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RIGHTS OF TICKETHOLDERS TO PLACES OF AMUSEMENTS

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Greenfeld v. Maryland Jockey Club of Baltimore[1]

This was a suit in equity in which the plaintiff prayed, first, for a declaratory decree stating that he is entitled, upon payment of admission charges, to attend any racing meetings conducted by the defendant, and, secondly, an injunction restraining the defendant from denying the plaintiff such right herein alleged and from interfering with plaintiff while he is in attendance as a spectator and bettor at any racing meeting. Plaintiff, in his bill, alleged that he was forcibly ejected from defendant's racing track without just cause, after having purchased a ticket thereto and having been admitted into defendant's enclosure upon presentment of that ticket. A demurrer to plaintiff's bill was sustained by the lower court and the Court here affirmed the ruling given below.

The demurrer, of course, raises merely the very broad question of law, namely, does the plaintiff's bill set forth a cause of action. By claiming the right to non-interference by defendant while in attendance at a racing meet, plaintiff, in effect, is claiming that a ticket of admission to defendant's track creates a property right in favor of the ticketholder. And by claiming a right to attend any racing meet upon payment of admission charges, plaintiff is claiming the primary right to acquire the property right arising out of the purchase of a ticket. Such rights, plaintiff asserts, exist by virtue of the common law and also by virtue of the Racing Commission Law,[2] which grants to the defendant a special privilege or franchise to conduct racing meeting with pari-mutuel betting. It is contended that defendant has no right to conduct such business as a matter of right. Such a business, it is claimed, cannot be considered a private business, but rather a public or quasi-public function, in the control, conduct, and management of which the state participates in order to protect the public interest. Since defendant was granted a franchise to carry out certain public purposes such as legalizing "gambling and betting under state supervision", providing "revenue for the

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[1] 57 A. (2d) 335 (Md. 1948).

[2] Md. Code (1939) Art. 78B, and Md. Code Supp. (1947) Art. 78B.

state", and improving "the breed of horses", defendant is obliged to afford to all citizens the equal right to enjoy its facilities. Plaintiff further contended that his ejection from the track without just cause or reason was a violation of Rule 226 of Art 78 B of the Code, which provides: "The chief inspector shall keep a record of the names and addresses of all persons ejected by any association from its grounds, together with the offense or offenses alleged against them, and any other material information relating thereto, and the associations shall report all ejections to the chief inspector. He shall promptly report the same to the Maryland Racing Commission." Plaintiff seems to have interpreted this rule to mean, by implication, that an ejection from any race track within the state can only be occasioned for a just cause or reason. Plaintiff finally charged that his ejection and defendant's continued refusal to permit him to attend the races constitute acts which are "illegal, capricious, arbitrary and discriminatory" and which deprive plaintiff of his rights and privileges guaranteed to the plaintiff by Article 23 of the Declaration of Rights and of immunities, privileges and equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States, due to the fact that defendant is a duly constituted agent of the State of Maryland when conducting racing meetings.

The plaintiff's right to acquire a ticket of admission to a race track or any place of amusement will first be considered. Under the common law, the operation of a baseball enterprise, race track, theatre, or any other amusement is held to be a private business, which is not conducted by virtue of authority derived from the state, and, in consequence, is not governed by rules relating to common carriers. As private businesses, such enterprises can be controlled by and at the sheer will and volition of their proprietors, who maintain their freedom of contract both as to subject matter and parties. Now, a common carrier, due to its public calling and the public nature of its business, is bound to receive for carriage, without discrimination, all persons who offer to become its passengers, unless a reasonable excuse exists for the denial of carriage.[3] Such duty arises independent of contract. On the other hand, an owner of a private business may choose those with whom he does business. The proprietor of an amusement enterprise, which is considered a private business under the common law, has, therefore, the right of selecting those

[3] 13 C. J. S., Sec. 538, n. 9.

with whom he wishes to contract, which right includes that of selecting the patrons. Hence, such an amusement operator can refuse admission to anyone whomsoever, the law assuming that he will exercise good judgment in the exclusion of patrons.[4] This matter was adequately summed up in *People v. Flynn*,[5] in which case the court said that a proprietor of an amusement place can exercise absolute control over the house and audience; that since his authority to carry on business is not derived from the state, he may conduct his business as any other private citizen and make whatever rules he desires as to the exclusion of patrons. In the *Greenfeld* case,[6] the Court declared that the above rule is not archaic, except in the case of common carriers, innkeepers, and similar public callings, quoting from the case of *Madden v. Queens County Jockey Club*,[7] in which it was held that a proprietor of a racing track "has the power to admit as spectators only those whom he may select, and to exclude others solely of his own volition, as long as the exclusion is not founded on race, creed, color, or national origin". The last quoted clause is applicable in states having a Civil Rights Law.

