[HIGH COURT OF AUSTRALIA.]

THE CORPORATION OF THE CITY OF ADELAIDE . . . . . APPELLANT;
DEFENDANT,

AND

THE AUSTRALASIAN PERFORMING RIGHT ASSOCIATION LIMITED . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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MELBOURNE, *Mar.* 14, 15.

SYDNEY, *April* 23.

Knox C.J., Isaacs, Higgins, Gavan Duffy and Starke JJ.

Copyright—Musical work—Infringement—Permitting hall to be used for performance—Hall let for concert—Control of owner over hall—Notice to owner of intended infringement—Omission of owner to do anything—Copyright Act 1912 (*No.* 20 *of* 1912), *secs.* 8, 15—*Copyright Act* 1911 (1 & 2 *Geo. V. c.* 46), *sec.* 2 (3).

Sec. 2 (3) of the British *Copyright Act* 1911 provides that "Copyright in a work shall also be deemed to be infringed by any person who for his private profit permits a theatre or other place of entertainment to be used for the performance in public of the work without the consent of the owner of the copyright, unless he was not aware, and had no reasonable ground for suspecting, that the performance would be an infringement of copyright."

The appellant corporation let its Town Hall to W. for a series of four vocal concerts. One of the conditions of the agreement was that, should the Town Clerk in the exercise of his judgment see fit, he might cancel the letting. Another condition was that the Town Clerk or City Treasurer might require a programme of the entertainment to be submitted to him and, if in his unfettered discretion he should decide that the programme or any item in it was objectionable or unsuited to the hall, he might prohibit the performance and if necessary stop it; and that if the hirer refused, when required, to supply a programme the Town Clerk or City Treasurer might cancel the engagement, prohibit the use of the hall by the hirer and take possession thereof and eject

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the hirer therefrom. The respondent informed the appellant that a song in which the respondent had the copyright would be sung without its authority in the Town Hall at concerts given by W. The song was sung at two concerts. The appellant did nothing beyond acknowledging the receipt of the information.

Held, by *Higgins*, *Gavan Duffy* and *Starke* JJ. (*Knox* C.J. and *Isaacs* J. dissenting), that no inference should be drawn that the appellant "permitted" the song to be sung, and therefore that there was no infringement of copyright within the meaning of sec. 2 (3) of the Act.

Decision of the Supreme Court of South Australia (Full Court) reversed.

APPEAL from the Supreme Court of South Australia.

An action was instituted in the Supreme Court of South Australia by the Australasian Performing Right Association Ltd. against the Corporation of the City of Adelaide in which the plaintiff, by its writ, claimed an injunction to restrain the defendant from infringing the plaintiff's copyrights and damages for infringement of such copyrights. The plaintiff then moved for an injunction pending the hearing of the action restraining the defendant from infringing the plaintiff's copyright in the musical work "I heard you singing," and in all other musical works whatsoever the copyright of which was vested in the plaintiff, and from permitting the Adelaide Town Hall to be used for profit to the defendant for the performance in public of the said musical work or any other musical work in respect of which the plaintiff was the owner of the copyright. The motion was heard before the Full Court, and by consent the hearing of the motion was treated as the trial of the action. The Full Court made an order restraining the defendant from permitting the Town Hall to be used for profit to the defendant for the performance in public of the musical work "I heard you singing," without the consent or leave of the plaintiff so long as the plaintiff should be the owner of the performing rights for such musical work, and ordering the defendant to pay to the plaintiff the sum of £2 damages for the infringement of the plaintiff's copyright in such musical work.

From that decision the defendant now appealed to the High Court.

The facts leading up to the institution of the action, as stated in the judgment of *Knox* C.J., were as follows:—On 9th September 1927 J. C. Williamson Ltd. applied to the appellant to hire the Town Hall on 15th, 18th, 20th and 22nd October for the purpose of vocal

concerts by Joseph Hislop. By the terms of the application the applicant agreed to pay £48 for the hire of the Town Hall and to be bound by the conditions attached to the application, which were to be deemed to be incorporated in the application and to form the basis of the contract. Clauses 16 and 27 of the conditions were in the words following:—"(16) Notwithstanding that the engagement of the hall or any room may have been duly entered into in accordance with these conditions, and that the rent and deposit may have been paid, it shall be in the power of the Town Clerk, should he in the exercise of his judgment see fit, to cancel the letting and direct the return of the rent and deposit (or such portion of the rent as may cover the unexpired portion of the hire) to the hirer, who hereby agrees in that case to accept the same and to be held to have consented to such cancellation, and to have no claim by law for loss or damage in consequence thereof." "(27) Notwithstanding that the engagement of the hall or of any room may have been duly entered into in accordance with these conditions, and that the rent and deposit may have been paid, it shall be in the power of the Town Clerk or the City Treasurer at any time to require the hirer to supply a full detailed written or printed programme showing precisely what entertainment is to take place in the hired hall or room on each and every occasion it is to be used during the period covered by such engagement, and such requisition may be made before or at the time of engagement of the hall or room, or at any time, or from time to time during the period of hire. Should the Town Clerk or City Treasurer in his absolute and unfettered discretion decide that the programme as a whole or any item or items of the programme submitted is or are objectionable or not suited to the hall or room (as the case may be) it shall be in the power of the Town Clerk or City Treasurer to prohibit and, if necessary, stop the exhibition or the performance of such programme or any particular item or items, without giving any specific reason to the hirer, who, in that case, agrees to be held to have consented to such prohibition and stoppage, and to have no claim by law for any loss or damage in consequence thereof. And if the hirer of the hall or any room shall refuse when required to supply such programme as aforesaid, it shall be within the power of the Town

