Dist Austell Pty Ltd v Comr of State Taxation (WA) 20 ATR 1139
Appl SA Brewing Holdings Ltd v Baxt 87 ALR 134
Cons Healley v Tasmanian Racing & Gaming Commission (1977) 137 CLR 487
Foll Buffalo Corp v Leone (2001) 40 ACSR 327
Appl Sin v Nirvana Pty Ltd (2000) 30 SR(WA) 11

[HIGH COURT OF AUSTRALIA.]

COWELL . . . . . APPELLANT;
PLAINTIFF,

AND

THE ROSEHILL RACECOURSE COMPANY LIMITED . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1936-1937.

SYDNEY, 1936, *Nov.* 17-19.

1937, *April* 22.

Latham C.J., Starke, Dixon, Evatt and McTiernan JJ.

Contract—Licence—Racecourse—Permission to view races—Revocation of licence—Forcible removal of spectator who had paid for admission—Assault—Damages—Equitable rights—Equitable pleadings.

Practice (N.S.W.)—Pleading—Equitable replication—Common Law Procedure Act 1899 (N.S.W.), (No. 21 of 1899), secs. 95, 97.

The appellant brought an action at common law against the respondent for damages for assault. The defence was that the appellant was trespassing on the respondent's land and that the respondent's servants and agents requested him to leave the land, which he refused to do, and the respondent's servants and agents thereupon removed him, using no more force than was necessary for that purpose, and that that removal was the alleged assault. The appellant, for reply on equitable grounds, said that the respondent was conducting a race meeting on the land and that in consideration of the appellant paying four shillings the respondent promised to allow him to remain on the racecourse and view the races, gave him leave and licence to enter and remain on the racecourse for that purpose and promised not to revoke the licence; that the appellant paid four shillings but the respondent, in breach of the promise alleged, revoked the leave and licence and assaulted the appellant in ejecting him from the racecourse. The respondent demurred to this pleading.

Held, by the whole court, that the licence, although given for value, did not create a proprietary interest in the land, but created a contractual right only,

H. C. OF A. 1936-1937.

COWELL v. ROSEHILL RACECOURSE CO. LTD.

and was revocable at common law; and (*Evatt* J. dissenting) that equity did not preclude the defendant from effectively revoking the licence or relying upon its revocation. Therefore there must be judgment for the respondent on the demurrer.

Wood v. *Leadbitter*, (1845) 13 M. & W. 838; 153 E.R. 351, followed.

Naylor v. *Canterbury Park Racecourse Co. Ltd.*, (1935) 35 S.R. (N.S.W.) 281; 52 W.N. (N.S.W.) 82, approved.

Hurst v. *Picture Theatres Ltd.*, (1915) 1 K.B. 1, not followed.

The circumstances in which a replication on equitable grounds may be pleaded under sec. 97 of the *Common Law Procedure Act* 1899 (N.S.W.) discussed.

Decision of the Supreme Court of New South Wales (Full Court) affirmed.

APPEAL from the Supreme Court of New South Wales.

In an action brought in the Supreme Court of New South Wales, the plaintiff, Albert Boesenberg Cowell, claimed from the defendant, the Rosehill Racecourse Co. Ltd., the sum of £5,000 as damages for an assault alleged to have been committed upon him by the defendant's servants and agents.

By its third plea the defendant pleaded that at the time of the alleged assault the plaintiff was trespassing on certain land owned by the defendant and that the defendant's servants and agents requested him to leave the land, which he refused to do, and the defendant's servants and agents thereupon gently laid hands upon him in order to remove him from the land doing no more than was necessary for that purpose and that this was the alleged assault.

For a second replication the plaintiff for a reply on equitable grounds as to the defendant's third plea said " that on the day of the committing of the grievances alleged in the declaration the defendant was about to conduct and was conducting a certain race meeting at which horse races were to be and were run on the said land under the control and management of the defendant and thereupon in consideration of the sum of four shillings paid by the plaintiff to the defendant the defendant promised the plaintiff that it would permit and allow the plaintiff to enter upon the said land and to attend at the said race meeting and remain on the said land and view all of the said horse races to be run thereat and for the consideration aforesaid the defendant gave to the plaintiff leave and licence to enter upon the said land and there remain continuously during the period of the said race meeting for the purpose of viewing the said

horse races and until the conclusion of the said race meeting and for the consideration aforesaid the defendant also promised the plaintiff that it would not during the period of the said race meeting and before the conclusion thereof revoke the said licence; and the plaintiff duly paid to the defendant the said sum of four shillings and entered upon the said land pursuant to the terms of the agreement between the plaintiff and the defendant hereinbefore alleged and the said leave and licence and not otherwise and for the purposes hereinbefore mentioned and all conditions were fulfilled and all things happened and all times elapsed necessary to entitle the plaintiff pursuant to and under the terms of the agreement and the said leave and licence to remain upon the said land for the purposes aforesaid and to entitle the plaintiff to a performance by the defendant of its said promises; and the plaintiff having entered upon the said land continuously remained thereon until the revocations hereinafter alleged pursuant to and under the terms of the said agreement and the said leave and licence and not otherwise and for the purposes thereof and not otherwise; yet the defendant during the period of the said race meeting and before the conclusion thereof in breach of its said promise revoked the said licence and the plaintiff remained upon the said land after such revocation but whilst the said race meeting was in progress and before the conclusion thereof which is the trespass by the plaintiff alleged in the defendant's said plea whereupon the defendant by its servants and agents committed the trespass alleged in the declaration for the purpose of ejecting and removing the plaintiff from the said land."

Upon a demurrer by the defendant to this replication the Full Court of the Supreme Court held that the case was covered by the decision of that court in *Naylor* v. *Canterbury Park Racecourse Co. Ltd.* (1), and entered judgment for the defendant in demurrer.

From that decision the plaintiff appealed to the High Court.

Teece K.C. (with him *Amsberg*), for the appellant. The distinction between law and equity still prevails in New South Wales, and the question is whether in these circumstances an equitable plea would be allowed in a court of law. This depends upon the question

(1) (1935) 35 S.R. (N.S.W.) 281; 52 W.N. (N.S.W.) 82.

H. C. OF A. 1936-1937.

COWELL v. ROSEHILL RACECOURSE CO. LTD.

whether before the introduction of an equitable plea the court of equity would have granted to the appellant an injunction against the respondent setting up the plea in a court of law. The reasons given for the decision in *Naylor* v. *Canterbury Park Racecourse Co. Ltd.* (1) are erroneous; therefore that decision should be overruled. The real test is not the validity of an equitable replication but whether the court of equity would grant an injunction against the equity of the plea. The decision in *Hurst* v. *Picture Theatres Ltd.* (2) applies, notwithstanding the fact that the *Judicature Act* is not in force in New South Wales. That Act is only as to procedure; it does not alter rights. This case does not involve any attack on *Wood* v. *Leadbitter* (3). That case was decided before the *Judicature Act* came into force, and also before the introduction of equitable pleas. To succeed at common law all that a plaintiff has to establish is that a court of equity will grant an absolute and unconditional injunction restraining the defendant from setting up an equitable plea. The law as stated in *Stephen's Principles of Pleading*, 6th ed. (1860), at pp. 194-196, is supported by a number of decisions including *Wood* v. *Dwarris* (4), *Vorley* v. *Barrett* (5), *O'Rourke* v. *Commissioner for Railways* (6) and *Redmond* v. *Wynne* (7). A parol licence merely to go upon land is revocable at law, and does not confer any right upon a licensee, other than an action founded on breach of contract if there has been an agreement, either express or implied, not to revoke the licence (*Wood* v. *Leadbitter* (3)). In *Vaughan* v. *Hampson* (8) which, on this point, appears to have been the first case decided after the *Judicature Act*, it was not expressly put on equitable grounds. The word "interest" was not used there in a proprietary sense as in *Wood* v. *Leadbitter* (3).

[EVATT J. referred to *Lowe* v. *Adams* (9).]

Hurst's Case (2) is a clear authority of the Court of Appeal that the plaintiff in that case would, before the *Judicature Act*, have obtained an injunction from the Court of Chancery restraining the

(1) (1935) 35 S.R. (N.S.W.) 281; 52 W.N. (N.S.W.) 82.
(2) (1915) 1 K.B. 1.
(3) (1845) 13 M. & W. 838; 153 E.R. 351.
(4) (1856) 11 Ex. 493; 156 E.R. 925.
(5) (1856) 1 C.B. (N.S.) 225; 140 E.R. 94.
(6) (1886) 7 L.R. (N.S.W.) (Eq.) 67.
(7) (1892) 13 L.R. (N.S.W.) 39; 8 W.N. (N.S.W.) 103.
(8) (1875) 33 L.T. (N.S.) 15.
(9) (1901) 2 Ch. 598, at p. 600.

defendant from pleading the plea set up by it in that case. The sound ground upon which that case can be founded is as stated in *J. C. Williamson Ltd.* v. *Lukey and Mulholland* (1), where the principles on which a court of equity does grant an injunction were discussed. The test is not whether equity would revoke the licence, but whether equity would grant an injunction. The fact that *Hurst's Case* (2) was decided after the *Judicature Act* does not render it inapplicable to New South Wales. That Act did not confer new rights; it only confirmed rights previously existing in the courts either of law or of equity (*Britain* v. *Rossiter* (3); *British South Africa Co.* v. *Companhia de Mocambique* (4)). The decision in *Wood* v. *Leadbitter* (5) was good law before the introduction of equitable pleadings, but the introduction of equitable pleadings means that it has to be read in the light of the change in procedure. The licence was not revocable; therefore the appellant was not a trespasser and the assault upon him cannot be justified. The decision in *Hurst's Case* (2) has never been questioned or doubted by any judicial tribunal, and has been accepted or favourably commented upon in *Cox* v. *Coulson* (6); *British Actors Film Co. Ltd.* v. *Glover* (7); *Said* v. *Butt* (8); *Messager* v. *British Broadcasting Co. Ltd.* (9); and *Barnswell* v. *National Amusement Co.* (10), but it has been the subject of unfavourable comment (See article by Sir *John Miles* in *Law Quarterly Review*, vol. 31, p. 217, but compare article by Professor *Winfield*, *Law Quarterly Review* vol. 51, p. 257; *Hanbury*, *Modern Equity* (1935), p. 117; *Holdsworth's History of English Law*, vol. VII., p. 328; and *Cheshire's Modern Law of Real Property*, 3rd ed. (1933) p. 261). The question considered by the court in *Butler* v. *Manchester Sheffield and Lincolnshire Railway Co.* (11) was not one of licence, but was one which arose *ex contractu*. Where there is a negative covenant there is a prima facie right to an injunction (*Doherty* v. *Allman* (12); *McEacharn* v. *Colton* (13); *Elliston* v. *Reacher* (14);

(1) (1931) 45 C.L.R. 282, at pp. 305, 306.
(2) (1915) 1 K.B. 1.
(3) (1879) 11 Q.B.D. 123, at p. 129.
(4) (1893) A.C. 602, at p. 628.
(5) (1845) 13 M. & W. 838; 153 E.R. 351.
(6) (1916) 2 K.B. 177, at pp. 181, 186, 187, 189.
(7) (1918) 1 K.B. 299, at p. 307.
(8) (1920) 3 K.B. 497, at p. 499.
(9) (1928) 138 L.T. 571, at p. 573.
(10) (1915) 23 D.L.R. 615.
(11) (1888) 21 Q.B.D. 207.
(12) (1878) 3 App. Cas. 709, at pp. 719, 720.
(13) (1902) A.C. 104, at p. 107.
(14) (1908) 2 Ch. 374, 665.

H. C. OF A. 1936-1937.

COWELL v. ROSEHILL RACECOURSE CO. LTD.

Halsbury's Laws of England, 2nd ed., vol. 18, p. 15), and the principles on which the court will grant it are as set forth in *J. C. Williamson Ltd.* v. *Lukey and Mulholland* (1). An agreement or a covenant not to revoke a licence is one which should be enforced by a court of equity, especially where, as here, the licence was granted for valuable consideration. Although in a particular matter it may be too late for the court of equity to give substantial relief, it will grant an injunction to restrain the putting in of a defence in a common law action between the parties (*Vorley* v. *Barrett* (2)). The decision in *Hyde* v. *Graham* (3) is not adverse to the appellant. Although the court is not bound by the decisions of the Court of Appeal, it is desirable that the decisions of these two courts should be uniform (*Sexton* v. *Horton* (4)).]

Dudley Williams K.C. (with him *Herron*), for the respondent. It was decided in *Wood* v. *Leadbitter* (5): (*a*) that a grant of a mere licence not coupled with an interest in land is revocable; (*b*) that a grant of a licence coupled with an interest in land is irrevocable so long as the interest in the land continues, e.g., an easement or a leasehold or other recognized legal interest in the land; and (*c*) that at law an interest in land can only be created by deed; therefore, in the absence of a deed an agreement creating an interest in land is a mere licence. Although a licence not coupled with an interest in land is revocable, it is a breach of contract and the licensee is entitled to damages (*Kerrison* v. *Smith* (6)). The law laid down in *Wood* v. *Leadbitter* (5) with respect to the creation of an interest in land is given statutory force in New South Wales by sec. 23B of the *Conveyancing Act* 1919-1932 (N.S.W.). An agreement creating an interest in land was sufficient in equity provided equity would enforce it either directly by specific performance (*Howard* v. *Miller* (7)), or indirectly by injunction (*James Jones & Sons Ltd.* v. *Tankerville* (*Earl*) (8)). What the majority of the court decided in *Hurst's Case* (9) was that the right conferred by the purchase

(1) (1931) 45 C.L.R., at pp. 298 et seq.
(2) (1856) 1 C.B. (N.S.) 225; 140 E.R. 94.
(3) (1862) 1 H. & C. 593; 158 E.R. 1020.
(4) (1926) 38 C.L.R., at p. 244.
(5) (1845) 13 M. & W. 838; 153 E.R. 351.
(6) (1897) 2 Q.B. 445.
(7) (1915) A.C. 318, at p. 326.
(8) (1909) 2 Ch. 440, at pp. 442, 443.
(9) (1915) 1 K.B. 1.

of a ticket to view the performance was a right in the land, but accepting the decision to the full, that could only be a contractual, and therefore an equitable right, and, at the time *Wood* v. *Leadbitter* (1) was decided, enforceable if pleaded in equity. Assuming the correctness of the decision in *Hurst's Case* (2), equity would not have specifically enforced the contract, as found, for want of mutuality. That decision must be read in the light of the *Judicature Act* which is in force in England but not in New South Wales, and assuming its correctness in England, it does not give the appellant the right he is claiming in New South Wales at common law. If proceedings had been taken in the equity court that court would have only granted a conditional injunction and not an absolute or unconditional injunction (*Metropolitan Electric Supply Co. Ltd.* v. *Ginder* (3); *Courage & Co. Ltd.* v. *Carpenter* (4); *Cox* v. *Coulson* (5); *Foley* v. *Classique Coaches Ltd.* (6); *J. C. Williamson Ltd.* v. *Lukey and Mulholland* (7); *Howes* v. *O'Neill* (8)).