It appears that in the case before us, the defendant Jockey Club had declared to the plaintiff its unwillingness to contract with plaintiff, who was ejected from the defendant's track on two successive days and told not to return and, if he did return, he would be denied admission. At least, the intent of the defendant was made known after the first ejection of the plaintiff. The Court now says that plaintiff could not have thereafter purchased a ticket of admission "unless by concealing his identity or by indirection or by mistake made known to him".[8] Hence, the Court indicates that it would agree in holding that if a person fraudulently, through a third person or otherwise, obtains a ticket of admission to a place of amusement, knowing that the proprietor thereof would not consent to sell him such ticket, the proprietor may eject that person from the premises, without a complaint on part of the supposed patron, the theory being that there exists no contract between the proprietor and the patron as there is lacking the necessary contractual intent on the part of the proprietor

[4] 52 Am. Jur., Theaters, Shows, Exhibitions, etc., Sec. 3; 62 C. J., Theaters and Shows, Art. II.
[5] 189 N. Y. 180, 82 N. E. 169, 12 Ann. Cas. 420 (1907).
[6] *Supra*, n. 1, 337.
[7] 296 N. Y. 249, 72 N. E. 2d 697, 698. 1 A. L. R. 2d 1160, 1162 (1947).
[8] *Supra*, n. 1, 337.

and, hence, there is lacking the necessary meeting of minds.[9]

Now, of course, the common law right of a proprietor to do business as he wishes, and his right to select his patrons may be limited to some extent by statute.[10] The operation of an amusement open to members of the public is affected with a public interest, which interest justifies legislative regulation of and interference with such an amusement. But the mere fact that a business is affected by a public interest or that it is subject to statutory regulation does not make that business a servant of the public in the sense a common carrier is a servant of the public anymore than does the regulation of a private carrier make it a common carrier.[11] The right to enter into such business is a common law right. No special consent of the state need be had, as long as the necessary license is obtained, the granting of which is dependent on whether such enterprise will be supported by and successfully integrated into the community, or whether such enterprise will be beneficial to the community, rather than on the fact of whether such an enterprise is a necessity to the community. The right to stay in such business is a common law right; the right to use the assets of the business for any purposes whatsoever and the right to terminate such business are common law rights. Contrast to this the derivation of the common carrier's right to do business. That authority of the common carrier is created by a franchise granted by the state, which franchise grants power nonexistent at common law; and, by virtue of such grant, certain obligations are imposed upon the recipient, duties that the state would have to perform if no such franchise was granted and accepted. It is wise to keep this in mind—the distinction between a statute limiting one's common law rights and a franchise which confers rights on an individual, which rights did not exist at common law. The acceptance of a franchise to perform public functions is also an acceptance of public duties, whereas no public duty can arise in the operation of a private business. From a practical standpoint, the contention that a business is a public one, because it is subject to state regulation, is absurd; for what

[9] Said v. Butt, 3 K. B. 497, 36 Times L. R. 762 (1920).

[10] *Supra*, n. 3.

[11] Rutledge Ass'n. v. Baughman, 153 Md. 297, 138 A. 29, 56 A. L. R. 1042 (1927). Continental Baking Co. v. Woodring, 286 U. S. 352, 81 A. L. R. 1402 (1932), holding the licensing regulation and taxation of a private carrier does not make it a common carrier.

business is now free from state regulation? If the contention were true, would any business be private in nature?

Turning to the consideration of the operation of a race track specifically, it is found that the right to operate such a project existed at common law since even this type of wagering was not illegal under common law.[12] In Maryland, it was not until 1890 that betting on horse races, except within the enclosures of properly licensed racing tracks, was made illegal.[13] Consequently, the Court held that "the license, instead of creating a privilege (as does a franchise), merely permits the exercise of one restricted and regulated by statute".[14] Hence, the conducting of a race track alone is not a public function but rather remains a private business and may be conducted as such.

Even though a business is private, it appears that special statutes may confer special privileges on members of the public. California has interpreted its Civil Rights Law as conferring on each citizen the right to gain admission to any amusement open to the public,[15] while New York has taken the contrary view.[16] No such Civil Rights Law exists in Maryland. As for our present Racing Commission Law, the Court held this to be merely for the regulation of the conduct and operation of and the betting within the tracks of the licensees, for the protection of the betting public, and for the acquisition and collection of revenue. But "the law confers no personal right on individuals to attend or bet at racing meetings. If it empowers the commission to require a licensee to admit all comers as spectators and bettors unless excluded for good cause (as to which we intimate no opinion), the commission has not done this by implication by Rule 226."[17] Thus, defendant here still maintains a right to exclude those that it wishes from its track, not having to give any reason for such exclusion; and, consequently, plaintiff has no right, under the common law or statute, to demand admission thereto.