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Clerk or City Treasurer to cancel the engagement and prohibit the use of the hall or room (as the case may be) by the hirer, and to take possession thereof and eject the hirer therefrom. And if the Town Clerk or City Treasurer shall cancel the engagement of the hall or room in exercise of the aforesaid power, then and in such case the rent or deposit (if any) paid by the hirer shall be absolutely forfeited to the Corporation, and the hirer shall forfeit all claim to the use of the hall or room." On 12th September £24 was paid to the appellant in pursuance of the application and the application was approved by the appellant. On 7th October the respondent wrote and sent to the appellant a letter which, so far as relevant, was in the words following:—"Evidence is before us that on or about 16th October next the Town Hall of the City of Adelaide is to be used for the purpose of a public concert to be given by Mr. Joseph Hislop. We understand that rental is paid to the Council, as representatives of the ratepayers of the City, for the use of the premises for the purpose mentioned. During the course of the entertainment we have reason for believing that musical compositions will be performed as per attached list. These works are copyright, and as such may not be performed in a place of public resort except with the authority of the owners of the performing right. The performing right in the compositions is vested in this Association by deeds of assignment, and the Association has given no authority for the public performance of them in the establishment on the occasion referred to. We hereby inform you that if your Council permits the Town Hall to be used for the performance of the compositions mentioned herein or any works of which the performing right is vested in this Association, at the entertainment on 16th October or thereabouts, it will commit an infringement of copyright. Under such circumstances, we intend to file statement of claim asking for injunction, damages and costs against your Council." The attached list included the work "I heard you singing." On 14th October the Town Clerk acknowledged receipt of the letter of 7th set out above. On 15th October the said Joseph Hislop sang at a public entertainment in the Town Hall the piece "I heard you singing." On 21st October the respondent's solicitors wrote and sent to the appellant a letter in the words following:—

"We have been instructed by the Australasian Performing Right Association Ltd. in connection with the series of concerts at present being given in the Adelaide Town Hall at which Mr. Hislop and others have been performing. On 7th inst. the Association wrote to the Mayor and Councillors of your Corporation informing them that it had reason to believe that certain musical compositions of which the Association owned the copyright were to be performed at Mr. Hislop's concerts, and forwarding a list of such compositions with an intimation that any such performance would be an infringement of its copyright. This warning has apparently been ignored by your Council as a number of such works have been performed at the concerts held to date and other infringements are threatened by advertisement in to-day's press. We have to request your Corporation, as owners of the building, not to permit any infringement of our client's copyrights and to inform you that if any such infringement occurs a writ will be issued against the Corporation without further notice claiming an injunction, damages and costs." The advertisement referred to in this letter contained an announcement that at the concert to be held in the Town Hall on the evening of 22nd October Joseph Hislop would sing "I heard you singing"; and on that evening he sang that piece.

Other material facts are fully set out in the judgments hereunder.

Robert Menzies (with him *Ohlstrom*), for the appellant. No inference can be drawn from the evidence that the appellant "permitted" the Town Hall to be used for the singing of the song so as to bring the case within sec. 2 (3) of the Imperial *Copyright Act* 1911, for there was no effective means by which the appellant could have prevented the singing of the song. The original letting of the hall could not by itself constitute a permission, for there was then no suggestion to the appellant that the particular song would be sung and the appellant was entitled to assume that the hirer would not break the law. Clause 27 of the conditions did not afford a means of preventing the singing of the song, for that clause is directed only to something inherent in the character of the work to be performed. Although clause 16 enables the appellant to terminate the hiring at any time, to impose on the appellant the

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duty to exercise that power upon receiving such a notice as was given in this case would be unreasonable.

Owen Dixon K.C. (with him *Eager*), for the respondent. The question of whether the work performed was copyrighted is irrelevant in determining whether there was permission to perform the work. The original contract of letting was a permission to perform works of a particular kind.

[STARKE J. referred to *Performing Right Society* v. *Ciryl Theatrical Syndicate* (1).

[ISAACS J. referred to *Monaghan* v. *Taylor* (2).]

It is not contended that from that contract an inference could be drawn that the appellant permitted the particular song to be sung. But by that contract the appellant allowed the hirer to choose what songs should be sung and, by clauses 16 and 27, reserved to itself an absolute control over what was being done at the Town Hall. If the appellant relaxed that control so as to enable a song to be sung which was an infringement of the respondent's copyright, that is within sec. 2 (3). The appellant could have forbidden the singing of the particular song and could have used its power to terminate the hiring in order to compel a promise that it should not be sung. Having received the letters from the respondent it was the appellant's duty to take some such step, and having failed to do anything a permission should be inferred. [Counsel also referred to *Falcon* v. *Famous Players Film Co.* (3); *Hobson* v. *Middleton* (4); *Berton* v. *Alliance Economic Investment Co.* (5); *Atkin* v. *Rose* (6); *Australian Performing Right Association and J. Leist Inc.* v. *J. Turner & Son* (7); *Monckton* v. *Pathé Frères Pathephone Ltd.* (8).]

[ISAACS J. referred to *Lowery* v. *Walker* (9).]

Robert Menzies, in reply, referred to *Russell* v. *Briant* (10).

Cur. adv. vult.

(1) (1924) 1 K.B. 1, at p. 15.
(2) (1886) 2 T.L.R. 685.
(3) (1926) 2 K.B. 474, at p. 491.
(4) (1827) 6 B. & C. 295, at p. 303.
(5) (1922) 1 K.B. 742.
(6) (1923) 1 Ch. 522.
(7) (1927) 27 S.R. (N.S.W.) 344.
(8) (1914) 1 K.B. 395, at p. 403.
(9) (1911) A.C. 10.
(10) (1849) 8 C.B. 836.

The following written judgments were delivered :—

KNOX C.J. This is an appeal from a judgment of the Supreme Court of South Australia whereby it was ordered that the appellant be restrained from permitting the Adelaide Town Hall to be used for profit to the appellant for the performance in public of the musical work " I heard you singing," without the consent or leave of the respondent, and that the appellant should pay to the respondent £2 damage for infringement of the respondent's copyright in the said musical work.

