[HIGH COURT OF AUSTRALIA.]

MOFFAT . . . . . APPELLANT;
PLAINTIFF,

AND

SHEPPARD AND ANOTHER . . . RESPONDENTS.
DEFENDANTS,

AND

ALEXANDER . . . . . APPELLANT;
PLAINTIFF,

AND

SYDNEY SHEPPARD, ARTHUR SHEPPARD, MOFFAT, AND THE IRVINEBANK MINING CO. LTD. . . . . RESPONDENTS.
DEFENDANTS,

APPEALS AND CROSS APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE. *April* 26, 27, 29.

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

Mining Tribute—Whether personal or not—Revocation of licence—Oral contract in regard to interest in land—Specific performance—Mining Act 1898 (*Queensland*), 62 *Vict. No.* 24.

An oral licence to mine on tribute is revocable unless the facts are such that a Court of Equity will enforce specific performance.

On appeal from a Warden the District Court Judge found that the defendants, who were licensees of a mining tenement on tribute "had expended nothing beyond what was absolutely necessary for the immediate purpose of enabling them to obtain the largest amount of ore in the shortest possible time, and that the defendants' mining methods, erections and appliances were

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worthless to the plaintiffs for the purposes of future operations, and that there was no evidence to justify the inference that the lode on which the defendants were working was or was likely to be permanent," and that they were not complying with the terms of the alleged contract, but were taking away large quantities of material that they had no right to take. On 2nd May 1907 the plaintiff's representative went to the claim, where he found persons who claimed to work under the tribute. He objected to their methods of mining and directed the stoppage of operations until they had made certain alterations in the mining equipment. Four days later the licensors brought actions in the Warden's Court against the licensees claiming possession of the tenement.

Held, (1) that upon the facts as found a Court of Equity would not enforce the performance of the contract, and (2) that there had been a revocation of the licence on 2nd May.

Licences to mine on tribute are not personal, but authorize the employment of a reasonable number of men.

Held, that the District Court Judge was justified on the evidence in finding that ten was a reasonable number, and also that working on Sundays was not contemplated by the licence.

Judgment of Supreme Court of Queensland varied. Judgment of *Rutledge* D.C.J. restored.

APPEAL from the decision of the Supreme Court of Queensland.

The facts are fully set out in the judgments hereunder.

Feez and *Marsland*, for the appellant Moffat. There is no necessity to go beyond 2nd May 1907, because it has been found that there was a revocation of the licence on that date, though there was evidence upon which it could have been found that the licence had been revoked on 26th March. The respondents, Arthur and Sydney Sheppard, are at most only entitled to their percentage of the ore won up to 2nd May by ten men working six days a week. As to whether the *Sunday Observance Act*, 29 Car. II. c. 7, is in force in Queensland, see *Mitchell* v. *Scales* (1); and *Quan Yick* v. *Hinds* (2). Apart from any statute law the Judge was at liberty to find that Sunday was not a day on which work is usually done on the mining fields; also, if the Judge was right in finding that the licence was not a personal one, he was at liberty to find that ten was a

(1) 5 C.L.R., 405. (2) 2 C.L.R., 345.

reasonable number of men. [They referred to the *Mining Act* 1898, 62 Vict. No. 24, secs. 145, 150 and 151; *Doe d. Burdett* v. *Wrighte* (1).]

Lilley, for the appellant Alexander. This is not a licence by a freeholder, but a licence by a holder of a mining lease, and is different to *In re Lander & Bagley's Contract* (2). Ordinary mining work is never carried out on Sundays. [He referred to *Job* v. *Potton* (3); and *Hodgkinson* v. *Fernie* (4).]

Stumm and *Hobbs*, for the respondents, Sydney and Arthur Sheppard. The respondents were entitled to all ore won up to 27th June, irrespective of the number of men employed and including work done on Sunday, less 5 per cent. There was no evidence of revocation on 2nd May 1907. As a matter of law the licence was irrevocable. Any breach of the agreement only gave a right to injunction and damages, and gave no right of re-entry except perhaps if there had been a failure to pay the tribute. The respondents were entitled to all ore got by ten men and not obtained on Sundays during the whole period up to the 2nd June less 5 per cent.

The licence to tributors is not a personal one, cf. secs. 218, 219 and 246 of the *Mining Act* 1898, 62 Vict. No. 24; and there is a difference between licences for profit and licences for pleasure: *Duchess of Norfolk* v. *Wiseman* (5), referred to in *Wickham* v. *Hawker* (6). Every licence coupled with an interest is irrevocable if once acted upon, as in the present case, when the respondents went on the land and found payable lode. [They referred to *Muskett* v. *Hill* (7); *Frank Warr & Co. Ltd.* v. *London County Council* (8); *Thomas* v. *Sorrell* (9); *Kerrison* v. *Smith* (10); *Hexter* v. *Pearce* (11); *Webber* v. *Lee* (12); *McManus* v. *Cooke* (13); *Wood* v. *Leadbitter* (14); *Atkinson* v. *King* (15); *Harrison* v. *Ames* (16); *Plimmer* v. *Mayor &c. of Wellington*

(1) 2 B. & A., 710, at p. 714.
(2) (1892) 3 Ch., 41.
(3) L.R. 20 Eq., 84.
(4) 27 L.J.C.P., 66.
(5) Year Book, 12 Hen. 7, 25.
(6) 7 M. & W., 63.
(7) 5 Bing. N.C., 694.
(8) (1904) 1 K.B., 713.
(9) Vaugh., 351.
(10) (1897) 2 Q.B., 445.
(11) (1900) 1 Ch., 341.
(12) 9 Q.B.D., 315.
(13) 35 Ch. D., 681.
(14) 13 M. & W., 838.
(15) 2 L.R.I., 320.
(16) 15 L.T., 321.