Now, assuming that the defendant had voluntarily sold to the plaintiff a ticket of admission, and plaintiff thereby enters upon the defendant's premises, does the plaintiff now have a right *in rem,* a property right in defendant's premises, a right of noninterference by the defendant ex-

[12] James v. State, 63 Md. 242 (1885). Lafontaine v. Wilson, 185 Md. 673, 45 A. 2d 729, 162 A. L. R. 1218 (1946).
[13] Md. Code (1939) Art. 27, Sec. 290.
[14] *Supra,* n. 1, 339.
[15] Greenberg v. Western Turf Ass'n., 140 Cal. 357, 73 P. 1050 (1903).
[16] *Supra,* n. 7.
[17] *Supra,* n. 1, 338.

cept for just cause; or does the plaintiff merely have a contract right, termed a "license", which is revocable at the sheer will of defendant? For the purpose of discussion, we here must accept, without controversy, the holding of a vast majority of cases that a license is not a property right in favor of the licensee, but a mere contractual right, which the licensor has the power, as distinguished from the right, to revoke at his option. To hold that a license is a property interest would totally defeat the question now presented and would render this discussion valueless, for if a license were a right *in rem,* it would be immaterial whether entry into a place of amusement pursuant to the purchase of a ticket created a license or some other property interest. Hence, Chief Justice Vaughan's definition of the term "license" will here be accepted, to *wit:* "A dispensation or license properly passeth no interest nor alters or transfers property in anything, but only makes an action lawful, which without it had been unlawful."[18] Putting it in another way, a license is said to be "merely a permission to do an act which, without such permission, would amount to a trespass."[19]

The Court accepts the view that has been commonly accepted in this country, that is, that a ticket to a place of amusement merely creates a license.[20] As mere license, it is revocable at the will of the proprietor of the amusement, even after the patron has taken the seat assigned him.[21] True, from the purchase of the ticket arises a contract, damages for the breach of which are recoverable by the patron; but such contract merely binds the person of the proprietor and not his property, since such a contract is not deemed sufficient to create a property interest. Justice Holmes assigns as the reasons why a ticket does not create a property interest the facts that it is not under seal and that it was never intended by the parties as a conveyance.[22] Judge Clark, in agreeing with Justice Holmes that a ticket creates a license (though holding such license irrevocable) assigns as his sole reason the fact that the parties never intended a sale of an interest in land, saying that "both theatre proprietor and theatre patron would be surprised

[18] Thomas v. Sorrell, Vaughan, 329, 351, 124 Eng. Rep. 1098, 1109 (C. P. 1673).

[19] Clifford v. O'Neill, 12 App. Div. 17, 29, 42 N. Y. S. 607, 609 (1896); Shipley v. Fink, 102 Md. 219, 226, 62 A. 360, 2 L. R. A. (N. S.) 1002 (1905); Cook v. Stearns, 11 Mass. 533, 538 (1814).

[20] *Supra,* n. 1, 339.

[21] Cases collected in 30 A. L. R. 951; 60 A. L. R. 1089.

[22] Marrone v. Washington Jockey Club, 227 U. S. 633, 636, 637, 43 L. R. A. (N. S.) 961 (1913).

to learn that the purchase of a ticket 'to see a show' was a sale of land."[23] Professor Conard, however, in his article, *An Analysis of Licenses in Land*,[24] tries to refute the view of Justice Holmes and Clark in saying that the parties did intend to create an interest in land for as long as the spectacle lasts. Conard might find difficulty in defending his position if asked: "What did the parties really intend to pass to the patron, a mere interest in land or a mere permission to see the spectacle upon the proprietor's premises?" The view of Professor Conard might be a means of demonstrating how an interest could possibly pass to the patron in the cases under discussion, but it is rather hard to find a mutual intent, between the parties, that a property interest should pass out of the proprietor and into the patron. Of course, the proprietor, when selling the ticket of admission, probably intended to be bound thereby, but this intention does not include the intent to make a conveyance. And to this must be added the fact that most tickets today state on their face that they merely create a revocable license.

Such a clause does not necessarily create a license, as the relationship between the parties is a matter of law rather than a matter of what the parties call such relationship. But, such a clause expressly negates the existence of any intention on the part of the proprietor to make a conveyance.