The facts were as follows :—[The facts as above stated were here set out.]

On 25th October the respondent issued a writ against the appellant claiming an injunction to restrain the appellant from infringing the respondent's copyrights and damages for infringement.

On motion made for an injunction, which was, by consent, treated as the trial of the action, the facts set out above were proved and it was also proved that the respondent was the owner of the copyright in " I heard you singing." The motion was heard by a Full Court of the Supreme Court of South Australia, and the Court held that the proper inference from the evidence was that the appellant for its private profit permitted the use of the hall for the purposes of the performance of the particular work complained of and thereby committed an infringement of the respondent's copyright (sec. 2 (3) of the Imperial *Copyright Act* 1911, adopted by the Commonwealth *Copyright Act* 1912).

On the appeal to this Court the only question raised was whether the Supreme Court was right in drawing the inference from the facts proved that the appellant " permitted " the use of the hall for the performance in question.

I agree with the learned Judges of the Supreme Court in thinking that indifference or omission is " permission " within the plain meaning of that word where the party charged (1) knows or has reason to anticipate or suspect that the particular act is to be or is likely to be done, (2) has the power to prevent it, (3) makes default in some duty of control or interference arising under the circumstances of the case, and (4) thereby fails to prevent it. This statement of the legal position was not challenged in argument before this Court.

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The Supreme Court thought, and I agree, that the question to be answered in this case was whether after the receipt of the letter of 7th October the appellant abstained from action which under the circumstances then existing it would have been reasonable to take, or, in other words, whether it exhibited a degree of indifference from which permission ought to be inferred. It is unnecessary in the present case to consider what the result would have been if the case made for the respondent had rested on the letter of 7th October alone, for on 21st October the appellant was referred to an advertisement which announced that the song in question was to be sung at the concert to be given on the evening of the following day. On receipt of the information the appellant had power under clause 16 of the conditions governing the letting of the hall to cancel the letting, returning portion of the rent paid. The appellant had been informed both by the respondent and by its solicitors that the performance of this work would be an infringement of the copyright of the respondent. Its attention was drawn to the fact that at the previous concerts of the series some of the works comprised in the list attached to the letter of 7th October had been performed, and proceedings for infringement were threatened. It had no reason to doubt the statements of the respondent and its solicitors that performance of the works mentioned in the list would be an infringement of copyright, and it therefore had reasonable ground for suspecting that the performance would be an infringement of copyright. In these circumstances it elected to do nothing. Having the power to prevent the threatened infringement, it abstained from doing so. Although an affidavit was made by the Town Clerk and used in opposition to the motion for injunction it contains no contradiction or qualification or explanation of the relevant facts deposed to in the affidavits filed on behalf of the respondent, nor does the deponent venture to suggest that there was not reasonable ground for suspecting that the copyright of the respondent in this song was likely to be infringed. It was left for counsel to suggest in argument that the Corporation could not know that the respondent was the owner of a valid copyright and for that reason was not bound to take action. In my opinion the Full Court was clearly right in holding that the degree of indifference exhibited by the

appellant in the circumstances of this case justified the conclusion that it permitted the use of the hall on 22nd October for the performance of the work in question. Indeed I think no other inference could properly be drawn from the conduct of the appellant.

In my opinion the appeal should be dismissed.

ISAACS J. This appeal turns on the meaning to be attributed to the word " permits " in sub-sec. 3 of sec. 2 of the Imperial *Copyright Act* 1911 (adopted by the Commonwealth *Copyright Act* 1912), and on the application to that sub-section of the admitted facts of the case. Prior to the Act of 1911 the law, notwithstanding the liberal interpretation placed upon it by the judiciary, as in *Marsh* v. *Conquest* (1) and *Monaghan* v. *Taylor* (2), was insufficient to prevent what is nothing more or less than stealing other men's mental creations. In two respects material to this case the Imperial legislation of 1911, part of the international arrangement constituted by the Berlin Convention of 1908 and adopted by the Commonwealth Act of 1912, made a distinct effort to bring the statute law up to the manifest demands of morality. For the word " cause," which had been given a restricted meaning, there was substituted the word " authorize," and that word is now understood as importing the sense of " sanction, approve and countenance " (see *Falcon* v. *Famous Players Film Co.* (3)). Along with that significant change, there was inserted the sub-section now under consideration, which is a necessary complement in the scheme of protection. It extends the previous limited responsibility of proprietors of halls who merely hire them out for remuneration without being directly connected with the performance itself. The gist of the sub-section is that such a person who " permits " the performance of a copyright piece is to all intents and purposes as much an infringer of the copyright by providing for gain to himself the necessary means of infringement as if he directly produced the performance, unless he proves that " he was not *aware*, and had no reasonable ground for *suspecting* " that the performance would be an infringement. Once show that he permitted his hall to be used for the performance of a piece

(1) (1864) 17 C.B. (N.S.) 418. (2) (1886) 2 T.L.R. 685.
(3) (1926) 2 K.B. 474.

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that in fact is copyright, he is liable unless he exculpates himself by proving that his actual participation in the wrong was innocent. That provision for his protection goes beyond the provision as to the civil liability of the actual producer. With regard to the latter it is true now, as it was in *Lee* v. *Simpson* (1), that "the statute would altogether fail to effect its object, if it were necessary to show that the defendant had a knowledge of the plaintiff's right of property." (See *Byrne* v. *Statist Co.* (2).) The hall proprietor, however, has a loophole of escape from civil liability if he satisfies the provision enabling him to establish what is peculiarly within his own knowledge. But his civil liability is not shown, even prima facie, unless the plaintiff proves that the hall proprietor, for his private profit, "permits" the hall to be used for the performance in public of the work.

