[HIGH COURT OF AUSTRALIA.]

MULCAHY . . . . . APPELLANT;
DEFENDANT,

AND

HOYNE . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Mar.* 3, 4; *June* 11.

Knox C.J., Isaacs and Starke JJ.

Landlord and Tenant—Lease—Determination—Breaches of covenant—Offences against licensing law—Knowledge and acquiescence of lessor—Waiver—Estoppel—Consideration—Landlord and Tenant Act 1915 (*Vict.*) (*No.* 2677), *sec.* 17—*Conveyancing Act* 1915 (*Vict.*) (*No.* 2633), *sec.* 21—*Licensing Act* 1915 (*Vict.*) (*No.* 2683), *secs.* 95, 177, 178—*Licensing Act* 1919 (*Vict.*) (*No.* 3028), *secs.* 7, 8.

By a lease under seal of a hotel the lessee covenanted (*inter alia*) that he would not do, commit, omit or suffer to be done, committed or omitted any act by which or by means of which the licence or any renewal thereof should be allowed to expire or become void or should or might be forfeited or rendered liable to be forfeited or refused. The lessee, with the knowledge and acquiescence of the lessor, systematically engaged in trading in liquor during prohibited hours and on Sundays contrary to the provisions of the *Licensing Act* 1915 (Vict.). In an action by the lessee against the lessor for wrongful eviction the lessor sought to justify the eviction on the ground of breaches of the covenant mentioned and a notice determining the tenancy on account of such breaches. The lessee contended that the lessor had waived the benefit of the covenant and was also estopped from alleging or relying on such breaches.

Held, that, even if the lessor's conduct amounted to an expression of intention not for the future to insist on observance of the covenant, the lessee could not, in the absence of consideration, rely upon that conduct as an effective waiver of the benefit of the covenant.

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Held, also, that the lessor was not estopped by her conduct from relying upon the breaches as justifying the determination of the lease.

Decision of the Supreme Court of Victoria (*Cussen* A.C.J.): *Hoyne* v. *Mulcahy*, (1924) 46 A.L.T. 96, reversed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court by William Hoyne against Bridget Mulcahy in which the plaintiff, by his statement of claim, alleged that he was the lessee by assignment of a certain hotel from the defendant and was the licensee thereof, and that the defendant had wrongfully evicted him and had deprived him of the licence by causing it to be transferred to the defendant. The plaintiff further alleged that the defendant's acts were a breach of a covenant in the lease for quiet enjoyment. The plaintiff claimed £925 damages, for which sum the plaintiff alleged that he had agreed to sell his interest in the hotel and licence. The defendant, by counterclaim, claimed (*inter alia*) a declaration that the lease was lawfully determined on 23rd February 1924. The action was heard by *Cussen* A.C.J., who gave judgment for the plaintiff for £600 and declared that the lease should be deemed to have been cancelled on 23rd February 1924: *Hoyne* v. *Mulcahy* (1).

From that decision, so far as it gave judgment for the plaintiff for £600, the defendant now appealed to the High Court.

The other material facts are stated in the judgments hereunder.

Owen Dixon K.C. (with him *Ah Ket*), for the appellant. The notice of 16th February 1924, even if it was insufficient to determine the tenancy, was an effective notice of the appellant's intention to put an end to the tenancy, and the subsequent acceptance of rent cannot operate as indicating a change of intention. The systematic trading during prohibited hours and on Sundays was a ground upon which the renewal of the licence might have been refused (*In re Nolan* (2)), and was a breach of the respondent's covenant which was within the exception to sec. 21 (1) of the *Conveyancing Act* 1915 (Vict.). A representation of a general intention cannot be the foundation of an estoppel, but there must be a representation inducing a belief that a certain state of facts exists and the representation must be

(1) (1924) 46 A.L.T. 96.

(2) (1890) 16 V.L.R. 227; 11 A.L.T. 156.

acted on to the detriment of the person to whom it is made (*Maclaine* v. *Gatty* (1); *Ferrier* v. *Stewart* (2); *Yorkshire Insurance Co.* v. *Craine* (3)). After the notice of 16th February 1924 the respondent could not have supposed that he still had permission to break the law. The acceptance of rent on 18th February cannot be treated as a waiver by the appellant of the benefit of the covenants, for the notice of 16th February 1924 was an unequivocal election by the appellant to determine the lease (*Jones* v. *Carter* (4)). What the Licensing Court did on 31st January amounted to a refusal to renew the licence (see sec. 95 of the *Licensing Act* 1915 (Vict.)), so that when the notice of 16th February was given the appellant had a right to re-enter. The payment of rent afterwards did not affect that right, for under the lease rent was payable until the date of re-entry. If there was a refusal of a renewal of the licence the lease was properly determined.