The first case holding that a ticket of admission to a spectacle merely created a revocable license was *Wood v. Leadbitter*,[25] which, like the case before us, involved a ticket to view races, which were to be conducted over a period of several days. The Court in that case held that, since an incorporeal interest could be created only by a grant (an instrument under seal) and since there existed no such grant in the case, there was created only a mere license, always revocable. It was also said that the plaintiff might have an action for breach of contract, but this is not the result of having an interest *in rem*, an interest in the racing track. The *Wood* case overruled the previous case of *Taylor v. Waters*,[26] in which a silver token that represented a ticket to all performances to be held in a certain opera house over a period of twenty-one years was held to have given rise to an irrevocable license. The *Wood*

[23] Clark, Covenants and Interests Running with the Land (2d Ed. 1947) 51.
[24] (1942) 42 Col. L. Rev. 809.
[25] 13 M. & W. 838, 153 Eng. Rep. 351 (1845).
[26] 7 Taunt. 374, 129 Eng. Rep. 150 (C. P. 1816).

case was believed to have settled the law in England and was followed by the American courts.

However, the main grounds on which the ruling of the *Wood* case was based do not seem to be valid anymore, as most states have abolished the necessity of using a seal when making a conveyance, and Maryland does not require a seal on instruments conveying estates of seven years or less.[27] However, even though a seal is not required at the present time, a ticket still would not constitute a conveyance of an incorporeal interest, because a writing is required to convey such an interest under Section 3 of the Statute of Frauds and a ticket is not a sufficient writing to constitute a conveyance due to the fact that it does not designate the grantee, another requirement essential to the validity of any conveyance. Connected with this idea is the question of whether the ticket represents a contract to make a conveyance which contract equity can enforce. True, the ticket is a writing, and the signature of the proprietor can be found thereon, as any mark can be adopted as a signature; but, even so, is this enough to constitute a sufficient memorandum that will satisfy the Statute of Frauds, compliance with which is the only prerequisite to equity's enforcement of a contract to execute a conveyance? Now, in the case of a railroad ticket, the ticket itself has been considered the contract,[28] but only one case has applied this view to theatre tickets and the like.[29] The better holding is that a theatre ticket is merely a receipt and not a contract.[30] And as a memorandum, a ticket seems clearly insufficient because it does not designate the patron, the would-be grantee; and, hence, as it does not name the parties to the contract, it does not set forth all the essential terms thereof, a requirement which must be met before a writing can serve as a memorandum. Unless some theory, analogous to that of partial performance, can be advanced so that the particular case, upon its facts, can be taken out of the scope of the Statute of Frauds it is doubtful whether equity would enforce a ticket of admission as, or make it operative as, a contract for the sale of land.

Taking the *Wood* case as the law of England, most of the American cases merely cite and follow the bare propo-

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[27] Md. Code (1939) Art. 21, Sec. 1.

[28] Comment, *The Nature of Railroad Tickets* (1896) 9 Har. L. Rev. 353.

[29] Interstate Amusement Co. v. Martin, 8 Ala. App. 481, 62 So. 404 (1913).

[30] Elmore v. Sands, 54 N. Y. 512, 13 Am. Rep. 617 (1874); Note, *Effect of Time Limitations in Tickets over Connecting Railroads*, (1910) 10 Col. L. Rev. 345; Note, *Carriers—Ticket—Time Limit* (1912) 7 Ill. L. Rev. 130; Louisville & N. R. Co. v. Turner, 100 Tenn. 213, 43 L. R. A. 140 (1898).

sition laid down in that case, to wit, a ticket of admission is a mere license, revocable at will. However, that English case was overruled by *Hurst v. Picture Theatres, Limited,*[31] which arose out of the plaintiff's ejection from a theatre after taking his seat on the grounds that the management had suspected him of not paying for his admission. Damages for assault and false imprisonment were granted, after the jury found that the plaintiff had paid for his seat, the court ruling that one who has taken his seat in the theatre cannot be ejected without just cause. The decision of this case was put on three grounds: (1) That the thing granted to the plaintiff was a right to view a spectacle, which right was an actual grant and the license to enter defendant's theatre was merely incidental to the grant, and, as such, was a license coupled with an interest which cannot be revoked. (2) That if the ticket contained a seal thereon, it would operate as a conveyance at law of an irrevocable property interest; however, equity will enforce such an instrument and decree that such conveyance be made, and, as the Judicature Act has merged equity into law, the law court can now treat such contract as an executed conveyance. (3) That the contract creating the license created an implied contract not to revoke the license, and such implied contract is an enforceable right in equity.