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(1); *In re Lander & Bagley's Contract* (2); *Coatsworth* v. *Johnson* (3).]

[ISAACS J. referred to *Willmott* v. *Barber* (4); *Ahmad Yan Khan* v. *Secretary of State for India* (5).

GRIFFITH C.J. referred to *Nunn* v. *Truscott* (6).]

They also referred to *Hodgkinson* v. *Crowe* (7); *In re Anderton & Milner's Contract* (8); *Swain* v. *Ayres* (9); *Lowe* v. *Adams* (10); *Bainbridge on Mines and Minerals*, 5th ed., p. 333; *McSwinney on Mines, Quarries and Minerals*, 3rd ed., p. 244.

[ISAACS J. referred to *Dennett* v. *Grover* (11)].

Feez, in reply, referred to *Willmott* v. *Barber* (4); *Thompson* v. *Guyon* (12); *Mundy* v. *Joliffe* (13); *Stanley* v. *Riky* (14); *Williams* v. *Morrison* (15); *Hetherington* v. *Samson* (16); *Fry on Specific Performance*, 4th ed., par. 580, p. 256.

Scott, for the *Irvinebank Mining Co. Ltd.*, one of the respondents, was not heard.

Cur. adv. vult.

April 29.

GRIFFITH C.J. This is an appeal from a decision of the Supreme Court upon an appeal from the judgment of the Judge of a District Court who himself was sitting as a Court of Appeal from a Warden's Court. I will state very briefly such of the facts as are necessary to make the history of the proceedings intelligible. The appellants, Moffat and Alexander, were joint owners of a mineral lease or leases in the Northern tin fields, the appellant Moffat being entitled to seven-twelfths and the appellant Alexander to five-twelfths. On 6th May 1907 they brought separate actions in the Warden's Court at Herberton. Moffat's action was brought against the respondents, Arthur and Sydney Sheppard, and the case that he made was that he

(1) 9 App. Cas., 699.
(2) (1892) 3 Ch., 41.
(3) 55 L.J. Q.B., 220.
(4) 15 Ch. D., 96.
(5) L.R. 28 I.A., 211.
(6) 3 DeG. & Sm., 304.
(7) L.R. 10 Ch., 622.
(8) 45 Ch. D., 476.
(9) 21 Q.B.D., 289.
(10) (1901) 2 Ch., 598.
(11) Willes, 195.
(12) 5 Sim. 65.
(13) 5 My. & C., 167.
(14) 31 L.R. Ir., 196.
(15) 32 Fed. Rep., 177.
(16) 4 N.Z. J.R. (N.S.) S.C., 84.

had granted a licence to mine, on the terms commonly called a tribute, to Arthur Sheppard in December 1906; that both the defendants had worked upon the land, claiming to do so under the terms of that licence; and that he had revoked it; and he claimed relief on that basis. Alexander also claimed against the two Sheppards, Moffat and the Irvinebank Mining Co. being joined as defendants. The relief that he asked was, first, a declaration that the entry and the mining upon the land by the defendants Arthur and Sydney Sheppard, otherwise than by Arthur Sheppard personally, was unlawful and contrary to the terms of the licence granted by Moffat, thus assuming that Arthur Sheppard personally had the right to be there, and he asked for an injunction restraining both defendants from mining. Both actions were dismissed by the Warden. The complainants in both actions appealed to the District Court, and the appeals were heard together. Under the *Mining Act* 1898 there is no pecuniary limit to the extent of the Warden's jurisdiction, so long as the subject matter relates to mining, but an appeal lies to the District Court. The hearing before the District Court is a re-hearing, and there is no appeal from the decision of the District Court on questions of fact, but an appeal lies to the Supreme Court on questions of law, which are to be raised by a special case stated by the Judge. If by any mischance the facts to enable judgment to be given between the parties are not found and stated in the case, there is nothing for it but to send the case back for further hearing. The Supreme Court cannot add to the facts found, nor can it infer the existence of any fact that is not found. It is bound to confine itself within the limits of the findings of the District Court Judge, and it is also bound to confine itself to the points of law stated in the case.

On the hearing before the District Court the learned Judge held that the licence, or tribute, had been granted by the appellant Moffat with the concurrence of the appellant Alexander to the defendant Arthur Sheppard, that it was in pursuance of that licence that the two defendants, and others, their servants or associates, had worked upon the land; secondly, that the licence was revocable; thirdly, that it was revoked on 2nd May 1907; fourthly, that it was not personal to Arthur Sheppard, but that

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it was limited to this extent—that not more than ten men ought to be employed under it at any one time, and that they ought not to be employed on more than six days in the week; and he gave consequent relief. Both parties appealed to the Supreme Court. The case stated submitted several questions of law. I will call attention to those which are now material. The first is: "Was I right in deciding that the plaintiff Alexander must be taken to have granted or sanctioned the granting of the said tribute by the plaintiff Moffat?" The next is: "Was I right in deciding that the said tribute was not personal to the defendant Arthur Sheppard but authorized the employment of other persons?" Then came questions as to abandonment which were not argued before us. The next other material questions are: (6) "Was there any evidence to support my finding that the said tribute did not authorize the employment of more than ten men at the same time and did not authorize work on Sunday, and was I right in so deciding?" (7) "Was I bound to find that the said tribute only authorized the employment of seven men and no more?" (9) "Was I right in deciding that the said tribute was legally revocable?" (10) "Was I bound to find that the said tribute was revoked on 26th day of March 1907, and should I have decided that it was so revoked?" (11) "Was there any evidence to support my finding that the said tribute was revoked on 2nd May 1907?"

