (3):—"We must be very careful in construing that section, because it imposes a penalty. If there is a reasonable interpretation which will avoid the penalty in any particular case we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sections." *Lindley* L.J., after referring to the suggested construction said (4):—"I doubt whether in a penal section that construction would be right. It seems to me that we should be treading upon very dangerous ground, and, having regard to the well settled rule that the Court will not hold that a penalty has been incurred, unless the

(1) 4 V.L.R. (L.), 1.
(2) 19 Q.B.D., 629.
(3) 19 Q.B.D., 629, at p. 638.
(4) 19 Q.B.D., 629, at pp. 644, 5.

language of the clause which is said to impose it is so clear that the case must necessarily be within it, I think we ought to keep on the safe side and say that the words 'unlawfully made' are sufficiently ambiguous to enable the defendant to escape from the penalty." But in deference to the argument pressed upon us, and as it is said that the matter is one of considerable importance, I will deal with the respondent's arguments a little more at length. They are based, as I apprehend them, on three grounds, first, on a comparison of the history of the previous legislation both in Australia and in England, secondly, on the exception contained in the words "except in his dwelling-house or shop," and thirdly, on the assumed object of the legislature in passing the Act.

The history of the legislation is simple enough. The original Act passed by the legislature of New South Wales in 1839, 3 Vict. No. 19, sec. 23, was substantially the same as sec. 25 of the Consolidating Act of 1890, except that at the end of the section, there was a proviso which said that:—"Provided that nothing herein contained shall be construed to extend to prevent any person from selling or exposing for sale any of the articles aforesaid in his or her dwelling-house or shop in any part of the said town." That extended as well to the provision that the market place should be the only place for the sale of marketable articles as to the penal provision in the closing sentence. But in 1864 the legislature of Victoria had repealed that Act and re-enacted the law as it now stands in the Act of 1890. In the meantime an Act had been passed in England—10 & 11 Vict. c. 14—called the *Market Clauses Act* 1847. Sec. 13 of that Act is as follows:—"After the market place is open for public use every person other than a licensed hawker who shall sell or expose for sale in any place within the prescribed limits, except in his own dwelling-place or shop, any articles in respect of which tolls are by the special Act authorized to be taken in the market, shall for every such offence be liable to a penalty not exceeding forty shillings." All that one can derive from that is that the Victorian legislature, having had their attention called to the English Act, had thought fit to leave out the general proviso in the old Act, 3 Vict. No. 19, and make it applicable only to the penal provisions of

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the section, adopting the exact words of the English Act, while at the same time retaining their own words of prohibition against selling in any of the "streets lanes entries or other public passages or places" instead of adopting the English single word "place." So that if the argument is of any weight—I have some doubt if it has any at all—the history of the legislation is entirely against the respondent.

Then I turn to the argument based on the words "except in his dwelling-house or shop." The argument is a familiar one, namely, that when an exception is attached to a provision in a Statute, it is *primâ facie* to be assumed that the legislature thought that the thing excepted would otherwise have been within the enactment. That argument must not be pressed too far. But here it is obvious that selling or exposing for sale in a shop or dwelling-house fronting on a street would, if the selling or exposing for sale were on the street front, be clearly within the enactment but for the exception. The exception was therefore necessary, so that no assistance can be derived from the exception.

Then as to the argument from the assumed intention of the legislature, there is nothing more dangerous and fallacious in interpreting a Statute than first of all to assume that the legislature had a particular intention, and then, having made up one's mind what that intention was, to conclude that that intention must necessarily be expressed in the Statute, and then proceed to find it. One object was clearly to protect markets established under the Act; another was to keep the streets and other places clear from stalls and itinerant sellers of goods. But no one could predicate how the legislature would effect those objects. To do that you must look at what they have said. As to setting up rival markets or disturbing markets, the ordinary Courts of law always had jurisdiction to award damages, or to grant an injunction. In cases of that sort questions of considerable difficulty, both of fact and law, frequently arise, as is shown by the cases on the subject, and we have no right to assume that the legislature intended that those questions should be left to be decided summarily by justices. I think it is in the highest degree improbable that in the year 1839 the legislature of New South Wales

would have prohibited a market gardener from selling his produce in his own garden, which would be the result of accepting the respondent's argument.