When there exists a license coupled with an interest, that interest is always found to be a right in tangible property, real or personal, and the license is merely incidental to that property right and exists merely to make possible the exercise of that right. But in the *Hurst* case, the right to see a spectacle was the interest that was coupled with the license, so as to make it irrevocable. Such a view seems odd and unique indeed. Actually there was no interest in the spectacle granted; there was merely granted a right to see the spectacle, which is nothing more than a contract right, a mere license to go on the premises for a specified reason. As Pollock said, "the cases (referring to those in which the license was found to be coupled with an interest) must not be confused with the *Wood v. Leadbitter* class, where the license is not ancillary to another object, but is itself the principal matter".[32] And quoting Justice Holmes, "While there might be an irrevocable right of entry under a contract incident to a right of property in land or in goods thereon, where the contract stands by itself, it must be a conveyance or a mere revocable

[31] 1 K. B. 1 (1915).
[32] Pollock, Torts (14th ed. 1939) 302.

license".[33] Hence, it seems that to hold a license to enter an amusement place is one coupled with an interest is stretching the point quite far.

As to the second basis on which the English court supports its decision, namely, the present agile powers of the law courts due to the merger of equity and law, the court merely answered the *Wood* case, assuming that the result of that case merely hinged on the lack of a seal on the ticket and assuming that equity would decree a conveyance be executed regardless of the lack of the seal. In regards to the status of the parties before the ticketholder gains entry to the place of amusement, it will suffice to reiterate the doubt expressed above as to whether equity will enforce a ticket as a conveyance, due to the facts that there is lacking the necessary intent to make a conveyance and that there is not adequate compliance with the Statute of Frauds. Assuming that the necessary intent exists to make a conveyance and the ticketholder has gained entry into the theatre or race track, whatever the case might be, is it not then too late to grant specific performance? With the ejection, the damage is done; and, within the same day, the interest that would have been conveyed would terminate by the terms of the conveyance sought to be validated. It seems idle to say that, because equity will validate a conveyance, such conveyance will be treated as existing and operative. The point is that, until equity acts, no legal interest passes; and, if equity never acts, no legal interest passes. In the *Hurst* case, the Court treated as done what it supposed could have been done. It is often said that equity will consider as done what ought to have been done, but treating as done that which could have been done seems to be a rather novel idea. The court was never asked to make the supposed conveyance effective; and it was too late for equity to act in this respect at the time when the case first came to trial. It might be said in passing that this foundation for the result reached by this English court could not be followed in Maryland, as there has been no substantive merger of equity and law here.

Finding that within a contract creating a license there also exists an implied contract not to revoke that license is a discovery provoked largely by the imagination of the court. Though quite ingenious, it has no objective foundation. Historically, the term "license" embraced the concepts of mere permission plus the power of retracting that

[33] *Supra*, n. 22.

permission at any time. These concepts have continued to prevail throughout the law, as seen by the fact that, even today, the licensor can revoke the license even though the licensee has expended great sums in reliance on the continued existence of the license.[34] Of course, if consideration was given for that license, the licensee may bring a suit for damages due to breach of contract. But this is his only remedy. The conception of the term "license" clearly negates the existence of an implied agreement not to revoke it. Furthermore, the revocability clause found on most tickets nowadays expressly denies the implication of any agreement not to revoke the license granted thereby.

Most writers seem to favor the decision laid down in the *Hurst* case, but purely from an equitable standpoint. Their usual thesis is that the proprietor should be restrained from breaching his contract and doing grave injustice to the patron. However, in granting damages in a tort action on the basis that the plaintiff had a property right or an irrevocable license, the *Hurst* case distorts well-established legal concepts. Those favoring this English case seem primarily to agree with the result attained therein, rather than the reasons for the result, trying to justify these reasons (for the result) by the result itself, indulging in pure rationalization to reach the desired end rather than *a priori* reasoning. If it is found that justice requires one conclusion to be reached rather than another it is suggested that courts and writers openly say so rather than justify a result by disrupting long followed legal principles. Whether justice demands that the result of the *Hurst* case should be followed as a general rule will be referred to later when discussing the question of damages for breach of contract.

A few cases are usually cited as being in accord with the rule that a patron of a place of amusement has an irrevocable license, but it will be found that in most of the cases, a suit for damages arising out of contract was involved or that the proprietor or his servants were guilty of gross misconduct analogous to the use of excessive force in ejecting a trespasser.[35] What is said as to the irrevocability of

[34] 3 A. 2d 471, 120 A. L. R., 543 (1939); Noted in Note, *Revocation of a "License Acted Upon"* (1939) 3 Md. L. Rev. 362.