O'Bryan and *Fullagar*, for the respondent. The validity of the notice of 16th February has never been set up, and the appellant is not now entitled to rely on it. There was not on 31st January a refusal of a renewal; there was only a statement of what the Licensing Court proposed to do. In the absence of the notice required by sec. 21 of the *Conveyancing Act* 1915, the appellant must rely on breaches of the covenant by which or by means of which the licence was or might be endangered. The acts which were relied on as such breaches were consented to by the appellant, who has by her conduct shown an intention to waive the whole benefit of the covenant and so cannot have the benefit of sec. 17 of the *Landlord and Tenant Act* 1915 (Vict). Having made that general waiver, the covenant had gone (see *Dumpor's Case* (5)), or, if it had not, the appellant did not get rid of the effect of the waiver by the notice of 10th February. [Counsel referred to *Flattery* v. *Anderdon* (6).] There was no evidence of acts after 16th February which endangered the licence and the appellant is not entitled to rely on acts done before that date in order to colour the acts done afterwards. The receipt of the rent

(1) (1921) 1 A.C. 376.
(2) (1912) 15 C.L.R. 32, at p. 44.
(3) (1922) 2 A.C. 541, at p. 553; 31 C.L.R. 27, at p. 38.
(4) (1846) 15 M. & W. 718, at p. 725.
(5) (1603) 4 Rep. 119b; 1 Sm. L.C. (12th ed.) 35, at p. 49.
(6) (1848) 12 Ir. Eq. R. 218.

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on 18th February precluded the appellant from relying on any breaches of covenant before that date (*R.* v. *Paulson* (1); *Davenport* v. *The Queen* (2); *Croft* v. *Lumley* (3)).

[ISAACS J. referred to *Matthews* v. *Smallwood* (4); *Fuller's Theatre and Vaudeville Co.* v. *Rofe* (5).]

The appellant did not at any time withdraw her acquiescence in the breaches of covenant, or the representation by her knowledge and acquiescence that she would not rely on those breaches.

[ISAACS J. referred to *Hoyt's Proprietary Ltd.* v. *Spencer* (6).]

Owen Dixon K.C., in reply. Sec. 17 of the *Landlord and Tenant Act* 1915 was intended to restrict the effect of a general waiver, and not to give it an effect which it had not before. Receipt of rent is a waiver only of breaches which have already occurred, for the breaches were continuing ones (*Doe d. Griffith* v. *Pritchard* (7); *Lloyd* v. *Crispe* (8); *Roe d. Gregson* v. *Harrison* (9); *Macher* v. *Foundling Hospital* (10); *Doe d. Muston* v. *Gladwin* (11); *Doe d. Flower* v. *Peck* (12)).

[ISAACS J. referred to *Penton* v. *Barnett* (13).

[STARKE J. referred to *Walrond* v. *Hawkins* (14).]

Cur. adv. vult.

June 11.

The following written judgments were delivered :—

KNOX C.J. The appellant was the lessor and the respondent was the assignee of the lessee of a public house under a lease for a term of six years from 17th November 1919. On the assignment of the lease the respondent entered into a covenant with the appellant that he would perform and observe all the covenants, agreements and conditions contained in the lease. The rent reserved was £5 10s. a week payable by equal lunar monthly instalments of £22 to be paid on each succeeding fourth Monday during the term. The reddendum

(1) (1921) 1 A.C. 271, at p. 282.
(2) (1877) 3 App. Cas. 115.
(3) (1857-58) 6 H.L.C. 672.
(4) (1910) 1 Ch. 777, at p. 786.
(5) (1923) A.C. 435, at p. 443.
(6) (1919) 27 C.L.R. 133.
(7) (1833) 5 B. & Ad. 765, at p. 771.
(8) (1813) 5 Taunt. 249, at p. 254.
(9) (1788) 2 T.R. 425.
(10) (1813) 1 V. & B. 188, at p. 190.
(11) (1845) 6 Q.B. 953.
(12) (1830) 1 B. & Ad. 428.
(13) (1898) 1 Q.B. 276.
(14) (1875) L.R. 10 C.P. 342.