Neither in the Supreme Court nor in this Court was any contest made as to "private profit." That was assumed. No question can arise as to the actual performance in public of the work, or as to that performance being an infringement. The only possible question remaining is whether what the appellant did answers the word "permits."

Like the new word "authorize," the word "permits" is of very extensive connotation. Having international effect, it should not be restricted to narrow limits. Going to the dictionary, as did *Buckley* L.J. (as he then was), for the former word, we find that in the *Oxford Dictionary* the primary meaning of "permit" is: "to allow, suffer, give leave; not to prevent." That was Lord Chancellor *Halsbury's* view of the word "permission." Speaking of the proprietor of a field in relation to persons passing over it, the learned Lord said: "Crossing it in one sense with his permission—not that he has given direct permission, but that he has declined to interfere and so acquiesced in their crossing it" (*Lowery* v. *Walker* (3)). (See also *Berton* v. *Alliance Economic Investment Co.* (4) and *Atkin* v. *Rose* (5).)

As an illustration, a person "permits" his hall to be used for the public performance of a play or a song, if he knows or has reason

(1) (1847) 3 C.B. 871, at p. 883.
(2) (1914) 1 K.B. 622.
(3) (1911) A.C., at p. 14.
(4) (1922) 1 K.B., at p. 759.
(5) (1923) 1 Ch., at pp. 534, 535.

to know or believe that the particular play or song (*Performing Right Society* v. *Ciryl Theatrical Syndicate* (1)) will or may be performed and, having the legal power to prevent it, nevertheless disregards that power and allows his property to be used for the purpose. For example, in *Performing Right Society Ltd.* v. *Mitchell & Booker (Palais de Danse) Ltd.* (2) *McCardie* J. held that the plaintiff's claim under sec. 2, sub-sec. 3, was rightly abandoned. But that was because the hall proprietors " did not know that the infringing performances would take place or that they were in fact taking place. They had no reasonable ground for suspecting that there would be an infringement of copyright by the band. *No programme of music was printed or announced* " (3). The position was the very antithesis of the present case. But *McCardie* J. did not include as a reason that the defendants already had a contract which they were not bound to terminate though they had the right to do so had they known an infringement was contemplated. The permission relied on here by the respondent was on 22nd October 1927. On the bare facts of that evening there can be no doubt that the appellant, the owner of the property, did not prevent but did actually " permit " the public performance of the particular work. Without the permission of the appellant the performance could not have taken place there at all. As far back as 7th October the appellant was formally notified that the particular work was one of those which would probably be performed, and was threatened with proceedings if that happened. On 14th October, the day before the first concert, this notification was merely acknowledged, and the concert proceeded. The culpable " indifference " indicated by *Bankes* L.J. in the *Ciryl Case* (4) was openly displayed. Again, on 21st October the appellant was reminded by the solicitors for the copyright owners of the previous warning; and this was added :—" This warning has apparently been ignored by your Council, as a number of works have been performed at the concerts held to date, and other infringements are threatened by advertisements in to-day's press. We have to request your Corporation, as owners of the building, not to permit any infringement of our client's copyrights, and to inform you that

(1) (1924) 1 K.B. 1.
(2) (1924) 1 K.B. 762.
(3) (1924) 1 K.B., at p. 764.
(4) (1924) 1 K.B., at p. 9.

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if any such infringement occurs a writ will be issued against the Corporation," &c. The newspaper advertisements giving programmes referred to, expressly specify the song the subject of the action. No step was taken to prevent the performance, and the letter was merely acknowledged on 24th October, that is, two days after the infringement which took place on the evening of the 22nd. The " indifference " of the appellant to all but profit is a wilful shutting of the eyes and ears to the rights of others, and is again of the kind that affords cogent evidence of permission.

The appellant contends that the actual permission operating on 22nd October does not satisfy the word " permits " in the sub-section, for the following reason. It says that the agreement of 9th September was the permission and the only permission, and was not, when made, a contravention of the sub-section, and there was no obligation on the appellant to cancel it prior to 22nd October. As to the first point, in strictness, the agreement is not the permission. It is an agreement to permit the occupancy of the room, but the permission referred to in the statute is the will of the owner, as existing and operating as a fact at the time of the performance. The prior agreement may or may not have imposed an obligation to give that permission. If for any reason the consideration were illegal, or if there were no consideration, a refusal on 22nd October would, at least, be lawful, and any performance thereafter taking place could not be said to be by the permission of the owner. The matter appears to be susceptible of a simple but decisive test:— Suppose, in ignorance of copyright, a hall proprietor by contract lets the hall for the purpose of performing a programme of several songs on a given night; before the night arrives, he, learning of copyright, forbids the singing of a certain song and receives an assurance that it will not be performed; suppose that, notwithstanding this assurance, the song is sung in public: is he liable under the sub-section for permitting the infringement ? In the view here taken that the statutory " permission " is referable to the moment of performance, whether it is evidenced by existing contract or otherwise, he is not liable. In the view taken by the appellant he would be liable, a result that offends one's sense of reason and justice.

What, then, is the effect of the Act on the bargain? Individual bargains cannot prevail over public law; unless illegal on their face, in which case they are ineffectual *ab initio*, they are necessarily subject to the condition that neither party is entitled to adhere to the agreement when such adherence is found to be contrary to law (*Cowan* v. *Milbourn* (1)). However innocent the agreement was originally from the appellant's standpoint, assuming that no performance of the particular song or, at all events, no infringement then appeared probable, yet, putting the matter even on the lowest ground possible, as soon as it was found that the agreement was to be made the means of infringing the public law of the Commonwealth the appellant was at least *free* to withdraw. Obligation to prevent is not the test of permission. It is obviously not so in the case of an original permission. The liberty or right or legal power to prevent is one valid and effective test (see the two cases of *Berton* v. *Alliance Economic Investment Co.* (2) and *Atkin* v. *Rose* (3)). There would be that liberty or right or legal power under this agreement, even if the agreement for letting were in respect of a continuous term.

