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Albert J. Harno
Washburn College

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THE REVOCABILITY OF LICENSES AS APPLIED TO PROPERTY IN LAND.

By Albert J. Harno*

The word "license," as applied to property in land, has ever had as a companion word the adjective, "revocable." In fact it has been repeatedly stated by courts and commentators on the law that one of the chief distinguishing characteristics of a license was to be found in the fact that it was always revocable.[1]

Bouvier's Law Dictionary defines a license as follows:

"A permission. A right given by some competent authority to do an act, which without such authority would be illegal or a tort or trespass. . . . It may be in writing or by parol; it may be with or without consideration, but in either case it is usually subject to revocation, though continuing a protection to the party acting under it until the revocation takes place."

And the following statement from Thomas v. Sorrell[2] is quoted in nearly every case where controversy over a license has arisen:

*Dean, Washburn College School of Law.

[1] "The difference between a license and an easement is that a license is an authority to enter in land, but confers no interest in the estate; it is generally granted by parol, and may be revoked by the licensor at pleasure, and, being a personal privilege, is not assignable, and usually amounts to an excuse for what would otherwise be a trespass * * * whilst an easement confers an interest in the land, and invests the owner with privileges that he cannot be deprived of at the mere will or wish of the proprietor of the servient estate." Rittenhouse v. Swango (1906), 97 S. W. (Ky.) 743, 744. Not officially reported.

And see Tiffany, Real Property (1903, p. 677, where it is said: "An easement is a right, in one person, created by grant, or its equivalent to do certain acts on another's land * * *. To be distinguished from easements, are licenses, which merely justify acts on another's land which would otherwise be illegal. They may be revoked at any time, except, in some states, after the licensee has incurred expense under the license, and they are not assignable."

[2] (1672) Vaughan 330, 351.

"A dispensation or license properly passes no interest nor alters or transfers property in anything, but only makes lawful, which without it would have been unlawful. As a license to go beyond the seas, to hunt in a man's park, to come into his house, are only actions, which without license had been unlawful."

It is a platitude to assert that the law of licenses has been unsettled. Starting with the rule of Thomas v. Sorrell, just referred to, courts have narrowed down the scope of the law of that case considerably since its decision. This, no doubt, was due primarily to the fact that judges have been dissatisfied with that decision in its sweeping terms and have engrafted exceptions in the interests of justice. Much of the difficulty has been due to inaccurate thinking. In the course of this study we shall review some of the authorities which have created the confusion, and reduce, if possible, the law of licenses to a scientific and reasonable basis. This will involve a discussion (1) of "bare licenses," (2) of licenses "coupled with an interest," and (3) of licenses founded upon valuable consideration, with some of the resulting legal relations.

Where a Bare License is Involved.

A says to B, "You have my permission to walk across my land any time you wish." The statement is oral, and there is no consideration. If B, relying on this statement, enters upon A's land what is B's legal status with reference to A? Has A the power at any time to revoke this privilege, and if he has what are the legal consequences?[3]

Under the facts stated B has the privilege of going upon A's land, and if found upon A's he cannot be sued by A as a trespasser. X, Y, Z and others, having no such privileges, are under a duty to stay off. But B is under no such duty. If A, without revoking the privilege, commits an assault upon B there is no doubt but that A

[3]The following analysis of jural relations in a scheme of opposites and correlatives by Professor Wesley N. Hohfeld in his article, Some Fundamental Legal Conceptions As Applied to Judicial Reasoning (1913), 23 Yale Law Journal 16, is adopted in this article:

Jural Opposites	right no-right	privilege duty	power disability	immunity liability
Jural Correlatives	right duty	privilege no-right	power liability	immunity disability

could be made to answer for it in tort. But does A have the power to revoke B's privilege? There was no deed to pass title, nor was there a contract, nor, from the facts stated, can the doctrine of equitable estoppel be brought to bear. A, therefore, is under no legal or equitable duty toward B, and B has no right against A if A revokes the privilege. In other words, A has the power to revoke B's privilege, and if revoked a duty is created in B to stay off.[4] Should B now enter the land, his privilege having been revoked A has the same affirmative right against him as he would have against X, Y or any one else who enters upon the land without permission. For such entry A may sue B as a trespasser.[5]