also provided for the payment, in the event of the term being determined by re-entry, of a proportionate part of the rent for the then current lunar month up to the date of such re-entry. The relevant covenants and provisions contained in the lease are as follows:—(1) Covenants by the lessee: (a) that the lessee and his permitted transferees should reside on the said premises and personally manage, carry on and conduct the trade or business of a licensed victualler in a quiet and orderly manner and comply with and conform to all the duties and liabilities of a licensed person or holder of a victualler's licence as required by and should not be guilty of or permit any breach or breaches of the provisions of the Licensing Acts or of any other Acts affecting or relating to licensed hotels or the holders of victuallers' licenses or any statutory modification, re-enactment or amendment thereof or any part thereof for the time being during the term by the said lease granted in force in the State of Victoria; and (b) that the lessee and his permitted transferees would not do, commit, omit or suffer to be done, committed or omitted any act, matter or thing whatsoever whereby or by means whereof any victualler's licence or any renewal thereof for the time being in force in respect of the said hotel should be allowed to expire or become void or should or might be forfeited or rendered liable to be forfeited, suspended, taken away or refused or whereby the lessee or licensee should be disqualified from receiving or holding or having a victualler's licence or any renewal thereof granted in respect of the said hotel. (2) A proviso for re-entry on breach or default in observance of the above covenants (although the lessor might not have taken advantage of some previous breach or default of a like nature) by giving twenty-four hours' notice in writing to the lessee determining the lease. (3) A covenant by the lessor for quiet enjoyment in the usual form. (4) A proviso in the words following: "Provided always and the lessee doth hereby expressly covenant with the lessor that each and every breach of any covenant or condition on the lessee's part herein contained shall be deemed a separate and continuing breach from day to day and that if the lessee shall be guilty of any breach of the provisions herein contained or implied or other acts which would render this lease liable to be forfeited or entitle the lessor to cancel the same under the provisions herein contained

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the receipt of rent by the lessor or the doing of any other act whatsoever by the lessor (which but for this covenant would amount to a waiver of the lessor's rights in respect of such breach or act) after such breach or act shall not be nor be deemed to be a waiver in any way of the lessor's rights and powers in respect of such breach or act any rule of law or equity to the contrary notwithstanding."

The respondent sued to recover damages for breach of the covenant for quiet enjoyment, alleging a wrongful eviction by the appellant on 23rd February 1924. The appellant admitted having evicted the respondent, but justified under the proviso for re-entry on breach of the covenants set out above and counterclaimed for a declaration that the lease was lawfully determined. The respondent in his reply set up (a) that after the alleged breaches and with knowledge of them the appellant accepted rent under the lease and thereby affirmed the lease or waived her right to forfeit; (b) that if the breaches alleged were committed the appellant was not entitled, according to the proper construction of the lease, to re-enter; and (c) (by amendment at the trial) that if the breaches alleged did occur the defendant "had at all times during the currency of the lease referred to in par. 1 of the statement of claim full knowledge that such breaches had been were being and/or were about to be committed and the defendant continued to accept rent from the plaintiff and his predecessors and treated the lease in all respects as subsisting and the defendant thereby waived generally the benefit of the covenants alleged in par. 8 of the defence and is estopped from alleging the said breaches of covenant and/or relying upon the said breaches as causes of forfeiture."

On the trial of the action *Cussen* A.C.J. found that there was during the whole period of the respondent's occupation of the licensed premises systematic unauthorized trading during prohibited hours and on Sundays, and that the appellant had at all times full knowledge that such unauthorized trading had been, was being, and was about to be, carried on, and acquiesced in it. On this footing he held that there was an actual waiver extending generally to any breach of the covenants relied on by the appellant, and that to that extent an intention to waive the benefit of the covenants appeared—at all events until notice to the contrary should be given;

and that the respondent was therefore entitled to succeed in the action.

The relevant facts are not now in dispute, and may be briefly stated as follows :—The respondent went into possession of the hotel in July 1923. In August 1923 he was convicted of an offence against the *Licensing Act*, namely, that persons were found in the hotel during prohibited hours. The appellant was informed of this conviction in the same month. The finding of the learned trial Judge that both before and after the respondent went into possession of the hotel the appellant knew of and acquiesced in systematic unauthorized trading is not challenged. On 31st October 1923 the respondent lodged an application for the renewal of his licence ; the application came on in November and was adjourned to a date to be fixed. Subsequently the sitting of the Licensing Court was extended under sec. 88 of the *Licensing Act* till the end of February 1924, and 31st January 1924 was fixed for the hearing of the adjourned application for renewal. On that day the Licensing Court, after hearing an objection on the ground of systematic unauthorized trading in prohibited hours and on Sundays, intimated that a renewal would not be granted to the respondent, but adjourned the application in order to give him an opportunity to sell and transfer the licence. The appellant's solicitor was present in Court on this occasion. On 16th February the respondent entered into a conditional contract for the sale of the licence, &c., and on the same day the appellant served on the respondent a notice purporting to determine the lease as from 19th February on the ground that the Licensing Court had refused to renew the respondent's licence. This notice has been treated by both parties as inoperative. On 18th February (Monday) the usual fortnightly payment of rent was made by the respondent and received by the appellant's agents without objection. It appears that the practice was to pay the rent fortnightly instead of monthly as provided by the lease. The learned trial Judge expressly found, and it is not disputed, that at the time of the payment the appellant had full knowledge of the facts relating to unauthorized trading in prohibited hours and on Sundays. On 21st February the appellant gave to the respondent notice in writing purporting to determine the lease, and requiring possession to be

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given and the licence transferred at the expiration of twenty-four hours, the ground of forfeiture relied on being breaches of the covenants set out above. On 23rd February the appellant took possession of the hotel. The substantial question for decision is whether the appellant was entitled to determine the lease by the notice of 21st February. If she was, she committed no breach of the covenant for quiet enjoyment and the respondent's action must fail. If she was not, the respondent is entitled to succeed.