But the facts go much further. The agreement was for the use of the hall on four disconnected and entirely separate nights, namely, 15th, 18th, 20th and 22nd October. On each evening the appellant necessarily performed *a new and distinct act of delivering the hall to the person known to be about to infringe the respondent's copyright.* That was a new active permission in fact, given, it is true, in pursuance of a bargain, which at least the appellant was *free* to repudiate as unlawful unless an undertaking were given not to transgress the law. It is not at all like a lease with a continuous term where the matter has passed from the domain of contract to that of the creation of an estate, and where the tenant is in possession and cannot be lawfully turned out by the individual act of the landlord, and where consequently also the remedy might have to be by ejectment or injunction. The relation between the parties is purely contractual only, no estate or interest in the land being carved out of the appellant's property by the instrument. Not only so, the contract contained, as *Napier* J. said, two clauses,

(1) (1867) L.R. 2 Ex. 230. (2) (1922) 1 K.B. 742.
(3) (1923) 1 Ch. 522.

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16 and 27, which enabled the appellant, certainly in the circumstances of this case, to cancel the letting. No one could say there would have been a harsh or unreasonable use of the power of cancellation—even if such be outside the limits of the clauses—to insist on the hirer's honesty and obedience to law, at the peril of cancellation. So much was beyond question in the legal power, and, it may be added, the moral duty of the appellant when its attention was so pointedly called to the invasion of the respondent's proprietary rights.

The Town Hall was "hired" not for a continuous term but, as stated, for four separate nights, namely, 15th, 18th, 20th and 22nd October 1927. A bulk sum was the consideration, whether the hirers "use" the same or not. Only the "use" of the hall was given, although the word "rent" is found in some of the conditions. It is also called "the total charge" and "hiring." By condition 18 "the Town Clerk and City Treasurer shall at all times, notwithstanding any hiring, be entitled to free access to any part of the building." By condition 25 "the hall porter is responsible at all times for keeping order, and hirers must conform to his instructions."

In determining whether an instrument is a lease or a licence, "we must, if we can," says Lord *Halsbury* in *Edwardes* v. *Barrington* (1)), "find from the language of the instrument, having regard to the relations between the parties and the object which was on the face of the instrument apparent, what were the real intentions of the parties." With this principle in hand the House of Lords, notwithstanding some technical expressions, held the document in hand to be a licence and not a lease. *Taylor* v. *Caldwell* (2) is another instance, and not wholly unlike this case. See also *Smith* v. *Overseers of St. Michael, Cambridge* (3).

In the result, so far, the existence of the agreement of 9th September, even assuming it cast no legal obligation on the appellant to rescind it, at least affords no ground for depriving the appellant of the legal right to refuse to proceed with it. It elected to adhere to the contract, to receive the price and to hand over the hall for the evening, and to allow *the hall to be used* for the purpose of the

(1) (1901) 85 L.T. 650, at p. 652. (2) (1863) 3 B. & S. 826.
(3) (1860) 3 E. & E. 383.

pieces advertised being performed, rather than return or forego the proportionate part of the hire-money. In so acting it "permitted" the actual infringement on that night and, not having excused itself under the terms of the sub-section, is liable as an infringer. The opposite view would deprive the sub-section of any real effectiveness, because in many cases the only legal remedy would lie against a strolling player whose responsibility would be merely nominal or a company that *McCardie* J. in the case cited calls "a migratory thing" (1). The result on this lower basis is perhaps more strikingly shown, though in no way different in principle, if applied to some other classes of acts. Suppose, with a similar power of ending a contract, a proprietor finds or has reason to believe that the hirer is intending to use the premises as a brothel, or for any other criminal purpose; and with this knowledge or belief elects to retain the contract and deliberately hands over to the hirer the premises for the evening and receives the rent: does he or does he not "permit" his premises to be used for the nefarious purposes? In my opinion he does "permit" his premises to be so used; he is really *particeps criminis*. But he is neither more guilty nor more innocent than the present appellant, applying merely the test of *power* to terminate the contract. The matter stands, however, still higher. *Cowan* v. *Milbourn* (2) shows that as soon as the party to a contract has reason to believe his property is intended to be used for an illegal purpose, he is not merely "entitled" but is "called on and bound by the law, to refuse his sanction to this use of his rooms" (per *Kelly* C.B., concurred in by *Martin* B.). On principle that must be so. What Sir *John Salmond*, in his posthumous work on *Contracts* (at p. 160), terms "the external condition of continued legality" works a determination of the bargain, a dissolution of the *vinculum juris*, as soon as the necessary facts appear, which constitute illegality. Intention of the parties as to this is immaterial; no personal intention can create a binding obligation to perform an agreement which either is in its inception or becomes during its existence an agreement to do what the law forbids. In my opinion, therefore, the appellant had no legal right to hand over the hall for the purpose of performing (*inter alia*) the

(1) (1924) 1 K.B., at p. 765.

(2) (1867) L.R. 2 Ex., at pp. 234, 235.

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song; because to perform it in the circumstances was a breach of positive law. The permission actually given on 22nd October was without any lawful obligation to support it.

The appeal should be dismissed.

HIGGINS J. In my opinion, this appeal of the Corporation should be allowed. It appears to me that there is no ground for the finding, the inference of fact, that the Corporation "permitted" (the words of sec. 2 (3) of the Act are "for his private profit *permits*") the Town Hall to be used for the performance of the musical work—"I heard you singing."

It is not denied that the burden of proving that the defendant "permitted" Hislop to sing the song lies on the plaintiff. Whatever else the plaintiff must prove, it must prove that permission. It is clear that there was no express permission; but it is urged that permission must be inferred from the failure of the defendant to interfere after the plaintiff's letter of 7th October 1927 or after the solicitor's letter of 21st October and from its failure to cancel the contract to hire the hall to J. C. Williamson Ltd.