[EVATT J. referred to *Peters American Delicacy Co. Ltd.* v. *Champion* (9).]

In *Naylor* v. *Canterbury Park Racecourse Co. Ltd.* (10) the Supreme Court came to the conclusion that, assuming *Hurst's Case* (2) to have been rightly decided, it did not affect the application of the decision in *Wood* v. *Leadbitter* (1) in New South Wales to a sufficient extent to enable the plaintiff to succeed. In *Hurst's Case* (2) the court decided that a contract of this nature would have created an interest in land in England at any time before the *Judicature Act* or otherwise, enforceable in equity just as the right in *James Jones & Sons Ltd.* v. *Tankerville* (*Earl*) (11) was enforceable, but because of the *Judicature Act* that equitable interest in land can be enforced in the King's Bench Division of the High Court of Justice. The licence there before the court was held to be irrevocable only because it was coupled with an equitable interest in land. The material date for determining what the equities are would be the date of the

(1) (1845) 13 M. & W. 838; 153 E.R. 351.
(2) (1915) 1 K.B. 1.
(3) (1901) 2 Ch. 799, at p. 812.
(4) (1910) 1 Ch. 262, at p. 269.
(5) (1916) 2 K.B., at p. 181.
(6) (1934) 2 K.B. 1, at p. 16.
(7) (1931) 45 C.L.R., at pp. 292-294, 299-301, 307-311, 314-320.
(8) (1930) 30 S.R. (N.S.W.) 167; 47 W.N. (N.S.W.) 64.
(9) (1928) 41 C.L.R. 316.
(10) (1935) 35 S.R. (N.S.W.) 281; 52 W.N. (N.S.W.) 82.
(11) (1909) 2 Ch. 440.

H. C. OF A. 1936-1937.

COWELL v. ROSEHILL RACECOURSE CO. LTD.

alleged assault. Before this equitable replication can be successfully pleaded in New South Wales under sec. 95 of the *Common Law Procedure Act* 1899 (N.S.W.), the contract alleged must be one in respect of which, upon the facts pleaded, a court of equity would grant a perpetual and unconditional injunction (*Betts and Louat's Supreme Court Practice* (*N.S.W.*), 2nd ed. (1928), p. 74; *Wodehouse* v. *Farebrother* (1); *Wakley* v. *Froggatt* (2); *Flight* v. *Gray* (3)). The facts alleged in the replication were not such as would entitle the appellant to unconditional and absolute relief in a court of equity; therefore the plea is bad. *Naylor's Case* (4) was correctly decided.

[EVATT J. referred to *Clerk* v. *Laurie* (5).]

The court of equity would never grant an injunction restraining the setting up of a plea. If the appellant wanted any relief in equity in connection with the circumstances of this case he would have to commence an equity suit asking for the appropriate relief, which would be an injunction against the respondent's excluding him from the racecourse; that injunction would be a conditional injunction. The court would only grant an injunction putting him back on the land conditionally on his being of good behaviour. There is no jurisdiction in the equity court against pleading an equitable plea, and there is nothing in *Wood* v. *Dwarris* (6) to the contrary, nor is any assistance on the problem given by *Vorley* v. *Barrett* (7), which decided only that the court could give effect to the equitable replication where the party stated that he had been induced into the agreement by mistake. The decision in *O'Rourke* v. *Commissioner for Railways* (8) was based on fraud, and in *Redmond* v. *Wynne* (9) on the ground that the contract there before the court was void as being against public policy. There is nothing inequitable in the respondent setting up a defence which is a perfectly valid bona fide legal defence.

(1) (1855) 5 E. & B. 277; 119 E.R. 485.
(2) (1863) 2 H. & C. 669; 159 E.R. 277.
(3) (1857) 3 C.B. (N.S.) 320; 140 E.R. 763.
(4) (1935) 35 S.R. (N.S.W.) 281; 52 W.N. (N.S.W.) 82.
(5) (1856) 1 H. & N. 452; 156 E.R. 1278; (1857) 2 H. & N. 199; 157 E.R. 83.
(6) (1856) 11 Ex. 493; 25 L.J. Ex. 129; 156 E.R. 925.
(7) (1856) 1 C.B. (N.S.) 225; 140 E.R. 94.
(8) (1886) 7 L.R. (N.S.W.) (Eq.) 67.
(9) (1892) 13 L.R. (N.S.W.) 39; 8 W.N. (N.S.W.) 103.

[EVATT J. referred to *Jordan, Chapters on Equity in New South Wales* (1921), p. 128.]

This court should refuse to follow *Hurst's Case* (1). In that case the majority of the court took an erroneous view of *Frogley* v. *Earl of Lovelace* (2), and *James Jones & Sons Ltd.* v. *Tankerville (Earl)* (3), and came to a wrong decision; the law was correctly interpreted in the dissenting judgment of *Phillimore* L.J. The distinction between a mere licence and a licence coupled with an interest in the subject matter was discussed in *Malone* v. *Harris* (4). Neither the agreement in this case nor in *Hurst's Case* (1) created an interest in the land (*Frank Warr & Co. Ltd.* v. *London County Council* (5); *Joel* v. *International Circus and Christmas Fair* (6); *Commissioner of Stamp Duties (N.S.W.)* v. *Yeend* (7); *J. C. Williamson Ltd.* v. *Lukey and Mulholland* (8); *Walton Harvey Ltd.* v. *Walker & Homfrays Ltd.* (9); *Wells* v. *Kingston-upon-Hull* (10)). Even a share-farming agreement does not give the grantee an interest in the land (*Hindmarsh* v. *Quinn* (11)). The court in *Cox* v. *Coulson* (12) did not discuss the foundation of the decision in *Hurst's Case* (1), nor does *Messager* v. *British Broadcasting Co. Ltd.* (13) carry the matter any further. A person must have an interest in the land before he can interfere with the possession of its owner. A licence by which a person is entitled to go on to the land to get his goods is to that extent irrevocable (*Cornish* v. *Stubbs* (14)). The decisions in *Wood* v. *Leadbitter* (15) and *Hurst's Case* (1) have been discussed in the *Law Quarterly Review*, vol. 31, p. 217, and *Salmond* on *Torts*, 8th ed. (1934), pp. 263-265. The rule that old decisions of the courts should be followed and not overruled or otherwise disturbed is confined to decisions in respect to conveyancing matters and has no application to matters of the nature now before the court.

Teece K.C., in reply. The only condition imposed by a court of law in respect of the allowing of an equitable replication is that it

(1) (1915) 1 K.B. 1.
(2) (1859) Johns. 333; 70 E.R. 450.
(3) (1909) 2 Ch. 440.
(4) (1859) 11 Ir. Ch. R. 33, at pp. 39, 40.
(5) (1904) 1 K.B. 713, at pp. 720-723.
(6) (1921) 124 L.T. 459, at p. 461.
(7) (1929) 43 C.L.R. 235.
(8) (1931) 45 C.L.R. 282.
(9) (1931) 1 Ch. 145, at pp. 154, 274, 277.
(10) (1875) L.R. 10 C.P. 402, at p. 408.
(11) (1914) 17 C.L.R. 622, at pp. 633, 637.
(12) (1916) 2 K.B. 177.
(13) (1928) 138 L.T. 571, at p. 573.
(14) (1870) L.R. 5 C.P. 334.
(15) (1845) 13 M. & W. 838; 153 E.R. 351.

H. C. OF A. 1936-1937.

COWELL v. ROSEHILL RACECOURSE CO. LTD.

must be satisfied that the court of equity would grant an injunction against the pleading of the plea (*Hunter* v. *Gibbons* (1)). To sustain an equitable plea the pleader must show that he has a right to go to the court of equity to restrain the judgment (*Gee* v. *Smart* (2)). A person is entitled, in some circumstances, to go upon the land of another person even without permission (*Rea* v. *Sheward* (3)).

Cur. adv. vult.

1937, April 22.

The following written judgments were delivered :—

LATHAM C.J. The plaintiff appellant sued the defendant respondent for damages for assault. The defence was that the plaintiff was trespassing on the defendant's land and that the defendant's servants and agents requested him to leave the land, which he refused to do, and the defendant's servants and agents thereupon removed him, using no more force than was necessary for that purpose, and that the said removal of the plaintiff was the alleged assault. The plaintiff, for reply on equitable grounds, said that the defendant was conducting a race meeting on the said land and that in consideration of the plaintiff paying four shillings the defendant promised to allow him to remain on the racecourse and view the races, gave him leave and licence to enter and remain on the racecourse for that purpose and promised not to revoke the licence ; that the plaintiff paid four shillings, but the defendant, in breach of the promise alleged, revoked the leave and licence and assaulted the plaintiff in ejecting him from the racecourse. The defendant demurred to this pleading and the Full Court of the Supreme Court of New South Wales upheld the demurrer, following *Naylor* v. *Canterbury Park Racecourse Co. Ltd.* (4), and ordered that judgment be entered for the defendant. The plaintiff has appealed to this court.

The question which arises in the appeal is whether this court should follow the decision in *Hurst* v. *Picture Theatres Ltd.* (5).

(1) (1856) 1 H. & N. 459, at p. 465 ; 156 E.R. 1281, at p. 1284.
(2) (1857) 8 E. & B. 313, at p. 319 ; 120 E.R. 116, at p. 119.
(3) (1837) 2 M. & W. 424 ; 150 E.R. 823.
(4) (1935) 35 S.R. (N.S.W.) 281 ; 52 W.N. (N.S.W.) 82.
(5) (1915) 1 K.B. 1.

The Full Court of the Supreme Court of New South Wales in *Naylor's Case* (1) refused to apply *Hurst's Case* (2) in New South Wales. The facts pleaded in this case are indistinguishable from those in *Hurst's Case*.

In *Hurst's Case* it was held that *Wood* v. *Leadbitter* (3), even if originally rightly decided, was no longer good law. In *Wood* v. *Leadbitter* it was decided that a mere licence, that is, a permission to do something which without permission would be unlawful, was revocable, whether it was under seal or not, but that a licence coupled with an interest was not revocable. *Kerrison* v. *Smith* (4) shows that where a licence is revoked the actual revocation may (if there be a contract) be a breach of contract for which damages are recoverable. Thus a person ejected from a place of entertainment could in such a case at least get back the price of admission which he had paid. It was not suggested in *Wood* v. *Leadbitter* that the existence of a contract not to revoke the licence made the licence irrevocable in the sense that it could not be effectually (though possibly wrongfully) revoked.

The doctrine of *Wood* v. *Leadbitter* is clear and coherent. If a man creates a proprietary right in another and gives him a licence to go upon certain land in order that he may use or enjoy that right, the grantor cannot divest the grantee of his proprietary right and revest it in the grantor, or simply determine it, by breaking the agreement under which the licence was given. The grantee owns the property to which the licence is incident, and this ownership, with its incidental licence, is unaffected by what purports to be a revocation of the licence. The revocation of the licence is ineffectual. Easements and *profits à prendre* supply examples of interests to which licences to enter and remain upon land may be incidental.

The majority judgment in *Hurst's Case* modified, if it did not reject, the law of *Wood* v. *Leadbitter* by holding that a " right to see " a spectacle was an interest which could be granted so that a licence to go into a theatre or a racecourse to see a play or to witness races was, when given for value, irrevocable because it was a licence coupled with an interest. Further, the majority judgment

(1) (1935) 35 S.R. (N.S.W.) 281 ; 52 W.N. (N.S.W.) 82.
(2) (1915) 1 K.B. 1.
(3) (1845) 13 M. & W. 838 ; 153 E.R. 351.
(4) (1897) 2 Q.B. 445.

H. C. OF A. 1936-1937.

COWELL v. ROSEHILL RACECOURSE CO. LTD.

Latham C.J.

held that, in so far as *Wood* v. *Leadbitter* (1) rested upon the rule that no incorporeal hereditament affecting land can be created or transferred otherwise than by deed, the *Judicature Act* had radically changed the position. The court was now bound to give effect to equitable doctrines and would therefore ignore the absence of a seal and would (as in *Frogley* v. *Earl of Lovelace* (2)) grant an injunction to protect the right granted.

The first ground of the decision, in my opinion, ignores the distinction between a proprietary right and a contractual right. In *Wood* v. *Leadbitter* there was obviously a contractual "interest." The plaintiff had bought and paid for a contractual right to go upon land for the purpose of witnessing a spectacle. But this fact, which was treated as irrelevant in *Wood* v. *Leadbitter*, is made the foundation of the first ground of the judgment in *Hurst's Case* (3). In that case *Buckley* L.J. (4) interpreted "interest" in a sense quite different from that in which the word was used in *Wood* v. *Leadbitter*. The learned judge said that there was a grant of a right to come to see a spectacle. The licence is described as "only something granted to him for the purpose of enabling him to have that which had been granted to him, namely, the right to see." The "right to see" is treated as the "interest" which has been "granted."