Should we now change the facts to a case where A has given B the privilege of entering upon A's land, and not only that, but also has permitted B to erect valuable improvements upon it, and has stood by while B has spent sums of money on the land, would the same result, as above, follow? In other words, under these circumstances, does A still have the power of revocation? As in the previous case there is no writing to satisfy the Statute of Frauds. Nor is there a contract. Many courts in passing upon this question have held that this again is but a "revocable license." In a New York case[6] the court in the course of its opinion said:

"There has been much contrariety of decision in the courts of different states and jurisdictions. But the courts in this state have upheld with great steadiness the general rule that a parol license to do an act on the land of the licensor, while it justifies anything done by the licensee before revocation, is, nevertheless, revocable at the option of the licensor, and this although the intention was to confer a continuing right and money had been expended by the licensee on the faith of the license."[7]

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[4]See Comment 26, Yale Law Journal 395.

[5]"As there was no consideration alleged to have been paid for the license, it was competent for the appellees to revoke it at any time before it had been acted upon by the appellant." Williamson, et al. v. Yingling, et al. (1883), 93 Ind. 42, 47.

[6]Crosdale v. Lanigan (1892), 129 N. Y. 604.

[7]"The most, we think, can possibly be claimed from the evidence is that the tracks were built under a parol license from the plaintiff; and there is nothing better settled than that a mere license, not subsidiary to a valid grant, may be revoked at pleasure, and does not create or transfer any interest in land, even though granted for a valuable consideration and though the license may be for a purpose which involves the expenditure of money on the faith of it." Minneapolis Mill Co. v. Minneapolis & St. L. Ry. Co. (1892), 51 Minn. 304, 312.

The Illinois courts have come to a like conclusion:

"The agreement is an indefinite and uncertain oral license to use the poles and right of way of the appellee. Such an agreement is within the Statute of Frauds and not being an agreement for a conveyance cannot be enforced in equity. It makes no difference that the licensee acting upon the strength of the parol license may have expended money and made valuable improvements on the faith of the license. Yet the license is revocable at the will of the licensor, when entry was not under an agreement for a conveyance. . . . The foregoing is the law in this state, and if the agreement contended for were admitted, still the appellee had the right to revoke it at any time and the appellant would not be entitled to the relief sought."[8]

Applying the test of jural opposites and correlatives to this state of facts, B no doubt has the privilege of entry, and he also has the privilege of erecting improvements on the land. These oral privileges so far have saved B from being a trespasser.[9] But is A in any manner bound by an oral privilege? Surely to begin with he is not. He has received no consideration nor has he passed an interest in the land. If the legal relation of the parties has become altered it must have been through the fact that B has erected improvements which A has permitted. Since in law A is not bound, his liability (if liable at all) must be based on equitable principles. In many jurisdictions, including those last mentioned, it is held that B's privilege remains revocable throughout and no equitable privileges arise:

"A licensee is conclusively presumed, as a matter of law, to know that a license is revocable at the pleasure of the licensor; and if he expends money in connection with his entry upon the land of the latter he does so at his own peril."[10]

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[8]Streator Ind. Tel. Co. v. Interstate Ind. Tel. Co. (1908), 142 Ill. App. 183, 194.

And see in accord: Hicks v. Swift Creek Mill Co. (1901), 133 Ala. 411; Hodgkins v. Farrington (1889), 150 Mass. 19; Johnson v. Stillman (1882), 29 Minn. 95; Foster v. Browning (1856), 4 R. I. 47.

[9]"The distinction is obvious. Licenses to do a particular act do not in any degree trench upon the policy of the law which requires bargains respecting the title or interest in real estate shall be by deed or in writing. They amount to nothing more than an excuse for the act, which would otherwise be a trespass." Cook v. Stearns (1814), 11 Mass. 533.

[10]Minneapolis Mill Co. v. Minneapolis & St. L. Ry. Co. (1892), 51 Minn. 304.

Other courts have come to a different conclusion through applying the doctrine of equitable estoppel. The holding of these courts is more nearly just, and is founded in better reason as it bears judicial analysis. To be sure A has the legal power to revoke B's privilege, but B, after adding improvements to the land, is in a different position than he was before. Before the improvements A had the power to revoke B's privilege, thereby creating in A a right against B that B should not be there, and a correlative duty in B to stay off. The addition of the improvements, however, has raised in B an equitable privilege, and an equitable "no-right" in A to revoke B's equitable privilege which conflicts with A's legal power. Many courts recognize this conflict, and give preference to the rules of equity holding that B's privilege has become irrevocable:[11]

