EJECTMENT WITHOUT CAUSE FROM A PLACE OF ENTERTAINMENT.

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THE object of this essay is, firstly, to discuss a techincal question of interest, and, secondly, to illustrate a mode of approach in accordance with modern jurisprudential theories. The question is this: If the proprietor of a place of entertainment ejects without reasonable cause (such as disorderly conduct) a patron who has paid for admission can the patron sue the proprietor for damages for assault or only for breach of contract? The method of approach suggested might be called "frankly cryptosociological." Like the ordinary cryptosociological judgment, it looks for a logical "legal" ground, but unlike the majority of such judgments it states frankly the social considerations which first make the search for such logical grounds urgent. This method was used in the celebrated dissenting judgment of Isaacs J. in *Cedzich v. Wright.*[1]

1. *The Problem.*—This matter has been raised in many cases, but has been fully considered in three only—*Wood v. Leadbitter*[2], *Hurst v. Picture Theatres*[3], and *Naylor v. Canterbury Park Racecourse Co.*[4]

In *Wood's* case, decided at Common Law before the Judicature Acts, the plaintiff had been ejected with "reasonable force," after being asked to leave, from a racecourse. He claimed damages for assault. The Court decided that he had not by paying for admission acquired any interest in land; a document under seal would in any case have been required, since his only possible interest would be an incorporeal one. (It is now clear, of course, that no such interest could exist, since it would be in gross and not appurtenant.) Hence the plaintiff had acquired merely a licence to enter. The plaintiff claimed that such licences were irrevocable in two circumstances: firstly, if they were to protect an interest, as in the case of a licence to enter and remove goods bargained and sold, or, secondly, if they were "beneficial licences," as where the plaintiff had given consideration and as in this case. The Court agreed that a licence coupled with an interest was irrevocable, but rejected the second supposed category of irrevocable licences. The contractual element in the case was used only in the argument about the "beneficial licences," otherwise the Court refused to consider the existence of other remedies. Hence the plaintiff's licence had been revocable; on its revocation the plaintiff had become a trespasser and the force used to eject him had been justified. This case was discussed and decided purely on a basis of the law of real property.

In *Hurst's* case, the facts were similar, except that the plaintiff had been ejected from a picture theatre. The Court of Appeal (Buckley and Kennedy L.J.'s, Phillimore L.J. diss.) awarded the

1. 43 C.L.R. at p. 500.
2. 13 M. and W., 838.
3. [1915] 1, K.B. 1.
4. *Sydney Morning Herald*, 21st June, 1935, page 6.

plaintiff damages for assault. The judgment of Kennedy L.J. is obscure, but it is probably correct to say that the following is the *ratio decidendi* of the case: the contract between picture theatre proprietor and patron is one such that a Court of Equity would grant an injunction to prevent the proprietor from committing a breach by ejecting the plaintiff. Hence, since the Judicature Acts the defendant could not be heard to say that he had revoked the licence in breach of his contract; hence he had laid hands on the plaintiff without just cause, and must pay damages for assault. Buckley L.J. also held that the contract conferred on the plaintiff an interest within the meaning of the doctrine of "licences coupled with an interest," so that his licence to enter was irrevocable at common law. Buckley L.J. showed a self-confidence in his opinion, which is ironical in view of the doubts cast on his decision ever since. Phillimore L.J. dissented from both of the arguments of his colleagues.

In *Naylor's* case, decided by the Full Court of the Supreme Court of New South Wales in its Common Law jurisdiction this year, the objections to *Hurst's* case raised by Phillimore L.J. in that case and by lawyers ever since were adopted. The pleadings are instructive. The plaintiff claimed damages for assault. The defendant admitted ejecting the plaintiff from its racecourse by force, but pleaded that he was a trespasser and necessary force had been used. The plaintiff replied that the defendant had contracted with him for 15/- to grant a licence to enter and not to revoke the same, and that the purported revocation of his licence was void. The defendant demurred, saying his revocation of the plaintiff's licence had been effectual though in breach of contract. The Court refused to follow *Hurst's* case. It said that there was neither principle nor authority for Buckley L.J.'s contention that a contract giving a liberty to see an entertainment conferred an interest within the meaning of the doctrine of "licences coupled with an interest." With respect to the effect of the Judicature Acts, it denied that a Court of Equity would protect a contract of this nature, either by specific performance (*Williamson v. Lukey*)[5] or by a perpetual and unconditional injunction (*Hyde v. Graham*).[6] The grounds of such cases are familiar; equity will not interfere at all in complex contracts, where to do complete justice it might be called on to supervise a course of conduct such as a theatrical performance. Hence the revocation of Naylor's licence was effectual, and the force used to eject him was justified.

On the arguments hitherto used in these cases, it is difficult to avoid the conclusion that *Naylor's* case is right and *Hurst's* case wrong.