The Supreme Court varied the judgment of the learned Judge of the District Court in one particular only, that is to say, they declared that the defendants, Arthur and Sydney Sheppard, were entitled to the whole of the proceeds of the ore obtained from the mine before 2nd May 1907. In other words, they struck out the limitation that the learned Judge had found—the limitation to ten men working six days a week. They overruled all the other objections taken on both sides. From this judgment an appeal was brought to this Court by Moffat and Alexander, and there is a cross-appeal by the defendants Sheppard. The cross-appeal asks for the restoration of the judgment of the Warden's Court, which was a judgment in favour of the defendants *simpliciter*. I will deal first with the cross-appeal.

The first point made is that the tribute, or licence, to work on

the land upon the tribute granted in December 1906 by Moffat was not revocable. A licence to work on tribute is a thing very well known on mining fields in Queensland, and, I suppose, in other parts of Australia. It is a thing known to the common law, and the general rule of common law is laid down in the well known case of *Wood* v. *Leadbitter* (1), which as far as I know is still good law. It is: "A licence under seal (provided it be a mere licence) is as revocable as a licence by parol; and, on the other hand, a licence by parol, coupled with a grant, is as irrevocable as a licence by deed, provided only that the grant is of a nature capable of being made by parol. But where there is a licence by parol, coupled with a parol grant, or pretended grant, of something which is incapable of being granted otherwise than by deed, there the licence is a mere licence; it is not an incident to a valid grant, and it is therefore revocable."

Now, since the case of *Webber* v. *Lee* (2), and, indeed, from an earlier period, it is not open to dispute that a grant of a right to begin to work on land and take away part of the minerals is a contract for an interest in land within the *Statute of Frauds*. The licence in the present case was by parol—by word of mouth. It created what is called a *profit à prendre*, and is therefore within the *Statute of Frauds*. If then there was no more in the case than a mere licence, the licensor was entitled to revoke it whenever he chose. But that right of revocation might be affected if the circumstances were such as to give a Court of Equity jurisdiction to compel specific performance of the agreement, although verbal; and the foundation of the jurisdiction of a Court of Equity to interfere in such a case would be that it would be inequitable to allow the licensor to take advantage of the *Statute of Frauds*. In order to do that he must rely upon the facts. The only fact found in the present case on that point by the learned District Court Judge is this: "I found that the said defendants had expended nothing beyond what was absolutely necessary for the immediate purpose of enabling them to obtain the largest amount of ore in the shortest possible time, and that the defendants' mining methods, erections, and appliances were worthless to the plaintiffs for the purposes of future operations, and that there

(1) 13 M. & W., 838, at p. 845. (2) 9 Q.B.D., 315.

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was no evidence to justify the inference that the lode upon which the defendants were working was or was likely to be permanent."

It was contended that on that finding of fact a Court of Equity would interfere to compel the specific performance of the verbal agreement. In my judgment there is nothing in the facts as found to raise any equity, and it would be sufficient to say that, if the point was really open (which is doubtful), further facts should have been proved. In that respect the case is indistinguishable from the case of *Stanley* v. *Riky* (1). There is, however, another answer to the objection, namely, that a party who seeks specific performance of an agreement must show that he has been performing it on his own part. If the findings of the learned Judge on other points, to which I will directly refer, are correct, the respondents were not complying with the terms of the alleged contract, but were taking away large quantities of material that they had no right to take. Thus they had disentitled themselves to any assistance from a Court of Equity. There is therefore no case here for the interference of a Court of Equity to prevent the licensors from acting on their common law right to revoke the licence at will. For that proposition *Swain* v. *Ayres* (2) is ample authority.

The next point made by the licensees was that the licence was never revoked. Now, upon that finding the question submitted by the learned Judge is: "Was there any evidence to support my finding that the said tribute was revoked on 2nd May, 1907?" Whether, when an affirmative finding is necessary to the successful party, there is any evidence to support the finding is a question of law. The evidence, shortly stated, is this: On 2nd May the representative of the two plaintiffs went to the claim, where he found persons who were claiming to work under the tribute. He objected to the manner in which they were working, and said it was being carried on under dangerous conditions, and directed that the work should be stopped until ladders were put in and the mine properly secured. The directions were not complied with. There is no question that he gave those directions. Four days later the actions were brought in the Warden's Court.

(1) 31 L.R. Ir., 196. (2) 21 Q.B.D., 289.

There is no dispute that bringing the actions was a sufficient revocation. The simple question is whether after that order or requirement was made upon the tributors they were working with the consent of the appellants. Of course, the answer is that they were not; they were forbidden to work. Possibly the interdict was, in a sense, conditional, that is to say, the appellants did not absolutely object to the continuance of work if the requirement made was complied with. But when the actions were brought they had not been complied with, and, as I said, there is no question that the bringing of the action was a sufficient revocation of the authority. The answer, therefore, to the question submitted by the learned Judge must be that there was sufficient evidence to support the finding that the tribute was revoked on 2nd May 1907. That disposes of the cross appeal so far as the questions raised by it are peculiar to the respondents.