It is clear that the learned judge used the word "grant" in a sense very different from that in which it was used in *Wood* v. *Leadbitter*. It was there used in relation to interests in land which were, if they existed at all, clearly proprietary interests. The right to see a spectacle cannot, in the ordinary sense of legal language, be regarded as a proprietary interest. Fifty thousand people who pay to see a football match do not obtain fifty thousand interests in the football ground. A contrary view produces results which may fairly be described as remarkable. The Statute of Frauds would be applicable. A person who bought a reserved seat might be held to have what could be called "a term of hours" in the seat. The "interest" of persons without reserved seats would, if regarded as proprietary interests, be more than difficult to describe. If the interests were held to be incorporeal hereditaments they would be quite new to the law—notwithstanding the strongly established

(1) (1845) 13 M. & W. 838; 153 E.R. 351.
(2) (1859) Johns. 333; 70 E.R. 450.
(3) (1915) 1 K.B. 1.
(4) (1915) 1 K.B., at pp. 5-9.

principle of *Keppell* v. *Bailey* (1). The feat would have been achieved of creating an easement in gross—an easement with a servient tenement, but without any dominant tenement. There is nothing in the majority judgments in *Hurst's Case* (2) to show that these consequences were appreciated when the case was decided. For the reasons mentioned, I cannot regard the transaction of buying a ticket for an entertainment as creating anything more than a contractual right in the buyer against the seller—a right to have the contract performed. For the breach of such a right there is a remedy in damages, but the remedies applicable to the protection of proprietary rights are not legally (or equitably) appropriate in such a case. There is, strictly, no grant of any interest. What is created is something quite different, namely, contractual rights and obligations. In *Wells* v. *Kingston-upon-Hull* (3) *Lord Coleridge* C.J. pointed out the difference between the creation of a proprietary interest in land by a contract relating to the possession or enjoyment of land and the creation of a contractual right to use land under conditions, the owner of land retaining possession and all rights over it. In that case a dock was "let" to a ship-owner for the purpose of repairing a ship, but it was held that no interest in land was created (See also *Frank Warr & Co. Ltd.* v. *London County Council* (4); *J. C. Williamson Ltd.* v. *Lukey and Mulholland* (5); *Commissioner of Stamp Duties (N.S.W.)* v. *Yeend* (6)—cases of rights to sell refreshments in a theatre or on a racecourse).

In my opinion, the first ground upon which *Hurst's Case* was decided (that there was in that case a licence coupled with an interest) cannot be supported.

The second ground of the decision in *Hurst's Case* is based upon the opinion that the plaintiff in *Wood* v. *Leadbitter* (7) failed because he did not have a grant under seal of the right which he claimed. It is true that the absence of a seal was a complete reply, in an action at law, to the contention of the plaintiff that he had an interest in the land upon which a race meeting was being held. But in fact the presence of a seal would not have assisted the plaintiff to establish the impossible proposition that he had an easement in gross. It is

(1) (1834) 2 My. & K. 517; 39 E.R. 1042.
(2) (1915) 1 K.B. 1.
(3) (1875) L.R. 10 C.P. 402.
(4) (1904) 1 K.B. 713.
(5) (1931) 45 C.L.R. 282.
(6) (1929) 43 C.L.R. 235.
(7) (1845) 13 M. & W. 838; 153 E.R. 351.

H. C. OF A. 1936-1937.

COWELL v. ROSEHILL RACECOURSE CO. LTD.

Latham C.J.

true that, as the majority judgments in *Hurst's Case* (1) state, a grant of an interest in land need not, in order to be effective in a court of equity, be made by deed, and that, since the *Judicature Act*, this rule is enforced in all divisions of the High Court in England (*Walsh* v. *Lonsdale* (2)). But this proposition does not justify the assertion that interests in land can, since the *Judicature Act*, be created by simple contract even though, before that Act, they were of such a character that they could not be created by deed as interests in land. *Buckley* L.J. applies to the facts of *Hurst's Case* the statement of *Parker* J. in *James Jones & Sons Ltd.* v. *Tankerville* (*Earl*) (3) that an injunction restraining the revocation of a licence "merely prevents" the defendant "from breaking his contract, and protects a right in equity which but for the absence of a seal would be a right at law, and since the *Judicature Act* it may well be doubted whether the absence of a seal in such a case can be relied on in any court." This statement was made with respect to a proprietary right (a *profit à prendre*) and it is a begging of the question to apply it to a case in which the matter in dispute is whether the alleged interest is such that it can be an interest in land, whether created by deed or not. *Frogley* v. *Earl of Lovelace* (4), which is relied upon in *Hurst's Case*, was a case of an agreement for a *profit à prendre*, an incorporeal hereditament. Thus the second ground for the majority judgments in *Hurst's Case* cannot, in my opinion, be supported. I regard the dissenting judgment of *Phillimore* L.J. as a convincing statement of the true position both at law and in equity.

In New South Wales the *Judicature Act* is not in force, but the *Common Law Procedure Act* 1899, sec. 97, provides that "the plaintiff may, in answer to any plea, reply facts avoiding such plea upon equitable grounds."

In this case the plaintiff relies upon an equitable replication containing an allegation that the defendant for consideration agreed not to revoke the licence to enter and remain upon the racecourse. Whether this replication is good or not depends upon whether such an agreement, if proved, prevents in equity the revocation of the licence in such a sense as to make entirely ineffectual anything

(1) (1915) 1 K.B. 1.
(2) (1882) 21 Ch. D. 9.
(3) (1909) 2 Ch., at p. 443.
(4) (1859) Johns. 333; 70 E.R. 450.

purporting to be a revocation of the licence. Except in *Hurst's Case* (1) there is no authority for the proposition that such a licence cannot be revoked at law in cases where no proprietary interest has been granted. The question is whether there is any principle of equity which prevents the effectual revocation of such a licence even though the revocation be a breach of contract. No authority apart from *Hurst's Case* has been cited to show that this is a principle of equity. Whether the replication is good or bad depends, not upon rules of pleading, but upon whether the facts alleged constitute a good answer in equity to the plea raised by the defendant that the plaintiff was a trespasser. If his licence was effectually revoked, though wrongfully, he was a trespasser, and the removal of him from the racecourse without the use of undue force did not constitute an assault. The plaintiff can escape from the position of being a trespasser only by showing that the licence was not effectually revoked. The only argument to support this proposition is to be found in the contention that the defendant cannot be heard to rely upon his own wrongful act in revoking the licence which he had agreed not to revoke. If the principle to be applied is a principle that the defendant cannot rely upon his own breach of contract, then that principle would surely have been mentioned in the reports of decided cases. No reference, however, has been made to any cases decided upon the basis of this principle.

It is common ground that an equitable replication under the *Common Law Procedure Act* 1899, sec. 97, can be sustained only where the facts pleaded are such that a court of equity would upon the basis of those facts have granted an absolute unconditional and perpetual injunction (See *Stephen's Principles of Pleading*, 7th ed. (1866), at p. 210; *Gee* v. *Smart* (2)).

It is clear that equity would never have decreed the specific performance of a contract to provide an entertainment. Equity would never have granted an unconditional injunction restraining the proprietor of a place of entertainment from excluding from that place a person who had bought a ticket of admission. Any injunction granted would necessarily have been subject at least to the condition

(1) (1915) 1 K.B. 1.
(2) (1857) 8 E. & B., at p. 319; 120 E.R., at p. 119.

H. C. OF A. 1936-1937.

COWELL v. ROSEHILL RACECOURSE CO. LTD.

Latham C.J.

that the plaintiff coming into equity should behave himself with due propriety during the entertainment.

But it is urged that equity would have granted an unconditional and perpetual injunction restraining the defendant from setting up an unconscientious plea, namely, a plea based upon his own wrongful withdrawal of a licence. This argument is suggested in a note to the article of Sir *John Miles* criticizing *Hurst's Case* (1) in the *Law Quarterly Review*, vol. 31, p. 217. In the first place there is no authority to support the contention in such a case as the present case. The real rule is that an equitable defence to a common law action is admissible under the *Common Law Procedure Act* only " where it discloses facts which would entitle the party pleading it to an absolute and unconditional injunction in a court of equity against the judgment which the opposite party might otherwise have obtained at law " (*Stephen's Principles of Pleading*, 7th ed. (1866), at p. 210). If the suggested principle were sound, it is remarkable that it was never advanced as a practical means of avoiding the law as laid down in *Wood* v. *Leadbitter* (2). Secondly, the contention appears to me to be based upon an idea that equity will always do whatever it can to bring about the specific performance of any contract according to its terms. The argument rests upon a vague assumption that equity would, by limiting the pleading in a common law action of a party who had broken a contract, seek to prevent him from merely paying damages for his breach if an injunction against his pleading would prevent him from gaining some " unconscientious " advantage by his breach. There is no such general equitable principle (see per *Pollock* C.B., *Hyde* v. *Graham* (3)). In cases of wrongful dismissal, for example, the only remedy for the breach of contract is to be found in damages. Even though the employer admits the wrongful dismissal, he cannot be ordered to re-employ his former servant. If the servant under an ordinary contract of service sues for wages in respect of a period after dismissal, the employer would never have been restrained from pleading that he had dismissed him, though wrongfully. In such cases—and there are many others, for example, sale of goods and commercial contracts generally—equity left the parties to their remedies at law. The equitable

(1) (1915) 1 K.B. 1. (2) (1845) 13 M. & W. 838 ; 153 E.R. 351.
(3) (1862) 1 H. & C., at p. 598 ; 158 E.R., at p. 1022.

remedies of injunction and specific performance were never applied merely or generally on grounds of unconscientiousness. They would be used to protect proprietary rights, to enforce negative agreements, and, in special cases only, to enforce affirmative agreements (*Doherty* v. *Allman* (1)). These agreements never included contracts to provide an entertainment in a particular place in return for payment. Thus I am unable to accept the contention that equity would at any time have restrained the defendant from pleading the replication in question.

This aspect of the case should be considered in relation to established principles of equity and not in relation to the arguments *ab inconvenienti* which are so prominent in the majority judgments in *Hurst's Case* (2). There are arguments from inconvenience on both sides. The right to see an entertainment is doubtless a valuable right. It is a right for which people are prepared to pay and which they esteem. There are other rights, the exercise of which involves entry upon land, which are still more valuable from a practical point of view. Consider, for example, the case of a servant who is employed for a term to do work upon certain premises. He is wrongfully dismissed. He is then excluded from the premises. His right to earn a living in accordance with a lawful contract is a right at least as important as a right to witness an entertainment. The principle approved in *Hurst's Case* would entitle him to go into and remain upon the premises, although he had been dismissed from his employment, and to obtain damages for assault if he were forcibly removed. Similarly an ordinary building contract enables the building contractor to go upon land for the purpose of conducting building operations so that he can perform his contract and earn his expected profit. This right continues to exist even if the building owner wrongfully repudiates the contract. But the only remedy of the building contractor for an infringement of the right is in damages. If he goes on the land against the will of the owner he may be treated as a trespasser. The adoption of the principle involved in *Hurst's Case* would alter these established rules. Consider further a case where a building devoted to entertainment becomes overcrowded by persons who have bought tickets. This

(1) (1878) 3 App. Cas., at p. 720.

(2) (1915) 1 K.B. 1.

H. C. OF A. 1936-1937.

COWELL v. ROSEHILL RACECOURSE CO. LTD.

Latham C.J.

may happen without any default on the part of the person in control of the building. If, however, the legal position is as stated in *Hurst's Case* (1), it is impossible for anyone (except possibly a constable) to remove any of the persons, either for the safety of the audience as a whole or in order to secure the observance of the law, without subjecting himself to the possibility of numerous actions for assault. It is doubtful whether such consequences were realized in *Hurst's Case*.

On the other hand it might be said that there is an implied condition that the licence to each member of the audience might be revoked in the interests of the safety of the audience or in order to secure the due observance of the law or for some other lawful reason. Such a view really constructs or invents a complicated contract between the parties and it would raise new and rather difficult questions. Why, for example, should A be asked to leave the building rather than B ? Would it be left to the judgment of the controller of the building to determine how many persons should be asked to leave ? In other cases it might be sought to avoid what would be described as an unreasonable extension of *Hurst's Case* by saying that the facts show that the parties intended that the licence should be revocable in certain conditions. I refer again to the case of a dismissed servant. Here, it appears to me, it is difficult to suggest in explicit terms an appropriate condition. It would be necessary to attach to the contract an implied condition that the employer might revoke the implied licence to come upon his premises if at any time he should determine the contract of employment even though he did so wrongfully. Such a view appears to me to be an unreal method of dealing with the position. A much more realistic approach is provided by the application of the simple principle of *Wood* v. *Leadbitter* (2), namely, that no " grant " of any proprietary right, that is, of any *jus in rem*, has been made to the plaintiff. He has simply obtained a contractual right which is enforceable *in personam* by an action for damages.

The denial of this principle will create more difficulties than are thought to be involved in its continued assertion. I agree with

(1) (1915) 1 K.B. 1.

(2) (1845) 13 M. & W. 838 ; 153 E.R. 351.

what *Jordan* C.J. says as to " common sense and practical convenience " in *Naylor's Case* (1).

Hurst's Case (2) has been criticized again and again by learned writers, although it has necessarily been accepted as an authority in Great Britain by subordinate courts (See references given in *Hanbury's Modern Equity* (1935), p. 118). The question, therefore, as it presents itself to me, is whether this court should hold itself bound by *Hurst's Case* for the simple and single reason that it is a decision of the Court of Appeal in England.