The facts are few and simple. The Corporation on 12th September let the hall to J. C. Williamson Ltd. for four evenings in October (15th, 18th, 20th and 22nd) for the purpose of "vocal concerts by Joseph Hislop" (not for the purpose of singing any specific song or songs), and received the rent. On 7th October the plaintiff wrote to the Corporation stating that it had reason to believe that musical compositions would be performed as per attached list (over twenty items, including the song in question); that the performing rights in all the compositions were vested in the plaintiff by assignment; that if the Corporation permitted the hall to be used for the performances, it would commit an infringement, and would be sued; and that the Corporation might, by paying an annual licence fee to the plaintiff, get the use of the entire repertoire of the plaintiff. This letter, it will be noticed, came about three or four weeks after the letting of the hall and the receipt of the money. The Town Clerk acknowledged this letter by a letter of 14th October. It cannot be regarded as surprising that time had to be taken before answering, especially as the plaintiff's letter involved a novel

responsibility for the conduct of lessees (or licensees, it matters not), and, possibly, a novel contractual relation with the plaintiff. There was no evidence even of the alleged copyright: registration itself did not take place till 8th October, the day after the plaintiff's letter; and in Melbourne, not Adelaide. Hislop sang the song on 15th and on 22nd. On 21st October the plaintiff's solicitor by letter threatened an action. It is not alleged that the Corporation saw any of the advertisements as to Hislop's proposed songs; but this second letter called attention to an advertisement of the song. It does not even appear that the Corporation had any meeting on 21st or 22nd October. So far as this position has been stated it is surely idle to talk of the Corporation as "permitting" the singing of this song. This action has, by consent, been tried on the motion affidavits; and there is not the slightest evidence of any "sanction, approval or countenance" given by the Corporation to the performance of the song in question. The *Copyright Act* does not put the lessor of the premises in the position of guarantor of copyright owners against breach of copyright on the part of the lessees: it merely forbids lessors (as well as other people) to "permit" for private profit the performance of a copyright work; and the word "permit" implies that the lessor has some control of the performers (*Marsh* v. *Conquest* (1)).

At most, it might be said that the Corporation showed itself indifferent; but, as "indifference" has a rather dyslogistic sense, let us say that the Corporation remained neutral. The problems involved in the letter of 7th October called for consideration and caution; and the Corporation had not the function of policing the provisions of the *Copyright Act* on behalf of alleged owners of copyright. The Corporation would know that if J. C. Williamson Ltd. was infringing the Act the plaintiff had its remedy against Williamson's by injunction and damages; and that under sec. 17 of the Australian Act, the plaintiff, by giving express notice, could make those performing liable to the criminal law. As the learned Judges of the Supreme Court have said, mere indifference or omission cannot be treated as "permission" unless the Corporation had the power to permit the performance, and unless there was some duty to interfere; and it

(1) (1864) 17 C.B. (N.S.) 418.

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had no such power, no such duty. It could not bring an action for injunction against J. C. Williamson Ltd., although the plaintiff could; and it had no duty toward the plaintiff except not to " permit " the singing of the song for profit. As the Supreme Court have also pointed out, to prove permission it is not enough to show that the Corporation gave a mere general authority for the performance of musical works, a " vocal concert " : it must be proved that permission was given to perform the particular works in question (and see per *Atkin* L.J. in *Performing Right Society* v. *Ciryl Theatrical Syndicate* (1)). Where is there even a semblance of proof of such permission ?

It should be distinctly understood that want of knowledge that the plaintiff had copyright in the song is not the Corporation's defence —if the Corporation " permitted " the song to be sung, it would take the risk of the copyright belonging to someone. But the mere fact that the song was sung is not equivalent to " permission " to sing it ; for the words of sec. 2 (3) are *not* that copyright of a work shall be deemed to be infringed by any person in whose place of entertainment the work happens to be performed—there is no infringement by that person unless he *permit* it to be performed. Nor does the Corporation rely on the exemption at the end of sec. 2 (3) as to " reasonable grounds for suspecting " the infringement —these words become relevant only where the Corporation has " permitted " the song to be sung. The sole point is, did it " permit " this specific song to be sung.

But the plaintiff has another string to its bow. It relies, by its counsel, on clause 16 of the conditions of hire of the hall, which prescribes that the Town Clerk may, if in his judgment he thinks fit, cancel the letting, returning the deposit and the rent for the unexpired term. That is to say, that, as the Corporation has no power to prevent directly the singing of the song, it should smash the lease, refunding money paid for all future performances of every kind, and thus prevent all singing of any sort. This seems rather an extreme suggestion. The doctrine as laid down by *Atkin* L.J is that " permit " means one of two things " either to give leave for an act which without that leave could not be legally done, or

(1) (1924) 1 K.B., at p. 15.

to abstain from taking reasonable steps to prevent the act where it is within a man's power to prevent it" (*Berton* v. *Alliance Economic Investment Co.* (1)). Is the smashing of the lease a "reasonable step" under the circumstances? It is not a step which would in itself prevent the infringement of the copyright, but a step which would do much more: it would put an end to the lease. The owner of a house has power to destroy it; if his house be used without his permission for the sale of intoxicants, is he to be expected to burn it down as a reasonable step? In my opinion, *Atkin* L.J. meant just what he said—he had in his mind a power to prevent the specific act (here the infringement of the copyright), not a power which, if exercised, would put an end to the whole relationship of lessor and lessee. The moral of Charles Lamb's story of the Chinaman is that however desirable roast pork may be it is not necessary every time to burn down a house for it.

