REVOCABILITY OF LICENCES

COWELL v. ROSEHILL RACECOURSE CO. LTD. (1937) A.L.R. 273

The long controversy about the cases of *Wood v. Leadbitter*[1] and *Hurst v. Picture Theatres*[2] has now been settled so far as Australia is concerned. It was thought by many that, despite *Hurst's* case, it was correct to say that a licence, whether under seal or not, is always revocable, whether or not the revocation involves a breach of contract, provided that it is a mere licence, not a licence coupled with a valid grant of property; and also that a person buying a ticket of admission for a public entertainment obtains no property interest but only a contractual right. In *Cowell v. Rosehill Racecourse Co. Ltd.* the High Court (Latham C.J., Starke, Dixon and McTiernan JJ., Evatt J. dissenting), upholding a decision of the Supreme Court of N.S.W.,[3] declared this to be the law in Australia, indicating that they considered *Hurst's* case to be "manifestly wrong."

The facts of the case were identical with those in *Wood v. Leadbitter,* viz., the plaintiff, having paid to enter the defendant's racecourse, was told to leave, and, on his refusal to do so, was ejected without undue force by the defendant's servants. The plaintiff brought an action claiming damages for assault, the defence to this claim being that, since the defendant had revoked the plaintiff's licence to be on the land, he (the plaintiff) was a trespasser and accordingly liable to be ejected. In *Hurst's* case it was held, on facts indistinguishable from these, that the plaintiff was entitled to damages for assault, although in *Wood v. Leadbitter* such a remedy was refused.

Wood v. Leadbitter laid down two propositions: (i) A deed is necessary to create any incorporeal interest in land. (ii) A licence is revocable whether it is under seal or not, unless it is a licence coupled with a grant of property; in that case the law will not permit the licence to be revoked so as to defeat the grant.

The majority judgments in *Hurst's* case proceeded on two grounds. The first was that a "right to see" a spectacle is a sufficient grant of property to render a licence with which it is coupled irrevocable. On this ground it was held that the defendant's contention that the assault was justified because the plaintiff had become a trespasser was not a good defence. This ground is expressly rejected in *Cowell's* case, where it was held that the subject-matter of the so-called grant was not a possible subject-matter for a grant at all and that all a purchaser of a ticket for a public entertainment obtains is a contractual right—a right for the breach of which the remedies appropriate to a breach of contract apply, but to which the remedies available for the violation of a proprietary right are wholly inapplicable.

Latham C.J. (p. 276) says: "The first ground . . . ignores the distinction between a proprietary right and a contractual right."

1. 13 M. & W. 844.
2. (1915) 1 K.B. 1.
3. The Supreme Court followed their previous decision in *Naylor v. Canterbury Park Racecourse Co. Ltd.* (1935) 35 S.R. (N.S.W.) 281, in which they had refused to follow *Hurst's* case. In *Cowell's* case the High Court expressly approve the decision in *Naylor's* case.

"The right to see a spectacle cannot, in the ordinary sense of legal language, be regarded as a proprietary right. . . . If the interests were held to be incorporeal hereditaments they would be quite new to the law, notwithstanding the strongly established principle of *Keppell v. Bailey*.[4] The feat would have been achieved of creating an easement in gross."

Dixon J.[5] points out that what the plaintiff acquired was not a proprietary right at all, but a contractual one, and discussing the reference by Buckley L.J. in *Hurst's* case to the "right to see" as a right of property so as to make the licence coupled with it irrevocable, he says:[6] "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 the presence in the place where the licence, while unrevoked, authorized the plaintiff to go and remain." He further points out that an express contract not to revoke a licence does not in any way affect its revocability. "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 himself to an action for 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 on the termination of the licence. This is in accordance with the general rule of 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."

The second ground of the majority in *Hurst's* case was that *Wood v. Leadbitter* was distinguishable as having been decided before the Judicature Act at common law, where the presence of a seal was all-important. Since the Judicature Act, however, they were bound to apply equity as well as law, and accordingly the absence of a seal was unimportant for equity took little notice of form and would disregard the common law requirement of a seal. Hence the plaintiff, having failed in *Wood v. Leadbitter* (on this view) because his ticket of admission was not under seal, must now succeed just as if he had a deed. But, while it is, of course, true that a grant of an interest in land was regarded as valid in equity if there was valuable consideration even in the absence of the deed which was essential at common law, and that this is now the rule to be applied in all courts, it is far from true to say, as was in effect said in *Hurst's* case, that it is now possible to create by simple contract interests in land which, prior to the Judicature Act, could not have been created by deed.