In matters affecting title to property, where rights have been paid for and where persons have acted upon the faith of established decisions, it is very desirable that those decisions should be followed, if possible, even though a court not strictly bound by a particular decision should be of opinion that it was wrong. So also in cases affecting mercantile practice. See *Sexton* v. *Horton* (3) where it was also said by *Knox* C.J. and *Starke* J. that unless a decision of the Court of Appeal was manifestly wrong it should be followed. In *Smith* v. *Australian Woollen Mills Ltd.* (4) a decision of the Court of Appeal was not followed because it was held to be inconsistent with established principles. I am of opinion, for the reasons which I have stated, that *Hurst's Case* is manifestly wrong, and that it is not possible to extract from it any general principle which is consistent with well-recognized principles of law. Hard cases may be put on both sides. One cannot but sympathize with the position of a person who is asked to leave a place of entertainment without just cause. On the other hand, there are grave inconveniences involved in the adoption of *Hurst's Case* as sound law, and it may be added that, if the law is not correctly stated in *Hurst's Case*, such a person may successfully avoid indignity by recognizing the law and going quietly.

The decision in *Hurst's Case* has never been considered by the Privy Council or the House of Lords, and in view of my clear opinion that it is a wrong decision I think that it is proper so to hold and to refuse to follow it in this court. In my opinion *Naylor's Case* (5)

(1) (1935) 35 S.R. (N.S.W.), at pp. 286, 287; 52 W.N. (N.S.W.), at pp. 83, 84.
(2) (1915) 1 K.B. 1.
(3) (1926) 38 C.L.R., at p. 244.
(4) (1933) 50 C.L.R. 504.
(5) (1935) 35 S.R. (N.S.W.) 281; 52 W.N. (N.S.W.) 82.

H. C. OF A. 1936-1937.

COWELL v. ROSEHILL RACECOURSE CO. LTD.

was rightly decided, and the Full Court was right in this case in upholding the demurrer. The appeal should be dismissed.

STARKE J. The plaintiff's action was trespass for assault. Plea that the defendant was possessed of certain land, and that the plaintiff was trespassing, whereupon the defendant requested him to leave the land, which he refused to do, and thereupon the defendant removed him from the land, doing no more than was necessary for that purpose. A replication upon equitable grounds was pleaded to this plea. It was as follows :—" The plaintiff for reply on equitable grounds as to the defendant's . . . plea says that on the day of the committing of the grievances alleged . . . the defendant was about to conduct and was conducting a certain race meeting at which horse races were to be and were run on the said land under the control and management of the defendant, and thereupon in consideration of the sum of four shillings paid by the plaintiff to the defendant the defendant promised the plaintiff that it would permit and allow the plaintiff to enter upon the said land, and to attend at the said race meeting, and remain on the said land, and view all of the said horse races to be run thereat and for the consideration aforesaid the defendant gave to the plaintiff leave and licence to enter upon the said land and there remain continuously during the period of the said race meeting for the purpose of viewing the said horse races and until the conclusion of the said race meeting and for the consideration aforesaid the defendant also promised the plaintiff that it would not during the period of the said race meeting and before the conclusion thereof revoke the said licence ; and the plaintiff duly paid to the defendant the said sum of four shillings and entered upon the said land pursuant to the terms of the agreement between the plaintiff and the defendant hereinbefore alleged and the said leave and licence and not otherwise and for the purposes hereinbefore mentioned and all conditions were fulfilled and all things happened and all times elapsed necessary to entitle the plaintiff pursuant to and under the terms of the agreement and the said leave and licence to remain upon the said land for the purposes aforesaid and to entitle the plaintiff to a performance by the defendant of its said promises ; and the plaintiff having entered upon

the said land continuously remained thereon until the revocations hereinafter alleged pursuant to and under the terms of the said agreement and the said leave and licence and not otherwise and for the purposes thereof and not otherwise; yet the defendant during the period of the said race meeting and before the conclusion thereof in breach of its said promise revoked the said licence and the plaintiff remained upon the said land after such revocation but whilst the said race meeting was in progress and before the conclusion thereof which is the trespass by the plaintiff alleged in the defendant's said plea whereupon the defendant by its servants and agents committed the trespass alleged in the declaration for the purpose of ejecting and removing the plaintiff from the said land." To this replication the defendant demurred, and the Supreme Court of New South Wales entered judgment for the defendant in demurrer for the reasons given by it in support of its decision in *Naylor* v. *Canterbury Park Racecourse Co. Ltd.* (1). An appeal from that judgment is now brought to this court. The decision of the Supreme Court is founded upon the well-known case of *Wood* v. *Leadbitter* (2), and the court distinguishes *Hurst* v. *Picture Theatres Ltd.* (3), on the ground that it was based upon the provisions of the *Judicature Acts*, which were not in force in New South Wales—though the court shared the difficulty of *Phillimore* L.J. in *Hurst's Case* (3) in understanding the relevance of the *Judicature Acts* to the matter under consideration.

The critical question on the present appeal is whether *Hurst's Case* was rightly decided. It was a decision of a majority in the Court of Appeal consisting of *Buckley* and *Kennedy* LL.J. (*Phillimore* L.J. dissenting), and it has been accepted as law in England by *Lush* and *McCardie* JJ. in *British Actors Film Co. Ltd.* v. *Glover* (4) and *Said* v. *Butt* (5) respectively, and in Ireland in *David Allen & Sons Billposting Ltd.* v. *King* (6). But it has not escaped the criticism of many learned lawyers (Cf. *Holdsworth's History of English Law*, vol. VII., pp. 327, 328; *Ashburner's Principles of Equity*, 2nd ed.

(1) (1935) 35 S.R. (N.S.W.) 281; 52 W.N. (N.S.W.) 82.
(2) (1845) 13 M. & W. 838; 153 E.R. 351.
(3) (1915) 1 K.B. 1.
(4) (1918) 1 K.B., at p. 307.
(5) (1920) 3 K.B., at p. 499.
(6) (1915) 2 I.R. 213; (1916) 2 A.C. 54.

H C. OF A. 1936-1937.

COWELL v. ROSEHILL RACECOURSE CO. LTD.

Starke J.

(1933), by *Denis Browne*, p. 19 ; *Cheshire's Modern Law of Real Property*, 2nd ed. (1927), pp. 253, 254, 292, 293 ; *Hanbury's Modern Equity* (1935), pp. 117, 118 ; *Gale* on *Easements*, 9th ed. (1916), p. 63). The decision in *Hurst's Case* (1) does not bind this court, but uniformity of decision is desirable. And the decisions of the Court of Appeal may well, I think, be taken as accurately stating the law of England unless some manifest error is apparent in them, or other special circumstances exist. Here we have, at variance with the decision of the Court of Appeal, the dissenting opinion of *Phillimore* L.J. (2), much professional criticism, and the judgment of the Supreme Court of New South Wales in *Naylor's Case* (3), followed in the case now under appeal. In these circumstances, I think this court should enter upon a consideration of the decision in *Hurst's Case* and the reasons given for it. The reasons were two :—

(*a*) The plaintiff had a licence coupled with a grant or interest. At law, a licence to use land, whether given by deed, writing, or parol, coupled with a grant or interest, was irrevocable, provided only, in the case of a licence by parol, that the grant was of a nature capable of being made by parol (*Wood* v. *Leadbitter* (4)). But " what is the sort of interest that must be conferred to make a licence irrevocable " ? (*Taplin* v. *Florence* (5)). It must be an interest in the thing to which the licence extends (6). Or, as *Parker* J. said in *James Jones & Sons Ltd.* v. *Tankerville* (*Earl*) (7), " a licence to enter a man's property is prima facie revocable, but is irrevocable even at law if coupled with or granted in aid of a legal interest conferred on the purchaser, and the interest so conferred may be a purely chattel interest or an interest in realty." Grants of easements, or of profits *à prendre* or the right of taking natural produce or profits from the lands of others, are well-known instances of licences coupled with grants or interests in realty, and are irrevocable. At law, such interests could only be created by deed (*Wood* v. *Leadbitter* (4) ; *Bird* v. *Higginson* (8) ; *Frogley* v. *Earl of Lovelace* (9) ;

(1) (1915) 1 K.B. 1.
(2) (1915) 1 K.B., at pp. 15-20.
(3) (1935) 35 S.R. (N.S.W.) 281 ; 52 W.N. (N.S.W.) 82.
(4) (1845) 13 M. & W. 838 ; 153 E.R. 351.
(5) (1851) 10 C.B. 744, at p. 762 ; 138 E.R. 294, at p. 301.
(6) (1851) 10 C.B., at p. 763 ; 138 E.R., at p. 301.
(7) (1909) 2 Ch., at p. 442.
(8) (1835) 2 A. & E. 696 ; 111 E.R. 267 ; (1837) 6 A. & E. 824 ; 112 E.R. 316.
(9) (1859) Johns. 333 ; 70 E.R. 450.

James Jones & Sons Ltd. v. *Tankerville (Earl)* (1); and see *Webber* v. *Lee* (2). And a licence to enter and take goods upon the lands of the seller is a licence coupled with an interest in personalty, and also is irrevocable (*Wood* v. *Manley* (3); and cf. *Taplin* v. *Florence* (4); *Williams* v. *Morris* (5); *Cornish* v. *Stubbs* (6); *James Jones & Sons Ltd.* v. *Tankerville (Earl)* (1)). On the other hand, it was held that a ticket of admission to a theatre or a racecourse operated as a mere licence justifying the act licenced, but conferring no other interest and therefore was revocable (*Wood* v. *Leadbitter* (7); and cf. *Hill* v. *Tupper* (8)). The reason for the distinction is indicated by *Parker* J. in *James Jones & Sons Ltd.* v. *Tankerville (Earl)* (9): the mere licence is not coupled with any chattel interest or any interest in realty. Or, to use the language of Sir *William Holdsworth* (*Holdsworth's History of English Law*, vol. VII., p. 328), "it is obvious, firstly, that when the court" in *Wood* v. *Leadbitter* "talked of a grant, they meant the grant of some ascertainable property which is capable of being granted, and, secondly, the court itself decided in that case that such a grant must have been validly made, so that if (as in that case) the grant was of an incorporeal right over land which could not be granted without a deed, and no deed was executed, the licence was revocable." The majority of the learned judges in *Hurst's Case* treated a "right to . . . hear . . . or see" on the same footing as a grant of some ascertainable property. But there, I think, lies the fallacy: the licence was not coupled with a grant or interest in any ascertainable property, it was simply a right, subsisting in contract, to see a performance. It was therefore, according to the doctrine of the common law, revocable, though no doubt a breach of the contract would sound in damages (*Kerrison* v. *Smith* (10); *Butler* v. *Manchester, Sheffield and Lincolnshire Railway Co.* (11)). The majority of the learned judges in *Hurst's Case* sought, however, to buttress their decision by reference to the doctrines of equity. Assuming, they suggested, that the plaintiff's

(1) (1909) 2 Ch. 440.
(2) (1882) 9 Q.B.D. 315.
(3) (1839) 11 A. & E. 34; 113 E.R. 325.
(4) (1851) 10 C.B. 744; 138 E.R. 294.
(5) (1841) 8 M. & W. 488; 151 E.R. 1131.
(6) (1870) L.R. 5 C.P. 334.
(7) (1845) 13 M. & W. 838; 153 E.R. 351.
(8) (1863) 2 H. & C. 121; 159 E.R. 51.
(9) (1909) 2 Ch., at p. 442.
(10) (1897) 2 Q.B. 445.
(11) (1888) 21 Q.B.D., at p. 213.

H. C. OF A. 1936-1937.

COWELL v. ROSEHILL RACECOURSE CO. LTD.

Starke J.

interest was incapable of being supported at law upon the footing of *Wood* v. *Leadbitter* (1), still, the ticket issued to the plaintiff conferred on him a good interest in equity, which, but for the absence of a seal, would have been enforceable at law, and since the *Judicature Acts* could it not be said " as against the plaintiff that he is a licensee with no grant merely because there is not an instrument under seal which gives him a right in law " (*Hurst's Case* (2); *Walsh* v. *Lonsdale* (3)). Again the fallacy is, I think, in the assumption that the ticket issued to the plaintiff conferred on him a right to some ascertainable property in equity : it did not do so in equity any more than at law. The relationship created by the issue of the ticket was merely contractual. It was immaterial whether the ticket was under seal or not, for the licence to hear and see the performance was not coupled with any grant or interest in any ascertainable property, either in equity or at law. Consequently, it should follow that the licence to hear and see the performance was revocable.

(*b*) The plaintiff had a licence given for value, coupled with an agreement not to revoke it. That was an enforceable right, and it was a breach of contract to revoke the licence. The replication in the present case expressly alleges that for a certain consideration the defendant " promised the plaintiff that it would not during the period of the race meeting and before the conclusion thereof revoke the said licence." On demurrer, that allegation must be accepted as a fact, however improbable it may be as a matter of proof. It is, of course, true that a court of equity had jurisdiction to restrain the violation of stipulations in contracts. Normally, it so restrained the breach of purely negative stipulations, but exercised a wide discretion in the case of affirmative stipulations (*Doherty* v. *Allman* (4)). But rights in property and contractual stipulations must not be confused. In *Hurst's Case* the plaintiff did not establish any right at law or in equity in any ascertainable property, but at best the breach of a contractual obligation. Assuming that a court of equity had jurisdiction to restrain and would by injunction have restrained such a breach—and cases may be put even of rights

(1) (1845) 13 M. & W. 838 ; 153 E.R. 351.
(2) (1915) 1 K.B., at p. 10.
(3) (1882) 21 Ch. D. 9.
(4) (1878) 3 App. Cas. 709.

"to hear and see performances," for instance, a contract for a box or a seat during a season of opera, in which equity might so act—still, the contract would not create a licence coupled with a grant or interest in any ascertainable property, which is the relevant consideration. The question is not whether a court of equity would grant an injunction for a breach of the contract, but whether an action of trespass is maintainable. Further, as *Ashburner* (*Principles of Equity*, 2nd ed. (1933), p. 19) observes, citing *Cooper* v. *Chitty* (1), "there is no case in the books in which a court of common law held that an action could be maintained for trespass on account of some act of the defendant which was not a trespass at law at the time when it was committed and only became so *ex post facto* if the effect of a decree of specific performance were related back."