The words of *Atkin* L.J. cited from *Berton's Case* (2) have been used in the judgment as if they meant to lay down an abstract universal test of "permission." But the words which immediately follow show that the mind of the learned Judge was addressed to the particular facts before him (3):—"Acts which fall short of that" (abstaining from taking reasonable steps to prevent the act when it is within a man's power to prevent it) "*though they be acts of sympathy or assistance, do not amount to permission at any rate in the covenants with which we are dealing.* It is clear that no leave was given by the appellants either to MacIntosh to let the premises or to the under-tenants to remain in them, and in my opinion there was no abstaining from taking reasonable steps to prevent a user contrary to the covenants." It was an action against the assignee of a lease for ejectment on the ground of breach of covenant not to permit, &c. The sub-lessee of the assignees had, in breach of covenant, let the premises in tenements to weekly tenants. The assignees did not take any steps against the weekly tenants, who relied (rightly or wrongly) on a special post-war Act in favour of tenants. It was held by the Court of Appeal, reversing the judgment of Lord *Coleridge* J., that the assignees had not "permitted" the

(1) (1922) 1 K.B., at p. 759. (2) (1922) 1 K.B. 742.
(3) (1922) 1 K.B., at p. 759.

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premises to be used within the meaning of the covenant, and the plaintiff failed in its action. It was pointed out that the words must involve the doing of some act or the abstention from action, by the covenantor himself, or by some person standing in *the relation of agent to him, a relation which does not exist as between lessor and lessee.* In several respects *Berton's Case* (1) is distinctly in favour of the Corporation.

But though we may avail ourselves of the dicta of learned Judges as to the meaning of words, dicta uttered when the mind is applied to particular circumstances, we have finally to apply our minds to the circumstances before us : can it be said that the Corporation in any way, by its words or its conduct, " permitted " the singing of the song ? To show such permission, it must be shown, *inter alia*, that the Corporation willed the song to be sung, and communicated that will in some way to the singer or his employer. These facts have not been shown here. Even if we treat the Corporation as " indifferent " (or neutral), it had a right to be indifferent (or neutral) ; and the letter of 7th October could not deprive the Corporation of that right. As *Bankes* L.J. said in the *Ciryl Case* (2), the indifference was " not of a kind to warrant the inference of authorization or permission. It was the indifference of one who did not consider it his business to interfere, who had no desire to see another person's copyright infringed, but whose view was that copyright and infringement were matters for " others (here J. C. Williamson Ltd.) " to consider." The essence of the position is that J. C. Williamson Ltd., had, on the existing facts, control of the performers as to what they should sing, whereas the Corporation had none.

Perhaps I ought to state that clause 27 of the conditions does not apply at all to the circumstances. This clause allows the Town Clerk to decide that the programme or any item therein is " objectionable " or " not suited to the hall," and to prohibit the performance. The word " objectionable " refers, obviously, not to copyright, but to such grounds as indecency, likelihood of faction fights, &c.

The savage horse case—*Lowery* v. *Walker* (3)—is, to my mind,

(1) (1922) 1 K.B. 742.

(2) (1924) 1 K.B., at p. 10.

(3) (1911) A.C. 10.

irrelevant. There a landholder, who could have prevented people from crossing his land, allowed them to cross it for years; and it was held that as the person injured by the horse was lawfully on the land, the landowner was under a *duty* to the person crossing to take precautions as to the dangerous animal he had introduced. Neglect of that duty was culpable—indifference was in such a case "permission."

The reasons of the Supreme Court for its judgment are so frank and lucid that the fairest and most satisfactory way for me to show where I must dissent is to state the vital passage in full. After stating and commenting on sec. 2 (3) of the Act in a manner favourable to the Corporation, the learned Judges say:—"On the other hand there was one thing which the defendant might have done, but apparently did not do. When the letter dated 7th October was received it might have been transmitted or its contents notified to the responsible parties, together with some warning or protest or at least some indication of a desire on the part of the defendant that its hall should *not* be used for the purpose of infringement. We feel bound to say that in our opinion this omission evidences a degree of indifference which suggests that the defendant had *no* real desire to prevent its hall from being used for this purpose. There may have been some good reason for the omission; but if there was it has not been disclosed. The defendant's attitude was that it was not concerned to interfere; but in adopting this attitude we think that it failed to realize that *there is at least some obligation to withhold countenance or support to what is commonly called 'piracy.'* This is really the crux of the case. We think that under the circumstances the defendant abstained from taking the reasonable step to prevent the performance of the particular work in question, *although we cannot say that any protest would certainly have been effective.* A fair view of the facts is this. The Town Clerk was in a position to enforce any protest he might see fit to make, and the plaintiff company, complaining of the omission of this step which the defendant might reasonably have taken is entitled to the benefit of any doubt there may be as to whether it would have proved effective. No point was made with respect to any question of 'private profit'; and in our opinion the proper inference from

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the evidence is that the defendant on receipt of the letter of 7th October knew or had good reason to anticipate that the song 'I heard you singing' would be performed, that it was within its power to prevent it by protesting, that it failed to take this reasonable step to that end, and that it thereby exhibited a degree of indifference which justifies the conclusion that it permitted the use of the hall for the purposes of the performances of the particular work complained of."