The next important question raised is whether the licence which was granted was personal to Arthur Sheppard, or whether it authorized the employment of more men than himself; and the further question, if so, was the number unlimited, and, if not, what was the limit? Now, the learned Judge found that the tribute was not personal to the defendant Arthur Sheppard, and the case of the *Duchess of Norfolk* v. *Wiseman* (1) referred to in *Wickham* v. *Hawker*) (2), cited by Mr. *Stumm*, is quite sufficient authority for that position, if any authority were necessary to support anything so obvious, having regard to the nature of the work to be done in working lode tin. In that case a distinction is taken between a licence for pleasure and licence for profit. A licence for pleasure is a personal licence; a licence for profit to go on land and take away part of the minerals for the benefit of the licensee is not personal. The respondents were, therefore, in law authorized in taking others with them to help them. Moreover, the conduct of the parties, as it appeared in the evidence, shows that the appellants always treated the case as one in which the licence authorized the employment of several persons.

The next question is what was the limit? The learned Judge asked on that two questions:—"Was there any evidence to support my finding that the said tribute did not authorize the employ-

(1) Year Book, 12 Hen. 7, 25. (2) 7 M. & W., 63.

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ment of more than ten men at the same time, and did not authorize work on Sundays," and was he bound to find that it only authorized the employment of seven men and no more? The evidence as to the granting of the tribute is extremely brief. It was granted by Moffat, and very little was said. Subsequently, in April, Moffat found the tributors working with a large number of men, and they were working seven days in the week. He objected to that, and said there were too many men, that he objected to their working on Sundays, and they would have to count one day a week off the duration of the tribute, which was expressed to be for six months. He also said, in evidence, that when tributes were granted for working such a mine, permission was never given to employ more than ten men. It appears to me that a proper conclusion is that a licence of that sort authorizes the employment of a reasonable number of men, and that there was evidence, on which the learned Judge could find, that ten was a reasonable number of men, and that any more would be unreasonable. He might have found that seven was a reasonable number, and that more would be unreasonable, but he was not bound to do so. There was evidence to justify him in finding, as he did find, that a number not exceeding ten was the number in contemplation of the parties when the licence was granted. For the same reason he was justified in finding that the licence did not contemplate working on Sundays. As I said, the licence was for a fixed term, and if the licensee worked seven days a week he would get one-sixth more than he would if he worked only six days in the week. It is not disputed that Sunday work is not common in mining. The answer, therefore, to that question must be that there was evidence that justified him in finding that the tribute did not authorize the employment of more than ten men or working on Sundays. The learned Judges of the Supreme Court thought—and this is the only point in which they differed from the conclusions of the learned District Court Judge—that the appellants, by not objecting until toward the end of the term to more men being employed and by not withdrawing their licence sooner, estopped themselves from objecting to the employment of a larger number of men. With great respect to the learned Judges, there is no statement of fact in

the case on which that argument can be based. They could only be estopped if they allowed a thing to go on with knowledge of it, and there is no finding of any such knowledge. The foundation, therefore, of that variation is wanting in that respect.

Another point was taken on Alexander's appeal that he did not concur in Moffat's granting the licence, and the question asked with respect to that is:—Was I right in deciding that plaintiffs Moffat and Alexander must be taken to have granted or sanctioned the granting of the licence to defendants? Now, there was evidence, strong evidence, of Alexander's concurrence in the original grant by Moffat. Moreover, in the action that he himself brought in the Warden's Court he did not by his plaint object to the working of the respondent Arthur Sheppard, to whom the licence was originally granted, but only to anybody else working, so that the learned Judge might very fairly have said that the point was not open to Alexander, and might also have found consent on his part. The learned Judge, however, rested his decision upon another ground. In paragraph 15 of the case he says:—"There was a conflict of evidence as to whether the plaintiff Alexander authorized the granting of the said tribute by the plaintiff Moffat. On behalf of the plaintiff Alexander it was contended that there was not sufficient evidence that he had ever granted, or sanctioned the granting of the said tribute, or that the granting or sanctioning the same could affect his five-twelfths interest in the said lease 1561 to the defendant Arthur Sheppard, and I should have felt very strongly disposed to adopt this view; but I decided, in consequence of the award in the arbitration proceedings, on the evidence referred to it must be taken as finally decided by the tribunal appointed by the parties that the plaintff Alexander did grant or sanction the grant of such licence." So that, apparently, he rested his decision upon the effect of the award referred to. The proceedings with respect to that award were somewhat singular. It appears that the appellant Alexander brought an action against the defendant Sydney Sheppard for trespassing on his interest in the lease. Now, Sydney Sheppard was there claiming to be working under the authority of his brother, Arthur Sheppard. Then, while these proceedings were pending, a submission to arbitration was made,

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the agreement being between Alexander on the one part and Arthur Sheppard, the person to whom the tribute had been granted, on the other; and the question to be determined by the arbitrators was "what was the amount payable to Alexander under the alleged tribute agreement with the said Arthur Sheppard in the Tornado and Vulcan Extended lease, and on what date the said tribute expired." The question submitted was what tribute was payable to Alexander by Arthur Sheppard under an alleged tribute agreement? Of course, nothing was payable unless there was a tribute agreement. That question was submitted to and answered by the arbitrators. They found that tribute was let to Arthur Sheppard for a period of six months at a royalty of 5 per cent., that it was let on 13th December, and expired on 12th June. In order to make the award that Arthur Sheppard was bound to pay a 5 per cent. royalty to Alexander intelligible it must have been either ascertained or admitted that Alexander had granted a licence for six months to him. If an action is brought by one man against another for rent, the issue being what is the amount of rent payable, when judgment has been given for the plaintiff he is estopped from saying afterwards, "I never let the property to him at all." I think, therefore, if it were necessary to rely upon the award to support the conclusion of the learned Judge that Alexander did concur in the granting of the tribute, sufficient may be found in the evidence relating to the award to support it. But, even if there were not, I do not think it would be proper to send the case back for further trial, because that was not the case Alexander came into Court to litigate. In his action he did not take any objection to the validity of the grant to Arthur Sheppard; he only objected to anybody being there beside him.