Consequently, in my judgment, the decision in *Hurst* v. *Picture Theatres Ltd.* (2) ought not to be accepted in this court as an accurate statement of the law. The judgment of the Supreme Court of New South Wales should, therefore, be affirmed and this appeal dismissed.

DIXON J. The defendant seeks to justify the assault of which the plaintiff complains, as a lawful exercise of force for the purpose of removing the plaintiff from the defendant's racecourse which he refused to leave upon request. The plaintiff alleges that for valuable consideration, viz., the price of admission, the defendant contracted to allow the plaintiff to enter the racecourse and remain and view the races and not to revoke his licence to do so. Do these facts deprive the defendant of its justification?

At common law they would have no effect upon the justification for the alleged tort. And, what is of much importance, they would not do so even if the contract were under seal and took the form of a grant of a right to enter and view the spectacle.

Such a right could not constitute an easement. The acts to which it relates do not form the subject of any class of easement hitherto recognized. But, apart from this consideration, the right is not appurtenant to any tenement. Strangely enough, *Alderson* B. in *Wood* v. *Leadbitter* (3) appears to concede that such a right might

(1) (1756) 1 Burr. 20; 97 E.R. 166.
(2) (1915) 1 K.B. 1.
(3) (1845) 13 M. & W., at p. 843; 153 E.R., at p. 354.

H. C. OF A. 1936-1937.

COWELL v. ROSEHILL RACECOURSE CO. LTD.

Dixon J.

exist as an easement in gross, a concession which has tended to confuse principle. But " it seems not improbable that in the middle of last century the doctrine that a dominant tenement is necessary to the existence of an easement was not so clearly held as it is at the present day " (Sir *John Miles*, *Law Quarterly Review* vol. 31, p. 217n ; cf. *Gapes* v. *Fish* (1)).

Such a right could not constitute a profit *à prendre*, because its subject is not the taking of something capable of ownership, of some material profit of the land (See *Race* v. *Ward* (2)).

It could not constitute a licence coupled with a grant. For it does not purport to confer any interest in any corporeal thing. "A licence to enter a man's property is prima facie revocable, but it is irrevocable even at law if coupled with or granted in aid of a legal interest conferred on the purchaser, and the interest so conferred may be a purely chattel interest or an interest in realty. If A sells to B felled timber lying on A's land on the terms that B may enter and carry it away, the licence conferred is an irrevocable licence because it is coupled with and granted in aid of the legal property in the timber which the contract for sale confers on B (*Wood* v. *Manley* (3) ") (per *Parker* J., *James Jones & Sons Ltd.* v. *Tankerville* (*Earl*) (4)). The licence to go upon the land is incident to the grant and depends upon it. But the purpose must be to take away something which is upon the land or forms part of the soil or otherwise to deal with an ascertainable subject of property. For the licence is irrevocable because it is necessary to the enjoyment or effectuation of a right of property that has been conferred. Thus, if the attempt to confer the proprietary right or interest proves void, the licence subsists but is countermandable (*Carrington* v. *Roots* (5) ; *Wood* v. *Leadbitter* (6)).

A licence which is not coupled with or granted in aid of an interest is revocable at law. It operates as a bare permission to do what would otherwise be an invasion of the licensor's rights. If the permission is terminated, further continuance of the acts it authorized

(1) (1927) V.L.R. 88.
(2) (1855) 4 E. & B. 702, at p. 709 ; 119 E.R. 259, at p. 262.
(3) (1839) 11 A. & E. 34 ; 113 E.R. 325.
(4) (1909) 2 Ch., at pp. 442, 443.
(5) (1837) 2 M. & W. 248 ; 150 E.R. 748.
(6) (1845) 13 M. & W., at p. 845 ; 153 E.R., at p. 355.

becomes wrongful. A licensee does not become a trespasser until he has received notice that the licence is countermanded and until a reasonable time has elapsed in which he may withdraw from the land and remove whatever property he has brought in pursuance of the licence (*Cornish* v. *Stubbs* (1)). But, if he then refuse to leave the premises, he cannot complain of his forcible removal.

" A licence under seal (provided it be a mere licence) is as revocable as a licence by parol " (per *Alderson* B., *Wood* v. *Leadbitter* (2)). Further, a licence is revocable at law notwithstanding an express contract not to revoke it. By revoking it, the licensor commits a breach of contract exposing him to an action of damages *ex contractu*. But the licensee cannot further avail himself of the licence and the licensor is not precluded in an action of tort from relying upon the termination of the licence (*Wood* v. *Leadbitter* (3) ; *Taplin* v. *Florence* (4)). This is in accordance with the general rule of the common law that a landowner's possessory rights cannot be renounced or altered by mere contract. The rights continue to subsist notwithstanding the contract, which operates only to impose obligations and not otherwise to prevent the exercise of rights arising from property.

In *Hurst* v. *Picture Theatres Ltd.* (5) after describing how the plaintiff, who had been ejected from a picture theatre, had duly paid for his admission " to enjoy the sight of a particular spectacle " *Buckley* L.J. said :—" That which was granted to him was the right to enjoy looking at a spectacle, to attend a performance from its beginning to its end. That which was called the licence, the right to go upon the premises, was only something granted to him for the purpose of enabling him to have that which had been granted him, namely, the right to see. He could not see the performance unless he went into the building. His right to go into the building was something given to him in order to enable him to have the benefit of that which had been granted to him, namely, the right to hear the opera, or see the theatrical performance, or see the moving pictures as was the case here. So that here there was a licence coupled with a grant. If so, *Wood* v. *Leadbitter* does not stand in the way at all.

(1) (1870) L.R. 5 C.P. 334.
(2) (1845) 13 M. & W., at p. 845 ; 153 E.R., at p. 354.
(3) (1845) 13 M. & W. 838 ; 153 E.R. 351.
(4) (1851) 10 C.B. 744 ; 138 E.R. 294.
(5) (1915) 1 K.B., at p. 7.

H. C. OF A. 1936-1937.

COWELL v. ROSEHILL RACECOURSE CO. LTD.

Dixon J.

A licence coupled with a grant is not revocable." With all respect to his Lordship, this statement entirely misconceives what is meant by a licence coupled with a grant. The opportunity of witnessing a performance is not an interest in property ; it is not a tangible thing to be taken away from the land or out of the soil. It is no more than a personal advantage arising from presence at the place where the licence, while unrevoked, authorized the plaintiff to go and remain.

There can, I think, be no doubt that at law the plaintiff could not recover in tort in respect of his forcible expulsion. His remedy in contract does not include damages for the assault. As it was the plaintiff's legal duty to leave the premises after notice that his licence to remain was withdrawn, and as the assault was the lawful consequence of his failure to do so, the assault could hardly be considered a reasonable and probable consequence of the defendant's breach of contract in withdrawing the licence. Perhaps it does not follow that in no circumstances can anything beyond repayment of the price of admission be recovered *ex contractu*. But if there be any cause for dissatisfaction with the common law rule, it arises less from the substance of the rule than from the measure of damages allowed in an action of contract (See *Addis* v. *Gramophone Co. Ltd.* (1)). For the assault, the defendant is under no liability at common law.

Is there a liability in equity ? Does any equity arise out of the plaintiff's situation entitling him to relief against the consequences of the defendant's reliance upon its legal rights ? Would the Court of Chancery have granted an unconditional injunction restraining the defendant from justifying the assault complained of in the plaintiff's action on the ground that he was a trespasser ? If so, in New South Wales the justification pleaded by the defendant is well answered by a replication on equitable grounds setting forth the facts which would entitle the plaintiff to such an injunction. Under the Judicature system the justification would be well answered by a reply setting out facts which formerly would have entitled the plaintiff to an injunction restraining the defendant from relying at

(1) (1909) A.C. 488.

law on such a justification, even if the injunction would have been conditional and not absolute.

But I am unable to believe that any equity exists as a result of which the plaintiff could meet the defendant's justification. This opinion I base upon the substantial ground that a patron of a public amusement who pays for admission obtains by the contract so formed and by acting on the licence it imports no equity against the subsequent revocation of the licence and the exercise by the proprietor of his common law right of expelling the patron. The rights conferred upon the plaintiff by the contract possess none of the characteristics which bring legal rights within the protection of equitable remedies, and the position of the plaintiff at law gives him no title under any recognizable equitable principle to relief against the exercise by the defendant of his legal rights. No right of a proprietary nature is given. The contract is not of a kind which courts of equity have ever enforced specifically. It is not an attempt to confer a right by parol agreement which at law might have been effectually granted by a deed. There is no clear negative stipulation the breach of which would be restrained by injunction.

On the other hand, there is a fugitive or ephemeral purpose of pleasure, mutual undertakings, mostly implied, affecting the behaviour of the parties, and a complete absence of material interest. The purpose is not to enjoy the amenities forming part of the land, but to witness the races and, perhaps, to use the facilities provided for adding to the pleasure and excitement of the spectacle.

Without entering upon an examination of the legal relations to their patrons of the proprietors of a racecourse, it may be assumed that the charge for admission involves some obligations on their part. The racegoer, on his side, is subject to an implied condition that he will behave in an orderly manner and do nothing to hinder or obstruct the proceedings. The implication that the licence to remain upon the course will not be revoked is subject to many conditions. If it is found necessary to suspend the proceeding owing to weather, to the disorderly conduct of a crowd, to some sudden public emergency, or to some other unforeseen event, the contractual right to remain upon the course will be brought to a

H. C. OF A. 1936-1937.

COWELL v. ROSEHILL RACECOURSE CO. LTD.

Dixon J.

premature end. If the individual racegoer behaves in a disorderly, insulting, or objectionable manner, he may be expelled notwithstanding that he has paid for his admission. The nature of such a contract takes it outside the scope of the equitable doctrines regulating the application of the remedies of specific performance or injunction. Except for *Hurst* v. *Picture Theatres Ltd.* (1) no precedent or dictum has been found giving any countenance to the notion that a court of equity would intervene. The reason for this is not the shortness of time in which the licence operates. No doubt if an equitable interest or an equity were considered to arise out of a contract the performance of which was limited only to a few hours, it might be difficult to invoke the jurisdiction of a court of equity in time to secure its performance or prevent a specific breach. But on the hypothesis that the contract fell within the cognizance of equity, the parties would, after the event, be compellable so to deal with the rights and liabilities resulting at law from what had been done as to give effect to the equities. Thus, if it were true that the licence conferred an equitable interest or the contract gave rise to an equity against the revocation of the licence, then although practical considerations might prevent the Court of Chancery from giving effect antecedently to the rights with which its doctrines supposedly invested the licensee, yet *ex post facto* it would not permit the other party to assert at law any right inconsistent with the equitable position. On the hypothesis stated, there would be no difficulty in a court of equity restraining a licensor who had purported to revoke a licence revocable at law but irrevocable in equity from asserting in any legal proceeding, whether by way of defence or otherwise, that he had revoked the licence. Nor do I see why after the event any conditions should be attached to the injunction. In other words, if the hypothesis were sound, I do not see why in New South Wales by means of an equitable replication the same result would not be produced, as would, in that event, ensue under a Judicature system. At the same time, in considering the correctness of the hypothesis, it is impossible to disregard the transient nature of the contractual rights out of which the alleged equity or equitable interest is said to grow. Nor can the conditions attending the licence be

(1) (1915) 1 K.B. 1.

ignored in dealing with the claim that the contract is, except for practical difficulties, susceptible of specific performance. But, in any case, the notion that equitable doctrine would give such a licence any special quality appears to me quite unwarranted. The hypothesis is false and it is for that reason that no precedent can be found for relief in equity in any such case. For that reason too neither under the Judicature system nor under the system prevailing in New South Wales can the defendant's common law justification for the assault be denied to it on equitable grounds.

Yet in *Hurst* v. *Picture Theatres Ltd.* (1) the contrary view was adopted by *Buckley* and *Kennedy* L.JJ., *Phillimore* L.J. dissenting. The explanation lies in a misapprehension by their Lordships as to the effect at common law if the contract for admission had not been by parol but under seal. The use of a seal would in truth have made no difference at all at law. The licence was a bare licence and, therefore, revocable whether granted under seal or by parol. If the licence had been coupled with a grant, it would have been irrevocable at law, if the grant were valid. If the supposed grant had been of an interest in land, as for instance in a standing tree or building (*Lavery* v. *Pursell* (2)), the grant would not have been valid unless under seal. Again, if a grant were made of a profit *à prendre*, it would include a right on the part of the grantee to enter for the purpose of taking the profit. But a profit *à prendre* is an incorporeal hereditament and a deed is necessary to grant it. If a grant of a profit *à prendre* or of a thing annexed to the land were attempted by parol, it would be regarded as a contract to make the grant by deed. If the contract were one enforceable by the remedy of specific performance, as it would be in the second case, and, according to circumstances, might be in the first, then in equity as between the parties the grant would be considered as made. The absence of a grant under seal would not in equity be allowed to affect their substantive rights. Both *Buckley* L.J. and *Kennedy* L.J. treated admission to a picture theatre as if these considerations applied to it. They based their judgment on the view that an agreement had been made for consideration for the acquisition of a right which at law could

(1) (1915) 1 K.B. 1.

(2) (1888) 39 Ch. D. 508, at p. 516.

H. C. OF A. 1936-1937.

COWELL v. ROSEHILL RACECOURSE CO. LTD.