[35] Drew v. Peer, 93 Pa. 234 (1880) (Dicta—A ticket granted more than a mere license) (Overruled by Horney v. Nixon, 213 Pa. 20, 61 A. 1088, 1 L. R. A. (N. S.) 1184, 110 Am. St. Rep. 520, 5 Ann. Cas. 349 (1905); Kelley v. Dent Theaters, 21 S. W. 2d 592 (Texas 1929), Court expressly said it would not commit self as to the revocability of the license, though giving damages to plaintiff; but, Terrell Wells Swimming Pool v. Rodriguez, 182 S. W. 2d 824 (Texas 1944), said the patron's license was absolutely

the license is usually *dicta* wholly immaterial to the particular case. The effect of holding the license revocable is merely this: that the proprietor may, by revocation of the license, consider the patron a trespasser and use that force which is reasonable to eject him from the premises, without being held liable in tort for assault and battery. Liability for the use of excessive force and for breach of contract are entirely different matters. These latter two points were not involved in the *Greenfeld* case, no damages being requested. The question of revocability of the license was clearly in issue, and the Court upheld the power of revocation. Much doubt is had as to whether those courts that have held in the favor of the patron on the question of damages will take a view contrary to this Maryland case, particularly in light of the fact that the Pennsylvania, Texas, and Kentucky courts, when the question of the revocability of the license was clearly before them, have overruled the *dicta* of earlier cases in their respective jurisdictions.[36]

Although the *Greenfeld* case involved no question as to damages, nevertheless, for the sake of completeness in the discussion of the general topic, the rights of ticket-holders to places of amusement, it is here appropriate to treat also the subject of damages recoverable in an action for breach of contract in a result of the plaintiff's ejection from the theatre, race track, dance hall and the like. It is conceded that the purchase of a ticket consummates a contract, which is breached by a refusal to honor such ticket at the entrance of the amusement place or by the ejection of the patron from the amusement place without just cause. The controversy arises as to the measures of damages. Most cases, adhering closely to the doctrine of the power of revocation and concluding that this doctrine sanctions the so-called "absolute right of revocation", limit the amount of damages to the mere purchase price of the ticket.[37] Some courts have taken a slightly modified position

revocable; and Smith v. Leo, 92 Hun. 242, 36 N. Y. Supp. 949, 72 N. Y. St. Rep. 314 (1895), by dicta—that proprietor has no right to eject plaintiff after inviting plaintiff to pay admission and come on premises. Accord MacGowan v. Duff, 14 Daly 315 (N. Y. 1887); Weber-Stair Co. v. Fisher, 119 S. W. 195 (Ky. App. 1909). *Contra*, Powell v. Weber-Stair Co., 125 S. W. 255 (Ky. App. 1910); Capital Theatre Co. v. Compton, 246 Ky. 130, 54 S. W. 2d 620 (1932); Bouknight v. Lester, 119 S. C. 466, 112 S. E. 274 (1921) (damages for humiliation and embarrassment); Cummins v. St. Louis Amusement Co., 147 S. W. 2d 190 (Mo. App. 1941).

[36] *Cf.*, *supra*, n. 35.

[37] See cases collected in 30 A. L. R. 951, most notable of which are: Marrone v. Washington Jockey Club, 227 U. S. 633, 43 L. R. A. (N. S.) 961 (1913); Finnesey v. Seattle Baseball Club, 122 Wash. 276, 210 P. 679, 30

and have granted, in addition to the mere purchase price of the ticket, compensation for expenses incurred by the plaintiff in order to attend the spectacle after the acquisition of his ticket.[38] Other courts moreover; particularly in the more recent cases where the actions were in contract, have allowed exemplary damages for insult, embarrassment and humiliation.[39]

Now, there is no question that an action for assault will lie when the proprietor has used unreasonable force in ejecting a patron, the rule being that only a reasonable amount of force can be used when ejecting a trespasser, which according to the majority of cases is the status of a patron on the proprietor's premises after the license has been revoked. Thus, when the patron is grabbed by the arms and insulted, without a prior request to leave the premises, an action will lie against the proprietor on this theory.[40] Another situation which is distinguishable from the general type of case now under discussion is presented by *Boswell v. Barnum & Bailey*[41] wherein an usher had used insulting language while the patrons were attempting to get to their assigned seats. Held, that although the defendant could have properly revoked the plaintiffs' licenses, nevertheless, while the licenses remained operative and unrevoked, the plaintiffs were entitled to civil treatment. And needless to say, that while the patrons are duly on the premises of the amusement operator, he owes them the duty of exercising due care and of properly maintaining the premises for the safeguard of their safety. In passing, another situation might be mentioned, analogous to the case in which excessive force is used in ejecting a patron. Such situation is one in which the proprietor causes the arrest of the patron where the conduct justifying the use of force in the ejection does not justify the arrest under the criminal code of the state. In such case, the proprietor is liable for false arrest.[42]

A. L. R. 948 (1922); Horney v. Nixon, 213 Pa. 20, 61 A. 1088, 1 L. R. A. (N. S.) 1184, 110 Am. St. Rep. 520, 5 Ann. Cas. 349 (1905). Also Terrell Wells Swimming Pool v. Rodriguez, *supra*, n. 35; Buenzle v. Newport Amusement Assn., 29 R. I. 23, 68 A. 721, 14 L. R. A. (N. S.) 1242 (1908).