All these arguments therefore fail, and we are thrown back on the plain grammatical meaning which can only be that the word "places" means public places.

It was suggested that this building is a "public" place, in the sense in which that word is used in the section. But a private building does not become a public place merely because the owner has been fortunate enough to attract a large crowd of customers. In my opinion this building is not a public place, and the word "places" in the section is used as applying to places *ejusdem generis* with the other places that are mentioned. That disposes of the case, since the information discloses no offence under the Statute.

On the assumption that the section applied to any place, public or private, a long argument was addressed to us to the effect that what the appellant did was to set up a rival market, or to disturb the corporation market. If he did so, he can be proceeded against by action at law or suit for an injunction. To such an action or suit he may have various defences, and it is sufficient to say that justices have not been empowered by the legislature to deal with such a question summarily. In my opinion the case is not distinguishable from the case of *Haynes* v. *Ford* (1), decided in April this year by the Court of Appeal.

For the reasons I have given I think that the appeal should be allowed.

I should add that I am sorry that *Cussen* J. should apparently have been misled by some remarks that fell from members of this Court in the case of *Weedon* v. *Davidson* (2). Perhaps those observations were not so accurately expressed as they might have been, but I do not think that anybody who had heard the arguments in that case could have misunderstood them.

BARTON J. Sec. 25 of the *Markets Act* has been before this Court in *Weedon* v. *Davidson* (2), and some inferences have been drawn from expressions used by the members of this Court in

(1) (1911) 2 Ch., 237. (2) 4 C.L.R., 895.

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that case which, if justified, would be in favor of the respondent. But the question which has been the subject of argument here was not debated in that case, nor can the observations referred to be really interpreted as a judgment upon that question. The first question that arises is as to the meaning of the word "place" in the third branch of sec. 25. That section is a verbatim copy of sec. 28 of the Act of 1864, which, with other legislation, was consolidated in the present Act. There was a previous Act, 3 Vict. No. 19, passed in 1839, which appears to have been amended by the Act of 1864. In sec. 23 of the Act 3 Vict. No. 19 reference is made to dwellings or shops, as to which I shall have a few words to say later on. That reference appears in the form of a proviso which says:—"Provided that nothing herein contained shall be construed to extend to prevent any person from selling or exposing for sale any of the articles aforesaid"—that is marketable articles—"in his or her dwelling-house or shop in any part of said town." For that proviso a substitution has been made by the insertion in sec. 25 of the Act of 1890 of the words "except in his dwelling-house or shop" after the words "appointed by the commissioners as aforesaid." As will be seen directly, I am of opinion that there is no difference for the purposes of this case between the meaning of the exception as it stood in the original Act and as it now stands in its altered form in the Act of 1890.

The main subject of argument—and I think it is the determining factor—is the meaning of the third branch of sec. 25. It was argued that the word "places" bears a signification not limited to public places, and therefore that all private places, apart from the markets themselves, are included in the prohibition contained in that branch of the section—with the exception, of course, of dwelling-houses and shops, to which it is said any possible exemption is limited, and within which it is said the appellant's premises do not fall. There is, in the first place, considerable warrant for saying that the word "places" is used in the third branch of the section in a sense *ejusdem generis* with the words "streets lanes entries or other public passages." That would be to hold that, on the assumption that the word "public" was not necessarily intended as qualifying the word "places," the doctrine applied as importing the qualification. That, however,

I think is scarcely necessary. It seems to me that these words, if read in the ordinary sense, are perfectly clear. Taking them as they stand, "in any of the streets lanes entries or other public passages or places," I think the ordinary reader, looking especially at the words "public passages or places," about which the argument circled, would infer as a reasonable thing that "places" were in the same class as "passages," and that "public passages and places" mean "public passages and public places." That is the impression that these words conveyed to me at the outset, and nothing has occurred to weaken it since. It is true that in the first and second branches of the section the word "places" is used with a signification which might include private places or places which are not public, and it has been argued that as the word is used in that sense in the first two branches of the section it must necessarily have been used in the same sense in the third branch. But I think the word "places" in the third branch is used in a collocation which indicates that it is qualified by the word "public," applied to "passages" and "places" alike.