Mr. Justice Gibson in Rerick v. Kern:

"But a license may become an agreement on valuable consideration; as where the enjoyment of it must necessarily be preceded by the expenditure of money; and when the grantee has made improvements or invested capital in consequence of it, he has become a purchaser for a valuable consideration. Such a grant is direct encouragement to expend money, and it would be against all conscience to annul it as soon as the benefit expected from the expenditure is beginning to be perceived."[12]

Mr. Justice Mason in Kastner v. Benz:

"The question therefore is fairly presented whether an executed parol license which was given for a valuable consideration, and upon the strength of which the licensee has expended money or labor may be revoked at the pleasure of the licensor. . . . The question being new in this court we adopt the reasoning that impresses us as being more in keeping with modern ideas of equitable principles as well as with natural justice . . . accepting the plaintiff's evidence as true we hold that (the) defendant is estopped from revoking the license."[13]

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[11]See (1913), 23 Yale Law Journal, 16, 43.

[12](1826), 14 S. & R. (Pa.) 267.

[13](1903), 67 Kan. 486. And see in accord: Stoner v. Zucker (1906), 146 Cal. 516; Wichersham v. Orr (1859), 9 Iowa 253; Noble v. Sherman (1898), 151 Ind. 573; Joseph v. Wild (1896), 146 Ind. 249; Jarvis v. Satterwhite (1881), 3 Ky. L. Rep. 190; Carrollton T. Exch. Co. v. Spicer (1917), 177 Ky. 340; Clark v. Glidden (1887), 60 Vt. 702.

License Coupled With An Interest.

A, the owner of land, for a valuable consideration, sells to B a stack of hay standing on the land. No interest in land is passed which would satisfy the Statute of Frauds. Does B have the privilege of entering upon the land for the purpose of hauling away the hay? And if he has, does A have the power of extinguishing that privilege?

The leading English case of Wood v. Manley appears to have settled the law on this question. In the words of Lord Denman, C. J.:

"Mr. Crowder's argument goes this length: that if I sell goods to a party who is, by the terms of the sale, to be permitted to come and take them, and he pays me, I may afterwards refuse to let him take them. The law countenances nothing so absurd as this: a license thus given and acted upon is irrevocable."[14]

In this class of cases the doctrine of "licenses coupled with an interest is involved."[15] There is a unanimity among the authorities holding that where a license is "coupled with an interest" it is irrevocable.[16] As previously stated, no interest in land has passed which would satisfy the Statute of Frauds, yet such a privilege is recognized as irrevocable even in a court of law:

"A license to enter a man's property is *prima facie* revocable but 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."[17]

If no interest in land can be created except as recognized by the Statute of Frauds how is it that an oral privilege when "coupled with an interest," which is itself no interest in land, is irrevocable?

"Now, in the present case, the right claimed by the plaintiff is a right, during a portion of each day for a limited number

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[14](1839), 11 Ad. & E. 34.

[15]This was a case not of a mere license but of a license coupled with an interest. The hay, by the sale, became the property of the defendant, and the license to remove it became, as in the case of the tree and the deer, put by C. J. Vaughan, irrevocable by the plaintiff; and the rule was properly refused." Wood v. Leadbitter (1845), 18 M. & W. 838.

[16]Jones v. Tankerville (1909), 2 Ch. 440; Snowden v. Wilas (1862), 19 Ind. 10.

[17]Jones v. Tankerville, supra.

of days, to pass into and through and to remain in a certain close belonging to Lord Eglintoun; to go and remain where if he went and remained, he would, but for the ticket, be a trespasser. This is a right affecting land at least as obviously and extensively as a right of way over land—it is a right of way and something more; and if we had to decide this case on general principles only, and independently of authority, it would appear to us as perfectly clear that no such right can be created otherwise than by deed."[18]

If the privilege to enter upon another's land affects land, and such a privilege to be irrevocable must be created by deed, by what legal reasoning can an oral privilege in aid of a legal grant of a movable on the land of the licensor, become irrevocable? The answer is that, aside from the Statute of Frauds, this class of cases is grounded in equitable principles. The correlative of B's privilege to enter A's land and haul away the hay is A's "no-right" that B should not enter. Since B's privilege forms part of a contract for the sale of a movable there is a valuable consideration for it. If this were a bare privilege there would be no doubt but that A would have the legal power to revoke it. The sale of the movable, however, has, in equity, created a "no-right" in A, and an equitable privilege in B, which equitable privilege conflicts with and prevails over A's legal power. It would seem, therefore, that this irrevocable privilege in B creates in him an interest in A's land, and that this case is without the purview of the Statute of Frauds.[19]

Should we vary the facts just stated to a case where A, for a valuable consideration, sells to B certain growing timber on A's land, with a stipulation in the contract that B may enter the land, cut and remove the timber, the same legal result would follow as in the sale of a movable. The subject of the purchase, to be sure,

[18]Wood v. Leadbitter, supra.