Now, there are several comments that suggest themselves as to this passage; but, to avoid prolixity, I shall just say that the passage involves, in my opinion, an unjustifiable shifting of the burden of proof. It is for the plaintiff to prove that the defendant permitted the performance; not for the defendant to intimate to J. C. Williamson Ltd. that it was not permitting. To permit the performance would be, not only a tort, but criminal under sec. 15 of the Australian Act. The Corporation had merely licensed J. C. Williamson Ltd. to give "vocal concerts" through Joseph Hislop; it had no means of verifying the statement, which J. C. Williamson Ltd. would probably be better able to verify, as to the ownership of the copyright; it had no right to assume that J. C. Williamson Ltd. would infringe the law as to copyright. Suppose J. C. Williamson Ltd. were prepared to dispute the plaintiff's copyright, how foolish as well as futile the suggested protest would be. The Corporation had no contractual or other relation with the plaintiff; and the facts are quite consistent with a reasonable hesitation to assume any responsibility as lessor for its lessee's conduct in regard to alleged copyright, or any responsibility for paying any licence fee to copyright owners. With all respect, I deny that it was within the power of the Corporation to prevent the singing of the song, and that, even if it had any such power, it was a duty of the Corporation to exercise that power. Under the agreement (see condition 18 *inter alia*), I think that the Corporation would even have been liable to J. C. Williamson Ltd. for breach of the agreement if it had locked the doors of the hall to J. C. Williamson Ltd. on any of the four nights specified.

The case of *Monaghan* v. *Taylor* (1), on which reliance was placed for the plaintiff during the argument, is not relevant to this case.

(1) (1886) 2 T.L.R. 685.

That was a case of agency—the singer was the agent of the defendant. The jury found for the plaintiff, taking the view that the defendant gave the agent a general authority to sing any songs he pleased, whether copyright or not (see per *Bowen* L.J. (1)); and the Court saw no sufficient grounds for a new trial. That case was fully explained by the Lords Justices in the *Ciryl Case* (2); and the difference of the position where the performers are agents of the defendant, not strangers as here, is well demonstrated in *Performing Right Society* v. *Mitchell & Booker (Palais de Danse) Ltd.* (3).

I am of opinion that the Corporation is not shown to have "permitted" the performance of the song. I confine my judgment to the point on which the Supreme Court relied, and on which we have had the advantage of argument of counsel. But I desire to reserve any opinion as to other points which may have to be dealt with in some future case—e.g., as to the effect of the words in sec. 2 (3) "for his private profit." For instance, even assuming that the word "private" may apply to the Corporation's gains, does "profit" apply to a mere lessor, whose rent is payable profits or no profits ?

GAVAN DUFFY AND STARKE JJ. "Copyright in a work shall . . . be deemed to be infringed by any person who for his private profit permits a theatre or other place of entertainment to be used for the performance in public of the work without the consent of the owner of the copyright, unless he was not aware, and had no reasonable ground for suspecting, that the performance would be an infringement of copyright" (*Copyright Act* 1912, sec. 8; Imperial *Copyright Act* 1911 (1 & 2 Geo. V. c. 46), sec. 2 (3)). Permission to do an act involves some power or authority to control the act to be done, and it is now settled that the permission contemplated by this sub-section is a permission relating particularly to the work the performance of which is complained of. "Such a permission is not to be inferred from a merely general authority to use a theatre for the performance of musical works" (*Performing Right Society* v. *Ciryl Theatrical Syndicate* (4)).

(1) (1886) 2 T.L.R., at p. 686.
(2) (1924) 1 K.B. 1.
(3) (1924) 1 K.B. 762.
(4) (1924) 1 K.B., at p. 15, *per Atkin* L.J.

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Gavan Duffy J. Starke J.

In the case before the Court the City of Adelaide, by an arrangement which was reduced to writing, let the Town Hall, Adelaide, to J. C. Williamson Ltd. on various days for the purpose of vocal concerts by one Joseph Hislop. At two of these concerts Hislop sang a song styled " I heard you singing," the copyright whereof is vested in the plaintiff, the Australasian Performing Right Association Ltd. The letting of the Town Hall for vocal concerts by Hislop does not relate particularly to the performance of this song and does not, therefore, establish any permission on the part of the Corporation of the City of Adelaide to the use of its Town Hall for its performance. It is said, however, that this permission should be inferred because when the Corporation learned that the performance was about to take place it did nothing. Mere inactivity or failure to take some steps to prevent the performance of the work does not necessarily establish permission. Inactivity or " indifference, exhibited by acts of commission or omission, may reach a degree from which an authorization or permission may be inferred. It is a question of fact in each case what is the true inference to be drawn from the conduct of the person who is said to have authorized the performance or permitted the use of a place of entertainment for the performance complained of " (*Performing Right Society* v. *Ciryl Theatrical Syndicate* (1)). The conduct of the Corporation must, therefore, be examined. It was informed by the plaintiff that the song in which it claimed copyright would be sung by Hislop at the Town Hall. By clause 16 of the letting agreement it was provided : " Notwithstanding that the engagement of the hall or any room may have been duly entered into in accordance with these conditions, and that the rent and deposit may have been paid, it shall be in the power of the Town Clerk, should he in the exercise of his judgment see fit, to cancel the letting and direct the return of the rent and deposit (or such portion of the rent as may cover the unexpired portion of hire) to the hirer, who hereby agrees in that case to accept the same and to be held to have consented to such cancellation, and to have no claim by law for loss or damage in consequence thereof." Despite the notice given to the Corporation, it neither exercised this power nor took any step to induce the hirer to prevent the performance. Now, the clause does

(1) (1924) 1 K.B., at p. 9, *per Bankes* L.J.

not give the Corporation any control over J. C. Williamson Ltd. or Hislop or over concerts given by them in the Town Hall: all it authorizes is a termination of the contractual relationship constituted by the letting agreement. The failure to prevent that which a man can legally prevent may be evidence of his consent to its coming into, or continuing in, existence; but no inference of consent should be drawn against one who having no such right remains quiescent and declines to alter his legal relations in order to acquire such a right. The question whether the Corporation permitted the Town Hall to be used for its private profit was not argued, and that question must, therefore, be reserved.

The appeal should be allowed and the action dismissed.

Appeal allowed.

Solicitors for the appellant, *E. J. Cox & Son*, Adelaide, by *J. Woolf*.

Solicitors for the respondent, *Symon, Mayo, Murray & Cudmore*, Adelaide, by *Gillott, Moir & Ahern*.

B. L.