We were referred to authorities on this question, and particularly to the case of *Reg.* v. *Wellard* (1). Now that was a very different case. The place was held to be a public place under the Act there in question. But a place may be public for the purpose of a particular Act, and not public for the purpose of another Act of a different character altogether. The place there held to be public was an unenclosed space accessible to the public at all times of the day or night. No one, apparently, exercised dominion over it, any more than dominion was exercised over the place under consideration in the case of *Ex parte Brian* (2). An open place at the intersection of two streets may be a public place for the purpose of a particular Act, and might be a public place for the purpose of this Act. But there is no such public place here. The right of exclusion constantly existed in the hands of the appellant. He could have closed his place of business at any time of the day, and did close it every evening. That differentiates the place spoken of in these cases from that we are dealing with. I do not think any of the Judges who decided these cases would have said that either

(1) 14 Q.B.D., 63.

(2) 2 S.R. (N.S.W.), 125.

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under the Statutes they were dealing with, or under the present Statute, a place such as the business house of the appellant could for a moment be deemed to be a public place.

Then there is the consideration which has been referred to by the learned Chief Justice that, when there is a question about the sense in which a phrase is used, a construction adopted for the purpose of fixing penal liability upon a person must be founded upon words bearing a clear sense in the Act under consideration. In *Tuck & Sons* v. *Priester* (1), cited by the learned Chief Justice, Lord *Esher* M.R. put it this way (2):—"If there are two reasonable constructions we must give the more lenient one," and *Lindley* L.J. in the same case (3) speaks of "the well-settled rule that the Court will not hold that a penalty has been incurred, unless the language of the clause which is said to impose it is so clear that the case must necessarily be within it." The matter was put even more conclusively by *Cave* J. in *Crane* v. *Lawrence* (4) in these words:—"It is a sound rule of construction that when any penalty or disability is imposed by Statute on any of Her Majesty's subjects, the Court before whom any charge is preferred must be able to see clearly what the conduct is which will render a person liable to the penalty so imposed."

On the law laid down in the two cases mentioned there are a great many decisions to the same effect. The construction which would render the appellant liable in this case is one of two which, at the very worst for the appellant, are equally applicable. If that is so, the construction which does not impose the liability is to be adopted, and that is the construction which makes "places" in the third branch of the section "public places" in common with the other places enumerated.

But it is said that, if the word "places" is as construed here, there is no reason for the exception of dwelling-houses and shops. I think that is not so. A dwelling-house or shop in a town is usually in a street or thoroughfare or in some place accessible to the public, it may be a square, and goods exposed for sale outside such a tenement are in the ordinary sense exposed for sale

(1) 19 Q.B.D., 629.
(2) 19 Q.B.D., 629, at p. 638.
(3) 19 Q.B.D., 629, at p. 645.
(4) 25 Q.B.D., 152, at p. 154.

in the street or other public place. As a matter of fact they can scarcely be so exposed for sale without literally being exposed in the street or other public place, unless they are behind glass, and to provide for such cases was, I think, the intention of the legislature in making the exception. It seems to me, therefore, that the word "places" in the third member of the section means "public places."

The further question arose whether the appellant's place of business was a "shop." It was a place in which, apart from the reception and sale of articles or goods sold by auction, he carried on a business of his own in the sale of a marketable commodity, butter, a very large business at times. There was nothing in the construction of the premises or in their use which differentiated the structure from such places as have been held in England to be shops. It is unnecessary to labour this point, inasmuch as the opinion we hold as to the first question settles the whole case, but, if it were necessary to decide whether this were a shop or not, I should have no hesitation on the subject, especially in view of the case of *Haynes* v. *Ford* (1), in which case the judgment of *Neville* J. has been affirmed by the Court of Appeal. On the whole case I am of opinion that the appeal must be allowed.

O'CONNOR J. The conviction under review in this case is founded upon sec. 25 of the *Markets Act* 1890. The history of previous legislation throws no light whatever upon the question we have to decide. The prosecutor, in framing the information, very properly alleged as part of the case he had to prove that the sale did not take place in the appellant's dwelling-house or shop. It is a well settled rule in prosecutions that, where an act is made an offence subject to a penalty, but it is declared not to be an offence under certain circumstances, then the excepted circumstances must be negatived in the information and in the proof by the prosecutor. The prosecutor, therefore, took upon himself the burden of proving that this sale did not take place in a shop. I have no doubt that the finding of the magistrates that the sale did take place in a shop was correct, and on that ground alone, apart from the question of law raised, this conviction cannot

(1) (1911) 2 Ch., 237.