Dixon J.

be conferred only by deed. *Buckley* L.J. cited *Frogley* v. *Earl of Lovelace* (1); *James Jones & Sons Ltd.* v. *Tankerville (Earl)* (2), both of which related to profits *à prendre*. He and *Kennedy* L.J. were, I think, misled by the references by *Alderson* B. in *Wood* v. *Leadbitter* (3) to the absence of a deed. They did not perceive that these references were based on the concession he made that the right to go upon the racecourse might have been the subject of an easement. This concession was, as we would now think, quite without foundation. But in it can be discerned the real source of a misunderstanding which operated through *Frogley* v. *Earl of Lovelace* (1) to lead the Court of Appeal into the very remarkable confusion of principle which appears in *Hurst* v. *Picture Theatres Ltd.* (4). In that case there was no contract to which the remedy of specific performance applied, there was no grant to which the licence was incident, no attempted grant of any interest in land requiring a seal and no profit *à prendre*. There was a bare licence revocable whether under seal or not. Yet it was held that there was a licence coupled with an interest and, in any case, that there was a contract for a licence which, if granted under seal, would be irrevocable. I think that we ought not to follow the decision. The errors upon which it is founded are fundamental and it is impossible to support it on any other grounds. To treat it as law, is to introduce into a coherent and well settled body of legal doctrine a source of confusion the consequences of which cannot be foreseen.

The decision has commended itself to some as substantially just in the result and to others as a development of a liberalizing kind. I think there is much to be said against the result in point of policy and, except that it may establish an otherwise unknown head of equity, I see nothing liberalizing in it. But it supplies an example of *Bacon's* observations upon innovations :—" It is true that what is settled by custom, though it be not good, yet at least it is fit; and those things which have long gone together, are as it were confederate within themselves; whereas new things piece not so well; but, though they help by their utility, yet they trouble by their

(1) (1859) Johns. 333; 70 E.R. 450.
(2) (1909) 2 Ch. 440.
(3) (1845) 13 M. & W. 838; 153 E.R. 351.
(4) (1915) 1 K.B. 1.

inconformity." It is because the decision tends to destroy the "confederacy" of principles and "corrupteth the fountain," not merely the stream, that I think that, although a decision of the Court of Appeal, we ought not to follow it. For the same reason it has provoked the criticism of many eminent writers.

The decision is condemned by Sir *William Holdsworth*, who says: "Unfortunately a desire to do substantial justice has recently led the Court of Appeal to disregard the rule that a grant must be the grant of some ascertainable property, and, in consequence, both to make a wholly new extension of the equitable modification of the legal rule, and to cast unfortunate and undeserved doubts upon the principles laid down in *Wood* v. *Leadbitter* (1)" (*Holdsworth's History of English Law*, vol. VII., p. 328). The editor of *Ashburner's Equity*, 2nd ed. (1933), p. 19, says that the decision "appears to give to a party in an action relief which he could not have obtained under the old dual procedure." This, of course, means that it depends upon a previously unknown equity. Mr. *Hanbury*, in his work, *Modern Equity* (1935), pp. 117, 118, gives it as an example of spurious equities and says that it "has been subjected to more criticism than has been the fate of any other decision of the present century." His discussion of the decision contains references to the chief writers who have condemned or commended it. He ends his examination of the decision with the statement:—"The decision is approved of in *Allen* v. *King* (2), where it was not, however, strictly necessary to express an opinion upon it. But it cannot but have repercussions on other established legal and equitable doctrines which will lead to situations of extreme difficulty." The decision is, indeed, approved in the case cited, but only in the Irish Court. In the House of Lords the argument of the appellant, which was based upon it, was rejected and, as it appears to me, in a manner consistent only with the view that a licence of a much more enduring nature than that to be present at a spectacle gave no interest legal or equitable in the land and did not bind those who took the land with notice. See the argument (3) and

(1) (1845) 13 M. & W. 838; 153 E.R. 351.
(2) (1915) 2 I.R. 213; (1916) 2 A.C. 54.
(3) (1916) 2 A.C., at p. 57.

H. C. OF A. 1936-1937.

COWELL v. ROSEHILL RACECOURSE CO. LTD.

Dixon J.

the opinions of Lord *Buckmaster* (1) and Lord *Loreburn* (2). The opinions contain no reference to *Hurst* v. *Picture Theatres Ltd.* (3), which is perhaps significant in view of the judgments below and the argument. Dr. *Cheshire* considers that neither the reasoning nor the conclusion in *Hurst* v. *Picture Theatres Ltd.* can be supported (*Cheshire's Modern Law of Real Property*, 3rd ed. (1933), pp. 261, 301, 302). In a learned paper Sir *John Miles* gave convincing reasons against its soundness (*Law Quarterly Review*, vol. 31, p. 217).

In the United States the Supreme Court and most other courts have adhered steadily to the principle that a ticket of admission to a place of amusement does no more than confer a contractual right and imports a licence and gives no proprietary right, legal or equitable. For the amusement proprietor to require the ticket holder to leave without justification is a breach of contract for which he may recover damages. But the American doctrine is that of the English common law, namely, that, notwithstanding the contract, the licence remains revocable. In spite of the breach of contract involved, the licence is effectually revoked and the ticket holder cannot complain of assault if he refuses to leave and is forcibly removed, that is, if no undue violence is used. It does not appear to have occurred to any one in America that an equity might be discoverable entitling the ticket holder to an injunction against revocation of the licence and expulsion from the place of entertainment, or, if he brought an action for assault, to an injunction restraining the defendant from justifying on the ground that the ticket holder had become a trespasser because the licence was revoked. Perhaps the decision of the Supreme Court of Massachusetts in *Burton* v. *Scherpf* (4) may be regarded as the leading authority. It was an action for assault and battery brought by a coloured man who, because of his colour, had been forcibly ejected from a public concert, although he had bought a ticket. Without contesting the general proposition that a licence to enter upon land may commonly be revoked at any time before the purpose for which it is given is accomplished, it was claimed on his behalf " that as the contract under which the licence was derived was either wholly or in part executed, and as he was in the actual enjoyment of the privilege

(1) (1916) 2 A.C., at p. 61.
(2) (1916) 2 A.C., at p. 62.
(3) (1915) 1 K.B. 1.
(4) (1861) 1 Allen 133; 79 Am. Dec. 717.

conferred upon him at the time when the defendant undertook to revoke it, the right of revocation was lost, and could no longer be asserted" (1). After distinguishing between bare licences which are revocable, and licences coupled with a grant or arising from a sale of property to be taken and carried from the land where it is situated, which are irrevocable, and referring to American and English cases, including *Wood* v. *Leadbitter* (2), the court concluded that the plaintiff had a mere licence which was revocable and revoked. "Upon his refusal to leave the hall to which his ticket gave him admittance, the defendant had a lawful right to remove him. For such removal, an action of trespass cannot, upon the facts reported, be maintained. He may have a remedy in another form of action for breach of the contract, but that cannot affect the decision of the present case" (3).

When the Supreme Court of the United States gave its authority to the rule it spoke through Mr. Justice *O. W. Holmes*. He described the argument as hardly going "beyond an attempt to overthrow the rule commonly accepted in this country from the English cases, and adopted below, that such tickets do not create a right *in rem*." He said:—"We see no reason for declining to follow the commonly accepted rule. The fact that the purchase of the ticket made a contract is not enough. A contract binds the person of the maker but does not create an interest in the property that it may concern, unless it also operates as a conveyance. The ticket was not a conveyance of an interest in the race track, not only because it was not under seal but because by common understanding it did not purport to have that effect. There would be obvious inconveniences if it were construed otherwise. But if it did not create such an interest, that is to say, a right *in rem* valid against the landowner and third persons, the holder had no right to enforce specific performance by self-help. His only right was to sue upon the contract for the breach. It is true that if the contract were incidental to a right of property either in the land or in goods upon the land, there might be an irrevocable right of entry, but when the contract stands by

(1) (1861) 79 Am. Dec., at p. 719.
(2) (1845) 13 M. & W. 838; 153 E.R. 351.
(3) (1861) 79 Am. Dec., at pp. 720, 721.

H. C. OF A. 1936-1937.

COWELL v. ROSEHILL RACECOURSE CO. LTD.

Dixon J.

itself it must be either a conveyance or a licence subject to be revoked" (*Marrone* v. *Washington Jockey Club* (1)). See further *Meisner* v. *Detroit, Belle Isle and Windsor Ferry Co.* (2) where the distinction between the position of common carriers and amusement proprietors is discussed, and *Johnson* v. *Wilkinson* (3).

In my opinion the judgment of the Supreme Court delivered by *Jordan* C.J. in *Naylor* v. *Canterbury Park Racecourse Co. Ltd.* (4) is right. I go further than he did, because he leaves open the question whether *Hurst* v. *Picture Theatres Ltd.* (5) may find a justification under the Judicature system. I hold that it cannot.

The appeal should be dismissed with costs.

EVATT J. This is an appeal from the Supreme Court of New South Wales.

The question has arisen upon a demurrer by the defendant to a replication of the plaintiff. The plaintiff in his declaration alleged an assault upon him by the defendant. The defendant, in its third plea, justified the assault, alleging that, at the material time, the plaintiff was trespassing upon certain land of which the defendant was possessed, whereupon *molliter manus imposuit.*

The plaintiff's replication (purporting to be on equitable grounds under sec. 97 (1) of the *Common Law Procedure Act* 1899 (N.S.W.)) made the following allegations, which must here be taken as established :—

(i.) The defendant was conducting a race meeting upon the land of which it was possessed.

(ii.) The defendant agreed with the plaintiff (*a*) that, on payment of four shillings by the plaintiff, it would allow the plaintiff to enter the land, and (*b*) that it would allow the plaintiff to remain on the land for the purpose of attending the race meeting and viewing the races, and (*c*) that, until the end of the race meeting, the defendant would not revoke the plaintiff's licence to remain on the land.

(1) (1913) 227 U.S. 633, at pp. 636, 637 ; 57 Law. Ed. 679, at p. 681.
(2) (1908) 154 Mich. 545 ; 129 Am. St. R. 493.
(3) (1885) 139 Mass. 3 ; 52 Am. R. 698.
(4) (1935) 35 S.R. (N.S.W.) 281 ; 52 W.N. (N.S.W.) 82.
(5) (1915) 1 K.B. 1.

(iii.) Performance by the plaintiff of the contract upon his part, payment being followed by entry on the land pursuant to the agreement.

(iv.) Wrongful breach of the agreement by the defendant's purporting to revoke the licence during the period of the race meeting.

The questions raised are, first, whether, in the circumstances I have summarized above, according to the law of England and of every State in Australia where law and equity are administered concurrently, the forcible ejection of the plaintiff by the defendant amounts to an actionable assault; and, second, whether in the State of New South Wales the plaintiff is deprived of his remedy for damages for assault by reason of the fact that, although equitable principles must be taken cognizance of by the Supreme Court of New South Wales on its common law side, this is subject to the requirements of sec. 97 of the *Common Law Procedure Act* (which allows equitable replications), and those requirements have not been observed.

Of course, the first of these two questions is of supreme importance, and the argument of the respondent to this court was a direct challenge to the correctness of the decision of the Court of Appeal in the case of *Hurst* v. *Picture Theatres Ltd.* (1), which was pronounced in July 1914, nearly twenty-three years ago. No doubt that decision, or part of the reasoning for the decision, was subjected to criticism at the hands of some commentators. One writer asserted that *Hurst's Case* was based on a " spurious " equity, but the supposedly spurious coin has become part of the accepted currency of the law. For, though at first a little grudgingly perhaps, its accuracy has long since been recognized by the leading text writers, and works like *Smith's Leading Cases* and *Pollock* on *Torts* and *Salmond* on *Torts* have long declared the law of England in strict accordance with it. I shall refrain from lengthy quotation, but one observation of Professor *P. H. Winfield* should be referred to :—

> " Two minor improvements in the law of trespass may be mentioned. Until the present century, a man might possibly be liable for trespass in two instances which any layman would have considered unjust: first, if he forcibly re-entered his land in pursuance of a right to do so and with no more force than was necessary; and secondly, if he refused to comply with the

(1) (1915) 1 K.B. 1.

H. C. OF A. 1936-1937.

COWELL v. ROSEHILL RACECOURSE CO. LTD.

Evatt J.

arbitrary request of the occupier to leave premises (e.g. a theatre) for admission to which he had paid. The Court of Appeal has rid the law of these *hereditates damnosae*" (*Law Quarterly Review*, vol. 51, p. 257).

Why should this court not follow *Hurst's Case* (1) ? So far as I can ascertain, it has always been regarded as declaring the law of England by the Courts of the Dominions and of Ireland before the establishment of the Irish Free State. For instance, in *Heller* v. *Niagara Racing Association* (2), *Hodgins* J.A., of the Ontario Appellate Division said :—

> "It appears to be settled law in England that a licence granted by the sale of a ticket includes a contract not to revoke the licence arbitrarily, which contract entitles the purchaser to stay and witness the whole performance, provided he behaves properly and complies with the rules of the management, and that this licence and agreement, if given for value, is an enforceable right (*Hurst* v. *Picture Theatres Ltd.* (3)). There is no reason why this court should not adopt what seems to be a most reasonable view, having regard to modern conditions."

Later, *Ferguson* J.A. said that *Hurst's Case*

> "had been followed in numerous cases in England and in this country (See *Cox* v. *Coulson* (4) ; *British Actors Film Co. Ltd.* v. *Glover* (5) ; *Said* v. *Butt* (6) ; *Hubbs* v. *Black* (7) " (8).

In the case of *Sexton* v. *Horton* (9), decided by this court ten years ago, it was stated by *Knox* C.J. and *Starke* J. that

> "unless some manifest error is apparent in a decision of the Court of Appeal, this court will render the most abiding service to the community if it accepts that court's decisions, particularly in relation to such subjects as the law of property, the law of contracts, and the mercantile law, as a correct statement of the law of England until some superior authority has spoken."