Another question was asked whether Sydney Sheppard had any right to be there under the authority granted to Andrew Sheppard, but it was not seriously pressed before us, and it appears that both plaintiffs had full knowledge that Sydney Sheppard was working there under the authority of Arthur, and no objection was made to his doing so on that ground. The result is that the decision of the learned District Court Judge was right and should be restored.

O'CONNOR J. The argument has extended over a wide field, but the jurisdiction of this Court in deciding the case is confined within well-defined limits. The appellants are limited, in the first place, by their notice of appeal—they cannot go outside the grounds that have been there set forth. In the second place, this Court can make no order which the Supreme Court could not have made. Our jurisdiction on this appeal is bound by the limits which bind the Supreme Court; and their jurisdiction, conferred by sec. 150 of the *Mining Act*, is to deal only with questions of law, and then only with questions of law submitted in the form of a special case. Now, there is only one aspect in which a question of fact may become a question of law, and that is where the question is, could the tribunal legally find the fact on the evidence? The only view, therefore, in which this Court can consider the facts is this: Could the District Court Judge legally come to the conclusion at which he arrived?

The cases of Moffat and Alexander are separated on one ground only. Apart from that their interests and their grounds of appeal are identical. I shall first deal with the question whether the tribute, which was let to defendants, bound Alexander as well as Moffat. If that letting of the tribute did not bind Alexander, then he is entitled, as he claims, to the proceeds obtained from the mine by the defendants, to the extent of 5/12ths, less certain deductions. If, on the other hand, the letting of the tribute was authorized by him, he stands in the same position as his co-owner, Moffat. The learned Judge did not find, as a matter of fact, that Moffat was authorized by Alexander to make an agreement for a tribute which would bind both of them, although, in my opinion, there was ample evidence on which he might have come to such a finding. But it is not necessary to discuss that, because it is apparent from the terms of his finding that he decided the matter upon a mere question of law —a question of law which arose out of inferences on the facts. The view which his Honor took was based entirely upon the legal aspect. At paragraph 15 of the case, after stating that there was a conflict of evidence as to whether Alexander authorized the granting of the tribute, and, stating Alexander's contention adding that he would have been strongly disposed to adopt it, he

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says: "But I decided that in consequence of the award in the arbitration proceedings on the evidence referred to, it must be taken as finally decided by the tribunal appointed by the parties that the plaintiff Alexander did grant or sanction the grant of such licence." The question therefore arises whether there were sufficient facts upon which the inference could properly be drawn, that the document which his Honor thus referred to bound Alexander to the tribute arrangement that was made by Moffat? The facts necessary to be considered in that connection are very few. On 30th April 1907 Alexander brought proceedings against Sheppard. In that action he treated Sheppard as a trespasser—as a man who had entered upon the mine, without any authority whatever, to that extent entirely disavowing any authority in Moffat to bind him by the tribute which had been let. Apparently between that date and 25th April he had changed his mind, because on 25th April the submission to arbitration was made between Alexander and Arthur Sheppard, and that recites:—"Whereas differences have arisen between the said Charles Booth Alexander and the said parties hereto of the second part as to the amount of tribute money to be paid to the said Charles Booth Alexander in respect of this interest in the said mining lease." It is clear that the only question there contemplated as being in dispute was the amount of tribute. It is clear also from the correspondence that the intention of the parties was to raise that question, and that was the question which was decided by the arbitration. On the hearing Alexander attended and gave evidence, and the finding of the arbitrators was that there was a six months' tribute let to Arthur Sheppard at a 5 per cent. royalty, and that it began on 15th December 1906, and expired on 12th June 1907.

Now, I think, taking these circumstances and the document together, this inference at least necessarily arises, that that award is binding to the extent of everything which necessarily is involved in the determination. One thing necessarily involved is that there was an agreement between Moffat and Arthur Sheppard that some amount was to be paid to Alexander, the precise amount being left to be settled; but that there was a tribute agreement, it seems to me is beyond all question, involved in the