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stand. As the question is of some importance I will add my reasons for thinking that the decision that the place was not a shop is not justified. It is impossible and indeed unnecesary to define exhaustively what is a shop, but there are certain incidents of this particular business which, it seems to me, cannot be left out of consideration in determining whether the structure in question here was a shop or not. Speaking generally, the appellant's premises were a collection of covered in places or rooms at the rear of other buildings fronting a public street, and opening on to a right of way on either side. There is an entry to them also from the public street in front. The business carried on was that of an auctioneer on a somewhat large scale. The place was called by the auctioneer in his advertisements "The Exchange." As a matter of fact it was the appellant's permanent place of business. The portion of it in which the sale of butter was carried on was separated from the rest of the premises. There a permanent store of butter was kept, principally the appellant's own property, and very large quantities of butter, amounting to over a ton a week, were sold there by retail. The auction sales of butter and other produce were held apparently two or three times a day on one day of the week, and very frequently on other days. Under those circumstances it is clear that the place was a place for the sale of goods stored and brought there for the purpose of being sold, and those goods were sold by retail. In that you have all the elements of a shop, and the question is whether the additional use to which the place was put in any way detracts from that character.

It was held by *Earle* C.J. in *Wiltshire* v. *Willett* (1) that a sale on commission and a sale by auction in a place do not take away from that place the character of a shop. That decision was followed in that respect by the Court of Appeal, and was approved by *Cozens-Hardy* M.R. in *Haynes* v. *Ford* (2). I think, therefore, that the building in which this butter was sold, the subject of the charge, being so used, was in all essentials a shop within the meaning of sec. 25, and that the prosecution therefore fails on that question of fact.

But apart from that arises the more important question as to

(1) 11 C.B.N.S., 240. (2) 27 T.L.R., 416.

the interpretation of section 25. I think Mr. *Davis*, in the course of his very careful argument, made it clear that there is an ambiguity in the use of the word "place," that it may be read in either of two ways, either, as the appellant contends, the word "public" must be supplied before it or, as the respondent contends, the words "any of the" must be supplied before it. The form of expression is elliptical, some words must be supplied, and the question is what word or words must be supplied.

If, as Mr. *Davis* contends, the words to be supplied are "any of the" then an offence is committed, whether the sale takes place in any place, public or private, which is not the defendant's dwelling-house or shop. If the appellant is right, then unless the sale takes place in a public place, which is not a dwelling-house or shop, no offence has been committed. Mr. *Davis's* principal argument, as I understood it, was put in this way. The main body of the section protects the right of market against any sale in any place, public or private, and the remedy given ought to be co-extensive with the right. It appears to me that does not follow at all. We must remember what is the nature of the remedy given. It is a penal prosecution before magistrates resulting in a summary conviction. It may very well be that the legislature, though giving a right to protection against every form of sale which would interfere with the market right, and would amount to a disturbance of market at common law, stopped short of placing the full remedy in the hands of magistrates. The principle according to which a section of this kind is to be interpreted seems to me to be of some importance in a case where the interpretation is doubtful. There is no doubt that at one time there was a very much more rigid rule of interpretation of criminal provisions in Statutes than there is now, but the modern rule is very well stated by *James* L.J. in *Dyke* v. *Elliott*; *The "Gauntlet"* (1). He said:—"It was much pressed in the Court below, and again before their Lordships, that the Statute being a penal, or, as it was phrased, a highly penal one, it was to be construed strictly. It appears to their Lordships necessary to say a few words as to this topic, which is so often pressed in argument. No doubt all penal Statutes are to be con-

(1) L.R. 4 P.C., 184, at p. 191.