I agree with *Cussen* A.C.J. in thinking that the receipt by the appellant on 18th February of rent due under the lease precludes her in the circumstances of this case from relying on any instances of unauthorized trading during prohibited hours or on Sundays before that day. The decision in *R.* v. *Paulson* (1) is clear on this point. It follows that, in order to support the notice of 21st February and to justify the re-entry in pursuance of it, the appellant must establish that between the 18th and 21st days of February the respondent committed breaches of the covenants above set out of which she was entitled to complain. The learned trial Judge found that during these three days there were some instances of trading during prohibited hours, though the result of what had happened was to make them much less numerous than they had previously been. He appears to have been of opinion, without actually deciding the point, that the instances of unauthorized trading which occurred after 18th February should, for the purposes of the present case, be regarded as isolated transactions, and that it was doubtful whether the appellant was entitled to rely on other circumstances—for instance, on the fact that the respondent had previously committed similar breaches of the licensing laws—in support of the contention that the respondent had after 18th February done acts whereby the licence might be rendered liable to be forfeited or refused. I cannot agree in this view of the matter. The appellant is not entitled to rely on any instance of unauthorized trading which occurred before 18th February as a breach of the lessee's covenant entitling her to determine the lease, but I see no reason why she should not be allowed to contend that, in view of all the circumstances, including the previous conduct of the lessee, the acts of unauthorized trading

(1) (1921) 1 A.C. 271.

committed after 18th February were acts whereby the licence or a renewal thereof might be forfeited or refused or whereby the lessee might be disqualified from receiving a renewal of his licence. On an application for renewal the Licensing Court would, presumably, take into consideration all the circumstances of the case, and the determination of that Court would, no doubt, be influenced by the previous conduct of the licensee. In order to determine whether a given act would amount to a breach of this covenant the Court which has to decide that question should, in my opinion, consider all the facts and circumstances which would be relevant on an application to the Licensing Court for a renewal of the licence.

In my opinion, the respondent should, on the facts proved, be held to have broken during these days his covenant not to do any act whereby the licence in respect of the premises might be forfeited or rendered liable to be forfeited or refused, or whereby the lessee should be disqualified from receiving a licence or a renewal thereof in respect of the said hotel.

The ground depending on the construction of the lease on which the respondent relied at the trial was not seriously pressed before us, and I agree with *Cussen* A.C.J. in thinking that it cannot be supported.

The remaining ground on which the respondent relies is that raised by the amendment made at the trial, and it was on this ground that the decision in his favour was based. The contention for the respondent was that the appellant by her conduct consented to the respondent doing the acts now relied on as breaches of covenant and thereby either waived the benefit of the covenant or was estopped from complaining of the breaches on which she relied.

First, as to waiver:—Some reliance was placed on the provisions of sec. 17 of the *Landlord and Tenant Act* 1915, which provides that an actual waiver of the benefit of a covenant in one particular instance shall not be deemed to extend to any other instance or to be a general waiver of the benefit of such covenant unless an intention to that effect shall appear. But this section was intended to limit or cut down in favour of the lessor the effect of a waiver, and cannot properly be read as extending the right of the lessee to treat a waiver of particular breaches of a covenant as a general waiver of the

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benefit of the covenant. Dealing with the question apart from this statutory provision, it seems that a passive acquiescence in one breach of covenant cannot be considered to be a waiver for all future time of the right to complain of any other breach (per Lord *Chelmsford* L.C. in *Western* v. *MacDermott* (1)). The finding in the present case is that the appellant knew of and acquiesced in unauthorized trading, and in my opinion this is not sufficient to support a conclusion that the appellant waived the benefit of the covenant. It is not suggested that there was any valuable consideration for the alleged agreement to waive the benefit of the covenant. It is said that the conduct of the appellant was equivalent to an expression by her of an intention not to insist upon her right to have this covenant observed by the lessee; but, even so, the mere statement of an intention not to insist on a right is not effectual unless made for consideration. In *Stackhouse* v. *Barnston* (2) Sir *W. Grant* said :—"A waiver is nothing; unless it amount to a release. It is by a release, or something equivalent, only, that an equitable demand can be given away. A mere waiver signifies nothing more than an expression of intention not to insist upon the right; which in equity will not without consideration bar the right any more than at law accord without satisfaction would be a plea."