[19]"A second class of authorities involving so-called 'licenses coupled with a grant' consists of cases like Wood v. Manley. This leading case established the rule that the sale of a movable located on the vendor's land, coupled with permission to enter on the land for the purpose of removal, results in an 'irrevocable' privilege (frequently called 'license') of entering the land and removing the object purchased. It would seem clear that in this case also there are accompanying rights (or claims) against interference. It is equally clear that the total aggregate (rights, privileges, powers and immunities) should be recognized as an interest in land, even though not within the general common law requirement of a deed or the requirement of section 1 of the Statute of Frauds." Hohfeld, Faulty Analysis in Easement and License Cases (1917), 27 Yale Law Journal 66, 100.

differs materially in that here is a sale of an immovable (trees drawing their sustenance from the soil), which in itself involves an interest in land. The legal reasoning applied in the former case, however, is *apropos* here. A valuable consideration having passed an equitable privilege is created in B to go upon the land, cut and remove the trees. Or, in other words, B has a right against interference. A, having the legal power to revoke B's legal privilege, is prevented from doing so by B's equitable privilege, which conflicts with his (A's) legal power.[20]

"On the other hand, if A, by instrument not under seal, for good consideration, agrees that B shall have the right of shooting and carrying away game on A's estate for a term of years, the license conferred is at law revocable, because the nature of the interest intended to be conferred is a profit *a prendre,* and cannot at law be created otherwise than by deed. The agreement, however, confers on B a good interest in equity, and the license is in equity an irrevocable license, and a court of equity will accordingly restrain its revocation. . . . Even, therefore, if no interest at law passes by a contract for the sale of specific growing timber to be cut by the purchaser, it is difficult to see why on principle equity should not restrain the vendor from revoking the license conferred by the contract, though it might be unable to compel the purchaser to cut the timber if he refused to do so. . . . An injunction restraining the revocation of the license when it is revocable at law, may in a sense be called relief by way of specific performance, but it is not specific performance in the sense of compelling the vendor to do anything. It merely prevents him 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

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[20]"The English Judicature Act of 1873, already quoted, after uniting all the higher tribunals into one Supreme Court of Judicature, enacts that, 'in every civil cause or matter law and equity shall be concurrently administered' by this court according to certain general rules; and that generally in all matters not particularly mentioned in other provisions of the act, in which there is a conflict or variance between the rules of equity and the rules of the common law, with reference to the same matter, the rules of equity shall prevail: 36 & 37 Vict., Chap. 66, Sections 24, 25. This great reform which was inaugurated by New York in 1848 has been adopted by the states of Ohio, Kentucky, Indiana, Wisconsin, Iowa, Minnesota, Missouri, Kansas, Nebraska, Nevada, California, Oregon, North Carolina, South Carolina, Arkansas, Connecticut, Colorado, and by the territories of Washington, Montana, Idaho, Dakota, Wyoming, Arizona, Utah. Pomeroy, Equity Jurisprudence (4th ed. 1918), Sec. 40, note.

doubted whether the absence of a seal in such a case can be relied on in any court."[21]

Licenses Founded Upon Valuable Consideration.

Up to this point the courts, on the various questions considered, have usually reached equitable solutions. But in turning to a state of facts where A, for a valuable consideration, grants to B the privilege, for some purpose or another, of entering A's land some startling results have been reached. It has been quite generally held, where the licensee's claim is based only in contract, that the privilege may be revoked at any time at the will of the licensor. And where revoked the licensee may sue for breach of contract, but not in tort, even though he has been forcibly ejected:

"The revocation of a license is in itself no less effectual though it may be a breach of contract. If the owner of the land or a building admits people thereto on payment, as spectators of an entertainment or the like, it may be a breach of contract to require a person, who has duly paid his money and entered, to go out, but a person so required has no title to stay, and if he persists in staying he is a trespasser."[22]