If this court declines to follow *Hurst's Case* on the present occasion the legal situation created will be most confusing. *Hurst's Case* has been regarded as a binding authority by those courts in the several States of Australia where equity and law are administered concurrently. In future, they will be placed in the dilemma of deciding between a decision of this Court, and a long-established decision of the Court of Appeal. If they follow the decision of this court, an appeal to the Judicial Committee may be brought direct from any of the Supreme Courts of the various States. In England,

(1) (1915) 1 K.B. 1.
(2) (1925) 2 D.L.R. 286, at p. 287.
(3) (1915) 1 K.B., at p. 10.
(4) (1916) 2 K.B. 177.
(5) (1918) 1 K.B. 299.
(6) (1920) 3 K.B. 497.
(7) (1918) 46 D.L.R. 583 ; 44 O.L.R. 545.
(8) (1925) 2 D.L.R., at p. 289.
(9) (1926) 38 C.L.R., at p. 244.

moreover, *Hurst's Case* (1) would certainly be followed, only the House of Lords being at liberty to overrule it. Sec. 74 of the Commonwealth Constitution was devised to preclude or restrict appeals to the Judicial Committee in constitutional cases of Australian concern only. But the prerogative to allow an appeal by special leave was left remaining, so that there might be no contradictory ruling of Empire courts as to the general principles of the common law or of equity. I feel strongly that it is a mistake on the part of this court to proceed to an independent review of the correctness of *Hurst's Case*, and, with all respect, I think the Supreme Court of New South Wales should not have taken liberty to re-examine that decision as it did very recently in *Naylor's Case* (2). As a result of that action, it is *Naylor's Case* (3) which is really under review on the present appeal.

But, if *Hurst's Case* is to be reviewed, I am unable to agree that it was "manifestly erroneous," to use the expression of this court in *Sexton* v. *Horton* (4). In his judgment, *Buckley* L.J. emphasized that the patron of the entertainment had expressly bargained for "the right . . . to attend a performance from its beginning to its end" (5). That being so, it was a very inadequate legal description of the relationship between the parties to say simply that the patron was a licensee upon the theatre proprietor's ground; it was an essential feature of the relationship that, during the currency of the performance, the occupier of the land was bound to refrain from exercising his legal rights as occupier for the purpose of ejecting the patron from the place of entertainment. And it is to be noted that, in the present case, the pleadings specifically allege that it was a definite part of the contract between the parties that the defendant should not exercise its legal power or right to revoke the plaintiff's licence to remain on the racecourse throughout the period of the race meeting.

But, before proceeding to examine certain aspects of the decision in *Hurst's Case*, it is convenient to dispose at once of the second part of the present appeal, and determine whether the *Common*

(1) 1915) 1 K.B. 1.
(2) (1935) 35 S.R. (N.S.W.), at pp. 287, 288; 52 W.N. (N.S.W.), at pp. 83, 84.
(3) (1935) 35 S.R. (N.S.W.) 281; 52 W.N. (N.S.W.) 82.
(4) (1926) 38 C.L.R. 240.
(5) (1915) 1 K.B., at p. 7.

H. C. OF A. 1936-1937.

COWELL v. ROSEHILL RACECOURSE CO. LTD.

Evatt J.

Law Procedure Act, although it allows equitable pleas and replications, does not enable the Supreme Court on its common law side to give effect to *Hurst's Case* (1). I am clearly of opinion that the New South Wales statute can be applied so that, if *Hurst's Case* is to be regarded as good law in England, the plaintiff would be entitled to judgment on the present demurrer. That opinion is, I gather, shared by other members of this court.

There can be no question that *Hurst's Case* decided that, under circumstances closely corresponding to those admitted to exist in the present case, the person forcibly removed from the place of entertainment became entitled to recover damages for assault. In other words, by virtue of the Court of Appeal's application, concurrently, of the principles of common law and of equity, the plaintiff succeeded in an action at law. In New South Wales, sec. 97 (1) of the *Common Law Procedure Act* entitled the present plaintiff to answer the defendant's plea by alleging facts " avoiding such plea upon equitable grounds." Similarly, under sec. 95 (1) of the Act, a defendant at law who would have become entitled to obtain equitable relief against a judgment at common law is given a statutory right to plead the facts showing that he has a right to obtain equitable relief against the enforcement of the common law judgment and to plead such facts at law by way of equitable defence. It is true that, in England, between the passing of the *Common Law Procedure Act* in 1854 and the introduction of the Judicature system some twenty years later, a rule was established in accordance with which equitable pleas and replications were allowed by the courts of common law only where, on the facts there pleaded, a court of equity would have decreed an absolute, unconditional and perpetual injunction (*Bullen and Leake's Precedents of Pleading*, 3rd ed. (1868), p. 568). In the case of *Wood* v. *Copper Miners' Co.* (2), *Jervis* C.J. suggested (in the year 1856) that the rule as to " perpetual, unqualified and continued injunction " was not necessarily applicable to every case of an equitable pleading. But the general rule was applied until the passing of the *Judicature Act*, and it has always been recognized in New South Wales in administering the equitable

(1) (1915) 1 K.B. 1.
(2) (1856) 25 L.J. C.P. 166, at p. 173; 17 C.B. 561, at p. 592; 139 E.R. 1195, at p. 1208.

pleading provisions of the *Common Law Procedure Act.* Of course, the reason for the rule lay in the practical necessities of the case, the common law courts possessing no machinery for doing more than pronouncing judgment either for the plaintiff or for the defendant on specific issues. But, as *Ferguson* J. pointed out of equitable pleas in *Rance* v. *Kensett* (1), " where the issue raised can be effectively dealt with by such a judgment, there is no reason why the plea should not be pleaded."

The present defendant's argument is that the facts admitted by the demurrer do not enable the plaintiff to recover damages for assault, because if, at the time of the plaintiff's ejection from the racecourse, he had applied to the Supreme Court in equity to restrain the revocation of his licence, the Supreme Court would not have granted him an injunction which was " absolute, unconditional and perpetual." This is the gist of the Supreme Court's decision in *Naylor's Case* (2). The argument is that, under the contract between the parties, there was an implied obligation upon the plaintiff to behave himself properly during the progress of the race meeting; therefore an injunction restraining the revocation of the licence would have been subject to the condition that the plaintiff should behave himself properly during the race meeting.

In my opinion this method of argument quite misunderstands the purpose of secs. 95 and 97 of the *Common Law Procedure Act.* Those sections look to the situation as it exists when the proceedings at law are being taken. If *at that time* the Supreme Court in equity would give relief (*a*) to a defendant at law against the enforcement of a common law judgment which was being sought by the plaintiff at law in respect of a good common law claim, or (*b*) to a plaintiff at law against a defendant at law who was setting up a plea contrary to the equities *then* existing between the parties, then the defendant or plaintiff in the common law court was entitled, by the statute, to allege and prove before the court of common law the facts which would have justified the Supreme Court in equity in interposing *its* jurisdiction to restrain the defendant or plaintiff in the common law action from enforcing mere legal rights. In other words, the

(1) (1916) 16 S.R. (N.S.W.) 285, at p. 294; 33 W.N. (N.S.W.) 119, at p. 121.

(2) (1935) 35 S.R. (N.S.W.), at p. 288; 52 W.N. (N.S.W.), at p. 84.

H. C. OF A. 1936-1937.

COWELL v. ROSEHILL RACECOURSE CO. LTD.

Evatt J.

"absolute, perpetual and unconditional injunction" to which the established rule refers is an injunction restraining the bringing of a claim or the setting up of a defence contrary to equitable principles, not restraining some act as at some earlier point of time. *Stephen* points out that an equitable pleading should disclose facts entitling the party pleading to an absolute and unconditional injunction "*against the judgment* which the other party might otherwise have obtained at law" (*Principles of Pleading*, 6th ed. (1860), p. 197; italics are mine). It is clear that the relevant time is the time when the common law action is proceeding.

No doubt, in determining the present existence of an equity to relief against the inequitable use of the common law courts, the court of equity would necessarily have to pay regard to the antecedent transaction between the parties which was entered into prior to the commencement of the action at law. But, none the less, the Supreme Court on its common law side, once seized of the issues raised by equitable pleadings, has to look at the matter from the point of view which the Supreme Court in equity would take if it was hearing the case simultaneously with the common law action, and was placed in possession of all the facts pleaded and proved at common law.

If we apply the principle just elaborated to the present case, it is plain that the argument suggesting that any injunction granted would be conditional upon the plaintiff's behaving himself properly during the race meeting, merely confuses the issue. The relevant time to define the attitude of a court of equity is the time of the proceedings for assault, i.e., here and now. The facts material to the question of intervention by a court of equity have all been pleaded, and they are now before us. It must be assumed that, throughout the race meeting, the plaintiff was *not* guilty of any such improper behaviour or conduct as would have justified the defendant in rescinding the contract between the parties. And the question is whether, by the operation of equitable principles, the equitable replication pleaded avoids the plea. It does avoid the plea if, on the facts, a court of equity should restrain the defendant from pleading that the plaintiff was a trespasser at a time when, according to

Hurst's Case (1), in the eyes of a court of equity he was not a trespasser but the holder of an irrevocable licence to remain on the property. Assuming *Hurst's Case* to be good law, it seems equitable that a court of equity should restrain the defendant at law from pleading that, by effectively revoking what he could not in equity revoke, and by deliberately repudiating his negative undertaking not to exercise his legal right to revoke, he became entitled to treat the plaintiff as a trespasser. Such an injunction, if granted at all, would be, not a conditional, qualified or temporary injunction, but an absolute, perpetual and unconditional injunction, restraining the defendant at law from setting up an obviously inequitable defence (Cf. Professor *Geldart's* note, *Law Quarterly Review*, vol. 31, p. 219, note (i)).

Such an injunction would not only be perpetual, absolute and unconditional according to its terms, but it would leave the present plaintiff in the position at law established by *Hurst's Case*, viz., the position of being successful in his action for damages for assault, for the only defence relied on would be avoided. As an illustration of the fact that no outstanding equities remain between the parties as at the time of the common law action, *Hurst's Case* itself is conclusive. There the judgment was for the plaintiff for the damages caused by an unjustified assault. Nothing else was ordered to be done except that the defendant pay such damages.

Further, even if the court had to consider the question as to the character of the injunction as at the time of the original revocation of the licence, the injunction ordered would still, I suggest, be "absolute, perpetual and unconditional." It would have addressed itself to the contract between the parties and restrained the defendant from "revoking the licence in breach of the contract." It is nothing to the point that the defendant could have lawfully revoked the licence or rescinded the contract on and by reason of the plaintiff's breach of his own obligation to behave himself properly. For such revocation or rescission would not be "in breach of the contract," but would be permissible under the contract. So far as I know, it is not the practice of the equity court, when granting an injunction to restrain a particular breach of a contract containing

(1) (1915) 1 K.B. 1.

H. C. OF A. 1936-1937.

COWELL v. ROSEHILL RACECOURSE CO. LTD.

Evatt J.

a series of mutual promises and forbearances, to make the grant of the injunction conditional upon the continued performance by the plaintiff of his contractual obligations or to so express its order. For instance, when the court grants an injunction based upon the lessor's covenant for quiet enjoyment, it is not necessary to state that the injunction is only to operate so long as the plaintiff, the lessee, continues to pay rent and otherwise perform the covenants on his part. As Lord *St. Leonards* said in relation to covenants as between landlord and tenant,

> "With respect to the negative covenants, if the tenant, for example, has stipulated not to cut or lop timber, or any other given act of forbearance, the court does not ask how many of the affirmative covenants on either side remain to be performed under the lease, but acts at once by giving effect to the negative covenant, specifically executing it by prohibiting the commission of acts which have been stipulated not to be done" (*Lumley* v. *Wagner* (1)).

Therefore, I think it is plain that despite the continued separation of the common law and equitable jurisdictions of the Supreme Court of New South Wales, the introduction of equitable principles into the former jurisdiction by the *Common Law Procedure Act* enables the present plaintiff to succeed in his action at law. The plaintiff in *Hurst's Case* was able to succeed by virtue of equitable principles according to which the defendant's attempt to set up the fact of trespass on land was defeated.

But the question remains, was *Hurst's Case* (2) correctly decided? There are several aspects from which the decision may be regarded. First, it is critical of the strictly legal position laid down in *Wood* v. *Leadbitter* (3). And certainly the judgment of *Dodderidge* J. in *Webb* v. *Paternoster* (4) (quoted *Holdsworth's History of English Law*, vol. VII., p. 328) contains a far more valuable analysis of licences than was given in *Wood* v. *Leadbitter*. The Court of Appeal in 1915 thought it somewhat extraordinary that the rights and liabilities created by a contract to admit to an entertainment conducted publicly and for the profit of the entrepreneur, and perhaps the education or pleasure of the patron, could be treated, even by a court of law, as assimilable to a mere dispensation to the theatre

(1) (1852) 1 DeG.M. & G. 604, at pp. 617, 618; 42 E.R. 687, at p. 693.
(2) (1915) 1 K.B. 1.
(3) (1845) 13 M. & W. 838; 153 E.R. 351.
(4) (1619) 2 Rolle 143, 152; 81 E.R. 713, 719.

patron to commit what otherwise would be a trespass on land. In actual fact, the rights and liabilities are not so assimilable and, in its modern developments, even the common law has recognized the inadequacy of the " bare licence " theory as a description of the relationship between the parties (*Cox* v. *Coulson* (1)).

The main part of the reasoning in *Wood* v. *Leadbitter* (2) was based on the well-known judgment of *Vaughan* C.J. in *Thomas* v. *Sorrell* (3), distinguishing there between licences or " dispensations " (e.g., to come into a man's house), and licences coupled with a grant of property (e.g., a licence to hunt and carry away the deer). It must be conceded that the " grants " intended to be referred to in *Wood* v. *Leadbitter* (a licence " coupled with a grant ") was a grant of some ascertainable property which is capable of being granted (*Holdsworth's History of English Law*, vol. VII., p. 328). It may therefore be admitted that Lord *Wrenbury* went too far in assimilating the right to view an entertainment with the grant of a proprietary right in or over land or chattels.