There remains the question whether the appellant is estopped by her conduct from taking advantage of a breach of this covenant committed after 18th February. The conduct of the appellant which is said to give rise to the estoppel consists of her continuing to accept rent under the lease and treating the lease as subsisting with knowledge that breaches of the covenant in question had been, were being and/or were about to be committed. In other words, the respondent sets up estoppel by acquiescence. In this connection acquiescence may be said to be quiescence in such circumstances that assent may reasonably be inferred, and, applying this definition to the facts of this case, the respondent in order to succeed must establish that he might reasonably have inferred from the conduct of the appellant that she consented to any breach of the covenant which he might choose to commit and would not attempt to take advantage of any such breach. Having regard to the serious

(1) (1866) L.R. 2 Ch. 72, at p. 74.

(2) (1805) 10 Ves. 453, at p. 466.

consequences which might result from a breach of this particular covenant, I do not think the respondent could reasonably draw the inference suggested. The respondent admitted that the appellant warned him that he would have to be very careful, if he traded after hours, not to get caught. If the respondent succeeded in not getting caught, there would be little or no danger of the renewal of the licence being refused on the ground of unlawful trading, and presumably the appellant did not care what happened so long as the licence was not jeopardized. According to the evidence of the respondent's brother, the appellant was concerned about convictions for "trading" being obtained as such convictions "went against the house." The real substantial obligation undertaken by the respondent under this covenant was that he would do nothing to jeopardize the renewal of the licence, and I can find no evidence of any conduct on the part of the appellant which would justify the respondent in inferring that she would abstain from insisting on the observance of that obligation. Her warning that he must be careful not to be caught trading after hours supports this view.

The respondent's case on the ground of estoppel is defective also in another respect. In order to raise an estoppel against a person who stands by while his legal right is being infringed, it must be shown that the person setting up the estoppel was mistaken as to his own legal rights, for, if he is aware that he is infringing the legal rights of another, he takes the risk of these rights being asserted, and the possessor of the legal right must know of the other party's mistaken belief (*Willmott* v. *Barber* (1)). The evidence in this case does not, in my opinion, establish either of these propositions. There is nothing to show either that the respondent believed that the appellant had lost her legal right to complain of a breach of the covenant or that the appellant knew of such mistaken belief, if the respondent had it.

On a consideration of all the evidence, and accepting the findings of fact of the learned trial Judge, I have come to the conclusion that the defence set up on the ground of estoppel has not been made out.

In my opinion the appeal should be allowed.

(1) (1880) 15 Ch. D. 96.

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ISAACS J. The respondent, William Hoyne, sued the appellant, Bridget Mulcahy, to recover damages for wrongful determination of a lease of an hotel called the "Tam o'Shanter Hotel," at North Melbourne, and for wrongfully evicting him and depriving him of the premises and the licence for them. The defence, so far as is now material, was that the lease granted by the appellant to the respondent contained a covenant by Hoyne that he "would not do commit or suffer to be done committed or omitted any act matter or thing whatsoever whereby or by means whereof any victualler's licence or any renewal thereof for the time being in force in respect of the said hotel should be allowed to expire or become void or should or might be forfeited or rendered liable to be forfeited suspended taken away or refused." The lease also provided that "if and whenever there shall be any breach or default in the performance or observance of any or either of the covenants . . . of this lease on the part of the lessee to be performed and observed then in every or any of such cases it shall be lawful for the lessor (although the lessor may not have taken advantage of some previous breach or default of a like nature) forthwith or at any time thereafter to determine this lease in respect of any breach or default by the lessee of or in respect of any covenant . . . of this lease to which sec. 21 of the *Conveyancing Act* 1915 does not extend . . . by giving twenty-four hours' notice in writing to the lessee determining this lease," &c. The lease was dated 17th November 1919, and created a term of six years from that date. On 16th February 1924 a notice in writing was given purporting to determine the lease as on 19th February, the reason being alleged to be the refusal by the Licensing Court to renew the respondent's licence. That notice was given under another clause of the lease which, as both parties at the trial treated the notice as inoperative, is immaterial except for one reason to be mentioned presently. This was followed by another notice in writing dated and served on 21st February 1924 purporting to be a twenty-four hours' notice determining the lease. This notice was based on two covenants alleged to have been broken, one of them being the covenant above quoted. This appeal concerns the legal effect of that notice.