The question has frequently arisen over the power of the licensor to revoke the licensee's privilege of admission to a place of amusement, when a valuable consideration has been paid. On this point the law seems to have been well settled (at least until recently) that the licensor may revoke this privilege at his pleasure. And if he, after revoking the privilege, ejects the licensee without unnecessary force, no tort action can be based thereon:

"It was suggested that, in the present case, a distinction might exist, by reason of the plaintiff's having paid a valuable consideration for the privilege of going on the land. But this fact makes no

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[21]Jones v. Tankerville, supra. And see Snowden v. Wilas, supra.
Compare the following cases holding that an oral sale of trees gives the vendee a privilege to enter, but that such privilege is revocable until the trees are severed when the privilege of entering and removing them as chattels becomes irrevocable: Armstrong v. Lawton (1881), 73 Ind. 498; Emerson v. Shores (1901), 95 Me. 237; Fish v. Capwell (1894), 18 R. I. 667.

[22]Pollock on Torts (9th ed. 1912) 390. And see Rhodes v. Otis (1859), 33 Ala. 578.

difference; whether it may give the plaintiff a right of action against those from whom he purchased the ticket, or those who authorized its being issued and sold to him, is a point not necessary to be discussed; any such action would be founded on breach of contract, and would not be the result of his having acquired by the ticket a right of going upon the land, in spite of the owner of the soil; and it is sufficient, on this point, to say, that in several of the cases we have cited . . . the alleged license has been granted for a valuable consideration but that was not held to make any difference."[23]

It is submitted the reasoning in these cases is inaccurate. Where a "bare license" is involved the licensor is under no legal duty. He may revoke at pleasure and such act will, of course, not involve a breach of a legal duty. But where a valuable consideration has passed the parties are in an entirely different position than they were before. If A has a horse and tells B that B may ride the horse to Oshkosh, A could, no doubt, withdraw the privilege, even after B was seated in the saddle. But if A has a horse and B has $100.00, and B says, "I will give you $100.00 for your horse," and A agrees, whereupon the money is paid, the horse belongs to B, and no court would hold that A could revoke the contract. Or if B should say to A, "I will give you $10.00 if you will allow me to ride your horse for one day," and A agrees, a binding contract has been created.[24] And if B were seated in the saddle on the day designated and A came along and said, "I hereby revoke your privilege

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[23]Wood v. Leadbitter (1845), 13 M. & W. 838. See in accord: Collister v. Hagman (1905), 183 N. Y. 250; and Mr. Justice Holmes in Marrone v. Washington Jockey Club (1913), 227 U. S. 633: "We see no reason for declining to follow the commonly accepted rule. The fact that the purchaser of the ticket made a contract is not enough. A contract binds only 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 inconvenience 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 land owner and third parties, 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 the right of property either in the land or in goods upon the land, there might be an irrevocable right of entry; but where the contract stands by itself, it must be either a conveyance or a license, subject to be revoked."

[24]See article by Professor Arthur L. Corbin, Offer and Acceptance and Some of the Resulting Legal Relations (1917), 26 Yale Law Journal 169.

to ride that horse," what court would not allow B to recover in tort if A proceeded to knock B off from the horse? And if A, on that day, took possession of the horse, without B's consent, B might even bring replevin for the horse.[25] Let if A owns a theater and sells B a ticket, it is held that A may revoke B's privilege, eject him, and not be answerable in tort, even though B has paid a valuable consideration and his conduct has been exemplary. And all this because the theater seat is on A's land, and B, not having purchased the land, or an interest in it, in a manner permissible under the Statute of Frauds, becomes a mere trespasser at A's will. Surely the average theatergoer would find little consolation in this reasoning after being ejected from a theater from no fault of his own.

But the law, in this particular, is not sound in reason. When B has paid A for the privilege of entering the theater B is no longer under a duty to stay out. The correlation of B's privilege is A's "no-right" that B should not attend the theater. B's privilege is equitable since it was not created in a manner recognized by law, i. e., the Statute of Frauds. Since B's privilege does not have the sanction of the Statute of Frauds, A still has the legal power to revoke it.[26] A's legal power therefore conflicts with B's equitable privilege, and when such is the case the rules of equity prevail.[27] A, therefore, in equity, cannot revoke B's privilege. Should A eject

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[25]Sowden v. Kessler (1898), 76 Mo. A. 581.