But, in my opinion, as an application of equitable principles to the complex relationship between entrepreneur and patron, *Hurst's Case* (4) is a convincing decision. As early as 1901, *Cozens Hardy* M.R. suggested that *Wood* v. *Leadbitter* might be of " very doubtful " validity if equitable principles were to be applied to its facts (*Lowe* v. *Adams* (5)). From the point of view of equitable principles, the essence of the judgment of *Buckley* L.J. is to be found in his references to Lord *Parker's* judgment in *James Jones & Sons Ltd.* v. *Tankerville* (*Earl*) (6), and to the passage on page 10 commencing : " There is another way in which the matter may be put." *Buckley* L.J.'s view was (*a*) that a contract giving a licence to enter and remain on land solely for the purpose of viewing an entertainment should be regarded by a court of equity as not subject to arbitrary revocation during the entertainment by a party to the contract in his capacity as occupier of the land, and (*b*) that a court of equity should give efficacy to a contract not to exercise the legal right of revocation of the licence, by restraining the occupier, either from exercising

(1) (1916) 2 K.B. 177.
(2) (1845) 13 M. & W. 838; 153 E.R. 351.
(3) (1674) Vaughan 330, at p. 351; 124 E.R. 1098, at p. 1109.
(4) (1915) 1 K.B. 1.
(5) (1901) 2 Ch., at p. 600.
(6) (1909) 2 Ch. 440.

H. C. OF A. 1936-1937.

COWELL v. ROSEHILL RACECOURSE CO. LTD.

Evatt J.

such legal right, or, at any rate, from subsequently setting up to his own advantage his own breach of contract and his own attempted revocation of the licence.

It is true that the observations of Lord *Parker* quoted by *Buckley* L.J. were not made in a case precisely analogous to that of *Hurst's Case* (1), because a recognized proprietary right, i.e., a "grant" was under consideration in *James Jones & Sons Ltd.* v. *Tankerville* (*Earl*) (2). But *Buckley* L.J. clearly thought that a court of equity should intervene in a case like *Hurst's Case* by restraining the revocation of a licence in breach of contract. No doubt, *Buckley* L.J. dwelt upon that part of the judgment in *Wood* v. *Leadbitter* (3) which emphasized the absence of an instrument under seal; and he indicated that pending the bringing into existence of the necessary deed a court of equity would make short work of such an objection. But, in so doing, *Buckley* L.J. was answering the reasoning of *Alderson* B. so far as it asserted or assumed that the plaintiff in *Wood* v. *Leadbitter* would have succeeded if he had possessed an instrument under seal giving him the right to view the race. It is a fair comment that the critics of *Hurst's Case* can hardly be allowed to set up as against *Buckley* L.J. any error of pure law to be discovered in *Wood* v. *Leadbitter*.

But a broad and just principle of equity appears from the judgments of *Buckley* L.J. and *Kennedy* L.J. to the effect that, although a court of law will still treat the transaction between entertainment proprietor and patron as creating only a revocable licence, a court of equity should regard the licence as irrevocable in all proceedings in which equitable principles have to be recognized. A consequential rule is that a defence to an action of assault that the licence had been duly revoked by the proprietor, though good at law, would be contrary to the equitable principle of irrevocability of licence and the equitable principle should prevail so as to avoid the defence.

It was the contrary view which, according to *Kennedy* L.J., led to "an astonishing conclusion" (at p. 12). He also regarded the contract as creating "an irrevocable right to remain until the

(1) (1915) 1 K.B. 1
(2) (1909) 2 Ch. 440.
(3) (1845) 13 M. & W. 838; 153 E.R. 351.

conclusion of the performance " (at p. 13). I hope it is superfluous to add that neither *Buckley* L.J., nor *Kennedy* L.J., was unaware of the fact that the right to see a theatrical performance was not a proprietary right in the nature of an easement. Indeed, *Kennedy* L.J. said that the plaintiff's " interest," " whether you call it an easement or not, is an interest which I can now acquire in equity by parol " (at p. 14). And he referred to an important passage in *Pollock* on *Torts*, 9th ed. (1912), at p. 390, which I mention below.

Further, the dissenting judgment of *Phillimore* L.J. is of great significance, for he is not unwilling to concede (at p. 18) that equity would give specific performance of the contract to see the entertainment. The main difficulty of *Phillimore* L.J. was that, assuming that equity would intervene, the plaintiff in equity could not necessarily be regarded as having *already* occupied the legal position which springs into existence only *after* he obtains specific performance. In other words, although the licence would be regarded in equity as irrevocable, still, until a court of equity actually pronounced its order, the existing legal relationship between the parties should be deemed to continue. In support of this view *Phillimore* L.J. adopted *Pollock's* suggestion in the passage mentioned above, that the plaintiff might have obtained an injunction, and so have been restored to the enjoyment of his licence, but that, in the meantime, he should be deemed a trespasser. With respect, it is difficult to appreciate the force of the difficulty which alone seemed to prevent *Phillimore* L.J. from concurring. The plaintiff in *Hurst's Case* (1) did not need to invoke the principle of *Walsh* v. *Lonsdale* (2), for the assumption of *Hurst's Case* was that no estate or interest in land was intended to be created by the contract. But equity's intervention in order to *prevent* a party from exercising his legal rights in breach of a contractual obligation is based on broader grounds than the principle of *Walsh* v. *Lonsdale* (2). If, as *Phillimore* L.J. was prepared to admit, a court of equity would have restrained the revocation of Hurst's licence, it could hardly treat the defendant as having improved his position at law solely because, in the nature of things, Hurst was unable to approach a court of equity *before* his forcible removal from the theatre. In other words, if a court

(1) (1915) 1 K.B. 1. (1) (1882) 21 Ch. D. 9.

H. C. OF A. 1936-1937.

COWELL v. ROSEHILL RACECOURSE CO. LTD.

Evatt J.

of equity regarded the licence as irrevocable, why should it allow the wrongdoer, by subsequently saying "I revoked it," to obtain an advantage at law. This view subsequently seemed to commend itself to Sir *F. Pollock*, who said :

> "And is it now possible for a court having equitable as well as legal jurisdiction to treat as rightful in any sense an expulsion which a court of equity would have restrained if a motion could have been made in time ?" (*Law Quarterly Review*, vol. 31, p. 9 ; cf. p. 221).

I think the fallacy in the criticism of *Hurst's Case* (1) lies in the continuous insistence upon discovering a proprietary right as a condition of equitable intervention. Sir *J. C. Miles*, whose criticisms of the decision in *Hurst's Case* have been little more than re-echoed by the later commentators, seemed mainly concerned with "the purely legal grounds of the decision" (*Law Quarterly Review* (1915), vol. 31, pp. 219-221), and was not so ready to deny its validity as an extension of equitable principles ; nor did he seem to consider the equitable question as affected in any way by the supposed difficulty upon which *Phillimore*, L.J. really based his dissent. As a Canadian commentator has recently said, in relation to the theory that a strict "property" interest must be the foundation of the intervention of equitable jurisdiction,

> "the danger in the application of the limitation lies in the circumstance that unenlightened courts are apt to apply it as a limitation of their jurisdiction, except in orthodox property interest cases, even though the situation is one to which the injunctive method is peculiarly appropriate" (*Canadian Bar Review*, vol. 10, p. 175).

In my opinion, the appeal should be allowed, and judgment entered for the plaintiff on the demurrer.

McTIERNAN J. To the appellant's action for assault the respondent pleaded that the appellant was a trespasser on its racecourse and justified the supposed assault as the lawful removal from its land of a trespasser who had had warning to go. The appellant replied on equitable grounds that the respondent for valuable consideration promised to permit him to enter and see all the races which it was conducting or about to conduct on the racecourse and gave him leave and licence to enter and remain there until the conclusion of the races, and promised that it would not before then revoke the

(1) (1915) 1 K.B. 1.

licence, and that the respondent in breach of these promises had him removed from the racecourse.

There is no fusion of law and equity in New South Wales, but the *Common Law Procedure Act* 1899 provides for equitable pleadings in an action at law, (secs. 95 and 97). In its common law jurisdiction the Supreme Court of New South Wales is not empowered to mould its judgment as if it were a decree in equity, and a plea or replication on equitable grounds is followed by the ordinary common law judgment. "Accordingly, it is a settled rule, that an equitable pleading is only admissible where it discloses facts which would entitle the party pleading it to an absolute and unconditional injunction in a court of equity against the judgment which the opposite party might otherwise have obtained at law" (*Stephen's Principles of Pleading*, 6th ed. (1860), p. 197).

The appellant's replication is founded on the assumption that, because of the existence of the contract in the terms alleged, it is inequitable for the respondent to plead that the appellant was a trespasser, and that a court of equity would grant an absolute and unconditional injunction restraining the respondent from pleading this defence to the action. The respondent demurred to the replication. The demurrer challenges the correctness of the assumption on which the replication is based. Its correctness depends upon whether any right which is within the scope of the equitable remedies was violated by the revocation of the licence (Cf. *Hyde* v. *Graham* (1)).

The appellant had become entitled to exercise on the respondent's land a contractual right to see all the races to be run at the race meeting, and to use the facilities, within the contemplation of the contract, which the respondent provided for its patrons. The licence to go and remain on the land was incident to and comprised in this contractual right. The alleged terms of the contract, relating to the giving of the licence and the promise not to revoke it, are pleaded as having been expressed in the contract, but the inclusion of these terms did no more than make explicit what would have been implied in the contract. Whether the appellant exercised this contractual right for profit or pleasure, the advantage which it gave him was not a right *in rem* or an interest in the land or in anything in or

(1) (1862) 1 H. & C. 593; 158 E.R. 1020.

H. C. OF A. 1936-1937.

COWELL v. ROSEHILL RACECOURSE CO. LTD.

McTiernan J.

upon the land. If the appellant had an equity to enjoy the licence for the duration of the race meeting it was not because the licence was coupled with any interest of a proprietary nature.

The effect of the contract was to impose a personal obligation on the respondent not to revoke the licence until the conclusion of the meeting; accordingly, the revocation of the licence was a breach of contract, but it did not amount to the impairment of any proprietary interest of the appellant. The breach of contract gave rise to an action at common law for damages, but the plaintiff has instituted an action for assault.

The replication cannot be sustained as an answer on equitable grounds to the fundamental allegation in the plea, that the appellant was a trespasser, unless equity would by a decree for specific performance or by an injunction enforce the contractual right which the appellant had to go and remain on the racecourse until the conclusion of the meeting. The positive terms of the contract pleaded are not of the class of contractual promises of which a court of equity would decree the specific performance or which it would enforce indirectly by injunction.

The contract pleaded, however, purports to reinforce its positive stipulations by a stipulation in the negative form whereby, as this stipulation is pleaded, the respondent promised not to revoke the appellant's licence to go and remain on the racecourse until the conclusion of the meeting. Equity will in certain cases restrain the breach of a negative covenant and the foundation of the relief in such a case need not be the protection of property. It has been observed that in the replication the stipulation in the negative form is pleaded as an express term of the contract. But this stipulation does not add a new obligation to that contained in the two positive stipulations which are pleaded as preceding it. The obligation imposed by the negative stipulation is equivalent in substance to that expressed in the positive terms of the contract. The stipulation in the negative form does not impose any obligation that is accessory to the respondent's main obligation; it is only verbiage amplifying the expression of the contractual relationship between the parties. In *Davis* v. *Foreman* (1) an application was refused for an injunction

(1) (1894) 3 Ch. 654.

to restrain the breach of a negative clause in a contract providing that an employer would not, except in the case of misconduct or breach of the agreement, require the manager to leave his employ. *Kekewich* J. said that, to his mind, that clause was distinctly equivalent to a stipulation by the employer that he would retain the manager in his employ. He added :—" It is only the form that is negative. If the court comes to the conclusion that that is really the substance of the agreement (which, being an agreement of service, cannot be specifically enforced), is it right, having regard to the line the authorities have taken, to say that merely because the agreement is negative in form an injunction ought to be granted ? To my mind, I should be going distinctly against the last decision in the Court of Appeal if I were to apply the doctrine of *Lumley* v. *Wagner* (1), which is not to be extended, to a case of this character " (2). The same principle was applied by *Eve* J. in *Kirchner & Co.* v. *Gruban* (3).

The substance of the agreement pleaded is that the respondent for valuable consideration permitted the appellant to go upon its racecourse to see all the races to be run at the meeting and to remain there for that purpose until the conclusion of the meeting. That agreement is not of the class which equity will enforce. The stipulation which is in the negative form expressed substantially the same obligation and does not give the appellant any equity to the performance of the promise in specie. In my opinion the contract pleaded created no equity in the appellant which enabled him to say that, in the contemplation of a court of equity, he would not be a trespasser although the respondent assumed to revoke his licence to go on the land and see all the races.

For these reasons the matters pleaded in the replication disclose no ground for asserting that the respondent's plea that the appellant was a trespasser could only be sustained at the cost of violating a right in equity which the appellant had to remain on the racecourse at the time when he was removed.

This conclusion is opposed to the decision of the Court of Appeal in *Hurst* v. *Picture Theatres Ltd.* (4). I share the difficulty of *Jordan*

(1) (1852) 1 DeG.M. & G. 604; 42 E.R. 687.
(2) (1894) 3 Ch., at p. 658.
(3) (1909) 1 Ch. 413.
(4) (1915) 1 K.B. 1.

H. C. OF A. 1936-1937.

COWELL v. ROSEHILL RACECOURSE CO. LTD.

McTiernan J.

C.J. expressed in *Naylor* v. *Canterbury Park Racecourse Co. Ltd.* (1), and of the majority of the members of this court in reconciling that case with principle and applying it to the present case. That decision seems either to have made the anomalous addition of a right arising from contract, but hardly recognizable as a proprietary interest, to the category of property, or to have made an anomalous extension of the relief which is granted by a court of equity for the enforcement of a contractual right.

The judgment of the Supreme Court was, in my opinion, right, and the appeal should be dismissed.

Appeal dismissed.

Solicitor for the appellant, *W. M. Niland.*

Solicitors for the respondent, *Minter, Simpson & Co.*

J. B.

(1) (1935) 35 S.R. (N.S.W.) 281; 52 W.N. (N.S.W.) 82.