Cussen A.C.J., who tried the case, held the notice ineffectual on the ground that there had been, within the meaning of sec. 17 of the *Landlord and Tenant Act* 1915, a general waiver by the appellant of the covenant referred to. I agree with the learned primary Judge as to his construction of the lease with reference to the *Conveyancing Act* 1915, and that that Act does not apply. But with respect to sec. 17 of the *Landlord and Tenant Act* I come to a different conclusion. The conclusion arrived at by *Cussen* A.C.J. is one partly of fact and partly of law. I pass by, as unnecessary for determination now, the full force of the expression " actual waiver " in sec. 17 (see *Mills* v. *Griffiths* (1)). As far as the question is one of fact, I assume the finding of the learned primary Judge to be correct. I do not decide so because if it were necessary for me to determine the question I should have to weigh various considerations. For instance, " waiver "—a word of very flexible meaning—must in this instance mean an abrogation of the covenant and condition, that is, a dissolution *pro tanto* of the contractual tie between the parties. In *Price* v. *Dyer* (2) Sir *William Grant* M.R. says of waiver in this sense : " The waiver spoken of in the cases, is an entire abandonment and dissolution of the contract ; restoring the parties to their former situation." Of course, the restoration to former situation may be total or partial, absolute or conditional. But in considering whether waiver in this sense had taken place I should have had to bear in mind a very important principle. In *Carolan* v. *Brabazon* (3) *Sugden* L.C. said : " If one party waive a contract, it implies that the other party was previously bound by the contract ; and this Court requires as clear evidence of the waiver as of the existence of the contract itself, and will not act upon less."

The oral evidence as to what the appellant said by way, as is contended, of waiving the contract *pro tanto* consists, not of evidence of actual words or even of their substantial purport, but rather of the respondent's mental impressions. He says :—" I gathered from her she wanted me to conduct the hotel decently and, so far as I could, to avoid being convicted. She practically said : ' Do anything you like so long as you are not caught.' . . . I did not

(1) (1876) 45 L.J. Q.B. 771. (2) (1810) 17 Ves. 356, at p. 364.
(3) (1846) 3 Jo. & Lat. 200, at p. 209.

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understand she wanted me to observe all the conditions of the *Licensing Act*." Later on he says: "She said not to have convictions for 'trading' as that goes against the house." The appellant gives a flat denial to any implied permission to break the law. She says: "I impressed on him that he was not to trade after hours." I refer to her statement, not for the purpose of accepting her testimony in opposition to that of the respondent, but for the purpose of showing that the respondent's evidence is not strengthened by admission or silence. It is a very serious matter to accept mental impressions such as "I did not understand she wanted me to observe all the conditions of the *Licensing Act*," when the actual formal instrument is most explicit on the point. And, so far as mere knowledge and standing by are concerned as elements in the conclusion of fact, it must not be overlooked that the lease itself provides that re-entry for a breach may be made "although the lessor may not have taken advantage of some previous breach or default of a like nature." This provision adds to the ordinary difficulty of establishing waiver of a forfeiture even when it is after breach. That is exemplified in *Ward* v. *Day* (1), a case in the Exchequer Chamber relating to waiver of forfeiture after breach. But, while adverting to these considerations to prevent misconception in future cases, I do not decide against the conclusion of fact. It is possible that the evidence as a whole, on full examination and having regard to the manner in which the witnesses gave their testimony, might be held to justify the conclusion that the acts and intention of the appellant and of the respondent amounted to a mutual waiver, that is, abandonment of the covenant and condition. Therefore I proceed on the assumption that it is correct. That conclusion is in these words (2): "There was an actual waiver extending generally to any such breach of the covenants as is now relied on, and . . . to that extent an intention to waive the benefit of the covenants appears, at all events until notice to the contrary should be given." Accepting that finding, a very serious question arises which was debated on the argument of this appeal. On the assumption that before the appellant could have the benefit of the covenant she must have given "notice to the contrary," was not the notice of 16th

(1) (1864) 33 L.J. Q.B. 254. (2) (1924) 46 A.L.T., at p. 98.