finding which the arbitrators have arrived at. As I have already pointed out, it is not necessary in this case to go any further with regard to any questions of fact than to inquire whether there was evidence on which the Judge might legally have arrived at the conclusion that he did arrive at. In my opinion there was ample evidence to justify the conclusion which the learned Judge came to, that Alexander was bound by the tribute agreement which was let by Moffat. Now, that being so, they must stand or fall together—their rights and their grounds of appeal are the same. But the learned District Court Judge also found that the tribute was revocable, that it had been revoked on 2nd May, and that there was a condition attached that work should be carried on by not more than ten men on week days, and not at all on Sundays, and he made an order accordingly that everything derived from the mine after 2nd May should belong absolutely to the plaintiffs; that everything got between the beginning of the tribute and the 2nd May should bear payment of a royalty of 5 per cent. to the plaintiffs, and that with respect to all ore obtained by working more than ten men and by working on Sundays it should be paid to them less certain deductions. Now, when the matter came before the Supreme Court, they agreed with the finding that the licence was revocable, and that it had been revoked, but they disagreed with the learned District Court Judge in his finding that between the beginning of the tribute and 2nd May the tribute was without either the conditions of limitation of the number of men or the working on Sundays. That decision necessarily involves a question of fact, because the finding of the terms of a verbal agreement is always a question of fact, and the matter to be determined by this Court is whether the Supreme Court were justified in coming to that conclusion, in other words, can it be said that there is no ground on which the learned Judge of the District Court could legally have come to the contrary conclusion? There is one ground on which the learned Judges of the Supreme Court based their decision as to the work on Sundays which seems to me quite untenable. They held that by reason of acquiescence the plaintiffs were estopped from complaining of Sunday working. I agree with my learned brother the Chief Justice that

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acquiescence is necessarily a question of fact, and there was no foundation of fact upon which they could come to that conclusion, The learned District Court Judge's finding seems to have been based upon the nature of a tribute agreement. The terms "tribute," "tribute granting" or "tribute letting," are well known in all countries where mining is carried on, and the learned Judge of the District Court seems to have based his decision upon the view that a tribute agreement necessarily involves the working of a mine according to the ordinary and usual methods of mining. Now, it is apparently according to the ordinary and usual methods of mining, when letting a tribute agreement, not to employ an unlimited number of men, but as to what number are to be employed apparently is a question of what is reasonable. He found it was not a reasonable thing, in all the circumstances, to employ more than ten men. As to working on Sundays, apart from the question whether the Statute of Charles II. applies here or not, apparently it is clear enough that the ordinary method of working a mine is not to work on Sundays. The learned Judge came to the conclusion that reasonably and necessarily, according to the ordinary methods of mining, this condition might be implied. I think there was sufficient evidence to justify his finding, and being justified by the facts, the learned Judges of the Supreme Court could not disturb it.

Now, as to the rights of the parties after the 2nd May, the position taken up by Mr. *Stumm* on behalf of defendants is this:—He says, in the first place, that the licence was not revocable, and in the second place, that it was never revoked, that is to say, there was no evidence on which the Judge could come to the conclusion that it had been revoked. There is no doubt as to the general principle of law upon which Mr. *Stumm* relies. A licence which is accompanied by an interest, provided that interest is lawfully created, is irrevocable, but it is an essential element of that proposition that the interest should be legally created; and the passage in *Macswinney on Mines*, which was cited to us by Mr. *Stumm*, said:—"A licence to dig minerals, coupled with a grant to carry them away, is a *profit à prendre*, an incorporeal hereditament lying in grant. . . . A license to dig minerals, coupled with a grant to carry them away, and convert them to

the grantee's own use, must, to be legally effectual, be created by deed."

The same proposition is borne out by the statement of law in the case of *Atkinson* v. *King* (1). The judgment of the Lord Chancellor, after referring to some of the arguments that were used, proceeds thus:—"To this it is objected, that, although a parol licence coupled with an interest may be admitted to be irrevocable (as if I sell a cock of hay, licence to cross my field in order to take it away accompanying the bargain, cannot be countermanded until the hay has been removed), yet this proposition assumes that the interest to which the licence has been attached was legally created; whereas here the interest was an interest in an incorporeal hereditament—to dig for coal *alieno solo*—and could not be effectually granted except by deed. But without controverting these general principles, and viewing this document as a licence, still the opinion of the Court of Queen's Bench—that, under the circumstances of this case, the rights derived from it by E. O'Neill could not have been withdrawn by the defendant—appears to me well founded, both on principle and authority."

That authority establishes, if it is necessary to cite authority in support of the proposition, that before the licence can become irrevocable, it must be shown that it was legally created. Here there is no deed, and Mr. *Stumm* is obliged to take up the position that, although the licence was not created by deed, the circumstances are such that the plaintiffs will not be allowed to take that objection. Now, the circumstances under which a man will be deprived of his right to insist upon a legal objection of that kind are very succinctly stated by *Fry* L.J., who was then *Fry* J., in the case of *Willmott* v. *Barber* (2). He says:—"It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights." To the same effect is the judgment of *Cottenham* L.C. in *Mundy* v.

(1) 2 L.R. Ir., 320, at p. 334.

(2) 15 Ch. D., 96, at p. 105.

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Jolliffe (1). He says: "Courts of Equity exercise their jurisdiction, in decreeing specific performance of verbal agreements, where there has been part performance, for the purpose of preventing the great injustice which would arise from permitting a party to escape from the engagements he has entered into, upon the ground of the *Statute of Frauds*, after the other party to the contract has, upon the faith of such engagement, expended his money or otherwise acted in execution of the agreement. Under such circumstances, the Court will struggle to prevent such injustice from being effected; and, with that object, it has, at the hearing, when the plaintiff had failed to establish the precise terms of the agreement, endeavoured to collect, if it can, what the terms of it really were." *Fry* J. makes the additional comment: "Such being the principle on which the Court acts, it follows that, wherever the acts of the party to be charged have caused no change of circumstances in the other party, and wherever the acts of part performance by the one are not such as to render refusal by the other party to perform the contract a fraud in law, however clearly they may evidence the existence of a contract, there the jurisdiction in question can have no application; and this may be the case, either from the character of the person permitting the acts, or from the nature of the acts themselves." The passage on which Mr. *Stumm* particularly relies is in the case of *Atkinson* v. *King* (2), where the Lord Chancellor, after stating the facts, says:—"Would it be consistent with justice to allow a party who had himself induced all this expense to nullify his own act, and reap, it might be, himself the fruit of another's outlay?"