[38] People v. Flynn, *supra*, n. 5; Boswell v. Barnum & Bailey, 135 Tenn. 35, 185 S. W. 692, L. R. A. 1916 E. 912 (1916). (*Dicta*—McCrea v. Marsh, 12 Gray 211, 71 Am. Dec. 745 (Mass. 1858).

[39] Smith v. Leo, *supra*, n. 35; Arron v. Ward, 203 N. Y. 351, 96 N. E. 736, 38 L. R. A. (N. S.) 204 (1911); Bouknight v. Lester, *supra*, n. 35. Weber-Stair Co. v. Fisher, *supra*, n. 35. Cases collected in 30 A. L. R. 955.

[40] Ayres v. Middleton Theater, 210 S. W. 911 (Mo. App. 1919); Amusement Co. v. Spangler, 143 Md. 98, 121 A. 851 (1923).

[41] *Supra*, n. 38.

[42] Rice v. Harrington, 38 R. I. 47, 94 A. 736, L. R. A. 1916 E. 356 (1915).

But in a pure contract action, is the giving of damages for insult, humiliation, and indignity justifiable? Usually, the measure of damages in a contract action is stated to be that loss accruing to the plaintiff which is the direct and natural result of the breach of contract or those damages which the defendant could have reasonably foreseen as flowing from the breach. The Restatement of Contracts states the general rule in Section 333 in the following manner:

> "In awarding damages, compensation is given for those injuries that the defendant has reason to foresee as a probable result of his breach when the contract was made. If the injury is one that follows the breach in the usual course of events, there is a sufficient reason for the defendant to foresee it; otherwise it must be shown specifically that defendant had reason to know the facts and foresee the injury."

Stopping at this point, there seems to be no theoretical objection to the granting of damages for humiliation, insult and indignity, flowing directly from the revocation of the license granted by a ticket amounting to a breach of contract. The Restatement in Sections 341 and 342 goes on to say that, generally, punitive damages are not allowable for breach of contract, except in cases of a common carrier ejecting a passenger, of an innkeeper ejecting a guest, of breach of contract of marriage, and in cases involving error in the sending of death messages by telegraph companies; that, generally, damages for mental disturbances resulting from breach of contract are not given in the absence of accompanying bodily harm. Now, it seems reasonable to say that if damages for mental disturbance are given for breach of a contract of carriage, they should also be given for breach of contract of admission to an amusement, particularly when the patron has been ejected from the premises after gaining entry thereupon, because in both cases the nature of the injury is the same and the damages are requested for the same reason, namely, compensation for the indignity and humiliation suffered by the passenger or patron by reason of his ejection from a place where he had a contractual right to be. The fact that the duty to the public imposed on a common carrier is much greater than the public duty imposed on a proprietor of a theatre or ball park is here wholly immaterial, because the concept of duty in this respect only concerns the scope of the contract entered into. Extrinsically, a contract of carriage with

a common carrier differs from the contracts in the ordinary relations of parties to each other only in that such contract of carriage is one which the public carrier is not at liberty to decline to make, where the would-be passenger has brought himself within the requirements entitling him to ask for the services of the carrier and he does in fact ask for such services.[43] On the question of whether punitive damages should be granted in these cases, the scope of the duty imposed by the contract seems irrelevant. The point is that once the contract is breached, whether a contract of carriage or a contract of admission to a spectacle, by the expulsion of the passenger or patron, the nature of the injury is the same; and, hence, the measure of damages should be the same in either case. Therefore, from the theoretical standpoint, there seems no obstacle to the granting of damages for humiliation, indignity, embarrassment, etc., in the action brought for the breach of a contract of admission.

However, looking at the problem from a practical angle, an entirely opposite aspect is encountered. In a large number of these cases of ejection, the patron is found to be a wrongdoer as he was in the *Wood* case, where the plaintiff was found to have attempted to drug the horses. Professor Conard[44] points out that interviews with the various attorneys for the New York Theatres disclose the fact that an ejection is never made arbitrarily, in fact, an expulsion of a patron is always sought to be prevented. The proprietors realize that misconduct on their part means the loss of good will; and the threat or fear of financial loss is found an adequate deterrent to the unreasonable expulsions of patrons from their theatres. Of the nine cases cited by Professor Conard as having favored the patron on the question of damages, there existed in seven cases an excuse for the ejection.[45] Here is the important fact to consider: cases have held that a proprietor owes a duty to his patrons

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[43] Virginia Ry. & Power Co. v. Arnold, 121 Va. 204, 92 S. E. 925 (1917).