February 1924, though inoperative as a determination of the tenancy, a very significant intimation that the appellant was no longer permitting the respondent to carry on illicit trading? She was forbidding him to carry on trading at all after 19th February, and for the expressed reason (taken now to be inaccurate) that he had been refused a renewal of his licence, the cause of the alleged refusal being equally known to both parties, namely, illicit trading. If it were necessary, I should say that there was quite sufficient notice to the respondent that any previous consent to his trading in contravention of the *Licensing Act*, and thereby imperilling the status of the hotel itself, was withdrawn. Nevertheless, on his own admission and by the finding of the learned primary Judge, his illicit trading continued. The best he can say is: "It did not alter much." Although that may be confined for this case to 20th February, so as to escape both the acceptance of prior rent and the date of intended determination in the first notice, it is technically enough. It would be certainly hard on the respondent that, after—on the assumption of fact that has been made—he had been permitted to break the law, he should lose so heavily for (say) one day's continued transgression. But the full consideration of this case, and its true analysis, have satisfied me that there is behind it a very much larger and more important principle that deprives the respondent of the right to complain of even the practical hardship referred to. That principle is really self-suggestive the moment the elements of general waiver of a contractual obligation are considered. Anyone may relinquish a right which has been created for his sole benefit. He may do so voluntarily, of course. But he cannot be compelled to do so except at a price. He may, as in cases of which *Hawksley* v. *Outram* (1) is a type, relinquish a stipulation for his benefit as a condition of getting specific performance of the contract otherwise. But where waiver is insisted upon by an opposing party there must be a price of some sort. *Parke* B. in *Foster* v. *Dawber* (2) said: "It is competent for both parties to an executory contract, by mutual agreement, without any satisfaction, to discharge the obligation of that contract." I assume that no difficulties arise such as might arise from the rules of law laid down by Viscount *Haldane* (3), by Lord *Dunedin* (4) and

(1) (1892) 3 Ch. 359.
(2) (1851) 6 Ex. 839, at p. 851.
(3) (1918) A.C., at pp. 18, 19.
(4) (1918) A.C., at pp. 25, 26.

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by Lord *Parmoor* (1) in *Morris* v. *Baron & Co.* (2), and by Lord *Sumner* in *British and Beningtons Ltd.* v. *North-Western Cachar Tea Co.* (3). But, putting aside all other difficulties, the doctrine of *Parke* B. connotes the release of mutual obligations, which in itself is a good consideration, because, as *Grant* M.R. said in *Price* v. *Dyer* (4), it is "restoring the parties to their former situation." Where the obligations are merely unilateral and are *ex hypothesi* created for valuable consideration, there must be some consideration other than mere agreement to abandon. This is as true in equity as at law (per *Lindley* L.J. in *Edwards* v. *Walters* (5) and per *Kay* L.J. (6)). There may be conduct creating an estoppel, and estoppel is relied on. A covenant not to build except in stone may be effectually waived by an encouragement to build in brick followed by actually so building. But, adhering for the moment to general waiver in the sense of rescission of a contract or part of it, there must be some consideration recognized by the law of contract.

That analysis automatically raises what I have referred to as the solid difficulty in the respondent's way. How conceivably could the consideration for the appellant's waiver be phrased in this case? There was none that I can perceive, except the actual illicit trading or the liability incurred of a determination of the lease and of punishment by the law. That cannot be accepted as valid consideration by a Court, whether the parties raise it or not. The respondent's carrying on illicit trade as a licensed victualler was in no sense an advantage to the appellant under this contract, nor was it a detriment to the lessee except by exposing him to legal penal proceedings and to the loss of his licence for breaking his covenant to keep the law. But that is only saying it is sheer illegality in the strict sense, because the trading assumed to be condoned is prohibited and punishable. Illegality in that sense can never be recognized by the law as sufficient to support a waiver; it is fatal to the claim. It is equally fatal to any notion of estoppel, which, though distinct from waiver (in any sense) as a principle (see *Craine* v. *Colonial Mutual Fire Insurance Co.* (7); *Yorkshire Insurance Co.* v. *Craine* (8)),

(1) (1918) A.C. at p. 38.
(2) (1918) A.C. 1.
(3) (1923) A.C. 48, at pp. 68, 69.
(4) (1810) 17 Ves., at p. 364.
(5) (1896) 2 Ch. 157, at p. 168.
(6) (1896) 2 Ch. at p. 172.
(7) (1920) 28 C.L.R. 305.
(8) (1922) 2 A.C. 541; 31 C.L.R. 27.

frequently runs parallel with waiver, and is sometimes used as an exchangeable term for waiver in relation to what is known as "approbating and reprobating." If the case be approached from this standpoint, still the same difficulty meets the respondent. All he can rely on is his breach of the positive law in reliance on the permission or representation of the appellant that he might do so.

The principle applying to both aspects of the case is one of high public policy and cannot be defeated by the private convention of the parties (see *Davies* v. *Davies* (1)).

This ends the matter on broad grounds, because it is not now contested that there was an actual breach of the covenant which, apart from waiver or estoppel, would have justified the appellant in determining the lease and ejecting the respondent.

The appeal should, in my opinion, be allowed and judgment entered for the appellant, but, in view of all the circumstances, including her undoubted want of vigilance in respect of the licensing law, without costs.