I have been dealing somewhat in detail with the question what amount of acquiescence will disentitle a man to take advantage of a legal objection, because the question is important in connection with the statement in *MacSwinney*, on which Mr. *Stumm* relies, and which it seems to me cannot be accepted, in the full and wide terms in which it is stated, as being the law. He says, after referring to a licence legally created by deed (page 244): "But, if created by a mere written contract, followed by exercise and also followed by the expenditure of money, it has apparently been always effectual in equity."

(1) 5 My. & C., 167, at p. 177.

(2) 2 L.R. Ir., 320, at p. 335.

Stated in that broad way the proposition cannot be supported. It is intended, no doubt, to include the qualification I have been referring to, mere expenditure is not sufficient, no matter how great the amount. There must be something in the acquiescence in the expenditure by the owner of the land to make it a fraud under all the circumstances, to take advantage of that expenditure, or to allow it to have gone on, and afterwards take the legal objection which is open to him at common law. In applying these principles to the facts, it is clear that there is no foundation for the equitable ground that Mr. *Stumm* has put forward in order to escape from the position in which he finds himself. The express findings of the learned Judge in the District Court seem to me to settle that matter. He says: "Counsel for the defendants, Arthur Sheppard and Sydney Sheppard, contended that, assuming the said tribute to be otherwise legally revocable, it was not revocable, because the defendants had expended large sums in developing the mine on the faith that the said tribute would continue for the period of six months from the granting thereof, and I found that the said defendants had expended nothing beyond what was absolutely necessary for the immediate purpose of enabling them to obtain the largest amount of ore in the shortest possible time; and that the defendants' mining methods, erections, and appliances were worthless to the plaintiffs for the purposes of future operations; and that there was no evidence to justify the inference that the lode on which the defendants were working was, or was likely to be permanent." There may be some findings of fact which are irrelevant to the particular matter I am dealing with, but, taking the findings of fact altogether, it is clear that there has been no such acquiescence, no such standing by, no such advantage derived from the carrying out of the work by the defendants, as is necessary for the groundwork on which a Court of Equity will act. Indeed, it seems to be almost grotesque to say, considering the position in which the plaintiffs are placed by the finding of the learned District Court Judge, that they are the parties really wronged by the carrying out of this tribute. It would be absurd to say that it would be a fraud on the part of plaintiffs, who have been so treated, to rely on a legal objection. There is another ground which makes it

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impossible for the defendants to succeed on this point, and I shall not do more than refer to it. A party who comes to a Court of Equity claiming to take advantage of part performance to enable him to escape from the requirements of the common law, cannot do so effectually if he himself comes into Court with a broken covenant. Here it is clear on the findings of the District Court Judge that the defendants came into Court with a broken covenant. It is not every broken covenant which would have that effect. A breach of covenant may be waived, if it has not been waived, but is a matter that can be compensated for by damages, the Court of Equity would not on that ground alone decree specific performance of a contract not under seal or in writing.

For these reasons I agree that the licence was revocable, and I have no doubt, on the facts found by the learned District Court Judge, that it was revoked. A question may be raised whether it was conditional, or whether it was unconditional, but it is clear that there was sufficient evidence upon which the learned Judge might come to the conclusion that, as the ladders were not placed there when directed, the defendant had no authority to remain there after 2nd May. Under those circumstances, both as a matter of law and as a matter of fact, it seems that this licence was revocable. There was evidence to support the finding that it was revoked. I think, therefore, that the judgment of the Supreme Court must be reversed in so far as it differs from the finding of the learned District Court Judge.

ISAACS J. read the following judgment:—The first question I may conveniently deal with is whether Alexander should be held to be party to the tributing agreement. He has sued separately so as entirely to disengage himself from any arrangements made by Moffat, and he claims 5/12ths of the metal won. The learned District Court Judge has not found that Alexander was a party to that agreement, except by holding him bound to it by reason of the award. He has asked whether he was right in deciding that Alexander must be taken to be so bound. That requires a construction of the award. At first sight it is not easy to understand the arbitrators' deter-

mination as so affecting him, and it has to be read in the light of the circumstances in which it was made.

Alexander, again separately, had sued Sydney Sheppard on 13th April 1907, challenging the defendant's assertion that he was mining under an agreement made with Moffat, and alternatively suing in simple trespass. He did not claim accounts as under the tribute agreement, but he demanded all the proceeds, or as a minimum 5/12ths of the proceeds by virtue of his partnership interest in the mine, of which he was a tenant in common.

By the submission which has been referred to he went to arbitration with Arthur Sheppard, who appeared to have in fact represented himself and Sydney Sheppard, and to have been so treated, for the purpose of determining the amount of tribute money payable to Alexander in respect of his interest in the lease. It may be that whatever was obtained by reason of a tribute under Moffat, whether joined in by Alexander or not, was treated as not unlawfully obtained, but under a tribute, and that Alexander, if not party to the agreement, was to be entitled to 5/12ths of the tribute proceeds. Now in that view it is evident that it was necessary to consider two things, first, the terms of the agreement which Moffat had made, and next, whether Alexander was a party to it. If he was a party, then nothing more was requisite than to state the term of Moffat's bargain, and leave him and Alexander to share the royalty as between themselves; if he was not, then it was necessary to limit the bargain to Moffat awarding Alexander 5/12ths of the proceeds, and to Moffat his percentage of the royalty, but only upon his 7/12ths of the proceeds.