[44] Conard, *The Privilege of Forcibly Ejecting an Amusement Patron* (1942) 90 Pa. L. R. 809.

[45] In Sparrow v. Johnson, 8 Quebec Official L. Rep. 379 (Q. B. 1899) plaintiff was a negro; for a discussion of Hearst v. Pictures Theatres, *cf.* text, *circa*, n. 31. In Taylor v. Waters, *supra*, n. 26, defendants were assignees of the original licensor. The remainder of cases are cited, *supra*, n. 35. In the Arron case, plaintiff was believed to have been involved in a quarrel with another patron; in the Drew case, plaintiff was a negro; in the Cummins case a commotion within the theatre was believed chargeable to plaintiff; in the Bouknight case, plaintiff used a ticket that defendant held was void; in the MacGowan case, plaintiff presented ticket for the wrong night. Only in the Smith case does no reason appear for plaintiff's ejection from a dance hall.

to maintain peace and order within his premises.[46] As the proprietor has such a duty, social policy seems to dictate that the proprietor should be allowed, without unreasonable restraints, to eject anyone suspected of causing a disturbance or who is likely to cause such a disturbance. To put the proprietor in fear of being held liable in damages for breach of contract beyond the mere price of admission, would confront him with this dilemma: Whether to risk a disturbance which might render him liable to his other patrons, or to eject the suspected instigator of the disorder on the fear that he, the proprietor, will later be held liable in damages for breach of contract if the one ejected turns out to be an innocent patron. In the light of this fact, the granting of the right of expulsion without the fear of being held for punitive damages thereafter is not unreasonable, particularly when it has been shown that the exercise of this power is adequately controlled by financial considerations. The suggestion that the proprietor should be free from liability if he had reason to believe a just cause existed for the expulsion does not help matters any because of the fact that the question of the proprietor's having such a reason for expulsion would have to be left for the determination of the jury, thus making the proprietor run the risk of the possibility of the jury finding adversely to him. Also, letting a jury solve additional problems adds more uncertainty to the law. Professor Conard, though ambiguous as to whether he favors the "absolute right of revocation" doctrine, suggests an additional reason for giving such right to race track operators, namely, that the patrons there do not occupy a fixed place throughout the races and thus cannot be constantly observed, and, as the evils are numerous, in such an enterprise, the slightest suspicion that one is undesirable should justify an expulsion of that person.

The doctrine of the absolute right of revocability of tickets may, at times, work a hardship on an innocent person. If the proprietor ejects a patron just for mere personal reasons, the patron is no doubt harmed, and the conduct of the proprietor in such case is grossly unjust. But such a case arises too infrequently to warrant a change of the doctrine.

In conclusion, one final distinction should be drawn. Cases have arisen where the patron had been given a ticket to a different performance than the one he wished to

[46] Savannah Theaters Co. v. Brown, 36 Ga. App. 352, 136 S. E. 478 (1927); Daniels v. Firm Amusement Co., 158 Misc. 252, 285 N. Y. S. 557 (Manhattan Mun. 1935).

attend; and, having appeared at the time he originally intended, he found another claiming his seat. Being considered the wrongdoer, he was subjected to insulting and humiliating language and ejected "in utter disregard of his rights". Damages were granted for such insult and humiliation.[47] Now, upon examination of such cases, it is found that such insult does not flow from the breach of contract alone. The insult for which damages were given as compensation was the insult following from the additional conduct of the proprietor and servants extrinsic to the contract and its breach. Hence, such damages do not compensate for an injury flowing from the breach and should not be considered as damages recovered for breach of the contract. Such cases are analogous to those involving the use of excessive force in ejecting a trespasser. The thing compensated for in such cases is the unnecessary insult. Dean Prosser recognizes that from these cases there is developing the new tort of "insult".[48]

The Court of Appeals has left the question of damages for breach of contract of admission wide open, saying: "We see no reason for declining to follow the rule (of the *Marrone* case), especially when no question of breach of contract or specific performance is involved."[49] What course the Court will take remains to be seen. The clause on a ticket limiting the damages to a refund of its purchase price presents no solution as the Court could easily render such clause ineffectual by holding it not a fair estimate of damages that would result from the contract's breach.

[47] Metts v. Charleston Theater Co., 105 S. C. 19, 89 S. E. 389 (1916); Weber-Stair Co. v. Fisher, *supra*, n. 35.
[48] PROSSER, TORTS (1941) 59, *et seq.*
[49] *Supra*, n. 1, 337.