STARKE J. I do not recapitulate the facts: they have been fully stated in the judgment under appeal and by the Chief Justice and my brother *Isaacs*. *Cussen* A.C.J. has found that the plaintiff Hoyne systematically engaged in a trade in liquor during prohibited hours and on Sundays, contrary to the provisions of the *Licensing Act* in force in Victoria. All this was in breach of the covenants of the lease under which he held his licensed premises, and prima facie the defendant Mulcahy was entitled to re-enter and to determine the lease pursuant to its terms. But on 18th February 1921 the defendant, with full knowledge of the facts, accepted the usual fortnightly payments of rent under the lease. That act unequivocally recognized the tenancy as still subsisting, and operated as a waiver of the forfeiture down to that time (*R.* v. *Paulson* (2)). But the unlawful trading still went on, and on 21st February the defendant served on the plaintiff a notice in writing determining the lease and retook possession on the 23rd day of the same month. *Cussen* A.C.J. found that the defendant knew of and acquiesced in unlawful trading, and, referring to sec. 17 of the *Landlord and Tenant Act* 1915,

(1) (1919) 26 C.L.R. 348, at p. 355. (2) (1921) 1 A.C. 271.

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he added (1): "I think there was here much more than a waiver in particular instances, and that there was an actual waiver extending generally to any such breach of the covenants as is now relied on, and that to that extent an intention to waive the benefit of the covenants appears, at all events until notice to the contrary should be given." Accepting unreservedly, as I do, the findings of the learned Judge, the question is: What is the proper conclusion of the case in point of law?

Under the old law, according to *Williams* (*Real Property*, 23rd ed., p. 564) and *Elphinstone* (*Introduction to Conveyancing*, 7th ed., p. 310), an actual waiver of a breach of covenant destroyed the right of entry for any subsequent breach. But the provisions of sec. 17 declared, among other things, that an actual waiver should not be assumed or deemed to be a general waiver of the benefit of any such covenant or condition unless an intention to that effect appears. Now, the learned Judge found, as I understand his judgment, that such an intention did appear, and therefore the case falls to be determined under the old law.

It is a case, then, in which a tenant has been given parol leave beforehand to commit a breach of the covenant. The lease is in fact under seal, and in any event, as an instrument under the *Transfer of Land Act* 1915 (Vict.), sec. 124, has the same efficacy as if under seal. At common law parties to a deed could only discharge their obligations by deed. A breach of covenant could not be justified by a parol licence to break it (*Doe d. Muston* v. *Gladwin* (2)). But the Court of Chancery would restrain a landlord who had given permission to commit a breach of the covenant from taking advantage of it, and, since the *Judicature Act*, that principle now prevails (*Elphinstone*, *Introduction to Conveyancing*, 7th ed., p. 310). The Courts of Chancery did not, however, any more than did the Courts of common law, enforce voluntary contracts or forbearances (*Colman* v. *Sarrel* (3); *Ellison* v. *Ellison* (4)). And it is clear, I think, that at law rights of action arising from breach of contract could only be waived by a release or by accord and satisfaction, which, as *Anson* says (*Contracts*, 15th ed., p. 392), "brings us back to the elementary rule of contract, that a promise made without consideration must,

(1) (1924) 46 A.L.T., at p. 98.
(2) (1845) 6 Q.B., at p. 962.
(3) (1789) 1 Ves. Jun. 49.
(4) (1802) 6 Ves. 656.

in order to be binding, be made under seal." Otherwise, the promise is a voluntary forbearance which does not preclude a party from relying upon the provisions of his contract (cf. *Ogle* v. *Earl Vane* (1); *Morris* v. *Baron & Co.* (2)). So in this case, a parol licence or permission to break the contract cannot justify its breach, for it was without consideration, and indeed involved the doing of unlawful acts, namely, the contravention of the *Licensing Act*.

The doctrine of estoppel was also relied upon. A passage in the speech of the Lord Chancellor (Lord *Cairns*) in *Hughes* v. *Metropolitan Railway Co.* (3) puts the argument strongly and lucidly: "It is the first principle upon which all Courts of equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results—certain penalties or . . . forfeitures—afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties." But can a party be allowed to say that he was led to suppose that the strict rights of the contract would not be enforced if he broke the law? Such a doctrine would be inimical to the interests of the State, and contrary to the policy of the law. Yet that, in truth, is the position which the plaintiff takes up in this case. It cannot, in my opinion, be supported.

I concur in the opinion of *Cussen* A.C.J. upon the *Conveyancing Act*, but, for the reasons already stated, my opinion is that this appeal must be allowed and judgment entered for the defendant.

Appeal allowed with costs. Judgment entered for the defendant on the plaintiff's claim. Otherwise judgment affirmed.

Solicitors for the appellant, *A. G. Hall & Wilcox.*

Solicitors for the respondent, *McInerney, McInerney & Williams.*

B.L.

(1) (1867) L.R. 2 Q.B. 275; (1868) L.R. 3 Q.B. 272.

(2) (1918) A.C. 1.

(3) (1877) 2 App. Cas. 439, at p. 448.