Now reading the award with these precautionary considerations, we find that its terms are not limited to Moffat or to Moffat's interest, and that no separate provision is made for Alexander, and no suggestion is made that the arbitrators have overlooked any part of their duty. I think the irresistible inference arising upon the construction of the award, reading it in relation to its subject matter and attendant circumstances, is that it decided the tribute was the joint tribute of Alexander and Moffat.

The next question is as to its terms. I agree that outside specific provisions it is in all respects a matter of reasonable

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intendment upon the whole of the facts: see *Dennett* v. *Grover* (1), and that the District Court Judge had materials before him upon which he might reasonably arrive at his conclusions upon this subject, and therefore that the limit of ten men and six days a week must be taken to be part of the terms of the tribute.

Now, it was expressly made one of the terms of the bargain that the authority to mine was to continue for the full period of six months. The appellants contend that they revoked it at all events on 2nd May 1907, according to the findings of the District Court Judge, and that all proceeds after that date should be fully accounted for on the footing of unauthorized trespass.

First, as to the actual fact of revocation, I think there was evidence upon which the learned Judge could come to his conclusion, and that in this case is the only point for consideration on that branch. The evidence points to a temporary revocation or suspension on 2nd May intended to last until certain precautions for safety were adopted, and before they were taken the appellants definitely determined to put an end to the tribute, and did so. So that, if the agreement was legally revocable, it was in fact revoked as from 2nd May.

The respondents cannot advance their case beyond that of a merely revocable licence unless they can establish a grant of the interest in the land: *Webber* v. *Lee* (2), or an agreement for valuable consideration specifically enforceable, or conduct raising an equity in their favour. Putting it briefly, they must show grant, contract, or estoppel.

The first is, of course, out of the question; the second cannot be maintained because even if it were in writing the respondents were under no obligation to work or to pay anything unless they did work, and then only in respect of their actual winnings; and the only real question arises under the head of estoppel.

If the respondents, in the just and reasonable expectation and belief that the appellants would in pursuance of the arrangement actually made allow them to continue mining operations for the full period of six months, had been encouraged or knowingly permitted by the appellants to expend to their prejudice money upon or in connection with those operations, so as to provide

(1) Willes, 195. (2) 9 Q.B.D., 315.

means and facilities for the expected continuance of the licence, it would be a fraud on the part of the appellants to revoke the licence. In such a case the appellants must be held to have acquiesced in the respondents' belief that the appellants' rights of prior revocation, whatever they might be, would not be asserted, and in the alteration of the respondents' position to his prejudice in reliance on that belief. The prejudice of the respondents' relying on the acquiescent attitude of the appellants is the central consideration, and it is not necessary that the expenditure should be upon the appellants' land itself.

These views are amply supported by the cases of *Ramsden* v. *Dyson* (1); *Willmott* v. *Barber* (2); *Proctor* v. *Bennis* (3); *Plimmer* v. *Wellington Corporation* (4); *Ahmad Yar Khan* v. *The Secretary of State of India* (5); and *Stanley* v. *Riky* (6). But it is indispensable to the respondents' equity that they should have acted to their detriment. If all they can show is that they put in a penny and took out a £1, they have nothing to complain of—there may have been want of good faith, but they have sustained no damage or prejudice: see *Ogilvie* v. *West Australian Mortgage &c. Corporation* (7). As *Cozens Hardy* L.J. said in *Lloyd's Bank Ltd.* v. *Cooke* (8), the essential principle of the law of estoppel is that a person cannot be allowed to set up the truth of the matter where by his conduct he has rendered it unjust and unfair that he should do so; and I see nothing of that character where the person asserting the estoppel, so far from being injured, has been actually and considerably benefited by the conduct complained of.

On the facts as found, the respondents have lost nothing. Their expenditure was incurred solely for the extraction of the ore actually obtained. It was a day to day outlay for a day to day output, and every penny of cost was more than satisfied by the corresponding return. Nothing remains of any advantage to the appellants, and the findings preclude the idea alike of loss to the respondents and of gain to the appellants at the respondents' cost.

(1) L.R. 1 H.L., 129.
(2) 15 Ch. D., 96.
(3) 36 Ch. D., 740, at pp. 760, 762.
(4) 9 App. Cas., 699.
(5) L.R. 28 I.A., 211.
(6) 31 L.R. Ir., 196.
(7) (1896) A.C., 257, at p. 268.
(8) (1907) 1 K.B., 794, at p. 804.

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It is in this view unnecessary to consider how far a breach of the conditions of the licence would be an answer to any claim for specific performance, because no interest having, even *prima facie*, been acquired, either at law or in equity, there is no necessity to determine whether the respondents, by any conduct of theirs, have disentitled themselves to assert it.

For these reasons I concur in the judgment of my learned brothers that the appeal should be allowed, the cross appeal dismissed, and the decision of the District Court Judge restored.

Appeal allowed—Cross Appeal dismissed. Decision of the District Court restored.

Solicitors, for the appellants, Moffat and Alexander and The Irvinebank Mining Co. Limited, *Chambers, McNab & McNab,* Brisbane, for *L. W. Marsland,* Cairns and Herberton.

Solicitors, for respondents, Sydney and Arthur Sheppard *Foxon, Hobbs, & McNish,* Brisbane, for *MacDonnell, Hannam & Havard,* Herberton.

H. V. J.