2. *A Suggested New Approach.*—In *Naylor's* case the Court indicated that it thought its decision from the social point of view a good thing. It considered that the interests of public order demanded that a person asked to leave such a place as a racecourse should not have the legal right to resist ejectment even though the proprietor had in

5. 45 C.L.R. 282 and cases there cited.
6. 1 H. & C., 593.

fact no justification for ordering him off. It is submitted that this is a reversion to feudalism or a landslide to fascism. The police are capable of dealing with public disorder; there is no reason why the property owner should be endowed with their powers, whatever may have been the case in mediaeval England when the law of property came into being or whatever may be the case in Germany under the notorious "Leader Law" of Hitlerism. In *Hurst's* case Buckley L.J. indicated some of the grossly unfair abuses of the power to eject which might arise. It is an anachronism to regard the proprietors of places of public entertainment in the same light as the private citizen in his castle-home. Theatres and racecourses are treated by the law for many purposes as public places; see the definition of "public buildings" in the Health Act,[7] Section 3, and Sections 169-178 of that Act; see also the Theatres Act[7] and the Police Offences Act[7], Sections 169-178. The right of the public to entertainment, particularly in the case of theatres, should be paramount to the regalian powers of property owners. Assuming, then, that plaintiffs in cases such as the above should be able to recover substantial damages and not merely their price of admission, is there any technical reason which would justify a Court in holding that a licence to enter in such cases cannot be arbitrarily revoked?

It is submitted that there is such a reason. It is the maxim "*Nullus commodum capere potest de injuria sua propria.*"—"No man can take advantage of his own wrong."[8] If the proprietor of the racecourse or the theatre is committing a breach of contract in revoking the plaintiff's licence to enter, then he is committing a wrong which he should not be allowed to plead in his own defence, so that the case would stand as if the licence had not been revoked. The problem is to decide whether a breach of contract is a "wrong" within the above maxim.

Holmes devotes lecture VIII of his celebrated "Common Law" to showing that in English law the breach of a contract is a neutral act; that the law of contract is a system of transferring risks, and that legally it is a matter of indifference whether the promisor keeps his promise or breaks it and pays for the privilege of so doing. Also, Phillimore L.J. in *Hurst's* case[9] refers to numerous authorities who have found nothing contradictory in the co-existence of the power to revoke a licence and a liability to pay damages for the breach of a contract not to revoke it. Again in connection with the problem of the revocability of an option, Griffith C.J. said that if options given for a consideration were irrevocable, it was only because they were interpreted as conditional offers, and not because the donor was estopped from alleging that he had revoked such an option.[10]

It is submitted, however, that there is good ground for describing a breach of contract as wrongful. There is no doubt that the

7. Victorian Statutes, 1929.
8. See Broome, Legal Maxims, 9th edit., p. 197 ff.
9. At page 18.
10. *Goldsborough Mort v. Quinn*, 10 C.L.R., at 678-9.

ordinary commercial morality of our time regards it as such. From a historical point of view, the action of *assumpsit* is an action on the case—that is, an action in tort—and based on the well known actions in tort of trespass on the case and deceit on the case. It has been re-asserted recently that the measure of damages in contract and tort is the same in principle.[11] On the question of the irrevocable option, O'Connor and Isaacs JJ. in the case mentioned above, held that the court would not hear the donor of the option say that he had revoked it, and that it was not necessary to rely on the "conditional offer" analysis.[12] Then, again, if the breach of a contract is not specifically a wrongful act, it is difficult to see why the inducement of the breach of a contract is itself an actionable tort. If a promisor has a liberty to break his promise and pay for so doing, then inducing him to do so should be actionable only where there is a malicious conspiracy.[13] Finally, what is the most celebrated type of case in which the maxim with respect to pleading one's own wrong has been applied? It is the following. A lease provides that in the event of the lessee committing certain breaches of his covenants the lease shall become void. The lessee, finding the lease onerous, deliberately commits those breaches and seeks to avoid the lease. The Court will not allow him to plead his own wrong in this way, and unless the lessor chooses to adopt the breaches and avoid the lease accordingly it will continue to be a valid and subsisting lease.[14] The only "wrong" which the lessee commits is a breach of covenant or (in the case of a lease not under seal and not required to be) a breach of contract.

I have stated the above arguments, for the sake of brevity, with an absoluteness which I do not feel. It is submitted, however, that this reasoning is worthy of strenuous presentation in any case which may arise in the future.

[I am indebted for assistance in this matter to Mr. A. Adam, of counsel, and to my classes at Ormond College.]

11. *The Arpad*, 50 T.L.R., at p. 512.
12. 10 C.L.R. at 686 and 691.
13. See *McKernan v. Fraser*, 46 C.L.R. 343; *Hardie and anor. v. Chilton* [1928] 2 K.B. 206, and compare *Jasperson v. Dominion Tobacco Co.* 1923, A.C. 709.
14. Broome, *op. cit.*; *Davenport v. R.*, 3 App. Cas. 115.