[26]"A right is one's affirmative claim against another, and a privilege is one's freedom from the right or claim of another. Similarly, a power is one's affirmative control over a given legal relation as against another; whereas an immunity is one's freedom from the legal power or 'control' of another as regards some legal relation." Hohfeld (1913), 23 Yale Law Journal 16, 55.

[27]"When A purchases a ticket to enter and occupy a seat in B's theater, it is commonly asserted that A gets a mere 'revocable license,' This is inaccurate. The term 'license' is merely descriptive of a group of operative facts which create in A a 'privilege' of entering and occupying the designated seat during the performance. The operative facts referred to are, of course, the payment of consideration, the issuance of the ticket, proper behavior, etc. A having acquired this 'privilege' B is obviously in a different position as regards A from what he was before. B is now said to have a 'no-right' that A should not be there; or, in other words, A does not have the 'duty' to stay out of the theater, the privilege of entering being the negation of the 'duty' to stay out. Under the doctrine of Wood v. Leadbitter, B would still possess a 'power' of extinguishing A's legal 'privilege' and creating a 'duty' in him to leave. This same act would, of course, extinguish his own 'no-right' and give rise to a 'right' or 'claim' that A depart. Wherever the principles of equity are enforced, however, A's equitable 'privilege' will remain undefeated by B's legal 'power.'" Comment (1917), 26 Yale Law Journal 395, 397.

B, A would be guilty of the breach of a legal duty, which would give rise to a correlative right in B to recover in tort.

This is the law reduced to sound principles. It remains to be seen if there is any judicial sanction for this reasoning, or whether it is "mere theory." The law of Wood v. Leadbitter, *supra,* is, almost without exception, the law in the United States today.[28] In England, however, Wood v. Leadbitter has been overruled by the case of Hurst v. Picture Theaters, Limited. In that case the plaintiff sued to recover damages for an alleged assault and false imprisonment. He had gone to the defendant's theater, had bought and paid for a six penny seat, and had been given a metal check entitling him to an unreserved seat. At the door he gave up his check and was shown to a place. In the midst of the performance he was asked to leave, and on his refusal to do so a porter took hold of him under the arms and lifted him from the seat. The plaintiff then walked out. The court held that the ticket of admission was not a revocable license but entitled the plaintiff to remain throughout the entire performance.

From the opinion of Buckley, C. J., in the case last mentioned:

"The position of matters now is that the court is bound under the Judicature Act to give effect to equitable doctrines. The question we have to consider is whether, having regard to equitable consideration, Wood v. Leadbitter, 13 M. & W. 838, is a decision which can be applied in its integrity in a court which is bound to give effect to equitable considerations. In my opinion, it is not. Cozens-Hardy, J., as he then was, the present Master of the Rolls, in the case of Lowe v. Adams, said this (1901), 2 Ch. 598, p. 600: 'Whether Wood v. Leadbitter, 13 M. & W. 838, is still good law having regard to Walsh v. Landsdale,' 21 Ch. D. 9, which is a decision of the court of appeal, 'is very doubtful.' The present Lord Parker, then Parker J., in the case of Jones v. Tankerville, says this (1909) 2 Ch. 440, at p. 443: 'An injunction restraining the revocation of the license, where it is revocable at law, may in a sense be called relief by way of specific performance, but it is not specific performance in the sense of compelling the vendor to do anything.

[28]Marrone v. Washington Jockey Club (1913 U. S.), supra. Collister v. Hayman (1905), 183 N. Y. 250; People v. Flynn (1907), 189 N. Y. 180; Buenzle v. Newport Amusement Assoc. (1908), 68 Atl. (R. I.) 721; N. W. V. Co. v. Black (1912), 113 Va. 728. But see California Statutes 1893, p. 220.

It merely prevents him 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.' What was relied on in Wood v. Leadbitter, 13 M. & W. 838, and rightly relied on at that date, was that there was not an instrument under seal, and therefore the licensee could not say that he was not a mere licensee, but a licensee with a grant. That is now swept away. It cannot 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 at law.''[29]

The following comment from the Law Quarterly Review, edited by Sir Frederick Pollock, is of interest:

"The well known and much discussed case of Wood v. Leadbitter, decided all but seventy years ago, by the court of exchequer, in its golden age . . . appears to be deprived of all practical authority by the decision of the court of appeal in Hurst v. Picture Theatres, Ltd. . . . According to the court of exchequer a revocable license is no less revocable because the revocation of it may be a breach of contract, and if it is revoked in breach of contract, the licensee's only remedy at law is an independent action for damages on the contract. He could not, of course, before the Judicature Act, make anything in a court of law of his claim to an injunction in equity, which in several cases he might well maintain. But suppose, even in 1845, a vice-chancellor present in the race stand or theatre, a ticketholder turned out by the bare arbitrary will of the manager in defiance of the contract and the licensee applying to the vice-chancellor, in the emergency, for an *ex parte* injunction, is it clear that the injunction would not have been granted? And is it now possible for a court having equitable as well as legal jurisdiction to treat as rightful in a sense an expulsion which a court of equity would have restrained if a motion could have been made in time? The Lord Justices Buckley and Kennedy think not, also suggesting that a contract for a seat at a specified performance creates not a bare license but a license coupled with some kind of interest, a point not made in Wood v. Leadbitter, and not considered by the court of exchequer. Phillimore, L. J., dissenting, not without plausible grounds, and suggested that the real implied term is only to return the licensee's money if the

[29](1915), 1 K. B. 1. And see the case of Taylor v. Waters (1816), 7 Taunt. 374, decided before the case of Wood v. Leadbitter, supra.

license is unreasonably revoked: a suggestion which surely no playgoer would accept."[30]

Changes occur; thought slowly progresses; one idea takes the place of another, and viewpoints vary. It has been one of the severest criticisms of the law that it has not kept abreast with events. We are not ready to assert that the Statute of Frauds has had its day and served its purpose. But when a portion of it is so applied that it is absurd to believe such could ever have been intended by its framers, and such portion hinders justice, courts should welcome the opportunity to supplant it with principles of equity and reason.

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[30](1915), 31 Law Quarterly Review 9. Irving, J. A., in Barnswell v. National Amusement Co., Ltd. (1915), 21 B. C. 435, 439: "It appears that the plaintiff entered the building as a spectator who had only paid his money to see the entertainment. He was therefore entitled to remain. Wood v. Leadbitter * * * was decided on the ground that the plaintiff had not obtained an instrument under seal granting him the privilege he claimed. But the Judicature Act has changed all that. The court now gives effect to equitable considerations and will protect a right in equity, which but for the absence of an instrument under seal would be a right at law."

Note to Jackson & Sharp Co. v. P. W. & B. R. R. Co. (1871), 4 Del. Ch. 180, 195: "It (the privilege of a ticket holder) would seem to be just such a privilege or authority as might properly be the subject of a license, and in that view the objection to the recovery of the plaintiff in Wood v. Leadbitter would rest, not upon the invalidity of the ticket considered as the grant of an easement, but upon its revocability as a license. On this point Mr. Baron Alderson held it revocable at the absolute pleasure of Lord Eglintoun even though sold for a consideration because he considered that a license to enter upon land was always revocable except when coupled with an interest in something upon the land created by grant or duly enacted otherwise than by the license itself. This opinion is based mainly upon an early judgment by C. J. Vaughan in Thomas v. Sorrell. * * * But C. J. Vaughan's general statement of the most common and obvious ground on which a license to enter on land becomes irrevocable can hardly be taken as sufficient authority to exclude all other grounds; and certainly the doctrine of equitable estoppel is as clear a ground for holding irrevocable a license to enter on land temporarily to witness races as is the right to the deer killed on the land under license to enter and kill such deer. Laying out of consideration the Statute of Frauds as not applying in either case, and if it applies to either it must to both, the question depends simply upon the revocability of a license; and there is nothing in the nature of a license to withdraw it from the doctrine of equitable estoppel, no more in a license to enter temporarily upon the land than a license to do anything else, supposing the Statute of Frauds out of the way. Indeed the cases put by C. J. Vaughan of a license to enter, coupled with an interest, must, after all, be resolved by this doctrine of estoppel; being upon it, is not a general right incident to property in the chattel, but it springs from the authority given by the owner of the soil to kill the deer or to place the chattel there, which authority he cannot in good faith revoke to the prejudice of the party who has acted upon it, supposing there be in such a case no objection to the validity of the license as passing an interest in land. And it is upon this principle of equitable estoppel that in the later cases the irrevocability of a license to enter on land is coupled with an interest in something upon it, has been placed."

Compare Metts v. Charleston Theatre Co. (1916), 105 S. C. 19; Boswell v. Barnum & Bailey (1916), 135 Tenn. 35; Weber-Stair Co. v. Fisher (1909), 119 S. W. (Ky.) 195.