All the majority Judges in the High Court disagreed with both

4. (1834) 2 My. & K. 517.
5. 1937 A.L.R. at p. 281.
6. At p. 282.

the reasoning and the result of *Hurst's* case, and none of them appeared to share the compunction so keenly felt by Evatt J. in refusing to follow a decision of the Court of Appeal, which had been subjected to such widespread and searching criticism. Thus Latham C.J. says:[7] "*Hurst's* case is manifestly wrong and it is not possible to extract from it any general principle which is consistent with well-recognized principles of law."

An endeavour was made to support the result of *Hurst's* case without reference to the reasoning in it by alleging that the defendant should not be allowed to set up his own wrong as a defence, that he should not be heard to say that he had revoked the plaintiff's licence.[8] This ground for the plaintiff's case was considered and definitely rejected, it being pointed out that there was no general principle of equity which operated in every case to prevent a litigant from setting up an "unconscientious" plea and that in this case the relation between the parties was one to which equitable remedies were in no way applicable. "If the principle to be applied is a principle that the defendant cannot rely on 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 on the basis of this principle"—

"It is clear that equity would never have decreed the specific performance of a contract to provide 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 for admission.

"But it is urged that equity would have granted an unconditional and perpetual injunction restraining the defendant from setting up an unconscientious plea, viz., a plea based on his own wrongful withdrawal of a licence. In the first place there is no authority to support the contention in such a case as the present case. 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*. The argument rests on 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 him pleading it would prevent him from gaining some 'unconscientious' advantage from his breach. There is no such general principle of equity."[9]

Dixon J. denies that there is an equity which would enable the plaintiff to meet the defendant's justification of the assault complained

7. At p. 279.

8. This resembles the "suggested new approach" indicated by Mr. Sawer in 1 *Res Judicatae* (1935), pp. 24-7, though the main question which he raises, viz., whether a breach of contract is a "wrong," does not appear to be considered explicitly in any of the judgments which seem, however, impliedly to reject it. It may be said in answer to Mr. Sawer on one point that if the reliance which he places on the measure of damages being the same in contract as in tort as a means of showing that a breach of contract is a "wrong" is justified, then his whole discussion is pointless, for if the measure of damages is the same in contract as in tort, then in the case under discussion the plaintiff would gain no advantage from suing in tort for the assault, which is the whole object of endeavouring to prevent the defendant from setting up his breach of contract.

9. *Per* Latham C.J., at p. 277.

of. "This opinion I base on 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 which 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."[10] The fact that the Court found it necessary to state that the contract was not one for which equity would decree specific performance (presumably the precise form, if such a remedy were available, would be an injunction against the revocation of the licence) seems to indicate that they thought that if the contract were such that equity would enforce, then the mere fact that it would not be possible for the plaintiff to obtain his decree in time to prevent his ejection would not prevent him from recovering damages for assault. The view of the Court seems quite definite that it was not the mere accident that the time factor did not permit equity to intervene in time to prohibit the ejection of the plaintiff which prevented him from recovering his damages, but that the reason why he could not succeed was that even if the time factor did permit it, equity would not interfere on his behalf because the contract was not one to which equitable remedies were applicable.

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10. *Per* Dixon J., at p. 282.

BRADLAUGH AND THE OATHS ACT

Section 95 of the Victorian Evidence Act 1928 provides that persons without religious belief or whose religious belief is such that the taking of an oath is contrary to such belief, may make a solemn affirmation in lieu thereof.

The particularly wide scope of the Section is well illustrated by an incident recently occurring in one of our Police Courts. A witness, strenuously averring religious belief, refused to take the oath, because he maintained the Bible forbade him to swear. Apparently, he had discovered *Matthew*, Chapter 5, Verses 34-37: "But I say unto you, swear not at all . . . but let your communication be Yea, yea; Nay, nay; for whatsoever is more than these cometh of evil." The Police Magistrate hurriedly decided that this was a case to invoke the affirmation provision of Section 95 of the Evidence Act, which thus neatly abrogates the disconcerting necessity for a judicial pronouncement on the precise connotation of the verses referred to. And so examples may be multiplied, disclosing with similar pungency the manner in which this provision operates as a vitally essential incident of judicial activity.

Yet it was not until the latter part of last century, by an Act of 1888, that the right to affirm was indisputably secured. This, the Oaths Act,[1] is the progenitor from which Section 95 of the Victorian Evidence Act is a "lineal" descendant. It was an enactment passed

1. Section 46, 51 and 52 Vic.