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strued 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, that there has been 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. On the other hand, the person charged has a right to say that the thing charged, although within the words, is not within the spirit of the enactment. But 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." That I think is the rule which I may describe as the modern rule by which we are to be guided in interpreting penal Statutes. One fair way of looking at the section is to inquire: what is the scope of the legislation, and will the construction contended for carry the provision beyond that scope? The scope is clearly to protect the market, and, if the protection of the market is effected fairly adequately by protecting it from sales in public places round about the market, or in the neighbourhood of the market, it appears to me that is all the protection which the Act, taken as a whole, contemplated. In *Haynes* v. *Ford* (1), although the decision was upon a Statute somewhat different in wording, I think exactly the same principles of interpretation as to the intention of the Act were applicable. *Cozens-Hardy* M.R., with regard to a section very similar to this, said (2):—"Then came sec. 10. It was reasonably plain that the general intention of sec. 10 was to protect the market against what might be called initerant vendors, people who sold their goods in alleys or lanes or other open spaces, and the section also prevented them from selling in any room which they might hire for the purpose at an inn or a warehouse. Then there was a saving, which ought to be construed as an express permission, that the section did not apply to persons who sold in their own shops. The question was

(1) 27 T.L.R., 416.

(2) 27 T.L.R., 416, at p. 417.

whether what the defendant was doing was selling within his own shop within the permission given by sec. 10."

That is a special provision which does not occur in this case. Now, if we look at the wording of the Act itself, the prohibition is against selling in any of the streets, lanes, entries or other public passages. All those are public places, sales in which would be likely to affect the carrying on of the market authorized by the Act to be established, and to go beyond that would be to take a much further step than is at all necessary to protect the market. One of the strongest arguments against Mr. *Davis's* contention is that, if it were adopted, it would go beyond the protection required and would have the effect of prohibiting sales of marketable commodities of every kind which were not made in a dwelling-house or shop. Many illustrations might be given similar to that given by the learned Chief Justice in his judgment, where a sale, which could in no way do harm to the market, and which would certainly not be a sale in a dwelling-house or shop, would be prohibited. It seems to me, applying the test laid down by *James* L.J. in *Dyke* v. *Elliott*; *The "Gauntlet"* (1), that the fair interpretation of this section, according to the scope of the Act, and looking at the rest of the sections, is to restrict the prohibition of sales to places of the same kind as streets, lanes, entries and other public passages. In my opinion, therefore, the proper word to be supplied before "places" is "public," and not the words for which Mr. *Davis* contends.

The proper interpretation of the section being that there can be no offence unless the sale takes place in a public place, it is clear that the sale in question did not take place in a public place within the meaning of the Statute. The words "public place" are general words, and the sense in which they are used is to be gathered only from the subject matter with which the legislature was dealing when it used them. A "public place" for the purpose of defining the offence dealt with in *Reg.* v. *Wellard* (2) was one thing, in *Ex parte Brian* (3), it was quite another. Here "public places" must be interpreted with regard to the objects of the Statute, that is, the protection of markets. If the appellant's

(1) L.R. 4 P.C., 184, at p. 191. (2) 14 Q.B.D., 63.
(3) 2 S.R (N.S.W.), 125.

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premises can be described as a public place, then every shop which attracts a large number of persons is a public place. The names of shops which might be given by way of illustration in Melbourne and Sydney will readily occur to anyone, where there is a large stream of people going in and out all day. It can hardly be contended that in an Act of this kind such shops were intended to be included in the term "public places" within the meaning of this section. On that ground, therefore, which is one of fact, I think the appellant must succeed.

I would like to add to what has been said by my brothers with regard to the case of *Weedon* v. *Davidson* (1) that some expressions were used which perhaps went beyond the necessity of the occasion, and have, I think, been misunderstood. Looking at my own judgment there, I find that I said that the remedy having been given by this penal section, was in substitution of other remedies under the old law. That statement is accurate, but I did not intend to convey that the remedy was substituted to the exclusion of other remedies given by the old law. If my words bear that meaning I think they went too far. There is no reason why the old remedy for the protection of market rights by action for disturbance of market should not exist at the same time as this new remedy. The enforcement of the old remedy is a very different thing from the enforcement of this new remedy, which lays open to prosecution not only a person who sets up a market, but every person who sells goods contrary to the provisions of sec. 25. For these reasons I am of the opinion that the learned Judge below took an erroneous view of the case, and that the appeal must be allowed.

Appeal allowed. Order appealed from discharged. Order to review discharged with costs. Order of the justices restored. Respondent to pay the costs of the appeal.

Solicitors, for the appellant, *Doyle & Kerr.*

Solicitors, for the respondent, *Harwood & Pincott.*

B. L.

(1) 4 C.L.R., 895.